Summary of key findings

• Terms of reference: In its other appeal, the United States claimed that the Panel erred in concluding that China's panel request, as it relates to China's facts available claims under Article12.7 of the SCM Agreement, was consistent with Article6.2 of the DSU. The Appellate Body considered it to be clear from China's panel request that China was challenging all instances where the USDOC used “facts available” across the 22 measures at issue listed in China's panel request. The Appellate Body also disagreed with the United States that Article12.7 of the SCM Agreement contained multiple, distinct obligations. The Appellate Body therefore rejected the United States' appeal and upheld the Panel's conclusion, finding that China's panel request, as it relates to China's facts available claims under Article12.7, provided a “brief summary of the legal basis of the complaint sufficient to present the problem clearly”, as required under Article6.2.

• Determination of benefit: With respect to the issues raised by China on appeal, the Appellate Body reversed the Panel's finding upholding the USDOC's rejection of private prices as potential benchmarks in the investigations at issue on the grounds that such prices were distorted. The Appellate Body also reversed the Panel's finding that China failed to establish that the USDOC acted inconsistently with the obligations of the United States under Articles14(d) and1.1(b) of the SCM Agreement in respect of the benefit analysis in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe investigations, and found, instead, that the USDOC acted inconsistently with the United States' obligations under Articles14(d) and 1.1(b) of the SCM Agreement by rejecting prices in China as benchmarks in its benefit analyses in these four countervailing duty investigations. While the Appellate Body agreed with China that there is a single definition of the term “government” for purposes of the SCM Agreement, it observed that it does not follow that, in determining the appropriate benefit benchmark under Article14(d), investigating authorities are required to limit their analysis to an examination of the role played in the market by government-related entities that have been properly found to be government in the narrow sense or public bodies. However, because the issue of whether a price may be relied upon for benchmarking purposes under Article14(d) is not a function of its source, but rather, whether it is a market-determined price reflective of prevailing market conditions in the country of provision, the Appellate Body stated that the selection of a benchmark for the purposes of Article14(d) cannot, at the outset, exclude consideration of in-country prices from any particular source, including government-related prices other than the financial contribution at issue. The Appellate Body explained that a finding of inconsistency with Article14(d) depends on whether the investigating authority conducted the necessary market analysis in order to evaluate whether the proposed benchmark prices are market determined such that they can be used to assess whether the relevant goods have been provided for less than adequate remuneration.

• Sequence of the specificity analysis under the subparagraphs of Article2.1: The Appellate Body upheld the Panel's finding that China did not establish that the USDOC acted inconsistently with the obligations of the United States under Article2.1 of the SCM Agreement by analysing specificity exclusively under Article2.1(c). Whereas the specificity analysis under each subparagraph of Article2.1 should “ordinarily” proceed in a certain sequence, the Appellate Body did not exclude the possibility that, in certain circumstances, an investigating authority could properly conduct the specificity analysis without examining the subparagraphs of Article2.1 in a strict sequential order. The Appellate Body found that the application of the principles laid down in subparagraphs(a) and (b) does not necessarily constitute acondition that must be met in order to consider the factors listed under subparagraph(c). Recalling that “there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article2.1 may be unnecessary”, the Appellate Body disagreed with China that the first sentence of Article2.1(c) conditions the assessment of defacto specificity on the basis of the factors listed under that subparagraph upon an application of the principles set out in
The Appellate Body further noted that China had not pointed to any evidence that was before the USDOC of the kind that would ordinarily be examined in determining de jure specificity under subparagraphs(a) and (b).

• Existence of an unwritten subsidy programme: The Appellate Body reversed the Panel's finding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 by failing to identify a “subsidy programme”. The Appellate Body noted that the reference to “use of a subsidy programme” in Article 2.1 suggests that it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme. The Appellate Body also found that the existence of an unwritten subsidy scheme or plan may be evidenced by, inter alia, asystematic series of actions pursuant to which financial contributions have been provided to certain enterprises. The Appellate Body found, however, that the Panel did not apply Article 2.1(c), as properly interpreted, because it failed to provide any case-specific discussion or references to the particular USDOC determinations of specificity challenged by China on an “as applied” basis. As a consequence, the Appellate Body reversed the Panel's finding and was unable to complete the analysis.

• Identification of the jurisdiction of the granting authority: The Appellate Body also reversed the Panel's finding that China had not established that the USDOC acted inconsistently with the obligations of the United States under Article 2.1 by failing to identify a “granting authority” in each of the specificity determinations at issue. The Appellate Body considered that the identification of the “jurisdiction of the granting authority” involves a holistic analysis and does not focus on the identity of the “granting authority” independently from its “jurisdiction”. The Appellate Body therefore disagreed with China that identification of the jurisdiction must necessarily be preceded by identification of the granting authority. Noting that the notion of jurisdiction is linked to, and does not exist in isolation from, the granting authority, the Appellate Body observed that a proper identification of “the jurisdiction of the granting authority” will require an analysis of both the “granting authority” and its “jurisdiction” in a conjunctive manner. However, the Appellate Body found that the Panel had conducted an extremely cursory analysis in rejecting China's claims on the basis that it appeared “that the relevant jurisdiction was at the very least implicitly understood to be China in the challenged investigations”. Consequently, the Appellate Body reversed the Panel's finding and was unable to complete the analysis.

• Use of facts available: The Appellate Body found that the Panel acted inconsistently with its obligations under Article 11 of the DSU in assessing China's claims under Article 12.7 of the SCM Agreement. The Appellate Body reversed the Panel's finding that China had 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 on the record in 42 “adverse” facts available determinations across the 13 investigations challenged by China. The Appellate Body recalled that Article 12.7 requires that an investigating authority must use those facts available that reasonably replace the missing “necessary” information that an interested party failed to provide. The Appellate Body also reiterated that ascertaining reasonable replacements for the missing information involves a process of reasoning and evaluation on the part of the investigating authority, although the evaluation that is required, and the form it may take, depend on the particular circumstances of a given case, including the nature, quality and amount of the evidence on the record and the particular determinations to be made. With respect to China's claim of error under Article 11 of the DSU, the Appellate Body found that the Panel failed to address each of the 42 instances of the USDOC's use of “adverse” facts available challenged by China. Moreover, the Appellate Body found that, in respect of the instances of the use of “adverse” facts available by the USDOC that the Panel did discuss in its Report, the Panel focused on the language and formulations used by the USDOC in its determinations, without undertaking a critical and in-depth examination of the USDOC's statements to assess whether the USDOC complied with Article 12.7 of the SCM Agreement. For these reasons, the Appellate Body reversed the Panel's finding that China failed to establish that the USDOC acted inconsistently.
with the United States’ obligations under Article 12.7. Having reversed the Panel’s conclusion, the Appellate Body did not complete the legal analysis, noting that completion in the present case would be of limited value in resolving the dispute and would also raise due process concerns.