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UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

FINAL REPORT OF THE PANEL

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Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, p. 2031
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Canada – Renewable Energy / Canada – Feed-in Tariff Program	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R and Add.1 / WT/DS426/R and Add.1, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R, DSR 2013:I, p. 237
Chile – Price Band System	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002, DSR 2002:VIII, p. 3045 (Corr.1, DSR 2006:XII, p. 5473)
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EC – Chicken Cuts	Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts*, WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, p. 9157
EC – Hormones	Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
EC – IT Products	Panel Reports, *European Communities and its member States – Tariff Treatment of Certain Information Technology Products*, WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
EC and certain member States – Large Civil Aircraft	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
EC and certain member States – Large Civil Aircraft	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R, DSR 2011:II, p. 685
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US – 1916 Act	Appellate Body Report, *United States – Anti-Dumping Act of 1916*, WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Anti-Dumping and Countervailing Duties (China)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
US – Anti-Dumping Methodologies (China)	Appellate Body Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R and Add.1, adopted 22 May 2017
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
US – Carbon Steel	Panel Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/R and Corr.1, adopted 19 December 2002, as modified by Appellate Body Report WT/DS213/AB/R, DSR 2002:IX, p. 3833
US – Carbon Steel (India)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Continued Zeroing	Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
US – Countervailing Duty Investigation on DRAMS	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Measures (China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015
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US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber IV	Panel Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R and Corr.1, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R, DSR 2004:II, p. 641
US – Softwood Lumber IV (Article 21.5 – Canada)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
US – Tyres (China)	Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
US – Upland Cotton (Article 21.5 – Brazil)	Appellate Body Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, and Corr.1, DSR 1997:I, p. 323
US – Zeroing (EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
US – Zeroing (EC) (Article 21.5 – EC)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
US – Zeroing (Japan) (Article 21.5 – Japan)	Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

EXHIBITS REFERRED TO IN THIS REPORT

Exhibit	Short Title	Description
CHN-1	Public Bodies Memorandum/CCP Memorandum	USDOC Memoranda dated 18 May 2012 for Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China
CHN-2	GOC Public Bodies Questionnaire response	GOC Questionnaire response (including exhibits GOC-A-02, GOK-A-03, and GOK-A-06) (15 May 2015)
CHN-4	Preliminary Determination on Public Bodies and Input Specificity	USDOC Memorandum dated 25 February 2016 on Preliminary Determination of Public Bodies and Input Specificity, and the attached Memorandum on Input Producers and Input Purchases During the Investigations
CHN-5	Final Section 129 Determination	USDOC Final Determination for Lawn Groomers, Kitchen Shelving, Wire Strand, Print Graphics, Aluminum Extrusions, Steel Cylinders, Seamless Pipe, Pressure Pipe, Line Pipe, OCTG, and Solar Panels (31 March 2016, 25 April 2016, 19 May 2016)
CHN-19	Ordover Report	Ordover Report, Exhibit GOC-D-25 to GOC Questionnaire response (6 July 2015)
CHN-20	Benchmark Memorandum	Memorandum dated 7 March on USDOC Benefit (Market Distortion)
CHN-21	Final Benchmark Determination	USDOC, Final Determination for Pressure Pipe, Line Pipe, OCTG, Wire Strand, and Solar Panels (19 May 2016)
CHN-23	Input Specificity Memorandum	USDOC Memorandum dated 31 December 2015, "Input Specificity: Preliminary Analysis of the Diversification of Economic Activities and Length of Time"
CHN-24	Preliminary Determination on Land Specificity	USDOC Memoranda dated 24 February 2016, "Preliminary Determination Regarding Land Specificity", and dated 31 March 2016, "No Comment Final Determinations"
CHN-27	Verification Report on Thermal Paper	USDOC Memorandum dated 22 February 2016, "Information Regarding a Land Transaction at Issue in the CVD Investigation of Thermal Paper from the PRC", attaching USDOC GG/ZG Verification Report in the Countervailing Duty Investigation of Lightweight Thermal Paper from the People's Republic of China (20 August 2008)
CHN-28	USDOC Final Determination in the original Solar Panels investigation	USDOC Issues and Decision Memorandum dated 9 October 2012 on Final Determination in the Countervailing Duty Investigation of Certain Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules from the People's Republic of China
CHN-30	USDOC First Administrative Review in Kitchen Shelving	USDOC Issues and Decision Memorandum dated 4 April 2012 on Final Results of the Countervailing Duty Administrative Review (2009) of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China
CHN-31	USDOC Second Administrative Review in Kitchen Shelving	USDOC Issues and Decision Memorandum dated 5 April 2013 on Final Results of the Countervailing Duty Administrative Review (2010) of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China
CHN-32	USDOC Third Administrative Review in Kitchen Shelving: Preliminary Determination	USDOC Issues and Decision Memorandum dated 30 September 2013 on Preliminary Results of the Countervailing Duty Administrative Review (2011) of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China
CHN-33	USDOC Third Administrative Review in Kitchen Shelving: Final Determination	USDOC Issues and Decision Memorandum dated 10 March 2014 on Final Results of the Countervailing Duty Administrative Review (2011) of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China
CHN-34	USDOC First Administrative Review in OCTG	USDOC Issues and Decision Memorandum dated 7 August 2013 on Final Results of the Countervailing Duty Administrative Review (2011) of Certain Oil Country Tubular Goods from the People's Republic of China
CHN-35	USDOC Second Administrative Review in OCTG: Preliminary Determination	USDOC Issues and Decision Memorandum dated 18 February 2014 on Preliminary Results of the Countervailing Duty Administrative Review (2012) of Certain Oil Country Tubular Goods from the People's Republic of China

Exhibit	Short Title	Description
CHN-36	USDOC Second Administrative Review in OCTG: Final Determination	USDOC Issues and Decision Memorandum dated 25 August 2014 on Final Results of the Countervailing Duty Administrative Review (2012) of Certain Oil Country Tubular Goods from the People's Republic of China
CHN-37	USDOC First Administrative Review in Magnesia Bricks	USDOC Issues and Decision Memorandum dated 9 April 2013 on Final Results of the Countervailing Duty Administrative Review (2010) of Certain Magnesia Carbon Bricks from the People's Republic of China
CHN-38	USDOC Second Administrative Review in Magnesia Bricks	USDOC Issues and Decision Memorandum dated 7 October 2014 on Final Results of the Countervailing Duty Administrative Review (2012) of Certain Magnesia Carbon Bricks from the People's Republic of China
CHN-39	USDOC First Administrative Review in Aluminum Extrusions	USDOC Issues and Decision Memorandum dated 26 December 2013 on Final Results of the Countervailing Duty Administrative Review (2010-2011) of Aluminum Extrusions from the People's Republic of China
CHN-40	USDOC Second Administrative Review in Aluminum Extrusions	USDOC Issues and Decision Memorandum dated 22 December 2014 on Final Results of the Countervailing Duty Administrative Review (2012) of Aluminum Extrusions from the People's Republic of China
CHN-41	USDOC Third Administrative Review in Aluminum Extrusions	USDOC Issues and Decision Memorandum dated 7 December 2015 on Final Results of the Countervailing Duty Administrative Review (2013) of Aluminum Extrusions from the People's Republic of China
CHN-42	USDOC First Administrative Review in Solar Panels	USDOC Issues and Decision Memorandum dated 7 July 2015 on Final Results of the Countervailing Duty Administrative Review (2012) of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China
CHN-43	USDOC Second Administrative Review in Solar Panels	USDOC Issues and Decision Memorandum dated 12 July 2016 on Final Results of the Countervailing Duty Administrative Review (2013) of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China
CHN-44	USDOC Sunset Review in Thermal Paper	USDOC Issues and Decision Memorandum dated 14 February 2014 on Final Results of the Expedited Sunset Review of the Countervailing Duty Order on Lightweight Thermal Paper from the People's Republic of China
CHN-45	USDOC Sunset Review in Pressure Pipe	USDOC Issues and Decision Memorandum dated 2 June 2014 on Final Results of the Expedited Sunset Review of the Countervailing Duty Order on Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China
CHN-46	USDOC Sunset Review in Line Pipe	USDOC Issues and Decision Memorandum dated 11 March 2014 on Final Results of the Expedited Sunset Review of the Countervailing Duty Order on Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China
CHN-47	USDOC Sunset Review in Kitchen Shelving	USDOC Issues and Decision Memorandum dated 1 December 2014 on Final Results of the Countervailing Duty Sunset Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China
CHN-48	USDOC Sunset Review in OCTG	USDOC Issues and Decision Memorandum dated 31 March 2015 on Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Oil Country Tubular Goods from the People's Republic of China
CHN-49	USDOC Sunset Review in Wire Strand	USDOC Issues and Decision Memorandum dated 31 August 2015 on the Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Prestressed Concrete Steel Wire Strand from the People's Republic of China
CHN-50	USDOC Sunset Review in Magnesia Bricks	USDOC Issues and Decision Memorandum dated 1 December 2015 on Final Results of the Expedited First Sunset Review of the Countervailing Duty Order on Certain Magnesia Carbon Bricks from the People's Republic of China
CHN-51	USDOC Sunset Review in Seamless Pipe	USDOC Issues and Decision Memorandum dated 28 January 2016 on Final Results of the Expedited First Sunset Review of the Countervailing Duty Order of Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China
CHN-52	USDOC Sunset Review in Print Graphics	USDOC Issues and Decision Memorandum dated 4 March 2016 on Final Results of the Expedited Sunset Review of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China

Exhibit	Short Title	Description
CHN-53	USDOC Sunset Review in Aluminum Extrusions	USDOC Issues and Decision Memorandum dated 1 August 2016 on Final Results of the First Expedited Sunset Review of the Countervailing Duty Order on Aluminum Extrusions from the People's Republic of China
CHN-54	Public Body Reference Chart	Public Body Reference Chart
USA-83	USDOC Public Bodies Questionnaire	USDOC Questionnaire Concerning "Public Bodies" (1 May 2015)
USA-84	Supporting Benchmark Memorandum	USDOC Supporting Memorandum dated 7 March 2016 to Preliminary Benefit (Market Distortion)
USA-121	USDOC Benchmark Questionnaire	USDOC Questionnaire Concerning the Benchmark Used to Measure Whether Certain Inputs Were Sold for Less than Adequate Remuneration (5 June 2015)
USA-122	GOC Benchmark Questionnaire response	GOC Response to the USDOC Benchmark Questionnaire (6 July 2015)
USA-126	Inputs Memorandum	Memorandum dated 25 February 2016 from E. B. Greynolds to the File on Input Producers and Input Purchases During the Investigations
USA-129	USDOC Administrative Review in Citric Acid	USDOC Issues and Decision Memorandum dated 22 December 2014 for the Final Results of the Countervailing Duty Administrative Review: Citric Acid and Certain Citrate Salts (2012)
USA-130	Public Bodies Record Memorandum	Memorandum dated 2 November 2015 on Placement of Factual Information on the Record with Respect to Public Bodies

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
CCP	Chinese Communist Party
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
GOC	Government of the People's Republic of China
IMF	International Monetary fund
OCTG	Oil country tubular goods
OECD	Organization for Economic Cooperation and Development
PRC	People's Republic of China
RPT	Reasonable period of time
SASAC	State-owned Asset Supervision and Administration Commission
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SIE	State-invested enterprise
SOE	State-owned enterprise
USDOC	United States Department of Commerce
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

1 INTRODUCTION

1.1 Complaint by China

1.1. This compliance dispute concerns China's claims against measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceeding in *US – Countervailing Measures (China)*.

1.2. On 13 May 2016, China requested consultations with the United States pursuant to Articles 4 and 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Article XXII of the General Agreement on Tariffs and Trade 1994 (GATT 1994), Article 30 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and paragraph 1 of the agreement between China and the United States dated 15 April 2016[1] concerning "Agreed Procedures under Articles 21 and 22 of the DSU".[2]

1.3. Consultations were held on 27 May 2016, but failed to resolve the dispute.

1.2 Panel establishment and composition

1.4. On 8 July 2016, China requested the establishment of a panel pursuant to Articles 6 and 21.5 of the DSU, Article XXIII of the GATT 1994, and Article 30 of the SCM Agreement with standard terms of reference.[3] At its meeting on 21 July 2016, the DSB referred this dispute, if possible, to the original panel in accordance with Article 21.5 of the DSU.

1.5. 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/DS437/21 and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[4]

1.6. It was not possible to resort to the original panel to hear this compliance dispute due to the unavailability of the Chair and one panelist. On 26 September 2016, China requested the Director-General to determine the composition of the panel, pursuant to Article 8.7 of the DSU. On 5 October 2016, the Director-General accordingly composed the Panel as follows:

Chairperson:	Mr Hugo Perezcano
Members:	Mr Luis Catibayan
	Mr Thinus Jacobsz

1.7. Australia, Canada, the European Union, Japan, the Republic of Korea, India, the Russian Federation, and Viet Nam notified their interest in participating in the Panel proceedings as third parties.

1.3 Panel proceedings

1.8. After consultation with the parties, the Panel adopted its Working Procedures[5] and timetable on 13 December 2016. The Panel subsequently revised its timetable on 15 May 2017 and 6 September 2017.

1.9. The Panel held its substantive meeting with the parties on 10 and 11 May 2017. A session with the third parties took place on 11 May 2017. The Panel issued its Interim Report to the parties on 3 November 2017. The Panel issued its Final Report to the parties on 15 December 2017.

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[1] Understanding between China and the United States regarding procedures under Articles 21 and 22 of the DSU, WT/DS437/19.
[2] Request for consultations by China, WT/DS437/20 (China's consultations request).
[3] Request for the establishment of a panel by China, WT/DS437/21 (China's panel request).
[4] Constitution note of the Panel, WT/DS437/22.
[5] See the Panel's Working Procedures in Annex A-1.

2 THE MEASURES AT ISSUE

2.1. The measures at issue in this compliance dispute are:

a. preliminary and final determinations made by the United States Department of Commerce (USDOC) under Section 129 of the Uruguay Round Agreements Act (Section 129) to comply with recommendations and rulings of the DSB made in the original proceeding in *US – Countervailing Measures (China)*[6];

b. the "Public Bodies Memorandum"[7] both as a measure of general and prospective application and a measure relating to the Section 129 proceedings at issue;

c. the original final countervailing duty determination of the USDOC in the Solar Panels investigation;

d. subsequent periodic and sunset reviews of the countervailing duty orders in the proceedings at issue as identified in annex 3 and annex 4, respectively, of China's request for the establishment of a compliance panel, as well as periodic and sunset review determinations subsequent to those set forth in annex 3 and annex 4; and

e. all instructions and notices by which the United States imposes, assesses, and/or collects cash deposits and countervailing duties in the proceedings at issue, as well as the ongoing conduct of the United States of imposing, assessing, and/or collecting cash deposits and countervailing duties in the proceedings at issue.

3 PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

3.1. China requests that the Panel find that:

a. In connection with the USDOC's public body determinations:

i. The USDOC's public body determinations in certain Section 129 proceedings[8] and periodic review determinations identified in annex 3 of China's panel request are inconsistent with Article 1.1(a)(1) of the SCM Agreement because they conclude that enterprises with full or majority government ownership, enterprises with less than majority government ownership, and wholly private enterprises are public bodies based on an erroneous interpretation of this term and/or in the absence of any evidence that these enterprises possess, exercise, or are vested with governmental authority pertaining to the provision of the relevant input(s).

ii. The Public Bodies Memorandum is inconsistent, as such, with Article 1.1(a)(1) of the SCM Agreement because it concludes that enterprises with full or majority government ownership, enterprises with less than majority government ownership, and wholly private enterprises are public bodies based on an erroneous interpretation of this term and/or in the absence of any evidence that these enterprises possess, exercise, or are vested with governmental authority pertaining to the provision of the relevant input(s).

b. In connection with the USDOC's benchmark determinations:

i. The USDOC's benchmark determinations in certain Section 129 proceedings[9] are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement because they erroneously conclude that domestic Chinese prices for the inputs at issue are not "market" prices within the meaning of those provisions and are not suitable benchmarks for evaluating the adequacy of remuneration.

[6] China's panel request, annex 2.
[7] Public Bodies Memorandum, (Exhibit CHN-1).
[8] Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels.
[9] OCTG, Solar Panels, Pressure Pipe, and Line Pipe.

ii. The USDOC's periodic review determinations identified in annex 3 of China's panel request are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement because they erroneously conclude that domestic Chinese prices for the inputs at issue are "distorted" and therefore unsuitable as benchmarks for evaluating the adequacy of remuneration.

iii. The USDOC's benchmark determinations in certain Section 129 proceedings[10] are inconsistent with Article 32.1 of the SCM Agreement because they constitute specific action against subsidization not in accordance with the provisions of the SCM Agreement insofar as the USDOC relied on subsidies allegedly provided to upstream input producers as a factor in its finding of "distortion".

c. In connection with the USDOC's input specificity determinations:

i. The USDOC's input specificity determinations in certain Section 129 proceedings[11] are inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC did not properly identify the existence or duration of a "subsidy programme", as this term is properly interpreted, and therefore had no basis to evaluate "the length of time during which the subsidy programme has been in operation".

ii. The USDOC's periodic review determinations identified in annex 3 of China's panel request are inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC failed to take into account the factors set forth in the last sentence of that provision.

d. The USDOC's land specificity determination in the Thermal Paper Section 129 proceeding is inconsistent with Article 2.2 of the SCM Agreement because the USDOC did not clearly substantiate on the basis of positive evidence that the alleged land-use subsidy is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority.

e. In connection with the USDOC's original final determination in the Solar Panels investigation:

i. The USDOC's final determination is inconsistent with Article 1.1(a)(1) of the SCM Agreement because, as the DSB found in respect of the preliminary determination in the same investigation, the USDOC incorrectly applied a majority government ownership test for the purpose of determining whether certain entities were public bodies within the meaning of that provision.

ii. The USDOC's final determination is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement because, as the DSB found in respect of the preliminary determination in the same investigation, the USDOC's analysis and explanation for rejecting in-country prices in its benchmark analysis was inconsistent with those provisions.

iii. The USDOC's final determination is inconsistent with Article 2.1(c) of the SCM Agreement, because as the DSB found in respect of the preliminary determination in the same investigation, the USDOC failed to take into account the two factors set forth in the last sentence of that provision in its specificity determination.

f. In connection with the periodic review determinations identified in annex 3 pertaining to the Magnesia Bricks countervailing duty order, the USDOC has continued to act inconsistently with Article 11.3 of the SCM Agreement by including within the so-called "adverse facts available rate" the alleged export restraint subsidy the investigation of which the DSB found had been improperly initiated in the original dispute. The USDOC

[10] OCTG, Solar Panels, Pressure Pipe, and Line Pipe.

[11] Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels.

also acted inconsistently with Article 12.7 of the SCM Agreement by including within the so-called "adverse facts available rate" the alleged export restraint subsidy that the USDOC revoked in the Section 129 proceedings.

g. In respect of the sunset review determinations identified in annex 4 of China's panel request, the USDOC's determinations are inconsistent with Article 21.3 of the SCM Agreement because they rely on prior determinations of subsidization contained in: (i) the original investigation determinations that were found inconsistent with relevant provisions of the SCM Agreement for the reasons set forth in the recommendations and rulings of the DSB, the deficiencies of which have not been remedied by the Section 129 determinations; and/or (ii) the subsequent periodic review determinations that China considers to be inconsistent with relevant provisions of the SCM Agreement.

h. In respect of any periodic review determinations in the proceedings at issue subsequent to those set forth in annex 3 of China's panel request that involve the same errors that China identified regarding the USDOC's public body, benefit, and specificity determinations, these subsequent periodic review determinations are inconsistent with the same provisions of the SCM Agreement as are identified with respect to the periodic review determinations set forth in annex 3 of China's panel request. Likewise, in respect of any sunset review determinations in the proceedings at issue subsequent to those set forth in annex 4 of China's panel request that involve the same errors that China identified regarding the sunset review determinations set forth in annex 4 of China's panel request, these subsequent sunset review determinations are likewise inconsistent with Article 21.3 of the SCM Agreement.

i. In respect of the measures by which the United States continues to impose, assess, and/or collect cash deposits and countervailing duties in the proceedings at issue, as well as the ongoing conduct of imposing, assessing, and/or collecting these cash deposits and countervailing duties, these measure are inconsistent with:

   i. Articles 1.1(a)(1), 1.1(b), 2.1(c), 11.3, and 14(d) of the SCM Agreement in relation to specific Section 129 determinations and periodic review determinations, because the cash deposits and countervailing duties that the United States continues to impose, assess, and/or collect in the proceedings at issue are inconsistent with those provisions for the reasons detailed in relation to those determinations;

   ii. Article 19.1 of the SCM Agreement, because the United States is imposing countervailing duties not in accordance with the provisions of Article 19 of the SCM Agreement;

   iii. Article 19.3 of the SCM Agreement, because the United States is not levying countervailing duties in the appropriate amounts in each case; and

   iv. Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, because the United States is levying countervailing duties in excess of the amount of the subsidy found to exist.

3.2. The United States requests that the Panel find that the United States has complied with the recommendations of the DSB and that the US measures taken to comply are not inconsistent with the SCM Agreement, and reject China's claims to the contrary.

4 ARGUMENTS OF THE PARTIES

4.1. The arguments of the parties are reflected in their executive summaries, provided to the Panel in accordance with paragraph 17 of the Working Procedures adopted by the Panel (see Annexes B-1 and C-1).

5 ARGUMENTS OF THE THIRD PARTIES

5.1. The arguments of Australia, Canada, the European Union, and Japan are reflected in their executive summaries, provided in accordance with paragraph 18 of the Working Procedures adopted by the Panel (see Annexes D-1, D-2, D-3, and D-4).

6 INTERIM REVIEW

6.1. On 3 November 2017, the Panel issued its Interim Report to the parties. On 17 November 2017, China and the United States submitted their written requests for review. On 1 December 2017, both parties submitted comments on the other party's requests for review. Neither party requested an interim review meeting.

6.2. The parties' requests made at the interim review stage as well as the Panel's discussion and disposition of those requests are set out in Annex A-2.

7 FINDINGS

7.1 General principles regarding treaty interpretation, standard of review, and burden of proof

7.1.1 Treaty interpretation

7.1. 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.[12]

7.1.2 Standard of review

7.2. 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.

7.3. The Appellate Body has stated that the "objective assessment" to be made by a panel reviewing an investigating authority's determination is to be informed by an examination of whether the authority provided a reasoned and adequate explanation as to: (a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported the overall determination.[13]

7.4. The Appellate Body has also stated that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgment for that of the investigating authority. A panel must limit its examination to the evidence that was before the authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute.[14] 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".[15]

7.1.3 Burden of proof

7.5. 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

[12] Appellate Body Reports, *US – Gasoline*, p. 17; *Japan – Alcoholic Beverages II*, p. 10, section D.
[13] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.
[14] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 187.
[15] Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Lamb*, paras. 106-107.

and prove its claim.[16] Therefore, China bears the burden of demonstrating that the challenged measures are inconsistent with the SCM Agreement. 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.[17] It is generally for each party asserting a fact to provide proof thereof.[18]

7.2 China's claim under Article 1.1(a)(1) of the SCM Agreement in relation to the USDOC's public body determinations

7.6. China claims that the United States failed to comply with the recommendations and rulings of the DSB under Article 1.1(a)(1) of the SCM Agreement in 11 Section 129 proceedings. In particular, China claims that the USDOC applied an improper legal standard in its public body determinations, and that the USDOC ignored evidence that contradicted the finding that entities providing the inputs at issue are public bodies. China also presents an "as such" claim against the "Public Bodies Memorandum", which was relied upon by the USDOC in the public body determinations made in these Section 129 proceedings.

7.2.1 China's "as applied" claim under Article 1.1(a)(1) of the SCM Agreement

7.2.1.1 Main arguments of the parties

7.7. China argues that the USDOC based its public body determinations on an incorrect finding that the entities providing the inputs at issue possessed, exercised, or were vested with governmental authority. In this connection, China criticizes what it considers to be the USDOC's failure to demonstrate a relationship between the identified "government function", namely to uphold and maintain the socialist market economy in China, and the sale of the relevant inputs in the investigations at issue.[19] China argues that a government function must bear some relationship to the financial contribution in question, as "it cannot be the case that an entity that is allegedly controlled by the government in relation to any 'government function' is a public body, even if the conduct that is the subject of the financial contribution inquiry is unrelated to that 'government function'".[20]

7.8. Although China "agrees with the USDOC that identifying a relevant 'government function' is essential to the public body inquiry", China considers that the function identified by the USDOC in the Public Bodies Memorandum is "fundamentally flawed"[21], as it is "irrelevant" in terms of its connection to the sale of inputs by the entities at issue.[22] Accordingly, China contends that "the USDOC's failure to engage in a case-by-case analysis and to identify a *relevant* 'government function' in relation to each of the countervailing duty investigations at issue in the Section 129 proceedings renders the USDOC's public body determinations in all twelve investigations inconsistent with Article 1.1(a)(1) of the SCM Agreement."[23]

7.9. In addition, China contends that the USDOC ignored substantial evidence that was inconsistent with a finding that the input producers in certain investigations were performing a "government function" when they sold inputs to downstream purchasers, and failed to provide any explanation for not considering such evidence.[24]

7.10. The United States disagrees with the legal standard advanced by China, considering it overly narrow and contrary to prior findings in relation to public body determinations.[25] The United States further argues that the USDOC carried out the type of analysis required by the Appellate Body by examining the functions or conduct ordinarily classified as governmental in the

[16] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 16.
[17] Appellate Body Report, *EC – Hormones*, para. 104.
[18] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14.
[19] China's first written submission, paras. 100-107.
[20] China's first written submission, para. 100. (emphasis original)
[21] China's first written submission, para. 70.
[22] China's response to Panel question No. 2(b); see also first written submission, para. 100 (arguing that the identified government function "is so broad and abstract that it bears no logical connection to the public body inquiry").
[23] China's first written submission, para. 107. (emphasis original)
[24] China's first written submission, paras. 108-156.
[25] United States' first written submission, paras. 19-56.

legal order of China, and the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority.[26] The United States also submits that the USDOC's public body determinations were reasoned and adequate and included extensive analysis and explanation; they were based on the totality of the evidence on the record; and they were supported by ample record evidence of the core features of the entities in question and their relationship with the government.[27] The United States argues that, on that basis, the USDOC found sufficient evidence to support a determination that the government of China meaningfully controls and uses the entities at issue to effectuate the governmental function of maintaining and upholding the socialist market economy.[28]

7.2.1.2 Main arguments of the third parties

7.11. Australia submits that China's proposed interpretation does not accord with the text of Article 1.1(a)(1), which distinguishes between governments and public bodies on the one hand, and private entities on the other. In Australia's view, for the former category "[t]here is no separate, context-specific requirement to determine whether such conduct involves the discharge of a governmental function in each instance", as "the 'governmental' character of those entities is sufficient".[29] Australia further considers that China's interpretation does not accord with prior Appellate Body findings and would impose an impractical evidentiary burden by requiring an investigating authority to obtain evidence that each transaction or series of transactions results from a particular performance of a governmental function.[30]

7.12. Canada disagrees with China's interpretation emphasizing the *conduct* of an entity and notes the Appellate Body's statements regarding the relevance of the "core features" of an entity and its relationship with the government.[31] Canada considers that "[t]he designation of public body is not dependent on each action the entity takes in relation to its function" but rather "on the basis of evidence related to government policies, the applicable legal order, the prevailing economic environment in the country, and other evidence related to the core features of the entity and its relationship with the government".[32]

7.13. The European Union submits that whether an entity qualifies as a "public body" is "closely connected to the more general issue of *attribution*"[33] and that "questions such as whether the entity performs a governmental function and whether that function is linked to the financial contribution at issue are, ultimately, only instruments to get at the broader question of attribution".[34] The European Union submits that "a financial contribution can be attributed to a public body … if certain indicators relevant to the entity in general show that its conduct can be attributed to the WTO Member", such as "the entity's legal status, the rules that are applicable to it, its governing structures, its tasks and objectives, the nature and intensity of State control over its activities etc."[35] For the European Union, it would not suffice if "an entity is in some loose way connected to the State or subject to State regulation".[36]

7.14. Japan disagrees with China's "mistaken view" that the Appellate Body exclusively focused on the conduct of an entity as "the Appellate Body focused just as much, if not more, on the characteristics or features or nature of the relevant entity".[37] Japan understands the reference of the Appellate Body to "the conduct of an entity" to refer "to the entity's general or overall conduct, that is, to the activities generally conducted by that entity" rather than "the specific conduct that is alleged to be a financial contribution".[38] Japan submits that a relevant aspect of whether an entity

[26] United States' first written submission, paras. 63-102.
[27] United States' first written submission, para. 116.
[28] United States' second written submission, para. 46.
[29] Australia's third-party statement, para. 4.
[30] Australia's third-party statement, paras. 6-7.
[31] Canada's third-party submission, paras. 13-15.
[32] Canada's third-party submission, para. 16.
[33] European Union's third-party submission, para. 6. (emphasis original)
[34] European Union's third-party submission, para. 14.
[35] European Union's third-party submission, para. 19.
[36] European Union's third-party submission, para. 21.
[37] Japan's third-party submission, para. 4.
[38] Japan's third-party submission, para. 7.

is a public body is "whether [a state-owned or state-invested enterprise] is structured in a manner that allows it to act not solely in accordance with commercial considerations".[39]

7.2.1.3 Evaluation by the Panel

7.2.1.3.1 Introduction

7.15. In this compliance dispute, we are called upon to evaluate China's claim that the USDOC's determination that providers of certain inputs were public bodies is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.16. We recall that a public body within the meaning of Article 1.1(a)(1) "must be an entity that possesses, exercises or is vested with governmental authority".[40] In this regard, a key question is whether "an entity is vested with authority to exercise governmental functions".[41] In evaluating whether a particular entity is a public body within the meaning of Article 1.1(a)(1), the Appellate Body has explained the following general requirement:

> Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.[42]

7.17. The absence of an express statutory delegation of governmental authority does not preclude a determination that a particular entity is a public body, as there are different ways in which a government could be understood to vest an entity with "governmental authority", and therefore different types of evidence may be relevant in this regard.[43] Although "the mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body"[44], state ownership may be evidence, in conjunction with other elements, indicating the delegation of governmental authority.[45] In addition, the fact that an entity is, in fact, exercising governmental functions may be evidence that it possesses or has been vested with governmental authority, particularly where the evidence points to a sustained and systematic practice.[46]

7.18. The Appellate Body has also found that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions".[47] Further, "where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority".[48]

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[39] Japan's third-party submission, para. 16.
[40] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[41] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[42] Appellate Body Report, *US – Carbon Steel (India)*, 4.29. Similarly, the Appellate Body has explained that "[p]anels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense." (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317). In this connection, the Appellate Body distinguished the concept of "'government' in the narrow sense" (e.g. formal agencies or departments of government) from the concept of "'government' in the collective sense", which also includes "public bodies".
[43] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.
[44] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.
[45] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310.
[46] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[47] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10.
[48] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

7.19. In determining whether or not a specific entity is a public body, it may be relevant to consider whether the functions or conduct of the entity "are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member".[49] Accordingly, "just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[50]

7.20. Finally, investigating authorities and panels must "avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant" to a public body determination.[51] Further, investigating authorities are "under an obligation to actively seek out information relevant to the analysis of whether a financial contribution had been made", including information relevant to the potential characterization of entities as public bodies, so as to be able to provide a reasoned and adequate explanation of their conclusions.[52]

7.21. We begin by addressing the parties' arguments in relation to the legal standard applicable to the public body inquiry under Article 1.1(a)(1), before turning to arguments concerning the consistency of the USDOC's public body determinations with Article 1.1(a)(1) based on the factual evidence on the record of its investigations.

7.2.1.3.2 Whether the USDOC applied an erroneous legal standard in its public body determinations

7.22. In claiming that the USDOC's public body determinations are inconsistent with Article 1.1(a)(1), China argues that the proper question for an investigating authority is whether an entity is performing a government function when it engages in relevant conduct under Article 1.1(a)(1) of the SCM Agreement, that is, when it provides a financial contribution.[53] China thus argues that the USDOC was required to determine "whether the enterprises *in the twelve relevant countervailing duty investigations* were performing a 'government function' when they sold *the specific inputs at issue* to particular downstream purchasers".[54]

7.23. The United States contends that, "[r]ather than focusing on the conduct undertaken by the entity, the Appellate Body has emphasized that the focus of the public body analysis is on the 'evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense'".[55] According to the United States, the focus of the public body inquiry is properly on such "core features" of the entity concerned, "rather than on the conduct in which the entity is engaged".[56]

7.24. The parties' disagreement raises the question of whether Article 1.1(a)(1) requires an investigating authority to establish that an entity is fulfilling a government function when providing a particular financial contribution in order to determine that the entity possesses, exercises, or is vested with governmental authority. We first address two related aspects of this question as it pertains to the USDOC's public body determinations in this case, namely: (a) identification of the relevant government function; and (b) the relationship between the relevant government function and the entity's specific conduct giving rise to a financial contribution.

7.25. With regard to the identification of a government function as part of a public body inquiry, and in light of the approach taken by the USDOC, we first note that the USDOC identified

[49] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297. Further, "the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies". (See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.9).

[50] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[51] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.

[52] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 344. In the Appellate Body's view, "merely incorporating by reference findings from one determination into another determination will normally not suffice as a reasoned and adequate explanation". However, "where there is close temporal and substantive overlap between … investigations, such cross reference may, exceptionally, suffice". (Ibid. para. 354).

[53] China's first written submission, paras. 79-95.

[54] China's first written submission, para. 77. (emphasis original)

[55] United States' first written submission, para. 31 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317).

[56] United States' first written submission, para. 31.

"maintaining and upholding the socialist market economy" as the relevant government function in China for the purposes of its public body analysis.[57]

7.26. We do not consider that we are called upon to judge this government function in the abstract, or in isolation from the rest of the USDOC's determinations. Although China has characterized the government function identified by the USDOC as "irrelevant" for the purposes of a public body analysis, it has clarified that it does not assert that "maintaining and upholding the socialist market economy" is not a government function, or that it is invalid *per se* for the purposes of a public body analysis. Rather, its claim is based on this function being "so broad that it is essentially meaningless"[58] in terms of its connection to the financial contribution in question, which in turn is based on its contention regarding the proper legal standard under Article 1.1(a)(1).

7.27. Turning to the relationship between a government function and an entity's conduct giving rise to a financial contribution, China has clarified that it does not consider the "government function" of a public body to be limited to actions constituting a financial contribution: a broader function could be identified if there is "a 'clear logical connection' between the 'government function' identified by an investigating authority and the conduct that is alleged to constitute a financial contribution".[59] On the other hand, the United States disagrees that there is a *legal requirement* under Article 1.1(a)(1) to establish a "clear logical connection" between an identified government function and the relevant financial contribution.[60] Therefore, although the parties agree that it is permissible under Article 1.1(a)(1) for an investigating authority to identify a broader government function than the specific action that is alleged to constitute a financial contribution, they disagree as to the implications of doing so in terms of the applicable legal standard for public body determinations.

7.28. In our view, the text of Article 1.1(a)(1) does not prescribe a "connection" of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution. The Appellate Body has clarified that to be a public body, an entity must be shown to possess, exercise, or be vested with governmental authority to perform a governmental function. The Appellate Body has also made clear that proper public body determinations may rest on a variety of considerations, with due regard for the particular circumstances of each case, based on the fact that "there are different ways in which a government could be understood to vest an entity with 'governmental authority'".[61] Further, what may constitute a "government function" may vary among Members. We do not consider there to be any *a priori* limitation on what may be the relevant government function for the purposes of a public body analysis.[62] Rather, where an investigating authority identifies a broader government

[57] United States' response to Panel question No. 1, para. 14 ("throughout the section 129 proceedings, the USDOC, at numerous points, identified maintaining and upholding the socialist market economy as a relevant governmental function of the GOC"). We note that the USDOC record additionally refers in several instances to "maintaining the leading role for the state sector". (See, e.g. Public Bodies Memorandum, (Exhibit CHN-1), pp. 6 and 9). In the context of the USDOC's analysis, we consider that this is an aspect or alternative formulation of the government function of "maintaining and upholding the socialist market economy". Indeed, "maintaining the leading role for the state sector" is consistently presented in connection with "maintaining and upholding the socialist market economy", and is seemingly subsumed under this broader function. The Public Bodies Memorandum at times even equates the two functions, for example in noting China's constitutional mandate "to maintain and uphold the socialist market economy, *i.e.*, an economy that preserves a leading role for the state sector". (Public Bodies Memorandum, (Exhibit CHN-1), p. 11).

[58] China's response to Panel question No. 2(b), para. 3.

[59] China's responses to Panel question No. 2(b), para. 4, and No. 4, para. 18. China refers to the United States' articulation of "clear logical connection" and submits that the parties are essentially in agreement as to the applicability of this standard. (China's responses to Panel question No. 3, fn 17, and No. 2(b), para. 15).

[60] United States' comments on China's response to Panel question No. 2, para. 7. The United States nevertheless argues that "[t]here is a clear logical connection between the governmental function that the USDOC identified and the conduct under Article 1.1(a)(1) in which the entities were engaged, and the USDOC established that connection on the basis of substantial record evidence." (United States' second written submission, para. 30; see also response to Panel question No. 3, para. 20).

[61] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10; see also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318 (noting that "There are many different ways in which government in the narrow sense could provide entities with authority.")

[62] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297 ("whether the functions or conduct are of a kind that are ordinarily classified as governmental … may be a relevant consideration for determining whether or not a specific entity is a public body").

function as part of a public body analysis, it must provide a reasoned and adequate explanation, based on relevant evidence, to support that identification.

7.29. In this regard, the Appellate Body has clarified the general requirement that:

> Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.[63]

7.30. In addition to these broad parameters that *must* be part of a public body determination consistent with Article 1.1(a)(1), there are various other types of information and evidence that *may be relevant* in assessing whether a particular entity is a public body. We see no basis to prejudge the relative weight or value of various types of relevant evidence in this regard. Rather, we consider that the applicable legal standard requires a holistic assessment by an investigating authority of the evidence before it. Similarly, a panel must consider whether the public body determination is based on relevant evidence and adequate explanation in assessing whether the investigating authority properly concluded that entities possessed, exercised, or were vested with governmental authority to perform a government function.

7.31. The parties' arguments regarding the legal standard of a "clear logical connection" relate to a broader question of the extent to which a public body analysis should focus on *particular conduct* or the more *general character* of the investigated entities.[64] In this regard, the parties have argued with respect to hypothetical entities that may be vested with *certain* governmental authority and whether such entities would be deemed to be public bodies when making financial contributions *unrelated* to that particular authority (e.g. a public health clinic providing iron ore inputs).[65] Similarly, the parties have advanced arguments based on prior disputes involving public body determinations in support of their respective positions regarding the legal standard under Article 1.1(a)(1), and in particular whether findings in prior disputes reflect a *required* connection to a particular financial contribution as opposed to other features of the entities concerned in those cases.[66]

7.32. The range of hypothetical scenarios argued before us is illustrative of the broad variety of situations in which an investigating authority may have to determine whether an entity making financial contributions exercises, possesses, or is vested with governmental authority. The very

[63] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

[64] We note that third parties in this dispute have argued that the focus of the public body analysis is the character of the relevant entity, rather than its conduct. (Japan's third-party submission, para. 14 (understanding prior Appellate Body rulings to mean that "the type of entity is most relevant for the determination of 'public body', whereas the conduct comes into play mainly in determining whether it falls within one of the types of financial contributions"); Canada's third-party submission, para. 15 (stating that "the conduct of the entity is not what needs to be examined" in a public body inquiry); and Australia's third-party statement, para. 4 (arguing that "the 'governmental' character" of public bodies is sufficient without a "separate, context-specific requirement to determine whether such conduct involves the discharge of a governmental function in each instance")). The European Union frames "the main contentious issue in this dispute" as whether meaningful control should be assessed "at the level of the specific transaction said to constitute a financial contribution, or at the level of the entity as a whole", and submits that "a financial contribution can be attributed to a public body … if certain indicators relevant to the entity in general show that its conduct can be attributed to the WTO Member". (European Union's third-party submission, paras. 10 and 19). In this regard, the European Union submits that a public body analysis "should focus on the features of the entity" without "[m]aking it necessary to show that a given financial contribution constitutes a governmental function", as this would "merge two distinct and sequential steps in the analysis: whether an entity is a public body and whether its conduct is a financial contribution". (European Union's third-party statement, para. 6).

[65] See, e.g. United States' second written submission, paras. 40-41; comments on China's response to Panel question No. 4, para. 25; China's second written submission, para. 82; opening statement at the meeting with the Panel, para. 10; and comments on United States' response to Panel question No. 3, paras. 4-5. See also European Union's third-party submission, para. 15 (contemplating that "[s]ome entities are so closely associated with the WTO Member that the issue of attribution will be straightforward", and that for some entities "it may be resolved by assessing the general characteristics of the entity" while others "may have been sufficiently linked to the State only when providing the financial contribution itself").

[66] China's first written submission, paras. 79-95; second written submission, paras. 51-59; United States' first written submission, paras. 38-42; and second written submission, paras. 68-90.

fact that there are many different possible scenarios reinforces for us the importance of a case by case approach to determining whether any given public body determination by an investigating authority is consistent with Article 1.1(a)(1). Further, we do not consider that the factual circumstances and case-specific determinations in prior disputes reflect rigid legal requirements that must be applied in other circumstances involving different analytical approaches. In a public body analysis, an investigating authority must give due consideration to *all* relevant facts regarding the characteristics and functions of an entity as appropriate in the particular circumstances of the case.[67]

7.33. The parties have also advanced various interpretive arguments in relation to the object and purpose of the SCM Agreement as well as relevant context.[68] With respect to object and purpose, we note the Appellate Body's finding that "considerations of object and purpose are of limited use in delimiting the scope of the term 'public body'" and "do not favour either a broad or a narrow interpretation of the term 'public body'".[69] The Appellate Body reasoned in this respect that a public body determination is not dispositive of the applicability of the disciplines of the SCM Agreement, which may also extend to financial contributions under Article 1.1(a)(iv) whereby a government or public body "entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii)".

7.34. In this respect, the parties also contest the interpretive implications of China's argument in relation to financial contributions made by private bodies. The United States argues that China's interpretation would collapse the public body inquiry into the inquiry of entrustment or direction by requiring focus on particular actions or transactions[70], while China argues that it is the USDOC's approach that would have this effect, in that it would allow investigating authorities to dispense with analysis of entrustment or direction for private bodies by treating them as public bodies under a broad government function unrelated to their conduct.[71] Third parties that have provided a view on this question have cautioned that China's interpretation could conflate public bodies with private bodies to the extent it required a particular connection between a government function and financial contribution.[72]

7.35. Although the provisions of Article 1.1(a)(1)(iv) provide some general interpretive guidance as to the meaning of the term "public body", we do not find that the considerations arising in the context of entrustment or direction of private bodies clearly resolve the parties' disagreement as to the legal standard applicable to public bodies. A finding of a financial contribution by a private body may necessarily involve consideration of the entity's particular conduct so that "the requisite link between the government and *that conduct* is established by a showing of entrustment or direction".[73] While this could be understood to suggest a relatively greater focus on an entity's particular conduct in an analysis of entrustment or direction of a private body, such evidence could also be relevant in a public body determination depending on the particular circumstances and evidence before the investigating authority.[74] We therefore do not consider the interpretive guidance of Article 1.1(a)(1)(iv) to imply any strict standard as to how an

[67] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

[68] See, e.g. China's first written submission, para. 92; United States' first written submission, paras. 49-51; and second written submission, para. 96.

[69] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 302-303.

[70] United States' first written submission, paras. 43-48; second written submission, para. 91.

[71] China's second written submission, paras. 68-74; response to Panel question No. 11, para. 83.

[72] Australia's third-party statement, para. 5; Canada's third-party submission, para. 22; European Union's third-party submission, para. 20; and Japan's third-party submission, paras. 8-9.

[73] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. (emphasis original)

[74] As noted by the Appellate Body, the same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body, and "the analysis of whether the conduct of a particular entity is conduct of the government or a public body or conduct of a private body is indeed multi-faceted and … an entity may display characteristics pointing into different directions." (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318 and fn 230). We also note that the United States agrees that the conduct under Article 1.1(a)(1) is relevant to the public body analysis, and in fact argues that in this case the USDOC "did not analyze 'meaningful control' and 'governmental function' in isolation from the conduct" of providing inputs. (United States' second written submission, para. 56; see also Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.43 and 4.52 (emphasising the potential relevance of an entity's conduct in a public body analysis)).

entity's particular conduct must be accounted for in a *public* body analysis to show that an entity possesses, exercises, or is vested with governmental authority.[75]

7.36. In conclusion, we do not agree with China's understanding of the legal standard for public body determinations insofar as it would require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue. We therefore conclude that China has failed to demonstrate that the USDOC's public body determinations in the relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement because they are based on an improper legal standard. Having reached this conclusion, we proceed to assess China's other arguments in support of its "as applied" claim under Article 1.1(a)(1).

7.2.1.3.3 Whether the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement

7.37. In addressing China's arguments, we first review the evidence relied upon by the USDOC in its analysis and which was drawn mainly from information solicited in the USDOC's Public Body Questionnaire, as well as the Public Bodies Memorandum placed on the record of the Section 129 proceedings.

7.2.1.3.3.1 The USDOC's Section 129 determinations in relation to public bodies

Public Body Questionnaire and GOC responses

7.38. The original panel found that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in 12 countervailing duty investigations because it found that state-owned enterprises (SOEs) were public bodies based solely on the fact that these enterprises were (majority) owned, or otherwise controlled, by the Government of the People's Republic of China (GOC).[76] This finding was not appealed.

7.39. In its Section 129 proceedings to implement the DSB recommendations and rulings in the original dispute, the USDOC issued a questionnaire to the GOC regarding public bodies for the 12 investigations at issue (the Public Body Questionnaire). The Public Body Questionnaire posed general questions regarding Chinese industrial policies and objectives, the categorization of industries and enterprises under Chinese industrial plans, and the role of the GOC as it relates to input producers and industries addressed in an "Input Producer Appendix".[77] In the Input Producer Appendix, specific questions were posed concerning the enterprises that produced inputs purchased by respondent companies in the 12 investigations at issue, seeking information on various aspects of corporate organization, ownership, and decision-making for these input producers.[78]

7.40. The GOC's response indicated that it had "made its best efforts to prepare responses for five of the investigations at issue".[79] For these five investigations, this included responses to the general questions in the Public Body Questionnaire, as well as responses to the specific questions in the Input Producer Appendix for input suppliers in which the GOC had a majority ownership interest during the period of investigation.[80] For the specific questions in the Input Producer

[75] In this regard, we note that China does not consider that an investigating authority is "required to look at the particular transactions at issue in order to determine whether such an entity was a public body". (China's response to Panel question No. 11, para. 77; second written submission, paras. 71-72). Thus, even under China's view, the required "connection" to the relevant financial contributions may be established indirectly, for example, with a focus on the *type* of financial contribution in question rather than the *particular* financial contributions themselves.

[76] Panel Report, *US – Countervailing Measures (China)*, para. 7.75.

[77] USDOC Public Bodies Questionnaire, (Exhibit USA-83), section II, pp. 2-3.

[78] USDOC Public Bodies Questionnaire, (Exhibit USA-83), section II, pp. 4-8.

[79] We note in this respect that although China raised various criticisms as to the amount of time given to respond to the Public Bodies Questionnaire, it has stated that "the procedural issues that China raised are not ultimately relevant to the Panel's disposition of China's legal claims under Article 1.1(a)(1)". (China's response to Panel question No. 10(a), para. 68).

[80] GOC Public Bodies Questionnaire response, (Exhibit CHN-2). The five investigations for which the GOC provided responses were Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders. (GOC Public

Appendix regarding enterprises in which the GOC had either no ownership interest or a minority ownership interest, the GOC indicated that it provided "a substantially complete response in respect of two of the investigations at issue".[81]

7.41. The GOC's responses[82] separately addressed the general and the specific questions in the Public Body Questionnaire and Input Producer Appendix. Main elements from the GOC's response to the general questions include the following:

a. Categories of industries and enterprises such as "backbone", "key", "core", "strategic", "focus", etc. are not defined legal terms under Chinese law. Where the terms are used to direct certain policies or measures, the description is normally followed by a list of the particular industries, "although the level of precision varies greatly". The GOC identified certain industries referred to as "pillar" or "basic" industries, including iron and steel as "industries in which the GOC at present wishes to maintain a major presence, including majority ownership of state-owned enterprises in these sectors, but in which the GOC ownership may be reduced as appropriate".[83]

b. Regarding the objectives of the GOC in holding shares in enterprises, the GOC responded that "China is a socialist country that maintains a socialist market economy". Further, the GOC maintains ownership interests in enterprises "in order to generate an economic return on publicly-owned resources and, more generally, because public ownership of commercial enterprises is consistent with the operation of a socialist market economy". At the same time, the GOC cited various provisions of Chinese law separating the operation of SOEs from the exercise of governmental functions. The GOC highlighted this separation with respect to the State-owned Asset Supervision and Administration Commission (SASAC), "the entity given responsibility for managing investments in state-owned enterprises". In addition, the GOC responded that its economic plans that include references to the steel industry "do not relate specifically to the government's ownership interests in particular steel enterprises", but rather "to the steel industry as a whole or to identified segments of the steel industry, without regard to the ownership of the relevant enterprises".[84]

c. With respect to policies or plans applicable to the industries to which the input producers or respondents belong, the GOC identified the Eleventh Five-Year Plan for National Economic and Social Development, and the 2005 Iron and Steel Policy. The GOC stated that economic and sector specific plans are not self-executing and mainly serve "to provide a framework for economic and social development over the period of the plan" and "provide notice of the focus of the GOC's policies over the plan period". The GOC stated of the Eleventh Five-Year Plan that "the steel industry was mentioned in several places, none of which reflect any binding goals, require the use of public resources to implement, or address the specific inputs at issue in this proceeding". Further, "the targets set for the steel industry in the *11th Five-Year Plan* were neither compulsory nor specific in nature". In respect of the Iron and Steel Policy, the GOC stated that this policy "sets forth the expected general direction of the industry, focusing on broader economic and public welfare goals rather than identifying specific actions to be taken by the sector, individual companies, or shareholders".[85]

Bodies Questionnaire response, (Exhibit CHN-2), cover letter, pp. 5-6; see also China's first written submission, paras. 34-35).

[81] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), cover letter, p. 6. The two investigations for which the GOC provided additional responses for such enterprises were OCTG and Kitchen Shelving. (GOC Public Bodies Questionnaire response, (Exhibit CHN-2), cover letter, pp. 5-6; see also China's first written submission, paras. 34-35).

[82] We note that the exhibit submitted by China containing the GOC's questionnaire responses appears to pertain only to the OCTG investigation and its relevant inputs; however, we understand from the parties' arguments and submissions that this reflects the GOC's responses in all investigations in which the GOC provided a reply.

[83] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. 1, pp. 1-2.

[84] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. 2, pp. 3-12.

[85] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. 3 and 4, pp. 12-16.

d. Regarding governmental approval of mergers or restructurings in the industries to which the input producers or respondents belong, the GOC stated that government authorizations, other than routine permitting and licensing, are not required for these types of transactions. However, the GOC noted that "certain investment projects may be deemed 'important projects and restricted projects', and require government 'admission' in order to protect the public interest". The GOC stated that this "admission" process for investment projects is applied regardless of whether a company is state owned or privately owned. For the steel sector, the GOC further explained that "iron-smelting, steel-smelting and steel rolling projects were designated as major or restricted projects consistent with the concerns expressed in the *11th Five-Year Plan* about excess obsolete iron and steel making capacity, and such projects require government 'admission'".[86] Regarding the specific role of SASAC in mergers or acquisitions involving the industries or enterprises in the Input Producer Appendix, and/or the industries to which respondents belonged, the GOC stated that "[t]he SASACs approve numerous mergers, acquisitions, capacity expansions and other investments in their capacity as shareholders in state-owned enterprises". However, the GOC was unable to identify specific instances of SASAC approval "in light of the vast scope of this question, and in light of the limited response time permitted by the Department".[87]

7.42. Main elements of the GOC's responses to specific questions regarding entities in the "Input Producer Appendix" include the following:

a. For majority government-owned enterprises, the GOC referred to full corporate names and addresses, as well as Articles of Association and Capital Verification Reports where available, that had been provided in the original investigation.[88]

b. For enterprises that were not majority government-owned, the GOC referred to corporate names and addresses, as well as Business Registrations, Articles of Association, and Capital Verification Reports where available, that had been provided in the original investigation. The GOC also referred to ownership structure diagrams submitted in the original investigation in response to questions about the identity of company owners, the nature of all outstanding shares of the companies, government ownership, and corporate governance of the entities.[89]

   i. With respect to corporate decision-making, the GOC described the functions of shareholders' meetings and boards of directors under the Company Law of the People's Republic of China (PRC).[90]

   ii. Regarding the involvement of the Chinese Communist Party (CCP) with the enterprises at issue, the GOC stated that "the CCP is not a governmental authority" but rather "a political party", and that CCP bodies identified in the USDOC's question were not "'Government administrative entities', nor are they 'owners' or 'regulators' in any sense under Chinese law". The GOC also reiterated the prohibition under Chinese law against the GOC interfering in any ordinary business operations and management of a company.[91] At the same time, the GOC noted that CCP "primary organizations" formed within companies[92] are required under the CCP Constitution "to maintain certain core tenants [sic] on behalf of the CCP", which in the GOC's view "do not overlap or conflict with the producer entity's decision making process".[93]

[86] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. 5, pp. 17-18.
[87] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. 6, p. 18.
[88] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. A.1, pp. 20-21.
[89] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. A.2-A.6, pp. 26-29.
[90] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. B.1 and B.2, pp. 29-30.
[91] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. B.3, pp. 30-32.
[92] Such "primary organizations" must be formed in companies where there are at least three party members. (GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. D.1, p. 34).
[93] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. B.4, pp. 30-32.

iii. The GOC stated that, to the best of its knowledge, "none of these companies are subject to any explicit or implicit obligations or targets regarding production quantities of alleged 'raw materials', nor are there any price targets".[94]

iv. Regarding mergers and restructuring during the period of investigation, the GOC replied that "any government role in any merger or restructuring activity in relation to the suppliers at issue, if any, would have had nothing to do with the prices at which these companies sell steel rounds or the customers to which these companies chose to sell that product".[95]

v. Regarding key persons and senior management of the enterprises at issue, the GOC stated that the "CCP Central Organization Department plays no role in the selection and monitoring of senior management". Regarding the role of government or CCP officials in the enterprises at issue, the GOC stated that government officials are prohibited by law in China from concurrently holding a position in an enterprise or any other profitmaking organization. Further, "[w]ith respect to CCP officials, it is not possible for the GOC to identify, pursuant to available business records, any individual owners, members of the board of directors or senior managers who were CCP officials during the [period of investigation]. In addition, the GOC is unable to require the CCP … to provide the information requested by the Department, because they are not governmental agencies".[96]

7.43. The GOC submitted responses to the supplemental questionnaires issued by the USDOC in documents that have not been submitted for the record of this compliance dispute.[97]

The Public Bodies Memorandum

7.44. Following the receipt of responses to its questionnaires, the USDOC placed on the record of the 12 Section 129 proceedings at issue the Public Bodies Memorandum, and the accompanying CCP Memorandum. These documents were part of the record of earlier Section 129 proceedings with respect to a different WTO dispute (DS379).[98]

7.45. In the Public Bodies Memorandum, the USDOC reviewed the Appellate Body's discussion of the types of evidence that may assist in determining whether an entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. The USDOC noted in particular the Appellate Body's references to whether the government exercises "meaningful control" over an entity, which it understood to mean "control related to the possession or exercise of governmental authority and governmental functions". In this context, the USDOC considered that "government ownership remains an important element of the analysis".[99]

7.46. After reviewing "the system of governance and state functions in the People's Republic of China", the USDOC made the following determinations in the Public Bodies Memorandum for the purposes of the United States' domestic countervailing duty law:

a. China has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the "socialist market economy", which includes maintaining a leading role for the state sector in the economy.

b. Relevant laws grant the government the authority to use state-invested enterprises (SIEs)[100] as the means or instruments by which to achieve this mandate.

[94] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. B.5, p. 33.
[95] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. C.1, p. 33.
[96] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. D.1 and D.2, p. 34.
[97] China's first written submission, para. 36.
[98] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 8.
[99] Public Bodies Memorandum, (Exhibit CHN-1), p. 3.
[100] The USDOC explained that it used the term SIE to refer to enterprises in which the GOC has an ownership stake of any size. (Public Bodies Memorandum, (Exhibit CHN-1), fn 5).

c. The actions taken by the GOC to fulfil its legal mandate in the economic sphere are functions which are ordinarily classified as governmental in the legal order of China.

d. The government exercises meaningful control over certain categories of SIEs in China and this control allows the government to use these SIEs as "instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy".[101]

7.47. The USDOC's finding with respect to the relevant governmental function in China of upholding the socialist market economy and maintaining a leading role for the state sector was based on *inter alia*:

a. provisions of China's constitution describing the "state-owned economy" as "the leading force in the national economy", and providing for the dominance of public ownership in China's economic system;

b. Articles 1 and 3 of China's Property Law similarly providing for the purpose of maintaining the socialist market order and the dominance of public ownership in the economy;

c. the Law on State-Owned Assets of Enterprises affirming the role of the state in the national economy, particularly through the state-owned economy;

d. provisions of the measure creating SASAC as the state's representative owner of state-assets and regulator of certain SIEs; and

e. industrial policies such as national and local five-year plans with sector-specific goals and objectives.[102]

7.48. With respect to whether the government exercises meaningful control over certain entities in China, the USDOC examined what it considered to be "manifold indicia of control indicating that SIEs possess, exercise, or are vested with governmental authority". In this respect, the USDOC made the following factual findings:

a. The government exercises control through the provision of direct and indirect benefits to SIEs.[103] This finding was based on *inter alia*:

i. A 2011 International Monetary Fund (IMF) Report noting that "with interest rates being held below market levels, loan demand has long been high and banks have been forced to ration credit. In these circumstances, banks have preferred to lend to SOEs that benefit from implicit state guarantees".

ii. A 2010 report on China by the Economist Intelligence Unit noting that "[d]espite official orders to transform themselves into truly commercial banks [the five large state-owned commercial banks] continue to lend much of their portfolios to the state-owned enterprises".

iii. An Organization for Economic Cooperation and Development (OECD) Economic Survey of China noting that "lending remains biased towards SOEs" and that "state-owned commercial banks are obliged to lend to SOEs that enjoy soft budget constraints, often have their debts forgiven and are therefore insensitive to changes in the price of credit".

iv. A joint report of the World Bank and the Development Research Center of the State Council of China noting that "state enterprise management and government officials usually support each other − management often accepts informal guidance from government officials and, in return, state enterprises are more likely to enjoy

[101] Public Bodies Memorandum, (Exhibit CHN-1), pp. 2, 3, 11, and 37.
[102] Public Bodies Memorandum, (Exhibit CHN-1), pp. 6-11.
[103] Public Bodies Memorandum, (Exhibit CHN-1), pp. 14-16.

preferential access to bank finance and other important inputs, privileged access to business opportunities, and even protection against competition".

b. The government both incentivizes and demands certain firm behavior in furtherance of industry policy goals.[104] This finding was based on *inter alia*:

   i. A 2008 World Bank evaluation of China's Eleventh Five-Year Plan, which notes various tools implemented at the microeconomic firm level to achieve policy goals, including: project approval; government investment combined with project review and permission; production and import licences; and "more indirect instruments such as tax incentives, price subsidies, and other kinds of 'favorable policies'".

   ii. Decision No. 40 of the State Council calling for a number of measures to be undertaken by central and local authorities in order to meet the policy goals of the State. This Decision is supplemented by an investment catalogue which specifies prohibited, restricted, and encouraged investments for all industries and all investors.

   iii. Industry-specific plans with detailed implementation measures, including: provisions of the Eleventh Five-Year Plan regarding direct government involvement in the iron and steel sector; the National Textile and Apparel Eleventh Five-Year Plan; and the Eleventh Five-Year Plan for National Economic and Social Development calling for increasing the development of important spare parts for the automobile industry.

c. The government considers ownership levels to be one of its main tools in maintaining control over the state sector.[105] This finding was based on *inter alia*:

   i. A 2010 OECD Economic Survey of China noting "a shift in policy away from encouraging private-sector involvement in all competitive sectors of the economy to one of privatizing smaller SOEs in non-strategic sectors while increasing state ownership in enterprises deemed to be strategic".

   ii. An interview with SASAC's former chairman provided by the GOC describing "pillar industries" as those considered "essential building blocks for industrial development", including iron and steel.

d. Enterprises in the state sector are a primary instrumentality by which the state seeks to manage market competition and market outcomes.[106] This finding was based on *inter alia*:

   i. State Council interventions in the telecommunications sector pursuant to which no company can enter the market unless it is SIE-controlled.

   ii. A joint report of the World Bank and the Development Research Center of the State Council of China noting limits on competition between state-owned and non-state parts of certain sectors, and stating that "strong direct ties between the government and incumbent SOEs, especially large SOEs, limit the entry and access to resources of private firms, hampering the efficient use and allocation of resources and stifling entrepreneurship and innovation". The report also describes interventions to achieve "market outcomes", for example through government-led mergers.

   iii. The 2006 State Council "Circular on Accelerating the Restructuring of the Industries with Production Capacity Redundancy" in response to overcapacity in state-dominated sectors, which addressed state control over investment in fixed assets and initiation of new projects, as well as elimination of production capacity redundancy "through selection".

[104] Public Bodies Memorandum, (Exhibit CHN-1), pp. 16-20.
[105] Public Bodies Memorandum, (Exhibit CHN-1), pp. 20-21.
[106] Public Bodies Memorandum, (Exhibit CHN-1), pp. 24-26.

e. The supervision of SASAC is a tool of meaningful control over SIEs by the government.[107] This finding was based on *inter alia*:

   i. The 2003 Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises, which established SASAC for the purposes of meeting "the demand of the socialist market economy, to *further activate the state-owned enterprises*, to promote the strategic adjustment of the layout and structure of the state-owned economy, to *develop and strengthen the state-owned economy*, and to try to maintain and increase the value of the state-owned assets".

   ii. Article 4 of the Interim Measures for the Supervision and Administration of the Investments by Central Enterprises, which states that "SASAC shall supervise and administrate the investment activities of the enterprises, and guide them to establish and improve investment decision-making procedures and management systems".

   iii. Measures for the Administration of Development Strategies and Plans of Central Enterprises requiring SIEs to formulate a development strategy and plan that shall be examined and approved by SASAC according to "whether or not it complies with the national development planning and industrial policies", and "whether or not it complies with the strategic adjustment of the layout and structure of the state-owned economy".

   iv. A 2009 review of regulatory reform in China by the OECD noting that SASAC "does not focus exclusively on exercising the state's ownership function but also has substantial regulatory responsibilities, including responsibility for restructuring in some of the industries where SOEs are now dominant".

   v. Regulations and regulatory documents issued by SASAC as indicated in GOC documents.

f. The government has control over all appointments in the state sectors, and uses this as a means to ensure that industrial policy objectives are being achieved.[108] This finding was based on *inter alia*:

   i. Article 13 of the Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises, which provides that SASAC has the power to appoint SOE managers, board members, and the Supervisory Board members.

   ii. Various secondary sources and press reports indicating control by the CCP over personnel decisions throughout the state sector.

   iii. Provisions of the 2006 Civil Servant Law providing the legal basis for exchanges of civil servants with personnel in SOEs.

   iv. A 2010 OECD economic survey of China noting that "direct control over business operations and government control in infrastructure sectors suggest that the line between government and the SOEs is still blurred", and that "almost half of the chairpersons and more than one third of chief executive officers of central SOEs were appointed by the Central Organization Department of the Communist Party and have civil servant status".

g. Meaningful control is exercised through the presence of CCP groups and committees.[109] This finding was based on *inter alia*:

   i. The presence of CCP committees in SIEs, and provisions of the CCP Constitution stating that a party committee in SIEs "guarantees and oversees the implementation

[107] Public Bodies Memorandum, (Exhibit CHN-1), pp. 26-30. (emphasis added)
[108] Public Bodies Memorandum, (Exhibit CHN-1), pp. 30-33.
[109] Public Bodies Memorandum, (Exhibit CHN-1), pp. 33-36.

of the principles and policies of the Party and the state in its own enterprise … and participates in making final decisions on major questions in the enterprise".

ii. A 2010 OECD economic survey of China noting that CCP committees in SOEs "often play an active role in human resources and the strategic decision making of the enterprise".

7.49. On the basis of the evidence and conclusions summarized above, the Public Bodies Memorandum set out conclusions about three categories of Chinese enterprises[110]:

a. First, any enterprise in China in which the government has a full or controlling ownership interest is a public body because, in the institutional and SIE-focused policy setting of China, the government exercises meaningful control over all such enterprises such that these enterprises possess, exercise, or are vested with governmental authority. In the USDOC's view, "these are the enterprises that comprise the state sector in China, which the government is mandated to uphold". Further, this determination was intended to reflect "the numerous indicia of control … showing that the government uses SIEs to fulfil its mandate to uphold the socialist market economy".

b. Second, enterprises in China in which the government has significant ownership that are also subject to certain government industrial plans may be public bodies. On a case-by-case basis, if indicia show that these enterprises "are used as instruments by the government to uphold the socialist market economy", the USDOC may find such enterprises to be public bodies. The circumstances under which the USDOC may find such enterprises to be public bodies "will rest upon additional indicia that show whether such SIEs are used as instruments by the government to uphold the socialist market economy". Such "additional indicia" include coverage of the relevant industry by industrial plans, government appointment of company officials, the presence of government or CCP officials on the board or in management, and the existence and role of a CCP committee.

c. Third, enterprises that have little or no formal government ownership are public bodies if China's government exercises meaningful control over such enterprises. Such a determination would be made on a case-by-case basis in light of indicia such as "a significant CCP or state presence on the board, in management or in the enterprises in the form of party committees".

7.50. The CCP Memorandum attached to the Public Bodies Memorandum addressed the *de jure* and *de facto* role that the CCP plays in China's economy and system of governance. The USDOC explained that its public body analysis includes an inquiry into the role of CCP representatives in enterprises "in order to develop sufficient information to enable the Department to determine whether the presence and role of any such CCP officials may inform a finding of government control over such enterprises".[111] The USDOC found the available evidence indicated that "the CCP and China's state apparatus are essential components that together form China's 'government' [as defined in that memorandum] solely for purposes of the [countervailing duty] law".[112]

7.51. In reaching its conclusion that the CCP is properly considered "government" within China's "party-state" system, the USDOC referred to provisions of China's Constitution, the Constitution of the CCP, and other Chinese legislation regarding the role of the CCP.[113] The USDOC also relied on various secondary sources (including research publications), and provisions of Chinese law where relevant, regarding the lack of other political parties permitted to exert political authority within China[114]; "the structure of China's party-state" through geographic entities at various levels and a

[110] Public Bodies Memorandum, (Exhibit CHN-1), pp. 37-38.
[111] CCP Memorandum, (Exhibit CHN-1), p. 2.
[112] Public Bodies Memorandum, (Exhibit CHN-1), fn 4, and p. 3 of the CCP Memorandum. The USDOC accordingly referred to "China's government" in the Public Bodies Memorandum as including "CCP bodies as well as China's ministries, agencies, etc." The USDOC further considered that the term "party-state" is an "appropriate characterization of China's system of government, and hence, of the institutional apparatus that governs China, controls its resources, and possesses the authority to engage in governmental activity". (CCP Memorandum, (Exhibit CHN-1), p. 7).
[113] CCP Memorandum, (Exhibit CHN-1), pp. 9-11.
[114] CCP Memorandum, (Exhibit CHN-1), pp. 6-7.

system of "ministerial organizations"[115]; the influence and authority of the CCP, including over appointments to government/state positions, courts, the military, and the media[116]; and evidence of the CCP's particular focus on the economy.[117]

7.52. On the basis of the evidence before it, the USDOC made certain intermediate observations in reaching its conclusion that the CCP is properly considered "government" within China's system, including:

a. The CCP and the state are organizationally separate, even though their structures generally mirror each other.

b. The CCP exercises authority over the formal institutions of government at the national and local levels.

c. The CCP makes policies the state then implements and the CCP directs and supervises that implementation through a number of formal and informal tools.

d. The CCP is particularly concerned with authority over the economy because of the importance of economic growth to advancing the cause of socialism.[118]

Preliminary public body determinations

7.53. On 25 February 2016, the USDOC issued a "Preliminary Determination of Public Bodies and Input Specificity"[119] aimed at "revising the analysis underlying the determinations with regard to various production inputs provided for less than adequate remuneration in 12 of the 15 countervailing duty [] investigations examined in WTO DS437".[120]

7.54. The USDOC made separate preliminary findings for: (a) the seven cases for which the GOC did not provide any response to the Public Body Questionnaire; and (b) the five cases for which the GOC did submit a response.

Seven investigations in which the GOC did not provide a response to the Public Body Questionnaire[121]

7.55. The USDOC stated that "[a]s a result of the GOC's failure to participate with regard to the [seven] Section 129 proceedings, we preliminarily determine that necessary information, on the ownership, management, and control of the input producers at issue is not on the record." The USDOC also preliminarily found that "the GOC withheld information that was requested and failed to provide information within the deadlines established", and further that "the GOC significantly impeded this proceeding". Further, the USDOC "preliminarily determine[d] that an adverse inference in selecting from among the facts otherwise available is warranted … because by not responding to the public bodies questionnaires, GOC failed to cooperate by not acting to the best of its ability to comply with a request for information in these seven Section 129 proceedings".[122]

7.56. The USDOC stated that "the records of the seven Section 129 proceedings include[] the Public Bodies Memorandum and CCP Memorandum, and thus contain factual information on which the Department can rely concerning the role played by the GOC in enterprises such as the input producers in the seven Section 129 proceedings." In the USDOC's view, "[t]his evidence supports an [adverse facts available] determination that the input producers in the seven Section 129 proceedings are public bodies."[123]

[115] CCP Memorandum, (Exhibit CHN-1), pp. 12-20.
[116] CCP Memorandum, (Exhibit CHN-1), pp. 20-29.
[117] CCP Memorandum, (Exhibit CHN-1), pp. 31-32.
[118] CCP Memorandum, (Exhibit CHN-1), p. 33.
[119] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4).
[120] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 1.
[121] Lawn Groomers, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions, and Solar Panels.
[122] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 13.
[123] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 13.

7.57. On this basis, the USDOC "preliminarily determine[d] as [adverse facts available] that the GOC exercised meaningful control over the input producers at issue in the seven Section 129 proceedings, such that these enterprises possess, exercise, or are vested with government authority". The USDOC therefore found that the input producers in the seven investigations constitute "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.[124]

Five investigations in which the GOC submitted responses to the Public Body Questionnaire[125]

7.58. In the five cases in which the GOC submitted responses, the USDOC separately examined: (a) enterprises in which the GOC had full or controlling ownership; and (b) enterprises in which the GOC had less than majority ownership.

7.59. The GOC reported that most of the input producers at issue in these five Section 129 proceedings were majority-owned by the government. Based on the GOC's questionnaire responses and evidence in the Public Bodies Memorandum, the USDOC "preliminarily determine[d] that the GOC meaningfully controlled those input producers that were majority government-owned during the relevant [periods of investigation] such that they possess, exercise or are vested with government authority". Accordingly, the USDOC preliminary determined that "the majority government-owned producers which provided the inputs purchased by the respondents … in the five investigations are … 'public bodies' within the meaning of Article 1.1(a)(1) of the SCM Agreement".[126]

7.60. The GOC further reported that the government had minority (less than 50%) ownership in several input producers. The Public Body Questionnaire had requested information on such enterprises concerning ultimate ownership, corporate governance, decision-making, and the extent to which the government, CCP, and related entities exerted control or influence over the input producers. However, the USDOC considered that "[a]s a result of the GOC's failure to cooperate to the best of its ability with regard to the non-majority government-owned input producers … and its decision not to respond to all of the questions … for such enterprises … the necessary information from the GOC concerning the ownership, management, and control of the input producers at issue is not available on the record".[127] The USDOC also preliminarily found that "the GOC withheld information that was requested of it", and further that "by not responding fully to the questionnaires, the GOC significantly impeded this proceeding". As a result, the USDOC "resort[ed] to the use of facts otherwise available" and "preliminarily determine[d] that an adverse inference is warranted in selecting from the facts otherwise available … because by not completely responding to the *Input Producer Appendix*, the GOC failed to cooperate by not acting to the best of its ability to comply with a request for information with regard to the non-majority government-owned enterprises at issue in the five investigations".[128]

7.61. Applying an adverse inference in selecting from the facts otherwise available, the USDOC referred to the Public Bodies Memorandum with respect to enterprises in which the government has significant ownership interest that are also subject to certain government industrial plans, as well as enterprises that have little or no formal government ownership over which the government may exercise meaningful control. In particular, the USDOC drew upon evidence in the Public Bodies Memorandum (and accompanying CCP Memorandum) regarding, *inter alia*, the control or influence over enterprises of the government, CCP, and related entities. On this basis, the USDOC preliminarily determined that "the relevant input producers are meaningfully controlled by the GOC such that they possess, exercise or are vested with government authority". Accordingly, the USDOC "preliminarily determine[d] that non-majority government-owned enterprises that produced the inputs purchased by the respondents … in the five investigations are … 'public bodies' within the meaning of Article 1.1(a)(1) of the SCM Agreement".[129]

[124] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 14.
[125] Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders.
[126] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), pp. 14-15.
[127] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 16. During these compliance panel proceedings, China argued that the GOC provided a "substantial portion" of the requested entity-specific information in the Kitchen Shelving and OCTG proceedings. (See, e.g. China's first written submission, paras. 149-155).
[128] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 16.
[129] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), pp. 15-18.

Final public body determinations

7.62. The USDOC's final determinations[130] summarize the comments made by the GOC in response to the USDOC's preliminary determinations as well as the comments made by US petitioners in rebuttal.

7.63. Responding to the comments of the parties, the USDOC disagreed with the GOC's comments that its approach to the public body issue failed to address the inquiry laid out by the Appellate Body. The USDOC reiterated the relevance of its Public Bodies Memorandum (and accompanying CCP Memorandum) as well as its need to rely on facts available due to lack of necessary information on record as a result of the GOC's failure to respond fully to the questionnaires in the Section 129 proceedings. Accordingly, the USDOC adopted the preliminary determinations with respect to public bodies as its final determinations in the Section 129 proceedings at issue.

7.2.1.3.3.2 Assessment of the USDOC's Section 129 public body determinations

7.64. China criticizes the USDOC's public body determinations for failing to engage in a case-by-case analysis in relation to each of the countervailing duty investigations at issue. In particular, China contends that the USDOC should have looked at the input at issue in a given investigation, as well as the input producers and the purchasers of that input, to determine whether the evidence supported a finding that the provision of that input by those producers to those purchasers is a government function.[131] In light of this criticism, and bearing in mind our finding above as to China's argument on the legal standard under Article 1.1(a)(1), we first assess the legal criteria relied upon by the USDOC as they relate to the requirements for a public body analysis, followed by an assessment of the evidence relied upon by the USDOC in its public body determinations.

Legal criteria relied upon by the USDOC

7.65. As outlined above, the Appellate Body has referred to a variety of criteria and evidence that may be relevant to whether an entity "possesses, exercises or is vested with governmental authority". This includes evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates.[132] Further, "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions".[133] In this regard, the Appellate Body distinguished "meaningful control" from mere ownership, noting that "where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority".[134]

7.66. The key evidentiary element relied upon by the USDOC is "meaningful control" by the government. In particular, the USDOC considered one of its "core findings" (apart from the identified government function) to be that "the government exercises meaningful control over certain categories of SIEs in China".[135] In the Public Bodies Memorandum, relied on in reaching this conclusion, the USDOC found that "in China, certain types of SIEs are public bodies due to the government's exercise of meaningful control over the entities given the backdrop of China's political and economic system".[136] As part of its analysis, the USDOC made the following observations with respect to "meaningful control"[137]:

[130] Final Section 129 Determination, (Exhibit CHN-5).
[131] China's first written submission, para. 106.
[132] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317).
[133] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[134] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[135] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 9.
[136] Public Bodies Memorandum, (Exhibit CHN-1), p. 3.
[137] Public Bodies Memorandum, (Exhibit CHN-1), pp. 12-14.

a. The USDOC sought to assess "the manifold indicia of government control over the state sector, certain industrial sectors and the enterprises that comprise these sectors" in order "to determine whether the government's control is such that the relevant entities can be said to possess, exercise or be vested with governmental authority".

b. The government maintains a primary focus on economic actions in the state sector as a means by which to fulfil the identified government function.

c. Various "benefits and protections" granted to the state sector "can be considered one of the manifold indicia of control, as they may lead to behind-the-scenes *quid pro quo*".

d. "Perhaps the strongest indicia can be found where the state can control SIEs' behaviors and incentives in order to achieve outcomes that would not have occurred without such government intervention and control."

e. In this regard, the USDOC considered the "manifold indicia or levers of control by the government over the state sector" to include the application of industrial plans, government management of competition, and supervision of the state sector through the appointment of management and directors.

7.67. An additional aspect of the public body analysis emphasized by the Appellate Body is a requirement in all cases to conduct "a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense".[138] Although the USDOC did not explicitly refer to "core features" or "characteristics" of SIEs in either the Public Bodies Memorandum or its Section 129 determinations, the United States nevertheless argues that the USDOC's consideration of "meaningful control" reflected the "core characteristics" of the relevant entities, including their relationship with the Chinese government.[139] For its part, China submits that:

> [T]he defect in the USDOC's public body determinations is that the USDOC focused on evidence of government ownership and formal indicia of control to the exclusion of other relevant evidence concerning these entities' "core characteristics", including evidence supporting the conclusion that there was not a "clear logical relationship" between the alleged "government function" identified by the USDOC and the entities' conduct under Article 1.1(a)(1).[140]

7.68. With respect to "meaningful control", we note the distinction drawn by the Appellate Body with mere "formal indicia of control" that would be insufficient on their own to establish that an entity is a public body, such as government ownership interest, appointment and nomination of directors, and other formal statements of "control".[141] In this connection, the Appellate Body cautioned against blurring the distinction "between the *existence* of control by a government over an entity, on the one hand, and 'meaningful control', on the other hand".[142] This clarification may be understood in relation to the Appellate Body's consistent reiteration that "meaningful control" is concerned with the government's exercise of control over an entity and its conduct.[143]

7.69. The Appellate Body's emphasis on "meaningful control" over the *conduct* of an entity may in turn relate to the parties' arguments regarding the legal standard under Article 1.1(a)(1) and the connection that may be required between a broader government function and the financial contribution. We concluded above that Article 1.1(a)(1) does not prescribe a particular degree or nature of connection that must be established in all cases between a government function and the financial contribution. We further noted that the USDOC considered relevant aspects of

[138] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

[139] United States' response to Panel question No. 5, para. 28. The United States further contends that evidence on the "core characteristics" of the relevant entities "included information on the legal and economic environment prevailing in China, as well as laws, regulations, policies, or plans requiring entities to carry out their business based upon the needs of the national economy and consistent with government industrial policies". (United States' response to Panel question No. 5(a), para. 36 (fn omitted)).

[140] China's response to Panel question No. 5, para. 52.

[141] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.43.

[142] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37. (emphasis original)

[143] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, paras. 4.43 and 4.52.

"meaningful control" to include the general background of Chinese governmental intervention in the state sector, and more specifically the application of industrial plans, government benefits and protections provided to SIEs, and supervision over managerial appointments in SIEs. This, in turn, formed part of the USDOC's assessment of the investigated entities in relation to the identified government function of upholding and maintaining the socialist market economy.

7.70. In our view, the question of "meaningful control" is inherently specific to particular factual circumstances, and the existence of such control may be established through a variety of potentially relevant considerations that may be cumulatively assessed by an investigating authority. The extent to which the particular conduct of entities is relevant in the context of "meaningful control" may depend on a number of factors, including the particular government function identified by an investigating authority and the evidence in its investigation. Further, although the Appellate Body has underscored the importance of considering the "core characteristics" of certain entities, this does not mean that such consideration must be explicit. In this case, the United States argues that the relevant considerations were addressed in the USDOC's consideration of "meaningful control". China's contention regarding the failure to consider the "core characteristics" of the entities concerned rests on the same premise as its criticism of the USDOC's assessment of meaningful control, namely the alleged lack of a "clear logical connection" between the identified government function and the particular conduct of providing inputs. Indeed, the parties appear to concur that the "core characteristics" of an entity may be established indirectly through other aspects of the public body analysis.[144]

7.71. In the present case, we consider the USDOC's assessment of "meaningful control" to be consonant with the obligation to have due regard for "the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates".[145] Ultimately, an investigating authority examining meaningful control must answer the substantive legal question of whether an entity exercises, possesses, or has been vested with government authority. As stated by the Appellate Body, "[t]his *substantive standard* should not be confused with the *evidentiary standard* required to establish that an entity is a public body within the meaning of the SCM Agreement."[146]

7.72. Thus, as an initial matter, we find that China has failed to demonstrate that the USDOC misconstrued the concept of "meaningful control" and its relevance to the substantive legal standard for a public body inquiry, and especially with respect to the relevance of the particular environment in which investigated entities operate. Having reached this conclusion, we now turn to the USDOC's determinations in relation to the evidentiary standard of a public body analysis, and particularly whether the USDOC adequately took into account and explained how factual evidence supported its public body determinations.

Evidence relied upon by the USDOC

7.73. The evidence relied upon by the USDOC in its public body determinations consisted of information in the Public Bodies Memorandum (including the CCP Memorandum), and information received by the USDOC in the course of the investigation.

Public Bodies Memorandum

7.74. The USDOC placed substantial reliance on evidence in the Public Bodies Memorandum, having determined that the GOC did not provide sufficient information in response to questionnaires and that an "adverse inference in selecting from among the facts otherwise available is warranted".[147] To recall, the Public Bodies Memorandum set out various factual findings along with supporting evidence from a variety of sources, which addressed governmental control through the provision of benefits to SIEs and influence over firm behaviour in furtherance of industry policy goals.[148] The Public Bodies Memorandum contained further findings with respect to government ownership as one of the main tools of the GOC in maintaining control over the state

[144] China's response to Panel question No. 5, para. 49; United States' response to Panel question No. 5(b), para. 42.
[145] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.
[146] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37. (emphasis original)
[147] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), pp. 13 and 16.
[148] Public Bodies Memorandum, (Exhibit CHN-1), pp. 14-20.

sector, in which enterprises are an instrumentality to manage market outcomes.[149] In addition, the Public Bodies Memorandum described government supervision over SIEs and control over appointments in the state sectors[150], as well as the exercise of governmental control through the presence of CCP groups and committees.[151] The CCP Memorandum contained evidence related to the *de jure* and *de facto* role that the CCP plays in China's economy and system of governance, including its role in implementing government policy through a number of formal and informal tools.[152]

7.75. China has stated that it "does not believe that all of the factual evidence set out in the Public Bodies Memorandum and the CCP Memorandum is irrelevant to the public body inquiry".[153] China goes on to specifically criticize the absence of any "positive evidence on the record before the USDOC to the effect that China's industrial plans and policies relating to the input producers at issue dictated to whom they should sell their product and at what price".[154] China thus argues that, "[a]t most, the evidence in the Public Bodies Memorandum and the CCP Memorandum constitutes evidence of 'mere ownership and control' by the GOC, without any evidence that such control has been exercised in a 'meaningful way' over the conduct that is the subject of the financial contribution inquiry."[155]

7.76. The Public Bodies Memorandum is broadly concerned with the interventions by the Chinese government (including the CCP) in firm behaviour and market outcomes, with particular emphasis on governmental influence over SIEs through commercial incentives and benefits, industrial policies, and supervisory control. At the same time, the Public Bodies Memorandum contains limited specific evidence and analysis of the sectors at issue in the Section 129 proceedings, and the particular conduct of providing inputs or other conduct at the firm level.

7.77. For example, with regard to the steel industry, the Public Bodies Memorandum refers to the following:

a. a mid-term evaluation of China's Eleventh Five-Year Plan by the World Bank, which stated that, in the steel industry, "government action has gone far beyond licensing" to include organizing "the work of dismantling steel making devices and melting them in furnaces"[156];

b. a reference to the steel industry as a "pillar industry" by SASAC's former chairman, explaining that such industries are considered "essential building blocks for industrial development"[157];

c. a reference to the iron and steel sector in China as "an example of an industry where direct government involvement in firm behavior is explicitly contemplated by the GOC's industry plans"[158]; and

d. an example of a government-influenced merger of a private steel company with "a large, financially unstable SIE created through previous mergers".[159]

7.78. With regard to the conduct of providing inputs, or other conduct at the firm level, the Public Bodies Memorandum refers to the following:

[149] Public Bodies Memorandum, (Exhibit CHN-1), pp. 20-21 and 24-26.
[150] Public Bodies Memorandum, (Exhibit CHN-1), pp. 26-33.
[151] Public Bodies Memorandum, (Exhibit CHN-1), pp. 33-36.
[152] CCP Memorandum, (Exhibit CHN-1), p. 33.
[153] China's response to Panel question No. 6(a), para. 53.
[154] China's response to Panel question No. 6(a), para. 58.
[155] China's response to Panel question No. 6(a), para. 59.
[156] Public Bodies Memorandum, (Exhibit CHN-1), fn 72.
[157] Public Bodies Memorandum, (Exhibit CHN-1), fn 83.
[158] Public Bodies Memorandum, (Exhibit CHN-1), p. 22 (with specific reference to provisions of the Order of the National Development and Reform Commission (No. 35) (2005), Development Policies for the Iron and Steel Industry regarding production scales, investments, technologies, products, and production locations, including for specific enterprises).
[159] Public Bodies Memorandum, (Exhibit CHN-1), p. 25.

a. the "disproportionate share of resources that SIEs receive relative to other types of enterprises", including preferential access to "key raw material inputs" and "other important inputs", as evidenced by a World Bank Report[160]; and

b. World Bank descriptions of industrial policy tools under the Eleventh Five-Year Plan that "are implemented at the microeconomic, firm level", including project approval, government investment, and production and import licences.[161]

7.79. We consider the evidence in the Public Bodies Memorandum and CCP Memorandum to be relevant to the USDOC's public body analysis, particularly regarding the relationship of entities with the government, the prevailing legal and economic environment in which the entities operate, the scope and content of government policies in the relevant sector, and the question of "meaningful control" by the government.[162]

Public Body Questionnaire

7.80. Apart from the more general information in the Public Bodies Memorandum and the CCP Memorandum, another aspect of the factual basis for the USDOC's public body determinations is the information requested and provided in the course of the USDOC's investigation.

7.81. To recall, the USDOC asked general questions pertaining to the following matters for all investigated entities:

a. An explanation of different categories of industries and enterprises, especially as enumerated in certain five-year plans, sector-specific industrial plans, provincial and local development and industrial plans, and other planning documents, as well as whether enterprises or industries that produce the input at issue are categorized as such.

b. The objectives of the GOC in holding shares in the enterprises, as well as whether those objectives are defined in a policy or law, and an explanation of any government ownership policy for enterprises or industries to which the respondents belonged.

c. Coverage of the relevant industries and producers by any five-year plans, industry-specific plans, investment guides, or other policy documents relevant to the period of investigation.

d. Whether the relevant industries or producers are subject to governmental approval for mergers, restructurings, or capacity additions, including the process of approval and whether such approval is linked to the industry of the input at issue.

e. Whether SASAC or another entity has approved mergers, acquisitions, capacity additions, or reductions in the relevant enterprises or industries.

7.82. In the responses that were provided in five investigations, the GOC generally emphasized the non-compulsory nature of industrial plans and policies (which set targets and guidelines rather than binding requirements). Further, while the GOC recognized the economic policy goals underlying its ownership interests in enterprises, it emphasized the legal insulation of business operations from the exercise of government functions. The GOC also responded that its approval of mergers or restructurings in the relevant industries consists of routine permitting and licensing, although an "admission" process is applied for projects of public interest, regardless of whether the entity is privately or state-owned. The GOC was unable to identify specific instances of SASAC approval given what it considered to be the vast scope of the question and limited time to respond.[163]

[160] Public Bodies Memorandum, (Exhibit CHN-1), p. 15.
[161] Public Bodies Memorandum, (Exhibit CHN-1), p. 18.
[162] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317; *US – Carbon Steel (India)*, para. 4.29.
[163] GOC Public Bodies Questionnaire response, (Exhibit CHN-2).

7.83. The USDOC also sent respondents an Input Producer Appendix with specific questions concerning the non-majority government-owned enterprises that produced inputs purchased by respondent companies in the 12 investigations at issue, which requested information on various aspects of corporate organization, ownership, decision-making, and the role of the CCP for these input producers.[164] While it provided governing laws on corporate organization, ownership, and decision-making in response, the GOC disputed that the CCP is a governmental authority and asserted that the activities of its various bodies do not extend to the day-to-day operations of businesses in specific industries.[165] The GOC reported that, to the best of its knowledge, "none of these entities have obligations that they are required to carry out on behalf of the government that have any relationship to the provision of inputs"[166], nor were any of these companies subject to obligations regarding "production quantities of raw materials" or "price targets".[167] For the questions concerning the government role in restructuring the entities at issue and their history of government ownership, the GOC responded that "any government role in any merger or restructuring activity in relation to the suppliers at issue, if any, would have had nothing to do with the prices at which these companies sell steel rounds or the customers to which these companies chose to sell that product".[168] Finally, regarding key persons and senior management of the enterprises at issue, the GOC responded that the "CCP Central Organization Department plays no role in the selection and monitoring of senior management", and that government officials are prohibited by law in China from concurrently holding a position in an enterprise or any other profitmaking organization.[169]

7.84. Based on the foregoing, we consider that much of the information solicited through the public body questionnaires corresponds to material in the Public Bodies Memorandum, and would complement a general factual framework addressed in the Public Bodies Memorandum with information specific to relevant entities or industries in the Section 129 proceedings at issue here.

7.85. First, the USDOC sought extensive information regarding levels of government ownership and governmental involvement in the selection of directors with respect to the investigated entities. For non-majority government-owned enterprises in particular, the USDOC sought extensive information regarding decision-making, the selection of "key persons", and the enterprises' ownership history.[170]

7.86. Second, the USDOC inquired about the applicability of government policies (including industrial policies and plans discussed in the Public Bodies Memorandum) to specific entities and industries at issue in the investigation.[171] In the Section 129 proceedings at issue, the USDOC inquired about the applicability of such policies for all entities under investigation.

7.87. Third, the USDOC requested entity-specific information relevant to the public body inquiry concerning key decision-making on a variety of matters, including appointment of managers, investments, production, financing, and mergers.[172]

7.88. Fourth, the USDOC posed a few questions that appear to indirectly address the conduct of the investigated entities and encompass the provision of inputs. For example, the USDOC asked whether non-majority government-owned entities were required to carry out any obligations on behalf of the government (including the CCP), as well as whether there were "any explicit or implicit obligations or targets regarding the prices or production quantities of raw materials". In

[164] USDOC Public Bodies Questionnaire, (Exhibit USA-83), section II, pp. 4-8.
[165] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. B.3 and B.4, pp. 31-33.
[166] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. B.4, pp. 32-33.
[167] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. B.5, p. 33.
[168] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. C.1, C.2, and C.3, p. 33.
[169] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. D.1 and D.2, p. 34.
[170] Although the Appellate Body has referred to these as "mere 'formal indicia of control'" that by themselves "do not provide a sufficient basis" for a public body finding, it also stated that such indicia "are certainly relevant to the question at issue". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.43).
[171] As stated by the Appellate Body, "evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29).
[172] United States' response to Panel question No. 8(a), para. 64.

the investigations in which the GOC provided any response to the questionnaires, it did not indicate that such obligations or requirements existed.[173]

7.89. In our view, the information requested by the USDOC in the Section 129 proceedings at issue is relevant to establishing that an entity possesses, exercises, or is vested with governmental authority. In particular, the requested entity-specific evidence included formal indicia of governmental control over the relevant entities, as well as the scope and content of government policies relating to the investigated entities, which would be relevant in an analysis of whether the government exercised meaningful control over the entities and their conduct.

7.90. Having considered the evidence solicited and relied upon, as well as the legal criteria applied by the USDOC, we now turn to China's arguments regarding the USDOC's alleged failure to consider information provided by the GOC.

7.2.1.3.3.3 Whether the USDOC failed to consider relevant evidence on the record

7.91. China argues that the USDOC ignored evidence that was in conflict with its public body determinations. We note that China's arguments in this regard relate only to those investigations in which the GOC cooperated by submitting information in response to the USDOC's requests. Therefore, these arguments are relevant only in connection with the five investigations in which such information was provided by the GOC.[174]

7.92. China refers to three types of information that it provided and that it asserts the USDOC ignored.

7.93. First, China argues that the USDOC ignored explanations by the GOC that the industrial plans referenced in the Public Bodies Memorandum do not indicate that the provision of inputs, generally, or the provision of the steel inputs at issue, specifically, is a government function. China also takes issue with the USDOC's failure to discuss the relevance of provincial and municipal plans provided by the GOC, as well as the GOC's explanation of the nature and purpose of such plans.[175]

7.94. Second, China argues that the USDOC ignored evidence that SIEs are legally insulated from governmental interference in day-to-day operational matters. In this regard, China cites explanations to the USDOC that SASAC was established on the basis of separating government administration from enterprise management, and that relevant provisions of the instrument establishing SASAC explicitly set out this separation of functions, as does China's 2008 Law on State-Owned Assets of Enterprises. China criticizes the USDOC's dismissal of such evidence of the autonomy of SIEs[176], as well as the GOC's references to China's Working Party Report commitments that SOEs would make "purchases and sales based solely on commercial considerations" and that China "would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold".[177]

7.95. Third, China argues that the USDOC ignored all entity-specific information provided by the GOC, particularly in respect of two investigations in which it was "able to prepare a substantially complete response".[178] Apart from the claimed burden of responding for a large number of upstream suppliers regarding detailed corporate information for the period of investigation, China criticizes the USDOC's failure to address its response that none of the input suppliers at issue was

[173] Specifically, regarding whether non-majority government-owned entities were required to carry out any obligations on behalf of the government (including the CCP), the GOC responded that it did not have knowledge of any such obligations that have any relationship to the provision of inputs. (GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question No. B.4, p. 33).

[174] Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders.

[175] China's first written submission, paras. 113-127; second written submission, paras. 92-94.

[176] China's first written submission, paras. 138-139 (noting that the USDOC did acknowledge this insulation in the Public Bodies Memorandum, but that "[t]he USDOC immediately dismisses the relevance of this provision ... by asserting that 'the enterprises that SASAC supervises are not insulated from the control and influence of the government'").

[177] China's first written submission, paras. 128-144 (quoting GOC Public Bodies Questionnaire response, (Exhibit CHN-2), p. 6).

[178] OCTG and Kitchen Shelving. (GOC Public Bodies Questionnaire response, (Exhibit CHN-2), p. 6; China's first written submission, para. 152).

required to sell inputs to downstream producers on behalf of the GOC. More generally, China criticizes the lack of any reference in the USDOC's determinations to any of the entity-specific information that was provided in the two investigations at issue.[179] China refers specifically to the GOC's explanation that none of the input suppliers at issue was required to sell inputs to downstream purchasers on behalf of the GOC, as well as the USDOC's failure to analyse company-specific documents it requested in order to determine whether any of the non-majority government-owned enterprises in Kitchen Shelving and oil country tubular goods (OCTG) had been vested with government authority in relation to the provision of inputs.[180]

7.96. The United States contends that the USDOC "considered all of the information provided by the GOC in the five investigations" in which the GOC responded to questionnaires from the USDOC.[181] The United States cites the Public Bodies Preliminary Determination in which the USDOC outlines the exchange of information with the GOC, particularly the information regarding the level of the GOC's ownership interest in producers during the respective periods of investigation.[182] The United States further cites the USDOC's responses to GOC comments in its Public Bodies Final Determination, in which it refers to "incomplete responses" to its questionnaires and states that where information was provided it "considered the information submitted by the GOC and relied on that information to determine that the relevant entities were public bodies".[183] Further, the United States responds that the USDOC in fact discussed many of the policies, laws, and instruments that China claims were ignored, and that China's argument simply amounts to disagreement with the weight the USDOC gave to information and explanations provided by the GOC.[184]

7.97. We note in this regard the United States' contention that the USDOC's determinations "were based on the totality of the evidence on the record" and that "China attempts to support its arguments by focusing narrowly on individual documents on the record of the section 129 proceedings."[185] We further bear in mind that:

> "[W]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the *totality* of the evidence, how the *interaction* of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation." In addition, if an investigating authority explains that the totality of the evidence supports the conclusion reached, a panel must undertake a critical examination of whether, in the light of the evidence on record, the investigating authority's conclusion was reasoned and adequate.[186]

7.98. Accordingly, we must determine whether the USDOC's determinations were supported by reasoned and adequate explanations in light of information provided by respondents in the course of the investigation, taking into account the totality of the evidence upon which the USDOC relied. We bear in mind our role as the reviewer of an agency decision, rather than as the initial trier of fact, and that we may not substitute our judgment for that of the investigating authority. Moreover, we do not consider that the USDOC was required to address every piece of evidence on its record in reaching its determinations, subject to the requirement that the conclusions reached must be reasoned and adequate, including explanations as to why alternative explanations and interpretations of the record evidence were rejected.[187]

7.99. In our view, China's argument regarding information allegedly ignored by the USDOC generally relate to the weight to be accorded to certain evidence, the closeness of the connection that must be demonstrated in relation to a particular financial contribution, and the inferences drawn by the USDOC in light of insufficient responses from the GOC.

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[179] China's first written submission, paras. 145-156.
[180] China's first written submission, paras. 152-153.
[181] United States' response to Panel question No. 9, para. 71.
[182] United States' response to Panel question No. 9, paras. 72-74.
[183] United States' response to Panel question No. 9, paras. 75-79 (quoting Final Section 129 Determination, (Exhibit CHN-5), p. 5). (emphasis omitted)
[184] United States' response to Panel question No. 9, paras. 78-85.
[185] United States' first written submission, para. 60.
[186] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 131. (emphasis original; fn omitted)
[187] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

7.100. We are not persuaded that the lack of explicit discussion of the GOC's argument regarding the significance of industrial plans (including provincial and municipal plans) or entity-specific information undermines the USDOC's determination made in light of the totality of the evidence on the record. In this case, the USDOC noted the GOC's contentions that the questions asked during the investigation were not calculated to elucidate whether input suppliers are public bodies, and its position that the USDOC should have sought evidence that the provision of a particular input is a government function that particular enterprises were vested with authority to perform.[188] In response, the USDOC stated in its final determinations that it was relying, as it had in the preliminary determinations, on information in the Public Bodies Memorandum. We do not consider that it was obligated to repeat the evidence in the Public Bodies Memorandum upon which it based its determinations. Moreover, we consider that the USDOC referred to specific aspects of the evidence and analysis in the Public Bodies Memorandum in its preliminary Section 129 determinations in addressing issues of meaningful governmental control about which the GOC had provided information in its responses.[189] Furthermore, the USDOC addressed several of the GOC's criticisms in its final Section 129 determinations, including by referring to the evidence underlying its conclusion that certain SIEs are used "as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy".[190] The USDOC also stated that incomplete responses by the GOC necessitated the use of facts available that "will often be less ideal than the information requested".[191]

7.101. In this regard, we recall that China has not made any claim under Article 12.7 of the SCM Agreement in relation to the USDOC's reliance on facts available, or its findings that the GOC provided insufficient information in response to the USDOC's questionnaires. Rather, China claims that the USDOC applied the wrong legal standard concerning the connection between the identified government function and the provision of inputs by the investigated entities.[192] We have rejected China's position on the legal standard under Article 1.1(a)(1) regarding any required degree or nature of connection between a government function and financial contribution. Thus, to the extent that the USDOC allegedly ignored responses from the GOC asserting such a legal requirement, China's arguments are insufficient to demonstrate that the USDOC's determinations are inconsistent with Article 1.1(a)(1). Moreover, given our findings as to the relevance of both the legal criteria and evidence relied upon by the USDOC, we do not consider that the USDOC acted inconsistently with Article 1.1(a) by failing to engage explicitly with information that was provided by the GOC that may not have been supportive of the USDOC's ultimate findings.[193]

7.102. Based on the above considerations, we are similarly unpersuaded that the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) for failing to engage with evidence regarding the legal insulation of SIEs' day-to-day business from administrative functions. Although the GOC submitted information regarding SASAC and Chinese laws on state-owned companies, we recall that these are discussed in the Public Bodies Memorandum, particularly with respect to the capability of SASAC to supervise business and investment plans, corporate and sectoral

[188] Final Section 129 Determination, (Exhibit CHN-5), p. 3 (Lawn Groomers, Kitchen Shelving, Wire Strand, Print Graphics, Aluminum Extrusions, and Steel Cylinders determinations), p. 3 (Seamless Pipe determination), and p. 4 (Pressure Pipe, Line Pipe, OCTG, and Solar Panels determinations).

[189] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), pp. 14-17.

[190] Final Section 129 Determination, (Exhibit CHN-5), p. 5 (Lawn Groomers, Kitchen Shelving, Wire Strand, Print Graphics, Aluminum Extrusions, and Steel Cylinders determinations), p. 5 (Seamless Pipe determination), and p. 7 (Pressure Pipe, Line Pipe, OCTG, and Solar Panels determinations) (referring to Public Bodies Memorandum, (Exhibit CHN-1), p. 37). See also Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 9.

[191] Final Section 129 Determination, (Exhibit CHN-5), p. 5 (Lawn Groomers, Kitchen Shelving, Wire Strand, Print Graphics, Aluminum Extrusions, and Steel Cylinders determinations), p. 5 (Seamless Pipe determination), and p. 7 (Pressure Pipe, Line Pipe, OCTG, and Solar Panels determinations).

[192] See, e.g. China's response to Panel question Nos. 51-53.

[193] We note that China's arguments concern the lack of *explicit* reference in the USDOC's determinations to the information provided by the GOC in response to questionnaires. (China's first written submission, para. 159; response to Panel question No. 10, para. 72; and comments on the United States' response to Panel question No. 9, para. 23). In this regard, we note that the Public Bodies Memorandum addressed various provisions of the instruments and policies discussed in the GOC's responses that China contends the USDOC failed to consider. (Public Bodies Memorandum, (Exhibit CHN-1), pp. 7, 17, 19, 22-23, 27, and 33 (referring to industrial plans, the Eleventh Five-Year Plan, Decision No. 40 of the State Council, the Iron and Steel Policy, the instrument establishing SASAC, the Law on State-Owned Assets of Enterprises, and the Company Law)).

restructurings, and appointing management and board members.[194] The fact that the evidence referred to by China may have supported a conclusion contrary to that reached by the USDOC is insufficient to demonstrate that the USDOC's determinations are inconsistent with Article 1.1(a)(1). To conclude otherwise would require us to substitute our judgment for that of the investigating authority in making determinations based on consideration of the totality of the evidence before it. This is particularly the case in an analysis of "meaningful control" in which, "in its consideration of evidence, an investigating authority must 'avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant'."[195]

7.103. For the reasons set out above, we therefore find that China has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement for having failed to consider relevant evidence on the record.

7.2.1.3.3.4 Conclusion on China's "as applied" claim under Article 1.1(a)(1) of the SCM Agreement

7.104. The USDOC relied upon the evidence and analysis discussed above to reach its conclusion that "certain state-invested enterprises are used 'as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy'".[196] The conclusions reached by the USDOC in this respect were based on its analysis of "meaningful control" as evidence that investigated entities exercise, possess, or have been vested with governmental authority to perform a government function. We found that the USDOC did not misconstrue the substantive legal standard for a public body inquiry in its analysis. Moreover, within this analytical framework, we found that the evidence in the Public Bodies Memorandum and CCP Memorandum was relevant to the public body analysis, and that the USDOC requested information concerning all investigated entities that would be relevant to establishing that a particular entity possesses, exercises, or is vested with governmental authority to perform a government function.

7.105. We note that the USDOC's approach was guided by the categories of enterprises based on the level of government ownership set out in the Public Bodies Memorandum, as the USDOC sought different entity-specific information according to these different categories. In our view, the Public Bodies Memorandum and the USDOC's determinations situate "government ownership" within "the institutional and SIE-focused policy setting of China"[197] and the manifold indicia of control set out therein. Therefore, we do not consider that the USDOC's determinations were based on "mere ownership or control over an entity by a government, *without more*"[198], given the legal analysis and broader factual background upon which those determinations were based.

7.106. For the reasons set out above, we reject China's position regarding the applicable legal standard insofar as it would require a particular degree or nature of connection between an identified government function and the financial contribution in question. We further find that the USDOC's determinations were based on relevant legal criteria and evidence, and that China has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) by failing to consider relevant evidence on the record.

7.107. We thus conclude that China has not demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn

[194] We note an analogous situation in another public body case concerning a contention by the Government of India that certain entities had a particular status under Indian law leading to "enhanced autonomy" and "freedom in its day-to-day operations". In that case, the Appellate Body faulted the panel for failing to consider "whether the *USDOC* properly assessed the implications of the status of the NMDC in the legal order of India", based on citations and explanations made by the USDOC itself. (Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.40-4.41 (emphasis original)).

[195] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319).

[196] Final Section 129 Determination, (Exhibit CHN-5), p. 5 (Lawn Groomers, Kitchen Shelving, Wire Strand, Print Graphics, Aluminum Extrusions, and Steel Cylinders determinations), p. 5 (Seamless Pipe determination), and p. 7 (Pressure Pipe, Line Pipe, OCTG, and Solar Panels determinations) (referring to Public Bodies Memorandum, (Exhibit CHN-1), p. 37).

[197] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 9.

[198] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10. (emphasis added)

Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.

7.2.2 China's "as such" claim under Article 1.1(a)(1) of the SCM Agreement in relation to the Public Bodies Memorandum

7.108. In addition to its claim that the USDOC's public body determinations in the individual Section 129 proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement, China also claims that the Public Bodies Memorandum itself is a measure inconsistent "as such" with Article 1.1(a)(1).

7.2.2.1 Main arguments of the parties

7.109. China considers that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement because it lays out the analytical framework that the USDOC will apply prospectively when there is an allegation that a commercial entity in China is a public body.[199] According to China, the Public Bodies Memorandum does not contemplate the USDOC examining whether the entity in question performs a governmental function when engaging in the conduct that is the subject of the financial contribution inquiry and therefore will necessarily lead to determinations that are inconsistent with Article 1.1(a)(1) every time it is applied in a given case.[200]

7.110. The United States contends that the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement.[201] The United States further argues that Article 21.5 of the DSU precludes China from bringing a claim against the Public Bodies Memorandum because it is not a measure taken to comply in this dispute and China could have challenged the Public Bodies Memorandum in the original proceeding, but opted not to do so.[202] The United States also argues that the Public Bodies Memorandum is not inconsistent "as such" with Article 1.1(a)(1) because it is not a "rule or norm of general or prospective application"[203] and because it does not necessarily result in an inconsistency with Article 1.1(a)(1).[204]

7.2.2.2 Whether the Public Bodies Memorandum is a challengeable measure within the scope of the Panel's jurisdiction

7.111. With respect to "measures" that can be challenged in WTO dispute settlement, we recall that:

> "[I]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings". The scope of measures that can be challenged in WTO dispute settlement is therefore broad. As a general proposition, we do not exclude the possibility that concerted action or practice could be susceptible to challenge in WTO dispute settlement. Nor do we consider that a complainant would necessarily be required to demonstrate the existence of a rule or norm of general and prospective application in order to show that such a measure exists.[205]

7.112. We further note the approach taken by the panel in the original proceedings of this case, which found that "even a policy or practice of an investigating authority could be a 'measure' subject to WTO dispute settlement proceedings".[206] The United States argues that the Public Bodies Memorandum, "on its face, does not purport to establish or describe a legal standard adopted or applied by the USDOC"[207], and that the Public Bodies Memorandum "explains certain

[199] China's first written submission, para. 178.
[200] China's first written submission, para. 182; second written submission, paras. 120-121.
[201] United States' first written submission, paras. 165-181.
[202] United States' first written submission, paras. 156-162.
[203] United States' first written submission, paras. 182-192.
[204] United States' first written submission, paras. 193-197.
[205] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).
[206] Panel Report, *US – Countervailing Measures (China)*, para. 7.101.
[207] United States' first written submission, para. 168.

findings the USDOC made based on the evidence it examined" relating to China's government and economic system.[208] In our view, the arguments of the United States (e.g. concerning the subject matter and nature of the Public Bodies Memorandum) are more pertinent to the Panel's jurisdiction or the substance of China's "as such" claims, rather than to the threshold question of whether the Public Bodies Memorandum can be challenged as a "measure" in the first place.[209]

7.113. In view of the wide scope of measures that can be challenged in WTO dispute settlement[210], we consider that the Public Bodies Memorandum falls within the broad definition of an "act" of the USDOC attributable to the United States that is challengeable in WTO dispute settlement.

7.114. Turning to whether the Public Bodies Memorandum is a measure within the scope of our jurisdiction, various elements may be considered in cases of disagreement as to whether a certain measure constitutes a "measure taken to comply" within the meaning of Article 21.5 of the DSU. In particular, a measure "with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5", and whether such other measure has "sufficiently close links" to be characterized as a "measure taken to comply" may depend on "the timing, nature, and effects of the various measures", as well as "the factual and legal background against which a declared 'measure taken to comply' is adopted".[211]

7.115. In this case, China submits that we need not examine any links in terms of nature, timing, and effects, because its argument is that "the Public Bodies Memorandum is an integral part of the Section 129 determinations that constitute the *declared* measures taken to comply in this dispute".[212] In this respect, the United States acknowledges that the Public Bodies Memorandum is not "separable" from the declared measures taken to comply, as it is a part of each of the administrative records of each of the Section 129 proceedings at issue.[213]

7.116. Given the United States' recognition that the Public Bodies Memorandum is an "integral part" of the declared measure taken to comply, we consider that the Public Bodies Memorandum is a measure within the scope of our terms of reference under Article 21.5 of the DSU. We find confirmation of this in the close relationship of the Public Bodies Memorandum with the Section 129 determinations and relevant DSB rulings in terms of its nature or subject matter (public body analysis of Chinese enterprises)[214] and effects (providing an analytical framework and evidentiary analysis for public body determinations relating to Chinese enterprises).[215]

7.117. With regard to the opportunity to challenge the Public Bodies Memorandum in the original proceedings, as a general matter a complainant "*ordinarily* would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not".[216]

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[208] United States' first written submission, para. 177.

[209] In this respect, we note the European Union's view that "[a] measure can be challenged before a panel even if it does not purport to identify a generally applicable 'legal standard', even if it is not mandatory, even if it is not of general application, and even if it is not written." (European Union's third-party submission, para. 44).

[210] Panel Report, *US – Countervailing Measures (China)*, paras. 7.95-7.100; Appellate Body Report, *Argentina – Import Measures*, para. 5.110.

[211] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

[212] China's response to Panel question No. 17, para. 103 (emphasis original). While China argues that this alone is sufficient for the Public Bodies Memorandum to fall within the scope of Article 21.5, it additionally contends that the Public Bodies Memorandum creates an analytical framework for public body determinations, evaluates evidence in relation that framework, and provides conclusions based on the application of that analytical framework to the evidence. (China's response to Panel question Nos. 19 and 23).

[213] United States' response to Panel question No. 19, para. 139.

[214] The United States considers it "self-evident that there is overlap in subject matter between the analysis and explanation presented in the Public Bodies Memorandum (and the evidence underlying it) and the section 129 determinations and the relevant DSB recommendations". (United States' response to Panel question No. 20, para. 141).

[215] United States' response to Panel question No. 23(a), para. 149. The United States submits that the Public Bodies Memorandum "does not merely summarize evidence" but also "presents analysis and explanation of the evidence underlying the Public Bodies Memorandum, and the USDOC, in the memorandum, has set forth and explained certain conclusions it has drawn about the economic and government system in China, and certain types of entities that operate within that system, based on the evidence it has examined".

[216] Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211. (emphasis added)

In this connection, we note that the USDOC issued the Public Bodies Memorandum on 18 May 2012 in connection with its reconsideration of countervailing duty determinations addressed in a different WTO dispute[217], prior to the original WTO request for consultations in this dispute as well as the USDOC's commencement of the Section 129 proceedings in this case.

7.118. In our view, the United States' argument that China is attempting a "lateral challenge" of a measure taken to comply in a different dispute[218] is at odds with its acknowledgement that the Public Bodies Memorandum is an "integral part" of its Section 129 determinations in *this* dispute. Moreover, we do not consider the present case to be one in which China could have challenged the Public Bodies Memorandum in the original dispute, but did not. It is undisputed that the original public body determinations rested on a different basis, and the Public Bodies Memorandum had no relevance to those determinations. As acknowledged by the United States:

> [T]he analysis and explanation in the Public Bodies Memorandum, and the evidence underlying it, was not "relevant" to the determinations challenged in the original proceedings in this dispute, because the Public Bodies Memorandum did not form part of the basis of those determinations, as it now forms part of the basis of the USDOC's redeterminations in the section 129 proceedings.[219]

7.119. Accordingly, the Public Bodies Memorandum only became relevant to the United States' implementation of the DSB rulings and recommendations in this dispute by virtue of its incorporation into the Section 129 record and its consideration by the USDOC in its public body determinations. This differs somewhat from scenarios addressed in previous Article 21.5 disputes regarding "unchanged aspects of the original measure" that have been challenged in original proceedings. Although the Public Bodies Memorandum existed at the time of the original measures, it did not comprise part of those measures, but it was made an integral part of the compliance measures subsequent to the DSB recommendations and rulings in this case.[220] In these circumstances, we do not consider the existence of the Public Bodies Memorandum at the time of the original proceedings to support the conclusion that the Public Bodies Memorandum is outside the scope of these compliance proceedings.[221]

7.120. We therefore find that the Public Bodies Memorandum is a challengeable measure within the scope of our jurisdiction under Article 21.5 of the DSU.

7.2.2.3 Whether the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement

7.2.2.3.1 Introduction

7.121. It is well-established that "'acts setting forth rules or norms that are intended to have general and prospective application' are measures subject to WTO dispute settlement", and a challenge against a measure "as such" relates to WTO-inconsistency "not only in a particular

[217] Public Bodies Memorandum, (Exhibit CHN-1) p. 1 (indicating that the subject of the Public Bodies Memorandum was "An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379").

[218] United States' response to Panel question No. 17, para. 132.

[219] United States' response to Panel question No. 18, para. 137.

[220] In light of this, even if we were to assess the Public Bodies Memorandum according to its close nexus with the United States' implementation of DSB recommendations and rulings, we do not consider this to be a case in which the length of time by which the Public Bodies Memorandum predates those recommendations and rulings "sever[s] the connection between that measure and a Member's implementation obligations". (Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 225).

[221] In any event, Article 21.5 does not preclude new claims against a measure taken to comply that "incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply". (Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432). It is therefore possible that an unchanged aspect of an original measure may be inseparable from a subsequent compliance attempt, by virtue of which fact it may be challenged in WTO compliance proceedings. We consider that this applies *a fortiori* to the Public Bodies Memorandum, which was not part of the original measure (although it existed at the time) but only became relevant to the United States' compliance in this dispute due to its placement on the record by the USDOC in the relevant Section 129 proceedings.

instance that has occurred, but in future situations as well".[222] When bringing a claim against a rule or norm that is a measure of general and prospective application, "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".[223]

7.122. The discretionary nature of a measure is no barrier to a challenge "as such", and a measure may be WTO-inconsistent "as such" if a complainant meets its burden of proving either that the measure mandates an investigating authority to act inconsistently with the relevant provision of WTO law, or that it restricts in a material way the authority's discretion to make a determination consistent with WTO law.[224]

7.123. We therefore proceed to consider whether the Public Bodies Memorandum is a rule or norm of general or prospective application; and, if so, whether the Public Bodies Memorandum restricts in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1).

7.2.2.3.2 Whether the Public Bodies Memorandum is a rule or norm of general or prospective application

7.124. With regard to the precise content of the Public Bodies Memorandum as a "rule or norm", as well as its general or prospective application, we note that relevant evidence may include the text of the measure as well as proof of the systematic application of the challenged "rule or norm".[225] With specific respect to the challenge of *written* rules or norms "as such", the precise content, attribution, as well as the general and prospective nature of the rule or norm may be discernible from the document itself, its official character, or the manner in which it was elaborated, adopted, or enacted.[226]

7.125. We examine in particular whether the Public Bodies Memorandum has "normative value", i.e. whether it provides administrative guidance and creates expectations among the public and among private actors.[227] We examine the element of general or prospective application as evidenced by whether the Public Bodies Memorandum is intended to apply to proceedings taking place after its issuance.[228]

7.126. In terms of the "starting point" of the Public Bodies Memorandum "on its face"[229], the text of the Public Bodies Memorandum contains elements that could support a finding of normative character as well as general or prospective application. In particular, the Public Bodies Memorandum states in several places that the analysis and conclusions therein are determinations by the USDOC "for the purposes of [US] countervailing duty law".

7.127. First, the USDOC determined for the purposes of US countervailing duty law that "China's government has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the 'socialist market economy', which includes maintaining a leading role for the state sector in the economy".[230] Second, the USDOC concluded that "certain categories of SIEs in China properly are considered to be public bodies for the purposes of the [countervailing duty]

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[222] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187 (quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82). See also Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.127:

> Ascertaining whether the rule or norm has general and prospective application is necessary because "as such" challenges seek to prevent the responding Member from engaging in certain conduct in general and in the future, as opposed to addressing particular instances of application that are occurring or have occurred.

[223] Appellate Body Report, *US – Zeroing (EC)*, para. 198.

[224] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.229.

[225] Appellate Body Reports, *US – Zeroing (EC)*, para. 198; *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[226] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.127.

[227] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[228] Panel Report, *US – Countervailing Measures (China)*, paras. 7.113-7.114; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[229] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 168.

[230] Public Bodies Memorandum, (Exhibit CHN-1), p. 2.

law and other categories in China may be considered public bodies under certain circumstances".[231] Although the United States characterizes such conclusions for the purposes of its countervailing duty law as a limitation (i.e. the analysis and conclusions in the Public Bodies Memorandum do not extend to other governmental determinations in relation to China)[232], these examples indicate a broader application of the Public Bodies Memorandum than only to the specific investigations for which it was initially issued. This is specifically evidenced by the USDOC determinations in the Section 129 proceedings at issue, in which the relevant government function and the framework of enterprise categories are consistent elements of the USDOC's reliance on the Public Bodies Memorandum in proceedings taking place after its issuance.

7.128. China has also highlighted the following excerpt from the Public Bodies Memorandum in support of its arguments:

> While record evidence leads the Department to the conclusion that the systemic analysis in this memorandum is appropriate for understanding the institutional and SIE-focused policy setting in China, we do not reach the conclusion that such a systemic analysis is necessary in every [countervailing duty] investigation involving an allegation that an entity is a public body.[233]

7.129. Whereas China considers this reference to "systemic" analysis to support the normative and general nature of the Public Bodies Memorandum[234], the United States counters that the reference to "systemic" pertains to the nature of the analysis required in public body determinations, and that the USDOC specifically noted that this analysis may not always be necessary.[235] Even as clarified by the United States, the reference to "systemic analysis" is consistent with the view that the Public Bodies Memorandum sets out an analysis that is susceptible to broader (i.e. general and prospective) application in countervailing duty investigations against Chinese enterprises.

7.130. In this connection, it is uncontested that the Public Bodies Memorandum has served as the basis for numerous determinations following its adoption by the USDOC.[236] Although there is evidence that the Public Bodies Memorandum is not the exclusive basis of the USDOC's public body determinations, as discussed below, a complainant is not required to show with certainty that a given measure will apply in future situations.[237] In this case, we consider evidence of the USDOC's repeated reliance on the Public Bodies Memorandum, combined with the textual elements above, to show "that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases".[238]

7.131. This conclusion is further supported by the United States' acknowledgement that "the Public Bodies Memorandum and the CCP Memorandum present pertinent analysis and explanation relating to the government and economic system of China" and that "[s]uch analysis and explanation is relevant in any countervailing duty investigation involving allegations that an input provider in China is a public body".[239] In our view, this is consistent with the Public Bodies Memorandum having been elaborated and adopted in manner so as to provide general analytical guidance to the USDOC and to have the potential to be relied upon in future countervailing duty investigations.

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[231] Public Bodies Memorandum, (Exhibit CHN-1), p. 37.
[232] United States' responses to Panel question No. 23, para. 147, and No. 16(a), para. 118.
[233] Public Bodies Memorandum, (Exhibit CHN-1), fn 48. (emphasis added)
[234] China's second written submission, para. 115.
[235] United States' first written submission, para. 174; second written submission, paras. 144-146; and response to Panel question No. 16(a), para. 117.
[236] Public Body Reference Chart, (Exhibit CHN-54).
[237] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.132.
[238] Panel Report, *US – Countervailing Measures (China)*, para. 7.117.
[239] United States' first written submission, para. 126. See also response to Panel question No. 16, para. 104; and first written submission, para. 170:

> Of course, while the USDOC prepared and published the Public Bodies Memorandum in connection with certain section 129 proceedings involving particular products, that very same analysis, explanation, and evidence, which relates to China in general, may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving other products from China.

7.132. In sum, China has adduced substantial evidence to support its argument that the analytical framework articulated in the Public Bodies Memorandum is both general, because it affects an unidentified number of Chinese economic operators, and is prospective, because it applies to future public body determinations.[240] Notwithstanding the fact that the Public Bodies Memorandum was nominally issued to assess relevant entities in specific countervailing duty proceedings[241], there are explicit textual indications regarding its potential for broader application, combined with evidence of its consistent use in subsequent countervailing duty investigations. Thus, with regard to the "normative value" of the Public Bodies Memorandum, we consider that the measure provides "administrative guidance and creates expectations among the public and among private actors"[242] by virtue of its explicit textual elements and the USDOC's consistent reliance on the Public Bodies Memorandum in Chinese investigations.[243]

7.133. Accordingly, we find that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application.

7.2.2.3.3 Whether the Public Bodies Memorandum restricts in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement

7.134. It is not disputed that the Public Bodies Memorandum is not mandatory in the sense that the USDOC is required or bound in all cases to apply its framework or findings in countervailing duty investigations.[244] At the same time, as explained above, the Public Bodies Memorandum may be found to be inconsistent "as such" with Article 1.1(a)(1) if it "restricts, in a material way", the discretion of the USDOC to act consistently with that provision.[245] Precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure and the WTO obligations at issue.[246]

7.135. At the outset, we note that China's claim against the Public Bodies Memorandum "as such" is largely based on the same grounds as its claims against the particular instances of application in the Section 129 determinations at issue. Thus, China argues:

> [A] proper public body analysis requires the investigating authority to determine whether the entity in question is performing a government function when it engages in the conduct that is the subject of the financial contribution inquiry. Whenever the USDOC relies on the framework articulated in the Public Bodies Memorandum to determine that an entity is a public body, it necessarily acts inconsistently with Article 1.1(a)(1), because the analysis in the Public Bodies Memorandum is premised on the U.S. view that the "government function" does not have to relate to the conduct at issue.[247]

7.136. We recall our rejection of China's position regarding the applicable legal standard insofar as it would require a particular degree or nature of connection between an identified government function and the financial contribution in question. Moreover, we did not find the USDOC to have misconstrued the substantive legal standard of a public body inquiry, particularly with respect to its analysis of "meaningful control". We further found that, within the analytical framework of "meaningful control", the factual evidence in the Public Bodies Memorandum (and accompanying CCP Memorandum) was relevant to the public body analysis. Thus, to the extent that China's claim against the Public Bodies Memorandum "as such" is premised on the same grounds as its

[240] China's response to Panel question No. 16, para. 101. See also Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 6.8.

[241] The United States points out that the Public Bodies Memorandum refers to the USDOC's assessment of "the relevant entities *covered by these proceedings*". (United States' first written submission, para. 169 (referring to Public Bodies Memorandum, (Exhibit CHN-1), p. 3 (emphasis original)).

[242] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

[243] Panel Report, *US – Countervailing Measures (China)*, para. 7.111.

[244] United States' first written submission, para. 177; China's comments on United States' response to Panel question No. 14, para. 34.

[245] Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.281; *US – Carbon Steel*, para. 162.

[246] Appellate Body Reports, *EU – Biodiesel (Argentina)*, para. 6.230; *US – Carbon Steel*, para. 157; and Panel Report, *EC – IT Products*, para. 7.112.

[247] China's second written submission, para. 120.

"as applied" claim against the Section 129 determinations[248], we find that China has failed to establish that the Public Bodies Memorandum is a measure that is inconsistent "as such" with Article 1.1(a)(1).

7.137. In our view, an additional point of consideration is whether, and if so, the extent to which the Public Bodies Memorandum restricts the USDOC's authority to consider and rely on other evidence in making public body determinations in its countervailing duty investigations, and specifically whether the USDOC is materially restricted in its discretion to complement the analysis of the Public Bodies Memorandum with additional factual findings in a given investigation in relation to investigated entities.

7.138. It is in this light that we recall that three categories of enterprises are described in the Public Bodies Memorandum[249]:

a. First, "any enterprise in China in which the government has a full or controlling ownership interest is found to be a public body", based on the evidence and analysis regarding the government's "meaningful control" within "the institutional and SIE-focused policy setting of China".

b. Second, "enterprises in China in which the government has significant ownership that are also subject to certain government industrial plans may be found to be public bodies", based on a "case-by-case analysis" that "will rest upon additional indicia that show whether such SIEs are used as instruments by the government to uphold the socialist market economy".

c. Third, the USDOC "may also find that certain enterprises that have little or no formal government ownership are public bodies" depending on a determination "that the government exercises meaningful control over such enterprises … on a case-by-case basis".

7.139. For the second and third categories of enterprises, the Public Bodies Memorandum explicitly contemplates that the USDOC's determinations will be made on a case-by-case basis, taking into account additional information and evidence pertaining to indicia of governmental control over the relevant entities. Indeed, China recognizes this feature of the Public Bodies Memorandum's analytical framework, but argues nonetheless that these categories are based on a flawed understanding of "meaningful control" that is divorced from the relevant conduct constituting the financial contribution.[250]

7.140. As a basic matter, we accept that the Public Bodies Memorandum "has no operational force and does not, in itself, constitute a determination by the USDOC in any countervailing duty proceeding".[251] Notwithstanding its normative character as well as its capacity for general or prospective application, the Public Bodies Memorandum does not, on its face, impinge upon the authority of the USDOC to disregard or supplement its content in any given investigation. In this sense, we consider that the Public Bodies Memorandum is an evidentiary analysis and framework that is *available* to the USDOC to be considered and potentially relied upon to the extent that the USDOC, in its discretion, finds it pertinent in any given investigation.

7.141. In our view, the USDOC's discretion to consider other evidence in a given investigation for all categories of enterprises, even where the Public Bodies Memorandum is on the record, is clear from the fact that the USDOC provides respondents with an opportunity "to rebut, clarify, or correct the factual information" that is placed on the record.[252] We also consider relevant the actual practice of the USDOC in issuing questionnaires requesting information according to the different categories of entities identified in the Public Bodies Memorandum. This includes questions about the applicability of government policies (including industrial policies and plans discussed in

[248] China's responses to Panel question No. 14, para. 91, and No. 15(b), para. 97; see also comments on United States' response to Panel question No. 14, para. 35.
[249] Public Bodies Memorandum, (Exhibit CHN-1), pp. 37-38. (emphasis added)
[250] China's comments on United States' response to Panel question No. 16, para. 41.
[251] United States' response to Panel question No. 23, para. 147.
[252] Public Bodies Record Memorandum, (Exhibit USA-130); United States' responses to Panel question No. 16, para. 105; and No. 23(b), para. 150.

the Public Bodies Memorandum) to all entities and industries at issue in the investigation, as well as entity-specific questions relating to various additional aspects of governmental control that are directed toward entities in the second and third categories. Moreover, we note that in at least one investigation, the USDOC concluded that certain entities were not public bodies on the basis of evidence provided by the respondent pertaining to the exercise of meaningful control by the GOC.[253] Taken together, these considerations indicate that the nature of the Public Bodies Memorandum is that of a resource available to the USDOC for use in making public body determinations, but it does not restrict the USDOC's discretion to supplement the record or take into account and rely on additional information that is provided in a particular investigation.

7.2.2.3.4 Conclusion on China's "as such" claim under Article 1.1(a)(1) of the SCM Agreement

7.142. In light of the foregoing, we find that, although it may be a rule or norm of general or prospective application, the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1). We thus conclude that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement.

7.3 China's claim under Articles 1.1(b) and 14(d) of the SCM Agreement in relation to the USDOC's benefit determinations

7.143. China claims that the USDOC's revised benefit analysis and determinations in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. In particular, China claims that the USDOC improperly rejected Chinese prices as benchmarks by relying on an incorrect legal standard under Article 14(d), and on the erroneous conclusion that Chinese prices for the inputs at issue are not "market-determined".

7.3.1 Main arguments of the parties

7.144. China challenges the legal standard allegedly relied on by the USDOC to reject in-country prices in China as potential benchmarks for the determination of benefit in the Section 129 determinations at issue. In particular, China considers that the standard applied by the USDOC is inconsistent with Article 14(d) because it requires a "pure" market undistorted by government intervention. Asserting that the ordinary meaning of "prevailing" is "as they exist" or "which are predominant", China argues that Article 14(d) requires the investigating authority "to evaluate the adequacy of remuneration in relation to the existing or predominant market conditions within the country of provision."[254] For China, this may involve situations in which "[t]he normal interplay of supply and demand in a market is … influenced by all of the ways in which governments regulate and influence markets" or affect conditions in those markets.[255]

7.145. As a result, China argues that, in assessing whether remuneration for the goods at issue is adequate, an investigating authority must use the prices of similar goods in the country of provision as benchmarks, unless it has made a positive finding that such prices are effectively determined, *de jure* or *de facto*, by the government.[256] According to China, "[t]his is the only circumstance in which panels and the Appellate Body have suggested that domestic benchmark prices may not reflect 'prevailing market conditions … in the country of provision'."[257] China contends that its interpretation is the only possible way to reconcile "the Appellate Body's recognition that Article 14(d) does not require a market 'undistorted by government

[253] USDOC Administrative Review in Citric Acid, (Exhibit USA-129), pp. 23-24; United States' response to Panel question No. 16(c), paras. 124-125.

[254] China's first written submission, para. 224. (fn omitted)

[255] China's first written submission, para. 238.

[256] China's first written submission, para. 223:

> So long as prices for the good in question are determined by the forces of supply and demand, there is a "market" in the sense of Article 14(d) and it is these market-determined prices that provide the baseline for determining whether the government has provided goods for less than adequate remuneration.

[257] China's first written submission, para. 240.

intervention' with its simultaneous finding that there are 'very limited' circumstances in which Article 14(d) allows an investigating authority to resort to out-of-country benchmarks."[258]

7.146. In addition to the asserted error in the legal standard allegedly relied on by the USDOC in the Section 129 proceedings at issue, China also alleges that the USDOC's determination lacks a factual basis. Specifically, China contends that the USDOC did not examine information concerning in-country prices for the inputs at issue. China also considers that the USDOC's analysis did not take into account relevant aspects of "prevailing market conditions" in China for the goods in question.[259] As a consequence, China argues that the USDOC's findings of widespread government intervention in the market fell short of explaining how government intervention effectively distorted the prices of the inputs at issue.[260]

7.147. The United States responds that an investigating authority can reject in-country prices as benchmarks for determining benefit if evidence on the record shows that in-country prices are distorted by government intervention, thus preventing the establishment of equilibrium market prices determined by the forces of supply and demand. The United States also contends that ample factual evidence on the USDOC record regarding government intervention in the Chinese economy demonstrates that prices in the Chinese steel and polysilicon sectors reflect government policy, rather than market forces.[261] On the basis of such evidence, the United States submits that the USDOC did not need to conduct a specific analysis of the market and price for each input in China during the period of investigation.[262]

7.3.2 Main arguments of the third parties

7.148. Australia submits that the SCM Agreement does not define exhaustively the types of governmental measures that could justify rejecting in-country prices as benchmarks and that *de jure* or *de facto* price setting by a government does not exhaust the "very limited" circumstances in which in-country prices can be rejected. In Australia's view, this analysis is necessarily case-specific, and it is neither possible nor desirable to develop rigid legal rules for the kinds of governmental measures that might justify rejecting in-country prices.[263]

7.149. Canada considers that the decision to reject in-country prices must be made on the basis of a market analysis that determines that such prices are not market-determined as a result of government intervention in the market.[264] Canada submits that the key factor allowing an authority to make this decision is evidence of how the government actually causes price distortion. In the context of this case, Canada considers that this compliance Panel must therefore examine what the USDOC has actually done to analyse the precise evidentiary path showing how the Chinese government has distorted prices in the market.[265]

7.150. The European Union argues that, besides situations where the government distorts prices through its market power, there may be other situations in which a government distorts in-country prices through other entities or channels, including through "other market interventions". In such a case, the European Union submits that an investigating authority would have to demonstrate specific price interventions in the market or that supply and demand do not determine market prices because of other types of interventions by the government.[266] For the European Union, an "evidentiary link" is required that leads from the government interventions in question to the distortion of the in-country price.[267] A determination must be made based on the "totality of the evidence", with the weight of the evidence depending on *inter alia* the directness of the

[258] China's second written submission, para. 144.
[259] China's response to Panel question No. 33, para. 164.
[260] China's second written submission, para. 161.
[261] United States' response to Panel question No. 32, paras. 173-174.
[262] United States' response to Panel question No. 35, paras. 179-182. See also Supporting Benchmark Memorandum (Exhibit USA-84), p. 5: "In light of the foregoing, a detailed analysis of the specific markets for hot-rolled steel, steel rounds and stainless steel coils is not integral to our finding of market distortion."
[263] Australia's third-party statement, pp. 5-6.
[264] Canada's third-party submission, para. 36.
[265] Canada's third-party submission, para. 38.
[266] European Union's third-party submission, paras. 58-59.
[267] European Union's third-party statement, para. 15.

government interventions on price, and the closeness of the relationship of the interventions to the product or sector in question.[268]

7.151. Japan submits that "distortion" may be established through a holistic assessment of the market and that a particular finding of the effect on the specific pricing conduct of suppliers is not necessarily required in each instance. According to Japan, the key question for a determination of distortion is whether the price in the market is formed through arm's length transactions based on respective market actors' commercial considerations. In this regard, Japan states that evidence that actors do not operate on the basis of commercial considerations will provide a strong indication that prices resulting from the interactions of those operators are distorted. Japan further argues that the distortion of prices through government intervention can be inferred when such intervention changes the conditions of competition in the market.[269]

7.3.3 Evaluation by the Panel

7.3.3.1 Introduction

7.152. In this compliance dispute, we are called upon to evaluate whether the USDOC's determination that Chinese prices for certain inputs[270] could not be used as benchmarks was consistent with the provisions of Article 14(d) of the SCM Agreement.

7.153. We recall that Article 14(d) of the SCM Agreement deals with situations in which the financial contribution in the sense of Article 1.1(a)(1)(iii) of the SCM Agreement is in the provision of goods or services or the purchase of goods by a government. It sets out a framework[271] for investigating authorities in determining whether the provision of goods or services in question confers a benefit on the recipient. Specifically, the provision of a good by a government:

> [S]hall not be considered as conferring a benefit unless the provision is made for less 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).

7.154. The Appellate Body has established that determining the benefit conferred by a subsidy involving the provision of a good for less than adequate remuneration requires a comparison between the terms on which the good in question is provided to the producers/exporters under investigation and the terms "that would have been available to [those producers/exporters] on the market".[272] Article 14(d) establishes that the standard for determining whether goods were provided to producers/exporters for less than adequate remuneration is whether they were provided on terms more advantageous than those available in the market. The focus of the analysis is on the "adequacy of the remuneration" received by the government: if it is inadequate, i.e. lower than the market remuneration for the goods in question, a benefit is deemed to have been conferred on the recipient of the goods.[273] Depending on the circumstances, the remuneration, i.e. "[t]he act of paying or compensating"[274], may encompass something other or more than the price paid for the goods (compensation in kind, for example). In most cases however, the price paid by the producer/exporter would typically constitute the remuneration for the provision of the good in question.

7.155. An analysis of whether remuneration is "less than adequate" and thus confers a benefit in the sense of Article 1.1(b), involves a comparator or benchmark, i.e. the "adequate" remuneration, with which the price paid by the producer/exporter for the goods in question can be compared.

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[268] European Union's third-party statement, para. 16.
[269] Japan's third-party submission, para. 28; third-party statement, paras. 26-27.
[270] Steel rounds and billets (OCTG), stainless steel coil (Pressure Pipe), hot-rolled steel (Line Pipe), and polysilicon (Solar Panels).
[271] Appellate Body Report, *US – Softwood Lumber IV*, para. 92.
[272] Appellate Body Report, *Canada – Aircraft*, para. 157.
[273] Appellate Body Report, *US – Softwood Lumber IV*, para. 84: "As the Panel observed, the term 'adequate' in this context means 'sufficient, satisfactory'. … Thus, a benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment or compensation for those goods." (fn omitted)
[274] *Black's Law Dictionary*, 10th edn, B.A. Garner (ed.) (Thomson Reuters, 2009), p. 1487.

Since terms on the market in the country of provision are the relevant standard for the comparison, Article 14(d) requires investigating authorities to determine and use a benchmark which relates to the prevailing market conditions in the country of provision.[275] The last sentence of Article 14(d) sets out an illustrative list of prevailing market conditions which may be relevant in undertaking the necessary comparison between the terms on which the good was provided by the government and the benchmark used by the authority, "including price, quality, availability, marketability, transportation and other conditions of purchase or sale" for the goods in question.

7.156. We note that this is not the first time a panel has been called upon to consider the meaning of this provision and apply it. Panels and the Appellate Body have done so in the past, including in the original dispute. Our analysis of China's claim in this compliance proceeding will thus be guided by our understanding of Article 14(d) in light of the ordinary meaning of its terms in context and their interpretation in past disputes.

7.157. In particular, we recall that "prevailing market conditions" in Article 14(d) "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices".[276] It follows that any benchmark for comparison purposes in determining the adequacy of remuneration must consist of *market-determined* prices for the same or similar goods in the country of provision.[277] Accordingly, prices established in accordance with the prevailing market conditions for the same or similar goods in the country of provision are presumed to be an adequate benchmark. They are the "starting-point"[278] of any analysis carried out in this context.[279] In our view, this implies that before resorting to an alternative benchmark, an investigating authority must determine whether market prices in the country of provision can be used as a benchmark to establish whether the recipient has benefitted from the financial contribution in question. If not, an investigating authority must adequately explain its decision before proceeding to determine an alternative benchmark.[280]

7.158. In the present dispute, the disagreement between the parties concerns the USDOC's determination that in-country prices in China are not "market-determined" and thus cannot be used as a benchmark for the purpose of determining the adequacy of remuneration under Article 14(d). The focus of our consideration is thus the explanation given by the USDOC for its determination that prices in China are not "market-determined". In this regard, we recall that Article 14(d) does not qualify in any way the "market" conditions which are relevant for the analysis. Article 14(d) does not refer to a benchmark derived from a "pure" market, a market "undistorted by government intervention", or a "fair market value" as a requirement for determining the adequacy of remuneration.[281] Nevertheless, an identified in-country benchmark should not, as a result of governmental intervention in the market, deviate from a market-determined price.[282]

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[275] Appellate Body Report, *US – Softwood Lumber IV*, paras. 89 and 96.

[276] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.46 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150).

[277] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.46 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151; in turn referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 89).

[278] Appellate Body Report, *US – Softwood Lumber IV*, para. 90

[279] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151:

> Proper benchmark prices would normally emanate from the market for the good in question in the country of provision. To the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d).

[280] Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.274 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 93).

[281] Appellate Body Report, *US – Softwood Lumber IV*, para. 87 (quoting Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51).

[282] See e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155:

> Although the benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices when they are not market determined. Proposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price as a result of governmental intervention in the market.

See also ibid. para. 4.150.

7.159. In view of the foregoing, we first consider the parties' arguments in relation to the proper legal standard for the identification of an appropriate benchmark under Article 14(d) of the SCM Agreement.

7.3.3.2 Whether the USDOC applied an erroneous legal standard in its benefit determinations

7.160. China's claim of inconsistency with Articles 1.1(b) and 14(d) is based at the outset on the allegedly incorrect legal standard applied by the USDOC to determine whether in-country prices in China were related to "prevailing market conditions" for the inputs in question. In particular, China argues that an investigating authority may resort to an out-of-country benchmark only when it has established that in-country prices are effectively determined by the government, either *de jure* or *de facto*.[283]

7.161. China itself recognizes that a government may distort prices in the market in many different ways.[284] For China however, government intervention is itself part of the prevailing conditions in any given market.[285] As a consequence, in China's view, evidence of government intervention cannot justify rejecting in-country prices under Article 14(d) because "there would be no end to the factors that investigating authorities could rely upon to depart from the requirement to evaluate the adequacy of remuneration 'in relation to prevailing market conditions … in the country of provision'".[286]

7.162. While we agree that evidence of governmental intervention in the economy, or even in a specific sector of the economy, will not, in and of itself, suffice as the basis for rejecting in-country prices as benchmarks, we do not accept that the narrow legal standard advocated by China is required by Article 14(d).

7.163. First, we recall − as the panel did in the original dispute − that there is no defined, exhaustive set of circumstances in which an authority may resort to an out-of-country benchmark.[287] For instance, in *US − Carbon Steel (India)*, the Appellate Body stated:

> [W]e do not consider that in-country prices may not be used to determine a benchmark only where such prices are distorted as a result of governmental intervention in the market. Indeed, there may be other circumstances where an investigating authority would not be required to use in-country prices to determine a benchmark for the purposes of Article 14(d), for example, where information pertaining to in-country prices cannot be verified so as to determine whether they are market determined in accordance with the second sentence of Article 14(d). As we see it, to find that an investigating authority is precluded from using alternative benchmarks in these situations would be contrary to a proper interpretation of Article 14(d).[288]

7.164. Consistent with our understanding that Article 14(d) requires a comparison of the terms of the financial contribution provided to the producer/exporter under investigation and the terms "that would have been available to the recipient on the market"[289], we consider that the "other circumstances" contemplated by the Appellate Body refer to the multiplicity of situations in which in-country prices might not be suitable for determining the terms on which the goods at issue are

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[283] China's first written submission, paras. 195 and 227-228; second written submission, paras. 145-146. See also response to Panel question No. 26, para. 130:

> [T]he "very limited" circumstance in which an investigating authority can reject available in-country price benchmarks is the circumstance in which the government effectively determines the price at which the good is sold.

[284] See e.g. China's first written submission, para. 238: "[t]here is no market that is 'undistorted by government intervention'".

[285] China's first written submission, para. 244:

> The "prevailing market conditions … in the country of provision" are necessarily influenced by all of the ways in which the government of that country organizes and regulates markets. No other type of "market conditions" exists.

[286] China's first written submission, para. 247.

[287] Appellate Body Report, *US − Countervailing Measures (China)*, para. 4.76.

[288] Appellate Body Report, *US − Carbon Steel (India)*, para. 4.189. (emphasis added)

[289] Panel Report, *Canada − Aircraft*, para. 9.112.

offered on the domestic market. This may encompass a variety of situations in which in-country prices for the goods at issue are either not available or not verifiable or cannot, for other reasons, be used to determine "whether the recipient is better off absent the financial contribution".[290] These circumstances, even if very limited, in our view go beyond the sole circumstance in which prices are determined, *de jure* or *de facto*, by the government.

7.165. Second, we are not convinced by China's argument that "panels and the Appellate Body have limited the concept of 'distortion' under Article 14(d) to situations in which the government effectively determines all in-country prices for the product in question".[291] China relies on five prior WTO disputes in which, according to China, resort to an out-of-country benchmark was found to be warranted because of the government's sole or predominant role in the market as provider of the goods in question.[292] China draws from the facts of these prior disputes a general principle according to which resort to an alternative benchmark is permitted only where it is shown that prices are effectively determined by the government.

7.166. We consider that the facts of prior disputes do not preclude us from reaching the conclusion that an out-of-country benchmark may be warranted in a different factual context. The facts of the present compliance dispute are quite different from those in the disputes relied on by China, and our consideration of the USDOC's determinations must be based on the facts of this case in light of the relevant legal standard. As noted by the European Union, the question of whether, and if so how, an investigating authority can "establish price distortion through government interventions that are not, or at least not primarily, the result of the government's market power regarding the product concerned" is raised for the first time in WTO dispute settlement proceedings in this dispute.[293]

7.167. Moreover, we note that the disputes relied on by China in support of its argument explicitly focus on evidence of *price distortion*, and not solely on evidence of *prices being set by the government*.[294] For instance, in the original dispute, the Appellate Body emphasized that:

> What allows an investigating authority to reject in-country prices is *price distortion*, not the fact that the government, as a provider of goods, is the predominant supplier *per se*.
>
> ...
>
> Once an investigating authority has properly established and explained that in-country prices are *distorted*, it is warranted to have recourse to an alternative benchmark for the benefit analysis under Article 14(d).[295]

7.168. Thus, in our view, an investigating authority may reject in-country prices if there is evidence of price distortion, and not only if there is evidence that a government "effectively determines" the price of the goods at issue. This strikes us as appropriate in the context of the Article 14(d) comparison, because the existence of price distortion may well, in our view, preclude a proper comparison of the terms of the financial contribution with market terms. This may be the case when the government is the sole or predominant provider of a good, but it may also be the

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[290] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.160.

[291] China's first written submission, para. 190.

[292] China's response to Panel question No. 31 (referring to Appellate Body Reports, *US – Softwood Lumber IV*; *US – Anti-Dumping and Countervailing Duties (China)*; *US – Carbon Steel (India)*; and *US – Countervailing Measures (China)*; and Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*).

[293] European Union's third-party submission, para. 62.

[294] [In *US – Softwood Lumber IV*,] the Appellate Body *limited* its examination to the situation of government predominance in the market, and merely *noted* examples of situations in which it would not be possible to use in-country prices, i.e.: (i) where the government is the only supplier of the particular goods in the country; and (ii) where the government administratively controls all of the prices for those goods in the country.
(Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.76 (emphasis original))

[295] Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.59 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446 (emphasis original)), and 4.62. (emphasis added)

case in other circumstances that render the comparison equally impossible or irrelevant. To conclude that an investigating authority is precluded from using alternative benchmarks in these situations would be contrary to a proper interpretation of Article 14(d).[296]

7.169. We note China's argument that the USDOC interprets Article 14(d) as requiring a "pure market", undistorted by government intervention:

> [T]he USDOC appears to consider that the term "market" in Article 14(d) refers to a "pure" market or to a market "undistorted by government intervention", or perhaps to a market with no more than some minimum (but unspecified) level of government influence over the forces of supply and demand.[297]

7.170. The United States disagrees with this characterization, contending instead that the USDOC's rejection of in-country prices requires evidence of distortions of a certain magnitude:

> [T]he question is whether the distortions in the market were of such a magnitude that they distorted firm-level decision-making and prevented the establishment of equilibrium prices determined by the "forces of supply and demand."[298]

7.171. The United States does not purport to establish a threshold above which government interventions would always result in price distortions sufficient to warrant the conclusion that prices are not market-determined.[299] Indeed, it specifically argues that "price distortion must be established on a case by case basis" and contends that, in the present case, the "USDOC was obligated only to determine in the Section 129 proceedings whether price distortion had been demonstrated in the steel input markets which it clearly did."[300] The United States argues that:

> The use or rejection of in-country prices is not a question of whether there are no "market conditions" or market forces, but rather a question of whether the market conditions allow for the use of an in-country benchmark or call for the use of an out-of-country benchmark.[301]

7.172. This view accords with our understanding of Article 14(d) of the SCM Agreement in light of relevant prior WTO rulings.[302] In particular, we consider that the outcome of the inquiry necessary to identify an appropriate benchmark, including the decision whether the circumstances in a particular investigation justify use of an out-of-country benchmark, will depend on the facts of each case.

7.173. We therefore do not consider that "the hypothetical tipping point at which government intervention in a market becomes distortive"[303] is a necessary or even relevant part of either an investigating authority's decision-making process, or our consideration of the USDOC determinations in this dispute. Rather, our task is to decide whether the USDOC's conclusion that in-country prices in China cannot be used as benchmarks to determine the adequacy of

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[296] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.189.

[297] China's first written submission, para. 230.

[298] United States' first written submission, para. 253. See also response to Panel question No. 24.

[299] See e.g. United States' response to Panel question No. 25, para. 154: "[T]he United States respectfully declines to speculate on the hypothetical circumstances pursuant to which certain types, or degrees, of government intervention might justify, or not justify a finding of price distortion." See also China's response to Panel question No. 26(b), para. 120.

[300] United States' second written submission, para. 170. See also comments on China's response to question No. 31, fn 178:

> To the contrary, the statement indicates (1) that a price that is not market-determined is not useable as a benchmark, and (2) that "government intervention" may cause prices to deviate from a market-determined price where appropriately substantiated by record evidence and analysis.

[301] United States' response to Panel question No. 26, para. 157.

[302] For instance, Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.61:

> [A] finding of inconsistency with Article 14(d) in the selection of a benefit benchmark depends on whether or not the investigating authority at issue conducted the necessary market analysis in order to evaluate whether the proposed benchmark prices are market determined such that they can be used to assess whether the remuneration is less than adequate.

[303] United States' response to Panel question No. 30, para. 171.

remuneration is adequately explained and is supported by the evidence on the record of the Section 129 proceedings at issue.[304]

7.174. For the reasons set out above, we find that Article 14(d) does not limit the possibility of resorting to an out-of-country benchmark as advocated by China. We reject China's view that its interpretation of Article 14(d) is the only possible way to reconcile the recognition that Article 14(d) does not require a market "undistorted by government intervention" with the "very limited circumstances" in which out-of-country benchmarks may be used.[305] While those circumstances may be very limited, they are not so limited as China argues. We consequently also reject China's claim that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by rejecting in-country prices without having first found that prices for the inputs in question were effectively determined by the government of China.

7.175. We thus proceed to consider China's arguments concerning the alleged lack of evidence supporting the USDOC's conclusion that the in-country prices of the inputs at issue were distorted.[306]

7.3.3.3 Whether the evidence on the record supports the determination that in-country prices in China could not be used to determine the adequacy of remuneration for the goods at issue

7.176. The scope and substance of an investigating authority's analysis and determination of an appropriate benchmark will "vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record".[307] In addressing China's arguments, we will review the record evidence upon which the USDOC based its determinations and consider whether the evidence supports the factual findings made, and whether those factual findings, in light of the explanations given, support the USDOC's determinations.

7.3.3.3.1 The USDOC's factual findings in relation to in-country prices for the inputs at issue

7.177. We recall that in the Section 129 determinations at issue, the USDOC concluded with respect to the Pressure Pipe, Line Pipe, and OCTG proceedings that:

> [T]here are no potential benchmarks within the steel industry in the PRC that can reasonably be considered usable indicators of "prevailing market conditions".[308]

The USDOC reached this determination on the basis that:

a. the GOC's response to the USDOC's questionnaires was incomplete, so that no valid benchmark was on the record; and

b. the entire structure of the Chinese steel market is so distorted that private prices cannot be considered "market based" or usable as potential benchmarks.

With respect to the Solar Panels proceeding, the USDOC concluded that the GOC "significantly distorts prices in this industry such that there are no potential benchmarks from the domestic industry".[309]

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[304] See e.g. United States' response to Panel question No. 30, para. 170. We agree with Canada's view that this analysis is "inherently fact driven and must be considered on a case-by-case basis". (Canada's third-party submission, para. 35).

[305] China's second written submission, para. 144.

[306] China's second written submission, section C ("Under Any Interpretation of Article 14(D), The United States Has Failed To Demonstrate That Chinese Prices For The Inputs At Issue Were Not 'Market' Prices.") See also ibid. para. 151.

[307] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.153.

[308] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 4.

7.178. Relevant evidence on the record includes the GOC's response to Benchmark Questionnaires, the two memoranda relating to benchmarks, and the Final Benchmark Determination.

7.3.3.3.1.1 The Benchmark Questionnaires

7.179. In the four Section 129 proceedings at issue, the USDOC sent "benchmark questionnaires" to the GOC. These questionnaires sought information relevant to establishing whether the mandatory respondents acquired certain inputs for less than adequate remuneration "from the Government of the People's Republic of China".[310] The GOC responded to the questionnaire within the prescribed deadline in three investigations (OCTG, Pressure Pipe, and Line Pipe) but did not reply at all in the Solar Panels investigation.

7.180. The Benchmark Questionnaires covered the following matters with respect to each investigation:

a. facts about the industry producing the input product: total number of producers, total volume and value of Chinese domestic consumption and production of the relevant input product, percentage of domestic consumption accounted for by domestic production, total volume and value of imports, physical differences between the imported product and the product produced in China;

b. existence of planning and policy documents applicable to the input industry during the period of investigation and addressing in particular the pricing, production, importation, or exportation and development of or restrictions in the production capacity of the input product;

c. export or price controls on the input product during the period of investigation and the previous two years;

d. VAT, import/export tariff rates, quotas, export licensing in force, restrictions on foreign investments;

e. list of industries in China purchasing the input product directly, breakdown of the production by regions/provinces;

f. barriers to domestic trade;

g. bankruptcy rules applicable to the industries producing the inputs;

h. possible sources of information on supply and prices of the main raw material inputs into the input product, demand for the input product, other factors affecting supply or price of the input product; and

i. list of all producers in the input product industry including level of production, level of government ownership, whether they are designated as SOEs or owned by central/sub-central SASAC, or are otherwise government-related entities. Whether any government authority has approval authority over mergers, acquisitions, capacity addition, or reduction for the producers.

7.181. The United States describes the scope of the requested information as covering:

> [T]he structure of the relevant input industry, as well as information regarding all industrial laws, plans, and policies that applied to the input markets during the relevant periods of investigation. The USDOC additionally requested information regarding any export restrictions on the relevant inputs during the periods of investigation and barriers to market entry and exit. Further, the USDOC requested

[309] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 9.
[310] USDOC Benchmark Questionnaire, (Exhibit USA-121), p. 1.

> information on any domestic or foreign investment restrictions and any other "market conditions, trends, and developments" for the goods.[311]

7.182. In light of the scope of the information sought, the Benchmark Questionnaires were, in our view, appropriate to elicit information relevant to the necessary case-by-case factual inquiry contemplated by the Appellate Body in the original proceedings in this case:

> [I]n conducting the necessary analysis to determine whether in-country prices are distorted or market-determined, an investigating authority may be called upon to examine, depending on the relevant circumstances, "the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It could also require assessing the behaviour of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices."[312]

7.183. In addition to the information received from the GOC in responses to the Benchmark Questionnaires, the USDOC also compiled information in two memoranda, the "Benchmark Memorandum" and the "Supporting Benchmark Memorandum", published on 7 March 2016 and incorporated in the record of each of the four Section 129 proceedings at issue.[313]

7.3.3.3.1.2 The memoranda

7.184. The two memoranda relating to benchmarks set forth evidence and analysis relevant to the following question:

> [W]hether prices of the relevant inputs from sources other than the providers of the financial contributions in question are market-determined and thus suitable as benchmarks when examining whether government goods are being provided for less than adequate remuneration in a [countervailing duty] proceeding.[314]

7.185. Their content can be described as follows:

a. The Benchmark Memorandum focuses "on the nature and role of SIEs in China in general, as well as the role of China's government (the GOC) in the steel industry". It also examines "the impact of the GOC's role in SIEs and the steel market on any private entities supplying the market in China for those goods, and the extent to which prices from such entities are distorted".[315]

b. The Supporting Benchmark Memorandum focuses on the four input products at issue. It finds that the record did not contain the information necessary to carry out an input-specific market analysis. The USDOC thus resorted to facts available in each investigation to determine whether the price of the input product at issue was "market-determined".[316]

The Benchmark Memorandum

7.186. The Benchmark Memorandum, in discussing the nature and role of SIEs in China in general, as well as the role of the GOC in the steel industry, covers three topics:

a. the role of SIEs in general as a tool used by governments to pursue policy goals;

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[311] United States' response to Panel question No. 34, para. 177. (fns omitted)
[312] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.52 (quoting Appellate Body Report, *US – Carbon Steel (India)*, fn 754).
[313] Benchmark Memorandum, (Exhibit CHN-20), fn 8. In its final benchmark determinations, the USDOC refers to the Benchmark Memorandum and Supporting Benchmark Memorandum as the "Benchmark Preliminary Determination Memoranda" and additionally refers to "Benchmark Preliminary Determinations". (Final Benchmark Determination, (Exhibit CHN-21), p. 2).
[314] Benchmark Memorandum, (Exhibit CHN-20), p. 2.
[315] Benchmark Memorandum, (Exhibit CHN-20), p. 3. (fn omitted)
[316] Supporting Benchmark Memorandum, (Exhibit USA-84), pp. 5-8.

b. the role of SIEs in the Chinese economy; and

c. government intervention in the Chinese steel sector.

It sets forth the following factual findings:

a. Government industrial policies in China guide the micro-economic decisions made by SIEs.[317]

b. The GOC intervenes in firm-level business decisions such as investments and development plans, appointments to the board and management, mergers, and acquisitions.[318]

c. China's SIEs operate in a "soft budget" environment due to the receipt of direct and indirect benefits.[319]

d. Competition from the non-state sector is constrained by investment guidelines issued by the GOC.[320]

7.187. The Benchmark Memorandum concludes that:

> In light of this operating environment, which is characterized by intensive government intervention, control and expectations … Chinese SIEs do not operate as true commercial actors because they are not necessarily subject to the conditions one would expect in a truly competitive market.[321]

7.188. Regarding the steel sector specifically, the Benchmark Memorandum sets forth the following factual findings:

a. The steel industry is a "pillar" industry in China.[322]

b. Excess capacities exist in the steel industry and the GOC intervenes to regulate capacities.[323]

c. The same government interventions noted for SIEs in general occur in the steel sector, including appointment of directors and senior executives; subsidies in the form of cheap energy, etc.[324]

7.189. The USDOC concluded, referring to the above findings, that the prices in the domestic market of steel inputs produced by China's SIEs cannot be considered to be "market-determined" for purposes of a benchmark analysis under Article 14(d) of the SCM Agreement.[325]

7.190. In addition, regarding prices other than those of SIEs (private producer and import prices) for steel inputs in China, the USDOC found that:

a. SIEs hold a significant market share of overall production in China's steel sector.[326]

[317] Benchmark Memorandum, (Exhibit CHN-20), p. 8.
[318] Benchmark Memorandum, (Exhibit CHN-20), p. 9.
[319] Benchmark Memorandum, (Exhibit CHN-20), fn 62.
[320] Benchmark Memorandum, (Exhibit CHN-20), p. 18.
[321] Benchmark Memorandum, (Exhibit CHN-20), p. 21.
[322] Benchmark Memorandum, (Exhibit CHN-20), p. 21 and fn 79 (referring to a 2010 report by the World Bank).
[323] Benchmark Memorandum, (Exhibit CHN-20), p. 24 and fn 100 (referring to *inter alia* the 2005 Iron and Steel Industry Policy (National Development and Reform Commission Order n° 35), which details production scales, investments, technologies, and geographical locations).
[324] Benchmark Memorandum, (Exhibit CHN-20), p. 26 and fn 109.
[325] Benchmark Memorandum, (Exhibit CHN-20), p. 26.
[326] Benchmark Memorandum, (Exhibit CHN-20), p. 27 and fn 117.

b. The market structure is characterized by the presence of many SIE steel producers that are shielded from competitive market forces and government intervention, so that even a minority presence of SIEs leads to the distortion of private prices.[327]

c. Export restraints on steel input products were in place during the periods of investigation (including taxes on exports of all three products).[328]

d. Restrictions on foreign investment in the steel sector were in place during this period.[329]

7.191. The USDOC found that, in this context, "[p]rivate producers will have little choice but to follow the lead set by the dominant SIEs in China's steel industry". It concluded that, based on the record in the Section 129 proceedings, all in-country private prices are distorted.[330]

The Supporting Benchmark Memorandum

7.192. The Supporting Benchmark Memorandum explains the USDOC's decision to resort to facts available in the four Section 129 proceedings at issue, as well as the conclusions reached by the USDOC.

7.193. With regard to the Solar Panels investigation, the USDOC stated that on 4 June 2015 it requested information from the GOC in relation to the polysilicon market in the PRC.[331] On 6 July 2015, the GOC responded that it would not provide the information requested.[332] The USDOC thus relied on facts available on the record, including:

a. an excerpt from the original petition pointing to a WTO panel report finding that the GOC maintains WTO-inconsistent export restraints on silicon exports;

b. a 2009 New York Times article explaining that the GOC's State Council has the ability to manage key aspects of the solar grade polysilicon industry, including capacity, access to land use, and lending from state-owned commercial banks; and

c. excerpts from the original petition showing, on the basis of articles, that the largest polysilicon producer in China sold polysilicon below cost, due to the assistance of government subsidies.[333]

7.194. The USDOC concluded that the record supported a determination that the GOC's involvement in the Chinese solar grade polysilicon industry significantly distorts the prices in this industry, such that there were no potential benchmarks from the domestic industry that could be considered "market based" in accordance with the SCM Agreement.[334]

7.195. With regard to the three steel inputs, the Supporting Benchmark Memorandum states that the "GOC provided incomplete information regarding the producers in the hot-rolled steel, steel rounds and stainless steel coils markets".[335] The USDOC therefore decided to extend to the markets for the three specific inputs in question the conclusions of the Benchmark Memorandum regarding the steel sector, based on the evidence of "government intervention and distortions in

[327] Benchmark Memorandum, (Exhibit CHN-20), p. 28.
[328] Benchmark Memorandum, (Exhibit CHN-20), fn 122 (referring to GOC responses to questionnaires in the countervailing duty investigations at issue).
[329] Benchmark Memorandum, (Exhibit CHN-20), pp. 29-30 and fn 125 (referring to an article from the Wall Street Journal which indicates that an investment by Mittal was blocked in 2005).
[330] Benchmark Memorandum, (Exhibit CHN-20), p. 30. Footnote 127 of the Benchmark Memorandum adds that, in the absence of significant imports of steel inputs in China, sellers of imported steel inputs are "price-takers selling at the rates that prevail". Therefore, the "finding of distortion extends to the prices of imports into China of the input in question".
[331] USDOC Benchmark Questionnaire, (Exhibit USA-121). The questionnaire covered four countervailing duty investigations (Pressure Pipe, Line Pipe, OCTG, and Solar Panels).
[332] GOC Benchmark Questionnaire response, (Exhibit USA-122).
[333] Supporting Benchmark Memorandum, (Exhibit USA-84), pp. 8-9.
[334] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 9.
[335] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 6.

the steel sector, of which hot-rolled steel, steel rounds and stainless steel coils [the three inputs in question] are a part".[336]

7.196. We now turn to China's argument alleging that the USDOC failed to provide a reasoned and adequate explanation for its determinations.

7.3.3.3.2 Whether the USDOC's factual findings support the conclusion that in-country prices in China are not "market-determined"

7.197. China contends that the USDOC "identifies no economic connection between the SIE-related factors that represent the overwhelming basis for its findings and the prices charged by at least half of the domestic Chinese suppliers of the products at issue".[337] In particular, according to China, the record contains no explanation as to how the "pervasive government intervention" identified by the USDOC in the Benchmark Memorandum affected SIE and non-SIE prices in China for the inputs at issue during the period of investigation:

> Neither the United States, nor the USDOC before it, has substantiated that these "interventions" affected the prices charged by either SIE or non-SIE suppliers of the three relevant inputs. … Thus, even taking the existence of these "interventions" at face value, the United States has failed to establish any causal pathway between the "interventions" that the USDOC relied upon and its conclusion that domestic Chinese prices were determined by market forces within "narrow and predetermined parameters".[338]

7.198. China adds that "the USDOC … failed to identify any causal pathway by which the pricing behaviour of SIEs affected the prices charged by *non*-SIE suppliers. The answer cannot be the possession and exercise of market power by SIEs, because the USDOC made no such finding."[339] More specifically, China asserts:

a. "[A]t no point in its analysis does the USDOC identify evidence on the record to support the conclusion that the GOC influences the prices at which SIEs sell their products, much less that it determines those prices."[340]

b. None of the economic planning documents referenced in the memoranda "refers to, much less determines, the prices at which either private or publicly-owned steel producers sell their output".[341]

c. The USDOC fails to demonstrate that export restraints on the three steel input products at issue and alleged upstream subsidies granted to input suppliers in China had an impact on SIE steel prices, or that "such an effect, if it existed, affected the prices charged by other steel producers in the market".[342]

7.199. The United States explains that "the specific mode of analysis used by USDOC in the determinations at issue was to examine whether prices within the steel sector were reflective of 'market conditions', using the standard of the Appellate Body in *EC-Large Civil Aircraft (AB)*. In particular, the USDOC determined whether prices in China's steel sector resulted from 'the discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market.'"[343] The United States considers that, in carrying out this assessment, an investigating authority may consider the following factors, depending on the relevant circumstances:

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[336] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 6.
[337] China's first written submission, para. 213.
[338] China's second written submission, para. 161.
[339] China's second written submission, para. 167. (emphasis original)
[340] China's first written submission, para. 269.
[341] China's first written submission, para. 274.
[342] China's first written submission, para. 282.
[343] United States' response to Panel question No. 35, para. 180 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 981).

> [T]he structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It could also require assessing the behaviour of the entities operating in that market in order to determine whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices.[344]

For the United States, the USDOC was "not required to analyze specific prices for the relevant inputs to determine that SIE and private prices in China's steel and polysilicon sectors are not market-determined".[345]

7.200. At the outset, we recall that the information collected and summarized in the Benchmark Memorandum focuses on government intervention in the Chinese economy as a whole and the steel sector generally[346], rather than on the specific input markets at issue. The Supporting Benchmark Memorandum only refers to the specific input markets at issue in discussing export restraints on the three products during the relevant periods of investigation.[347] It also confirms that the USDOC did not consider that it was necessary to proceed with a detailed analysis of the specific markets for the inputs at issue:

> In light of the foregoing, a detailed analysis of the specific markets for hot-rolled steel, steel rounds and stainless steel coils is not integral to our finding of market distortion.[348]

7.201. Before us, the United States explains that "[t]o the extent country-or sector-wide laws, policies, or other evidence are relevant to evaluating price distortion for a particular input market, that evidence can be used to support an investigating authority's analysis of the 'prevailing market conditions' for the good in question."[349] In addition, the United States argues that:

> [The] "equilibrium price established in a market" [results] "from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market." … Where, as in China's steel sector, one side of the equation (supply) continually fails to respond to the other side of the equation (demand), it cannot be said that the resulting prices reflect a market equilibrium of supply and demand.[350]

The United States further argues that:

a. "widespread sectoral intervention meant that SIEs were constrained in their ability to pursue commercial outcomes, and even if they were not so constrained, their commercial motivations themselves would be distorted by preferential treatment and subsidization"[351];

b. "broad-based governmental intervention in favor of the state share of the economy … 'distorts market signals for all participants in the sectors, just as surely as does the presence of monopoly market power'"[352];

c. "forced mergers and acquisitions and the presence of export taxes … artificially depressed prices for the relevant steel inputs during the period of investigation"[353]; and

[344] Appellate Body Report, US − Countervailing Measures (China), para. 4.52; and United States' first written submission, para. 275.
[345] United States' response to Panel question No. 35, para. 179.
[346] Benchmark Memorandum, (Exhibit CHN-20), sections III and IV.
[347] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 4.
[348] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 5.
[349] United States' response to Panel question No. 26(a), para. 161.
[350] United States' first written submission, para. 254. See also Benchmark Memorandum, (Exhibit CHN-20), p. 28.
[351] United States' second written submission, para. 179. See also Benchmark Memorandum, (Exhibit CHN-20), p. 28.
[352] United States' second written submission, para. 180 (quoting Benchmark Memorandum, (Exhibit CHN-20), p. 28). See also Benchmark Memorandum, (Exhibit CHN-20), p. 30.

d. "the GOC exercises various levers of control over commercial actors in China's steel sector, with the result that these actors operate within a set of narrow and predetermined parameters. These narrow parameters mean that these commercial actors in China are not responding to supply and demand in the market in a manner which permits an equilibrium price to be established."[354]

7.202. We recall that an analysis of the market in the country of provision is necessary to determine whether particular in-country prices can be relied upon as a proper benchmark.[355] In our view, an investigating authority may carry out such a market analysis at different levels of detail with respect to the products in question, depending on the circumstances of the case. We see nothing in the text of Article 14(d) of the SCM Agreement or prior disputes that would preclude an investigating authority from taking a broader approach to the question of whether in-country prices in the country of provision can serve as the basis of a proper benchmark.

7.203. However, we recall that a determination that the price of certain inputs is not market-determined must be based on positive evidence and supported by a reasoned and adequate explanation. Investigating authorities must undertake a case-specific analysis, which "encompasses a requirement to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts and to base [the] determination on positive evidence on the record".[356]

7.204. We also recall that:

> Proposed in-country prices will not be reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price *as a result of* governmental intervention in the market.[357]

7.205. In view of the fact that government intervention may, in principle, affect supply or demand for a certain good in any market and in view of the fact that "the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited"[358], it is important that a decision to reject in-country prices as a benchmark be supported by a reasoned and adequate explanation as to how government intervention distorts the price of the inputs at issue. Evidence of widespread government intervention in the economy, without evidence of a direct impact on the price of the good in question or an adequate explanation of how the price of the good in question is distorted as a result, will not suffice to justify a determination that there are no "market-determined" prices for the good in question which can be used for purposes of determining the adequacy of remuneration for government-provided goods. Nor will a presumption that government intervention in the market necessarily results in price distortions for the goods in question suffice to support the conclusion that in-country prices for the input at issue may be rejected as a benchmark. An investigating authority must explain how government intervention in the market *results* in in-country prices for the inputs at issue deviating from a market-determined price.

7.206. The record of the four Section 129 proceedings at issue and the arguments of the United States clearly show that the USDOC did not find it necessary to demonstrate how the actions of the GOC influenced the in-country price of the inputs at issue. The USDOC did not even

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[353] United States' second written submission, para. 181. See also Benchmark Memorandum, (Exhibit CHN-20), p. 29.

[354] United States' second written submission, fn 341.

[355] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

[356] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.190. See also ibid. para. 4.152:

> Article VI:3 of the GATT 1994 has been interpreted to impose certain requirements on investigating authorities. The Appellate Body has stated that, "under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation." The Appellate Body has further explained that the obligation under Article VI:3 "encompasses a requirement to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts and to base its determination on positive evidence in the record". As we see it, the obligation under Article 14 of the SCM Agreement to calculate the amount of a subsidy in terms of the benefit to the recipient encompasses the same requirement.

(fns omitted)

[357] Appellate Body Report, *US – Carbon Steel (India)*, para. 4. 155. (emphasis added)

[358] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

attempt to provide a reasoned and adequate explanation for its determinations that in-country prices for steel rounds and billets (OCTG), stainless steel coil (Pressure Pipe), hot-rolled steel (Line Pipe), and polysilicon (Solar Panels) were distorted as a result of pervasive government intervention in the Chinese domestic markets for these inputs, and therefore were not market-determined. Rather, the USDOC outlined governmental involvement in the relevant markets and, on that basis alone, determined that it could not use in-country prices of the relevant inputs to assess the adequacy of remuneration. We therefore find that the USDOC failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price.

7.3.3.3.3 Whether the USDOC disregarded evidence regarding prices for the inputs at issue

7.207. China considers it "self-evident that any evaluation of how Chinese steel prices were determined during the period 2006-2008 should begin with a review of what those prices were".[359]

7.208. China asserts that the USDOC failed to consider prices for the inputs at issue, including price information placed on the record of the investigations by respondents. According to China, the "USDOC's determinations never refer to any Chinese steel prices, let alone analyse the determinants of those prices"[360] and the USDOC "avoided any examination of actual Chinese steel prices …".[361] In addition, China argues that, "[f]or the most part … the USDOC's questions were not relevant to the analysis required under Article 14(d)".[362] In particular, China contends that "[t]he USDOC did ask two questions that somewhat relate to [whether in-country prices are determined by the interplay of supply and demand] but neither question directly requested market prices for the inputs".[363]

7.209. It is not disputed that in the underlying investigations, the USDOC did not request evidence of actual prices for the goods at issue in China.[364] As discussed above, the questionnaires issued focused on evidence of government intervention in each sector; on economic indicators for each sector, including data on production and consumption volume and value; and on factors which may have an impact of prices; but they did not request information concerning remuneration in arm's length transactions for the goods at issue. Nevertheless, the GOC and the petitioners in three of the four investigations did submit price information.

7.210. There is no indication that the USDOC tried to obtain information on arm's length prices for the inputs at issue from sources in China other than the GOC or respondents. In this context, the USDOC stated that:

> It would be … difficult, if not impossible, to collect additional data from firms that are not subject to individual examination in a given proceeding, i.e., firms that have not been selected as respondents. The Department, like any trade remedy investigating authority, does not have an enforceable manner in which to request this data from firms not selected to be respondents in [countervailing duty] proceedings and it has no ability to compel, even selected firms, to provide information on their prices or pricing strategies.[365]

7.211. Nevertheless, the USDOC stated in the Supporting Benchmark Memorandum that in the Pressure Pipe, Line Pipe, and OCTG investigations:

[359] China's first written submission, para. 253.
[360] China's first written submission, para. 253.
[361] China's first written submission, para. 257.
[362] China's response to Panel question No. 34, para. 165.
[363] China's response to Panel question No. 36, para. 170. See also ibid. para. 171: "Question 16(a) requests information concerning 'prices of the main raw material inputs to the input product' (not prices of the input itself), while question 16(c) requests information concerning 'other factors affecting supply or price of the input in question'. Neither question requested actual market prices for the inputs at issue."
[364] China's response to Panel question No. 36; United States' comments on China's response to Panel question No. 36. See also China's second written submission, para. 154.
[365] Final Benchmark Determination, (Exhibit CHN-21), pp. 20-21.

> [T]he Department examined potential benchmarks to determine whether those benchmarks were market-determined, such that they could be used to assess the adequacy of remuneration in accordance with Article 14(d) of the SCM Agreement.[366]

7.212. We recall that the necessary investigation and analysis to determine a proper benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.

7.213. Based on the foregoing, and in light of the facts before us, we are of the view that there is a significant difference between the Solar Panels Section 129 proceeding, in which the GOC did not respond to the USDOC's request for information at all, and the Line Pipe, Pressure Pipe, and OCTG Section 129 proceedings, in which the GOC did respond and submitted information on allegedly arm's length prices for the three inputs at issue. We therefore address them separately below.

7.3.3.3.3.1 The Pressure Pipe, Line Pipe, and OCTG Section 129 proceedings

7.214. In these three Section 129 proceedings, the record contains price information for the inputs at issue from three sources:

a. A document provided by the GOC and entitled "China's steel market and price research report" (the Mysteel Report), which sets out domestic steel prices during the period 2006-2008, with a breakdown per category of input: stainless steel coil, hot rolled steel, steel billet. This report comprises a "[l]ist of [monthly] market prices of stainless steel coil, hot-rolled steel and steel billets in some typical areas during 2006-2008".[367]

b. The purchase data of the respondent companies for the inputs at issue.

c. A data series of monthly average domestic Chinese prices compiled from two sources, the Steel Benchmarker and Mysteel, and submitted for the record in the OCTG and Line Pipe investigations by the petitioners.[368]

The USDOC questioned the relevance of the price information provided because:

a. neither the GOC nor the petitioners were able to distinguish price data pertaining to the provision of goods by SIEs on the one hand and private suppliers on the other[369];

b. the purchase data of the respondent companies for the inputs at issue − which did distinguish between SIEs and private suppliers − was "very limited" and insufficient to assess "whether such data can be fairly viewed as a representative sample"[370]; and

c. the GOC failed to provide data on domestic consumption of the inputs in terms of either volume or value.[371]

The USDOC concluded that the record did not contain any evidence of arm's length prices for the goods in question which could be used for assessing the adequacy of the remuneration.

7.215. We are mindful that a panel reviewing an investigating authority's determination may not undertake a *de novo* review of the evidence or substitute its judgement for that of the investigating authority. At the same time, a panel must not simply defer to the conclusions of the investigating authority. In keeping with this standard of review, we will consider the

[366] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 4.
[367] Ordover Report, (Exhibit CHN-19). The document describes the prices as collected "from local major steel dealers or steel plant sales companies, which must be representative … Mysteel spot market price is the spot batch closing price of that very date not covering cost for delivery of cargo from storage and transportation expenses, with product quality meeting national standards."
[368] Final Benchmark Determination, (Exhibit CHN-21), p. 20 and fn 85.
[369] Final Benchmark Determination, (Exhibit CHN-21), pp. 19-20.
[370] Final Benchmark Determination, (Exhibit CHN-21), p. 19 and fn 83.
[371] Supporting Benchmark Memorandum, (Exhibit USA-84), p. 5.

USDOC's determinations to decide whether, in light of the evidence and arguments, and the explanations given, its conclusions rejecting the price evidence on the record and concluding that the record contained no domestic price information suitable for use as a benchmark to assess the adequacy of remuneration for steel inputs, were such as could be reached by a reasonable and objective investigating authority.

7.216. The USDOC explained why it considered that the "main source of such prices available to the Department", the prices paid by respondent companies to their supplier firms, were not representative. In particular, the USDOC explained that "the total volume of steel rounds purchased by the firms examined in the OCTG investigation are small relative to the PRC's total domestic production of steel rounds during the same period [and] the records for Line Pipe and Pressure Pipe yield similarly small ratios."[372] No record evidence to the contrary has been brought to our attention that would undermine the USDOC's conclusion. In our view, it was not unreasonable for the USDOC to conclude that the limited data set, in relation to the size of domestic production, meant the price information could not be relied upon as representative.

7.217. We note that additional data on arm's length transactions for the goods in question in China was apparently not requested by the USDOC. In this regard however, the USDOC stated that it did not have "an enforceable manner in which to request this data from firms not selected to be respondents in [countervailing duty] proceedings and it has no ability to compel, even selected firms, to provide information on their prices or pricing strategies".[373] China does not argue that this information was otherwise available.

7.218. We recall that the price information provided by the petitioners and by the GOC did not distinguish between pricing data "from sources that might be characterized as SIEs as opposed to private entities".[374] Given that "proper benchmark prices may be drawn from a variety of potential sources, including private or government-related entities"[375], price information which does not distinguish between SIE suppliers and private suppliers may nonetheless be relevant to an analysis of the adequate remuneration for the inputs at issue. There is nothing on the record of the investigations to suggest that the USDOC considered this possibility, and certainly no explanation of why the information submitted was not relevant in this case, if that was its conclusion.

7.219. Moreover, it seems clear that the USDOC failed to consider the price data placed on the record by the GOC. China asserts:

> China placed on the record of the Section 129 proceedings detailed spot market pricing information for the three steel products at issue. Accompanying those prices was a report by Mysteel summarizing the particular supply and demand factors that drove Chinese steel prices during the period 2006-2008. The United States has not contested the accuracy of either the prices contained in the Mysteel report or Mysteel's summary of the supply and demand conditions that those prices reflect.[376]

The record of the Section 129 proceedings shows that the Mysteel Report was largely ignored by the investigating authority. Neither the Benchmark Memorandum nor the Supporting Benchmark

[372] Final Benchmark Determination, (Exhibit CHN-21), fn 83.
[373] Final Benchmark Determination, (Exhibit CHN-21), pp. 20-21.
[374] Final Benchmark Determination, (Exhibit CHN-21), p. 20. See also United States' first written submission, para. 239.
[375] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151:
> Because Article 14(d) requires that the assessment of the adequacy of remuneration for a government-provided good must be made in relation to *prevailing market conditions in the country of provision*, it follows that any benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in question in the country of provision. Proper benchmark prices would normally emanate from the market for the good in question in the country of provision. To the extent that such in-country prices are market-determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d). In our view, such in-country prices could emanate from a variety of potential sources, including private or government-related entities.

(emphasis original; fn omitted)
[376] China's second written submission, para. 133.

Memorandum to that memorandum[377], nor the Final Benchmark Determination in the Pressure Pipe, Line Pipe, OCTG, Wire Strand, and Solar Panels[378] refer to the prices for the inputs at issue set out in the Mysteel Report. Similarly, there is no explanation by the USDOC of why, in its view, the price data on the record did not relate to prevailing market conditions in the country of provision in the sense of Article 14(d).[379]

7.220. We recall that the SCM Agreement does not prescribe a specific mode of analysis for the determination of an appropriate benchmark for purposes of determining whether goods are provided for less than adequate remuneration within the meaning of Article 14(d). However, when information which appears on its face relevant to that analysis under Article 14(d) is before the investigating authority, it must consider this information and, if it concludes it is not probative or relevant to its analysis, explain that conclusion. In the three proceedings at issue here, we conclude that the USDOC failed to adequately explain its rejection of in-country prices in light of the evidence before it, and we therefore cannot conclude that its determination was one that could be reached by a reasonable and objective investigating authority.

7.3.3.3.3.2 The Solar Panels Section 129 proceeding

7.221. In the Solar Panels Section 129 proceeding:

a. the GOC did not provide information in response to the written questionnaire;

b. neither the mandatory respondents, nor the GOC provided any information on arm's-length prices of polysilicon in China; and

c. there is no indication on the record − and China has not argued − that such information was submitted or otherwise available to the USDOC.

7.222. In light of the above, we find that there was no relevant information on arm's-length in-country prices of polysilicon in China before the USDOC on the basis of which it could have considered a proper benchmark for purposes of determining whether goods are provided for less than adequate remuneration within the meaning of Article 14(d). We therefore find that China has not demonstrated that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement for failing to consider in-country prices that were available on the record in this Section 129 proceeding.

7.3.3.3.4 Conclusion on China's claim under Articles 1.1(b) and 14(d) of the SCM Agreement

7.223. For the reasons set out above, we find that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) in concluding that there were no market-determined in-country prices for the inputs at issue that could be used as benchmarks to determine the adequacy of remuneration in the four investigations at issue. In particular, the USDOC failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings, how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price. In addition, in the Section 129 proceedings on Pressure Pipe, Line Pipe, and OCTG, the USDOC failed to consider price data on the record. For these reasons, we find that the USDOC failed to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations.

7.224. We thus conclude that China has demonstrated that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings.

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[377] Benchmark Memorandum, (Exhibit CHN-20); Supporting Benchmark Memorandum, (Exhibit USA-84).

[378] Final Benchmark Determination, (Exhibit CHN-21).

[379] The United States dismisses the "heavy emphasis" placed by China on the Mysteel Report by stating that these "data ultimately say nothing about whether those prices also reflect the effects of sustained state intervention in the sector". (United States' second written submission, para. 185; response to Panel question No. 36).

7.4 China's claim under Article 32.1 of the SCM Agreement

7.225. China claims that, by making a determination that input prices in China are not market-determined *inter alia* because "subsidies" are granted to input producers, the USDOC took a specific action against a subsidy other than "in accordance with the provisions of the GATT 1994", in the sense of Article 32.1 of the SCM Agreement.

7.4.1 Main arguments of the parties

7.226. In support of its claim, China argues that the USDOC found that subsidies were granted to Chinese suppliers of inputs and that this was "central"[380] to its decision to reject in-country benchmarks for those inputs.[381] China considers that the rejection of in-country benchmarks then triggered a positive finding of subsidization of the downstream products, which, in turn, led to the imposition of countervailing measures. China argues that by doing so, the USDOC imposed countervailing duties on downstream products in order to offset subsidies granted to upstream products, but without complying with the disciplines set forth in the WTO Agreements. As stated by China:

> In the Section 129 determinations at issue, the United States countered subsidies allegedly provided to the Chinese steel industry by relying upon these alleged subsidies as a basis for rejecting available in-country benchmarks when evaluating the adequacy of remuneration for steel inputs provided to downstream producers of finished products.[382]

7.227. China thus considers that the preliminary and final benchmark determinations[383] are inconsistent with Article 32.1, as each of them constitutes "specific action against subsidization" in the sense of this provision.[384]

7.228. The United States responds that China has failed to identify precisely the measure at issue, other than the imposition of countervailing duties on products exported to the United States.[385] As a consequence, there is no other measure that "is opposed to, has an adverse bearing on, has the effect of dissuading the practice of subsidization of inputs, or creates an incentive to terminate such practices".[386] The United States disagrees that the USDOC made findings of subsidization in relation to subsidies provided to input producers. Rather, the United States argues that it analysed a "range of evidence"[387] – including the granting of subsidies – in order to determine if input prices were market-determined. According to the United States, the only actions taken against subsidization in the Section 129 proceedings at issue are the countervailing duties imposed on the goods exported to the United States, which is a permissible response to subsidization under the SCM Agreement.[388]

7.4.2 Evaluation by the Panel

7.4.2.1 The measures at issue

7.229. The United States first argues that China has failed to comply with the requirements of Article 6.2 of the DSU to identify the specific measures at issue, because it identifies different "measures" in this Article 21.5 proceeding[389]:

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[380] China's response to Panel question No. 55, para. 222.
[381] China quotes several excerpts of the USDOC's preliminary and final determinations on benchmarks in support of its claim. See for example, China's response to Panel question No. 55, fn 201.
[382] China's response to Panel question No. 55, para. 221.
[383] The preliminary determinations at issue in the context of this claim are the Benchmark Memorandum and the Supporting Benchmark Memorandum of 7 March 2016. They concern four Section 129 proceedings: OCTG, Line Pipe, Pressure Pipe, and Solar Panels.
[384] China's first written submission, paras. 285-299; second written submission, para. 184.
[385] United States' response to Panel question No. 57, para. 192.
[386] United States' response to Panel question No. 58, para. 195.
[387] United States' response to Panel question No. 59, para. 196.
[388] United States' second written submission, paras. 213-214.
[389] United States' second written submission, para. 211.

> For example, China identifies at least three distinct items as the object of its challenge: i) the *OCTG, Solar Panels, Pressure Pipe, and Line Pipe* section 129 proceedings, ii) the USDOC's distortion analysis as a rationale for use of an out-of-country benchmark, and iii) the imposition of countervailing duties.[390]

7.230. We agree that China's presentation of the measures at issue has varied somewhat in the course of this proceeding. However, we consider that China has presented its claim with sufficient clarity under Article 32.1. China states that its claim under Article 32.1 concerns the preliminary and final benchmark determinations in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings.[391] This is consistent with China's request for the establishment of a panel, which states:

> China further considers that these benchmark determinations are inconsistent with Article 32.1 of the SCM Agreement because they constitute a specific action against subsidization not in accordance with the provisions of the SCM Agreement insofar as the USDOC relies on subsidies allegedly provided to upstream input producers as a factor to support its finding of "distortion".[392]

7.231. China argues that "within" each of these measures, the USDOC takes a specific action against subsidization other than in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement. This specific action is the USDOC's reliance upon alleged upstream subsidies and their assumed effects as a basis for rejecting available in-country prices as benchmarks.[393]

7.232. Based on our understanding of the measures that are the subject of China's claim, we therefore find that China has sufficiently identified the specific measures at issue, that these measures were covered by its request for the establishment of a panel, and that its claim is thus within the scope of this Panel's jurisdiction. We also find that the measures at issue, as described above, constitute acts attributable to the United States that are susceptible to being challenged in WTO dispute settlement.

7.4.2.2 The legal provision at issue

7.233. Article 32.1 of the SCM Agreement provides that:

> 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.[*]
>
> [*fn original][56] This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate.

7.234. This provision applies to measures which are both "'specific' to … subsidization" and "'against' … subsidization". If these conditions are not met, the measure at issue cannot be subject to the provisions of Article 32.1.[394]

7.235. In the context of Article 18.1 of the Anti-Dumping Agreement, the phrase "specific action against dumping" was interpreted as follows:

> In our view, the ordinary meaning of the phrase "specific action against dumping" of exports within the meaning of Article 18.1 is action that is taken in response to situations presenting the constituent elements of "dumping". "Specific action against dumping" of exports must, at a minimum, encompass action that may be taken *only* when the constituent elements of "dumping" are present.[395]

[390] United States' second written submission, para. 211 and fn 378. (emphasis original)
[391] China's response to Panel question No. 56, para. 224.
[392] China's panel request, para. 26.
[393] China's response to Panel question No. 56, para. 224.
[394] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 236.
[395] Appellate Body Report, *US – 1916 Act*, para. 122 (cited in Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 238). (emphasis original; fn omitted)

This finding is equally pertinent for the interpretation of Article 32.1 of the SCM Agreement "[g]iven that Article 18.1 of the Anti-Dumping Agreement and 32.1 of the SCM Agreement are identical except for the reference in the former to dumping, and in the latter to a subsidy".[396] A "specific action against subsidization" must therefore, at a minimum, encompass action that may be taken *only* when the constituent elements of a subsidy are present.

7.236. With regard to the meaning of the phrase "specific action against subsidization", Article 32.1 "refers to specific action against 'a subsidy', not action against the imported subsidized product or a responsible entity".[397] A panel confronted with a claim under Article 32.1 must therefore assess whether "the design and structure of a measure is such that the measure is 'opposed to', has an adverse bearing on, or, more specifically, has the effect of dissuading the practice of … subsidization, or creates an incentive to terminate such practice[]."[398]

7.237. In this regard, we are also mindful that:

> In undertaking the task of properly characterizing a challenged measure, a panel "must thoroughly scrutinize the measure before it, both in its design and in its operation, and identify its principal characteristics". Moreover, "[i]n making its objective assessment of the applicability of specific provisions of the covered agreements to a measure properly before it, a panel must identify *all* relevant characteristics of the measure, and recognize which features are the most central to that measure itself, and which are to be accorded the most significance for purposes of characterizing the relevant [measure] and, thereby, properly determining the discipline(s) to which it is subject under the covered agreements".[399]

7.238. We thus proceed by examining the "relevant characteristics" of the benchmark determinations and whether they constitute specific action against subsidies to upstream producers.

7.4.2.3 The relevant characteristics of the benchmark determinations

7.239. We recall that the measures at issue may only be found inconsistent with Article 32.1 of the SCM Agreement if it is demonstrated that they were taken in response to situations presenting the constituent elements of a subsidy, and if it is demonstrated that they are opposed to, have an adverse bearing on, or, more specifically, have the effect of dissuading the practice of subsidization, or create an incentive to terminate such practice.[400]

7.240. We also recall that the measures at issue are the benchmark determinations issued by the USDOC in the context of four Section 129 proceedings, insofar as they rely on allegations of subsidies granted by the GOC to producers of inputs.

7.241. The Benchmark Memorandum was issued in support of the USDOC's determination that inputs were provided for less than adequate remuneration to the producers/exporters involved in four investigations. More specifically, the USDOC "further analyzed the structure of China's steel market, including the role of any government intervention in the market and the types and roles of the entities operating therein … [and] focused on the nature and role of SIEs in China in general, as well as the role of China's government … in the steel industry".[401] The "subsidies" referred to in the Benchmark Memorandum are the "significant subsidies in the form of land, capital and inputs" allegedly received by "many SIEs in China".[402]

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[396] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 238. The Appellate Body considered that "the constituent elements of a subsidy" are encompassed in the definition of a subsidy in Article 1 of the SCM Agreement, i.e. a financial contribution by a government or a public body conferring a benefit.

[397] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 251.

[398] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.

[399] Panel Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.194 (quoting Appellate Body Report, *China – Auto Parts*, para. 171). (emphasis original; fns omitted)

[400] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 254.

[401] Benchmark Memorandum, (Exhibit CHN-20), pp. 2-3. (fn omitted)

[402] China's response to Panel question No. 57, para. 228.

7.242. Based on our review of the Benchmark Memorandum, we find that these documents do refer to some of the constituent elements of subsidies, such as certain types of financial contributions (provision of land, capital, and inputs) provided by the GOC. They also refer, at least implicitly[403], to benefits conferred by these financial contributions, insofar as they are construed as "affect[ing] the true cost of production".[404]

7.243. However, contrary to what is argued by China, we also find that the alleged granting of subsidies to SOEs is not "central" to the USDOC's determination that domestic prices cannot be used as a benchmark in the Section 129 proceedings at issue. As noted by China itself in its response to the questions of the Panel, the USDOC "relied upon the existence of these subsidies as *one of many factors* in assessing whether prices within the Chinese steel sector are distorted".[405] More importantly for the consideration of China's claim under Article 32.1, we find that the Benchmark Memorandum does not prescribe or even contemplate any "action" (direct or indirect) against subsidies to upstream input producers. In fact, the focus of the USDOC's analysis is on the adequate remuneration for inputs purchased by exporters subject to countervailing duties rather than on subsidies received by upstream input producers. Hence, we disagree that the relevant characteristics of the determinations at issue evidence a specific action against subsidies to upstream producers.

7.244. Moreover, we are not convinced that a determination to use an out-of-country benchmark can be properly characterized as "an action against subsidization". The choice of an appropriate out-of-country benchmark consistent with the provisions of Article 14(d) of the SCM Agreement does not compel a finding of less than adequate remuneration, and may potentially lead to a finding that the remuneration was adequate. In addition, we note that an analysis of the relevant market conditions for the inputs at issue is prescribed by the text of Article 14(d). Therefore, preventing an investigating authority from taking account of potential subsidies (which are not being countervailed and thus need not meet the definition of a subsidy under Article 1 of the SCM Agreement) affecting the market price of inputs, could render the required analysis under Article 14(d) incomplete with respect to a relevant factor affecting market conditions for the good in question.

7.245. In view of the foregoing, we find that the relevant characteristics of the measures at issue do not support the conclusion that, by relying on alleged subsidies granted to input producers, among other factors, as a factual basis for its preliminary and final benchmark determinations, the USDOC was taking a specific action against those alleged subsidies in the sense of Article 32.1 of the SCM Agreement.

7.4.2.4 Conclusion on China's claim under Article 32.1 of the SCM Agreement

7.246. We recall that:

> [A]n action that is *not* "specific" within the meaning of … Article 32.1 of the *SCM Agreement*, but is nevertheless related to dumping or subsidization, is not prohibited by … Article 32.1 of the *SCM Agreement*.[406]

7.247. In the present case, although the Benchmark Memorandum may well be "related to subsidization", it does not represent or prescribe any action which is specific, or against subsidization, in the sense of Article 32.1 of the SCM Agreement.

7.248. On that basis, we reject China's argument that the reliance on subsidies to input producers in the determinations at issue represents specific action taken against the "'direct and indirect benefits' allegedly conferred upon SOEs"[407] and we thus conclude that China has not demonstrated

[403] The requirement that the constituent elements of a subsidy be present can "include cases where the constituent elements of dumping and of a subsidy are implicit in the measure". (Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 244).

[404] Benchmark Memorandum, (Exhibit CHN-20), p. 3.

[405] China's response to Panel question No. 55, fn 201 (referring to Final Benchmark Determination, (Exhibit CHN-21), p. 12). (emphasis added)

[406] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 262. (emphasis original)

[407] China's response to Panel question No. 55 (referring to Benchmark Memorandum, (Exhibit CHN-20), pp. 17-18).

that the USDOC's the preliminary and final determinations in the OCTG, Line Pipe, Pressure Pipe, and Solar Panels investigations are inconsistent with Article 32.1 of the SCM Agreement.

7.249. We thus conclude that China has not demonstrated that the United States acted inconsistently with Article 32.1 of the SCM Agreement in the OCTG, Line Pipe, Pressure Pipe, and Solar Panels Section 129 proceedings.

7.5 China's claim under Article 2.1(c) of the SCM Agreement in relation to *de facto* specificity

7.250. China claims that the USDOC's *de facto* specificity determinations remain inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC failed to take account of the length of time during which the relevant subsidy programme has been in operation. China's claim is based both on the alleged improper interpretation of the requirements of the last sentence of Article 2.1(c) of the SCM Agreement by the USDOC and on the argument that the specificity determination reached by the USDOC is not supported by the evidence on the record.[408]

7.5.1 Main arguments of the parties

7.251. China argues that the USDOC did not properly identify a "subsidy programme" within the meaning of Article 2.1(c), nor did it properly take into account the length of time during which the subsidy programme has been in operation. In particular, China argues that the USDOC relied upon evidence of the specific transactions during the period of investigation that were found to confer countervailable subsidies, but failed to identify a "plan or scheme" pursuant to which the subsidies at issue had been provided.[409] China further contends that the USDOC failed to adequately identify all potential users of the alleged subsidy programme, and thus could not determine whether the actual users of the subsidy programme were limited in number in relation to the potentially eligible recipients under the subsidy programme in question.[410] In addition, China argues that the USDOC failed to establish the duration of the alleged subsidy programme, as it based its determination that the subsidy programme had not been in operation "for a limited period of time only" on the fact that Chinese SOEs started producing the inputs at issue in the 1950s. However, China submits that this merely constitutes evidence, at most, that the GOC has provided financial contributions over that period, not evidence that the GOC provided subsidies over that period, as required under Article 2.1(c).[411]

7.252. The United States submits that it has complied with the relevant DSB ruling as the USDOC "addressed the 'length of time' aspect of Article 2.1(c) in great detail and considered it along with the other Article 2.1(c) factors in reaching its specificity determinations".[412] In particular, the United States contends that the USDOC sought information on each of the relevant subsidy programmes, reviewed record evidence confirming the existence of a programme in each case, and reasonably and adequately explained why it found the systematic provision of inputs to constitute a subsidy programme in the challenged determinations.[413] The United States further argues that the USDOC was not required to limit its specificity analysis to the provision of inputs that were provided for less than adequate remuneration, as there is no requirement, in examining a subsidy programme, to consider only activities resulting in the conferral of a benefit.[414] The United States thus contends that for the identification of a subsidy programme the "repeated provision of inputs need not consist exclusively of *subsidized* inputs"[415], and that the USDOC properly found the repeated provision of inputs to be a systematic series of actions as evidence of a subsidy programme.[416] Finally, the United States argues that the evidence on the USDOC record supported a determination that the limited number of subsidy recipients did not result from a limited duration of the subsidy programme at issue.[417]

[408] China's first written submission, para. 313.
[409] China's first written submission, paras. 320-322; second written submission, paras. 199-201.
[410] China's first written submission, paras. 323-325; second written submission, para. 202.
[411] China's first written submission, paras. 336-340; second written submission, paras. 205-211.
[412] United States' first written submission, para. 287; see also second written submission, para. 242.
[413] United States' second written submission, paras. 233.
[414] United States' first written submission, paras. 293-297.
[415] United States' second written submission, para. 235. (emphasis original)
[416] United States' first written submission, paras. 300-301; second written submission, paras. 235-239.
[417] United States' first written submission, paras. 288-291; second written submission, paras. 242-243.

7.5.2 Main arguments of the third parties

7.253. The European Union submits that to establish a subsidy programme, it may suffice to show that individual companies "systematically" received inputs at lower than adequate value over a certain period of time.[418] The European Union considers that where individual companies in a specific sector systematically receive an input in exchange for less than adequate remuneration, there is a strong indication that such a measure is "used by a limited number of certain enterprises", and it may not be necessary for an investigating authority to inquire whether other enterprises or industries had access to the same subsidy.[419] The European Union further submits that, in the context of Article 2.1(c), the "entire life [of the subsidy] does not have to be assessed by the investigating authority"; rather, "the investigating authority must assess whether there is any indication that the use by a limited number of enterprises may be the result of the short duration of the subsidy programme", for example if "the subsidy is still in its 'start-up phase' and may become more broadly available in due course".[420] For unwritten measures, as in the present case, the European Union argues that the investigating authority "must make this assessment on the basis of all available factual information and factual circumstances".[421]

7.5.3 Evaluation by the Panel

7.5.3.1 Introduction

7.254. The original panel found that the USDOC acted inconsistently with Article 2.1(c) of the SCM Agreement by failing to take into account the two factors in the last sentence of Article 2.1(c) – including "the length of time during which the subsidy programme has been in operation" – when it made specificity determinations in 12 of the contested countervailing duty investigations.[422] This finding was not appealed by the United States.[423] In this compliance dispute, we are thus confronted with the question of whether the United States' revised input specificity determinations in the Section 129 proceedings at issue comply with Article 2.1(c).

7.255. Article 2.1(c) provides that "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", including "use of a subsidy programme by a limited number of certain enterprises". In addition, Article 2.1(c) provides that "account shall be taken … of the length of time during which the subsidy programme has been in operation" when considering whether a subsidy is, in fact, specific.

7.256. The starting point of an analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1.[424] The assessment of specificity under Article 2 is therefore to be distinguished from the requirement to show the *existence* of a subsidy under Article 1.1, as "Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*".[425] Accordingly, the specificity requirement of Article 2 is concerned with establishing a limitation on access to a subsidy, not the existence of the subsidy itself, which is dealt with under Article 1.1.[426]

7.257. Therefore, once an investigating authority has established the existence of a subsidy during the period of investigation, it must, as part of its specificity analysis: consider whether the factors in the second sentence of Article 2.1(c) are present, including "use of a subsidy programme by a limited number of certain enterprises"; and take account of the length of time during which the subsidy programme has been in operation.

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[418] European Union's third-party submission, para. 77.
[419] European Union's third-party submission, para. 78.
[420] European Union's third-party submission, para. 83.
[421] European Union's third-party submission, para. 82.
[422] Panel Report, *US – Countervailing Measures (China)*, paras. 7.257 and 8.1(v).
[423] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.156.
[424] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140 (referring to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 747).
[425] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144. (emphasis original)
[426] Panel Report, *US – Countervailing Measures (China)*, para. 7.236; see also Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.21 ("the specificity requirement is not about the existence of a subsidy, which is dealt with in Article 1.1, but rather about access thereto").

7.258. The reference to "a subsidy programme" in the context of an analysis of *de facto* specificity suggests that the *de facto* specificity of a subsidy is to be assessed in a "broader analytical framework"[427] than the framework for establishing the existence of a subsidy under Article 1.1. In particular, a specificity analysis under Article 2.1 focuses not only on whether a subsidy has been provided to particular recipients, "but focuses also on all enterprises or industries eligible to receive that same subsidy".[428] It is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind, which may be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises.[429] An examination of the existence of a plan or scheme regarding the use of the subsidy at issue may also require assessing the operation of such plan or scheme over a period of time.[430]

7.259. The phrase "account shall be taken" in the last sentence of Article 2.1(c) has been understood as imposing an obligation "to take something into reckoning or consideration; to take something on notice".[431] Thus, in the present case, the last sentence of Article 2.1(c) requires that the length of time during which the relevant subsidy programme has been in operation must form part of the USDOC's consideration of whether the subsidy was used by a limited number of certain enterprises. The objective of this inquiry is to determine whether the limited number of users is the result of a limited access to the subsidy programme or if it is merely a consequence of the short period of operation of the programme.

7.260. With this analytical framework in mind, we proceed to examine China's argument in relation to the legal standard applicable to the obligation to take account of the length of time during which a subsidy programme has been in operation. We then turn to assess the steps taken by the USDOC in reaching its revised input specificity determinations.

7.5.3.2 Whether the USDOC applied an erroneous legal standard under the last sentence of Article 2.1(c) of the SCM Agreement

7.261. We recall that China's claim under Article 2.1(c) is based on the alleged failure of the USDOC to take account of the length of time during which the subsidy programme has been in operation. In support of this claim, China argues that the USDOC had to identify the existence, content, and scope of any subsidy programme or subsidy programmes, as well as the duration of the programme(s) at issue.[432]

7.262. An initial point of disagreement between the parties relates to what an investigating authority must demonstrate in order to establish the existence of an unwritten subsidy programme. For China, an authority must demonstrate a systematic series of actions in which a financial contribution and a benefit are granted to a recipient.[433] For the United States, the focus is on the systematic series of actions pursuant to which the subsidy identified under Article 1.1 of the SCM Agreement was provided. In the present case, the United States argues that "the repeated provision of inputs is evidence of the series of actions or activity that constitutes a program" regardless of whether that repeated provision consists exclusively of subsidized inputs.[434]

7.263. We are thus called upon to address what is required in the identification of a subsidy programme under Article 2.1(c), and particularly whether an investigating authority is required to show that subsidies (i.e. financial contributions conferring a benefit) are systematically granted as part of this programme, or whether the systematic granting of a financial contribution will suffice to identify a subsidy programme.

7.264. In our view, the requirements of Article 2.1(c) should be understood in light of the fundamental separation between the determination that a subsidy exists under Article 1, and the

[427] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.
[428] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140 (referring to Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 753).
[429] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.
[430] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.
[431] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.969 (referring to *The New Shorter Oxford Dictionary*, 4th edn, A. Stevenson (ed.) (Oxford University Press, 1993), p. 15).
[432] China's first written submission, paras. 314-332.
[433] China's response to Panel question No. 42(b), paras. 196-197.
[434] United States' second written submission, para. 235.

finding of *de facto* specificity under Article 2, which is based on different considerations. We recall, moreover, that the analysis of the existence of a subsidy programme is part of the "broader analytical framework" prescribed in the context of a *de facto* specificity analysis under Article 2.1(c). In particular, an examination of the existence of a plan or scheme regarding the use of the subsidy at issue may require assessing the operation of such plan or scheme over a period of time, which is longer than the period of investigation for assessing the existence of a subsidy under Article 1.1 of the SCM Agreement.

7.265. We note in this context the finding by the Appellate Body in the original dispute that:

> The mere fact that financial contributions have been provided to certain enterprises is not sufficient … to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement. In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.[435]

7.266. We read this as distinguishing the "systematic series of actions" demonstrating a programme from the mere grant of financial contributions to the recipients. This is consistent with the ordinary meaning of the term "programme", which refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done".[436] Thus, the mere grant of financial contributions is not enough. Those grants must be in the context of a programme pursuant to which subsidies are granted. Consequently, we find that in order to identify a subsidy programme, an investigating authority must have "adequate evidence" that the financial contributions identified as conferring a benefit and therefore to be subsidies were made as part of a plan or scheme.

7.267. For these reasons, we consider that an investigating authority may demonstrate the existence of a subsidy programme based on evidence of: (a) the existence of a subsidy within the meaning of Article 1.1; and (b) a "plan or scheme" pursuant to which this subsidy has been provided to certain enterprises.

7.268. Another point of disagreement between the parties is whether an investigating authority seeking to take account of the length of time a subsidy programme has been in operation must identify the total duration of the subsidy programme. China argues that "the total length of time during which the subsidy programme has been in operation must be taken into account", as Article 2.1(c) does not qualify or limit the reference to the "length of time".[437] China therefore contends that "[w]ithout establishing the duration of the subsidy programs at issue, the USDOC necessarily failed to take account of the duration and thus violated Article 2.1(c)".[438] By contrast, the United States submits that "Article 2.1(c) does not require an investigating authority to establish the total length of time during which the subsidy program has been in operation".[439]

7.269. We consider that the requirements of Article 2.1(c) are to be understood in connection with the nature and purpose of the specificity analysis at issue. In particular, we recall that "taking account" of the length of time during which a subsidy programme has been in operation is part of an assessment of whether a limited number of actual users of the programme can be explained by the short time the programme has been in operation.

7.270. We do not exclude that an investigating authority may, in some cases, be required to consider more than individual subsidy transactions during the period of investigation in order to properly take account of the length of time during which the relevant subsidy programme has been in operation.[440]

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[435] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.
[436] Appellate Body Report, *US – Countervailing Measures (China)*, fn 674.
[437] China's response to Panel question No. 41, para. 188.
[438] China's comments on United States' response to Panel question No. 41, para. 77.
[439] United States' response to Panel question No. 41, para. 207.
[440] As noted by the Appellate Body, "if construed too narrowly, any individual subsidy transaction would be, by definition, specific to the recipient", and other context in Article 2.1 – including the reference to a

7.271. At the same time, an investigating authority may be able to demonstrate that the duration of the programme is not the reason for the limited number of recipients of the subsidy, without establishing the total duration of the programme. Moreover, we are mindful that "a *de facto* specificity analysis under subparagraph (c) would appear to be most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are not explicitly provided for in a law or regulation".[441] For such unwritten subsidy programmes, when the conditions of eligibility are not explicitly set out in written instruments, there may be inherent limits in an investigating authority's ability to evaluate the total duration of a subsidy programme, or *all* past and potential beneficiaries.

7.272. It is for this reason that Article 2.1(c) "concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise" when making a determination of *de facto* specificity, while "the last sentence of Article 2.1(c) function[s] as a safeguard that keeps in check this flexibility".[442] Depending on the different factual scenarios that may arise, we do not exclude that an investigating authority may comply with the obligation to take into account "the length of time during which the subsidy programme has been in operation" without determining the full duration of the programme in question.

7.273. Based on the foregoing, we do not consider that Article 2.1(c) imposes in all cases a requirement to establish the total duration of the programme. Rather, to comply with the requirement of the last sentence of Article 2.1(c), it would be sufficient to show that the programme has been in operation for a duration that does not itself account for "use of a subsidy programme by a limited number of certain enterprises".[443]

7.274. Having reached this conclusion with regard to the legal standard under Article 2.1(c), we proceed to assess whether the USDOC complied with this provision in its determination that the subsidies at issue were *de facto* specific. We recall that China argues that the USDOC failed to demonstrate that it took account of the length of time during which the subsidy programme had been in operation.

7.5.3.3 Whether the USDOC's determinations of *de facto* specificity are inconsistent with Article 2.1(c) of the SCM Agreement

7.5.3.3.1 The USDOC's determinations of *de facto* input specificity

7.275. In view of the recommendations made by the DSB[444], the USDOC "revisit[ed]" its specificity determinations for the subsidy programmes at issue as part of its Section 129 proceedings.[445] In a memorandum issued on 31 December 2015 (Input Specificity Memorandum)[446], the USDOC explained its "preliminary analysis of the diversification of economic activities and length of time" in the context of the relevant Section 129 proceedings.

7.276. In the Input Specificity Memorandum, the USDOC explained that a determination of *de facto* specificity due to a limited number of enterprises or industries "is based upon whether the subsidy is broadly available and widely used throughout the economy of the investigated

"subsidy programme" in Article 2.1(c) – "suggests a potentially broader framework within which to examine specificity". (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 749). Further, as noted by the Appellate Body, a specificity analysis under Article 2.1 focuses not only on whether a subsidy has been provided to particular recipients, "but focuses also on all enterprises or industries eligible to receive that same subsidy". Therefore, a specificity inquiry may require determining "what other enterprises or industries also have access to that same subsidy under that subsidy scheme" such that "[i]t is relevant therefore to consider not only the *actual*, but also the *past* and *potential* recipients of a particular subsidy." (Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.140; *US – Large Civil Aircraft (2nd complaint)*, para. 753 (emphasis original)).

[441] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.129.

[442] Panel Report, *US – Countervailing Measures (China)*, para. 7.252.

[443] See also Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.970 (finding that "using the total amount of subsidies granted under a subsidy programme over its entire life … may not always be appropriate" in assessing *de facto* specificity under Article 2.1(c), in the context of "the granting of disproportionately large amounts of subsidy to certain enterprises").

[444] Panel Report, *US – Countervailing Measures (China)*, paras. 7.257 and 8.1(v).

[445] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 19.

[446] Input Specificity Memorandum, (Exhibit CHN-23).

country".[447] The USDOC cited the example of the OCTG investigation, in which the GOC stated that seven industries[448] used the relevant inputs (steel round and billets). On the basis of this information, "the [USDOC] analysed the recipients of this subsidy program and determined that a subsidy provided only to the [seven] industries was not a subsidy that was broadly available and widely used throughout the economy of the PRC. Therefore, the [USDOC] found this program *de facto* specific because the recipients were limited in number."[449]

7.277. With respect to establishing the existence of an "unwritten subsidy programme", the USDOC stated in its preliminary input specificity determination that, "[o]n the basis of case specific input purchase information, which was reported to the [USDOC] in the 12 [countervailing duty] investigations and compiled in the Department's Inputs Memorandum, we preliminarily find that there is adequate evidence in each of the 12 [countervailing duty]investigations that public bodies systematically provided [the relevant inputs] for [less than adequate remuneration] to producers in the PRC."[450] The "Inputs Memorandum" providing "case specific information" was placed on the record as an attachment to the USDOC's Section 129 preliminary determinations, setting out redacted "proprietary" (i.e. confidential) information for each case with a section on input specificity containing an "Example of 'systematic activity'" that had redacted entries for an input producer, respondent, input, and number of sales transactions.[451]

7.278. Regarding the duration of operation of the subsidy programme, the USDOC explained that it had asked various questions "[i]n order to give consideration to length of time in the Department's analysis of *de facto* specificity", including in the "Standard Questions Appendix"[452] of the countervailing duty questionnaire, which requested information regarding:

a. the date the subsidy was established[453];

b. the number of programme recipients for a four-year period (the year in which the respondent company was approved for assistance under the programme as well as each of the preceding three years)[454]; and

c. "with respect to the provision of inputs for [less than adequate remuneration] programs at issue in the 12 cases that were subject to dispute, three years of data regarding the industry providing the relevant input".[455]

[447] Input Specificity Memorandum, (Exhibit CHN-23), p. 2.

[448] These were the rebar, plain bar, merchant bar, light sections, narrow strip, wire rod, and seamless tubes industries.

[449] Input Specificity Memorandum, (Exhibit CHN-23), pp. 2-3 (quoting "OCTG and accompanying Issues and Decision Memorandum at page 15"). The underlying documents from the original investigation, for the OCTG and other investigations, have not been submitted on the record of these compliance proceedings.

[450] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 19. The relevant inputs cited by the USDOC were stainless steel coil, hot-rolled steel, wire rod, steel rounds, caustic soda, green tubes, primary aluminium, seamless tubes, standard commodity steel billets and blooms, polysilicon, and coking coal**.**

[451] Inputs Memorandum, (Exhibit USA-126); Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 1. The Inputs Memorandum is also an attachment to the USDOC's preliminary determination in Exhibit CHN-4.

[452] Input Specificity Memorandum, (Exhibit CHN-23), p. 6. The questions and responses from the "Standard Questions Appendix" have not been submitted on the record of these compliance proceedings.

[453] Input Specificity Memorandum, (Exhibit CHN-23), fn 19 (quoting "e.g., Countervailing Duty Questionnaire Certain Kitchen Shelving and Racks from the People's Republic of China (Kitchen Racks Questionnaire) at Section II, Appendix I, Standard Questions A.; Countervailing Duty Questionnaire High Pressure Steel Cylinders from the People's Republic of China (Steel Cylinders Questionnaire) at Section II, Appendix I, Standard Questions A").

[454] Input Specificity Memorandum, (Exhibit CHN-23), fn 20 (quoting "e.g., Kitchen Racks Questionnaire Section II, Appendix I at question F.6; Steel Cylinders Questionnaire Section II, Appendix I at question G.2"). The USDOC further explained that the Standard Questions Appendix requested the GOC to "provide the following information, in table form, regarding the number of recipient companies and industries and the amount of assistance approved under this program for the year in which any mandatory company was approved for assistance, as well as each of the preceding three years." (Ibid. fn 2).

[455] Input Specificity Memorandum, (Exhibit CHN-23), fn 21 (quoting "e.g., Kitchen Racks Questionnaire at 11-5 and 11-6: Steel Cylinders Questionnaire at II-11 through II-19"). The USDOC further explained that the three-year period corresponded to the year of the receipt of the subsidy and the prior two years for the Chinese industry selling the input at issue in each of the 12 cases. According to the USDOC, the use of a

7.279. In the Section 129 proceedings at issue, the USDOC also asked in each of the 12 proceedings: (a) how long SOEs have been producing and selling the inputs in China; (b) how long the inputs have been produced in China; and (c) how long the inputs have been consumed in China.[456] The GOC provided a response in five[457] of the 12 cases covered by the Section 129 proceedings, but did not provide a response in the seven other cases. In its responses, the GOC stated that SOEs started to produce and sell the inputs at issue in the PRC at some point during the period covered by the first Five-Year Plan (1953-1957), and possibly earlier, and that "it is fair to assume that the input at issue has been consumed in the PRC" since the date of its founding.[458]

7.280. On this basis, the USDOC considered that, "at the latest, SOEs were producing and providing the inputs at issue in the five proceedings in which the GOC provided responses within the geographic location of China by 1957". For those inputs, the USDOC preliminary concluded that the "subsidy program ha[d] not been in operation 'for a limited period of time only' and, therefore, the length of time in which the subsidy program ha[d] been in operation [did] not change the Department's determination that the input [for less than adequate remuneration] programs in each of those cases were *de facto* specific."[459] The USDOC used the GOC's answer in these five cases as "facts available" in the seven cases in which the GOC did not provide response to its questions and reached on that basis the same preliminary determination that the subsidy programmes had not been in operation for a limited period of time only.[460]

7.281. This analysis was incorporated in the USDOC's preliminary Section 129 determinations concerning *de facto* input specificity issued on 25 February 2016[461] as well as in the final Section 129 determinations issued between March and May 2016.[462]

7.5.3.3.2 Whether the USDOC properly established the existence of a subsidy programme

7.282. We start by noting that the original panel in these proceedings considered that the "use of a subsidy programme by a limited number of certain enterprises" is to be evaluated with respect to a "subsidy programme", and that "the starting point of an analysis of specificity under that factor should be the identification of the relevant subsidy programme."[463] The original panel found with respect to identification of a subsidy programme that evidence of a "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".[464] The Appellate Body considered that "[e]vidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms", including "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises".[465]

7.283. We have noted that although Article 2.1(c) does not lay down any strict rules as to how a "subsidy programme" is to be identified, it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind. We have also noted that although evidence of "a systematic series of actions" may be particularly relevant in the context of

three-year period was, in part, "a practical accommodation to parties in a countervailing duty proceeding" due to the possible difficulty of providing "detailed usage data for several past years". The USDOC considered that "More importantly, [its] experience has shown that three years of data provides a reasonable reflection of the usage and distribution of the subsidy program at the time of its bestowal to the respondent". (Ibid. fn 25).

[456] Input Specificity Memorandum, (Exhibit CHN-23), p. 7.

[457] Pressure pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders.

[458] GOC Public Bodies Questionnaire response, (Exhibit CHN-2), response to question Nos. 7-9, pp. 18-19. See also Input Specificity Memorandum, (Exhibit CHN-23), p. 7.

[459] Input Specificity Memorandum, (Exhibit CHN-23), pp. 7-8.

[460] Input Specificity Memorandum, (Exhibit CHN-23), pp. 8-9.

[461] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), pp. 19-20.

[462] Final Section 129 Determination, (Exhibit CHN-5), p. 2 (Lawn Groomers, Kitchen Shelving, Wire Strand, Print Graphics, Aluminum Extrusions, and Steel Cylinders determinations), p. 2 (Seamless Pipe determination), and p. 2 (Pressure Pipe, Line Pipe, OCTG, and Solar Panels determinations).

[463] Panel Report, *US – Countervailing Measures (China)*, para. 7.237. We note the United States' argument in the original dispute that "[t]he 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". (Ibid. para. 7.214).

[464] Panel Report, *US – Countervailing Measures (China)*, para. 7.243.

[465] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

an *unwritten programme*[466], the mere fact that financial contributions have been provided to certain enterprises is not sufficient to demonstrate that such financial contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement.

7.284. Turning to the "subsidy programme" identified by the USDOC, we note that the USDOC made findings of *de facto* specificity in its original investigations after having "analysed the recipients of this subsidy program" to determine that such "recipients were limited in number".[467] Further, the USDOC relied on "case specific input purchase information" to find that "public bodies systematically provided [inputs] for [less than adequate remuneration] to producers in the PRC."[468] This "case specific input purchase information" was compiled in the "Inputs Memorandum" attached to the USDOC's preliminary specificity determination, which included information for each investigation under the heading "Example of 'systematic activity'" relating to: (a) the particular input producer; (b) the respondent; (c) the input; and (d) the number of sales transactions. The redacted, non-confidential version of this memorandum refers to the information illustrated below[469]:

B. INPUT SPECIFICITY

Example of "systematic activity"

Input Producer	Respondent	Input	Number of Sales Transactions
[			]

In two investigations[470], the "Inputs Memorandum" included similar information under the heading "Example of 'series of activities'" with entries for an additional respondent, as illustrated below:

2 *Example of "series of activities"*

Input Producer	Respondent	Respondent	Input	Number of Sales Transactions
[				]

This confidential information was the basis for the USDOC's finding of "adequate evidence in each of the 12 [countervailing duty] investigations that public bodies systematically provided" the relevant inputs.[471]

7.285. China criticizes the USDOC's reliance on "information already on the record of the original investigation documenting the purchase of inputs by respondent producers during the one-year period of investigation", which "consisted of nothing more than evidence pertaining to the *specific transactions* that the USDOC had found to confer countervailable subsidies".[472] The identification by an investigating authority of subsidies within the meaning of Article 1.1 may inform an analysis of *de facto* specificity and of the existence of a "subsidy programme". Indeed, it is possible "that the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1".[473]

7.286. The key question in this case is whether the information relied upon by the USDOC supports its finding of a systematic series of actions evidencing the existence of a plan or scheme pursuant to which subsidies have been provided.

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[466] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

[467] Input Specificity Memorandum, (Exhibit CHN-23), pp. 2-3 (quoting "OCTG and accompanying Issues and Decision Memorandum at page 15"). The USDOC also explained that when it "finds that a subsidy program is *de facto* specific because there are a limited number of enterprises or industries, that determination is based upon whether the subsidy is broadly available and widely used throughout the economy of the investigated country". (Ibid. p. 2).

[468] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 19.

[469] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), attachment: "Inputs Memorandum"; Inputs Memorandum, (Exhibit USA-126).

[470] OCTG and Wire Strand.

[471] Preliminary Determination on Public Bodies and Input Specificity, (Exhibit CHN-4), p. 19.

[472] China's first written submission, para. 320 (emphasis original). See also China's first written submission, para. 327 (arguing that "the USDOC in its Section 129 determinations simply referred back to the evidence on the record of the original investigations establishing that individual respondent producers purchased the relevant inputs during the period of investigation"); and China's comments on the United States' response to Panel question No. 39, para. 75.

[473] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

7.287. In this regard, we do not find any explanation on the USDOC record as to how the information on the record, and especially the information compiled in the Inputs Memorandum, demonstrated or otherwise reflected the *systematic nature* of actions that would evidence the existence of a plan or scheme pursuant to which subsidies were provided. While the Inputs Memorandum designates certain information as an "example of systematic activity" (or "series of activities"), we find no explanation as to how such information (dealing with the number of transactions between input producers and respondents) informs the existence or nature of the relevant subsidy programme. Rather, the USDOC cites such information as evidence that "public bodies systematically provided" inputs for less than adequate remuneration, without further elaboration. Therefore, we do not consider the USDOC to have provided a reasoned and adequate explanation with regard to its identification of the relevant subsidy programme for the purposes of its determination of *de facto* specificity in this case.

7.288. In our view, the USDOC's determination fails to explain how the evidence on the record supports its factual findings of *systematic* activity, and how those factual findings support its determination regarding the existence of an unwritten subsidy programme and the *de facto* specificity of the relevant subsidies.[474] Based on the USDOC record, it is unclear how the USDOC, relying on some number of transactions between certain producers and respondents, substantiated the existence of the unwritten subsidy programme in question.[475] In this regard, while the information before the USDOC clearly indicates *repeated* transactions, it is unclear on what basis the USDOC concluded that these transactions were conducted pursuant to a plan or scheme of some kind.

7.289. We are mindful of the requirement to limit our examination to the evidence that was before the USDOC during the course of the investigation. In this regard, we note that the USDOC requested information on "the number of *programme* recipients for a four-year period", and "three years of data regarding the industry providing the relevant input" for "the provision of inputs for [less than adequate remuneration] *programmes*".[476] However, the explanations supporting the USDOC's findings or determinations − with respect to the existence of the relevant subsidy programme as part of its *de facto* specificity analysis − do not appear to have been based on such evidence. Similarly, information regarding how long the relevant inputs have been produced and sold in China does not appear to have been relied upon by the USDOC in identifying the relevant subsidy programme.

7.290. Before us, the United States has referred to the "systematic provision of inputs for nearly 50 years" and "a regularized and well-planned series of actions"[477]; "a program of action" according to which those inputs were provided[478]; and the potential relevance of the operation of "policy mandates" or "actions by which China provided the inputs in question".[479] However, we do not find any such explanations in the investigating authority's determinations, and recall that an investigating authority's determinations may not be justified by an *ex post* rationale.[480] In keeping with the applicable standard of review, we therefore decline to consider such arguments to the extent they are not reflected, even implicitly, in the USDOC's explanations with respect to the identification of the relevant subsidy programme.

7.291. Having concluded that the USDOC failed to provide a reasoned and adequate explanation for its conclusions regarding the existence of a subsidy programme, we do not find it necessary, for the resolution of this dispute, to further consider whether the USDOC took into account the length of time during which the subsidy programme had been in operation. Indeed, having failed to properly determine the existence of a subsidy programme, the USDOC could not properly take account of the length of time during which a subsidy programme had been in operation.

[474] Appellate Body Report, *US − Countervailing Duty Investigation on DRAMS*, para. 186.
[475] See, e.g. China's second written submission, para. 201.
[476] Input Specificity Memorandum, (Exhibit CHN-23), p. 6. (emphasis added)
[477] United States' opening statement at the meeting of the Panel, para. 39.
[478] United States' response to Panel question No. 45, para. 216.
[479] United States' comments on China's response to Panel question No. 43, para. 146.
[480] Appellate Body Reports, *US − Tyres (China)*, para. 329; *US − Countervailing Duty Investigation on DRAMS*, para. 186; and *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 93.

7.5.3.4 Conclusion on China's claim under Article 2.1(c) of the SCM Agreement

7.292. On the basis of the foregoing, we find that the United States did not comply with the requirement contained in Article 2.1 (c) to "take account of the length of time during which the subsidy programme has been in operation" because it failed to adequately explain its conclusions regarding the existence of the relevant subsidy programme.

7.293. We thus conclude that China has demonstrated that the United States acted inconsistently with Article 2.1 (c) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.

7.6 China's claim under Article 2.2 of the SCM Agreement in relation to regional specificity

7.6.1 Main arguments of the parties

7.294. China challenges the USDOC's regional specificity determination in the Section 129 proceeding on Thermal Paper, on the basis that the USDOC applied an incorrect legal standard focused on whether a "distinct land regime" was applicable in the economic zone where some producers/exporters were located.[481]

7.295. China argues that the USDOC should have determined whether "the financial contribution (i.e., the provision of land-use rights by the government) or the benefit (i.e., the provision of land-use rights by the government for [less than adequate remuneration]), or both, was limited to certain enterprises located within a designated geographical region."[482] According to China, a "proper inquiry" would have required the USDOC to "determine whether cheaper land was offered *outside* the designated area as compared to land granted within the area".[483] China considers that evidence relevant to this inquiry was absent from the record, such that the USDOC's regional specificity determination is not based on positive evidence.

7.296. The United States argues that the USDOC's determination is consistent with the findings of the original panel, according to which "there must also be some 'finding that the provision of land within the park or zone is distinct from the provision of land outside the park or zone'".[484] In particular, the United States argues that the USDOC did look for evidence concerning: (a) incentives or preferential policies offered to firms inside the zone; and (b) whether these incentives or preferential policies were available outside the zone.[485] Further, the United States contends that the USDOC properly made its determination based on the limited evidence provided in the investigation and facts otherwise available.[486]

7.6.2 Main arguments of the third parties

7.297. The European Union submits that prior rulings of the Appellate Body support the position that the mere existence of a "distinct land regime" within a wider geographical area of the granting authority, does not say "anything about whether preferential conditions exist for the use of land within that specific regime". Thus, according to the European Union, "[a]n investigating authority must take into account all relevant evidence, notably evidence that land is provided for less than adequate remuneration also outside the industrial park in question."[487]

[481] China's second written submission, para. 215.
[482] China's first written submission, para. 362.
[483] China's second written submission, para. 219. (emphasis original)
[484] United States' second written submission, para. 249 (quoting Panel Report, *US – Countervailing Measures (China)*, para. 7.352).
[485] United States' first written submission, para. 310.
[486] United States' first written submission, paras. 311-312.
[487] European Union's third-party submission, para. 88.

7.6.3 Evaluation by the Panel

7.6.3.1 Whether the USDOC applied an incorrect legal standard in its regional specificity determinations

7.298. The first disagreement between the parties concerns the legal standard allegedly applied by the USDOC in its assessment of regional specificity.

7.299. In particular, for China, the USDOC failed to examine whether "the alleged benefit from the provision of land-use rights was limited to the [zone]".[488] Instead, China argues, the USDOC applied a legal standard under Article 2.2 pursuant to which "all 'incentives or preferential policies' are potential evidence of a 'distinct land regime' for the provision of land-use rights."[489] China considers that this analysis of incentives or preferential policies within the zone is irrelevant to whether the subsidy (provision of land-use rights for less than adequate remuneration) was provided only within the zone.

7.300. We recall that the original panel made a finding in relation to the type of evidence an investigating authority may rely on in order to determine that the grant of land-use rights in an economic zone is regionally specific. In particular, it found that:

> [T]he provision of land-use rights … 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.[490]

7.301. In the context of the Section 129 proceeding at issue, the USDOC was therefore required to determine that the conditions for the provision of land within the zone were different and preferential to the conditions outside the zone in order to make a finding of regional specificity.[491]

7.302. The Section 129 proceeding record shows that the USDOC requested from the mandatory respondents evidence of: (a) incentives or preferential policies offered to firms inside the zone; and (b) whether these incentives or preferential policies were available outside the zone.[492] Before this compliance Panel, the United States emphasizes that the USDOC's inquiry related to whether there was limited access to the specific *preferential* treatment of the land-rights in question.[493] Thus, the USDOC's regional specificity analysis appears to hinge on the geographical limitation of the relevant subsidy, insofar as it focused on "whether the prices or terms of sale, including other incentives tied to the purchase of the land, inside the geographic region at issue, are different from those offered outside the geographic region".[494]

7.303. We do not consider that the legal standard applied by the USDOC in the context of the Section 129 proceeding was inconsistent with the requirements of Article 2.2 of the SCM Agreement, nor that the questions asked by the USDOC during the investigation were irrelevant to establishing specificity.[495] By asking the respondents to list incentives or preferential policies offered to firms located within the industrial park/economic zone at issue and whether these policies and incentives were also offered outside the geographic areas under examination,

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[488] China's first written submission, para. 364.
[489] China's first written submission, para. 367.
[490] Panel Report, *US – Countervailing Measures (China)*, para. 7.352. (italics original; underlining added)
[491] We note that the United States and China agree with this standard. (United States' response to Panel question No. 47(a), para. 219; China's response to Panel question No. 47, paras. 205-206).
[492] Preliminary Determination on Land Specificity, (Exhibit CHN-24), p. 10.
[493] Specifically, the United States argues that the USDOC's findings related to evidence of preferential treatment within a particular zone "and whether access to *that* specific preferential treatment was limited as described by Article 2.2", such that "other types of preferential land-rights in or outside of zones … is not pertinent to the specificity of the subsidy at issue". (United States' comments on China's response to Panel question No. 47, para. 154 (emphasis original)).
[494] Preliminary Determination on Land Specificity, (Exhibit CHN-24), p. 6; United States' comments on China's response to Panel question No. 47, para. 155.
[495] China's response to Panel question No. 47(a), para. 207.

the USDOC provided an opportunity to the respondents to demonstrate that the conditions for the provision of land within the park or zone were not different from and preferential to the conditions outside the park or zone. As suggested by China, the USDOC sought to determine whether the granting authority was "providing land-use rights at the same or lower prices outside of the geographical region at issue".[496] The record shows that the GOC did not provide any information in this regard during the Section 129 proceeding.[497] The Preliminary Determination on Land Specificity also indicates that "[n]o other information regarding the land for [less than adequate remuneration] programs at issue was received from any other interested party".[498] The determination reached by the USDOC in this case was thus based on facts available.

7.304. In view of the scope of the inquiry carried out by the USDOC in the Section 129 proceeding on Thermal Paper, we reject China's argument that the investigating authority applied a legal standard which is inconsistent with the provisions of Article 2.2 of the SCM Agreement.

7.305. We now turn to China's separate argument that, in using facts available in the Thermal Paper investigation, the USDOC failed to identify facts on the record which support a finding that the subsidy was limited to enterprises located inside the economic zone.

7.6.3.2 Whether the USDOC erred in its evaluation

7.306. We recall that China challenges the selection of facts and the conclusion that the USDOC drew from the limited evidence on the record of the Thermal Paper Section 129 proceeding.

7.307. We note that, in this compliance dispute, China is not making a claim of violation of Article 12.7 of the SCM Agreement, which provides that when an "interested Member or interested party refuses access to, or otherwise does not provide, necessary information … determinations, affirmative or negative, may be made on the basis of the facts available". In the absence of such a claim, we will neither consider nor make a finding as to whether the USDOC's use of facts available in the investigation was consistent with this provision. In view of the arguments made by China in support of its claim under Article 2.2 of the SCM Agreement, our task is to examine whether China has demonstrated that the USDOC's determination of regional specificity is not supported by the facts relied on by the investigating authority in light of the evidence and the arguments before it.

7.308. Our analysis of whether the evidence on the record supports the USDOC's determination is necessarily affected by the non-cooperation of the responding party in the Thermal Paper Section 129 proceeding. The failure to respond to the USDOC's request for information relating to the issue of regional specificity created a situation in which the lack of evidence on the record limited the investigating authority in making factual findings. When reviewing whether the evidence supports the determination reached by the investigating authority, we consider it relevant to take into account the inquiry carried out by the authority − which includes the application of the correct legal standard − as well as the quantity and quality of the information submitted by interested parties. If the mandatory respondents were given a genuine opportunity to provide information relevant to the question at issue but failed to do so, an investigating authority must nonetheless reach a determination, albeit on the basis of a limited factual record, on the questions at issue in the investigation. In this case, the USDOC found that the respondent failed to provide necessary information and therefore relied on facts available, and in light of the GOC's failure to cooperate, an adverse inference.

7.309. We are also mindful that a panel is not permitted to conduct a *de novo* review of the facts of the case or substitute its judgement for that of the investigating authority. Nevertheless, our examination of the conclusions reached by the authority must be critical and searching, and be based on the information on the record and the explanations given by the authorities in their report. Overall, we must ascertain whether the investigating authority has evaluated all relevant evidence in an objective and unbiased manner, including by taking sufficient account of conflicting

[496] China's response to Panel question No. 47(a), para. 208.
[497] Preliminary Determination on Land Specificity, (Exhibit CHN-24), p. 4.
[498] Preliminary Determination on Land Specificity, (Exhibit CHN-24), p. 5.

evidence in an objective and unbiased manner, and responding to competing plausible explanations of the evidence.[499]

7.310. With regard to the factual findings made by the USDOC, the record in this case contained two pieces of evidence − both obtained during the verification visit in the original investigation − dealing with the price of land inside and outside the zone: "the appraisal report for Plot 2" (the land at issue within the zone) and "the comparison appraisal".[500]

7.311. The United States maintains that the comparison appraisal was unsuitable for a proper comparison of land price.[501] In particular, the verification report points out that the appraisal methodology used in the "comparison appraisal" was different from the methodology used in the appraisal of the land at issue. The verification report also states that an official for the respondent company "was not able to give us a technical explanation of the details of the different appraisal calculation methods or the reasons for the different approaches, but he indicated it was his understanding that differences are probably based on the fact that the appraiser must factor in conditions that are particular to each parcel of land".[502] We thus find that the USDOC explicitly addressed the relevance of the comparison appraisal in the original investigation and cited specific problems with the comparability of the terms of each appraisal.

7.312. The USDOC's specificity determination is based entirely on adverse facts available, specifically the appraisal for the land at issue, which refers to the fact that "[t]his appraisal fully considered … government *preferential* policies to attract industry, commerce and investments, thus the appraisal price is of a particular nature".[503] The USDOC explained in its Preliminary Determination on Land Specificity that "the land appraisal issued by the government referenced a 'preferential treatment' for the respondent" and, on the basis of adverse facts available, found that "the reference to a preferential price with regard to the respondent indicates that the GOC sold the land in question to the respondent at a price and at terms that were not available to other firms".[504] As explained by the United States in these proceedings, the USDOC concluded that:

> [T]he preferential treatment … supported a determination that preferential pricing existed within the zone at issue relative to pricing outside of the zone and thus supported a regional specificity determination.[505]

7.313. The United States also argues that this evidence was "probative of and tending to support a conclusion that companies located within the zone received preferential treatment when purchasing land-use rights and, therefore, evidenced a distinct land regime. This interpretation of the record evidence is reasonable and is neither a non-factual assumption nor speculation."[506]

7.314. China, however, argues that in the original investigation, the responding company provided:

> [A]n appraisal for land outside of the [zone] that contained similar "preferential treatment" language. The USDOC verified that the "preferential treatment" language appears "in the same location of the appraisal report, and in precisely identical form",

[499] Appellate Body Report, *EU − Fatty Alcohols (Indonesia)*, para. 5.84 (referring to Appellate Body Report, *US − Softwood Lumber VI (Article 21.5 − Canada)*, para. 97).

[500] Verification Report on Thermal Paper, (Exhibit CHN-27), p. 18. The comparison appraisal is described in the verification report as "a copy of an appraisal report from the appraisal company that performed the appraisal of GG's plot 2" (the land at issue). The verification report indicates that it was pointed out to the authority that the address of the company indicates that it was located outside the Economic Zone.

[501] Verification Report on Thermal Paper, (Exhibit CHN-27), p. 19; United States' second written submission, fn 454; and response to Panel question No. 48, para. 221. See also United States' comments on China's response to Panel question No. 48, para. 161.

[502] Verification Report on Thermal Paper, (Exhibit CHN-27), p. 19.

[503] Verification Report on Thermal Paper, (Exhibit CHN-27), p. 19 (emphasis added). See also United States' response to Panel question No. 48, para. 221 and fn 355.

[504] Preliminary Determination on Land Specificity, (Exhibit CHN-24), pp. 11-12.

[505] United States' first written submission, para. 311.

[506] United States' response to Panel question No. 48, para. 221.

> in both the appraisal report for the land at issue and in the sample comparison appraisal for land outside of the zone.[507]

7.315. China thus argues that the appraisal for the land at issue which was the basis for the specificity determination cannot support the conclusion reached by the USDOC as facts available.

7.316. We consider that the USDOC's ability to make factual findings in the Section 129 proceeding on Thermal Paper was limited by the GOC's failure to respond to the questions posed by the investigating authority. It seems clear to us that responses to the questions asked by the investigating authority could have had probative value in determining whether the provision of land within the zone was different from and preferential by comparison with the provision of land outside the zone. We also note that the respondents were well aware that the investigating authority had expressed doubts, during the original investigation, about the evidence placed on the record by the company. As noted above, the verification report in the Thermal Paper case indicates that the methodology for calculating land price inside and outside the zone was different, and the mandatory respondent failed to provide any explanation for "the different appraisal calculation methods or the reasons for the different approaches".[508] Finally, we recall that China has made no claim regarding the USDOC's reliance on adverse facts available under the relevant provision of the SCM Agreement, Article 12.7. In light of the foregoing, we conclude that China has not demonstrated that the evidence on the record does not support the USDOC's factual findings, nor that those factual findings do not support the overall determination.

7.6.3.3 Conclusion on China's claim under Article 2.2 of the SCM Agreement

7.317. We recall that we have rejected China's argument that the USDOC applied a legal standard that was inconsistent with Article 2.2. Moreover, in the absence of a claim under Article 12.7, we have no basis to consider the consistency of the USDOC's reliance on adverse facts available, and China did not demonstrate that the USDOC's determination was not supported by its factual findings and the evidence on record.

7.318. We thus conclude that China has not demonstrated that the United States acted inconsistently with Article 2.2 of the SCM Agreement in the Thermal Paper Section 129 proceeding.

7.7 China's claims concerning the final determination in the original Solar Panels investigation

7.319. China claims that the final determination in the original Solar Panels investigation is within the scope of this compliance Panel because it is closely connected to the preliminary determination which was found inconsistent with the SCM Agreement in the original dispute.[509] China also claims that the final determination is inconsistent with Articles 1.1(a)(1), 2.1(c), 1.1(b), and 14(d) of the SCM Agreement because the USDOC relied on the same erroneous findings as in the preliminary determination.[510]

7.320. We consider that the close connection between the final determination in the Solar Panels investigation, the declared measure taken to comply, and the recommendations and rulings of the DSB in the original dispute concerning the preliminary determination in Solar Panels, warrants the inclusion of the contested measure in the scope of these Article 21.5 proceedings. In this regard, we note the closely connected nature (i.e. the application of a particular legal standard under the same countervailing duty order concerning the same products from China) and related effects arising from the resulting determination and imposition of countervailing duties on the products in question.[511]

7.321. On the substance of China's claim, it is clear from the record that the final public body, benchmark, and *de facto* specificity determinations in the Solar Panels investigation were supported by the same explanations as the preliminary determinations. Specifically, with respect

[507] China's response to Panel question No. 48, para. 211 (quoting Verification Report on Thermal Paper, (Exhibit CHN-27), pp. 18-19).
[508] Verification Report on Thermal Paper, (Exhibit CHN-27), p. 19.
[509] China's first written submission, para. 372.
[510] China's first written submission, para. 373.
[511] See also Section 7.8.1.3 below.

to public bodies, the USDOC recalled its analysis of government ownership or control of the relevant input producers and affirmed explanations provided in its preliminary determination.[512] Regarding the rejection of in-country benchmarks, the USDOC justified the use of external benchmarks "when the government's sales constitute a significant portion of the sales of the good in question" and reaffirmed its "preliminary conclusion that the GOC is the predominant force within the internal market". Although the USDOC explained that its preliminary conclusion was not contradicted by import penetration rates indicated by the GOC, the USDOC found that "the GOC's significant presence in the market distorts all domestic prices (including prices paid for imports)"[513] without explaining "whether and how the relevant … producers possessed and exerted market power such that other in-country prices were distorted" or "whether the prices of the … government-related entities themselves were market determined".[514] Finally, regarding *de facto* specificity, the USDOC affirmed its preliminary determinations without any indication that the additional factors under Article 2.1(c) were considered in reaching its final determination.[515]

7.322. We recall that the original panel found that the preliminary public bodies and specificity determinations were inconsistent with Article 1.1(a)(1) and Article 2.1(c) of the SCM Agreement, respectively. Moreover, the Appellate Body found that the preliminary benchmark determination was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

7.323. Based on the foregoing, we consider that China has made a *prima facie* case that the final determination in the original Solar Panels investigation is inconsistent with Articles 1.1(a)(1), 1.1(b) and 14(d) and with Article 2.1(c) of the SCM Agreement.

7.324. Because the United States has not rebutted China's arguments in relation to the final determinations made, we find that China has demonstrated that the final determination in the original Solar Panels investigation is inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), and 14(d) of the SCM Agreement.

7.325. We thus conclude that China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1), 1.1(b), 2.1(c), and 14(d) of the SCM Agreement in the final determination of the original Solar Panels investigation.

7.8 China's claims in relation to subsequent administrative and sunset reviews

7.326. China claims that the United States has failed to bring itself into conformity in respect of measures subsequent to the USDOC's original determinations that were found to be inconsistent in the original dispute. These measures include administrative reviews and sunset reviews that China contends are "subsequent closely connected measures" that are within the Panel's terms of reference in this proceeding under Article 21.5. China further argues that these "subsequent closely connected measures … reflect the continued application of legal standards that are inconsistent" with the relevant obligations under the SCM Agreement.[516]

7.327. We will first address issues relating to the scope of Article 21.5 proceedings and the Panel's terms of reference with respect to administrative and sunset reviews, before addressing whether China has made a *prima facie* case in respect of these subsequent measures.

7.8.1 Whether the subsequent administrative and sunset review determinations challenged by China are within the scope of the Panel's jurisdiction

7.8.1.1 Introduction

7.328. China identifies certain administrative and sunset reviews of the countervailing duty orders in annex 3 and annex 4, respectively, of its request for the establishment of a compliance panel.

[512] USDOC Final Determination in the original Solar Panels investigation, (Exhibit CHN-28), pp. 30-31. We note that the USDOC considered that the DSB recommendations and rulings in DS379 concerning public bodies were limited to the investigations at issue in that dispute, indicating that the USDOC did not apply a revised legal standard in its public body determinations in the Solar Panels case.
[513] USDOC Final Determination in the original Solar Panels investigation, (Exhibit CHN-28), pp. 34-35.
[514] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.96.
[515] USDOC Final Determination in the original Solar Panels investigation, (Exhibit CHN-28), p. 33.
[516] China's first written submission, para. 376.

China argues that the determinations in these subsequent reviews are closely connected in terms of their nature, effects, and timing to the measures the United States' declared it took to comply and the relevant DSB rulings and recommendations, and therefore come within the scope of this Panel's jurisdiction in this proceeding under Article 21.5 of the DSU.[517] During these proceedings, China identified one additional administrative review and one additional sunset review in which determinations were issued subsequent to the filing of its request for the establishment of a panel, and which it considers are within the Panel's jurisdiction.[518]

7.329. Our mandate under Article 21.5 of the DSU is not limited to an examination of measures declared to be "taken to comply" by the implementing Member. Measures with a sufficiently close relationship to the declared measure taken to comply, and to the recommendations and rulings of the DSB, may also be within the jurisdiction of a panel acting under Article 21.5. In order to determine whether the measures challenged by China are properly before us, we must "scrutinize these relationships, which may, depending on the particular facts, call for an examination of the timing, nature, and effects of the various measures" as well as "the factual and legal background against which a declared 'measure taken to comply' is adopted".[519]

7.330. Accordingly, we proceed to consider the nature, timing, and effects of the administrative and sunset review measures challenged by China to determine whether they fall within the scope of our jurisdiction in this proceeding under Article 21.5 of the DSU by virtue of their relationship to the Section 129 determinations that the United States declared as the measures taken to comply, as well as to the recommendations and rulings of the DSB.

7.8.1.2 Main arguments of the parties

7.331. With respect to their nature, China submits that the subsequent measures "were issued under the same countervailing duty orders as the measures challenged in the original dispute", and they "reflect either the exact same legal standards that were found by the DSB to be inconsistent with the SCM Agreement in the original dispute, or they reflect the equally unlawful legal standards that the USDOC applied in the Section 129 determinations that are also before this compliance Panel".[520]

7.332. With respect to the effects of the various measures, China argues that they "replaced the effects of the original countervailing duty determinations in a manner that reflects the USDOC's continued application of erroneous legal standards in relation to the provisions of the SCM Agreement that were the subject of the original dispute".[521] Thus, according to China, "the subsequent administrative reviews and sunset reviews, reflecting the USDOC's continued application of erroneous legal standards, had the same effects as the declared measures 'taken to comply'".[522]

7.333. Finally, China asserts that "[e]ach successive review … is closely linked, in terms of timing, to the immediately preceding review or to the original countervailing duty determination at issue", and "the original countervailing duty determinations at issue were superseded by a subsequent review which establishes the final duty liability for the previous review period, and the cash deposit rate for the next review period".[523] China further argues that the timing of the measure is not determinative, and that measures adopted before the DSB's adoption of recommendations and

[517] China's first written submission, para. 384.
[518] China's first written submission, fns 382-383. Specifically, China refers to an administrative review in Solar Panels, and a sunset review in Aluminum Extrusions, in which determinations were issued after its filing of a request for the establishment of a Panel. China contends that these determinations are encompassed by paragraph 32 of its request for the establishment of a panel, in which China advances the same claims against periodic and sunset review determinations "subsequent to those set forth in" annex 3 and annex 4 to the extent that any such periodic and sunset review determinations "involve the same errors" claimed against the determinations identified in annex 3 and annex 4 of its panel request. (China's first written submission, para. 434(n)).
[519] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.
[520] China's first written submission, para. 385.
[521] China's first written submission, para. 386.
[522] China's first written submission, para. 386.
[523] China's first written submission, para. 387.

rulings may fall within the scope of Article 21.5 of the DSU, provided it is shown they have a sufficiently close nexus to those recommendations and the declared measures taken to comply.[524]

7.334. The United States argues that "nearly all of the measures that China identifies were concluded prior to the end of the [reasonable period of time (RPT)] on April 1, 2016, and thus were not 'subsequently closely connected' to the measures taken to comply in this dispute".[525] The United States further argues that determinations in administrative and sunset reviews issued during the course of these compliance proceedings "necessarily did not exist at the time of the panel's establishment" and therefore "they are not measures within the panel's terms of reference".[526] The United States also distinguishes the findings and facts regarding subsequent measures in the context of implementation of panel and Appellate Body decisions concerning the zeroing methodology, asserting that the zeroing methodology is a "vastly simpler type of 'measure' than the challenged determinations" in this case, which "are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding as part of its analysis".[527]

7.8.1.3 Evaluation by the Panel

7.335. One of the main contentions of the United States regarding whether the challenged subsequent measures fall within the scope of this proceeding concerns the timing of the issuance of the relevant determinations in relation to the expiry of the RPT and the establishment of this compliance panel. In particular, the United States contests the inclusion of reviews completed prior to the end of the RPT as well as of measures not in existence at the time of panel establishment.[528]

7.336. The administrative and sunset reviews identified in China's panel request were clearly in existence at the time this Panel was established. Some of these reviews were completed before the end of the RPT on 1 April 2016, while others were completed prior to the DSB's adoption of recommendations and rulings in the original phase of the dispute on 16 January2015.[529]

7.337. We recall that the timing of a measure alone is not a decisive factor in establishing whether it has a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5 proceeding.[530] More fundamentally, excluding measures solely on the grounds that they pre-date the end of the RPT would seem to be incompatible with the purpose of the RPT, which is to provide a period of time in which an implementing Member may take measures in order to bring itself into compliance with DSB recommendations and rulings. In principle, it would be expected that compliance measures would be taken before the end of the RPT, and that disagreements as to the existence or consistency of such measures would be subject to consideration under Article 21.5.[531] The existence of a declared measure taken to comply after the end of the RPT does not automatically mean that measures taken *during* the RPT fall outside the scope of a compliance proceeding under Article 21.5. Rather, whether such earlier measures are properly within the scope of an Article 21.5 proceeding depends on other aspects of the "close nexus" test in relation to a Member's implementation of the recommendations and rulings of the DSB. Similarly, measures pre-dating DSB adoption may still fall within the scope of an Article 21.5 proceeding provided that there is a sufficiently close nexus in terms of their nature and effects.[532] Thus, even if "measures

[524] China's second written submission, para. 230.
[525] United States' first written submission, para. 321.
[526] United States' first written submission, para. 322.
[527] United States' second written submission, paras. 266-268.
[528] See, e.g. United States' first written submission, para. 314 (arguing that "China has not identified any actions, conduct, or omissions occurring after the expiration of the RPT and before the establishment of the Article 21.5 panel" in relation to the scope of the Panel's terms of reference in this case).
[529] Annex 3 and annex 4 of China's request for the establishment of a panel.
[530] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224.
[531] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299 (noting that "Article 21.3 of the DSU implies that the obligation to comply with the recommendations and rulings of the DSB has to be fulfilled by the end of the reasonable period of time at the latest").
[532] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 226-235. In this regard, we do not consider any of the subsequent reviews identified by China to have occurred so long before the recommendations and rulings of the DSB so as to "sever the connection between" those measures and the United States' implementation obligations. (Ibid. para. 225).

taken to comply with recommendations and rulings of the DSB *ordinarily* post-date the adoption of the recommendations and rulings"[533], this is not necessarily the case, and is in any event not a requirement for measures to be considered in a compliance proceeding.

7.338. Regarding measures not in existence at the time of panel establishment, there are circumstances in which such measures may nevertheless fall within a panel's terms of reference in a compliance proceeding. For example, amendments to measures at issue in a dispute made during the course of panel proceedings have been found to fall within a panel's terms of reference when the challenged measure was amended "without changing its essence".[534] The conclusion that a subsequent measure has the "same essence" has thus been recognized as a basis for finding that "measures enacted subsequent to the establishment of the panel may, in certain limited circumstances, fall within a panel's terms of reference".[535] Moreover, "an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the function of compliance proceedings", given that:

> A measure that is initiated before there has been recourse to an Article 21.5 panel, and which is completed during those Article 21.5 panel proceedings, may have a bearing on whether there is compliance with the DSB's recommendations and rulings. Thus, if such a measure incorporates the same conduct that was found to be WTO-inconsistent in the original proceedings, it would show non-compliance with the DSB's recommendations and rulings.[536]

7.339. We are of the view that measures with a "particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB"[537] may also fall within the limited circumstances in which measures that come into being after establishment of a compliance panel fall within that panel's terms of reference.[538] Accordingly, we proceed to consider the nature and effects of the various measures at issue before us to determine whether they have a sufficiently close nexus with the DSB's recommendations and rulings in this case and the United States' implementation of those recommendations and rulings.

7.340. The nature of the measures in question concerns their subject matter[539], which may encompass a variety of relevant considerations in the specific context of subsequent reviews in trade remedy cases. For example, an overlap of the covered products and the substantive issue in question may indicate a close nexus in subject matter.[540] It may also be relevant to consider whether the particular substantive issue was itself the subject of the recommendations and rulings of the DSB.[541] Another relevant consideration may be that subsequent reviews and determinations are issued under the same "order" as measures challenged in original proceedings, constituting "connected stages … involving the imposition, assessment and collection of duties".[542] Such relevant similarities in the nature of the various measures may indicate a sufficiently close nexus notwithstanding formal differences, such that, for example, "differences between original investigations and administrative reviews in countervailing duty cases do not prevent the latter from falling within the scope of compliance proceedings".[543]

7.341. At the same time, we are of the view that there are limits to the situations in which subsequent reviews may be found to have a sufficiently close nexus in nature so as to fall within

[533] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 222. (emphasis added)
[534] Appellate Body Report, *Chile – Price Band System*, para. 139.
[535] Appellate Body Report, *EC – Chicken Cuts*, para. 156.
[536] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122.
[537] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.
[538] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 22 (finding that a measure introduced after the establishment of a compliance panel could be considered a measure taken to comply in the sense of Article 21.5 due to being "so clearly connected to the panel and Appellate Body reports concerned, both in time and in respect of the subject-matter").
[539] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230.
[540] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 83.
[541] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230
[542] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230
[543] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 244. See also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 83.

the scope of an Article 21.5 proceeding.[544] For example, "identity in terms of product and country coverage alone would be an insufficient basis for determining that [subsequent administrative reviews] have a sufficiently close nexus, in terms of nature, with the recommendations and rulings of the DSB with respect to the original investigations".[545] In the present case, however, the overlap of subject matter extends beyond merely an identity of product and country coverage. China has identified determinations made in administrative and sunset reviews conducted under the same countervailing duty orders as were the subject of the DSB rulings and recommendations. Moreover, in our view, the alleged application of the same legal standard that was found to be WTO-inconsistent in the original dispute, or that was applied in the declared measures taken to comply (in this case the Section 129 determinations) may be a particularly relevant aspect in determining whether the requisite "close nexus" exists.

7.342. This in turn raises the question of whether the administrative and sunset reviews have a sufficiently close nexus in terms of their effects with the United States' implementation of the DSB recommendations and rulings. The effects of a challenged measure that may be relevant in this regard include the potential perpetuation of the WTO-inconsistency originally found, which may undermine a Member's compliance with DSB recommendations and rulings.[546] In this case, China challenges subsequent administrative and sunset reviews allegedly involving the same substantive errors as those found originally in the relevant public body, input specificity, regional specificity, and benchmark determinations.

7.343. In this regard, we note the United States' arguments distinguishing prior compliance proceedings involving the application of the zeroing methodology in subsequent reviews of anti-dumping orders. The United States underscores the fact-intensive and case-specific nature of the determinations made under the countervailing orders at issue in this case, which it argues distinguish the situation here from that in the zeroing compliance proceedings. For example, the United States argues that whereas the application of zeroing, a WTO-inconsistent methodology, was evident in subsequent measures:

> [T]he USDOC's public bodies, input specificity, land, and benchmark determinations, are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding as part of its analysis and any WTO-inconsistency cannot be established without considering the totality of evidence that was before the USDOC.[547]

7.344. In this case, the subject matter overlap (resulting from the application of a particular legal standard under the same countervailing duty order concerning the same products from China) bears on the effects of the relevant measures because it is reflected in the resulting determination and consequent imposition of countervailing duties on imports of the products in question. In this sense, the measures at issue involve "successive determinations" under the same countervailing-duty order and may be considered to "form part of a continuum of events"[548] that bears a close relationship to the United States' implementation of the relevant DSB rulings and recommendations. Within this continuum of events, administrative reviews affected the countervailing duty and cash deposit rates established in the original determinations that were the subject of the DSB's recommendations and rulings. Moreover, the USDOC'S Section 129 determinations − the United States' declared measures taken to comply − had the effect of superseding previously completed administrative reviews, or were superseded by the subsequent

[544] The Appellate Body has emphasized that its findings "should not be read to mean that every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel". (Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 93).

[545] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 239.

[546] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 250. In this regard, it may be relevant to consider whether a challenged measure "update[s]" or "supersede[s]" the effects of a declared measure to comply (e.g. Section 129 determinations). (Appellate Body Report, *US − Softwood Lumber IV (Article 21.5 − Canada)*, para. 85).

[547] United States' second written submission, para. 268. In this connection, the United States emphasizes that "the GOC's decision to cooperate − or not − with the USDOC's request for information has a direct impact on whether the USDOC has the information necessary to produce a nuanced finding or must reach its conclusions based on limited facts available on the record". (United States' second written submission, para. 270).

[548] Appellate Body Report, *US − Zeroing (EC) (Article 21.5 − EC)*, para. 251.

administrative review identified by China.[549] For sunset reviews, the USDOC's determinations of whether injurious subsidisation is likely to continue were not made in isolation from determinations made either in the original investigations at issue in the original dispute or in subsequent administrative reviews.[550]

7.345. We are therefore not convinced that differences in the time-period reviewed or the factual record in various subsequent reviews interrupt this continuum, or negate the close nexus of effects stemming from the common elements of the various measures.[551] Similarly, we are not persuaded that differences between administrative and sunset reviews under US domestic law undermine the existence of close nexus where, notwithstanding certain distinctions between these types of review, each review takes as its basis, and thereby reflects, and to some extent incorporates, the USDOC's earlier determinations with respect to countervailable subsidies.[552] We consider the interrelated effects of the USDOC's original determinations, Section 129 determinations, and administrative and sunset review determinations to reflect a particularly close relationship for the purposes of Article 21.5 of the DSU.

7.346. We note in this regard that the jurisdictional question before us is to be distinguished from the substantive question of whether the subsequent administrative and sunset reviews are themselves inconsistent with the provisions of the SCM Agreement as claimed by China. Therefore, in concluding that there is a close nexus in terms of the nature and effects of the relevant measures and DSB rulings and recommendations, we are not inquiring whether or finding that China has demonstrated that the subsequent review determinations are inconsistent with the provisions of the SCM Agreement raised by China.[553] Rather, at this stage of our analysis, we consider that the overlapping subject matter identified by China in respect of subsequent reviews has implications in terms of the effects of those measures that, in turn, have a close relationship to the United States' implementation of the relevant DSB recommendations and rulings.

7.347. On the basis of the foregoing, we therefore find that the administrative and sunset reviews identified by China, including those that came into existence after the establishment of this Panel, fall within our terms of reference under Article 21.5 of the DSU by virtue of their close relationship to the recommendations and rulings of the DSB and the relevant Section 129 determinations of the USDOC.

7.8.2 Whether the subsequent administrative and sunset review determinations are inconsistent with the SCM Agreement

7.348. China's substantive claims are based on the assumption that the "subsequent closely connected measures … reflect the continued application of legal standards that are inconsistent" with the relevant obligations under the SCM Agreement.[554] The allegedly inconsistent legal standards at issue are those relied on in the USDOC's public body determinations, input and regional specificity determinations, and benchmark determinations in the respective administrative and sunset reviews. In the following sections, we analyse each administrative and sunset review

[549] In the only administrative review identified by China that post-dates the relevant Section 129 determination (the second administrative review in Solar Panels), we note China's explanation that the USDOC's determination had the effect of generating the duty assessment rate for the relevant review period and replacing the cash deposit rate calculated in the Section 129 determination with a revised cash deposit rate going forward. (China's response to Panel question No. 61, para. 234; see also Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 85 (outlining similar considerations in respect of an subsequent administrative review's effect on the cash deposit rate resulting from a Section 129 determination)).

[550] China's response to Panel question No. 61, para. 236. Further, the sunset review determination in Aluminum Extrusions, issued after the relevant Section 129 determination, had the effect of providing the basis for the continuation of countervailing duties going forward at the cash deposit rates calculated in the Section 129 determination. (Ibid. para. 234).

[551] See, e.g. United States' response to Panel question No. 61, para. 239

[552] United States' response to Panel question No. 61, paras. 240-241. We further recall in this regard that municipal law classifications are not determinative in WTO dispute settlement. (Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 244; *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82).

[553] In this regard, we do not agree with the United States' contention that "the question is not whether an annual review is closely related to an investigation; rather, the question is whether the factual determinations in a subsequent review are identical to factual determinations made based on the different factual record in the investigation." (United States' second written submission, para. 269).

[554] China's first written submission, para. 376.

determination in light of China's legal claims, to determine if China has made a *prima facie* case that the USDOC acted inconsistently with the SCM Agreement in each of those determinations.

7.8.2.1 Administrative reviews in the Kitchen Shelving proceeding

7.349. China claims that in the three administrative reviews in the Kitchen Shelving proceeding[555], the USDOC:

a. applied a government ownership and control standard to determine that producers of wire rod and steel strip are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement; and

b. failed, in its *de facto* specificity determination, to take account of "the extent of diversification of economic activities within the jurisdiction of the granting authority" and of "the length of time during which the subsidy programme has been in operation".[556]

On this basis, China claims that the three administrative reviews are inconsistent with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement.

7.8.2.1.1 Whether the USDOC applied an improper legal standard in its public body determinations

7.350. We recall the finding in the original dispute[557] that the USDOC had acted inconsistently with Article 1.1(a)(1) in its public body determinations because "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".[558] We also recall that "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 governmental function. Accordingly, such evidence, alone, cannot support a finding that an entity is a public body."[559]

7.351. In the present dispute, we are called upon to determine whether, in each of the three administrative reviews in Kitchen Shelving, the USDOC found that input producers were public bodies on the sole basis of evidence of government ownership or control and without establishing that the entities possessed, exercised, or were vested with authority to perform a governmental function.

7.352. In the first administrative review, the USDOC sought ownership information about wire rod producers and, "for any of the wire rod producers that are not majority-owned by the GOC", the USDOC asked the GOC "to trace back the ownership to the ultimate individual or state owners".[560] The USDOC also relied on information suggesting that "the CCP exerts significant control over activities in the PRC. As such, the requested information about the individual owner's status as CCP officials [was] relevant to whether the wire rod supplier is an 'authority'".[561] With regard to producers of steel strip, the USDOC noted that it "normally treats producers that are majority-owned by the government or a government entity as 'authorities'", and thus sought information in relation to majority government-ownership.[562]

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[555] USDOC First Administrative Review in Kitchen Shelving, (Exhibit CHN-30); USDOC Second Administrative Review in Kitchen Shelving, (Exhibit CHN-31); and USDOC Third Administrative Review in Kitchen Shelving: Final Determination, (Exhibit CHN-33).

[556] China's first written submission, paras. 390-395.

[557] Panel Report, *US – Countervailing Measures (China)*, paras. 7.75 and 8.1(i).

[558] Panel Report, *US – Countervailing Measures (China)*, para. 7.73.

[559] Panel Report, *US – Countervailing Measures (China)*, para. 7.70 (referring to Appellate Body Report *US – Anti-Dumping and Countervailing Duties (China)*, para. 346).

[560] USDOC First Administrative Review in Kitchen Shelving, (Exhibit CHN-30), p. 5. The USDOC additionally discussed "*ownership information* submitted by the GOC regarding one wire rod producer" and "whether the individuals that *owned* that wire rod producer were government officials or officials of the CCP". (Ibid. pp. 5-6 (emphasis added)).

[561] USDOC First Administrative Review in Kitchen Shelving, (Exhibit CHN-30), p. 6. (fn omitted)

[562] USDOC First Administrative Review in Kitchen Shelving, (Exhibit CHN-30), p. 7.

7.353. In the second administrative review, the USDOC similarly sought ownership information about producers of steel strip and wire rod, and for producers "that are not majority-owned by the GOC" the USDOC asked the GOC "to trace back the ownership to the ultimate individual or state owners".[563] The USDOC considered that "[g]iven the GOC's lack of a response, we have no information concerning government ownership or control of any of the companies that supplied steel strip and wire rod" and therefore made an adverse inference that the suppliers of steel strip and wire rod were public bodies.[564]

7.354. In the third administrative review, the USDOC sought similar information and relied on the same reasoning in explaining its public body determination with respect to producers of steel strip and wire rod.[565]

7.355. We find no evidence in the determinations or the records of the administrative reviews at issue that the USDOC considered other characteristics of the input producers. Nor do we find evidence that the USDOC considered whether these producers, at the time of the reviews, possessed, exercised, or were vested with governmental authority to perform a governmental function on any basis other than government ownership or control.

7.356. We thus find that China has made a *prima facie* case that the USDOC applied an ownership or control standard, and did not make its public body determinations on the basis of whether the entities in question possessed, exercised, or were vested with governmental authority. The United States has not rebutted China's arguments in relation to the public body determinations in the reviews at issue.

7.357. We therefore find that China has demonstrated that the three measures at issue are inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.8.2.1.2 Whether the USDOC failed to take account of the diversification of economic activities and of the length of time the subsidy programme has been in operation

7.358. In all three reviews, the USDOC relied on the factual findings made in the "underlying investigation" to conclude that the provision of wire rod for less than adequate remuneration "conferred a countervailable subsidy". Further, the USDOC considered in all three reviews that, with respect to wire rod, "[n]o interested party provided new evidence that would lead us to reconsider our earlier findings that … the subsidy conferred is specific".[566] Regarding the provision of steel strip for less than adequate remuneration, in the first administrative review, the USDOC relied on the fact that "'steel consuming industries' [were] limited in number and, hence, the subsidy [was] specific".[567] In the second and third administrative reviews, the USDOC simply relied on its findings in the first administrative review.[568]

7.359. We recall the finding in the original dispute that the USDOC had acted inconsistently with Article 2.1(c) in its specificity determinations by failing to take into account "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".[569] We find that the provision of steel strip and wire rod for less than adequate remuneration were considered *de facto* specific on the same basis as in the original investigation. We find no indication in the determinations or the record − and the United States points to none − that additional factors were considered, either explicitly or implicitly, during the administrative reviews.

[563] USDOC Second Administrative Review in Kitchen Shelving, (Exhibit CHN-31), p. 6.
[564] USDOC Second Administrative Review in Kitchen Shelving, (Exhibit CHN-31), p. 6.
[565] USDOC Third Administrative Review in Kitchen Shelving: Preliminary Determination, (Exhibit CHN-32), p. 5, which was the basis for the final determination. (USDOC Third Administrative Review in Kitchen Shelving: Final Determination, (Exhibit CHN-33), pp. 4-5).
[566] USDOC First Administrative Review in Kitchen Shelving, (Exhibit CHN-30), p. 17: "In the underlying investigation, we determined that this program conferred a countervailable subsidy. No interested party provided new evidence that would lead us to reconsider our earlier findings that … the subsidy conferred is specific." See also USDOC Second Administrative Review in Kitchen Shelving, (Exhibit CHN-31), pp. 9-11; and USDOC Third Administrative Review in Kitchen Shelving: Preliminary Determination, (Exhibit CHN-32), pp. 8-9.
[567] USDOC First Administrative Review in Kitchen Shelving, (Exhibit CHN-30), p. 20.
[568] USDOC Second Administrative Review in Kitchen Shelving, (Exhibit CHN-31), p. 11; USDOC Third Administrative Review in Kitchen Shelving: Preliminary Determination, (Exhibit CHN-32), p. 9.
[569] Panel Report, *US − Countervailing Measures (China)*, paras. 7.257 and 8.1(v).

7.360. We conclude that China has made a *prima facie* case that the USDOC did not take account of the two factors in the last sentence of Article 2.1(c) in its specificity determinations in the three administrative reviews in Kitchen Shelving. We also consider that the United States has not rebutted China's arguments in relation to the *de facto* specificity determinations in these administrative reviews.

7.361. We therefore find that China has demonstrated that the three measures at issue are inconsistent with Article 2.1(c) of the SCM Agreement.

7.8.2.1.3 Conclusion on China's claims concerning the Kitchen Shelving administrative reviews

7.362. China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the three Kitchen Shelving administrative reviews.

7.8.2.2 Administrative reviews in the OCTG proceeding

7.363. China claims that in the two administrative reviews in the OCTG proceeding[570], the USDOC:

a. applied a government ownership and control standard to determine that producers of steel rounds are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement;

b. rejected domestic prices of steel rounds in China for determining whether a benefit was conferred in the absence of any evidence that government-related entities possessed and exercised market power in a manner that distorts domestic prices in China; and

c. failed, in its *de facto* specificity determination, to take account of "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".[571]

On this basis, China claims that the two administrative reviews are inconsistent with Articles 1.1(a)(1), 1.1(b), 14(d), and 2.1(c) of the SCM Agreement.

7.8.2.2.1 Whether the USDOC applied an improper legal standard in its public body determinations

7.364. In the first administrative review in OCTG, the USDOC focused on the ownership of the providers of steel rounds as the basis for its public body determinations, as follows:

a. With respect to steel rounds producers owned or controlled directly or indirectly by the GOC, the USDOC found that these enterprises were "'authorities' … as they [were] majority owned by the government".[572]

b. With respect to steel rounds producers that the GOC claimed were not majority state owned or controlled, the USDOC attempted to identify the "eventual owners" "because it is the eventual owners … that ultimately control the steel round producers".[573]

c. With respect to steel rounds producers owned by individuals, the USDOC inquired whether the "ultimate individual owners … were CCP officials". The Final Determination indicates that this information is relevant "because … CCP exerts significant control over activities in the PRC".[574]

[570] USDOC First Administrative Review in OCTG, (Exhibit CHN-34), pp. 9-12; USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), pp. 9-16.
[571] China's first written submission, paras. 396-401.
[572] USDOC First Administrative Review in OCTG, (Exhibit CHN-34), p. 11.
[573] USDOC First Administrative Review in OCTG, (Exhibit CHN-34), p. 11.
[574] USDOC First Administrative Review in OCTG, (Exhibit CHN-34), pp. 10-11.

7.365. We do not find any indication in the determination or the records that the USDOC considered evidence that these producers, at the time of the investigation, possessed, exercised, or were vested with governmental authority to perform a governmental function. Although the USDOC referred to information in the Public Bodies Memorandum and CCP Memorandum in its explanations based on "certain findings relevant to the CCP", the USDOC clarified that "[i]n describing the Public Bodies Memorandum and CCP Memorandum in this review, we do not mean to suggest that we are applying the same standard in this review" as that set out in those documents, i.e. an analysis of whether entities possessed, exercised, or were vested with governmental authority. Rather, the USDOC described the legal standard applied in the first review as follows: "in this review, we find that an entity is an 'authority' if it is controlled by the government".[575] In our view, this indicates that the USDOC applied an ownership or control standard, and did not make its public body determination on the basis of whether the entities in question possessed, exercised, or were vested with governmental authority.

7.366. We thus conclude that China has made a *prima facie* case that the USDOC applied an ownership or control standard, and did not make its public body determination on the basis of whether the entities in question possessed, exercised, or were vested with governmental authority. The United States has not rebutted China's arguments in relation to the public body determination in the review at issue.

7.367. We therefore find that China has demonstrated that the public body determination in the first administrative review in OCTG is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.368. In the second administrative review, regarding government-owned producers of steel rounds the USDOC found that "steel round producers that are majority owned by the government are 'authorities' … for the reasons described in the Public Body Memorandum".[576] The USDOC further explained that its finding with respect to majority government-owned companies was "not based solely on state ownership", but rather was "based on the fact that the GOC exercises meaningful control over these entities and uses them to effectuate its goals of upholding the socialist market economy, allocating resources and maintaining the predominant role of the state sector."[577] Regarding companies "that the GOC claimed were privately owned by individuals" and "owned by other corporations … or with less-than-majority state ownership", the USDOC explained that the information received in response to its questions was incomplete and determined that it "cannot confirm the GOC's claim that these companies are not majority-owned by the state".[578] In this regard, the USDOC referred to information in the Public Bodies Memorandum regarding the role of the government in Chinese enterprises, and applied an adverse inference based on facts available to conclude that "non-SOE producers of steel rounds for which the GOC failed to provide" requested information were public bodies.[579]

7.369. In addition, the final determination in the second administrative review in OCTG sets out extensive reasoning and explanation by the USDOC with respect to majority state-owned producers of steel rounds, as well as the relevance to the public body inquiry of CCP affiliations with companies, specifically referring to information in the Public Bodies Memorandum and the CCP Memorandum.[580] In this regard, the USDOC recalled that "a 'public body' must be an entity that possesses, exercises or is vested with governmental authority", and stated this to be the USDOC's finding in this administrative review.[581]

7.370. Therefore, in the second administrative review in OCTG, it is not apparent that the USDOC applied the same standard of government ownership or control that was found to be inconsistent in the original dispute. China has not addressed any of the foregoing aspects of the

[575] USDOC First Administrative Review in OCTG, (Exhibit CHN-34), fn 210.
[576] USDOC Second Administrative Review in OCTG: Preliminary Determination, (Exhibit CHN-35), p. 24; USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), p. 28.
[577] USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), p. 49.
[578] USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), pp. 10-13. The USDOC's questionnaire sought information relating to the ownership of such companies as well as "whether and how operational or strategic decisions made by the management or board of directors are subject to government review or approval". (USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), p. 11).
[579] USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), pp. 14-15.
[580] USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), pp. 48-56.
[581] USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), p. 50.

USDOC's determination in the second administrative review in OCTG, particularly regarding the USDOC's explanations relating to whether entities possessed, exercised, or were vested with governmental authority.

7.371. We therefore find that China has not made a *prima facie* case that the USDOC's public body determination in the second administrative review in OCTG is inconsistent with the provisions of Article 1.1(a)(1) of the SCM Agreement.

7.8.2.2.2 Whether the USDOC improperly rejected in-country prices as benchmarks

7.372. China claims that "the USDOC rejected in-country prices as benchmarks in the absence of any evidence that government-related entities possessed and exercised market power in a manner that distorts domestic prices in China."[582]

7.373. We are not convinced by China's argument. Article 14(d) of the SCM Agreement requires that the "adequacy of remuneration shall be determined in relation to prevailing market conditions for the good in question in the country of provision or purchase". For the reasons set out above[583] we do not consider that in-country prices may be rejected as a benchmark only when government-related entities possess and exercise market power in a manner that distorts in-country prices. As discussed above, there may be other circumstances in which an investigating authority may reject in-country prices as a benchmark in determining benefit.

7.374. China has not put forward any other argument in support of its claim that the USDOC improperly rejected in-country prices as benchmarks, and has not otherwise contested the USDOC's conclusion in these administrative reviews regarding "the government's extensive involvement in the Chinese steel rounds market".[584] We therefore find that China has not made a *prima facie* case that the USDOC's benchmark determinations in the two administrative reviews in the OCTG proceeding are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

7.8.2.2.3 Whether the USDOC failed to take account of the diversification of economic activities and of the length of time the subsidy programme has been in operation

7.375. In the first administrative review the USDOC relied on the same finding as in the OCTG investigation, i.e. that "the products listed by the GOC … are a limited group of industries", to determine that the provision of steel rounds for less than adequate remuneration was specific.[585] In the second administrative review, the USDOC found that the provision of steel rounds was specific as "no information [had] been provided on the record of the instant review that would cause [the USDOC] to reach a different determination" from that in the OCTG investigation.[586]

7.376. We recall the finding in the original dispute that the USDOC had acted inconsistently with Article 2.1(c) in its specificity determinations by failing to take account 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".[587] We find that the provision of steel rounds for less than adequate remuneration was found to be *de facto* specific on the same basis as in the original investigation in the administrative reviews at issue here. We find no indication on the record − and the United States points to none − that additional factors were considered, either explicitly or implicitly, during the administrative reviews.

7.377. We thus conclude that China has made a *prima facie* case that the USDOC did not take account of the two factors in the last sentence of Article 2.1(c) in its specificity determinations in the two administrative reviews in OCTG. The United States has not rebutted China's arguments in relation to the *de facto* specificity determinations in these administrative reviews.

7.378. We therefore find that China has demonstrated that the two measures at issue are inconsistent with Article 2.1(c) of the SCM Agreement.

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[582] China's first written submission, paras. 398-399.
[583] See Section 7.3.3.2 above.
[584] USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), p. 28.
[585] USDOC First Administrative Review in OCTG, (Exhibit CHN-34), p. 49.
[586] USDOC Second Administrative Review in OCTG: Final Determination, (Exhibit CHN-36), p. 28.
[587] Panel Report, *US − Countervailing Measures (China)*, paras. 7.257 and 8.1(v).

7.8.2.2.4 Conclusion on China's claims concerning the OCTG administrative reviews

7.379. China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the first OCTG administrative review and that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the second OCTG administrative review.

7.380. China has not demonstrated that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the first OCTG administrative review nor that the United States acted inconsistently with Articles 1.1(a)(1), 1.1(b), and 14(d) of the SCM Agreement in the second OCTG administrative review.

7.8.2.3 Administrative reviews in the Aluminum Extrusions proceeding

7.381. China claims that in the three administrative reviews in the Aluminum Extrusions proceeding[588], the USDOC:

a. Applied, in its public body determination, a government ownership and control standard to determine that producers of primary aluminium are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement; and

b. Failed, in its *de facto* specificity determination, to take account of "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".

On this basis, China claims that the three administrative reviews are inconsistent with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement.

7.8.2.3.1 Whether the USDOC applied an improper legal standard in its public body determinations

7.382. In the first administrative review, the USDOC's investigation focused on the ownership of the providers of primary aluminium.[589] In particular, the USDOC found that:

> [F]or those input producers for which the GOC failed to provide ownership information, failed to identify whether the members of the board of directors, owners or senior managers were government/CCP officials, or failed to report if the companies had CCP committees, we are finding them to be "authorities".[590]

7.383. We find no evidence in the determination or record of the first administrative review that the USDOC considered other characteristics of the input producers. Nor do we find any evidence that the USDOC considered whether these producers, at the time of the investigation, possessed, exercised, or were vested with governmental authority to perform a governmental function. We thus conclude that China has made a *prima facie* case that the USDOC applied an ownership or control standard, and did not make its public body determinations on the basis of whether the entities in question possessed, exercised, or were vested with governmental authority. The United States has not rebutted China's arguments in relation to the public body determinations in the review at issue.

7.384. We therefore find that China has demonstrated that the measure at issue is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.385. In the second and third administrative reviews in the Aluminum Extrusions proceeding, the USDOC applied a different analytical framework in its public body determinations.[591] The

[588] USDOC First Administrative Review in Aluminum Extrusions, (Exhibit CHN-39); USDOC Second Administrative Review in Aluminum Extrusions, (Exhibit CHN-40); and USDOC Third Administrative Review in Aluminum Extrusions, (Exhibit CHN-41).

[589] USDOC First Administrative Review in Aluminum Extrusions, (Exhibit CHN-39), pp. 22-26.

[590] USDOC First Administrative Review in Aluminum Extrusions, (Exhibit CHN-39), p. 25.

[591] USDOC Second Administrative Review in Aluminum Extrusions, (Exhibit CHN-40), p. 17 and fn 68 (referring to Public Bodies Memorandum and CCP Memorandum, (Exhibit CHN-1)); USDOC Third Administrative

determinations rely on the content of the Public Bodies Memorandum and indicate that the USDOC's findings are not based solely on state ownership, but rather on the finding in the Public Bodies Memorandum that majority government-owned SOEs in the PRC possess, exercise, or are vested with governmental authority because the GOC exercises meaningful control over these entities and uses them to effectuate its goals of upholding the socialist market economy, allocating resources, and maintaining the predominant role of the state sector.[592] The USDOC also explained the relevance to the public body inquiry of CCP affiliations with companies, specifically referring to information in the Public Bodies Memorandum and the CCP Memorandum.[593]

7.386. Therefore, in the second and third administrative reviews in Aluminum Extrusions, it is not apparent that the USDOC applied the same standard of government ownership or control that was found to be inconsistent in the original dispute. China has not addressed any of the foregoing aspects of the USDOC's determinations in the second and third administrative reviews in Aluminum Extrusions, particularly regarding the USDOC's explanations relating to whether entities possessed, exercised, or were vested with governmental authority.

7.387. We therefore find that China has not made a *prima facie* case that the USDOC's public body determinations in the second and third administrative reviews in Aluminum Extrusions are inconsistent with the provisions of Article 1.1(a)(1) of the SCM Agreement.

7.8.2.3.2 Whether the USDOC failed to take account of the diversification of economic activities and of the length of time the programme has been in operation

7.388. In the three administrative reviews, the USDOC relied on the same explanation as in the original investigation as a basis for its *de facto* specificity analysis.[594]

7.389. We recall the finding in the original dispute that the USDOC had acted inconsistently with Article 2.1(c) in its specificity determinations by failing to take account 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".[595] We find that the provision of primary aluminium for less than adequate remuneration was considered *de facto* specific in the three administrative reviews on the same basis as in the original dispute. We find no indication on the record − and the United States points to none − that additional factors were considered, either explicitly or implicitly, during the administrative reviews.

7.390. We thus conclude that China has made a *prima facie* case that the USDOC did not take account of the two factors in the last sentence of Article 2.1(c) in its specificity determinations in the administrative reviews in Aluminum Extrusions. The United States has not rebutted China's arguments in relation to the *de facto* specificity determinations in these administrative reviews.

7.391. We therefore find that China has demonstrated that the measures at issue are inconsistent with Article 2.1(c) of the SCM Agreement.

Review in Aluminum Extrusions, (Exhibit CHN-41), p. 20 and fn 72 (referring to Public Bodies Memorandum and CCP Memorandum, (Exhibit CHN-1)).

[592] USDOC Second Administrative Review in Aluminum Extrusions, (Exhibit CHN-40), p. 59; USDOC Third Administrative Review in Aluminum Extrusions, (Exhibit CHN-41), p. 22.

[593] USDOC Second Administrative Review in Aluminum Extrusions, (Exhibit CHN-40), pp. 61-64; USDOC Third Administrative Review in Aluminum Extrusions, (Exhibit CHN-41), p. 112.

[594] USDOC First Administrative Review in Aluminum Extrusions, (Exhibit CHN-39), p. 29: "the GOC has not provided information to warrant a reconsideration of our determination from the *Investigation*, where the Department found that the provision of primary aluminum is specific" (emphasis original). See USDOC Second Administrative Review in Aluminum Extrusions, (Exhibit CHN-40), p. 25: "we continue to find that, based on data provided by the GOC in the investigation on the end uses for primary aluminum, the industries which purchase primary aluminum are limited in number and, hence, the subsidy is specific." See USDOC Third Administrative Review in Aluminum Extrusions, (Exhibit CHN-41), p. 53: consistent with the first and second reviews, "we find that the industries that purchase primary aluminum are limited in number and, hence, the subsidy is specific."

[595] Panel Report, *US − Countervailing Measures (China)*, paras. 7.257 and 8.1(v).

7.8.2.3.3 Conclusion on China's claims concerning the Aluminum Extrusions administrative reviews

7.392. China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the first Aluminum Extrusions administrative review and that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the second and third Aluminum Extrusions administrative reviews.

7.393. China has not demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in the second and third Aluminum Extrusions administrative reviews.

7.8.2.4 Administrative reviews in the Solar Panels proceeding

7.394. China claims that in the two administrative reviews in the Solar Panels proceeding[596], the USDOC:

a. applied a government ownership and control standard to determine that producers of polysilicon and solar glass are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement;

b. rejected domestic prices of polysilicon and solar glass in China for determining whether a benefit was conferred in the absence of any evidence that government-related entities possessed and exercised market power in a manner that distorts domestic prices in China; and

c. failed, in its *de facto* specificity determination, to take account of "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".

On this basis, China claims that the two administrative reviews are inconsistent with Articles 1.1(a)(1), 1.1(b), 14(d) and 2.1(c) of the SCM Agreement.

7.8.2.4.1 Whether the USDOC applied an improper legal standard in its public body determinations

7.395. In support of its claim, China refers to the Issues and Decision Memoranda for the "final results" of two administrative reviews in the Solar Panels proceeding.[597] We understand, based on these documents, that the final public body determinations reached by the USDOC are the same as its preliminary determinations.[598] However, we find no evidence in these documents of the legal standard applied by the USDOC in determining that producers of polysilicon and solar glass are public bodies.

7.396. We thus conclude that China has not made a *prima facie* case that the USDOC's public body determinations in the two administrative reviews at issue are inconsistent with Article 1.1(a)(1) of the SCM Agreement.

7.8.2.4.2 Whether the USDOC improperly rejected in-country prices as benchmarks

7.397. China claims that "the USDOC rejected domestic prices as benchmarks in the absence of any evidence that government-related entities … possessed and exercised market power in a manner that distorts domestic prices in China".[599]

[596] USDOC First Administrative Review in Solar Panels, (Exhibit CHN-42); USDOC Second Administrative Review in Solar Panels, (Exhibit CHN-43).
[597] USDOC First Administrative Review in Solar Panels, (Exhibit CHN-42); USDOC Second Administrative Review in Solar Panels, (Exhibit CHN-43).
[598] USDOC First Administrative Review in Solar Panels, (Exhibit CHN-42), pp. 15-16; USDOC Second Administrative Review in Solar Panels, (Exhibit CHN-43), p. 4.
[599] China's first written submission, paras. 411-412.

7.398. We are not convinced by China's argument. Article 14(d) of the SCM Agreement requires that the "adequacy of remuneration shall be determined in relation to prevailing market conditions for the good in question in the country of provision or purchase". For the reasons set out above[600], we do not consider that in-country prices may be rejected as a benchmark only when government-related entities possess and exercise market power in a manner that distorts in-country prices. As discussed above, there may be other circumstances in which an investigating authority may reject in-country prices as a benchmark in determining benefit.

7.399. China has not put forward any other argument in support of its claim that the USDOC improperly rejected in-country prices as benchmarks. In particular, China has not otherwise contested the USDOC's conclusion that "the GOC's involvement ... significantly distorts the prices in the industry".[601] We therefore find that China has not made a *prima facie* case that the USDOC's benchmark determinations in the two administrative reviews in the Solar Panels proceeding are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

7.8.2.4.3 Whether the USDOC failed to take account of the diversification of economic activities and of the length of time the subsidy programme has been in operation

7.400. In the first administrative review, the USDOC determined − on the basis of the number of industries using polysilicon and solar glass − that the provision of polysilicon and solar glass for less than adequate remuneration was a specific subsidy.[602] We find no evidence on the record of these compliance proceedings − and the United States points to none − that additional factors were considered, either explicitly or implicitly, during the administrative reviews.

7.401. We thus conclude that China has made a *prima facie* case that the USDOC's *de facto* specificity determination in the first administrative review did not take account of the extent of the diversification of economic activities or of the length of time during which the subsidy programme had been in operation. The United States does not rebut China's argument in relation to *de facto* specificity. For the foregoing reasons, we find that China has demonstrated that the USDOC's determination in the first administrative review in the Solar Panels proceeding is inconsistent with Article 2.1(c) of the SCM Agreement.

7.402. Regarding the second administrative review, China refers to an Issues and Decision Memorandum for the "final results" of the second administrative review in the Solar Panels case in support of its claim.[603] We understand, based on this document, that the Final Determination reached by the USDOC is the same as its preliminary determination on several issues, including *de facto* specificity.[604] However, we find no evidence in this document of the legal standard applied by the USDOC to determine if the subsidy at issue was *de facto* specific.

7.403. We thus find that China has not made a *prima facie* case that the USDOC's *de facto* specificity determination in the second Solar Panels administrative review was inconsistent with Article 2.1(c) of the SCM Agreement.

7.8.2.4.4 Conclusion on China's claims concerning the Solar Panels administrative reviews

7.404. China has demonstrated that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the first Solar Panels administrative review.

7.405. China has not demonstrated that the United States acted inconsistently with Articles 1.1(a)(1), 1.1(b), and 14(d) of the SCM Agreement in the two Solar Panels administrative

[600] See Section 7.3.3.2 above.
[601] USDOC First Administrative Review in Solar Panels, (Exhibit CHN-42), p. 17; USDOC Second Administrative Review in Solar Panels, (Exhibit CHN-43), p. 6. The USDOC additionally stated in the second administrative review that "the GOC's involvement in the polysilicon market has resulted in distortions, and therefore the market is not reliable for the purposes of calculating a program benefit in this proceeding". (USDOC Second Administrative Review in Solar Panels, (Exhibit CHN-43), p. 18).
[602] USDOC First Administrative Review in Solar Panels, (Exhibit CHN-42), pp. 21. and 24.
[603] USDOC Second Administrative Review in Solar Panels, (Exhibit CHN-43).
[604] USDOC Second Administrative Review in Solar Panels, (Exhibit CHN-43), p. 4.

reviews nor that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the second Solar Panel administrative review.

7.8.2.5 China's claims concerning administrative reviews in the Magnesia Bricks proceeding

7.406. China claims that the USDOC continues to act in violation of Article 11.3 of the SCM Agreement by imposing countervailing duties on imports of magnesia bricks on the basis of subsidy determinations in an investigation which was not properly initiated. China also claims that, by including this subsidy in the "adverse facts available rate" calculated in the administrative reviews, the USDOC violated Article 12.7 of the SCM Agreement which, according to China, "requires that investigating authorities base their determinations on the basis of the facts available on the record of the administrative reviews at issue".[605]

7.407. The United States does not rebut China's arguments alleging violations of Article 11.3 and Article 12.7 in the Magnesia Bricks proceeding. The United States' response focuses on the alleged lack of jurisdiction of this compliance Panel to consider the two administrative reviews at issue. In particular, the United States asserts that "the measures that China identifies were concluded prior to the end of the RPT on April 1, 2016, and thus were not 'subsequently closely connected' to the measures taken to comply in this dispute".[606]

7.408. We recall, however, that in the context of a "close nexus" analysis, the timing of measures alone is not a decisive factor.[607] More fundamentally, excluding measures on the grounds that they pre-date the end of the RPT seems incompatible with the purpose of the RPT, namely to give Members a period of time in which to comply with DSB recommendations and rulings.

7.409. We recall our views above regarding the close connection between determinations under the same countervailing duty order concerning the same products from China, and the related effects arising from the resulting imposition of countervailing duties on the products in question. Accordingly, we find that the two administrative reviews in the Magnesia Bricks proceeding are within the scope of our review in these Article 21.5 proceedings.

7.8.2.5.1 China's claim under Article 11.3 of the SCM Agreement

7.410. In the original dispute, China challenged the initiation of the Magnesia Bricks investigation on the basis that a financial contribution existed by virtue of an export restraint and its effects on domestic prices in the exporting country.[608] The panel found that the USDOC's initiation of a countervailing duty investigation in respect of certain export restraints was inconsistent with Article 11.3 of the SCM Agreement.[609]

7.411. The evidence before us in this compliance proceeding shows that, in the administrative review determination pertaining to Magnesia Bricks covering the year 2012, the USDOC calculated the countervailing duty rate on the basis of the subsidy margins calculated for several subsidy programs, including the "Export Restraints of Raw Materials".[610] We find no such evidence regarding the calculation of the countervailing duty rate in the administrative review covering the period August 2010 – December 2010.[611]

7.412. Article 11.3 of the SCM Agreement deals with the initiation of countervailing duty investigations and states:

[605] China's first written submission, para. 402.
[606] United States' first written submission, para. 321.
[607] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224.
[608] Panel Report, *US – Countervailing Measures (China)*, para. 7.392.
[609] Panel Report, *US – Countervailing Measures (China)*, para. 7.406. In particular, the panel considered that an unbiased, objective investigating authority would not have found that the evidence in the application in Magnesia Bricks was 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. (Ibid. para. 7.404).
[610] USDOC Second Administrative Review in Magnesia Bricks, (Exhibit CHN-38), p. 4 and attachment, pp. A-1 and A-5.
[611] USDOC First Administrative Review in Magnesia Bricks, (Exhibit CHN-37).

> 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.

7.413. In the present compliance dispute, China challenges the calculation of the countervailing duty rate applied as a result of the administrative reviews conducted for 2010 and 2012. China's claim under Article 11.3 does not concern the initiation of an investigation, but rather the calculation of the subsidy margin for the product concerned in the administrative reviews on the basis of facts available. The applicable provision covering administrative reviews is Article 21 of the SCM Agreement[612], which establishes different disciplines than those applicable to original investigations under Article 11 of the SCM Agreement.[613] We note that China has not raised a claim under Article 21 of the SCM Agreement in relation to the administrative reviews in question.

7.414. Based on China's limited arguments, it is unclear to us how "the United States continues to act inconsistently with Article 11.3 of the SCM Agreement"[614], which concerns the initiation of *original* investigations, in its calculation of countervailing duty rates based on facts available in an *administrative* review that is subject to different and distinct provisions of the SCM Agreement. Therefore, we are of the view that China has not explained how its explanation supports a claim that the USDOC acted inconsistently with Article 11.3 of the SCM Agreement in the Magnesia Bricks administrative reviews.

7.415. We thus find that China has not made a *prima facie* case that the two administrative reviews in the Magnesia Bricks proceeding are inconsistent with Article 11.3 of the SCM Agreement.

7.8.2.5.2 China's claim under Article 12.7 of the SCM Agreement

7.416. China also claims that, by including the alleged export restraint subsidy in the so-called "adverse facts available rate", the United States acted inconsistently with Article 12.7 of the SCM Agreement. In particular, China argues that Article 12.7 requires investigating authorities to base their determinations on the facts available on the record of the administrative reviews at issue.[615]

7.417. Article 12.7 allows investigating authorities to make determinations on the basis of the facts available in cases in which an interested party refuses access to or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation. Annex II to the Anti-Dumping Agreement (which is relevant context for the interpretation of Article 12.7) refers to the use of "Best Information Available". In particular, paragraph 7 of Annex II provides that "if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate."

7.418. The Appellate Body has established that facts which can be used to replace the missing information are those that are in the possession of the investigating authorities and on its written record.[616] In that process, all substantiated facts on the record must be taken into account[617]; by contrast, non-factual assumptions or speculations cannot form the basis of a determination.

7.419. It is not clear to us from China's arguments why the subsidy margin established for the alleged export restraint subsidy could not be considered as one of the facts available on the record. We recall that the original panel's finding of inconsistency of the initiation was based on the

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[612] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.523.

[613] The Appellate Body has stated that and the focus of the inquiry under Article 21 "is on the amount of time that a duty may *remain* in force, rather than the circumstances under which that duty initially *entered into* force". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.524 (referring to Panel Report, *Japan – DRAMs (Korea)*, para. 7.350 (emphasis original))). The Appellate Body further observed that "nothing in the language of Articles 11 and 21 expressly imports the requirements of Article 11 to the conduct of administrative reviews under Article 21". (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.527).

[614] China's first written submission, para. 402.

[615] China's first written submission, para. 402.

[616] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.417.

[617] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419 (referring to Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294).

(in)adequacy of evidence in the application concerning the existence of a financial contribution. China has not explained how this finding leads to the conclusion that the export restraint subsidy margin is not one of the "facts available" to the investigating authority in the administrative reviews at issue. This is particularly the case for the 2012 review determination, in which the alleged export restraint subsidy rate does appear on the record. In the case of the administrative review for August-December 2010, we do not even find evidence that the alleged export restraint subsidy rate was used at all in the calculation of the countervailing duty rate.

7.420. We therefore find that China has not made a *prima facie* case that inclusion of the export restraint subsidy margin in the determination of the adverse facts available rate in the administrative review determinations is inconsistent with Article 12.7 of the SCM Agreement.

7.8.2.5.3 Conclusion on China's claim under Articles 11.3 and 12.7 of the SCM Agreement in the Magnesia Bricks proceeding

7.421. We thus conclude that China has not demonstrated that the United States acted inconsistently with Articles 11.3 and 12.7 of the SCM Agreement in the two Magnesia Bricks administrative reviews.

7.8.2.6 China's claims under Article 21.3 of the SCM agreement

7.422. China claims that certain sunset review determinations are inconsistent with Article 21.3 of the SCM Agreement because they "rely on prior determinations of subsidization" that are inconsistent with the SCM Agreement.[618] In particular, China claims that each sunset review determination in question[619] is inconsistent with Article 21.3 of the SCM Agreement because the USDOC's findings are *based in part* on the USDOC's original determinations, which were found to be inconsistent with various provisions of the SCM Agreement in the original dispute.

7.423. The United States responds that China has not adduced sufficient evidence and argument that the methodologies used by the USDOC in the identified sunset reviews are WTO-inconsistent. According to the United States:

> China has merely cited to the determinations and provided very cursory discussions of the sunset reviews. China has also failed to provide a sufficient legal argument with respect to the methodologies in the concluded sunset reviews that they were inconsistent with the SCM Agreement.[620]

7.424. China responds that for each administrative review and sunset review determination issued subsequent to the measures at issue in the original dispute it: (a) identified the legal standard applied by the USDOC and referred the Panel to the portion of the USDOC Issues and Decision Memorandum in which that legal standard was applied; (b) identified the provision of the SCM Agreement which contains the obligation implicated in the USDOC's analysis and the legal standard that the USDOC should have applied; and (c) explained that the USDOC had applied an erroneous legal standard.[621]

7.425. Article 21.3 of the SCM Agreement provides that a countervailing duty should be terminated after five years unless the investigating authorities determine that there is a likelihood of continuation or recurrence of subsidization and injury. An investigating authority's determination of the likelihood of continuation or recurrence of subsidization rests on an evaluation of the evidence, including evidence from the original investigation, the intervening reviews, and the sunset review.[622] We recall that:

> The evidence and arguments underlying a *prima facie* case … must be sufficient to identify the challenged measure and its basic import, identify the relevant WTO

[618] China's first written submission, paras. 415-424.
[619] Sunset reviews in Thermal Paper, Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, and Aluminum Extrusions.
[620] United States' first written submission, para. 337.
[621] China's second written submission, para. 241.
[622] Panel Report, *US – Carbon Steel*, paras. 8.92-8.95.

> provision and obligation contained therein, and explain the basis for the claimed inconsistency of the measure with that provision.[623]

We also recall that a panel cannot make the case for the complaining party.[624]

7.426. With these principles in mind, we understand China's argument to be that the determinations in the sunset reviews at issue are inconsistent with Article 21.3 because the USDOC based its sunset review findings *in part* on findings in earlier determinations that were found to be inconsistent with the SCM Agreement.[625] The earlier inconsistencies referred to by China in this regard are with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d), the provisions of the SCM Agreement with which the USDOC was found, in the original dispute, to have acted inconsistently. China makes no claim or argument that the sunset review determinations are themselves inconsistent with those provisions. For example, in its panel request, China states that the sunset review determinations "*are inconsistent with Article 21.3 of the SCM Agreement* because they rely on prior determinations of subsidization" that are otherwise inconsistent with the SCM Agreement.[626]

7.427. Based on the foregoing, we find that, albeit briefly, China has sufficiently explained its claim in relation to the sunset reviews identified in this case. We thus turn to consideration of: (a) whether each sunset review challenged by China was based on determinations that were inconsistent with the "relevant provisions" of the SCM Agreement; and (b) if so, whether this results in a violation of Article 21.3 of the SCM Agreement.

7.8.2.6.1 The Thermal Paper sunset review

7.428. China claims that the USDOC's determination in the sunset review in the Thermal Paper proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on a determination of regional specificity which had been found inconsistent with Article 2.2 of the SCM Agreement in the original dispute.

7.429. We recall that the original panel found in the Thermal Paper proceeding that:

> [T]he 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.[627]

7.430. As part of a *prima facie* case that the sunset review determination in the Thermal Paper proceeding was inconsistent with Article 21.3, China must adduce evidence that the USDOC's determination of likelihood of continuation or recurrence of countervailable subsidies in that determination was based on the same error as had been found in the original dispute.

7.431. In support of its claim, China refers to the 2014 Issues and Decision Memorandum for the final results of the expedited first sunset review in Thermal Paper.[628] This document indicates that the USDOC considered the net countervailable subsidy determined in the investigation and any subsequent reviews, and whether "any changes in the programs which gave rise to the net

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[623] Appellate Body Report, *US – Gambling*, para. 141.

[624] Appellate Body Report, *Japan – Agricultural Products II*, para. 129.

[625] This is also the way the United States appears to have understood China's claim: see United States' first written submission, para. 337: "China merely asserts that the USDOC's finding that revocation of the respective orders would be likely to lead to continuation or recurrence of countervailable subsidies [was] based in part on specificity and/or public body, benchmark and input specificity determinations and that such determinations were found to be WTO-inconsistent in the original dispute."

[626] China's panel request, para. 31 (emphasis added). Similarly, China argues that each of the identified sunset reviews is inconsistent with Article 21.3 as a consequence of reliance on inconsistencies with other provisions of the SCM Agreement. (China's first written submission, paras. 415-424 and 434(m)).

[627] Panel Report, *US – Countervailing Measures (China)*, para. 7.354. (emphasis original)

[628] China's first written submission, para. 415 and fn 426; USDOC Sunset Review in Thermal Paper, (Exhibit CHN-44).

countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[629] In the absence of an administrative review of the countervailing duty order in this proceeding, the USDOC found that there was "no information indicating any changes in the programs"[630], including the provision of land to Guangdong Guanhao High-tech Co., Ltd in the Zhanjiang Economic and Technological Development Zone for less than adequate remuneration, and that a "countervailable subsidy would be likely to continue or recur if the [countervailing duty] order were revoked" because of "the continued existence of programs found to provide countervailable benefits."[631] Additionally, with respect to the net countervailable subsidy rates likely to prevail if the order were revoked, the USDOC determined that it did not "need to adjust the rates from the investigation to account for additional subsidies, program-wide changes or terminated programs".[632]

7.432. We therefore find that China has adduced evidence that the sunset review determination in the Thermal Paper proceeding was based in part on an inconsistent finding of regional specificity.

7.8.2.6.2 The Pressure Pipe sunset review

7.433. China claims that the USDOC's sunset review in the Pressure Pipe proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body, benchmark, and *de facto* specificity determinations which had been found to be inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), and 14(d) of the SCM Agreement in the original dispute.

7.434. We recall that the original panel found in the Pressure Pipe proceeding that:

> [T]he 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.
>
> 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 [period of investigation] constitute government authorities.[633]

7.435. In addition, the Appellate Body found:

> [T]he USDOC did not explain in its determination whether and how the mentioned market shares held by SOEs actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers aligned their prices with those of the government-provided goods.
>
> Accordingly, we find that the USDOC's analysis and explanation for rejecting in-country prices in China in its benchmark analysis in the Pressure Pipe countervailing duty investigation is inconsistent with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement.[634]

[629] USDOC Sunset Review in Thermal Paper, (Exhibit CHN-44), p. 4.
[630] USDOC Sunset Review in Thermal Paper, (Exhibit CHN-44), p. 5.
[631] USDOC Sunset Review in Thermal Paper, (Exhibit CHN-44), p. 5.
[632] USDOC Sunset Review in Thermal Paper, (Exhibit CHN-44), pp. 7 and 10.
[633] Panel Report, *US – Countervailing Measures (China)*, paras. 7.61-7.62. (emphasis original)
[634] Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.101-4.102. (emphasis original)

7.436. Finally, in relation to the *de facto* specificity of the provision of stainless steel coil for less than adequate remuneration, we recall that the original panel found that the USDOC had failed to take account of the two factors in the last sentence of Article 2.1(c) of the SCM Agreement.

7.437. As part of a *prima facie* case that the sunset review determination in the Pressure Pipe proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC's determination of likelihood of continuation or recurrence of countervailable subsidies was based on the same errors as had been found in the original dispute.

7.438. In support of its claim, China refers to the 2014 Issues and Decision Memorandum for the final results of the expedited sunset review in Pressure Pipe.[635] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[636] The USDOC stated that it had not conducted an administrative review of the order since it went into effect and that no party submitted evidence to demonstrate that the countervailable programs (including the provision of stainless steel coil for less than adequate remuneration) had expired or been terminated. Thus, the USDOC determined that "there is a likelihood of recurrence of countervailable subsidies because the record in this proceeding indicates that the subsidy programs found countervailable during the investigation continue to exist and be used".[637] For this reason, the USDOC determined that "the net countervailable subsidy rates found in the investigation … are the net countervailable subsidy rates likely to prevail were the order to be revoked".[638] This determination encompassed the provision of stainless steel coil for less than adequate remuneration.[639]

7.439. We therefore find that China has adduced evidence that the sunset review determination in the Pressure Pipe proceeding was based in part on inconsistent public body, benchmark, and *de facto* specificity findings.

7.8.2.6.3 The Line Pipe sunset review

7.440. China claims that the USDOC's sunset review in the Line Pipe proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body, benchmark, and *de facto* specificity determinations which had been found to be inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), and 14(d) of the SCM Agreement in the original dispute.

7.441. As part of a *prima facie* case that the sunset review determination in the Line Pipe proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC's determination of likelihood of continuation or recurrence of countervailable subsidies was based on the same errors found as had been found in the original dispute.

7.442. In support of its claim, China refers to the 2014 Issues and Decision Memorandum for the final results of the expedited sunset review in Line Pipe.[640] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[641] In the absence of an administrative review of the order since it went into effect, the USDOC determined that there was "a likelihood of recurrence of countervailable subsidies because the record in this proceeding indicates that the subsidy programs found countervailable during the investigation continue to exist and be used".[642] For this reason, the USDOC determined that "the net countervailable subsidy rates found in the investigation … are the net countervailable subsidy

[635] China's first written submission, para. 416 and fn 428; USDOC Sunset Review in Pressure Pipe, (Exhibit CHN-45).
[636] USDOC Sunset Review in Pressure Pipe, (Exhibit CHN-45), p. 4.
[637] USDOC Sunset Review in Pressure Pipe, (Exhibit CHN-45), p. 5.
[638] USDOC Sunset Review in Pressure Pipe, (Exhibit CHN-45), p. 6.
[639] USDOC Sunset Review in Pressure Pipe, (Exhibit CHN-45), p. 6.
[640] China's first written submission, para. 417 and fn 430; USDOC Sunset Review in Line Pipe, (Exhibit CHN-46).
[641] USDOC Sunset Review in Line Pipe, (Exhibit CHN-46), p. 4.
[642] USDOC Sunset Review in Line Pipe, (Exhibit CHN-46), p. 5.

rates likely to prevail were the order to be revoked".[643] This determination encompassed the provision of hot-rolled steel for less than adequate remuneration.[644]

7.443. We therefore find that China has adduced evidence that the sunset review determination in the Line Pipe proceeding was based in part on inconsistent public body, benchmark, and *de facto* specificity findings.

7.8.2.6.4 The Kitchen Shelving sunset review

7.444. China claims that the USDOC's sunset review in the Kitchen Shelving proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body and *de facto* specificity determinations which were found to be inconsistent with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the original dispute.

7.445. As part of a *prima facie* case that the sunset review determination in the Kitchen Shelving proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC's determination of likelihood of continuation or recurrence of countervailable subsidies was based on the same errors as had been found in the original dispute.

7.446. In support of its claim, China refers to the 2014 Issues and Decision Memorandum for the final results of the expedited sunset review in Kitchen Shelving.[645] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[646] In view of the fact that three administrative reviews of the countervailing duty order in this case found that "PRC producers of kitchen racks continued to receive countervailable subsidies from programs identified in the investigation as providing countervailable subsidies" and considering that "no party submitted evidence to demonstrate that the countervailable programs [had] expired or been terminated", the USDOC determined that the subsidies found countervailable during the investigation and subsequent administrative reviews continued to exist and be used.[647] For this reason, the USDOC added to the net countervailable subsidy rates determined in the original investigation the countervailable subsidy rates from the additional subsidies found to be countervailable in three administrative reviews.[648] This determination encompassed the provision of wire rod and steel strip for less than adequate remuneration.[649]

7.447. We therefore find that China has adduced evidence that the sunset review determination in the Kitchen Shelving proceeding was based in part on inconsistent public body and *de facto* specificity findings.

7.8.2.6.5 The OCTG sunset review

7.448. China claims that the USDOC's sunset review in the OCTG proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body, benchmark, and *de facto* specificity determinations which had been found to be inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), and 14(d) of the SCM Agreement in the original dispute.

7.449. As part of a *prima facie* case that the sunset review determination in the OCTG proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC's determination of likelihood of continuation or recurrence of countervailable subsidies was based on the same errors as had been found in the original dispute.

[643] USDOC Sunset Review in Line Pipe, (Exhibit CHN-46), p. 6.
[644] USDOC Sunset Review in Line Pipe, (Exhibit CHN-46), p. 8.
[645] China's first written submission, para. 418 and fn 432; USDOC Sunset Review in Kitchen Shelving, (Exhibit CHN-47).
[646] USDOC Sunset Review in Kitchen Shelving, (Exhibit CHN-47), p. 6.
[647] USDOC Sunset Review in Kitchen Shelving, (Exhibit CHN-47), p. 8.
[648] USDOC Sunset Review in Kitchen Shelving, (Exhibit CHN-47), p. 9.
[649] USDOC Sunset Review in Kitchen Shelving, (Exhibit CHN-47), pp. 12-13.

7.450. In support of its claim, China refers to the 2015 Issues and Decision Memorandum for the final results of the expedited sunset review in OCTG.[650] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[651] In view of the fact that two administrative reviews of the countervailing duty order in this case found that "PRC producers of OCTG continued to receive countervailable subsidies from programs identified in the investigation … [as] providing benefits to PRC producers of OCTG" and considering that "no party submitted evidence to demonstrate that the countervailable programs [had] expired or been terminated", the USDOC determined that the subsidies found countervailable during the investigation and subsequent administrative reviews continued to exist and be used.[652] For this reason, the USDOC added to the net countervailable subsidy rates determined in the original investigation the countervailable subsidy rates from the additional subsidies found be countervailable in the two administrative reviews.[653] This determination encompassed the provision of steel rounds for less than adequate remuneration.[654]

7.451. We therefore find that China has adduced evidence that the sunset review determination in the OCTG proceeding was based in part on inconsistent public body and *de facto* specificity findings.

7.8.2.6.6 The Wire Strand sunset review

7.452. China claims that the USDOC's sunset review in the Wire Strand proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body and *de facto* specificity determinations which were found to be inconsistent with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the original dispute.

7.453. As part of a *prima facie* case that the sunset review determination in the Wire Strand proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC's determination of likelihood of continuation or recurrence of countervailable subsidies was based on the same errors as had been found in the original dispute.

7.454. In support of its claim, China refers to the 2015 Issues and Decision Memorandum for the final results of the expedited sunset review in Wire Strand.[655] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[656] The USDOC also indicated that in view of the fact that no administrative review had been carried out in this case since issuance of the countervailing duty order and considering that no party had submitted evidence to demonstrate that the subsidy programs found to be countervailable in the final determination had expired or been terminated, "the subsidy programs found countervailable during the investigation continued to exist and be used."[657] For this reason, the USDOC determined that "no evidence [had] been provided that would warrant making a change to the net countervailable subsidy rate found for PRC producers and exporters in the investigation."[658] This determination encompassed the provision of wire rod for less than adequate remuneration.[659]

7.455. We therefore find that China has adduced evidence that the sunset review determination in the Wire Strand proceeding was based in part on inconsistent public body and *de facto* specificity findings.

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[650] China's first written submission, para. 419 and fn 434; USDOC Sunset Review in OCTG, (Exhibit CHN-48).
[651] USDOC Sunset Review in OCTG, (Exhibit CHN-48), p. 5.
[652] USDOC Sunset Review in OCTG, (Exhibit CHN-48), p. 7.
[653] USDOC Sunset Review in OCTG, (Exhibit CHN-48), p. 8.
[654] USDOC Sunset Review in OCTG, (Exhibit CHN-48), pp. 9-10.
[655] China's first written submission, para. 420 and fn 436; USDOC Sunset Review in Wire Strand, (Exhibit CHN-49).
[656] USDOC Sunset Review in Wire Strand, (Exhibit CHN-49), p. 4.
[657] USDOC Sunset Review in Wire Strand, (Exhibit CHN-49), p. 5.
[658] USDOC Sunset Review in Wire Strand, (Exhibit CHN-49), p. 6.
[659] USDOC Sunset Review in Wire Strand, (Exhibit CHN-49), p. 8.

7.8.2.6.7 The Magnesia Bricks sunset review

7.456. China claims that the sunset review in Magnesia Bricks is inconsistent with Article 21.3 of the SCM Agreement because the sunset review determination is based "in part" on the "alleged export restraints for raw materials program"[660], which China challenged before the original panel on the basis of Article 11.3 and 12.7 of the SCM Agreement. We recall that the panel found the initiation of an investigation with respect to this alleged programme to be inconsistent with Article 11.3 of the SCM Agreement.

7.457. In determining the net countervailable subsidy rates likely to prevail should the order be revoked in the sunset review determination challenged by China, the USDOC reported a countervailable subsidy rate from the investigation that incorporates the export restraints at issue.[661]

7.458. We therefore find that China has adduced evidence that the sunset review determination in Magnesia Bricks incorporated a finding of subsidy which had been made in an investigation initiated inconsistently with Article 11.3 with respect to that same subsidy.

7.8.2.6.8 The Seamless Pipe sunset review

7.459. China claims that the USDOC's sunset review in the Seamless Pipe proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body and *de facto* specificity determinations which were found to be inconsistent with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the original dispute.

7.460. As part of a *prima facie* case that the sunset review determination in the Seamless Pipe proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC reached its determination of likelihood of continuation or recurrence of countervailable subsidies on the basis of the same errors as had been found in the original dispute.

7.461. In support of its claim, China refers to the 2016 Issues and Decision Memorandum for the final results of the expedited sunset review in Seamless Pipe.[662] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[663] In the absence of an administrative review in this case and considering that "neither the GOC nor other respondent interested parties [have] participated in this sunset review", the USDOC determined that the subsidy programs found countervailable during the investigation continued to exist.[664] For this reason, the USDOC decided not to adjust "the rates from the investigation to account for additional subsidies, program-wide changes or terminated programs".[665] This determination encompassed the provision of steel rounds for less than adequate remuneration.[666]

7.462. We therefore find that China has adduced evidence that the sunset review determination in the Seamless Pipe proceeding was based in part on inconsistent public body and *de facto* specificity findings.

7.8.2.6.9 The Print Graphics sunset review

7.463. China claims that the USDOC's sunset review in the Print Graphics proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body and *de facto* specificity determinations which had been found to be inconsistent with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the original investigation.

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[660] China's first written submission, para. 421.
[661] USDOC Sunset Review in Magnesia Bricks, (Exhibit CHN-50), p. 8.
[662] China's first written submission, para. 422 and fn 440; USDOC Sunset Review in Seamless Pipe, (Exhibit CHN-51).
[663] USDOC Sunset Review in Seamless Pipe, (Exhibit CHN-51), p. 4.
[664] USDOC Sunset Review in Seamless Pipe, (Exhibit CHN-51), p. 6.
[665] USDOC Sunset Review in Seamless Pipe, (Exhibit CHN-51), p. 7.
[666] USDOC Sunset Review in Seamless Pipe, (Exhibit CHN-51), p. 7.

7.464. As part of a *prima facie* case that the sunset review determination in the Print Graphics proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC reached its determination of likelihood of continuation or recurrence of countervailable subsidies on the basis of the same errors as had been found in the original dispute.

7.465. In support of its claim, China refers to the 2016 Issues and Decision Memorandum for the final results of the expedited sunset review in Print Graphics.[667] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[668] In the absence of an administrative review in this case and considering that "neither the GOC nor other respondent interested parties [have] participated in this sunset review", the USDOC determined that the subsidy programs found countervailable during the investigation continued to exist.[669] For this reason, the USDOC decided not to adjust "the rates from the investigation to account for additional subsidies, program-wide changes or terminated programs".[670] This determination encompassed the provision of papermaking chemicals (including caustic soda) for less than adequate remuneration.[671]

7.466. We therefore find that China has adduced evidence that the sunset review determination in the Print Graphics proceeding was based in part on inconsistent public body and *de facto* specificity findings.

7.8.2.6.10 The Aluminum Extrusions sunset review

7.467. China claims that the USDOC's sunset review in the Aluminum Extrusions proceeding is inconsistent with Article 21.3 of the SCM Agreement because the finding of likelihood of continuation or recurrence of subsidization was based "in part" on public body and *de facto* specificity determinations which had been found to be inconsistent with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the original dispute.

7.468. As part of a *prima facie* case that the sunset review determination in the Aluminum Extrusions proceeding was inconsistent with Article 21.3 of the SCM Agreement, China must adduce evidence that the USDOC reached its determination of likelihood of continuation or recurrence of countervailable subsidies on the basis of the same errors as had been found in the original dispute.

7.469. In support of its claim, China refers to the 2016 Issues and Decision Memorandum for the final results of the expedited sunset review in Aluminum Extrusions.[672] This document indicates that the USDOC considered whether "any changes in the programs which gave rise to the net countervailable subsidy have occurred that are likely to affect the net countervailable subsidy".[673] The USDOC determined that there was "no information on the record indicating any changes in the programs found to be countervailable during the investigation or subsequent administrative reviews".[674] For this reason, the USDOC added to the net countervailable subsidy rates determined in the original investigation the countervailable subsidy rates from the additional subsidies found to be countervailable in three administrative reviews.[675] This determination encompassed the provision of primary aluminium, aluminium extrusions, and glass for less than adequate remuneration.[676]

7.470. We therefore find that China has adduced evidence that the sunset review determination in the Aluminum Extrusions proceeding was based in part on inconsistent public body and *de facto* specificity findings.

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[667] China's first written submission, para. 423 and fn 442; USDOC Sunset Review in Print Graphics, (Exhibit CHN-52).
[668] USDOC Sunset Review in Print Graphics, (Exhibit CHN-52), p. 5.
[669] USDOC Sunset Review in Print Graphics, (Exhibit CHN-52), p. 6.
[670] USDOC Sunset Review in Print Graphics, (Exhibit CHN-52), pp. 7 and 10.
[671] USDOC Sunset Review in Print Graphics, (Exhibit CHN-52), p. 9.
[672] China's first written submission, para. 424 and fn 444; USDOC Sunset Review in Aluminum Extrusions, (Exhibit CHN-53).
[673] USDOC Sunset Review in Aluminum Extrusions, (Exhibit CHN-53), p. 7.
[674] USDOC Sunset Review in Aluminum Extrusions, (Exhibit CHN-53), p. 8.
[675] USDOC Sunset Review in Aluminum Extrusions, (Exhibit CHN-53), p. 10.
[676] USDOC Sunset Review in Aluminum Extrusions, (Exhibit CHN-53), p. 16.

7.8.2.6.11 Conclusion on China's claim in relation to sunset reviews

7.471. We have found that China has adduced evidence that each of the sunset reviews it challenges were based in part on underlying determinations which had been found inconsistent with the SCM Agreement.[677]

7.472. We recall that China's claim is that the USDOC's determinations in the sunset reviews at issue are inconsistent with Article 21.3 of the SCM Agreement. Article 21.3 sets out a distinct obligation pertaining to the termination of countervailing duties that is separate from the disciplines imposed by other provisions of the SCM Agreement on the determination of subsidies and the investigation and imposition of countervailing duties. China's position appears to be that the fact that a sunset review determination is based in part on inconsistencies in other underlying determinations automatically demonstrates a violation of Article 21.3.

7.473. However, in our view, China has not sufficiently explained how the incorporation of certain earlier inconsistent findings results in determinations inconsistent with Article 21.3. In the absence of a clear legal argument, we find that China has not made a *prima facie* case that the USDOC acted inconsistently with Article 21.3 in determining that revocation of the orders at issue in the challenged sunset reviews would be likely to lead to continuation or recurrence of subsidization.

7.474. We thus conclude that China has not demonstrated that the United States acted inconsistently with Article 21.3 of the SCM Agreement in the Thermal Paper, Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics, and Aluminum Extrusions sunset reviews.

7.9 China's claims regarding the ongoing conduct of imposing, assessing, and collecting countervailing duties and cash deposits under the countervailing duty orders at issue

7.9.1 Main arguments of the parties

7.475. China claims that the United States' "ongoing conduct", that is, continuing to impose, assess, and collect countervailing duties and/or cash deposits under the countervailing duty orders at issue, is inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement, because it is "based on the USDOC's present, continued, and systematic application of erroneous legal standards".[678] China also claims that the ongoing conduct is inconsistent with Articles 19.1, 19.3, and 19.4 of the SCM Agreement, because it results in the levying of countervailing duties and cash deposits that are in excess of the amount of subsidization.[679] According to China, the USDOC's consistent application of erroneous legal standards in the administrative reviews to date "strongly suggests" that the USDOC will apply the same erroneous legal standards when the same issues arise in forthcoming administrative reviews in other proceedings.[680]

7.476. The United States asks the Panel to reject China's claim because measures not yet in existence at the time of Panel establishment and potential future measures ("an indeterminate number of potential future measures") cannot be within a panel's terms of reference.[681] Specifically, the United States argues that China has failed to establish the existence of a "string of determinations, made sequentially … over an extended period of time" and the fact that the challenged practices would likely continue to be applied in successive proceedings.[682]

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[677] In this regard, we note that all of the relevant sunset review determinations explicitly identified by China in its panel request were issued prior to the USDOC's adoption of final determinations in the Section 129 proceedings on 9 June 2016. (China's first written submission, para. 3). The only sunset review determination referred to by China post-dating the relevant Section 129 determinations is the sunset review in the Aluminum Extrusions case, which was issued on 1 August 2016. We find no indication in any of these sunset reviews that the USDOC took into account its revised determinations from the Section 129 proceedings at issue in this dispute. Rather, the relevant sunset review determinations reflect reliance on original determinations from each investigation as well as determinations in subsequent administrative reviews, where applicable.

[678] China's first written submission, para. 432.

[679] China's first written submission, para. 432.

[680] China's first written submission, para. 428.

[681] United States' first written submission, para. 314.

[682] United States' first written submission, paras. 327-331.

7.477. In addition, the United States argues that China has failed to make a *prima facie* case that, through the ongoing conduct at issue, the United States acts in violation of the SCM Agreement. In particular, according to the United States, China has neither:

a. identified the instances of collection of duties and cash deposits, as well as instances of assessments, that it is challenging;

b. adduced evidence with respect to the content and nature of the instances of alleged ongoing conduct for the Panel to be able to make findings in relation to that content and nature; nor

c. provided the Panel with sufficient legal arguments to rule upon, as it merely asserts that such ongoing conduct is purportedly based on the application of erroneous legal standards.[683]

7.9.2 Main arguments of the third parties

7.478. Canada submits that ongoing conduct may be challenged provided a complainant shows: (a) that the measure is attributable to a Member; (b) the precise content of the measure; (c) the repeated application of the conduct; and (d) the likelihood such conduct will continue.[684] Canada considers that understanding and applying the analytical device of "ongoing conduct" in a flexible manner is necessary to allow Members to obtain relief without having to return to dispute settlement multiple times[685], and that such conduct is capable of being a "measure taken to comply" within the meaning of Article 21.5 of the DSU if there is a sufficiently close nexus with the recommendations and rulings of the DSB and the declared measures taken to comply.[686]

7.9.3 Evaluation by the Panel

7.479. We recall that there are circumstances in which "a string of connected and sequential determinations"[687] by which duties are maintained in cases involving the "imposition, assessment and collection of duties under the same anti-dumping duty order"[688] may constitute "ongoing conduct" that can be a measure subject to challenge in WTO dispute settlement. The burden of demonstrating the existence of such ongoing conduct, as well as the burden of proving a legal claim that the ongoing conduct at issue is inconsistent with WTO rules, rests on the complainant. In this case, China has framed its challenge against ongoing conduct based on "the USDOC's present, continued, and systematic application of erroneous legal standards"[689], and has further argued that "[t]he USDOC's repeated application of these erroneous legal standards … reasonably indicates that such conduct is not only presently occurring, but also likely to occur in the future".[690]

7.480. Therefore, in our view, China must demonstrate the existence of: (a) a string of connected and sequential determinations reflecting the systematic application of erroneous legal standards in relation to the SCM Agreement[691]; and (b) a likelihood that these inconsistencies would also continue in successive proceedings.[692]

7.481. In considering the administrative reviews at issue in this proceeding, we have found that China has demonstrated the existence of a string of connected determinations having a sufficient nexus with the rulings and recommendations of the DSB in the original dispute to bring those determinations within the Panel's jurisdiction. However, we have also found that China had not made a *prima facie* case that the subsequent administrative and sunset review determinations challenged by China in this dispute were systematically inconsistent with Articles 1.1(a)(1), 1.1(b),

[683] United States' first written submission, para. 340.
[684] Canada's third-party statement, paras. 6-7.
[685] Canada's third-party statement, para. 10.
[686] Canada's third-party statement, paras. 22-27.
[687] Appellate Body Report, *US – Continued Zeroing*, para. 180.
[688] Appellate Body Report, *US – Continued Zeroing*, para. 181.
[689] China's first written submission, para. 432.
[690] China's first written submission, para. 431.
[691] Appellate Body Report, *US – Continued Zeroing*, para. 180.
[692] Appellate Body Report, *Argentina – Import Measures*, para. 5.144.

2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement as a consequence of the application of an erroneous legal standard. In particular, we found that in several administrative reviews China failed to demonstrate the application of an improper legal standard. Further, we have determined that, in the Section 129 determinations at issue, China had not made a *prima facie* case that the USDOC applied an improper legal standard in each determination.

7.482. As China itself states:

> In order to establish the existence of the ongoing conduct that it challenges, China needs to establish that the USDOC applied unlawful public body, benefit, input specificity, land specificity, and export restraints legal standards in "successive determinations by which duties are maintained [in] connected stages … involving [the] imposition, assessment and collection of duties under the same [countervailing] duty order".[693]

7.483. We are not convinced that the evidence on the record of this compliance proceeding demonstrates the existence of consistent violations of the SCM Agreement nor that such inconsistencies would be replicated in subsequent proceedings. Although there is "a string of connected and sequential determinations" under each countervailing duty order, we fail to see the "unchanged component" in each of these successive proceedings.[694] On the contrary, there are variations in the legal standards applied, and the WTO-consistency of the resulting determinations by the USDOC, in the various stages and proceedings in each of the relevant investigations.

7.484. We thus conclude that China has failed to demonstrate the existence of ongoing conduct inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement and with Articles 19.1, 19.3, and 19.4 of the SCM Agreement.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, the Panel concludes as follows:

a. With respect to China's "as applied" claim under Article 1.1(a)(1) of the SCM Agreement, China has not demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.

b. With respect to China's "as such" claim under Article 1.1(a)(1) of the SCM Agreement, China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement.

c. With respect to China's claim under Articles 1.1(b) and 14(d) of the SCM Agreement, China has demonstrated that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings.

d. With respect to China's claim under Article 32.1 of the SCM Agreement, China has not demonstrated that the United States acted inconsistently with Article 32.1 of the SCM Agreement in the OCTG, Line Pipe, Pressure Pipe, and Solar Panels Section 129 proceedings.

e. With respect to China's claim under Article 2.1(c) of the SCM Agreement, China has demonstrated that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.

[693] China's second written submission, para. 257.
[694] Appellate Body Report, *US – Continued Zeroing*, paras. 180-181.

f. With respect to China's claim under Article 2.2 of the SCM Agreement, China has not demonstrated that the United States acted inconsistently with Article 2.2 of the SCM Agreement in the Thermal Paper Section 129 proceeding.

g. With respect to China's claim concerning the final determination of the USDOC in the original Solar Panels investigation, China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1), 1.1(b), 2.1(c), and 14(d) of the SCM Agreement in the final determination of the original Solar Panels investigation.

h. With respect to China's claims concerning the Kitchen Shelving, OCTG, Aluminum Extrusions, Solar Panels, and Magnesia Bricks administrative reviews:

   i. China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the three Kitchen Shelving administrative reviews.

   ii. China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the first OCTG administrative review and that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the second OCTG administrative review.

   iii. China has not demonstrated that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the first OCTG administrative review nor that the United States acted inconsistently with Articles 1.1(a)(1), 1.1(b), and 14(d) of the SCM Agreement in the second OCTG administrative review.

   iv. China has demonstrated that the United States acted inconsistently with Articles 1.1(a)(1) and 2.1(c) of the SCM Agreement in the first Aluminum Extrusions administrative review and that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the second and third Aluminum Extrusions administrative reviews.

   v. China has not demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in the second and third Aluminum Extrusions administrative reviews.

   vi. China has demonstrated that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the first Solar Panels administrative review.

   vii. China has not demonstrated that the United States acted inconsistently with Articles 1.1(a)(1), 1.1(b), and 14(d) of the SCM Agreement in the two Solar Panels administrative reviews nor that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the second Solar Panel administrative review.

   viii. China has not demonstrated that the United States acted inconsistently with Articles 11.3 and 12.7 of the SCM Agreement in the two Magnesia Bricks administrative reviews.

i. China has not demonstrated that the United States acted inconsistently with Article 21.3 of the SCM Agreement in the Thermal Paper, Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, Wire Strand, Magnesia Bricks, Seamless Pipe, Print Graphics and Aluminum Extrusions sunset reviews.

j. With respect to the ongoing conduct of imposing, assessing, and collecting countervailing duty and cash deposits under the countervailing duty orders at issue, China has not demonstrated the existence of ongoing conduct inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement and with Articles 19.1, 19.3, and 19.4 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 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.

WORLD TRADE ORGANIZATION

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UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

FINAL REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS437/RW.

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF CHINA

ANNEX C

ARGUMENTS OF THE UNITED STATES OF AMERICA

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 13 December 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel preferably with its first written submission and no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this

procedure upon a showing of good cause, which may include the case where issues of translation arise later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN 1, CHN 2, etc. If the last exhibit in connection with the first submission was numbered CHN 5, the first exhibit of the next submission thus would be numbered CHN 6.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to the substantive meeting.

Substantive meeting

11. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. on the previous working day.

12. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

Third parties

13. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

14. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

15. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

16. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

17. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, opening and closing oral statements and responses to questions and comments thereon following the substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 20 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

18. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

19. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

20. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

21. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

22. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

23. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 3 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs/USB keys, 2 CD-ROMS/DVDs/USB keys and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD, a USB key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to judith.czako@wto.org, alexis.massot@wto.org and rodd.izadnia@wto.org. If a CD-ROM, DVD or USB key is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

g. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. 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. We modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, a number of changes of an editorial nature have been made to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, including those suggested by the parties.

1.2. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Interim Report and, where it differs, includes the corresponding footnote numbering in the Final Report.

2 REQUESTS FOR REVIEW SUBMITTED BY CHINA

Paragraph 7.6

2.1. China requests a correction of this paragraph to indicate that its claim under Article 1.1(a)(1) of the SCM Agreement was in relation to 11 (rather than 12) Section 129 proceedings.

2.2. The United States did not comment on China's request.

2.3. We have decided to grant China's request and have edited this paragraph accordingly. Consequential to this adjustment, we have also edited paragraph 7.63.

Paragraphs 7.6 and 7.7

2.4. China requests replacing the term "financial contribution" with "inputs at issue" as the use of the term "financial contribution" prejudges the question at issue, which is whether the entities providing the relevant inputs are public bodies.

2.5. The United States did not comment on China's request.

2.6. We have decided to grant China's request by replacing the term "financial contribution" in these paragraphs with "inputs at issue".

Paragraph 7.27

2.7. China suggests the insertion of the term "allegedly" in the phrase "actions constituting a financial contribution". China also suggests additional text to reflect that the "broader government function" is in relation to the specific action that is alleged to constitute a financial contribution.

2.8. The United States did not comment on China's request.

2.9. We have decided to grant China's request in part by including additional text as follows: "a broader government function than the specific action that is alleged to constitute a financial contribution". We see no need to modify the Interim Report on the basis of China's other comment on this paragraph.

Paragraph 7.31, footnote 64

2.10. China requests modification of this paragraph as it believes that the European Union did not argue that the focus of the public body analysis is the character of the relevant entity, as opposed to its conduct, but rather identified what it considered to be "the main contentious issue" in the dispute.

2.11. The United States does not agree with China's suggestion and considers that footnote 64 of the Interim Report correctly characterizes the positions of the European Union and other third parties.

2.12. We have decided to partially grant China's request by adjusting this footnote to include direct quotations from the European Union's third-party submission.

Paragraphs 7.47, 7.51, 7.185(b), and 7.190(b)

2.13. China noted the absence of citations to the relevant portions of the Public Bodies Memorandum, CCP Memorandum, and the two memoranda relating to benchmarks in these paragraphs.

2.14. The United States did not provide any comment in this respect.

2.15. We have added citations to the relevant memoranda in these paragraphs.

Paragraph 7.60

2.16. China requests modification of this paragraph to reflect that the GOC's refusal to respond to requests for information was a position taken by the USDOC that China contested during this compliance panel proceeding.

2.17. The United States does not agree with China's suggested modification of this paragraph. The United States notes the USDOC's position that the GOC declined to provide "complete" responses, and thus considers that neither the USDOC nor the United States asserted that the GOC failed to respond at all in five of the Section 129 proceedings.

2.18. We have decided to grant China's request by modifying this paragraph to directly cite the USDOC's findings in its preliminary determination, and by including a footnote referencing China's argument that the GOC provided a "substantial portion" of the requested information in certain Section 129 proceedings regarding non-majority government-owned enterprises.

Paragraph 7.75

2.19. China requests modification of this paragraph to reflect that its argument was in response to a statement made, and later retracted, by the United States at the Panel's meeting with the parties.

2.20. The United States disagrees with China's suggestion to modify this paragraph. The United States considers that a statement that was explicitly retracted does not constitute an argument of the United States, and there is no basis to include a reference to an argument that the United States did not make.

2.21. We see no need to modify the Interim Report on the basis of China's comment on this paragraph. In our view, the quoted portion of China's argument is sufficiently clear without the suggested "context" that China requests to be reflected in this paragraph. Further, the additional citations to Appellate Body statements requested by China appear in other paragraphs where relevant.

Paragraphs 7.76-7.78

2.22. China requests deletion or modification of these paragraphs as it considers that neither of the examples cited in paragraph 7.78 is relevant to the provision of inputs by SIEs or non-SIEs to respondent purchasers. China therefore does not believe that it is accurate for the Panel to cite these as examples of evidence or analysis in the Public Bodies Memorandum of the conduct at issue in the Section 129 proceedings.

2.23. The United States considers that the relevant passages are not offered as examples of evidence in the Public Bodies Memorandum relating to "the provision of inputs by SIEs or non-SIEs

to respondent purchasers", but rather are references to "interventions by the Chinese government (including the CCP)" mentioned in paragraph 7.76.

2.24. We decline China's request to delete or modify the examples cited in paragraph 7.78, which pertain to "the conduct of providing inputs, or other conduct at the firm level". We have decided to adjust the last sentence of paragraph 7.76 to correspond to the formulation in paragraph 7.78.

Paragraphs 7.146, 7.200, and 7.206

2.25. China notes that there are several references in these paragraphs to "government intervention" that should be preceded by the term "alleged".

2.26. The United States does not agree with China's suggestion to add the term "alleged" before "government intervention", as these paragraphs refer to the "findings" of the USDOC and it would not be accurate to say that the USDOC made a finding of alleged government intervention.

2.27. We see no need to modify the Interim Report on the basis of China's comment on this paragraph, as the relevant statements refer to the findings that were in fact reached by the USDOC concerning "government intervention".

Paragraph 7.183

2.28. China requests modification of the paragraph to reflect that the information provided in response to the Benchmark Questionnaires was provided by the GOC rather than by mandatory respondents.

2.29. The United States did not comment on China's request.

2.30. We have decided to grant China's request by replacing the reference to "mandatory respondents" in this paragraph with "the GOC".

Paragraph 7.184

2.31. China suggests modification of this paragraph to reflect that the cited evidence and analysis were only "purportedly" relevant to the question at issue.

2.32. The United States does not agree with China's suggestion to add the term "purportedly" before "relevant" in this paragraph because. The "question" identified in this paragraph is a quote from the Benchmark Memorandum describing the evidence considered and analysis undertaken, and the Benchmark Memorandum refers to the Appellate Body's findings as to the relevance of such evidence and analysis to the benchmark question.

2.33. We see no need to modify the Interim Report on the basis of China's comment on this paragraph. In this paragraph, the Panel describes the content of the Benchmark Memorandum in relation to the specific question that was reviewed by the USDOC. The Panel subsequently assesses whether the USDOC's analysis in relation to this question supports the determination made, in consideration of the requirements under Article 14(d).

Paragraph 7.197

2.34. China requests modification of this paragraph to reflect that the USDOC did not "establish" the existence of "pervasive government intervention".

2.35. The United States disagrees with China's suggestion as it considers that there is no dispute that the USDOC identified and established pervasive government intervention, notwithstanding China's claims about the effects of that intervention.

2.36. In light of China's comment, we have decided to replace the word "established" with "identified".

Paragraph 7.251

2.37. China suggests a revision to this paragraph to more accurately reflect China's arguments before the Panel by adding the phrase "and taking the USDOC's public body determinations at face value".

2.38. The United States does not agree with China's suggested additional phrase as it could be misconstrued as the Panel's view if it were to appear in the manner China suggests, when in fact that Panel examined the USDOC's public body determinations and found that they are not inconsistent with the SCM Agreement.

2.39. We see no need to modify the Interim Report on the basis of China's comment on this paragraph, as the paragraph in question specifically concerns the requirements under Article 2.1(c) relating to *de facto* specificity. The fact that the USDOC's public body determinations are contested by China is addressed in the relevant sections of the Report. Moreover, the current text of this paragraph accurately reflects that China considers that the information at issue "at most" constitutes evidence that the GOC has provided financial contributions, rather than subsidies, during the relevant period.

Paragraph 7.278(c)

2.40. China suggests a modification of this paragraph to accurately reflect the cited part of the Input Specificity Memorandum.

2.41. The United States did not comment on China's request.

2.42. We have decided to accept China's request by quoting directly from the relevant portion of the Inputs Specificity Memorandum.

3 REQUESTS FOR REVIEW SUBMITTED BY THE UNITED STATES

Paragraph 7.37

3.1. The United States asks the Panel to change the reference to "Section 129 investigations" to "Section 129 proceedings" throughout the Report, in order to better distinguish original investigations from implementation proceedings conducted pursuant to section 129 of the Uruguay Round Agreements Act. The changes would affect the following paragraphs: 7.84, 7.89, 7.108, 7.143, 7.146, 7.179, 7.192, 7.206, 7.214, 7.219, 7.223, 7.227 (footnote 373 of the Interim Report, renumbered to footnote 383 of the Final Report), 7.240, 7.254, 7.294, 7.301, 7.302, 7.303 (two instances), 7.304, 7.306, 7.308, and 7.316.

3.2. China did not comment on the United States' request.

3.3. We have decided to grant the United States' request by replacing the terms "Section 129 investigation(s)" by "Section 129 proceeding(s)" throughout the Report in the paragraphs identified by the United States, including corresponding edits in paragraphs 7.213, 7.220, 7.221, and 7.222 and headings 7.3.3.3.3.1 and 7.3.3.3.3.2.

Paragraph 7.48(g)(ii)

3.4. The United States asks the Panel to delete the phrase "and the strategic decision making of the enterprise" to accurately reflect the original text of the 2010 OECD economic survey of China presented in this paragraph.

3.5. China did not comment on the United States' request.

3.6. We have decided to grant the United States' request by deleting the repetition of "and the strategic decision making of the enterprise" in paragraph 7.48(g)(ii) of the Interim Report.

Paragraph 7.147

3.7. The United States asks the Panel to modify the last sentence of this paragraph to better reflect the United States' response to Panel question No. 35.

3.8. China did not comment on the United States' request.

3.9. We have decided to edit footnote 255 (footnote 262 of the Final Report) to reflect both the United States' response to Panel question No. 35, as well as the statement in the Supporting Benchmark Memorandum that the USDOC did not need to conduct a specific analysis of the market for each input in China during the period of investigation.

Paragraph 7.161

3.10. The United States asks the Panel to replace the reference to "the market" by a reference to "a market" in this paragraph to clarify that the Panel is referring to markets in general.

3.11. China did not comment on the United States' request.

3.12. We see no need to modify the Interim Report on the basis of the United States' comment on this paragraph.

Paragraph 7.177

3.13. The United States asks the Panel to clarify that this section of the report relates not only to investigations involving steel inputs, but also to the Solar Panels investigation.

3.14. China did not comment on the United States' request.

3.15. We have decided to grant the United States' request by clarifying the first sentence of paragraph 7.177 as follows:

> We recall that in the Section 129 determinations at issue, the USDOC concluded with respect to the Pressure Pipe, Line Pipe, and OCTG proceedings …

We have also added the following text after the discussion of steel inputs in paragraphs 7.177-7.178:

> With respect to the Solar Panels investigation, the USDOC concluded that the GOC "significantly distorts prices in this industry such that there are no potential benchmarks from the domestic industry."[FN]
>
> [FN]: Supporting Benchmark Memorandum, (Exhibit USA-84), p. 9.

Paragraph 7.178

3.16. The United States asks the Panel to clarify that the relevant evidence on the record incorporates multiple GOC responses and three memoranda relating to benchmarks (the Benchmark Memorandum, Supporting Benchmark Memorandum, and Final Benchmark Determination).

3.17. China did not comment on the United States' request.

3.18. We have decided to grant the United States' request in part, by adding a reference to the Final Benchmark Determination in paragraph 7.178.

3.19. We see no need to modify the Interim Report on the basis of the United States' other comments on this paragraph because we consider that the wording of paragraph 7.178 of the Interim Report correctly describes the record. In particular, we consider that the reference to "the

GOC's response to Benchmark Questionnaires" in this paragraph sufficiently indicates that the GOC provided several questionnaire responses.

Paragraph 7.196

3.20. The United States asks the Panel to modify this paragraph by referring to reasoned and adequate explanations for [the USDOC's] determinations.

3.21. China did not comment on the United States' request.

3.22. We have decided to grant the United States request in part by referring to USDOC's determinations. However we see no need to modify the Interim Report with respect to the other comments made by the United States on this paragraph.

Paragraph 7.224

3.23. The United States asks the Panel to clarify, in this paragraph that China has not demonstrated an inconsistency with Articles 1.1(b) and 14(d) in the Solar Panels Section 129 proceedings.

3.24. China asks the Panel to reject the United States' request and suggests that the Panel should modify paragraph 7.222 by clarifying that the last sentence of this paragraph relates only to the question of whether the USDOC failed to consider in-country prices that were available on the record.

3.25. In view of the parties' comments, we have clarified in the second sentence of paragraph 7.223 that "the USDOC failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings, how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market − determined price." We have also modified the last sentence of paragraph 7.222 to clarify that this paragraph relates only to the question of whether the USDOC failed to consider in-country prices that were available on the record.

Paragraph 7.228

3.26. The United States asks the Panel to clarify that the USDOC analysed a range of evidence − including the granting of subsidies − in order to determine if input prices were market-determined for purposes of measuring the adequacy of remuneration.

3.27. China did not comment on the United States' request.

3.28. We see no need to modify the Interim Report on the basis of the United States' comment on this paragraph as we consider that the paragraph in question is sufficiently clear.

Paragraph 7.241

3.29. The United States asks the Panel to quote the full sentence extracted from the Benchmark Memorandum.

3.30. China did not comment on the United States' request.

3.31. We have decided to grant the United States request by quoting the sentence in its entirety.

Paragraph 7.245

3.32. The United States asks the Panel to clarify that the alleged subsidies were one of the many factors that were the basis of the USDOC's benchmark determinations.

3.33. China did not comment on the United States' request.

3.34. We have decided to grant the United States request by editing the relevant paragraph accordingly.

Paragraph 7.343 and footnote 537 (footnote 547 of the Final Report)

3.35. The United States asks the Panel to modify footnote 537 to better reflect the explanation given by the United States in paragraph 270 of its second written submission.

3.36. China did not comment on the United States' request.

3.37. We have decided to grant the United States request by editing the relevant footnote to include a more complete quotation of the United States' second written submission.

Paragraph 7.349

3.38. The United States asks the Panel to refer to administrative reviews and sunset reviews as being conducted in "proceedings" rather than "investigations", in order to more clearly reflect the distinction between these types of proceedings and original investigations.

3.39. China did not comment on the United States' request.

3.40. We have decided to grant the United States' request and have modified accordingly the following paragraphs of the Interim Report, as well as associated headings: 7.351, 7.363, 7.364, 7.374, 7.381, 7.385, 7.394, 7.395, 7.399, 7.401, 7.406, 7.407, 7.409, 7.415, 7.428-7.434, 7.437, 7.439-7.441, 7.443-7.445, 7.447-7.449, 7.451-7.453, 7.455, 7.459, 7.460, 7.462-7.464, 7.466-7.468, and 7.470.

Paragraph 7.375

3.41. The United States asks the Panel to replace "original OCTG determination" and "original determination" with the terms "OCTG investigation".

3.42. China did not comment on the United States' request.

3.43. We have decided to grant the United States request and have thus edited this paragraph accordingly.

Paragraph 7.385 and footnote 581 (footnote 591 of the Final Report)

3.44. The United States asks the Panel to add references to the Public Bodies and CCP Memoranda in footnote 581.

3.45. China did not comment on the United States' request.

3.46. We have decided to grant the United States request and have thus edited this paragraph accordingly.

Paragraph 7.431

3.47. The United States asks the Panel to refer specifically to the two separate questions examined by the USDOC in sunset reviews: (a) whether revocation of the CVD order would be likely to lead to continuation or recurrence of a countervailable subsidy and (b) which rate to report to the US International Trade Commission as the net countervailable subsidy rate likely to prevail if the order were revoked.

3.48. China did not comment on the United States' request.

3.49. We have decided to grant the United States request in part and have thus edited paragraph 7.431 accordingly. Having clarified the USDOC's analysis in this paragraph, we do not see the need to also edit paragraphs 7.438, 7.442, 7.446, 7.450, 7.454, 7.461, and 7.469.

Paragraph 7.457

3.50. With regard to the nature of the USDOC determination in the context of sunset reviews, the United States asks the Panel to refer to "the determination of the net countervailable subsidy rates likely to prevail" rather than to the "calculation" of a subsidy rate.

3.51. China did not comment on the United States' request.

3.52. We have decided to grant the United States request and have thus edited this paragraph accordingly.

ANNEX B

ARGUMENTS OF CHINA

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF CHINA

21 June 2017

I. The Section 129 Public Body Determinations Do Not Bring the United States into Compliance with Its Obligations Under the SCM Agreement

A. Introduction

1. It has been more than five years since the Appellate Body rejected the USDOC's application of a *per se* rule of majority government ownership to determine whether Chinese enterprises are "public bodies" under Article 1.1(a)(1) of the SCM Agreement. In *US – Anti-Dumping and Countervailing Duties (China)* ("DS379"), the Appellate Body explained that an investigating authority conducting a public body analysis must instead determine whether the entity is "vested with authority to exercise governmental functions".[1] The Appellate Body explained that an investigating authority must "engage in a careful evaluation of the entity in question" in order to "identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government".[2]

2. In the more than five years since the Appellate Body issued its report in DS379, the USDOC has never once engaged in the "careful evaluation" described by the Appellate Body when conducting a public body analysis of Chinese enterprises. To the contrary, what the USDOC has done is take the *per se* rule of majority government ownership that the Appellate Body rejected and replace it with a *per se* rule that is substantially broader. Whereas the old *per se* rule led the USDOC to conclude that all majority government-owned entities in China are public bodies, the new *per se* rule leads the USDOC to conclude that all companies in China, regardless of ownership, are public bodies.

3. The new framework applied by the USDOC is described in its "Public Bodies Memorandum", which the USDOC first issued in 2012 during the Section 129 proceedings that followed the adoption of the reports in DS379. The Public Bodies Memorandum begins with the USDOC's assertion that "an important inquiry in a public body analysis is a determination of 'what functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member'".[3] Based on its review of certain of China's legal instruments and policies, the USDOC concludes that "government oversight and control of the economy, and in particular economic decision-making in the state sector", is a "government function" in China for purposes of its public bodies analysis.[4] The USDOC also refers to this function as "maintaining and upholding the socialist market economy".[5]

4. After identifying this alleged "government function", the USDOC then analyses whether state-invested enterprises ("SIEs") possess, exercise, or are vested with authority to "maintain and uphold the socialist market economy".[6] The USDOC explains that the evidence relevant to this determination concerns "the breadth and depth of government control over the economy as a whole and over SIEs generally in China".[7] Based on its review of certain "indicia" of alleged "control", the USDOC concludes that "the government exercises meaningful control over certain categories of SIEs in China, and that this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy".[8]

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.
[3] Public Bodies Memorandum, p. 2, quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297 (CHI-1).
[4] Public Bodies Memorandum, p. 11 (CHI-1).
[5] Public Bodies Memorandum, p. 6 (CHI-1).
[6] Public Bodies Memorandum, p. 12 (CHI-1).
[7] Public Bodies Memorandum, p. 12 (CHI-1).
[8] Public Bodies Memorandum, p. 37 (CHI-1).

5. Since the USDOC issued the Public Bodies Memorandum in 2012, the USDOC has routinely conducted its public body "analysis" within the framework of this Memorandum. The outcome has been the same in each instance, including in the Section 129 proceedings under review here. For all companies that are majority government-owned, the USDOC has concluded on the basis of its analysis in the Public Bodies Memorandum that the companies are public bodies. For all companies that are not majority government-owned, the USDOC has resorted to "adverse facts available" based on the GOC's failure to respond to certain questions regarding the Chinese Communist Party (CCP). On the basis of the "facts available" in the Public Bodies Memorandum, the USDOC has then concluded that all non-majority government-owned enterprises are also public bodies.

6. Accordingly, the result of the USDOC's "refined" analytical framework for determining whether companies in China are public bodies is that, since 2012, the USDOC has consistently concluded that all input suppliers in countervailing duty investigations of imports from China are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. The USDOC has reached this conclusion without ever once considering the relevance of any of the evidence that the GOC and the mandatory respondents have placed on the record calling into question the legitimacy of the USDOC's analysis, including the evidence provided by the GOC in the context of these Section 129 proceedings.

7. In DS379, the Appellate Body made clear that "control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body".[9] Nonetheless, the USDOC spends the vast majority of the Public Bodies Memorandum analysing "the breadth and depth of government control over the economy as a whole and over SIEs generally in China".[10] It appears to be the USDOC's view that what distinguishes its new control-based standard from the control-based standard that the Appellate Body expressly rejected in DS379 is the USDOC's explanation that the control that it purports to identify "allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy".[11] This is the alleged "government function" that Chinese enterprises are "performing", and it is the performance of this function that makes the "indicia of control" identified by the USDOC "meaningful".

8. The glaring defect in the USDOC's analysis is that the USDOC fails to explain how the "government function" it has identified is relevant to the public body inquiry. The USDOC's conclusion that "maintaining and upholding the socialist market economy" is a "government function" amounts to a conclusion that China is a socialist market economy – a fact which is undisputed. Broadly speaking, a purpose of the Chinese government is undoubtedly to "maintain and uphold" China's economy, just as other WTO Member governments "maintain and uphold" their economies. This conclusion has no discernible relevance, however, to "whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body".[12]

9. In China's view, both the Appellate Body's interpretative analysis of the term "public body" in DS379 and *US – Carbon Steel (India)* ("DS436"), and the Appellate Body's application of its analytical framework to state-owned commercial banks (SOCBs) in DS379, demonstrate that there must be a "clear logical connection" between the "government function" identified by an investigating authority and the conduct that is alleged to constitute a financial contribution.[13]

[9] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 320.
[10] Public Bodies Memorandum, p. 12 (CHI-1).
[11] Public Bodies Memorandum, p. 37 (CHI-1).
[12] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[13] China notes that the "clear logical connection" standard was introduced by the United States in its second written submission, and is not language that China used in its own written submissions. See United States' second written submission, para. 30; see also United States' opening statement, para. 18. However, China explained in its opening statement at the meeting of the parties that if it was in fact the U.S. position that there must be a "clear logical connection" between the "government function" and the conduct at issue under Article 1.1(a)(1), then China believed that the parties were essentially in agreement regarding the proper legal standard. See China's opening statement, para. 18. The United States made clear at the meeting of the parties that this is an accurate characterization of the U.S. view, at least for purposes of the Panel's evaluation of the USDOC's public body determinations in the Section 129 proceedings. Accordingly, China adopted the U.S. terminology, because China believes that it is an effective (and shorter) way to explain China's view, which is that an entity must be vested with authority that it exercises when engaged in the conduct at issue under Article 1.1(a)(1), but that the authority vested in the entity may be for the purpose of performing a "government function" that is broader than the particular conduct at issue under

10. In the United States' view, "it is not necessary for the Panel to define the outer bounds of what may constitute 'governmental authority' or a 'governmental function' for the purpose of resolving this dispute", because "the 'governmental function' identified by the USDOC – maintaining and upholding the socialist market economy – has a clear, logical connection to the particular conduct under Article 1.1(a)(1) of the SCM Agreement – providing goods."[14] The United States maintains that "[t]he producers of inputs that provided those inputs to the company respondents in the investigation were, in doing so, acting to maintain the predominant role of the state sector in the economy, and upholding the socialist market economy."[15]

11. In order to support this assertion, the United States explains as follows:

> Ample record evidence supports the USDOC's conclusion that the Government of China exercises meaningful control over the entities at issue such that the government can use the entities "to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy." Thus, any time the entities provided inputs to the company respondents in the investigation – the activity in which the entities engaged on a day-to-day basis and also conduct that is described under Article 1.1(a)(1) of the SCM Agreement – the entities were acting in support of a governmental function in China.[16]

However, the use of the word "[t]hus" at the beginning of the second sentence above does not change the fact that the conclusion that follows is a complete non sequitur. Even if it were true that the GOC can "use the entities at issue 'to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy'", it does not automatically follow that the entities' conduct of providing the relevant inputs was in support of this function.[17]

12. In fact, in the *Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG*, and *Steel Cylinders* investigations, the GOC provided extensive evidence in response to the Public Body Questionnaire that cuts directly against the conclusion that the entities' conduct of providing the relevant inputs was in support of this function. Yet the USDOC ignored this information in its public body determinations.[18]

13. Specifically, as China explained in detail in Section II.D.4 of its first written submission, the USDOC failed to consider the various laws and regulations submitted by the GOC that specifically insulate SIEs from government interference in their day-to-day business operations. The USDOC ignored all of the industrial plans from the provinces and municipalities where the respondents and input producers from the investigations at issue were located, and the fact that none of these plans support the conclusion that the entities at issue were performing a "government function" when they provided inputs. The USDOC also ignored the entity-specific information submitted in the *Kitchen Shelving* and OCTG investigations that likewise indicated that the entities at issue were not vested with relevant government authority, simply asserting that the GOC "refused to respond to the Department's requests" and that "information necessary to the analysis of whether the producers are 'public bodies' is not available on the record".[19]

Article 1.1(a)(1). See, e.g. China's response to Panel Question 4. China also believes that the idea that the "government function" must have a "clear logical connection" to the relevant conduct of that entity under Article 1.1(a)(1) is consistent with the European Union's view that an investigating authority should examine whether the "alleged financial contribution falls within the scope of the governmental function said to make the entity a public body." See European Union oral statement, para. 7.

[14] United States' response to Panel question 3, para. 20.

[15] United States' response to Panel question 12, para. 89.

[16] United States' response to Panel question 12, para. 92.

[17] As China discussed in response to Panel question 4, the USDOC cites evidence that SIE *investments* must be in-line with state industrial policies, but cites no evidence supporting the same conclusion in relation to the provision of inputs.

[18] The only information cited by the USDOC in support of the proposition that it "considered" and "relied on" evidence provided by the GOC in making its public body determinations was information concerning the level of government ownership of the enterprises at issue. See China's first written submission, paras. 160-161.

[19] See Preliminary Public Bodies Determination, p. 15 (CHI-4).

14. The United States has provided no compelling justification for the USDOC's failure to comply with its obligation to provide a reasoned explanation for why it "rejected or discounted" evidence that was contrary to a conclusion that there was a "clear logical connection" between the alleged "government function" that it identified and the conduct at issue.

15. The United States has also steadfastly refused to answer China's questions regarding how such a sweeping conclusion would make sense. For example, despite repeated prompting by China, the United States has never explained how an SIE selling inputs to a *private* company for less than adequate remuneration would be "acting in support" of the alleged function of "maintaining the predominant role of the *state* sector in the economy". Such a conclusion is even less plausible when the input producer is itself a private company, as were many in the Section 129 proceedings at issue.

16. Furthermore, despite its agreement that "evidence regarding the scope and content of government policies relating to the sector in which an investigated entity operates" is relevant to an investigating authority's public body analysis[20], the United States never explained how government policies relating to a particular sector would possibly be relevant under the USDOC's framework. If *all* entities providing *all* inputs are acting in support of the alleged "government function" of "maintaining the predominant role of the state sector in the economy", it seems clear to China that sector-specific evidence is utterly irrelevant to the USDOC.

17. In light of the fact that the United States' assertion that the USDOC established a "clear logical connection" between the alleged "government function" and the conduct at issue cannot be substantiated based on the record of the Section 129 proceedings, the United States has also suggested that there may not need to be a "clear logical connection" in all cases.

18. In this respect, the United States highlights the Appellate Body's observation that "there are different ways in which a government could be understood to vest an entity with 'governmental authority', and therefore different types of evidence may be relevant in this regard".[21] The United States explains that in its view, this indicates that the Appellate Body "has understood the concepts of 'governmental authority' and 'governmental function' as being more open-ended than China suggests"[22], and that "a wide range of governmental functions could be relevant to the public body analysis."[23]

19. While the United States has repeatedly emphasized the fact that an entity may be vested with authority in "different ways", the United States has never explained *why* this leads to the conclusion that the concepts of "governmental authority" and "governmental function" are "more open-ended than China suggests". In light of the Appellate Body's emphasis that the relevant *legal standard* is always the same[24], China does not understand why the *manner* in which an entity is vested with authority to perform government functions should change whether or not there needs to be a "clear logical connection" between the authority vested in the entity and the conduct at issue under Article 1.1(a)(1).

20. Furthermore, while the United States argues that "a wide range of governmental functions could be relevant to the public body analysis", the United States has also emphasized that its argument is not that "a public body is an entity vested with authority to perform *any* function that is 'ordinarily' considered a governmental function".[25] However, the United States has never articulated how it proposes to distinguish between the "wide range of governmental functions" that it believes would be relevant to the public body analysis, and those "governmental functions" that it believes would not be relevant to such an analysis. Rather, in relation to the proper analytical framework for determining whether an entity is a public body, the United States has left the Panel with numerous contradictory statements and unanswered questions.

[20] United States' response to Panel question 5, para. 32, citing Appellate Body Report, *US – Carbon Steel*, para. 4.29.

[21] United States' response to Panel question 3, paras. 18-19, quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

[22] United States' response to Panel question 3, para. 19.

[23] United States' response to Panel question 3, para. 19, quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

[24] See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37.

[25] United States' second written submission, para. 43.

21. For example, the United States maintains that it is not arguing that "any entity 'empowered by the law of the State to exercise elements of the governmental authority' [is a 'public body'] *regardless of whether that entity was acting in that capacity* when engaged in the conduct that is the subject of the financial contribution inquiry."[26] Yet the United States maintains that an entity vested with authority to "take steps, as needed, to address certain public health issues of pressing concern to the state" would properly be considered a public body even if it were providing "cheap iron ore".[27]

22. Accordingly, contrary to the initial statement above, the United States *does* appear to believe that an entity can be a public body under Article 1.1(a)(1) regardless of whether the entity is acting pursuant to the authority with which it has been vested, *at least in some instances*. But the United States has provided no basis for the Panel to distinguish these instances from those where it believes that an entity must be empowered to exercise elements of governmental authority and must be "*acting in that capacity*" in order to be a public body.

23. The United States has repeatedly noted throughout these proceedings that "rather than focusing on the conduct undertaken by the entity, the Appellate Body has emphasized that the focus of the public body analysis is on the 'evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense.'"[28] Yet the United States does not dispute that when an investigating authority evaluates evidence of "meaningful control" as part of its evaluation of the "core features of the entity concerned", as the USDOC did in the Public Bodies Memorandum, any alleged government control must be exercised *in relation to the conduct at issue under Article 1.1(a)(1)* in order for such alleged control to be "meaningful".[29] The United States' insistence that an investigating authority must focus on the "core features of the entity" rather than on the conduct at issue cannot be reconciled with the United States' acknowledgment that the conduct at issue is an essential element of a proper "meaningful control" analysis.

24. The United States maintains that "China's attack on Commerce's public body determinations in the section 129 proceedings here is, in reality, an attack on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*" in relation to SOCBs.[30] Yet as China explained in detail in response to Panel question 4, the United States' own chart in its second written submission highlights the difference between the evidence that the Appellate Body focused on in its evaluation of whether SOCBs were performing a "government function" when they provided loans, and the evidence that the USDOC relied upon to determine that every single entity at issue in the Section 129 proceedings was a public body.[31] The United States' insistence that the Appellate Body was not focused on evidence related to the conduct of SOCBs when they provided loans is also belied by the United States' own understanding that the Appellate Body was examining whether there was sufficient evidence before the USDOC to conclude that the banks were "effectively carrying out government functions" when they "'exercise[d] … their functions' *(lending)*".[32]

25. Finally, the United States maintains that China's position regarding the nature of the government authority that must be vested in an entity in order for that entity to be a public body is "not in accord with the findings in prior reports", "is not supported by the text of Article 1.1(a)(1) of the SCM Agreement", and "is not logical."[33] Yet China's position is indistinguishable from the United States' own position in DS436, where the United States argued before the Appellate Body that "the authority required of a public body" is the authority to exercise the "key governmental functions" in the subparagraphs of Article 1.1(a)(1).[34] If the United States believes that China's position in these proceedings is unsupported and illogical, then it is likewise

[26] United States' second written submission, para. 61 (emphasis added).
[27] United States' second written submission, paras. 41, 89.
[28] See, e.g. United States' second written submission, para. 39, quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[29] See United States' second written submission, para. 56.
[30] United States' response to Panel question 3, para. 19.
[31] See China's response to Panel question 4.
[32] United States' second written submission, *US – Countervailing Measures (China)* (31 May 2013), para. 37 (CHI-68) (emphasis added).
[33] United States' opening statement, para. 20.
[34] See United States' opening statement before the Appellate Body, *US – Carbon Steel (India)* (24 September 2014), para. 11 (CHI-67).

condemning its own position before the Appellate Body in the last dispute to examine the meaning of the term "public body".

26. In China's view, the contradictory nature of the U.S. submissions reflects the fact that while the United States recognizes the palpably absurd consequences that would flow from the conclusion that a public body is an entity vested with *any* government authority whatsoever, the United States is still trying to defend the USDOC's public body determinations in the Section 129 proceedings at issue. And despite the Appellate Body's unambiguous rejection of the USDOC's *per se* control-based rule in DS379, the USDOC remains unwilling to relinquish a *per se* control-based rule when it comes to a public body analysis of Chinese enterprises.

27. In order to maintain such a *per se* rule, the USDOC has identified a "government function" that is so broad that the USDOC believes that it covers any and all conduct by any and all companies in China.[35] As is evident in these Section 129 proceedings, the USDOC believes that the expansive "government function" it has identified permits it to ignore any evidence relevant to the particular enterprises or industries at issue.

28. The USDOC's analysis bears no relationship to the case-by-case inquiry that the Appellate Body described in DS379. China recalls the Appellate Body's statement in DS379 that a public body is an entity "vested with *certain* governmental responsibilities, or exercising *certain* governmental authority".[36] The United States has not explained how an investigating authority would determine whether the government authority vested in an entity is relevant to the public body inquiry, and part of the "certain government authority" identified by the Appellate Body, if not by reference to whether that authority is logically connected to the conduct that is potentially being attributed to the government.

29. The USDOC's failure to demonstrate a "clear logical connection" between the alleged "government function" and the conduct at issue, and the USDOC's failure to consider evidence to the contrary, renders the USDOC's public body determinations inconsistent with Article 1.1(a)(1) of the SCM Agreement. The USDOC's Section 129 public body determinations have not brought the United States into compliance with its obligations under the SCM Agreement.

B. The Public Bodies Memorandum Is Inconsistent "As Such" with Article 1.1(a)(1) of the SCM Agreement

30. Before the original Panel, China challenged the USDOC's "rebuttable presumption", articulated in the context of the *Kitchen Shelving* investigation, that majority government-owned entities in China are public bodies. The original Panel found that the *Kitchen Shelving* policy was "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement, because it reflected the same government ownership and control standard that had been found by the Appellate Body in DS379 to be insufficient, as a matter of law, to establish a "public body" within the meaning of that provision.

31. In the Section 129 determinations at issue in this dispute, the USDOC stopped relying on the *Kitchen Shelving* framework and relied instead on the Public Bodies Memorandum to find that all entities at issue were "public bodies". Like the "rebuttable presumption", the Public Bodies Memorandum is "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement for the following four reasons.

[35] The logical extension of the U.S. arguments before the Panel is that the United States believes that the evidence that the Appellate Body emphasized in relation to SOCBs in DS379 − that SOCBs were required to take into account government industrial policies *when making loans* − would be unnecessary to support a finding that every SOCB in China is a public body. Instead, the United States believes that it would be sufficient for the USDOC to cite the Public Bodies Memorandum for the proposition that all SOCBs in China are performing the function of "maintaining and upholding the socialist market economy", without ever demonstrating that this alleged "government function" has anything to do with the provision of loans by the relevant entities. The United States believes that because the GOC can allegedly use SIEs "to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy", it follows that these entities are performing this "government function" when engaged in *any* conduct.

[36] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 296 (emphasis added).

32. First, China demonstrated that the Public Bodies Memorandum is a measure "taken to comply" that falls within this Panel's terms of reference under Article 21.5 of the DSU. Despite the fact that the Public Bodies Memorandum was adopted ostensibly to implement the DSB recommendations and rulings in DS379, it was the basis for *each* of the USDOC's determinations in the Section 129 determinations that constitute the *declared* measures taken to comply in *this dispute*.[37] The fact that the Public Bodies Memorandum was issued seven days prior to the filing of consultations request in the original dispute is immaterial, because it is undisputedly "part of each of the administrative records of each of the section 129 proceedings that the USDOC undertook to implement the recommendations and rulings of the DSB in this dispute."[38]

33. Second, China established that the Public Bodies Memorandum is a measure susceptible to challenge in WTO dispute settlement proceedings. The scope of measures that may be challenged before a WTO panel is, in principle, broad, and "any acts or omissions attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[39] It is undisputed that the Public Bodies Memorandum is an act attributable to the United States, and China had no obligation to demonstrate that it establishes a "practice" or "methodology", as the United States argues.[40]

34. Third, China demonstrated that the Public Bodies Memorandum provides a rule or norm of general and prospective application that is challengeable "as such". By its express terms, the Public Bodies Memorandum articulates an analytical framework that is general, because it applies to an unidentified number of Chinese economic operators, and prospective, because it applies to all future CVD investigations of Chinese imports. As such, the Public Bodies Memorandum has normative value, because it provides administrative guidance and creates expectations among the public and private actors as to the USDOC's public body analysis. The existence of a rule or norm of general and prospective application is corroborated by evidence that the USDOC has systematically applied the Public Bodies Memorandum to make public body determinations since its publication.[41]

35. Fourth and finally, the Public Bodies Memorandum is "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement because it restricts, in a material way, the USDOC's discretion to act *consistently* with Article 1.1(a)(1) of the SCM Agreement. Pursuant to the Public Bodies Memorandum framework, commercial entities in China are divided in three categories: (i) all entities in which the Government of China has a controlling ownership interest are irrebuttably presumed to be "public bodies"; (ii) entities in which the government of China retains a "significant ownership interest" are "public bodies", where there are "additional indicia that show whether such SIEs are used as instruments by the government to uphold the socialist market economy"; and (iii) entities with "little or no formal government ownership" are "public bodies", where there is evidence that the government exercises "meaningful control" over the entity. The USDOC's conclusions in relation to all three "categories" of entities are necessarily inconsistent with Article 1.1(a)(1) in each instance in which the Public Bodies Memorandum is applied, because the USDOC's conclusions are based on a flawed understanding of what constitutes "meaningful control", and in the absence of any determination that a particular entity is performing a "government function" when engaged in the conduct that is the subject of the financial contribution inquiry.

II. The USDOC's Decision to Reject In-Country Benchmark Prices Is Inconsistent with Articles 14(D), 1.1(B) and 32.1 of the SCM Agreement

A. Articles 14(d) and 1.1(b) of the SCM Agreement

36. In the original proceedings before the Panel, the United States defended the USDOC's findings of "distortion" on the grounds that the Government of China played "a predominant role … in the market" as a provider of the inputs in question. On appeal, the Appellate Body reaffirmed that, under this rationale, an investigating authority must demonstrate that the government

[37] China's second written submission, para. 108.

[38] China's responses to Panel questions, para. 48 (referring to United States' response to Panel question 19, para. 139. See also United States' response to Panel question 23, para. 148).

[39] China's second written submission, para. 111, quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[40] United States' first written submission, para. 167.

[41] China's second written submission, para. 117 (referring to Exhibit CHI-54).

possessed and exercised market power so as to cause the prices of other suppliers to align with a government-determined price. Because the USDOC had made no such showing, the Appellate Body found that the determinations at issue were inconsistent with Article 14(d) of the SCM Agreement.

37. In the Section 129 determinations before the Panel, the USDOC abandoned its rationale based on the government's role as a provider of the good. The reason for this abandonment is clear: the record evidence demonstrated that the Government of China did not possess and exercise market power in the markets for hot rolled steel, steel rounds and billets, stainless steel coil, or polysilicon (the relevant inputs at issue). The facts and economics simply did not support the USDOC's original rationale. The United States' submissions to the Panel confirm that the United States has abandoned this rationale.

38. In place of its original rationale, the USDOC adopted a sweeping new theory for rejecting available domestic benchmark prices under Article 14(d). The USDOC's determinations, and the United States' defence of those determinations as set forth in submissions to the Panel, make clear that this new theory is not constrained in any meaningful way either by the text of the treaty or by facts. It is a theory that replaces customary rules of treaty interpretation with terms and distinctions that are entirely of the United States' own invention, and that replaces careful evaluation of the evidence with sweeping, unsubstantiated assertions.

39. Article 14(d) of the SCM Agreement requires an investigating authority to evaluate the adequacy of remuneration for the provision of a good "in relation to prevailing market conditions for the good … in the country of provision … (including price, quality, availability, marketability, transportation and other conditions of purchase and sale)". As a result of the parties' submissions, the Panel has before it two competing interpretations of what this provision means and, in particular, when this provision permits an investigating authority to resort to a benchmark outside the country of provision.

40. Consistent with the ordinary meaning of its terms, as confirmed by prior panel and Appellate Body reports, China considers that the phrase "prevailing market conditions … in the country of provision" refers to prices that are determined by the interplay of supply and demand within the country of provision. The Appellate Body has found that the term "market" in Article 14(d) refers to "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".[42] Domestic benchmark prices are "market" prices when they are "between independent buyers and sellers in a competitive market where prices are determined by the forces of supply and demand".[43]

41. Article 14(d) further specifies that the adequacy of remuneration shall be determined in relation to *prevailing* market conditions within the country of provision. The ordinary meaning of the term "prevailing" is "as they exist" or "which are predominant".[44] Article 14(d) therefore requires the investigating authority to evaluate the adequacy of remuneration in relation to the existing or predominant market conditions within the country of provision. The Appellate Body has held that to the extent that in-country prices are market determined, i.e. determined by the forces of supply and demand, such prices "would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)".[45]

42. In the five Appellate Body reports to have addressed the issue of "distortion" under Article 14(d), the Appellate Body has consistently referred to "distortion" as the circumstance in which the government effectively determines the price at which the good is sold, thus rendering the comparison required by Article 14(d) circular. This is the "very limited" circumstance that the Appellate Body first identified in *US – Softwood Lumber IV* as justifying the use of out-of-country benchmarks. The three circumstances that panels and the Appellate Body have identified as potentially justifying the use of out-of-country benchmarks are all circumstances in which the

[42] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150, citing Appellate Body Report, *US – Upland Cotton*, para. 404. See also Appellate Body Report, *EC – Aircraft,* para. 981 (finding that the term "market" refers to "a sphere in which goods and services are exchanged between willing buyers and sellers").

[43] Panel Report, *US – Softwood Lumber IV*, para. 4.154.

[44] Panel Report, *US – Softwood Lumber III*, para. 7.50 (quoting Concise Oxford English Dictionary, p. 1084).

[45] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.

government effectively determines the price at which the good is sold, either *de jure* or *de facto*. These circumstances are: (1) where the government sets prices administratively; (2) where the government is the sole supplier of the good; and (3) where the government possesses and exercises market power as a provider of the good so as to cause the prices of private suppliers to align with a government-determined price.

43. It is undisputed that Chinese prices for the inputs at issue are not set administratively, and the USDOC made no finding that they are. It is likewise undisputed that the GOC is not the sole provider of these inputs. Nor did the USDOC find that the GOC possessed and exercised market power in the relevant input markets during the periods of investigation so as to cause the prices of other input suppliers to align with a government-determined price. The USDOC's Section 129 determinations are therefore not based upon any of the three rationales that the DSB has previously recognized as a potential basis for rejecting in-country benchmark prices under Article 14(d). Nor do the USDOC's Section 129 determinations relate, more generally, to the DSB's concern with circular price comparisons.

44. The USDOC's Section 129 determinations are, instead, based on a different interpretation of Article 14(d), one that the United States has struggled to articulate coherently during the course of these proceedings. To the extent that the United States' proposed interpretation can be inferred from its submissions, it appears to be the United States' position that Article 14(d) allows an investigating authority to go beyond the question of whether in-country prices were determined by the interplay of supply and demand and undertake an *additional* inquiry into whether any type of government policy or action "affected" the conditions of supply and demand within the relevant market. The United States appears to consider that an investigating authority may evaluate the "nature" of any type of government policy or action and the "degree" of its influence upon the conditions of supply and demand, and on that basis find that available benchmark prices were not *sufficiently* determined by the interplay of supply and demand to require their use under Article 14(d).

45. The United States does not offer an interpretative basis for its belief that Article 14(d) permits an additional inquiry into whether government policies or actions "affect conditions" in the market. The United States does not contest the finding of the panel and Appellate Body in *US – Softwood Lumber IV* that the term "market" in Article 14(d) does not "refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'".[46] Nor does the United States contest that a wide variety of government policies and actions have the potential to "affect conditions" in a market. Most importantly, the United States offers no basis to distinguish, either as a matter of treaty interpretation or in practice, among all of the different ways in which government policies and actions "affect conditions" in markets, based either on the "nature" of those policies and actions or the "degree" of influence that they have on market conditions.

46. Beginning with the "nature" of different types of government policies or actions that affect market conditions, the United States offers no interpretative basis for the suggestion that the term "market" in Article 14(d) allows the forces of supply and demand to be influenced by certain types of government policies or actions, but not others. Governments "affect conditions" in the marketplace in a myriad of different ways, from the macro (e.g. monetary and fiscal policies) to the micro (e.g. laws and regulations that affect particular products or industries). The United States offers no interpretation of the term "market" that would allow only some of these government policies or actions to affect the conditions of supply and demand within a market.

47. The United States likewise offers no explanation or interpretative support for its suggestion that government policies and actions may affect the forces of supply and demand only to some "degree". What is this "degree", and how would it be expressed? How is this "degree" discernible in the phrase "prevailing market conditions"? The United States' emphasis on the "degree" of government influence upon the forces of supply and demand is particularly troubling in light of the fact that the United States eschews any obligation to examine actual domestic benchmark prices or to identify any causal pathway by which government policies or actions affected those prices. The United States seems to consider that the "degree" of government influence upon domestic benchmark prices is relevant, but then wants to avoid any obligation to evaluate and substantiate what that "degree" of influence actually was.

[46] Appellate Body Report, *US – Softwood Lumber IV*, para. 87 (quoting Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51).

48. In sum, the interpretation of Article 14(d) on which the USDOC's Section 129 determinations are based is unfounded as a matter of treaty interpretation. Because the determinations at issue are based on the United States' erroneous interpretation of Article 14(d), the Panel must find that the determinations are inconsistent with Article 14(d) for this reason alone.

49. Under a proper interpretation of Article 14(d), the evidence on the record of the Section 129 proceedings demonstrated that prices for the inputs at issue were determined by the interplay of supply and demand and therefore constituted "market" prices within the meaning of Article 14(d). Notwithstanding the fact that the USDOC did not even bother to solicit information concerning Chinese prices for the inputs at issue − the very prices that the USDOC found to be "distorted" − the Government of China placed spot market prices for the three steel products on the record. These prices, along with the market commentary accompanying these prices, plainly evinced the operation of market forces for these products. Neither the USDOC in its determinations, nor the United States in seeking to defend those determinations, offered any basis in the record evidence to reject the operation of market forces evident in these pricing data.

50. The operation of market forces in the Chinese steel sector was further evidenced by the market structure of the steel industry during the period 2006-2008 and, in particular, by the rapidly growing levels of private investment in the steel industry during that period. SIE producers of the products at issue represented no more than half of domestic Chinese production of these products, with non-SIE producers and foreign-invested producers accounting for the remainder of the market. Privately-owned steel producers, both Chinese and non-Chinese, invested billions of dollars in the Chinese steel industry during the period 2006-2008. These undisputed facts cannot be reconciled with the USDOC's conclusion that private Chinese prices for the inputs at issue were not market-determined prices.

51. At no point in its determinations did the USDOC identify a causal relationship between the "distortion" factors that it claimed to identify and the prices charged by Chinese suppliers of the inputs in question, whether SIE or non-SIE suppliers. During the course of the Panel proceedings, the United States made clear that, in its view, it was neither "necessary nor possible" for the USDOC to demonstrate a causal relationship between the "distortion" factors that it relied upon, on the one hand, and the domestic benchmark prices that it chose to reject, on the other. This means that the USDOC's findings of "distortion" are based on nothing more than assertion. In the absence of any evidence that the factors identified by the USDOC had *any* effect on available benchmark prices, the USDOC's findings of "distortion" cannot be sustained under any conceivable interpretation of Article 14(d).

52. For these reasons, the Panel should find that the Section 129 determinations at issue remain inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

B. Article 32.1 of the SCM Agreement

53. Article 32.1 of the SCM Agreement imposes limits on "the range of actions that a Member may take unilaterally to counter … subsidization".[47] Under Part V of the SCM Agreement, the permissible responses to injurious subsidization are definitive countervailing duties, provisional measures, and price undertakings.[48] In the Section 129 determinations at issue, the United States countered subsidies allegedly provided to the Chinese steel industry by relying upon these alleged subsidies as a basis for rejecting available in-country benchmarks when evaluating the adequacy of remuneration for steel inputs provided to downstream producers of finished products. This is not one of the permissible responses to subsidization, and this action is therefore inconsistent with Article 32.1.

54. Central to the USDOC's rationale for rejecting available in-country benchmarks in the Section 129 determinations at issue is its finding that Chinese steel producers receive "subsidies". If the United States believes that Chinese steel producers receive "subsidies", the steps that the SCM Agreement permits it to take are: (1) impose definitive countervailing duties, provisional

[47] Appellate Body Report, *US − Offset Act (Byrd Amendment),* para. 252.

[48] Appellate Body Report, *US − Offset Act (Byrd Amendment),* para. 231. Part III of the SCM Agreement allows a Member to take countermeasures if a subsidizing Member fails to withdraw a prohibited subsidy or fails to take appropriate steps to remove the adverse effects of an actionable subsidy or withdraw the actionable subsidy.

measures, or price undertakings in respect of any steel products imported into the United States that the United States properly determines to be subsidized and causing injury; (2) undertake a proper upstream subsidy analysis to determine whether Chinese producers of the relevant steel products did, in fact, receive actionable subsidies and, if so, how much of the subsidy (if any) passed through to downstream purchasers of these products; or (3) request consultations and, if necessary, initiate dispute settlement proceedings under Part III of the SCM Agreement if the United States considers that subsidies allegedly provided to Chinese steel producers are prohibited subsidies or cause adverse effects.

55. The SCM Agreement does not contemplate that a Member may counteract subsidization by relying upon the existence of such subsidies (whether or not shown to be actionable subsidies) and their presumed effects as a basis for rejecting in-country benchmarks under Article 14(d). This action would circumvent the disciplines that the SCM Agreement imposes upon the steps that a Member may take to counteract subsidization. This action against subsidization is not contemplated by the SCM Agreement and, in fact, directly contravenes the disciplines that the SCM Agreement imposes upon actions against alleged upstream subsidies. The Panel must therefore find that the USDOC's Section 129 determinations are inconsistent with Article 32.1 of the SCM Agreement.

III. The USDOC's Section 129 Determinations Remain Inconsistent with Article 2.1(c) of the SCM Agreement

56. In the original proceedings, the Panel found that 12 of the countervailing duty determinations at issue were inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC had failed to take into account "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", as required by the last sentence of that provision. The United States did not appeal these findings of the Panel. As a result, the USDOC was required to reconsider its findings of specificity in respect of the alleged provision of inputs for less than adequate remuneration in each of the investigations at issue.

57. The second of the two factors in the last sentence of Article 2.1(c) requires the investigating authority to take into account "the length of time during which the subsidy programme has been in operation". It is evident that, in order to take this factor into account, the investigating authority must first identify the relevant "subsidy programme", and then determine the length of time during which that subsidy programme, so identified, has been in operation. Only then can the investigating authority evaluate whether a subsidy programme has been "use[d] … by a limited number of certain enterprises" taking into account "the length of time during which the subsidy programme has been in operation".

58. The Appellate Body has stated that the term "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done".[49] While a "subsidy programme" would ordinarily be evidenced in writing, "[a] subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."[50] The "evidence" that the USDOC relied upon in the Section 129 determinations to establish the existence and content of twelve input-specific "subsidy programmes" consisted of nothing more than the fact that the respondent producers had received these alleged subsidies over the course of the one-year period of investigation.

59. The inescapable logic of the USDOC's reasoning is that the provision of a *subsidy* would be sufficient to establish the existence of a *subsidy programme*. In addition, the *subsidy* that gave rise to the specificity inquiry in the first place would define the content and scope of the *subsidy programme*, so that the two become coterminous. This reasoning, if accepted, would collapse the distinction between a "subsidy" and a "subsidy programme", and would render meaningless the separate and independent requirement of identifying a "subsidy programme" pursuant to which the subsidies at issue were granted. Specificity under Article 2.1(c) would become a circular and self-fulfilling inquiry. Not only is this a nonsensical result, but it cannot be reconciled with the

[49] Appellate Body Report, para. 4.141.
[50] Appellate Body Report, para. 4.141.

Appellate Body's prior findings. The mere *repetition* of actions, without a showing of any systematic feature, cannot establish "a systematic series of actions" probative of a plan or scheme.

60. Because the USDOC's Section 129 determinations did not properly identify and substantiate on the basis of positive evidence the existence, scope, and content of a "subsidy programme" or "subsidy programmes", it follows that the USDOC did not properly evaluate "the length of time during which the subsidy programme has been in operation" as required by the recommendations and rulings of the DSB. The USDOC could not have identified the length of time during which a "subsidy programme" has been in operation without properly identifying what that "subsidy programme" is. However, even if the Panel were to accept the USDOC's identification of input-specific "subsidy programmes", the Panel would still need to reject the USDOC's evaluation of "the length of time during which" these alleged "subsidy programmes" have been in operation.

61. The evidentiary basis for the USDOC's finding that the "subsidy programmes" at issue had not been in operation "for a limited period of time only" was based on China's explanation that SOEs "began producing and selling the inputs" at issue in the PRC "at some point during the period covered by the first Five-Year Plan (1953-1957) and possibly earlier". The problem with the USDOC's conclusion is that the fact that Chinese SOEs have *produced and sold* a particular input over a long period of time does not constitute evidence that those inputs have been sold *for less than adequate remuneration* over the same period of time.

62. At the very most, and taking the USDOC's public body determinations at face value, the fact that Chinese SOEs have produced and sold a particular input over a long period of time serves only as evidence that the GOC has provided *financial contributions* over that period, not evidence that the GOC has provided *subsidies* over that period. As the Appellate Body has found, "[t]he mere fact that financial contributions have been provided to certain enterprises is not sufficient … to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement".[51] This would include for the purpose of determining "the length of time during which the subsidy programme has been in operation". Thus, the fact that Chinese SOEs have produced and sold the inputs at issue since at least 1957 is insufficient, on its face, to establish the length of time during which the alleged "subsidy programmes" have been in operation.

IV. The USDOC's Section 129 Land Specificity Determination in Thermal Paper Remains Inconsistent with Article 2.2 of the SCM Agreement

63. In DS379, the Appellate Body explained that under Article 2.2 of the SCM Agreement, "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both".[52] The Appellate Body also explained that it did not read the panel report in DS379 as implying that "the mere existence of a 'distinct' regime would enable a subsidy to be found to be specific to a designated geographical region, even if the identical subsidy were also available to enterprises outside that designated geographical region".[53]

64. Despite the Appellate Body's clear message in DS379 that the "mere existence of a 'distinct' regime" does not permit an investigating authority to conclude that an alleged land-use rights subsidy is regionally specific under Article 2.2[54], the USDOC explained in these Section 129 proceedings that, since DS379, it has "hinged its regional specificity analysis on whether there is a 'distinct land regime' within [a designated geographical region]".[55]

65. In relation to the *Thermal Paper* investigation, the GOC did not respond to the USDOC's Section 129 land specificity questionnaire, and so the USDOC concluded based on "adverse facts available" that "the LTAR program at issue constitutes a 'distinct land regime' and is therefore specific".[56] It is well established, however, that the application of "facts available" does not excuse the application of an improper legal standard.

[51] Appellate Body Report, para. 4.143.

[52] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 378. See ibid. para. 413.

[53] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 421.

[54] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 421.

[55] See Preliminary Land Specificity Determination, p. 6 (CHI-24).

[56] See Preliminary Land Specificity Determination, pp. 9-12 (CHI-24).

66. Based on the investigation record, the USDOC knew that the granting authority did not provide land-use rights at a *price* that was not available to companies outside of the relevant zone. The USDOC also knew that there was evidence on the record that cheaper land was available outside of the zone. Despite this evidence, the USDOC still concluded that the provision of land-use rights for LTAR was specific to the ZETDZ because "the LTAR program at issue constitutes a 'distinct land regime' and is therefore specific".[57]

67. The USDOC was able to reach this conclusion only because the USDOC applies a legal standard under Article 2.2 pursuant to which all "incentives or preferential policies" are potential evidence of a "distinct land regime" for the provision of land-use rights. This legal standard cannot be reconciled with the Appellate Body's finding that "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both".[58] Accordingly, the Panel should find the legal standard applied by the USDOC in *Thermal Paper* is inconsistent with Article 2.2 of the SCM Agreement.

V. The Final Determination in the Solar Panels Investigation Is Inconsistent with Articles 1, 2, and 14 of the SCM Agreement for the Same Reasons that the Preliminary Determination Was Found Inconsistent by the DSB

68. Before the Panel in the original proceeding, China challenged the USDOC's *preliminary* public body, input specificity, and benchmark determinations. The Panel concluded that the USDOC's preliminary public body determinations were inconsistent with Article 1.1(a)(1) of the SCM Agreement[59], and that the USDOC's preliminary input specificity determinations were inconsistent with Article 2.1(c).[60] On appeal, the Appellate Body found that the USDOC's preliminary benchmark distortion determination was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.[61]

69. China considers that the USDOC's *final* determination in *Solar Panels* is a measure "taken to comply" under Article 21.5 of the DSU. China believes that the USDOC's final public body, input specificity, and benchmark determinations are inconsistent with the aforementioned provisions of the SCM Agreement for the same reasons identified by the Panel and the Appellate Body in relation to the preliminary determinations. Accordingly, China believes that the Panel should conclude that the USDOC's final determinations in the *Solar Panels* investigation with regard to public body, input specificity, and benchmark distortion are inconsistent with the SCM Agreement.

VI. The United States Has Failed to Bring Itself into Conformity with the SCM Agreement in Respect of Subsequent Administrative Reviews, Sunset Reviews, and the Ongoing Conduct of Assessing and Collecting Countervailing Duties and Cash Deposits Under the Countervailing Duty Orders at Issue

70. The United States has failed to bring itself into conformity with its obligations under the SCM Agreement by continuing to issue administrative reviews and sunset reviews under the countervailing duty orders at issue in the original dispute, in each instance applying erroneous legal standards which serve as a basis for the continued assessment and collection of countervailing duties subsequent to the expiration of the RPT.

71. The subsequent administrative and sunset reviews fall within this Panel's terms of reference under Article 21.5 of the DSU because they have a sufficiently close nexus, in terms of *nature, effects and timing*, to both the DSB recommendations and rulings and to the Section 129 determinations which constitute the "declared" measures taken to comply.

72. More specifically, the use of unlawful legal standards in successive public body, benefit, and specificity determinations under the same CVD order provides a sufficiently close link, in terms of *nature* or subject matter, between the DSB recommendations and rulings, the subsequent reviews, and the Section 129 determinations. Similarly, the unlawful inclusion of the improperly initiated export restraint subsidies in the calculation of the "all others" rate in successive determinations

[57] Preliminary Land Specificity Determination, p. 12 (CHI-24).
[58] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 378 and 413.
[59] See Panel Report, paras. 7.75, 8.1(i).
[60] See Panel Report, paras. 7.257, 8.1(v).
[61] See Appellate Body Report, paras. 4.97, 5.1(b).

under the *Magnesia Bricks* order provides a sufficiently close link, in terms of *nature* or subject matter, between the DSB recommendations and rulings, those subsequent reviews, and the Section 129 determination in that countervailing duty order.

73. In terms of *effects*, each of the subsequent administrative reviews at issue in this dispute has generated countervailing duty rates and cash deposit rates that replaced the effects of those determinations found to be WTO-inconsistent in the original dispute, or the effects of the Section 129 determinations. Similarly, the sunset reviews at issue have the same effects as the immediately preceding review determination, and the superseding Section 129 determinations, as a basis for the continued imposition of unlawful countervailing duties under the same CVD order.

74. Finally, each successive review is closely linked, in terms of *timing*, to the immediately preceding review, to the original countervailing duty determination, or to the Section 129 determination that it superseded. In this regard, the United States is incorrect that measures pre-dating the end of the RPT or measures post-dating panel establishment are outside this Panel's terms of reference, because both categories of measures may have a bearing on whether the United States achieved substantive compliance by the end of the RPT.[62]

75. On substance, the subsequent reviews at issue constitute a failure by the United States to bring itself into conformity with the covered agreements by the end of the RPT because they continue to reflect legal standards that are inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3 and 14(d) of the SCM Agreement, and because they result in the assessment and collection of countervailing duties and cash deposits in a manner inconsistent with Articles 19.1, 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.

76. Finally, the subsequent administrative reviews, sunset reviews, and Section 129 determinations challenged by China in these proceedings demonstrate that the continued and systematic application of erroneous legal standards in a string of successive determinations leading to the continued assessment and collection of countervailing duties under the CVD orders at issue constitutes "ongoing conduct" that is separately challengeable in WTO dispute settlement proceedings.

77. Such "ongoing conduct" is not only a measure susceptible to challenge in WTO dispute settlement, but also a measure that falls within this Panel's terms of reference under Article 21.5 of the DSU, given the pervasive links that it has, in terms of nature, effects and timing, to both the DSB recommendations and rulings and to the declared measures taken to comply. In this regard, the United States is incorrect that the ongoing conduct challenged by China had not materialized at the time of Panel establishment or constitutes "future" conduct. To the contrary, the subsequent administrative reviews, sunset reviews, and Section 129 determinations challenged by China in these proceedings demonstrate that the United States has systematically applied the unlawful public body, benefit, and specificity legal standards in successive determinations made in each countervailing duty order at issue, leading to the continued imposition of unlawful countervailing duties and/or cash deposits under those orders. Similarly, the subsequent reviews in *Magnesia Bricks* demonstrate that the USDOC systematically included improperly initiated export restraint subsidies in the "adverse facts available" rates in a string of successive determinations issued under that CVD order. This evidence unquestionably demonstrates that the application of these unlawful legal standards in successive determinations under the CVD orders at issue constitutes "conduct that is currently taking place and is likely to continue in the future."[63]

78. The United States is also incorrect in stating that the countervailing duty determinations at issue are more complex and fact-specific than the determinations at issue in *US – Continued Zeroing*. In fact, the subsequent reviews at issue demonstrate that the application of unlawful legal standards by the USDOC does not depend on the underlying facts in the administrative record of the investigation, or on the degree of cooperation by the respondents. To the contrary, the application of unlawful legal standards is the unchanged component in each subsequent review at issue, and the only aspect which the United States purportedly attempted to modify in the Section 129 determinations.

[62] China's second written submission, paras. 231 and 236 (quoting Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122.

[63] China's second written submission, para. 258 (quoting Appellate Body Report, *Argentina – Import Measures*, para. 5.144, in turn quoting Panel Report, *US – Orange Juice (Brazil)*, para. 7.175).

79. For the reasons articulated above, the continued and systematic application of erroneous legal standards in a string of connected and successive determinations leading to the assessment and collection of countervailing duties under the CVD orders at issue constitutes "ongoing conduct" that is inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement. Such ongoing conduct is also inconsistent with Articles 19.1, 19.3, 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it results in the United States levying countervailing duties and cash deposits in excess of the amount of subsidization.

ANNEX C

ARGUMENTS OF THE UNITED STATES OF AMERICA

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

21 June 2017

I. INTRODUCTION

1. To bring the United States into compliance with the recommendations of the Dispute Settlement Body ("DSB") with respect to "as applied" findings made by the original Panel and the Appellate Body, the U.S. Department of Commerce ("USDOC") conducted proceedings pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 proceedings"), in which the USDOC made and published revised determinations.

2. China erroneously claims that the United States has failed to comply with the recommendations and rulings adopted by the DSB in this dispute. China also attempts to expand the proper scope of this compliance proceeding by challenging purported measures that are not measures taken to comply subject to review by this Panel. The Panel's objective assessment of the matter is not assisted when, as the United States has identified in its submissions, China mischaracterizes the determinations of the USDOC; or distorts the arguments made by the United States in this compliance proceeding and in other disputes; or misstates the findings of the Appellate Body in prior reports. China's approach to this compliance proceeding places additional burdens on the Panel to sort through the accuracy of China's assertions and arguments before it can even begin to evaluate their merits. This is not an efficient use of the resources of the WTO dispute settlement system, which is under serious stress.

3. On the substance, China has failed to propose interpretations of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that would accord with the customary rules of interpretation of public international law, and China has failed to acknowledge the extensive analysis and ample record evidence that support the USDOC's determinations in the section 129 proceedings at issue here. The United States has demonstrated that it has implemented the recommendations of the DSB and brought its measures into conformity with the SCM Agreement. The Panel therefore should reject China's claims.

II. CHINA'S ARGUMENTS CONCERNING ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT LACK MERIT

A. The United States Has Complied with the DSB's Recommendations Concerning the "As Applied" Findings with Respect to Public Bodies

4. China wrongly argues that the USDOC's public body determinations in the section 129 proceedings at issue here do not bring the United States into compliance with U.S. obligations under the SCM Agreement. China's argument is premised on a novel, flawed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Furthermore, China asks the Panel to ignore the massive amount of record evidence that the USDOC collected and analyzed, which provides ample support for the USDOC's public body determinations. China's arguments are utterly without merit.

1. China's Interpretive Arguments Lack Merit

5. The novel interpretation of the term "public body" that China proposes fails to take into account the interpretive findings of the original Panel and reflects a misreading of the original panel report and relevant Appellate Body reports. Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") instructs a panel to evaluate "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. In effect, Article 21.5 takes the underlying panel findings, as modified by the Appellate Body, as a given. In the guise of a new interpretive argument, China is re-arguing an excessively narrow approach to the legal interpretation of the term "public body" that was rejected by the original Panel.

6. The original Panel understood that "the critical consideration in identifying a public body is the question of authority to perform governmental functions," and "[t]herefore, 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."

7. China argues, in effect, that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser, is a government function, and that engaging in that activity is consistent with the government's objectives. China denies that its position is that the government function and the conduct under Article 1.1(a)(1) must be the same, but China's arguments belie its assertion. China's proposed approach to the public body analysis is untenable and entirely at odds with findings in prior reports.

8. Rather than focusing on the conduct undertaken by the entity, the Appellate Body has emphasized that the focus of the public body analysis is on the "evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense." China, with its focus on the particular "*conduct* that is the subject of the financial contribution inquiry," appears to suggest that an entity may be deemed a public body only when the entity is "*exercising*" governmental authority. That is contrary to the Appellate Body's findings, under which an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue.

9. Again and again, the Appellate Body has emphasized the relevance of the "core features of the entity and its relationship to the government in the narrow sense," as opposed to a focus on the particular conduct in which the entity is engaged. Contrary to the narrow focus on the conduct of the entity in question that China now proposes, when the Appellate Body has provided guidance concerning the public body analysis, it consistently has called for a wider-ranging examination of a variety of kinds of evidence, which the Appellate Body has explained is "bound to differ from entity to entity, State to State, and case to case."

10. China misreads the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report. Rather than focusing its review narrowly on evidence and analysis relating to the conduct of the SOCBs when they were making particular loans, the Appellate Body observed that the USDOC had "discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions." The evidence that SOCBs were meaningfully controlled in the exercise of their functions was "include[ed]" in the broader discussion of evidence relating to the relationship between the SOCBs and the Chinese Government.

11. China's argument that the "conduct" of the entity is the proper focus of the *public body* analysis also does not accord with the Appellate Body's explanation that a focus on the conduct of an entity is more relevant when examining a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement. The troubling implication of China's new proposed interpretation is that there would be no need for a public body category at all in Article 1.1(a)(1), which is inconsistent with the principle of effectiveness and thus contrary to the customary rules of interpretation.

12. The United States also has demonstrated that China's arguments related to the object and purpose of the SCM Agreement and the relevance to the Panel's interpretative analysis of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") are at odds with Appellate Body guidance and lack merit.

2. The USDOC's Public Body Determinations in the Section 129 Public Proceedings Comply with the Recommendations of the DSB and Are Not Inconsistent with Article 1.1(a)(1) of the SCM Agreement

13. The original Panel explained that "simple ownership or control by a government of an entity is not sufficient" to establish that an entity is a public body. "A further inquiry is needed." Such a "further inquiry" is precisely what the USDOC undertook in the section 129 proceedings.

14. China attempts to support its arguments by focusing narrowly on individual documents on the record of the section 129 proceedings, but the USDOC's determinations were based on the totality of the evidence on the record. The Appellate Body has found previously that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the totality of the evidence, how the interaction of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."

15. The USDOC's public body determinations are set forth and explained in a preliminary determination and a final determination that the USDOC produced as part of the section 129 proceedings, as well as in memoranda analyzing public bodies in China (the Public Bodies Memorandum) and discussing the relevance of the Chinese Communist Party ("CCP") to the public body analysis (the CCP Memorandum). All of these documents, read together, present the USDOC's analysis and explanation underlying its public body determinations. The USDOC's public body determinations are based on analysis and explanation that, altogether, spans more than 90 pages, and in turn that analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record, as well as the USDOC's consideration of information and arguments submitted by the Government of China ("GOC") and other interested parties.

16. The USDOC examined the functions or conduct that are of a kind ordinarily classified as governmental in the legal order of China, the role played by the CCP in China's system of governance, and the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority. The USDOC requested information from the GOC about the relevant input providers in the section 129 proceedings and considered the information the GOC provided or failed to provide. The USDOC addressed the GOC's arguments in the Public Bodies Final Determination in the section 129 proceedings. Ultimately, the USDOC "concluded that certain categories of state-invested enterprises (SIEs) in China properly are considered to be public bodies for the purposes of the United States CVD law, and other categories of enterprises in China may be considered public bodies under certain circumstances."

17. The USDOC's public body determinations were reasoned and adequate and included extensive analysis and explanation; they were based on the totality of the evidence on the record; and they were supported by ample record evidence of the "core features" of the entities in question and their "relationship to the government," which establishes that the entities possess, exercise, or are vested with governmental authority to perform governmental functions in China. It is clear on the face of the USDOC's determinations that the USDOC properly applied the correct interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

3. China's Arguments Against the USDOC's Public Body Determinations in the Section 129 Proceedings Lack Merit

18. China's arguments against the USDOC's public body determinations fail because they are all premised on China's new proposed interpretation of the term "public body," which the United States has shown is legally erroneous and does not accord with findings in prior reports.

19. China's arguments also are unfounded. China argues that the USDOC is required "to undertake a new analysis for each countervailing duty investigation" and further contends that the USDOC failed to "engage in a case-by-case analysis." In fact, the USDOC requested from the GOC entity-specific information about the relevant input providers in each of the section 129 proceedings, but the GOC refused to provide much of the requested information. Specifically, in seven of the twelve section 129 proceedings (*Lawn Groomers, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions,* and *Solar Panels*), the GOC completely failed to cooperate and respond to the USDOC's request for information. In the remaining five proceedings (*Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG,* and *Steel Cylinders*), the GOC only partially responded to the USDOC's request. As a result of the GOC's non-cooperation, the USDOC relied upon the facts that were available on the record, that is, the Public Bodies Memorandum and the CCP Memorandum, which present pertinent analysis and explanation relating to the government and economic system of China. Such analysis and explanation is relevant in a countervailing duty investigation involving allegations that an input provider in China is a public body, particularly where the GOC fails to cooperate and provide the requested entity-specific information.

20. China contends that "the GOC provided extensive evidence" to the USDOC and the USDOC "ignored" that evidence. This is untrue. Rather than failing to evaluate the evidence submitted by the GOC, and far from rejecting or discounting that evidence, the USDOC actually discussed that evidence at length and the USDOC relied on the evidence for its conclusions.

21. China asserts that "[t]he USDOC provided no … 'reasoned and adequate explanation' on the face of its published determinations, much less address 'alternative explanations that could reasonably be drawn from the evidence'." As the Panel will see for itself when it examines the USDOC's preliminary and final determinations and the Public Bodies Memorandum and the CCP Memorandum, China's assertion is absurd.

4. Even under China's New, Flawed Proposed Interpretation of the Term "Public Body," the USDOC's Section 129 Public Body Determinations that Were Based on the Facts Otherwise Available Are Not Inconsistent with the SCM Agreement

22. The USDOC requested from the GOC entity-specific information that would be relevant even under China's new proposed interpretation of the term "public body." However, as discussed above, in seven of the twelve section 129 proceedings, the GOC simply refused to respond to the USDOC's request for information. In the remaining five section 129 proceedings, the GOC, while providing responses to some questions, did not provide the entity-specific information requested by the USDOC. Thus, the GOC deprived the USDOC of the kind of entity-specific evidence contemplated by China's new proposed interpretation. Accordingly, the USDOC's determinations justifiably would have been based on facts available and an adverse inference in selecting from the facts available, as they, in fact, were.

23. Nevertheless, even under China's new proposed interpretation of the term "public body," the USDOC provided a reasoned and adequate explanation, which was supported by ample record evidence, and the analysis, explanation, reasoning, and conclusions in the USDOC's facts available determinations would be equally relevant under China's new proposed interpretation of the term "public body." Accordingly, the USDOC's discussion and the evidence underlying it was probative of and supported a public body determination even under China's proposed interpretation.

B. China's "As Such" Claim Concerning the Public Bodies Memorandum Fails

24. China's claim that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement fails for a number of reasons.

25. First, China cannot bring a challenge against the Public Bodies Memorandum within the scope of this Article 21.5 compliance proceeding because the memorandum is not a measure taken to comply in this dispute. The Public Bodies Memorandum was published in connection with measures taken to comply with the DSB's recommendations and rulings in an entirely different, earlier dispute. Article 21.5 of the DSU does not permit the kind of lateral challenge China attempts. Additionally, the Public Bodies Memorandum was published prior to the commencement of this dispute. China could have challenged the memorandum in the original proceeding, but it opted not to do so. Thus, the Public Bodies Memorandum is outside the scope of this Article 21.5 compliance proceeding.

26. Second, the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement, as confirmed when viewed in light of the analysis applied in other reports. Applying the same analysis to the Public Bodies Memorandum that the original Panel applied to the Kitchen Shelving policy reveals striking contrasts and supports the conclusion that the Public Bodies Memorandum is not "a measure susceptible to WTO dispute settlement." China makes unfounded assertions but points to no language suggesting that the USDOC intended in the Public Bodies Memorandum to describe an "approach," "policy," "long standing practice," or "methodology."

27. The Public Bodies Memorandum, on its face, does not purport to establish or describe a legal standard adopted or applied by the USDOC. Indeed, the Public Bodies Memorandum expressly states that the USDOC was not announcing through the issuance of the memorandum an approach that would be applied in every countervailing duty proceeding. The USDOC, in the Public Bodies Memorandum, presented extensive analysis and explanation and came to certain conclusions after examining voluminous evidence relating to the government and economic system of China. The

analysis, explanation, and evidence in the Public Bodies Memorandum relates to China in general; it may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving China. The USDOC's decisions to incorporate by reference and rely on the Public Bodies Memorandum − and the evidence to which it refers − in subsequent countervailing duty proceedings that also involved products from China did not, after the fact, confer on the Public Bodies Memorandum a status as a "measure" for which there is no support in the text of the Public Bodies Memorandum itself.

28. The Public Bodies Memorandum is not "mandatory" as it does not have any legal effect upon the USDOC. The Public Bodies Memorandum does not, on its face, even purport to set forth an "internal policy." The Public Bodies Memorandum does not describe any rebuttable presumptions, nor any other policy.

29. Third, China argues that the Public Bodies Memorandum prescribes future conduct but China makes no attempt to "clearly establish, through arguments and supporting evidence," that the Public Bodies Memorandum is a rule or norm that has general and prospective application. Instead, China offers bare assertions without even pointing to any language in the memorandum.

30. The Public Bodies Memorandum does not announce a "policy" in a "declaratory style." At most, all that is before the Panel now is "simple repetition." That is, the USDOC has, on a number of occasions, decided to put the Public Bodies Memorandum − and all of the evidence to which it refers − on the administrative records of countervailing duty proceedings involving products from China. That is entirely appropriate given that the underlying facts regarding China's government and economic system are the same in all of those countervailing duty proceedings. In light of China's refusal to provide requested information to the USDOC in many countervailing duty proceedings, it is not surprising that the USDOC has put the Public Bodies Memorandum and supporting information on the record of subsequent countervailing duty proceedings to provide relevant facts for its determinations.

31. Fourth, and finally, China's claim fails because the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement. The Public Bodies Memorandum, by its terms, neither "obliges" the USDOC to do anything nor "restricts" the USDOC from doing anything. The Public Bodies Memorandum does not require the USDOC to reach any WTO-inconsistent determination. Rather, to the extent the USDOC places the Public Bodies Memorandum and supporting evidence onto the record of a countervailing duty proceeding, the USDOC in that proceeding would determine what significance to give to the findings in the Public Bodies Memorandum in the context of making its determination in that proceeding.

III. CHINA'S CLAIMS REGARDING BENCHMARKS LACK MERIT

32. China erroneously claims that Article 14(d) of the SCM Agreement does not permit the use of alternative benchmarks − even where prices are distorted in the country of provision − unless the government is a monopoly provider or relies exclusively on a "price-setting mechanism" to control the marketplace. But recourse to an alternative benchmark for the benefit analysis under Article 14(d) is warranted once an investigating authority has established and explained that in-country prices are not market-determined.

33. China has failed to refute the comprehensive evidence that "systemic and pervasive government intervention . . . diminishes the impact of market signals," limits private enterprise to a "subordinate" role, and results in a persistent imbalance between supply and demand. The USDOC fully explained that prices in the domestic market for steel and polysilicon inputs are not properly described as market-determined; they are distorted by virtue of the GOC's policy interventions and a number of other factors. In light of this, the USDOC determined that the relevant input prices "are not based on market conditions within the meaning of Article 14(d) of the SCM Agreement and, as result . . . are inappropriate to use as benchmarks to determine the adequacy of remuneration." This is consistent with the recommendations of the DSB.

A. Article 14(d) Permits the Use of External Benchmarks

34. Article 14(d) provides that the adequacy of remuneration for government-provided goods or services "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase." In the Appellate Body's words, a "proper finding"

that "recourse to an alternative benchmark is justified requires an investigating authority to properly evaluate whether the proposed benchmark prices are market determined or distorted by governmental intervention."

35. The use or rejection of in-country prices is not a question of whether there are no "market conditions" or market forces, but rather a question of whether the market conditions allow for the use of an in-country benchmark or call for the use of an out-of-country benchmark. Here, the USDOC found that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"

36. In *US – Carbon Steel (India)*, the Appellate Body defined "prevailing market conditions" as consisting of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices." Further, in *EC – Large Civil Aircraft (AB)*, the Appellate Body clarified that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."

37. The USDOC conducted a market analysis and found that the requisite "market conditions" do not exist in China's steel and polysilicon sectors, as the Appellate Body has defined the term. Applying the standard articulated by the Appellate Body does not require a finding that there are *no* other types of market conditions that exist in a particular sector, or that prices for the good in question are wholly unresponsive to external market forces.

38. An interpretation of Article 14(d) that requires the total absence of *any* market conditions would effectively equate to a situation where, through government regulation or administrative fiat, the price for the good in question is set by the government. Although this is one situation identified by the Appellate Body in which domestic prices can be disregarded for the benefit analysis under Article 14(d), it is not a determination that is required for other situations where, as here, pervasive government intervention in the sector is determined to distort prices for the good in question.

39. China misreads the Appellate Body findings in prior disputes when it argues that the distortions evaluated in those disputes are the only types of distortions that would call for the use of out-of-country benchmarks. Simply because the Appellate Body has not previously considered the type of pervasive distortions at issue here does not support the conclusion that those distortions are irrelevant to the benchmark selection analysis. Indeed, in *US – Softwood Lumber IV*, for example, the Appellate Body cautioned that its findings were "expressly limited to considering only the situation of government predominance in the market as a provider of goods *because it was 'the only one raised on appeal*.'" The Appellate Body stated explicitly that it was not *"foreclosing the possibility* that there could be situations other than price distortion due to government predominance as a provider in the market, in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark."

40. Nor is there anything in the Appellate Body's prior reports that suggests – as China asserts – that there should be an arbitrary line between prices that are "effectively determined" by a government and prices that are distorted by the government's extensive interference in a sector (both as a supplier and otherwise). Moreover, the Appellate Body in this very dispute recognized that "what allows an investigating authority to reject in-country prices is *price distortion*." Because price distortion can exist in scenarios other than where the government has effectively set sector-wide prices, China's proposed reading of Article 14(d) would arbitrarily and incorrectly preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined.

41. The U.S. position in this dispute, by contrast, is grounded in the text of Article 14(d) as interpreted by the Appellate Body. In particular, in *US – Carbon Steel (India)*, the Appellate Body found that "prevailing market conditions" under Article 14(d) consist of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices." In *EC – Large Civil Aircraft*, the Appellate Body found that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to

pay. Rather, the equilibrium price established in the market results from a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market." Furthermore, under *EC − Large Civil Aircraft (AB)*, this equilibrium must result from the discipline enforced by an exchange reflective of *both* supply and demand.

42. In the section 129 proceedings, the USDOC applied this analytical framework to its evaluation of the record evidence. Based on consideration of the totality of the evidence, the USDOC concluded that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"

43. As USDOC found based on record evidence, China intervenes heavily in its steel and polysilicon sectors to achieve certain outcomes. The outcomes it achieves through these interventions are not consistent with or reflective of a market discipline between buyers and sellers. China has not even attempted to refute these facts. Instead, China proposes that authorities are limited in their investigation by a *per se* rule of China's own invention. China's *per se* rule, however, cannot be supported under any interpretation of the SCM Agreement. Rather, as the Appellate Body has stated, "[p]roposed in-country prices *will not be reflective of prevailing market conditions in the country of provision* when they deviate from a market-determined price *as a result of government intervention in the market*." The proper focus is on the distortion that occurs "as a result" of the intervention, not on whether the government intervention took a certain form.

44. China overlooks the fact that widespread government intervention in a particular sector can fundamentally distort market signals, regardless of whether that intervention comes in the form of direct control over prices or more general control over a company's internal business decisions. It is not necessary to demonstrate that prices have been *de jure* or *de facto* determined by the government to find that such prices are not market-determined for purposes of Article 14(d).

45. China's approach makes an arbitrary distinction between an investigating authority's ability to consider price distortion caused by *direct* government influence over pricing and price distortion caused *indirectly* by extensive government interference in a sector, including interference with the entities operating in that sector. China presents no basis in law or logic for the proposition that an authority is foreclosed from conducting a holistic analysis that takes account of all types of government interference. Further, China's position is inconsistent with the object and purpose of the SCM Agreement: if accepted, it would prevent WTO Members from fully offsetting the effects of an injurious subsidy by applying countervailing duties.

46. China's argument is based on the premise that the WTO Agreement must be construed so as to avoid any situation in which an authority (or dispute settlement panel) must conduct a close, case-by-case factual evaluation of a particular situation. But China presents no support for this premise. Indeed, many issues involving measures challenged under the WTO Agreement − such as trade remedy measures, or SPS measures, or measures subject to *de facto* national treatment claims − require a close factual analysis. China presents no basis for its argument that a WTO discipline must be governed by simplistic tests.

47. The Appellate Body has explained that: "the task of a panel [is] to assess whether the explanations provided by the authority are 'reasoned and adequate.'" The United States recalls that it is not the task of a panel task to evaluate the underlying evidence to make its own *de novo* findings, or to substitute its own judgment for that of the investigating authority. This type of evaluation, and the appropriate standard of review, is the same regardless of whether the issue under examination is relatively simple (such as that involving a straightforward mathematical operation), or relatively complex, such as that involving market distortion and the authority's choice of a benchmark. Accordingly, the central point in this dispute is whether the USDOC provided a reasoned and adequate explanation for its decision to employ out-of-country benchmarks in the particular proceedings at issue.

B. The USDOC Provided a Reasoned and Adequate Explanation

48. The USDOC's benchmark determinations in the subject proceedings are well reasoned and based on the totality of the available record evidence, which includes information provided by China, evidence of broad-based intervention within the relevant markets, and the demonstrated effects that the intervention has had on conditions in China's steel and polysilicon sectors. The USDOC's redeterminations rely upon extensive evidence from a variety of sources, including reports and research from independent multilateral institutions such as the OECD and the World Bank.

49. The USDOC identified a number of organizations and enterprises that serve as "instruments for policy implementation" and "legally require SIEs to act as instrumentalities of the state to carry out its policy goals and industrial plans rather than commercial, market-oriented outcomes." The USDOC concluded that SIEs are a "unique" kind of organization, and "are considered a potent mechanism for the government to implement national policies." The USDOC concluded that these policies, actors, and actions create a "critical nexus" of policy and ownership that is unique to China. The USDOC reasoned that the "degree and nature of the GOC interventions" is unlike the "governmental regulatory frameworks [that] affect commercial enterprises in most economies" and that "the institutional framework . . . creates a *milieu* in which SIE decision-making is insulated from the disciplines of market forces."

50. Through this "critical nexus" in the steel sector, China ensures that steel prices align with policy goals. The USDOC found that in practice, active government management and the "ensuing interference in [SIE] decision-making, result in the SIEs implementing state policy, which may require pursuing actions inconsistent with market disciplines and the firm's . . . market goals." This politicization of business decisions "necessarily removes" these businesses "from the principles of the market economy and competition." The USDOC concluded that prices flowing from those entities were not reflective of "market conditions," insofar as they do not result from the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers." The USDOC also found that domestic private prices in the steel sector are not reflective of market conditions, based not only upon evidence of the "significant market share" garnered by SIEs, but also broad-based governmental intervention in favor of the state share of the economy that "goes beyond that of ownership in assets or share of production" and that "distorts market signals for all participants in the sectors, just as surely as does the presence of monopoly market power." The USDOC also cited evidence that certain governmental interventions directly extended to private enterprises and affected their pricing, such as forced mergers and acquisitions and the presence of export taxes.

51. Price operates as a signal to convey the relative supply and demand. But when "government policies inflate supply (or otherwise distort choices by market participants that would affect their pricing), the price no longer corresponds with the information it should signal." The USDOC cited extensive evidence that in China's steel sector, China intervenes heavily to achieve certain outcomes in pursuit of desired policy goals, which are not consistent with or reflective of market disciplines between buyers and sellers. This heavy-handed intervention distorts choices by market participants, and has had the effect of inflating supply. Based on the totality of the evidence on the record, the prices at which steel goods are sold cannot fairly be viewed as "market prices."

52. With respect to *Solar Products*, the USDOC solicited detailed information but the GOC declined to respond. In the absence of market information needed to conduct further analysis, the USDOC relied on the facts available, *i.e.*, evidence of extensive Chinese governmental intervention at various levels in the polysilicon market, and the existence of export restraints that artificially depressed domestic prices for polysilicon. On this basis, the USDOC found that all domestic prices for polysilicon within China were distorted by governmental intervention and were, thus, not useable "market" benchmarks.

C. China's Arguments Have No Merit

53. Instead of engaging with the evidence, China argues that the USDOC should have taken a different approach. In China's view, the phrase "prevailing . . . conditions" in Article 14(d) means those conditions − seemingly in every possible situation, and regardless of the level of distortion − must be the conditions as affected by government policies and actions. This interpretation is untenable. If accepted, authorities would be required to ignore the existence of government-

created distortions in the marketplace. The fundamental issue, however, in determining whether to rely upon an out-of-country benchmark under Article 14(d) is, in fact, the existence of price distortion. And, because price distortion can arise due to government intervention, Article 14(d) cannot be read to preclude an investigating authority from addressing situations in which government action has rendered prices not market-determined. Indeed, the Appellate Body in *US − Carbon Steel (India) (AB)* confirmed as much, stating that "in-country prices will not be reflective of prevailing market conditions . . . when they deviate from a market-determined price as a result of government intervention in the market."

54. China also insists that the USDOC should have limited its assessment to an examination of prices themselves and ignored other evidence that is relevant to an evaluation of price distortion. This argument is not supportable. Nothing in the SCM Agreement dictates the specific mode of analysis that an authority must employ in conducting a benchmark analysis. Nor has the Appellate Body prescribed a certain approach. In fact, the Appellate Body in this dispute stated that the "specific type of analysis . . . will vary." The Appellate Body even described a number of approaches that might be employed, stating, for example, that "investigating authorities may have to examine the structure of the relevant market" or the "nature" of the entities operating in that market. The Appellate Body also made clear that what ultimately determines whether "recourse to an alternative benchmark is justified" depends not on the mode of analysis, but on "whether the proposed benchmark prices are market determined or distorted by governmental intervention."

55. Price validation exercises become problematic because systemic distortions resulting from pervasive state influence throughout China's economy may preclude any meaningful quantitative analysis of prices. Any "baseline" that could be calculated to compare input prices could be influenced by the same systemic distortions as the prices themselves. Moreover, it is not necessary to look at input prices to determine that excess supply (all else being equal) has the effect of suppressing prices for a particular product.

56. While nothing in the SCM Agreement supports China's insistence that a particular type of analysis is required, the "market power" approach that China advocates is fundamentally flawed. This approach presupposes that a government exercises market power exclusively through the economic behavior of state-owned suppliers. This, however, excludes from consideration the impact of legal and policy instruments that influence − and empower − state-invested enterprises. China's approach also depends on the assumption that state-invested enterprises operate as profit-seeking commercial actors. But this assumption is unfounded in a system where state-owned and politicized enterprises are used as tools of policy implementation and are insulated from competitive market pressures.

57. China's reliance on a certain private investments in the steel industry also is misplaced. Indeed, the USDOC's determinations were not premised on the lack of any private involvement in the sector. To the contrary, the USDOC based its determination on a thorough, holistic analysis of the sector, and found extensive evidence that the sector as a whole was distorted.

58. With respect to the *Solar Products* redetermination and the use of an external benchmark for polysilicon, the USDOC's findings were fully explained in the redetermination. In particular, the USDOC explained that China decided not to participate in the proceeding, and thereby refused to provide the requested information. In the absence of China's participation, the USDOC relied on multiple sources of evidence on the record, and reasonably found that the GOC intervened at various levels in the polysilicon market. China has done nothing to question the adequacy of the USDOC's explanation regarding the polysilicon market in China.

59. China encourages the Panel to disregard the USDOC's evidentiary findings. This is at odds with the appropriate standard of review. In the words of the original Panel in this dispute: "a panel reviewing a determination . . . based on the 'totality' of the evidence . . . must conduct its review on the same basis." Where "an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination." An analysis of the evidence in this dispute − when examined in light of the totality of the circumstances − demonstrates a probative and objective basis for the determination that the relevant prices in China are not market-determined. In each of the disputed proceedings, this analysis comports with Article 14(d).

IV. CHINA'S CLAIMS CONCERNING ARTICLE 32.1 OF THE SCM AGREEMENT LACK MERIT

60. China's claim under Article 32.1 that the USDOC's price distortion analysis somehow constitutes an impermissible specific action against subsidization has no merit. China has not articulated a cognizable claim nor has it identified the measure it seeks to challenge.

61. China's panel request asserts that the "benchmark determinations" in four of the section 129 proceedings are inconsistent with Article 32.1. Yet, in the course of this dispute, China's presentation of this issue has appeared in a variety of inconsistent formulations, each of which fails to identify the specific measure that China challenges. Nor has China identified any specific action against subsidization apart from the countervailing duty determinations themselves. Given that the imposition of countervailing duties is a permissible response to injurious subsidization, China has no basis for its Article 32.1 claim.

62. As an initial matter, China has failed to comply with the requirements of Article 6.2 of the DSU to "identify the specific measures at issue." Indeed, the measure that China is challenging has been unclear and has remained a moving target throughout the course of this Article 21.5 proceeding. In its panel request, China pointed to the "benchmark determinations." In its first written submission, China asserted that "the USDOC's *reliance on subsidies* allegedly provided to upstream steel producers . . . is unquestionably 'a specific action against a subsidy.'" But even within the same paragraph China also asserted that the "rejection of in-country benchmark prices" is a "measure" that acts against subsidization. China's second written submission further confuses its Article 32.1 claim because it identifies different "measures" as being at issue in this Article 21.5 proceeding.

63. Given these inconsistent (and underdeveloped or abandoned) descriptions of the "measure," which do not correspond to the "benchmark determinations" mentioned in its panel request, this Panel should reject China's claim because China failed to comply with Article 6.2 of the DSU by not identifying any of these alleged "measures at issue." As the Appellate Body has made clear, a party cannot expand a WTO dispute to include measures which were not included within its panel request. China is now impermissibly attempting to do so.

64. An Article 32.1 claim can only succeed if, *inter alia*, the action being challenged is not in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement. In this regard, a measure is in accordance with the GATT 1994, as interpreted by the SCM Agreement, if it is one of the four permissible responses to subsidization: i) definitive countervailing duties, ii) provisional measures, iii) undertakings, and iv) countermeasures. To the extent China is challenging the imposition of countervailing duties, China is improperly attempting to challenge one of the four permissible responses to subsidization in its Article 32.1 claim.

65. Further, China's arguments, in their entirety, are based on the unsupported premise that the USDOC's discussion of subsidies is a necessary and sufficient cause for the USDOC's finding of distortion. Crucially, China cannot and does not, establish that this premise is true. China's argument also requires an assumption that the benefit amount calculated by the USDOC regarding the subsidization of the downstream product bears a specific relationship to the distortion finding rather than, for example, the benchmark price that was used in each case. China has also failed to support this proposition.

66. Article 32.1 does not contemplate challenging intermediate analytical steps that take place when carrying out a CVD investigation. In particular, the Appellate Body in *US – Softwood Lumber IV* and in other reports has recognized that calculating a benefit and using out-of-country benchmarks to do so is consistent with the obligations of the SCM Agreement.

67. The USDOC's analysis of China's steel sector discussed many aspects of government intervention; this analysis cannot be considered an "action" taken by the United States. The only "action" here – as China recognized during the Panel meeting – is the imposition of countervailing duties. Moreover, the USDOC's analysis of China's steel sector does not contain an "upstream subsidy analysis" as China has suggested. The USDOC's analysis likewise does not have an adverse bearing on subsidies provided to upstream producers and thus does not result in an implicit upstream subsidy determination, as China claims. The use or rejection of in-country prices

only bears on the measurement of the adequacy of remuneration for the subsidies being investigated.

V. CHINA'S CLAIMS CONCERNING ARTICLE 2.1(C) OF THE SCM AGREEMENT LACK MERIT

68. With respect to the USDOC's findings that the provision of material inputs for less than adequate remuneration was *de facto* specific, the United States has taken all steps necessary to bring its determinations into compliance with Article 2.1(c). The USDOC identified the subsidies at issue and the systematic series of actions pursuant to which those subsidies were provided. In doing so, the USDOC properly took account of the length of time the relevant programs have been in operation. The USDOC sought information for each subsidy program under investigation. The USDOC reviewed record evidence confirming how the subsidies were provided to a limited number of recipients over time. In each case, the USDOC provided a reasonable and adequate explanation of its determination that the systematic provision of inputs was *de facto* specific.

69. For each of the inputs at issue, the USDOC identified a series of systematic activities that demonstrate the existence of a subsidy program. The USDOC determined, "[o]n the basis of case specific input purchase information, which was reported to the Department in the 12 CVD investigations and compiled in the Department's Inputs Memorandum," that "there is adequate evidence in each of the 12 CVD investigations that public bodies systematically provided stainless steel coil, hot-rolled steel, wire rod, steel rounds, caustic soda, green tubes, primary aluminum, seamless tubes, standard commodity steel billets and blooms, polysilicon, and coking coal for LTAR to producers in the PRC."

70. Given that the subsidies at issue appeared to be provided to a limited number of producers, the USDOC considered whether this limitation might simply reflect that the subsidy programs were only recently introduced (should that be the case). The USDOC explained that it "interprets the criterion concerning the duration of a subsidy program to mean that where a new subsidy program is recently introduced, it is unreasonable to expect that use of the subsidy will spread throughout the economy in question instantaneously." Therefore, to determine whether the limited number of recipients related to the duration of the subsidies in each investigation, the USDOC requested that the GOC explain for each input at issue (1) "how long SOEs have been producing and selling the input in the PRC," (2) "how long the input has been produced in the PRC," and (3) "how long the input has been consumed in the PRC."

71. Based upon China's response, the USDOC found that, "at the latest, SOEs were producing and providing the inputs at issue in the five proceedings in which the GOC provided responses within the geographic location of China by 1957." The USDOC further explained that "for those subsidies at issue, we have preliminarily determined that the subsidy program has not been in operation 'for a limited period of time only' and, therefore, the length of time in which the subsidy program has been in operation does not change the Department's determination that the input LTAR programs in each of those cases were *de facto* specific." In other words, the limited number of recipients did not result from a limited duration of the subsidies at issue.

72. China argues that the fact that Chinese SOEs have produced and sold a particular input over a period of time does not constitute evidence that those inputs have been sold *for less than adequate remuneration* over that period of time. China's argument, however, fundamentally misunderstands the inquiry at issue in the last sentence of Article 2.1(c) of the SCM Agreement. That provision requires that the USDOC take account of "the length of time that the subsidy programme has been in operation," where, as the Appellate Body has explained, the term "subsidy programme" "refers to *a plan or scheme* regarding the subsidy at issue." That plan or scheme, *i.e.*, the "programme," "may . . . be *evidenced by* a systematic series of actions *pursuant to which* financial contributions that confer a benefit have been provided to certain enterprises," but that is not to say that each of these actions would need to meet the definition of a "subsidy" under Article 1 of the SCM Agreement.

73. China misunderstands where the "subsidy program" element fits into the overall subsidization analysis. The identification of a subsidy requires three separate elements: a finding of a (1) financial contribution that (2) confers a benefit and (3) the subsidy is specific. As the Appellate Body stated, "the *existence* of a subsidy is to be analysed under Article 1.1 of the

SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."

74. As one component of a *de facto* specificity analysis involving the provision of inputs, an authority may identify a program involving the *repeated provisions* of inputs over the relevant period. The repeated provision of inputs need not consist exclusively of *subsidized* inputs. Thus, China is wrong in asserting that the program must consist only of activities that have been definitively identified as subsidies. Rather, the relevant inquiry is the existence of repeated instances in which inputs were provided as the result of some sort of planned series of activities or events, which is evidence of the series of actions or activity that constitutes a program.

75. China's argument is based on an incorrect reading of Appellate Body decisions − one that ignores the substance of Articles 1 and 2 of the SCM Agreement and offers no basis upon which to undermine the USDOC's specificity findings. China cannot credibly claim that the subsidies at issue were provided to an unlimited number of users or were made widely available outside the identified industries.

76. China demonstrates a misunderstanding of Articles 1 and 2 of the SCM Agreement by asserting that "[a] 'subsidy programme' is a programme of subsidies." The Appellate Body expressly stated that the subsidy program is an action or series of actions pursuant to which the subsidy in question is provided. China suggests that the elements of a subsidy must be present in each of the actions that constitute a program, but as we have explained, the identification of a subsidy and its elements is separate from the determination of whether that subsidy is specific. The question of specificity speaks to whether there is a limitation on access to the subsidy and not whether a subsidy has been provided historically as well. Here, that limitation is evident in the number of recipients. The SCM Agreement does not provide that an additional finding of *historical* subsidization is required.

VI. CHINA'S CLAIMS CONCERNING ARTICLE 2.2 LACK MERIT

77. With respect to the land specificity determination in *Thermal Paper* − one of the section 129 proceedings in which China declined to participate − the USDOC had only limited evidence regarding "preferential treatment" in land-use rights because China refused to provide requested information. The USDOC properly relied on the available evidence; namely, a statement that the respondent received preferential treatment. The USDOC found that statement probative and tending to support a determination that that respondent received preferential treatment within the zone. When the USDOC sought to further examine the issue during the section 129 proceeding, China failed to provide requested information. China repeatedly mischaracterizes the USDOC's determination. The USDOC properly determined that the land at issue was provided pursuant to a "distinct land regime" and is therefore specific.

78. The original Panel found that a firm's presence in a zone was not enough to establish that the subsidy was provided to limited recipients. Rather, the Panel found that there must also be some "finding that the provision of land within the park or zone is distinct from the provision of land outside the park or zone." The Panel observed that the USDOC's original determinations would have been adequately supported if USDOC had established that "the conditions for the provision of land within the ... zone were different from and preferential to the conditions outside the ... zone, in terms of special rules or distinctive pricing." In the redeterminations at issue, the USDOC thus considered whether the provision of land within the park or zone is distinct from the provision of land outside the park or zone, and whether the conditions for the provision of land within the zone are different from and preferential to the conditions outside the zone.

79. At issue was the 2005 purchase of granted land-use rights by the respondent, Guangdong Guanhao High-Tech Co., Ltd. (GG), located in the Zhanjiang Economic and Technological Development Zone (ZETD Zone). With respect to GG's purchase of land-use rights in the ZETD Zone, the USDOC requested that China provide information about whether a "distinct land regime" existed, "*e.g.*, whether the prices or terms of sale, including other incentives tied to the purchase of the land inside the geographic region at issue, are different from those offered outside of the geographic region." If such differences were found, the USDOC explained, this would serve as the basis for finding regional specificity. The USDOC's analytical approach is consistent with the DSB's recommendations because, just as the Panel suggested, it evaluates whether the conditions on which land was sold inside a zone were distinct from those outside the zone.

80. China argues that the USDOC based its determination on a misplaced interpretation of the term "preferential treatment" in a government-issued land appraisal. These claims are predicated on China's misunderstanding of the USDOC's determination and a misreading of the record. The USDOC's determination relied on the facts available from the original investigation because China declined to respond to the USDOC's requests for information pertaining to land. Without this information, the USDOC found that it was unable to fully investigate certain aspects of the provision of land at issue. The investigation record indicates that the land appraisal issued to the respondent refers to "preferential treatment," but beyond this observation the USDOC was unable to further examine the exact terms of that "preferential treatment."

81. Company officials in their comparison appraisal report indicated that the government's preferential policies resulted in an "appraisal price . . . of a particular nature," which suggests that the "preferential treatment" at issue affected pricing. The verification report also explains that the USDOC examined an appraisal for land outside of the ZETD Zone, but could not reach a resolution as to whether it presented comparable terms. Thus, the USDOC relied on this evidence of "preferential treatment" as it constituted the facts available and found that that the GOC sold the land in question to the respondent at a price and at terms that were not available to other firms, *i.e.*, firm located outside of the ZETD Zone. The record does not contain any evidence additional to the comparison appraisal from the original investigation upon which the USDOC could have relied. China had the opportunity to provide additional information, but China declined to cooperate in this proceeding.

VII. THE PANEL SHOULD REJECT CHINA'S CHALLENGE TO COMPLETED OR FUTURE REVIEWS OR SO-CALLED "ONGOING CONDUCT"

82. China seeks to expand the scope of this Article 21.5 proceeding beyond the existence or consistency of measures taken to comply with the DSB's recommendations, asserting that the Panel's terms of reference include certain additional proceedings and so-called ongoing conduct that should be adjudicated in this proceeding. China's attempt to expand the scope of U.S. implementation obligations has no basis in the DSU, and China's claims against alleged "subsequent closely connected measures" are invalid for several reasons.

83. China has failed to make out its claims or a *prima facie* case with respect to the additional reviews, sunset reviews and so-called "ongoing conduct." China's "claims" consist of little more than a list of proceedings without the evidence or argument to satisfy its burden as the complaining party. China has failed to meet its burden of argument with respect to any of these claims. These additional reviews and sunset determinations are not sufficiently closely connected because they do not, as China claims, consist of simply applying "the same" or "equally unlawful legal standards." Rather, they consist of fact-intensive determinations that in each case depend on the evidence and circumstances of the proceeding.

84. China has also not demonstrated that these subsequent proceedings are closely connected because it has not established the facts and circumstances of each of the additional proceedings. Although China refers the Panel to excerpts from each of the subsequent determinations, China neglects to provide the necessary analysis that would be required to make conclusions about the investigating authority's reasoning or evidence in each case. As the Appellate Body observed in *US – Gambling*, a claim necessarily must fail if the complaining Member does not make a *prima facie* case, and moreover, it would be legal error for a panel to make the *prima facie* case for a complaining Member.

85. The Panel should likewise reject China's attempt to expand the terms of reference to include these past proceedings given China's failure to put forth a *prima facie* case that the findings and analysis in subsequent proceedings are "closely connected" to the measures taken to comply. The United States emphasizes that the question of whether subsequent reviews are "related in nature" is not the applicable threshold for determining whether a "particularly close relationship" or "sufficiently close nexus" exists in connection with the measures taken to comply. Rather, China's claim depends on two questions: (1) whether the challenged measure existed at the time of panel establishment, and (2) whether it is closely connected with a measure taken to comply. Here, the answer to both questions is "no," and thus China's claims fail.

86. The first question − whether the measure exists at the time of panel establishment − is fundamental to any WTO proceeding. A complaining party may wish to cover measures that may be adopted in the future, but the DSU does not contemplate such an approach. To do so would require a panel to chase after a moving target and the panel process could not function effectively if that were the case. The only exception is in the case of a measure with the "same essence," which is not the case in this dispute.

87. With respect to the second question, a measure that exists at the time of panel establishment − even if not labeled as a compliance measure − may fall within the terms of reference of a compliance proceeding under Article 21.5 as a "measure taken to comply" by virtue of its "particularly close relationship" or "sufficiently close nexus" to a compliance measure. "Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures."

88. China's core argument is that the subsequent reviews are related in nature because they are related to the same countervailing duty orders. However, the mere fact that the reviews are related to the same order is insufficient to establish that the determinations made therein have the same nature such that the reviews have a "particularly close relationship" or "sufficiently close nexus" with the section 129 proceedings at issue in this dispute. Rather, it would be necessary to establish that the nature of the analyses and individual findings within each review are of the same nature. Here, China has failed to do so. The nature of the findings made in the challenged subsequent reviews vary according to the facts of each given proceeding, the time period at issue, the sequence of questionnaires issued and responses provided, and the analysis of the evidence in each case.

89. Despite China's attempts to liken the question before the Panel in this dispute to the question of zeroing, China has not demonstrated − or even provided a plausible explanation − that the *nature* of the inconsistencies found in the original determinations can be found in the subsequent proceedings. When the Appellate Body discussed the nature of related proceedings in the zeroing context, the Appellate Body recognized the fact that several DSB findings had already established the existence of an "as such" measure. The Appellate Body's decisions in *US − Zeroing (Japan) (Article 21.5 − Japan)* (and in *US − Zeroing (EC) (Article 21.5 − EC)*) were decided in an environment where there were no questions as to whether the action in subsequent proceedings was of the same nature as in the original proceedings. The zeroing methodology (the use of which hinged only on whether a respondent's sales database included sales with "negative" margins) is a vastly simpler type of "measure" than the challenged determinations, which are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding.

90. In contrast to the calculation issue in those disputes, the issue addressed in the section 129 proceedings pertains to whether or not the given facts, taken together, demonstrate a countervailable subsidy. The questions of whether there is evidence of a financial contribution by a public body, evidence that a benefit is thereby provided, and evidence that a subsidy is specific − are questions of an altogether different nature from the question of recalculating a dumping margin without zeroing.

91. Given that the public bodies, input specificity, land, and benchmark determinations, are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding as part of its analysis, it cannot reasonably be found, without close examination of the specific determination in each challenged proceeding, that the determinations in subsequent administrative and sunset reviews are of the same nature as the originally challenged proceedings.

92. China's claims with respect to "future conduct" are also not within the Panel's terms of reference. Measures that are not yet in existence at the time of panel establishment − much less those which may never come into being − cannot be within a panel's terms of reference.

93. China has likewise failed to establish that any so-called "ongoing conduct" exists that may be challenged as a rule or norm of general and prospective application. In the view of the United States, "ongoing conduct" is not cognizable as a measure that is susceptible to challenge.

China has failed to establish that any such "ongoing conduct" exists or is likely to continue under the challenged orders that are at issue in this dispute. Likewise, even if the Panel were to find that China has established the subsequent reviews constitute the "ongoing conduct," China has not demonstrated a "particularly close relationship" or "sufficiently close nexus" to the declared "measure taken to comply" and it cannot be presumed that such a close connection exists.

94. In advancing its "ongoing conduct" claim, China has failed to even identify the indeterminate number of measures comprising the purported "ongoing conduct" "measure," much less identify the conduct within such measures that is purportedly inconsistent with the SCM Agreement. Thus, China has not only failed to establish the "string of determinations, made sequentially. . . over an extended period of time" that would be required to support its claims related to alleged "ongoing conduct," but also has failed to establish that the challenged practices "would likely continue to be applied in successive proceedings." Thus, China's claims in relation to "ongoing conduct" must be rejected.

VIII. FACTS AVAILABLE

95. The Panel cannot make any findings under Article 12.7 of the SCM Agreement regarding the USDOC's use of facts available in the challenged proceedings. A party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim. As the Appellate Body has explained, a complaining party will satisfy its burden of proof "when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence." A "*prima facie* case is one 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 presenting the *prima facie* case." The case presented by China fails to meet this standard. To meet its burden, China must adequately identify measures that fall within the scope of the panel's terms of reference, and it must make an adequate legal argument for each of its claims and "adduce[] evidence sufficient to raise a presumption that what it claims is true." The panel may not make the case for it.

96. China, as the complaining party in this Article 21.5 proceeding, must make a *prima facie* case with respect to each of the measures that purportedly constitute an inconsistency with Article 12.7 of the SCM Agreement. Although China put forth various claims with respect to the USDOC's use of facts available in its panel request, it subsequently failed to make a *prima facie* case with respect to these claims. Moreover, China concedes that it does not challenge what the facts are in these proceedings, but rather challenges the "legal standard." China claims that, regardless of whether the USDOC relied on the facts available, its decisions are "just as inconsistent." In other words, China recognizes that there is no basis upon which to make Article 12.7 findings.

97. The United States notes that China's response to the Panel's questions confirms that "China is not pursuing claims under Article 12.7." The United States does not agree with China that the Panel can make findings under Article 12.7 when China failed to challenge the application of Article 12.7 in the first place.

IX. CONCLUSION

98. The United States respectfully requests that the Panel find that the United States has complied with the recommendations of the DSB and that the U.S. measures taken to comply are not inconsistent with the SCM Agreement.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF AUSTRALIA

11 May 2017

I. INTRODUCTION

1. Members of the Panel, thank you for the opportunity to present Australia's views in this dispute. While not taking a position on the particular facts at issue in this dispute, Australia considers that significant questions about the proper interpretation of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) arise regarding "public body" and "benefit".

II. PUBLIC BODY

2. Australia agrees with the approach articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* and reiterated in *US – Carbon Steel (India)* for determining whether certain conduct is that of a public body. In particular, such a determination "must be made by evaluating the core features of the entity and its relationship to government" and "must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority."[1] Based on this approach, the focus of the determination is clearly on the entity itself, and whether that entity possesses, exercises, or is vested with governmental authority.

3. China's proposed interpretation has a different focus. Under China's approach, an investigating authority must assess the particular conduct or transaction at issue − such as providing inputs or purchasing goods − and determine whether that conduct or transaction involves the performance of a governmental function.[2] For China, therefore, the question of whether an entity constitutes a "public body" is transaction-dependent. It can vary depending on the act in question.[3] The same entity may be a "public body" for some transactions, but not for others.

4. This approach is problematic for a number of reasons. First, it does not accord with the text of Article 1.1(a)(1). In particular, the text distinguishes between "two principal categories of entities": governments and public bodies on the one hand, and private entities on the other.[4] As the Appellate Body recognised in *US – Anti-Dumping and Countervailing Duties (China)*, *all* conduct of governments and public bodies constitutes a financial contribution where it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv).[5] There is no separate, context-specific requirement to determine whether such conduct involves the discharge of a governmental function in each instance. Rather, the "governmental" character of those entities is sufficient.[6] By contrast, for "private entities", there must be an additional showing that the specific conduct in question results from entrustment or direction by government to carry out such conduct.[7] Therefore, whether the conduct of a private entity is subject to Article 1.1(a)(1) is context-dependent.

5. If − as for "private entities" − the test for "public bodies" were to require a context-dependent assessment of whether the specific conduct in question flowed from the exercise of a governmental function, there would be no meaningful difference between "public bodies" and "private entities". This would render their separate inclusion in the text inutile. Further, such an interpretation would be inconsistent with the Appellate Body's distinction between the governmental character of public bodies and the non-governmental character of private entities.[8]

[1] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 345; *US – Carbon Steel (India)*, para. 4.52.
[2] China's first written submission, para. 14.
[3] China's first written submission, paras. 93-94
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.
[5] Ibid.
[6] Ibid paras. 284 and 291.
[7] Ibid.
[8] Ibid paras. 291-292.

6. Second, contrary to China's understanding,[9] the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* does not establish that investigating authorities must assess whether the specific conduct or transaction at issue involves the exercise of a government function as a pre-requisite to determining public body. Rather, in that case, the consideration of the specific conduct or transaction at issue was a consequence of the fact that such conduct was contained in the instrument vesting the relevant entities with governmental authority.[10] There was no suggestion that, had that instrument *not* mentioned that conduct, a finding of "public body" would have been precluded.[11] The same is true for *US – Carbon Steel (India)*.[12]

7. Third, China's approach would impose an impractical evidentiary burden on investigating authorities by requiring an investigating authority to obtain evidence that *each* transaction or series of transactions result from a particular performance of a governmental function. In Australia's view such a requirement would make it impractical to render findings on public bodies, particularly when faced with uncooperative parties. As a result, this approach would be inconsistent with the context afforded by other elements of the SCM Agreement which affirm that investigations must be capable of rendering findings. In particular, this context includes: (i) Article 11.1, which describes the function of an investigation as to "*determine* the existence, degree and effect of any alleged subsidy"; (ii) Article 12.7, which enables an investigation to proceed even where interested Members or parties fail to provide necessary information; and (iii) Article 12.12, which clarifies that the due process safeguards contained in Article 12 are not intended to prevent an investigation "from proceeding expeditiously" in reaching determinations or applying countervailing measures. In Australia's view, the approach proposed by China would frustrate an investigating authority's discharge of its function to make determinations on "public body" and is contrary to the contextual interpretation of the obligation within the SCM Agreement.

III. BENEFIT

8. Turning to China's "benefit" claims, we understand the disagreement between the Parties regarding the interpretation of Article 14(d) in this dispute to hinge on this question: does *de jure* or *de facto* price setting by government exhaust the "very limited"[13] circumstances in which in-country prices can be rejected or adjusted, or could such a rejection also be justified on the basis of distortions caused by other kinds of governmental measures?[14]

9. In Australia's view, the SCM Agreement does not define exhaustively the types of governmental measures that could justify rejecting or adjusting in-country prices. The fact that WTO jurisprudence has recognised *de jure* and *de facto* price setting as a potential basis for rejecting in-country prices does not mean that other governmental measures should necessarily be excluded in that regard.[15] For instance, a governmental measure – other than price setting – could have the effect of suppressing the prices of public bodies. If that governmental measure has the same effect on private prices, it may not be appropriate to use those private prices for a comparison under Article 14(d). Instead, it may be appropriate in such circumstances to remove the price effects of the governmental measure, although we recognise that such circumstances have been described by the Appellate Body as "very limited".[16]

10. Australia does not express a view on whether the governmental measures at issue in the present dispute provided a sufficient basis for rejecting in-country prices. Nonetheless, Australia considers that the present dispute does not turn on whether those measures involve *de jure* or

[9] China's first written submission, paras. 67 and 89-91; second written submission, paras. 25, 30, and 40-50.

[10] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 349.

[11] See eg Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.

[12] *US – Carbon Steel (India)*, para. 4.29: 'For example, evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates *may inform* the question of whether the conduct of an entity is that of a public body.' (emphasis added)

[13] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

[14] See China's first written submission, paras. 240 and 243; United States' first written submission paras. 251-255.

[15] Indeed, the Appellate Body has stated that 'We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself' (Appellate Body Report, *US – Countervailing Measures (China),* fn 530 to para. 4.50).

[16] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

de facto price setting. For Australia, it is neither possible nor desirable to develop rigid legal rules for the kinds of governmental measures that might justify rejecting in-country prices. Such an assessment is necessarily case-specific.[17] Therefore, the key question in the present dispute is whether the USDOC provided a reasoned and adequate explanation based on the particular record evidence in the investigation at issue for rejecting in-country prices.

IV. CONCLUSION

11. For the reasons outlined, Australia submits that the Panel find: (i) that the determination of "public body" does not require evidence that the entity is performing a governmental function when engaging in the impugned conduct or transaction; and (ii) that the question of whether a given governmental measure falls within the "very limited" circumstances that justify rejecting or adjusting in-country prices under Article 14(d) is necessarily case-specific and not susceptible to rigid legal rules.

12. Thank you for the opportunity to present Australia's views in this dispute.

[17] See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.51.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF CANADA

21 June 2017

I. INTRODUCTION

1. Canada's views on public bodies, out-of-country benchmarks, ongoing conduct, and measures taken to comply are set out below.

II. PUBLIC BODIES

2. The Appellate Body has found that in making a public body determination, the core features of the entity at issue and its relationship with the government are what matter. The conduct of the entity in making financial contributions is not the focus of the analysis. Rather, the conduct is to be analyzed with regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the prevailing legal and economic environment.[1]

3. Based on an evaluation of the core features of the entity and its relationship with the government, an investigating authority will determine either that an entity is a public body or that it is not, in the same way that an entity is either government or it is not. The designation of public body is not dependent on each action the entity takes in relation to its function. Rather, a public body designation should be made on the basis of evidence related to government policies, the applicable legal order, the prevailing economic environment in the country, and other evidence related to the core features of the entity and its relationship with the government.[2]

4. In addition, evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.[3] Meaningful government control over an entity's functions need not be evaluated in relation to each financial contribution.[4] Evidence of meaningful control relates to the legal, economic and policy framework of the entity, not its conduct in the provision of financial contributions under inquiry.[5]

5. China's interpretation that "an entity must be performing a 'government function' when engaged in the conduct that is the subject of the financial contribution inquiry"[6] would effectively render the term "public body" redundant with the "entrusts or directs" provision of Article 1.1(a)(1)(iv).

III. OUT-OF-COUNTRY BENCHMARKS

6. Article 14(d) establishes a guideline for determining whether a benefit is conferred in the context of a government's provision of goods and services and the purchase of goods.[7] A comparison is generally required in determining whether remuneration for the provision of a good is "less than adequate".[8] This involves the selection of an appropriate comparator with which to

[1] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317 and *US – Carbon Steel (India)*, para. 4.29.
[2] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.
[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[4] Ibid. paras. 317-318.
[5] Ibid. para. 350.
[6] China's first written submission, para. 91.
[7] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.84 and *US – Carbon Steel (India)*, para. 4.147.
[8] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.44 and *US – Carbon Steel (India)*, para. 4.148.

compare the government price for the good in question.[9] Moreover, investigating authorities may consider the possibility of using out-of-country benchmarks in very limited circumstances.[10]

7. The assessment of the benefit must be made in relation to prevailing market conditions in the country of provision.[11] As a result, any benchmark for conducting such an assessment must consist of market-determined prices under the prevailing market conditions for the good in question in the country of provision".[12]

8. The primary benchmark and starting point in any analysis must be prices from arm's length-transactions in the country of provision. Nevertheless, it is not the source of the prices that is determinative, but rather whether the prices are market-determined and reflective of prevailing market conditions in the country of provision. In this respect, even the prices of government-related entities in a predominant market position could be established on market principles.[13]

9. The decision to reject in-country prices must be made on the basis of a market analysis that determines that such prices are not market determined as a result of government intervention in the market.[14] The key factor, nevertheless, is not government predominance or even the possession of sufficient market power *per se*.[15] Rather, the key factor is evidence of how government predominance and the possession and exercise of market power has actually been used to cause price distortion. The investigating authority must demonstrate a clear evidentiary path from the government's predominant position to its possession of market power to its exercise of that power to distort market prices.[16]

10. Thus, in the context of this case, this compliance Panel must examine what the USDOC has actually done to analyze the precise evidentiary path showing how the Chinese government has distorted prices in the market. Moreover, the USDOC must do so in a manner that is based on positive evidence and demonstrates an adequate explanation of this conclusion.

IV. ONGOING CONDUCT

11. The ability of Members to challenge unwritten measures, including ongoing conduct, is an important mechanism for achieving both the prompt settlement of disputes and a final resolution to the dispute and is consistent with the principle that any act or omission attributable to a WTO Member can be challenged in WTO dispute settlement proceedings.[17]

12. The Appellate Body has described ongoing conduct as, "conduct that is currently taking place and is *likely to continue* in the future".[18] The Appellate Body has said that to establish the existence of ongoing conduct a Member must show (i) that the measure is attributable to a Member; (ii) the precise content of the measure; (iii) the repeated application of the conduct; and (iv) the likelihood that such conduct will continue.[19]

13. It is evident from these criteria that the analytical framework for ongoing conduct is not limited to the facts of cases (*i.e. Argentina – Import measures*, *US – Import Measures* and *US –*

[9] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.44 and *US – Carbon Steel (India)*, para. 4.148.
[10] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[11] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.46 and *US – Carbon Steel (India)*, para. 4.150.
[12] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.46 and *US – Carbon Steel (India)*, para. 4.151.
[13] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.48 and *US – Carbon Steel (India)*, para. 4.154.
[14] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.76 and *US – Softwood Lumber IV*, paras. 98-99.
[15] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.59.
[16] Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.52, 4.59 and 4.62 and US – *Carbon Steel (India)*, fn. 754.
[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 81. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.109.
[18] Appellate Body Report, *Argentina – Import Measures*, para 5.144, citing Panel Report, *US – Orange Juice (Brazil)*, paras. 7.175-7.176 (emphasis in original).
[19] Appellate Body Report, *Argentina – Import Measures*, paras 5.104 and 5.108.

Orange Juice (Brazil)) in which it has existed to date. On the contrary, the analytical framework for ongoing conduct is capable of being applied in a broad range of circumstances, including the present case, provided the above four criteria are satisfied.

14. Ongoing conduct is neither "an entirely new type of 'measure'"[20], nor an "indeterminate number of future measures"[21], as the United States claims; rather, ongoing conduct is an analytical tool for understanding and evaluating certain types of measures and requires evidence of repeated past application of the conduct in question.

15. Understanding and applying the analytical device of ongoing conduct in a flexible manner is necessary to allow Members to obtain relief without having to return to dispute settlement multiple times.

V. MEASURES TAKEN TO COMPLY

16. The Appellate Body has found that under the *Dispute Settlement Understanding*, a failure to fully implement the Dispute Settlement Body's (DSB) recommendations and rulings cannot be found before the end of the reasonable period of time (RPT).[22] However, once the RPT has expired, the implementing Member is obligated to fully comply with the recommendations and rulings of the DSB, and any WTO-inconsistency has to cease by the end of the RPT with prospective effect.[23] When it comes to the assessment of any duties following the end of the RPT, whether implementation is compliant should not be determined by reference to the date when liability arises, but rather by reference to the time when final duty liabilities are assessed.[24] Thus, any subsequent reviews or proceedings may not extend the use of WTO-inconsistent methodology beyond the end of the RPT.[25]

17. In evaluating whether a Member has implemented the DSB's recommendations and rulings, a compliance panel is to examine "measures taken to comply with the recommendations and rulings"[26] of the DSB and is not limited to measures that a Member says it has taken to comply.[27] A panel may also examine the timing, nature, and effects of other measures to determine whether there is a close nexus between such measures and the DSB's recommendations and rulings.[28] This nexus-based test is principled and focuses on the substance of a respondent Member's actions or omissions rather than on formalistic labels.

18. In its argument regarding Panel jurisdiction, the United States appears to be recycling lines of reasoning that were rejected by the Appellate Body in both *US – Zeroing (EC) (Article 21.5 – EC)* and *US – Zeroing (Japan) (Article 21.5 – Japan)*, and which would effectively undermine dispute settlement concerning trade remedies measures. Relying on the past decisions of the Appellate Body, the Panel should reject the United States' assertion that measures completed during the course of compliance proceedings necessarily fall outside of the Panel's jurisdiction solely on the basis of their timing. Jurisdiction should instead be determined on the basis of all three elements of the nexus-based test. Moreover, it is not important whether any of the administrative and sunset reviews challenged by China were conducted before or after the end of the RPT.[29] What is significant is whether WTO-consistent methodology is being applied by the investigating authority in any action taken related to a measure subject to implementation of DSB recommendations or rulings following the end of the RPT.

19. Furthermore, a measure evidenced using the analytical tool of ongoing conduct is *in principle* susceptible to review by a compliance panel.[30] Whether a certain alleged ongoing conduct

[20] United States' first written submission, para. 328.
[21] United States' first written submission, para. 326.
[22] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.
[23] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.
[24] Ibid. para. 309.
[25] Ibid.
[26] Article 21.5 of the DSU.
[27] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 73.
[28] Ibid. para. 77.
[29] See United States' first written submission, para. 321, where the United States writes that "nearly all of the measures that China identifies were concluded prior to the end of the RPT on April 1, 2016, and thus were not 'subsequently closely connected' to the measures taken to comply in this dispute".
[30] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

falls within the terms of reference of a compliance panel should be evaluated on the basis of the same nexus-based test that applies to all "measures taken to comply".

20. If the Panel were to accept the interpretation advanced by the United States, Members would not be able to obtain effective relief against the United States' trade remedies system through WTO dispute settlement. If Members need to bring a new dispute for each connected stage of an investigation, such as an administrative or sunset review, the next review may have been completed before the end of the reasonable period of time to comply expires. Members seeking to challenge such a sequence of determinations would find themselves in a circular process with little prospect of ever obtaining effective relief. This interpretation could not only frustrate compliance proceedings, it would also be inconsistent with the objectives of promptly settling disputes and securing positive solutions to disputes.[31]

[31] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan),* para. 122.

ANNEX D-3

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

21 June 2017

I. CONCERNING CHINA'S CLAIMS REGARDING THE USDOC'S PUBLIC BODY DETERMINATIONS

A. "Public bodies" under Article 1.1(a)(1)

1. In *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that "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). An entity can be vested with authority in many different ways. Whether an entity qualifies as a "public body" is, as the Appellate Body has emphasized, closely connected to the more general issue of *attribution*. All relevant evidence should be taken into account, and a wide range of factors (e.g. the links between the entity and the State, specific regulatory frameworks etc.), may be relevant. While this assessment must always be tailored to the circumstances of the case, in the EU's view, the investigating authority may also take into account more general assessments that have been placed on the record of the investigation.

2. Demonstrating the exercise of "governmental functions" is one way of showing "governmental authority". Both parties seem to agree that, to the extent that a public body determination in a given case is based on the exercise of "governmental functions", the assessment should take into account the entity's conduct. This suggests that some nexus may need to exist between the governmental function the entity is alleged to exercise and the type of conduct the entity is actually engaged in. For example, we might ask whether the alleged financial contribution falls within the scope of the governmental function said to make the entity a public body. However, this is different from asking whether the specific financial contribution constitutes a governmental function. Unlike with private bodies, it is not necessary to show that a public body was specifically entrusted or directed to provide the financial contribution at issue. Thus, a financial contribution can be attributed to a public body not only when the government in the narrow sense entrusted or directed the entity to provide it, but also if certain indicators relevant to the entity in general show that its conduct can be attributed to the WTO Member. It should also be kept in mind that there is no *a priori* limitation on what can be a governmental function for a particular WTO Member.

3. When deciding whether a certain entity is a public body, governmental regulation may be relevant. On the other hand, the mere fact that a sector is regulated does not in itself necessarily suffice to show that all entities in that sector are vested with governmental authority. Rather, all the relevant facts and elements would need to be taken into account.

B. China's challenge against the Public Bodies Memorandum "as such"

1. The timing of measures taken to comply

4. Compliance proceedings under Article 21.5 can only assess the WTO consistency of measures "taken to comply". The Appellate Body has made clear that even if a measure is not *declared* to be a measure taken to comply, it may also be susceptible to review by a panel acting under Article 21.5 if it is a "measure […] with *a particularly close relationship* to the declared "measure taken to comply."

5. An aspect of the close nexus test which appears to be particularly relevant in this dispute is the element of *timing*. Proximity in time between the adoption of the measure at issue and the declared measure taken to comply speaks in favour of a finding that there was a close link. It is not, however, indispensable. In that respect, the EU would observe the following.

6. Compliance proceedings should not be used to "short-circuit" original panel proceedings. If there was nothing preventing a challenge against a measure at the time of the original panel request, then the complainant may well be precluded from challenging it in compliance proceedings.

7. However, the Appellate Body has found that measures cannot be formalistically excluded from Article 21.5 proceedings for the sole reason that they pre-date the adoption of the recommendations and rulings in the original dispute. The EU does not see why they could be

similarly formalistically excluded if they pre-date the original panel request. Whether the complaining Member could have pursued a claim in the original proceeding is a more complex matter than whether a particular legal text had been published prior to the original panel request. For example, a measure may become *de facto* WTO-inconsistent over time even while its text remains the same. The crucial question, in the EU's view, is whether the measure is indeed "taken to comply". If so, it is difficult to see how due process would be served by excluding it from the scope of Article 21.5 proceedings for reasons of timing alone. The Appellate Body has recognized as much (in *US – Zeroing (EC) (Article 21.5 – EC)*).

2. Measures subject to challenge in WTO dispute settlement, "as such" and otherwise

8. Article 3.3 of the DSU speaks simply of "measures taken by another Member". The concept of a measure is broad; it extends to any act or omission that is attributable to a WTO Member. The arguments of the United States on this point seem to be more pertinent to a different, more specific issue: whether the measure has "general and prospective application".

9. The evidence and arguments that must be supplied to show the existence of a measure are a function of how the measure is described or characterized by the complainant. A range of factual elements may come into play when deciding whether a measure indeed has general and prospective application: for example, whether the challenged "rule or norm" is systematically applied, and what the "concrete instrumentalities" that evidence its existence are. The mere fact that the measure itself does not explicitly state that it is of general or prospective application (or, for example, that it lays down a policy that must be followed in all future cases) does not in itself settle the issue.

II. CONCERNING CHINA'S CLAIM UNDER ARTICLE 14(D) REGARDING THE USDOC'S REJECTION OF IN-COUNTRY BENCHMARK PRICES

10. The EU recalls that Article 14(d) SCM stipulates that the determination of benefit in case of the provision of goods by a government depends on whether the remuneration is less than adequate which shall be determined "in relation to prevailing market conditions for the good in the country of provision." It follows that in-country prices must be "market-determined."

11. The EU recalls the Appellate Body's statement that what permits the use of out-of-country benchmarks is price distortion which must be established on a case-by-case basis. The EU considers that a finding of price distortion may be the result of the market power of the government as a supplier of the good in question or the result of other government interventions not related to the government's market power, or be based on a combination of both elements. While the EU considers that the legal and evidentiary threshold for a finding of price distortion is high because out-of-country benchmarks may only be used in "very limited circumstances", it does not agree with China that the individual price must be "effectively determined" in the sense of being set or fixed by the government. The distortion by the government of important parameters that are relevant for price-building, for example government interventions affecting demand or supply, may also be considered in this regard. At the other end of the spectrum, the EU does not believe that a mere "change in the conditions of competition" would, in itself and without more, necessarily always be enough for an inference of price distortion as proposed by Japan.

12. The EU considers that an evidentiary link is required that leads from the government interventions in question to the distortion of the domestic price. Such evidentiary link will depend on the particular circumstances of each case.

13. According to the EU several considerations may be relevant for establishing such an evidentiary link. First, evidence relating to government interventions that are directly relevant for prices or price-setting will normally carry more weight than evidence relating to government interventions that only have an indirect impact on prices. Second, and in a similar vein, the closer the relevant evidence is related to the product or sector in question, the more weight it will normally carry. For example, evidence regarding government interventions directly impacting the product or sector in question will carry more weight than evidence regarding government interventions regarding the overall economy, for example monetary policy. Third, the level of evidence required to demonstrate price distortion through government interventions may depend on the degree of market power of the government as a supplier. In particular, the more market power a government exercises as supplier of the product in question, the less additional evidence regarding other government interventions will normally be required to show price distortion. The

EU agrees with the United States that the "totality of the evidence" will be relevant for an assessment of price distortion.

14. The EU does not take position whether the USDOC discharged its burden in the present case.

III. CONCERNING CHINA'S CLAIM OF INCONSISTENCY WITH ARTICLE 2.1(C)

A. China's claims regarding "subsidy programmes"

15. The EU recalls that the Panel found in the original proceedings that "the consistent provision by the State-owned enterprises ("SOEs") in question of inputs for less than adequate remuneration" provided a sufficient basis for the USDOC's identification of subsidy programmes.

16. The EU disagrees with China's argument that the USDOC, by finding a "subsidy programme" through the mere identification of subsidies provided to individual companies, would "render meaningless" the distinction between the term "subsidy" and "subsidy programme" that would have been established by the Appellate Body. The EU considers that although Article 1.1 does not refer expressly to the term "programme", a number of terms in Article 1.1 indicate that the definition extends both to a subsidy in the form of a subsidy to one enterprise, and a subsidy in the form of a subsidy programme.

17. The main issue in this dispute appears to be not so much an issue of the correct definition of the term "subsidy" or "subsidy programme" as China seems to argue, but rather an evidentiary issue that is rooted in the particular situation of "unwritten" subsidies which are the subject of the present case.

18. A different question and the issue which − at least in case of written measures - is usually the main focus of Article 2.1(c), is the question whether the subsidy programme so established, is "used by a limited number of enterprises". The EU considers that both issues should be kept strictly separate.

B. China's claims regarding the "duration" of the subsidy programmes

19. The EU recalls the statement of a previous panel which found that the notion of specificity has to do with whether a subsidy is sufficiently broadly available throughout an economy so as not to benefit "certain enterprises". The need to take account of "the length of time during which the subsidy programme has been in operation" must be understood in this context.

20. In deciding whether the USDOC adequately took into account the length of the subsidy programme, the EU considers that the Panel may take into account: (i) the fact that it is uncontested by China that the subsidy programme existed for at least one year; (ii) the fact that the USDOC requested, and presumably analysed, data for a 3-year period; (iii) the fact that the inputs in question have been provided for a long period of time in a mature industry and (iv) the fact that China has not put forward any argument or evidence that the subsidy programme was only in existence of a short time period.

IV. CONCERNING CHINA'S CLAIM OF INCONSISTENCY WITH ARTICLE 2.2

21. The EU recalls that the question of the legal relevance of a "distinct land regime" under Article 2.2 was brought before the Appellate Body by China in *US − Anti-Dumping and Countervailing Duties (China)*. While the Appellate Body did not rule on this issue, its statements in this respect imply support for the position that the mere existence of a "distinct land regime" within a wider geographical area of the granting authority, does not suffice to demonstrate regional specificity. The EU considers that the mere existence of a distinct land regime may normally not in itself be sufficient for a finding of regional specificity. An investigating authority must take into account all relevant evidence, notably evidence that land is provided for less than adequate remuneration also outside the industrial park in question.

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF JAPAN

21 June 2017

1. In this proceeding, Japan addresses the interpretation and application of the term "public body" in Article 1.1(a)(1) and the calculation of the amount of the subsidy under Article 14(d).

I. PUBLIC BODY INQUIRY

2. The standard for the analysis of "public body" that has been established in prior cases is whether the entity at issue "possesses, exercises or is vested with governmental authority."

3. The issue raised by China in these proceedings concerns the relationship between the government function and the conduct that allegedly constitutes a financial contribution. China's position is that the government function identified by an investigating authority, in the context of a public body analysis, must be the same government function that the entity at issue is performing when it engages in the conduct that is the subject of the financial contribution inquiry.

4. In Japan's view, an investigating authority is not required to establish such a link between the relevant government function and the conduct that is the subject of the financial contribution inquiry, as the relevant analysis must focus on the characteristics, features or nature of the relevant entity and not on its specific conduct or transaction it engages in. To require such a link would conflate two distinct requirements, namely, whether an entity is a "public body" and whether such entity's conduct is a "financial contribution."

5. The focus on the characteristics or features of the relevant entity is evident throughout the Appellate Body's analysis. For example, in *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clearly stated that "[p]anels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of *the core features of the entity concerned*, and its relationship with government in the narrow sense,"[1] and that an investigating authority must "evaluate and give due consideration to all relevant characteristics of the entity" and must "avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant."[2]

6. The Appellate Body further found, in *US — Carbon Steel (India)*, that "[w]hether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to *the core characteristics and functions of the relevant entity,* its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates."[3]

7. With regard to specific elements or evidence to be evaluated, a flexible approach and an examination of different types of evidence are required given that "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State and case to case."[4] In this regard, the Appellate Body further explained that "[t]here are many different ways in which government in the narrow sense could provide entities with authority" and "[a]ccordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity."[5]

8. From the standpoint of Japan, an important element in the evaluation of the "core features of the entity concerned, and its relationship with government in the narrow sense" is whether such an entity is structured in a manner that allows it to act not solely in accordance with commercial

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317. (emphasis added)
[2] Ibid., para. 319.
[3] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29. (emphasis added)
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[5] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

considerations. Where an entity is structured in a manner that enables it to engage in activities that a private market actor (in particular, a private company) is unable to reasonably and sustainably engage in, this would constitute a strong indication that the entity is vested with a governmental function, even if that entity is not vested with any *de jure* governmental authority, e.g. a regulatory power.

9. What private entities can reasonably and sustainably engage in and what they are incapable of doing (i.e. what only the government can do) may be objectively distinguished since, for example, private entities' financial capabilities are limited unlike entities that have recourse to financial capabilities provided by the government. Therefore, Japan considers that whether an entity is structured to act not solely in accordance with commercial considerations could bring an objective and strongly probative perspective to the "public body" analysis.

10. Having said that, Japan would like to note that the analysis of governmental function must always involve looking at the relationship between the entity and the government in the narrow sense, and if there is no such a relationship found, it is difficult to say a "government" function exists.

11. China's proposed interpretation is problematic since it would require a twofold assessment of whether a private body has been entrusted or directed to carry out a government function: first, as part of the evaluation of whether the relevant SOEs are public or private bodies; and, second, after they have been found to be private bodies, to determine whether there is entrustment or direction of such SOEs to carry out the particular conduct that is subject to financial contribution inquiry, as provided for in Article 1.1(a)(1)(iv). Thus, China's argument would result in drawing an arbitrary requirement that is specific to subparagraph (iv) and apply it to the whole of Article 1.1(a)(1) in the context of the independent requirement of "public body." Such an approach is not consistent with the customary rules of interpretation of international law reflected in the Vienna Convention.[6]

II. THE CALCULATION OF THE AMOUNT OF A SUBSIDY UNDER ARTICLE 14(D)

12. Article 14 of the SCM Agreement sets out guidelines for the calculation of benefit. Subparagraph (d) of Article 14 concerns the provision of goods or services or the purchase of goods by a government. According to the guidelines provided in Article 14(d) of the SCM Agreement, 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. Article 14(d) further explains that 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.

13. With respect to these guidelines, the Appellate Body in *US — Softwood Lumber IV* has found that prices in the market of the country of provision or purchase are "the primary, but not the exclusive benchmark" for the calculation of benefit under Article 14(d) and has confirmed that "an investigating authority may use a benchmark other than private prices of the goods in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods".

14. China and the United States disagree with respect to the interpretation and application of the phrase "prevailing market conditions" and, in particular, as to the circumstances in which an investigating authority may depart from in-country prices to determine the adequacy of remuneration.

15. China argues for a very strict standard in which in-country prices must be used except when the investigating authority determines that "the government action or policy, whatever it is, effectively determined all other domestic prices for the same or similar goods, such that a

[6] *See* Appellate Body Report, *India – Patents (US)*, para. 45.

comparison between the price of the government-provided good and a domestic benchmark price would amount to a circular comparison between two government-determined prices."[7]

16. The United States, for its part, submits that the fundamental issue in determining whether to rely on an out-of-country benchmark under Article 14(d) is price distortion. The United States argues that China's proposed interpretation would arbitrarily preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined.[8]

17. Japan agrees with the United States that Article 14(d) does not establish that price distortion can be found only when an investigating authority finds that the government effectively determined all other domestic prices for the same or similar goods. China's overly demanding test is not required by either the text of Article 14(d) or prior rulings.

18. Japan recalls the Appellate Body's finding in *US — Anti-Dumping and Countervailing Duties (China)* that the key question to be determined is whether there is "price distortion" in the market, and "price distortion must be established on a case-by-case basis. "[9] The Appellate Body in *US — Carbon Steel (India)* has further explained that, in the context of Article 14(d), prevailing market conditions "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[10] The Appellate Body in *EC and certain member States — Large Civil Aircraft* has also explained that market prices are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay."[11] Instead, "the equilibrium price established in the market results from a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[12] In economic terms, as the United States noted, "equilibrium" is "[a] situation in which supply and demand are matched and prices are stable."

19. Japan notes that, with regard to specific elements to consider in finding "price distortion", the Appellate Body in *US – Carbon Steel (India)* has stated that "an investigating authority may be called upon to examine various aspects of the relevant market."[13] This examination may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It could also require assessing the behavior of the entities operating in that market in order to determine whether the government itself, or acting through government related entities, exerts market power so as to distort in-country prices.

20. It is also notable that the Appellate Body in *US — Countervailing Measures (China)* has made clear that what an investigating authority must do "will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information". Thus, as the Appellate Body in *US – Softwood Lumber IV* and *US — Countervailing Measures (China)* has stated*,* the assessment of price distortion is fact-specific and must be conducted on a "case-by-case basis", taking into account "all of the evidence". These Appellate Body findings support Japan's views that, for purposes of Article 14(d), "distortion" may be established through a holistic assessment of the market. Thus, even in cases where an investigating authority cannot find that the government effectively determined prices for the good in question, "distortion" of the relevant market may be established when there is other evidence that, considered through a holistic analysis of the market, indicates so.

21. China's position seems to be based on the misunderstanding that in-country prices can only be found to be distorted in situations in which the government administratively determines prices or is the provider of the good. However, the Appellate Body in *US — Countervailing Measures*

[7] China's second written submission, para. 148.
[8] United States' second written submission, para. 165.
[9] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[10] Appellate Body Report, *US — Carbon Steel (India)*, para. 4.150.
[11] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para 981.
[12] Ibid.
[13] Appellate Body Report, *US — Carbon Steel (India)*, para. 4.157.

(China) expressly left open the possibility "that the government may distort in-country prices through other entities or channels than the provider of the good itself."[14]

22. Japan also believes that a possible approach to determine distortion is to evaluate whether the price in the market is formed through arm's length transactions based on the respective market actors' commercial considerations. A "market" should in principle consist of actors that act solely in accordance with commercial considerations, as opposed to non-commercial considerations, such as the achievement of governmental policy objectives. Evidence that actors do not operate on the basis of commercial considerations will provide a strong indication that prices resulting from interactions of these operators are distorted, and consequently may cause a price distortion of the relevant market.

23. Finally, Japan agrees with Canada that "the investigating authority must demonstrate a clear evidentiary path". However, in Japan's view, this "evidentiary path" should be between the government intervention (more broadly defined than predominance) and the distortion of market prices.

[14] Appellate Body Report, *US — Countervailing Measures (China),* footnote 530 to para. 4.50.

WORLD TRADE ORGANIZATION

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UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

FINAL REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS437/RW.

LIST OF ANNEXES

ANNEX A

PANEL DOCUMENTS

ANNEX B

ARGUMENTS OF CHINA

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ARGUMENTS OF THE UNITED STATES OF AMERICA

ANNEX D

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ANNEX A

PANEL DOCUMENTS

ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 13 December 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel preferably with its first written submission and no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this

procedure upon a showing of good cause, which may include the case where issues of translation arise later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN 1, CHN 2, etc. If the last exhibit in connection with the first submission was numbered CHN 5, the first exhibit of the next submission thus would be numbered CHN 6.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to the substantive meeting.

Substantive meeting

11. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. on the previous working day.

12. The substantive meeting of the Panel shall be conducted as follows:

a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.

b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.

c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

Third parties

13. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

14. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

15. The third party session shall be conducted as follows:

a. All third parties may be present during the entirety of this session.

b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.

c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.

d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

16. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

17. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, opening and closing oral statements and responses to questions and comments thereon following the substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 20 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

18. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

19. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

20. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

21. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

22. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

23. The following procedures regarding service of documents shall apply:

a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).

b. Each party and third party shall file 3 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs/USB keys, 2 CD-ROMS/DVDs/USB keys and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.

c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD, a USB key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to judith.czako@wto.org, alexis.massot@wto.org and rodd.izadnia@wto.org. If a CD-ROM, DVD or USB key is provided, it shall be filed with the DS Registry.

d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.

e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.

f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.

g. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. 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. We modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, a number of changes of an editorial nature have been made to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, including those suggested by the parties.

1.2. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Interim Report and, where it differs, includes the corresponding footnote numbering in the Final Report.

2 REQUESTS FOR REVIEW SUBMITTED BY CHINA

Paragraph 7.6

2.1. China requests a correction of this paragraph to indicate that its claim under Article 1.1(a)(1) of the SCM Agreement was in relation to 11 (rather than 12) Section 129 proceedings.

2.2. The United States did not comment on China's request.

2.3. We have decided to grant China's request and have edited this paragraph accordingly. Consequential to this adjustment, we have also edited paragraph 7.63.

Paragraphs 7.6 and 7.7

2.4. China requests replacing the term "financial contribution" with "inputs at issue" as the use of the term "financial contribution" prejudges the question at issue, which is whether the entities providing the relevant inputs are public bodies.

2.5. The United States did not comment on China's request.

2.6. We have decided to grant China's request by replacing the term "financial contribution" in these paragraphs with "inputs at issue".

Paragraph 7.27

2.7. China suggests the insertion of the term "allegedly" in the phrase "actions constituting a financial contribution". China also suggests additional text to reflect that the "broader government function" is in relation to the specific action that is alleged to constitute a financial contribution.

2.8. The United States did not comment on China's request.

2.9. We have decided to grant China's request in part by including additional text as follows: "a broader government function than the specific action that is alleged to constitute a financial contribution". We see no need to modify the Interim Report on the basis of China's other comment on this paragraph.

Paragraph 7.31, footnote 64

2.10. China requests modification of this paragraph as it believes that the European Union did not argue that the focus of the public body analysis is the character of the relevant entity, as opposed to its conduct, but rather identified what it considered to be "the main contentious issue" in the dispute.

2.11. The United States does not agree with China's suggestion and considers that footnote 64 of the Interim Report correctly characterizes the positions of the European Union and other third parties.

2.12. We have decided to partially grant China's request by adjusting this footnote to include direct quotations from the European Union's third-party submission.

Paragraphs 7.47, 7.51, 7.185(b), and 7.190(b)

2.13. China noted the absence of citations to the relevant portions of the Public Bodies Memorandum, CCP Memorandum, and the two memoranda relating to benchmarks in these paragraphs.

2.14. The United States did not provide any comment in this respect.

2.15. We have added citations to the relevant memoranda in these paragraphs.

Paragraph 7.60

2.16. China requests modification of this paragraph to reflect that the GOC's refusal to respond to requests for information was a position taken by the USDOC that China contested during this compliance panel proceeding.

2.17. The United States does not agree with China's suggested modification of this paragraph. The United States notes the USDOC's position that the GOC declined to provide "complete" responses, and thus considers that neither the USDOC nor the United States asserted that the GOC failed to respond at all in five of the Section 129 proceedings.

2.18. We have decided to grant China's request by modifying this paragraph to directly cite the USDOC's findings in its preliminary determination, and by including a footnote referencing China's argument that the GOC provided a "substantial portion" of the requested information in certain Section 129 proceedings regarding non-majority government-owned enterprises.

Paragraph 7.75

2.19. China requests modification of this paragraph to reflect that its argument was in response to a statement made, and later retracted, by the United States at the Panel's meeting with the parties.

2.20. The United States disagrees with China's suggestion to modify this paragraph. The United States considers that a statement that was explicitly retracted does not constitute an argument of the United States, and there is no basis to include a reference to an argument that the United States did not make.

2.21. We see no need to modify the Interim Report on the basis of China's comment on this paragraph. In our view, the quoted portion of China's argument is sufficiently clear without the suggested "context" that China requests to be reflected in this paragraph. Further, the additional citations to Appellate Body statements requested by China appear in other paragraphs where relevant.

Paragraphs 7.76-7.78

2.22. China requests deletion or modification of these paragraphs as it considers that neither of the examples cited in paragraph 7.78 is relevant to the provision of inputs by SIEs or non-SIEs to respondent purchasers. China therefore does not believe that it is accurate for the Panel to cite these as examples of evidence or analysis in the Public Bodies Memorandum of the conduct at issue in the Section 129 proceedings.

2.23. The United States considers that the relevant passages are not offered as examples of evidence in the Public Bodies Memorandum relating to "the provision of inputs by SIEs or non-SIEs

to respondent purchasers", but rather are references to "interventions by the Chinese government (including the CCP)" mentioned in paragraph 7.76.

2.24. We decline China's request to delete or modify the examples cited in paragraph 7.78, which pertain to "the conduct of providing inputs, or other conduct at the firm level". We have decided to adjust the last sentence of paragraph 7.76 to correspond to the formulation in paragraph 7.78.

Paragraphs 7.146, 7.200, and 7.206

2.25. China notes that there are several references in these paragraphs to "government intervention" that should be preceded by the term "alleged".

2.26. The United States does not agree with China's suggestion to add the term "alleged" before "government intervention", as these paragraphs refer to the "findings" of the USDOC and it would not be accurate to say that the USDOC made a finding of alleged government intervention.

2.27. We see no need to modify the Interim Report on the basis of China's comment on this paragraph, as the relevant statements refer to the findings that were in fact reached by the USDOC concerning "government intervention".

Paragraph 7.183

2.28. China requests modification of the paragraph to reflect that the information provided in response to the Benchmark Questionnaires was provided by the GOC rather than by mandatory respondents.

2.29. The United States did not comment on China's request.

2.30. We have decided to grant China's request by replacing the reference to "mandatory respondents" in this paragraph with "the GOC".

Paragraph 7.184

2.31. China suggests modification of this paragraph to reflect that the cited evidence and analysis were only "purportedly" relevant to the question at issue.

2.32. The United States does not agree with China's suggestion to add the term "purportedly" before "relevant" in this paragraph because. The "question" identified in this paragraph is a quote from the Benchmark Memorandum describing the evidence considered and analysis undertaken, and the Benchmark Memorandum refers to the Appellate Body's findings as to the relevance of such evidence and analysis to the benchmark question.

2.33. We see no need to modify the Interim Report on the basis of China's comment on this paragraph. In this paragraph, the Panel describes the content of the Benchmark Memorandum in relation to the specific question that was reviewed by the USDOC. The Panel subsequently assesses whether the USDOC's analysis in relation to this question supports the determination made, in consideration of the requirements under Article 14(d).

Paragraph 7.197

2.34. China requests modification of this paragraph to reflect that the USDOC did not "establish" the existence of "pervasive government intervention".

2.35. The United States disagrees with China's suggestion as it considers that there is no dispute that the USDOC identified and established pervasive government intervention, notwithstanding China's claims about the effects of that intervention.

2.36. In light of China's comment, we have decided to replace the word "established" with "identified".

Paragraph 7.251

2.37. China suggests a revision to this paragraph to more accurately reflect China's arguments before the Panel by adding the phrase "and taking the USDOC's public body determinations at face value".

2.38. The United States does not agree with China's suggested additional phrase as it could be misconstrued as the Panel's view if it were to appear in the manner China suggests, when in fact that Panel examined the USDOC's public body determinations and found that they are not inconsistent with the SCM Agreement.

2.39. We see no need to modify the Interim Report on the basis of China's comment on this paragraph, as the paragraph in question specifically concerns the requirements under Article 2.1(c) relating to *de facto* specificity. The fact that the USDOC's public body determinations are contested by China is addressed in the relevant sections of the Report. Moreover, the current text of this paragraph accurately reflects that China considers that the information at issue "at most" constitutes evidence that the GOC has provided financial contributions, rather than subsidies, during the relevant period.

Paragraph 7.278(c)

2.40. China suggests a modification of this paragraph to accurately reflect the cited part of the Input Specificity Memorandum.

2.41. The United States did not comment on China's request.

2.42. We have decided to accept China's request by quoting directly from the relevant portion of the Inputs Specificity Memorandum.

3 REQUESTS FOR REVIEW SUBMITTED BY THE UNITED STATES

Paragraph 7.37

3.1. The United States asks the Panel to change the reference to "Section 129 investigations" to "Section 129 proceedings" throughout the Report, in order to better distinguish original investigations from implementation proceedings conducted pursuant to section 129 of the Uruguay Round Agreements Act. The changes would affect the following paragraphs: 7.84, 7.89, 7.108, 7.143, 7.146, 7.179, 7.192, 7.206, 7.214, 7.219, 7.223, 7.227 (footnote 373 of the Interim Report, renumbered to footnote 383 of the Final Report), 7.240, 7.254, 7.294, 7.301, 7.302, 7.303 (two instances), 7.304, 7.306, 7.308, and 7.316.

3.2. China did not comment on the United States' request.

3.3. We have decided to grant the United States' request by replacing the terms "Section 129 investigation(s)" by "Section 129 proceeding(s)" throughout the Report in the paragraphs identified by the United States, including corresponding edits in paragraphs 7.213, 7.220, 7.221, and 7.222 and headings 7.3.3.3.3.1 and 7.3.3.3.3.2.

Paragraph 7.48(g)(ii)

3.4. The United States asks the Panel to delete the phrase "and the strategic decision making of the enterprise" to accurately reflect the original text of the 2010 OECD economic survey of China presented in this paragraph.

3.5. China did not comment on the United States' request.

3.6. We have decided to grant the United States' request by deleting the repetition of "and the strategic decision making of the enterprise" in paragraph 7.48(g)(ii) of the Interim Report.

Paragraph 7.147

3.7. The United States asks the Panel to modify the last sentence of this paragraph to better reflect the United States' response to Panel question No. 35.

3.8. China did not comment on the United States' request.

3.9. We have decided to edit footnote 255 (footnote 262 of the Final Report) to reflect both the United States' response to Panel question No. 35, as well as the statement in the Supporting Benchmark Memorandum that the USDOC did not need to conduct a specific analysis of the market for each input in China during the period of investigation.

Paragraph 7.161

3.10. The United States asks the Panel to replace the reference to "the market" by a reference to "a market" in this paragraph to clarify that the Panel is referring to markets in general.

3.11. China did not comment on the United States' request.

3.12. We see no need to modify the Interim Report on the basis of the United States' comment on this paragraph.

Paragraph 7.177

3.13. The United States asks the Panel to clarify that this section of the report relates not only to investigations involving steel inputs, but also to the Solar Panels investigation.

3.14. China did not comment on the United States' request.

3.15. We have decided to grant the United States' request by clarifying the first sentence of paragraph 7.177 as follows:

> We recall that in the Section 129 determinations at issue, the USDOC concluded with respect to the Pressure Pipe, Line Pipe, and OCTG proceedings …

We have also added the following text after the discussion of steel inputs in paragraphs 7.177-7.178:

> With respect to the Solar Panels investigation, the USDOC concluded that the GOC "significantly distorts prices in this industry such that there are no potential benchmarks from the domestic industry."[FN]
>
> [FN]: Supporting Benchmark Memorandum, (Exhibit USA-84), p. 9.

Paragraph 7.178

3.16. The United States asks the Panel to clarify that the relevant evidence on the record incorporates multiple GOC responses and three memoranda relating to benchmarks (the Benchmark Memorandum, Supporting Benchmark Memorandum, and Final Benchmark Determination).

3.17. China did not comment on the United States' request.

3.18. We have decided to grant the United States' request in part, by adding a reference to the Final Benchmark Determination in paragraph 7.178.

3.19. We see no need to modify the Interim Report on the basis of the United States' other comments on this paragraph because we consider that the wording of paragraph 7.178 of the Interim Report correctly describes the record. In particular, we consider that the reference to "the

GOC's response to Benchmark Questionnaires" in this paragraph sufficiently indicates that the GOC provided several questionnaire responses.

Paragraph 7.196

3.20. The United States asks the Panel to modify this paragraph by referring to reasoned and adequate explanations for [the USDOC's] determinations.

3.21. China did not comment on the United States' request.

3.22. We have decided to grant the United States request in part by referring to USDOC's determinations. However we see no need to modify the Interim Report with respect to the other comments made by the United States on this paragraph.

Paragraph 7.224

3.23. The United States asks the Panel to clarify, in this paragraph that China has not demonstrated an inconsistency with Articles 1.1(b) and 14(d) in the Solar Panels Section 129 proceedings.

3.24. China asks the Panel to reject the United States' request and suggests that the Panel should modify paragraph 7.222 by clarifying that the last sentence of this paragraph relates only to the question of whether the USDOC failed to consider in-country prices that were available on the record.

3.25. In view of the parties' comments, we have clarified in the second sentence of paragraph 7.223 that "the USDOC failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings, how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market − determined price." We have also modified the last sentence of paragraph 7.222 to clarify that this paragraph relates only to the question of whether the USDOC failed to consider in-country prices that were available on the record.

Paragraph 7.228

3.26. The United States asks the Panel to clarify that the USDOC analysed a range of evidence − including the granting of subsidies − in order to determine if input prices were market-determined for purposes of measuring the adequacy of remuneration.

3.27. China did not comment on the United States' request.

3.28. We see no need to modify the Interim Report on the basis of the United States' comment on this paragraph as we consider that the paragraph in question is sufficiently clear.

Paragraph 7.241

3.29. The United States asks the Panel to quote the full sentence extracted from the Benchmark Memorandum.

3.30. China did not comment on the United States' request.

3.31. We have decided to grant the United States request by quoting the sentence in its entirety.

Paragraph 7.245

3.32. The United States asks the Panel to clarify that the alleged subsidies were one of the many factors that were the basis of the USDOC's benchmark determinations.

3.33. China did not comment on the United States' request.

3.34. We have decided to grant the United States request by editing the relevant paragraph accordingly.

Paragraph 7.343 and footnote 537 (footnote 547 of the Final Report)

3.35. The United States asks the Panel to modify footnote 537 to better reflect the explanation given by the United States in paragraph 270 of its second written submission.

3.36. China did not comment on the United States' request.

3.37. We have decided to grant the United States request by editing the relevant footnote to include a more complete quotation of the United States' second written submission.

Paragraph 7.349

3.38. The United States asks the Panel to refer to administrative reviews and sunset reviews as being conducted in "proceedings" rather than "investigations", in order to more clearly reflect the distinction between these types of proceedings and original investigations.

3.39. China did not comment on the United States' request.

3.40. We have decided to grant the United States' request and have modified accordingly the following paragraphs of the Interim Report, as well as associated headings: 7.351, 7.363, 7.364, 7.374, 7.381, 7.385, 7.394, 7.395, 7.399, 7.401, 7.406, 7.407, 7.409, 7.415, 7.428-7.434, 7.437, 7.439-7.441, 7.443-7.445, 7.447-7.449, 7.451-7.453, 7.455, 7.459, 7.460, 7.462-7.464, 7.466-7.468, and 7.470.

Paragraph 7.375

3.41. The United States asks the Panel to replace "original OCTG determination" and "original determination" with the terms "OCTG investigation".

3.42. China did not comment on the United States' request.

3.43. We have decided to grant the United States request and have thus edited this paragraph accordingly.

Paragraph 7.385 and footnote 581 (footnote 591 of the Final Report)

3.44. The United States asks the Panel to add references to the Public Bodies and CCP Memoranda in footnote 581.

3.45. China did not comment on the United States' request.

3.46. We have decided to grant the United States request and have thus edited this paragraph accordingly.

Paragraph 7.431

3.47. The United States asks the Panel to refer specifically to the two separate questions examined by the USDOC in sunset reviews: (a) whether revocation of the CVD order would be likely to lead to continuation or recurrence of a countervailable subsidy and (b) which rate to report to the US International Trade Commission as the net countervailable subsidy rate likely to prevail if the order were revoked.

3.48. China did not comment on the United States' request.

3.49. We have decided to grant the United States request in part and have thus edited paragraph 7.431 accordingly. Having clarified the USDOC's analysis in this paragraph, we do not see the need to also edit paragraphs 7.438, 7.442, 7.446, 7.450, 7.454, 7.461, and 7.469.

Paragraph 7.457

3.50. With regard to the nature of the USDOC determination in the context of sunset reviews, the United States asks the Panel to refer to "the determination of the net countervailable subsidy rates likely to prevail" rather than to the "calculation" of a subsidy rate.

3.51. China did not comment on the United States' request.

3.52. We have decided to grant the United States request and have thus edited this paragraph accordingly.

ANNEX B

ARGUMENTS OF CHINA

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF CHINA

21 June 2017

I. The Section 129 Public Body Determinations Do Not Bring the United States into Compliance with Its Obligations Under the SCM Agreement

A. Introduction

1. It has been more than five years since the Appellate Body rejected the USDOC's application of a *per se* rule of majority government ownership to determine whether Chinese enterprises are "public bodies" under Article 1.1(a)(1) of the SCM Agreement. In *US – Anti-Dumping and Countervailing Duties (China)* ("DS379"), the Appellate Body explained that an investigating authority conducting a public body analysis must instead determine whether the entity is "vested with authority to exercise governmental functions".[1] The Appellate Body explained that an investigating authority must "engage in a careful evaluation of the entity in question" in order to "identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government".[2]

2. In the more than five years since the Appellate Body issued its report in DS379, the USDOC has never once engaged in the "careful evaluation" described by the Appellate Body when conducting a public body analysis of Chinese enterprises. To the contrary, what the USDOC has done is take the *per se* rule of majority government ownership that the Appellate Body rejected and replace it with a *per se* rule that is substantially broader. Whereas the old *per se* rule led the USDOC to conclude that all majority government-owned entities in China are public bodies, the new *per se* rule leads the USDOC to conclude that all companies in China, regardless of ownership, are public bodies.

3. The new framework applied by the USDOC is described in its "Public Bodies Memorandum", which the USDOC first issued in 2012 during the Section 129 proceedings that followed the adoption of the reports in DS379. The Public Bodies Memorandum begins with the USDOC's assertion that "an important inquiry in a public body analysis is a determination of 'what functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member'".[3] Based on its review of certain of China's legal instruments and policies, the USDOC concludes that "government oversight and control of the economy, and in particular economic decision-making in the state sector", is a "government function" in China for purposes of its public bodies analysis.[4] The USDOC also refers to this function as "maintaining and upholding the socialist market economy".[5]

4. After identifying this alleged "government function", the USDOC then analyses whether state-invested enterprises ("SIEs") possess, exercise, or are vested with authority to "maintain and uphold the socialist market economy".[6] The USDOC explains that the evidence relevant to this determination concerns "the breadth and depth of government control over the economy as a whole and over SIEs generally in China".[7] Based on its review of certain "indicia" of alleged "control", the USDOC concludes that "the government exercises meaningful control over certain categories of SIEs in China, and that this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy".[8]

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[2] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.
[3] Public Bodies Memorandum, p. 2, quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297 (CHI-1).
[4] Public Bodies Memorandum, p. 11 (CHI-1).
[5] Public Bodies Memorandum, p. 6 (CHI-1).
[6] Public Bodies Memorandum, p. 12 (CHI-1).
[7] Public Bodies Memorandum, p. 12 (CHI-1).
[8] Public Bodies Memorandum, p. 37 (CHI-1).

5. Since the USDOC issued the Public Bodies Memorandum in 2012, the USDOC has routinely conducted its public body "analysis" within the framework of this Memorandum. The outcome has been the same in each instance, including in the Section 129 proceedings under review here. For all companies that are majority government-owned, the USDOC has concluded on the basis of its analysis in the Public Bodies Memorandum that the companies are public bodies. For all companies that are not majority government-owned, the USDOC has resorted to "adverse facts available" based on the GOC's failure to respond to certain questions regarding the Chinese Communist Party (CCP). On the basis of the "facts available" in the Public Bodies Memorandum, the USDOC has then concluded that all non-majority government-owned enterprises are also public bodies.

6. Accordingly, the result of the USDOC's "refined" analytical framework for determining whether companies in China are public bodies is that, since 2012, the USDOC has consistently concluded that all input suppliers in countervailing duty investigations of imports from China are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. The USDOC has reached this conclusion without ever once considering the relevance of any of the evidence that the GOC and the mandatory respondents have placed on the record calling into question the legitimacy of the USDOC's analysis, including the evidence provided by the GOC in the context of these Section 129 proceedings.

7. In DS379, the Appellate Body made clear that "control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body".[9] Nonetheless, the USDOC spends the vast majority of the Public Bodies Memorandum analysing "the breadth and depth of government control over the economy as a whole and over SIEs generally in China".[10] It appears to be the USDOC's view that what distinguishes its new control-based standard from the control-based standard that the Appellate Body expressly rejected in DS379 is the USDOC's explanation that the control that it purports to identify "allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy".[11] This is the alleged "government function" that Chinese enterprises are "performing", and it is the performance of this function that makes the "indicia of control" identified by the USDOC "meaningful".

8. The glaring defect in the USDOC's analysis is that the USDOC fails to explain how the "government function" it has identified is relevant to the public body inquiry. The USDOC's conclusion that "maintaining and upholding the socialist market economy" is a "government function" amounts to a conclusion that China is a socialist market economy – a fact which is undisputed. Broadly speaking, a purpose of the Chinese government is undoubtedly to "maintain and uphold" China's economy, just as other WTO Member governments "maintain and uphold" their economies. This conclusion has no discernible relevance, however, to "whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body".[12]

9. In China's view, both the Appellate Body's interpretative analysis of the term "public body" in DS379 and *US – Carbon Steel (India)* ("DS436"), and the Appellate Body's application of its analytical framework to state-owned commercial banks (SOCBs) in DS379, demonstrate that there must be a "clear logical connection" between the "government function" identified by an investigating authority and the conduct that is alleged to constitute a financial contribution.[13]

[9] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 320.
[10] Public Bodies Memorandum, p. 12 (CHI-1).
[11] Public Bodies Memorandum, p. 37 (CHI-1).
[12] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[13] China notes that the "clear logical connection" standard was introduced by the United States in its second written submission, and is not language that China used in its own written submissions. See United States' second written submission, para. 30; see also United States' opening statement, para. 18. However, China explained in its opening statement at the meeting of the parties that if it was in fact the U.S. position that there must be a "clear logical connection" between the "government function" and the conduct at issue under Article 1.1(a)(1), then China believed that the parties were essentially in agreement regarding the proper legal standard. See China's opening statement, para. 18. The United States made clear at the meeting of the parties that this is an accurate characterization of the U.S. view, at least for purposes of the Panel's evaluation of the USDOC's public body determinations in the Section 129 proceedings. Accordingly, China adopted the U.S. terminology, because China believes that it is an effective (and shorter) way to explain China's view, which is that an entity must be vested with authority that it exercises when engaged in the conduct at issue under Article 1.1(a)(1), but that the authority vested in the entity may be for the purpose of performing a "government function" that is broader than the particular conduct at issue under

10. In the United States' view, "it is not necessary for the Panel to define the outer bounds of what may constitute 'governmental authority' or a 'governmental function' for the purpose of resolving this dispute", because "the 'governmental function' identified by the USDOC – maintaining and upholding the socialist market economy – has a clear, logical connection to the particular conduct under Article 1.1(a)(1) of the SCM Agreement – providing goods."[14] The United States maintains that "[t]he producers of inputs that provided those inputs to the company respondents in the investigation were, in doing so, acting to maintain the predominant role of the state sector in the economy, and upholding the socialist market economy."[15]

11. In order to support this assertion, the United States explains as follows:

> Ample record evidence supports the USDOC's conclusion that the Government of China exercises meaningful control over the entities at issue such that the government can use the entities "to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy." Thus, any time the entities provided inputs to the company respondents in the investigation – the activity in which the entities engaged on a day-to-day basis and also conduct that is described under Article 1.1(a)(1) of the SCM Agreement – the entities were acting in support of a governmental function in China.[16]

However, the use of the word "[t]hus" at the beginning of the second sentence above does not change the fact that the conclusion that follows is a complete non sequitur. Even if it were true that the GOC can "use the entities at issue 'to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy'", it does not automatically follow that the entities' conduct of providing the relevant inputs was in support of this function.[17]

12. In fact, in the *Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG*, and *Steel Cylinders* investigations, the GOC provided extensive evidence in response to the Public Body Questionnaire that cuts directly against the conclusion that the entities' conduct of providing the relevant inputs was in support of this function. Yet the USDOC ignored this information in its public body determinations.[18]

13. Specifically, as China explained in detail in Section II.D.4 of its first written submission, the USDOC failed to consider the various laws and regulations submitted by the GOC that specifically insulate SIEs from government interference in their day-to-day business operations. The USDOC ignored all of the industrial plans from the provinces and municipalities where the respondents and input producers from the investigations at issue were located, and the fact that none of these plans support the conclusion that the entities at issue were performing a "government function" when they provided inputs. The USDOC also ignored the entity-specific information submitted in the *Kitchen Shelving* and OCTG investigations that likewise indicated that the entities at issue were not vested with relevant government authority, simply asserting that the GOC "refused to respond to the Department's requests" and that "information necessary to the analysis of whether the producers are 'public bodies' is not available on the record".[19]

Article 1.1(a)(1). See, e.g. China's response to Panel Question 4. China also believes that the idea that the "government function" must have a "clear logical connection" to the relevant conduct of that entity under Article 1.1(a)(1) is consistent with the European Union's view that an investigating authority should examine whether the "alleged financial contribution falls within the scope of the governmental function said to make the entity a public body." See European Union oral statement, para. 7.

[14] United States' response to Panel question 3, para. 20.

[15] United States' response to Panel question 12, para. 89.

[16] United States' response to Panel question 12, para. 92.

[17] As China discussed in response to Panel question 4, the USDOC cites evidence that SIE *investments* must be in-line with state industrial policies, but cites no evidence supporting the same conclusion in relation to the provision of inputs.

[18] The only information cited by the USDOC in support of the proposition that it "considered" and "relied on" evidence provided by the GOC in making its public body determinations was information concerning the level of government ownership of the enterprises at issue. See China's first written submission, paras. 160-161.

[19] See Preliminary Public Bodies Determination, p. 15 (CHI-4).

14. The United States has provided no compelling justification for the USDOC's failure to comply with its obligation to provide a reasoned explanation for why it "rejected or discounted" evidence that was contrary to a conclusion that there was a "clear logical connection" between the alleged "government function" that it identified and the conduct at issue.

15. The United States has also steadfastly refused to answer China's questions regarding how such a sweeping conclusion would make sense. For example, despite repeated prompting by China, the United States has never explained how an SIE selling inputs to a *private* company for less than adequate remuneration would be "acting in support" of the alleged function of "maintaining the predominant role of the *state* sector in the economy". Such a conclusion is even less plausible when the input producer is itself a private company, as were many in the Section 129 proceedings at issue.

16. Furthermore, despite its agreement that "evidence regarding the scope and content of government policies relating to the sector in which an investigated entity operates" is relevant to an investigating authority's public body analysis[20], the United States never explained how government policies relating to a particular sector would possibly be relevant under the USDOC's framework. If *all* entities providing *all* inputs are acting in support of the alleged "government function" of "maintaining the predominant role of the state sector in the economy", it seems clear to China that sector-specific evidence is utterly irrelevant to the USDOC.

17. In light of the fact that the United States' assertion that the USDOC established a "clear logical connection" between the alleged "government function" and the conduct at issue cannot be substantiated based on the record of the Section 129 proceedings, the United States has also suggested that there may not need to be a "clear logical connection" in all cases.

18. In this respect, the United States highlights the Appellate Body's observation that "there are different ways in which a government could be understood to vest an entity with 'governmental authority', and therefore different types of evidence may be relevant in this regard".[21] The United States explains that in its view, this indicates that the Appellate Body "has understood the concepts of 'governmental authority' and 'governmental function' as being more open-ended than China suggests"[22], and that "a wide range of governmental functions could be relevant to the public body analysis."[23]

19. While the United States has repeatedly emphasized the fact that an entity may be vested with authority in "different ways", the United States has never explained *why* this leads to the conclusion that the concepts of "governmental authority" and "governmental function" are "more open-ended than China suggests". In light of the Appellate Body's emphasis that the relevant *legal standard* is always the same[24], China does not understand why the *manner* in which an entity is vested with authority to perform government functions should change whether or not there needs to be a "clear logical connection" between the authority vested in the entity and the conduct at issue under Article 1.1(a)(1).

20. Furthermore, while the United States argues that "a wide range of governmental functions could be relevant to the public body analysis", the United States has also emphasized that its argument is not that "a public body is an entity vested with authority to perform *any* function that is 'ordinarily' considered a governmental function".[25] However, the United States has never articulated how it proposes to distinguish between the "wide range of governmental functions" that it believes would be relevant to the public body analysis, and those "governmental functions" that it believes would not be relevant to such an analysis. Rather, in relation to the proper analytical framework for determining whether an entity is a public body, the United States has left the Panel with numerous contradictory statements and unanswered questions.

[20] United States' response to Panel question 5, para. 32, citing Appellate Body Report, *US – Carbon Steel*, para. 4.29.

[21] United States' response to Panel question 3, paras. 18-19, quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

[22] United States' response to Panel question 3, para. 19.

[23] United States' response to Panel question 3, para. 19, quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

[24] See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37.

[25] United States' second written submission, para. 43.

21. For example, the United States maintains that it is not arguing that "any entity 'empowered by the law of the State to exercise elements of the governmental authority' [is a 'public body'] *regardless of whether that entity was acting in that capacity* when engaged in the conduct that is the subject of the financial contribution inquiry."[26] Yet the United States maintains that an entity vested with authority to "take steps, as needed, to address certain public health issues of pressing concern to the state" would properly be considered a public body even if it were providing "cheap iron ore".[27]

22. Accordingly, contrary to the initial statement above, the United States *does* appear to believe that an entity can be a public body under Article 1.1(a)(1) regardless of whether the entity is acting pursuant to the authority with which it has been vested, *at least in some instances*. But the United States has provided no basis for the Panel to distinguish these instances from those where it believes that an entity must be empowered to exercise elements of governmental authority and must be "*acting in that capacity*" in order to be a public body.

23. The United States has repeatedly noted throughout these proceedings that "rather than focusing on the conduct undertaken by the entity, the Appellate Body has emphasized that the focus of the public body analysis is on the 'evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense.'"[28] Yet the United States does not dispute that when an investigating authority evaluates evidence of "meaningful control" as part of its evaluation of the "core features of the entity concerned", as the USDOC did in the Public Bodies Memorandum, any alleged government control must be exercised *in relation to the conduct at issue under Article 1.1(a)(1)* in order for such alleged control to be "meaningful".[29] The United States' insistence that an investigating authority must focus on the "core features of the entity" rather than on the conduct at issue cannot be reconciled with the United States' acknowledgment that the conduct at issue is an essential element of a proper "meaningful control" analysis.

24. The United States maintains that "China's attack on Commerce's public body determinations in the section 129 proceedings here is, in reality, an attack on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*" in relation to SOCBs.[30] Yet as China explained in detail in response to Panel question 4, the United States' own chart in its second written submission highlights the difference between the evidence that the Appellate Body focused on in its evaluation of whether SOCBs were performing a "government function" when they provided loans, and the evidence that the USDOC relied upon to determine that every single entity at issue in the Section 129 proceedings was a public body.[31] The United States' insistence that the Appellate Body was not focused on evidence related to the conduct of SOCBs when they provided loans is also belied by the United States' own understanding that the Appellate Body was examining whether there was sufficient evidence before the USDOC to conclude that the banks were "effectively carrying out government functions" when they "'exercise[d] … their functions' *(lending)*".[32]

25. Finally, the United States maintains that China's position regarding the nature of the government authority that must be vested in an entity in order for that entity to be a public body is "not in accord with the findings in prior reports", "is not supported by the text of Article 1.1(a)(1) of the SCM Agreement", and "is not logical."[33] Yet China's position is indistinguishable from the United States' own position in DS436, where the United States argued before the Appellate Body that "the authority required of a public body" is the authority to exercise the "key governmental functions" in the subparagraphs of Article 1.1(a)(1).[34] If the United States believes that China's position in these proceedings is unsupported and illogical, then it is likewise

[26] United States' second written submission, para. 61 (emphasis added).
[27] United States' second written submission, paras. 41, 89.
[28] See, e.g. United States' second written submission, para. 39, quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[29] See United States' second written submission, para. 56.
[30] United States' response to Panel question 3, para. 19.
[31] See China's response to Panel question 4.
[32] United States' second written submission, *US – Countervailing Measures (China)* (31 May 2013), para. 37 (CHI-68) (emphasis added).
[33] United States' opening statement, para. 20.
[34] See United States' opening statement before the Appellate Body, *US – Carbon Steel (India)* (24 September 2014), para. 11 (CHI-67).

condemning its own position before the Appellate Body in the last dispute to examine the meaning of the term "public body".

26. In China's view, the contradictory nature of the U.S. submissions reflects the fact that while the United States recognizes the palpably absurd consequences that would flow from the conclusion that a public body is an entity vested with *any* government authority whatsoever, the United States is still trying to defend the USDOC's public body determinations in the Section 129 proceedings at issue. And despite the Appellate Body's unambiguous rejection of the USDOC's *per se* control-based rule in DS379, the USDOC remains unwilling to relinquish a *per se* control-based rule when it comes to a public body analysis of Chinese enterprises.

27. In order to maintain such a *per se* rule, the USDOC has identified a "government function" that is so broad that the USDOC believes that it covers any and all conduct by any and all companies in China.[35] As is evident in these Section 129 proceedings, the USDOC believes that the expansive "government function" it has identified permits it to ignore any evidence relevant to the particular enterprises or industries at issue.

28. The USDOC's analysis bears no relationship to the case-by-case inquiry that the Appellate Body described in DS379. China recalls the Appellate Body's statement in DS379 that a public body is an entity "vested with *certain* governmental responsibilities, or exercising *certain* governmental authority".[36] The United States has not explained how an investigating authority would determine whether the government authority vested in an entity is relevant to the public body inquiry, and part of the "certain government authority" identified by the Appellate Body, if not by reference to whether that authority is logically connected to the conduct that is potentially being attributed to the government.

29. The USDOC's failure to demonstrate a "clear logical connection" between the alleged "government function" and the conduct at issue, and the USDOC's failure to consider evidence to the contrary, renders the USDOC's public body determinations inconsistent with Article 1.1(a)(1) of the SCM Agreement. The USDOC's Section 129 public body determinations have not brought the United States into compliance with its obligations under the SCM Agreement.

B. The Public Bodies Memorandum Is Inconsistent "As Such" with Article 1.1(a)(1) of the SCM Agreement

30. Before the original Panel, China challenged the USDOC's "rebuttable presumption", articulated in the context of the *Kitchen Shelving* investigation, that majority government-owned entities in China are public bodies. The original Panel found that the *Kitchen Shelving* policy was "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement, because it reflected the same government ownership and control standard that had been found by the Appellate Body in DS379 to be insufficient, as a matter of law, to establish a "public body" within the meaning of that provision.

31. In the Section 129 determinations at issue in this dispute, the USDOC stopped relying on the *Kitchen Shelving* framework and relied instead on the Public Bodies Memorandum to find that all entities at issue were "public bodies". Like the "rebuttable presumption", the Public Bodies Memorandum is "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement for the following four reasons.

[35] The logical extension of the U.S. arguments before the Panel is that the United States believes that the evidence that the Appellate Body emphasized in relation to SOCBs in DS379 − that SOCBs were required to take into account government industrial policies *when making loans* − would be unnecessary to support a finding that every SOCB in China is a public body. Instead, the United States believes that it would be sufficient for the USDOC to cite the Public Bodies Memorandum for the proposition that all SOCBs in China are performing the function of "maintaining and upholding the socialist market economy", without ever demonstrating that this alleged "government function" has anything to do with the provision of loans by the relevant entities. The United States believes that because the GOC can allegedly use SIEs "to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy", it follows that these entities are performing this "government function" when engaged in *any* conduct.

[36] Appellate Body Report, *US − Anti-Dumping and Countervailing Duties (China)*, para. 296 (emphasis added).

32. First, China demonstrated that the Public Bodies Memorandum is a measure "taken to comply" that falls within this Panel's terms of reference under Article 21.5 of the DSU. Despite the fact that the Public Bodies Memorandum was adopted ostensibly to implement the DSB recommendations and rulings in DS379, it was the basis for *each* of the USDOC's determinations in the Section 129 determinations that constitute the *declared* measures taken to comply in *this dispute*.[37] The fact that the Public Bodies Memorandum was issued seven days prior to the filing of consultations request in the original dispute is immaterial, because it is undisputedly "part of each of the administrative records of each of the section 129 proceedings that the USDOC undertook to implement the recommendations and rulings of the DSB in this dispute."[38]

33. Second, China established that the Public Bodies Memorandum is a measure susceptible to challenge in WTO dispute settlement proceedings. The scope of measures that may be challenged before a WTO panel is, in principle, broad, and "any acts or omissions attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."[39] It is undisputed that the Public Bodies Memorandum is an act attributable to the United States, and China had no obligation to demonstrate that it establishes a "practice" or "methodology", as the United States argues.[40]

34. Third, China demonstrated that the Public Bodies Memorandum provides a rule or norm of general and prospective application that is challengeable "as such". By its express terms, the Public Bodies Memorandum articulates an analytical framework that is general, because it applies to an unidentified number of Chinese economic operators, and prospective, because it applies to all future CVD investigations of Chinese imports. As such, the Public Bodies Memorandum has normative value, because it provides administrative guidance and creates expectations among the public and private actors as to the USDOC's public body analysis. The existence of a rule or norm of general and prospective application is corroborated by evidence that the USDOC has systematically applied the Public Bodies Memorandum to make public body determinations since its publication.[41]

35. Fourth and finally, the Public Bodies Memorandum is "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement because it restricts, in a material way, the USDOC's discretion to act *consistently* with Article 1.1(a)(1) of the SCM Agreement. Pursuant to the Public Bodies Memorandum framework, commercial entities in China are divided in three categories: (i) all entities in which the Government of China has a controlling ownership interest are irrebuttably presumed to be "public bodies"; (ii) entities in which the government of China retains a "significant ownership interest" are "public bodies", where there are "additional indicia that show whether such SIEs are used as instruments by the government to uphold the socialist market economy"; and (iii) entities with "little or no formal government ownership" are "public bodies", where there is evidence that the government exercises "meaningful control" over the entity. The USDOC's conclusions in relation to all three "categories" of entities are necessarily inconsistent with Article 1.1(a)(1) in each instance in which the Public Bodies Memorandum is applied, because the USDOC's conclusions are based on a flawed understanding of what constitutes "meaningful control", and in the absence of any determination that a particular entity is performing a "government function" when engaged in the conduct that is the subject of the financial contribution inquiry.

II. The USDOC's Decision to Reject In-Country Benchmark Prices Is Inconsistent with Articles 14(D), 1.1(B) and 32.1 of the SCM Agreement

A. Articles 14(d) and 1.1(b) of the SCM Agreement

36. In the original proceedings before the Panel, the United States defended the USDOC's findings of "distortion" on the grounds that the Government of China played "a predominant role … in the market" as a provider of the inputs in question. On appeal, the Appellate Body reaffirmed that, under this rationale, an investigating authority must demonstrate that the government

[37] China's second written submission, para. 108.

[38] China's responses to Panel questions, para. 48 (referring to United States' response to Panel question 19, para. 139. See also United States' response to Panel question 23, para. 148).

[39] China's second written submission, para. 111, quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

[40] United States' first written submission, para. 167.

[41] China's second written submission, para. 117 (referring to Exhibit CHI-54).

possessed and exercised market power so as to cause the prices of other suppliers to align with a government-determined price. Because the USDOC had made no such showing, the Appellate Body found that the determinations at issue were inconsistent with Article 14(d) of the SCM Agreement.

37. In the Section 129 determinations before the Panel, the USDOC abandoned its rationale based on the government's role as a provider of the good. The reason for this abandonment is clear: the record evidence demonstrated that the Government of China did not possess and exercise market power in the markets for hot rolled steel, steel rounds and billets, stainless steel coil, or polysilicon (the relevant inputs at issue). The facts and economics simply did not support the USDOC's original rationale. The United States' submissions to the Panel confirm that the United States has abandoned this rationale.

38. In place of its original rationale, the USDOC adopted a sweeping new theory for rejecting available domestic benchmark prices under Article 14(d). The USDOC's determinations, and the United States' defence of those determinations as set forth in submissions to the Panel, make clear that this new theory is not constrained in any meaningful way either by the text of the treaty or by facts. It is a theory that replaces customary rules of treaty interpretation with terms and distinctions that are entirely of the United States' own invention, and that replaces careful evaluation of the evidence with sweeping, unsubstantiated assertions.

39. Article 14(d) of the SCM Agreement requires an investigating authority to evaluate the adequacy of remuneration for the provision of a good "in relation to prevailing market conditions for the good … in the country of provision … (including price, quality, availability, marketability, transportation and other conditions of purchase and sale)". As a result of the parties' submissions, the Panel has before it two competing interpretations of what this provision means and, in particular, when this provision permits an investigating authority to resort to a benchmark outside the country of provision.

40. Consistent with the ordinary meaning of its terms, as confirmed by prior panel and Appellate Body reports, China considers that the phrase "prevailing market conditions … in the country of provision" refers to prices that are determined by the interplay of supply and demand within the country of provision. The Appellate Body has found that the term "market" in Article 14(d) refers to "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".[42] Domestic benchmark prices are "market" prices when they are "between independent buyers and sellers in a competitive market where prices are determined by the forces of supply and demand".[43]

41. Article 14(d) further specifies that the adequacy of remuneration shall be determined in relation to *prevailing* market conditions within the country of provision. The ordinary meaning of the term "prevailing" is "as they exist" or "which are predominant".[44] Article 14(d) therefore requires the investigating authority to evaluate the adequacy of remuneration in relation to the existing or predominant market conditions within the country of provision. The Appellate Body has held that to the extent that in-country prices are market determined, i.e. determined by the forces of supply and demand, such prices "would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)".[45]

42. In the five Appellate Body reports to have addressed the issue of "distortion" under Article 14(d), the Appellate Body has consistently referred to "distortion" as the circumstance in which the government effectively determines the price at which the good is sold, thus rendering the comparison required by Article 14(d) circular. This is the "very limited" circumstance that the Appellate Body first identified in *US – Softwood Lumber IV* as justifying the use of out-of-country benchmarks. The three circumstances that panels and the Appellate Body have identified as potentially justifying the use of out-of-country benchmarks are all circumstances in which the

[42] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150, citing Appellate Body Report, *US – Upland Cotton*, para. 404. See also Appellate Body Report, *EC – Aircraft,* para. 981 (finding that the term "market" refers to "a sphere in which goods and services are exchanged between willing buyers and sellers").

[43] Panel Report, *US – Softwood Lumber IV*, para. 4.154.

[44] Panel Report, *US – Softwood Lumber III*, para. 7.50 (quoting Concise Oxford English Dictionary, p. 1084).

[45] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.

government effectively determines the price at which the good is sold, either *de jure* or *de facto*. These circumstances are: (1) where the government sets prices administratively; (2) where the government is the sole supplier of the good; and (3) where the government possesses and exercises market power as a provider of the good so as to cause the prices of private suppliers to align with a government-determined price.

43. It is undisputed that Chinese prices for the inputs at issue are not set administratively, and the USDOC made no finding that they are. It is likewise undisputed that the GOC is not the sole provider of these inputs. Nor did the USDOC find that the GOC possessed and exercised market power in the relevant input markets during the periods of investigation so as to cause the prices of other input suppliers to align with a government-determined price. The USDOC's Section 129 determinations are therefore not based upon any of the three rationales that the DSB has previously recognized as a potential basis for rejecting in-country benchmark prices under Article 14(d). Nor do the USDOC's Section 129 determinations relate, more generally, to the DSB's concern with circular price comparisons.

44. The USDOC's Section 129 determinations are, instead, based on a different interpretation of Article 14(d), one that the United States has struggled to articulate coherently during the course of these proceedings. To the extent that the United States' proposed interpretation can be inferred from its submissions, it appears to be the United States' position that Article 14(d) allows an investigating authority to go beyond the question of whether in-country prices were determined by the interplay of supply and demand and undertake an *additional* inquiry into whether any type of government policy or action "affected" the conditions of supply and demand within the relevant market. The United States appears to consider that an investigating authority may evaluate the "nature" of any type of government policy or action and the "degree" of its influence upon the conditions of supply and demand, and on that basis find that available benchmark prices were not *sufficiently* determined by the interplay of supply and demand to require their use under Article 14(d).

45. The United States does not offer an interpretative basis for its belief that Article 14(d) permits an additional inquiry into whether government policies or actions "affect conditions" in the market. The United States does not contest the finding of the panel and Appellate Body in *US – Softwood Lumber IV* that the term "market" in Article 14(d) does not "refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'".[46] Nor does the United States contest that a wide variety of government policies and actions have the potential to "affect conditions" in a market. Most importantly, the United States offers no basis to distinguish, either as a matter of treaty interpretation or in practice, among all of the different ways in which government policies and actions "affect conditions" in markets, based either on the "nature" of those policies and actions or the "degree" of influence that they have on market conditions.

46. Beginning with the "nature" of different types of government policies or actions that affect market conditions, the United States offers no interpretative basis for the suggestion that the term "market" in Article 14(d) allows the forces of supply and demand to be influenced by certain types of government policies or actions, but not others. Governments "affect conditions" in the marketplace in a myriad of different ways, from the macro (e.g. monetary and fiscal policies) to the micro (e.g. laws and regulations that affect particular products or industries). The United States offers no interpretation of the term "market" that would allow only some of these government policies or actions to affect the conditions of supply and demand within a market.

47. The United States likewise offers no explanation or interpretative support for its suggestion that government policies and actions may affect the forces of supply and demand only to some "degree". What is this "degree", and how would it be expressed? How is this "degree" discernible in the phrase "prevailing market conditions"? The United States' emphasis on the "degree" of government influence upon the forces of supply and demand is particularly troubling in light of the fact that the United States eschews any obligation to examine actual domestic benchmark prices or to identify any causal pathway by which government policies or actions affected those prices. The United States seems to consider that the "degree" of government influence upon domestic benchmark prices is relevant, but then wants to avoid any obligation to evaluate and substantiate what that "degree" of influence actually was.

[46] Appellate Body Report, *US – Softwood Lumber IV*, para. 87 (quoting Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51).

48. In sum, the interpretation of Article 14(d) on which the USDOC's Section 129 determinations are based is unfounded as a matter of treaty interpretation. Because the determinations at issue are based on the United States' erroneous interpretation of Article 14(d), the Panel must find that the determinations are inconsistent with Article 14(d) for this reason alone.

49. Under a proper interpretation of Article 14(d), the evidence on the record of the Section 129 proceedings demonstrated that prices for the inputs at issue were determined by the interplay of supply and demand and therefore constituted "market" prices within the meaning of Article 14(d). Notwithstanding the fact that the USDOC did not even bother to solicit information concerning Chinese prices for the inputs at issue − the very prices that the USDOC found to be "distorted" − the Government of China placed spot market prices for the three steel products on the record. These prices, along with the market commentary accompanying these prices, plainly evinced the operation of market forces for these products. Neither the USDOC in its determinations, nor the United States in seeking to defend those determinations, offered any basis in the record evidence to reject the operation of market forces evident in these pricing data.

50. The operation of market forces in the Chinese steel sector was further evidenced by the market structure of the steel industry during the period 2006-2008 and, in particular, by the rapidly growing levels of private investment in the steel industry during that period. SIE producers of the products at issue represented no more than half of domestic Chinese production of these products, with non-SIE producers and foreign-invested producers accounting for the remainder of the market. Privately-owned steel producers, both Chinese and non-Chinese, invested billions of dollars in the Chinese steel industry during the period 2006-2008. These undisputed facts cannot be reconciled with the USDOC's conclusion that private Chinese prices for the inputs at issue were not market-determined prices.

51. At no point in its determinations did the USDOC identify a causal relationship between the "distortion" factors that it claimed to identify and the prices charged by Chinese suppliers of the inputs in question, whether SIE or non-SIE suppliers. During the course of the Panel proceedings, the United States made clear that, in its view, it was neither "necessary nor possible" for the USDOC to demonstrate a causal relationship between the "distortion" factors that it relied upon, on the one hand, and the domestic benchmark prices that it chose to reject, on the other. This means that the USDOC's findings of "distortion" are based on nothing more than assertion. In the absence of any evidence that the factors identified by the USDOC had *any* effect on available benchmark prices, the USDOC's findings of "distortion" cannot be sustained under any conceivable interpretation of Article 14(d).

52. For these reasons, the Panel should find that the Section 129 determinations at issue remain inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

B. Article 32.1 of the SCM Agreement

53. Article 32.1 of the SCM Agreement imposes limits on "the range of actions that a Member may take unilaterally to counter … subsidization".[47] Under Part V of the SCM Agreement, the permissible responses to injurious subsidization are definitive countervailing duties, provisional measures, and price undertakings.[48] In the Section 129 determinations at issue, the United States countered subsidies allegedly provided to the Chinese steel industry by relying upon these alleged subsidies as a basis for rejecting available in-country benchmarks when evaluating the adequacy of remuneration for steel inputs provided to downstream producers of finished products. This is not one of the permissible responses to subsidization, and this action is therefore inconsistent with Article 32.1.

54. Central to the USDOC's rationale for rejecting available in-country benchmarks in the Section 129 determinations at issue is its finding that Chinese steel producers receive "subsidies". If the United States believes that Chinese steel producers receive "subsidies", the steps that the SCM Agreement permits it to take are: (1) impose definitive countervailing duties, provisional

[47] Appellate Body Report, *US − Offset Act (Byrd Amendment),* para. 252.

[48] Appellate Body Report, *US − Offset Act (Byrd Amendment),* para. 231. Part III of the SCM Agreement allows a Member to take countermeasures if a subsidizing Member fails to withdraw a prohibited subsidy or fails to take appropriate steps to remove the adverse effects of an actionable subsidy or withdraw the actionable subsidy.

measures, or price undertakings in respect of any steel products imported into the United States that the United States properly determines to be subsidized and causing injury; (2) undertake a proper upstream subsidy analysis to determine whether Chinese producers of the relevant steel products did, in fact, receive actionable subsidies and, if so, how much of the subsidy (if any) passed through to downstream purchasers of these products; or (3) request consultations and, if necessary, initiate dispute settlement proceedings under Part III of the SCM Agreement if the United States considers that subsidies allegedly provided to Chinese steel producers are prohibited subsidies or cause adverse effects.

55. The SCM Agreement does not contemplate that a Member may counteract subsidization by relying upon the existence of such subsidies (whether or not shown to be actionable subsidies) and their presumed effects as a basis for rejecting in-country benchmarks under Article 14(d). This action would circumvent the disciplines that the SCM Agreement imposes upon the steps that a Member may take to counteract subsidization. This action against subsidization is not contemplated by the SCM Agreement and, in fact, directly contravenes the disciplines that the SCM Agreement imposes upon actions against alleged upstream subsidies. The Panel must therefore find that the USDOC's Section 129 determinations are inconsistent with Article 32.1 of the SCM Agreement.

III. The USDOC's Section 129 Determinations Remain Inconsistent with Article 2.1(c) of the SCM Agreement

56. In the original proceedings, the Panel found that 12 of the countervailing duty determinations at issue were inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC had failed to take into account "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", as required by the last sentence of that provision. The United States did not appeal these findings of the Panel. As a result, the USDOC was required to reconsider its findings of specificity in respect of the alleged provision of inputs for less than adequate remuneration in each of the investigations at issue.

57. The second of the two factors in the last sentence of Article 2.1(c) requires the investigating authority to take into account "the length of time during which the subsidy programme has been in operation". It is evident that, in order to take this factor into account, the investigating authority must first identify the relevant "subsidy programme", and then determine the length of time during which that subsidy programme, so identified, has been in operation. Only then can the investigating authority evaluate whether a subsidy programme has been "use[d] … by a limited number of certain enterprises" taking into account "the length of time during which the subsidy programme has been in operation".

58. The Appellate Body has stated that the term "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done".[49] While a "subsidy programme" would ordinarily be evidenced in writing, "[a] subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."[50] The "evidence" that the USDOC relied upon in the Section 129 determinations to establish the existence and content of twelve input-specific "subsidy programmes" consisted of nothing more than the fact that the respondent producers had received these alleged subsidies over the course of the one-year period of investigation.

59. The inescapable logic of the USDOC's reasoning is that the provision of a *subsidy* would be sufficient to establish the existence of a *subsidy programme*. In addition, the *subsidy* that gave rise to the specificity inquiry in the first place would define the content and scope of the *subsidy programme*, so that the two become coterminous. This reasoning, if accepted, would collapse the distinction between a "subsidy" and a "subsidy programme", and would render meaningless the separate and independent requirement of identifying a "subsidy programme" pursuant to which the subsidies at issue were granted. Specificity under Article 2.1(c) would become a circular and self-fulfilling inquiry. Not only is this a nonsensical result, but it cannot be reconciled with the

[49] Appellate Body Report, para. 4.141.
[50] Appellate Body Report, para. 4.141.

Appellate Body's prior findings. The mere *repetition* of actions, without a showing of any systematic feature, cannot establish "a systematic series of actions" probative of a plan or scheme.

60. Because the USDOC's Section 129 determinations did not properly identify and substantiate on the basis of positive evidence the existence, scope, and content of a "subsidy programme" or "subsidy programmes", it follows that the USDOC did not properly evaluate "the length of time during which the subsidy programme has been in operation" as required by the recommendations and rulings of the DSB. The USDOC could not have identified the length of time during which a "subsidy programme" has been in operation without properly identifying what that "subsidy programme" is. However, even if the Panel were to accept the USDOC's identification of input-specific "subsidy programmes", the Panel would still need to reject the USDOC's evaluation of "the length of time during which" these alleged "subsidy programmes" have been in operation.

61. The evidentiary basis for the USDOC's finding that the "subsidy programmes" at issue had not been in operation "for a limited period of time only" was based on China's explanation that SOEs "began producing and selling the inputs" at issue in the PRC "at some point during the period covered by the first Five-Year Plan (1953-1957) and possibly earlier". The problem with the USDOC's conclusion is that the fact that Chinese SOEs have *produced and sold* a particular input over a long period of time does not constitute evidence that those inputs have been sold *for less than adequate remuneration* over the same period of time.

62. At the very most, and taking the USDOC's public body determinations at face value, the fact that Chinese SOEs have produced and sold a particular input over a long period of time serves only as evidence that the GOC has provided *financial contributions* over that period, not evidence that the GOC has provided *subsidies* over that period. As the Appellate Body has found, "[t]he mere fact that financial contributions have been provided to certain enterprises is not sufficient … to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement".[51] This would include for the purpose of determining "the length of time during which the subsidy programme has been in operation". Thus, the fact that Chinese SOEs have produced and sold the inputs at issue since at least 1957 is insufficient, on its face, to establish the length of time during which the alleged "subsidy programmes" have been in operation.

IV. The USDOC's Section 129 Land Specificity Determination in Thermal Paper Remains Inconsistent with Article 2.2 of the SCM Agreement

63. In DS379, the Appellate Body explained that under Article 2.2 of the SCM Agreement, "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both".[52] The Appellate Body also explained that it did not read the panel report in DS379 as implying that "the mere existence of a 'distinct' regime would enable a subsidy to be found to be specific to a designated geographical region, even if the identical subsidy were also available to enterprises outside that designated geographical region".[53]

64. Despite the Appellate Body's clear message in DS379 that the "mere existence of a 'distinct' regime" does not permit an investigating authority to conclude that an alleged land-use rights subsidy is regionally specific under Article 2.2[54], the USDOC explained in these Section 129 proceedings that, since DS379, it has "hinged its regional specificity analysis on whether there is a 'distinct land regime' within [a designated geographical region]".[55]

65. In relation to the *Thermal Paper* investigation, the GOC did not respond to the USDOC's Section 129 land specificity questionnaire, and so the USDOC concluded based on "adverse facts available" that "the LTAR program at issue constitutes a 'distinct land regime' and is therefore specific".[56] It is well established, however, that the application of "facts available" does not excuse the application of an improper legal standard.

[51] Appellate Body Report, para. 4.143.

[52] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 378. See ibid. para. 413.

[53] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 421.

[54] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 421.

[55] See Preliminary Land Specificity Determination, p. 6 (CHI-24).

[56] See Preliminary Land Specificity Determination, pp. 9-12 (CHI-24).

66. Based on the investigation record, the USDOC knew that the granting authority did not provide land-use rights at a *price* that was not available to companies outside of the relevant zone. The USDOC also knew that there was evidence on the record that cheaper land was available outside of the zone. Despite this evidence, the USDOC still concluded that the provision of land-use rights for LTAR was specific to the ZETDZ because "the LTAR program at issue constitutes a 'distinct land regime' and is therefore specific".[57]

67. The USDOC was able to reach this conclusion only because the USDOC applies a legal standard under Article 2.2 pursuant to which all "incentives or preferential policies" are potential evidence of a "distinct land regime" for the provision of land-use rights. This legal standard cannot be reconciled with the Appellate Body's finding that "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both".[58] Accordingly, the Panel should find the legal standard applied by the USDOC in *Thermal Paper* is inconsistent with Article 2.2 of the SCM Agreement.

V. The Final Determination in the Solar Panels Investigation Is Inconsistent with Articles 1, 2, and 14 of the SCM Agreement for the Same Reasons that the Preliminary Determination Was Found Inconsistent by the DSB

68. Before the Panel in the original proceeding, China challenged the USDOC's *preliminary* public body, input specificity, and benchmark determinations. The Panel concluded that the USDOC's preliminary public body determinations were inconsistent with Article 1.1(a)(1) of the SCM Agreement[59], and that the USDOC's preliminary input specificity determinations were inconsistent with Article 2.1(c).[60] On appeal, the Appellate Body found that the USDOC's preliminary benchmark distortion determination was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.[61]

69. China considers that the USDOC's *final* determination in *Solar Panels* is a measure "taken to comply" under Article 21.5 of the DSU. China believes that the USDOC's final public body, input specificity, and benchmark determinations are inconsistent with the aforementioned provisions of the SCM Agreement for the same reasons identified by the Panel and the Appellate Body in relation to the preliminary determinations. Accordingly, China believes that the Panel should conclude that the USDOC's final determinations in the *Solar Panels* investigation with regard to public body, input specificity, and benchmark distortion are inconsistent with the SCM Agreement.

VI. The United States Has Failed to Bring Itself into Conformity with the SCM Agreement in Respect of Subsequent Administrative Reviews, Sunset Reviews, and the Ongoing Conduct of Assessing and Collecting Countervailing Duties and Cash Deposits Under the Countervailing Duty Orders at Issue

70. The United States has failed to bring itself into conformity with its obligations under the SCM Agreement by continuing to issue administrative reviews and sunset reviews under the countervailing duty orders at issue in the original dispute, in each instance applying erroneous legal standards which serve as a basis for the continued assessment and collection of countervailing duties subsequent to the expiration of the RPT.

71. The subsequent administrative and sunset reviews fall within this Panel's terms of reference under Article 21.5 of the DSU because they have a sufficiently close nexus, in terms of *nature, effects and timing*, to both the DSB recommendations and rulings and to the Section 129 determinations which constitute the "declared" measures taken to comply.

72. More specifically, the use of unlawful legal standards in successive public body, benefit, and specificity determinations under the same CVD order provides a sufficiently close link, in terms of *nature* or subject matter, between the DSB recommendations and rulings, the subsequent reviews, and the Section 129 determinations. Similarly, the unlawful inclusion of the improperly initiated export restraint subsidies in the calculation of the "all others" rate in successive determinations

[57] Preliminary Land Specificity Determination, p. 12 (CHI-24).
[58] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 378 and 413.
[59] See Panel Report, paras. 7.75, 8.1(i).
[60] See Panel Report, paras. 7.257, 8.1(v).
[61] See Appellate Body Report, paras. 4.97, 5.1(b).

under the *Magnesia Bricks* order provides a sufficiently close link, in terms of *nature* or subject matter, between the DSB recommendations and rulings, those subsequent reviews, and the Section 129 determination in that countervailing duty order.

73. In terms of *effects*, each of the subsequent administrative reviews at issue in this dispute has generated countervailing duty rates and cash deposit rates that replaced the effects of those determinations found to be WTO-inconsistent in the original dispute, or the effects of the Section 129 determinations. Similarly, the sunset reviews at issue have the same effects as the immediately preceding review determination, and the superseding Section 129 determinations, as a basis for the continued imposition of unlawful countervailing duties under the same CVD order.

74. Finally, each successive review is closely linked, in terms of *timing*, to the immediately preceding review, to the original countervailing duty determination, or to the Section 129 determination that it superseded. In this regard, the United States is incorrect that measures pre-dating the end of the RPT or measures post-dating panel establishment are outside this Panel's terms of reference, because both categories of measures may have a bearing on whether the United States achieved substantive compliance by the end of the RPT.[62]

75. On substance, the subsequent reviews at issue constitute a failure by the United States to bring itself into conformity with the covered agreements by the end of the RPT because they continue to reflect legal standards that are inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3 and 14(d) of the SCM Agreement, and because they result in the assessment and collection of countervailing duties and cash deposits in a manner inconsistent with Articles 19.1, 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.

76. Finally, the subsequent administrative reviews, sunset reviews, and Section 129 determinations challenged by China in these proceedings demonstrate that the continued and systematic application of erroneous legal standards in a string of successive determinations leading to the continued assessment and collection of countervailing duties under the CVD orders at issue constitutes "ongoing conduct" that is separately challengeable in WTO dispute settlement proceedings.

77. Such "ongoing conduct" is not only a measure susceptible to challenge in WTO dispute settlement, but also a measure that falls within this Panel's terms of reference under Article 21.5 of the DSU, given the pervasive links that it has, in terms of nature, effects and timing, to both the DSB recommendations and rulings and to the declared measures taken to comply. In this regard, the United States is incorrect that the ongoing conduct challenged by China had not materialized at the time of Panel establishment or constitutes "future" conduct. To the contrary, the subsequent administrative reviews, sunset reviews, and Section 129 determinations challenged by China in these proceedings demonstrate that the United States has systematically applied the unlawful public body, benefit, and specificity legal standards in successive determinations made in each countervailing duty order at issue, leading to the continued imposition of unlawful countervailing duties and/or cash deposits under those orders. Similarly, the subsequent reviews in *Magnesia Bricks* demonstrate that the USDOC systematically included improperly initiated export restraint subsidies in the "adverse facts available" rates in a string of successive determinations issued under that CVD order. This evidence unquestionably demonstrates that the application of these unlawful legal standards in successive determinations under the CVD orders at issue constitutes "conduct that is currently taking place and is likely to continue in the future."[63]

78. The United States is also incorrect in stating that the countervailing duty determinations at issue are more complex and fact-specific than the determinations at issue in *US – Continued Zeroing*. In fact, the subsequent reviews at issue demonstrate that the application of unlawful legal standards by the USDOC does not depend on the underlying facts in the administrative record of the investigation, or on the degree of cooperation by the respondents. To the contrary, the application of unlawful legal standards is the unchanged component in each subsequent review at issue, and the only aspect which the United States purportedly attempted to modify in the Section 129 determinations.

[62] China's second written submission, paras. 231 and 236 (quoting Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122.

[63] China's second written submission, para. 258 (quoting Appellate Body Report, *Argentina – Import Measures*, para. 5.144, in turn quoting Panel Report, *US – Orange Juice (Brazil)*, para. 7.175).

79. For the reasons articulated above, the continued and systematic application of erroneous legal standards in a string of connected and successive determinations leading to the assessment and collection of countervailing duties under the CVD orders at issue constitutes "ongoing conduct" that is inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement. Such ongoing conduct is also inconsistent with Articles 19.1, 19.3, 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it results in the United States levying countervailing duties and cash deposits in excess of the amount of subsidization.

ANNEX C

ARGUMENTS OF THE UNITED STATES OF AMERICA

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

21 June 2017

I. INTRODUCTION

1. To bring the United States into compliance with the recommendations of the Dispute Settlement Body ("DSB") with respect to "as applied" findings made by the original Panel and the Appellate Body, the U.S. Department of Commerce ("USDOC") conducted proceedings pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 proceedings"), in which the USDOC made and published revised determinations.

2. China erroneously claims that the United States has failed to comply with the recommendations and rulings adopted by the DSB in this dispute. China also attempts to expand the proper scope of this compliance proceeding by challenging purported measures that are not measures taken to comply subject to review by this Panel. The Panel's objective assessment of the matter is not assisted when, as the United States has identified in its submissions, China mischaracterizes the determinations of the USDOC; or distorts the arguments made by the United States in this compliance proceeding and in other disputes; or misstates the findings of the Appellate Body in prior reports. China's approach to this compliance proceeding places additional burdens on the Panel to sort through the accuracy of China's assertions and arguments before it can even begin to evaluate their merits. This is not an efficient use of the resources of the WTO dispute settlement system, which is under serious stress.

3. On the substance, China has failed to propose interpretations of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that would accord with the customary rules of interpretation of public international law, and China has failed to acknowledge the extensive analysis and ample record evidence that support the USDOC's determinations in the section 129 proceedings at issue here. The United States has demonstrated that it has implemented the recommendations of the DSB and brought its measures into conformity with the SCM Agreement. The Panel therefore should reject China's claims.

II. CHINA'S ARGUMENTS CONCERNING ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT LACK MERIT

A. The United States Has Complied with the DSB's Recommendations Concerning the "As Applied" Findings with Respect to Public Bodies

4. China wrongly argues that the USDOC's public body determinations in the section 129 proceedings at issue here do not bring the United States into compliance with U.S. obligations under the SCM Agreement. China's argument is premised on a novel, flawed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Furthermore, China asks the Panel to ignore the massive amount of record evidence that the USDOC collected and analyzed, which provides ample support for the USDOC's public body determinations. China's arguments are utterly without merit.

1. China's Interpretive Arguments Lack Merit

5. The novel interpretation of the term "public body" that China proposes fails to take into account the interpretive findings of the original Panel and reflects a misreading of the original panel report and relevant Appellate Body reports. Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") instructs a panel to evaluate "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. In effect, Article 21.5 takes the underlying panel findings, as modified by the Appellate Body, as a given. In the guise of a new interpretive argument, China is re-arguing an excessively narrow approach to the legal interpretation of the term "public body" that was rejected by the original Panel.

6. The original Panel understood that "the critical consideration in identifying a public body is the question of authority to perform governmental functions," and "[t]herefore, 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."

7. China argues, in effect, that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser, is a government function, and that engaging in that activity is consistent with the government's objectives. China denies that its position is that the government function and the conduct under Article 1.1(a)(1) must be the same, but China's arguments belie its assertion. China's proposed approach to the public body analysis is untenable and entirely at odds with findings in prior reports.

8. Rather than focusing on the conduct undertaken by the entity, the Appellate Body has emphasized that the focus of the public body analysis is on the "evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense." China, with its focus on the particular "*conduct* that is the subject of the financial contribution inquiry," appears to suggest that an entity may be deemed a public body only when the entity is "*exercising*" governmental authority. That is contrary to the Appellate Body's findings, under which an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue.

9. Again and again, the Appellate Body has emphasized the relevance of the "core features of the entity and its relationship to the government in the narrow sense," as opposed to a focus on the particular conduct in which the entity is engaged. Contrary to the narrow focus on the conduct of the entity in question that China now proposes, when the Appellate Body has provided guidance concerning the public body analysis, it consistently has called for a wider-ranging examination of a variety of kinds of evidence, which the Appellate Body has explained is "bound to differ from entity to entity, State to State, and case to case."

10. China misreads the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report. Rather than focusing its review narrowly on evidence and analysis relating to the conduct of the SOCBs when they were making particular loans, the Appellate Body observed that the USDOC had "discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions." The evidence that SOCBs were meaningfully controlled in the exercise of their functions was "include[ed]" in the broader discussion of evidence relating to the relationship between the SOCBs and the Chinese Government.

11. China's argument that the "conduct" of the entity is the proper focus of the *public body* analysis also does not accord with the Appellate Body's explanation that a focus on the conduct of an entity is more relevant when examining a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement. The troubling implication of China's new proposed interpretation is that there would be no need for a public body category at all in Article 1.1(a)(1), which is inconsistent with the principle of effectiveness and thus contrary to the customary rules of interpretation.

12. The United States also has demonstrated that China's arguments related to the object and purpose of the SCM Agreement and the relevance to the Panel's interpretative analysis of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") are at odds with Appellate Body guidance and lack merit.

2. The USDOC's Public Body Determinations in the Section 129 Public Proceedings Comply with the Recommendations of the DSB and Are Not Inconsistent with Article 1.1(a)(1) of the SCM Agreement

13. The original Panel explained that "simple ownership or control by a government of an entity is not sufficient" to establish that an entity is a public body. "A further inquiry is needed." Such a "further inquiry" is precisely what the USDOC undertook in the section 129 proceedings.

14. China attempts to support its arguments by focusing narrowly on individual documents on the record of the section 129 proceedings, but the USDOC's determinations were based on the totality of the evidence on the record. The Appellate Body has found previously that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the totality of the evidence, how the interaction of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."

15. The USDOC's public body determinations are set forth and explained in a preliminary determination and a final determination that the USDOC produced as part of the section 129 proceedings, as well as in memoranda analyzing public bodies in China (the Public Bodies Memorandum) and discussing the relevance of the Chinese Communist Party ("CCP") to the public body analysis (the CCP Memorandum). All of these documents, read together, present the USDOC's analysis and explanation underlying its public body determinations. The USDOC's public body determinations are based on analysis and explanation that, altogether, spans more than 90 pages, and in turn that analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record, as well as the USDOC's consideration of information and arguments submitted by the Government of China ("GOC") and other interested parties.

16. The USDOC examined the functions or conduct that are of a kind ordinarily classified as governmental in the legal order of China, the role played by the CCP in China's system of governance, and the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority. The USDOC requested information from the GOC about the relevant input providers in the section 129 proceedings and considered the information the GOC provided or failed to provide. The USDOC addressed the GOC's arguments in the Public Bodies Final Determination in the section 129 proceedings. Ultimately, the USDOC "concluded that certain categories of state-invested enterprises (SIEs) in China properly are considered to be public bodies for the purposes of the United States CVD law, and other categories of enterprises in China may be considered public bodies under certain circumstances."

17. The USDOC's public body determinations were reasoned and adequate and included extensive analysis and explanation; they were based on the totality of the evidence on the record; and they were supported by ample record evidence of the "core features" of the entities in question and their "relationship to the government," which establishes that the entities possess, exercise, or are vested with governmental authority to perform governmental functions in China. It is clear on the face of the USDOC's determinations that the USDOC properly applied the correct interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

3. China's Arguments Against the USDOC's Public Body Determinations in the Section 129 Proceedings Lack Merit

18. China's arguments against the USDOC's public body determinations fail because they are all premised on China's new proposed interpretation of the term "public body," which the United States has shown is legally erroneous and does not accord with findings in prior reports.

19. China's arguments also are unfounded. China argues that the USDOC is required "to undertake a new analysis for each countervailing duty investigation" and further contends that the USDOC failed to "engage in a case-by-case analysis." In fact, the USDOC requested from the GOC entity-specific information about the relevant input providers in each of the section 129 proceedings, but the GOC refused to provide much of the requested information. Specifically, in seven of the twelve section 129 proceedings (*Lawn Groomers, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions,* and *Solar Panels*), the GOC completely failed to cooperate and respond to the USDOC's request for information. In the remaining five proceedings (*Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG,* and *Steel Cylinders*), the GOC only partially responded to the USDOC's request. As a result of the GOC's non-cooperation, the USDOC relied upon the facts that were available on the record, that is, the Public Bodies Memorandum and the CCP Memorandum, which present pertinent analysis and explanation relating to the government and economic system of China. Such analysis and explanation is relevant in a countervailing duty investigation involving allegations that an input provider in China is a public body, particularly where the GOC fails to cooperate and provide the requested entity-specific information.

20. China contends that "the GOC provided extensive evidence" to the USDOC and the USDOC "ignored" that evidence. This is untrue. Rather than failing to evaluate the evidence submitted by the GOC, and far from rejecting or discounting that evidence, the USDOC actually discussed that evidence at length and the USDOC relied on the evidence for its conclusions.

21. China asserts that "[t]he USDOC provided no … 'reasoned and adequate explanation' on the face of its published determinations, much less address 'alternative explanations that could reasonably be drawn from the evidence'." As the Panel will see for itself when it examines the USDOC's preliminary and final determinations and the Public Bodies Memorandum and the CCP Memorandum, China's assertion is absurd.

4. Even under China's New, Flawed Proposed Interpretation of the Term "Public Body," the USDOC's Section 129 Public Body Determinations that Were Based on the Facts Otherwise Available Are Not Inconsistent with the SCM Agreement

22. The USDOC requested from the GOC entity-specific information that would be relevant even under China's new proposed interpretation of the term "public body." However, as discussed above, in seven of the twelve section 129 proceedings, the GOC simply refused to respond to the USDOC's request for information. In the remaining five section 129 proceedings, the GOC, while providing responses to some questions, did not provide the entity-specific information requested by the USDOC. Thus, the GOC deprived the USDOC of the kind of entity-specific evidence contemplated by China's new proposed interpretation. Accordingly, the USDOC's determinations justifiably would have been based on facts available and an adverse inference in selecting from the facts available, as they, in fact, were.

23. Nevertheless, even under China's new proposed interpretation of the term "public body," the USDOC provided a reasoned and adequate explanation, which was supported by ample record evidence, and the analysis, explanation, reasoning, and conclusions in the USDOC's facts available determinations would be equally relevant under China's new proposed interpretation of the term "public body." Accordingly, the USDOC's discussion and the evidence underlying it was probative of and supported a public body determination even under China's proposed interpretation.

B. China's "As Such" Claim Concerning the Public Bodies Memorandum Fails

24. China's claim that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement fails for a number of reasons.

25. First, China cannot bring a challenge against the Public Bodies Memorandum within the scope of this Article 21.5 compliance proceeding because the memorandum is not a measure taken to comply in this dispute. The Public Bodies Memorandum was published in connection with measures taken to comply with the DSB's recommendations and rulings in an entirely different, earlier dispute. Article 21.5 of the DSU does not permit the kind of lateral challenge China attempts. Additionally, the Public Bodies Memorandum was published prior to the commencement of this dispute. China could have challenged the memorandum in the original proceeding, but it opted not to do so. Thus, the Public Bodies Memorandum is outside the scope of this Article 21.5 compliance proceeding.

26. Second, the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement, as confirmed when viewed in light of the analysis applied in other reports. Applying the same analysis to the Public Bodies Memorandum that the original Panel applied to the Kitchen Shelving policy reveals striking contrasts and supports the conclusion that the Public Bodies Memorandum is not "a measure susceptible to WTO dispute settlement." China makes unfounded assertions but points to no language suggesting that the USDOC intended in the Public Bodies Memorandum to describe an "approach," "policy," "long standing practice," or "methodology."

27. The Public Bodies Memorandum, on its face, does not purport to establish or describe a legal standard adopted or applied by the USDOC. Indeed, the Public Bodies Memorandum expressly states that the USDOC was not announcing through the issuance of the memorandum an approach that would be applied in every countervailing duty proceeding. The USDOC, in the Public Bodies Memorandum, presented extensive analysis and explanation and came to certain conclusions after examining voluminous evidence relating to the government and economic system of China. The

analysis, explanation, and evidence in the Public Bodies Memorandum relates to China in general; it may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving China. The USDOC's decisions to incorporate by reference and rely on the Public Bodies Memorandum − and the evidence to which it refers − in subsequent countervailing duty proceedings that also involved products from China did not, after the fact, confer on the Public Bodies Memorandum a status as a "measure" for which there is no support in the text of the Public Bodies Memorandum itself.

28. The Public Bodies Memorandum is not "mandatory" as it does not have any legal effect upon the USDOC. The Public Bodies Memorandum does not, on its face, even purport to set forth an "internal policy." The Public Bodies Memorandum does not describe any rebuttable presumptions, nor any other policy.

29. Third, China argues that the Public Bodies Memorandum prescribes future conduct but China makes no attempt to "clearly establish, through arguments and supporting evidence," that the Public Bodies Memorandum is a rule or norm that has general and prospective application. Instead, China offers bare assertions without even pointing to any language in the memorandum.

30. The Public Bodies Memorandum does not announce a "policy" in a "declaratory style." At most, all that is before the Panel now is "simple repetition." That is, the USDOC has, on a number of occasions, decided to put the Public Bodies Memorandum − and all of the evidence to which it refers − on the administrative records of countervailing duty proceedings involving products from China. That is entirely appropriate given that the underlying facts regarding China's government and economic system are the same in all of those countervailing duty proceedings. In light of China's refusal to provide requested information to the USDOC in many countervailing duty proceedings, it is not surprising that the USDOC has put the Public Bodies Memorandum and supporting information on the record of subsequent countervailing duty proceedings to provide relevant facts for its determinations.

31. Fourth, and finally, China's claim fails because the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement. The Public Bodies Memorandum, by its terms, neither "obliges" the USDOC to do anything nor "restricts" the USDOC from doing anything. The Public Bodies Memorandum does not require the USDOC to reach any WTO-inconsistent determination. Rather, to the extent the USDOC places the Public Bodies Memorandum and supporting evidence onto the record of a countervailing duty proceeding, the USDOC in that proceeding would determine what significance to give to the findings in the Public Bodies Memorandum in the context of making its determination in that proceeding.

III. CHINA'S CLAIMS REGARDING BENCHMARKS LACK MERIT

32. China erroneously claims that Article 14(d) of the SCM Agreement does not permit the use of alternative benchmarks − even where prices are distorted in the country of provision − unless the government is a monopoly provider or relies exclusively on a "price-setting mechanism" to control the marketplace. But recourse to an alternative benchmark for the benefit analysis under Article 14(d) is warranted once an investigating authority has established and explained that in-country prices are not market-determined.

33. China has failed to refute the comprehensive evidence that "systemic and pervasive government intervention . . . diminishes the impact of market signals," limits private enterprise to a "subordinate" role, and results in a persistent imbalance between supply and demand. The USDOC fully explained that prices in the domestic market for steel and polysilicon inputs are not properly described as market-determined; they are distorted by virtue of the GOC's policy interventions and a number of other factors. In light of this, the USDOC determined that the relevant input prices "are not based on market conditions within the meaning of Article 14(d) of the SCM Agreement and, as result . . . are inappropriate to use as benchmarks to determine the adequacy of remuneration." This is consistent with the recommendations of the DSB.

A. Article 14(d) Permits the Use of External Benchmarks

34. Article 14(d) provides that the adequacy of remuneration for government-provided goods or services "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase." In the Appellate Body's words, a "proper finding"

that "recourse to an alternative benchmark is justified requires an investigating authority to properly evaluate whether the proposed benchmark prices are market determined or distorted by governmental intervention."

35. The use or rejection of in-country prices is not a question of whether there are no "market conditions" or market forces, but rather a question of whether the market conditions allow for the use of an in-country benchmark or call for the use of an out-of-country benchmark. Here, the USDOC found that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"

36. In *US – Carbon Steel (India)*, the Appellate Body defined "prevailing market conditions" as consisting of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices." Further, in *EC – Large Civil Aircraft (AB)*, the Appellate Body clarified that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."

37. The USDOC conducted a market analysis and found that the requisite "market conditions" do not exist in China's steel and polysilicon sectors, as the Appellate Body has defined the term. Applying the standard articulated by the Appellate Body does not require a finding that there are *no* other types of market conditions that exist in a particular sector, or that prices for the good in question are wholly unresponsive to external market forces.

38. An interpretation of Article 14(d) that requires the total absence of *any* market conditions would effectively equate to a situation where, through government regulation or administrative fiat, the price for the good in question is set by the government. Although this is one situation identified by the Appellate Body in which domestic prices can be disregarded for the benefit analysis under Article 14(d), it is not a determination that is required for other situations where, as here, pervasive government intervention in the sector is determined to distort prices for the good in question.

39. China misreads the Appellate Body findings in prior disputes when it argues that the distortions evaluated in those disputes are the only types of distortions that would call for the use of out-of-country benchmarks. Simply because the Appellate Body has not previously considered the type of pervasive distortions at issue here does not support the conclusion that those distortions are irrelevant to the benchmark selection analysis. Indeed, in *US – Softwood Lumber IV*, for example, the Appellate Body cautioned that its findings were "expressly limited to considering only the situation of government predominance in the market as a provider of goods *because it was 'the only one raised on appeal*.'" The Appellate Body stated explicitly that it was not *"foreclosing the possibility* that there could be situations other than price distortion due to government predominance as a provider in the market, in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark."

40. Nor is there anything in the Appellate Body's prior reports that suggests – as China asserts – that there should be an arbitrary line between prices that are "effectively determined" by a government and prices that are distorted by the government's extensive interference in a sector (both as a supplier and otherwise). Moreover, the Appellate Body in this very dispute recognized that "what allows an investigating authority to reject in-country prices is *price distortion*." Because price distortion can exist in scenarios other than where the government has effectively set sector-wide prices, China's proposed reading of Article 14(d) would arbitrarily and incorrectly preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined.

41. The U.S. position in this dispute, by contrast, is grounded in the text of Article 14(d) as interpreted by the Appellate Body. In particular, in *US – Carbon Steel (India)*, the Appellate Body found that "prevailing market conditions" under Article 14(d) consist of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices." In *EC – Large Civil Aircraft*, the Appellate Body found that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to

pay. Rather, the equilibrium price established in the market results from a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market." Furthermore, under *EC − Large Civil Aircraft (AB)*, this equilibrium must result from the discipline enforced by an exchange reflective of *both* supply and demand.

42. In the section 129 proceedings, the USDOC applied this analytical framework to its evaluation of the record evidence. Based on consideration of the totality of the evidence, the USDOC concluded that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"

43. As USDOC found based on record evidence, China intervenes heavily in its steel and polysilicon sectors to achieve certain outcomes. The outcomes it achieves through these interventions are not consistent with or reflective of a market discipline between buyers and sellers. China has not even attempted to refute these facts. Instead, China proposes that authorities are limited in their investigation by a *per se* rule of China's own invention. China's *per se* rule, however, cannot be supported under any interpretation of the SCM Agreement. Rather, as the Appellate Body has stated, "[p]roposed in-country prices *will not be reflective of prevailing market conditions in the country of provision* when they deviate from a market-determined price *as a result of government intervention in the market*." The proper focus is on the distortion that occurs "as a result" of the intervention, not on whether the government intervention took a certain form.

44. China overlooks the fact that widespread government intervention in a particular sector can fundamentally distort market signals, regardless of whether that intervention comes in the form of direct control over prices or more general control over a company's internal business decisions. It is not necessary to demonstrate that prices have been *de jure* or *de facto* determined by the government to find that such prices are not market-determined for purposes of Article 14(d).

45. China's approach makes an arbitrary distinction between an investigating authority's ability to consider price distortion caused by *direct* government influence over pricing and price distortion caused *indirectly* by extensive government interference in a sector, including interference with the entities operating in that sector. China presents no basis in law or logic for the proposition that an authority is foreclosed from conducting a holistic analysis that takes account of all types of government interference. Further, China's position is inconsistent with the object and purpose of the SCM Agreement: if accepted, it would prevent WTO Members from fully offsetting the effects of an injurious subsidy by applying countervailing duties.

46. China's argument is based on the premise that the WTO Agreement must be construed so as to avoid any situation in which an authority (or dispute settlement panel) must conduct a close, case-by-case factual evaluation of a particular situation. But China presents no support for this premise. Indeed, many issues involving measures challenged under the WTO Agreement − such as trade remedy measures, or SPS measures, or measures subject to *de facto* national treatment claims − require a close factual analysis. China presents no basis for its argument that a WTO discipline must be governed by simplistic tests.

47. The Appellate Body has explained that: "the task of a panel [is] to assess whether the explanations provided by the authority are 'reasoned and adequate.'" The United States recalls that it is not the task of a panel task to evaluate the underlying evidence to make its own *de novo* findings, or to substitute its own judgment for that of the investigating authority. This type of evaluation, and the appropriate standard of review, is the same regardless of whether the issue under examination is relatively simple (such as that involving a straightforward mathematical operation), or relatively complex, such as that involving market distortion and the authority's choice of a benchmark. Accordingly, the central point in this dispute is whether the USDOC provided a reasoned and adequate explanation for its decision to employ out-of-country benchmarks in the particular proceedings at issue.

B. The USDOC Provided a Reasoned and Adequate Explanation

48. The USDOC's benchmark determinations in the subject proceedings are well reasoned and based on the totality of the available record evidence, which includes information provided by China, evidence of broad-based intervention within the relevant markets, and the demonstrated effects that the intervention has had on conditions in China's steel and polysilicon sectors. The USDOC's redeterminations rely upon extensive evidence from a variety of sources, including reports and research from independent multilateral institutions such as the OECD and the World Bank.

49. The USDOC identified a number of organizations and enterprises that serve as "instruments for policy implementation" and "legally require SIEs to act as instrumentalities of the state to carry out its policy goals and industrial plans rather than commercial, market-oriented outcomes." The USDOC concluded that SIEs are a "unique" kind of organization, and "are considered a potent mechanism for the government to implement national policies." The USDOC concluded that these policies, actors, and actions create a "critical nexus" of policy and ownership that is unique to China. The USDOC reasoned that the "degree and nature of the GOC interventions" is unlike the "governmental regulatory frameworks [that] affect commercial enterprises in most economies" and that "the institutional framework . . . creates a *milieu* in which SIE decision-making is insulated from the disciplines of market forces."

50. Through this "critical nexus" in the steel sector, China ensures that steel prices align with policy goals. The USDOC found that in practice, active government management and the "ensuing interference in [SIE] decision-making, result in the SIEs implementing state policy, which may require pursuing actions inconsistent with market disciplines and the firm's . . . market goals." This politicization of business decisions "necessarily removes" these businesses "from the principles of the market economy and competition." The USDOC concluded that prices flowing from those entities were not reflective of "market conditions," insofar as they do not result from the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers." The USDOC also found that domestic private prices in the steel sector are not reflective of market conditions, based not only upon evidence of the "significant market share" garnered by SIEs, but also broad-based governmental intervention in favor of the state share of the economy that "goes beyond that of ownership in assets or share of production" and that "distorts market signals for all participants in the sectors, just as surely as does the presence of monopoly market power." The USDOC also cited evidence that certain governmental interventions directly extended to private enterprises and affected their pricing, such as forced mergers and acquisitions and the presence of export taxes.

51. Price operates as a signal to convey the relative supply and demand. But when "government policies inflate supply (or otherwise distort choices by market participants that would affect their pricing), the price no longer corresponds with the information it should signal." The USDOC cited extensive evidence that in China's steel sector, China intervenes heavily to achieve certain outcomes in pursuit of desired policy goals, which are not consistent with or reflective of market disciplines between buyers and sellers. This heavy-handed intervention distorts choices by market participants, and has had the effect of inflating supply. Based on the totality of the evidence on the record, the prices at which steel goods are sold cannot fairly be viewed as "market prices."

52. With respect to *Solar Products*, the USDOC solicited detailed information but the GOC declined to respond. In the absence of market information needed to conduct further analysis, the USDOC relied on the facts available, *i.e.*, evidence of extensive Chinese governmental intervention at various levels in the polysilicon market, and the existence of export restraints that artificially depressed domestic prices for polysilicon. On this basis, the USDOC found that all domestic prices for polysilicon within China were distorted by governmental intervention and were, thus, not useable "market" benchmarks.

C. China's Arguments Have No Merit

53. Instead of engaging with the evidence, China argues that the USDOC should have taken a different approach. In China's view, the phrase "prevailing . . . conditions" in Article 14(d) means those conditions − seemingly in every possible situation, and regardless of the level of distortion − must be the conditions as affected by government policies and actions. This interpretation is untenable. If accepted, authorities would be required to ignore the existence of government-

created distortions in the marketplace. The fundamental issue, however, in determining whether to rely upon an out-of-country benchmark under Article 14(d) is, in fact, the existence of price distortion. And, because price distortion can arise due to government intervention, Article 14(d) cannot be read to preclude an investigating authority from addressing situations in which government action has rendered prices not market-determined. Indeed, the Appellate Body in *US − Carbon Steel (India) (AB)* confirmed as much, stating that "in-country prices will not be reflective of prevailing market conditions . . . when they deviate from a market-determined price as a result of government intervention in the market."

54. China also insists that the USDOC should have limited its assessment to an examination of prices themselves and ignored other evidence that is relevant to an evaluation of price distortion. This argument is not supportable. Nothing in the SCM Agreement dictates the specific mode of analysis that an authority must employ in conducting a benchmark analysis. Nor has the Appellate Body prescribed a certain approach. In fact, the Appellate Body in this dispute stated that the "specific type of analysis . . . will vary." The Appellate Body even described a number of approaches that might be employed, stating, for example, that "investigating authorities may have to examine the structure of the relevant market" or the "nature" of the entities operating in that market. The Appellate Body also made clear that what ultimately determines whether "recourse to an alternative benchmark is justified" depends not on the mode of analysis, but on "whether the proposed benchmark prices are market determined or distorted by governmental intervention."

55. Price validation exercises become problematic because systemic distortions resulting from pervasive state influence throughout China's economy may preclude any meaningful quantitative analysis of prices. Any "baseline" that could be calculated to compare input prices could be influenced by the same systemic distortions as the prices themselves. Moreover, it is not necessary to look at input prices to determine that excess supply (all else being equal) has the effect of suppressing prices for a particular product.

56. While nothing in the SCM Agreement supports China's insistence that a particular type of analysis is required, the "market power" approach that China advocates is fundamentally flawed. This approach presupposes that a government exercises market power exclusively through the economic behavior of state-owned suppliers. This, however, excludes from consideration the impact of legal and policy instruments that influence − and empower − state-invested enterprises. China's approach also depends on the assumption that state-invested enterprises operate as profit-seeking commercial actors. But this assumption is unfounded in a system where state-owned and politicized enterprises are used as tools of policy implementation and are insulated from competitive market pressures.

57. China's reliance on a certain private investments in the steel industry also is misplaced. Indeed, the USDOC's determinations were not premised on the lack of any private involvement in the sector. To the contrary, the USDOC based its determination on a thorough, holistic analysis of the sector, and found extensive evidence that the sector as a whole was distorted.

58. With respect to the *Solar Products* redetermination and the use of an external benchmark for polysilicon, the USDOC's findings were fully explained in the redetermination. In particular, the USDOC explained that China decided not to participate in the proceeding, and thereby refused to provide the requested information. In the absence of China's participation, the USDOC relied on multiple sources of evidence on the record, and reasonably found that the GOC intervened at various levels in the polysilicon market. China has done nothing to question the adequacy of the USDOC's explanation regarding the polysilicon market in China.

59. China encourages the Panel to disregard the USDOC's evidentiary findings. This is at odds with the appropriate standard of review. In the words of the original Panel in this dispute: "a panel reviewing a determination . . . based on the 'totality' of the evidence . . . must conduct its review on the same basis." Where "an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination." An analysis of the evidence in this dispute − when examined in light of the totality of the circumstances − demonstrates a probative and objective basis for the determination that the relevant prices in China are not market-determined. In each of the disputed proceedings, this analysis comports with Article 14(d).

IV. CHINA'S CLAIMS CONCERNING ARTICLE 32.1 OF THE SCM AGREEMENT LACK MERIT

60. China's claim under Article 32.1 that the USDOC's price distortion analysis somehow constitutes an impermissible specific action against subsidization has no merit. China has not articulated a cognizable claim nor has it identified the measure it seeks to challenge.

61. China's panel request asserts that the "benchmark determinations" in four of the section 129 proceedings are inconsistent with Article 32.1. Yet, in the course of this dispute, China's presentation of this issue has appeared in a variety of inconsistent formulations, each of which fails to identify the specific measure that China challenges. Nor has China identified any specific action against subsidization apart from the countervailing duty determinations themselves. Given that the imposition of countervailing duties is a permissible response to injurious subsidization, China has no basis for its Article 32.1 claim.

62. As an initial matter, China has failed to comply with the requirements of Article 6.2 of the DSU to "identify the specific measures at issue." Indeed, the measure that China is challenging has been unclear and has remained a moving target throughout the course of this Article 21.5 proceeding. In its panel request, China pointed to the "benchmark determinations." In its first written submission, China asserted that "the USDOC's *reliance on subsidies* allegedly provided to upstream steel producers . . . is unquestionably 'a specific action against a subsidy.'" But even within the same paragraph China also asserted that the "rejection of in-country benchmark prices" is a "measure" that acts against subsidization. China's second written submission further confuses its Article 32.1 claim because it identifies different "measures" as being at issue in this Article 21.5 proceeding.

63. Given these inconsistent (and underdeveloped or abandoned) descriptions of the "measure," which do not correspond to the "benchmark determinations" mentioned in its panel request, this Panel should reject China's claim because China failed to comply with Article 6.2 of the DSU by not identifying any of these alleged "measures at issue." As the Appellate Body has made clear, a party cannot expand a WTO dispute to include measures which were not included within its panel request. China is now impermissibly attempting to do so.

64. An Article 32.1 claim can only succeed if, *inter alia*, the action being challenged is not in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement. In this regard, a measure is in accordance with the GATT 1994, as interpreted by the SCM Agreement, if it is one of the four permissible responses to subsidization: i) definitive countervailing duties, ii) provisional measures, iii) undertakings, and iv) countermeasures. To the extent China is challenging the imposition of countervailing duties, China is improperly attempting to challenge one of the four permissible responses to subsidization in its Article 32.1 claim.

65. Further, China's arguments, in their entirety, are based on the unsupported premise that the USDOC's discussion of subsidies is a necessary and sufficient cause for the USDOC's finding of distortion. Crucially, China cannot and does not, establish that this premise is true. China's argument also requires an assumption that the benefit amount calculated by the USDOC regarding the subsidization of the downstream product bears a specific relationship to the distortion finding rather than, for example, the benchmark price that was used in each case. China has also failed to support this proposition.

66. Article 32.1 does not contemplate challenging intermediate analytical steps that take place when carrying out a CVD investigation. In particular, the Appellate Body in *US – Softwood Lumber IV* and in other reports has recognized that calculating a benefit and using out-of-country benchmarks to do so is consistent with the obligations of the SCM Agreement.

67. The USDOC's analysis of China's steel sector discussed many aspects of government intervention; this analysis cannot be considered an "action" taken by the United States. The only "action" here – as China recognized during the Panel meeting – is the imposition of countervailing duties. Moreover, the USDOC's analysis of China's steel sector does not contain an "upstream subsidy analysis" as China has suggested. The USDOC's analysis likewise does not have an adverse bearing on subsidies provided to upstream producers and thus does not result in an implicit upstream subsidy determination, as China claims. The use or rejection of in-country prices

only bears on the measurement of the adequacy of remuneration for the subsidies being investigated.

V. CHINA'S CLAIMS CONCERNING ARTICLE 2.1(C) OF THE SCM AGREEMENT LACK MERIT

68. With respect to the USDOC's findings that the provision of material inputs for less than adequate remuneration was *de facto* specific, the United States has taken all steps necessary to bring its determinations into compliance with Article 2.1(c). The USDOC identified the subsidies at issue and the systematic series of actions pursuant to which those subsidies were provided. In doing so, the USDOC properly took account of the length of time the relevant programs have been in operation. The USDOC sought information for each subsidy program under investigation. The USDOC reviewed record evidence confirming how the subsidies were provided to a limited number of recipients over time. In each case, the USDOC provided a reasonable and adequate explanation of its determination that the systematic provision of inputs was *de facto* specific.

69. For each of the inputs at issue, the USDOC identified a series of systematic activities that demonstrate the existence of a subsidy program. The USDOC determined, "[o]n the basis of case specific input purchase information, which was reported to the Department in the 12 CVD investigations and compiled in the Department's Inputs Memorandum," that "there is adequate evidence in each of the 12 CVD investigations that public bodies systematically provided stainless steel coil, hot-rolled steel, wire rod, steel rounds, caustic soda, green tubes, primary aluminum, seamless tubes, standard commodity steel billets and blooms, polysilicon, and coking coal for LTAR to producers in the PRC."

70. Given that the subsidies at issue appeared to be provided to a limited number of producers, the USDOC considered whether this limitation might simply reflect that the subsidy programs were only recently introduced (should that be the case). The USDOC explained that it "interprets the criterion concerning the duration of a subsidy program to mean that where a new subsidy program is recently introduced, it is unreasonable to expect that use of the subsidy will spread throughout the economy in question instantaneously." Therefore, to determine whether the limited number of recipients related to the duration of the subsidies in each investigation, the USDOC requested that the GOC explain for each input at issue (1) "how long SOEs have been producing and selling the input in the PRC," (2) "how long the input has been produced in the PRC," and (3) "how long the input has been consumed in the PRC."

71. Based upon China's response, the USDOC found that, "at the latest, SOEs were producing and providing the inputs at issue in the five proceedings in which the GOC provided responses within the geographic location of China by 1957." The USDOC further explained that "for those subsidies at issue, we have preliminarily determined that the subsidy program has not been in operation 'for a limited period of time only' and, therefore, the length of time in which the subsidy program has been in operation does not change the Department's determination that the input LTAR programs in each of those cases were *de facto* specific." In other words, the limited number of recipients did not result from a limited duration of the subsidies at issue.

72. China argues that the fact that Chinese SOEs have produced and sold a particular input over a period of time does not constitute evidence that those inputs have been sold *for less than adequate remuneration* over that period of time. China's argument, however, fundamentally misunderstands the inquiry at issue in the last sentence of Article 2.1(c) of the SCM Agreement. That provision requires that the USDOC take account of "the length of time that the subsidy programme has been in operation," where, as the Appellate Body has explained, the term "subsidy programme" "refers to *a plan or scheme* regarding the subsidy at issue." That plan or scheme, *i.e.*, the "programme," "may . . . be *evidenced by* a systematic series of actions *pursuant to which* financial contributions that confer a benefit have been provided to certain enterprises," but that is not to say that each of these actions would need to meet the definition of a "subsidy" under Article 1 of the SCM Agreement.

73. China misunderstands where the "subsidy program" element fits into the overall subsidization analysis. The identification of a subsidy requires three separate elements: a finding of a (1) financial contribution that (2) confers a benefit and (3) the subsidy is specific. As the Appellate Body stated, "the *existence* of a subsidy is to be analysed under Article 1.1 of the

SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."

74. As one component of a *de facto* specificity analysis involving the provision of inputs, an authority may identify a program involving the *repeated provisions* of inputs over the relevant period. The repeated provision of inputs need not consist exclusively of *subsidized* inputs. Thus, China is wrong in asserting that the program must consist only of activities that have been definitively identified as subsidies. Rather, the relevant inquiry is the existence of repeated instances in which inputs were provided as the result of some sort of planned series of activities or events, which is evidence of the series of actions or activity that constitutes a program.

75. China's argument is based on an incorrect reading of Appellate Body decisions − one that ignores the substance of Articles 1 and 2 of the SCM Agreement and offers no basis upon which to undermine the USDOC's specificity findings. China cannot credibly claim that the subsidies at issue were provided to an unlimited number of users or were made widely available outside the identified industries.

76. China demonstrates a misunderstanding of Articles 1 and 2 of the SCM Agreement by asserting that "[a] 'subsidy programme' is a programme of subsidies." The Appellate Body expressly stated that the subsidy program is an action or series of actions pursuant to which the subsidy in question is provided. China suggests that the elements of a subsidy must be present in each of the actions that constitute a program, but as we have explained, the identification of a subsidy and its elements is separate from the determination of whether that subsidy is specific. The question of specificity speaks to whether there is a limitation on access to the subsidy and not whether a subsidy has been provided historically as well. Here, that limitation is evident in the number of recipients. The SCM Agreement does not provide that an additional finding of *historical* subsidization is required.

VI. CHINA'S CLAIMS CONCERNING ARTICLE 2.2 LACK MERIT

77. With respect to the land specificity determination in *Thermal Paper* − one of the section 129 proceedings in which China declined to participate − the USDOC had only limited evidence regarding "preferential treatment" in land-use rights because China refused to provide requested information. The USDOC properly relied on the available evidence; namely, a statement that the respondent received preferential treatment. The USDOC found that statement probative and tending to support a determination that that respondent received preferential treatment within the zone. When the USDOC sought to further examine the issue during the section 129 proceeding, China failed to provide requested information. China repeatedly mischaracterizes the USDOC's determination. The USDOC properly determined that the land at issue was provided pursuant to a "distinct land regime" and is therefore specific.

78. The original Panel found that a firm's presence in a zone was not enough to establish that the subsidy was provided to limited recipients. Rather, the Panel found that there must also be some "finding that the provision of land within the park or zone is distinct from the provision of land outside the park or zone." The Panel observed that the USDOC's original determinations would have been adequately supported if USDOC had established that "the conditions for the provision of land within the ... zone were different from and preferential to the conditions outside the ... zone, in terms of special rules or distinctive pricing." In the redeterminations at issue, the USDOC thus considered whether the provision of land within the park or zone is distinct from the provision of land outside the park or zone, and whether the conditions for the provision of land within the zone are different from and preferential to the conditions outside the zone.

79. At issue was the 2005 purchase of granted land-use rights by the respondent, Guangdong Guanhao High-Tech Co., Ltd. (GG), located in the Zhanjiang Economic and Technological Development Zone (ZETD Zone). With respect to GG's purchase of land-use rights in the ZETD Zone, the USDOC requested that China provide information about whether a "distinct land regime" existed, "*e.g.*, whether the prices or terms of sale, including other incentives tied to the purchase of the land inside the geographic region at issue, are different from those offered outside of the geographic region." If such differences were found, the USDOC explained, this would serve as the basis for finding regional specificity. The USDOC's analytical approach is consistent with the DSB's recommendations because, just as the Panel suggested, it evaluates whether the conditions on which land was sold inside a zone were distinct from those outside the zone.

80. China argues that the USDOC based its determination on a misplaced interpretation of the term "preferential treatment" in a government-issued land appraisal. These claims are predicated on China's misunderstanding of the USDOC's determination and a misreading of the record. The USDOC's determination relied on the facts available from the original investigation because China declined to respond to the USDOC's requests for information pertaining to land. Without this information, the USDOC found that it was unable to fully investigate certain aspects of the provision of land at issue. The investigation record indicates that the land appraisal issued to the respondent refers to "preferential treatment," but beyond this observation the USDOC was unable to further examine the exact terms of that "preferential treatment."

81. Company officials in their comparison appraisal report indicated that the government's preferential policies resulted in an "appraisal price . . . of a particular nature," which suggests that the "preferential treatment" at issue affected pricing. The verification report also explains that the USDOC examined an appraisal for land outside of the ZETD Zone, but could not reach a resolution as to whether it presented comparable terms. Thus, the USDOC relied on this evidence of "preferential treatment" as it constituted the facts available and found that that the GOC sold the land in question to the respondent at a price and at terms that were not available to other firms, *i.e.*, firm located outside of the ZETD Zone. The record does not contain any evidence additional to the comparison appraisal from the original investigation upon which the USDOC could have relied. China had the opportunity to provide additional information, but China declined to cooperate in this proceeding.

VII. THE PANEL SHOULD REJECT CHINA'S CHALLENGE TO COMPLETED OR FUTURE REVIEWS OR SO-CALLED "ONGOING CONDUCT"

82. China seeks to expand the scope of this Article 21.5 proceeding beyond the existence or consistency of measures taken to comply with the DSB's recommendations, asserting that the Panel's terms of reference include certain additional proceedings and so-called ongoing conduct that should be adjudicated in this proceeding. China's attempt to expand the scope of U.S. implementation obligations has no basis in the DSU, and China's claims against alleged "subsequent closely connected measures" are invalid for several reasons.

83. China has failed to make out its claims or a *prima facie* case with respect to the additional reviews, sunset reviews and so-called "ongoing conduct." China's "claims" consist of little more than a list of proceedings without the evidence or argument to satisfy its burden as the complaining party. China has failed to meet its burden of argument with respect to any of these claims. These additional reviews and sunset determinations are not sufficiently closely connected because they do not, as China claims, consist of simply applying "the same" or "equally unlawful legal standards." Rather, they consist of fact-intensive determinations that in each case depend on the evidence and circumstances of the proceeding.

84. China has also not demonstrated that these subsequent proceedings are closely connected because it has not established the facts and circumstances of each of the additional proceedings. Although China refers the Panel to excerpts from each of the subsequent determinations, China neglects to provide the necessary analysis that would be required to make conclusions about the investigating authority's reasoning or evidence in each case. As the Appellate Body observed in *US – Gambling*, a claim necessarily must fail if the complaining Member does not make a *prima facie* case, and moreover, it would be legal error for a panel to make the *prima facie* case for a complaining Member.

85. The Panel should likewise reject China's attempt to expand the terms of reference to include these past proceedings given China's failure to put forth a *prima facie* case that the findings and analysis in subsequent proceedings are "closely connected" to the measures taken to comply. The United States emphasizes that the question of whether subsequent reviews are "related in nature" is not the applicable threshold for determining whether a "particularly close relationship" or "sufficiently close nexus" exists in connection with the measures taken to comply. Rather, China's claim depends on two questions: (1) whether the challenged measure existed at the time of panel establishment, and (2) whether it is closely connected with a measure taken to comply. Here, the answer to both questions is "no," and thus China's claims fail.

86. The first question − whether the measure exists at the time of panel establishment − is fundamental to any WTO proceeding. A complaining party may wish to cover measures that may be adopted in the future, but the DSU does not contemplate such an approach. To do so would require a panel to chase after a moving target and the panel process could not function effectively if that were the case. The only exception is in the case of a measure with the "same essence," which is not the case in this dispute.

87. With respect to the second question, a measure that exists at the time of panel establishment − even if not labeled as a compliance measure − may fall within the terms of reference of a compliance proceeding under Article 21.5 as a "measure taken to comply" by virtue of its "particularly close relationship" or "sufficiently close nexus" to a compliance measure. "Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures."

88. China's core argument is that the subsequent reviews are related in nature because they are related to the same countervailing duty orders. However, the mere fact that the reviews are related to the same order is insufficient to establish that the determinations made therein have the same nature such that the reviews have a "particularly close relationship" or "sufficiently close nexus" with the section 129 proceedings at issue in this dispute. Rather, it would be necessary to establish that the nature of the analyses and individual findings within each review are of the same nature. Here, China has failed to do so. The nature of the findings made in the challenged subsequent reviews vary according to the facts of each given proceeding, the time period at issue, the sequence of questionnaires issued and responses provided, and the analysis of the evidence in each case.

89. Despite China's attempts to liken the question before the Panel in this dispute to the question of zeroing, China has not demonstrated − or even provided a plausible explanation − that the *nature* of the inconsistencies found in the original determinations can be found in the subsequent proceedings. When the Appellate Body discussed the nature of related proceedings in the zeroing context, the Appellate Body recognized the fact that several DSB findings had already established the existence of an "as such" measure. The Appellate Body's decisions in *US − Zeroing (Japan) (Article 21.5 − Japan)* (and in *US − Zeroing (EC) (Article 21.5 − EC)*) were decided in an environment where there were no questions as to whether the action in subsequent proceedings was of the same nature as in the original proceedings. The zeroing methodology (the use of which hinged only on whether a respondent's sales database included sales with "negative" margins) is a vastly simpler type of "measure" than the challenged determinations, which are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding.

90. In contrast to the calculation issue in those disputes, the issue addressed in the section 129 proceedings pertains to whether or not the given facts, taken together, demonstrate a countervailable subsidy. The questions of whether there is evidence of a financial contribution by a public body, evidence that a benefit is thereby provided, and evidence that a subsidy is specific − are questions of an altogether different nature from the question of recalculating a dumping margin without zeroing.

91. Given that the public bodies, input specificity, land, and benchmark determinations, are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding as part of its analysis, it cannot reasonably be found, without close examination of the specific determination in each challenged proceeding, that the determinations in subsequent administrative and sunset reviews are of the same nature as the originally challenged proceedings.

92. China's claims with respect to "future conduct" are also not within the Panel's terms of reference. Measures that are not yet in existence at the time of panel establishment − much less those which may never come into being − cannot be within a panel's terms of reference.

93. China has likewise failed to establish that any so-called "ongoing conduct" exists that may be challenged as a rule or norm of general and prospective application. In the view of the United States, "ongoing conduct" is not cognizable as a measure that is susceptible to challenge.

China has failed to establish that any such "ongoing conduct" exists or is likely to continue under the challenged orders that are at issue in this dispute. Likewise, even if the Panel were to find that China has established the subsequent reviews constitute the "ongoing conduct," China has not demonstrated a "particularly close relationship" or "sufficiently close nexus" to the declared "measure taken to comply" and it cannot be presumed that such a close connection exists.

94. In advancing its "ongoing conduct" claim, China has failed to even identify the indeterminate number of measures comprising the purported "ongoing conduct" "measure," much less identify the conduct within such measures that is purportedly inconsistent with the SCM Agreement. Thus, China has not only failed to establish the "string of determinations, made sequentially. . . over an extended period of time" that would be required to support its claims related to alleged "ongoing conduct," but also has failed to establish that the challenged practices "would likely continue to be applied in successive proceedings." Thus, China's claims in relation to "ongoing conduct" must be rejected.

VIII. FACTS AVAILABLE

95. The Panel cannot make any findings under Article 12.7 of the SCM Agreement regarding the USDOC's use of facts available in the challenged proceedings. A party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim. As the Appellate Body has explained, a complaining party will satisfy its burden of proof "when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence." A "*prima facie* case is one 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 presenting the *prima facie* case." The case presented by China fails to meet this standard. To meet its burden, China must adequately identify measures that fall within the scope of the panel's terms of reference, and it must make an adequate legal argument for each of its claims and "adduce[] evidence sufficient to raise a presumption that what it claims is true." The panel may not make the case for it.

96. China, as the complaining party in this Article 21.5 proceeding, must make a *prima facie* case with respect to each of the measures that purportedly constitute an inconsistency with Article 12.7 of the SCM Agreement. Although China put forth various claims with respect to the USDOC's use of facts available in its panel request, it subsequently failed to make a *prima facie* case with respect to these claims. Moreover, China concedes that it does not challenge what the facts are in these proceedings, but rather challenges the "legal standard." China claims that, regardless of whether the USDOC relied on the facts available, its decisions are "just as inconsistent." In other words, China recognizes that there is no basis upon which to make Article 12.7 findings.

97. The United States notes that China's response to the Panel's questions confirms that "China is not pursuing claims under Article 12.7." The United States does not agree with China that the Panel can make findings under Article 12.7 when China failed to challenge the application of Article 12.7 in the first place.

IX. CONCLUSION

98. The United States respectfully requests that the Panel find that the United States has complied with the recommendations of the DSB and that the U.S. measures taken to comply are not inconsistent with the SCM Agreement.

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

ANNEX D-1

INTEGRATED EXECUTIVE SUMMARY OF AUSTRALIA

11 May 2017

I. INTRODUCTION

1. Members of the Panel, thank you for the opportunity to present Australia's views in this dispute. While not taking a position on the particular facts at issue in this dispute, Australia considers that significant questions about the proper interpretation of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) arise regarding "public body" and "benefit".

II. PUBLIC BODY

2. Australia agrees with the approach articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* and reiterated in *US – Carbon Steel (India)* for determining whether certain conduct is that of a public body. In particular, such a determination "must be made by evaluating the core features of the entity and its relationship to government" and "must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority."[1] Based on this approach, the focus of the determination is clearly on the entity itself, and whether that entity possesses, exercises, or is vested with governmental authority.

3. China's proposed interpretation has a different focus. Under China's approach, an investigating authority must assess the particular conduct or transaction at issue − such as providing inputs or purchasing goods − and determine whether that conduct or transaction involves the performance of a governmental function.[2] For China, therefore, the question of whether an entity constitutes a "public body" is transaction-dependent. It can vary depending on the act in question.[3] The same entity may be a "public body" for some transactions, but not for others.

4. This approach is problematic for a number of reasons. First, it does not accord with the text of Article 1.1(a)(1). In particular, the text distinguishes between "two principal categories of entities": governments and public bodies on the one hand, and private entities on the other.[4] As the Appellate Body recognised in *US – Anti-Dumping and Countervailing Duties (China)*, *all* conduct of governments and public bodies constitutes a financial contribution where it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv).[5] There is no separate, context-specific requirement to determine whether such conduct involves the discharge of a governmental function in each instance. Rather, the "governmental" character of those entities is sufficient.[6] By contrast, for "private entities", there must be an additional showing that the specific conduct in question results from entrustment or direction by government to carry out such conduct.[7] Therefore, whether the conduct of a private entity is subject to Article 1.1(a)(1) is context-dependent.

5. If − as for "private entities" − the test for "public bodies" were to require a context-dependent assessment of whether the specific conduct in question flowed from the exercise of a governmental function, there would be no meaningful difference between "public bodies" and "private entities". This would render their separate inclusion in the text inutile. Further, such an interpretation would be inconsistent with the Appellate Body's distinction between the governmental character of public bodies and the non-governmental character of private entities.[8]

[1] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 345; *US – Carbon Steel (India)*, para. 4.52.
[2] China's first written submission, para. 14.
[3] China's first written submission, paras. 93-94
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.
[5] Ibid.
[6] Ibid paras. 284 and 291.
[7] Ibid.
[8] Ibid paras. 291-292.

6. Second, contrary to China's understanding,[9] the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* does not establish that investigating authorities must assess whether the specific conduct or transaction at issue involves the exercise of a government function as a pre-requisite to determining public body. Rather, in that case, the consideration of the specific conduct or transaction at issue was a consequence of the fact that such conduct was contained in the instrument vesting the relevant entities with governmental authority.[10] There was no suggestion that, had that instrument *not* mentioned that conduct, a finding of "public body" would have been precluded.[11] The same is true for *US – Carbon Steel (India)*.[12]

7. Third, China's approach would impose an impractical evidentiary burden on investigating authorities by requiring an investigating authority to obtain evidence that *each* transaction or series of transactions result from a particular performance of a governmental function. In Australia's view such a requirement would make it impractical to render findings on public bodies, particularly when faced with uncooperative parties. As a result, this approach would be inconsistent with the context afforded by other elements of the SCM Agreement which affirm that investigations must be capable of rendering findings. In particular, this context includes: (i) Article 11.1, which describes the function of an investigation as to "*determine* the existence, degree and effect of any alleged subsidy"; (ii) Article 12.7, which enables an investigation to proceed even where interested Members or parties fail to provide necessary information; and (iii) Article 12.12, which clarifies that the due process safeguards contained in Article 12 are not intended to prevent an investigation "from proceeding expeditiously" in reaching determinations or applying countervailing measures. In Australia's view, the approach proposed by China would frustrate an investigating authority's discharge of its function to make determinations on "public body" and is contrary to the contextual interpretation of the obligation within the SCM Agreement.

III. BENEFIT

8. Turning to China's "benefit" claims, we understand the disagreement between the Parties regarding the interpretation of Article 14(d) in this dispute to hinge on this question: does *de jure* or *de facto* price setting by government exhaust the "very limited"[13] circumstances in which in-country prices can be rejected or adjusted, or could such a rejection also be justified on the basis of distortions caused by other kinds of governmental measures?[14]

9. In Australia's view, the SCM Agreement does not define exhaustively the types of governmental measures that could justify rejecting or adjusting in-country prices. The fact that WTO jurisprudence has recognised *de jure* and *de facto* price setting as a potential basis for rejecting in-country prices does not mean that other governmental measures should necessarily be excluded in that regard.[15] For instance, a governmental measure – other than price setting – could have the effect of suppressing the prices of public bodies. If that governmental measure has the same effect on private prices, it may not be appropriate to use those private prices for a comparison under Article 14(d). Instead, it may be appropriate in such circumstances to remove the price effects of the governmental measure, although we recognise that such circumstances have been described by the Appellate Body as "very limited".[16]

10. Australia does not express a view on whether the governmental measures at issue in the present dispute provided a sufficient basis for rejecting in-country prices. Nonetheless, Australia considers that the present dispute does not turn on whether those measures involve *de jure* or

[9] China's first written submission, paras. 67 and 89-91; second written submission, paras. 25, 30, and 40-50.

[10] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 349.

[11] See eg Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.

[12] *US – Carbon Steel (India)*, para. 4.29: 'For example, evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates *may inform* the question of whether the conduct of an entity is that of a public body.' (emphasis added)

[13] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

[14] See China's first written submission, paras. 240 and 243; United States' first written submission paras. 251-255.

[15] Indeed, the Appellate Body has stated that 'We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself' (Appellate Body Report, *US – Countervailing Measures (China),* fn 530 to para. 4.50).

[16] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

de facto price setting. For Australia, it is neither possible nor desirable to develop rigid legal rules for the kinds of governmental measures that might justify rejecting in-country prices. Such an assessment is necessarily case-specific.[17] Therefore, the key question in the present dispute is whether the USDOC provided a reasoned and adequate explanation based on the particular record evidence in the investigation at issue for rejecting in-country prices.

IV. CONCLUSION

11. For the reasons outlined, Australia submits that the Panel find: (i) that the determination of "public body" does not require evidence that the entity is performing a governmental function when engaging in the impugned conduct or transaction; and (ii) that the question of whether a given governmental measure falls within the "very limited" circumstances that justify rejecting or adjusting in-country prices under Article 14(d) is necessarily case-specific and not susceptible to rigid legal rules.

12. Thank you for the opportunity to present Australia's views in this dispute.

[17] See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.51.

ANNEX D-2

INTEGRATED EXECUTIVE SUMMARY OF CANADA

21 June 2017

I. INTRODUCTION

1. Canada's views on public bodies, out-of-country benchmarks, ongoing conduct, and measures taken to comply are set out below.

II. PUBLIC BODIES

2. The Appellate Body has found that in making a public body determination, the core features of the entity at issue and its relationship with the government are what matter. The conduct of the entity in making financial contributions is not the focus of the analysis. Rather, the conduct is to be analyzed with regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the prevailing legal and economic environment.[1]

3. Based on an evaluation of the core features of the entity and its relationship with the government, an investigating authority will determine either that an entity is a public body or that it is not, in the same way that an entity is either government or it is not. The designation of public body is not dependent on each action the entity takes in relation to its function. Rather, a public body designation should be made on the basis of evidence related to government policies, the applicable legal order, the prevailing economic environment in the country, and other evidence related to the core features of the entity and its relationship with the government.[2]

4. In addition, evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.[3] Meaningful government control over an entity's functions need not be evaluated in relation to each financial contribution.[4] Evidence of meaningful control relates to the legal, economic and policy framework of the entity, not its conduct in the provision of financial contributions under inquiry.[5]

5. China's interpretation that "an entity must be performing a 'government function' when engaged in the conduct that is the subject of the financial contribution inquiry"[6] would effectively render the term "public body" redundant with the "entrusts or directs" provision of Article 1.1(a)(1)(iv).

III. OUT-OF-COUNTRY BENCHMARKS

6. Article 14(d) establishes a guideline for determining whether a benefit is conferred in the context of a government's provision of goods and services and the purchase of goods.[7] A comparison is generally required in determining whether remuneration for the provision of a good is "less than adequate".[8] This involves the selection of an appropriate comparator with which to

[1] Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317 and *US – Carbon Steel (India)*, para. 4.29.
[2] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.
[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.
[4] Ibid. paras. 317-318.
[5] Ibid. para. 350.
[6] China's first written submission, para. 91.
[7] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.84 and *US – Carbon Steel (India)*, para. 4.147.
[8] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.44 and *US – Carbon Steel (India)*, para. 4.148.

compare the government price for the good in question.[9] Moreover, investigating authorities may consider the possibility of using out-of-country benchmarks in very limited circumstances.[10]

7. The assessment of the benefit must be made in relation to prevailing market conditions in the country of provision.[11] As a result, any benchmark for conducting such an assessment must consist of market-determined prices under the prevailing market conditions for the good in question in the country of provision".[12]

8. The primary benchmark and starting point in any analysis must be prices from arm's length-transactions in the country of provision. Nevertheless, it is not the source of the prices that is determinative, but rather whether the prices are market-determined and reflective of prevailing market conditions in the country of provision. In this respect, even the prices of government-related entities in a predominant market position could be established on market principles.[13]

9. The decision to reject in-country prices must be made on the basis of a market analysis that determines that such prices are not market determined as a result of government intervention in the market.[14] The key factor, nevertheless, is not government predominance or even the possession of sufficient market power *per se*.[15] Rather, the key factor is evidence of how government predominance and the possession and exercise of market power has actually been used to cause price distortion. The investigating authority must demonstrate a clear evidentiary path from the government's predominant position to its possession of market power to its exercise of that power to distort market prices.[16]

10. Thus, in the context of this case, this compliance Panel must examine what the USDOC has actually done to analyze the precise evidentiary path showing how the Chinese government has distorted prices in the market. Moreover, the USDOC must do so in a manner that is based on positive evidence and demonstrates an adequate explanation of this conclusion.

IV. ONGOING CONDUCT

11. The ability of Members to challenge unwritten measures, including ongoing conduct, is an important mechanism for achieving both the prompt settlement of disputes and a final resolution to the dispute and is consistent with the principle that any act or omission attributable to a WTO Member can be challenged in WTO dispute settlement proceedings.[17]

12. The Appellate Body has described ongoing conduct as, "conduct that is currently taking place and is *likely to continue* in the future".[18] The Appellate Body has said that to establish the existence of ongoing conduct a Member must show (i) that the measure is attributable to a Member; (ii) the precise content of the measure; (iii) the repeated application of the conduct; and (iv) the likelihood that such conduct will continue.[19]

13. It is evident from these criteria that the analytical framework for ongoing conduct is not limited to the facts of cases (*i.e. Argentina – Import measures*, *US – Import Measures* and *US –*

[9] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.44 and *US – Carbon Steel (India)*, para. 4.148.
[10] Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[11] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.46 and *US – Carbon Steel (India)*, para. 4.150.
[12] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.46 and *US – Carbon Steel (India)*, para. 4.151.
[13] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.48 and *US – Carbon Steel (India)*, para. 4.154.
[14] Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.76 and *US – Softwood Lumber IV*, paras. 98-99.
[15] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.59.
[16] Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.52, 4.59 and 4.62 and US – *Carbon Steel (India)*, fn. 754.
[17] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 81. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.109.
[18] Appellate Body Report, *Argentina – Import Measures*, para 5.144, citing Panel Report, *US – Orange Juice (Brazil)*, paras. 7.175-7.176 (emphasis in original).
[19] Appellate Body Report, *Argentina – Import Measures*, paras 5.104 and 5.108.

Orange Juice (Brazil)) in which it has existed to date. On the contrary, the analytical framework for ongoing conduct is capable of being applied in a broad range of circumstances, including the present case, provided the above four criteria are satisfied.

14. Ongoing conduct is neither "an entirely new type of 'measure'"[20], nor an "indeterminate number of future measures"[21], as the United States claims; rather, ongoing conduct is an analytical tool for understanding and evaluating certain types of measures and requires evidence of repeated past application of the conduct in question.

15. Understanding and applying the analytical device of ongoing conduct in a flexible manner is necessary to allow Members to obtain relief without having to return to dispute settlement multiple times.

V. MEASURES TAKEN TO COMPLY

16. The Appellate Body has found that under the *Dispute Settlement Understanding*, a failure to fully implement the Dispute Settlement Body's (DSB) recommendations and rulings cannot be found before the end of the reasonable period of time (RPT).[22] However, once the RPT has expired, the implementing Member is obligated to fully comply with the recommendations and rulings of the DSB, and any WTO-inconsistency has to cease by the end of the RPT with prospective effect.[23] When it comes to the assessment of any duties following the end of the RPT, whether implementation is compliant should not be determined by reference to the date when liability arises, but rather by reference to the time when final duty liabilities are assessed.[24] Thus, any subsequent reviews or proceedings may not extend the use of WTO-inconsistent methodology beyond the end of the RPT.[25]

17. In evaluating whether a Member has implemented the DSB's recommendations and rulings, a compliance panel is to examine "measures taken to comply with the recommendations and rulings"[26] of the DSB and is not limited to measures that a Member says it has taken to comply.[27] A panel may also examine the timing, nature, and effects of other measures to determine whether there is a close nexus between such measures and the DSB's recommendations and rulings.[28] This nexus-based test is principled and focuses on the substance of a respondent Member's actions or omissions rather than on formalistic labels.

18. In its argument regarding Panel jurisdiction, the United States appears to be recycling lines of reasoning that were rejected by the Appellate Body in both *US – Zeroing (EC) (Article 21.5 – EC)* and *US – Zeroing (Japan) (Article 21.5 – Japan)*, and which would effectively undermine dispute settlement concerning trade remedies measures. Relying on the past decisions of the Appellate Body, the Panel should reject the United States' assertion that measures completed during the course of compliance proceedings necessarily fall outside of the Panel's jurisdiction solely on the basis of their timing. Jurisdiction should instead be determined on the basis of all three elements of the nexus-based test. Moreover, it is not important whether any of the administrative and sunset reviews challenged by China were conducted before or after the end of the RPT.[29] What is significant is whether WTO-consistent methodology is being applied by the investigating authority in any action taken related to a measure subject to implementation of DSB recommendations or rulings following the end of the RPT.

19. Furthermore, a measure evidenced using the analytical tool of ongoing conduct is *in principle* susceptible to review by a compliance panel.[30] Whether a certain alleged ongoing conduct

[20] United States' first written submission, para. 328.
[21] United States' first written submission, para. 326.
[22] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.
[23] Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.
[24] Ibid. para. 309.
[25] Ibid.
[26] Article 21.5 of the DSU.
[27] Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada),* para. 73.
[28] Ibid. para. 77.
[29] See United States' first written submission, para. 321, where the United States writes that "nearly all of the measures that China identifies were concluded prior to the end of the RPT on April 1, 2016, and thus were not 'subsequently closely connected' to the measures taken to comply in this dispute".
[30] Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

falls within the terms of reference of a compliance panel should be evaluated on the basis of the same nexus-based test that applies to all "measures taken to comply".

20. If the Panel were to accept the interpretation advanced by the United States, Members would not be able to obtain effective relief against the United States' trade remedies system through WTO dispute settlement. If Members need to bring a new dispute for each connected stage of an investigation, such as an administrative or sunset review, the next review may have been completed before the end of the reasonable period of time to comply expires. Members seeking to challenge such a sequence of determinations would find themselves in a circular process with little prospect of ever obtaining effective relief. This interpretation could not only frustrate compliance proceedings, it would also be inconsistent with the objectives of promptly settling disputes and securing positive solutions to disputes.[31]

[31] Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan),* para. 122.

ANNEX D-3

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

21 June 2017

I. CONCERNING CHINA'S CLAIMS REGARDING THE USDOC'S PUBLIC BODY DETERMINATIONS

A. "Public bodies" under Article 1.1(a)(1)

1. In *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that "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). An entity can be vested with authority in many different ways. Whether an entity qualifies as a "public body" is, as the Appellate Body has emphasized, closely connected to the more general issue of *attribution*. All relevant evidence should be taken into account, and a wide range of factors (e.g. the links between the entity and the State, specific regulatory frameworks etc.), may be relevant. While this assessment must always be tailored to the circumstances of the case, in the EU's view, the investigating authority may also take into account more general assessments that have been placed on the record of the investigation.

2. Demonstrating the exercise of "governmental functions" is one way of showing "governmental authority". Both parties seem to agree that, to the extent that a public body determination in a given case is based on the exercise of "governmental functions", the assessment should take into account the entity's conduct. This suggests that some nexus may need to exist between the governmental function the entity is alleged to exercise and the type of conduct the entity is actually engaged in. For example, we might ask whether the alleged financial contribution falls within the scope of the governmental function said to make the entity a public body. However, this is different from asking whether the specific financial contribution constitutes a governmental function. Unlike with private bodies, it is not necessary to show that a public body was specifically entrusted or directed to provide the financial contribution at issue. Thus, a financial contribution can be attributed to a public body not only when the government in the narrow sense entrusted or directed the entity to provide it, but also if certain indicators relevant to the entity in general show that its conduct can be attributed to the WTO Member. It should also be kept in mind that there is no *a priori* limitation on what can be a governmental function for a particular WTO Member.

3. When deciding whether a certain entity is a public body, governmental regulation may be relevant. On the other hand, the mere fact that a sector is regulated does not in itself necessarily suffice to show that all entities in that sector are vested with governmental authority. Rather, all the relevant facts and elements would need to be taken into account.

B. China's challenge against the Public Bodies Memorandum "as such"

1. The timing of measures taken to comply

4. Compliance proceedings under Article 21.5 can only assess the WTO consistency of measures "taken to comply". The Appellate Body has made clear that even if a measure is not *declared* to be a measure taken to comply, it may also be susceptible to review by a panel acting under Article 21.5 if it is a "measure […] with *a particularly close relationship* to the declared "measure taken to comply."

5. An aspect of the close nexus test which appears to be particularly relevant in this dispute is the element of *timing*. Proximity in time between the adoption of the measure at issue and the declared measure taken to comply speaks in favour of a finding that there was a close link. It is not, however, indispensable. In that respect, the EU would observe the following.

6. Compliance proceedings should not be used to "short-circuit" original panel proceedings. If there was nothing preventing a challenge against a measure at the time of the original panel request, then the complainant may well be precluded from challenging it in compliance proceedings.

7. However, the Appellate Body has found that measures cannot be formalistically excluded from Article 21.5 proceedings for the sole reason that they pre-date the adoption of the recommendations and rulings in the original dispute. The EU does not see why they could be

similarly formalistically excluded if they pre-date the original panel request. Whether the complaining Member could have pursued a claim in the original proceeding is a more complex matter than whether a particular legal text had been published prior to the original panel request. For example, a measure may become *de facto* WTO-inconsistent over time even while its text remains the same. The crucial question, in the EU's view, is whether the measure is indeed "taken to comply". If so, it is difficult to see how due process would be served by excluding it from the scope of Article 21.5 proceedings for reasons of timing alone. The Appellate Body has recognized as much (in *US – Zeroing (EC) (Article 21.5 – EC)*).

2. Measures subject to challenge in WTO dispute settlement, "as such" and otherwise

8. Article 3.3 of the DSU speaks simply of "measures taken by another Member". The concept of a measure is broad; it extends to any act or omission that is attributable to a WTO Member. The arguments of the United States on this point seem to be more pertinent to a different, more specific issue: whether the measure has "general and prospective application".

9. The evidence and arguments that must be supplied to show the existence of a measure are a function of how the measure is described or characterized by the complainant. A range of factual elements may come into play when deciding whether a measure indeed has general and prospective application: for example, whether the challenged "rule or norm" is systematically applied, and what the "concrete instrumentalities" that evidence its existence are. The mere fact that the measure itself does not explicitly state that it is of general or prospective application (or, for example, that it lays down a policy that must be followed in all future cases) does not in itself settle the issue.

II. CONCERNING CHINA'S CLAIM UNDER ARTICLE 14(D) REGARDING THE USDOC'S REJECTION OF IN-COUNTRY BENCHMARK PRICES

10. The EU recalls that Article 14(d) SCM stipulates that the determination of benefit in case of the provision of goods by a government depends on whether the remuneration is less than adequate which shall be determined "in relation to prevailing market conditions for the good in the country of provision." It follows that in-country prices must be "market-determined."

11. The EU recalls the Appellate Body's statement that what permits the use of out-of-country benchmarks is price distortion which must be established on a case-by-case basis. The EU considers that a finding of price distortion may be the result of the market power of the government as a supplier of the good in question or the result of other government interventions not related to the government's market power, or be based on a combination of both elements. While the EU considers that the legal and evidentiary threshold for a finding of price distortion is high because out-of-country benchmarks may only be used in "very limited circumstances", it does not agree with China that the individual price must be "effectively determined" in the sense of being set or fixed by the government. The distortion by the government of important parameters that are relevant for price-building, for example government interventions affecting demand or supply, may also be considered in this regard. At the other end of the spectrum, the EU does not believe that a mere "change in the conditions of competition" would, in itself and without more, necessarily always be enough for an inference of price distortion as proposed by Japan.

12. The EU considers that an evidentiary link is required that leads from the government interventions in question to the distortion of the domestic price. Such evidentiary link will depend on the particular circumstances of each case.

13. According to the EU several considerations may be relevant for establishing such an evidentiary link. First, evidence relating to government interventions that are directly relevant for prices or price-setting will normally carry more weight than evidence relating to government interventions that only have an indirect impact on prices. Second, and in a similar vein, the closer the relevant evidence is related to the product or sector in question, the more weight it will normally carry. For example, evidence regarding government interventions directly impacting the product or sector in question will carry more weight than evidence regarding government interventions regarding the overall economy, for example monetary policy. Third, the level of evidence required to demonstrate price distortion through government interventions may depend on the degree of market power of the government as a supplier. In particular, the more market power a government exercises as supplier of the product in question, the less additional evidence regarding other government interventions will normally be required to show price distortion. The

EU agrees with the United States that the "totality of the evidence" will be relevant for an assessment of price distortion.

14. The EU does not take position whether the USDOC discharged its burden in the present case.

III. CONCERNING CHINA'S CLAIM OF INCONSISTENCY WITH ARTICLE 2.1(C)

A. China's claims regarding "subsidy programmes"

15. The EU recalls that the Panel found in the original proceedings that "the consistent provision by the State-owned enterprises ("SOEs") in question of inputs for less than adequate remuneration" provided a sufficient basis for the USDOC's identification of subsidy programmes.

16. The EU disagrees with China's argument that the USDOC, by finding a "subsidy programme" through the mere identification of subsidies provided to individual companies, would "render meaningless" the distinction between the term "subsidy" and "subsidy programme" that would have been established by the Appellate Body. The EU considers that although Article 1.1 does not refer expressly to the term "programme", a number of terms in Article 1.1 indicate that the definition extends both to a subsidy in the form of a subsidy to one enterprise, and a subsidy in the form of a subsidy programme.

17. The main issue in this dispute appears to be not so much an issue of the correct definition of the term "subsidy" or "subsidy programme" as China seems to argue, but rather an evidentiary issue that is rooted in the particular situation of "unwritten" subsidies which are the subject of the present case.

18. A different question and the issue which − at least in case of written measures - is usually the main focus of Article 2.1(c), is the question whether the subsidy programme so established, is "used by a limited number of enterprises". The EU considers that both issues should be kept strictly separate.

B. China's claims regarding the "duration" of the subsidy programmes

19. The EU recalls the statement of a previous panel which found that the notion of specificity has to do with whether a subsidy is sufficiently broadly available throughout an economy so as not to benefit "certain enterprises". The need to take account of "the length of time during which the subsidy programme has been in operation" must be understood in this context.

20. In deciding whether the USDOC adequately took into account the length of the subsidy programme, the EU considers that the Panel may take into account: (i) the fact that it is uncontested by China that the subsidy programme existed for at least one year; (ii) the fact that the USDOC requested, and presumably analysed, data for a 3-year period; (iii) the fact that the inputs in question have been provided for a long period of time in a mature industry and (iv) the fact that China has not put forward any argument or evidence that the subsidy programme was only in existence of a short time period.

IV. CONCERNING CHINA'S CLAIM OF INCONSISTENCY WITH ARTICLE 2.2

21. The EU recalls that the question of the legal relevance of a "distinct land regime" under Article 2.2 was brought before the Appellate Body by China in *US − Anti-Dumping and Countervailing Duties (China)*. While the Appellate Body did not rule on this issue, its statements in this respect imply support for the position that the mere existence of a "distinct land regime" within a wider geographical area of the granting authority, does not suffice to demonstrate regional specificity. The EU considers that the mere existence of a distinct land regime may normally not in itself be sufficient for a finding of regional specificity. An investigating authority must take into account all relevant evidence, notably evidence that land is provided for less than adequate remuneration also outside the industrial park in question.

ANNEX D-4

INTEGRATED EXECUTIVE SUMMARY OF JAPAN

21 June 2017

1. In this proceeding, Japan addresses the interpretation and application of the term "public body" in Article 1.1(a)(1) and the calculation of the amount of the subsidy under Article 14(d).

I. PUBLIC BODY INQUIRY

2. The standard for the analysis of "public body" that has been established in prior cases is whether the entity at issue "possesses, exercises or is vested with governmental authority."

3. The issue raised by China in these proceedings concerns the relationship between the government function and the conduct that allegedly constitutes a financial contribution. China's position is that the government function identified by an investigating authority, in the context of a public body analysis, must be the same government function that the entity at issue is performing when it engages in the conduct that is the subject of the financial contribution inquiry.

4. In Japan's view, an investigating authority is not required to establish such a link between the relevant government function and the conduct that is the subject of the financial contribution inquiry, as the relevant analysis must focus on the characteristics, features or nature of the relevant entity and not on its specific conduct or transaction it engages in. To require such a link would conflate two distinct requirements, namely, whether an entity is a "public body" and whether such entity's conduct is a "financial contribution."

5. The focus on the characteristics or features of the relevant entity is evident throughout the Appellate Body's analysis. For example, in *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clearly stated that "[p]anels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of *the core features of the entity concerned*, and its relationship with government in the narrow sense,"[1] and that an investigating authority must "evaluate and give due consideration to all relevant characteristics of the entity" and must "avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant."[2]

6. The Appellate Body further found, in *US — Carbon Steel (India)*, that "[w]hether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to *the core characteristics and functions of the relevant entity,* its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates."[3]

7. With regard to specific elements or evidence to be evaluated, a flexible approach and an examination of different types of evidence are required given that "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State and case to case."[4] In this regard, the Appellate Body further explained that "[t]here are many different ways in which government in the narrow sense could provide entities with authority" and "[a]ccordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity."[5]

8. From the standpoint of Japan, an important element in the evaluation of the "core features of the entity concerned, and its relationship with government in the narrow sense" is whether such an entity is structured in a manner that allows it to act not solely in accordance with commercial

[1] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317. (emphasis added)
[2] Ibid., para. 319.
[3] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29. (emphasis added)
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.
[5] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

considerations. Where an entity is structured in a manner that enables it to engage in activities that a private market actor (in particular, a private company) is unable to reasonably and sustainably engage in, this would constitute a strong indication that the entity is vested with a governmental function, even if that entity is not vested with any *de jure* governmental authority, e.g. a regulatory power.

9. What private entities can reasonably and sustainably engage in and what they are incapable of doing (i.e. what only the government can do) may be objectively distinguished since, for example, private entities' financial capabilities are limited unlike entities that have recourse to financial capabilities provided by the government. Therefore, Japan considers that whether an entity is structured to act not solely in accordance with commercial considerations could bring an objective and strongly probative perspective to the "public body" analysis.

10. Having said that, Japan would like to note that the analysis of governmental function must always involve looking at the relationship between the entity and the government in the narrow sense, and if there is no such a relationship found, it is difficult to say a "government" function exists.

11. China's proposed interpretation is problematic since it would require a twofold assessment of whether a private body has been entrusted or directed to carry out a government function: first, as part of the evaluation of whether the relevant SOEs are public or private bodies; and, second, after they have been found to be private bodies, to determine whether there is entrustment or direction of such SOEs to carry out the particular conduct that is subject to financial contribution inquiry, as provided for in Article 1.1(a)(1)(iv). Thus, China's argument would result in drawing an arbitrary requirement that is specific to subparagraph (iv) and apply it to the whole of Article 1.1(a)(1) in the context of the independent requirement of "public body." Such an approach is not consistent with the customary rules of interpretation of international law reflected in the Vienna Convention.[6]

II. THE CALCULATION OF THE AMOUNT OF A SUBSIDY UNDER ARTICLE 14(D)

12. Article 14 of the SCM Agreement sets out guidelines for the calculation of benefit. Subparagraph (d) of Article 14 concerns the provision of goods or services or the purchase of goods by a government. According to the guidelines provided in Article 14(d) of the SCM Agreement, 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. Article 14(d) further explains that 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.

13. With respect to these guidelines, the Appellate Body in *US — Softwood Lumber IV* has found that prices in the market of the country of provision or purchase are "the primary, but not the exclusive benchmark" for the calculation of benefit under Article 14(d) and has confirmed that "an investigating authority may use a benchmark other than private prices of the goods in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods".

14. China and the United States disagree with respect to the interpretation and application of the phrase "prevailing market conditions" and, in particular, as to the circumstances in which an investigating authority may depart from in-country prices to determine the adequacy of remuneration.

15. China argues for a very strict standard in which in-country prices must be used except when the investigating authority determines that "the government action or policy, whatever it is, effectively determined all other domestic prices for the same or similar goods, such that a

[6] *See* Appellate Body Report, *India – Patents (US)*, para. 45.

comparison between the price of the government-provided good and a domestic benchmark price would amount to a circular comparison between two government-determined prices."[7]

16. The United States, for its part, submits that the fundamental issue in determining whether to rely on an out-of-country benchmark under Article 14(d) is price distortion. The United States argues that China's proposed interpretation would arbitrarily preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined.[8]

17. Japan agrees with the United States that Article 14(d) does not establish that price distortion can be found only when an investigating authority finds that the government effectively determined all other domestic prices for the same or similar goods. China's overly demanding test is not required by either the text of Article 14(d) or prior rulings.

18. Japan recalls the Appellate Body's finding in *US — Anti-Dumping and Countervailing Duties (China)* that the key question to be determined is whether there is "price distortion" in the market, and "price distortion must be established on a case-by-case basis. "[9] The Appellate Body in *US — Carbon Steel (India)* has further explained that, in the context of Article 14(d), prevailing market conditions "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[10] The Appellate Body in *EC and certain member States — Large Civil Aircraft* has also explained that market prices are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay."[11] Instead, "the equilibrium price established in the market results from a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[12] In economic terms, as the United States noted, "equilibrium" is "[a] situation in which supply and demand are matched and prices are stable."

19. Japan notes that, with regard to specific elements to consider in finding "price distortion", the Appellate Body in *US – Carbon Steel (India)* has stated that "an investigating authority may be called upon to examine various aspects of the relevant market."[13] This examination may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It could also require assessing the behavior of the entities operating in that market in order to determine whether the government itself, or acting through government related entities, exerts market power so as to distort in-country prices.

20. It is also notable that the Appellate Body in *US — Countervailing Measures (China)* has made clear that what an investigating authority must do "will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information". Thus, as the Appellate Body in *US – Softwood Lumber IV* and *US — Countervailing Measures (China)* has stated*,* the assessment of price distortion is fact-specific and must be conducted on a "case-by-case basis", taking into account "all of the evidence". These Appellate Body findings support Japan's views that, for purposes of Article 14(d), "distortion" may be established through a holistic assessment of the market. Thus, even in cases where an investigating authority cannot find that the government effectively determined prices for the good in question, "distortion" of the relevant market may be established when there is other evidence that, considered through a holistic analysis of the market, indicates so.

21. China's position seems to be based on the misunderstanding that in-country prices can only be found to be distorted in situations in which the government administratively determines prices or is the provider of the good. However, the Appellate Body in *US — Countervailing Measures*

[7] China's second written submission, para. 148.
[8] United States' second written submission, para. 165.
[9] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[10] Appellate Body Report, *US — Carbon Steel (India)*, para. 4.150.
[11] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para 981.
[12] Ibid.
[13] Appellate Body Report, *US — Carbon Steel (India)*, para. 4.157.

(China) expressly left open the possibility "that the government may distort in-country prices through other entities or channels than the provider of the good itself."[14]

22. Japan also believes that a possible approach to determine distortion is to evaluate whether the price in the market is formed through arm's length transactions based on the respective market actors' commercial considerations. A "market" should in principle consist of actors that act solely in accordance with commercial considerations, as opposed to non-commercial considerations, such as the achievement of governmental policy objectives. Evidence that actors do not operate on the basis of commercial considerations will provide a strong indication that prices resulting from interactions of these operators are distorted, and consequently may cause a price distortion of the relevant market.

23. Finally, Japan agrees with Canada that "the investigating authority must demonstrate a clear evidentiary path". However, in Japan's view, this "evidentiary path" should be between the government intervention (more broadly defined than predominance) and the distortion of market prices.

[14] Appellate Body Report, *US — Countervailing Measures (China),* footnote 530 to para. 4.50.