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

REPORT OF THE PANEL

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<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>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
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<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
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<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:XI, p. 4865
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**ABBREVIATIONS USED IN THIS REPORT**

Abbreviation	Description
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Vienna Convention	Vienna Convention on the Law of Treaties, Done at Vienna, 23 May 1969, 1155 UNTS 331; 8 International Legal Materials 679
WTO	World Trade Organization
SCM Agreement	Agreement on Subsidies and Countervailing Measures
USDOC	United States Department of Commerce
SOEs	State-owned enterprises

## 1 INTRODUCTION

### 1.1 Complaint by China

1.1. On 25 May 2012, China requested consultations with the United States under Article 4 of the DSU, Article XXIII:1 of GATT 1994, and Article 30 of the SCM Agreement with respect to the United States' countervailing duty measures on certain products from China as described in document WT/DS437/1.

1.2. Consultations were held on 25 June 2012 and 18 July 2012 with a view to reaching a mutually satisfactory solution. These consultations clarified certain issues pertaining to this matter, but failed to resolve the dispute.

### 1.2 Panel establishment and composition

1.3. On 20 August 2012, China requested the establishment of a panel pursuant to Article 6 of the DSU with standard terms of reference.<sup>1</sup> At its meeting on 28 September 2012, the DSB established a panel pursuant to the request of China in document WT/DS437/2, in accordance with Article 6 of the DSU.<sup>2</sup>

1.4. The Panel's terms of reference are the following:

To examine, in the light of the relevant provisions of the covered agreements cited by the parties to the dispute, the matter referred to the DSB by China in document WT/DS437/2 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.<sup>3</sup>

1.5. On 14 November 2012, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 26 November 2012, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Mario Matus
Members:	Mr Scott Gallacher Mr Hugo Perezcano Díaz

1.6. Australia, Brazil, Canada, the European Union, India, Japan, Korea, Norway, the Russian Federation, the Kingdom of Saudi Arabia (Saudi Arabia), Turkey and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

### 1.3 Panel proceedings

#### 1.3.1 General

1.7. After consultation with the parties, the Panel adopted its Working Procedures<sup>4</sup> and timetable on 19 December 2012. Following its adoption, the Panel introduced subsequent modifications to its timetable.

1.8. The Panel held a first substantive meeting with the parties on 30 April and 1 May 2013. A session with the third parties took place on 30 April 2013. The Panel held a second substantive meeting with the parties on 23-24 July 2013. On 2 August, the Panel issued the descriptive part of its Report to the parties. The Panel issued its Interim Report to the parties on 28 February 2014. The Panel issued its Final Report to the parties on 9 May 2014.

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<sup>1</sup> WT/DS437/2.

<sup>2</sup> See WT/DSB/M/322.

<sup>3</sup> WT/DS437/3 and Corr.1.

<sup>4</sup> See the Panel's Working Procedures in Annex H-1.

### 1.3.2 Request for enhanced third party rights

1.9. On 4 December 2012, Canada requested the Panel to grant it enhanced third party rights in the Panel's working procedures. Subsequently, Australia, Brazil and Turkey endorsed this request.

1.10. In a communication dated 20 December 2012, addressed to Canada, Australia, Brazil and Turkey, and copied to the parties and all other third parties, the Panel declined Canada's request for enhanced third-party rights in these proceedings and indicated that it would provide its reasoning on this matter in its report.

1.11. The Panel notes, first, that the parties to the dispute have opposed the request of Canada that it be accorded enhanced third party rights. In addition, the Panel has carefully reviewed the reasons advanced by Canada to support its request. In the Panel's view, these reasons are not among those that would justify departing from the third party rights established in paragraphs 2 and 3 of Article 10 of the DSU, paragraph 6 of Appendix 3 of the DSU, and subsequent panel practice regarding enhanced third party rights.

1.12. In its request, Canada argues that "it has significant legal and systemic interests in the outcome of this dispute, particularly because any clarifications made to the provisions of the [SCM Agreement] raised in this dispute may have potentially wide-ranging implications for the methodology used by authorities in subsidy investigations and the results of such investigations". According to Canada, "[t]he rights traditionally granted to third parties are inadequate to allow the Panel to fully take into account Canada's interests in this dispute".

1.13. In the Panel's view, what Canada characterizes as its "significant legal and systemic interests in the outcome of this dispute" means that Canada has a "substantial interest" within the meaning of Article 10.2 of the DSU in the matter before this Panel. However, the Panel fails to see how those legal and systemic interests differentiate Canada from any other WTO Member, such as to warrant the granting of enhanced third party rights. Canada does not assert that it is affected by this particular dispute in a manner that differentiates it from any other third party. The Panel observes that in recent practice panels have generally rejected requests for enhanced third party rights based on assertions of interests of a general systemic nature and where the parties requesting enhanced third party rights have failed to identify how they are specifically affected by a particular dispute.<sup>5</sup> The Panel is further of the view that Canada has not explained why the existing third party rights are inadequate to allow the Panel to fully take into account Canada's interests.

### 1.3.3 Preliminary ruling

1.14. On 14 December 2012, the United States submitted to the Panel a request for a preliminary ruling concerning the consistency of China's request for the establishment of the Panel with Article 6.2 of the DSU.

1.15. On 8 February 2013, the Panel issued a preliminary ruling to the parties. After consulting the parties to the dispute, the Panel decided to inform the DSB of the content of its preliminary ruling.<sup>6</sup>

1.16. The preliminary ruling provides that it "is an integral part of the Panel's Final Report, subject to any changes that may be necessary in the light of comments received from the parties during Interim Review".

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<sup>5</sup> See, e.g. the discussion of panel practice regarding enhanced third party rights in Panel Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 7.16-7.17.

<sup>6</sup> WT/DS437/4.

## 2 FACTUAL ASPECTS

### 2.1 The measures at issue

2.1. China's claims relate to 32 initiations of investigations or preliminary or final determinations in 17 countervailing duty investigations conducted from 2007 through 2012.<sup>7</sup>

## 3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China requests that the Panel find that:

- a. In connection with the alleged provision of input goods for less than adequate remuneration:
  - i. The USDOC's findings of financial contribution are inconsistent with Article 1.1(a)(1) of the SCM Agreement, because the USDOC incorrectly determined, or did not have a sufficient basis to determine, that certain SOEs are "public bodies" within the meaning of that provision in the input subsidy investigations listed in CHI-1;
  - ii. The "rebuttable presumption" established and applied by the USDOC in respect of whether SOEs can be classified as "public bodies" is, as such, inconsistent with Article 1.1(a)(1) of the SCM Agreement;
  - iii. The USDOC's initiation of countervailing duty investigations in respect of allegations that SOEs confer countervailable subsidies through their sales of inputs to downstream producers, in the absence of sufficient evidence in the petition to support an allegation that SOEs constitute "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement, and in the absence of a sufficient review of the petition by the USDOC in respect of this allegation, is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement in the Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks investigations;
  - iv. The USDOC's findings of benefit are inconsistent with Article 1.1(b) and Article 14(d) of the SCM Agreement, because the USDOC improperly found that the alleged provision of goods for less than adequate remuneration conferred a benefit upon the recipient, and improperly calculated the amount of any benefit allegedly conferred, including, *inter alia*, its erroneous findings that prevailing market conditions in China were "distorted" as the basis for rejecting actual transaction prices in China as benchmarks in the input subsidy investigations listed in CHI-1;
  - v. The USDOC's findings of specificity are inconsistent with Articles 2.1 and 2.4 of the SCM Agreement, because the USDOC failed to make a proper determination on the basis of positive evidence that the alleged provision of inputs for less than adequate remuneration was specific to an enterprise or industry or group of enterprises or industries in the input subsidy investigations listed in CHI-1;
  - vi. The USDOC's initiation of countervailing duty investigations in respect of the alleged provision of inputs for less than adequate remuneration, in the absence of sufficient evidence in the petition to support an allegation that any such subsidy would be specific under Article 2 of the SCM Agreement, and in the absence of a sufficient review of the petition by the USDOC in respect of this allegation, is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement in the input subsidy investigations listed in CHI-1.
- b. In connection with all of the identified countervailing duty investigations in which the USDOC has issued a preliminary or final countervailing duty determination:
  - i. The USDOC's use of so-called "adverse facts available" to support its findings of financial contribution, specificity, and benefit is inconsistent with Article 12.7 of

<sup>7</sup> See table in paragraph 7.1. of this Report.

the SCM Agreement in the instances identified in CHI-2 because the USDOC did not rely on facts available on the record.

- c. In connection with the alleged provision of land and land-use rights for less than adequate remuneration:
  - i. The USDOC's findings of specificity are inconsistent with Articles 2.2 and 2.4 of the SCM Agreement, because the USDOC failed to make a proper determination on the basis of positive evidence that the alleged subsidy was specific to an enterprise or industry or to a group of enterprises or industries in the land specificity investigations listed in CHI-1.
- d. In connection with export restraints allegedly maintained by China:
  - i. The USDOC's initiation of countervailing duty investigations in respect of these allegations is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement in the Magnesia Bricks and Seamless Pipe investigations;
  - ii. The USDOC's determination that export restraints provided a "financial contribution" is inconsistent with Article 1.1(a) of the SCM Agreement in the Magnesia Bricks and Seamless Pipe investigations.

3.2. China requests that in each instance where the Panel makes a finding of inconsistency, the Panel also find that, as a consequence, the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT. It also requests that the Panel recommend that the United States bring the challenged measures into conformity with its obligations under the relevant covered agreements.

3.3. The United States requests that the Panel reject China's claims in this dispute. It also requests the Panel to disregard China's claims pertaining to the preliminary determinations in Wind Towers and Steel Sinks. As China did not request consultations on these determinations, such determinations should thus be outside the terms of reference of this panel proceeding.

#### **4 ARGUMENTS OF THE PARTIES**

4.1. The arguments of the parties, other than in their answers to questions, are reflected in their written submissions, oral statements or their executive summaries thereof, provided to the Panel in accordance with paragraph 16 of the Working Procedures adopted by the Panel (see Annexes A, B, D, F and G).

#### **5 ARGUMENTS OF THE THIRD PARTIES**

5.1. The arguments of the third parties, other than in their answers to questions, are reflected in their written submissions, oral statements or their executive summaries thereof, provided in accordance with paragraph 16 of the Working Procedures adopted by the Panel (see Annexes A, C and E). The arguments of Australia, Canada, Norway and Saudi Arabia are reflected in their third-party written submissions and third-party oral statements or their executive summaries thereof. The arguments of Brazil are reflected in its third-party comments on the United States' request for a preliminary ruling, the executive summary of its third-party written submission and in its third-party oral statement. The arguments of the European Union are reflected in the executive summary of its third-party comments on the United States' request for a preliminary ruling and in the executive summary of its third-party written submission. The arguments of India, Japan, Korea and Turkey are reflected in their third-party oral statements. The Russian Federation and Viet Nam did not submit third-party written or oral arguments to the Panel.

#### **6 INTERIM REVIEW**

6.1. On 28 February 2014, the Panel submitted its Interim Report to the parties. On 14 March 2014, China and the United States each submitted written requests for the review of precise aspects of the Interim Report. On 11 April 2014, each party submitted comments on the other's requests for review. Neither party requested an interim review meeting.

6.2. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. The Panel modified aspects of its Report in light of the parties' comments where it considered it appropriate, as explained below. Due to changes made as a result of our review, the numbering of footnotes in the Final Report has changed from the Interim Report. The text below refers to the footnote numbers in the Interim Report, with the corresponding footnote numbers in the Final Report (if different) in parentheses for ease of reference.

### **6.1 Enhanced third party rights**

6.3. Regarding paragraphs 1.11-1.13, the United States requests the deletion of part of the reasons provided by the Panel for the rejection of Canada's request for enhanced third party rights. The United States argues that the opposition of the parties to a request for enhanced third party rights serves as an independent and sufficient basis for such a request to be rejected. As such, the United States requests that the additional reasons provided by the Panel be deleted. The United States is concerned that these additional reasons could be misread to imply that a panel has discretion to grant enhanced third party rights for any number of reasons, potentially even where each party to the dispute has objected to granting enhanced rights.

6.4. China does not comment on the United States' request.

6.5. The Panel has decided to reject the United States' request, as it is well established that it is within a panel's discretion whether to grant enhanced third party rights. In particular, the Appellate Body has confirmed that, beyond the minimum rights guaranteed under Article 10 and Appendix 3 to the DSU, "[p]anels enjoy a discretion to grant additional participatory rights to third parties in particular cases, as long as such 'enhanced' rights are consistent with the provisions of the DSU and the principles of due process".<sup>8</sup> As such, the Panel has made no modifications to paragraphs 1.11-1.13.

### **6.2 Preliminary ruling**

6.6. Regarding paragraphs 1.14-1.16, the United States requests that the findings contained in the preliminary ruling be set out as a part of the Final Report, instead of being incorporated by reference. In addition, the United States requests that certain editing and typographical errors be corrected in the preliminary ruling.

6.7. China does not comment on the United States' request.

6.8. The Panel notes that it is consistent with previous panels' practice to circulate the preliminary ruling as a separate document. However, for the sake of completeness, the Panel has added a footnote to paragraph 8.1 to reiterate that the Panel's conclusions incorporate those set forth in its preliminary ruling, as contained in the document WT/DS437/4, circulated on 21 February 2013, which has been attached to this Report as Annex A-8.

### **6.3 Terms of reference**

6.9. Regarding paragraph 7.25, China requests that the first sentence of the paragraph be modified to conform with China's response to Panel question No. 2, cited therein.

6.10. The United States does not comment on China's request.

6.11. The Panel has made modifications to the first sentence of paragraph 7.25 to reflect China's request.

### **6.4 Claims under Article 1.1(a)(1) of the SCM Agreement**

6.12. Regarding paragraph 7.92, China requests that the description, in the first sentence of the paragraph, of Kitchen Shelving as "the only available written evidence" of the USDOC's policy be

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<sup>8</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 243. See also Appellate Body Reports, *EC – Hormones*, para. 154; and *US – 1916 Act*, para. 150.

modified to reflect the fact that the application of the same policy by the USDOC in subsequent CVD cases also constitutes evidence of the policy. As such, China requests that the Panel either replace the word "only" with the word "first" or, alternatively, that the first sentence of the paragraph be rephrased as follows: "We begin our assessment of this claim by looking at the relevant excerpt of Kitchen Shelving, where according to China the USDOC first articulated its policy."

6.13. The United States submits that it does not support China's reformulation of paragraph 7.92. Nonetheless, the United States does not oppose China's alternative proposed modification, subject to the addition of commas after the terms "where" and "China".

6.14. The Panel has modified the first sentence of paragraph 7.92 in line with the alternative wording put forth by China, while also accepting the modification to this wording proposed by the United States.

6.15. Regarding paragraph 7.116, the United States requests that the wording of the second sentence of the paragraph be modified to accurately reflect the statement made by the USDOC in the Solar Panels Issues and Decision Memorandum, and quoted in that paragraph. Accordingly, the United States provides a modified wording for the sentence.

6.16. China submits that the Panel should reject the United States' request on the grounds that the wording of paragraph 7.116 is appropriate, especially when taking into account the context of the USDOC's statement. In China's view, the context is important as it shows that the USDOC's statement was meant to convey a lack of intent to modify the USDOC's approach to the public body issue, despite the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)*.

6.17. The Panel has modified the second sentence of paragraph 7.116 according to the wording provided by the United States, as well as made certain editorial changes, to improve the clarity of the Report.

6.18. Regarding paragraph 7.127, the United States requests that the last two sentences of the paragraph be deleted, and that the first sentence of paragraph 7.127 be moved to the end of paragraph 7.126. The United States makes its request on the grounds that neither the text of the Kitchen Shelving Issues and Decision Memorandum nor US domestic law supports the Panel's conclusion that the USDOC is restricted from considering other evidence beyond ownership.

6.19. China submits that the Panel should reject the United States' request, as it merely restates the arguments presented by the United States in support of the proposition that the policy articulated in the Kitchen Shelving Issues and Decision Memorandum could not be challenged "as such". Nonetheless, China suggests modified wording for the second sentence of paragraph 7.127.

6.20. The Panel has amended paragraph 7.127 in accordance with the wording suggested by China, as it considers that this modification most appropriately addresses the issue raised by the United States.

## **6.5 Claims under Article 11 of the SCM Agreement – evidence of a financial contribution**

6.21. Regarding paragraph 7.138, which summarises the United States' arguments, the United States requests that the first sentence of that paragraph be modified to properly characterise the United States' arguments on the initiation issue. As a related matter, with respect to paragraph 7.139, the United States requests that a sentence be added to the end of that paragraph to fully reflect the United States' arguments.

6.22. China submits that the Panel should reject the United States' request to modify paragraph 7.138, as that paragraph accurately reflects the United States' argument.

6.23. The Panel notes that the first sentence of paragraph 7.138 accurately reflects the United States' rejection, in paragraph 115 of its second written submission, of the argument made by China in paragraph 32 of its opening statement at the first meeting of the Panel. Nonetheless, the Panel accepts the United States' requests to modify the first sentence of paragraph 7.138 and



to add a sentence to paragraph 7.139, with some editorial changes, to clarify and fully reflect the United States' core arguments on the initiation issue.

#### **6.6 Claims under Articles 1.1(b) and 14(d) of the SCM Agreement**

6.24. Regarding paragraph 7.166, which summarises the United States' arguments, the United States requests the deletion of the adjective "right" in the fourth sentence of the paragraph from the characterization of the test for determining a benefit.

6.25. China does not comment on the United States' request.

6.26. The Panel has modified paragraph 7.166 as requested by the United States.

6.27. Regarding paragraph 7.167, which summarises the United States' arguments, the United States requests that certain modifications be made to the first and second sentences of the paragraph, and that two sentences be added after the second sentence of the paragraph, in order to more accurately reflect the United States' arguments made in its submissions.

6.28. China submits that the Panel should reject the United States' request to make certain modifications to the first sentence of paragraph 7.167, as China considers that the paragraph of the submission cited by the United States in support of its request does not speak in favour of the modification.

6.29. The Panel has modified paragraph 7.167 as requested by the United States, with certain editorial changes.

6.30. Regarding paragraph 7.167, which summarises the United States' arguments, and footnotes 212 (223) and 213 (224), the United States requests that certain modifications be made to the footnotes to better reflect the United States' arguments.

6.31. China does not comment on the United States' request.

6.32. The Panel has modified footnotes 212 (223) and 213 (224) as requested by the United States.

6.33. Regarding paragraph 7.186, and footnotes 235 (246) and 238 (249), the United States requests that the footnotes be modified to more accurately reflect the determinations cited in support of the Panel's factual findings. With respect to footnote 235 (246), the United States requests that the reference to Aluminum Extrusions be deleted, since it does not lend support to the statement that "some determinations are based on the market share of government-owned/controlled firms in domestic production alone". With respect to footnote 238 (249), the United States requests that the reference to Steel Cylinders be deleted, since it does not lend support to the statement that "some determinations are based on the market share of the government plus the existence of ... export restraints".

6.34. China submits that if the Panel accepts the United States' requested deletion of Aluminum Extrusions from footnote 235 (246), a reference to Aluminum Extrusions should be added to footnote 238 (249). Similarly, if the Panel accepts the United States' requested deletion of Steel Cylinders from footnote 238 (249), China requests that a reference to Steel Cylinders be added to footnote 236 (247), since it involves recourse to adverse facts available.

6.35. The Panel has modified footnotes 235 (246) and 238 (249) in accordance with the requests made by the United States and China, as they enhance the factual accuracy of the Report. However, the Panel has decided to reject China's related request to add a reference to Steel Cylinders to footnote 236 (247), as the Panel does not consider the reason given by China for this addition to be factually accurate.

6.36. Regarding paragraph 7.187, the United States requests that certain modifications be made to the paragraph to better reflect the factual evidence underlying the Panel's evaluation.

6.37. China does not comment on the United States' request.

6.38. The Panel has modified paragraph 7.187 as requested by the United States.

6.39. Regarding paragraph 7.197, the United States requests that the Panel add findings with respect to Article 1.1(b) of the SCM Agreement.

6.40. China does not comment on the United States' request.

6.41. The Panel has modified paragraph 7.197 as requested by the United States, as well as paragraph 8.1 for the sake of completeness.

#### **6.7 Claims under Articles 2.1 and 2.4 of the SCM Agreement**

6.42. Regarding paragraph 7.215, which summarises the United States' arguments, the United States requests that a sentence be added to the end of that paragraph for the sake of completeness.

6.43. China does not comment on the United States' request.

6.44. The Panel has added the sentence suggested by the United States, with some editorial changes, to the end of paragraph 7.215.

6.45. Regarding paragraph 7.229 and footnote 293 (305), as well as paragraph 7.239 and footnote 307 (319), the United States requests that the references to the Oxford English Dictionary be made more specific.

6.46. China does not comment on the United States' request.

6.47. The Panel has made certain modifications to footnotes 293 (305) and 307 (319) to reflect the United States' requests.

#### **6.8 Claims under Article 11 of the SCM Agreement – evidence of specificity**

6.48. With respect to paragraph 7.282, the United States suggests adding the term "for purposes of initiation" in order to elucidate the meaning of the sentence.

6.49. China does not comment on the United States' request.

6.50. The Panel has modified paragraph 7.282 as suggested by the United States.

#### **6.9 Claims under Article 12.7 of the SCM Agreement**

6.51. Regarding paragraphs 7.284 and 7.307, and footnotes 345 (357) and 378 (deleted), the United States requests that the introduction to section 7.10 be brought in line with the introduction to section 7.8 with respect to the exclusion of the preliminary determinations in Wind Towers and Steel Sinks, and that footnote 345 (357), rather than footnote 378 (deleted), reflect this.

6.52. China does not comment on the United States' request.

6.53. The Panel has made the modifications requested by the United States to paragraph 7.284 and footnote 345 (357), and has deleted footnote 378 (deleted), to consistently reflect the finding that the preliminary determinations in Wind Towers and Steel Sinks are not within the Panel's terms of reference.

6.54. Regarding paragraph 7.318 and footnote 390 (401), the United States requests that the references to the preliminary determination in Wind Towers be removed, in light of the finding that it is not within the Panel's terms of reference.

6.55. China does not comment on the United States' request.

6.56. The Panel has made the modifications requested by the United States to paragraph 7.318 and footnote 390 (401), to properly reflect the finding that the preliminary determination in Wind Towers is not within the Panel's terms of reference.

6.57. Regarding paragraph 7.324, the United States requests the deletion of that paragraph on the grounds that the USDOC's statements referred to therein are not part of China's affirmative case in support of its claim, and that the paragraph is therefore extraneous to the Panel's analysis.

6.58. China submits that the Panel should reject the United States' request. According to China, it has provided the specific language in each investigation that demonstrates the lack of factual foundation in the adverse facts available determinations referenced by the Panel. As such, the Panel is acting within its mandate.

6.59. The Panel has decided to reject the United States' request to delete paragraph 7.324. We do not agree with the United States that paragraph 7.324 is extraneous to the Panel's analysis. While China does fail to discuss, or even acknowledge, the meaning of these statements, the statements themselves form part of the evidence provided by China to the Panel in its Exhibits in support of its case. As such, the Panel is within its rights to express concern over these statements.

#### **6.10 Claims under Articles 2.2 and 2.4 of the SCM Agreement**

6.60. Regarding paragraph 7.326 and footnote 405 (416), the United States requests that a reference to exhibits CHI-1 and CHI-121, identifying the regional specificity determinations challenged by China, be added to footnote 405 (416) for purposes of greater clarity.

6.61. China does not comment on the United States' request.

6.62. The Panel has modified footnote 405 (416) in accordance with the United States' request.

6.63. Regarding paragraph 7.328, the United States suggests that the first sentence of the paragraph be clarified by using the terminology of the SCM Agreement.

6.64. China does not comment on the United States' request.

6.65. The Panel has modified paragraph 7.328 in accordance with the United States' suggestion.

6.66. Regarding paragraph 7.349, China requests that the paragraph be modified to correctly reflect China's argument, namely that the relevant inquiry under Article 2.2 is whether the financial contribution (i.e. the provision of land-use rights, in this case) or the benefit is limited to the identified industrial park or economic development zone. China has however provided no alternate wording for paragraph 7.349.

6.67. The United States submits that the Panel should reject China's request, since, despite the use of slightly different language by the Panel, paragraph 7.349 accurately reflects China's arguments.

6.68. The Panel has made certain modifications to paragraph 7.349 to reflect China's request and more clearly align the language used therein with the language used in China's submissions.

#### **6.11 Claims concerning export restraints**

6.69. Regarding paragraph 7.374, which summarises the United States' arguments, the United States requests that wording be added to the paragraph to more accurately reflect the argument that the applications contained evidence which supports the USDOC's initiations of investigations.

6.70. China does not comment on the United States' request.

6.71. The Panel has modified paragraph 7.374 as requested by the United States.

6.72. Regarding paragraph 7.375 and footnote 454 (465), the United States requests that a further reference to the United States' first written submission be added to footnote 454 (465).

6.73. China does not comment on the United States' request.

6.74. The Panel has modified footnote 454 (465) as requested by the United States.

## 6.12 Editing and typographical changes

6.75. In addition to the specific requests discussed above, the parties have asked the Panel to make changes of an editorial nature to improve clarity and accuracy or better reflect the language used in their submissions. The Panel has considered these requests and made the changes that it considered appropriate. In addition, the Panel also corrected typographical errors and made changes to other paragraphs to improve the clarity of the text and better express its reasoning.

## 7 FINDINGS

### 7.1 Introduction

#### 7.1.1 Measures at issue

7.1. In this dispute China advances "as applied" claims with respect to 17 countervailing duty investigations<sup>9</sup> initiated by the USDOC in the period 2007-2012:

Short Title	Full Title
Thermal Paper	<b>Lightweight Thermal Paper From the People's Republic of China Investigation C-570-921</b>
Pressure Pipe	<b>Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China Investigation C-570-931</b>
Line Pipe	<b>Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China Investigation C-570-936</b>
Citric Acid	<b>Citric Acid and Certain Citrate Salts From the People's Republic of China Investigation C-570-938</b>
Lawn Groomers	<b>Certain Tow Behind Lawn Groomers and Certain Parts Thereof from the People's Republic of China Investigation C-570-940</b>
Kitchen Shelving	<b>Certain Kitchen Appliance Shelving and Racks from the People's Republic of China Investigation C-570-942</b>
OCTG	<b>Certain Oil Country Tubular Goods from the People's Republic of China Investigation C-570-944</b>
Wire Strand	<b>Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China Investigation C-570-946</b>
Magnesia Bricks	<b>Certain Magnesia Carbon Bricks From the People's Republic of China Investigation C-570-955</b>
Seamless Pipe	<b>Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China Investigation C-570-957</b>
Print Graphics	<b>Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People's Republic of China Investigation C-570-959</b>
Drill Pipe	<b>Drill Pipe From the People's Republic of China Investigation C-570-966</b>
Aluminum Extrusions	<b>Aluminum Extrusions From the People's Republic of China Investigation C-570-968</b>
Steel Cylinders	<b>High Pressure Steel Cylinders From the People's Republic of China Investigation C-570-978</b>

<sup>9</sup> In its request for establishment of a panel in document WT/DS437/2, China advances "as applied" claims in respect of 22 countervailing duty investigations. China explains in its first written submission to the Panel that it is not pursuing its claims with respect to the countervailing duty investigations in *Wire Decking from the People's Republic of China*, *Certain Steel Grating from the People's Republic of China*, *Certain Steel Wheels from the People's Republic of China*, *Galvanized Steel Wire from the People's Republic of China*, and *Multilayered Wood Flooring from the People's Republic of China*. China's first written submission, fn 2.

Short Title	Full Title
Solar Panels	<b>Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China Investigation C-570-980</b>
Wind Towers	<b>Utility Scale Wind Towers From the People's Republic of China Investigation C-570-982</b>
Steel Sinks	<b>Drawn Stainless Steel Sinks From the People's Republic of China Investigation C-570-984</b>

7.2. In respect of 14 of these investigations<sup>10</sup>, China's claims relate to: (i) findings of the USDOC that Chinese SOEs were public bodies; (ii) findings of the USDOC that the provision of certain inputs by the Chinese SOEs conferred a benefit; (iii) findings of the USDOC that alleged subsidies arising from the provision of inputs at less than adequate remuneration were specific; and (iv) the decisions of the USDOC that there was sufficient evidence with respect to specificity of the alleged subsidies to justify the initiation of a countervailing duty investigation. With respect to four of these 14 investigations<sup>11</sup>, China's claims relate to the USDOC's treatment of Chinese SOEs as public bodies for purposes of the initiation of the countervailing duty investigation.

7.3. With regard to 15 of the 17 countervailing duty investigations at issue in this dispute<sup>12</sup>, China's claims concern the USDOC's resort to the use of adverse facts available.

7.4. With regard to seven countervailing duty investigations<sup>13</sup>, China's claims relate to findings of the USDOC that subsidies in the form of the provision of land use rights are specific.

7.5. Finally, with regard to two countervailing duty investigations<sup>14</sup>, China's claims concern the USDOC's initiation of countervailing duty investigations into export restraints and its findings that these export restraints are financial contributions.

7.6. In addition to these "as applied" claims, China presents an "as such" claim with respect to the USDOC's "rebuttable presumption" that SOEs are public bodies.

## **7.2 General principles regarding treaty interpretation, standard of review and burden of proof**

### **7.2.1 Treaty interpretation**

7.7. Article 3.2 of the DSU provides that the WTO dispute settlement system serves to clarify the existing provisions of the covered agreements "in accordance with customary rules of interpretation of public international law". It is generally accepted that the principles codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties are such customary rules.

### **7.2.2 Standard of review**

7.8. Panels generally are bound by the standard of review set forth in Article 11 of the DSU, which provides, in relevant part, that:

[A] panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.

7.9. The Appellate Body has explained that where a Panel is reviewing an investigating authority's determination, the "objective assessment" standard in Article 11 of the DSU requires a panel to review whether the authorities have provided a reasoned and adequate explanation as to (i) how

<sup>10</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminium Extrusions, Steel Cylinders, Solar Panels, Wind Towers and Steel Sinks.

<sup>11</sup> Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks.

<sup>12</sup> China makes these claims with respect to all countervailing duty investigations except the investigations in Thermal Paper and Kitchen Shelving.

<sup>13</sup> Thermal Paper, Line Pipe, Citric Acid, OCTG, Wire Strand, Seamless Pipe and Print Graphics.

<sup>14</sup> Magnesia Bricks and Seamless Pipe.

the evidence on the record supported its factual findings; and (ii) how those factual findings support the overall determination.<sup>15</sup>

7.10. The Appellate Body has clarified that a panel should not conduct a *de novo* review of the evidence, nor should it substitute its judgment for that of the authority. A panel must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.<sup>16</sup> At the same time, a panel must not simply defer to the conclusions of the investigating authority; a panel's examination of those conclusions must be "in-depth" and "critical and searching".<sup>17</sup>

### 7.2.3 Burden of proof

7.11. The general principles applicable to the allocation of the burden of proof in WTO dispute settlement require that a party claiming a violation of a provision of a WTO Agreement must assert and prove its claim.<sup>18</sup> Therefore, China bears the burden of demonstrating that the challenged measures are inconsistent with the SCM Agreement. The Appellate Body has stated that a complaining party will satisfy its burden when it establishes a *prima facie* case, namely a case which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party.<sup>19</sup> Finally, it is generally for each party asserting a fact to provide proof thereof.<sup>20</sup>

7.12. The United States argues that in respect of most of its claims China has failed to make a *prima facie* case. The United States submits that China's first written submission relies on broad and inaccurate generalisations regarding the facts of the USDOC's preliminary and final determinations and fails to discuss how the provisions of the SCM Agreement apply to any of the determinations made by the USDOC.<sup>21</sup> By contrast, China considers that with respect to all of its claims it has met each of the elements that the Appellate Body has deemed necessary to establish a *prima facie* case.<sup>22</sup> The Panel will address the issue of China's alleged failure to make a *prima facie* case to the extent that this is necessary to make a finding on the merits of each of China's claims.<sup>23</sup>

## 7.3 Whether the preliminary determinations in Wind Towers and Steel Sinks are within the Panel's terms of reference

### 7.3.1 Introduction

7.13. The United States requests the Panel to rule that the preliminary determinations in Wind Towers and Steel Sinks are not within the Panel's terms of reference because they were not subject to the consultations requested by China in this dispute.<sup>24</sup>

### 7.3.2 Relevant Provisions

7.14. Article 4 of the DSU provides, relevantly:

4. ... Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

<sup>15</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186; see also Appellate Body Report, *US – Lamb*, para. 103.

<sup>16</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 187-188.

<sup>17</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>18</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>19</sup> Appellate Body Report, *EC – Hormones*, para. 104.

<sup>20</sup> Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.

<sup>21</sup> United States' second written submission, paras. 12-16.

<sup>22</sup> China's second written submission, paras. 14-24.

<sup>23</sup> In the Panel's view, there is no requirement that a panel make a separate finding as to whether a complainant has made a *prima facie* case before it can proceed to consider the merits of a complainant's claim. See, e.g. Appellate Body Report, *Korea – Dairy*, paras. 144-145.

<sup>24</sup> United States' first written submission, para. 12.



7. If the consultations fail to settle a dispute within 60 days after the date of receipt of the request for consultations, the complaining party may request the establishment of a panel. The complaining party may request a panel during the 60-day period if the consulting parties jointly consider that consultations have failed to settle the dispute.

7.15. Article 6 of the DSU provides, relevantly:

2. 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.

### 7.3.3 Main arguments of parties

#### 7.3.3.1 United States

7.16. The United States argues that the preliminary determinations in the Wind Towers and Steel Sinks investigations are outside the terms of reference of the panel proceeding.<sup>25</sup> The United States notes that these preliminary determinations have never been the subject of consultations between the two parties because they were not included in China's request for consultations. Their inclusion would have been in any event impossible because both determinations were issued after China's request for consultations. The latter included only the initiations of the corresponding investigations.<sup>26</sup> The United States argues that based on Articles 4.4 and 4.7 as well as 6 of the DSU, a complaining party must request consultations regarding a matter before the latter may be referred to the DSB for the establishment of a panel, which in turn establishes the terms of reference for the panel proceeding in accordance with Article 7.1 of the DSU. The United States further contends that China tries to circumvent the requirements of DSU by not having filed an additional or supplemental consultations request.<sup>27</sup> In addition, the United States argues that in the panel request, China made additional legal claims relating to the public body, facts available, benchmark and specificity findings of the preliminary determinations of Wind Towers and Steel Sinks which expands the scope of the dispute.<sup>28</sup>

7.17. The United States argues that there is an inherent contradiction between, on the one hand, China's argument that the addition of the preliminary determinations in Wind Towers and Steel Sinks does not expand the scope of the dispute because these determinations are the "next phase" of the investigations initiated, and, on the other, China's argument that the addition of the legal claims associated with these preliminary determinations does not expand the scope of the dispute because the same legal claims have been raised for other final determinations. The United States also submits that China's argument reading preliminary determinations as "next phases" could arguably open the door for complainants to add "next phases" of an investigation after the consultation request while they included in the latter only the initiation of the investigation in question. The United States further contends that China fails to recognize that preliminary determinations are distinct from the initiations of investigations.<sup>29</sup>

7.18. Moreover, the United States argues that the legal claims of China regarding the preliminary determinations are not a natural evolution from the legal claims associated with the measures consulted upon – the initiation of the investigations. The United States considers that each legal claim for each measure stands independently of each other. According to the United States, the only similarity in the scope of the dispute between the consultation and panel request is that China challenges separate, different measures using the same claims it has used for other measures.<sup>30</sup>

<sup>25</sup> United States' first written submission, paras. 13-21.

<sup>26</sup> United States' first written submission, para. 13 and fn 12, where the United States clarifies that China's request for consultations is dated 25 May 2012 while the preliminary determination in Wind Towers was issued on 6 June 2012 and the one in Steel Sinks on 6 August 2012.

<sup>27</sup> United States' response to Panel question No. 1, para. 4.

<sup>28</sup> United States' response to Panel question No. 1, para. 5.

<sup>29</sup> United States' second written submission, paras. 6-9.

<sup>30</sup> United States' second written submission, paras. 9-11; United States' comments on China's responses to the Panel question No. 82, paras. 3-4.

7.19. The United States also contends that China has failed to establish a proper legal foundation for challenging preliminary determinations as compared to final determinations<sup>31</sup>, and in particular has failed to explain why, in light of the language of a particular provision and the preliminary nature of the determinations, it would be appropriate to make a finding under that provision with respect to a preliminary determination that is subject to change.<sup>32</sup>

### 7.3.3.2 China

7.20. China submits that the Wind Towers and Steel Sinks investigations are the "measures at issue" in the sense of Article 4.4 of the DSU and both the initiation and preliminary determinations are the "specific measures at issue" in the context of Article 6.2 of the DSU.<sup>33</sup> Both the initiation and preliminary determinations concern the same investigation of the same products from the same country by the same agency. China further argues that the Appellate Body has held that Articles 4 and 6 do not require a "precise and exact identity" between the specific measures that were the subject of consultations and those identified in the panel request as long as the complainant does not "expand the scope of the dispute" or change the "essence of the challenged measures".<sup>34</sup> The preliminary determinations are merely the next phase of the investigations, the initiation of which was identified in the consultation request, and together with which they represent a "continuum of events". There is therefore a "sufficient degree of identity" to warrant a conclusion that the inclusion of the preliminary determinations in the panel request does not expand the scope of the dispute.<sup>35</sup>

7.21. In addition, China argues that the inclusion of these two preliminary determinations in the panel request has no effect on the scope of China's legal claims in this dispute. The two preliminary determinations represent two additional instances of the same claims that China has already raised in respect of other measures at issue in this dispute. China thus requests the Panel to reject the US assertion that these determinations are not within the Panel's terms of reference.<sup>36</sup> Moreover, China contends that its two arguments are not contradictory; rather the second one, with respect to the legal claims, reinforces the fact that including the next phase of an investigation, the initiation of which was identified in the consultations request, does not expand the scope of the dispute.<sup>37</sup>

7.22. In relation to the inclusion of preliminary determinations in its complaint, China argues that the SCM Agreement does not contain a provision equivalent to Article 17.4 of the Anti-Dumping Agreement which China interprets as an expression of an unconditional right to challenge preliminary countervailing duty determinations. China cites in support of its position the *US – Softwood Lumber III* dispute, where the challenged measures on which the panel reached findings and made recommendations were preliminary countervailing duty determinations of the USDOC.<sup>38</sup>

### 7.3.4 Evaluation by the Panel

7.23. In order to decide whether the preliminary affirmative countervailing duty determinations in Wind Towers and Steel Sinks, which were not subject to the consultations held in this dispute, are within our terms of reference, we must determine whether the inclusion of these determinations in China's panel request has expanded the scope of this dispute.<sup>39</sup> We may examine the scope of the dispute in terms of both the measures at issue and the claims advanced by China.<sup>40</sup> We are guided in our assessment by the Appellate Body's statement that a "precise and exact identity" of

<sup>31</sup> United States' first written submission, para. 12, fn 11.

<sup>32</sup> United States' response to Panel question No. 3, para. 16.

<sup>33</sup> China's response to Panel question No. 2, para. 7.

<sup>34</sup> China's second written submission, para. 9, citing Appellate Body Reports, *Brazil – Aircraft*, para. 132; *US – Upland Cotton*, para. 293; and *Mexico – Anti-Dumping Measures on Rice*, para. 137.

<sup>35</sup> China's second written submission, para. 10.

<sup>36</sup> China's response to Panel question No. 1, paras. 4-6; China second written submission, para. 11.

<sup>37</sup> China's response to Panel question No. 82, paras 1-3.

<sup>38</sup> China's response to Panel question No. 3, paras. 8-11.

<sup>39</sup> Appellate Body Reports, *US – Continued Zeroing*, paras. 224 and 228; *US – Shrimp (Thailand)* / *US – Customs Bond Directive*, para. 293.

<sup>40</sup> Appellate Body Report, *US – Continued Zeroing*, para. 233.



measures between the two requests is not necessary, "provided that the 'essence' of the challenged measures had not changed".<sup>41</sup>

7.24. In both its request for consultations and its panel request, China identifies the specific measures at issue as those preliminary and final determinations listed in Appendix 1 of each request. China explains:

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.<sup>42</sup>

7.25. Indeed, as noted above, in response to a question from the Panel, China asserted that "[t]he *Wind Towers* and *Steel Sinks* investigations are, broadly speaking, "measures at issue" in the sense of article 4.4 of the DSU ...".<sup>43</sup> However, the investigations are not measures themselves, but rather proceedings, i.e. a series of activities involving a formal or set procedure.<sup>44</sup> Certainly, they lead to the adoption of *measures*, and specifically the initiations and preliminary and final determinations (although they may involve other measures, e.g. the decision to accept an undertaking pursuant to Article 18 of the SCM Agreement). The nature and purpose of each of these measures is different and there are significant distinctions especially between the decision to initiate an investigation and the preliminary and final determinations. For instance, as we have noted elsewhere in this Report<sup>45</sup>, the SCM Agreement does not require an investigating authority to make any findings or explain its understanding of key issues (such as the financial contribution, the benefit or specificity) when initiating an investigation, which contrasts with the requirements of preliminary or final determinations. Indeed, Article 22.2 requires that the public notice of the initiation of an investigation contain or make available adequate information on *inter alia* "a description of the subsidy practice or practices to be investigated". In contrast, Article 22.3 requires that the public notice of any preliminary or final determination set forth in sufficient detail "the findings and conclusions reached on all issues of fact and law considered material by the investigating authority".<sup>46</sup>

7.26. Their effects are also quite different. As already noted, the notice of initiation describes the subsidy practice or practices *to be investigated*. The preliminary and final determinations may be affirmative or negative, and they may or may not impose provisional or final countervailing duties, respectively. In fact, an affirmative preliminary determination does not necessarily lead to an affirmative final determination.

7.27. In its request for consultations China challenges, among other things, the USDOC's treatment of the alleged provision of input goods for less than adequate remuneration. In this regard, China's request for consultations claims that the USDOC acted inconsistently with the SCM Agreement in 14 final affirmative countervailing duty determinations and two preliminary countervailing duty determinations<sup>47</sup> by finding that certain SOEs were public bodies, by finding that the alleged provision of input goods for less than adequate remuneration was specific, and by finding that the alleged provision of input goods for less than adequate remuneration conferred a

<sup>41</sup> Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice*, para. 137 (referring to Appellate Body Report, *Brazil — Aircraft*, para. 132).

<sup>42</sup> China's request for the establishment of a panel, p. 1.

<sup>43</sup> China's response to Panel question No. 2, para. 7.

<sup>44</sup> Oxford Dictionaries, accessed on 19 February 2014, <[http://www.oxforddictionaries.com/us/definition/american\\_english/proceedings](http://www.oxforddictionaries.com/us/definition/american_english/proceedings)>.

<sup>45</sup> See paragraphs 7.149. -7.154. of this Report.

<sup>46</sup> See paragraphs 7.149. -7.154. of this Report.

<sup>47</sup> In its request for consultations at footnote 4, China appears to have mistakenly referred to the preliminary determination in *Steel Cylinders*, since the final determination had already been issued and it is the latter that it is included in Appendix 1 thereof. It made the correction in its panel request. That is why the number of final determinations changed from 14 in the request for consultations to 15 in the panel request, and the number of preliminary determinations changed from two to three, respectively. In reality there were 15 final determinations involved in both requests, but only one preliminary determination in the request for consultations.

benefit upon the recipient. In its panel request China advances exactly the same claims with respect to 15 final affirmative countervailing duty determinations and three preliminary countervailing duty determinations. While China's claims in this dispute in respect of the alleged provision of input goods at less than adequate remuneration appear to be of a horizontal nature, its specific claim regarding the initiation of four investigations (including Wind Towers and Steel Sinks) is different to those concerning the USDOC's findings in its preliminary and final determinations. As explained in detail in section 7.6 of this Report, China contended that the initiations are inconsistent with Article 11.3 because they were based on the application of an *incorrect legal standard* — as opposed to *findings* that SOEs were public bodies. This Panel has rejected this claim by China, for the reasons set forth in section 7.6.

7.28. The fact that the USDOC later made findings similar to those of the other investigations does not change the different nature, purpose and effects of a decision to initiate an investigation and a preliminary (or final) determination. It may well be that such an outcome is the result, at least in part, of the application of a deliberate policy of general and prospective application, as China has also contended in this case. China has properly challenged such a policy as an "as such" measure and we deal with that claim in the appropriate section of this Report.

7.29. In light of the foregoing considerations, the Panel finds that the preliminary countervailing duty determinations in Wind Towers and Steel Sinks are not within the Panel's terms of reference.

#### **7.4 Whether the USDOC's findings that certain SOEs were public bodies are inconsistent with Article 1.1 (a)(1) of the SCM Agreement**

##### **7.4.1 Introduction**

7.30. In this section of the Report, the Panel turns to China's claims regarding the USDOC's findings that certain Chinese SOEs were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement in 12 of the 17 countervailing duty investigations at issue in this dispute, 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.<sup>48</sup>

7.31. In each of these 12 investigations, the USDOC found that financial contributions existed in the form of provisions of certain inputs to the respondents. In this context, the USDOC determined that SOEs which provided the inputs to the respondents were "authorities" within the meaning of section 771(5)(B) of the US Tariff Act of 1930.<sup>49</sup>

7.32. China claims that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement because the USDOC determinations that certain SOEs in China were public bodies are inconsistent with the interpretation of the term "public body" set out by the Appellate Body in its report in *US – Anti-Dumping and Countervailing Duties (China)*. Furthermore, as a consequence of these inconsistencies with Article 1.1(a)(1), China claims that the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement, as well as Article VI:3 of the GATT 1994.

##### **7.4.2 Relevant provisions**

7.33. The present claim mainly concerns Article 1.1(a)(1) of the SCM Agreement, which relevantly provides the following:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government")

<sup>48</sup> See table in paragraph 7.1. of this Report. We recall that the Panel has found that the preliminary determinations in Wind Towers and Steel Sinks fall outside the Panel's terms of reference.

<sup>49</sup> The USDOC uses the US statutory term "authority" in its determinations. See 19 U.S.C. Section 1677(5)(B). The term "authority" is defined to include a "public entity". The United States has explained that a "public entity" is the same as a "public body". China's first written submission, fn 8, citing Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 8.99.

### 7.4.3 Main arguments of China

7.34. China claims that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement because the USDOC determinations that certain SOEs in China were public bodies are inconsistent with the interpretation of the term "public body" set out by the Appellate Body in its report in *US – Anti-Dumping and Countervailing Duties (China)*.

7.35. China points out that in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body determined that "'being vested with, and exercising, authority to perform governmental functions' is the 'core feature' that defines a public body" within the meaning of Article 1.1(a)(1). China highlights the significance attached by the Appellate Body to the use of the collective term "government" in Article 1.1(a)(1) and the Appellate Body's reliance upon its finding in *Canada – Dairy* that the "essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority". China argues, in this connection, that a public body, like government in the narrow sense, thus must itself possess the authority to "regulate, control, supervise or restrain" the conduct of others. China recalls that the Appellate Body found further support for its interpretation of the term "public body" in sub-paragraph (iv) of Article 1.1 and in the object and purpose of the SCM Agreement.<sup>50</sup>

7.36. China recalls that the Appellate Body found in *US – Anti-Dumping and Countervailing Duties (China)* that in the cases before it the USDOC had not complied with its obligation "to ensure that its determinations were based on a sufficient factual basis" because evidence of government ownership "cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function".<sup>51</sup> China submits that the input subsidy investigations at issue in the present dispute suffer from the same inconsistency identified by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* because the USDOC found that the SOEs selling inputs to downstream producers of the products under investigation were public bodies based on the same control-based test that the Appellate Body rejected in that dispute. China argues that the USDOC's financial contribution determinations are inconsistent with the SCM Agreement both in those investigations where the USDOC's "government authority" findings were based on evidence submitted by China and in those cases where the USDOC relied on "adverse facts available". This is because the USDOC applied the same flawed control-based standard in all of the input subsidy investigations at issue in this dispute.<sup>52</sup>

7.37. China argues<sup>53</sup> that, in its consideration of China's claims under Article 1.1(a)(1), the Panel should be guided by the principles that the Appellate Body has established regarding the relevance of its legal interpretations of the covered agreements. While the Appellate Body has never had occasion to elaborate upon what sort of "cogent reasons" might justify departing from a legal interpretation embodied in a previously adopted Appellate Body report, simply advancing minor elaborations on arguments already considered and rejected by the Appellate Body cannot constitute "cogent reasons".<sup>54</sup> In China's view, the arguments advanced by the United States before this Panel regarding the interpretation of the term "public body" are not significantly different from the arguments advanced by the United States, and rejected by the Appellate Body, in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>55</sup> China considers that the allegedly "new" control-based standard advocated by the United States in this dispute differs in no meaningful way from the "old" control-based standard that the United States advocated in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>56</sup> The new standard advanced by the United States is also irrelevant because it is undisputed that the USDOC's public body findings at issue in this dispute all reflect the prior control-based standard that the Appellate Body found inconsistent with Article 1.1(a)(1).<sup>57</sup> China expects the Panel to follow the Appellate Body's ruling in *US – Anti-Dumping and Countervailing Duties (China)* because that is the only outcome

<sup>50</sup> China's first written submission, paras. 20-25.

<sup>51</sup> China's first written submission, paras. 26-29.

<sup>52</sup> China's first written submission, paras. 30-31.

<sup>53</sup> China's first oral statement, paras. 10-12.

<sup>54</sup> China's first oral statement, para. 15; second written submission, paras. 31-36.

<sup>55</sup> China's first oral statement para. 15; second written submission, paras. 34-35; Exhibit CHI-127.

<sup>56</sup> China's response to Panel question No. 17.

<sup>57</sup> China's second written submission, para. 34, fn 36; comments on response of the United States to Panel question No. 87.

consistent with the security and predictability of the multilateral trading system and with the objective of a prompt settlement of this dispute.<sup>58</sup>

7.38. China submits that the identical term for public body in the Spanish text of Article 1.1 of the SCM Agreement – "organismo público" – is used in the plural form in the Spanish text of Article 9.1 of the Agreement on Agriculture to mean "agencies" of a "government". According to China, the requirement to give effect to the integrated nature of the different agreements under the WTO Agreement means that identical terms in different agreements must ordinarily be given the same meaning. China argues that the English terms "public body" and "government agency" must be treated as functional equivalents, since that is how the Spanish texts of the SCM Agreement and the Agreement on Agriculture treat the corresponding terms. Thus, a public body – like a government agency and like an "organismo público" – must be "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens".<sup>59</sup> China considers that the United States provides no support for its assertion that the context and object and purpose of the SCM Agreement and the Agreement on Agriculture are different. China argues that Article 9.1 of the Agreement on Agriculture and Article 1.1(a)(1) of the SCM Agreement in fact have very similar contexts in that each provision addresses the question of what entities other than the government itself may bestow subsidies subject to the disciplines of the respective agreements.<sup>60</sup>

#### 7.4.4 Main arguments of the United States

7.39. The United States argues that the Panel should reject China's claims because they rest on a flawed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Interpreted according to the customary rules of interpretation of public international law pursuant to Article 3.2 of the DSU, the term "public body" in Article 1.1(a)(1) means an entity that is controlled by the government such that the government can use that entity's resources as its own.

7.40. The United States argues that dictionary definitions of "public" and "body" suggest that a public body is an entity of, belonging to, or pertaining to the community as a whole and that nothing in those dictionary definitions would restrict the meaning of that term to an entity vested with, or exercising, government authority. The United States also argues in this regard that if the drafters had wished to convey the meaning of "vested with or exercising governmental authority" they could have used terms such as "governmental body", "public agency", "governmental agency" or "governmental authority".<sup>61</sup>

7.41. The United States argues that reading the term "public body" in context supports the conclusion that a public body is any entity controlled by the government such that the government can use that entity's resources as its own. The principle of effectiveness in treaty interpretation requires that the term "public body" be interpreted in a manner that does not make it redundant with the word "government". Thus, the term "public body" in Article 1.1(a)(1) of the SCM Agreement should be interpreted as meaning something other than an entity that performs "functions of a 'governmental' character, that is to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens".<sup>62</sup>

7.42. The United States argues that the use of the term "government" as a shorthand reference for the phrase "a government or any public body within the territory of a Member" in Article 1.1(a)(1) of the SCM Agreement does not require a narrow interpretation of the term "public body". While the shorthand reference suggests that government and public body are related, understanding the relationship to be one in which the government has authorized the public body to perform governmental acts would make the term "public body" redundant and would be inconsistent with the dictionary definitions of "public body". Understanding the relationship as one of control of a public body by "a government" (on behalf of the community it represents) gives meaning to both terms and avoids reducing the term "public body" to

<sup>58</sup> China's first oral statement, para. 16.

<sup>59</sup> China's second written submission, paras. 38-47, response to Panel question No. 84.

<sup>60</sup> China's response to Panel question No. 83.

<sup>61</sup> United States' first written submission, paras. 36-47.

<sup>62</sup> United States' first written submission, paras. 49-51.

redundancy. It is also consistent with the dictionary definitions relevant to the term "public body".<sup>63</sup>

7.43. The United States argues that the context provided by the term "private body" in Article 1.1(a)(1)(iv) supports an understanding of the term "public body" as an entity controlled by the government such that the government can use the entity's resources as its own. Logically, since the ordinary meaning of the term "public" is the opposite of "private", the term "public" means "provided or owned by the State or a public body rather than an individual".

7.44. The United States argues that a financial contribution within the meaning of Article 1.1(a)(1) is a conveyance of value and that entities controlled by the government can convey value just as the government can and the value conveyed can be precisely the same as that conveyed by the government. There is no reason why the concept of financial contribution would cover a transaction, for example a direct transfer of funds, in which a Member conveys value directly to an economic actor through its government but not a transaction in which the Member conveys value through an entity that it controls such that it can use that entity's resources as its own.<sup>64</sup>

7.45. The United States argues that the context provided by the "entrusts or directs" language in Article 1.1(a)(1)(iv) does not weigh against an understanding of the term "public body" as an entity controlled by the government such that the government can use the entity's resources as its own. The fact that an entity has the "authority" or "responsibility" to do a task, such as selling steel or chemicals, which can be entrusted to another entity if the first entity so chooses, does not mean that the entity has "authority" or "responsibility" to perform governmental functions. Further, even assuming *arguendo* that the authority or responsibility to entrust or direct is the same as the authority or responsibility to perform governmental functions, it does not follow that all public bodies must have this authority. Additionally, the suggestion that the reference to governmental functions in Article 1.1(a)(1)(iv) relates to the "authority to 'regulate, control, supervise or restrain' the conduct of others" is unsupported by the text. It is circular to read Article 1.1(a)(1)(iv) as requiring that the term "public body" be interpreted as meaning an entity vested with or exercising authority to perform governmental functions.<sup>65</sup> The United States considers that the Appellate Body's characterization of governmental functions in *Canada – Dairy* and *US – Anti-Dumping and Countervailing Duties (China)* is incomplete in that the organs of a government might perform many other functions that do not involve the regulation, control, supervision, or restraint of individuals or do so only in the broad sense of trying to control the conditions of society and the economy.<sup>66</sup>

7.46. The United States argues that the object and purpose of the SCM Agreement support an interpretation of the term "public body" as meaning an entity controlled by the government such that the government can use the entity's resources as its own, without the additional requirement that the entity must be vested with authority from the government to perform governmental functions. Interpreting the term "public body" in this way preserves the strength and effectiveness of the subsidy disciplines and inhibits circumvention because it ensures that governments cannot escape those disciplines by using entities under their control to accomplish tasks that would potentially be subject to those disciplines were the governments themselves to undertake them.<sup>67</sup>

7.47. The United States argues that the Panel should make its own evaluation of the meaning of the term "public body" in accordance with the customary rules of interpretation of public international law, taking due account of interpretations of that term in previous WTO dispute settlement proceedings. China's position that the Panel must apply the standard adopted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* is contrary to the requirement in Article 11 of the DSU that the Panel make "an objective assessment of the matter before it, including an objective assessment of the case and the applicability of and conformity with the relevant covered agreements". In addition, Appellate Body reports have no binding effect

<sup>63</sup> United States' first written submission, paras. 56-62.

<sup>64</sup> United States' first written submission, paras. 66-74; Comments on China's responses to Panel question No. 83, para. 8.

<sup>65</sup> United States' first written submission, paras. 80-90.

<sup>66</sup> United States' response to Panel question No. 24; comments on China's response to Panel question No. 84.

<sup>67</sup> United States' first written submission, paras. 94-100; second written submission, paras. 39-43.

other than in the context of the particular dispute between the parties. The United States also argues that China itself is seeking a significant modification of the Appellate Body's interpretation of the term "public body" when China argues that a public body must itself possess authority to regulate, control, supervise or restrain the conduct of others. The United States points out that the interpretation which it is advocating in this dispute is not the same as the interpretation considered by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>68</sup>

7.48. The United States argues that the interpretation of the term "public body" that it proposes in this dispute is similar to the concept of "meaningful control" discussed and relied upon by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* in its analysis of USDOC's determinations that state-owned banks in China were public bodies.<sup>69</sup>

7.49. The United States argues that China's argument regarding the use of "organismo público" in Article 9.1 of the Agreement on Agriculture implies that China's position is that a public body is a "government agency". This position is contrary to the principle of effectiveness in treaty interpretation in that it renders the term "public body" redundant or inutile. In making this argument, China also ignores the differences between that provision and Article 1.1(a)(1) of the SCM Agreement.<sup>70</sup>

#### 7.4.5 Main arguments of third parties

7.50. **Australia** submits that the Appellate Body's conclusion in *US – Anti-Dumping and Countervailing Duties (China)* regarding the interpretation of the term "public body" was that "a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that possesses, exercises *or* is vested with governmental authority". These descriptions appear to be *alternatives* to one another. In Australia's view, this conclusion is broader than is indicated in China's submission. In addition, Australia notes that the Appellate Body's discussion of "core" and "key" features of a public body does not fully explain what the other features might be and whether an entity might be considered a public body if it has other features of a public body even if not the core or key ones. Finally, Australia notes that it would not support a view that an entity must be vested with governmental authority in order to be regarded as public body because public bodies have such authority without being vested with it, while the notion of "being vested with" could also transpose artificially to the public body determination the test for "entrustment or direction".<sup>71</sup>

7.51. **Brazil** notes that the "exercise of lawful authority" is a necessary element to the definition of a public body and contends that only when a body is considered to be vested with typical governmental functions *and* exercises the authority inherent to such functions, may it be classified as public body. Mere link of ownership is not sufficient; rather the entity should be able to be considered part of the government itself. Brazil also argues that an investigating authority should conduct a broader analysis, on a case-by-case basis, going beyond the verification of a governmental majority of assets, in order to determine whether the entity under investigation is, in fact, a public body.<sup>72</sup>

7.52. **Canada** submits that an entity controlled by a government should constitute a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Canada submits that such interpretation maintains the *effet utile* of the term public body and distinguishes it from a "private body". At the same time, this interpretation ensures that the disciplines of the SCM Agreement are given a sufficiently broad scope in terms of the entities to which they apply and as such prevents the creation of loopholes allowing for the circumvention of the SCM Agreement.<sup>73</sup>

7.53. **The European Union** submits that while the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* is part of the WTO *acquis*, it does not provide a definitive

<sup>68</sup> United States' first written submission, paras. 119-124; second written submission, paras. 22-30.

<sup>69</sup> United States' second written submission, paras. 35-38; responses to Panel questions Nos. 25 and 26.

<sup>70</sup> United States' second oral statement, para. 15; comments on China's response to Panel question No. 83.

<sup>71</sup> Australia's third-party submission, paras. 4-12.

<sup>72</sup> Brazil's third-party submission, paras. 2-12.

<sup>73</sup> Canada's third-party submission, paras. 4-10.



interpretation of the term "public body" and can be the subject of further, complementary, clarification in subsequent Appellate Body reports. The European Union considers that the right test for determining if an entity is a public body is one that "focusses on a *more specific link* between the *conduct* in question and the *government*, that is, "... the use by a government of its resources, or resources it controls ...". The European Union also suggests that the Panel should determine whether the fact patterns of the 14 challenged investigations are the same for all relevant purposes to the fact patterns of the measures in *US – Anti-Dumping and Countervailing Duties (China)* and whether the USDOC asked for information, other than ownership information and how such information or lack thereof was assessed by the USDOC, for example what inferences the USDOC may or may not have drawn and/or what other available facts it might have relied on, especially beyond government ownership and control in general terms.<sup>74</sup>

7.54. **India** is of the view that the issue raised in the present dispute concerning the interpretation of the term "public body" is identical to the issue before the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, and the United States has not provided any "cogent" reasons different from those argued in that dispute. Therefore, the Panel must interpret this issue in a consistent manner.<sup>75</sup>

7.55. **Japan** observes that a public body may be an entity which enjoys some form of financial backing or guarantee from the government. This underlying financial backing or guarantee could indicate, under the relevant circumstances, that the entity in question is not seeking its own interest or profits; rather, it advances public policy goals even if it accumulates losses. In Japan's view, mere governmental majority shareholding would not be sufficient to allow an entity to advance such goals without seeking profits.<sup>76</sup>

7.56. **Korea** argues that the Panel should confirm and apply the legal standard established by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* to the facts of this case. Korea is of the view that, subject to the Panel's evaluation of all the information on the record, there is no persuasive reason to disturb the clearly articulated jurisprudence of the Appellate Body in this regard.<sup>77</sup>

7.57. **Norway** agrees with the interpretation of the term "public body" as articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. Norway considers that Article 1.1(a)(1)(iv) provides important context to the interpretation of the term "public body" and that paragraph 5(c) of the GATS Annex on Financial Services sheds light on the intent of the Members when considering conduct that should be attributable to the government. Norway further argues that just because a public body is vested with the power to exercise certain governmental functions, this does not equate a public body with government in the narrow sense. Norway further highlights that in order to ascertain whether a certain "function" is governmental, relevant factual elements are the practice of the legal order in the relevant WTO Member and the classification and functions of entities within WTO members generally.<sup>78</sup>

7.58. **Saudi Arabia** agrees with the Appellate Body's interpretation of the term "public body" in *US – Anti-Dumping and Countervailing Duties (China)*. Saudi Arabia contends that investigating authorities must base their public body determination on positive evidence establishing that an entity possesses, exercises or is vested with governmental authority. Any evidential weight given by an investigating authority to government ownership or control should not undermine the governmental authority standard.<sup>79</sup>

7.59. **Turkey** argues that government ownership is the most important decisive indicator showing control of the entity in question. An entity controlled by a government should constitute a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. In the light of the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*, Turkey considers that

<sup>74</sup> European Union's third-party submission, paras. 25-31.

<sup>75</sup> India's third-party statement, para. 6.

<sup>76</sup> Japan's third-party statement, paras. 6, 7 and 9.

<sup>77</sup> Korea's third-party statement, para. 6.

<sup>78</sup> Norway's third-party submission, paras. 3-25.

<sup>79</sup> Saudi Arabia's third-party submission, paras. 3-22.

factors other than "shareholder ownership" can be useful indicators in the public body analysis, but are subsidiary to the main legal standard of "government ownership".<sup>80</sup>

#### 7.4.6 Evaluation by the Panel

7.60. The question before the Panel is whether in the 12 countervailing duty investigations at issue<sup>81</sup> the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement when the USDOC found that SOEs that were majority-owned, or controlled, by the Government of China constituted public bodies.<sup>82</sup>

7.61. Although the relevant sections of China's written submissions do not actually discuss the public body findings made by the USDOC in each of the 12 individual countervailing duty investigations<sup>83</sup>, we consider that in Exhibits CHI-1 and CHI-123 China has provided sufficient evidence to support its assertion that in each of these investigations 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 Government of China, either on the basis of the evidence on the record or by assuming such government ownership or control when the USDOC applied facts available.

7.62. This is evident from the excerpts from the *Issues and Decision Memoranda* that China has provided in Exhibit CHI-123, the relevant parts of which we cite below:

##### Pressure Pipe

Based on our review of the information submitted by the GOC, we determined in the preliminary determination that domestic suppliers of the Winner Companies' SSC that were majority-owned by the GOC during the POI constitute government authorities.

##### Line Pipe

[...] we find that the GOC has failed to act to the best of its ability in terms of providing the Department with the information it requested concerning the ownership of respondents' HRS suppliers. Therefore, pursuant to section 776 of the Act, we are assuming that all of the respondents' HRS suppliers were government-owned and government authorities that provided financial contributions to respondents under section 771(D)(iii) of the Act.

##### Lawn Groomers

[...] the use of facts available is warranted, given that the Department was unable to verify *the precise relationship* between HRS-provider-X and ZMIPOAMC. [...] [c]ombined with the GOC's unwillingness to place on the record of this investigation relevant information regarding the ownership of HRS provider-X that we examined at verification, justifies the use of AFA. As a result, we determine that HRS-provider-X was a state-controlled producer of hot-rolled steel during the POI and a government 'authority' under the Act.

##### Kitchen Shelving

The Department considers firms that are majority-owned by the government to be 'authorities' within the meaning of section 771(5)(B) of the Act. [...]

In this investigation, the GOC holds a majority ownership position in certain of the wire rod producers that supply Wire King. Consistent with the policy explained above, we are treating these producers as 'authorities' and, hence, the wire rod they provide

<sup>80</sup> Turkey's third-party statement, paras. 4 and 6.

<sup>81</sup> See table in paragraph 7.1. of this Report. The Panel recalls its finding that the preliminary determinations in Wind Towers and Steel Sinks fall outside its terms of reference.

<sup>82</sup> The relevant term under US countervailing duty law is "authorities". See footnote 49 of this Report.

<sup>83</sup> China's first written submission, paras. 12-31; second written submission, paras. 26-47.



to Wire King constitutes a countervailable subsidy to the extent that it is sold for LTAR and is specific.

#### OCTG

In the instant investigation, the GOC has identified numerous steel rounds suppliers as SOEs and the information submitted in GOC FIS shows that the state holds a majority ownership position in these firms. As explained further in Comment 9, we are treating these suppliers as authorities.

#### Wire Strand

Based on information in the new Information memorandum as well as on information included in interested parties' [...] comments, we find that the corporate owners of Producer A's parent company are linked to a SASAC and, therefore, are subject to GOC control. As such, we find that Producer A, by virtue of this ownership chain, is ultimately under the control of a SASAC. [...]

While the GOC has not specified the level of ownership the state-owned firm held in the parent of Producer A during the duration of the POI, we determine for purposes of this investigation that in the absence of data to the contrary, there is sufficient evidence to establish that the state-owned firm owned a significant share of the parent of Producer A during the POI, thereby rendering the parent of Producer A a GOC authority during the POI. Accordingly, we further determine that Producer A, in turn, operated as a GOC authority [...]

#### Seamless Pipe

##### *[Regarding the USDOC's finding on the input of Steel Rounds]*

[...], for majority-government-owned companies, respondents can rebut the presumption that majority ownership results in control, and the GOC has not done so here. For enterprises that are less than majority-owned by the government, including private companies and FIEs, the Department sought information to ascertain whether those enterprises are, nonetheless, controlled by the government. While the GOC provided certain ownership information for these companies, it failed to provide the full information needed. Accordingly, the Department was unable to determine whether the government did not control these companies. [...] the Department has continued to apply AFA, with the result that all the steel rounds suppliers are being treated as authorities.

##### *[Regarding the USDOC's finding on the input of Coking Coal]*

Thus, we determine, as AFA, that all of Valin Xiangtan's non-cross-owned suppliers of coking coal are "authorities" [...]

Because record evidence demonstrates that certain of the coking coal producers are majority government-owned, the Department continues to find that these producers constitute authorities.

With respect to coking coal producers that are less-than majority government-owned or private, in the Hengyang Post-Preliminary Analysis, the Department found that the GOC did not provide the information requested by the Department concerning, e.g., ownership and direction of and decision-making within these companies. [...] the GOC has not provided the information relevant to determine whether the government may be exercising control of these companies and, therefore, as AFA have determined that these companies [...] constitute authorities.

## Print Graphics

[...], for majority-government-owned companies, respondents can rebut the presumption that majority ownership results in control, and the respondents have not done so here. For enterprises that are less than majority-owned by the government, including private companies and FIEs, the Department sought information to ascertain whether those enterprises are, nonetheless, controlled by the government. While the GOC provided certain ownership information for these companies, it failed to provide the full information needed. [...] the Department has continued to apply AFA, with the result that all the papermaking chemicals suppliers are being treated as authorities.

## Drill Pipe

*[Regarding the USDOC's finding on the input of Steel Rounds]*

With respect to the GOC's failure to provide ownership information about a certain producer of the steel rounds, we are assuming adversely that this producer is a government authority.

[...] for those producers that the DP Master Group identified as SOEs, we determine that the producers are government authorities [...]

*[Regarding the USDOC's finding on the input of Green Tubes]*

[...] both the GOC and the DP Master Group reported that the only supplier of green tubes to the companies during the POI is an SOE, thereby conceding that the green tube producer is a government authority.

## Aluminum Extrusions

[...] we have continued to treat majority state-owned input producers as GOC authorities capable of providing primary aluminum for LTAR.

## Steel Cylinders

*[Regarding the USDOC's finding on the input of HRS]*

The GOC reported that these hot-rolled steel producers are majority owned and controlled by the GOC [...]. Thus, we determine these suppliers are "authorities" within the meaning of section 771(5)(B) of the Act.

*[Regarding the USDOC's finding on the input of Seamless Tubes]*

[...] based on AFA, we determine that the producer of seamless tube steel owned by individuals from which BTIC purchased inputs during the POI is an "authority" [...]

As AFA, we find that the seamless tube steel produced by the producer BTIC first informed us of at verification was produced by a government authority [...]

The GOC provided ownership information indicating that certain seamless tube steel producers are SOEs. Thus, we determine these producers are "authorities" [...]

*[Regarding the USDOC's finding on the input of Steel Billets]*

The GOC provided ownership information for these input producers indicating that all are directly or indirectly majority owned by the GOC. As explained above, the Department has determined that majority government ownership of an input producer is sufficient to qualify it as an "authority."

## Solar Cells

[...] we have determined as AFA that the producers of the polysilicon purchased by both respondents are "authorities" [...]

7.63. The United States does not contest that in the 12 countervailing duty investigations at issue in this dispute the USDOC actually applied an ownership-based control test in determining whether Chinese SOEs were public bodies.<sup>84</sup>

7.64. While we are required by Article 11 of the DSU to make our own objective assessment of the matter before us, the Appellate Body has affirmed that "[f]ollowing the Appellate Body's conclusions in earlier disputes is not only appropriate, it is what would be expected from panels, especially where the issues are the same".<sup>85</sup> We therefore begin by reviewing what we consider to be the most relevant findings made by the Appellate Body in order to consider the extent to which they may offer relevant guidance for our objective assessment of China's claim.

7.65. The meaning of the concept of "public body" in the sense of Article 1.1(a)(1) of the SCM Agreement has been the subject of lengthy interpretative analysis by the Appellate Body in its report in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body observed that:

... a 'public body' in the sense of Article 1.1(a)(1) connotes an entity vested with certain governmental responsibilities, or exercising certain governmental authority.<sup>86</sup>

... being vested with, and exercising, authority to perform governmental functions is a core feature of a 'public body' in the sense of Article 1.1(a)(1).<sup>87</sup>

A public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority.<sup>88</sup>

What matters is whether an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved.<sup>89</sup>

7.66. We understand the Appellate Body to have found that the critical consideration in identifying a public body is the question of authority to perform governmental functions. Therefore, an investigating authority must evaluate the core features of the entity in question and its relationship to government, in order to determine whether it has the authority to perform governmental functions.<sup>90</sup>

7.67. We are not persuaded by China's argument that the fact that a public body must possess or be vested with authority to exercise governmental functions necessarily means that "[a] public body, like government in the narrow sense, thus must itself possess the authority to 'regulate, control, supervise or restrain' the conduct of others".<sup>91</sup> In our view this proposition is not supported by the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*. The Appellate Body does not state explicitly in that Report that a public body must have the "effective power to regulate, control, supervise individuals, or otherwise restrain their

<sup>84</sup> The Panel observes that the fact patterns of the 12 challenged investigations are equivalent, for all relevant purposes, to the fact patterns of the measures in *US – Anti-Dumping and Countervailing Duties (China)*. The panel in *US – Anti-Dumping and Countervailing Duties (China)* found that "the USDOC determined that the SOEs were 'public bodies' that provided financial contributions in the form of certain goods – HRS, rubber, and petrochemicals – to investigated producers of, respectively, CWP, LWR, OTR and LWS ... [I]n all of the investigations at issue, the USDOC determined that the SOE input suppliers were 'public bodies' ... by applying a rule of majority government ownership". See Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 8.97-8.114.

<sup>85</sup> Appellate Body Report, *US – Continued Zeroing*, para. 362.

<sup>86</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 296.

<sup>87</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310.

<sup>88</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

<sup>89</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

<sup>90</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

<sup>91</sup> China's first written submission, para. 22; response to Panel question No. 84.

conduct, through the exercise of lawful authority".<sup>92</sup> In our view, China misreads the Appellate Body's reference to its prior finding in *Canada – Dairy* that:

The essence of "government" is, therefore, that it enjoys the effective power to "regulate", "control" or "supervise" individuals, or otherwise "restrain" their conduct, through the exercise of lawful authority. This meaning is derived, in part, from the functions performed by a government and, in part, from the government having the powers and authority to perform those functions. A "government agency" is, in our view, an entity which exercises powers vested in it by a "government" for the purpose of performing functions of a "governmental" character, that is, to "regulate", "restrain", "supervise" or "control" the conduct of private citizens.<sup>93</sup>

7.68. We first observe that China's interpretation would equate the term "public body" with the term "government agency", an approach that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* has not followed.

7.69. We also observe that the above-mentioned definition of the Appellate Body in *Canada-Dairy* refers to the "essence" of a government. The use of the word "essence" would indicate that the Appellate Body did not consider that this definition exhausted the scope of the powers and functions that modern governments routinely have or perform.<sup>94</sup> As the Appellate Body itself recognized dictionaries are not "the sole source for determining the ordinary meaning of a treaty term".<sup>95</sup> Other sources such as the *Encyclopædia Britannica* demonstrate that the range of functions, tasks and activities that governments perform is quite broad (including not only regulation of the economy but also the provision of goods and services) and depend on how the State actually operates.<sup>96</sup> Furthermore, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body stated that: "the performance of governmental functions or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body".<sup>97</sup> In our view, governments, either directly themselves or through entities that are established, owned, controlled, managed, run or funded by the government, commonly exercise or conduct many functions or responsibilities that go beyond "the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct". Such entities can include SOEs (including banks and other financial institutions); universities, libraries and other academic institutions; scientific research and development centres; hospitals and other healthcare institutions; museums, orchestras, and other cultural organizations; sports organizations; and many others.

7.70. Within the context of this interpretation of "public body", we focus on the Appellate Body's finding that ownership and control in and of themselves are not sufficient for determining that an entity is a public body.

State ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority.<sup>98</sup>

The USDOC relied "principally" on information about ownership. In our view, this is not sufficient because evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a

<sup>92</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 290.

<sup>93</sup> Appellate Body Report, *Canada – Dairy*, para. 97.

<sup>94</sup> The Panel, however, does not endorse the view that that all activities that involve a government in fact constitute "governmental functions". Whether a function is of a governmental nature requires a case-by-case analysis, looking at how the government and the state of the relevant WTO Member actually operate.

<sup>95</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 335.

<sup>96</sup> The *Encyclopædia Britannica* defines "government" by reference to the *political system* (<http://global.britannica.com/EBchecked/topic/240105/government>, last visited on 25 February 2014) which is, in turn, defined as "the set of formal legal institutions that constitute a "government" or a "state". ... [t]he term comprehends actual as well as prescribed forms of political behaviour, not only the legal organization of the state but also the reality of how the state functions".

(<http://global.britannica.com/EBchecked/topic/467746/political-system>, last visited on 25 February 2014)

<sup>97</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 288-290.

<sup>98</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310.

governmental function. Accordingly, such evidence, alone, cannot support a finding that an entity is a public body.<sup>99</sup>

7.71. The Appellate Body specifically rejected the idea that an entity can be found to be a public body based on a notion of control in the sense of the "everyday financial concept of a 'controlling interest' in a company".<sup>100</sup> In our view, other than "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority", it is not self-evident that all activities that involve a government in fact constitute "governmental functions". For instance, government ownership or control may be temporary and purely circumstantial — for example where a government takes over an enterprise temporarily in order to save it from going bankrupt, to avoid a strike or to guarantee continuity in the provision of certain services (such as air traffic control services).

7.72. Therefore, as noted by the Appellate Body, simple ownership or control by a government of an entity is not sufficient to establish that it is a public body. A further inquiry is needed. Indeed, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body confirmed that, upon review of the USDOC's more comprehensive analysis, certain State-owned commercial banks were properly identified as public bodies.

7.73. It is not in dispute that in the 12 countervailing duty investigations at issue the USDOC found that SOEs were public bodies by relying on a concept of control based, in most cases, on (majority) ownership of an entity by the government. In none of these investigations did the USDOC rely on evidence of the kind that led the Appellate Body to conclude in *US – Anti-Dumping and Countervailing Duties (China)* that the USDOC had before it evidence indicating that state-owned commercial banks exercised "governmental functions".<sup>101</sup> This is evident from the excerpts from the relevant *Issues and Decision Memoranda* that we have reproduced in paragraph 7.62. above.

7.74. The United States argues in this proceeding that the Panel should interpret "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement to mean an entity that is controlled by a government such that the government can use the resources of that entity as its own; and that this interpretation is similar to the concept of "meaningful control" relied upon by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* when it upheld the USDOC's findings that certain state-owned commercial banks were public bodies.<sup>102</sup> We note that the findings made by the USDOC in the 12 countervailing duty investigations at issue in this dispute were not based on the interpretation of the term "public body" advocated by the United States in this dispute.<sup>103</sup> As a consequence, even if we concluded that this interpretation is consistent with the Appellate Body's reliance on the concept of "meaningful control", this could not constitute a basis to find that in the investigations at issue the USDOC's public body findings were consistent with the meaning of the term "public body" as interpreted by the Appellate Body. Therefore we do not consider it necessary to reflect on whether this interpretation is consistent with the "meaningful control" concept used by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

<sup>99</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 346.

<sup>100</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 320.

<sup>101</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 349-350.

<sup>102</sup> The United States observes: "The Appellate Body agreed that there were sufficient links between the government and the SOCBs such that when the banks 'exercised[d] ... their functions (lending), they were effectively carrying out governmental functions. The Appellate Body called the links 'meaningful control'. We think the clearest way to understand the links sufficient to constitute 'meaningful control' is to examine the economic relationship between the government and an entity. As we have suggested, there will be sufficient links when a government controls an entity such that it can use the entity's resources as its own. Using this approach, the government certainly had 'meaningful control' over the SOCBs in *US – Anti-Dumping and Countervailing Duties (China)*, so that when the banks carried out their lending activities it was appropriate to consider that lending a financial contribution attributable to the Government of China". United States' second written submission, para. 37. See also United States' second oral statement, para. 10; response to Panel question No. 87, para. 7.

<sup>103</sup> As acknowledged by the United States. United States' response to Panel question No. 87, para. 8.

7.75. In light of the foregoing considerations, the Panel finds 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.

## **7.5 Whether the USDOC's "rebuttable presumption" is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement**

### **7.5.1 Introduction**

7.76. In this part of the Report, the Panel addresses China's claim that "the USDOC's 'rebuttable presumption' that majority government-owned enterprises are 'public bodies' is inconsistent, with the covered agreements, as such".<sup>104</sup>

### **7.5.2 Main arguments of China**

7.77. China argues that in the final determination issued in July 2009 in the Kitchen Shelving investigation the USDOC stated its policy with regard to analysing whether a firm is a public body, and that this policy is a "rebuttable presumption" that majority government-owned enterprises are "authorities" (public bodies). China argues that this "rebuttable presumption" is a rule or norm of general and prospective application that may be subject to an "as such" challenge in WTO dispute settlement, and which is inconsistent with the proper legal standard for determining whether an entity is a public body under Article 1.1(a)(1) of the SCM Agreement.<sup>105</sup>

7.78. In support of its view that the "rebuttable presumption" established by the USDOC in Kitchen Shelving is a rule or norm of general and prospective application, China points out that the USDOC stated that "[i]n most instances majority government ownership alone indicates that a firm is an authority "and that, in order for a party to demonstrate that an entity with majority government ownership is not an authority, the burden would be on that party to "demonstrate that majority ownership does not result in control of the firm". The USDOC subsequently described the "policy" it articulated in Kitchen Shelving as "a rebuttable presumption that majority-government owned enterprises are authorities within the meaning of section 771(5)(B) of the Act". China argues that based on this rebuttable presumption the USDOC has consistently determined in investigations involving imports from China that majority-state-owned input producers are authorities.<sup>106</sup>

7.79. China argues, with reference to the Appellate Body report in *US – Zeroing (EC)*, that it has demonstrated that the Kitchen Shelving policy sets forth a rule or norm that is attributable to the United States; that it has demonstrated the precise content of this rule or norm and that it has demonstrated that this rule or norm does have general or prospective application. The Kitchen Shelving policy is a rule or norm attributable to the United States in that it articulates a "policy" to address the "recurring issue" of analysing whether entities controlled by the Government of China are public bodies and thereby "provides guidance and creates expectations among the public and among private actors". Regarding the precise content of the Kitchen Shelving policy, China argues that it has demonstrated that this policy reflects an irrebuttable presumption that a government's control over an entity makes it a public body in all cases. Finally, China argues that the facts refute the argument of the United States that the Kitchen Shelving policy has no general and prospective application on the grounds that it only "describes what has been done in the past". According to China, the express terms of the Kitchen Shelving determination establish that it sets forth a rule or norm that is intended to apply to all subsequent countervailing duty investigations in which the question of whether SOEs are public bodies arises. China considers that its position on the general and prospective character of the Kitchen Shelving policy is corroborated by evidence

<sup>104</sup> In its first written submission China refers to the measure that is the subject of its "as such" challenge as the "USDOC's 'rebuttable presumption' that majority-government-owned enterprises are 'public bodies'". China's first written submission, paras. 32-44. In its second written submission China refers to the measure at issue as "the policy articulated by the USDOC in Kitchen Shelving" or "Kitchen Shelving policy". China's second written submission, paras. 48-69.

<sup>105</sup> China's first written submission, paras. 32-44.

<sup>106</sup> China's first written submission, paras. 35-36.

demonstrating that the USDOC has systematically applied the Kitchen Shelving policy in all subsequent determinations in which the public body issue has arisen.<sup>107</sup>

7.80. China rejects the argument of the United States that the Kitchen Shelving policy cannot be subject to WTO dispute settlement because it is mere practice or repeat action. China argues, in this regard, that the Appellate Body has made it clear that the scope of measures that can be challenged in WTO dispute settlement is broad and has not excluded the possibility that concerted action or practice can be susceptible to challenge in WTO dispute settlement. China also argues that the panel report in *US – Export Restraints* does not support the view that practice cannot be challenged in WTO dispute settlement. China also argues that, unlike the complainant in *US – Steel Plate*, in this dispute China does not rely exclusively on "repetition of an action" to discern the normative content of the Kitchen Shelving policy.<sup>108</sup> China disagrees with the United States that there is an "independent operational status" requirement for a measure to be susceptible to challenge in WTO dispute settlement.<sup>109</sup>

7.81. China considers that the Kitchen Shelving policy sets forth a *per se* legal rule, rather than a mere rule of evidence because parties can only rebut the factual question of whether majority government ownership establishes control of the firm. Parties cannot rebut the USDOC's legal interpretation that government control over a firm makes the latter a public body. Thus, Kitchen Shelving sets forth a *per se* legal rule pursuant to which the USDOC indicated that it would treat government control as legally determinative of whether an entity is a public body in all subsequent cases.<sup>110</sup>

7.82. China contends that the argument of the United States that Kitchen Shelving merely reflects the USDOC's reasoning in the context of a particular investigation is directly contradicted by the text of the Kitchen Shelving determination. In Kitchen Shelving the USDOC applied the rule or norm of general application that it had just articulated in that case as the "policy" to address the "recurring issue" of how to analyse whether particular entities were public bodies. Subsequent cases refer back to the policy articulated in Kitchen Shelving as the only *ratio decidendi* for the relevant public body findings.<sup>111</sup> China argues that the fact that the Kitchen Shelving policy was articulated in the body of a final determination, rather than in a stand-alone document like the Sunset Policy Bulletin, is irrelevant.<sup>112</sup>

7.83. China argues, in its first written submission, that the USDOC "rebuttable presumption" that majority government-owned enterprises are public bodies is inconsistent, as such, with Article 1.1(a)(1) of the SCM Agreement because it is premised on the idea that government control over an entity, by itself, is sufficient evidence on which to base a finding that an entity is a "government authority", and that majority government ownership presumptively establishes such control. This is inconsistent with the Appellate Body's interpretation of Article 1.1(a)(1) in *US – Anti-Dumping and Countervailing Duties (China)*, according to which government control, is insufficient, as a matter of law, to establish that an entity has been vested with authority to perform governmental functions.<sup>113</sup>

7.84. China claims that the argument of the United States that the Kitchen Shelving policy does not necessarily result in a breach of Article 1.1(a)(1) of the SCM Agreement because the USDOC has discretion to abandon the policy in the future is based on a mandatory/discretionary distinction, the continued relevance of which is debatable. The fact that, as held by the Appellate Body, non-mandatory measures may be challenged as such logically also implies that on the merits such measures may be found to be inconsistent as such with the relevant provisions of the covered agreements.<sup>114</sup> China further submits that even assuming that the mandatory/discretionary distinction were relevant to the Panel's assessment of the merits of China's "as such" claim, the relevant question is not whether the USDOC retains the theoretical discretion to abandon the Kitchen Shelving policy in the future but whether the policy itself provides the USDOC with discretion to act consistently with Article 1.1(a)(1) of the

<sup>107</sup> China's second written submission, paras. 56-62; response to Panel question No. 10, paras. 31-32.

<sup>108</sup> China's second written submission, paras. 51-55.

<sup>109</sup> China's response to Panel question No. 85, para. 23.

<sup>110</sup> China's first written submission, para. 36; and response to Panel question No. 85, paras. 21-22.

<sup>111</sup> China's second oral statement, paras. 9-10; response to Panel question No. 88, paras. 13-20.

<sup>112</sup> China's second oral statement, para. 11.

<sup>113</sup> China's first written submission, paras. 42-43.

<sup>114</sup> China's second written submission, paras. 63-66.

SCM Agreement. In this respect, China argues that the application of the Kitchen Shelving policy always results in a breach of Article 1.1(a)(1) of the SCM Agreement because this policy establishes an irrebuttable presumption that all government-controlled entities are public bodies and thus reflects the same control-based standard that the Appellate Body has found to be insufficient to establish that an entity is a public body.<sup>115</sup>

7.85. China argues that because the United States is acting inconsistently, as such, with Article 1.1 of the SCM Agreement, it follows that the United States does not impose countervailing duties in accordance with the requirements of the SCM Agreement and Article VI of the GATT 1994 and thereby acts in violation of Article 10 of the SCM Agreement. It also follows that the United States acts inconsistently with Article 32.1 of the SCM Agreement because it takes specific actions against subsidies that are not in accordance with the provisions of the GATT 1994, as interpreted by the SCM Agreement.<sup>116</sup>

### 7.5.3 Main arguments of the United States

7.86. The United States argues that China has failed to establish that the Kitchen Shelving discussion necessarily results in a breach, nor has China shown that discussion is a "measure". First, the United States argues that to succeed in an "as such" challenge China must demonstrate that the discussion in Kitchen Shelving necessarily results in the USDOC acting in a WTO-inconsistent manner. The United States contends that China has failed to do so and that the challenged discussion simply explains the USDOC's historic approach, at the time of Kitchen Shelving, to the public body issue. That discussion does not commit the USDOC to any future course of action and does not necessarily lead to any action inconsistent with any WTO provision. Even labelling the Kitchen Shelving discussion as a "policy" or "practice" by the USDOC would not necessarily result in a breach of the SCM Agreement because it is well-established as a matter of US domestic law that the USDOC can change a practice or policy at any time provided it is permissible under the statute and the USDOC has a reason for doing so. The United States argues that the Kitchen Shelving discussion is an explanation of the USDOC's past practice, which can be changed adapted, modified or abandoned at any time and that it is intended to explain the USDOC's actions, not to create binding rules.<sup>117</sup>

7.87. Second, the United States contends that the USDOC's discussion in Kitchen Shelving is not a "measure" and therefore that discussion cannot result in a breach. Even labelling the discussion as a "policy" or "practice" does not lead to the conclusion that China has established the existence of a measure that can be challenged because an administrative practice is not a "measure". The United States refers to the panel findings in *US – Export Restraints* and *US – Steel Plate* as support for the view that practice has no independent operational status and can therefore not be challenged as a "measure".<sup>118</sup> The United States argues that even with China's broad and problematic definition of a measure as "any act or omission attributable to a WTO Member", the explanation in Kitchen Shelving is not an "act or omission" because, on its own, it does not do or accomplish anything and has no "independent operational status such that it could independently give rise to a WTO violation". As a discussion of the USDOC's historic approach to the public body issue, it is descriptive rather than prescriptive.<sup>119</sup> The United States argues that China has not found any causation between the Kitchen Shelving memorandum and any other action by the United States that would indicate that it is an "act" or is "doing something".<sup>120</sup> The United States also argues that the USDOC's references to the Kitchen Shelving discussion in other determinations that followed do not establish it as a "measure" or give it "legal effect".<sup>121</sup>

7.88. The United States considers that the discussion in Kitchen Shelving does not have "general and prospective application". There is no indication in that discussion that the USDOC intended the Kitchen Shelving reasoning to apply to all cases, nor "to conclusively treat all entities controlled by the Government of China as 'public bodies' in *all* cases ...". The United States argues that, on the

<sup>115</sup> China's second written submission, paras. 67-69.

<sup>116</sup> China's first written submission, para. 44.

<sup>117</sup> United States' first written submission, paras. 131-133; response to Panel question No. 29, paras. 63-65.

<sup>118</sup> United States' first written submission, paras. 135-136; response to Panel question No. 10, paras. 36-39.

<sup>119</sup> United States' second written submission, para. 45.

<sup>120</sup> United States' opening statement at the second meeting with the Panel, para. 22.

<sup>121</sup> United States' response to Panel question No. 10, para. 39.



contrary, the language used in Kitchen Shelving indicates that the USDOC would in the future examine evidence and arguments that "majority ownership does not result in control of the firm" and would consider "all relevant information".<sup>122</sup> In this connection, the United States distinguishes the Kitchen Shelving discussion from the USDOC's policy bulletin found to be a "measure" in *US – Oil Country Tubular Goods Sunset Reviews* and also discussed in *US – Corrosion-Resistant Steel Sunset Review*, which provided "guidance regarding the conduct of sunset reviews".<sup>123</sup> The United States contends that China's argument that the Kitchen Shelving discussion creates an "irrebuttable presumption" that all government-controlled entities are public bodies ignores the context and the plain language of the Kitchen Shelving determination because the USDOC's statement in Kitchen Shelving did not address the issue of whether or not all government-controlled entities are public bodies under the SCM Agreement.<sup>124</sup>

7.89. The United States claims that China can cite to no prior dispute in which a panel or Appellate Body has found that an investigating authority's *explanation of its reasoning* in the context of a trade remedy investigation is a "measure" that can be challenged "as such". Only stand-alone policy documents with stated prospective effect, or well-established methodologies reflected in computer programming, have been found to be measures.<sup>125</sup> The United States also argues that China's argument that the Kitchen Shelving discussion is a measure that can be challenged as such is inconsistent with Article 22.5 of the SCM Agreement because it would transform the provision of reasons, an obligation under Article 22.5, into an independent measure.<sup>126</sup>

7.90. The United States argues that China's statement that the Kitchen Shelving policy is the only *ratio decidendi* mentioned by the USDOC in its public body findings made subsequent to Kitchen Shelving is an unsupported assertion as China fails to identify a single case that solely uses the Kitchen Shelving memorandum as the reasoning for relevant public body findings. The United States submits that public body findings in proceedings subsequent to Kitchen Shelving were based upon the facts and circumstances of each investigation and not solely reliant on the reasoning in Kitchen Shelving.<sup>127</sup>

#### 7.5.4 Main arguments of third parties

7.91. **The European Union** contends that the nature of the alleged measure, of the rebuttable presumption, is that of a rule of evidence rather than a rule of substance. The European Union considers that it may be reasonable that the authority draws an inference, at the end of an investigation, after having posed precise questions that have not been fully answered, and after having provided a prior indication of the inference that is intended to draw. However, it may not necessarily be reasonable for an authority to posit the same inference at the outset of the investigation in the form of a presumption. In the European Union's view, this specific procedural context must inform the Panel's consideration of whether or not China has demonstrated the existence and precise content of the measure at issue.<sup>128</sup>

#### 7.5.5 Evaluation by the Panel

##### 7.5.5.1 Relevant excerpt from the Kitchen Shelving Issues and Decision Memorandum

7.92. We begin our assessment of this claim by looking at the relevant excerpt of Kitchen Shelving, where, according to China, the USDOC first articulated its policy. We find it is the appropriate starting point for examining whether China has established the existence and content of the "measure" at issue and subsequently, its alleged inconsistency, on an "as such" basis, with Article 1.1(a)(1) of the SCM Agreement. The relevant part of the USDOC's Issues and Decision Memorandum in Kitchen Shelving provides the following:

<sup>122</sup> United States' second written submission, paras. 46-47.

<sup>123</sup> United States' second written submission, para. 48.

<sup>124</sup> United States' second oral statement, para. 23.

<sup>125</sup> United States' second written submission, para. 49.

<sup>126</sup> United States' second written submission, para. 51.

<sup>127</sup> United States' response to Panel question No. 88, paras. 9-10.

<sup>128</sup> European Union's third-party submission, para. 36.

The Department considers firms that are majority-owned by the government to be "authorities" within the meaning of section 771(5)(B) of the Act. This treatment is reflected in the CVD Preamble,<sup>[135]</sup> which identifies "treating most government-owned corporations as the government itself" as a longstanding practice. It is also reflected in numerous determinations in which the Department has treated government-owned firms providing such goods and services as electricity, water, natural gas, and iron ore as authorities without any discussion of the matter or any questioning of this treatment by the parties to the proceeding.<sup>[136]</sup>

*[ORIGINAL FOOTNOTES]*

<sup>135</sup> See CVD Preamble, 63 Fr at 65402.

<sup>136</sup> See, e.g., *Final Magnesium from Canada at "Exemption from Payment of Water Bills; Steel Products from Argentina at Regional Tariff Zones for Natural Gas"; Steel Sheet and Strip from Korea at Electricity Discounts Under the Requested Load Adjustment Program; and Hot-Rolled Steel from India at Iron Ore.*

However, in certain cases, including certain instances involving firms with majority government ownership, the Department has considered additional relevant information to support its determination that firms should be treated as authorities for purposes of the countervailing duty law. Because our approach to analyzing whether a firm is an authority has become a recurring issue particularly in CVD investigations of imports from the PRC, we are taking this opportunity to clearly state our policy in this regard.

One of the earliest instances in which the Department was faced with the issue of whether a business (as opposed to a ministry or policy bank) should be treated as a government entity was in a 1987 investigation of fresh cut flowers from the Netherlands.<sup>[137]</sup> Specifically, in that investigation, we considered whether Gasunie, a firm that was fifty percent owned by the government, was conferring a subsidy through its provision of natural gas to the flowers growers.

*[ORIGINAL FOOTNOTE]*

<sup>137</sup> See *Flowers from Netherlands.*

Because the government did not have a controlling interest in Gasunie, the Department looked to other indicators and determined that the government provided subsidies through Gasunie. In some subsequent cases, where it was unclear whether a firm was an authority based on ownership information alone, the Department examined broadly similar indicators as in the flowers case, namely: 1) government ownership; 2) the government's presence on the entity's board of directors; 3) the government's control over the entity's activities; 4) the entity's pursuit of governmental policies or interests; and 5) whether the entity is created by statute.

Commerce does not analyze each of these "five factors" for every firm in every case, however. In most instances, majority government ownership alone indicates that a firm is an authority. Indeed, a careful examination of the five factors reveals that when a government is the majority owner of a firm, factors one through four are largely redundant. If the government owns a majority of the firm's shares, then the government would normally appoint a majority of the members of the firm's board of directors who, in turn, would select the firm's managers, giving the government control over the entity's activities.

It has been argued that government-owned firms may act in a commercial manner. We do not dispute this. Indeed, the Department's own regulations recognize this in the case of government owned banks by stating that loans from government-owned banks may serve as benchmarks in determining whether loans given under government programs confer a benefit. However, this line of argument conflates the issues of the "financial contribution" being provided by an authority and "benefit". If firms with majority government ownership provide loans or goods or services at

commercial prices, i.e., act in a commercial manner, then the borrower or purchaser of the good or service receives no benefit. Nonetheless, the loans or good or service is still being provided by an authority and, thus, constitutes a financial contribution within the meaning of the Act.

For the reasons given above, it normally is not necessary for the Department to apply the five factor analysis in situations where the provider of the financial contribution is majority government owned. This does not preclude parties from arguing that firms with majority government ownership are not authorities, but to succeed in such an argument a party must demonstrate that majority ownership does not result in control of the firm. Such situations may exist, but they are rare. Where majority ownership does not exist, the Department will consider all relevant information regarding the control of the firm, including, where appropriate and necessary, some or all of the five factors discussed above, in determining whether the firm should be treated as an authority.

In this investigation, the GOC holds a majority ownership position in certain of the wire rod producers that supply Wire King. Consistent with the policy explained above, we are treating these producers as "authorities" and, hence, the wire rod they provide to Wire King confers a countervailable subsidy to the extent that it is sold for LTAR and is specific.<sup>[138]</sup>

[ORIGINAL FOOTNOTE]

<sup>138</sup> See Memorandum Accompanying the Final Determination, "Analysis Concerning Authorities" dated July 20, 2009 ("Authorities Memorandum")

#### **7.5.5.2 Whether the USDOC's "rebuttable presumption" is a "measure" and if so, whether it can be challenged "as such"**

7.93. As a starting point, we note that the parties disagree on whether the "rebuttable presumption", as set out in the Kitchen Shelving Issues and Decision Memorandum, is a "measure" that can be challenged under WTO dispute settlement proceedings. The United States considers that the relevant articulation is only a discussion in the context of an investigation that cannot be challenged, while China argues that it reflects a policy statement. The parties further disagree on whether the challenged "rebuttable presumption" is a measure that can be challenged on an "as such" basis.

7.94. We now turn to examine, firstly, whether the "rebuttable presumption" policy, as framed by China in this dispute, constitutes such a "measure" and, secondly, whether it can be challenged "as such".

- a. Is the rebuttable presumption/Kitchen Shelving discussion a "measure" susceptible to WTO dispute settlement?

7.95. Starting with the concept of "measure", we recall Article 3.3 of the DSU<sup>129</sup> which refers to "situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreement are being impaired by *measures taken by another Member*" (emphasis ours). The Appellate Body in *United States – Corrosion-Resistant Steel Sunset Review* stated that this "phrase identifies the relevant nexus, for purposes of dispute settlement proceedings, between the 'measure' and a 'Member'".<sup>130</sup>

7.96. In previous cases, the Appellate Body has addressed, in the context of the Anti-Dumping Agreement, the scope of "measures" that may be the subject of WTO dispute settlement. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body indicated that, "[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of

<sup>129</sup> Article 3.3 provides that "The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members".

<sup>130</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch".<sup>131</sup>

7.97. We also believe that the provisions of Article 32.5 of the SCM Agreement are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under the SCM Agreement. Article 32.5 contains an explicit obligation for each Member to "take all necessary steps, of a general or particular character" to ensure "the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the Member in question." Similar to the conclusion of the Appellate Body in *United States – Corrosion-Resistant Steel Sunset Review* regarding the corresponding provision of Article 18.4 of the Anti-Dumping Agreement, the phrase "laws, regulations and administrative procedures" seems to encompass the entire body of generally applicable rules, norms and standards, for purposes of WTO law, adopted by Members in connection with the conduct of countervailing duty investigations. If some of these types of measures could not, as such, be subject to dispute settlement under the SCM Agreement, it would frustrate the obligation of "conformity" set forth in Article 32.5.<sup>132</sup>

7.98. As the Appellate Body further explained in that same case, the determination of the scope of "laws, regulations and administrative procedures" must be based on the "content and substance" of the alleged measure, and "not merely on its form".<sup>133</sup>

7.99. In relation to whether a "practice", "policy" or a "methodology" can be a "measure" that could be challenged in dispute settlement proceedings, previous findings have not always been consistent. Two previous panels have observed that when a "practice" is only established by "repetition" or does not *do* something or *require* the investigating authority to do something, or refrain from doing something, then it does not appear to have independent operational status such that it could independently give rise to a WTO violation.<sup>134</sup> However, another panel and the Appellate Body, in *US – Countervailing Measures on Certain EC Products*, accepted that an "administrative practice" could be a measure subject to WTO dispute settlement proceedings.<sup>135</sup> Moreover, the panel in *US – Gambling* also stated that even a ""practice" can be considered as an autonomous measure that can be challenged in and of itself or it can be used to support an interpretation of a specific law that is challenged "as such"". <sup>136</sup> Further, in *US – Zeroing (EC)*, the panel accepted that the "measure" was specific lines of computer code contained in the USDOC's AD Margin Programme ("Standard Zeroing Procedures") and the "consistent practice" (or

<sup>131</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 188, citing Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>132</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87. Such an interpretation is also consistent with the Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, in which Ministers underlined "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".

<sup>133</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 87.

<sup>134</sup> Panel Reports, *US – Steel Plate*, para. 7.23; and *US – Export Restraints*, para. 8.126. However, the panel in *US – Export Restraints* had cited approvingly in paragraph 8.80 of its report the Appellate Body finding in *Guatemala – Cement* that it found no reason or basis to rule in the abstract that a given type of instrument or action cannot be the subject of claims in WTO dispute settlement. The panel also stated in paragraph 8.123 of the report that, in its view, the complainant (Canada) had not clearly identified what it referred to when it used the term "practice" and as a result the panel had great difficulty in conceiving of "practice" as a measure in that dispute.

<sup>135</sup> Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, paras. 128-129. The practice in question in that dispute was the "same person" *methodology* used by the USDOC to determine whether a "benefit" continues to exist following a change in ownership. That method was prescribed neither by United States statute nor by USDOC regulations. Rather, the USDOC had developed this method as an administrative practice in the course of responding to orders of the United States Court of International Trade in the appeals of certain countervailing duty cases.

<sup>136</sup> Panel Report, *US – Gambling*, paras. 6.196-6.197, citing Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, and Appellate Body Reports, *US – Corrosion-Resistant Steel Sunset Review*; *US – Countervailing Measures on Certain EC Products*; and *US – Carbon Steel*, and stating: "The panel in *US – Corrosion-Resistant Steel Sunset Review* stated that "practice" under WTO law is "a repeated pattern of similar responses to a set of circumstances". The Appellate Body in the same case indicated that "practice" in the form, for example, of a policy bulletin, may be challenged "as such". In *US – Countervailing Measures on Certain EC Products*, the Appellate Body issued a recommendation that the US bring its "practice" into conformity with the SCM Agreement. The Appellate Body in *US – Carbon Steel* indicated that "practice" may also be used to provide evidence of how laws are being interpreted and applied".

*methodology*) as such of the United States with regards to zeroing.<sup>137</sup> Finally, the Appellate Body in *EC and certain member States – Large Civil Aircraft* did not exclude the possibility that "concerted action or practice could be susceptible to challenge in WTO dispute settlement", and that it was not necessary for the complainant to establish "the existence of a rule or norm of general and prospective application in order to show that such measure exists".<sup>138</sup>

7.100. The Appellate Body has also acknowledged that a "measure" may be any act of a Member, whether or not legally binding, and it can include even *non-binding guidance* by a government.<sup>139</sup>

7.101. Based on the above, we are of the view that, in principle, even a policy or practice of an investigating authority could be a "measure" subject to WTO dispute settlement proceedings.

7.102. Moving to the facts of the present dispute, in order to decide whether the so-called "rebuttable presumption" or "*Kitchen Shelving policy*" is a "measure", we start by looking at the available text describing the challenged measure. The most direct characterisation of the "rebuttable presumption" comes from the USDOC itself when it introduces the discussion in the Kitchen Shelving Issues and Decision Memorandum by stating that: "Because *our approach to analysing* whether a firm is an authority ... we are taking this opportunity to clearly state our *policy* in this regard". (emphasis ours) We see no reason to question the USDOC's acknowledgment and portrayal of a "policy" regarding its own approach to interpreting whether an entity is a public body. Further, the countervailing duty Preamble characterises this approach as a "long standing practice". The introductory language of the countervailing duty Preamble also clarifies that these rules "deal with countervailing duty *methodology*" and "codify certain *administrative practices*".

7.103. We also observe that this policy has been applied consistently over a long period of time. The USDOC states in the Kitchen Shelving Issues and Decision Memorandum that its practice "is also reflected in numerous determinations in which the Department has treated government-owned firms providing such goods and services as electricity, water, natural gas, and iron ore as authorities without any discussion of the matter or any questioning of this treatment by the parties to the proceeding". Some of the determinations cited by the USDOC were made several decades ago. China has also provided evidence demonstrating that this methodology has been applied in all the challenged cases subsequent to the "policy" announcement in the Kitchen Shelving Issues and Decision Memorandum as well.<sup>140</sup>

7.104. The language of this policy is not "mandatory" as it does not have any legal effect upon the USDOC. It is its own internal policy. It does provide, though, that the USDOC would normally apply first the "rebuttable presumption" and only if there are convincing arguments and evidence to the contrary would the USDOC reconsider its by-default approach. The text does not define what such arguments or evidence could be, nor what weight they might have over the USDOC's standard approach. On the contrary, the text presumes that such occasions would be "rare" and shifts the burden of proof on the interested parties to prove a negative.

7.105. Finally, the issue is not what the status of the "rebuttable presumption" within the domestic legal system of the United States is but rather whether it is a "measure" that may be challenged within the WTO system. It may be that the policy articulated in the Kitchen Shelving Issues and Decision Memorandum is not "binding" upon the USDOC under US law and that the USDOC is free to depart from that policy at any time. However, as the Appellate Body has stated, it is not for us to opine on matters of United States domestic law. Our mandate is confined to clarifying the provisions of the WTO Agreement and to determining whether the challenged measure is consistent with those provisions.<sup>141</sup>

7.106. Based on the above, we understand what is challenged is not a mere "discussion" limited to the Kitchen Shelving investigation or the Kitchen Shelving Issues and Decision Memorandum as such, rather it is the "policy" which is expressed through that Issues and Decision Memorandum. This policy has been applied both before and subsequent to the Kitchen Shelving Issues and

<sup>137</sup> Panel Report, *US – Zeroing (EC)*, para. 7.72.

<sup>138</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.

<sup>139</sup> Appellate Body Report, *Guatemala – Cement I*, fn 47 to para. 69, citing *Japan – Trade in Semi-Conductors*, adopted 4 May 1988, BISD 35S/116.

<sup>140</sup> See paragraph 7.115 below of this Report.

<sup>141</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

Decision Memorandum. In our view, the scope of this "policy" concerns the legal standard that the USDOC applies by default to determine that a majority government-owned entity is a public body. We therefore find that what is challenged is a measure susceptible to WTO dispute settlement.

b. Can the rebuttable presumption/Kitchen Shelving discussion be challenged "as such"?

7.107. In principle, we share the Appellate Body's view that "allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated".<sup>142</sup> Moreover, the Appellate Body found no basis, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measures can be challenged "as such" in dispute settlement proceedings under the Anti-Dumping Agreement. The Appellate Body thus saw no reason to conclude that, in principle, non-mandatory measures cannot be challenged as such. In our view, this conclusion should also apply in dispute settlements proceedings under the SCM Agreement.<sup>143</sup>

7.108. In *United States – Corrosion-Resistant Steel Sunset Review*, the Appellate Body stated that measures consist "not only of particular acts applied only to a specific situation, but also of *acts setting forth rules or norms that are intended to have general and prospective application* [original footnote omitted]. In other words, instruments of a Member containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance".<sup>144</sup>

7.109. The Appellate Body then set out the relevant standard for bringing an "as such" challenge against a "rule or norm". A complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application. Evidence may include the concrete instrumentalities and proof of the systematic application of the challenged "rule or norm".<sup>145</sup>

7.110. The Panel in *US – Zeroing (EC)* also concluded that the above findings of the Appellate Body apply even where the measure in question is not "a legal instrument" under the law of a Member and does not bind an administering agency.<sup>146</sup> In the same case, the Appellate Body recalled that both participants agreed that an "as such" challenge can, in principle, be brought against a measure that is not expressed in the form of a written document.<sup>147</sup>

7.111. Similar to the analysis undertaken by the Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* concerning the Sunset Policy Bulletin, we also consider that the "rebuttable presumption" articulated in Kitchen Shelving has normative value, as it provides "administrative guidance and creates expectations among the public and among private actors".<sup>148</sup> This is evident from the declaratory style of the text, as articulated in the Kitchen Shelving Issues and Decision Memorandum and the consistent application of this policy by the USDOC. In its response to our questions, the United States admits that a "policy" announcement provides "the public with guidance as to how [the USDOC] may interpret and apply the statute and regulations in individual cases".<sup>149</sup> In our view, all the above demonstrate that this "policy" has normative value and is therefore a "rule or norm".

7.112. In our view, it is clear that the parties do not disagree that the "rebuttable presumption/Kitchen policy" is attributable to the United States as it is applied by the executive branch of the US government in US countervailing duty investigations.

<sup>142</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>143</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 88. Such an interpretation is also consistent with the Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, in which Ministers underlined "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures".

<sup>144</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>145</sup> Appellate Body, *US – Zeroing (EC)*, para. 198.

<sup>146</sup> Panel Report, *US – Zeroing (EC)*, para. 7.96.

<sup>147</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 194.

<sup>148</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

<sup>149</sup> United States' response to Panel question No. 29, para. 64.

7.113. As for its precise content, we understand from the text of the "rebuttable presumption" that the USDOC's policy is to presume that any entity that is majority-owned by the government is a public body. When there is no majority-ownership by the government, the USDOC could still reach a public body finding based on other elements beyond government ownership.<sup>150</sup> The USDOC mentions explicitly four such other elements, on the basis of which it could find that an entity is a public body if it is controlled by the government. The text is not explicit, though, as to whether the USDOC will reach a public body finding only on the basis of governmental "control".

7.114. This policy seems, in our view, to have general and prospective application, as it is intended to apply to future investigations.<sup>151</sup> Based on the text itself, the USDOC explains that this policy has been applied for some time, that the USDOC is clarifying its policy for the public through the Issues and Decision Memorandum and that the USDOC will continue applying it, hence the use of the words such as "normally" reflecting both the historic and expected approach of the USDOC in cases in the future as well as the use of the future tense in stating what the USDOC "will consider [all other information]".

7.115. In addition, we have also before us evidence regarding the application of this "policy" in all determinations challenged in this dispute that followed the Kitchen Shelving Issues and Decision Memorandum:<sup>152</sup>

- i. Wire Strand: "following the reasons set forth in Racks from the PRC, we have continued to treat majority state-owned input producers as GOC authorities capable of providing wire rod for LTAR."<sup>153</sup>
- ii. Aluminum Extrusions: "following the reasons set forth in Racks from the PRC, we have continued to treat majority state-owned input producers as GOC authorities capable of providing primary aluminum for LTAR."<sup>154</sup>
- iii. Print Graphics: "Having determined that ownership/control is central to deciding whether an enterprise is an authority, the Department looks to whether the enterprise is majority owned or not. ... [F]or majority government-owned companies, respondents can rebut the presumption that majority ownership results in control, and the GOC has not done so here. For enterprises that are less than majority-owned by the government, including private companies and FIEs, the Department sought information to ascertain whether those companies are, nonetheless, controlled by the government."<sup>155</sup>
- iv. OCTG: "In [Kitchen Shelving], the Department explained with respect to the five factors test that majority-government-owned firms are normally treated as [public bodies]. Thus, determining the ownership of a company is a threshold matter in our investigations. In the instant investigation, the [Government of China] has identified numerous steel rounds suppliers as SOEs and the information submitted in [Government of China] FIS shows that the state holds a majority ownership position in these firms. As explained further in Comment 9, we are treating these suppliers as [public bodies]."<sup>156</sup>
- v. Seamless Pipe: After initially recalling that "[i]n [Kitchen Shelving], we have established a rebuttable presumption that majority-government-owned enterprises

<sup>150</sup> China's response to Panel question No. 10, para. 31.

<sup>151</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188.

<sup>152</sup> China's second written submission, para. 62, fn 81 and 82.

<sup>153</sup> China's first written submission, para. 36, citing *Wire Strand*, Issues and Decision Memorandum, p. 75 (CHI-52). "Racks from the PRC" is the same case herein referred to as Kitchen Shelving.

<sup>154</sup> China's first written submission, para. 36, citing *Aluminum Extrusions*, Issues and Decision Memorandum, p. 91 (CHI-87).

<sup>155</sup> China's response to Panel question No. 85, para. 22 and fn 38, citing *Print Graphics*, Issues and Decision Memorandum, pp. 67-68, (CHI-73).

<sup>156</sup> China's comments on the United States' response to Panel question No. 88, fn 16, citing *OCTG*, Issues and Decision Memorandum, p. 70, (CHI-45). In Comment 9, the USDOC again notes that in Kitchen Shelving, "the Department clarified its policy with respect to application of the five factors test", noting that the "aspect of that policy that is relevant here is the Department's treatment of enterprises that are majority-owned by the government as 'authorities'". Ibid. p. 72.



are [public bodies]", the USDOC goes on to find that: "Having determined that ownership and control is central to deciding whether an enterprise is [a public body], the Department looks to whether the enterprise is majority-government-owned or not. As explained above, for majority-government-owned companies, respondents can rebut the presumption that majority ownership results in control, and the [Government of China] has not done so here. For enterprises that are less than majority-owned by the government ... the Department sought information to ascertain whether those enterprises are, nonetheless, controlled by the government. While the [Government of China] provided certain ownership information for these companies, it failed to provide the full information needed. Accordingly, ... all steel round suppliers are being treated as [public bodies]."<sup>157</sup>

- vi. Steel Cylinders: the USDOC does not expressly refer to Kitchen Shelving but rather to an earlier decision (*OTR Tires*) that reflects the same substantive "rebuttable presumption" and concludes that "the Department determined that majority government ownership of an input producer is sufficient to qualify it as [a public body]. Thus, we determine these suppliers (sic) are [public bodies]."<sup>158</sup>
- vii. Solar Panels: "For each producer in which the GOC was a majority owner [we stated that] the GOC needed to provide the following information that is relevant to our analysis of whether that producer is an "authority". [...] documents that demonstrate the producer's ownership during the POI", etc. ... [and] "[a]ny other relevant evidence the GOC believes demonstrates that the company is not controlled by the government."<sup>159</sup>
- viii. Drill Pipe: "with respect to the specific companies that produced the steel rounds purchased by the respondents, we asked the [Government of China] to provide particular ownership information for these producers so that we could determine whether the producers are [public bodies]. Specifically, we stated in our questionnaire that the Department *normally treats producers that are majority owned by the government or a government entity as [public bodies]*. Thus, for any steel rounds producers that were majority government-owned, the GOC needed to provide the following ownership information if it wished to argue that those producers were not authorities: ... Any relevant evidence to demonstrate that the company *is not controlled by the government, e.g.,* that the private, minority shareholder(s) control the company."<sup>160</sup>

7.116. The references in the text of the Kitchen Shelving Issues and Decision Memorandum to both previous countervailing duty proceedings, to the countervailing duty Preamble as well as the evidence provided by China on the approach followed in countervailing duty investigations after the Kitchen Shelving proceeding, demonstrate that the application of this policy has been a constant feature of the US countervailing proceedings for a considerable period of time. We recall that the USDOC has stated that the findings of the panel and Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* were limited to the four investigations at issue in that dispute. The relevant text provides:

[R]egarding the DSB's reports in the DS 379 proceeding, we note that, while we have reached section 129 final determinations in the four investigations at issue in that dispute, the decisions of the panel and the appellate body regarding whether a producer is an authority (a "public body" within the WTO context) were limited to those four investigations.<sup>161</sup>

<sup>157</sup> China's comments on the United States' response to Panel question No. 88, para. 16, fn 18, citing Seamless Pipe, Issues and Decision Memorandum (CHI-66), p 65.

<sup>158</sup> China's comments on the United States' response to Panel question No. 88, para. 16, fn 17, citing Steel Cylinders, Issues and Decision Memorandum, (CHI-99), p. 17.

<sup>159</sup> China's comments on the United States' response to Panel question No. 88, para. 17, fn 20, citing Solar Panels, Preliminary Affirmative Countervailing Duty Determination, 77 Federal Register 17439 (CHI-105).

<sup>160</sup> China's comments on the United States' response to Panel question No. 88, para. 18, fn 23, citing Drill Pipe, Issues and Decision Memorandum (CHI-80), p. 6 (emphasis added).

<sup>161</sup> China's first written submission, para. 40, citing Solar Panels, Issues and Decision Memorandum, p. 31.

7.117. The above statement, in conjunction with the manner in which the USDOC explained its policy in the Kitchen Shelving Issues and Decision Memorandum reflects, in our view, a deliberate policy. In our view, the evidence before the Panel shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases.

7.118. We also do not agree with the United States that the discussion in the Kitchen Shelving Issues and Decision Memorandum merely responds to the "specific factual and legal questions in a particular investigation" and "does not have any identifiable legal or normative value over other investigations". This statement is not factually accurate. The relevant part of the text does not discuss the specific facts of the Kitchen Shelving investigation. On the contrary, the USDOC as it states in the Kitchen Shelving Issues and Decision Memorandum, "takes this opportunity to clearly state *our policy* in this regard". We consider that the USDOC, through the Kitchen Shelving Issues and Decision Memorandum, expressed in more detail its policy on public body that has been effective for some time before that specific investigation. For this reason we also do not agree with the United States' argument that a finding that the Kitchen Shelving policy is a "measure" would compromise Members' obligations under Article 22.5 of the SCM Agreement. The policy reflected in Kitchen Shelving is not an explanation regarding the USDOC's reasoning for the specific factual and legal questions in the Kitchen Shelving investigation alone. It is a policy announcement that has been inserted within the final determination of a countervailing duty proceeding.

7.119. Based on the above, we find that the challenged measure is a single rule or norm of general and prospective application that provides for finding that majority government-owned entities are public bodies. Therefore, we find that it can be challenged "as such".

#### **7.5.5.3 Is the Kitchen Shelving's rebuttable presumption inconsistent as such with Article 1.1 of the SCM Agreement?**

7.120. We begin our assessment by relying on the Appellate Body's finding in *United States – Corrosion-Resistant Steel Sunset Review* where it was stated that "When a measure is challenged "as such", the starting point for an analysis must be the measure on its face. If the meaning and content of the measure are clear on its face, then the consistency of the measure as such can be assessed on that basis alone. If, however, the meaning or content of the measure is not evident on its face, further examination is required".<sup>162</sup>

7.121. We also take note of the Appellate Body's statement in *United States – Corrosion-Resistant Steel Sunset Review* that "we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction. [...] We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the "mandatory/discretionary distinction" may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion".

7.122. We also note that both parties agree that for such a claim to be successful the measure should *necessarily* result in an inconsistency. Within this general framework, we rely on the approach taken by the Appellate Body when faced with analogous considerations<sup>163</sup>, and follow a similar two-step approach based on: (i) whether the policy obliges USDOC to consider majority-ownership as a sufficient basis for a public body finding; and (ii) whether the policy restricts the USDOC's consideration of evidence relating to factors other than ownership in a particular investigation?

- a. Whether the policy obliges the USDOC to consider majority-ownership as a sufficient basis for a public body finding

7.123. The "rebuttable presumption or Kitchen Shelving policy"<sup>164</sup> clearly instructs USDOC to consider by priority evidence of majority-ownership by the government because "in most instances, majority government ownership alone indicates that a firm is an authority".<sup>165</sup> The USDOC attaches therefore decisive weight to this factor. Majority-ownership is presumed to

<sup>162</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

<sup>163</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 174.

<sup>164</sup> See footnote 104 above of this Report.

<sup>165</sup> Kitchen Shelving, Issues and Decision Memorandum for the Final Determination, Exhibit CHI-38, p. 43.

constitute sufficient evidence that an entity is a public body. Such a presumption might have had some validity if the Appellate Body had reached an interpretation of the term "public body" based on ownership. However, this is not the case.

7.124. In our view, a firm evidentiary foundation is required in each case for a proper determination of an entity being a public body. Such a determination cannot be based solely on the mechanistic application of presumptions. The consistency of the "rebuttable presumption" with Article 1.1(a)(1) of the SCM Agreement hinges upon whether it instructs USDOC to treat majority-ownership as determinative or conclusive, on the one hand, or merely indicative or probative, on the other hand, of the likelihood of a public body finding. On the face of the text, this policy is qualified by the word "normally". We understand that this qualifying word seems to suggest that there is some scope for the USDOC not to make an affirmative finding of public body even if the majority-ownership element exists; and also identifies that the USDOC will consider other elements when the majority-ownership element does not exist. However, in our view, what is crucial is that the presumption suggests that majority-ownership will be regarded as conclusive. Although there is never an automatic presumption and the outcome would depend on the facts of the case, absent evidence to the contrary the existence of majority-ownership would *necessarily* lead to a public body finding.

7.125. We also take note of the consistent application of this presumption in numerous cases over a long period of time, as mentioned in paragraph 7.115. above as supportive evidence that this policy necessarily leads the USDOC to consider majority-ownership as a sufficient basis for a public body finding.

- b. Whether the policy restricts the USDOC to consider evidence other than majority-ownership

7.126. The USDOC recognises a number of factors other than ownership as potentially relevant to its public body determination. We understand that this list of other factors is not exhaustive.

7.127. However, the policy establishes that the burden is on an interested party to provide information or evidence that would warrant consideration of any other factors. As a consequence, under the policy of the "rebuttable presumption", the USDOC does not look for other information, unless an interested party raises it. It effectively thus restricts the USDOC to consider other evidence on its own initiative.

7.128. In conclusion, based on the above considerations and given the Panel's finding regarding the correct interpretation of the term "public body", we find that the "policy" articulated in Kitchen Shelving is also inconsistent on an "as such" basis to the extent it leads the USDOC to act inconsistently with Article 1.1(a)(1) of the SCM Agreement by using the government-majority ownership/control as the basis on which an entity can be a public body contrary to the Appellate Body's finding in *US – Anti-Dumping and Countervailing Duties (China)* that ownership of an entity by a government, in itself, is not sufficient to establish that an entity is a public body.

## **7.6 Whether the USDOC's initiations of investigations are inconsistent with Article 11 of the SCM Agreement due to insufficient evidence of a financial contribution**

### **7.6.1 Introduction**

7.129. The Panel now turns to the claims advanced by China concerning evidence of a financial contribution in the USDOC's initiation of four investigations, namely Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks.<sup>166</sup>

7.130. The USDOC initiated a countervailing duty investigation in Steel Cylinders on 8 June 2011, pursuant to an application for the initiation of such an investigation filed on 11 May 2011; in Solar Panels on 16 November 2011, pursuant to an application for the initiation of such an investigation on 19 October 2011; in Wind Towers on 24 January 2012, pursuant to an application for the initiation of such an investigation on 29 December 2011; and in Steel Sinks on 27 March 2012, pursuant to an application for the initiation of such an investigation on 1 March 2012.

<sup>166</sup> See table in paragraph 7.1. of this Report.

7.131. China claims that the USDOC's initiation of these countervailing duty investigations in respect of allegations that SOEs confer countervailable subsidies through their sales of inputs to downstream producers, in the absence of sufficient evidence in the petition to support an allegation that SOEs constitute public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement, and in the absence of a sufficient review of the petition by the USDOC in respect of this allegation, is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement. Furthermore, as a consequence of these inconsistencies with Articles 11.2 and 11.3, China claims that the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

### 7.6.2 Relevant provisions

7.132. The present claims concern Articles 11.2 and 11.3 of the SCM Agreement, which relevantly provide the following:

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

...

- (iii) evidence with regard to the existence, amount and nature of the subsidy in question;

...

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

### 7.6.3 Main arguments of China

7.133. With regard to the United States' claim that China has failed to present a *prima facie* case, China states generally that it has done the following with respect to each of its claims: (i) identified the challenged measure at issue and provided explicit citations to the portions of the measure pertinent to the claim; (ii) identified the relevant provisions of the SCM Agreement with which it alleges the challenged measures are inconsistent, and presented its understanding of the legal obligation each such provision imposes; and (iii) explained the basis for its claim that each of the challenged measures is inconsistent with the relevant provisions of the SCM Agreement, properly interpreted.<sup>167</sup>

7.134. China claims that the USDOC's initiation of four investigations in respect of allegations that SOEs confer countervailable subsidies through their sales of inputs to downstream producers, in the absence of sufficient evidence in the petition to support an allegation that SOEs constitute public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement, and in the absence of a sufficient review of the petition by the USDOC in respect of this allegation, is inconsistent with Articles 11.2 and 11.3. In particular, China objects to the initiation of the four investigations solely on the basis of evidence of majority government ownership, without any indication that the SOEs were "vested with, and exercising, authority to perform governmental functions".<sup>168</sup>

7.135. China has clearly stated in the course of these proceedings that its above claim is contingent on the Panel finding that a public body under Article 1.1(a)(1) is an entity "vested with, and exercising, authority to perform governmental functions", as the Appellate Body held in *US –*

<sup>167</sup> China's response to Panel question No. 4, para. 14.

<sup>168</sup> China's first written submission, paras. 45-58.

*Anti-Dumping and Countervailing Duties (China)*.<sup>169</sup> Indeed, China submits that the initiations are inconsistent with Article 11.3 because they were based on the application of an incorrect legal standard. In this regard, China submits that the USDOC's challenged initiations are based on the application of the same legal standard that China is challenging under Article 1.1(a)(1).<sup>170</sup> China argues that when an investigating authority initiates a countervailing duty investigation on the basis of an incorrect legal standard, it necessarily acts inconsistently with Article 11.3. Indeed, China takes the view that the "adequacy" and "sufficiency" of evidence, required by Article 11.3, can only be assessed in relation to a legal standard.<sup>171</sup>

7.136. In the course of these proceedings, China stated that, in its view, it would be appropriate for the present Panel to follow the approach taken by the panel in *China – GOES*, namely to read the obligations in Article 11.3 together with Article 11.2, but to make findings only under Article 11.3.<sup>172</sup>

#### 7.6.4 Main arguments of the United States

7.137. The United States submits that China has failed to establish a *prima facie* case with regard to its claims.<sup>173</sup> In particular, the United States submits that initiation decisions are fact-specific, and the question of whether an investigating authority has complied with the standard set out in Article 11 of the SCM Agreement is similarly dependent on the facts presented by each individual application.<sup>174</sup>

7.138. Furthermore, the United States rejects China's assertion that the USDOC's initiations were predicated on an incorrect legal standard and argues that regardless of the ultimate legal interpretation of the term "public body", there was adequate evidence within the meaning of Article 11 to support the USDOC's initiations. The United States submits that Article 11 speaks to providing and evaluating evidence; it does not require that applicants allege or that an investigating authority recites any particular standard. For initiation purposes under Article 11, what is required is adequate evidence tending to prove or indicating the existence of a financial contribution by a government or public body, in light of what is reasonably available to the applicant.<sup>175</sup>

7.139. However, the United States contends that, even accepting China's interpretation of the term "public body", the USDOC's initiation of investigations was consistent with Article 11 since in *US – Anti-Dumping and Countervailing Duties (China)* the Appellate Body held that evidence of "meaningful" government control over an entity can serve as relevant evidence that the entity possesses, exercises or is vested with governmental authority.<sup>176</sup> The United States argues that the four initiations challenged by China were supported by sufficient evidence tending to prove, or indicating, that public bodies provided goods, under either the definition of "public body" advocated by the United States or the definition of "public body" advocated by China.<sup>177</sup>

#### 7.6.5 Main arguments of third parties

7.140. **Canada** submits that Article 11.3 of the SCM Agreement permits an investigating authority to take into account, when reviewing the sufficiency of the evidence, that access to relevant information may be limited. According to Canada, a subsidizing Member should not be able to evade its obligations under the SCM Agreement because it is in a position to make information relating to subsidies inaccessible or "unavailable".<sup>178</sup>

7.141. **The European Union** considers that the information an applicant might be expected to adduce must be a function of the availability of such information in the public domain. According to

<sup>169</sup> China's response to Panel question No. 53, para. 143.

<sup>170</sup> China's second written submission, paras. 150-153.

<sup>171</sup> China's second written submission, paras. 154-163.

<sup>172</sup> China's second written submission, fn 161, citing Panel Report, *China – GOES*, para. 7.50.

<sup>173</sup> United States' first written submission, para. 210.

<sup>174</sup> United States' first written submission, paras. 210 and 233.

<sup>175</sup> United States' second written submission, paras. 115-117.

<sup>176</sup> United States' first written submission, paras. 240-277.

<sup>177</sup> United States' first written submission, paras. 240-254.

<sup>178</sup> Canada's third-party submission, paras. 43-55.

the European Union, information and evidence concerning the types of additional factors over and above ownership and control, which the Appellate Body has indicated may be relevant in the assessment of whether an entity is a public body, may prove difficult for an applicant to obtain.<sup>179</sup>

7.142. **Turkey** submits that the determination of sufficiency of evidence and reasonable availability of information is case and fact-specific, and at the investigating authority's discretion. The reasonable availability of information depends in particular on a government's record keeping and publication requirements, on companies' publication requirements, and access to laws and regulations. The non-fulfilment of notification requirements contained in Article 25 of the SCM Agreement adversely affects access to information.<sup>180</sup>

#### 7.6.6 Evaluation by the Panel

7.143. We note at the outset that, according to China, it would be appropriate for the present Panel to follow the approach taken by the panel in *China – GOES*, namely to read the obligations in Article 11.3 of the SCM Agreement together with Article 11.2, but to make findings only under Article 11.3.<sup>181</sup>

7.144. In this regard, the panel in *China – GOES* stated the following:

In the Panel's view, the obligation upon Members in relation to the sufficiency of evidence in an application finds expression in Article 11.3 of the SCM Agreement, which provides that an investigating authority must assess the accuracy and adequacy of the evidence in an application to determine whether it is sufficient to justify initiation. The obligation in Article 11.3 must be read together with Article 11.2 of the SCM Agreement, which sets forth the requirements for "sufficient evidence". If an investigating authority were to initiate an investigation without "sufficient evidence" before it, this would be inconsistent with Article 11.3. Given this interpretation, the Panel considers it appropriate to make findings under Article 11.3 with respect to the 11 programmes at issue. The Panel will reach its conclusions by reference to the requirements for "sufficient evidence" set forth in Article 11.2, but does not consider it necessary to reach separate conclusions under this provision.<sup>182</sup>

7.145. This is also in line with statements made by the panel in *Mexico – Steel Pipes and Tubes* with regard to Articles 5.2 and 5.3 of the Anti-Dumping Agreement.<sup>183</sup> We note that the United States does not appear to oppose China's request. As such, in this instance, we find no reason not to limit our findings to Article 11.3, read together with Article 11.2, as requested by China.

7.146. The Panel agrees with the reasoning of the panel in *China – GOES* with regard to the meaning of the concept of "sufficient evidence" as used in Articles 11.2 and 11.3 of the SCM Agreement<sup>184</sup> and the standard of review that applies to a review of a claim under Article 11.3.<sup>185</sup>

<sup>179</sup> European Union's third-party submission, paras. 39-41.

<sup>180</sup> Turkey's third-party statement, paras. 13-18.

<sup>181</sup> China's second written submission, fn 161, citing Panel Report, *China – GOES*, para. 7.50.

<sup>182</sup> Panel Report, *China – GOES*, para. 7.50.

<sup>183</sup> Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.21.

<sup>184</sup> Panel Report, *China – GOES*, paras. 7.54-7.55:

"The term 'evidence' is defined, relevantly, as 'the available facts, circumstances, etc. supporting or otherwise a belief, proposition, etc., or indicating whether or not a thing is true or valid' and 'information given personally or drawn from a document etc. and tending to prove a fact or proposition'. The term 'sufficient' is defined, relevantly, as 'adequate'. The Panel notes that the phrase 'sufficient evidence' in Articles 11.2 and 11.3 of the SCM Agreement is used in the context of determining whether the initiation of a countervailing duty investigation is justified. In making this determination, the investigating authority is balancing two competing interests, namely the interest of the domestic industry 'in securing the initiation of an investigation' and the interest of respondents in ensuring that 'investigations are not initiated on the basis of frivolous or unfounded suits'. It is clear that at the stage of initiating an investigation, an investigating authority is not required to reach definitive conclusions regarding the existence of a subsidy, injury or a causal link between the two. Rather, as the panel noted in *Guatemala – Cement II*,

7.147. In making its claims, China takes the position that the challenged initiations are inconsistent with Article 11.3 because they were based on the application of an incorrect "legal standard". Indeed, China states that if the Panel agrees that the legal standard applied by the USDOC at the time of initiation with respect to financial contribution is inconsistent with Article 1.1(a)(1), then the USDOC was without a proper basis to conclude that there was sufficient evidence of a financial contribution to justify initiation in the investigations under challenge.<sup>186</sup>

7.148. More specifically, China objects to the fact that the applications allege merely that entities that are majority-owned by the Government of China provided inputs to producers, and that this constitutes a financial contribution<sup>187</sup>, and that the USDOC continued to initiate investigations into allegations concerning subsidies allegedly provided by SOEs based on nothing more than evidence of majority government ownership.<sup>188</sup> The United States rejects China's assertion that the USDOC initiated the investigations on the basis of the same control-based standard that the Appellate Body rejected in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>189</sup> According to the United States, the USDOC did not explain that it was initiating based upon any particular interpretation of the term "public body".<sup>190</sup>

7.149. Article 11.2 states most relevantly that "[a]n application shall include sufficient evidence of the existence of ... a subsidy ...". Furthermore, Article 11.2(iii) specifies that the application shall contain "evidence with regard to the existence, amount and nature of the subsidy in question". Article 11.3 in turn states that "[t]he authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation". Evidence of a subsidy must plainly be evidence of a financial contribution by a government or any public body within the territory of a Member, in one of the forms described in Article 1.1(a)(1), that confers a benefit.

7.150. We agree with the United States that evidence of government ownership of an entity can serve as evidence that the entity is a public body within the meaning of Article 1.1(a)(1). Indeed, the Appellate Body found in *US – Anti-Dumping and Countervailing Duties (China)* that while evidence of government ownership is in itself insufficient to support a final finding that an entity is

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an 'investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward'. Indeed, both parties appear to agree with the reasoning of the panel in *US – Softwood Lumber V*, in examining the analogous provisions under the Anti-Dumping Agreement, that 'the quantity and the quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination'.

Therefore, while the amount and quality of the evidence required at the time of initiation is less than that required to reach a final determination, at the same time the requirement of "sufficient evidence" is also a means by which investigating authorities filter those applications that are frivolous or unfounded. Although definitive proof of the existence and nature of a subsidy, injury and a causal link is not necessary for the purposes of Article 11.3, adequate evidence, tending to prove or indicating the existence of these elements, is required. Indeed, in considering the quality of the evidence that should be provided in an application before an investigation is justified, we note that Article 11.2 requires 'sufficient evidence of the *existence* of a subsidy', meaning that the evidence should provide an indication that a subsidy actually exists. It is also clear from the terms of Article 11.2 that "simple assertion, unsubstantiated by relevant evidence" is not sufficient to justify the initiation of an investigation." (footnotes omitted)

<sup>185</sup> Panel Report, *China – GOES*, para. 7.51:

"Regarding the standard of review that the Panel should apply under Article 11.3 of the SCM Agreement, both parties agree with the interpretation of the analogous provision under the Anti-Dumping Agreement adopted by the panel in *US – Softwood Lumber V*. In particular, the parties submit that a panel should determine 'whether an unbiased and objective investigating authority would have found that the application contained sufficient information to justify initiation of the investigation'. The Panel agrees with the parties that its role is not to conduct a *de novo* review of the accuracy and adequacy of the evidence to arrive at its own conclusion regarding whether the evidence in the application was sufficient to justify initiation. Rather, the Panel must consider the reasonableness of MOFCOM's conclusions, by reference to the test articulated by the panel in *US – Softwood Lumber V*." (footnote omitted)

<sup>186</sup> China's second written submission, para. 163.

<sup>187</sup> China's first written submission, para. 48.

<sup>188</sup> China's first written submission, para. 45.

<sup>189</sup> China's opening statement at the first meeting of the Panel, para. 29.

<sup>190</sup> United States' second written submission, para. 122.



a public body, such evidence can serve as evidence that an entity is a public body: "State ownership, while not being a decisive criterion, may serve as evidence indicating, in conjunction with other elements, the delegation of governmental authority".<sup>191</sup>

7.151. Furthermore, we agree with the panel in *China – GOES* that the quantity and quality of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination.<sup>192</sup> Although definitive proof of the existence and nature of a subsidy is not necessary for the purposes of Article 11.3, adequate evidence, tending to prove or indicating the existence of these elements, is required.<sup>193</sup>

7.152. As such, we consider that evidence of government ownership may be considered to amount to evidence "tending to prove or indicating" that an entity is a public body capable of conferring a financial contribution.

7.153. However, China argues that a finding by the Panel that the evidence in the applications was sufficient for initiation purposes despite the application of an incorrect legal standard would amount to a *de novo* review by the Panel.<sup>194</sup> Indeed, China submits that if the Panel were to evaluate whether the evidence before the USDOC would have justified initiation, had the USDOC applied the legal standard adopted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, such an evaluation would constitute an improper *de novo* review.<sup>195</sup>

7.154. We do not agree with China's position. In making its case, China focuses on certain evidence contained in the applications, to a large extent overlooking how the USDOC handled such evidence. While China stated in the course of these proceedings that the initiation checklists are where the USDOC provides its reasoning for its initiation determinations, China provides no discussion of that reasoning.<sup>196</sup> The initiation checklists in fact do not contain any explanation of the USDOC's understanding of a financial contribution or public body. This is unsurprising since the SCM Agreement does not require an investigating authority to make any findings or explain its understanding of a financial contribution or public body when initiating an investigation. This is in contrast with the requirements imposed by the Agreement on investigating authorities when making preliminary or final determinations. Indeed, Article 22.2 requires that the public notice of the initiation of an investigation contain or make available adequate information on *inter alia* "a description of the subsidy practice or practices to be investigated". In contrast, Article 22.3 requires that the public notice of any preliminary or final determination set forth in sufficient detail "the findings and conclusions reached on all issues of fact and law considered material by the investigating authority". The distinction between the requirements imposed by Articles 22.2 and 22.3 well reflects the fact that the initiation of an investigation is only a preliminary stage of an investigation, from which point an investigating authority's reasoning is developed. Therefore, we do not consider that a finding by the Panel that the evidence in the applications was sufficient for initiation purposes amounts to a *de novo* review by the Panel.

7.155. In light of all of the above, the Panel finds that China has failed to establish that the USDOC acted inconsistently with the United States' obligations under Article 11 of the SCM Agreement by initiating the challenged investigations without sufficient evidence of a financial contribution.<sup>197</sup>

<sup>191</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310.

<sup>192</sup> Panel Report, *China – GOES*, para. 7.54.

<sup>193</sup> Panel Report, *China – GOES*, para. 7.55.

<sup>194</sup> China's opening statement at the first meeting of the Panel, paras. 32-34.

<sup>195</sup> China's second written submission, fn 177.

<sup>196</sup> China's second written submission, para. 150.

<sup>197</sup> While the Panel acknowledges the United States' argument on whether China has established a *prima facie* case, the Panel does not consider it necessary to address this issue in light of the Panel's finding under this claim.



## 7.7 Whether the USDOC's determinations that SOEs provided inputs for less than adequate remuneration are inconsistent, as applied, with Articles 1.1(b) and 14(d) of the SCM Agreement

### 7.7.1 Introduction

7.156. China claims that the USDOC's determinations that SOEs provided inputs for less than adequate remuneration (LTAR) are inconsistent, *as applied*, with Articles 1.1(b) and 14(d) of the SCM Agreement in the 12 countervailing duty proceedings, 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.<sup>198</sup>

### 7.7.2 Relevant Provisions

7.157. Article 1 provides the definition of a subsidy as follows:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

...

(iii) a government provides goods or services other than general infrastructure, or purchases goods;

...

and

(b) a benefit is thereby conferred.

7.158. Article 14 provides for the calculation of the amount of a subsidy in terms of the benefit to the recipient, as follows:

For the purpose of Part V, any method used by the investigating authority to calculate the benefit to the recipient conferred pursuant to paragraph 1 of Article 1 shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained. Furthermore, any such method shall be consistent with the following guidelines:

...

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

### 7.7.3 Main arguments of China

7.159. China argues that the USDOC used out-of-country benchmarks in the benefit calculation on the basis of market distortion caused by the predominant role of the government. China argues that the USDOC used its public body findings as the essential factual predicate to find that the government, in the collective sense of the term, plays a "predominant" role in the market for the

<sup>198</sup> Exhibit CHI-1. We recall that the Panel has found that the preliminary determinations in Wind Towers and Steel Sinks fall outside the Panel's terms of reference.

relevant input.<sup>199</sup> In doing so, China argues that, in fact, Commerce applied the same erroneous ownership/control test for finding SOEs were government suppliers in both the financial contribution and distortion analysis.<sup>200</sup>

7.160. China submits that these facts are evident on the face of the excerpts provided in Exhibits CHI-1 and CHI-124, and are not in dispute.<sup>201</sup>

7.161. China's legal claim is based on two legal arguments, namely (i) that the interpretation of the term "public body" established in *US – Anti-Dumping and Countervailing Duties (China)* should be applied for determining whether an entity is a government supplier for purposes of the distortion inquiry under Article 14(d);<sup>202</sup> and (ii) that the above argument stands because, the *only* legitimate potential cause of "distortion" that the Appellate Body has ever recognised is 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".<sup>203</sup>

7.162. China further argues that Article 1.1(a)(1) of the SCM Agreement sets forth a single definition of the term "government" which applies throughout the SCM Agreement, covering also Article 14(d).<sup>204</sup> The government that provides the financial contribution is "a government or any public body"; an entity that is neither of these two should not be a government supplier under Article 14(d).<sup>205</sup> China considers that it follows, as a matter of law, from the finding of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that government ownership and control alone must be an insufficient basis on which to conclude that the provision of goods by an SOE is the conduct of a government supplier or indicate "government involvement" for purposes of the distortion inquiry.<sup>206</sup> China further argues that the application of a different legal standard would result in a nonsensical outcome where an entity being found to be a "private body" under Article 1.1(a)(1) could be considered a government supplier under Article 14(d).<sup>207</sup> In addition, China contends that, contrary to the *US – Anti-Dumping and Countervailing Duties (China)* jurisprudence, the USDOC rejected the relevance of evidence other than government ownership and market share in its benchmark determinations.<sup>208</sup> In China's view, 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>209</sup>

7.163. According to China, the distortion inquiry is not premised on a generic governmental "ability to affect prices" or "the potential for government to influence prices in this market" as this statement expands the Appellate Body's jurisprudence<sup>210</sup> in an impermissible way.<sup>211</sup>

<sup>199</sup> China's first written submission, paras. 59-72. China argues that the *mere fact* that SOEs provided a "substantial" portion of the relevant input provides an *insufficient basis* on which to conclude that the government played a "predominant role" in those markets. Therefore, the USDOC had no lawful basis for rejecting Chinese prices as a benchmark. See China's second written submission, para. 70; response to Panel question No. 32, para. 76; and response to Panel question No. 33, para. 88. China argues that because the USDOC is applying the wrong legal standard in its distortion analysis, it does not matter if its findings were based on evidence on the record or on "adverse facts available" as its recourse to an out-of-country benchmark is inconsistent with the SCM Agreement in either case.

<sup>200</sup> China's opening statement at the first meeting of the Panel, paras. 46-47.

<sup>201</sup> China's second written submission, para. 71; response to Panel question No. 32, para. 76.

<sup>202</sup> See China's first written submission, paras. 70-72; opening statement at the first meeting of the Panel, paras. 38-43; response to Panel question No. 31, paras. 72-73; response to Panel question No. 32, para. 77; response to Panel question 33, paras. 84-87; second written submission, paras. 72 and 78; and opening statement at the second meeting of the Panel, para. 13.

<sup>203</sup> China's second written submission, paras. 81 and 86-93; opening statement at the first meeting of the Panel, para. 41; response to Panel question No. 33, para. 86; response to Panel question No. 86, paras. 26-27; and comments on the United States' response to Panel question No. 89, para. 24.

<sup>204</sup> China's opening statement at the first meeting with the Panel, para. 40; second written submission, para. 80.

<sup>205</sup> China's response to Panel question No. 86, paras. 26-27.

<sup>206</sup> See China's opening statement at the first meeting of the Panel, paras. 39-40; response to Panel question No. 33, paras. 84-87; and second written submission, paras. 73-74.

<sup>207</sup> China's opening statement at the first meeting of the Panel, para. 43; and second written submission, paras. 84-85.

<sup>208</sup> China's first written submission, fn 82.

<sup>209</sup> China's opening statement at the second meeting of the Panel, para. 17.

<sup>210</sup> Appellate Body Reports, *US – Softwood Lumber IV*, para. 93; and *US – Anti-Dumping and Countervailing Duties (China)*, paras. 444 and 446.

7.164. Moreover, China dismisses the United States' argument that the *US – Anti-Dumping and Countervailing Duties (China)* supports the US position because, in China's view, the Appellate Body decided the case in the posture that was presented to it and did not address the same question of legal interpretation as in the present dispute.<sup>212</sup>

7.165. China finally argues that the USDOC did not rely on any "other facts" beyond SOE presence in a market because, in the seven investigations where this occurred, these facts did not provide an independent basis for the USDOC's findings, rather only "further" evidence, and both "low level of imports" and "export restraints" cannot say anything about the extent to which the government may be a predominant supplier in a given market, without the principal finding of SOE market share as the appropriate foundation. China further argues that export restraints should not be part of the distortion analysis because they do not constitute a financial contribution nor do they involve a government "pricing strategy" capable of forcing private prices to align with a government price.<sup>213</sup>

#### 7.7.4 Main arguments of the United States

7.166. The United States dismisses China's arguments and contends that China erroneously conflates two separate legal analyses, that of the financial contribution and that of benefit, contrary to the Appellate Body jurisprudence.<sup>214</sup> The United States finds support in the Appellate Body finding in *US – Anti-Dumping and Countervailing Duties (China)* where the Appellate Body examined the USDOC's use of out-of-country benchmarks and, notwithstanding its decision concerning public bodies, upheld the USDOC's determinations. The United States argues that the Appellate Body's benchmark findings did not concern whether or not SOEs are public bodies, but rather whether the extent of SOE involvement in a marketplace supported a determination consistent with Article 14(d) that prices in that market were distorted and thus the use of an external benchmark was appropriate.<sup>215</sup> Further, the Appellate Body's findings also support the view that Article 14(d) is focused exclusively on the adequacy of the remuneration, which is the test for determining benefit. While the term "government" appears in Article 14(d), it is only in the context of the financial contribution analysis, not benefit analysis, which is a different inquiry, while the term "government supplier" appears nowhere in Article 14(d).<sup>216</sup> According to the United States, the Appellate Body finding also demonstrates that a public body analysis is not an essential factual predicate for the market distortion analysis and that these findings are different because the underlying inquiries (the entity providing the financial contribution and the adequacy of remuneration) are fundamentally different.<sup>217</sup> In addition, the United States argues that there is no basis in the text of the SCM Agreement for China's assumption, when it discusses the term "private body", that unless an entity has been found to be a public body or is part of the government in the narrow sense, it cannot be taken into account when an authority examines price distortion in the benchmark analysis.<sup>218</sup> The United States thus contends that the USDOC's determinations regarding SOEs being public bodies are legally and factually separate from its distortion analysis on the basis of SOEs/government's involvement.<sup>219</sup>

7.167. In addition, the United States contends that China mischaracterises the analyses underlying and facts of the USDOC's determinations.<sup>220</sup> In the United States' view, China has not established that in each challenged investigation the USDOC equated SOEs with public bodies.<sup>221</sup> The United States contends that even if China had established that the USDOC equated SOEs with public bodies for its benefit analysis, it would not support China's argument. Instead, it would

<sup>211</sup> China's comments on the United States' response to the Panel question No. 89, paras. 25-26.

<sup>212</sup> See China's opening statement at the first meeting of the Panel, paras. 44-45; and response to Panel question No. 33, paras. 79-81; where China stated that, before the Appellate Body, China had assumed the validity of the USDOC's (and the panel's) equation of SOEs with government suppliers for purposes of the distortion inquiry as China had only challenged USDOC's exclusive reliance on a *per se*, quantitative test of SOE market share.

<sup>213</sup> China's second written submission, paras. 86-93.

<sup>214</sup> United States' first written submission, paras. 147-152.

<sup>215</sup> United States' first written submission, paras. 147-152.

<sup>216</sup> United States' second written submission, para. 57; United States' opening statement at the second meeting with the Panel, paras. 31-34; United States' response to Panel question No. 89, paras. 12-13.

<sup>217</sup> United States' second written submission, paras. 62-64.

<sup>218</sup> United States' response to Panel question No. 89, para. 16.

<sup>219</sup> United States' first written submission, paras. 147-152.

<sup>220</sup> United States' second written submission, paras. 60 and 67-69.

<sup>221</sup> United States' second written submission, para. 60.

demonstrate that the USDOC considered the ownership or control test was appropriate to an analysis of distortion of private prices in the relevant market.<sup>222</sup> The USDOC did not deem the market share held by SOEs equivalent to the market share held by the government itself. Rather, the USDOC used data on domestic production, consumption and market share as provided by China in response to the USDOC's Questionnaires.<sup>223</sup> Moreover, the United States argues that it is inaccurate, as also shown in Exhibit CHI-124, that each of the USDOC's distortion determinations was relying exclusively on the degree of government production in the Chinese market. The USDOC relied on other facts as well.<sup>224</sup> Moreover, where China failed to provide information that USDOC requested to assess the government's role in the relevant input market, the USDOC's benefit findings, based on facts available, are consistent with Article 12.7 of the SCM Agreement and consequently not inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.<sup>225</sup>

7.168. Furthermore, the United States claims that China erroneously considers that distortion can be found only when a government's role in the market is so predominant that the benefit analysis becomes circular. In the United States' view, the distortion analysis is made on a case-by-case basis and although sometimes the government's predominant role may be sufficient on its own, there can be also *other circumstances* under which an investigating authority may reach a distortion finding.<sup>226</sup>

7.169. For example, the United States contends that the term "predominance" also refers to "market power" which the Appellate Body has equated with the *ability to influence prices*;<sup>227</sup> government ownership or control, can therefore be an appropriate test for determining the government's ability to affect private prices in the relevant market.<sup>228</sup> SOE presence in a particular market is evidence of such ability.<sup>229</sup> Government ownership or control—in and of itself—is an appropriate test for determining whether SOE presence in a given market indicates government involvement in that market.<sup>230</sup> Where the government maintains a controlling ownership interest in SOEs, the government, like any owner of a company, has the ability to influence that entity's prices. In addition, the United States contends that the larger the SOE presence vis-à-vis private producer and import presence, the stronger the market power of the SOEs and, through the SOEs, the government and its ability to affect private prices in the relevant market. Moreover, the United States recalls that the USDOC also considers other forms of government involvement in the market beyond SOE presence.<sup>231</sup>

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<sup>222</sup> United States' second written submission, para. 60.

<sup>223</sup> The USDOC sent a question about the volume and value of domestic production by companies in which the government maintained an ownership or management interest in order for the USDOC to assess whether the GOC controlled the relevant industry. China provided data, for example, on the "total output volume of wire rod produced by State-owned companies, defined for purposes of this response as those companies with 50% or more government ownership or other SOE ownership ...". The United States argued that the USDOC used the market share data reported by China and based on China's definition of SOEs calculated the percentage of the relevant input produced by the government. See United States' first written submission, paras. 153-157.

<sup>224</sup> United States' first written submission, paras. 158-167; United States' second written submission, paras. 67-69. The United States argues that the fact that China had to change its argument that the USDOC findings were based exclusively (in its first written submission) on its equation of SOEs with the government suppliers to "exclusively or primarily" (in its second written submission) demonstrates that there is no generally applicable measure by which the USDOC finds distortion in particular market, rather it is a case-by-case analysis. Therefore, in the United States' view, even if control and ownership could not be an appropriate basis for a finding of market distortion, the USDOC did not rely solely on this factor.

<sup>225</sup> United States' second written submission, paras. 70-71.

<sup>226</sup> United States' first written submission, paras. 158-167; United States' second written submission, para. 54.

<sup>227</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444.

<sup>228</sup> United States' second written submission, paras. 58-64.

<sup>229</sup> United States' second written submission, paras. 58-59.

<sup>230</sup> United States' second written submission, para. 60.

<sup>231</sup> United States response to Panel question No. 31, para. 75.

### 7.7.5 Main arguments of third parties

7.170. **Australia** argues that, on the basis of previous findings of the Appellate Body, the use of out-of-country benchmarks is not inconsistent with Article 14(d) of the SCM Agreement but such possibility is very limited and must be made on a case-by-case distortion analysis.<sup>232</sup>

7.171. **Brazil** focuses its comments in clarifying the concept of "market power" in relation to the concept of "predominance" of government in the market. In Brazil's view, governments may play different roles in different markets. The objectives pursued and the way in which governments act in their respective markets seem to provide context to understand the concept of "market power" and, therefore, of predominance. Brazil also highlights that the description of "prevailing market conditions" under Article 14(d) mirrors textually the "commercial considerations" in Article XVII of the GATT 1994. The language in Article XVII could inform how a government should be deemed to act under prevailing market conditions, with adequate remuneration. In such a case, a government would not be using its power and market share to influence prices. Consequently, in-country benchmarks should not, for this reason alone, be discarded.<sup>233</sup>

7.172. **Canada** considers that price distortion may arise not only where the government itself is a supplier of the good, but also where the suppliers of the good are owned and controlled by the government. The latter suppliers, such as SOEs, do not need to be public bodies under Article 1.1(a)(1) of the SCM Agreement to be in a position to distort private prices in the market and for these prices to constitute an improper benchmark as a result. In Canada's view, this is confirmed by the Appellate Body decision in *US-Anti-Dumping and Countervailing Duties (China)*. Canada thus submits that an investigating authority may reject the use of in-country private transaction prices for a good where the evidence on the record shows that private prices are distorted because of the predominant role of government-controlled entities in the market as providers of the same or similar good.<sup>234</sup>

7.173. **The European Union** notes its understanding that, according to China, this claim would appear to be largely consequential on the preceding public body claim. As a result, the role of government market share or predominance is not *per se* at issue. Consequently, the Panel should reject China's claim if it considers that China has failed to demonstrate that either the public body determinations are WTO inconsistent or that the benefit determinations rest upon the public body determinations. Further, the European Union refers to the Appellate Body's findings in *US – Softwood Lumber IV* and states its agreement with the United States' concurrence with the Appellate Body in that respect.<sup>235</sup>

7.174. **Korea** recalls the Appellate Body's finding that an investigating authority cannot refuse to consider evidence relating to factors other than government market share and simply base itself on a finding that the government is the predominant supplier of the relevant goods. In Korea's view, the USDOC's benefit analysis in the determinations at dispute was closely related and even dependent on its "government ownership-determinative" public body findings. Consequently, Korea argues that if the public body findings of the USDOC are found to be inconsistent with the SCM Agreement, its benefit findings should be equally inconsistent.<sup>236</sup>

7.175. **Saudi Arabia** claims that alternative benchmarks may be used only where it has been established that domestic prices of the good at issue are distorted; while the government's predominant role as a supplier of that good in the home market may not be used as a *per se* proxy for price distortion; and finally government predominance may not be found simply because SOEs sell the good and have a significant share of the home market. Moreover, in Saudi Arabia's view, the same standard for defining "government" or "public body" under Article 1.1(a)(1) must apply when determining whether the government is the predominant supplier of a good such that prices

<sup>232</sup> Australia's third-party submission, paras. 13-16, citing Appellate Body Reports, *US – Softwood Lumber IV*, paras. 101 and 102; and *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

<sup>233</sup> Brazil's third-party submission, paras. 15-18.

<sup>234</sup> Canada's third-party submission, paras. 14-18.

<sup>235</sup> The European Union's third-party submission, para. 44.

<sup>236</sup> Korea's third-party statement, paras. 7-9.

of that good are distorted and the benefit must be calculated under Article 14(d) using an alternative benchmark.<sup>237</sup>

7.176. **Turkey** submits that an investigating authority may reach a finding that prices are distorted based on the government's predominant role in the market on the basis of various possible factual situations. Either because the government is a supplier of the investigated product, or because it owns and controls suppliers of the relevant product, or because it regulates the supply or price of the raw material of the product concerned; or on the basis that government entities or public bodies interfere to the domestic market price of the investigated product. Turkey considers that the overwhelming role of the state in the domestic market is a strong proxy that domestic prices fail to reflect the levels that are normally observed in market conditions free from government intervention.<sup>238</sup>

### 7.7.6 Evaluation by the Panel

#### 7.7.6.1 Introduction

7.177. The first question before the Panel is whether China has established that the USDOC found in each of the challenged determinations of market distortion that SOEs were public bodies and thus part of the government in its collective sense.

7.178. The second question before the Panel is whether Article 14(d) allows for the resort to an external benchmark only in a situation where a government's role in providing a financial contribution is so predominant that it distorts private prices in the market.

#### 7.7.6.2 The factual premise of China's claims

7.179. China argues that the only "fact" that is relevant for purposes of determining whether the USDOC is acting inconsistently with Article 14(d) of the SCM Agreement is 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>239</sup> China claims that the USDOC's equation of SOEs with the government is explicitly or implicitly based on its interpretation that entities majority-owned and controlled by the government are public bodies.

7.180. The evidence before us does not support China's assertion. Our review of the relevant Issues and Decision Memoranda reveals that it is only in a few cases that the USDOC's findings of a predominant role of the government in the relevant market, because of the market share of SOEs, refer to the SOEs as public bodies. The first such investigation is Kitchen Shelving, where the relevant text provides the following:

The *GOC has reported* that SOEs accounted for approximately 46.12 percent of the wire rod production in the PRC during the POI. The GOC further reported that 1.85 percent of wire rod producers were classified as "collectives." In the final determination of LWRP from the PRC, the Department affirmed its decision to treat collectives as *government authorities*. Therefore, we find that the GOC *has direct ownership or control of* at least 47.97 percent of wire rod production. While this is not a majority of the production, *the substantial market share held by the SOEs shows that the government plays a predominant role in this market.* (emphasis added)

7.181. The above excerpt seems to acknowledge that at least the "collectives" were considered by the USDOC to be public bodies and thus part of the government's role in the market.

7.182. In both OCTG<sup>240</sup> and Seamless Pipe<sup>241</sup>, which referred to the provision of "steel rounds and billets", the USDOC relied on Adverse Facts Available to determine that certain public bodies were

<sup>237</sup> Saudi Arabia's third-party submission, paras. 23-37.

<sup>238</sup> Turkey's third-party statement, paras. 10-12.

<sup>239</sup> See footnote 9 of this Report. The Panel recalls that it has found that the Wind Towers and Steel Sinks preliminary determinations fall outside its terms of reference.

<sup>240</sup> OCTG, Issues and Decision Memorandum for the Final Determination, 23 November 2009, p. 14.

<sup>241</sup> Seamless Pipe, Issues and Decision Memorandum for the Final Determination, 10 September 2010, p. 17.

taken into account in assessing the government's role in the market. In both investigations, the USDOC found that:

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

7.183. The last case where it is explicit that the government's predominant role is based on the market share of SOEs on the basis that they are "authorities" (public bodies) is Solar Panels<sup>242</sup>, where the part of the determination dealing with this point states that:

*The Department has preliminarily determined that all the producers of polysilicon purchased by the respondents during the POI are "authorities" within the meaning of section 771(5)(B) of the Act. 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 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.*

7.184. In another case, Steel Cylinders, the USDOC characterised SOEs as "government-owned providers" but it stopped short of characterising them as "authorities (public bodies)", so it is not clear whether the USDOC took them into account in its benefit analysis on the basis of a finding that they are public bodies and thus part of the government in the collective sense.<sup>243</sup>

7.185. In addition, China's argument that the USDOC's consideration of the level of imports and of the existence of export restraints does not provide an independent basis for the USDOC's findings is also not supported by the text of all the relevant determinations. More specifically, the low level of imports provides only "further support" to an initial finding of the government's predominant role in Kitchen Shelving and Wire Strand. However, in Seamless Pipe, Print Graphics and Steel Cylinders the USDOC seems to take this element into account on equal footing with the other reasons before reaching a distortion finding.<sup>244</sup> Similarly, we find that the existence of

<sup>242</sup> Solar Panels, Preliminary Affirmative Countervailing Duty Determination, Federal Register, Vol. 77, No. 58, 26 March 2012, pp. 17448-17449.

<sup>243</sup> Steel Cylinders: "Based on the GOC's response, companies that the GOC classified as state-owned accounted for 70 percent of hot-rolled steel production in the PRC during the POI and, therefore, government-owned providers constitute a majority of the market". Steel Cylinders, Issues and Decision Memorandum for the Final Determination, 30 April 2012, p. 18.

<sup>244</sup> The Seamless Pipe determination provides: "Statistics in the GICCR show that imports of coking coal accounted for only 0.66 per cent of domestic coking coal consumption in the PRC during the POI". Seamless Pipe, Issues and Decision Memorandum for the Final Determination, 10 September 2012, p. 31.

In Print Graphics, the relevant part of the determination provides: "[combining the percentage of the industry owned by SOEs and collectives] with the fact that imports as a share of domestic consumptions are insignificant, we may reasonably conclude that domestic prices in the PRC for caustic soda and kaolin clay are distorted such that they cannot be used as a tier one benchmark. For the same reasons, we determine that import prices into the PRC cannot serve as a benchmark. [...] The Department has previously determined that high levels of import penetration may indicate that domestic prices are not distorted, even where government ownership of domestic production is significant." Print Graphics, Issues and Decision Memorandum for the Final Determination, 20 September 2010, p. 22.

In Steel Cylinders, the relevant part of the determination also provides that: "Moreover, imports as a share of domestic consumption are insignificant. [...] For the same reasons, we determine that import prices into the PRC cannot serve as a benchmark". Steel Cylinders, Issues and Decision Memorandum for the Final Determination, 30 April 2012, p. 18.

certain export restraints is considered as a stand-alone factor for the market distortion finding in Wire Strand, Seamless Pipe<sup>245</sup> while it could arguably be an additional factor confirming the government's predominant role in Kitchen Shelving and Aluminum Extrusions.

7.186. Moreover, China's argument that the USDOC applied the same framework for evaluating whether market prices for a particular input in China are distorted is not accurate. Each determination's analysis is somewhat different from another depending on the facts before the USDOC. In our view, some determinations are based on the market share of government-owned/controlled firms in domestic production alone<sup>246</sup>, others on adverse facts available<sup>247</sup>, others on the market share of the government plus the existence of low level of imports<sup>248</sup> and/or export restraints.<sup>249</sup>

7.187. Furthermore, after examining also the USDOC's benefit findings on the basis of Adverse Facts Available (AFA)<sup>250</sup>, we observe that China's claim that the USDOC based its findings solely on the lack of information regarding state ownership is not accurate. For example, in Lawn Groomers, the USDOC applied AFA because the GOC failed to provide, among other information, information on domestic consumption and in Drill Pipe because the GOC failed to provide information on both domestic production and consumption.

7.188. We would thus conclude that China has not established its claim's basic factual premise, i.e. that the USDOC has actually treated SOEs as public bodies and thus part of the government in the collective sense in the context of the benefit analysis in each challenged determination.

<sup>245</sup> Wire Strand findings included the following text: "In addition, [...] the Department determined that the 10 percent export tariff and export licensing requirement instituted by the GOC contributed to the distortion of the domestic market in the PRC for wire rod. [...] such export restraints can discourage exports and increase the supply of wire rod in the domestic market, with the result that domestic prices are lower than they would otherwise be". Wire Strand, Issues and Decision Memorandum for the Final Determination, 14 May 2010, p. 21.

In the Seamless Pipe determination, the relevant excerpt provides: "Further, Petitioners placed on the record evidence that coking coal exports were subject to a 10 percent tariff in 2008 and a five percent tariff in 2007, and that the GOC had export quotas in place on coking coal during the POI. Export tariffs and quotas can increase the domestic quantity of good subject to the tariffs and quotas that is available in the PRC with the result that they suppress domestic prices". Seamless Pipe, Issues and Decision Memorandum for the Final Determination, 10 September 2010, p. 31.

<sup>246</sup> See, for example, Issues and Decision Memoranda for the Final Determinations in Pressure Pipe and Solar Panels.

<sup>247</sup> See, for example, Issues and Decision Memoranda for the Final Determinations in Line Pipe, Lawn Groomers, OCTG, Seamless Pipe, and Drill Pipe.

<sup>248</sup> See, for example, Issues and Decision Memoranda for the Final Determinations in Print Graphics and Steel Cylinders.

<sup>249</sup> See, for example, Issues and Decision Memoranda for the Final Determinations in Kitchen Shelving, Aluminum Extrusions and Wire Strand.

<sup>250</sup> Line Pipe: due to the GOC's refusal to provide ownership information concerning HRS suppliers, the USDOC assumed that government-owned producers manufactured all HRS in China. Line Pipe, Issues and Decision Memorandum for the Final Determination, 17 November 2008, p. 18.

Lawn Groomers: due to GOC's failure to provide all necessary information concerning its involvement in the PRC hot-rolled steel market (notably data on domestic consumption), the USDOC made an adverse finding that GOC is a predominant supplier and an adverse inference that the portion of domestic consumption supplied by private parties/imported is negligible. Lawn Groomers, Issues and Decision Memorandum for the Final Determination, 12 June 2009, pp. 15 and 16.

OCTG: based on the GOC's failure to provide the requested information, an adverse inference was made and the USDOC assumed that GOC-owned or controlled firms dominate the steel rounds market in the PRC. OCTG, Issues and Decision Memorandum for the Final Determination, 23 November 2009, p. 14.

Seamless Pipe: the USDOC relied on AFA to conclude that *GOC authorities* play a predominant role in the production of steel rounds and billets. Seamless Pipe, Issues and Decision Memorandum for the Final Determination, 10 September 2010, p. 4.

Drill Pipe: GOC indicated there were no official statistics readily available regarding the production and consumption of steel rounds in the PRC and [...] did not provide the requested information. [...] determine that the GOC did not provide ... share of steel rounds accounted for by SOEs ... we are drawing an adverse inference with respect to the percentage of steel rounds produced by SOEs during the POI ... determine that SOEs accounted for a dominant share ... domestic prices... cannot serve as a viable tier-one benchmark... [...] GOC indicated no official statistics available for green tube production ... the Department finds no evidence that the GOC is not cooperating to the best of its ability ... application of FA is warranted ... [i]n several CVD investigations involving the PRC that various steel inputs cannot serve as viable tier-one benchmarks ... we determine GOC has a predominant role in the green tube market. Drill Pipe, Issues and Decision Memorandum for the Final Determination, p. 7 et seq.



Moreover, we have found that several other factual assertions made by China are also not supported by the evidence before us.

### **7.7.6.3 The appropriate interpretation of Article 14(d) of the SCM Agreement with regard to when an investigating authority can resort to an out-of-country benchmark**

7.189. We understand that China's approach regarding the reading of the Appellate Body report in *US – Softwood Lumber IV* is 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.

7.190. However, in our view, both the panel and the Appellate Body in *US – Softwood Lumber IV* have suggested that there can be other circumstances that could justify an investigating authority's decision to use an alternative benchmark. We find support for this understanding in the Appellate Body's following statements:

[...] the Panel nevertheless acknowledged that "it will in certain situations not be possible to use in-country prices" as a benchmark, and gave two examples of such situations, neither of which is found to be present in the underlying countervailing duty investigation: (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. In these situations, the Panel reasoned that the "only remaining possibility would appear to be the construction of some sort of a proxy for, or estimate of, the market price for the good in that country."<sup>251</sup>

7.191. We also consider important another statement of the Appellate Body in the same dispute:

Considering that the situation of government predominance in the market, as a provider of certain goods, is the only raised on appeal by the United States, we will limit our examination to whether an investigating authority may use a benchmark other than private prices in the country of provision in that particular situation.<sup>252</sup>

7.192. The above statements show that the Panel and 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. We also find that China has not explained sufficiently why the relevant Appellate Body findings in *US – Softwood Lumber IV* support its position.

7.193. In addition, we see merit in the argument of the United States that a government can distort prices in other ways than through its role as a provider of the financial contribution.

7.194. Moreover, we recall that the Appellate Body was faced with a very similar situation in *US – Anti-Dumping and Countervailing Measures (China)*. In that case, the Appellate Body, after having found that the USDOC's findings on "financial contribution" were inconsistent with Article 1.1(a)(1) of the SCM Agreement because of an erroneous interpretation of the term "public body", upheld the USDOC's use of out-of-country benchmarks in the same determinations.<sup>253</sup> The 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 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>254</sup>

7.195. We find that the USDOC's benchmark analysis in the presently challenged investigations is very similar to the approach followed in USDOC's determinations reviewed by the Appellate Body in *US – Anti-Dumping and Countervailing Measures (China)*. We find 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

<sup>251</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 98, citing Panel Report, para. 7.57.

<sup>252</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 99.

<sup>253</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and

611.

<sup>254</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 425-458 and

611.

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>255</sup>

7.196. In light of the above consideration, we conclude that apart from the fact that China has not sufficiently substantiated the factual premises of its "as applied" claims for each investigation challenged, China's claims also fail on the grounds that they rest on an erroneous interpretation of Article 14 (d) of the SCM Agreement.

7.197. In light of the above, we find that China has 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.

## **7.8 Whether the USDOC's determinations regarding the specificity of alleged input subsidies are inconsistent with Articles 2.1 and 2.4 of the SCM Agreement**

### **7.8.1 Introduction**

7.198. The Panel now turns to the claims advanced by China concerning the USDOC's specificity determinations across 12 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.<sup>256</sup>

7.199. In each of these investigations, the USDOC made a finding of *de facto* specificity with respect to one or several inputs as follows: in the Pressure Pipe investigation, the USDOC made a finding of *de facto* specificity with respect to the provision of stainless steel coil; in the Line Pipe investigation, with respect to the provision of hot-rolled steel; in the Lawn Groomers investigation, with respect to the provision of hot-rolled steel; in the Kitchen Shelving investigation, with respect to the provision of wire rod; in the OCTG investigation, with respect to the provision of steel rounds; in the Wire Strand investigation, with respect to the provision of wire rod; in the Seamless Pipe investigation, with respect to the provision of steel rounds; in the Print Graphics investigation, with respect to the provision of caustic soda; in the Drill Pipe investigation, with respect to the provision of steel rounds as well as green tubes; in the Aluminum Extrusions investigation, with respect to the provision of primary aluminium; in the Steel Cylinders investigation, with respect to the provision of hot-rolled steel as well as seamless tube steel and billets; and in the Solar Panels investigation, with respect to the provision of polysilicon.<sup>257</sup>

7.200. China claims that the USDOC's specificity determinations are inconsistent with Articles 2.1 and 2.4 of the SCM Agreement because the USDOC failed to make a proper determination on the basis of positive evidence that the alleged provision of inputs for less than adequate remuneration was specific to an enterprise or industry or group of enterprises or industries in the above input subsidy investigations. Furthermore, as a consequence of these inconsistencies with Articles 2.1 and 2.4, China claims that the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

### **7.8.2 Relevant provisions**

7.201. Article 2.1 of the SCM Agreement reads as follows:

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:

<sup>255</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 456.

<sup>256</sup> See table in paragraph 7.1. of this Report. The Panel recalls its finding that the preliminary determinations of the USDOC in Wind Towers and Steel Sinks fall outside its terms of reference.

<sup>257</sup> Exhibit CHI-1. See also China's response to Panel question No. 37, paras. 104-106.

- (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 documents, so as to be capable of verification.
- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises...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. (footnotes omitted)

7.202. Article 2.4 of the SCM Agreement, in turn, states the following:

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

### 7.8.3 Main arguments of China

7.203. China claims that, in 14<sup>258</sup> input subsidy investigations, the USDOC's findings of specificity are inconsistent with Articles 2.1 and 2.4 of the SCM Agreement, because the USDOC failed to make a proper determination, on the basis of positive evidence, that the alleged provision of inputs for less than adequate remuneration was specific to an enterprise or industry or group of enterprises or industries.

7.204. In support of its claim, China presents evidence in order to show that, in each of the relevant specificity determinations, the USDOC applied one and the same "legal standard". China refers to this as an "end-use" approach" to specificity since it is based exclusively on an examination of the end uses of the particular input that the USDOC has decided to investigate. More specifically, China submits that the USDOC's specificity determinations follow a predictable format, whereby the USDOC begins from the unstated premise that it should evaluate specificity at the level of the particular input that it decided to investigate as a potentially countervailable subsidy; during the investigation, the USDOC seeks information from the respondents concerning the types of enterprises or industries that make use of this particular input; the USDOC then invariably determines that the types of enterprises or industries that make use of the input are "limited in number"; because the USDOC finds in each instance that the types of enterprises or industries that make use of a particular input are limited in number, the USDOC concludes that the recipients of the subsidy are specific.<sup>259</sup> In China's view, the excerpts from the USDOC's Issues and Decision Memoranda and preliminary determinations cited in Exhibit CHI-1, and provided in Exhibit CHI-122, show that the USDOC applied this legal standard.<sup>260</sup> Further to this, China

<sup>258</sup> China's claim includes the preliminary determinations in Wind Towers and Steel Sinks which the Panel has found to be outside its terms of reference.

<sup>259</sup> China's first written submission, paras. 89 and 90.

<sup>260</sup> China's response to Panel question No. 5, paras. 20 and 21.

provides a short discussion of the facts in three investigations to "illustrate the consistent pattern of these determinations".<sup>261</sup>

7.205. China claims that the end-use approach to specificity applied by the USDOC suffers from the four following flaws: (i) failure 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 the principles laid down in subparagraphs (a) and (b); (ii) failure to identify a "subsidy programme"; (iii) failure to identify a "granting authority"; and (iv) failure to take into account the factors in the final sentence of Article 2.1(c).<sup>262</sup>

7.206. China argues that the USDOC's failure to carry out the four aspects of a specificity analysis required under Article 2.1(c) is "evident" from the excerpts cited in Exhibit CHI-1 and provided in Exhibit CHI-122, since the USDOC was entirely silent with respect to these four factors.<sup>263</sup> The USDOC's findings demonstrate, on their face, that the USDOC applied an incorrect interpretation of Article 2.1(c).<sup>264</sup>

7.207. Firstly, China submits that the USDOC failed 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 the principles laid down in subparagraphs (a) and (b), as required under Article 2.1. Indeed, China argues that an investigating authority must first consider the principles set forth under subparagraphs (a) and (b).<sup>265</sup> This argument is primarily based on the ordinary meaning of the first sentence of Article 2.1(c), and the clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)". According to China, the use of the word "if" immediately before this clause introduces a condition that must be satisfied before an investigating authority "may" consider the other factors specified in the remainder of Article 2.1(c).<sup>266</sup> In addition, China points to the context and framework of Article 2.1 as support for its position. In this regard, China argues that subparagraphs (a) and (b) have primacy in the overall structure of Article 2.1 and must feature in any Article 2.1 analysis, whereas subparagraph (c) is an exception that may be taken into account when the prior application of subparagraphs (a) and (b) has resulted in an appearance of non-specificity.<sup>267</sup> China finds support for its position in prior findings by the Appellate Body, particularly in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Large Civil Aircraft (2nd complaint)*.<sup>268</sup>

7.208. Secondly, China submits that the USDOC failed to identify any subsidy programme, as required under the first of the other factors in Article 2.1(c). In China's view, a subsidy programme indicates a series of subsidies that is planned. As such, there must be evidence that the subsidies at issue were "intended" and "planned" as a distinct "series of subsidies";<sup>269</sup> that there was a "plan or outline" requiring SOEs to provide subsidised inputs to downstream producers of manufactured products.<sup>270</sup> China seems to suggest that such a planned series of subsidies will always be evidenced by either one or several written documents, or an express act or pronouncement by the granting authority.<sup>271</sup> In that regard, China argues that the USDOC has provided no evidentiary support for the existence of the alleged subsidy programmes, and has merely assumed their existence. In particular, China argues that the USDOC should have provided a reasoned and adequate explanation in its published determination of how the evidence on the record supported the existence of the alleged programmes. Furthermore, the USDOC failed to explain why the alleged input subsidy programmes were separate programmes, instead of a single overarching programme.

<sup>261</sup> China's first written submission, para. 91.

<sup>262</sup> While the Panel notes that China presents these four specific aspects of its claim in a different sequence in its first written submission, they are presented here in the sequence they appear in China's second written submission.

<sup>263</sup> China's second written submission, fn 114.

<sup>264</sup> China's second written submission, paras. 96 and 97.

<sup>265</sup> China's first written submission, para. 85.

<sup>266</sup> China's second written submission, para. 106.

<sup>267</sup> China's second written submission, fn 130.

<sup>268</sup> China's first written submission, paras. 85 and 86.

<sup>269</sup> China's response to Panel question No. 91, para. 30.

<sup>270</sup> China's first written submission, para. 109.

<sup>271</sup> China's response to Panel question No. 38, para. 108.

7.209. Thirdly, China submits that the USDOC failed to identify the relevant granting authority, as required under Article 2.1. According to China, it is the proper identification of the relevant granting authority that situates the analysis of specificity within a particular governmental jurisdiction, as required by the chapeau of Article 2.1.<sup>272</sup>

7.210. Fourthly, China submits that the USDOC failed to consider the factors in the final sentence of Article 2.1(c), namely "the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as the length of time during which the subsidy programme had been in operation", as required by that provision.<sup>273</sup>

#### 7.8.4 Main arguments of the United States

7.211. The United States firstly argues that China has failed to make a *prima facie* case with respect to its claims that the USDOC's specificity determinations were inconsistent with Article 2 of the SCM Agreement. More specifically, the United States submits that China has not discussed the elements of the USDOC's analysis on a case-by-case basis, and explained why each analysis is inconsistent with Article 2.<sup>274</sup> Furthermore, China has not provided support for its argument that the USDOC should have disregarded evidence relating to the existence of a subsidy programme constituting the provision of an input for less than adequate remuneration.<sup>275</sup>

7.212. In addition to the above, the United States argues that China bases its challenge regarding the USDOC's specificity determinations on four incorrect interpretations of Article 2.1.

7.213. Firstly, the United States rejects China's claim that Article 2.1 contains any order of analysis. According to the United States, the purpose of the dependent "notwithstanding" clause in the first sentence of Article 2.1(c) is to convey that a finding of non-specificity under subparagraphs (a) or (b) does not prevent further consideration of a subsidy under (c). Furthermore, the instruction in the chapeau of Article 2.1 that certain principles apply neither explicitly nor implicitly mandates the manner in which an investigating authority should apply these principles in a specificity analysis. In addition to the above, the evidence before the USDOC unequivocally indicated that the subsidies were not specific under subparagraph (a), thus any consideration under subparagraphs (a) or (b) was unnecessary. Finally, the Appellate Body has repeatedly confirmed that there is no mandatory order of analysis in Article 2.1, and that subparagraphs (a) through (c) are principles that should be concurrently applied in a manner appropriate given the facts of any particular specificity analysis.<sup>276</sup>

7.214. Secondly, the United States submits that Article 2.1 does not require an investigating authority to identify a formal subsidy programme. A subsidy programme can just as well be formally or informally established through its operation, a "series of activities or events".<sup>277</sup> Furthermore, the United States argues that its investigating authority's findings on the existence of subsidy programmes were supported by the record of the investigations. The subsidy programmes evaluated under Article 2.1(c) were the use of a specific input being provided for less than adequate remuneration by a limited number of enterprises.<sup>278</sup> Finally, in response to China's argument that the USDOC did not explain why the alleged input subsidy programmes were different programmes instead of a single overarching programme, the United States contends that there was no basis for the USDOC to assume the existence of such a scheme in the absence of any evidence on the record of such a single overarching scheme.<sup>279</sup> The United States in addition points out that China itself refutes the existence of such a scheme.<sup>280</sup>

7.215. Thirdly, the United States argues that it is not necessary to analyse and identify the granting authority as part of its specificity analysis under Article 2, when the granting authority has already been identified as part of the financial contribution analysis under Article 1.1.

<sup>272</sup> China's first written submission, para. 95.

<sup>273</sup> China's first written submission, para. 115.

<sup>274</sup> United States' first written submission, paras. 170-173.

<sup>275</sup> United States' second written submission, para. 74.

<sup>276</sup> United States' second written submission, paras. 86-91.

<sup>277</sup> United States' second written submission, para. 76.

<sup>278</sup> United States' second written submission, para. 75. See also United States' response to Panel question No. 91, para. 25.

<sup>279</sup> United States' first written submission, paras. 182 and 183.

<sup>280</sup> United States' response to Panel question No. 44, para. 92.

However, the United States clarified in the course of the proceedings that it is not claiming that the SOEs are the granting authorities.<sup>281</sup> The United States further argued that the relevant inquiry for the purposes of the specificity analysis is what jurisdiction the subsidy is available in, and pointed out that, in each case, the USDOC considered the jurisdiction within which it was conducting the specificity analysis to be China.<sup>282</sup>

7.216. Fourthly, the United States argues that a requirement to "take into account" the two factors in the last sentence of Article 2.1(c) does not mean that an investigating authority must explicitly analyse the two factors in every investigation. No such analysis is required where there is no reason to believe that either factor would alter the specificity analysis.<sup>283</sup>

### 7.8.5 Main arguments of third parties

7.217. **Canada** submits that Article 2.1 of the SCM Agreement sets out several principles that assist in determining whether a subsidy is specific, but does not require a specific order of analysis. In some cases, certain principles may not be relevant to the specificity analysis at all. In the absence of any allegation that there were formal limitations or objective factors relevant to the specificity analysis, the facts of the dispute between China and the United States seem to exemplify a situation where an analysis under subparagraphs (a) and (b) of Article 2.1 is not required.<sup>284</sup> Furthermore, Canada argues that the identification of the granting authority may not be a strict necessity when conducting a specificity analysis. Canada recalls the Appellate Body's statement in *US – Large Civil Aircraft (2nd complaint)* 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. Moreover, with regard to the application of the criteria in the last sentence of Article 2.1(c), Canada argues that there should not be an obligation on an investigating authority to mechanically address the state of diversification of the economy. Citing the panel report in *US – Softwood Lumber IV*, Canada argues that where it is well-established that an economy is highly diversified, this fact is likely to be taken into account by an investigating authority in its analysis of *de facto* specificity.<sup>285</sup>

7.218. **The European Union** notes that in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body stated that the principles in Article 2.1 of the SCM Agreement are to be applied concurrently, although it may not be necessary to consider all sub-paragraphs in all cases, and caution should be exercised when applying one sub-paragraph if the potential for the application of the others is warranted on the facts of the case. The Appellate Body confirmed this in *US – Large Civil Aircraft (2nd complaint)*. Therefore, the Panel should consider the circumstances in which it is permissible to resort directly to sub-paragraph (c). Furthermore, it would be for China to provide evidence that different public bodies in different industries provide diverse inputs as part of a single subsidy "programme".<sup>286</sup> With regard to the identification of a subsidy programme more specifically, the European Union notes that if a subsidy is granted to all firms in a particular sector or industry, or using a particular product, then each of the subsidies in question is *de jure* specific. In addition, there is reason to believe that, as a matter of fact, the Member in question is operating a subsidy programme, even if it is unwritten or if the text of the relevant measure is undisclosed.<sup>287</sup>

7.219. **Saudi Arabia** submits that investigating authorities must take into account the level of diversification of economic activities in the exporting country when determining *de facto* specificity under Article 2.1(c) of the SCM Agreement.<sup>288</sup>

### 7.8.6 Evaluation by the Panel

7.220. In essence, China argues that the USDOC applied one and the same legal standard<sup>289</sup>, namely an end-use approach, in making its specificity findings in each of the challenged

<sup>281</sup> United States' second written submission, para. 97.

<sup>282</sup> United States' second written submission, para. 94.

<sup>283</sup> United States' first written submission, paras. 197-199.

<sup>284</sup> Canada's third-party submission, paras. 19-29.

<sup>285</sup> Canada's third-party statement, paras. 9-12.

<sup>286</sup> European Union's third-party submission, paras. 45-56.

<sup>287</sup> European Union's response to Panel question No. 7, para. 7.

<sup>288</sup> Saudi Arabia's third-party submission, paras. 38-43.



investigations, and that this legal standard is contrary to Articles 2.1 and 2.4 of the SCM Agreement in the following four specific respects: (i) failure 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 the principles laid down in subparagraphs (a) and (b); (ii) failure to identify a "subsidy programme"; (iii) failure to identify a "granting authority"; and (iv) failure to take into account the factors in the final sentence of Article 2.1(c).<sup>290</sup>

7.221. We consider the application of what China calls an end-use approach to be fairly evident from the excerpts cited in Exhibit CHI-1 and provided in Exhibit CHI-122, where the USDOC's specificity determination is explicitly based on the finding that the industries using a specific input are limited in number.<sup>291</sup> While this is somewhat less evident in the investigations where the USDOC's specificity determinations are based on "facts available"<sup>292</sup>, the United States itself seems to suggest that the USDOC followed one and the same approach across all of the challenged investigations.<sup>293</sup>

7.222. Furthermore, we consider it to be quite evident on the face of the evidence provided by China that this end-use approach does not apply Article 2.1 of the SCM Agreement *in the manner interpreted by China* with regard to the application of the subparagraphs of Article 2.1, the identification of a "subsidy programme", and the two factors in the final sentence of Article 2.1(c).

<sup>289</sup> China's response to Panel question No. 7, para. 24.

<sup>290</sup> The Panel will address these four specific aspects of China's claim in the sequence they appear in China's second written submission. See footnote 262 above.

<sup>291</sup> Issues and Decision Memorandum for the Final Determination, Kitchen Shelving, Exhibit CHI-38, p. 16: "we determine that the industries named by the GOC are limited in number and, hence, the subsidy is specific. See section 771(5A)(D)(iii)(I) of the Act."; Issues and Decision Memorandum for the Final Determination, OCTG, Exhibit CHI-45, p. 75: "We have continued to find provision of steel rounds to be de facto specific under section 771(5A)(D)(iii)(I). ... the products listed by the GOC (rebar, plain bar, merchant bar, light sections, narrow strip, wire rod, and seamless tubes) are a limited group of industries under Section 771 (5A)(D)(iii)(I)." (emphasis original); Issues and Decision Memorandum for the Final Determination, Wire Strand, Exhibit CHI-52, p. 24: "The GOC stated that the end uses of wire rod relate to the type of industry involved as a direct purchaser of the input. ... Based on our review of the data and consistent with our past practice, we determine that the industries named by the GOC are limited in number and, hence, the subsidy is specific. See section 771(5A)(D)(iii)(I) of the Act ...." (emphasis original); Issues and Decision Memorandum for the Final Determination, Seamless Pipe, Exhibit CHI-66, p. 18: "with respect to specificity, the GOC ... stated, 'Steel rounds ... are {used} by the seamless pipe industry.' Section 771(5A)(d)(iii)(I) of the Act clearly directs the Department to conduct its specificity analysis on an industry or enterprise basis. Therefore ... we determine that this subsidy is specific because the recipients are limited in number."; Issues and Decision Memorandum for the Final Determination, Drill Pipe, Exhibit CHI-80, with respect to the provision of steel rounds, p. 31: "With regard to specificity, the GOC stated that steel rounds are used by producers of various types of seamless pipe (including the drill pipe industry). Therefore, we determine that this subsidy is specific because the recipients are limited in number. See section 771(5A)(D)(iii)(I) of the Act ...." (emphasis original); with respect to the provision of green tubes, pp. 24 and 25: "With respect to specificity, we determine that the program is specific under section 771(5A)(D)(iii)(I) of the Act because the industries that utilize green tubes are limited. This finding is in keeping with the Department's determination in other China CVD investigations where we found the industries that used a particular steel input to be limited"; Issues and Decision Memorandum for the Final Determination, Aluminum Extrusions, Exhibit CHI-87, p. 36: "with respect to specificity, the GOC has provided information on end uses for primary aluminium. ... Based on our review of the data and consistent with our past practice, we determine that the industries named by the GOC are limited in number and, hence, the subsidy is specific. See section 771(5A)(D)(iii)(I) of the Act." (emphasis original); Issues and Decision Memorandum for the Final Determination, Steel Cylinders, Exhibit CHI-99, with respect to hot-rolled steel, p. 17: "the GOC has reported that hot-rolled steel is only provided to steel consuming industries, we determine that the subsidy is being provided to a limited number of industries and is, therefore, specific"; with respect to seamless tube steel, p. 19: "The GOC has reported that seamless tube steel is used by a 'wide variety of steel consuming industries,' and the GOC specifically identified the following uses: plumbing and heating systems, air conditioning units, sprinklers, and in the construction and repair of refineries and chemical plants. Because seamless tube steel is only provided to steel consuming industries, we determine that the subsidy is being provided to a limited number of industries and is, therefore, specific"; with respect to billets, p. 20: "Because billets are provided only to steel consuming industries, we determine that the subsidy is being provided to a limited number of industries and is, therefore, specific." (all footnotes omitted)

<sup>292</sup> Pressure Pipe, Line Pipe, Lawn Groomers, Print Graphics and Solar Panels.

<sup>293</sup> United States' second written submission, para. 72.

7.223. As China challenges four specific aspects of what it calls the end-use approach applied by the USDOC in its specificity determinations, the Panel will address each of these aspects in turn.<sup>294</sup>

a. Application of the subparagraphs of Article 2.1 of the SCM Agreement

7.224. One aspect of China's claim under Article 2 of the SCM Agreement relates to the application of the subparagraphs of Article 2.1. In terms of the facts, there seems to be no disagreement between the parties that the USDOC did not conduct a specificity analysis under subparagraphs (a) and (b) in the challenged investigations, but merely under subparagraph (c).<sup>295</sup> Therefore, the question before the Panel is whether a correct application of Article 2.1(c) must always follow the application of subparagraphs (a) and (b), or whether it may, in certain circumstances, be permissible for an investigating authority to proceed directly to a specificity analysis under Article 2.1(c). In particular, we note that the parties advance somewhat differing interpretations of statements made by the Appellate Body regarding the relationship between each of the subparagraphs of Article 2.1 of the SCM Agreement. The Panel will address these below.

7.225. With regard to the ordinary meaning of the first sentence of Article 2.1(c), the parties disagree on what the application of "other factors" is conditional upon. According to China, the ordinary meaning of the first sentence of Article 2.1(c) clearly conditions any evaluation of "other factors" under that provision on a prior "appearance of non-specificity" resulting from the application of the principles laid down in subparagraphs (a) and (b).<sup>296</sup> The United States, however, takes the view that the ordinary meaning of the first sentence of Article 2.1(c) indicates that the evaluation of "other factors" is conditional upon the existence of "reasons to believe that the subsidy may in fact be specific", and that a finding of non-specificity under subparagraphs (a) or (b) does not prevent further consideration under subparagraph (c).<sup>297</sup>

7.226. We do not agree with the interpretation advanced by China. The word "if" in Article 2.1(c) refers to the clause "there are reasons to believe that the subsidy may in fact be specific". As such, 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", notwithstanding any appearance of non-specificity resulting from the application of subparagraphs (a) and (b). The Appellate Body has indeed clarified that "Article 2.1(c) proceeds where 'there are reasons to believe that the subsidy may in fact be specific'", and that such reasons "relate to the factors set in subparagraph (c)".<sup>298</sup> However, we note that the clause "reasons to believe that the subsidy may in fact be specific" is not the focus of China's present claim.<sup>299</sup>

7.227. The fact that the clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" is placed between "if" and "there are reasons to believe that the subsidy may in fact be specific" does not mean that "if" relates to what comes directly after. The "notwithstanding ..." clause could equally have been placed in last position, as follows: "if there are reasons to believe that the subsidy may in fact be specific, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), other factors may be considered". This is in fact what has been done in the Spanish version of Article 2.1(c): "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".<sup>300</sup> As such, the clause "notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)" 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>294</sup> China's response to Panel question No. 92, para. 31.

<sup>295</sup> United States' first written submission, para. 188: "Accordingly, it was appropriate for Commerce to focus its analysis solely on Article 2.1(c)".

<sup>296</sup> China's second written submission, para. 125.

<sup>297</sup> United States' second written submission, paras. 83 and 84.

<sup>298</sup> Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, paras. 797, 877 and 878.

<sup>299</sup> See, for example, China's response to Panel question No. 90, para. 28.

<sup>300</sup> For the sake of completeness it will be noted that the French version uses the same sentence structure as the English text: "Si, nonobstant toute apparence de non-spécificité résultant de l'application des principes énoncés aux alinéas a) et b), il y a des raisons de croire que la subvention peut en fait être spécifique, d'autres facteurs pourront être pris en considération".



7.228. In terms of the context of the first sentence of Article 2.1(c), China considers that subparagraphs (a) and (b) have primacy and must feature in any concurrent application of Article 2.1, while subparagraph (c) is of the nature of an exception that may be taken into account if the application of subparagraphs (a) and (b) leads to an appearance of non-specificity. According to the United States, the reference in the chapeau of Article 2.1 to the fact that certain "principles ... apply" to a specificity analysis neither implicitly nor explicitly mandates the manner in which an investigating authority should apply the principles in any particular factual circumstance. In this regard, we note that China's position is linked to its views on what can amount to a "subsidy programme". In particular, China explains that it considers subparagraphs (a) and (b) to have primacy within the framework of Article 2.1 since 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>301</sup> Indeed, China takes the position that an examination of the principles in subparagraphs (a) and (b) would have led the USDOC to realise that there is no legislation or other type of official measure providing for the alleged subsidies, and no programme.<sup>302</sup>

7.229. It is explicit in the chapeau of Article 2.1 that subparagraphs (a), (b) and (c) set out "principles", as opposed to "rules", as highlighted by the Appellate Body.<sup>303</sup> The Appellate Body has furthermore specified that these principles must be applied "concurrently"<sup>304</sup>, meaning "running together ... as parallel lines"; "going on side by side"; "occurring together"; "existing or arising together"; "conjoint, associated".<sup>305</sup> The Panel agrees with China to the extent that the subparagraphs of Article 2.1 follow a certain logical structure, and this has also been recognised by the Appellate Body: "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)".<sup>306</sup> However, the Panel does not consider this logical structure in Article 2.1 to translate into procedural rules that investigating authorities must follow in each specificity analysis under that provision. This is in line with a certain degree of flexibility recognised by the Appellate Body in the application of the principles in Article 2.1. Indeed, the Appellate Body has stated that the structure of Article 2.1 indicates that the application of subparagraph (c) will "normally" follow the application of subparagraphs (a) and (b).<sup>307</sup> The application of these principles must take 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, and "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>308</sup>

7.230. In our view, the set of facts before us in this dispute embody such circumstances. Indeed, it is undisputed that the USDOC's findings are not based on an explicit limitation of access by the granting authority or the legislation pursuant to which the granting authority operates; nor are they based on criteria or conditions that were spelled out in law, regulation, or other official document. It was the unwritten nature of the subsidies that the USDOC found to exist that led it to consider "other factors" under subparagraph (c).

7.231. Therefore, with respect to China's claim on the application of the subparagraphs of Article 2.1 of the SCM Agreement, the Panel finds 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).

<sup>301</sup> See China's second written submission, para. 119.

<sup>302</sup> China's first written submission, para. 101.

<sup>303</sup> Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366; and *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 796.

<sup>304</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371.

<sup>305</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), p. 470.

<sup>306</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 796. (emphasis added)

<sup>307</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 796.

<sup>308</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 371.

b. Identification of a subsidy programme

7.232. Turning to another, related aspect of China's claim, we note at the outset that it is uncontested that the USDOC's challenged specificity determinations were made under the first of the "other factors" of Article 2.1(c) of the SCM Agreement.<sup>309</sup>

7.233. The parties appear to agree that the analysis of specificity under the first of the "other factors" of Article 2.1(c), namely the "use of a subsidy programme by a limited number of certain enterprises", requires some form of identification of a "subsidy programme". However, the parties essentially disagree on two closely-related aspects, namely what amounts to a "subsidy programme" and how a "subsidy programme" can be identified and evidenced, and whether the USDOC identified and evidenced a "subsidy programme" in each challenged investigation.

7.234. China suggests that it would be highly unusual for there to be no written evidence of a subsidy programme, and even in the unusual case in which there is no written evidence, the subsidy programme would be reflected in express pronouncements by the granting authority.<sup>310</sup> With regard to how the USDOC actually identified subsidy programmes in the investigations at issue, China states that the USDOC has merely referred in its determinations to input-specific programmes, such as the "provision of wire rod for LTAR program".<sup>311</sup> However, China argues that this is not sufficient to properly identify a subsidy programme, since the USDOC has failed to provide evidentiary support for the existence of these alleged programmes.<sup>312</sup>

7.235. The United States takes the view that a subsidy programme can be identified and evidenced through the operation of the subsidy itself and its recipients<sup>313</sup>, by the stream of subsidies to "certain enterprises" using such a subsidy programme.<sup>314</sup> The United States claims that in Aluminum Extrusions, for example, the application alleged, and contained sufficient evidence for purposes of initiation, that primary aluminium was being provided by SOEs to primary aluminium consumers in China for less than adequate remuneration, and that the provision of the input was specific to a limited number of users.<sup>315</sup>

7.236. We firstly recall that the specificity requirement of Article 2 is concerned with establishing a limitation of access to a subsidy, not the existence of the subsidy itself, which is dealt with under Article 1.1. Indeed, this distinction is well reflected in Article 1.2, which states that "[a] subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2". In this respect, our position is in line with that of the panel in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>316</sup>

7.237. In our view, it is clear from the language of Article 2.1(c) that the "use ... by a limited number of certain enterprises" is to be evaluated with respect to a "subsidy programme". In this regard, the starting point of an analysis of specificity under that factor should be the identification of the relevant subsidy programme. As such, we agree with the finding of the panel in *EC and certain member States – Large Civil Aircraft*, made in the context of the second of the "other factors" in Article 2.1(c), that "when considering whether there is "predominant use" of a subsidy

<sup>309</sup> United States' second written submission, para. 72.

<sup>310</sup> China furthermore submits that written documents could include a piece of legislation, published eligibility requirements, an application form or budget allocations. An express pronouncement would need to be sufficient to determine that a particular series of subsidies is a planned series of subsidies, and to identify the characteristics of the subsidy programme that distinguish it from the provision of other subsidies. China's response to Panel question No. 38, para. 108. See also China's first written submission, paras. 101 and 121.

<sup>311</sup> China's first written submission, para. 109.

<sup>312</sup> China's first written submission, para. 109.

<sup>313</sup> United States' response to Panel question No. 91, para. 24.

<sup>314</sup> United States' second written submission, para. 76.

<sup>315</sup> United States' response to Panel question No. 91, para. 25; also see response to Panel question No. 34, para. 77; second written submission, para. 79.

<sup>316</sup> "[T]he specificity requirement is not about the existence of a subsidy, which is dealt with in Article 1.1, but rather about access thereto". Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.21.

programme within these terms, the starting point should be the identification of the relevant subsidy programme".<sup>317</sup>

7.238. Article 2 refers to a subsidy "programme", as opposed to a subsidy, in Article 2.1(c) only. In our view, the use of the term "subsidy programme", as opposed to "subsidy", is not lacking in significance. Indeed, we agree with the panel in *EC and certain member States – Large Civil Aircraft* that "it would not have been difficult for the drafters of the SCM Agreement to include a reference to a subsidy programme in the text of the third specificity factor, as they did for the first and second specificity factors. However, the drafters chose not to do so".<sup>318</sup> At the same time, we note that the SCM Agreement remains silent as to the definition of a "programme". This contrasts with the detailed definition of a "subsidy" provided in Article 1.

7.239. With regard to the ordinary meaning of the word "programme", its dictionary definition indicates most pertinently "[a] plan or outline of (esp. intended) activities; a planned series of activities or events".<sup>319</sup> This ordinary meaning must be read in light of the context of Article 2.1(c), as well as of the object and purpose of the SCM Agreement as a whole. Whereas Article 2.1(a) addresses "explicit" limitations on access to a subsidy (commonly referred to as *de jure* specificity), Article 2.1(c) addresses situations where "the subsidy may *in fact* be specific" (commonly referred to as *de facto* specificity). As such, Article 2.1(c) is clearly concerned with facts. As succinctly expressed by the panel in *US – Softwood Lumber IV*, Article 2 as a whole is "concerned with the distortion that is created by a subsidy which either in law or in fact is not broadly available".<sup>320</sup>

7.240. In our view, Article 2.1(c) reflects the diversity of facts and circumstances that investigating authorities may be confronted with when analysing subsidies covered by the SCM Agreement. The 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, in our view suggests that "subsidy programme" should be interpreted broadly. A broad interpretation gives due recognition to the reality that "subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit".<sup>321</sup> Conversely, a narrow interpretation of "subsidy programme" could enable the circumvention of the disciplines of the SCM Agreement and even discourage the transparent management of subsidies.

7.241. As such, the fact that the USDOC allegedly identified subsidy programmes that are neither in writing nor expressly pronounced by the granting authority does not in and of itself render the USDOC's specificity determinations inconsistent with Article 2.1(c).

7.242. 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.

7.243. Therefore, with respect to China's claim on the identification of a subsidy programme, we find that evidence of such systematic activity or series of 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.

#### c. Identification of the granting authority

7.244. A further aspect of China's claim under Article 2 of the SCM Agreement concerns the identification of the granting authority.

7.245. China submits that, in the challenged investigations, the USDOC failed to identify who the relevant granting authority is in relation to the provision of inputs for less than adequate remuneration. China argues that the identification of the granting authority is essential for

<sup>317</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.993.

<sup>318</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.965.

<sup>319</sup> *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), p. 2371.

<sup>320</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.116.

<sup>321</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.32.

evaluating whether a particular subsidy is specific to certain enterprises "within the jurisdiction of the granting authority".<sup>322</sup> As such, China claims that the USDOC failed to identify the relevant granting authority, and *ergo* the relevant jurisdiction for an inquiry under Article 2.1.<sup>323</sup> China makes no specific references to the facts of any challenged investigations in making this claim.

7.246. The United States claims that in each instance, the USDOC considered the jurisdiction within which it was conducting its specificity analysis, i.e. the jurisdiction of the granting authority, to be China.<sup>324</sup> In 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.<sup>325</sup>

7.247. The chapeau of Article 2.1 contains a reference to the granting authority. The ordinary meaning and context of the chapeau, as well as the negotiating history of Article 2, suggest to us that the reference to "within the jurisdiction of the granting authority" firstly indicates that specificity may only exist within the territory of a Member, and secondly recognises that, in certain countries, subsidies may be granted not only by the central authorities, but also by other subdivisions. The chapeau of Article 2.1 thus situates the assessment of a limitation of access within the jurisdiction of the granting authority.

7.248. 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.

7.249. As such, we find that China has failed to establish that the USDOC acted inconsistently with Article 2.1 of the SCM Agreement by failing to explicitly identify the relevant granting authority, and *ergo* the relevant jurisdiction, in the specificity determinations at issue.

d. Factors in the last sentence of Article 2.1(c)

7.250. A fourth aspect of China's claim under Article 2 of the SCM Agreement concerns the final sentence of Article 2.1(c). The question before the Panel is whether the factors in the final sentence of Article 2.1(c), namely "the extent of diversification of economic activities within the jurisdiction of the granting authority" and "the length of time during which the subsidy programme has been in operation", must be taken into account by an investigating authority in every Article 2.1(c) analysis.

7.251. With regard to the ordinary meaning of the final sentence of Article 2.1(c), we are of the view that the use of the term "shall" clearly connotes an obligation. Indeed, the term is defined as "has a duty to; more broadly, is required to".<sup>326</sup> The decision by the drafters of the SCM Agreement to use the term "shall" instead of terms such as "should" or "may" is significant.

7.252. With regard to the context of Article 2.1(c) more broadly, as we have seen above, subparagraph (c) concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise. In this context, we consider the last sentence of Article 2.1(c) to function as a safeguard that keeps in check this flexibility. Indeed, where economic activities within the jurisdiction of the granting authority are less diversified, the use of a subsidy programme by a limited number of certain enterprises may nonetheless lead to a finding of non-specificity. Use by a limited number of certain enterprises may similarly lead to a finding of non-specificity where the subsidy programme has been in operation for a limited period of time only.

7.253. In light of the above, the Panel agrees with the finding of the panel in *US – Softwood Lumber IV* that taking into account the two factors in the final sentence of Article 2.1(c) need not be done explicitly.<sup>327</sup> Similarly, the panel in *EC – Countervailing Measures on DRAM Chips* did not

<sup>322</sup> China's first written submission, para. 95.

<sup>323</sup> China's first written submission, paras. 95 and 96; second written submission, para. 138.

<sup>324</sup> United States' second written submission, para. 94.

<sup>325</sup> United States' second written submission, fn 150.

<sup>326</sup> *Black's Law Dictionary*, 1999, p. 1379.

<sup>327</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.124.

find it unreasonable for an investigating authority to not include an *explicit* statement that these factors had been taken into account.<sup>328</sup> In *US – Softwood Lumber IV*, however, the panel found that a certain statement of the investigating authority indicated that these factors had been taken into account implicitly.<sup>329</sup>

7.254. In the present dispute, we see no evidence that the two factors in the final sentence of Article 2.1(c) were taken into account, either explicitly or implicitly, nor has the United States pointed to any such specific evidence.<sup>330</sup>

7.255. Furthermore, we find no support in Article 2.1(c) for the United States' assertion that the requirement in the final sentence of Article 2.1(c) is dependent upon whether an interested party raised the relevance of the two factors.

7.256. As such, the Panel finds that the USDOC failed to take into account the two factors in the final sentence of Article 2.1(c) of the SCM Agreement, as required by that provision.

e. Overall conclusion of the Panel's evaluation

7.257. The Panel finds that the USDOC acted inconsistently with the obligations of the United States under the last sentence of Article 2.1(c) of the SCM Agreement by failing to take account of the two factors listed therein when making the relevant specificity determinations.

7.258. However, the Panel finds that, in the specificity determinations at issue, the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c); that the USDOC sufficiently identified subsidy programmes for the purposes of the first of the "other factors" under Article 2.1(c); and that China has failed to establish that the USDOC acted inconsistently with Article 2.1 by failing to explicitly identify the relevant granting authority.<sup>331</sup>

7.259. In light of the fact that China has presented no substantial evidence or arguments in support of its claim under Article 2.4 of the SCM Agreement, the Panel considers its above findings sufficient to resolve the dispute between the parties under this claim.

## **7.9 Whether the USDOC's initiations of investigations are inconsistent with Article 11 of the SCM Agreement due to insufficient evidence of specificity**

### **7.9.1 Introduction**

7.260. The Panel now turns to the claims advanced by China concerning evidence of specificity in the USDOC's initiation of 14 investigations, namely 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.<sup>332</sup>

7.261. The USDOC initiated a countervailing duty investigation in Pressure Pipe on 25 February 2008, pursuant to an application for the initiation of such an investigation filed on 30 January 2008; in Line Pipe on 29 April 2008, pursuant to an application for the initiation of such an investigation filed on 3 April 2008; in Lawn Groomers on 21 July 2008, pursuant to an application for the initiation of such an investigation filed on 24 June 2008; in Kitchen Shelving on 26 August 2008, pursuant to an application for the initiation of such an investigation filed on 31 July 2008; in OCTG on 5 May 2009, pursuant to an application for the initiation of such an investigation filed on 8 April 2009; in Wire Strand on 23 June 2009, pursuant to an application for the initiation of such an investigation filed on 27 May 2009; in Seamless Pipe on 15 October 2009, pursuant to an application for the initiation of such an investigation filed on 16 September 2009; in

<sup>328</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.229.

<sup>329</sup> The panel read the USDOC's statement that "the vast majority of companies and industries in Canada does not receive benefits under the programmes" as implying that the two factors in the final sentence of Article 2.1(c) had been taken into account. Panel Report, *US – Softwood Lumber IV*, para. 7.124.

<sup>330</sup> United States' response to Panel question No. 45, paras. 95-97.

<sup>331</sup> The Panel notes that, throughout its submissions, China makes statements criticising the alleged circularity of the USDOC's approach to specificity. However, while China has raised this issue, we do not consider that China has asked the Panel to make specific findings on this issue.

<sup>332</sup> See table in paragraph 7.1. of this Report.

Print Graphics on 20 October 2009, pursuant to an application for the initiation of such an investigation filed on 23 September 2009; in Drill Pipe on 27 January 2010, pursuant to an application for the initiation of such an investigation filed on 30 December 2009; in Aluminum Extrusions on 27 April 2010, pursuant to an application for the initiation of such an investigation filed on 31 March 2010; in Steel Cylinders on 8 June 2011, pursuant to an application for the initiation of such an investigation filed on 11 May 2011; in Solar Panels on 16 November 2011, pursuant to an application for the initiation of such an investigation filed on 19 October 2011; in Wind Towers on 24 January 2012, pursuant to an application for the initiation of such an investigation filed on 29 December 2011; and in Steel Sinks on 27 March 2012, pursuant to an application for the initiation of such an investigation filed on 1 March 2012.

7.262. China claims that the USDOC's initiation of these 14 countervailing duty investigations in respect of the alleged provision of inputs for less than adequate remuneration, in the absence of sufficient evidence in the petition to support an allegation that any such subsidy would be specific under Article 2 of the SCM Agreement, and in the absence of a sufficient review of the petition by the USDOC in respect of the allegations, is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement. Furthermore, as a consequence of these inconsistencies with Articles 11.2 and 11.3, China claims that the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

### 7.9.2 Relevant provisions

7.263. The present claim concerns Articles 11.2 and 11.3 of the SCM Agreement, which relevantly provide the following:

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

...

- (iii) evidence with regard to the existence, amount and nature of the subsidy in question;

...

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

### 7.9.3 Main arguments of China

7.264. With regard to the United States' claim that China has failed to present a *prima facie* case, China states generally that it has done the following with respect to each of its claims: (i) identified the challenged measure at issue and provided explicit citations to the portions of the measure pertinent to the claim; (ii) identified the relevant provisions of the SCM Agreement with which it alleges the challenged measures are inconsistent, and presented its understanding of the legal obligation each such provision imposes; and (iii) explained the basis for its claim that each of the challenged measures is inconsistent with the relevant provisions of the SCM Agreement, properly interpreted.<sup>333</sup>

7.265. China claims that the USDOC's initiation of 14 investigations in respect of the alleged provision of inputs for less than adequate remuneration in the absence of sufficient evidence in the petition to support an allegation that any such subsidy would be specific under Article 2 of the SCM Agreement, and in the absence of a sufficient review of the petition by the USDOC in respect

<sup>333</sup> China's response to Panel question No. 4, para. 14.

of this allegation, is inconsistent with Articles 11.2 and 11.3. In particular, China objects to the initiation of the investigations on the basis of evidence that the inputs were used by a limited number of industries or enterprises, since such evidence fails to address the four factors required under an Article 2.1 specificity analysis.<sup>334</sup>

7.266. China submits that the initiations are inconsistent with Article 11.3 because they were based on the application of an incorrect legal standard. In this regard, China submits that the USDOC's challenged initiations are based on the application of the same legal standard that China is challenging under Article 2.<sup>335</sup> China argues that when an investigating authority initiates a countervailing duty investigation on the basis of an incorrect legal standard, it necessarily acts inconsistently with Article 11.3. Indeed, China takes the view that the "adequacy" and "sufficiency" of evidence, required by Article 11.3, can only be assessed in relation to a legal standard.<sup>336</sup>

7.267. In the course of the proceedings, China stated that, in its view, it would be appropriate for the present Panel to follow the approach taken by the panel in *China – GOES*, namely to read the obligations in Article 11.3 together with Article 11.2, but to make findings only under Article 11.3.<sup>337</sup>

#### 7.9.4 Main arguments of the United States

7.268. The United States submits that China has failed to establish a *prima facie* case with regard to its claims.<sup>338</sup> In particular, the United States submits that initiation decisions are fact-specific, and the question of whether an investigating authority has complied with the standard set out in Article 11 of the SCM Agreement is similarly dependent on the facts presented by each individual application.<sup>339</sup> The United States furthermore submits that China has failed to make a *prima facie* case due to its focus on the relevant applications and failure to discuss the USDOC's initiation decisions made on the basis of those applications.<sup>340</sup>

7.269. Furthermore, the United States argues that the identification of and evidence on a facially non-specific subsidy programme, the granting authority, and the two factors in the last sentence of Article 2.1(c), as understood by China, is not required as part of an Article 2.1(c) analysis, and much less so under Article 11.<sup>341</sup>

7.270. The United States submits that the relevant issue under the first factor of Article 2.1(c) is whether there are a limited number of users of the subsidy programme; as such, the question of which enterprises use the input is relevant to the inquiry. In this regard the United States refers to the observation by the panel in *US – Softwood Lumber IV* that "[i]n the case of good that is provided by the government ... and that has utility only for certain enterprises ..., it is all the more likely that a subsidy conferred via the provision of that good is specifically provided to certain enterprises only".<sup>342</sup>

7.271. Furthermore, the United States rejects China's assertion that once an investigating authority initiates an investigation on the basis of an incorrect legal standard, it necessarily acts inconsistently with Article 11. The United States submits that Article 11 speaks to providing and evaluating evidence; it does not require that applicants allege or that an investigating authority recites any particular standard. For initiation purposes under Article 11, what is required is adequate evidence tending to prove or indicating the existence of specificity, in light of what is reasonably available to the applicant.<sup>343</sup>

<sup>334</sup> China's first written submission, para. 126; second written submission, para. 152.

<sup>335</sup> China's second written submission, paras. 150-153.

<sup>336</sup> China's second written submission, paras. 154-163.

<sup>337</sup> China's second written submission, fn 161, citing Panel Report, *China – GOES*, para. 7.50.

<sup>338</sup> United States' first written submission, para. 210.

<sup>339</sup> United States' first written submission, para. 210.

<sup>340</sup> United States' first written submission, para. 217.

<sup>341</sup> United States' second written submission, para. 112.

<sup>342</sup> United States' second written submission, paras. 110 and 111, citing Panel Report, *US – Softwood Lumber IV*, para. 7.116.

<sup>343</sup> United States' second written submission, paras. 115-117.

### 7.9.5 Main arguments of third parties

7.272. **Canada** submits that Article 11.3 of the SCM Agreement permits an investigating authority to take into account, when reviewing the sufficiency of the evidence, that access to relevant information may be limited. According to Canada, a subsidizing Member should not be able to evade its obligations under the SCM Agreement because it is in a position to make information relating to subsidies inaccessible or "unavailable".<sup>344</sup>

7.273. **The European Union** considers that the information an applicant might be expected to adduce must be a function of the availability of such information in the public domain.<sup>345</sup>

7.274. **Turkey** submits that the determination of sufficiency of evidence and reasonable availability of information is case and fact-specific, and at the investigating authority's discretion. The reasonable availability of information depends in particular on a government's record keeping and publication requirements, on companies' publication requirements, and access to laws and regulations. The non-fulfilment of notification requirements contained in Article 25 of the SCM Agreement adversely affects access to information.<sup>346</sup>

### 7.9.6 Evaluation by the Panel

7.275. We note at the outset that China states that, in its view, it would be appropriate for the present Panel to follow the approach taken by the panel in *China – GOES*, namely to read the obligations in Article 11.3 together with Article 11.2, but to make findings only under Article 11.3.<sup>347</sup> For the same reasons as explained in paragraphs 7.143. to 7.145. above, we find no reason not to limit our findings to Article 11.3, read together with Article 11.2, as requested by China.

7.276. As noted in paragraph 7.146. above, the Panel agrees with the reasoning of the panel in *China – GOES* with regard to the meaning of the concept of "sufficient evidence" as used in Articles 11.2 and 11.3 of the SCM Agreement, and the standard of review that applies to a review of a claim under Article 11.3.

7.277. In making its claims, China takes the position that the challenged initiations are inconsistent with Article 11.3 because they were based on the application of an incorrect legal standard. Indeed, in China's view, if the Panel agrees with China that the legal standard applied by the USDOC at the time of initiation with respect to specificity is inconsistent with Article 2, then the USDOC was "without a proper basis to conclude that there was sufficient evidence" of these elements of a subsidy to justify initiation in the investigations under challenge.<sup>348</sup>

7.278. Within the context of specificity, the legal standard that China objects to is one based on an erroneous understanding of Article 2.1(c), which fails to address the four essential factors contained in that provision.<sup>349</sup> Indeed, according to China, in not a single instance did an application contain evidence of "use of a subsidy programme by a limited number of certain enterprises"; the applications failed to present evidence of any subsidy programme, much less evidence of a facially non-specific subsidy programme that, in practice, was used by a limited number of certain enterprises; nor did the applications present evidence relating to the identity of the relevant granting authorities or evidence that would be relevant under the last sentence of Article 2.1(c).<sup>350</sup>

7.279. We observe that China's assertion that "[e]ach of the applications at issue contains nothing more than an assertion, usually limited to a single sentence, that the recipients of the alleged input subsidies are "limited in number""<sup>351</sup> seems to be factually incorrect. The applications did contain evidence of the limited number of users of the alleged subsidy; however, whether this was

<sup>344</sup> Canada's third-party submission, paras. 43-55.

<sup>345</sup> European Union's third-party submission, paras. 39-41.

<sup>346</sup> Turkey's third-party statement, paras. 13-18.

<sup>347</sup> China's second written submission, fn 161, citing Panel Report, *China – GOES*, para. 7.50.

<sup>348</sup> China's second written submission, para. 163.

<sup>349</sup> China's opening statement at the first meeting of the Panel, para. 63.

<sup>350</sup> China's first written submission, para. 126.

<sup>351</sup> China's first written submission, para. 125.



the only evidence, as well as the quality of the evidence, varies from investigation to investigation. Upon further review of the petitions, we agree with the United States that "[s]ome applications relied on evidence such as research reports and the financial statements of Chinese companies, in support of claims of specificity, while others, instead, or in addition, relied on prior determinations of Commerce".<sup>352</sup> Moreover, China contradicts its above statement by contending that "[i]n some cases, the application also asserts that the alleged input subsidies are either *predominantly used by certain enterprises or that disproportionately large amounts of subsidy are granted to certain enterprises, or both*. These, too, are single-sentence assertions unsupported by any evidence whatsoever".<sup>353</sup>

7.280. In addition to the above, we note that China challenges the USDOC's initiation of the challenged investigations as inconsistent with Article 11.3 despite essentially overlooking how the USDOC handled the evidence contained in the applications. In this regard, we note the USDOC's observation that in the Kitchen Shelving investigation, for example, the USDOC requested further information from applicants with regard to the description of the industries that purchase wire rod, as well as an explanation as to why those industries comprise a specific enterprise or industry or group thereof.<sup>354</sup>

7.281. As the Panel concludes in paragraph 7.258. above, the understanding of Article 2.1 advanced by China is mostly incorrect in the Panel's view. In particular, the Panel disagrees with China's interpretation regarding the identification of a subsidy programme, the application of the subparagraphs of Article 2.1, and the identification of the granting authority.

7.282. While we find that the two factors in the final sentence of Article 2.1(c) should have been taken into account by the USDOC, this procedural requirement imposed on investigating authorities does not affect what "reasonably available" evidence was required of applicants, "tending to prove or indicating" the existence of specificity for purposes of initiation.<sup>355</sup>

7.283. As such, the Panel finds that China has not established that the USDOC acted inconsistently with the United States' obligations under Article 11 of the SCM Agreement by initiating the challenged investigations without sufficient evidence of specificity.<sup>356</sup>

## **7.10 Whether the uses of "adverse facts available" by the USDOC are inconsistent with Article 12.7 of the SCM Agreement**

### **7.10.1 Introduction**

7.284. The Panel now turns to the claims advanced by China with regard to the USDOC's use of "adverse facts available" in 42 instances across 13 investigations, 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>357</sup>

7.285. Across the 15 investigations challenged by China, the USDOC found non-cooperation by the interested parties and made 48 positive determinations on financial contribution, benefit and specificity on the basis of adverse facts available with respect to input subsidies as well as other types of subsidies.

7.286. China claims that the USDOC's use of so-called adverse facts available to support its findings of financial contribution, benefit and specificity is inconsistent with Article 12.7 of the SCM Agreement in 48 instances because the USDOC did not rely on facts available on the record.

<sup>352</sup> United States' first written submission, para. 223.

<sup>353</sup> China's first written submission, fn 124. (emphasis added)

<sup>354</sup> United States' second written submission, fn 181.

<sup>355</sup> Panel Report, *China – GOES*, para. 7.56.

<sup>356</sup> While the Panel acknowledges the United States' argument on whether China has established a *prima facie* case, the Panel does not consider it necessary to address this issue in light of the Panel's finding under this claim.

<sup>357</sup> See table in paragraph 7.1. of this Report. See Exhibit CHI-2; China's first written submission, para. 146 and fn 136. The Panel recalls its finding that the preliminary determinations of the USDOC in Wind Towers and Steel Sinks fall outside the Panel's terms of reference. As a result, the number of "instances" challenged by China, as per Exhibit CHI-125, and falling within the Panel's terms of reference, is 42 instead of 48.

Furthermore, as a consequence of these inconsistencies with Article 12.7, China claims that the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

### 7.10.2 Relevant provision

7.287. The present claim concerns Article 12.7 of the SCM Agreement, which provides the following:

12.7 In 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, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

### 7.10.3 Main arguments of China

7.288. China claims that 48 instances in which the USDOC uses adverse facts available in making determinations on financial contribution, benefit and specificity across 15 investigations are inconsistent with Article 12.7 of the SCM Agreement because the USDOC did not rely on facts available on the record.<sup>358</sup>

7.289. In support of its case, China provides as Exhibit CHI-125 what it considers to be the relevant excerpts from the determinations, previously identified in Exhibit CHI-2. China considers these excerpts to be relevant to its claim as they are those portions of the USDOC's determinations in which the USDOC applies what China considers to be an incorrect legal standard with respect to the use of facts available.<sup>359</sup> China provides 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>360</sup> These are intended to serve as examples of the USDOC's pervasive use of adverse facts available.<sup>361</sup>

7.290. China argues that the USDOC's determinations lack a factual foundation. Once the USDOC finds that there is non-cooperation by a respondent, it simply pronounces the ultimate legal conclusion at issue, without relying on any facts on the record. Instead, the USDOC either assumed the ultimate conclusion of its inquiry, or based its conclusion on evidence or conclusions drawn from a different investigation.<sup>362</sup>

7.291. China in particular objects to the USDOC's use of adverse facts available. According to China, the term is a misnomer, because the USDOC does not rely on facts that are available on the record, adverse or otherwise. What the USDOC refers to as "adverse facts available" is, in fact, more accurately described as the use of adverse inferences.<sup>363</sup>

7.292. China submits that the use of facts available is fundamentally different from the drawing of adverse inferences. The use of facts available allows an investigating authority to use facts on the record to make a determination in the face of incomplete information. The drawing of adverse inferences, if authorized, would provide a vehicle for an investigating authority to punish non-cooperation by reaching a result adverse to the interests of the responding party.<sup>364</sup> China points to the finding of the panel in *China – GOES* that the drawing of adverse inferences is contrary to the purpose of the facts available mechanism under Article 12.7.<sup>365</sup>

7.293. Furthermore, China argues that what the USDOC refers to as "adverse inferences" in fact amounts to "assumptions". China defines an assumption as "a conclusion that is taken for granted

<sup>358</sup> Exhibit CHI-2; China's first written submission, para. 146 and fn 136.

<sup>359</sup> China's response to Panel question No. 7, para. 24.

<sup>360</sup> China's first written submission, paras. 147-153; opening statement at the first meeting of the Panel, paras. 70-72, 76.

<sup>361</sup> China's first written submission, para. 152.

<sup>362</sup> China's first written submission, paras. 128-156.

<sup>363</sup> China's first written submission, para. 145.

<sup>364</sup> China's first written submission, para. 139.

<sup>365</sup> China's first written submission, paras. 141 and 142, citing Panel Report, *China – GOES*, para. 7.302.

rather than having an actual basis in fact".<sup>366</sup> China argues that where the USDOC relies on "adverse inferences" in the 48 instances at issue, it is clear that the USDOC's determination is not an inference drawn from facts on the record, but is, instead, just another way of stating that the USDOC's determination is based on an "assumption".<sup>367</sup> In response to the United States' definition of "inference" as "[a] process of reasoning by which a fact or proposition sought to be established is deduced as a logical consequence from other facts, or a state of facts, already proved or admitted"<sup>368</sup>, China responds that this definition bears no relationship to Commerce's use of adverse inferences in the determinations under challenge.<sup>369</sup> China then states, referring to the conclusion of one challenged facts available determination, that "[a]s is evident in the example above, Commerce's 'inferences' are mere 'assumptions'".<sup>370</sup> Furthermore, China states that the USDOC often uses the term "assumption" interchangeably with the term "inference".<sup>371</sup>

7.294. China concedes that the use of facts available by an investigating authority could be adverse to the interests of the non-cooperating party. However, China stresses that the investigating authority must still use facts available.<sup>372</sup>

7.295. In response to the United States' argument that China has failed to present a *prima facie* case, China submits that the incompatibility between the requirements of Article 12.7 and the 48 instances of adverse facts available that China has identified is evident in the rationale – or lack thereof – that the USDOC provided in each instance.<sup>373</sup> Indeed, when the USDOC says that it is adversely "assuming" or "inferring" the legal conclusion at issue, making no reference of any kind to facts on the record, it is evident that those determinations are not based on available facts.<sup>374</sup> Moreover, China argues that the USDOC follows a consistent pattern in the 48 instances at issue.<sup>375</sup>

7.296. Further in this regard, China submits that the mere existence of a particular fact on the record of an investigation is insufficient to fulfil the requirements of Article 12.7.<sup>376</sup> China submits that it was the USDOC's obligation as the investigating authority to provide a reasoned and adequate explanation of how the evidence on the record supported its application of facts available under Article 12.7. Referring to the Appellate Body's findings in *US – Countervailing Duty Investigation on DRAMS*<sup>377</sup>, China argues that investigating authorities have to provide a reasoned and adequate explanation of (i) how the evidence on the record supported their factual findings, and (ii) how those factual findings supported the overall subsidy determination. Such an explanation should be discernible from the published determination itself.<sup>378</sup> According to China, Exhibit USA-94 only confirms the inconsistency of the USDOC's challenged determinations with Article 12.7.<sup>379</sup>

#### 7.10.4 Main arguments of the United States

7.297. The United States primarily argues that China has failed to make a *prima facie* case in support of the 48 alleged breaches of Article 12.7 of the SCM Agreement. Instead, China bases its claims on sweeping and inaccurate generalizations. In particular, Exhibit CHI-125 fails to advance China's arguments, as it only consists of excerpted text, taken out of context and merely providing a description of the USDOC's conclusion with respect to each determination. Exhibit CHI-125 fails to explain how or why China views these excerpts as support for the proposition that the USDOC failed to base its determinations on available facts on the record in the investigations.<sup>380</sup>

<sup>366</sup> China's second written submission, para. 177.

<sup>367</sup> China's second written submission, para. 177.

<sup>368</sup> United States' first written submission, para. 333, citing *Black's Law Dictionary* (1991), p. 536.

<sup>369</sup> China's opening statement at the first meeting of the Panel, para. 72.

<sup>370</sup> China's opening statement at the first meeting of the Panel, para. 72.

<sup>371</sup> China's opening statement at the first meeting of the Panel, para. 72.

<sup>372</sup> China's response to Panel question No. 74, paras. 184-185.

<sup>373</sup> China's second written submission, para. 178.

<sup>374</sup> China's opening statement at the first meeting of the Panel, para. 78.

<sup>375</sup> China's opening statement at the first meeting of the Panel, para. 70.

<sup>376</sup> China's response to Panel question No. 103, para. 53.

<sup>377</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>378</sup> China's second written submission, paras. 175-191.

<sup>379</sup> China's response to Panel question No. 103, para. 50.

<sup>380</sup> United States' second written submission, paras. 145 and 146.

7.298. Furthermore, the United States rejects China's assertion that the USDOC's facts available determinations follow a "pattern". The facts and circumstances of each determination are unique because the USDOC's facts available determinations are case-specific and rely on the totality of the evidence in any given investigation. The United States furthermore points out that China has not challenged a measure of general applicability with respect to the USDOC's facts available determinations. In such circumstances, China should have demonstrated that the USDOC acted inconsistently with Article 12.7 in each of the 48 separate uses of facts available. In particular, China should have demonstrated that each of the USDOC's determinations is not supported by the record of the investigations.<sup>381</sup>

7.299. In addition, the United States argues that, in the course of the proceedings, China has attempted to refocus its position by alleging that the USDOC failed to provide a "reasoned and adequate explanation" of its facts available determinations. In the United States' opinion, this is a matter under Article 22 of the SCM Agreement, not Article 12.7. Moreover, contrary to China's assertion, the USDOC was not required to provide a citation to each individual fact that underlies each facts available determination. No such obligation exists in the SCM Agreement, nor has any panel or Appellate Body report described such an obligation.<sup>382</sup>

7.300. In terms of the facts, the United States submits that China has mischaracterized the way in which the USDOC employs facts available, and adverse facts available in particular. The USDOC's use of an adverse inference in selecting from among the facts otherwise available is, by its terms and in each case, based on facts available.<sup>383</sup>

7.301. The use of the terms "inferring" or "assuming" merely reflect the fact that, due to a lack of cooperation, there was often very little factual information on the record, other than the evidence provided in the application, for the USDOC to make the applicable determination. The USDOC used this limited factual basis to make inferences to reach its determination. Because necessary information, which might have been more direct evidence on the issue to be determined, was unavailable due to a lack of co-operation, an "inference" was needed to connect the fact relied upon to the conclusion in the determination.<sup>384</sup>

7.302. In support of its case, the United States provides case-specific discussion of the USDOC's facts available determinations in four investigations, namely Print Graphics, Magnesite Bricks, Line Pipe and OCTG.<sup>385</sup> Furthermore, the United States submitted Exhibit USA-94 which, according to the United States, provides the complete discussion from the relevant Issues and Decision Memoranda and/or preliminary determinations for each determination.

7.303. Finally, in terms of legal arguments, the United States takes the view that the facts surrounding an interested party's failure to cooperate form part of the totality of the evidence before the investigating authority, in light of which one possible inference may be more reasonable or logical. The more uncooperative a party is in fact, the more attenuated and extensive the inferences that it may be reasonable to draw. However, whether a certain inference is reasonable, in light of all the circumstances, is a matter that can only be determined on a case-by-case basis.<sup>386</sup>

#### 7.10.5 Main arguments of third parties

7.304. **Canada** agrees with the United States that in a situation of non-cooperation by an interested party, an investigating authority may use an inference that is adverse to the interests of a party, where it is choosing among facts otherwise available. In the absence of facts provided by

<sup>381</sup> United States' second written submission, paras. 143 and 144.

<sup>382</sup> United States' comments on China's response to Panel questions No. 103 and 104, para. 51.

<sup>383</sup> United States' second written submission, para. 145.

<sup>384</sup> United States' second written submission, para. 146.

<sup>385</sup> United States' first written submission, paras. 290 and 291, and 334-337; second written submission, para. 145; response to Panel question No. 77, paras. 134-136; and opening statement to the second meeting of the Panel, para. 65.

<sup>386</sup> United States' response to Panel question No. 80, para. 141.

the respondent, the next set of facts available to an investigating authority may be the facts reasonably available to, and provided by the petitioners.<sup>387</sup>

7.305. **The European Union** observes that as a matter of principle, WTO law permits investigating authorities to put appropriate questions to interested parties and to draw inferences if responses are not forthcoming. In drawing inferences, an authority is not permitted to identify two different but equally possible inferences, and then select the inference most adverse to the interests of a particular party, solely because it is the most adverse. Rather, the authority must draw the inference that best fits the facts that have been evidenced. This may include a consideration of the behaviour of the interested party in question.<sup>388</sup>

7.306. **India** argues that Article 12.7 places a restraint on the investigating Member to only apply those facts that are the most fitting or most appropriate. Furthermore, the provision places a positive obligation on the investigating Member to arrive at this most fitting or most appropriate information after engaging in an evaluative, comparative assessment of all the available evidence. Thirdly, the investigating Member is prohibited from using the facts available standard in a punitive manner so as to draw adverse inferences against the non-cooperating party. In particular, India argues that the United States disregards facts from secondary sources that may lead to better results, and only chooses those secondary facts that lead to the least favourable result. Indeed, according to India, the United States' approach forecloses the possibility of considering facts from secondary sources which may lead to better results.<sup>389</sup>

#### 7.10.6 Evaluation by the Panel

7.307. Under the present claims, China's challenge specifically concerns whether the USDOC based 42 "adverse facts available" determinations on *facts*. As such, the relevant question before the Panel is whether China has established that, in the 42 challenged adverse facts available determinations, the USDOC failed to base its determinations on facts, in contravention of Article 12.7 of the SCM Agreement.

7.308. Article 12.7 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. As stated by the Appellate Body, "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. Thus, the provision 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>390</sup>

7.309. We consider the requirement to base any determination made on the basis of the facts available on *facts* to be explicit in the text of Article 12.7. This has furthermore been confirmed by panels in previous disputes.<sup>391</sup>

7.310. We note that the Appellate Body has explained that under the applicable standard of review, 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>392</sup>

7.311. Applying 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. As such, for the purposes of the Panel's assessment of this claim under Article 12.7, the level of explanation required is that sufficient to assess whether the USDOC based its adverse facts available determinations on facts. However, we see no procedural requirement in the text of Article 12.7 in and of itself for an investigating authority to explicitly cite each fact on the basis of which it makes facts available determinations.

<sup>387</sup> Canada's third-party submission, paras. 30-42.

<sup>388</sup> European Union's third-party submission, paras. 57-65.

<sup>389</sup> India's third-party statement, paras. 16-21.

<sup>390</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.

<sup>391</sup> Panel Reports, *EC – Countervailing Measures on DRAM Chips*, para. 7.61; and *China – GOES*, para. 7.296.

<sup>392</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, paras. 186-188; and *US – Softwood Lumber VI (Article 21.5-Canada)*, para. 93.

Whether 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.

7.312. As mentioned in paragraph 7.289. above, China argues that the USDOC applied one and the same legal standard in the challenged adverse facts available determinations.<sup>393</sup> In support of its case, China essentially points to the conclusions of the challenged adverse facts available determinations, cited by China in Exhibit CHI-2 and supplied in Exhibit CHI-125. China argues that it has provided only some references to the facts of each investigation because those references are all that is necessary to establish that the USDOC applied an incorrect legal standard with respect to its determinations relating to the use of facts available.<sup>394</sup>

7.313. China takes the position that these determinations' inconsistency with Article 12.7 is evident on the face of their conclusions, and in particular from the terminology used in the conclusions. According to China, the incompatibility between the requirements of Article 12.7 and the instances of adverse facts available that China has identified is evident in the rationale – or lack thereof – that the USDOC provided in each instance. Indeed, China submits that determinations that are based on "assumptions" and unfounded "inferences", especially "adverse" inferences, are inconsistent on their face with Article 12.7.<sup>395</sup>

7.314. We do not agree with China's position. Indeed, we consider the evidence put forth by China in support of its claim, relating in great part to the terminology used in the conclusions of the determinations, to be insufficient to establish that each of the 42 challenged adverse facts available determinations lacked a factual foundation.

7.315. We observe, at the outset, that China does *not* challenge the use of "adverse facts available" by the USDOC on an "as such" basis. Instead, China's claim is made on an "as applied" basis, with respect to each of the 42 challenged adverse facts available determinations.

7.316. Furthermore, as is clear from the Panel's review of Exhibit USA-94<sup>396</sup> and the full Issues and Decision Memoranda and Preliminary Determinations provided by China as exhibits, we note that the USDOC's adverse facts available determinations go well beyond the conclusions cited by China in Exhibit CHI-2 and provided in Exhibit CHI-125. The challenged adverse facts available determinations were made in a wide variety of different factual scenarios.

7.317. Crucially, contrary to what China asserts, we do not consider it evident on the face of the evidence provided by China that one and the same legal standard<sup>397</sup> was applied across the 42 challenged adverse facts available determinations. We observe, in particular, that one of the 42 instances challenged by China does not apply adverse facts available.<sup>398</sup>

7.318. More specifically, the terminology used in the conclusions of the determinations, on which China relies heavily, is not as homogenous as China suggests. Firstly, not all conclusions of the adverse facts available determinations challenged by China refer to "assumptions", "adverse inferences" or "similar terminology".<sup>399</sup> In one challenged instance in Lawn Groomers, the USDOC states it is "making the *adverse finding* that the GOC is a predominant supplier of hot-rolled

<sup>393</sup> China's response to Panel question No. 4, para. 19.

<sup>394</sup> China's response to Panel question No. 4, para. 19.

<sup>395</sup> China's second written submission, para. 178.

<sup>396</sup> We note that Exhibit USA-94 does not cover the USDOC's public body determinations; see United States' Second Written Submission, fn 255.

<sup>397</sup> China's response to Panel question No. 7, para. 24.

<sup>398</sup> Drill Pipe, Exhibit CHI-80, p. 10, designated as instance 33 in Exhibit CHI-125:

"With respect to the GOC's failure to provide the requested information about the production and consumption of green tubes in the PRC, we find that the GOC acted to the best of its ability in responding to the Department's information request. Unlike its response with respect to steel rounds, the GOC provided details regarding the efforts it took to obtain information regarding green tubes. Therefore, the Department must rely on "facts available" in making the determination on the PRC green tubes industry. See section 776(a)(1) of the Act. Because the record is void of any information on the production and consumption of green tubes in the PRC, we find that the use of an external benchmark is warranted for calculating the benefit that the DP Master Group received from purchasing green tubes from an SOE during the POI."

<sup>399</sup> China's second written submission, para. 177.

steel".<sup>400</sup> In a further six of the 42 challenged facts available determinations, the USDOC makes no reference to "assumptions", "adverse inferences" or "similar terminology", and instead only refers to the application of adverse facts available.<sup>401</sup>

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>

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 Commerce's repeated assertions that it is applying facts available, the 'facts' are conspicuously absent from its analysis".<sup>407</sup>

7.321. In this respect, we note China's reliance on findings made by the panel in *China – GOES* specifically regarding "adverse inferences". The panel stated that "the use of facts available should be distinguished from the application of adverse inferences".<sup>408</sup> The panel further explained that "[w]hile non-cooperation triggers the use of facts available, non-cooperation does not justify the drawing of adverse inferences. Nor does non-cooperation justify determinations that are devoid of any factual foundation".<sup>409</sup> In making these statements, the panel appears to be responding to an argument by China that "authorities may draw certain inferences – plainly adverse – *from [the] failure to cooperate*".<sup>410</sup> Furthermore, in *China – GOES*, there was in fact evidence that the inferences drawn were contrary to record evidence.<sup>411</sup>

7.322. Thirdly, while we agree with China that "assumptions" and "adverse inferences" have different connotations, we do not consider China to have established that each reference to "adverse inferences" in the challenged determinations in fact equates to an "assumption".<sup>412</sup>

7.323. Since it is not entirely evident that one and the same legal standard<sup>413</sup> was applied across the 42 challenged adverse facts available determinations, China's failure to address the specific facts of each of the challenged investigations is problematic for its claim. Crucially, contrary to what China asserts, it is not evident on the face of the evidence provided by China that the USDOC's application of adverse facts available equates to the lack of a factual foundation in each of the 42 challenged adverse facts available determinations.

7.324. Notwithstanding the above, we observe that the language used in the conclusions of certain adverse facts available determinations potentially raises concerns. In one such determination in the Drill Pipe investigation, for instance, the USDOC states that "[b]ecause *the record is void of any information on the production and consumption of green tubes in the PRC*, we find that the use of an external benchmark is warranted for calculating the benefit that the

<sup>400</sup> Lawn Groomers, Exhibit CHI-31, p. 15, designated as instance 11 in Exhibit CHI-125. (emphasis added)

<sup>401</sup> Wire Strand, Exhibit CHI-52, p. 13, designated as instances 17-19 in Exhibit CHI-125; Drill Pipe, Exhibit CHI-80, p. 10, designated as instance 33 in Exhibit CHI-125; and Solar Panels, Exhibit CHI-105, pp. 17451 and 17445, designated as instances 39 and 42 in Exhibit CHI-125.

<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.

<sup>408</sup> Panel Report, *China – GOES*, para. 7.302.

<sup>409</sup> Panel Report, *China – GOES*, para. 7.302.

<sup>410</sup> Panel Report, *China – GOES*, para. 7.301. (emphasis added)

<sup>411</sup> Panel Report, *China – GOES*, para. 7.303.

<sup>412</sup> See paragraph 7.293. of this Report.

<sup>413</sup> China's response to Panel question No. 7, para. 24.



DP Master Group received from purchasing green tubes from an SOE during the POI".<sup>414</sup> In the challenged determination in Aluminum Extrusions, the USDOC refers to "those programs *for which we lack the necessary information* and for which the GOC failed to cooperate".<sup>415</sup> While we consider such statements to be potentially of concern, China fails to discuss, or even acknowledge, the meaning of such statements.

7.325. In light of all of the above, however, the Panel finds that China has not established that 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.

## **7.11 Whether the USDOC's findings of regional specificity are inconsistent with Articles 2.2 and 2.4 of the SCM Agreement**

### **7.11.1 Introduction**

7.326. The Panel now turns to the claims advanced by China with regard to the USDOC's findings of regional specificity in the following seven investigations: Thermal Paper, Line Pipe, Citric Acid, OCTG, Wire Strand, Seamless Pipe, and Print Graphics.<sup>416</sup>

7.327. In each of these investigations, the USDOC found purchases of granted land-use rights to be regionally specific within the meaning of Article 2.2 of the SCM Agreement. In six of these investigations, namely Thermal Paper, Line Pipe, Citric Acid, OCTG, Wire Strand, and Seamless Pipe, the regional specificity determination was based on a finding that the land at issue was within an industrial park or economic development zone, a "designated area", which in turn was within the jurisdiction of the seller of the land rights.<sup>417</sup> In Print Graphics, the regional specificity determination was based on "facts available".<sup>418</sup>

7.328. China claims that the USDOC's findings of specificity are inconsistent with Articles 2.2 and 2.4 because the USDOC failed to make a proper regional specificity determination on the basis of positive evidence that the alleged subsidy was specific to an enterprise or industry or to a group of enterprises or industries in the above investigations. Furthermore, as a consequence of these inconsistencies with Articles 2.2 and 2.4, China claims that the United States acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

### **7.11.2 Relevant provisions**

7.329. The present claim concerns the first sentence of Article 2.2 of the SCM Agreement, which provides the following:

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific.

7.330. Article 2.4 of the SCM Agreement, in turn, states the following:

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

<sup>414</sup> Drill Pipe, Exhibit CHI-80, p. 10, designated as instance 33 in Exhibit CHI-125. (emphasis added)

<sup>415</sup> Aluminum Extrusions, Exhibit CHI-87, p. 16, designated as instance 34 in Exhibit CHI-125. (emphasis added)

<sup>416</sup> See table in paragraph 7.1. of this Report, as well as Exhibits CHI-1 and CHI-121.

<sup>417</sup> Thermal Paper: Issues and Decision Memorandum, 25 September 2008, Exhibit CHI-5, p. 25; Line Pipe: Issues and Decision Memorandum, 17 November 2008, Exhibit CHI-19, p. 14; Citric Acid: Issues and Decision Memorandum, 6 April 2009, Exhibit CHI-24, pp. 23 and 24; OCTG: Issues and Decision Memorandum, 23 November 2009, Exhibit CHI-45, p. 20; Wire Strand: Issues and Decision Memorandum, 14 May 2010, Exhibit CHI-52, pp. 24 and 25; and Seamless Pipe: Issues and Decision Memorandum, 10 September 2010, Exhibit CHI-66, p. 21.

<sup>418</sup> Print Graphics: Issues and Decision Memorandum, 20 September 2010, Exhibit CHI-73, pp. 24 and 25.



### 7.11.3 Main arguments of China

7.331. With regard to the United States' claim that China has failed to present a *prima facie* case, China submits that it has demonstrated what analysis of regional specificity was used in each of the challenged investigations, and that each such analysis is inconsistent with the SCM Agreement.<sup>419</sup>

7.332. China claims that the USDOC's regional specificity findings with respect to the provision of land-use rights for less than adequate remuneration are inconsistent with Articles 2.2 and 2.4 of the SCM Agreement because the USDOC failed to demonstrate, on the basis of positive evidence, that either the financial contribution or the benefit of the subsidy was "limited to certain enterprises located within a designated geographical region", as required by that provision. More specifically, China claims that, in none of the determinations at issue, did the USDOC identify an explicit limitation on access to the financial contribution or benefit.<sup>420</sup>

7.333. China submits that, in the determinations at issue, the USDOC applied a legal standard whereby a finding of regional specificity was premised solely on two factors, namely (i) a finding that the land in question was within an industrial park or economic development zone, and (ii) a finding that the park or zone was within the seller's (e.g. municipality's or county's) jurisdiction. In other words, China argues that the USDOC's regional specificity determinations amount to a finding that because land constitutes a "geographical region", the provision of land-use rights is regionally specific.<sup>421</sup> Absent from this standard is any finding that either the provision of land-use rights or the alleged benefit was actually limited to the relevant industrial park or economic development zone.<sup>422</sup>

7.334. China further submits that this legal standard is the same one applied by the USDOC in the Laminated Woven Sacks investigation, which the panel in *US – Anti-Dumping and Countervailing Duties (China)* found to be inconsistent with Article 2.2 of the SCM Agreement. In this regard, China moreover states that there are no material differences between the facts in Laminated Woven Sacks and the seven investigations at issue in the current dispute.<sup>423</sup>

### 7.11.4 Main arguments of the United States

7.335. The United States primarily argues that China has failed to make a *prima facie* case with respect to any of the alleged breaches of Article 2.2 of the SCM Agreement. More specifically, the United States submits that China has failed to explain the facts at issue in each investigation, as well as what the USDOC ultimately determined. Furthermore, China has failed to explain how those facts are relevant to each of its claims.<sup>424</sup>

7.336. More specifically, according to the United States, China's legal arguments under this claim consist of assertions that the findings in another dispute, namely *US – Anti-Dumping and Countervailing Duties (China)*, should apply in the present dispute. However, the regional specificity finding in *US – Anti-Dumping and Countervailing Duties (China)* was made on an "as applied" basis and was "driven by the specific facts that were on the record of that investigation". The United States argues that China does not address the facts of the seven investigations at issue in this dispute and does not explain how the legal reasoning in *US – Anti-Dumping and Countervailing Duties (China)* is applicable to the individual regional specificity analyses challenged by China.<sup>425</sup>

7.337. As it considers that China has not met its burden as the complaining party, the United States asserts that it cannot respond substantively to China's claims.<sup>426</sup>

<sup>419</sup> China's second written submission, paras. 143-147.

<sup>420</sup> China's first written submission, paras. 157-164.

<sup>421</sup> China's responses to Panel questions No. 47 and 48, paras. 136-138.

<sup>422</sup> China's response to Panel question No. 46, para. 134.

<sup>423</sup> China's first written submission, paras. 158-162.

<sup>424</sup> United States' response to Panel question No. 52, para. 102.

<sup>425</sup> United States' first written submission, paras. 203-208.

<sup>426</sup> United States' response to Panel question No. 52, para. 103.

7.338. Nonetheless, the United States rejects China's claim that findings of regional specificity in Print Graphics were a result of the application of the same legal standard, despite being based on facts available.<sup>427</sup>

7.339. Furthermore, reacting to certain responses made by China to questions from the Panel, the United States argues that a finding that the provision of land-use rights takes place within an industrial park or economic development zone is material to the analysis of whether the land at issue constitutes a "geographical region". According to the United States, the weight of such a finding depends on the case-specific facts that are available on the record.<sup>428</sup>

#### 7.11.5 Main arguments of third parties

7.340. **The European Union** submits that the issue raised by China was dealt with by the panel, and to a limited extent the Appellate Body, in *US – Anti-Dumping and Countervailing Duties (China)*. The European Union anticipates that the Panel may follow a similar approach in this case.<sup>429</sup>

7.341. **Korea** submits that, since it is critical that an investigating authority demonstrate that either the financial contribution or benefit was "limited to certain enterprises located within a designated geographical region", the terms "limitation" and "designation" are the key concepts in finding regional specificity. Mere reference to a geographical element may not satisfy the "limitation" and "designation" requirements.<sup>430</sup>

7.342. **Saudi Arabia** submits that it would be useful for the Panel to provide guidance on what may constitute a "designated geographical region" and thus regional specificity. In doing so, the Panel should refer to case-law under Article 2.1, as both Articles 2.1 and 2.2 are subject to a limiting principle. In the context of Article 2.2, this limiting principle designates a point at which a subsidy has been provided to a sufficiently broad geographic region, to be determined on a case-by-case analysis, as to not be considered specific.<sup>431</sup>

#### 7.11.6 Evaluation by the Panel

7.343. The question before the Panel is whether China has established that, in the challenged investigations, the USDOC failed to establish that the subsidies in question were *limited* to certain enterprises located within a designated geographical region, as required under Article 2.2 of the SCM Agreement.

7.344. In essence, China argues that the USDOC applied one and the same legal standard<sup>432</sup>, in making its seven challenged regional specificity determinations, whereby a finding of regional specificity was premised solely on two factors, namely (i) a finding that the land in question was within an industrial park or economic development zone, and (ii) a finding that the park or zone was within the seller's (e.g. municipality's or county's) jurisdiction.

7.345. With respect to Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand, and Seamless Pipe, we consider it to be evident on the face of the excerpts cited by China in Exhibit CHI-1 and subsequently provided in Exhibit CHI-121 that the USDOC applied the legal standard opposed by China whereby a finding of regional specificity was premised solely on two factors, namely (i) a finding that the land in question was within an industrial park or economic development zone, and (ii) a finding that the park or zone was within the seller's jurisdiction. Indeed, the USDOC's regional specificity determinations in each of the challenged investigations seem fairly succinct. It appears to us that the excerpts cited in Exhibit CHI-1 and provided in Exhibit CHI-121 essentially capture the USDOC's reasoning and conclusions on regional specificity. For these reasons, we do not consider China's lack of case-specific discussion of the facts of each of the challenged investigations to be problematic to its claim.

<sup>427</sup> United States' second written submission, para. 105.

<sup>428</sup> United States' second written submission, para. 104.

<sup>429</sup> European Union's third-party submission, paras. 66-70.

<sup>430</sup> Korea's third-party statement, paras. 10 and 11.

<sup>431</sup> Saudi Arabia's third-party statement, paras. 12-14.

<sup>432</sup> China's response to Panel question No. 7, para. 24.

7.346. However, with respect to Print Graphics, where the regional specificity determination was based on "facts available", the Panel finds the factual foundation of China's claim to be erroneous. Indeed, China's assertion that the USDOC made a finding of regional specificity in Print Graphics on the basis of the same two factors, namely (i) a finding that the land in question was within an industrial park or economic development zone, and (ii) a finding that the park or zone was within the seller's jurisdiction, is not supported by the evidence provided by China and appears to be factually inaccurate. Keeping in mind that China's challenge of the regional specificity determination in the Print Graphics investigation is made on an "as applied" basis, the Panel does not consider it sufficient for China to argue that there is no indication that the USDOC departed from its "usual legal standard", even though it used a finding of non-cooperation to jump straight to the legal conclusion that the alleged subsidy is specific.<sup>433</sup>

7.347. Article 2.2 of the SCM Agreement requires a subsidy to be limited to certain enterprises located within a designated geographical region in order to be specific. The Appellate Body has clarified that a limitation of access to a subsidy can be effected through a limitation on access to the financial contribution, to the benefit, or to both.<sup>434</sup>

7.348. The relevant issue in the present dispute is whether a limitation of access to certain enterprises located within a designated geographical region can be established by finding that the land in question was within an industrial park or economic development zone, and that the park or zone was within the jurisdiction of the seller of the land in question.

7.349. China argues in this regard that whether or not the land at issue is located within an industrial park or economic development zone is immaterial to a determination of regional specificity unless it has been established that either the provision of land-use rights or the alleged benefit is limited to the relevant industrial park or economic development zone<sup>435</sup>; in other words, unless the provision of land-use rights within the park or zone is distinct from the provision of land-use rights outside the park or zone.

7.350. In what is essentially its only argument relating to the substance of Article 2.2, the United States argues that whether the provision of land-use rights takes place within an industrial park or economic development zone is material to the analysis of whether the land at issue constitutes a "geographical region".<sup>436</sup>

7.351. The Panel finds that, with respect to the Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand and Seamless Pipe investigations, China has established that the USDOC failed to ascertain a limitation on access to either the financial contribution or the benefit when making its determinations of regional specificity. The United States has largely failed to rebut this argument.

7.352. The Panel agrees with China that the fact that the land in question is located within an industrial park or economic development zone, and that that park or zone is within the seller's jurisdiction, is insufficient *by itself* to establish that there is a limitation of access to the subsidy, in the absence of any finding that the provision of land within the park or zone is distinct from the provision of land outside the park or zone. In other words, whether the provision of land-use rights takes place within an industrial park or economic development zone *can* be relevant for the finding of a limitation, but *only if* it is determined that the provision of land within the park or zone is distinct from the provision of land outside the park or zone. Establishing that the conditions for the provision of land within the park or zone were different from and preferential to the conditions outside the park or zone, in terms of special rules or distinctive pricing, for instance, would have established the required limitation.

7.353. A very similar issue was considered by the panel in *US – Anti-Dumping and Countervailing Duties (China)* in connection with the Laminated Woven Sacks investigation. The panel in that dispute found fault in the USDOC's failure to assiduously pursue its inquiry into whether there was evidence that distinguished the provision of land inside the industrial park in question from the provision of land outside the park, or any other evidence that the park constituted a unique land-use regime. In particular, the panel found that an investigating authority should examine evidence

<sup>433</sup> China's response to Panel question No. 51, para. 142.

<sup>434</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 378.

<sup>435</sup> China's response to Panel questions No. 47 and 48, paras. 136-138.

<sup>436</sup> United States' second written submission, para. 104.

of special rules, distinctive pricing, or other elements that distinguished the provision of land inside and outside the industrial park or zone to determine whether a distinct land regime exists.<sup>437</sup> We observe that in five of the seven investigations at issue, the USDOC explicitly relies upon its findings in Laminated Woven Sacks to reach a conclusion regarding the existence of regional specificity.<sup>438</sup>

7.354. In light of the above, the Panel finds that, with respect to six of the seven challenged investigations, namely Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand and Seamless Pipe, China has established that the USDOC acted inconsistently with the United States' obligations under Article 2.2 of the SCM Agreement by making positive determinations 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.

7.355. With respect to the Print Graphics investigation, however, the Panel finds that China has failed to establish that the USDOC acted inconsistently with the United States' obligations 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.

7.356. In light of the fact that China has presented no substantial evidence or arguments in support of its claim under Article 2.4 of the SCM Agreement, the Panel considers its above findings sufficient to resolve the dispute between the parties under this claim.

## **7.12 Whether the USDOC's treatment of certain export restraints in Magnesia Bricks and Seamless Pipe is inconsistent with the SCM Agreement**

### **7.12.1 Introduction**

7.357. The Panel now turns to the claims advanced by China with regard to the USDOC's treatment of certain export restraints in the countervailing duty investigations in Magnesia Bricks and Seamless Pipe.<sup>439</sup>

7.358. The USDOC initiated countervailing duty investigations in Magnesia Bricks and Seamless Pipe on 25 August 2009 and 15 October 2009<sup>440</sup>, respectively, pursuant to applications for the initiation of such investigations filed on 29 July 2009 and 16 September 2009. Among the measures that were the subject of these applications and the ensuing investigations were certain export restraints applied by the Government of China with regard to magnesia and coke, respectively.<sup>441</sup> In its final affirmative countervailing duty determinations in these investigations the USDOC found that these export restraints constitute countervailable subsidies.<sup>442</sup> In making

<sup>437</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 9.159 and 9.162.

<sup>438</sup> Thermal Paper: Issues and Decision Memorandum (Exhibit CHI-5), p. 25: "consistent with LWS from the PRC, we determine that ..."; Citric Acid: Issues and Decision Memorandum (Exhibit CHI-24), pp. 23 and 24: "consistent with LWS from the PRC, we find ..."; OCTG: Issues and Decision Memorandum (Exhibit CHI-45), p. 20: "The Department determined in LWS from the PRC that ..."; Wire Strand: Issues and Decision Memorandum (Exhibit CHI-52), p. 25: "consistent with LWS from the PRC, we determine that ..."; and Seamless Pipe: Issues and Decision Memorandum (Exhibit CHI-66), p. 21: "Consistent with LWS from the PRC ..., we find that ...".

<sup>439</sup> See table in paragraph 7.1. of this Report.

<sup>440</sup> Magnesia Bricks, Initiation of Countervailing Duty Investigation, Federal Register, Vol. 74, No.163, 25 August 2009 (Exhibit CHI-57), pp. 42858-42861; Seamless Pipe, Initiation of Countervailing Duty Investigation, Federal Register, Vol. 74, No.198, 15 October 2009 (Exhibit CHI-64), pp. 52945-52948.

<sup>441</sup> These measures consisted of export quotas and bidding policies for export quotas in respect of magnesia (Magnesia Bricks) and export taxes, export quotas and restrictive export licensing requirements on the export of coke (Seamless Pipe). Magnesia Bricks, Petition for the Imposition of Anti-Dumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act of 1930, as amended, Information Relating to the People's Republic of China – Countervailing Duties, Volume II-A ("Application, Magnesia Bricks", Exhibit CHI-55), pp. 20-23; Seamless Pipe, Petition for the Imposition of Anti-Dumping and Countervailing Duties Pursuant to Sections 701 and 731 of the Tariff Act, As Amended, Vol. III, Information relating to the People's Republic of China – Countervailing Duties ("Application, Seamless Pipe", Exhibit CHI-62), pp. 120-124.

<sup>442</sup> Magnesia Bricks, Final Affirmative Countervailing Duty Determination, Federal Register, Vol. 75, No.147, 2 August 2010 (Exhibit CHI-60), pp. 45472-45474; Seamless Pipe, Final Affirmative Countervailing Duty Determination, Final Affirmative Critical Circumstances Determination, Federal Register, Vol. 75, No.182, 21 September 2010 (Exhibit CHI-67), pp. 57444-57449.

these findings, the USDOC relied on the use of facts otherwise available and drew adverse inferences.

7.359. China claims that: (i) the initiation by the USDOC of these investigations into export restraints is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement; (ii) the findings of the USDOC that these export restraint measures are subsidies are inconsistent with Article 1 of the SCM Agreement; (iii) and, as a consequence of these inconsistencies with Articles 11 and 1, the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.

### 7.12.2 Relevant provisions

7.360. Articles 11.2 and 11.3 of the SCM Agreement provide, relevantly:

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

...

(iii) evidence with regard to the existence, amount and nature of the subsidy in question.

...

11.3 The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation.

7.361. Article 1 of the SCM Agreement further provides, relevantly:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

(a)(1) there is financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

...

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; ...

### 7.12.3 Main arguments of China

7.362. China submits that the initiation by the USDOC of investigations with respect to petitioners' export restraint claims in Magnesia Bricks and Seamless Pipe is inconsistent with Article 11.2 of the SCM Agreement because the applications did not "provide an indication that a subsidy actually exists". China also claims that the initiation of these investigations is inconsistent with Article 11.3 because in the absence of any evidence of a financial contribution, an unbiased and objective

investigating authority would not have "found that the application contained sufficient information to justify initiation of the investigation".<sup>443</sup>

7.363. In support of these claims, China argues that WTO jurisprudence compels the conclusion that export restraints do not constitute a "financial contribution" within the meaning of Article 1.1(a)(1) of the SCM Agreement. China considers that the Panel should first evaluate whether the export restraints concerned in the Magnesia Bricks and Seamless Pipe investigations can, as a matter of law, constitute financial contributions within the meaning of Article 1.1(a)(1)(iv). If the Panel finds this not to be the case, it necessarily follows that the initiation of the two investigations is inconsistent with Article 11.<sup>444</sup>

7.364. China argues that the panel report in *US – Export Restraints* held that an export restraint cannot constitute the government-entrusted or government-directed provision of goods and therefore cannot constitute a "financial contribution" within the meaning of Article 1.1(a)(1). First, the panel concluded that entrustment and direction requires the presence of: "(i) an explicit and affirmative action, be it delegation or command; (ii) addressed to a particular party; and (iii) the object of which action is a particular task or duty".<sup>445</sup> Second, the panel emphasized the need to determine the existence of a financial contribution on the basis of the nature of the action of the government rather than on the basis of its effects. Third, the panel rejected the argument advanced by the United States that excluding export restraints from the scope of the Article 1.1(a)(1) would frustrate the object and purpose of the SCM Agreement. Finally, the panel found confirmation of its interpretation of the term "financial contribution" in the negotiating history of the SCM Agreement.<sup>446</sup> China submits that subsequent WTO jurisprudence has repeatedly endorsed both the reasoning and the holding of the panel in *US – Export Restraints*.<sup>447</sup> The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* endorsed without qualification those aspects of the panel's reasoning in *US – Export Restraints* that were central to its conclusion that export restraints cannot, as a matter of law, constitute government-entrusted or –directed provision of goods.<sup>448</sup>

7.365. China rejects the argument of the United States that Article 1.1(a)(1)(iv) of the SCM Agreement supports an interpretation that export restraints may constitute a financial contribution. First, with reference to the Appellate Body's interpretation of "entrustment" and "direction" in *US – Countervailing Duty Investigation on DRAMS*, China argues that for an export restraint to qualify as a government-entrusted or government-directed provision of a good, it must involve either (i) the government giving responsibility to a private body to provide goods, or (ii) the government exercising its authority over a private body to provide goods. China submits that an export restraint involves neither of these things. An export restraint is merely a governmental regulatory measure that imposes specific limitations and/or conditions on the export of particular items. China considers that the attempt of the United States to explain how an export restraints falls within the ordinary meaning of the terms used in Article 1.1(a)(1)(iv) is wholly unpersuasive. An export restraint does not "invest" private bodies with a "trust" to do anything; it merely imposes conditions on private bodies' export of goods. Moreover, the United States' argument that an export restraint constitutes government direction focuses on the effects or results of a government action, rather than on its nature. This "effects based" approach was rejected by the panel in *US – Export Restraints*. Furthermore, the Appellate Body agreed in *US – Countervailing Duty Investigation on DRAMS* that government entrustment or direction cannot be inadvertent or a mere by-product of governmental regulation.<sup>449</sup>

7.366. Second, China argues that the contextual argument advanced by the United States for its position that export restraints may constitute a financial contribution is little more than a repackaging of an argument advanced by the United States, and rejected by the panel, in *US – Export Restraints*. In China's view, the alleged breadth or narrowness of subparagraphs (i)-(iv) has

<sup>443</sup> China's first written submission, paras. 186-190.

<sup>444</sup> China's response to Panel question No. 70, para. 178; second written submission, paras. 173-174.

<sup>445</sup> Panel Report, *US – Export Restraints*, para. 8.31.

<sup>446</sup> China's first written submission, paras. 169-179.

<sup>447</sup> China refers to the Appellate Body Reports in *US – Softwood Lumber IV* and *US – Countervailing Duty Investigation on DRAMS*, and to the Panel Reports in *US – Large Civil Aircraft* and *China – GOES*. China's first written submission, paras. 180-184.

<sup>448</sup> China's statement at the first meeting of the Panel, paras. 87-89.

<sup>449</sup> China's response to Panel question No. 68, paras. 164-171.

no relevance to the interpretative question of whether an export restraint constitutes the entrustment or direction of a private body to provide goods.<sup>450</sup>

7.367. Third, China argues that the argument of the United States regarding the object and purpose of the SCM Agreement is unpersuasive for the reasons identified by the panel in *US – Export Restraints*.<sup>451</sup>

7.368. China contends that the circumstances relating to China's claims in this case fall squarely within those that led the panel in *US – Export Restraints* to conclude that export restraints cannot, as a matter of law, constitute a financial contribution. In this respect, China argues that: (i) the export restraints in Magnesia Bricks and Seamless Pipe are identical to those considered by the panel in *US – Export Restraints*; (ii) the petitioners alleged that the effect of the restraints was to lower the cost of raw materials to downstream customers, thus providing a benefit to them; and (iii) the sole basis for the petitioners' claims that the export restraints constituted a financial contribution was the assertion that through such measures the Government of China was entrusting or directing domestic suppliers to provide the inputs to downstream producers of the subject merchandise. The USDOC initiated these investigations into export restraints based solely on the petitioners' evidence and assertions concerning the mere existence of the export restraints and their purported effects on the prices at which downstream consumers purchased raw material inputs.<sup>452</sup> China considers that there is no support in the evidence before the Panel for the argument of the United States that there was "contextual evidence" that the export restraints at issue were part of a broader government policy to promote the manufacture and export of downstream products. More importantly, the United States has not explained how such contextual evidence affects the analysis of whether those export restraints entrust or direct private parties to provide goods.<sup>453</sup>

7.369. China notes that, consistent with its position that export restraints cannot be treated as financial contributions, it had informed the USDOC in the investigations in Magnesia Bricks and Seamless Pipe that it would not respond to certain requests for factual information in the USDOC's questionnaires regarding these alleged subsidy programmes. As a consequence, the USDOC resorted to "adverse facts available" in concluding that the export restraints at issue provided a financial contribution that was specific. China argues that these findings of the USDOC are unlawful because they were made pursuant to investigations that were initiated in violation of Article 11 of the SCM Agreement and because they are based on actions that do not constitute financial contributions.<sup>454</sup>

#### 7.12.4 Main arguments of the United States

7.370. The United States submits that USDOC's initiation of investigations into certain export restraint policies imposed by China is consistent with the SCM Agreement. The United States argues that China has not made a *prima facie* case in relation to its export restraint claims. This is because China relies on a single panel decision to invalidate all of the USDOC's determinations, rather than making an adequate legal argument for each of its claims, based on the facts of each investigation.<sup>455</sup>

7.371. The United States argues that the USDOC's decision to initiate investigations into China's export restraints is not inconsistent with Articles 11.2 and 11.3 of the SCM Agreement because the applicants submitted sufficient evidence of the existence of a subsidy to justify the initiation of an investigation.<sup>456</sup> Specifically, the evidence before USDOC indicated that "China was implementing measures that entrusted or directed private entities to change their behaviour in a way that was

<sup>450</sup> China's response to Panel question No. 68, paras. 172-173.

<sup>451</sup> China's response to Panel question No. 68, paras. 174-175.

<sup>452</sup> China's first written submission, paras. 186-187; statement at the first meeting of the Panel, paras. 82-84, response to Panel question No. 65, paras. 155-158; response to Panel question No. 67, paras. 160-163; second written submission, paras. 164-168.

<sup>453</sup> China's first written submission, paras. 186-187; statement at the first meeting of the Panel, paras. 82-84, response to Panel question No. 65, paras. 155-158; response to Panel question No. 67, paras. 160-163; second written submission, paras. 164-172; oral statement at second meeting of the Panel, paras. 49-52; comments on United States' responses to Panel questions Nos. 101 and 102, paras. 39-52.

<sup>454</sup> China's first written submission, paras. 191-193.

<sup>455</sup> United States' first written submission, para. 282; response to Panel question No. 63, para. 115.

<sup>456</sup> United States' first written submission, paras. 284-291.



providing goods to Chinese domestic entities at prices drastically lower than their foreign competitors".<sup>457</sup>

7.372. The United States rejects China's argument that export restraints cannot constitute a financial contribution through entrustment or direction for purposes of the SCM Agreement. The United States submits that Article 1.1(a)(1)(iv) of the SCM Agreement supports an interpretation that export restraints may constitute a "financial contribution" within the meaning of Article 1.1. First, subparagraphs (i) through (iv) are worded broadly to encompass a wide spectrum of potentially actionable government behaviours and contain non-exhaustive lists of examples of activities that fall under a particular type of conduct. An export restraint can be one of the activities that falls under the rubric of a financial contribution from a private body that is entrusted or directed by the government to provide a good in the domestic marketplace.<sup>458</sup> Second, the ordinary definitions of "entrust" and "direct" support the notion that export restraints can constitute a financial contribution such as a government provided good or service through entrustment or direction.<sup>459</sup> Third, the initiation of an investigation into whether export restraints constitute a financial contribution through a government-entrusted or government-directed provision of a good is supported by the fact that entrustment or direction is not necessarily explicit and that an investigating authority may need to rely on circumstantial evidence.<sup>460</sup> Finally, allowing a case-by-case analysis of whether an export restraint constitutes a financial contribution through entrustment or direction is consistent with the object and purpose of the SCM Agreement.<sup>461</sup>

7.373. The United States argues that China's reliance on the panel's decision in *US – Export Restraints* is misplaced in light of subsequent Appellate Body and panel reports that have adopted a broader interpretation of entrustment and direction. In *US – Countervailing Duty investigations on DRAMS* the Appellate Body disagreed with the *US – Export Restraints* panel's finding that "entrust" and "direct" must include some notion of "delegation" or "command", respectively, and the panels in *Japan – DRAMS* and *Korea – Commercial Vessels* rejected the *US – Export Restraints* panel's interpretation that "entrusts" or "directs" must be "an explicit and affirmative action".<sup>462</sup> The United States argues that a further reason why the findings of the *US – Export Restraints* panel are not persuasive for this dispute is the difference in evidence before that panel and the evidence before this Panel. Whereas the *US – Export Restraints* panel considered a hypothetical scenario, in the present case there are actual export restraint measures at issue and contextual and circumstantial evidence exists to inform the analysis of those measures.<sup>463</sup>

7.374. The United States rejects China's assertion that the USDOC initiated the investigations into China's export restraint schemes merely on the basis of evidence concerning the existence and effects of export restraints, and instead contends that when considered in its totality, the evidence in the applications supported the USDOC's initiations. In this regard, the United States argues that the applications contained evidence that the export restraints at issue were applied as part of a policy to promote the export of higher value goods. The United States agrees with the European Union's suggestion in its third-party submission that evidence of the government's intention to support the downstream industry, or the existence of other government measures ensuring a particular result on the market could be relevant in determining the existence of a financial contribution under Article 1.1(a)(1)(iv). Furthermore, the United States argues that evidence provided in the applications of price differences between coke and magnesite sold in China and sold abroad can reasonably be interpreted as tending to prove or indicate the existence of entrustment or direction to suppliers in China to sell domestically to the downstream industry because normally a firm would prefer to sell at the higher price.<sup>464</sup>

7.375. The United States argues that the USDOC's decisions to countervail China's export restraints on coke and magnesia are not WTO-inconsistent where they were based upon the use of

<sup>457</sup> United States' first written submission, para. 293.

<sup>458</sup> United States' first written submission, para. 297; second written submission, para. 131.

<sup>459</sup> United States' first written submission, paras. 298-299.

<sup>460</sup> United States' first written submission, paras. 300-301; response to panel question No. 65, para. 123.

<sup>461</sup> United States' first written submission, para. 301; second written submission, para. 134.

<sup>462</sup> United States' first written submission, paras. 306-309; second written submission, paras. 136-138.

<sup>463</sup> United States' second written submission, para. 139.

<sup>464</sup> United States' responses to Panel questions Nos. 65 and 71; second written submission, paras. 126-129; responses to Panel questions Nos. 101 and 102.



facts available pursuant to Article 12.7 of the SCM Agreement. The use of facts available was required after China declined to provide necessary information based on its erroneous position that, as a legal matter, an export restraint cannot constitute a financial contribution encompassed by Article 1.1(a) of the SCM Agreement.<sup>465</sup>

#### 7.12.5 Main arguments of third parties

7.376. **Australia** does not rule out the possibility that an export restraint may constitute a financial contribution. However, Australia notes that Article 1.1(a)(1)(iv) requires that a private body is entrusted or directed by a government "to carry out one or more of the type of functions illustrated in (i) to (iii)". While the United States has referred briefly to the function listed in Article 1.1(a)(1)(iii), it has not analysed this element.<sup>466</sup>

7.377. **Canada** submits that export restraints cannot be a subsidy because they are not listed as one of the types of government conduct that can constitute a financial contribution under Article 1.1(a)(1) of the SCM Agreement. This was confirmed by the panel in *US – Export Restraints*. Canada argues that the imposition of export restraints is one of the many instances of government regulation of a market where there is no immediate link between the regulatory measure and the actions that private entities may or may not take based thereon.<sup>467</sup> With reference to the Appellate Body's findings in *US – Countervailing Duty Investigations on DRAMS* regarding "entrustment or direction" under Article 1.1(a)(1)(iv), Canada submits that when imposing an export restraint, a government neither gives responsibility to, nor exercises its authority over producers of a good to do anything.<sup>468</sup>

7.378. **The European Union** observes that the Appellate Body and other panels have agreed with the panel in *US – Export Restraints* that it is the nature of government action, rather than its result or effect in the market, that is relevant under Article 1.1(a)(1)(iv) of the SCM Agreement. This implies that the producers of the product subject to export restraints must be "directed" to sell locally (i.e. by effectively eliminating the free choice of private operators in the market). The European Union notes that the extent to which producers subject to export restraints have options other than selling domestically at reduced prices must be examined on a case-by-case basis. There must be a demonstrable link between the government and the conduct of the private body. In this regard, evidence of the government's intention to support the downstream industry, or the existence of other government measures ensuring a particular result in the market (e.g. an export restraint together with a government measure preventing operators subject to export restraints from stocking their products), may be relevant to the existence of a financial contribution under Article 1.1(a)(1)(iv) of the SCM Agreement.<sup>469</sup>

7.379. **Saudi Arabia** submits that an export restraint does not constitute a subsidy because there is no financial contribution by the government, as defined under Article 1.1(a)(1) of the SCM Agreement. Specifically, where a government restricts exportation of a certain good, it does not thereby "entrust or direct" a private producer of those goods to provide them to domestic purchasers. Rather, entrustment and direction requires an affirmative demonstration of the link between the government and the specific conduct at issue.<sup>470</sup> Saudi Arabia further notes that an export restraint cannot compel a producer to sell the specific product domestically because the producer may for instance decide to produce and sell other products.<sup>471</sup>

#### 7.12.6 Evaluation by the Panel

7.380. China advances claims regarding the initiation of investigations into export restraints under both Article 11.2 and Article 11.3 of the SCM Agreement. As explained in paragraphs 7.143. to 7.145. and 7.275. above, and consistent with the approach of the panel in *China – GOES*, the Panel will make findings only under Article 11.3.

<sup>465</sup> United States' first written submission, paras. 279 and 314-321.

<sup>466</sup> Australia's third-party submission, paras. 17-20.

<sup>467</sup> Canada's third-party submission, paras. 56-66.

<sup>468</sup> Canada's response to Panel question No. 5, paras. 7-11.

<sup>469</sup> European Union's third-party submission, paras. 71-78.

<sup>470</sup> Saudi Arabia's third-party submission, paras. 52-63.

<sup>471</sup> Saudi Arabia's response to Panel question No. 1.

7.381. As noted in paragraph 7.146. above, the Panel agrees with the reasoning of the panel in *China – GOES* with regard to the meaning of the concept of "sufficient evidence" as used in Articles 11.2 and 11.3 of the SCM Agreement and the standard of review that applies to a review of a claim under Article 11.3.

7.382. Thus, the question before us is whether an unbiased and objective investigating authority would have found that the information provided in the applications in *Magnesia Bricks and Seamless Pipe* on certain export restraints applied by the Government of China is "adequate evidence tending to prove or indicate" that the Government of China provides a financial contribution within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement by entrusting or directing a private body to provide magnesia and coke to users in China.

7.383. The application for the initiation of a countervailing duty investigation in *Magnesia Bricks* alleges that "the GOC restrains exports of various raw materials, including but not limited to magnesia".<sup>472</sup> In support of this allegation, the application submits the following information:

- i. Minutes of the 2002 Coordination Meeting of Light-Burnt and Dead-Burnt Magnesia Successful Bidders, which indicate that China imposes export quotas for light-burnt and dead-burnt magnesia, and bidding policies for the quotas.<sup>473</sup>
- ii. An Industry Study on Refractories, indicating that prices for magnesia in the United States have risen to unprecedented levels.<sup>474</sup>
- iii. A regression analysis in which the conclusion is reached that China's restraints on the supply of magnesite (and its conspiracy to fix prices) resulted in United States purchasers paying higher prices for magnesite than they would have absent the restraints (where the price in the United States prior to the existence of the restraints and price fixing was used as the benchmark).<sup>475</sup>
- iv. An Industry Study on Refractories, indicating that the purpose of the export restraints was to encourage the export of higher value-added products from China.<sup>476</sup>

7.384. The application in *Magnesia Bricks* contends that:

By restricting exports of magnesia, magnesium and magnesium compounds, and magnesite, the GOC is suppressing prices of magnesia sold to domestic manufacturers of MCB. The lower price of these raw materials available to domestic producers of MCB, yet unavailable to foreign producers, is a substantial benefit bestowed on the manufacturers of MCB in the GOC. As the Department pointed out in the Preamble to its CVD regulations, this type of intervention in the market is countervailable under U.S. law.<sup>477</sup>

and:

By restricting the exports of raw materials, the GOI entrusts or directs domestic magnesia, magnesium and magnesium compound, and magnesite suppliers to sell magnesium and magnesite at suppressed prices to domestic consumers thus providing a good for less than adequate remuneration as described in Sections 771(5)(B)(iii) and 771(5)(D)(iii) of the Act.<sup>478</sup>

7.385. The countervailing duty Investigation Initiation Checklist in *Magnesia Bricks* characterizes the alleged financial contribution in similar terms: "by restraining exports of magnesia the GOC entrusts or directs domestic suppliers to provide magnesia to domestic customers as described in

<sup>472</sup> Application, *Magnesia Bricks*, p. 20, Exhibit CHI-55.

<sup>473</sup> Application, *Magnesia Bricks*, (Exhibit I-29), Exhibit US-53.

<sup>474</sup> Supplement to *Magnesia Bricks* Application, (Exhibit S-4), Exhibit US-54.

<sup>475</sup> Supplement to *Magnesia Bricks* Application, (Exhibit S-5), Exhibit US-55.

<sup>476</sup> Application, *Magnesia Bricks*, (Exhibit I-23 at p. 36), Exhibit US-73.

<sup>477</sup> Application, *Magnesia Bricks*, p. 22, Exhibit CHI-55.

<sup>478</sup> Application, *Magnesia Bricks*, p. 22, Exhibit CHI-55.

Section 771(5A)(D)(i) of the Act". The USDOC found with respect to this allegation that "[p]etitioner has made a proper allegation based on information reasonably available. In particular, petitioner has provided adequate pricing data to support the allegation".<sup>479</sup>

7.386. The application for the initiation of a countervailing duty investigation in Seamless Pipe alleges that pursuant to the GOC's Steel Policy the GOC "imposes several restraints on exports of coke from China, including an export tax, export quota, and export licensing requirements".<sup>480</sup>

7.387. In support of this allegation, the application includes the following information:

- i. "Steel Business Briefing" articles, discussing increases in export taxes on coke, from 15% to 25% in January 2008, and then to 40% on 20 August 2008.<sup>481</sup>
- ii. "Steel Business Briefing" article discussing the existence of export quotas for coke in 2008 and an Announcement from the Chinese Ministry of Commerce detailing the allocation of coke export quotas in 2008.<sup>482</sup>
- iii. The application contends that a 2008 USTR Report to Congress on China's WTO Compliance provides information indicating that China imposed restrictive export licensing requirements on the export of coke. In the report the USTR discusses export quotas and duties relating to coke. The report also lists a number of export restrictions, including export licensing requirements, and a number of raw materials, including coke, to which "some or all" of the listed export restrictions apply. Therefore, although it is possible that export licensing requirements apply to coke, this is not entirely clear from the report at issue.<sup>483</sup> However, the application also refers to a "Steel Business Briefing" article entitled "China cuts the number of authorised coke exporters", which seems to indicate that coke exporters must be licensed.<sup>484</sup>
- iv. The 2008 USTR Report to Congress on China's WTO Compliance, which states that export restraints resulted in a Chinese domestic price for coke that was \$400/MT less than the comparable world market price during 2008.<sup>485</sup>
- v. A paper on China's industrial policy regime, indicating that the government policy is to promote the export of higher-value goods to overseas markets and that strict plans should apply to the export of major resource commodities that are vital to the national interest.<sup>486</sup>

7.388. The application in Seamless Pipe alleges that:

[t]he GOC's export restrictions on coke provide a financial contribution to China's seamless pipe producers by artificially increasing the domestic supply of coke, thereby suppressing coke prices in China.<sup>487</sup>

7.389. The application in Seamless Pipe also notes that "the Department's determinations in lumber and leather establish that when export restrictions suppress domestic prices, a financial contribution exists".<sup>488</sup>

7.390. The countervailing duty Investigation Initiation Checklist in Seamless Pipe notes the applicants' allegation that "the PRC's export restrictions provide a financial contribution to

<sup>479</sup> Countervailing duty investigation Initiation Checklist, pp. 9-10, Exhibit CHI-56.

<sup>480</sup> Application, Seamless Pipe, p. 120, Exhibit CHI-62.

<sup>481</sup> Application, Seamless Pipe, Exhibit III-242, III-244 and III-246, Exhibit US-49.

<sup>482</sup> Application, Seamless Pipe, Exhibit III-249 and III-250, Exhibit US-50.

<sup>483</sup> Application, Seamless Pipe, Exhibit III-165, Exhibit US-47.

<sup>484</sup> Application, Seamless Pipe, p. 121, fn 431, Exhibit CHI-62 (referring to Exhibit III-171, which is not provided as an Exhibit by either party).

<sup>485</sup> Application, Seamless Pipe, Exhibit III-165, Exhibit US-47.

<sup>486</sup> Application, Seamless Pipe, Exhibit III-109, Exhibit US-71.

<sup>487</sup> Application, Seamless Pipe, p. 123, Exhibit CHI-62.

<sup>488</sup> Application, Seamless Pipe, p. 124, Exhibit CHI-63.

seamless pipe producers by artificially increasing the domestic supply of coke, thereby suppressing coke prices in the PRC".<sup>489</sup>

7.391. Based on our review of the financial contribution allegations in the petitions in Magnesia Bricks and Seamless Pipe in relation to the export restraints and the evidence provided in support of those allegations, we find that these allegations are predicated solely on the existence of the export restrictions and their suppressing effect on prices of magnesia and coke sold to domestic producers in China. The applicants argue that the "entrustment" or "direction" by the Government of China arises from the export restraints themselves. As stated in the application in Magnesia Bricks, "[b]y restricting the exports of raw materials, the GOI entrusts or directs domestic ... suppliers to sell magnesium and magnesite at suppressed prices ... thus providing a good for less than adequate remuneration ...". There is nothing in the applications to suggest that the entrustment or direction results from the export restrictions applied in conjunction with some other kind of measure. We also find nothing to indicate that the petitioners' allegations of financial contribution and the USDOC's acceptance of those allegations for purposes of initiating the investigations involves the contextual evidence referred to by the United States in this proceeding indicating that the export restraints are part of broader governmental policies to promote development of higher value goods producing industries.

7.392. Therefore, we consider that the key issue before us in this case is whether it is consistent with Articles 11.2 and 11.3 of the SCM Agreement for an investigating authority to initiate a countervailing duty investigation based on an allegation and evidence that a financial contribution exists by virtue of an export restraint applied by a foreign government and its effects on domestic prices in the exporting country.<sup>490</sup>

7.393. We note that one previous WTO panel has considered whether export restraints amount to a financial contribution within the meaning of Article 1.1. In *US – Export Restraints*, the issue was whether United States legislation mandated a violation of the SCM Agreement because it required the treatment of export restraints as countervailable subsidies. In this context, the panel addressed the issue of whether, under the SCM Agreement, an export restraint can constitute a financial contribution. In the circumstances of the dispute, an export restraint was considered to be "a border measure that takes the form of a government law or regulation which expressly limits the quantity of exports or places explicit conditions on the circumstances under which exports are permitted, or that takes the form of a government-imposed fee or tax on exports of the product calculated to limit the quantity of exports".<sup>491</sup> The panel concluded that an export restraint, as defined in the dispute, could not constitute government-entrusted or government-directed provision of goods under Article 1.1(a)(1)(iv) of the SCM Agreement and therefore could not constitute a financial contribution. The panel rejected the United States' argument that, to the extent an export restraint causes an increased domestic supply of the restrained good, it is the same as if a government had expressly entrusted or directed a private body to provide the good domestically.<sup>492</sup>

7.394. In reaching this conclusion, the panel in *US – Export Restraints* held that the ordinary meanings of the terms "entrust" and "direct" require that the action of the government under Article 1.1(a)(1)(iv) of the SCM Agreement contain a notion of delegation (in the case of entrustment) or command (in the case of direction). The panel concluded that both the act of entrusting and that of directing necessarily embody three elements: (i) an explicit or affirmative action, be it delegation or command; (ii) addressed to a particular party; (iii) to perform a particular task or duty.<sup>493</sup> On this basis, the panel in *US – Export Restraints* noted that government entrustment or direction is very different from the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market.<sup>494</sup> The panel emphasised the existence of a financial contribution must be proven by reference to the nature of the action by the government, rather than by reference to the reaction of affected entities. Further, accepting the United States' position would seem to imply that any government

<sup>489</sup> Countervailing Duty Initiation Checklist, p. 28, Exhibit CHI-63.

<sup>490</sup> We note that China does not contest the evidence provided in the application regarding the existence of the export restraint measures and their effects on prices of magnesia and coke in China.

<sup>491</sup> Panel Report, *US – Export Restraints*, para. 8.17.

<sup>492</sup> Panel Report, *US – Export Restraints*, para. 8.75.

<sup>493</sup> Panel Report, *US – Export Restraints*, para. 8.29.

<sup>494</sup> Panel Report, *US – Export Restraints*, para. 8.31.

measure that creates market conditions favourable to or resulting in the increased supply of a product in the domestic market would constitute a government-entrusted or directed provision of goods and hence a financial contribution.<sup>495</sup> Finally, the panel in *US – Export Restraints* found that the object and purpose of the SCM Agreement, and its negotiating history, supported its conclusion.<sup>496</sup>

7.395. The panel in *Korea – Commercial Vessels* agreed with the interpretation given to the terms "entrust" and "direct" in *US – Export Restraints* as delegation and command, respectively. Furthermore, the panel agreed that such delegation or command must take the form of an affirmative act. In this regard, the panel stated that "[t]he object of a Member's responsibility should be its acts, as such, rather than the reactions to or consequences of those acts, as alleged reactions and consequences may simply be the result of happenstance or chance".<sup>497</sup> However, the panel disagreed with some of the specific conditions imposed in *US – Export Restraints*.<sup>498</sup>

7.396. In *US – Countervailing Duty Investigation on DRAMS* the Appellate Body considered that the definition of the terms "entrustment" and "direction" that the panel in *US – Export Restraints* had adopted was too narrow. In particular, the Appellate Body held that the term "entrusts" connotes the action of giving responsibility to someone for a task or an object, while the term "directs" conveys the sense of authority exercised over someone".<sup>499</sup> Further to the above, the Appellate Body stated that "[i]n most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction"; in any case, "[t]he determination of entrustment or direction will

<sup>495</sup> Panel Report, *US – Export Restraints*, para. 8.35.

<sup>496</sup> Panel Report, *US – Export Restraints*, paras. 8.60-8.72.

<sup>497</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.370.

<sup>498</sup> Panel Report, *Korea – Commercial Vessels*, paras. 7.370 and 7.372:

"[W]e see nothing in the text of Article 1.1(a)(1)(iv) that would require the act of delegation or command to be "explicit". Although the particular facts of the *US – Export Restraints* case may have caused that panel to employ the term "explicit", no such qualification is included in the terms of Article 1.1(a)(1)(iv). In our view, the affirmative act of delegation or command could be explicit or implicit, formal or informal."

"[A]lthough the plain meaning of entrustment and direction requires that something must be delegated to someone, or that someone must be commanded to do something, the plain meaning of those terms does not require that such someone or something must necessarily be specified in great detail. That being said, the evidence of entrustment or direction must in all cases be probative and compelling. Thus, whatever the nature or form of the affirmative acts of delegation or command at issue, the evidence must demonstrate that each entity allegedly providing, or participating in, a financial contribution was entrusted or directed by the government to do so."

<sup>499</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 110 and 111:

"The term 'entrusts' connotes the action of giving responsibility to someone for a task or an object. In the context of paragraph (iv) of Article 1.1(a)(1), the government gives responsibility to a private body 'to carry out' one of the types of functions listed in paragraphs (i) through (iii) of Article 1.1(a)(1). As the United States acknowledges, 'delegation' (the word used by the Panel) may be a means by which a government gives responsibility to a private body to carry out one of the functions listed in paragraphs (i) through (iii). Delegation is usually achieved by formal means, but delegation also could be informal. Moreover, there may be other means, be they formal or informal, that governments could employ for the same purpose. Therefore, an interpretation of the term 'entrusts' that is limited to acts of 'delegation' is too narrow."

As for the term 'directs', we note that some of the definitions—such as 'give authoritative instructions to' and "order (a person) to do"—suggest that the person or entity that 'directs' has authority over the person or entity that is directed. In contrast, some of the other definitions—such as 'inform or guide'—do not necessarily convey this sense of authority. In our view, that the private body under paragraph (iv) is directed 'to carry out' a function underscores the notion of authority that is included in some of the definitions of the term 'direct'. This understanding of the term 'directs' is reinforced by the Spanish and French versions of the *SCM Agreement*, which use the verbs 'ordenar' and 'ordonner', respectively. Both of these verbs unambiguously convey a sense of authority exercised over someone. In the context of paragraph (iv), this authority is exercised by a government over a private body. A 'command' (the word used by the Panel) is certainly one way in which a government can exercise authority over a private body in the sense foreseen by Article 1.1(a)(1)(iv), but governments are likely to have other means at their disposal to exercise authority over a private body. Some of these means may be more subtle than a "command" or may not involve the same degree of compulsion. Thus, an interpretation of the term 'directs' that is limited to acts of 'command' is also too narrow."

hinge on the particular facts of the case".<sup>500</sup> Nonetheless, the Appellate Body made a clear distinction between entrustment and direction on the one hand and encouragement on the other. Indeed, it held that entrustment and direction "imply a more active role than mere acts of encouragement".<sup>501</sup> In this regard, the Appellate Body pointed out that, by way of contrast, Article 11.3 of the Agreement on Safeguards specifically uses the term "encourage" by stating that "Members shall not encourage or support the adoption or maintenance by public and private enterprises of non-governmental measures equivalent to those referred to in paragraph 1". Article 11.1 refers to voluntary export restraints, orderly marketing arrangements, or any other similar measures on the export or import side.<sup>502</sup>

7.397. In discussing entrustment and direction, the Appellate Body noted its agreement with the panel in *US – Export Restraints* that Article 1.1(a)(1)(iv) of the SCM Agreement does not cover the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the reaction of actors in the market. The Appellate Body held that entrustment and direction "cannot be inadvertent or a mere by-product of government regulation".<sup>503</sup> It noted that this was consistent with its statement in *US – Softwood Lumber IV* that "not all government measures capable of conferring benefits would necessarily fall within Article 1.1(a)". To find otherwise would render paragraphs (i) through (iv) of Article 1.1(a) unnecessary "because all government measures conferring benefits, *per se*, would be subsidies".<sup>504</sup> In this regard the Appellate Body seems to implicitly agree with the observations made by the panel in *US – Export Restraints* on the negotiating history of the concept of "financial contribution".<sup>505</sup> Furthermore, the Appellate Body recalled its statement in *Canada – Dairy (Article 21.5 – New Zealand and US)*, when interpreting a provision of the Agreement on Agriculture, that "[g]overnments are constantly engaged in regulation of different kinds in pursuit of a variety of objectives".<sup>506</sup>

7.398. Finally, we note that the panel in *China – GOES* rejected the argument of China that certain voluntary restraint agreements could constitute a financial contribution under Article 1.1(a)(1)(iv). The panel stated that it "does not consider that when a government policy, such as a border measure, has the indirect effect of increasing prices in a market, the government has entrusted or directed private consumers to provide direct transfers of funds to the industry selling the good in the affected market".<sup>507</sup> The panel held that "when the action of a private party is a mere side-effect resulting from a government measure, this does not come within the meaning of entrustment or direction under Article 1.1(a)(1)(iv)".<sup>508</sup>

7.399. As discussed above, the Appellate Body has interpreted "entrustment" and "direction" in Article 1.1(a)(1)(iv) to mean that the government gives responsibility to, or exercises its authority over, a private body to carry out one of the type of functions in (i) through (iii) of Article 1.1(a)(1). The type of function at issue here is the provision of goods within the meaning of Article 1.1(a)(1)(iii). The question therefore is whether an unbiased and objective investigating authority would have found that the applications in *Magnesia Bricks and Seamless Pipe* provide "adequate evidence, tending to prove or indicating"<sup>509</sup> that the Government of China gives responsibility to, or exercises its authority over, Chinese producers of magnesium and coke to carry out the function of providing magnesium and coke to users of these products in China.

7.400. With regard to whether the evidence in the applications in *Magnesia Bricks and Seamless Pipe* is "adequate evidence, tending to prove or indicating" that the Government of China provides a financial contribution by *entrusting* a private body to carry out the function of providing goods to domestic producers, we fail to see how the evidence presented in the applications of the existence

<sup>500</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.

<sup>501</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

<sup>502</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, fn 182.

<sup>503</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

<sup>504</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114, citing Appellate Body Report, *US – Softwood Lumber IV*, fn 35.

<sup>505</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, fn 185, citing Panel Report, *US – Export Restraints*, para. 8.65.

<sup>506</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, fn 184, citing Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 115.

<sup>507</sup> Panel Report, *China – GOES*, para. 7.90.

<sup>508</sup> Panel Report, *China – GOES*, para. 7.91.

<sup>509</sup> See paragraph 7.151. of this Report.

of export restraints and their price effects indicates that the Government of China "gives responsibility" to domestic producers to carry out the function of providing goods to domestic users in China. As discussed above, in both cases the measure allegedly giving rise to the financial contribution is the export restraint itself. In our view, when the Government of China limits the ability of domestic producers of magnesia and coke to export those products, it does not "give responsibility" to domestic producers to do anything. We find unpersuasive the argument of the United States that through the export restraint measures at issue in this dispute, private entities are "invested with a trust" that they will sell the good to the domestic market.<sup>510</sup> In this regard, we agree with the panel in *Korea – Commercial Vessels* when it stated that "[t]he object of a Member's responsibility should be its acts, as such, rather than the reactions to or consequences of those acts, as alleged reactions and consequences may simply be the result of happenstance or chance".<sup>511</sup>

7.401. With regard to whether evidence in the applications in Magnesia Bricks and Seamless Pipe is "adequate evidence, tending to prove or indicating" that the Government of China provides a financial contribution by *directing* a private body to carry out the function of providing goods to domestic producers, we note that the Appellate Body has held that "direction" means that the government exercises its authority over a private body in order to effectuate a financial contribution.<sup>512</sup> We do not contest that, as argued by the United States, the evidence submitted by the applicants in Magnesia Bricks and Seamless Pipe demonstrates that the Government of China "exercises its authority over the private entities through formal measures that induce them to change their economic behaviour under penalty of law".<sup>513</sup> However, the Panel is not persuaded that such evidence demonstrates that this exercise of authority occurs in respect of the function of providing goods to domestic users in China of magnesia and coke. Rather, this exercise of authority relates only to the conditions of export of magnesia and coke. The fact that the Government of China exercises its authority and thus engages in an act of direction with respect to the conditions under which magnesium and coke may be exported from China, is not sufficient to establish that the Government of China exercises authority over a private body to carry out the function of providing magnesium and coke to domestic users in China. In order for a government action to constitute "direction" within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement, it is not sufficient that the action involves an exercise of authority over a private body. The exercise of authority must have as its object one of "types of function" within the meaning of Articles 1.1(a)(1)(iv). To interpret "direction" to occur where an exercise of authority in respect of a restriction leads producers to increase their supply to the domestic market essentially means that direction is found to exist on the basis of the economic effects of the export restraint.

7.402. We note, in this respect, the argument of the United States that there is "direction" in this case because, as a result of China's policies, the private entities are "caused to move in a specified direction"; if they are to continue the sales of their products, they must sell the good to the domestic market.<sup>514</sup> We consider that this argument is inconsistent with the idea that "the existence of each of the four types of financial contribution is determined by reference to the action of the government concerned rather than by reference to the effects of the measure on a market".<sup>515</sup> We also consider that this argument is in contradiction with the statements of the Appellate Body that entrustment and direction "imply a more active role than mere acts of encouragement", that entrustment or direction "cannot be inadvertent or a mere by-product of governmental regulation" and that "in most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction".<sup>516</sup> Furthermore, we find pertinent the Appellate Body's observation that "there must be a demonstrable link between the government and the conduct of the private party".<sup>517</sup> In the latter regard, we agree with Canada's comment that "[t]here is no such demonstrable link between an export restraint and the reactions of market operators, because the government does not task market operators to sell in the domestic market".<sup>518</sup>

<sup>510</sup> United States' first written submission, para. 299.

<sup>511</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.370.

<sup>512</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113.

<sup>513</sup> United States' first written submission, para. 299.

<sup>514</sup> United States' first written submission, para. 299.

<sup>515</sup> Panel Report, *China – GOES*, para. 7.85; *US – Export Restraints*, para. 8.34.

<sup>516</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras. 114 and 116.

<sup>517</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113.

<sup>518</sup> Canada's response to Panel question No. 5 to third parties, para. 11.

7.403. We have carefully considered the arguments of the United States in support of its view that the initiation of the investigations into export restraints in the investigations in Magnesia Bricks and Seamless Pipe was justified in light of certain contextual and circumstantial evidence. As discussed above, we consider that the evidence in the applications is insufficient on conceptual grounds insofar as it pertains only to the export restraints themselves and their price suppressing effects and does not pertain to any action of the Government of China other than those export restraints. The arguments of the United States regarding the significance of the contextual and circumstantial evidence do not address this problem. For example, assuming that the evidence demonstrates that the Government of China pursues the objective of supporting production and export of processed products, the fact remains that the alleged financial contribution is the export restraint itself.

7.404. Thus, in sum, in the absence of any information in the applications in Magnesia Bricks and Seamless Pipe on how the Government of China "gives responsibility to" or "exercises authority over" a private body in China specifically to carry out the function of providing magnesia and coke goods to domestic users, (as distinguished from information about the application of the export restraints themselves) we consider that an unbiased, objective investigating authority would not have found that the evidence in the applications in Magnesia Bricks and Seamless Pipe is "adequate evidence tending to prove or indicating" the existence of a financial contribution in the form of a government-entrusted or government-directed provision of goods. Our finding is based on the particular facts of the two cases before us. We do not exclude the possibility that initiation of a countervailing duty investigation with respect to measures involving export restraints might be justified under other factual scenarios.

7.405. We are not persuaded by the United States' argument that finding the export restraints in Seamless Pipe and Magnesia Bricks to not constitute a financial contribution under Article 1.1 would enable the circumvention of the SCM Agreement, contrary to its object and purpose.<sup>519</sup> The Appellate Body has noted that "[p]aragraph (iv), in particular, is intended to ensure that governments do not evade their obligations under the *SCM Agreement* by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they taken by the government itself. In other words, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision".<sup>520</sup> However, it is also well-established that not all government actions capable of conferring benefits were intended to be captured and disciplined as subsidies under the SCM Agreement. The concept of "financial contribution" was incorporated into the definition of a subsidy specifically to limit the scope of the agreement's disciplines.

7.406. In conclusion, the Panel finds that the USDOC's initiation of two countervailing duty investigations in respect of certain export restraints is inconsistent with Article 11.3 of the SCM Agreement.

7.407. The Panel notes that China also requests that the Panel find that the USDOC acted inconsistently with the SCM Agreement when the USDOC determined in these investigations that the export restraints at issue constituted financial contributions. In light of the very limited argumentation provided by China in support of this claim, the Panel considers that such a finding is not warranted.

### **7.13 China's claims under Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994**

7.408. China requests that in each instance where the Panel makes a finding of inconsistency, the Panel also find that, as a consequence, the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.<sup>521</sup>

<sup>519</sup> See in particular United States' second written submission, para. 134.

<sup>520</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113.

<sup>521</sup> China's first written submission, para. 194.



7.409. Article 10 of the SCM Agreement provides:

*Application of Article VI of GATT 1994*

Members shall take all necessary steps to ensure that the imposition of a countervailing duty<sup>36</sup> on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture. (footnotes omitted in part)

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<sup>36</sup> The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994.

7.410. Article VI:3 of the GATT 1994 provides that:

No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

7.411. Article 32.1 of the SCM Agreement provides:

No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.<sup>56</sup>

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<sup>56</sup> This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

7.412. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body observed:

We recall 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 definition in Article 1 are present, the right to impose a countervailing duty has not been established and this, as a consequence, means that the countervailing duties imposed are inconsistent with Articles 10 and 32.1 of the *SCM Agreement*. Accordingly, we are of the view that China was not required to advance further arguments to establish a consequential violation of Articles 10 and 32.1.<sup>522</sup> (footnote omitted)

and

We have already explained that when a Member's measures do not satisfy the express conditions for the imposition of a countervailing duty set out in relevant provisions of the *SCM Agreement*, this means that the right to impose a countervailing duty has not been established and, as a consequence, such measures are also inconsistent with Articles 10 and 32.1 of the *SCM Agreement*. Accordingly, we are of the view that

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<sup>522</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 358.

China was not required to advance further arguments to establish a consequential violation of Articles 10 and 32.1.<sup>523</sup>

7.413. We have found in this dispute that the United States acted inconsistently with Articles 1, 2 and 11 of the SCM Agreement. As a consequence, we also find that the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement. We do not consider it necessary to make a finding under Article VI:3 of the GATT 1994.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:<sup>524</sup>

- i. 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<sup>525</sup>, the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement when the USDOC found that SOEs were public bodies.
- ii. The USDOC's policy, articulated in Kitchen Shelving, to presume that a majority government-owned entity is a public body, is inconsistent, as such, with Article 1.1(a)(1) of the SCM Agreement.
- iii. With respect to four countervailing duty investigations, namely Steel Cylinders, Solar Panels, Wind Towers, and Steel Sinks<sup>526</sup>, China has failed to establish that the USDOC acted inconsistently with the United States' obligations under Article 11 of the SCM Agreement by initiating the challenged investigations without sufficient evidence of a financial contribution.
- iv. 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<sup>527</sup>, China has 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.
- v. 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<sup>528</sup>, China has established that the USDOC acted inconsistently with the obligations of the United States under the last sentence of Article 2.1(c) of the SCM Agreement by failing to take account of the two factors listed therein. However, China has 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".
- vi. With respect to 14 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, Solar Panels, Wind Towers and Steel Sinks<sup>529</sup>, China has not established that the USDOC acted inconsistently with the United States' obligations under Article 11 of the

<sup>523</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 610.

<sup>524</sup> The Panel's conclusions incorporate those set forth in its preliminary ruling, as contained in document WT/DS437/4, circulated on 21 February 2013 and included as Annex A-8 to this Report, and which forms an integral part of this Report.

<sup>525</sup> See table in paragraph 7.1. of this Report.

<sup>526</sup> See table in paragraph 7.1. of this Report.

<sup>527</sup> See table in paragraph 7.1. of this Report.

<sup>528</sup> See table in paragraph 7.1. of this Report.

<sup>529</sup> See table in paragraph 7.1. of this Report.

SCM Agreement by initiating the challenged investigations without sufficient evidence of specificity.

- vii. With respect to 13 countervailing duty investigations, 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>530</sup>, China has 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.
- viii. With respect to six countervailing duty investigations, namely Line Pipe, Thermal Paper, Citric Acid, OCTG, Wire Strand and Seamless Pipe<sup>531</sup>, China has established that the USDOC acted inconsistently with the United States' obligations under Article 2.2 of the SCM Agreement by making positive determinations 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. With respect to the Print Graphics investigation<sup>532</sup>, however, China has failed to establish that the USDOC acted inconsistently with the United States' obligations 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.
- ix. With respect to two countervailing duty investigations, namely Magnesia Bricks and Seamless Pipe<sup>533</sup>, China has established that 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.
- x. As a consequence of the inconsistencies of the USDOC's actions with Articles 1, 2 and 11 of the SCM Agreement, the United States has acted inconsistently with Articles 10 and 32.1 of the SCM Agreement.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with certain provisions of the SCM Agreement, they have nullified or impaired benefits accruing to China under that agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measures into conformity with its obligations under the SCM Agreement.

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<sup>530</sup> See table in paragraph 7.1. of this Report. See Exhibit CHI-2; China's first written submission, para. 146 and fn 136.

<sup>531</sup> See table in paragraph 7.1. of this Report.

<sup>532</sup> See table in paragraph 7.1. of this Report.

<sup>533</sup> See table in paragraph 7.1. of this Report.