



UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS  
FROM CHINA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

AB-2018-2

*Report of the Appellate Body*

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## ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CCP	Chinese Communist Party
CVD	countervailing duty
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
ILC Articles	International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts
OCTG	oil country tubular goods
OECD	Organization for Economic Cooperation and Development
Original Panel Report	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R
PRC	People's Republic of China
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Section 129	Section 129 of the Uruguay Round Agreements Act
SIE	state-invested enterprise
SOCB	state-owned commercial bank
SOE	state-owned enterprise
USDOC	United States Department of Commerce
WTO	World Trade Organization

## PANEL EXHIBITS CITED IN THIS REPORT\*

Exhibit Number	Short Title (if applicable)	Description
CHN-1	Public Bodies Memorandum	USDOC Memorandum 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: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379; and USDOC Memorandum dated 18 May 2012 on the relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be "public bodies" within the context of a countervailing duty investigation
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

\* In this Report, exhibits submitted by the parties to the Panel are referred to using the 3-digit ISO code found in document ISO 3166-1. Thus, exhibits submitted by China are referred to as CHN-# and exhibits submitted by the United States are referred to as USA-#.

Exhibit Number	Short Title (if applicable)	Description
CHN-5	Final Section 129 Determination	USDOC Final Determination for Lawn Groomers, Kitchen Shelving, Wire Strand, Print Graphics, Aluminum Extrusions, and Steel Cylinders dated 31 March 2016; Seamless Pipe dated 25 April 2016; Pressure Pipe, Line Pipe, OCTG, and Solar Panels dated 19 May 2016
CHN-19	Ordoover Report	Exhibit GOC-D-25 to GOC Questionnaire response (6 July 2015)
CHN-20	Benchmark Memorandum	Memorandum dated 7 March 2016 on USDOC Benefit (Market Distortion)
CHN-21	Final Benchmark Determination	USDOC Final Determination for Pressure Pipe, Line Pipe, OCTG, Wire Strand, and Solar Panels dated 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-28	USDOC Final Determination in the original Solar Panels investigation	USDOC Issues and Decision Memorandum dated 9 October 2012 on Final Results of the Countervailing Duty Investigation 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-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-67		United States' opening statement before the Appellate Body in <i>US – Carbon Steel (India)</i>
USA-21	Benchmark Questionnaire	USDOC Questionnaire dated 5 June 2015 concerning the Benchmark Used to Measure Whether Certain Inputs Were Sold for Less than Adequate Remuneration
USA-83	Public Bodies Questionnaire	USDOC Questionnaire dated 1 May 2015 concerning "Public Bodies"
USA-84	Supporting Benchmark Memorandum	USDOC Supporting Memorandum dated 7 March 2016 to Preliminary Benefit (Market Distortion) Memorandum
USA-130	Public Bodies Record Memorandum	Memorandum dated 2 November 2015 on Placement of Factual Information on the Record with Respect to Public Bodies

## CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
<i>Australia – Automotive Leather II (Article 21.5 – US)</i>	Panel Report, <i>Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS126/RW and Corr.1, adopted 11 February 2000, DSR 2000:III, p. 1189
<i>Australia – Salmon (Article 21.5 – Canada)</i>	Panel Report, <i>Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, p. 2031
<i>Brazil – Aircraft</i>	Appellate Body Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1161
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, p. 1377

Short Title	Full Case Title and Citation
<i>Canada – Aircraft (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, p. 4299
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/AB/RW and Add.1, adopted 12 February 2016, DSR 2016:I, p. 7
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Japan – DRAMs (Korea)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Peru – Agricultural Products</i>	Appellate Body Report, <i>Peru – Additional Duty on Imports of Certain Agricultural Products</i> , WT/DS457/AB/R and Add.1, adopted 31 July 2015, DSR 2015:VI, p. 3403
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
<i>US – Anti-Dumping Methodologies (China)</i>	Appellate Body Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/AB/R and Add.1, adopted 22 May 2017, DSR 2017:III, p. 1423
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Carbon Steel (India)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/R and Add.1, adopted 19 December 2014, as modified by Appellate Body Report WT/DS436/AB/R, DSR 2014:VI, p. 2189
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015
<i>US – Countervailing Measures (China)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R and Add.1, adopted 16 January 2015, as modified by Appellate Body Report WT/DS437/AB/R
<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS437/RW and Add.1, circulated to WTO Members 21 March 2018

Short Title	Full Case Title and Citation
<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Exports Restraints as Subsidies</i> , WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
<i>US – FSC (Article 21.5 – EC II)</i>	Appellate Body Report, <i>United States – Tax Treatment for “Foreign Sales Corporations” – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006, DSR 2006:XI, p. 4721
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, p. 4051
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Softwood Lumber IV</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , 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
<i>US – Softwood Lumber IV (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, p. 11357
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015, DSR 2015:X, p. 5133
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins (“Zeroing”) – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
<i>US – Zeroing (Japan) (Article 21.5 – Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan</i> , WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, p. 3441

WORLD TRADE ORGANIZATION  
APPELLATE BODY

United States – Countervailing Duty  
Measures on Certain Products from China

Recourse to Article 21.5 of the DSU by China

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

Australia, *Third Participant*  
Canada, *Third Participant*  
European Union, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
India, *Third Participant*  
Russia, *Third Participant*  
Viet Nam, *Third Participant*

AB-2018-2

Appellate Body Division:

Graham, Presiding Member  
Bhatia, Member  
Servansing, Member

## 1 INTRODUCTION

1.1. The United States and China each appeal certain issues of law and legal interpretations developed in the Panel Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China*<sup>1</sup> (Panel Report). The Panel was established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to consider a complaint by China<sup>2</sup> regarding the consistency with the Agreement on Subsidies and Countervailing Measures (SCM Agreement) of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceedings in *US – Countervailing Measures (China)*.<sup>3</sup>

1.2. The dispute from which the present Article 21.5 compliance proceedings arise concerns the imposition by the United States of countervailing duties on a range of products from China<sup>4</sup>, as well as the underlying investigations leading to the imposition of such duties. Before the original panel, China challenged several aspects of the investigations conducted by the United States Department of Commerce (USDOC), including the application of an alleged "rebuttable presumption" used to determine whether Chinese state-owned enterprises (SOEs) qualify as public bodies within the meaning of the SCM Agreement. China further challenged several aspects of the USDOC's determinations stemming from such investigations.

1.3. In its report, circulated to Members of the World Trade Organization (WTO) on 14 July 2014, the original panel found, among other things, that in 12 of the investigations at issue: (i) the USDOC's determinations that SOEs are public bodies were inconsistent with the United States' obligations under Article 1.1(a)(1) of the SCM Agreement; and (ii) the USDOC's specificity determinations were inconsistent with the United States' obligations under Article 2.1(c) of the SCM Agreement because they failed to take into account the duration of the subsidy programme and economic diversification. The original panel further found that: (iii) the USDOC's application of a "rebuttable presumption" that a majority government-owned entity is a public body was, "as such", inconsistent with Article 1.1(a)(1) of the SCM Agreement; and (iv) in two investigations at issue,

<sup>1</sup> WT/DS437/RW, 21 March 2018.

<sup>2</sup> Request for the Establishment of a Panel by China, WT/DS437/21.

<sup>3</sup> The recommendations and rulings of the DSB resulted from the adoption on 16 January 2015, by the DSB, of the Appellate Body Report, WT/DS437/AB/R, and the Panel Report, WT/DS437/R, in *US – Countervailing Measures (China)*. In this Report, we refer to the panel that considered the original complaint brought by China as the "original panel" and to its report as the "original panel report".

<sup>4</sup> The products at issue were solar panels, wind towers, thermal paper, coated paper, lawn groomers, kitchen shelving, steel sinks, citric acid, magnesia carbon bricks, pressure pipe, line pipe, seamless pipe, steel cylinders, drill pipe, oil country tubular goods (OCTG), wire strand, and aluminum extrusions. (See Original Panel Report, paras. 7.1-7.5)



the USDOC acted inconsistently with the United States' obligations under Article 11.3 of the SCM Agreement by initiating investigations with respect to export restraints. At the same time, the original panel rejected a number of claims brought by China. In particular, the original panel found that: (v) the USDOC did not act inconsistently with the United States' obligations under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China in its benchmark determinations; (vi) the USDOC did not act inconsistently with the United States' obligations under Article 2.1(c) of the SCM Agreement by failing to identify the underlying subsidy programmes; and (vii) the USDOC did not act inconsistently with the United States' obligations under Article 12.7 of the SCM Agreement by not relying on facts available on the record.<sup>5</sup>

1.4. Each of the participants appealed certain aspects of the original panel's findings. Neither participant appealed the panel's findings of inconsistency with respect to the issue of public bodies under Article 1.1(a)(1) of the SCM Agreement. Among other things, the Appellate Body: (i) reversed the original panel's finding that the USDOC did not act inconsistently with the United States' obligations under Article 14(d) or Article 1.1(b) of the SCM Agreement by rejecting in-country private prices in China, and found that the USDOC's benchmark determinations were inconsistent with such provisions; (ii) reversed the original panel's finding that the USDOC did not act inconsistently with the United States' obligations under Article 2.1 of the SCM Agreement by failing to identify a "subsidy programme", found that the original panel failed to provide any case-specific discussion or references to the USDOC's determinations of specificity challenged by China, but found itself unable to complete the legal analysis in this regard; and (iii) reversed the original panel's finding that the USDOC did not act inconsistently with the United States' obligations under Article 12.7 of the SCM Agreement by not relying on facts available on the record, but found itself unable to complete the legal analysis in this regard.<sup>6</sup>

1.5. Following the original dispute, the USDOC revised 12 of the countervailing duty determinations at issue and maintained the related duties in place. The compliance dispute, which is the subject of this appeal, concerns China's claims against measures taken by the United States to comply with the DSB's recommendations and rulings in the original dispute. The measures at issue in these compliance proceedings are the following: (i) preliminary and final determinations made by the USDOC under Section 129 of the Uruguay Round Agreements Act (Section 129) to comply with the recommendations and rulings of the DSB made in the original proceedings; (ii) the Public Bodies Memorandum<sup>7</sup>, both as a measure of general and prospective application and a measure relating to the Section 129 proceedings at issue; (iii) the original USDOC final countervailing duty determination in the Solar Panels investigation; (iv) subsequent periodic and sunset reviews of the countervailing duty orders identified in Annexes 3 and 4 to China's request for the establishment of a compliance panel<sup>8</sup>, as well as periodic and sunset review determinations subsequent to those set forth in Annexes 3 and 4 to China's panel request; and (v) all "instructions and notices" by which the United States imposes, assesses, and/or collects cash deposits and countervailing duties in the proceedings at issue, and its ongoing conduct in doing so.<sup>9</sup>

1.6. In the Panel Report, circulated to Members of the WTO on 21 March 2018, the Panel found that:

- 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, Oil Country Tubular Goods (OCTG), Wire Strand, Seamless Pipe, Print

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<sup>5</sup> See Original Panel Report, para. 8.1.

<sup>6</sup> See Appellate Body Report, *US – Countervailing Measures (China)*, para. 5.1.

<sup>7</sup> USDOC Memorandum 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: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379; and USDOC Memorandum dated 18 May 2012 on the relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be "public bodies" within the context of a countervailing duty investigation (Panel Exhibit CHN-1) (Public Bodies Memorandum).

<sup>8</sup> Request for the Establishment of a Panel by China pursuant to Article 21.5 of the DSU, WT/DS437/21 (China's panel request).

<sup>9</sup> See Panel Report, para. 2.1.

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;
- 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 Panels administrative review; and
- 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; and
- 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.<sup>10</sup>

1.7. On 27 April 2018, the United States notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal<sup>11</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>12</sup> (Working Procedures). On 2 May 2018, China notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal and other appellant's submission<sup>13</sup> pursuant to Rule 23 of the Working Procedures. On 15 May 2018, China and the United States each filed an appellee's submission.<sup>14</sup> On 18 May 2018, Canada, the European Union, and Japan each filed a third participant's submission.<sup>15</sup> On the same day, Australia and India each notified its intention to appear at the oral hearing as a third participant.<sup>16</sup> On 1 February 2019, Korea and Russia submitted their delegation lists for the oral hearing to the Appellate Body Secretariat and the participants and third participants in this dispute.<sup>17</sup>

1.8. By letter dated 26 June 2018, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision, for the reasons contained therein.<sup>18</sup> For the reasons explained in the letter, work on this appeal could gather pace only in October 2018. On 2 July 2019, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated to WTO Members on 16 July 2019.

1.9. On 28 September 2018, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Appellate Body Member Mr Shree Baboo Chekitan Servansing to complete the disposition of this appeal, to which he had been assigned before the completion of his term of office as Appellate Body Member on 30 September 2018.

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<sup>10</sup> Panel Report, para. 8.1.

<sup>11</sup> WT/DS437/24 (contained in Annex A-1 of the Addendum to this Report, WT/DS437/AB/RW/Add.1).

<sup>12</sup> WT/AB/WP/6, 16 August 2010.

<sup>13</sup> WT/DS437/25 (contained in Annex A-2 of the Addendum to this Report, WT/DS437/AB/RW/Add.1).

<sup>14</sup> Pursuant to Rules 22 and 23(4) of the Working Procedures.

<sup>15</sup> Pursuant to Rule 24(1) of the Working Procedures.

<sup>16</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>17</sup> For purposes of this appeal, we have understood Korea's and Russia's actions as notifications expressing the intention to attend the oral hearing pursuant to Rule 24(4) of the Working Procedures.

<sup>18</sup> WT/DS437/26. The Chair of the Appellate Body explained that this was due to a number of factors, including the backlog of appeals pending with the Appellate Body at present and the overlap in the composition of all divisions resulting in part from the reduced number of Appellate Body Members.

1.10. On 14 November 2018, the Appellate Body Division hearing this appeal informed the participants and third participants that the oral hearing was scheduled to take place on 4 and 5 February 2019. By letter dated 20 November, China informed the Division that these dates would coincide with the Chinese New Year holiday, and requested the Division to reschedule the hearing to the week of 21 January 2019. On 21 November, the Division invited the United States and the third participants to provide comments on China's request, if they so wished. The Division also indicated that, were it to accept China's request to reschedule the oral hearing, it may consider dates other than those suggested by China. On 23 November, the United States responded that it did not, in principle, object to China's request. Referring to a panel meeting to be held in another dispute settlement proceeding, the United States observed that it would not be able to participate in an oral hearing in this appeal if it were scheduled during the week of 25 February 2019. The United States also noted that 21 January and 18 February 2019 are US federal holidays, and US federal government offices are closed on those days. The Division also received responses from Canada, the European Union, and Korea. The European Union did not oppose China's request; however, the European Union noted that the representatives of the European Union in this dispute would be attending a meeting in DSU Article 22.6 proceedings scheduled for 11-13 February 2019. Canada and Korea had no objection to China's request. By letter dated 3 December 2018, the Division informed the participants and third participants of its decision to change the dates of the oral hearing to 14 and 15 February 2019.

1.11. The oral hearing in this appeal was held on 14 and 15 February 2019. The participants and four of the third participants (Australia, Canada, the European Union, and Japan) made oral statements. The participants and third participants responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

## 2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.<sup>19</sup> The Notices of Appeal and the executive summaries of the participants' claims and arguments are contained in Annexes A and B of the Addendum to this Report, WT/DS437/AB/RW/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission (Canada, the European Union, and Japan) are reflected in the executive summaries of their written submissions provided to the Appellate Body<sup>20</sup> and are contained in Annex C of the Addendum to this Report, WT/DS437/AB/RW/Add.1.

## 4 ISSUES RAISED IN THIS APPEAL

4.1. The following issues are raised in this appeal:

- a. whether the Panel erred in finding that certain administrative and sunset reviews identified by China were within its terms of reference (raised by the United States);
- b. whether the Panel erred in finding 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 Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings. In particular:
  - i. whether the Panel erred in finding that the legal standard for public body determinations under Article 1.1(a)(1) does not "require a particular degree or

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<sup>19</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

<sup>20</sup> Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

- nature of connection in all cases between an identified government function and the particular financial contribution at issue" (raised by China); and
- ii. whether the Panel erred in rejecting China's claims that: (i) the USDOC misconstrued the concept and relevance of "meaningful control" and based its determinations on "mere ownership or control over an entity by a government, without more"; and (ii) the USDOC failed to consider relevant evidence in the five investigations in which the Government of the People's Republic of China (GOC) participated (raised by China);
- c. whether the Panel erred in finding that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement. In particular:
- i. whether the Panel erred in finding that the Public Bodies Memorandum falls "as such" within the scope of these Article 21.5 proceedings (raised by the United States);
  - ii. whether the Panel erred in finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application (raised by the United States); and
  - iii. whether the Panel erred in finding that the Public Bodies Memorandum does not restrict, in a material way, the USDOC's discretion to act consistently with Article 1.1(a)(1) (raised by China);
- d. whether the Panel erred in finding 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. In particular:
- i. whether the Panel erred in its interpretation of Articles 1.1(b) and 14(d) in finding that an investigating authority may reject available in-country prices if there is evidence of price distortion, and not only if there is evidence that a government "effectively determines" the price at which the good is sold within the country of provision (raised by China); and
  - ii. whether the Panel erred in its interpretation and application of Articles 1.1(b) and **14(d) in finding that the United States "failed to explain ... how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price"** and by failing "to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations" (raised by the United States);
- e. whether the Panel erred in finding 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. In particular:
- i. whether the Panel erred in faulting the USDOC for not having sufficiently explained its conclusions regarding the "existence" of the relevant subsidy programmes in circumstances where this issue was not covered by the DSB's recommendations and rulings in the original dispute, and thus could not serve as an appropriate basis upon which to assess the consistency of the measures with that provision (raised by the United States); and
  - ii. whether the Panel erred in its interpretation and application of Article 2.1(c), including in finding that the United States did not comply with the requirement 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 (raised by the United States).

## 5 ANALYSIS OF THE APPELLATE BODY

### 5.1 The Panel's terms of reference

5.1. The United States requests us to reverse the Panel's findings<sup>21</sup> that certain administrative reviews<sup>22</sup> and sunset reviews<sup>23</sup> issued under the countervailing duty orders listed in Annex 3 and Annex 4 to China's panel request (subsequent reviews) fell within the scope of the Panel's terms of reference.<sup>24</sup> The United States contends that the Panel erred in finding that the subsequent reviews have a sufficiently close nexus, in terms of nature, timing, and effects, to the declared measures taken to comply and to the DSB's recommendations and rulings in the original dispute.<sup>25</sup> For its part, China requests us to uphold the Panel's finding that the subsequent reviews fell within the scope of these Article 21.5 proceedings.<sup>26</sup> China submits that the pervasive links in the subject matter of these successive determinations issued under the countervailing duty orders at issue in the original dispute weigh strongly in favour of the subsequent reviews falling within the Panel's terms of reference under Article 21.5 of the DSU.<sup>27</sup>

#### 5.1.1 The Panel's findings

5.2. Before the Panel, China claimed that the United States had failed to achieve compliance with respect to the subsequent reviews. China argued before the Panel that the subsequent reviews had been issued under the same countervailing duty orders as the measures challenged in the original proceedings and that they replaced the effects of the original countervailing duty determinations in a manner that reflected the USDOC's continued application of an erroneous legal standard in relation to the provisions of the SCM Agreement that had been the subject of the original proceedings.<sup>28</sup> China further argued that measures enacted before the adoption of DSB recommendations and rulings in the original case may fall within the scope of Article 21.5 proceedings, provided it is shown that they have a sufficiently close nexus to the DSB's recommendations and rulings and to the declared measures taken to comply.<sup>29</sup>

5.3. The United States responded that nearly all of the subsequent reviews identified by China had been concluded prior to the end of the reasonable period of time on 1 April 2016, and that they could therefore not be found to be "closely connected" to the measures taken to comply in this dispute.<sup>30</sup> The United States further argued that the subsequent reviews had been issued during the course of these compliance proceedings; they thus did not exist at the time of the Panel's establishment and could therefore not fall within the Panel's terms of reference.<sup>31</sup>

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<sup>21</sup> Panel Report, para. 7.347; United States' appellant's submission, para. 230 (referring to Panel Report, paras. 8.1.g and 8.1.h.i-ii, iv, and vi).

<sup>22</sup> Panel Report, para. 2.1.d. The specific administrative reviews are listed in Annex 3 to China's panel request. In addition to the administrative reviews listed there, China identified USDOC Second Administrative Review in Solar Panels (Panel Exhibit CHN-43). China explained that this review was issued by the USDOC after China filed its panel request and that it is encompassed by paragraph 32 of the panel request, which refers to periodic review determinations in the proceedings at issue subsequent to those set forth in Annex 3. (Ibid., fn 518 to para. 7.328)

<sup>23</sup> Panel Report, para. 2.1.d. The specific sunset reviews are listed in Annex 4 to China's panel request. In addition to the sunset reviews listed there, China identified USDOC Sunset Review in Aluminum Extrusions (Panel Exhibit CHN-53). China explained that this review was issued by the USDOC after China filed its panel request and that it is encompassed by paragraph 32 of the panel request, which refers to periodic review determinations in the proceedings at issue subsequent to those set forth in Annex 4. (Ibid., fn 518 to para. 7.328)

<sup>24</sup> The United States' request for reversal includes the Panel's finding in paras. 7.320 and 8.1.g that the USDOC Final Determination in the original Solar Panels investigation (Panel Exhibit CHN-28) fell within its terms of reference (United States' appellant's submission, fn 8 to para. 9 and para. 230(e)). The United States does not provide separate arguments in this respect. The Panel's reasoning with respect to this finding is based, *inter alia*, on the same considerations as its reasoning relating to the subsequent reviews (see Panel Report, fn 511 to para. 7.320) and the analysis below thus also concerns these findings.

<sup>25</sup> United States' appellant's submission, para. 206.

<sup>26</sup> China's appellee's submission, para. 220 (referring to Panel Report, para. 7.347).

<sup>27</sup> China's appellee's submission, para. 211.

<sup>28</sup> Panel Report, para. 7.332 (referring to China's first written submission to the Panel, para. 386).

<sup>29</sup> Panel Report, para. 7.333 (referring to China's second written submission to the Panel, para. 230).

<sup>30</sup> Panel Report, para. 7.334 (quoting United States' first written submission to the Panel, para. 321).

<sup>31</sup> Panel Report, para. 7.334 (quoting United States' first written submission to the Panel, para. 322).

5.4. At the outset of its analysis, the Panel noted that its 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. Rather, measures with a sufficiently close relationship to the declared measures taken to comply, and to the recommendations and rulings of the DSB, may also fall within the terms of reference of a panel acting under Article 21.5.<sup>32</sup> The Panel explained that, therefore, it needed to assess the relationship of the subsequent reviews and the declared measures taken to comply, focusing in particular on the nature, timing, and effects of the various measures, as well as the factual and legal background against which the measures had been adopted.<sup>33</sup>

5.5. With respect to the subsequent reviews, the Panel noted that they were "in existence" at the time that the Panel was established.<sup>34</sup> While some of these reviews had been completed prior to the DSB's adoption of recommendations and rulings in the original dispute on 16 January 2015, others had been completed thereafter, yet before the end of the reasonable period of time on 1 April 2016.<sup>35</sup> The Panel stated that the timing of a measure alone was not a decisive factor for determining whether it had a sufficiently close nexus with a declared measure taken to comply.<sup>36</sup> Further, the Panel held that, even if "measures taken to comply with recommendations and rulings of the DSB *ordinarily* post-date the adoption of the recommendations and rulings", this did not necessarily have to be the case, and in any event there was no requirement that measures taken to comply post-date the adoption of the recommendations and rulings in the original dispute.<sup>37</sup> Where measures that come into being after the establishment of a compliance panel have a "particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB", they may also fall within the compliance panel's terms of reference.<sup>38</sup>

5.6. The Panel then proceeded to consider the nature and effects of the subsequent reviews at issue to determine whether they had a sufficiently close nexus with the DSB's recommendations and rulings in the original dispute and the United States' implementation of those recommendations and rulings.<sup>39</sup> With respect to the "nature" of the subsequent reviews, the Panel considered that an overlap of the covered products and the substantive issue in question could indicate a close nexus in subject matter.<sup>40</sup> In the Panel's view, other relevant considerations were whether the particular substantive issue raised with respect to a review was itself the subject of the recommendations and rulings of the DSB<sup>41</sup>, and whether subsequent reviews and determinations were issued under the same "order" as measures challenged in original proceedings, thus constituting "connected stages ... involving the imposition, assessment and collection of duties".<sup>42</sup> The Panel concluded that such relevant similarities in the nature of various measures could 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."<sup>43</sup>

5.7. At the same time, the Panel recognized certain limits to finding a close nexus in nature between subsequent reviews and declared measures taken to comply. The Panel explained that identity in

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<sup>32</sup> Panel Report, para. 7.329.

<sup>33</sup> Panel Report, para. 7.329 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

<sup>34</sup> Panel Report, para. 7.336.

<sup>35</sup> Panel Report, para. 7.336 (referring to China's panel request, Annexes 3-4).

<sup>36</sup> Panel Report, para. 7.337 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224).

<sup>37</sup> Panel Report, para. 7.337 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 222). (emphasis original)

<sup>38</sup> Panel Report, para. 7.339 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77; referring to 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")).

<sup>39</sup> Panel Report, para. 7.339.

<sup>40</sup> Panel Report, para. 7.340 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 83).

<sup>41</sup> Panel Report, para. 7.340 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230, in turn referring to Appellate Body Report, *US – Continued Zeroing*, para. 181).

<sup>42</sup> Panel Report, para. 7.340 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230).

<sup>43</sup> Panel Report, para. 7.340 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 244; referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 82).

terms of product and country coverage alone would be an insufficient basis for determining that subsequent reviews have a close nexus, in terms of nature, with the recommendations and rulings of the DSB with respect to the original investigations.<sup>44</sup> However, the Panel considered that, in the present case, the overlap of subject matter extended beyond merely an identity of product and country coverage. In particular, the Panel noted that the subsequent reviews at issue had been conducted under the same countervailing duty orders as were the subject of the DSB's recommendations and rulings in the original dispute.<sup>45</sup>

5.8. With respect to the close nexus in terms of effects between the subsequent reviews at issue and the United States' implementation acts, the Panel noted that the Appellate Body had previously considered relevant whether a challenged measure perpetuated the WTO-inconsistency originally found, thus undermining a Member's compliance with DSB recommendations and rulings.<sup>46</sup> The Panel also addressed the United States' argument that the more fact-intensive and case-specific nature of the determinations made under the countervailing orders at issue distinguished this case from past cases involving subsequent measures applying the zeroing methodology. In this respect, the Panel considered relevant that the subsequent reviews at issue in the present case involve "successive determinations" under the same countervailing duty order. The Panel considered them to "form part of a continuum of events"<sup>47</sup> bearing a close relationship to the United States' implementation of the relevant DSB recommendations and rulings. In particular, the Panel took into account that the 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, and that 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 administrative review identified by China. Moreover, regarding sunset reviews, the Panel held that the USDOC's determinations of whether injurious subsidization was likely to continue or recur were not made in isolation from determinations made either in the investigations at issue in the original dispute or in subsequent administrative reviews.<sup>48</sup>

5.9. Ultimately, the Panel was not convinced that differences in the timing and in the factual record of various subsequent reviews interrupted this continuum or negated the close nexus of effects stemming from the common elements of the various measures. Furthermore, the Panel was not persuaded that differences between administrative and sunset reviews under US domestic law undermine the existence of a 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. On that basis, the Panel found that the "interrelated effects"<sup>49</sup> of the USDOC's original determinations, Section 129 determinations, and administrative and sunset review determinations reflect a particularly close relationship for the purposes of Article 21.5 of the DSU and that, therefore, the subsequent reviews at issue fell within the Panel's terms of reference by virtue of their close relationship to the recommendations and rulings of the DSB and the relevant Section 129 determinations of the USDOC.<sup>50</sup>

### 5.1.2 Claims and arguments on appeal

5.10. The United States requests us to reverse the Panel's finding that the subsequent reviews at issue fell within its terms of reference.<sup>51</sup> The United States contends that the Panel erred in finding that these reviews had a sufficiently close nexus, in terms of nature, timing, and effects, to the declared measures taken to comply.<sup>52</sup> The United States alleges that the Panel's "superficial examination" does not reflect a proper application of the approach articulated by the Appellate Body

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<sup>44</sup> Panel Report, para. 7.341 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 239).

<sup>45</sup> Panel Report, para. 7.341.

<sup>46</sup> Panel Report, para. 7.342 (referring to Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 250; *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 85).

<sup>47</sup> Panel Report, para. 7.344 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 251).

<sup>48</sup> Panel Report, para. 7.344 (referring to China's response to Panel question No. 61, para. 236).

<sup>49</sup> Panel Report, para. 7.345.

<sup>50</sup> Panel Report, para. 7.347.

<sup>51</sup> Panel Report, para. 7.347; United States' appellant's submission, para. 230 (referring to Panel Report, paras. 8.1.g and 8.1.h.i-ii, iv, and vi).

<sup>52</sup> United States' appellant's submission, para. 206.



in past disputes.<sup>53</sup> For the United States, the Panel failed to scrutinize properly the relationship of the measures and instead "presumed" the existence of a close nexus of the subsequent reviews with the measure taken to comply.<sup>54</sup>

5.11. With respect to the nexus between the subsequent reviews and the declared measures taken to comply in terms of their "nature", the United States takes issue with the Panel relying on the observation that each review takes as its basis the USDOC's earlier determinations with respect to countervailable subsidies.<sup>55</sup> The United States alleges that the Panel ignored that each review is based on a different factual record.<sup>56</sup>

5.12. Regarding the nexus between the subsequent reviews and the declared measures taken to comply in terms of their "timing", the United States notes that the majority of the subsequent reviews were concluded prior to the expiration of the reasonable period of time and prior to the adoption of the DSB's recommendations and rulings in the original dispute. For the United States, this demonstrates that, in terms of "timing", the subsequent reviews were not closely connected to the measures taken to comply.<sup>57</sup>

5.13. With respect to the nexus between the subsequent reviews and the declared measures taken to comply in terms of "effects", the United States takes issue with the Panel's reasoning that both the subsequent reviews and the declared measures taken to comply had the effect of superseding previously completed administrative reviews, or were superseded by the subsequent administrative review identified by China.<sup>58</sup> The United States argues that, when findings of an administrative review supersede determinations made in a previous administrative review, this does not, in itself, establish the existence of a close nexus in terms of effect.

5.14. For its part, China requests us to uphold the Panel's finding that the subsequent reviews fell within its terms of reference under Article 21.5 of the DSU.<sup>59</sup> China submits that the Panel correctly held that the subsequent reviews had a substantial overlap in nature with the DSB recommendations and rulings and the declared measures taken to comply. China refers to a finding by the Appellate Body, in *US – Zeroing (EC) (Article 21.5 – EC)*, that the use of zeroing in subsequent reviews provides the necessary link, in terms of nature or subject matter, between such measures, the declared measures taken to comply, and the DSB's recommendations and rulings.<sup>60</sup> For China, the Panel adhered to this analytical framework in assessing the links, in terms of nature, between the subsequent reviews, the DSB's recommendations and rulings, and the Section 129 determinations in this dispute. In this respect, China notes the Panel's findings that the subsequent reviews were issued under the same countervailing duty orders that were the subject of the DSB's recommendations and rulings, that they embodied the identical legal standards for public body, benchmark, and specificity that were the subject of those recommendations, and that they had been applied in the Section 129 determinations that constitute the declared measures taken to comply by the United States.<sup>61</sup>

5.15. China further argues that the Panel correctly found that the effects of the subsequent reviews weigh in favour of a sufficiently close nexus. China disagrees with the United States' contention that the Panel "presumed" that the same or similar results would occur in each subsequent review.<sup>62</sup> China asserts that the Panel expressly rejected the United States' arguments relating to the fact-specific nature of each determination, finding instead that the interrelated effects of the USDOC's original determinations, Section 129 determinations, and sunset review determinations reflect a particularly close relationship, because administrative reviews affected the countervailing

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<sup>53</sup> United States' appellant's submission, para. 217.

<sup>54</sup> United States' appellant's submission, para. 221.

<sup>55</sup> United States' appellant's submission, para. 224 (quoting Panel Report, para. 7.345).

<sup>56</sup> United States' appellant's submission, para. 224.

<sup>57</sup> United States' appellant's submission, para. 228.

<sup>58</sup> United States' appellant's submission, para. 229 (quoting Panel Report, para. 7.344).

<sup>59</sup> China's appellee's submission, para. 220 (referring to Panel Report, para. 7.347).

<sup>60</sup> China's appellee's submission, para. 209 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230).

<sup>61</sup> China's appellee's submission, para. 211.

<sup>62</sup> China's appellee's submission, para. 213 (referring to United States' appellant's submission, para. 229).

duty and cash deposit rates established in the original determinations that were the subject of the DSB's recommendations and rulings.<sup>63</sup>

5.16. Finally, China contends that the Panel correctly held that the timing of the subsequent reviews established a sufficiently close nexus. China explains that, in *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body had criticized that panel for its "formalistic" reliance on the date of issuance of the subsequent reviews, and had reversed its finding that determinations issued prior to the adoption of the DSB's recommendations and rulings could not be deemed measures "taken to comply" within the meaning of Article 21.5 of the DSU.<sup>64</sup> Instead, the Appellate Body reasoned that the timing of the measures was not determinative, and it saw no reason to exclude from a compliance panel's terms of reference events that pre-dated the recommendations and rulings of the DSB, particularly because those events may have a bearing on a Member's implementation of those recommendations.<sup>65</sup> China contends that, accordingly, the Panel did not err in finding that measures pre-dating DSB adoption may fall within the scope of Article 21.5 proceedings provided that there is a sufficiently close nexus in terms of their nature and effects.

### 5.1.3 Whether the Panel erred in finding that the subsequent reviews at issue fell within its terms of reference

5.17. We now turn to address the scope of measures falling within the terms of reference of compliance proceedings pursuant to Article 21.5 of the DSU. Thereafter, we turn to the question of whether, in the present case, the Panel erred in finding that the subsequent reviews at issue fell within its terms of reference.

5.18. At the outset, we recall that the first sentence of Article 21.5 of the DSU stipulates:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

5.19. Article 21.5 provides the basis for disputes concerning Members' compliance with recommendations and rulings of the DSB. The "matter" in compliance proceedings consists of two elements: (i) the specific *measures* at issue; and (ii) the legal basis of the complaint (that is, the *claims*).<sup>66</sup> In determining the scope of compliance proceedings, the Appellate Body has distinguished between these two elements, and it has found certain limitations regarding both the measures that can be challenged in compliance proceedings and the claims that can be raised in such proceedings.

5.20. The present case concerns limitations regarding the *measures* falling within the compliance panel's terms of reference. We note that the text of Article 21.5 expressly links the "measures taken to comply" with the recommendations and rulings of the DSB. The Appellate Body understood this to suggest that the "specific measures at issue" to be identified in Article 21.5 proceedings are measures that have a bearing on compliance with such recommendations and rulings<sup>67</sup>, and, accordingly, that determining the scope of "measures taken to comply" in any given case also involves consideration of the recommendations and rulings contained in the original report adopted by the DSB.<sup>68</sup>

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<sup>63</sup> China refers to the Appellate Body's finding that "administrative reviews [which] generated assessment rates and cash deposit rates calculated with zeroing that replaced those found to be WTO-inconsistent in the original proceedings" have a sufficient link, in terms of effects, with the recommendations and rulings of the DSB to argue that the same is true for the sunset review determinations in this dispute, which provided the legal basis for the continued imposition of assessment rates and cash deposits. (China's appellee's submission, para. 215 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 231))

<sup>64</sup> China's appellee's submission, para. 218 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 226).

<sup>65</sup> China's appellee's submission, para. 218 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224).

<sup>66</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

<sup>67</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 61.

<sup>68</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.

5.21. In particular, the present appeal concerns the question of whether, in addition to a determination under Section 129 as the principal measure taken to comply, subsequent administrative and sunset review measures that were issued under the same countervailing duty orders as the measures challenged in the original dispute may also fall within the ambit of these Article 21.5 proceedings, regardless of whether they have been declared to be measures taken to comply by the implementing Member. In previous disputes, the Appellate Body has addressed the question of whether subsequent administrative or sunset review measures may fall within the scope of Article 21.5 proceedings with respect to both countervailing duty<sup>69</sup> and anti-dumping measures.<sup>70</sup> With respect to the former, the Appellate Body held:

Some measures 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. 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. This also requires an Article 21.5 panel to examine the factual and legal background against which a declared "measure taken to comply" is adopted. Only then is a panel in a position to take a view as to whether there are sufficiently close links for it to characterize such an other measure as one "taken to comply" and, consequently, to assess its consistency with the covered agreements in an Article 21.5 proceeding.<sup>71</sup>

5.22. Similarly, addressing the terms of reference in compliance proceedings under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), the Appellate Body has focused on the nexus, in terms of nature, timing, and effects, between subsequent reviews and the declared measure taken to comply.<sup>72</sup> In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body addressed the question of whether the panel in that case was correct in excluding certain subsequent reviews from the scope of compliance proceedings on the basis that they pre-dated the adoption of the recommendations and rulings of the DSB<sup>73</sup>, and whether it was correct of the panel to include within its terms of reference certain administrative reviews issued after the reasonable period of time had expired.<sup>74</sup>

5.23. Moreover, in *US – Zeroing (Japan) (Article 21.5 – Japan)*, the Appellate Body addressed the question of whether an administrative review measure that had not yet existed at the time of the panel request could nonetheless fall within the panel's terms of reference.<sup>75</sup> The Appellate Body agreed with the panel that this review measure fell within that panel's terms of reference, because it was part of a chain of measures in which each new review superseded the previous one.<sup>76</sup> This was based on the observation that subsequent periodic reviews had been issued under the same respective anti-dumping order as the measures in the original proceedings, and thus constituted "connected stages" involving the imposition, assessment, and collection of duties under the same anti-dumping order.<sup>77</sup> Furthermore, the Appellate Body found that an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the objectives of "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired", as reflected in Article 3.3 of the DSU, and of securing "a positive solution to a dispute", as contemplated in Article 3.7.<sup>78</sup>

5.24. Finally, the Appellate Body has previously rejected the proposition that a measure taken *before* the adoption of the DSB's recommendations and rulings can rarely, if ever, be a measure taken "to comply", and that consequently only measures enacted *after* the adoption of the related panel and/or Appellate Body report can be considered by a compliance panel.<sup>79</sup> While the timing of

<sup>69</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*.

<sup>70</sup> See Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*.

<sup>71</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

<sup>72</sup> Appellate Body Reports, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 208-270; *US – Zeroing (Japan) (Article 21.5 – Japan)*, paras. 106-130.

<sup>73</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 217.

<sup>74</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 236.

<sup>75</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 120.

<sup>76</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 130.

<sup>77</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 116.

<sup>78</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122.

<sup>79</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, paras. 223 and 227.

a measure's adoption is a relevant factor<sup>80</sup>, it cannot be determinative of whether a measure bears a sufficiently close nexus with a Member's implementation of the DSB's recommendations and rulings. The inquiry must focus on whether the subsequent reviews bear a sufficiently close nexus, in terms of nature, effects, *and* timing, with the recommendations and rulings, and with the declared measures "taken to comply".<sup>81</sup>

5.25. With these considerations in mind, we now turn to review the Panel's analysis of whether the subsequent reviews at issue fell within the Panel's terms of reference.

5.26. We note that the Panel began by recalling previous jurisprudence and then assessed the nexus between: (i) the subsequent reviews and the Section 129 determinations that constitute the declared measures taken to comply by the United States; and (ii) the recommendations and rulings of the DSB in terms of the "nature"<sup>82</sup>, the "timing"<sup>83</sup>, and the "effects".<sup>84</sup> Based on considerations relating to all three factors, the Panel found that the "interrelated effects of the USDOC's original determinations, Section 129 determinations, and administrative and sunset review determinations" reflect a particularly close relationship for the purposes of Article 21.5 of the DSU<sup>85</sup>, and thus concluded that the subsequent reviews at issue fell within the Panel's terms of reference.<sup>86</sup>

5.27. While not contesting the analytical framework articulated by the Panel, the United States takes issue with the Panel's *application* of the legal standard, alleging that the Panel based its findings on a "superficial examination"<sup>87</sup> of the relationship between the subsequent reviews at issue and the declared measures taken to comply, on the one hand, and the recommendations and rulings of the DSB, on the other hand.

5.28. In particular, regarding the *nature* of the relationship between the subsequent reviews at issue and the DSB's recommendations and rulings, the United States argues that the Panel erred by equating the "nature of the measures in question" with "their subject matter".<sup>88</sup> We note that the Panel observed that "an overlap of the covered products and the substantive issue in question may indicate a close nexus in subject matter."<sup>89</sup> The Panel found that it "may also be relevant to consider whether the particular substantive issue was itself the subject of the recommendations and rulings of the DSB".<sup>90</sup> The Panel added that "[a]nother 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'."<sup>91</sup> The Panel does not appear to have treated any one of these considerations as determinative, rather it referred to them as "relevant consideration[s]". Thus, contrary to what the United States alleges, the Panel did not equate the "nature of the measures in question" with "their subject matter" or limit its analysis to considering the "subject matter" of the measures without considering the reasoning and evidence relied upon by the USDOC in the subsequent reviews.

5.29. The United States further alleges that, under the compliance Panel's rationale, "any reviews under the same order are considered fair game for the purposes of an Article 21.5 compliance proceeding" and alleges that the Panel noted, but did not heed, the Appellate Body's emphasis in

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<sup>80</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 225 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 84; Panel Reports, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10(22); *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5).

<sup>81</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 226.

<sup>82</sup> Panel Report, paras. 7.339-7.341.

<sup>83</sup> Panel Report, paras. 7.335-7.338.

<sup>84</sup> Panel Report, paras. 7.342-7.344.

<sup>85</sup> Panel Report, para. 7.345.

<sup>86</sup> Panel Report, para. 7.347.

<sup>87</sup> United States' appellant's submission, para. 217.

<sup>88</sup> United States' appellant's submission, para. 218 (quoting Panel Report, para. 7.340, in turn referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230).

<sup>89</sup> Panel Report, para. 7.340 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 83).

<sup>90</sup> Panel Report, para. 7.340 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230).

<sup>91</sup> Panel Report, para. 7.340 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230).

*US – Softwood Lumber IV (Article 21.5 – Canada)* 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'."<sup>92</sup>

5.30. We note that, contrary to what the United States alleges, the Panel in fact acknowledged the existence of "limits to the situations in which subsequent reviews may be found to have a sufficiently close nexus in nature so as to fall within the scope of an Article 21.5 proceeding".<sup>93</sup> As one such limit, the Panel described that "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."<sup>94</sup> Specifically with regard to the present case, the Panel found that "the overlap of subject matter extends beyond merely an identity of product and country coverage", and that "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."<sup>95</sup> This indicates that the Panel took into consideration these specific reasons as a basis for its conclusion, rather than assuming that every assessment review necessarily falls within the jurisdiction of an Article 21.5 panel. Moreover, the Panel's reasoning demonstrates that, contrary to what the United States alleges, its nexus analysis did not turn on whether the same legal standard was applied in the relevant determinations. Rather, the Panel's analysis focused on the fact that it had been alleged that a legal standard that had been found to be WTO-inconsistent in the original dispute had also been applied in the measures taken to comply.

5.31. In addition, the United States alleges that the Panel erred in finding that, because subsequent reviews are measures issued under the same countervailing duty order, they are "successive determinations" that bear a close relationship in terms of their "nature" to the United States' implementation of the relevant DSB recommendations and rulings. In particular, the United States takes issue with the Panel's reliance on its observation that "each review takes as its basis, and thereby reflects, and to some extent incorporates, the USDOC's earlier determinations with respect to countervailable subsidies."<sup>96</sup> The United States submits that the mere fact that measures have been issued under the same countervailing duty order is insufficient to establish the existence of a close relationship in terms of their "nature".<sup>97</sup> Rather, the Panel should have scrutinized the relationship of the measures at issue based on the particular facts of each proceeding.

5.32. We note that, indeed, the Panel did not scrutinize the particular facts of the various reviews and related earlier determinations. Rather, in its analysis, the Panel relied on the fact that "subsequent reviews and determinations [had been] issued under the same 'order' as measures challenged in original proceedings" and found that therefore they constituted "connected stages ... involving the imposition, assessment and collection of duties".<sup>98</sup> As we see it, the extent to which a Panel should scrutinize the particular facts of each review and related earlier determination is informed by the purpose of this analysis, namely, to determine whether certain subsequent reviews bear a close relationship, in terms of nature, timing, and effects, to the United States' implementation. This does not require a detailed examination by a panel of the particular facts of the various reviews and related earlier determinations. In this respect, we note that the Appellate Body has not understood the nexus test to entail an analysis of the particular facts of the related measures, for instance, in its application of this test in *US – Softwood Lumber IV (Article 21.5 – Canada)* and in *US – Zeroing (EC) (Article 21.5 – EC)*.

5.33. Furthermore, the United States argues that China did not adduce sufficient evidence and arguments to show that the USDOC's findings in each of the administrative reviews and sunset

<sup>92</sup> United States' appellant's submission, para. 218 (quoting Panel Report, fn 544 to para. 7.341, in turn quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 93). (emphasis original)

<sup>93</sup> Panel Report, para. 7.341 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 93).

<sup>94</sup> Panel Report, para. 7.341 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 239).

<sup>95</sup> Panel Report, para. 7.341.

<sup>96</sup> Panel Report, paras. 7.344-7.345. (fn omitted)

<sup>97</sup> United States' appellant's submission, para. 223.

<sup>98</sup> Panel Report, para. 7.340 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 230, in turn referring to Appellate Body Report, *US – Continued Zeroing*, para. 181).

reviews at issue are WTO-inconsistent<sup>99</sup>, and that this also resulted in an insufficient basis for the compliance panel to conduct a close nexus analysis.<sup>100</sup>

5.34. Whether China had made a *prima facie* case of WTO-inconsistency with respect to the reviews at issue has no bearing on whether these measures fell within the scope of these Article 21.5 proceedings. A measure may well fall within the Panel's terms of reference even if, ultimately, the complainant fails to make a *prima facie* case of inconsistency in that respect. Conversely, a measure may fall outside the scope of the proceedings, even if, in principle, the complainant might have been able to make a *prima facie* case of inconsistency regarding the measure. Accordingly, it was correct of the Panel to distinguish two distinct questions, namely, the question concerning the scope of the Article 21.5 proceedings and the question of whether the subsequent administrative and sunset reviews are themselves inconsistent with the provisions of the SCM Agreement, as claimed by China.<sup>101</sup>

5.35. Next, regarding the *timing* of the relevant measures, the United States alleges that, rather than assessing whether the challenged measures had a sufficiently close nexus in terms of timing, the Panel merely found that whether measures taken before the expiration of the reasonable period of time were within the scope of the Article 21.5 proceedings depended on other aspects of the close nexus test.<sup>102</sup>

5.36. In this respect, we note the Panel's observation that the administrative and sunset reviews identified in China's panel request were in existence at the time the Panel was established, and that while some of these reviews were completed prior to the DSB's adoption of recommendations and rulings in the original dispute on 16 January 2015, others had been completed thereafter, yet before the end of the reasonable period of time on 1 April 2016.<sup>103</sup> In addition, we note that two subsequent reviews were completed after Panel establishment.<sup>104</sup> The Panel noted that the purpose of the reasonable period of time 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. The Panel followed from this that, in principle, it would be expected that compliance measures would be taken *before* the end of the reasonable period of time. Based on this reasoning, the Panel disagreed with the United States that measures adopted prior to the end of the reasonable period of time did not fall within the Panel's terms of reference.<sup>105</sup> In addition, the Panel considered the United States' position incompatible with the proposition that the timing of a measure alone could not be a decisive factor in establishing whether it had a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB.<sup>106</sup> Moreover, the Panel considered the subsequent reviews identified by China had not occurred *so long before* the recommendations and rulings of the DSB as to sever the connection between those measures and the United States' implementation obligations.<sup>107</sup>

5.37. It is clear from the Panel Report that, rather than failing to engage with the "timing" of the measures at issue, the Panel engaged with the United States' argument that measures adopted prior to the end of the reasonable period of time did not fall within the Panel's terms of reference. The Panel found that, in principle, the opposite was true, namely, that such measures fall within a panel's terms of reference. The Panel also found the United States' position incompatible with the principle that the timing of a measure alone cannot be 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. Thus, contrary to what the United States alleges, the Panel in fact undertook an assessment of the nexus of the measures at issue in terms of their timing.

5.38. In addition, we consider the Panel's assessment of the nexus in terms of timing to be consistent with the approach outlined above. We recall that, in *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body held that the *timing* of a measure *alone* cannot be determinative of whether it bears a sufficiently close nexus with a Member's implementation of the recommendations and

<sup>99</sup> United States' appellant's submission, paras. 225-226.

<sup>100</sup> United States' appellant's submission, para. 227.

<sup>101</sup> Panel Report, para. 7.346.

<sup>102</sup> United States' appellant's submission, para. 228.

<sup>103</sup> Panel Report, para. 7.336 (referring to China's panel request, Annexes 3-4).

<sup>104</sup> See para. 5.5 above.

<sup>105</sup> Panel Report, para. 7.337.

<sup>106</sup> Panel Report, para. 7.337.

<sup>107</sup> Panel Report, fn 532 to para. 7.337.

rulings of the DSB so as to fall within the scope of Article 21.5 proceedings.<sup>108</sup> Rather, as set out above, this nexus is to be established on the basis of the nature, timing, and effects. Accordingly, the mere fact that a measure was adopted before or after the expiration of the reasonable period of time for implementation is insufficient to determine whether that measure falls within the Panel's terms of reference. Based on our analysis of the scope of Article 21.5 set out above, we consider that the Panel was correct to assess the temporal relationship along with the nexus in terms of nature and effects, rather than excluding, *a priori*, certain measures based on timing.

5.39. Specifically, with respect to measures adopted *before* the expiration of the reasonable period of time, panels and the Appellate Body have consistently found such measures to fall within the scope of Article 21.5 proceedings. The Panel in the present case took the same approach. We agree with the Panel that a reasonable period of time serves the purpose of providing a period of time in which an implementing Member may take measures in order to bring itself into compliance with DSB recommendations and rulings and that it would run contrary to this purpose to exclude measures adopted within that period of time from the scope of Article 21.5 proceedings.<sup>109</sup>

5.40. With regard to measures coming into effect after the expiration of the reasonable period of time, we recall that, in the context of the Anti-Dumping Agreement, the Appellate Body upheld a panel finding that a periodic review measure that had not yet been in existence at the time of the panel request fell within that panel's terms of reference as part of a chain of measures in which each new review superseded the previous one.<sup>110</sup> Similarly, we consider that the Panel in the present case was correct to find that "an *a priori* exclusion of measures completed during Article 21.5 proceedings could frustrate the function of compliance proceedings."<sup>111</sup>

5.41. Finally, with respect to the nexus in terms of the *effects* of the relevant measures, the United States alleges that the Panel erred in attributing significance to the fact that the "administrative reviews affected the countervailing duty and cash deposit rates established in the original determinations" and "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 administrative review identified by China."<sup>112</sup> For the United States, simply because the findings made in the context of a subsequent administrative review may supersede determinations made in a previous review does not necessarily result in a change to the finding of benefit, for example, and therefore does not mean that there is a close nexus in terms of effect between the two determinations.

5.42. We note that, with respect to the "effects" of the challenged measure, the Panel referred to the "potential perpetuation of the WTO-inconsistency originally found", which may undermine a Member's compliance with DSB recommendations and rulings.<sup>113</sup> The Panel also addressed and disagreed with the United States' argument that the issue of potential perpetuation of an inconsistency was limited to anti-dumping disputes and was not relevant in the context of countervailing duty cases.<sup>114</sup> Thus, contrary to what the United States contends on appeal, the Panel's finding of a close nexus in terms of effect was not based *exclusively* on the observation that findings of an administrative review may supersede determinations made in a previous administrative review. Nor did the Panel base its finding of a close nexus in terms of effect on whether or not cash deposit rates had changed in subsequent reviews. Rather, the Panel found that a close relationship existed due to the "interrelated effects" of the USDOC's original determinations, Section 129 determinations, and administrative and sunset review determinations.<sup>115</sup>

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<sup>108</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224.

<sup>109</sup> Panel Report, para. 7.337.

<sup>110</sup> Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 130.

<sup>111</sup> Panel Report, para. 7.338 (quoting Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122).

<sup>112</sup> Panel Report, para. 7.344. (fn omitted)

<sup>113</sup> Panel Report, para. 7.342 (referring to Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 250).

<sup>114</sup> Panel Report, para. 7.344 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 251).

<sup>115</sup> Panel Report, para. 7.345.

#### 5.1.4 Conclusion

5.43. In sum, we consider that the Panel correctly assessed the scope of the measures falling within its terms of reference in these Article 21.5 proceedings based on the criteria of their relationship in terms of nature, timing, and effects. We therefore uphold the Panel's findings, in paragraphs 7.320, 7.347, 8.1.g, and 8.1.h.i-ii, iv, and vi of its Report, that the subsequent reviews at issue and the Final Determination in the original Solar Panels investigation fell within the Panel's terms of reference under Article 21.5 of the DSU.

#### 5.2 Article 1.1(a)(1) of the SCM Agreement

5.44. The United States and China each appeal the Panel's findings under Article 1.1(a)(1) of the SCM Agreement. Specifically, the participants' claims on appeal are directed at the Panel's findings concerning: (i) the USDOC's public body determinations in the relevant Section 129 investigations; and (ii) the Public Bodies Memorandum "as such".

5.45. First, with respect to the Panel's findings concerning the USDOC's public body determinations in the relevant Section 129 investigations, China requests us to reverse the Panel's finding, in paragraph 7.36 of its Report, 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) ... because they are based on an improper legal standard."<sup>116</sup> For China, the Panel erred in finding that the legal standard for public body determinations under Article 1.1(a)(1) does not "require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue".<sup>117</sup>

5.46. Should we find error in the Panel's interpretation of the legal standard for public body determinations under Article 1.1(a)(1), China requests us also to reverse certain "additional findings" by the Panel, which China considers to be "tainted" by the Panel's erroneous interpretation.<sup>118</sup> In particular, China claims that the Panel erred: (i) in finding, in paragraph 7.72 of its Report, that China "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 in concluding, in paragraph 7.105 of its Report, that it did "not consider that the USDOC's determinations were based on 'mere ownership or control over an entity by a government, without more'"<sup>119</sup>; and (ii) in finding, in paragraphs 7.103 and 7.106 of its Report, that China did not demonstrate that the USDOC failed to consider relevant evidence in the five investigations in which the GOC participated.<sup>120</sup>

5.47. In addition, China requests us to reverse the Panel's conclusion, in paragraphs 7.107 and 8.1.a of its Report, that the USDOC's public body determinations in the relevant Section 129 investigations are not inconsistent with Article 1.1(a)(1)<sup>121</sup>, to complete the legal analysis, and to find that the USDOC's public body determinations are, indeed, inconsistent with Article 1.1(a)(1) because they are based on an improper legal standard.<sup>122</sup>

5.48. Second, with respect to the Panel's findings concerning the Public Bodies Memorandum "as such", the United States requests us to reverse the Panel's finding, in paragraph 7.120 of its Report, that the Public Bodies Memorandum is a measure falling within the scope of these Article 21.5 proceedings.<sup>123</sup> Further, the United States seeks reversal of the Panel's finding, in paragraph 7.133 of its Report, that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application.<sup>124</sup>

5.49. China, for its part, requests us to reverse the Panel's finding, in paragraph 7.136 of its Report, that "China did not demonstrate that the Public Bodies Memorandum is inconsistent 'as such' with

<sup>116</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 4.

<sup>117</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 4.

<sup>118</sup> China's other appellant's submission, heading II.D.

<sup>119</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 5.

<sup>120</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 6.

<sup>121</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 7.

<sup>122</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 8.

<sup>123</sup> United States' appellant's submission, para. 230. See also United States' Notice of Appeal, para. 2.

<sup>124</sup> United States' appellant's submission, para. 230. See also United States' Notice of Appeal, para. 3.



Article 1.1(a)(1) ... because [it] is based on an improper legal standard."<sup>125</sup> China further seeks reversal of the Panel's finding, in paragraph 7.142 of its Report, that "the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)."<sup>126</sup> Should we reverse the Panel's finding that the Public Bodies Memorandum is not inconsistent "as such" with Article 1.1(a)(1), China requests us to complete the legal analysis and find that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) because it is premised on an erroneous legal standard and restricts in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1).<sup>127</sup>

5.50. Each participant requests us to reject the other participant's claims on appeal in their entirety.<sup>128</sup>

5.51. Our analysis of the participants' claims on appeal proceeds in the following order. First, we provide a brief description of the measures at issue – namely, the Public Bodies Memorandum and the USDOC's public body determinations in the relevant Section 129 investigations – followed by an overview of the relevant Panel findings. Next, we address China's claim concerning the Panel's interpretation of the legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement. In particular, we assess whether the Panel erred in finding, in paragraph 7.36 of its Report, that Article 1.1(a)(1) does not "require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue".<sup>129</sup> To the extent that we find error in the Panel's interpretive finding, we then turn to China's claims concerning the Panel's additional findings, in paragraphs 7.72, 7.103, 7.105, and 7.106 of its Report, regarding the USDOC's public body determinations in the relevant Section 129 investigations.<sup>130</sup> Finally, we turn to the participants' claims concerning the Panel's findings with respect to the Public Bodies Memorandum "as such".

### 5.2.1 The measures at issue

5.52. The original panel found that the USDOC acted inconsistently with the United States' obligations under Article 1.1(a)(1) of the SCM Agreement in 12 countervailing duty investigations because it had determined that certain Chinese SOEs were public bodies based solely on the fact that they were (majority-) owned, or otherwise controlled, by the GOC.<sup>131</sup> In order to comply with the recommendations and rulings of the DSB in the original proceedings, the USDOC issued new preliminary and final public body determinations in the relevant Section 129 investigations. The investigation record providing the basis for those new determinations consists of two main sets of materials.

5.53. First, the USDOC issued a questionnaire to the GOC regarding public bodies for the 12 investigations at issue (Public Bodies Questionnaire). The Public Bodies Questionnaire asked a number of general questions regarding China's 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.<sup>132</sup> In turn, the Input Producer Appendix to the questionnaire posed specific questions regarding the producers of the inputs purchased by respondent companies in the 12 investigations at issue, and sought information on the corporate organization, ownership, and decision-making procedures of those input

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<sup>125</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>126</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>127</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 10.

<sup>128</sup> See China's appellee's submission, paras. 24, 41, and 221; United States' appellee's submission, paras. 155, 158, 176-177, 197, 220-221, and 286.

<sup>129</sup> Panel Report, para. 7.36.

<sup>130</sup> China's claims on appeal concerning these additional findings by the Panel are conditioned upon our reversal of the Panel's interpretation of the legal standard for public body determinations under Article 1.1(a)(1).

<sup>131</sup> Original Panel Report, para. 7.75. This finding by the original panel was not appealed.

<sup>132</sup> Public Bodies Questionnaire (Panel Exhibit USA-83), section II, pp. 2-3. See also Panel Report, para. 7.39.

producers.<sup>133</sup> The GOC responded to the Public Bodies Questionnaire in five of the 12 investigations at issue.<sup>134</sup> The GOC did not respond to the Questionnaire in the other seven investigations.<sup>135</sup>

5.54. Second, the USDOC placed the Public Bodies Memorandum, including the CCP Memorandum<sup>136</sup>, on the record of all 12 investigations at issue.<sup>137</sup> These documents were also part of the record of earlier Section 129 proceedings with respect to a different WTO dispute (*US – Anti-Dumping and Countervailing Duties (China)* (DS379)).<sup>138</sup>

5.55. The Public Bodies Memorandum examines "the system of governance and state functions" in China<sup>139</sup>, with a view to assessing the role of the GOC in what the USDOC calls state-invested enterprises (SIEs) – i.e. enterprises in which the GOC has an ownership stake of any size.<sup>140</sup> In setting out its analysis, the Memorandum reviews the Appellate Body's discussion of the types of evidence that may assist in determining whether an entity is a public body under Article 1.1(a)(1) of the SCM Agreement. Among other things, the Memorandum mentions the Appellate Body's reference to "meaningful control" by a government over an entity. According to the Memorandum, "meaningful control" means "control related to the possession or exercise of governmental authority and governmental functions". Further, the Memorandum states that "government ownership remains an important element of the analysis."<sup>141</sup>

5.56. The Public Bodies Memorandum identifies the "governmental function" relevant to the USDOC's inquiry as China's constitutional mandate to "maintain and uphold the socialist market economy", which includes maintaining a leading role for the state sector in the economy.<sup>142</sup> According to the Memorandum, the actions taken by the GOC to fulfil this mandate are ordinarily classified as "governmental" in the legal order of China.<sup>143</sup> Having identified the relevant governmental function, the Public Bodies Memorandum notes that the GOC exercises "meaningful control" over "certain categories of SIEs in China", and uses 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".<sup>144</sup> The USDOC grounded these findings on "manifold indicia of control indicating that SIEs possess, exercise, or are vested with governmental

<sup>133</sup> Public Bodies Questionnaire (Panel Exhibit USA-83), section II, pp. 4-8. See also Panel Report, para. 7.39.

<sup>134</sup> The five investigations for which the GOC provided responses were: Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders. (See Panel Report, fn 80 to para. 7.40) In those investigations, the GOC provided clarifications, *inter alia*, on the following topics: the domestic industries considered as "pillar" or "basic" in the Chinese economic system, and in which the GOC "wishes to maintain a major presence" including "majority ownership" of SOEs; the objective of the GOC in holding shares in enterprises, which the GOC described as "maintain[ing] a socialist market economy" and "generat[ing] an economic return on publicly-owned resources"; the policies or plans applicable to the industries to which the input producers in the five investigations at issue belong, which the GOC described as not self-executing and aimed to "provide a framework for economic and social development"; and the extent of governmental approval of mergers or restructurings in those industries, which the GOC described as limited to "important projects and restricted projects". (Ibid., para. 7.41) The GOC also responded to the Input Producer Appendix by providing specific information on the input producers in the five investigations at issue, including: corporate names and addresses; business registrations, Articles of association, and capital verification reports; and ownership structure and corporate governance diagrams. The GOC explained that neither the Government nor the CCP imposes "explicit or implicit obligations or targets" regarding production quantities or prices, and that the CCP "plays no role in the selection and monitoring of senior management". (Ibid., para. 7.42)

<sup>135</sup> Panel Report, para. 7.54.

<sup>136</sup> USDOC Memorandum dated 18 May 2012 on the relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be "public bodies" within the context of a countervailing duty investigation (CCP Memorandum).

<sup>137</sup> For purposes of this Report, we refer to both documents collectively as the "Public Bodies Memorandum" or simply "the Memorandum".

<sup>138</sup> Panel Report, para. 7.44 (referring to Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 8).

<sup>139</sup> Public Bodies Memorandum (Panel Exhibit CHN-1), p. 2. See also Panel Report, para. 7.46.

<sup>140</sup> Panel Report, fn 100 to para. 7.46 (referring to Public Bodies Memorandum (Panel Exhibit CHN-1), fn 5).

<sup>141</sup> Panel Report, para. 7.45 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), p. 3).

<sup>142</sup> Panel Report, para. 7.46 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), p. 11).

<sup>143</sup> Panel Report, para. 7.46 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), p. 11). The USDOC found support for these observations in China's constitution and in various domestic measures and regulations, including industrial policies and national and local five-year plans. (Panel Report, para. 7.47 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), pp. 6-11))

<sup>144</sup> Panel Report, para. 7.46 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), p. 37).

authority".<sup>145</sup> Such indicia include: (i) the provision of direct and indirect benefits to SIEs; (ii) governmental incentives and demands for certain firm behaviour in furtherance of certain policy goals; (iii) the GOC's maintenance of ownership levels as a means to maintain control over the state sector; (iv) the GOC's management of market competition and market outcomes through the instrumentality of enterprises in the state sector; (v) the supervision of the State-Owned Assets Supervision and Administration Commission over SIEs; (vi) the GOC's control over all company appointments in the state sector; and (vii) the presence of CCP groups and committees within enterprises.<sup>146</sup>

5.57. The Public Bodies Memorandum summarizes the USDOC's findings with respect to three categories of enterprises in China:

- a. "[A]ny enterprise in China in which the government has a full or controlling ownership interest is found to be a public body." This conclusion "rests upon the [USDOC's] finding that, in the institutional and SIE-focused policy setting of China, the [GOC] is exercising meaningful control over all such enterprises, such that these enterprises possess, exercise, or are vested with governmental authority". Further, this conclusion "reflects the numerous indicia of control" showing that the GOC "uses SIEs to fulfil its mandate to uphold the socialist market economy".<sup>147</sup>
- b. "[E]nterprises in which the [GOC] has significant ownership that are also subject to certain government industrial plans may be found to be public bodies", on a case-by-case basis, if indicia show that these enterprises "are used as instruments by the [GOC] to uphold the socialist market economy".<sup>148</sup>
- c. Certain enterprises that "have little or no formal government ownership" may be found to be public bodies if the GOC "exercises meaningful control over such enterprises". Such a determination would be made "on a case-by-case basis" in light of relevant indicia.<sup>149</sup>

5.58. The CCP Memorandum, for its part, addresses "the *de jure* and *de facto* role that the CCP plays in China's economy and system of governance".<sup>150</sup> Based on its examination of the relevant evidence, the USDOC observes in the CCP Memorandum that: (i) while the CCP and the GOC "are organizationally separate", their structures "generally mirror each other"; (ii) the CCP "exercises authority over the formal institutions of government at the national and local levels"; (iii) the CCP "makes policies the state then implements and the CCP directs and supervises that implementation through a number of formal and informal tools"; and (iv) the CCP is "particularly concerned with authority over the economy because of the importance of economic growth to advancing the cause of socialism".<sup>151</sup> On these bases, the CCP Memorandum concludes 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."<sup>152</sup>

5.59. On 25 February 2016, the USDOC issued its preliminary public body determinations in the 12 investigations at issue. The USDOC referred to the Public Bodies Memorandum and the accompanying CCP Memorandum, and observed that "[e]nterprises that satisfy the criteria and analysis described in the Public Bodies Memorandum, which the Department placed on the record of these Section 129 proceedings, are considered to be public bodies."<sup>153</sup> The USDOC made separate preliminary determinations for: (i) the seven cases for which the GOC did not respond to the Public Bodies Questionnaire; and (ii) the five cases for which the GOC did respond. In particular:

- a. In the seven investigations in which the GOC did not provide a response, the USDOC found that "the GOC withheld information that was requested and failed to provide information within the deadlines established", thereby warranting "an adverse inference in selecting

<sup>145</sup> Panel Report, para. 7.48 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), p. 11).

<sup>146</sup> Panel Report, para. 7.48 (referring to Public Bodies Memorandum (Panel Exhibit CHN-1), pp. 11-37).

<sup>147</sup> Public Bodies Memorandum (Panel Exhibit CHN-1), p. 37. See also Panel Report, para. 7.49.a.

<sup>148</sup> Public Bodies Memorandum (Panel Exhibit CHN-1), pp. 37-38. See also Panel Report, para. 7.49.b.

<sup>149</sup> Public Bodies Memorandum (Panel Exhibit CHN-1), p. 38. See also Panel Report, para. 7.49.c.

<sup>150</sup> Panel Report, para. 7.50.

<sup>151</sup> Panel Report, para. 7.52.

<sup>152</sup> Panel Report, para. 7.50.

<sup>153</sup> Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 8.

from among the facts otherwise available".<sup>154</sup> The USDOC observed that the Public Body Memorandum contained factual information about the role played by the GOC in enterprises such as the input producers in the seven Section 129 investigations, and considered that information sufficient to warrant a determination, based on facts available, that the input producers at issue are public bodies.<sup>155</sup>

- b. In the five investigations in which the GOC provided responses, the USDOC separately examined:
  - (i) enterprises in which the GOC had full or controlling ownership; and
  - (ii) enterprises in which the GOC had less than controlling ownership.
    - i. Based on the GOC's response that most of the input producers at issue were majority-owned by the government, the USDOC determined that "the GOC meaningfully controlled those input producers" during the relevant periods of investigation "such that they possess, exercise or are vested with government authority".<sup>156</sup>
    - ii. As for the input producers of which the GOC had minority ownership, the USDOC determined that the GOC had failed to respond to certain questions and provide the necessary information about the "ownership, management, and control" of those input producers.<sup>157</sup> Therefore, the USDOC resorted to facts otherwise available and relied on the information contained in the Public Bodies Memorandum regarding the GOC and the CCP's control or influence over enterprises subject to governmental industrial plans. According to the USDOC, this information on the record was sufficient to warrant a determination that the input producers at issue are public bodies.<sup>158</sup>

5.60. In light of the foregoing, the USDOC preliminarily determined that all the input producers at issue in the relevant Section 129 investigations were public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. The USDOC later reaffirmed these findings in its final public body determinations.<sup>159</sup>

### 5.2.2 The Panel's findings

5.61. Before the Panel, China claimed 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. China argued, first, that, in its public body determinations in the relevant Section 129 investigations, the USDOC applied an improper legal standard, in that it failed 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 by the investigated entities.<sup>160</sup> Second, China submitted that the USDOC failed to properly construe and apply the notion of "meaningful control" in its determinations. In particular, argued China, the USDOC failed to engage in a case-by-case analysis of the input producers at issue in each investigation<sup>161</sup>, and disregarded substantial evidence that was inconsistent with a finding that such input producers were performing a "government function" when they sold inputs to downstream purchasers.<sup>162</sup>

5.62. The United States disagreed with the legal standard advanced by China, which it saw as overly narrow. According to the United States, the USDOC carried out the appropriate type of analysis by examining the functions or conduct ordinarily classified as governmental in the legal order of China, and the manifold indicia of control indicating that relevant input providers possess, exercise, or are

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<sup>154</sup> Panel Report, para. 7.55 (quoting Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 13).

<sup>155</sup> Panel Report, para. 7.56 (quoting Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 13).

<sup>156</sup> Panel Report, para. 7.59 (quoting Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 14).

<sup>157</sup> Panel Report, para. 7.60 (quoting Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 16).

<sup>158</sup> Panel Report, para. 7.61 (referring to Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), pp. 15-18).

<sup>159</sup> Panel Report, para. 7.63 (referring to Final Section 129 Determination (Panel Exhibit CHN-5)).

<sup>160</sup> Panel Report, para. 7.7 (referring to China's first written submission to the Panel, paras. 100-107).

<sup>161</sup> Panel Report, para. 7.64.

<sup>162</sup> Panel Report, para. 7.9 (referring to China's first written submission to the Panel, paras. 108-156).

vested with governmental authority. The United States considered the explanations provided by the USDOC to be reasoned and adequate, based on the totality of the evidence on the record, and supported by ample record evidence of the core features of the entities at issue.<sup>163</sup>

5.63. The Panel began by addressing the legal standard for public body determinations under Article 1.1(a)(1). The Panel noted that a public body within the meaning of that provision is "an entity that possesses, exercises or is vested with governmental authority", or, in other words, "an **entity ... vested with authority to exercise governmental functions**".<sup>164</sup> The Panel also observed that **an inquiry into whether the conduct of an entity is that of a public body must have "due regard ... 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"**.<sup>165</sup> Further, the Panel noted that "evidence that a government exercises meaningful control over an entity and its conduct" may serve, in certain circumstances, as proof that such entity possesses governmental authority and exercises it in the performance of governmental functions<sup>166</sup>, and that the presence of manifold indicia of meaningful control may warrant an "inference that the entity concerned is exercising governmental authority".<sup>167</sup> Finally, the Panel recalled that a public body inquiry may entail consideration of whether the conduct or functions of an entity "are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member".<sup>168</sup>

5.64. The Panel then turned to the question of whether the finding that an entity is a public body pursuant to Article 1.1(a)(1) requires an investigating authority to establish that the entity is performing a governmental function when providing a particular financial contribution.<sup>169</sup> The Panel recalled that the USDOC identified the relevant governmental function as "maintaining and upholding the socialist market economy".<sup>170</sup> The Panel took the view that it was not its task to "judge this government function in the abstract, or in isolation from the rest of the USDOC's determinations".<sup>171</sup> Furthermore, the Panel noted that 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.<sup>172</sup> Rather, public body determinations "may rest on a variety of considerations, with due regard for the particular circumstances of each case".<sup>173</sup> Indeed, reasoned the Panel, the ways in which a government could vest an entity with governmental authority, as well as the functions that may be "governmental" in nature, vary among Members, such that no "*a priori* limitation" exists in these respects.<sup>174</sup> Instead, an investigating authority must provide a "reasoned and adequate explanation", based on a "holistic assessment" of the evidence on the investigation record, to support a determination that an investigated entity is a public body.<sup>175</sup> The Panel considered that the broad variety of situations in which an entity may exercise, possess, **or be vested with governmental authority "reinforces ... the importance of a case by case approach"**.<sup>176</sup> In the Panel's view, the factual circumstances and the specific determinations in prior disputes did not reflect "rigid legal requirements that must be applied in other circumstances".<sup>177</sup>

5.65. The Panel thus disagreed with China that the legal standard for public body determinations "require[s] a particular degree or nature of connection in all cases between an identified government

<sup>163</sup> Panel Report, para. 7.10 (referring to United States' first written submission to the Panel, paras. 19-56, 63-102, and 116).

<sup>164</sup> Panel Report, para. 7.16 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 317-318).

<sup>165</sup> Panel Report, para. 7.16 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29; referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317).

<sup>166</sup> Panel Report, para. 7.18 (quoting Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318; *US – Carbon Steel (India)*, para. 4.10).

<sup>167</sup> Panel Report, para. 7.18 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318).

<sup>168</sup> Panel Report, para. 7.19 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297; referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.9).

<sup>169</sup> Panel Report, para. 7.24.

<sup>170</sup> Panel Report, para. 7.25. (fn omitted)

<sup>171</sup> Panel Report, para. 7.26.

<sup>172</sup> Panel Report, para. 7.28.

<sup>173</sup> Panel Report, para. 7.28. (fn omitted)

<sup>174</sup> Panel Report, para. 7.28 (referring to Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.10; *US – Anti-Dumping and Countervailing Duties (China)*, paras. 297 and 318).

<sup>175</sup> Panel Report, paras. 7.28-7.30.

<sup>176</sup> Panel Report, para. 7.32.

<sup>177</sup> Panel Report, para. 7.32.

function and the particular financial contribution at issue".<sup>178</sup> The Panel concluded that China had failed to demonstrate that the USDOC's public body determinations in the relevant Section 129 investigations are based on an improper legal standard and thus inconsistent with Article 1.1(a)(1) of the SCM Agreement.<sup>179</sup>

5.66. Applying its reading of Article 1.1(a)(1) to the USDOC's public body determinations in the relevant Section 129 investigations, the Panel addressed China's claim that the USDOC misconstrued and misapplied the notion of "meaningful control". For the Panel, the existence of "meaningful control" is inherently specific to particular factual circumstances and can be established through a variety of potentially relevant considerations that may be cumulatively assessed by an investigating authority.<sup>180</sup> Such considerations may include "the particular government function identified by an investigating authority and the evidence in its investigation".<sup>181</sup> The Panel found that, in the present case, the USDOC's assessment of whether the GOC exercised "meaningful control" over Chinese SIEs was consonant with the obligation to consider "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".<sup>182</sup> Thus, the Panel rejected China's claim that the USDOC misconstrued and misapplied the notion of "meaningful control" in its public body determinations.

5.67. Next, the Panel addressed China's claim that the USDOC disregarded material evidence purportedly undermining a finding that the input producers in the investigations at issue were public bodies. The Panel recalled that the evidence on the investigation record consisted of the Public Bodies Memorandum and, in five of the 12 investigations, the GOC's responses to the Public Bodies Questionnaire. The Panel observed that the Public Bodies Memorandum focuses on the GOC's interventions in firm behaviour and market outcomes, with particular emphasis on governmental influence over SIEs through commercial incentives and benefits, industrial policies, and supervisory control.<sup>183</sup> Further, the Panel considered that the information solicited through the Public Bodies Questionnaire "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".<sup>184</sup> On this basis, the Panel found that the evidence solicited and relied upon by the USDOC was "relevant to establishing that an entity possesses, exercises, or is vested with governmental authority".<sup>185</sup> The Panel further noted that China's claim hinged on the legal standard adopted by the USDOC under Article 1.1(a)(1) concerning the connection between the identified government function and the provision of input by the investigated entities.<sup>186</sup> The Panel recalled that it had already rejected China's position on the legal standard under Article 1.1(a)(1). The Panel found that, to the extent that China's allegations that the USDOC ignored evidence related to elements of the legal standard advocated by China and rejected by the Panel, those allegations did not demonstrate that the USDOC's determinations were inconsistent with Article 1.1(a)(1).<sup>187</sup>

5.68. Accordingly, the Panel concluded that China had not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in its public body determinations in the 12 Section 129 investigations at issue.

5.69. Next, the Panel addressed China's claim that the Public Bodies Memorandum is, "as such", inconsistent with Article 1.1(a)(1). China maintained that the Memorandum lays out an analytical framework that the USDOC will apply prospectively when there is an allegation that an entity in China is a public body.<sup>188</sup> This framework, China argued, does not require the USDOC to examine whether the entity in question performs a governmental function when engaging in the conduct that is the subject of the financial contribution inquiry. According to China, this necessarily leads to determinations that are inconsistent with Article 1.1(a)(1) every time the Public Body Memorandum

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<sup>178</sup> Panel Report, para. 7.36.

<sup>179</sup> Panel Report, para. 7.36.

<sup>180</sup> Panel Report, para. 7.70.

<sup>181</sup> Panel Report, para. 7.70.

<sup>182</sup> Panel Report, para. 7.71 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29).

<sup>183</sup> Panel Report, para. 7.76.

<sup>184</sup> Panel Report, para. 7.84.

<sup>185</sup> Panel Report, para. 7.89. See also *ibid.*, para. 7.79.

<sup>186</sup> Panel Report, para. 7.101.

<sup>187</sup> Panel Report, para. 7.101.

<sup>188</sup> Panel Report, para. 7.109 (referring to China's first written submission to the Panel, para. 178).

is applied in a given case.<sup>189</sup> In response, the United States contended that the Public Bodies Memorandum is not a measure within the scope of the current Article 21.5 proceedings, is not a "rule or norm of general or prospective application", and does not necessarily result in an inconsistency with Article 1.1(a)(1).<sup>190</sup>

5.70. The Panel began its analysis by recalling the "broad" scope of measures challengeable in WTO dispute settlement – encompassing, in principle, "any act or omission attributable to a WTO Member".<sup>191</sup> It found that the Public Bodies Memorandum is an "act" of the USDOC that is attributable to the United States and is, therefore, challengeable in WTO dispute settlement.<sup>192</sup>

5.71. The Panel then examined whether the Memorandum is within the scope of these Article 21.5 proceedings. It recalled that the jurisdiction of Article 21.5 panels extends to measures having "a particularly close relationship" and "sufficiently close links" to the declared measure taken to comply and with the recommendations and rulings of the DSB, depending on "the timing, nature, and effects of the various measures" and "the factual and legal background against which [the] declared 'measure taken to comply' is adopted".<sup>193</sup> The Panel noted the United States' recognition that the Memorandum is not "separable" from the USDOC's public body determinations<sup>194</sup>, as well as the "close relationship" of the Memorandum with the "analytical framework" and the "evidentiary analysis" conducted by the USDOC.<sup>195</sup> The Panel also rejected the United States' argument that China could have challenged the Memorandum in the original proceedings, but did not.<sup>196</sup> According to the Panel, the USDOC's original public body determinations "rested on a different basis"<sup>197</sup>, and the Memorandum only became relevant when it was later incorporated into the determinations made by the USDOC to comply with the recommendations and rulings of the DSB.<sup>198</sup> Hence, the Panel found that the Public Bodies Memorandum was properly within the scope of these Article 21.5 proceedings.<sup>199</sup>

5.72. Further, the Panel assessed whether the Public Bodies Memorandum is a rule or norm of general or prospective application. For the Panel, a key question concerning general or prospective application was whether the Memorandum would be applied in investigations taking place after its issuance.<sup>200</sup> The Panel examined the language contained in the Memorandum and found that it "could support a finding of normative character as well as general or prospective application".<sup>201</sup> The Panel also noted the USDOC's conclusion contained in the Memorandum that "the systemic analysis in [the Memorandum] is appropriate for understanding the institutional and SIE-focused policy setting in China".<sup>202</sup> To the Panel, this indicated that the Public Bodies Memorandum sets out an analysis that is susceptible to "general and prospective" application in countervailing duty investigations on Chinese enterprises.<sup>203</sup> Finally, the Panel observed that the Memorandum "has served as the basis

<sup>189</sup> Panel Report, para. 7.109 (referring to China's first written submission to the Panel, para. 182; China's second written submission to the Panel, paras. 120-121).

<sup>190</sup> Panel Report, para. 7.110 (referring to United States' first written submission to the Panel, paras. 156-162 and 182-197).

<sup>191</sup> Panel Report, para. 7.111 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794, in turn quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81).

<sup>192</sup> Panel Report, para. 7.113.

<sup>193</sup> Panel Report, para. 7.114 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

<sup>194</sup> Panel Report, para. 7.115 (quoting United States' response to Panel question No. 19, para. 139).

<sup>195</sup> Panel Report, para. 7.116.

<sup>196</sup> Panel Report, para. 7.118 (referring to United States' response to Panel question No. 17, para. 132).

<sup>197</sup> Panel Report, para. 7.118.

<sup>198</sup> Panel Report, para. 7.119.

<sup>199</sup> Panel Report, para. 7.116 (quoting United States' response to Panel question No. 19, para. 139).

<sup>200</sup> Panel Report, para. 7.125 (referring to Panel Report, *US – Countervailing Measures (China)*, paras. 7.113-7.114; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187).

<sup>201</sup> Panel Report, para. 7.126. In particular, the Panel focused on the USDOC's findings that: (i) "for the purposes of the [countervailing duty] law", China has "a constitutional mandate ... to maintain and uphold the 'socialist market economy', which includes maintaining a leading role for the state sector in the economy"; and (ii) "certain categories of SIEs in China properly are considered to be public bodies for the purposes of the [countervailing duty] law". (Ibid., paras. 7.126-7.127 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), pp. 2 and 37))

<sup>202</sup> Panel Report, para. 7.128 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), fn 48). (emphasis omitted)

<sup>203</sup> Panel Report, para. 7.129.

for numerous determinations following its adoption"<sup>204</sup>, including in the Section 129 investigations at issue in these proceedings.<sup>205</sup> On these bases, the Panel found that the Public Bodies Memorandum sets out an analytical framework that is both "general, because it affects an unidentified number of Chinese economic operators", and "prospective, because it applies to future public body determinations".<sup>206</sup>

5.73. Finally, the Panel assessed whether the Public Body Memorandum, as a rule or norm of general and prospective application, is "as such" inconsistent with Article 1.1(a)(1). The Panel noted that China's claim of inconsistency with respect to the Memorandum "as such" was "largely based on the same grounds" as China's claim of inconsistency with respect to the USDOC's public body determinations in the relevant Section 129 investigations.<sup>207</sup> In particular, the Panel observed, both claims related to the fact that the USDOC may determine an entity to be a public body without inquiring into "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".<sup>208</sup> The Panel referred to its prior finding that, pursuant to Article 1.1(a)(1), a finding that an entity is a public body does not require "a particular degree or nature of connection between an identified government function and the financial contribution in question".<sup>209</sup> Thus, the Panel found that China had failed to establish that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).<sup>210</sup>

5.74. The Panel further noted 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".<sup>211</sup> Indeed, reasoned the Panel, the Memorandum requires a case-by-case analysis, based on additional information pertaining to indicia of governmental control, to reach a public body determination with respect to: (i) "enterprises in China in which the government has significant ownership that are also subject to certain government industrial plans"; and (ii) "enterprises that have little or no formal government ownership".<sup>212</sup> The Panel added that the Public Bodies Memorandum "has no operational force" in itself<sup>213</sup> and "does not, on its face, impinge upon the authority of the USDOC to disregard or supplement its content in any given investigation".<sup>214</sup> Rather, the Memorandum is a resource "*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".<sup>215</sup> In addition, the Panel observed that the USDOC retains "discretion to consider other evidence in a given investigation for all categories of enterprises, even where the Public Bodies Memorandum is on the record"<sup>216</sup>, and provides respondents with an opportunity "to rebut, clarify, or correct the factual information" that is placed on the record.<sup>217</sup>

5.75. In light of the foregoing, the Panel found 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). Hence, the Panel concluded that China had not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement.<sup>218</sup>

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<sup>204</sup> Panel Report, para. 7.130.

<sup>205</sup> Panel Report, para. 7.127.

<sup>206</sup> Panel Report, para. 7.132 (referring to Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 6.8).

<sup>207</sup> Panel Report, para. 7.135.

<sup>208</sup> Panel Report, para. 7.135 (quoting China's second written submission to the Panel, para. 120).

<sup>209</sup> Panel Report, para. 7.136.

<sup>210</sup> Panel Report, para. 7.136.

<sup>211</sup> Panel Report, para. 7.134 (referring to United States' first written submission to the Panel, para. 177; China's comments on United States' response to Panel question No. 14, para. 34).

<sup>212</sup> Panel Report, para. 7.138 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), pp. 37-38).

<sup>213</sup> Panel Report, para. 7.140 (quoting United States' response to Panel question No. 23, para. 147).

<sup>214</sup> Panel Report, para. 7.140.

<sup>215</sup> Panel Report, para. 7.140. (emphasis original)

<sup>216</sup> Panel Report, para. 7.141.

<sup>217</sup> Panel Report, para. 7.141 (quoting Public Bodies Record Memorandum (Panel Exhibit USA-130); United States' responses to Panel questions No. 16, para. 105; No. 23(b), para. 150).

<sup>218</sup> Panel Report, para. 7.142.



### 5.2.3 The legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement

5.76. We begin by addressing what China has described as "the basis" of its appeal under Article 1.1(a)(1) of the SCM Agreement: namely, the Panel's interpretive finding that the legal standard for public body determinations under 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".<sup>219</sup> Below, we outline the participants' and third participants' arguments on appeal, before turning to our assessment of the Panel's interpretation of the legal standard for public body determinations under Article 1.1(a)(1).

#### 5.2.3.1 Claims and arguments on appeal

5.77. China argues that a proper interpretation of Article 1.1(a)(1) of the SCM Agreement requires a "clear logical connection" between the "government function" identified by an investigating authority and the conduct alleged to constitute a financial contribution.<sup>220</sup> For China, the Panel's approach, which does not require such a connection, cannot be reconciled with the Appellate Body's interpretation of the term "public body". In particular, China argues that the Appellate Body's statement that an investigating authority must examine the "core features" of an entity and "its relationship with the government in the narrow sense" is necessarily framed by the relevant inquiry of "*whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body*".<sup>221</sup> In China's view, it would confound the entire purpose of that inquiry to attribute conduct to a WTO Member even when that conduct is unrelated to any government authority with which an entity has been vested.<sup>222</sup>

5.78. According to China, the Panel's interpretive error is reflected in its review of the USDOC's approach to the public body inquiry. Instead of examining whether "*the function or conduct*" of providing steel inputs was of a kind that is ordinarily classified as governmental in China, the USDOC instead engaged in an abstract review of China's system of governance and state functions to determine "*what functions generally are considered governmental in China*".<sup>223</sup> For China, this approach is irreconcilable with the Appellate Body's statements that a public body "connotes an entity vested with *certain* governmental responsibilities, or exercising *certain* governmental authority".<sup>224</sup> Moreover, argues China, the Appellate Body has stated that "*whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body*".<sup>225</sup> To China, these statements indicate that "*the functions or conduct*" that must reflect governmental authority are "*the functions or conduct of a specific entity under Article 1.1(a)(1)*".<sup>226</sup>

5.79. China further contends that the Panel's interpretation of the term "public body" is irreconcilable with Article 1.1(a)(1)(iv), pursuant to which a government or public body may "entrust or direct" a private body to "carry out" a function listed in Article 1.1(a)(1)(i)-(iii).<sup>227</sup> China maintains that, if the governmental authority possessed by public bodies who "entrust or direct" private bodies must necessarily relate to the functions listed in Article 1.1(a)(1)(i)-(iii), then the governmental authority possessed by *other* public bodies cannot logically be completely unrelated to such functions.<sup>228</sup> Moreover, China alleges that the Panel erred by failing to address Article 5 of the

<sup>219</sup> China's other appellant's submission, para. 18 (quoting Panel Report, para. 7.28). See also Panel Report, paras. 7.36 and 7.106.

<sup>220</sup> China's other appellant's submission, para. 17. While, according to China, the relevant "government function" need not perfectly coincide with one of the types of conduct listed in the subparagraphs of Article 1.1(a)(1), a direct relationship must nonetheless be established between the two. (China's response to questioning at the oral hearing)

<sup>221</sup> China's other appellant's submission, para. 63 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317). (emphasis original)

<sup>222</sup> China's other appellant's submission, para. 63. See also *ibid.*, para. 71.

<sup>223</sup> China's other appellant's submission, para. 69 (quoting Public Bodies Memorandum (Panel Exhibit CHN-1), p. 2). (emphasis original)

<sup>224</sup> China's other appellant's submission, para. 66 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 296). (emphasis original)

<sup>225</sup> China's other appellant's submission, para. 67 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297). (emphasis original)

<sup>226</sup> China's other appellant's submission, para. 68. (emphasis original)

<sup>227</sup> China's other appellant's submission, para. 73.

<sup>228</sup> China's other appellant's submission, para. 73.

International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles), despite the Appellate Body's recognition of the "similarities" between that provision and Article 1.1(a)(1) of the SCM Agreement.<sup>229</sup>

5.80. China also submits that the Panel's approach is incompatible with the Appellate Body's application of the public body standard in *US – Anti-Dumping and Countervailing Duties (China)*. In that dispute, notes China, the Appellate Body grounded its conclusion that certain Chinese state-owned commercial banks (SOCBs) were public bodies on evidence that SOCBs are "meaningfully controlled by the government *in the exercise of their functions*"<sup>230</sup> – i.e. "*in making loans*", the conduct that was subject to the financial contribution inquiry.<sup>231</sup> Thus, China submits that the Panel's failure to examine a government's exercise of control over the conduct that is the subject of the financial contribution inquiry is irreconcilable with the Appellate Body's analysis of SOCBs.<sup>232</sup>

5.81. Finally, China argues that, in the appeal in *US – Carbon Steel (India)*, the United States advocated for the very interpretation of the term "public body" that China is advocating before the Appellate Body in the present case. In particular, China refers to the United States' argument, in *US – Carbon Steel (India)*, that "the key governmental functions at issue are those functions described in the subparagraphs" of Article 1.1(a)(1), and that "the authority required of a public body is the authority to exercise *these* functions on behalf of the government."<sup>233</sup>

5.82. The United States, for its part, requests us to uphold the Panel's interpretation of Article 1.1(a)(1).<sup>234</sup> The United States disagrees with China's reading of the term "public body", and in particular with China's position that Article 1.1(a)(1) requires a "clear logical connection" between the "government function" identified by an investigating authority and the conduct alleged to constitute a financial contribution.<sup>235</sup> For the United States, China's position conflates the relevant "government function" exercised by an entity with the particular conduct or activities described in Article 1.1(a)(1)(i)-(iii).<sup>236</sup> The United States maintains that the relevant question is not "whether the *conduct* under Article 1.1(a)(1) is governmental", but rather "whether the *entity* engaging in the conduct is governmental".<sup>237</sup> In the United States' view, China's position entails that a public body determination must be based on evidence that the entity's specific activity "is itself a government function, and that engaging in that activity is consistent with the government's objectives".<sup>238</sup> Such an interpretation, argues the United States, would shield conduct from scrutiny under the SCM Agreement whenever an entity engaging in that conduct is acting outside its normal, established functions.<sup>239</sup>

5.83. According to the United States, China's interpretation runs counter to the Appellate Body's reading of the term "public body". The United States notes the Appellate Body's past statements that a public body is "an entity that possesses, exercises or is vested with governmental authority" and that, therefore, the substantive legal question to be answered is "whether *one or more* of these characteristics exist in a particular case".<sup>240</sup> The United States argues that, under this framework elaborated by the Appellate Body, 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 that authority at the time of the particular transaction at issue.<sup>241</sup> The United States also recalls the Appellate Body's statement that "[e]vidence that an entity is, in fact,

<sup>229</sup> China's other appellant's submission, para. 77 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 311).

<sup>230</sup> China's other appellant's submission, para. 87 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355). (emphasis original)

<sup>231</sup> China's other appellant's submission, para. 87. (emphasis original)

<sup>232</sup> China's other appellant's submission, para. 94.

<sup>233</sup> China's other appellant's submission, para. 24 (quoting United States' opening statement before the Appellate Body in *US – Carbon Steel (India)* (Panel Exhibit CHN-67), para. 11 (emphasis original)).

<sup>234</sup> United States' appellee's submission, para. 286.

<sup>235</sup> United States' appellee's submission, para. 186.

<sup>236</sup> United States' appellee's submission, paras. 92 and 95.

<sup>237</sup> United States' appellee's submission, para. 84. (emphasis original) See also *ibid.*, paras. 101 and 107.

<sup>238</sup> United States' appellee's submission, para. 100.

<sup>239</sup> United States' appellee's submission, para. 112.

<sup>240</sup> United States' appellee's submission, para. 102 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37). (emphasis original)

<sup>241</sup> United States' appellee's submission, para. 102.

exercising governmental functions" is relevant to a public body inquiry to the extent that it "points to a sustained and systematic practice", thereby shedding light on the core features of the entity concerned.<sup>242</sup>

5.84. Further, the United States contends that China's interpretation cannot be sustained in light of the context provided by Article 1.1(a)(1)(iv). The United States points to the Appellate Body's statement that a focus on the conduct of an entity is relevant when examining the entrustment or direction of a *private* body.<sup>243</sup> In contrast, the proper focus of a *public* body inquiry is on what is "ordinarily" considered a governmental function in the legal order of the Member, the "core features of the entity" concerned, and its "relationship to the government in the narrow sense".<sup>244</sup> Thus, the United States maintains that a public body need not necessarily have "authority" or "responsibility" that "relates to the performance" of the functions described in Article 1.1(a)(1)(i)-(iii).<sup>245</sup> The United States posits that China's interpretation conflates the "entrustment or direction" inquiry with a public body inquiry and makes the latter redundant, contrary to the principle of effective treaty interpretation.<sup>246</sup>

5.85. Moreover, the United States asserts that the Panel did not err by not addressing the relevance of ILC Article 5 in its analysis of Article 1.1(a)(1) of the SCM Agreement. Given the important differences between the two provisions<sup>247</sup>, the United States contends that it was neither appropriate nor necessary for the Panel to take ILC Article 5 into account in its interpretation of Article 1.1(a)(1).<sup>248</sup> The United States also disagrees with China that the Appellate Body's public body analysis in relation to SOCBs in *US – Anti-Dumping and Countervailing Duties (China)* supports China's proposed interpretation of the term "public body". The United States argues that, contrary to China's argument, the Appellate Body did not focus narrowly on evidence relating to the conduct of SOCBs in making particular loans, but also considered evidence relating to the broader "relationship between the SOCBs and the [GOC]".<sup>249</sup> For the United States, the Appellate Body's conclusions in that dispute were grounded on all such evidence "taken together".<sup>250</sup>

5.86. Finally, the United States objects to China's contention that, in *US – Carbon Steel (India)*, the United States advocated for the same interpretation of the term "public body" that China is advocating before us in the present case. The United States also contends that, in *US – Carbon Steel (India)*, it sought a clarification that "in certain circumstances, government control over an entity ... may be sufficient to establish that an entity is a 'public body'", especially when "the government may use that entity's resources as its own."<sup>251</sup> The United States adds that, while the Appellate Body did not evaluate its argument, it nonetheless recognized that whether a government can use an "entity's resources as its own ... may certainly be relevant evidence" for purposes of a public body inquiry.<sup>252</sup> At the oral hearing, the United States requested that we confirm that a public body under Article 1.1(a)(1) is "any entity that a government meaningfully controls, such that when the entity is conveying economic resources, it is transferring the public's resources".<sup>253</sup>

5.87. As a third participant, Australia contends that it is not necessary for an investigating authority to assess, in all cases, whether the specific conduct or transaction at issue involves the exercise of

<sup>242</sup> United States' appellee's submission, para. 106 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318).

<sup>243</sup> United States' appellee's submission, para. 125 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284).

<sup>244</sup> United States' appellee's submission, paras. 128-129 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 297 and 317).

<sup>245</sup> United States' appellee's submission, para. 133 (referring to China's other appellant's submission, para. 73).

<sup>246</sup> United States' appellee's submission, para. 130.

<sup>247</sup> United States' appellee's submission, para. 141 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 309 and 311).

<sup>248</sup> United States' appellee's submission, para. 141.

<sup>249</sup> United States' appellee's submission, para. 143 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355).

<sup>250</sup> United States' appellee's submission, para. 144 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355). (emphasis omitted)

<sup>251</sup> United States' appellee's submission, para. 148 (quoting United States' opening statement before the Appellate Body in *US – Carbon Steel (India)* (Panel Exhibit CHN-67), para. 10).

<sup>252</sup> United States' appellee's submission, para. 152 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20). (emphasis omitted)

<sup>253</sup> United States' opening statement at the oral hearing, para. 18.

a government function.<sup>254</sup> For Australia, China's position conflates a public body inquiry with the question of whether a financial contribution exists.<sup>255</sup> Moreover, China's interpretation blurs the distinction between the attribution rule pertaining to public bodies, which focuses on the governmental character of an entity, and that pertaining to private bodies, which requires an additional showing that the specific conduct of an entity results from governmental entrustment or direction.<sup>256</sup> For Australia, China's approach would impose an impractical evidentiary burden on investigating authorities by requiring them to establish a connection between *each* transaction or series of transactions and the performance of a governmental function.<sup>257</sup>

5.88. The European Union maintains that the attribution to a Member of the conduct of a public body requires a showing that an entity is vested with, possesses, or exercises "governmental authority".<sup>258</sup> For the European Union, there is no *a priori* limitation on what can be considered as a governmental function for a particular WTO Member, nor is there a requirement to define the governmental function as the provision of particular kinds of financial contributions.<sup>259</sup> In the European Union's view, the "exceptional" scenario<sup>260</sup> may arise where an entity engages in two distinct areas of activity, which are clearly separated and independent from each other. According to the European Union, such an entity may be seen as acting as a public body when engaged in one of those areas, but not in the other.<sup>261</sup> That being said, the European Union sees no error in the Panel's interpretative approach. Indeed, the Panel merely disagreed with China that an investigating authority must, "in *all cases*", establish a connection of a particular nature or degree between the governmental function and the particular financial contribution at issue.<sup>262</sup>

5.89. Japan disagrees with China that a public body determination requires that governmental control over an entity be exercised in relation to the conduct at issue under Article 1.1(a)(1). According to Japan, an important element in the evaluation of the core features of an entity is whether such entity is "structured in a manner so that it can act not solely in accordance with commercial considerations".<sup>263</sup> Where an entity is structured in a way that enables it to engage in activities that private market actors would be unable to reasonably sustain, this would constitute a strong indication that the entity is vested with governmental authority.<sup>264</sup> For Japan, China's position conflates the requirement that the entity be a public body with the requirement that there be a financial contribution, and disregards the distinction between the public body and private body inquiries under Article 1.1(a)(1).<sup>265</sup>

#### 5.2.3.2 Whether the Panel erred in its interpretation of the legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement

5.90. China claims that past Appellate Body reports stand for the proposition that, in determining that an entity is a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement, an investigating authority must, in all cases, establish a "clear logical connection" between an identified "government function" and the conduct alleged to constitute a financial contribution.<sup>266</sup> In response, the United States disagrees with China that, in its past reports, the Appellate Body has required such a connection to be established in all cases.<sup>267</sup>

5.91. The issue before us is therefore whether, in the context of a public body inquiry, Article 1.1(a)(1) requires an investigating authority to establish, in all cases, a clear logical

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<sup>254</sup> Australia's opening statement at the oral hearing, para. 14.

<sup>255</sup> Australia's opening statement at the oral hearing, paras. 8-10.

<sup>256</sup> Australia's opening statement at the oral hearing, paras. 11-13.

<sup>257</sup> Australia's opening statement at the oral hearing, para. 16.

<sup>258</sup> European Union's third participant's submission, para. 17.

<sup>259</sup> European Union's third participant's submission, para. 18.

<sup>260</sup> European Union's third participant's submission, para. 23.

<sup>261</sup> European Union's third participant's submission, para. 23.

<sup>262</sup> European Union's third participant's submission, para. 24. (emphasis original)

<sup>263</sup> Japan's third participant's submission, para. 8.

<sup>264</sup> Japan's third participant's submission, paras. 8 and 10.

<sup>265</sup> Japan's third participant's submission, para. 5.

<sup>266</sup> China's other appellant's submission, para. 17. While, according to China, the relevant "government function" need not perfectly coincide with one of the types of conduct listed in the subparagraphs of Article 1.1(a)(1), a direct relationship must nonetheless be established between the two. (China's response to questioning at the oral hearing)

<sup>267</sup> United States' appellee's submission, paras. 94-124 and 142-145.

connection between an identified "government function" and the specific conduct alleged to give rise to a financial contribution.

5.92. We begin by considering the text of Article 1.1, which stipulates, in relevant part:

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

- (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
- (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
  - (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
  - (iii) a government provides goods or services other than general infrastructure, or purchases goods;
  - (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices **normally followed by governments; ...**

and

(b) a benefit is thereby conferred.<sup>268</sup>

5.93. Article 1.1(a)(1) is concerned with the different forms that a "financial contribution" may take. Subparagraphs (i)-(iii) and the first clause of subparagraph (iv) list the types of conduct involving a financial contribution. In addition, the second clause of subparagraph (iv) provides that a financial contribution exists when a government entrusts or directs a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii) above, which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments.

5.94. Article 1.1(a)(1) also governs the attribution to a WTO Member of the types of conduct listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv).<sup>269</sup> The provision contemplates "two principal categories of entities" whose conduct may be attributed to a Member.<sup>270</sup> First, conduct may be attributable to a Member if it is performed by "a government or any public body" – i.e. entities that are "governmental" in nature.<sup>271</sup> Second, the conduct of a "private body" – i.e. an entity that is "neither a government in the narrow sense nor a public body" – can be attributed to a Member if that Member's government has "entrusted or directed" that private body to carry out the conduct concerned.<sup>272</sup>

5.95. In prior disputes, the Appellate Body has addressed the meaning of the term "public body" under Article 1.1(a)(1). It has observed, among other things, that the text of Article 1.1(a)(1) collectively refers to "a government or any public body" as "government", thereby suggesting a

<sup>268</sup> Fn omitted. Articles 1.1(a)(2) and 1.1(b) of the SCM Agreement stipulate that a subsidy shall also be deemed to exist if there is any form of income or price support in the sense of Article XVI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and a benefit is thereby conferred. This dispute does not raise the issue of subsidies granted in the form of income or price support.

<sup>269</sup> See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 309.

<sup>270</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

<sup>271</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

<sup>272</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 291 (referring to Panel Report, *US – Export Restraints*, para. 8.49).

certain "degree of commonality or overlap in their essential characteristics".<sup>273</sup> The Appellate Body has found that a public body is an entity that "possesses, exercises or is vested with governmental authority"<sup>274</sup>, and has stated that a public body determination hinges on whether "one or more of these characteristics exist in a particular case".<sup>275</sup> The Appellate Body has also explained that the question of what constitutes a public body is informed by which functions or conduct "are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", as well as "the classification and functions of entities within WTO Members generally".<sup>276</sup>

5.96. As explained by the Appellate Body, a public body inquiry must be conducted on a case-by-case basis, having due regard to "the core characteristics and functions of the relevant entity", that entity's "relationship with the government", and "the legal and economic environment prevailing in the country in which the investigated entity operates".<sup>277</sup> 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.<sup>278</sup> The absence of an express statutory delegation of governmental authority does not necessarily preclude a finding that an entity is a public body.<sup>279</sup> Instead, a public body determination may be based on different types of evidence.<sup>280</sup> Depending on the specific circumstances of each case, relevant evidence may include: (i) evidence that "an entity is, in fact, exercising governmental functions", especially where such evidence "points to a sustained and systematic practice"<sup>281</sup>; (ii) evidence regarding "the scope and content of government policies relating to the sector in which the investigated entity operates"<sup>282</sup>; and (iii) evidence that a government exercises "meaningful control over an entity and its conduct".<sup>283</sup> When conducting a public body inquiry, an investigating authority must "evaluate and give due consideration to all relevant characteristics of the entity"<sup>284</sup> and examine all types of evidence that may be pertinent to that evaluation; in doing so, it should avoid "focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant".<sup>285</sup>

5.97. In *US – Carbon Steel (India)*, the Appellate Body was unpersuaded by the United States' understanding of a public body as "an entity controlled by the government ... **such that the** government may use the entity's resources as its own".<sup>286</sup> The Appellate Body considered that such understanding was "difficult to reconcile" with its prior statement that a public body "must be an entity that possesses, exercises or is vested with governmental authority".<sup>287</sup> According to the Appellate Body, "a government's exercise of 'meaningful control' over an entity and its conduct, including control such that the government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body."<sup>288</sup> Similarly, "government ownership of an entity, while not a decisive criterion, may serve, in conjunction with other elements, as evidence."<sup>289</sup> However, the Appellate Body reiterated that, in its consideration of evidence, an investigating authority must "avoid focusing exclusively or unduly

<sup>273</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.22.

<sup>274</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317).

<sup>275</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37.

<sup>276</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.9 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297).

<sup>277</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

<sup>278</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.9 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317).

<sup>279</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.

<sup>280</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.

<sup>281</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

<sup>282</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

<sup>283</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.

<sup>284</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.

<sup>285</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20.

<sup>286</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.19 (referring to United States' other appellant's submission in *US – Carbon Steel (India)*, para. 52).

<sup>287</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.19.

<sup>288</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20.

<sup>289</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20.

on any single characteristic without affording due consideration to others that may be relevant".<sup>290</sup> For these reasons, we disagree with the United States' contention in this dispute that a public body is "any entity that a government meaningfully controls, such that when the entity is conveying economic resources, it is transferring the public's resources".<sup>291</sup> This would conflate the relevant *evidentiary* elements for a public body determination and the *definition* of a public body, as set out in paragraph 5.95 above.

5.98. With these considerations in mind, we now turn to review the Panel's interpretation of the legal standard for public body determinations under Article 1.1(a)(1) in light of the participants' claims and arguments. To recall, the Panel rejected China's contention that the USDOC articulated and applied an incorrect legal standard under Article 1.1(a)(1)<sup>292</sup>, and found that this provision "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".<sup>293</sup>

5.99. On appeal, China contends that the ultimate goal of a public body inquiry is establishing whether the specific "*conduct* falling within the scope of Article 1.1(a)(1)" is that of a public body.<sup>294</sup> The thrust of China's position is that it is not sufficient for an investigating authority to establish that a certain entity, overall, has a sufficiently close relationship with government to constitute a public body. Rather, for China, that investigating authority must *also* establish that the entity concerned is exercising a governmental function *when engaging in the specific investigated conduct under subparagraphs (i)-(iii) or the first clause of subparagraph (iv) of Article 1.1(a)(1)*. By contrast, the United States maintains that the relevant question for a public body inquiry is not "whether the *conduct* under Article 1.1(a)(1) is governmental" but rather "whether the *entity* engaging in the conduct is governmental".<sup>295</sup> Thus, according to the United States, it is sufficient for an investigating authority to determine that, *overall*, the entity concerned has a sufficiently close relationship with government to find that entity to constitute a public body.

5.100. Our summary of relevant jurisprudence in paragraphs 5.95-5.96 above indicates that the central focus of a public body inquiry under Article 1.1(a)(1) is not, as China contends, whether the *conduct* that is alleged to give rise to a financial contribution under subparagraphs (i)-(iii) or the first clause of subparagraph (iv) – i.e. the particular transaction at issue – is logically connected to an identified "government function".<sup>296</sup> Rather, the relevant inquiry hinges on the *entity* engaging in that conduct, its core characteristics, and its relationship with government.<sup>297</sup> This focus on the entity, as opposed to the conduct alleged to give rise to a financial contribution, comports with the fact that a "government" (in the narrow sense) and a "public body" share a "degree of commonality or overlap in their essential characteristics"<sup>298</sup> – i.e. they are both "governmental" in nature.<sup>299</sup> Just as any "act or omission" by a government in the narrow sense can be deemed to constitute a measure attributable to a Member<sup>300</sup>, so any act or omission by a public body is directly attributable to a Member irrespective of the nature of the act or omission itself. Indeed, once it has been established that an entity is a public body, then "*all conduct*" of that entity shall be attributable to the Member concerned for purposes of Article 1.1(a)(1).<sup>301</sup> When that entity's conduct "*falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)*", then it will be deemed to give rise to a financial contribution for purposes of Article 1.1(a)(1).<sup>302</sup>

<sup>290</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20 (referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319).

<sup>291</sup> United States' opening statement at the oral hearing, para. 18.

<sup>292</sup> Panel Report, para. 7.36.

<sup>293</sup> Panel Report, para. 7.28.

<sup>294</sup> China's other appellant's submission, para. 63 (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317). (emphasis original)

<sup>295</sup> United States' appellee's submission, para. 84. (emphasis original) See also *ibid.*, paras. 101 and 107.

<sup>296</sup> China's other appellant's submission, para. 17.

<sup>297</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

<sup>298</sup> See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 288. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.22.

<sup>299</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

<sup>300</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>301</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. (emphasis added)

<sup>302</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

5.101. In our view, the nature of an entity's conduct or practice may certainly constitute evidence relevant to a public body inquiry.<sup>303</sup> However, the assessment of such evidence is aimed at answering the central question of whether the *entity itself* possesses the core characteristics and functions that would qualify it as a public body.<sup>304</sup> In other words, we do not consider that a public body inquiry must necessarily focus on every instance of conduct in which the relevant entity may engage, or on whether each such instance of conduct is connected to a "government function". Instead, the conduct of an entity – particularly when it points to a "sustained and systematic practice"<sup>305</sup> – is *one* of the various types of evidence that, depending on the circumstances of each investigation, may shed light on the core characteristics of an entity and its relationship with government in the narrow sense.

5.102. In this connection, we note China's argument concerning the notion of "meaningful control" – which, as the Panel noted, was a "key evidentiary element relied upon by the USDOC" in determining whether the relevant entities are public bodies.<sup>306</sup> China submits that "the concept of 'meaningful control' only makes sense in the context of a public body inquiry if the control is being exercised in relation to the conduct at issue under Article 1.1(a)(1)."<sup>307</sup> In other words, states China, "a government must exercise control *over the conduct that is the subject of the inquiry* in order for that control to be 'meaningful'."<sup>308</sup> In support of its argument, China points to the Appellate Body's application of the notion of "meaningful control" to SOCBs in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>309</sup> The United States takes issue with China's definition of "meaningful control" and considers that the Appellate Body's analysis in *US – Anti-Dumping and Countervailing Duties (China)* does not support that definition.<sup>310</sup>

5.103. We disagree with China to the extent it suggests that an entity must necessarily be found to have been "meaningfully controlled" by the government in the specific conduct at issue under subparagraphs (i)-(iii) or the first clause of subparagraph (iv). The type of inquiry that China describes appears to be more akin to the inquiry an investigating authority would undertake to assess, pursuant to the second clause of Article 1.1(a)(1)(iv), whether a government or public body has "entrusted or directed" a *private body* to carry out one of the types of conduct listed in subparagraphs (i)-(iii). The Appellate Body has explained that, when it is alleged that the conduct of a private body gives rise to a financial contribution, an investigating authority must establish an *additional* "link between the government and *that conduct*" in the form of "entrustment or direction".<sup>311</sup> In other words, unless an investigating authority can show that a private body is carrying out a function that has been "entrusted" to it or "directed" by the government *when engaging in one of the conducts under subparagraphs (i)-(iii)*, that investigating authority will not be able to properly attribute the conduct in question to a Member. By contrast, if it is established that an entity is a public body within the domestic system of a Member, then the conduct of that entity is *directly* attributable to the Member concerned.<sup>312</sup> As we see it, to accept China's position would unduly blur the distinction between, on the one hand, a public body inquiry and, on the other hand, an "entrustment or direction" inquiry.

5.104. Finally, we are unpersuaded by China's argument concerning the Appellate Body's application of Article 1.1(a)(1) to SOCBs in *US – Anti-Dumping and Countervailing Duties (China)*.

<sup>303</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.

<sup>304</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.

<sup>305</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318. See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.10.

<sup>306</sup> Panel Report, para. 7.66. See also Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 9.

<sup>307</sup> China's other appellant's submission, para. 84.

<sup>308</sup> China's other appellant's submission, para. 8. (emphasis original)

<sup>309</sup> See China's other appellant's submission, paras. 87-88.

<sup>310</sup> See United States' appellee's submission, paras. 142-145.

<sup>311</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. (emphasis original) As the Appellate Body has explained, "direction" refers to the situation where a government or public body exercises its authority in order to compel or command a private body or govern a private body's actions, whereas "entrustment" describes the situation where a government or public body gives responsibility for certain tasks to a private body. (Ibid., para. 294) In turn, the authority that constitutes the object of entrustment or direction pursuant to Article 1.1(a)(1)(iv) is one that "would normally be vested in the government". (Ibid., para. 295)

<sup>312</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.



According to China, the Appellate Body's conclusion that those SOCBs were public bodies was based on the consideration that the GOC "meaningfully controlled" them "*in making loans*" – i.e. a specific conduct falling under subparagraph (i) of Article 1.1(a)(1).<sup>313</sup> However, this was not the sole basis for the Appellate Body's conclusion. Instead, as noted above, the Appellate Body addressed other "extensive evidence" relied on by the USDOC<sup>314</sup>, including information showing that: (i) "[t]he chief executives of the head offices of the SOCBs are government appointed and the [CCP] retains significant influence in their choice"; and (ii) SOCBs "still lack adequate risk management and analytical skills".<sup>315</sup> This evidence was not limited to SOCBs' lending activity *per se*, but rather spoke to their organizational features, chains of decision-making authority, and overall relationship with the GOC. Thus, while the USDOC did take into account evidence relating to the conduct of SOCBs, it did so within the framework of its inquiry into the core characteristics of those *entities* and their relationship with the GOC.<sup>316</sup>

5.105. In light of the foregoing, we consider that the Panel was correct in rejecting China's reading of Article 1.1(a)(1) as requiring that an investigating authority inquire into whether an entity is exercising a government function when engaging in one of the specific conducts listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv). We, therefore, uphold the Panel's finding, in paragraphs 7.36 and 7.106 of its Report, that the legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement does not prescribe a connection of a particular degree or nature that must necessarily be established between an identified government function and the particular financial contribution at issue. We also uphold the Panel's conclusion, in paragraph 7.36 of its Report, 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."

5.106. Having so found, we recall that China raised a number of additional claims with respect to the Panel's subsequent findings, in paragraphs 7.72, 7.103, and 7.105-7.106 of its Report, concerning the USDOC's public body determinations in the relevant Section 129 investigations. In particular, China challenges the Panel's findings that: (i) the USDOC did not misconstrue the concept of "meaningful control" and its relevance to the substantive legal standard for a public body inquiry<sup>317</sup>; (ii) the USDOC's determinations were not based on "mere ownership or control over an entity by a government, without more"<sup>318</sup>; and (iii) the USDOC did not fail to consider relevant evidence in the five investigations in which the GOC participated.<sup>319</sup>

5.107. China has framed these additional claims as *conditional* upon our reversal of the Panel's interpretive finding that 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. For instance, in its other appellant's submission, China states:

*If* the Appellate Body agrees with China that the Panel erred in concluding that the legal standard for public body determinations does not "require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue", China requests that the Appellate Body reverse the Panel's subsequent findings in relation to China's "as applied" claims under

<sup>313</sup> China's other appellant's submission, para. 87. (emphasis original)

<sup>314</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.

<sup>315</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 350.

<sup>316</sup> We further recall that, in that dispute, the Appellate Body also reviewed the USDOC's public body determinations in respect to *other* SOEs, namely, "producers of steel, rubber and petrochemical inputs" that sold such inputs to downstream producers. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 343) Although the Appellate Body ultimately found those determinations to be WTO-inconsistent, it did so because it found that the USDOC had relied "principally" on government ownership. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 346) Contrary to what China suggests, the Appellate Body *did not* find that, in order to be considered public bodies, the SOEs at issue would necessarily have to be controlled by the GOC when engaging in every sale of input to downstream producers.

<sup>317</sup> China's Notice of Other Appeal, para. 5.

<sup>318</sup> China's Notice of Other Appeal, para. 5.

<sup>319</sup> China's Notice of Other Appeal, para. 6.

Article 1.1(a)(1), because each of these findings is irreparably tainted by the Panel's improper legal interpretive finding.<sup>320</sup>

5.108. At the oral hearing, China confirmed that its claims concerning the Panel's "subsequent findings" are, indeed, conditional on our reversal of the Panel's interpretive finding. Since we have upheld the Panel's interpretive finding, the condition triggering China's additional claims is not met, and China's additional claims with respect to the Panel's findings, in paragraphs 7.72, 7.103, and 7.105-7.106 of its Report, are thus not before us.

#### 5.2.4 The Public Bodies Memorandum

5.109. We now turn to the participants' claims concerning the Panel's findings with respect to the Public Bodies Memorandum "as such". To recall, the United States challenges: (i) the Panel's finding, in paragraph 7.120 of its Report, that the Public Bodies Memorandum is a measure falling, "as such", within the scope of these Article 21.5 proceedings<sup>321</sup>; and (ii) the Panel's finding, in paragraph 7.133 of its Report, that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application.<sup>322</sup>

5.110. China, for its part, seeks reversal of: (i) the Panel's finding, in paragraph 7.136 of its Report, that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement "because [it] is based on an improper legal standard"<sup>323</sup>; (ii) the Panel's finding, in paragraph 7.142 of its Report, that the Public Bodies Memorandum "does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)"<sup>324</sup>; and (iii) the Panel's "ultimate conclusion", in paragraph 8.1(b) of its Report, that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).<sup>325</sup>

5.111. We begin our analysis with the threshold question of whether the Public Bodies Memorandum falls, "as such", within the scope of these Article 21.5 proceedings. To the extent it does, we then proceed to examine the participants' claims regarding the "as such" consistency of the Public Bodies Memorandum with Article 1.1(a)(1) of the SCM Agreement, including issues relating to the possibility to challenge of the Public Bodies Memorandum as a rule or norm of general or prospective application.

##### 5.2.4.1 Whether the Public Bodies Memorandum falls, "as such", within the scope of these Article 21.5 proceedings

5.112. The Panel found, in paragraph 7.120 of its Report, that the Public Bodies Memorandum is, "as such", a measure "within the scope of [its] jurisdiction under Article 21.5 of the DSU". In particular, reasoned the Panel, the jurisdiction of compliance panels extends to measures having "a particularly close relationship" and "sufficiently close links" to the declared "measure taken to comply", depending on "the timing, nature, and effects of the various measures" and "the factual and legal background against which [the] declared 'measure taken to comply' is adopted".<sup>326</sup> The Panel noted the United States' recognition that the Memorandum is not "separable" from the USDOC's public body determinations<sup>327</sup>, as well as the "close relationship" of the Memorandum with the "analytical framework" and the "evidentiary analysis" conducted by the USDOC in reaching those determinations.<sup>328</sup> The Panel also rejected the United States' argument that China could have challenged the Memorandum in the original proceedings, but did not.<sup>329</sup> According to the Panel, the USDOC's original public body determinations "rested on a different basis"<sup>330</sup>, and the Memorandum only became relevant when it was later incorporated into the determinations made by the USDOC

<sup>320</sup> China's other appellant's submission, para. 102. (emphasis added)

<sup>321</sup> United States' appellant's submission, para. 230. See also United States' Notice of Appeal, para. 2.

<sup>322</sup> United States' appellant's submission, para. 230. See also United States' Notice of Appeal, para. 3.

<sup>323</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>324</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>325</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>326</sup> Panel Report, para. 7.114 (quoting Appellate Body Report, *US – Softwood Lumber IV*

(*Article 21.5 – Canada*), para. 77).

<sup>327</sup> Panel Report, para. 7.115 (quoting United States' response to Panel question No. 19, para. 139).

<sup>328</sup> Panel Report, para. 7.116.

<sup>329</sup> Panel Report, para. 7.118 (referring to United States' response to Panel question No. 17, para. 132).

<sup>330</sup> Panel Report, para. 7.118.

to comply with the recommendations and rulings of the DSB.<sup>331</sup> On these bases, the Panel concluded that the Public Bodies Memorandum is properly within the scope of these compliance proceedings.<sup>332</sup>

5.113. On appeal, the United States takes issue with the Panel's conclusion. The United States submits, first, that the Memorandum was adopted in connection with measures taken to comply with the recommendations and rulings of the DSB in *US – Anti-Dumping and Countervailing Duties (China)* – i.e. an "entirely different, earlier dispute".<sup>333</sup> According to the United States, the Public Bodies Memorandum is not, in itself, "a measure taken to comply in *this* dispute".<sup>334</sup> More specifically, the United States contends that, if the Memorandum is an "*integral part*" of "the declared measures taken to comply" in this dispute, then "it is not separable from those measures and is not, in itself, an independent measure taken to comply *in this dispute*".<sup>335</sup> If, on the other hand, the Memorandum is an "independent 'measure'", then that measure was "taken to comply with the DSB's recommendations in *US – Anti-Dumping and Countervailing Duties (China)*", and not with the DSB's recommendations "*in this dispute*".<sup>336</sup> In addition, the United States argues that China could have challenged it in the original proceedings, but opted not to do so.<sup>337</sup> Indeed, observes the United States, China filed its request for consultations in the original proceedings after the adoption by the DSB of the reports in *US – Anti-Dumping and Countervailing Duties (China)* and after the USDOC's adoption of the Memorandum.<sup>338</sup> Hence, China could have included claims concerning the Public Bodies Memorandum in its request for consultations, but did not.<sup>339</sup>

5.114. China, for its part, supports the Panel's conclusion. In China's view, the United States' acknowledgement that the Public Bodies Memorandum is an "integral part" of the declared measure taken to comply relieved the Panel of an assessment of whether the Memorandum bears sufficient "links" with the USDOC's public body determinations at issue in terms of "nature, timing, and effects".<sup>340</sup> Such acknowledgement, coupled with the USDOC's consistent application of the Public Bodies Memorandum in its investigations on Chinese products, suffices, according to China, to demonstrate that the Memorandum is an "independent measure" that falls within the scope of these compliance proceedings.<sup>341</sup> Moreover, China disagrees with the United States that the Public Bodies Memorandum could have been challenged in the original proceedings, but was not. China stresses that the Memorandum only became relevant to this dispute by becoming the basis for the USDOC's public body determinations in the Section 129 investigations at issue.<sup>342</sup>

5.115. As a third participant, the European Union considers that, while the Panel's analysis was "rather truncated"<sup>343</sup>, its conclusions are correct given the existence of a "close nexus" between the Memorandum and the USDOC's determinations.<sup>344</sup> According to the European Union, "one and the same measure" may be considered as a "measure taken to comply" in two or more different disputes.<sup>345</sup> The European Union also cautions against a formalistic exclusion of measures from the scope of compliance proceedings "for the sole reason that they pre-date the original panel request".<sup>346</sup>

5.116. We begin by recalling that the object of Article 21.5 proceedings is the WTO-consistency of measures declared to be "measures taken to comply" with the recommendations and rulings of the DSB.<sup>347</sup> In addition, "measures 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

<sup>331</sup> Panel Report, para. 7.119.

<sup>332</sup> Panel Report, para. 7.116 (quoting United States' response to Panel question No. 19, para. 139).

<sup>333</sup> United States' appellant's submission, para. 23. (emphasis omitted)

<sup>334</sup> United States' appellant's submission, para. 24. (emphasis original)

<sup>335</sup> United States' appellant's submission, para. 27. (emphasis original)

<sup>336</sup> United States' appellant's submission, para. 27. (emphasis original)

<sup>337</sup> United States' appellant's submission, para. 29.

<sup>338</sup> United States' appellant's submission, paras. 22 and 30.

<sup>339</sup> United States' appellant's submission, para. 30.

<sup>340</sup> China's appellee's submission, para. 18 (referring to Panel Report, paras. 7.115-7.116).

<sup>341</sup> China's appellee's submission, para. 20.

<sup>342</sup> China's appellee's submission, para. 22.

<sup>343</sup> European Union's third participant's submission, para. 32.

<sup>344</sup> European Union's third participant's submission, para. 32. See also *ibid.*, para. 30.

<sup>345</sup> European Union's third participant's submission, para. 33.

<sup>346</sup> European Union's third participant's submission, para. 35.

<sup>347</sup> See e.g. Appellate Body Reports, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 202.

by a panel acting under Article 21.5.<sup>348</sup> Determining whether such a close relationship exists calls 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".<sup>349</sup>

5.117. We understand the thrust of the Panel's reasoning to hinge on: (i) the United States' recognition that the Public Bodies Memorandum is an "integral part" of the USDOC's public body determinations at issue (i.e. the declared measures taken to comply); and (ii) the "close relationship" between those measures in terms of "subject matter" and "effects".<sup>350</sup> Albeit succinct, the Panel's analysis comports with the "close relationship" test outlined above. Indeed, the USDOC placed the Public Bodies Memorandum on the record of all the Section 129 determinations at issue in these compliance proceedings. Moreover, the analysis, assessment of the evidence, and explanation contained in the Memorandum were highly relevant to the USDOC's conclusion that the relevant input producers are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. Finally, before the Panel, the United States confirmed that the Public Bodies Memorandum is an "integral part" of the USDOC's public body determinations at issue.<sup>351</sup> These elements indicate to us that a "particularly close relationship" exists between the Public Bodies Memorandum, the declared "measure taken to comply", and "the recommendations and rulings of the DSB".<sup>352</sup>

5.118. Turning to the United States' argument that China could have challenged the Public Bodies Memorandum, but chose not to do so, we recall that, in principle, a complaining Member is "not ... allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not".<sup>353</sup> This is because compliance proceedings cannot be used to "re-open issues decided on substance in the original proceedings".<sup>354</sup> At the same time, the situation may arise where a complainant puts forward "new claims against a measure taken to comply", and such a measure "incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply".<sup>355</sup> In that case, the possibility to challenge an element of the measure at issue for the first time in compliance proceedings, even if that element may not have changed, hinges on the "critical question" of whether such an element forms "an integral part of the measure taken to comply".<sup>356</sup> Indeed, even when certain elements of a compliance measure remain unchanged from an original measure, the legal import and significance of such elements may be altered as a result of the modifications introduced in other parts of the compliance measure.<sup>357</sup>

5.119. It is undisputed that the Public Bodies Memorandum was adopted before China filed its consultations request in the present dispute and has remained unchanged since. However, we note that the Memorandum was not part of the record of the USDOC's public body determinations that were subject to the recommendations and rulings of the DSB in the original proceedings.<sup>358</sup> Indeed, as the United States recognized before the Panel, the analysis and explanation in the 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".<sup>359</sup> In other words, as the Panel noted, the Public Bodies Memorandum existed at the time of adoption of the original measures, but "*did not comprise part of those measures*".<sup>360</sup> Under these circumstances, we fail to see on what basis China could have challenged the Public Bodies Memorandum in the context of its complaint in the original proceedings. Although

<sup>348</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77. See also e.g. Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 205.

<sup>349</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

<sup>350</sup> Panel Report, para. 7.116.

<sup>351</sup> Panel Report, para. 7.116.

<sup>352</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77.

<sup>353</sup> Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211. See also e.g. Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 427.

<sup>354</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 427. See also Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, paras. 96-98; *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 212.

<sup>355</sup> See also Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.78 (quoting Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432).

<sup>356</sup> Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 434.

<sup>357</sup> See Appellate Body Reports, *EC – Bed Linen (Article 21.5 – India)*, fn 101 to para. 86; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.7.

<sup>358</sup> Panel Report, para. 7.118.

<sup>359</sup> United States' response to Panel question No. 18, para. 137.

<sup>360</sup> Panel Report, para. 7.119. (emphasis added)

it would have been technically possible for China to include the Memorandum among the measures at issue in the original proceedings, China would not have had a reason to do so at that stage, given the lack of a connection between the Memorandum and the USDOC's original public body determinations. It is only later – namely, at the compliance stage – that the USDOC placed the Public Bodies Memorandum on the record of its Section 129 investigations and relied on the analysis, evidence, and explanation contained therein in reaching its public body determinations. Hence, it is only at the compliance stage that the Memorandum became an "integral part" of the measures taken to comply and that, therefore, a reason arose for China to challenge it.

5.120. In sum, we agree with the Panel that the Public Bodies Memorandum bears a "close relationship" to the declared "measure taken to comply", namely, the USDOC's public body determinations in the relevant Section 129 proceedings, and with the recommendations and rulings of the DSB in the original proceedings.<sup>361</sup> We also agree with the Panel that China could not have challenged the Public Bodies Memorandum as part of its complaint in the original proceedings.<sup>362</sup> We, therefore, uphold the Panel's finding, in paragraph 7.120 of its Report, that the Public Bodies Memorandum falls, "as such", within the scope of these Article 21.5 proceedings.

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

5.121. We now turn to the participants' claims concerning the "as such" consistency of the Public Bodies Memorandum with Article 1.1(a)(1) of the SCM Agreement. The participants challenge different aspects of the Panel's analysis and findings. China takes issue with the Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).<sup>363</sup> China also seeks reversal of the Panel's intermediate findings that: (i) the Public Bodies Memorandum is not "based on an improper legal standard"<sup>364</sup>; and (ii) the Public Bodies Memorandum "does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)".<sup>365</sup> The United States, for its part, challenges the Panel's intermediate finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application.<sup>366</sup>

5.122. To recall, the Panel concluded, in paragraphs 7.142 and 8.1(b) of its Report, that the Memorandum is not, "as such", inconsistent with Article 1.1(a)(1). The Panel's conclusion rests, in part, on similar considerations as the Panel's interpretive finding that 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. In particular, the Panel observed that China's claim with respect to the Public Bodies Memorandum "as such" was "largely based on the same grounds" as China's claim with respect to the USDOC's public body determinations in the relevant Section 129 investigations.<sup>367</sup> Indeed, both claims related to the fact that the USDOC may determine an entity to be a public body without inquiring into "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".<sup>368</sup> In addressing China's "as such" claim, the Panel referred to its prior finding that the public body standard under Article 1.1(a)(1) does not require "a particular degree or nature of connection between an identified government function and the financial contribution in question".<sup>369</sup> On this basis, the Panel found, in paragraph 7.136 of its Report, that China had failed to establish that the Public Bodies Memorandum is, "as such", inconsistent with Article 1.1(a)(1).

5.123. Having made this finding, the Panel went on to examine, as "an additional point of consideration", 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."<sup>370</sup> The Panel found that the Public Bodies Memorandum "does not, on its face, impinge upon the authority of the USDOC to disregard or supplement its content in any

<sup>361</sup> Panel Report, para. 7.116.

<sup>362</sup> Panel Report, para. 7.118.

<sup>363</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>364</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>365</sup> China's other appellant's submission, para. 196. See also China's Notice of Other Appeal, para. 9.

<sup>366</sup> United States' appellant's submission, para. 230. See also United States' Notice of Appeal, para. 3.

<sup>367</sup> Panel Report, para. 7.135.

<sup>368</sup> Panel Report, para. 7.135 (quoting China's second written submission to the Panel, para. 120).

<sup>369</sup> Panel Report, para. 7.136.

<sup>370</sup> Panel Report, para. 7.137.

given investigation".<sup>371</sup> Rather, the Memorandum is a resource "*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".<sup>372</sup> On this basis, the Panel concluded that "the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)".<sup>373</sup>

5.124. The participants do not dispute that the Public Bodies Memorandum allows the USDOC to determine that an entity is a public body without inquiring into whether that entity is performing a governmental function when engaging in one of the conducts listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv) of Article 1.1(a)(1). Rather, as noted in section 5.2.3 above, the participants disagree as to whether such an inquiry is *required* under Article 1.1(a)(1). As it did before the Panel, China maintains on appeal that an investigating authority may not determine an entity to be a public body without establishing a "clear logical connection" between an identified government function and the specific conduct alleged to constitute a financial contribution.<sup>374</sup> In its other appellant's submission, China described the core "question" underlying its "as such" claim as being "whether, when the USDOC *does* rely on the Public Bodies Memorandum, it will restrict, in a material way, its ability to make determinations that are consistent with Article 1.1(a)(1)".<sup>375</sup> China argues that "[i]f the Appellate Body were to agree with China that the Public Bodies Memorandum is premised on a fundamentally flawed legal standard, then the answer to this question should be yes."<sup>376</sup> This is because, China explains, the Public Bodies Memorandum allows the USDOC to find certain Chinese companies to be public bodies despite the fact that "these entities are performing a 'government function' that has no discernible connection to the conduct at issue under Article 1.1(a)(1)".<sup>377</sup> Hence, concludes China, "[a]ny resulting public body determination based on a conclusion that these entities are performing an irrelevant government function would be inconsistent with Article 1.1(a)(1) of the SCM Agreement."<sup>378</sup> On appeal, China has not identified any other specific reasons for which it considers the Public Bodies Memorandum to be "as such" inconsistent with Article 1.1(a)(1).

5.125. In light of the above, we understand China's challenge of the Panel's conclusion on the Public Bodies Memorandum "as such" to be predicated on China's view that Article 1.1(a)(1) requires, in each case, the establishment of a "clear logical connection" between a "government function" identified by the investigating authority and the conduct alleged to give rise to a financial contribution. We have disagreed with that view in paragraph 5.105 above. We have also upheld the Panel's finding 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) because they are based on an improper legal standard.

5.126. Given our prior findings and the way in which China has framed its appeal, we do not find it necessary to engage further with China's claim concerning the Panel's conclusion, in paragraph 8.1(b) of its Report, that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1). We also do not find it necessary to engage with the participants' claims concerning the Panel's intermediate findings leading to that conclusion, namely: (i) the Panel's finding, in paragraph 7.133 of its Report, that the Public Bodies Memorandum "can be challenged 'as such' as a rule or norm of general or prospective application"; and (ii) the Panel's finding, in paragraph 7.142 of its Report, that "the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)." The Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1), therefore, stands.

### 5.3 Article 14(d) of the SCM Agreement

5.127. The United States and China appeal different Panel findings under Articles 1.1(b) and 14(d) of the SCM Agreement. The United States seeks reversal of the Panel's findings that the USDOC benchmark determinations in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129

<sup>371</sup> Panel Report, para. 7.140.

<sup>372</sup> Panel Report, para. 7.140. (emphasis original)

<sup>373</sup> Panel Report, para. 7.142.

<sup>374</sup> China's other appellant's submission, para. 17.

<sup>375</sup> China's other appellant's submission, para. 120. (emphasis original)

<sup>376</sup> China's other appellant's submission, para. 121. (emphasis added)

<sup>377</sup> China's other appellant's submission, para. 121.

<sup>378</sup> China's other appellant's submission, para. 121.

proceedings are inconsistent with Articles 1.1(b) and 14(d).<sup>379</sup> In particular, the United States contends that the Panel erred in finding that the United States "failed to explain ... how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price" and "failed to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations".<sup>380</sup> The United States submits that the Panel's rationale lacks any indication that it considered evidence before the USDOC indicating that steel prices in China are not market-determined or the USDOC's explanation and analysis of that evidence, and that the failure of the Panel to do so amounts to an erroneous interpretation and application of Article 14(d).<sup>381</sup> Specifically, in the United States' view, the Panel failed to recognize that examining prices is not the only way to demonstrate price distortion, that the examination of "prevailing market conditions" assumes the existence of a "functioning market", and that, absent a functioning market, an internal price cannot serve as a benchmark for measuring the adequacy of remuneration.<sup>382</sup> Furthermore, the United States argues that the Panel made a number of erroneous observations in examining whether the USDOC considered in-country and government-related prices, analysed specific input markets on a standalone basis, and conducted a diligent investigation and solicited relevant facts.<sup>383</sup>

5.128. In response, China submits that the United States' position poses at least two interpretative problems, namely: (i) "whether *any* type of government policy or action ('intervention') that affects market conditions can be characterized as a potential 'distortion'"; and (ii) "whether the effect of government 'interventions' on market conditions must go beyond some *de minimis* level to qualify as a 'distortion' and, if so, how this 'degree' of distortion would be calculated and identified."<sup>384</sup> With respect to the evidentiary showing required to establish that in-country prices are "distorted", China contends that "[w]hatever the opposite of a 'market' price is, the proper interpretation and application of Article 14(d) requires an investigating authority to demonstrate with evidence that one or more 'government interventions' actually resulted in a 'distortion' of in-country prices in this sense."<sup>385</sup> China specifically argues that the USDOC's Section 129 determinations contain no reference to the Mysteel pricing data, which demonstrated that in-country prices for the steel inputs at issue were market-determined.<sup>386</sup> Moreover, China submits that "[n]either the USDOC in its determinations, nor the United States in its submissions to the Panel, had a meaningful response to the evidence of private investment in the Chinese steel industry", which grew rapidly during the periods of investigation.<sup>387</sup> Equally, China considers that the USDOC identified no evidence in its Section 129 determinations that government-related suppliers of those inputs priced their products other than in accordance with commercial considerations.<sup>388</sup>

5.129. In its other appeal, China seeks review of the Panel's finding that "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."<sup>389</sup> While China agrees with the Panel's ultimate conclusion, China requests the Appellate Body to modify its basis and find that Article 14(d) limits recourse to an out-of-country benchmark to situations where prices for the inputs in question were effectively determined by the government.<sup>390</sup> In China's view, the mere fact that a particular government policy or action is shown to have affected market prices is not a sufficient basis for rejecting those prices as benchmarks under Article 14(d).<sup>391</sup> Instead, China contends that prior jurisprudence stands for the proposition that the "very limited" circumstance in which an investigating authority may resort to out-of-country benchmarks is when the government

<sup>379</sup> United States' Notice of Appeal, para. 4 (referring to Panel Report, paras. 7.199-7.200, 7.205-7.206, 7.209-7.211, 7.218-7.220, 7.223-7.224, and 8.1.c).

<sup>380</sup> United States' Notice of Appeal, para. 4 (quoting Panel Report, para. 7.223). (emphasis original)

While the United States considers these errors to be issues of law and legal interpretations, the United States argues that, if the Appellate Body were to consider instead that the issues are issues of fact, then the Appellate Body should find that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU. (Ibid., fn 7 to para. 4)

<sup>381</sup> United States' appellant's submission, para. 119.

<sup>382</sup> United States' appellant's submission, paras. 121-141.

<sup>383</sup> United States' appellant's submission, paras. 146-170.

<sup>384</sup> China's appellee's submission, para. 78. (emphasis original)

<sup>385</sup> China's appellee's submission, para. 95.

<sup>386</sup> China's appellee's submission, paras. 114-115.

<sup>387</sup> China's appellee's submission, para. 133. See also *ibid.*, paras. 131-132.

<sup>388</sup> China's appellee's submission, para. 135.

<sup>389</sup> China's Notice of Other Appeal, para. 11 (quoting Panel Report, para. 7.168).

<sup>390</sup> China's other appellant's submission, para. 158.

<sup>391</sup> China's other appellant's submission, para. 133.



effectively determines the price at which the good is sold, thereby rendering circular the comparison required by Article 14(d).<sup>392</sup> China considers that the Panel failed "to establish as a matter of law" what constitutes a "market price", or a "market-determined price"<sup>393</sup>, and "whether such prices exist within the country of provision".<sup>394</sup> For China, the Panel therefore had no basis to determine whether "government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price".<sup>395</sup>

5.130. In response, the United States highlights that Appellate Body findings have recognized various forms of price distortion that would support the use of out-of-country benchmarks<sup>396</sup>, and points out that "the common tenet among these findings is the 'economic logic' reflected in a proper interpretation of the text of Article 14(d)"<sup>397</sup>, and that it is "important to emphasize the market orientation of the inquiry".<sup>398</sup> The United States is of the view that the Panel was correct in its rejection of China's overly narrow legal interpretation of the circumstances allowing resort to out-of-country benchmarks.<sup>399</sup> In particular, the United States agrees with the Panel's conclusion that "[t]hese circumstances, even if very limited, ... go beyond the sole circumstance in which prices are determined, *de jure* or *de facto*, by the government"<sup>400</sup>, and considers that this is consistent with the "economic logic" reflected in Article 14(d).<sup>401</sup> The United States further contends that nothing in prior Appellate Body reports suggests "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)."<sup>402</sup> According to the United States, "it would be contrary to the principles of treaty interpretation to construe 'market' in a way that would deprive that term of its meaning", and "a proper interpretation of the term 'market' must give meaning to that term, and in particular, what the term 'market' means in the context of the search for an appropriate benchmark against which to evaluate the level of benefit resulting from a government subsidy."<sup>403</sup>

5.131. Our analysis below begins by setting out the interpretation of Article 14(d) of the SCM Agreement. We then turn to China's claim that the Panel erred in finding that recourse to out-of-country prices is not limited to circumstances in which the government "effectively determines" the price of the goods in question. Thereafter, we examine the United States' claim that the Panel erred in finding that the USDOC failed to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations.

### 5.3.1 Interpretation of Articles 1.1(b) and 14(d) of the SCM Agreement

5.132. In order for there to be a subsidy, a financial contribution by a government must confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement. The existence of a benefit is therefore one of the constituent elements of a subsidy under the SCM Agreement.<sup>404</sup> The SCM Agreement does not provide a definition of the term "benefit". Nor does it prescribe a particular methodology for determining its existence<sup>405</sup> or quantum.<sup>406</sup> The Appellate Body has found that the term "benefit" encompasses some form of advantage<sup>407</sup>, and implies a comparison, since there can

<sup>392</sup> China's other appellant's submission, paras. 136 and 165.

<sup>393</sup> China's other appellant's submission, para. 157.

<sup>394</sup> China's other appellant's submission, para. 150.

<sup>395</sup> China's other appellant's submission, para. 157 (referring to Panel Report, 7.206).

<sup>396</sup> United States' appellee's submission, para. 240 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.186).

<sup>397</sup> United States' appellee's submission, para. 243 (referring to Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.169; *US – Softwood Lumber IV*, para. 94 and fn 118 thereto, in turn referring to Panel Report, *US – Softwood Lumber IV*). (fn omitted)

<sup>398</sup> United States' appellee's submission, para. 243 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151).

<sup>399</sup> United States' appellee's submission, para. 245 (referring to Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.162).

<sup>400</sup> United States' appellee's submission, para. 247 (quoting Panel Report, para. 7.164).

<sup>401</sup> United States' appellee's submission, para. 247.

<sup>402</sup> United States' appellee's submission, para. 257 (referring to China's other appellant's submission, para. 136). (emphasis original; fn omitted)

<sup>403</sup> United States' appellee's submission, para. 277.

<sup>404</sup> Appellate Body Report, *Brazil – Aircraft*, para. 157.

<sup>405</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 833.

<sup>406</sup> Appellate Body Report, *US – Softwood Lumber IV*, paras. 91-92.

<sup>407</sup> Appellate Body Report, *Canada – Aircraft*, para. 153.



be no "benefit" to the recipient unless the financial contribution makes the recipient "better off" than it would otherwise have been, absent that contribution.<sup>408</sup> The marketplace provides the appropriate basis for such comparison, because the trade-distorting potential of a "financial contribution" can be identified only by determining whether the recipient has received that "financial contribution" on terms more favourable than those available in the market.<sup>409</sup>

5.133. In this respect, we recall that Article 14(d) of the SCM Agreement provides, in relevant part:

*Article 14*

*Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*

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

...

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

5.134. Article 14(d) relates to, *inter alia*, the calculation of benefit when goods are provided by the government. In particular, Article 14(d) establishes that the provision of goods by a government shall not be considered as conferring a benefit unless such provision is made for less than adequate remuneration. Thus, a benefit is conferred when a government provides goods to a recipient and, in return, receives insufficient payment or compensation for those goods.<sup>410</sup> With regard to the question of *how* to determine whether adequate remuneration was paid for the goods provided by the government, the second sentence of Article 14(d) provides that benefit "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase". Article 14(d) also indicates that prevailing market conditions in the country of provision include "price, quality, availability, marketability, transportation and other conditions of purchase or sale".

5.135. A determination of whether the remuneration paid for a government-provided good is "less than adequate" under Article 14(d) requires the selection of a benchmark against which the price for the government-provided good must be compared.<sup>411</sup> In *US – Softwood Lumber IV*, the Appellate Body stated that the market from which a benchmark is selected for the purpose of a benefit analysis need not be completely undistorted or free of any government intervention. In this respect, the Appellate Body noted that "the text [of Article 14(d)] does not explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'" and that the provision therefore "does not qualify in any way the 'market' conditions which are to be used as the benchmark".<sup>412</sup> The Appellate Body remarked that the phrase "in relation to" in Article 14(d) was used in the broader sense of "relation, connection, reference", and therefore did not exclude the possibility of using as a benchmark something other than private prices in the market of the country of provision.<sup>413</sup> This suggests that an investigating authority must determine whether, based on the facts of the case, "the benchmark chosen relates or refers to, or is connected with, the conditions

<sup>408</sup> Appellate Body Report, *Canada – Aircraft*, para. 157.

<sup>409</sup> Appellate Body Report, *Canada – Aircraft*, para. 157.

<sup>410</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 84.

<sup>411</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.

<sup>412</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 87 (referring to Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51).

<sup>413</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 89.

prevailing in the market of the country of provision."<sup>414</sup> Furthermore, the reference to "any" method in the *chapeau* of Article 14 has been understood to imply that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.<sup>415</sup>

5.136. Although Article 14(d) does not dictate that in-country prices "are to be used as the *exclusive* benchmark in all situations, it does emphasize by its terms that prices of similar goods sold by private suppliers in the country of provision are the primary benchmark that investigating authorities must use when determining whether goods have been provided by a government for less than adequate remuneration."<sup>416</sup> The Appellate Body concluded that the guideline in Article 14(d) "does not require the use of private prices in the market of the country of provision in every situation" but rather requires that "the method selected for calculating the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale."<sup>417</sup>

5.137. Having answered the question of "whether Article 14(d) of the SCM Agreement permits investigating authorities to use a benchmark other than private prices in the country of provision"<sup>418</sup>, the Appellate Body separately addressed the issue of "when" investigating authorities may "use a benchmark other than private prices in the country of provision".<sup>419</sup> In this regard, the Appellate Body observed that the situation of government predominance in the market, as a provider of certain goods, was the only one raised on appeal<sup>420</sup>, and found that "[w]hen private prices are distorted because the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers will align their prices with those of the government-provided goods, it will not be possible to calculate benefit having regard exclusively to such prices."<sup>421</sup> The Appellate Body did not exclude that there may be other situations in which recourse to out-of-country prices may be warranted.<sup>422</sup> The Appellate Body, however, highlighted that the possibility under Article 14(d) for investigating authorities to consider a benchmark other than in-country private prices is "very limited" and "an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision."<sup>423</sup>

5.138. Subsequently, the Appellate Body clarified that the concept of "price distortion" is central to the analysis of whether recourse to out-of-country prices is warranted under Article 14(d). In

<sup>414</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 89.

<sup>415</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 91. Thus, the context provided by the *chapeau* of Article 14 does not suggest that in-country prices, whenever available, have to be used exclusively as a benchmark for the purposes of Article 14(d). (Ibid.)

<sup>416</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 90. (emphasis original) However, always requiring the use of in-country private prices may frustrate the object and purpose of the SCM Agreement, which includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies. (Ibid., para. 95)

<sup>417</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 96.

<sup>418</sup> Appellate Body Report, *US – Softwood Lumber IV*, subheading V.B. (italics original; underlining added)

<sup>419</sup> Appellate Body Report, *US – Softwood Lumber IV*, subheading V.C. (italics original; underlining added)

<sup>420</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 99.

<sup>421</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 101. The Appellate Body reasoned that "[w]hen the government is the predominant provider of certain goods, even if not the sole provider, it is likely that it can affect through its own pricing strategy the prices of private providers for those goods, inducing the latter to align their prices to the point where there may be little difference, if any, between the government price and the private prices." (Ibid., para. 100) Because this would lead to an artificially low or even non-existent determination of benefit, the Appellate Body reasoned that subsidy disciplines and the right of Members to countervail subsidies could be undermined or circumvented when the government is a predominant provider of certain goods. The Appellate Body considered that Article 14(d) "ensures that the provision's purposes are not frustrated in such situations" by permitting investigating authorities "to use a benchmark other than private prices in that market". (Ibid., para. 101)

<sup>422</sup> See also Appellate Body Report, *US – Carbon Steel (India)*, para. 4.184.

<sup>423</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

*US – Anti-Dumping and Countervailing Duties (China)*<sup>424</sup>, the Appellate Body highlighted that what would allow an investigating authority to reject in-country private prices is *price distortion*, not the fact that the government is the predominant supplier *per se*.<sup>425</sup> Importantly, "the decision to reject in-country prices as the benchmark due to the role of the government in the market for the good in question can only be made on a case-by-case basis, in accordance with the relevant evidence in the particular investigation, rather than in the abstract."<sup>426</sup> Thus, while the government's predominant role as the provider of goods may make distortion of in-country prices likely, it is a finding of "price distortion" that allows an investigating authority to reject those prices.<sup>427</sup>

5.139. In *US – Carbon Steel (India)*, the Appellate Body further emphasized the market orientation of the enquiry under Article 14(d), and noted that, while in-country private prices may serve as the *starting point* of the analysis under Article 14(d), this does not mean that, having identified such prices, the analysis must necessarily end there. Rather, "[p]rices of goods provided by government-related entities other than the entity providing the financial contribution at issue must also be examined to determine whether they are market determined and can therefore form part of a proper benchmark."<sup>428</sup> At the same time, "[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 governmental intervention in the market."<sup>429</sup> The required examination may, on the basis of information supplied by petitioners and respondents, or collected by the authority in a countervailing duty investigation, 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 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 resulting in distortion of in-country prices.<sup>430</sup> In addition, the Appellate Body observed that its previous findings had not indicated that it was "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."<sup>431</sup> The findings in *US – Carbon Steel (India)* therefore make clear that the central inquiry in determining a proper benefit benchmark under Article 14(d) is whether in-country prices are market-determined or distorted by government intervention.

5.140. Moreover, in the original proceedings of the present dispute, the Appellate Body again emphasized the importance of establishing the existence of price distortion by clarifying that "in *US – Anti-Dumping and Countervailing Duties (China)* ... **the findings by the Appellate Body** did not hinge on whether or not the entities that provided hot-rolled steel constituted 'public bodies' within

<sup>424</sup> In that case, the Appellate Body examined a claim by China relating to the USDOC's rejection of in-country private prices in China as benchmarks for calculating the adequacy of remuneration for hot-rolled steel (HRS) provided by certain SOEs to investigated companies. The USDOC had determined that, because China's SOEs accounted for the "overwhelming" majority of the production and sale of HRS (96.1%), private prices of HRS in China were not suitable as price benchmarks. (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 429)

<sup>425</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 443 and 446. Similarly, where the government is only a "significant" supplier, "evidence pertaining to factors other than government market share will be needed, as the government's role as a significant supplier cannot, on its own, prove distortion of private prices." (Ibid., para. 443) The Appellate Body pointed out that, although there is no specific threshold for reaching a finding of price distortion based on the government's predominance in the market, it is clear that the more predominant a government's role in the market is, the more *likely* this role will result in the distortion of private prices and other evidence carries only limited weight. (Ibid., paras. 444 and 446)

<sup>426</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 445 (referring to Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.47, in turn referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 102).

<sup>427</sup> See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446. The Appellate Body "has therefore cautioned against equating the concepts of price distortion and government predominance, and has highlighted that the link between the two concepts is an evidentiary one." (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.156)

<sup>428</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.49.

<sup>429</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

<sup>430</sup> Appellate Body Report, *US – Carbon Steel (India)*, fn 754 to para. 4.157. Investigating authorities may also be "called upon to examine the conditions of competition in the relevant market in order to assess whether the government is influencing the pricing conduct of any government-related or private entities". (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.62)

<sup>431</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.185.

the meaning of Article 1.1(a)(1) of the SCM Agreement but, rather, on whether the USDOC had correctly reached the conclusion that price distortion in the market, due to governmental intervention, warranted recourse to an alternative benchmark."<sup>432</sup>

5.141. As we see it, the central inquiry under Article 14(d) in choosing an appropriate benefit benchmark is whether government intervention results in *price distortion* such that recourse to out-of-country prices is warranted, or whether instead in-country prices of private enterprises and/or government-related entities are *market-determined* and can therefore serve as a basis for determining the existence of benefit. Thus, what would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention in the market itself. Indeed, various types of government interventions may lead to price distortion, such that recourse to out-of-country prices is warranted, beyond the situation in which the government is so predominant that it effectively determines the prices of the goods in question. Therefore, the decision to reject in-country prices as a benchmark should be made case by case and based on the relevant evidence on the record in the particular investigation. What an investigating authority must do in conducting the necessary analysis therefore will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.<sup>433</sup> In all cases, the investigating authority must provide a reasoned and adequate explanation of the basis for its conclusions in its determination, and only once it has properly established and explained why in-country prices are distorted, is it warranted to have recourse to an alternative benchmark for the benefit analysis under Article 14(d).<sup>434</sup>

### 5.3.2 Whether the Panel erred in its interpretation of Articles 1.1(b) and 14(d) of the SCM Agreement in finding that recourse to out-of-country prices is not limited to circumstances in which the government "effectively determines" the price of the goods in question

5.142. China requests us to modify the basis for the Panel's conclusion that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement, and affirm the Panel's finding of inconsistency on the ground that the USDOC did not determine that domestic Chinese prices for the relevant inputs were effectively determined by the government.<sup>435</sup> China argues that, while the Panel correctly found that "an investigating authority must demonstrate *causation* [between government intervention and price distortion] in order to reject available in-country benchmarks under Article 14(d)", the Panel "was required to address the logically prior issue of what constitutes a 'market' price".<sup>436</sup> In China's view, "[u]nder a proper interpretation of Article 14(d), an investigating authority may reject available in-country prices only in the 'very limited' circumstance in which government policies or actions effectively determine the price at which the good is sold within the country of provision, either *de jure* or *de facto*."<sup>437</sup>

5.143. In response, the United States highlights that Appellate Body findings have recognized various forms of price distortion that would support the use of out-of-country benchmarks<sup>438</sup>, and points out that "the common tenet among these findings is the 'economic logic' reflected in a proper interpretation of the text of Article 14(d)"<sup>439</sup>, and that it is "important to emphasize the market orientation of the inquiry".<sup>440</sup> The United States is of the view that the Panel was correct in its

<sup>432</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.54. Therefore, China's argument that there is a single standard for defining the term "government" did not answer the question of "whether a proposed in-country price is a market-determined price for the same or similar goods in the country of provision, and thus whether it may serve as a benchmark for determining benefit." (Ibid.)

<sup>433</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.

<sup>434</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.62.

<sup>435</sup> China's other appellant's submission, para. 138.

<sup>436</sup> China's other appellant's submission, para. 130.

<sup>437</sup> China's other appellant's submission, para. 191.

<sup>438</sup> United States' appellee's submission, para. 240 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.186).

<sup>439</sup> United States' appellee's submission, para. 243 (referring to Appellate Body Reports, *US – Softwood Lumber IV*, in turn referring to Panel Report, *US – Softwood Lumber IV*; *US – Carbon Steel (India)*, para. 4.169). (fn omitted)

<sup>440</sup> United States' appellee's submission, para. 243 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151).

rejection of China's overly narrow legal interpretation of the circumstances allowing resort to out-of-country benchmarks.<sup>441</sup> The United States further contends that nothing in the Appellate Body's prior reports suggests "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)."<sup>442</sup>

5.144. We note the Panel's finding that "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."<sup>443</sup> The Panel took the view that "the existence of price distortion may ... 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 case in other circumstances that render the comparison equally impossible or irrelevant."<sup>444</sup> Therefore, the Panel considered 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."<sup>445</sup> We agree. As explained above, central to the inquiry under Article 14(d) in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention in the market. Moreover, different types of government interventions may result in price distortion, such that recourse to out-of-country prices is warranted, beyond the scenario in which the government's role is so predominant that it effectively determines the price of the goods in question.

5.145. We further agree with the Panel that the existence of price distortion "may well ... preclude a proper comparison of the terms of the financial contribution with market terms" not only when the government is the sole or predominant provider of a good, but also "in other circumstances that render the comparison equally impossible or irrelevant".<sup>446</sup> As we discuss below, the Panel also recognized that, in the absence of evidence of a direct impact on the price of the good in question, "an adequate explanation of how the price of the good in question is distorted as a result" could justify recourse to out-of-country prices.<sup>447</sup> We return to this issue in the next section of this report. Indeed, we do not exclude that types of government intervention that do not directly or effectively determine in-country prices may have similar distortive impact on those prices, such that they no longer represent a proper benchmark for adequate remuneration. In our view, recourse to out-of-country prices in such situations may be warranted, insofar as the investigating authority has established the existence of price distortion resulting from government intervention. We therefore disagree with China that the "three circumstances that panels and the Appellate Body have identified as potentially justifying the use of out-of-country benchmarks" are limited to those "in which the government effectively determines the price at which the good is sold, either *de jure* or *de facto*" – namely, where the government: (i) sets prices administratively; (ii) is the sole supplier of the good; and (iii) 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.<sup>448</sup>

5.146. At the same time, we recall the Appellate Body's finding that "[b]ecause 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*, ... [the] benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in question in the country of provision."<sup>449</sup> As observed above, central to this inquiry is the question of whether in-country prices of private enterprises and government-related entities are distorted. However, the concept of "price distortion" is not equivalent to *any* impact on prices as a result of *any* government intervention. We therefore disagree with China's suggestion that the

<sup>441</sup> United States appellee's submission, para. 245 (referring to Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 7.162).

<sup>442</sup> United States' appellee's submission, para. 257 (referring to China's other appellant's submission, para. 136). (emphasis original; fn omitted)

<sup>443</sup> Panel Report, para. 7.168.

<sup>444</sup> Panel Report, para. 7.168.

<sup>445</sup> Panel Report, para. 7.172.

<sup>446</sup> Panel Report, para. 7.168.

<sup>447</sup> Panel Report, para. 7.205.

<sup>448</sup> China's other appellant's submission, para. 189.

<sup>449</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151 (referring to Appellate Body Report, *US – Softwood Lumber IV*, para. 89).

Panel's interpretative approach in the present dispute is based on the premise "that any government policy or action is a potential 'distortion' under Article 14(d) and that the only fact that an investigating authority must establish" is that the policy or action had what the Panel called a "direct impact" upon in-country prices for the good in question.<sup>450</sup> Instead, the determination of whether in-country prices are distorted must be made on a case-by-case basis, taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record.<sup>451</sup> Only once the investigating authority has properly complied with its obligation to investigate whether there are in-country prices that reflect prevailing market conditions in the country of provision and has made a finding of price distortion, may it consistently with Article 14(d) have recourse to out-of-country prices.

### 5.3.2.1 Conclusion

5.147. Central to the inquiry under Article 14(d) of the SCM Agreement in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention. What would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention in the market itself. Different types of government interventions could lead to price distortion, such that recourse to out-of-country prices is warranted, beyond the situation in which the government's role is so predominant that it effectively determines the price of the goods in question. Instead, the determination of whether in-country prices are distorted must be made case by case, based on the relevant evidence in the particular investigation, and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record. We thus disagree with China's proposition that the circumstances potentially justifying recourse to out-of-country prices are limited to those in which the government effectively determines the price at which the good is sold, including more specifically, where the government sets prices administratively, is the sole supplier of the good, or 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.<sup>452</sup>

5.148. We therefore find that the Panel did not err, in paragraph 7.174 of its Report, in rejecting 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 the People's Republic of China.<sup>453</sup>

### 5.3.3 Whether the Panel erred in its interpretation and application of Articles 1.1(b) and 14(d) of the SCM Agreement

5.149. The United States requests us to reverse the Panel's findings that the USDOC benchmark 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.<sup>454</sup> The United States argues that the Panel erred in finding that evidence of "governmental involvement in the relevant markets"<sup>455</sup> was insufficient to support the USDOC's decision to use out-of-country benchmarks, and in examining the USDOC's determinations by looking only for a single kind of price analysis, specifically, **one that would demonstrate the "deviat[ion]" between "in-country prices" and "a market-determined price"**.<sup>456</sup> The United States submits that the Appellate Body's approach under Article 14(d) is not limited to a specific kind of price analysis and the common tenet among

<sup>450</sup> China's other appellant's submission, para. 134. (emphasis original)

<sup>451</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157. 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. (Appellate Body Report, *US – Carbon Steel (India)*, fn 754 to para. 4.157) It would 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". (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.52 (quoting Appellate Body Report, *US – Carbon Steel (India)*, fn 754 to para. 4.157))

<sup>452</sup> China's other appellant's submission, para. 189.

<sup>453</sup> Panel Report, para. 7.174.

<sup>454</sup> United States' Notice of Appeal, para. 4 (referring to Panel Report, paras. 7.199-7.200, 7.205-7.206, 7.209-7.211, 7.218-7.220, 7.223-7.224, and 8.1.c).

<sup>455</sup> United States' appellant's submission, paras. 80 and 116 (quoting Panel Report, para. 7.206).

<sup>456</sup> United States' appellant's submission, para. 113.

its findings is the fundamental role of market-determined prices.<sup>457</sup> Specifically, in the United States' view, using Chinese prices as a benchmark in the present case would not serve as a meaningful basis of comparison because the same government behaviour that gave rise to the subsidies at issue is also the behaviour that characterizes and pervades the entire steel sector in China. For the United States, what the Panel dismissed as merely "[e]vidence of widespread government intervention in the economy" should instead have been considered as providing compelling support for the USDOC's finding that prices for the relevant inputs in China are not market-determined and cannot therefore function as a proper benchmark under Article 14(d).<sup>458</sup> The United States further considers that, as a result of employing the wrong approach, the Panel erred in assessing the adequacy of the USDOC's explanation and evidence of price distortion, including its basis for rejecting in-country SIE and private prices in China, that it considered the specific input markets but found that information was not available on the record, and that it had no obligation to request evidence on actual prices beyond what it had already done.<sup>459</sup>

5.150. China argues that the United States' position poses at least two interpretative problems, namely: (i) "whether *any* type of government policy or action ('intervention') that affects market conditions can be characterized as a potential 'distortion'"; and (ii) "whether the effect of government 'interventions' on market conditions must go beyond some *de minimis* level to qualify as a 'distortion' and, if so, how this 'degree' of distortion would be calculated and identified."<sup>460</sup> With respect to the evidentiary showing required to establish that in-country prices are "distorted", China contends that "[w]hatever the opposite of a 'market' price is, the proper interpretation and application of Article 14(d) requires an investigating authority to demonstrate with evidence that one or more 'government interventions' actually resulted in a 'distortion' of in-country prices in this sense."<sup>461</sup> China specifically argues that the USDOC's Section 129 determinations contain no reference to the Mysteel pricing data, which demonstrated that in-country prices for the steel inputs at issue were market-determined.<sup>462</sup> Moreover, China submits that "[n]either the USDOC in its determinations, nor the United States in its submissions to the Panel, had a meaningful response to the evidence of private investment in the Chinese steel industry", which grew rapidly during the periods of investigation.<sup>463</sup> Equally, China considers that the USDOC identified no evidence in its Section 129 determinations that government-related suppliers of those inputs priced their products other than in accordance with commercial considerations.<sup>464</sup>

5.151. The Panel first examined whether the USDOC's factual findings support the conclusion that in-country prices in China are not "market-determined".<sup>465</sup> In this regard, the Panel stated that the USDOC "did not even attempt to provide a reasoned and adequate explanation for its determinations that in-country prices for [the four inputs at issue] were distorted as a result of pervasive government intervention in the Chinese domestic markets for these inputs, and therefore were not market-determined".<sup>466</sup> The Panel concluded 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."<sup>467</sup> Separately, the Panel assessed whether the USDOC disregarded evidence regarding prices for the inputs at issue<sup>468</sup> and found that, with regard to the Line Pipe, Pressure Pipe, and OCTG Section 129 proceedings, "the USDOC failed to adequately explain its rejection of in-country prices in light of the evidence before it."<sup>469</sup> With regard to the Solar Panels Section 129 proceeding, however, the Panel found that China had not demonstrated that the USDOC had failed to consider in-country prices that were available on the record.<sup>470</sup>

<sup>457</sup> United States' appellant's submission, paras. 122 and 128.

<sup>458</sup> United States' appellant's submission, para. 141 (quoting Panel Report, para. 7.205).

<sup>459</sup> United States' appellant's submission, paras. 146-170.

<sup>460</sup> China's appellee's submission, para. 78. (emphasis original)

<sup>461</sup> China's appellee's submission, para. 95.

<sup>462</sup> China's appellee's submission, paras. 114-115.

<sup>463</sup> China's appellee's submission, para. 133. See also *ibid.*, paras. 131-132.

<sup>464</sup> China's appellee's submission, para. 135.

<sup>465</sup> Panel Report, section 7.3.3.3.2.

<sup>466</sup> Panel Report, para. 7.206.

<sup>467</sup> Panel Report, para. 7.206. (emphasis original)

<sup>468</sup> Panel Report, section 7.3.3.3.3.

<sup>469</sup> Panel Report, para. 7.220.

<sup>470</sup> Panel Report, para. 7.222.

### 5.3.3.1 Whether the Panel erred in its interpretation of Articles 1.1(b) and 14(d) of the SCM Agreement

5.152. The United States argues that the Panel "examined the USDOC's determinations by looking only for a single kind of price analysis, specifically, one that would demonstrate the 'deviat[ion]' between 'in-country prices' and 'a market-determined price'."<sup>471</sup> In the United States' view, the Panel drew this approach from a misreading of prior Appellate Body reports, in particular, the Appellate Body's statement in *US – Carbon Steel (India)* that "[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 governmental intervention in the market."<sup>472</sup> The United States considers that, when read together with the sentence that immediately precedes it, "it is evident that the *first* sentence is the one more appropriately described as the applicable approach, while the second sentence"<sup>473</sup> provides an example, as follows:

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. [*For example,*] 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.<sup>474</sup>

5.153. The United States argues that, in relying on the notion of "deviation from a market determined price" as the legal standard for recourse to out-of-country prices, the Panel erroneously considered that "distortion of internal prices, justifying resort to out-of-country benchmarks, is only evident in the difference between the price of the good being assessed and a market-determined price in the same country."<sup>475</sup> The United States considers that, in this way, the Panel misconstrued the legal standard under Article 14(d) as requiring a price comparison analysis or quantification of the price distortion, such that an explanation of why in-country prices are distorted requires, in each case, a showing of the extent of deviation, or the quantification of the difference, between two different price points.<sup>476</sup> The United States points out that, under this approach, "[w]here no in-country prices are market determined, price distortion cannot be demonstrated."<sup>477</sup> Thus, in the United States' view, the requirements articulated by the Panel "would effectively preclude an investigating authority from relying on other types of evidence of government interventions in the market (e.g., participation in the market by SIEs that do not behave as commercial/market actors, national level industry plans, circulars identifying industrial policy goals, evidence of government-imposed mergers and acquisitions, industrial policy measures, appointment of board members and senior executives in SIEs, the propping up of the least efficient producers) unless it could identify the effect of such interventions (i.e., determine the impact on in-country prices)."<sup>478</sup>

5.154. As noted above, a finding that in-country prices are not market-determined requires a showing that they are distorted by government intervention, such that recourse to out-of-country prices is warranted. Central to this analysis is the finding of price distortion, which must be reached "on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation".<sup>479</sup> As we see it, the specific type of analysis that an investigating authority must conduct for purposes of arriving at a proper benchmark, as well as the types and amount of evidence that would be considered sufficient in this regard, will necessarily vary depending upon a number of factors, including the circumstances of the case and the characteristics of the market.<sup>480</sup> However, in all cases, the existence of price distortion resulting from government intervention has to be established and adequately explained by the investigating authority in its report. There may be

<sup>471</sup> United States' appellant's submission, para. 113 (quoting Panel Report, para. 7.204).

<sup>472</sup> United States' appellant's submission, para. 114 (quoting Panel Report, para. 7.204, in turn quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155 (emphasis added by the Panel)).

<sup>473</sup> United States' appellant's submission, para. 114.

<sup>474</sup> United States' appellant's submission, para. 114 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155). (emphasis added)

<sup>475</sup> United States' appellant's submission, para. 83.

<sup>476</sup> United States' response to questioning at the oral hearing.

<sup>477</sup> United States' appellant's submission, para. 84.

<sup>478</sup> United States' appellant's submission, para. 140 (referring to Final Benchmark Determination (Panel Exhibit CHN-21), pp. 7-20 and 24-27). (fn omitted)

<sup>479</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 102).

<sup>480</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.153.



different ways to demonstrate that prices are actually distorted, such as a quantitative assessment, price comparison methodology, or a counterfactual analysis. Depending on the circumstances, a qualitative analysis may also appropriately establish how government intervention actually results in price distortion, provided that it is adequately explained. We recognize, in this regard, that governmental involvement in the market can take many forms, which may have distortive price effects, irrespective of whether the government directly regulates prices or indirectly affects them such that they are found to be distorted as a result. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clarified that, in *US – Softwood Lumber IV*, it had not found "a specific requirement that, to reject in-country prices, investigating authorities must show that government prices are artificially low".<sup>481</sup> The Appellate Body found instead that, in the context of Article 14(b), it would be sufficient for the USDOC to establish that all the factors it had analysed – i.e. the government's predominant role as a lender, government regulation of interest rates, evidence of undifferentiated interest rates, and government influence over SOCB-lending decisions – taken together resulted in a distortion such that comparing the interest rates of the investigated loans with observed interest rates in the same market would not be meaningful for the purpose of Article 14(b).<sup>482</sup> Therefore, evidence of direct impact of the government intervention on prices, such as administrative price-fixing or predominance of the government as a supplier in the market, may be probative and make the finding of price distortion very likely such that other evidence may be of lesser importance.<sup>483</sup> While evidence of indirect impact of the government intervention on prices may also be relevant in determining the existence of price distortion, establishing the nexus between such government intervention and price distortion may require more detailed analysis and explanation of how prices have been distorted as a result of such indirect impact of the government intervention.

5.155. Furthermore, while the investigating authority's analysis of whether and how price distortion resulted from government intervention will vary depending upon the circumstances of the case, it has to adequately take into account the arguments and evidence supplied by the petitioners and respondents, together with all other information in the record, so that its determination of how prices in the specific markets at issue are actually distorted as a result of government intervention would be based on positive evidence.<sup>484</sup> Thus, independently of the method chosen by the investigating authority, it has to engage with and analyse the methods, data, explanations, and supporting evidence put forward by interested parties, or collected by the investigating authority, in order to ensure that its finding of price distortion is supported, and not diminished or contradicted, by evidence and explanations on the record. In turn, it is the role of panels to assess whether the investigating authority's explanation for its determination is reasoned and adequate by critically reviewing that explanation, in depth, and in light of the facts and explanations presented by the interested parties.<sup>485</sup> Specifically, panels have to review whether the competent authority's explanation of how government intervention actually results in price distortion in the markets in question fully addresses the nature and complexities of the data in the record, and whether it appears adequate in light of alternative methods, data, and explanations of that data presented by the parties.<sup>486</sup> In any event, the investigating authority needs to provide a reasoned and adequate explanation of how the government intervention actually results in distortion of in-country prices.

5.156. In the first sentence of paragraph 4.155 of *US – Carbon Steel (India)*, the Appellate Body observed that, "[a]lthough 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."<sup>487</sup> The United States disagrees with the Panel's reading of the Appellate Body's statement in the following sentence of the same paragraph, namely, that "[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 governmental intervention in the market."<sup>488</sup> The United States considers the first sentence as the "one more appropriately [describing] the

<sup>481</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 506.

<sup>482</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 506 and 508.

<sup>483</sup> See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

<sup>484</sup> See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.

<sup>485</sup> Appellate Body Report, *US – Lamb*, para. 106.

<sup>486</sup> See Appellate Body Report, *US – Lamb*, para. 106.

<sup>487</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

<sup>488</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

applicable [legal] approach", while the second sentence merely provides an "example" of the kind of situation in which an investigating authority might find that prices are not market-determined.<sup>489</sup>

5.157. We note that these statements were made in the context of the discussion of the sources of in-country prices that can be relied upon in arriving at a proper benchmark.<sup>490</sup> Thus, the Appellate Body concluded in the preceding paragraph 4.154 that "Article 14(d) establishes no legal presumption that in-country prices from any particular source can be discarded in a benchmark analysis", but rather "requires an analysis of the market in the country of provision to determine whether particular in-country prices can be relied upon in arriving at a proper benchmark".<sup>491</sup> Like the Panel, we consider that the Appellate Body's statements in the first and second sentences of paragraph 4.155 quoted above together form part of the Appellate Body's interpretation of Article 14(d). They reflect the understanding that different methods may be chosen by the investigating authority in demonstrating the direct or indirect impact of government intervention on in-country prices. However, the investigating authority needs to provide a reasoned and adequate explanation whether prices are market-determined or how they are distorted as a result of government intervention. Therefore, we do not consider that the statement "[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 governmental intervention in the market"<sup>492</sup> constitutes merely an example of a situation when prices might not be market-determined, as the United States seems to suggest. Nor do we understand the Panel to have read this statement as requiring the use of a single type of analysis in determining the existence of price distortion, in each case.

5.158. Turning to the Panel's interpretation in the present case, we note that the Panel elaborated on the requirements for recourse to out-of-country prices by pointing out 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"<sup>493</sup>, and that "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."<sup>494</sup> The Panel also considered that nothing precludes investigating authorities "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".<sup>495</sup> At the same time, the Panel observed 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."<sup>496</sup> In addition, the Panel recalled the Appellate Body's statement in *US – Carbon Steel (India)* that "[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 governmental intervention in the market."<sup>497</sup>

5.159. The Panel then observed that "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', 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*."<sup>498</sup> According to the Panel, "[e]vidence 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."<sup>499</sup> We consider this statement to be

<sup>489</sup> United States' appellant's submission, para. 114.

<sup>490</sup> See Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.151-4.157.

<sup>491</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.

<sup>492</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

<sup>493</sup> Panel Report, para. 7.202 (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154).

<sup>494</sup> Panel Report, para. 7.202.

<sup>495</sup> Panel Report, para. 7.202.

<sup>496</sup> Panel Report, para. 7.203.

<sup>497</sup> Panel Report, para. 7.204 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155).

<sup>498</sup> Panel Report, para. 7.205 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 102). (emphasis added)

<sup>499</sup> Panel Report, para. 7.205. (emphasis added)

consistent with our interpretation of the standard for recourse to out-of-country prices under Article 14(d). In particular, by requiring in the alternative either "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"<sup>500</sup>, the Panel's statement is in line with our conclusion that, while there may be different ways to demonstrate the existence of price distortion, the investigating authority must choose a method capable of establishing how in-country prices are actually distorted as a result of government intervention. As recognized by the Panel, in the absence of evidence of a direct impact of the government intervention on prices, which may in itself inform the existence of price distortion, a more detailed analysis and explanation may be required by the investigating authority. We nevertheless highlight that investigating authorities should provide a reasoned and adequate explanation of the basis for their price distortion findings in each case, independently of whether their finding is based on evidence of direct or indirect impact of the government intervention on in-country prices.

5.160. We further agree with the Panel's conclusion that "[a]n 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"<sup>501</sup>, insofar as it clarifies that the investigating authority has to make a finding of price distortion resulting from government intervention. In light of our understanding of the statement from *US – Carbon Steel (India)*, the Panel's reasoning is consonant with our above interpretation that the existence of price distortion by reason of government intervention can be established by recourse to different methods in different cases, as long as the investigating authority has undertaken the necessary analysis in order to establish in its report that price distortion actually results from government intervention in the market. As we see it, the Panel's statement referring to "direct impact"<sup>502</sup> as well as other forms of more indirect impact on prices – provided that the investigating authority explains how the prices of the goods in question are distorted as a result – acknowledges that various forms of government intervention could lead to price distortion, while recognizing that, in each case, an explanation would be required as to whether and how the government intervention has actually resulted in price distortion, before a finding that certain in-country prices cannot be relied upon is reached. This reasoning comports with our interpretation of Article 14(d). Nor does the Panel require one single type of quantitative or price comparison analysis in all cases.

5.161. In sum, investigating authorities have discretion to choose the specific method or type of analysis for purposes of determining the existence of price distortion. However, while there may be different ways to make this demonstration, and while impact of government intervention on prices need not necessarily be direct, whatever method is chosen, and whatever the evidence relied upon, investigating authorities must establish, by providing an adequate explanation based on evidence, how price distortion actually results from government intervention in the market.

5.162. With these considerations in mind, we turn to review the Panel's application of the articulated legal standard to the present dispute.

### 5.3.3.2 Whether the Panel erred in its application of Articles 1.1(b) and 14(d) of the SCM Agreement

5.163. The United States contends that the Panel "fixated on a particular kind of price analysis and excluded from its consideration the explanation and evidence the USDOC provided demonstrating how prices in the relevant sectors are not market determined", and "[h]aving already adopted the **incorrect approach for its analysis ... further erred in characterizing the USDOC's explanation as unresponsive to the question of whether prices were or were not market determined.**"<sup>503</sup> Specifically, in the United States' view, the Panel failed to recognize that examining prices is not the only way to demonstrate price distortion, that the emphasis on market-determined prices highlights that an examination of "prevailing market conditions" assume the existence of a "functioning market", and that, absent such a market, an internal price cannot serve as a benchmark for measuring the adequacy of remuneration.<sup>504</sup> Furthermore, the United States argues that the Panel made a number of erroneous observations in examining whether the USDOC considered in-country and

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<sup>500</sup> Panel Report, para. 7.205.

<sup>501</sup> Panel Report, para. 7.205. (emphasis added)

<sup>502</sup> Panel Report, para. 7.205.

<sup>503</sup> United States' appellant's submission, para. 116.

<sup>504</sup> United States' appellant's submission, paras. 121-141.

government-related prices, analysed specific input markets on a standalone basis, and conducted a diligent investigation and solicited relevant facts.<sup>505</sup>

5.164. At the outset, we recall that a panel assessing the WTO-consistency of a determination by an investigating authority is not an initial trier of the facts. Nor is it for the panel, or for the parties, to provide an explanation of the basis for the investigating authority's conclusions. Rather, it is the investigating authority that reviews the submissions and evidence presented by the interested parties, collects evidence, and draws factual conclusions from that evidence in the first instance. A panel must not conduct a *de novo* review of the evidence before an agency whose determination is subject to a WTO dispute.<sup>506</sup> Rather, the panel conducts an "objective assessment" of whether the investigating authority provided a reasoned and adequate explanation of (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.<sup>507</sup> Such explanation must be "given by the authority in its published report"<sup>508</sup> and must be "discernible from the published determination itself".<sup>509</sup> The parties in a WTO dispute settlement proceeding reviewing an investigating authority's determination are precluded from offering a new rationale or explanation *ex post* to justify that determination.<sup>510</sup> At the same time, a panel can assess whether the competent authority's explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in light of the evidence before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data.<sup>511</sup> A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in light of that alternative explanation.<sup>512</sup> Thus, in making an "objective assessment" of a claim before them, panels must be open to the possibility "that the explanation given by the competent authorities is not reasoned or adequate".<sup>513</sup>

5.165. In sum, the task of a panel is to examine whether the investigating authority has adequately performed its investigative function and has adequately explained how the evidence supports its conclusions. It follows from the requirement that the investigating authority provide a "reasoned and adequate" explanation for its conclusions, and that the rationale for the investigating authority's decision must be set out in or is at least discernible from its published determination.<sup>514</sup> This is not to say, however, that the meaning of a determination cannot be clarified by referring to evidence on the record. Yet, in all instances, it is the evidence and reasoning provided in the written report of the investigating authority that a panel has to scrutinize in order to assess whether the determination was sufficiently explained and reasoned.<sup>515</sup>

5.166. The United States' appeal of the Panel's analysis of the USDOC's determination that in-country prices in China could not be used to determine the adequacy of remuneration in section 7.3.3.3 of its Report, focuses principally on the Panel's conclusions in paragraph 7.206. For instance, the United States contends that "[o]nly the compliance Panel's misunderstanding of the appropriate approach can explain its characterization of thousands of pages of evidence and analysis as having merely 'outlined government involvement' or its conclusion that the USDOC 'did not even attempt to provide a reasoned and adequate explanation for its determinations that in-country prices ... **were not market-determined**.'"<sup>516</sup> We begin our analysis by considering the background against which these statements were made by the Panel, which, in our view, sheds light on the Panel's ultimate conclusion, in paragraph 7.206 of its Report, that "the USDOC failed to explain how

<sup>505</sup> United States' appellant's submission, paras. 146-170.

<sup>506</sup> See e.g. Appellate Body Reports, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93; *US – Countervailing Duty Investigation on DRAMS*, paras. 183 and 186-188; *US – Lamb*, para. 106.

<sup>507</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>508</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

<sup>509</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>510</sup> Appellate Body Reports, *Japan – DRAMS (Korea)*, para. 159; *US – Tyres (China)*, para. 329.

<sup>511</sup> Appellate Body Report, *US – Lamb*, para. 106.

<sup>512</sup> Appellate Body Report, *US – Lamb*, para. 106.

<sup>513</sup> Appellate Body Report, *US – Lamb*, para. 106.

<sup>514</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>515</sup> See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>516</sup> United States' appellant's submission, para. 116 (quoting Panel Report, para. 7.206).

government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price."<sup>517</sup>

5.167. In section 7.3.3.3.1 of the Panel Report, the Panel outlined the content of the USDOC's Benchmark Questionnaire<sup>518</sup>, Benchmark Memorandum<sup>519</sup>, and Supporting Benchmark Memorandum.<sup>520</sup> As is evident from the Panel's description of the USDOC's analysis, the USDOC assessed a number of factors relating to the GOC's intervention with SIEs in China, and in China's steel sector generally.<sup>521</sup> From this analysis, the USDOC inferred 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."<sup>522</sup> In turn, the question before the Panel was whether the USDOC had provided, in its written determinations, a reasoned and adequate explanation of how the evidence on the record actually established the existence of price distortion in the markets of the inputs at issue as a result of government intervention and how this explanation supported its decision to have recourse to out-of-country prices.

5.168. Indeed, the Panel emphasized the importance of ensuring "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", as opposed to merely relying on "[e]vidence of widespread government intervention in the economy".<sup>523</sup> In reaching its conclusion, the Panel relied on the Appellate Body's statement that "[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 governmental intervention in the market."<sup>524</sup> We thus understand the Panel's preoccupation to have been with the requirement to establish how the existence of price distortion actually resulted from the government interventions in the market. To this end, the Panel reviewed the USDOC's determinations and referred to various statements made in the Benchmark Memorandum and the United States' submissions.<sup>525</sup> For instance, the Panel took note 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 and certain member States – Large Civil Aircraft*.<sup>526</sup> The Panel also noted that 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", which "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."<sup>527</sup> In addition, the Panel took note of the USDOC's conclusion in the Supporting Benchmark Memorandum that, "[i]n 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."<sup>528</sup>

5.169. Therefore, the Panel rejected as insufficient and problematic the USDOC's determination that prices in the entire steel and solar grade polysilicon sectors in China cannot be used as benefit benchmarks in the absence of a specific and focused assessment of how government intervention had resulted in price distortion in the four input markets at issue. In our view, critical for the Panel's conclusion was the United States' position that "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'."<sup>529</sup> The Panel also emphasized that "the information collected and summarized in the Benchmark Memorandum focuses on *government intervention* in the Chinese

<sup>517</sup> Panel Report, para. 7.206. (emphasis original)

<sup>518</sup> Panel Report, paras. 7.179-7.183.

<sup>519</sup> Panel Report, paras. 7.186-7.191.

<sup>520</sup> Panel Report, paras. 7.192-7.196.

<sup>521</sup> Panel Report, paras. 7.186-7.188.

<sup>522</sup> Panel Report, para. 7.189 (quoting Benchmark Memorandum (Panel Exhibit CHN-20), p. 26).

<sup>523</sup> Panel Report, para. 7.205.

<sup>524</sup> Panel Report, para. 7.204 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155).

(emphasis original)

<sup>525</sup> Panel Report, section 7.3.3.3.2.

<sup>526</sup> Panel Report, para. 7.199 (quoting United States' response to Panel question No. 35, para. 180, in turn quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 981)).

<sup>527</sup> Panel Report, para. 7.200 (referring to Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 4). (emphasis added)

<sup>528</sup> Panel Report, para. 7.200 (quoting Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 4). (emphasis added)

<sup>529</sup> Panel Report, para. 7.199 (referring to United States' response to Panel question No. 35, para. 179). (emphasis added)

economy as a whole and the steel sector generally, *rather than on the specific input markets at issue*.<sup>530</sup> Our understanding is in line with the Panel's conclusion that "[t]he USDOC did not even 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."<sup>531</sup> The Panel acknowledged that "an investigating authority may carry out such a market analysis at different levels of detail with respect to the products in question", and that it is not precluded from "taking a broader approach".<sup>532</sup> However, the Panel emphasized 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", and noted that investigating authorities must undertake "a case-specific analysis", which encompasses a requirement "to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts".<sup>533</sup>

5.170. China submits that "[i]n the absence of any evidence that all government-related suppliers of the inputs at issue sold these products on a non-commercial basis, and in the absence of any evidence that the prices charged by government-related suppliers affected the prices charged by privately-owned suppliers, the USDOC had no evidentiary basis to reject available in-country prices that included prices charged by both government-related and privately-owned suppliers."<sup>534</sup> In the Supporting Benchmark Memorandum, the USDOC noted that its finding that there are no potential benchmarks within China's steel industry "is based on evidence of pervasive government intervention in the steel sector as a whole, which necessarily includes all types of steel inputs sold in the PRC [People's Republic of China]."<sup>535</sup> On that basis, the USDOC concluded that "[t]he record evidence does not indicate that this finding applies with any less force to the three specific inputs in question in these proceedings, hot-rolled steel, steel rounds and stainless steel coils, or that the market for the three products has been insulated from these sectoral-wide distortions."<sup>536</sup> In other words, the USDOC considered that its rationale of "pervasive government intervention" in China's economy in general and its steel industry as a whole equally applies to the specific input markets at issue because the steel sector "necessarily includes all types of steel inputs", without further analysis or explanation of how various forms of government intervention actually resulted in distortion of the prices of the specific input markets under investigation.<sup>537</sup> Beyond its reference to the fact that "the records in these three cases demonstrate the existence of export restraints for these three products during the relevant periods of investigation"<sup>538</sup>, the USDOC did not engage in any specific assessment of the four input markets in question. Thus, from its conclusions that the decision-making process of SIEs in China in general and in the steel sector as a whole was distorted by government intervention, the USDOC appears to have drawn a general inference that prices in the specific markets at issue were equally distorted.

5.171. Furthermore, the Panel quoted the USDOC's references to "widespread sectoral intervention [which] meant that SIEs were constrained in their ability to pursue commercial outcomes", "broad-based governmental intervention in favour of the state share of the economy [which] distorts market signals for all participants in the sectors", "forced mergers and acquisitions and the presence of export taxes [which] artificially depressed prices for the relevant steel inputs", and the fact that "**GOC exercises various levers of control over commercial actors in China's steel sector ... mean[ing]** 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."<sup>539</sup> In this context, the Panel rejected the notion that "a presumption that *government intervention in the market necessarily results in price distortions* for the goods in question [would] suffice to support the conclusion that in-country prices for the input at issue may be rejected as a benchmark."<sup>540</sup> The Panel then concluded that

<sup>530</sup> Panel Report, para. 7.200 (referring to Benchmark Memorandum (Panel Exhibit CHN-20), sections III-IV). (emphasis added; fn omitted)

<sup>531</sup> Panel Report, para. 7.206. (emphasis added)

<sup>532</sup> Panel Report, para. 7.202.

<sup>533</sup> Panel Report, para. 7.203. (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.190). (emphasis added)

<sup>534</sup> China's appellee's submission, para. 141.

<sup>535</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 4.

<sup>536</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 4.

<sup>537</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 4.

<sup>538</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 5.

<sup>539</sup> Panel Report, para. 7.201. See Benchmark Memorandum (Panel Exhibit CHN-20), pp. 28-30.

<sup>540</sup> Panel Report, para. 7.205. (emphasis added)

"[t]he 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."<sup>541</sup> We thus understand the Panel to have been concerned with the focus of the USDOC's analysis in the Benchmark Memorandum on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, rather than on *how* specifically this involvement influenced pricing decisions regarding the inputs at issue, and resulted in price distortion with respect to the determinations at hand. Absent from this analysis was a sufficient assessment of how the various forms of government intervention, taken individually or together, impacted upon the prices in China's steel market, and specifically the input markets at issue, and how they actually resulted in the distortion of all the SIE and private *prices* of those inputs in those markets, as opposed to more generally distorting the *market*.<sup>542</sup> Rather, the USDOC's finding remains general in that it finds that, because of the extensive and varied government involvement in the sector, none of the steel prices in China can be "considered to be 'market-determined' for purposes of a benchmark analysis".<sup>543</sup> It is against this background that we read the Panel's conclusion that "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."<sup>544</sup>

5.172. We therefore do not see that, as the United States argues, the Panel "fixated on a particular kind of price analysis and excluded from its consideration the explanation and evidence the USDOC provided demonstrating how prices in the relevant sectors are not market determined", and "erred in characterizing the USDOC's explanation as unresponsive to the question of whether prices were or were not market determined".<sup>545</sup> Instead, we understand the Panel to have found that the USDOC did not sufficiently analyse or explain how the widespread government interventions described in the Benchmark Memorandum actually resulted in the distortion of in-country prices in the specific input markets with regard to the specific products subject to each of the challenged USDOC determinations at issue. In this light, we understand the Panel's statement in paragraph 7.206 of its Report regarding the United States' position that it was "not required to analyze specific prices" as indicating the Panel's concern that the USDOC did not consider itself obliged to conduct an analysis of whether all in-country prices in the four specific input markets at issue were actually distorted as a result of government intervention.<sup>546</sup> We see in the same vein the Panel's statement "[n]or 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."<sup>547</sup> The Panel also noted the country-wide and sector-wide focus of the Benchmark Memorandum and the absence of an analysis of the "specific input markets" at issue. As observed, this reflects the Panel's concern with the focus of the USDOC's analysis in the Benchmark Memorandum on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, which, according to the USDOC's approach, meant that, as a consequence, all in-country prices were necessarily distorted. Rather, what the USDOC's determinations did not contain were explanations of *how* this government

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<sup>541</sup> Panel Report, para. 7.206.

<sup>542</sup> In this regard, China argues that the USDOC cited no evidence that the government's involvement had any impact upon Chinese steel prices. (See e.g. China's appellee's submission, para. 122)

<sup>543</sup> Benchmark Memorandum (Panel Exhibit CHN-20), p. 26.

<sup>544</sup> Panel Report, para. 7.206.

<sup>545</sup> United States' appellant's submission, para. 116.

<sup>546</sup> See also Panel Report, para. 7.199 (referring to United States' response to Panel question No 35, para. 179: "[T]he USDOC was not required to analyse specific prices for the relevant inputs to determine that SIE and private prices in China's steel and polysilicon sectors are not market-determined.") In the Final Benchmark Determination, the USDOC also recalled that it had "found the prices of all Chinese steel input producers to be distorted as a result [of] the significant government interventions" mentioned earlier "such that there are no potential in-country benchmarks that can be considered market-based – rather than due to price alignment resulting from the presence of market power by the providers of the good." Thus, the USDOC found that "it is not necessary to conduct an analysis of whether prices of government and private providers align due to the market power of government providers". Nonetheless, the USDOC reviewed the available record information with a view towards whether it might be possible to analyse whether SIE market dominance has caused price alignment in the context of a countervailing duty proceeding. However, the USDOC concluded that "neither the available record evidence on prices in these three proceedings nor the evidence on prices likely to be available to an investigating authority is likely to provide additional probative insight on the question of whether private suppliers have aligned their prices with the prices charged by predominant government input providers." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 19) We address the United States' arguments in this regard below.

<sup>547</sup> Panel Report, para. 7.205.

involvement influenced pricing decisions regarding the inputs at issue and actually resulted in price distortion with respect to the determinations at hand.

5.173. Contrary to the USDOC's allegations<sup>548</sup>, it is evident from the Panel's survey of the USDOC's analysis in the Benchmark Memorandum and the Supporting Benchmark Memorandum, as well as the Panel's reference to the United States' submissions in this regard, that the Panel did explore the rationale underlying the USDOC's determinations. However, given the USDOC's focus on the pervasiveness of government interventions in China and its steel market in general, and in the absence of an analysis of specific input markets and of how these interventions actually resulted in distortion of in-country prices for the inputs subject to the determinations at issue, the Panel found that the USDOC's benchmark determinations were deficient in that they provided an insufficient explanation for establishing that prices were actually distorted as a result of those government interventions. As the Panel stated, the investigating authority's report must contain reasoning and findings of how government intervention actually results in price distortion supported by an adequate explanation with respect to the specific input markets that the determinations at issue are concerned with.<sup>549</sup> The Panel's analysis of the determinations at issue led it to conclude that the USDOC did not provide a reasoned and adequate explanation in reaching its conclusion that government interventions in China's steel market, taken together, actually resulted in the distortion of all in-country prices in China's steel market, and more particularly in the specific input markets at issue, such that their prices could not be used to determine adequacy of remuneration.<sup>550</sup> Thus, the Panel understood the USDOC's analysis as one of widespread government intervention and "market distortion" more generally, and not of "price distortion" in the input markets at issue resulting specifically from those government interventions.

5.174. The Panel's analysis of whether the USDOC disregarded evidence regarding prices for the inputs at issue in section 7.3.3.3.3 of its Report supports its conclusion 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."<sup>551</sup> In this regard, the United States argues that the "Panel concluded, without justification, that the USDOC automatically rejected government prices"<sup>552</sup>, whereas "[t]he USDOC provided an extensive explanation as to why it rejected 'government-related' prices" and "did not reject these prices because of their source, but rather because of their *nature*".<sup>553</sup> Furthermore, the United States contends that "[t]he Mysteel prices are precisely the subject of the USDOC's analysis in the benchmark memoranda – that is, they are among the Chinese prices the USDOC described as being distorted by the numerous government interventions identified on the record."<sup>554</sup>

5.175. With respect to the Pressure Pipe, Line Pipe, and OCTG Section 129 proceedings, the Panel observed that the record contains price information for the inputs at issue from three sources: (i) the Mysteel Report<sup>555</sup>, which set out monthly domestic steel prices during the period 2006-2008, with a breakdown per category of input (stainless steel coil, hot-rolled steel, and steel billet); (ii) the purchase data of the respondent companies for the inputs at issue; and (iii) a data series of monthly

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<sup>548</sup> The United States contends that "[o]nly the compliance Panel's misunderstanding of the appropriate approach can explain its characterization of thousands of pages of evidence and analysis as having merely 'outlined government involvement' or its conclusion that the USDOC 'did not even attempt to provide a reasoned and adequate explanation for its determinations that in-country prices ... were not market-determined'". (United States' appellant's submission, para. 117 (quoting Panel Report, para. 7.206)) By contrast, China argues that the USDOC cited no evidence that the government's involvement had any impact upon Chinese steel prices. (See e.g. China's appellee's submission, para. 122)

<sup>549</sup> Panel Report, para. 7.205. As noted above, a number of appropriate ways and methods exist to demonstrate that price distortion resulted from government intervention, depending on the specific circumstances of the case, including a quantitative or counterfactual analysis, price comparison, or a qualitative analysis of how the government interventions result in price distortion.

<sup>550</sup> In the Panel's view, a presumption that government intervention in the market necessarily results in price distortions for the goods in question will not suffice to support the conclusion that in country prices for the input at issue can be rejected. (Panel Report, 7.205)

<sup>551</sup> Panel Report, para. 7.206.

<sup>552</sup> United States' appellant's submission, para. 153.

<sup>553</sup> United States' appellant's submission, para. 157. (emphasis original)

<sup>554</sup> United States' appellant's submission, para. 151.

<sup>555</sup> The Mysteel Report is a document provided by the GOC, entitled "China's steel market and price research report". (Panel Report, para. 7.214 (referring to Ordovery Report (Panel Exhibit CHN-19)))



average domestic Chinese prices compiled by the Steel Benchmarker and Mysteel, and submitted for the record in the OCTG and Line Pipe investigations by the petitioners.<sup>556</sup>

5.176. Although that price information provided by the petitioners and the GOC did not distinguish between SIE and private sources, the Panel considered that such price information could nevertheless be relevant to an analysis of adequate remuneration.<sup>557</sup> The Panel concluded that "[t]here is nothing on the record of the investigations to suggest that the USDOC considered" the relevancy of SIE suppliers' price information, "and certainly no explanation of why the information submitted was not relevant in this case, if that was its conclusion".<sup>558</sup> Similarly, with respect to price data in the Mysteel Report, the Panel found that it was "largely ignored by the investigating authority", and "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."<sup>559</sup>

5.177. In line with the applicable standard of review, whereas the investigating authority has discretion in choosing the method for establishing price distortion, it also needs to analyse alternative methods, arguments, and evidence presented by the parties, in order to assess whether its approach properly determines the existence of price distortion resulting directly or indirectly from government intervention.<sup>560</sup> Ultimately, the investigating authority's conclusion has to be sufficiently reasoned and adequately explained, also in light of these alternative arguments, explanations, and evidence. In turn, "[a] panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation."<sup>561</sup> Thus, the Panel's task in the present case was to review whether, in light of the evidence and arguments submitted by the parties, and the rationale underlying plausible alternative explanations, the approach ultimately adopted by the USDOC in its determinations, and the conclusions drawn from the evidence it relied upon, remain adequate and sufficiently substantiated also in the light of those alternative explanations. In particular, the question before the Panel was whether the USDOC's determinations sufficiently discussed why those alternative explanations – of why in-country prices are not distorted – do not detract from the approach the USDOC adopted in finding that all in-country steel prices are distorted. As the Panel observed, while "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", it also "must not simply defer to the conclusions of the investigating authority".<sup>562</sup> The Panel therefore turned to "consider the 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."<sup>563</sup>

5.178. With respect to the Panel's finding that "the Mysteel Report was largely ignored by the investigating authority"<sup>564</sup>, the United States submits that "[t]he Mysteel prices are precisely the subject of the USDOC's analysis in the benchmark memoranda – that is, they are among the Chinese prices the USDOC described as being distorted by the numerous government interventions identified

<sup>556</sup> Panel Report, para. 7.214. With respect to the purchase data of the respondent companies, the Panel considered that "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." (Ibid., para. 7.216) The Panel further noted that China did not contest the USDOC's statement that it did not have an enforceable manner to request additional data on arm's length transactions for the goods in question in China from firms not selected to be respondents in the countervailing duty proceedings. (Ibid., para. 7.217)

<sup>557</sup> Panel Report, para. 7.218 (quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151).

<sup>558</sup> Panel Report, para. 7.218.

<sup>559</sup> Panel Report, para. 7.219. (fns omitted; emphasis added)

<sup>560</sup> The Appellate Body observed that panels must "review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data"; in particular, panels must find that "an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation." (Appellate Body Report, *US – Lamb*, para. 106 (emphasis original))

<sup>561</sup> Appellate Body Report, *US – Lamb*, para. 106. (emphasis original)

<sup>562</sup> Panel Report, para. 7.215.

<sup>563</sup> Panel Report, para. 7.215.

<sup>564</sup> Panel Report, para. 7.219.

on the record."<sup>565</sup> We recall that the USDOC's rationale in the Benchmark Memorandum was focused on establishing price distortion based on the pervasiveness of government intervention in China's steel sector, rather than on the exercise of market power by the GOC and therefore on the question of whether the government could effectively determine prices in the input markets in question. Above, we understood the Panel's concern to have been with the focus of the USDOC's analysis on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, and with the absence of an explanation of *how* this involvement influenced actual pricing decisions regarding the inputs at issue and resulted in price distortion for purposes of the determinations at hand, such that recourse to out-of-country prices was warranted. We therefore disagree with the United States, to the extent it suggests that the Panel "ignored the central question of market-determined pricing".<sup>566</sup> Instead, we understand the Panel to have found that the USDOC's rejection of in-country prices (including Mysteel prices) was based on, and merely consequential to, its findings of pervasive government intervention and market distortion in the steel sector generally, which did not provide a reasoned and adequate explanation of how the widespread government intervention and "market distortion" led to "price distortion" in the specific input markets at issue.<sup>567</sup>

5.179. We further note that the USDOC did not question the plausibility of Professor Ordover's analytical framework of price alignment but rejected its relevance and the Mysteel pricing data mainly because it had adopted a different approach in these compliance proceedings.<sup>568</sup> The USDOC observed, in particular, that "the GOC's intervention in the steel sector as a whole in the Benchmark Memorandum establishes that the market signals – throughout the sector as a whole – are distorted by the effects of longstanding and continued pervasive government intervention", and that "[i]n these circumstances, the presence or absence of Professor Ordover's antitrust based 'indicia' are not particularly telling indicia of market distortion."<sup>569</sup> The USDOC also noted that Professor Ordover's approach was not "the *only* framework under which to determine whether the government can affect the market". We observe, however, that the fact that the alternative framework was not the *only* one does not respond to the question whether, in light of that alternative framework and price data, the framework adopted by the USDOC in these Section 129 proceedings and its conclusions still hold. Rather, we agree with the Panel that "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."<sup>570</sup>

5.180. In this regard, China argues that pricing data in the Mysteel Report reflected the proposition that market factors – as opposed to government intervention – were responsible for the fluctuations of Chinese steel prices.<sup>571</sup> Furthermore, the Ordover Report<sup>572</sup> highlighted that "the Chinese steel industry as a whole is 'highly fragmented', as are the specific steel markets at issue in the relevant investigations", "which makes the domestic market highly competitive and difficult to control".<sup>573</sup> The same report also documented some of the major instances in which "private investment in the Chinese steel industry grew rapidly during the periods of investigation", in the form of "private investment in major capacity expansions as well as private investments in existing Chinese steel

<sup>565</sup> United States' appellant's submission, para. 151 (referring to Final Benchmark Determination (Panel Exhibit CHN-21), pp. 12-22).

<sup>566</sup> United States' appellant's submission, para. 151.

<sup>567</sup> See Panel Report, para. 7.206.

<sup>568</sup> The USDOC noted that "although the Department does not take issue with whether Professor Ordover's analytical framework concerning 'market power' is useful in the context of antitrust analysis, we disagree that it is the *only* framework under which to assess whether and, to what extent, a government can affect the market and thus determine if prices by private entities are distorted" and that a "singular focus on an antitrust paradigm is not required by Article 14(d)". Final Benchmark Determination (Panel Exhibit CHN-21), p. 13. (emphasis original) Referring to the Appellate Body's statement in *US – Countervailing Measures (China)*, that "the government may distort in-country prices through other entities or channels than the provider of the good itself", the USDOC noted that "there is no single analytical framework under which a market distortion analysis must be conducted". (Final Benchmark Determination (Panel Exhibit CHN-21), p. 14)

<sup>569</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 17.

<sup>570</sup> Panel Report, para. 7.220.

<sup>571</sup> See China's appellee's submission, paras. 114-116.

<sup>572</sup> Panel Exhibit CHN-19.

<sup>573</sup> China's appellee's submission, paras. 125-126 (referring to Ordover Report (Panel Exhibit CHN-19)).

enterprises".<sup>574</sup> In China's view, "[t]he lack of any evidence that SIEs possessed and exercised market power, combined with the evidence of extensive private investment in the Chinese steel industry, strongly undercut the mere *presumption* by the USDOC that the various 'government interventions' that it identified affected the prices charged by private and government-related suppliers of the inputs at issue."<sup>575</sup> Therefore, even though the USDOC's analysis was not based primarily on the SIEs' market share in China's steel market or on a price alignment rationale, it appears that the alternative explanations and pricing data on the record may have nevertheless been relevant for examining whether price distortion actually existed in the input markets at issue. Yet, the USDOC determinations do not explain why, in light of the price data and alternative explanations, the conclusion it had reached for the entire steel sector necessarily applies to all specific inputs. Rather, when addressing the Ordover Report and the Mysteel data, the USDOC referred to its earlier conclusion that all prices in China's steel market were distorted based on a different approach. Under the applicable standard of review<sup>576</sup>, the fact that the USDOC's approach to price distortion was different from that suggested by China does not appear to be sufficient reason for justifying the USDOC's cursory engagement with these additional pricing data, evidence, and alternative explanations on the record.

5.181. We therefore do not see that the Panel's analysis reflects an insistence that a particular method of analysis of prices is the only way to establish price distortion, or that, as the United States puts it, the Panel "overlooked the context within which the USDOC addressed the Mysteel evidence".<sup>577</sup> Indeed, the Panel recognized 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)".<sup>578</sup> At the same time, the Panel considered the price data on the record to have been relevant to the question whether the existence of price distortion had been adequately established and explained under the USDOC's own approach. As the Panel observed, however, "[n]either the Benchmark Memorandum nor the Supporting Benchmark Memorandum to that memorandum, nor the Final Benchmark Determination in the Pressure Pipe, Line Pipe, OCTG, Wire Strand, and Solar Panels refer to the prices for the inputs at issue set out in the Mysteel Report."<sup>579</sup> In this regard, the Panel referred to China's contention that "[t]he 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."<sup>580</sup>

5.182. We also note that the USDOC's analysis in the Benchmark Memorandum was conducted at the level of the GOC's intervention in the economy overall, including the steel sector in general. On that basis, the USDOC extended its finding to the three specific inputs at issue, concluding that "it was not reasonable to expect that conditions in the sector's subset could operate under different conditions given the nature of the products."<sup>581</sup> The United States thus takes issue with the Panel's observation 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."<sup>582</sup> Above, we found that, in its analysis in the Benchmark Memorandum, the USDOC did not engage in a specific assessment of the four input markets in question. The USDOC drew an overall inference that prices in all specific input markets are distorted from its conclusions that the decision-making process of SIEs in China in general and in the steel sector as a whole was distorted by government intervention. However, the Mysteel prices placed by the GOC on the record were specific to the three steel inputs at issue and, in China's view, "[t]here was no evidence on the record that any plans or policies adopted by the GOC directed either privately-owned or government-related suppliers to sell these inputs to particular entities or at a particular price."<sup>583</sup> Thus, as observed by the Panel, it would have been relevant for the USDOC to

<sup>574</sup> China's appellee's submission, para. 131 (referring to Ordover Report (Panel Exhibit CHN-19)). In this regard, China argues that "[t]he evidence of private investment is obviously probative: rational, profit-seeking companies do not invest billions of dollars in an industry if they do not believe that it is a 'functioning market'." (Ibid., para. 133)

<sup>575</sup> China's appellee's submission, para. 134. (emphasis original)

<sup>576</sup> Appellate Body Report, *US – Lamb*, para. 106.

<sup>577</sup> United States' appellant's submission, para. 151.

<sup>578</sup> Panel Report, para. 7.220.

<sup>579</sup> Panel Report, para. 7.219. (fns omitted)

<sup>580</sup> Panel Report, para. 7.219 (quoting China's second written submission to the Panel, para. 133).

<sup>581</sup> United States' appellant's submission, para. 158 (referring to Supporting Benchmark Memorandum (Panel Exhibit USA-84), pp. 5-6).

<sup>582</sup> United States' appellant's submission, para. 159 (quoting Panel Report, para. 7.200).

<sup>583</sup> China's appellee's submission, para. 114.

take into account this data in its analysis and examine the extent to which it affected its conclusions that price distortion existed in China's steel sector and, in particular, in the three specific input markets.<sup>584</sup>

5.183. The United States also points to the USDOC's conclusion that, "[a]lthough the Department requested information from the GOC to ascertain the structure of the hot-rolled steel, steel rounds, and stainless steel coils markets, including the identities and state ownership levels of the producers operating therein, the GOC's response was incomplete and therefore unreliable for purposes of such an analysis."<sup>585</sup> The USDOC thus found that "information necessary to an input-specific market analysis is not available on the record [and] in addition to, and in the alternative to, [its] determination about the Chinese steel sector as a whole", the USDOC also relied upon "the facts otherwise available ... with regard to the particular steel inputs at issue".<sup>586</sup>

5.184. We recall that recourse to facts available "is not a licence to rely on only part of the evidence provided".<sup>587</sup> Specifically, "[t]o the extent possible, an investigating authority using the 'facts available' in a countervailing duty investigation must take into account all the substantiated facts provided by an interested party, even if those facts may not constitute the complete information requested of that party."<sup>588</sup> In relying upon facts available, however, the USDOC did not consider the Mysteel prices for the three specific inputs provided by China. We therefore do not consider that the fact that China's responses to the USDOC's request for information were incomplete could justify the absence of an assessment of those price data that were submitted and thus available on the record. In this light, China's responses with respect to the USDOC's request for information "to ascertain the structure of the hot-rolled steel, steel rounds and stainless steel coils markets, including the identities and state ownership levels of the producers operating therein"<sup>589</sup>, albeit incomplete, do not discount the relevance of the price information that was otherwise available on the record. The USDOC did not provide an explanation of whether and why, in light of such pricing information, its conclusions that pervasive government intervention and market distortion in the Chinese economy and in the steel sector generally applied to each of the input markets at issue were still valid. Rather, as noted above, in rejecting such in-country pricing data, the USDOC noted that it had already found earlier that all in-country prices were distorted and could not be used as a benefit benchmark.<sup>590</sup>

5.185. Therefore, although the USDOC had discretion to choose its approach in establishing whether in-country prices were distorted, it would have been necessary to explain in its determinations why the approach it had adopted and the conclusions it had reached were still valid, in light of the Mysteel pricing data and the alternative narrative of the Ordovery Report.<sup>591</sup> We further note China's argument that, "[i]n the absence of any evidence that all government-related suppliers of the inputs at issue sold these products on a non-commercial basis, and in the absence of any evidence that the prices charged by government-related suppliers affected the prices charged by privately-owned suppliers, the USDOC had no evidentiary basis to reject available in-country prices that included prices charged by both government-related and privately-owned suppliers."<sup>592</sup> It is in this light that we understand the Panel's conclusion that "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

<sup>584</sup> See Panel Report, para. 7.220.

<sup>585</sup> United States' appellant's submission, para. 160 (quoting Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 5).

<sup>586</sup> United States' appellant's submission, para. 162 (quoting Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 6).

<sup>587</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294. The Appellate Body has explained that an investigating authority must use those facts available that reasonably replace the necessary information that an interested party failed to provide with a view to arriving at an accurate determination. (Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 293-294; *US – Carbon Steel (India)*, paras. 4.416 and 4.419)

<sup>588</sup> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 294.

<sup>589</sup> United States' appellant's submission, para. 162.

<sup>590</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 19 (referring to Benchmark Memorandum (Panel Exhibit CHN-20), pp. 27-30).

<sup>591</sup> Although the Mysteel pricing data, indicia, and rationale underlying in the Ordovery Report were different from the approach adopted by the USDOC in the Benchmark Memorandum, these indicia related to the steel sector and the relevant input markets. As such, they constituted pertinent information which could potentially call into question the USDOC's finding that all in-country prices including private prices were distorted.

<sup>592</sup> China's appellee's submission, para. 141.

of Article 14(d).<sup>593</sup> It appears that, for the Panel, the USDOC did not sufficiently consider the rationale in the Ordoover Report and the Mysteel pricing data in its analysis of prices in China's steel sector, and assess whether prices in the specific input markets were actually distorted by government intervention. This conclusion is in line with the Panel's earlier findings that the USDOC did not consider that it was necessary "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", or "to proceed with a detailed analysis of the specific markets for the inputs at issue".<sup>594</sup>

5.186. Additionally, with respect to in-country private prices, the United States contends that "after considering import pricing data that China submitted on the record of the original investigations, the USDOC concluded that it could not be used"<sup>595</sup>, and that the USDOC actually used Chinese prices where appropriate, such as in the Pressure Pipe investigation.<sup>596</sup> As we see it, the use or rejection by the USDOC of certain import pricing data provided by China in the original proceedings did not obviate the need for the USDOC to examine the evidence and explanations on the record of the Section 129 proceedings at issue. These United States' arguments therefore are neither pertinent to nor affect the Panel's conclusion that the USDOC failed adequately to explain its rejection of in-country prices on the record of the Pressure Pipe, Line Pipe, and OCTG investigations in the course of the present Section 129 proceedings.<sup>597</sup>

5.187. The United States further challenges the basis for the Panel's finding that nothing on the record suggests that the USDOC considered the possibility that "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."<sup>598</sup> The United States submits that the USDOC did not reject government-related prices "because of their source, but rather because of their *nature*".<sup>599</sup> In the section on "Evaluation of Additional Issues" in the Final Benchmark Determination<sup>600</sup>, the USDOC noted the possibility of alignment of private and SIE prices, but found that "it is neither necessary nor feasible to conduct such a price analysis in these section 129 proceedings."<sup>601</sup> The USDOC relied on the conclusion it had already reached in the Benchmark Memorandum that **"the GOC's intervention in the steel sector as a whole ... establishes that the market signals – throughout the sector as a whole – are distorted by the effects of longstanding and continued pervasive government intervention."**<sup>602</sup>

5.188. While the USDOC may not have rejected these data because of their source, it nevertheless rejected them because, at the point of addressing the question of whether a price alignment analysis would be possible in the Final Benchmark Determination, the USDOC had already reached its conclusion in the Benchmark Memorandum that longstanding and continued pervasive government intervention distorted market signals throughout the steel sector, such that there were no potential benchmarks from the domestic industry that could be considered "market-based" for any of the inputs at issue. This latter conclusion was reached separately from, and before addressing, the Mysteel prices in the USDOC's additional discussion of whether an analysis of price alignment is

<sup>593</sup> Panel Report, para. 7.219.

<sup>594</sup> Panel Report, paras. 7.199-7.200.

<sup>595</sup> United States' appellant's submission, para. 149.

<sup>596</sup> The United States observes that "the USDOC considered whether a respondent's import purchases were market determined and, concluding that the prices were indeed market determined, the USDOC *used* those prices as part of its benchmark". (United States' appellant's submission, para. 150 (emphasis original))

<sup>597</sup> Having said that, we do not exclude that the investigating authority may, in a Section 129 re-determination for purposes of Article 21.5 proceedings, refer to or incorporate into its reasoning data from the original investigation or findings that were not found to be inconsistent in the original WTO proceedings.

<sup>598</sup> United States' appellant's submission, para. 153 (referring to Panel Report, para. 7.218).

<sup>599</sup> United States' appellant's submission, para. 157. (emphasis original)

<sup>600</sup> Final Benchmark Determination (Panel Exhibit CHN-21), pp. 12-18. See also Benchmark Memorandum (Panel Exhibit CHN-20), pp. 26-27 (analysing SIE producer prices); p. 30 (analysing private producer prices). The USDOC found, based on its analysis in the Benchmark Memorandum, that "'{t}his government intervention ... so distorts and diminishes the impact of market signals that, based on the record in these proceedings, all domestic private {steel} prices', as well as SIE prices, are distorted." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 15 (quoting Benchmark Memorandum (Panel Exhibit CHN-20), p. 30))

<sup>601</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 18.

<sup>602</sup> Final Benchmark Determination (Panel Exhibit CHN-21), pp. 15 and 17.

possible.<sup>603</sup> The USDOC relied on these findings in the Final Benchmark Determination in stating, *inter alia*, that arguments regarding the market share of SIEs, "although important to our overall market distortion analysis, [are] no longer central to our finding".<sup>604</sup> It then recalled its earlier finding that prices of all Chinese steel producers were distorted and, therefore, found it not necessary to carry out an analysis of whether the prices of private and government providers align.<sup>605</sup> However, above we agreed with the Panel that the USDOC did not provide a reasoned and adequate explanation of how pervasive government intervention distorted prices in the input markets subject to its determinations and in its analysis and determinations did not engage sufficiently with the price data on the record, which appeared on its face relevant to the analysis of price distortion and was specific to the three inputs at issue. Therefore, the USDOC's prior conclusion as to the existence of price distortion in the entire steel sector based on pervasive government intervention in the Benchmark Memorandum could not, in itself, constitute a sufficient basis for rejecting the relevance of the Mysteel data.

5.189. In addition, the USDOC considered that "neither the available record evidence" "nor the **evidence on prices likely to be available ... is likely to provide additional probative insight** on the question of whether private suppliers have aligned their prices with the prices charged by predominant government input providers."<sup>606</sup> It was in this context that the USDOC referred to the price evidence before it and indicated that it was only limited, in particular because most data, including the Mysteel prices, did not distinguish between SIEs and private suppliers.<sup>607</sup> The USDOC thus considered that it would not be possible to conduct an analysis of whether private prices aligned with SIE prices in the absence of sufficient data distinguishing between these two sets of prices. We have noted that an investigating authority is not required to adopt any particular methodology in assessing whether prices are actually distorted so as to justify recourse to out-of-country prices.<sup>608</sup> However, as noted above, although the rationale of the Ordo Report and the associated Mysteel pricing data were different from the approach adopted by the USDOC in the Benchmark Memorandum, these indicia related to the steel sector and the relevant input markets.<sup>609</sup> As such, they constituted pertinent information that could potentially call into question the USDOC's finding that all in-country prices, including private prices of the inputs at issue, were distorted. Therefore, we see no reason to disagree with the Panel that "[g]iven that 'proper benchmark prices may be drawn from a variety of potential sources, including private or government-related entities', 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." Nevertheless, as the Panel observed, "[t]here is nothing on the record of the investigations to suggest that the USDOC

<sup>603</sup> See Benchmark Memorandum (Panel Exhibit CHN-20), pp. 26-27 (analysing SIE producer prices); p. 30 (analysing private producer prices); Final Benchmark Determination (Panel Exhibit CHN-21), p. 11 et seq.

<sup>604</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 18. The USDOC acknowledged that its "analytical framework differed from that in the original determination", and observed that its original approach was "not the only framework for gauging whether prices are market-determined". As we noted earlier, stating that a framework is not the only one is not a sufficient explanation for not assessing the reasoning adopted by the investigating authority in light of that alternative framework.

<sup>605</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 19.

<sup>606</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 19. The USDOC also noted why it considered it unlikely that it would obtain sufficient probative information and stated that it did "not expect that in most cases it would be able to gather pricing data for a market as a whole that distinguishes between the prices of SIE providers and private entities" or that samples would be representative. (Ibid., p. 20)

<sup>607</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 20.

<sup>608</sup> The USDOC stated that "based on the totality of circumstances present in the Chinese steel sector, we find it is not necessary to conduct an analysis of whether the prices of government and private providers align due to the market power of the government providers." The USDOC then added that "[n]onetheless, for the purposes of these Section 129 proceedings we have reviewed the available record information with a view towards whether it might be possible to analyze whether SIE market dominance has caused price alignment in the context of a CVD proceeding." However, the USDOC concluded that "neither the available record evidence on prices in these three proceedings nor the evidence on prices likely to be available to an investigating authority is likely to provide additional probative insight on the question of whether private suppliers have aligned their prices with the prices charged by predominant government input providers." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 19)

<sup>609</sup> As argued by China, the Mysteel pricing data reflected the proposition that market factors were responsible for the fluctuations of Chinese steel prices, and the Ordo Report pointed to the fragmented nature of China's steel industry and the existence of private investment and profitability. (China's appellee's submission, paras. 125-131) Albeit put on the record for purposes of demonstrating the absence of price alignment in China's steel sector, this evidence was also relevant in the context of the USDOC's own framework for assessing the existence of price distortion.

considered this possibility, and certainly no explanation of why the information submitted was not relevant in this case, if that was its conclusion."<sup>610</sup>

5.190. As we see it, in addressing the question of whether it would be possible to analyse price alignment, the USDOC dismissed, in the Final Benchmark Determination, the price data on the record largely on the basis of its prior conclusion in the Benchmark Memorandum that all in-country steel prices in China were distorted by government intervention.<sup>611</sup> The United States itself points out that the USDOC considered that "the price survey data from China was not usable because it was already established that the government's prices are not market-determined prices and that, in fact, the government prevents private prices from being determined by market conditions as well."<sup>612</sup> However, the Panel found that, in reaching this prior conclusion, 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.<sup>613</sup> Even though the USDOC might not have "exclude[d] government-related prices automatically"<sup>614</sup> or because of their source, it did not engage in an analysis of whether this pricing data was distorted, or consider whether the data and supporting explanations could have affected its conclusions in the Benchmark Memorandum that *both* government-related and private prices in China's steel sector are distorted, as they applied to the specific inputs at issue. In this regard, as the Panel observed, the United States "dismiss[e]d 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'."<sup>615</sup> It appears that the Panel considered that the USDOC insufficiently explained "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)"<sup>616</sup>, and rejected the relevance of this information mainly because the rationale underlying the Ordoover Report and the Mysteel pricing data were different from the rationale that the USDOC had adopted in the determinations at issue. Thus, for the Panel, the USDOC did not sufficiently engage with record-pricing data and alternative explanations before reaching the conclusion that no in-country prices can be relied upon as benefit benchmarks and that, therefore, the USDOC would continue using the alternative benchmarks from the original investigations.<sup>617</sup>

5.191. The Panel's conclusion is consistent with its earlier finding in paragraph 7.206 of its Report that the USDOC failed to explain how government intervention in the market resulted in price distortion for the inputs at issue. Above, we understood the Panel to have found that the USDOC did not explain how the widespread government interventions described in the Benchmark Memorandum resulted in the distortion of in-country prices in the specific input markets subject to each of the challenged USDOC determinations at issue. Thereafter, in analysing the USDOC's assessment of price evidence on the record, the Panel reviewed whether the USDOC had engaged with the methods, data, explanations, and supporting evidence put forward by interested parties, in order to ensure that its finding of price distortion is supported, and not undermined, by evidence and explanations on the record. The Panel properly assessed whether the USDOC's explanation for its determination is reasoned by critically reviewing whether it provided an adequate explanation of whether and how prices are distorted by government intervention in the relevant markets, and whether it sufficiently addressed the nature and complexities of the evidence on the record, including alternative methods, data, and explanations of that data presented by the interested parties. The Panel considered that the pricing data on the record was "on its face relevant" to the USDOC's analysis and that the USDOC was therefore required to address the pertinence of such information and provide an explanation as

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<sup>610</sup> Panel Report, para. 7.218.

<sup>611</sup> Thus, the USDOC concluded that it "has not conducted a price alignment analysis in this proceeding because [it did] not consider it necessary in light of the Department's finding that the Chinese domestic market for steel is distorted by virtue of the GOC's policy interventions in the sector and other factors". The USDOC further observed that, in any event, it was "unable to reliably undertake such an analysis on the limited records of these investigations", and "it would be very difficult for the Department and interested parties to identify and obtain sufficient evidence to analyze whether SIEs were exercising market power in such a way that they were causing private supplier prices to align with the SIE prices." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 21)

<sup>612</sup> United States' appellant's submission, para. 156.

<sup>613</sup> Panel Report, para. 7.206.

<sup>614</sup> United States' appellant's submission, para. 154.

<sup>615</sup> Panel Report, fn 379 to para. 7.219 (quoting United States' second written submission to the Panel, para. 185; response to Panel question No. 36).

<sup>616</sup> Panel Report, para. 7.219.

<sup>617</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 21. See Benchmark Memorandum (Panel Exhibit CHN-20), pp. 26-27 (analysing SIE producer prices); p. 30 (analysing private producer prices).

to why it does not alter its conclusions. We see no reason to disagree with the Panel that the evidence in the Ordoover Report, as well as the Mysteel data, would have been relevant to the USDOC's analysis of whether in-country prices are distorted. In this regard, the United States contends that "[o]n its own terms, the analysis in the Mysteel report, even if credited as valid, does not disturb the conclusions the USDOC reached in its market analysis", because e.g. "nothing in the report contradicts the USDOC's findings that market entry and exit are prevented or that firm behavior is not consistent with profit-seeking enterprises".<sup>618</sup> However, the USDOC's benchmark determinations in the context of the present proceedings do not provide an explanation as to why its conclusion remains valid in light of this price data. As noted above, it rather appears that the USDOC rejected its relevance mainly because the rationale underlying the Ordoover Report and the Mysteel pricing data were different from the rationale that the USDOC had adopted in the determinations at issue. We are therefore not persuaded that the Panel erred in its application of Article 14(d) in finding that it could not conclude that the USDOC's determination was one that could be reached by a reasonable and objective investigating authority.<sup>619</sup>

5.192. In light of the above, we consider that the Panel did not fail properly to apply Article 14(d) of the SCM Agreement when finding, in paragraphs 7.206 and 7.220 of its Report, 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", and "failed to adequately explain its rejection of in-country prices in light of the evidence before it".

5.193. In a footnote to its Notice of Appeal, the United States notes that it considers the Panel's errors in the context of benefit to be issues of law and legal interpretations. At the same time, the United States observes that, if the Appellate Body were to consider instead that these errors involve issues of fact, then the Appellate Body should find that the Panel failed to make an objective assessment of the matter before it under Article 11 of the DSU.<sup>620</sup> In our analysis above, we have treated the United States' claim on appeal as properly relating to the Panel's interpretation of Article 14(d), as well as its application of this provision to the facts of the present dispute. Leaving aside the question whether the claim under Article 11 was properly made and substantiated, we in any event do not find it necessary to address the United States' arguments relating to Article 11 of the DSU.

5.194. Finally, the United States claims that the Panel's finding of inconsistency with regard to the Solar Panels investigation is incoherent and unsupported by any rationale.<sup>621</sup> The United States takes issue with the Panel's conclusion 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)." <sup>622</sup> The Panel therefore found 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."<sup>623</sup> In its overall conclusion under Articles 1.1(b) and 14(d), however, the Panel found that:

[T]he 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.<sup>624</sup>

5.195. We observe that the Panel's finding in the second sentence of the quote regarding the USDOC's failure to consider price data on the record refers only to the Section 129 proceedings in

<sup>618</sup> United States' appellant's submission, para. 152.

<sup>619</sup> Panel Report, para. 7.220.

<sup>620</sup> United States' Notice of Appeal, fn 7 to para. 4. In response, China contends that "[d]ropping a footnote at the beginning of an appellant submission asking the Appellate Body to recast an entire set of legal arguments as a claim under Article 11 of the DSU, should it be so inclined, is a textbook example of an Article 11 claim that does not 'stand by itself'." (China's appellee's submission, para. 166 (quoting Appellate Body Report, *Peru – Agricultural Products*, para. 5.66) (emphasis original))

<sup>621</sup> United States' appellant's submission, para. 145.

<sup>622</sup> Panel Report, para. 7.222.

<sup>623</sup> Panel Report, para. 7.222.

<sup>624</sup> Panel Report, para. 7.223. (italics original; underlining added)



the Pressure Pipe, Line Pipe, and OCTG investigations. By contrast, the Panel finding in the first sentence regarding the USDOC's failure to explain how government intervention resulted in price distortion covers all four proceedings, including the Solar Panels investigation. Therefore, the Panel's finding of inconsistency with respect to the Solar Panels investigation was based on its earlier finding 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."<sup>625</sup> In other words, the Panel's conclusion follows from its separate analyses of whether: (i) the USDOC's factual findings support the conclusion that in-country prices in China are not "market-determined"; and (ii) the USDOC disregarded evidence regarding prices for the inputs at issue.<sup>626</sup> As noted above, the Panel considered that absent from the USDOC's analysis was an assessment of how the various government interventions, taken together, actually resulted in distortion of in-country prices in China's steel market, and specifically the input markets at issue, such that these prices could not be used to determine adequacy of remuneration. We observed that the Panel's analysis of the determinations led it to conclude that the USDOC did not provide a reasoned and adequate explanation in reaching its conclusion that government interventions in China's steel market have resulted in price distortion in the specific input markets.<sup>627</sup>

5.196. In this light, we understand that, in its subsequent analysis of whether the USDOC disregarded evidence regarding prices for the inputs at issue, the Panel found that there was no relevant price information on the record of the Solar Panels investigation and, thus, the USDOC could not have erred in disregarding price evidence on the record submitted by the GOC. This, however, did not undermine the Panel's earlier conclusions that the USDOC did not provide "a reasoned and adequate explanation for its determinations that in-country prices for ... polysilicon (Solar Panels) were distorted as a result of pervasive government intervention in the Chinese domestic markets for these inputs", and that it "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".<sup>628</sup> Specifically, even though there was no price evidence on the record of the Solar Panels investigation that should have been taken into account by the USDOC, the Panel found that, in its earlier analysis, the USDOC failed to explain how government intervention in the market resulted in price distortion also with respect to this investigation.

### 5.3.3.3 Conclusion

5.197. The specific type of analysis that an investigating authority must conduct for purposes of arriving at a proper benchmark under Article 14(d) of the SCM Agreement, as well as the types and amount of evidence that would be considered sufficient in this regard, will necessarily vary depending upon a number of factors in the circumstances of the particular case. However, in all cases, it has to be established that price distortion actually results from government intervention and it has to be adequately explained by the investigating authority in its report. There may be different ways to demonstrate that prices are actually distorted, such as a quantitative assessment, price comparison methodology, or a counterfactual analysis. Depending on the circumstances, a qualitative analysis may also appropriately establish how government intervention actually results in price distortion, provided that it is adequately explained. While evidence of direct impact of the government intervention on prices may be probative and make the finding of price distortion likely, evidence of indirect impact may also be relevant. At the same time, establishing the nexus between such indirect impact of government intervention and price distortion may require more detailed analysis and explanation of how prices have been distorted as a result of such indirect impact of the government intervention. Independently of the method chosen by the investigating authority, it has to adequately take into account the arguments and evidence supplied by the petitioners and respondents, together with all other information on the record, so that its determination of how prices in the specific markets at issue are in fact distorted as a result of government intervention would be based on positive evidence. In turn, it is the role of panels to assess whether the investigating authority's explanation for its determination is reasoned and adequate by critically reviewing that explanation, in depth, and in light of the facts and explanations presented by the interested parties.

<sup>625</sup> Panel Report, para. 7.206. (emphasis original)

<sup>626</sup> See Panel Report, sections 7.3.3.3.2-7.3.3.3.3.

<sup>627</sup> Panel Report, para. 7.206.

<sup>628</sup> See Panel Report, para. 7.206.

5.198. We do not consider that the statement "[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 governmental intervention in the market" in paragraph 4.155 of *US – Carbon Steel (India)* constitutes merely an example of a situation when prices might not be market-determined, as the United States seems to suggest. Instead, it forms part of the Appellate Body's interpretation of Article 14(d) in that dispute and reflects the understanding that the investigating authority needs to provide a reasoned and adequate explanation as to whether prices are market-determined or how they are distorted as a result of government intervention. We further agree with the Panel's conclusion that "[a]n 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", insofar as it clarifies that the investigating authority has to make a finding of price distortion resulting from government intervention. In sum, we do not see that the Panel required one single type of quantitative or price comparison analysis in all cases. We therefore find that the Panel did not err in its interpretation of Article 14(d).

5.199. Under the applicable standard of review, the Panel reviewed whether the USDOC had provided, in its written determinations, a reasoned and adequate explanation of how the evidence on the record actually established the existence of price distortion in the market of the inputs at issue as a result of government intervention and how this explanation supported its decision to have recourse to out-of-country prices. Specifically, the Panel's task was to review whether, in light of the evidence and arguments submitted by the parties, and the rationale underlying plausible alternative explanations, the approach ultimately adopted by the USDOC in its determinations, and the conclusions drawn from the evidence it relied upon, remain adequate and sufficiently substantiated also in light of those alternative data and explanations.

5.200. With respect to the Panel's finding, in paragraph 7.206 of its Report, 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", we understand the Panel to have rejected as insufficient and problematic the USDOC's determination that prices in the entire steel and solar grade polysilicon sectors in China cannot be used as benefit benchmarks in the absence of a specific assessment of how government intervention had resulted in price distortion in the four input markets at issue. Furthermore, we understand the Panel to have been concerned with the focus of the USDOC's analysis in the Benchmark Memorandum on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, rather than on *how* specifically this involvement influenced pricing decisions regarding the inputs at issue and resulted in price distortion with respect to the determinations at hand. Therefore, as we see it, the Panel's analysis of the determinations at issue led it to conclude that the USDOC did not provide a reasoned and adequate explanation of how the widespread government interventions described in the Benchmark Memorandum resulted in the distortion of in-country prices in the specific input markets and regarding the specific products subject to each of the challenged USDOC determinations at issue.

5.201. With respect to the Panel's finding, in paragraph 7.220 of its Report, that "the USDOC failed to adequately explain its rejection of in-country prices in light of the evidence before it", we understand the Panel to have considered that the USDOC's rejection of in-country prices was merely consequential to its findings of market distortion in the steel sector generally, which the Panel considered not to provide a reasoned and adequate explanation of how government intervention resulted in price distortion. Furthermore, although the focus of the USDOC's analysis in the Benchmark Memorandum was different from the one underlying the Ordovery Report, the alternative explanations and pricing data on the record may have nevertheless been relevant for examining whether price distortion actually existed in the input markets at issue. Yet, the USDOC determinations do not explain why, in light of the price data and alternative explanations, the conclusion it reached for the entire steel sector necessarily applies to all specific input markets. In addition, the USDOC drew an overall inference of price distortion with respect to all input markets from its conclusions that the decision-making process of SIEs in China in general and in the steel sector as a whole was distorted by government intervention. However, it would have been relevant for the USDOC to take into account in its analysis the input-specific Mysteel pricing data on the record and examine the extent to which it affected its conclusions of price distortion. Finally, in assessing whether it would be possible to conduct an analysis of price alignment in the Final Benchmark Determination, the USDOC dismissed the price data on the record largely on the basis of its prior conclusion that all in-country steel prices in China were distorted by government intervention. However, the USDOC's prior conclusion as to the existence of price distortion in the

entire steel sector based on pervasive government intervention in the Benchmark Memorandum could not, in itself, constitute a sufficient basis for rejecting the relevance of the Mysteel data.

5.202. With respect to the Solar Panels investigation, we understand that, in its analysis of whether the USDOC disregarded evidence regarding prices for the inputs at issue, the Panel found that there was no relevant price information on the record of the Solar Panels investigation and, thus, the USDOC could not have erred in disregarding price evidence on the record submitted by the GOC. This, however, did not undermine the Panel's earlier conclusions that the USDOC did not provide a reasoned and adequate explanation for its determinations that in-country prices for polysilicon were distorted as a result of pervasive government intervention in the Chinese domestic market for this input.

5.203. We therefore find that the United States has not established that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement in finding 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. In addition, we find that the United States has not established that the Panel erred in finding that, in the Section 129 proceedings on Pressure Pipe, Line Pipe, and OCTG, the USDOC failed to consider price data on the record. We consequently uphold the Panel's findings, in paragraphs 7.223-7.224 and 8.1(c) of its Report, 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.

#### 5.4 Article 2.1(c) of the SCM Agreement

5.204. Based on its reading of Article 2.1(c) of the SCM Agreement, and its review of the USDOC's reasoning and analysis, the Panel found "that the United States did not comply with the requirement 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."<sup>629</sup> Accordingly, the Panel concluded that China had demonstrated that the United States had acted inconsistently with Article 2.1(c) 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.<sup>630</sup>

5.205. The United States appeals the Panel's finding on two main grounds. First, the United States takes issue with the fact that the Panel based its finding on its view that the USDOC failed to "adequately explain" its conclusions regarding the existence of the subsidy programmes that were subject to its investigations. The United States submits in essence that there were no findings by the original panel or the Appellate Body on this matter, and consequently no recommendations and rulings by the DSB requiring the United States to take implementation action in this regard.<sup>631</sup>

5.206. Second, the United States contends that the Panel improperly interpreted Article 2.1(c) to require the USDOC to identify a "systematic subsidy programme" consisting "entirely of acts of subsidization", where each provision of an input by the government confers a benefit to the recipient.<sup>632</sup> Referring to statements made by the Appellate Body in the original proceedings, the United States maintains there is no requirement to demonstrate that subsidization is "systematic" in nature.<sup>633</sup> The United States further submits that the Panel's erroneous reading of Article 2.1(c) led it to disregard reasoning and analysis provided by the USDOC that was "directly responsive" to the compliance Panel's concerns regarding the existence of the relevant "subsidy programmes".<sup>634</sup>

<sup>629</sup> Panel Report, para. 7.292.

<sup>630</sup> Panel Report, paras. 7.293 and 8.1(e). Having found that the USDOC did not "adequately explain its conclusions" regarding the existence of the relevant subsidy programmes, the Panel found it unnecessary, 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". (Ibid., paras. 7.291-7.292)

<sup>631</sup> United States' appellant's submission, para. 173. The United States submits, in its appellant's submission, that "the compliance Panel's examination improperly considered the consistency of the measures taken to comply with a provision of Article 2.1(c) of the SCM Agreement that was not included among the recommendations and rulings of the DSB." (United States' appellant's submission, subtitle of section IV.B)

<sup>632</sup> United States' appellant's submission, para. 193.

<sup>633</sup> United States' appellant's submission, paras. 174 and 193-194 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143).

<sup>634</sup> United States' appellant's submission, paras. 201-202.

We address these issues in turn, beginning with the United States' appeal insofar as it concerns the scope of recommendations and rulings by the DSB and the basis for the compliance Panel's findings.

5.207. For its part, China argues that for the USDOC to properly take into account the "duration" of the subsidy programme, as required by the third sentence of Article 2.1(c), it had first to identify and substantiate the relevant subsidy programme.<sup>635</sup> According to China, a proper analysis under *both* the second *and* the third sentences of Article 2.1(c) requires identification of "the existence, content and scope of the subsidy programme".<sup>636</sup> China further submits that the Panel rightly found that an investigating authority is required to establish (i) "a subsidy" and (ii) "a programme" and that (iii) the subsidy is granted "pursuant to" a programme, in order to prove the existence of a subsidy programme.<sup>637</sup> China further maintains that "throughout this dispute, the United States has *never* demonstrated that the inputs at issue are produced and provided to industrial users at subsidized prices under the instruction, guidance or intervention of the Chinese government."<sup>638</sup>

#### 5.4.1 Whether the Panel erred by assessing if the USDOC had sufficiently identified the relevant subsidy programmes

5.208. Referring to the recommendations and rulings of the DSB in the original proceedings, the United States argues that neither the panel nor the Appellate Body made findings of inconsistency regarding the "existence of a subsidy programme" when presented with that issue in this dispute. Consequently, according to the United States, "that issue was not among those covered by the DSB's recommendations and rulings" and it was not "an appropriate basis upon which to assess the consistency of the measures with Article 2.1(c), third sentence – the only aspect of Article 2.1(c) that is found in the recommendations and rulings of the DSB".<sup>639</sup> The United States adds that the obligation to take into account the length of time during which the relevant subsidy programmes had been in operation is distinct from the obligation to identify the underlying subsidy programmes, and that the Panel erred by conflating the two.<sup>640</sup>

5.209. China counters that for the USDOC to properly take into account the "duration" of the subsidy programme, as required pursuant to the recommendations and rulings of the DSB, it was first required to identify and substantiate the relevant subsidy programmes.<sup>641</sup> China therefore agrees with the Panel that "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."<sup>642</sup> China further submits that Article 2.1(c) contemplates a "single, holistic *de facto* specificity inquiry" rather than "a three-step analysis, with each sentence serving its own distinct, separable 'function'"<sup>643</sup>, and that a proper analysis under *both* the second *and* the third sentences of Article 2.1(c) requires identification of "the existence, content and scope of the subsidy programme".<sup>644</sup>

5.210. As this aspect of the United States' appeal relates to the basis for the compliance Panel's findings under Article 2.1(c), we consider it useful to begin by recalling the relevant findings made by the original panel and the Appellate Body. Indeed, the original panel determined that "the USDOC acted inconsistently with the obligations of the United States under the last sentence of Article 2.1(c) of the SCM Agreement by failing to take account of the two factors listed therein [that is, duration and economic diversification] when making the relevant specificity determinations."<sup>645</sup> This finding was not appealed, and, consequently, was not reviewed by the Appellate Body. The original panel also made another finding under Article 2.1(c), which was appealed – not by the United States, but by China. It concerned the USDOC's identification of the relevant subsidy programme. The original panel found that the "consistent provision" by the relevant SIEs of inputs for less than adequate remuneration provided a sufficient basis for the USDOC's identification of the relevant "subsidy

<sup>635</sup> China's appellee's submission, para. 171.

<sup>636</sup> China's appellee's submission, para. 180.

<sup>637</sup> China's appellee's submission, para. 189.

<sup>638</sup> China's appellee's submission, para. 201. (emphasis original)

<sup>639</sup> United States' appellant's submission, para. 173.

<sup>640</sup> See United States' appellant's submission, paras. 187-190.

<sup>641</sup> China's appellee's submission, para. 171.

<sup>642</sup> China's appellee's submission, para. 169 (quoting Panel Report, para. 7.291).

<sup>643</sup> China's appellee's submission, para. 179.

<sup>644</sup> China's appellee's submission, para. 180.

<sup>645</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.257.

programmes" for the purpose of carrying out a specificity analysis under Article 2.1(c).<sup>646</sup> The Appellate Body agreed that, in the absence of any written instrument or explicit pronouncement, evidence of a "systematic activity or series of activities" may provide a sufficient basis to establish the existence of a subsidy programme.<sup>647</sup> However, the Appellate Body found it "troubling" that the panel did not provide any "case-specific discussion or references to the USDOC's determinations of specificity challenged by China", and reversed the original panel's findings on those grounds.<sup>648</sup> The Appellate Body declined to complete the analysis regarding whether the "USDOC sufficiently identified and substantiated the existence of a 'subsidy programme' in each of the determinations at issue"<sup>649</sup> given that the panel had, in any event, found the USDOC's determinations to be inconsistent with Article 2.1(c) on other grounds, as described above.

5.211. It is apparent, therefore, that the issue of whether the USDOC had properly identified the relevant subsidy programmes was left unresolved in the original proceedings. As there was no ruling on the merits of the claim raised by China regarding the USDOC's identification of the underlying subsidy programmes, we see no reason why China would have been precluded from reasserting it here in these compliance proceedings, as a basis for its contention that the United States was in breach of its obligations under Article 2.1(c). Indeed, in *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body found that Article 21.5 panels are not merely called upon to assess whether the Member concerned has implemented the specific recommendations and rulings adopted by the DSB in the original dispute.<sup>650</sup> Rather, a complainant in Article 21.5 proceedings might well even raise new claims, arguments, and factual circumstances different from those raised in the original proceedings, insofar as it considers that a "measure taken to comply" is inconsistent with WTO obligations in ways different from the original measure.<sup>651</sup> Here, in fact, the arguments that China raised to support its claim under Article 2.1(c) are largely the same as the arguments it raised in the original proceedings, where it also alleged that the USDOC had failed to sufficiently identify and substantiate the relevant subsidy programmes for purposes of its *de facto* specificity analysis.

5.212. We further note that, in its panel request in these compliance proceedings, China claimed that the USDOC did not properly identify the existence of the relevant "subsidy programmes" and thus had no basis to evaluate the length of time during which they had been in operation.<sup>652</sup> For China, the question before the Panel was "*not* limited to determining whether the USDOC properly took into account the length of time during which a 'subsidy programme' has been in operation", but also concerned "whether the USDOC identified and substantiated the relevant 'subsidy programmes' under the correct legal standard".<sup>653</sup> The United States did not invoke procedural grounds to object to the Panel's examination of these arguments. Instead, it engaged with their merits, asserting that the USDOC had sufficiently identified the relevant subsidy programmes.<sup>654</sup> We find it difficult to agree with the United States when it now faults the Panel for having engaged with China's arguments regarding the USDOC's alleged failure to identify the underlying subsidy programmes as a basis for its analysis of China's claims under Article 2.1(c).

5.213. This brings us to the question of whether an investigating authority can be found to have *complied* with the requirement under Article 2.1(c) to consider the length of time during which a subsidy programme has been in operation if it has failed to properly determine the existence of the

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<sup>646</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.243.

<sup>647</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.149.

<sup>648</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.151.

<sup>649</sup> See Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.156-4.157.

<sup>650</sup> See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 40.

<sup>651</sup> See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

<sup>652</sup> See China's panel request, para. 21.

<sup>653</sup> China's response to Panel question No. 39, para. 181. (emphasis original)

<sup>654</sup> Before the Panel, the United States argued, for example, that "in conducting its redetermination for each of the inputs at issue, the USDOC identified a series of systematic activities that demonstrate the existence of a subsidy program." (United States' first written submission to the Panel, para. 286) The United States further noted, in its second written submission to the Panel, China's claim that "the USDOC (1) did not identify a 'subsidy programme' pursuant to which the subsidized inputs were provided and (2) did not adequately take account of the length of time the relevant subsidy programs have been in operation" and then proceeded to "address each claim in turn". (United States' second written submission to the Panel, para. 225)

underlying subsidy programme in the first place.<sup>655</sup> The United States argues in this regard that the obligation to identify a subsidy programme "arises under the second sentence of Article 2.1(c)" and is distinct from the obligation to consider the duration of a subsidy programme, which already assumes that the relevant subsidy programme has been properly identified.<sup>656</sup>

5.214. We agree with the United States that the requirement under the third sentence of Article 2.1(c) to consider "the length of time during which the subsidy programme has been in operation" contemplates that the relevant subsidy programme is known.<sup>657</sup> Contrary to what the United States suggests, this does not mean, however, that an investigating authority can be found to have *complied* with the requirement under Article 2.1(c) to consider the length of time during which a subsidy programme has been in operation *regardless* of whether it has properly identified a subsidy programme in the first place. Indeed, consideration of the duration of a subsidy programme would seem to presuppose that the relevant programme has been properly identified. Thus, where an investigating authority makes a finding of *de facto* specificity based on an analysis of whether there has been "use of a subsidy programme by a limited number of certain enterprises", the requirement to establish the existence of a subsidy programme is part and parcel of the obligation, arising under the third sentence of Article 2.1(c), to take into account the time during which the subsidy programme has been in operation.

5.215. For all of these reasons, we disagree with the United States that the Panel was required to *limit* its review to the USDOC's examination of the "duration" of the relevant subsidy programmes, without considering whether the USDOC had properly identified relevant subsidy programmes either in the context of the original investigations or in the context of the Section 129 proceedings where the USDOC made findings concerning the duration of the underlying subsidy programmes and economic diversification.

5.216. We turn next to assess whether the Panel erred in finding that the USDOC had not identified, for purposes of its specificity analysis, the "subsidy programmes" that were the subject of its investigations in the underlying countervailing duty proceedings.

#### 5.4.2 Whether the Panel erred in its interpretation and application of Article 2.1(c) of the SCM Agreement

##### 5.4.2.1 The Panel's findings

5.217. Before the Panel, China claimed that the USDOC's *de facto* specificity determinations in 11 of the contested Section 129 determinations were *inconsistent* with Article 2.1(c) of the SCM Agreement because the USDOC "failed to identify a 'plan or scheme' pursuant to which the subsidies at issue had been provided".<sup>658</sup> The United States countered 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."<sup>659</sup>

5.218. In light of the disagreement between the parties as to what must be demonstrated "to establish the existence of an unwritten subsidy programme", the Panel saw as its task to address whether an investigating authority is required to show that subsidies (i.e. financial contributions conferring a benefit) are systematically granted as part of a subsidy programme, or whether the systematic granting of a financial contribution will suffice to identify a subsidy programme.<sup>660</sup> Referring to Appellate Body findings made in the original proceedings, the Panel understood the

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<sup>655</sup> The first sentence of Article 2.1(c) states 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." In turn, the second sentence of Article 2.1(c) identifies four such factors, including "use of a subsidy programme by a limited number of certain enterprises", which is the factor on which the USDOC based its specificity findings in the present case.

<sup>656</sup> United States' appellant's submission, para. 187.

<sup>657</sup> United States' appellant's submission, para. 185.

<sup>658</sup> Panel Report, para. 7.251 (referring to China's first written submission to the Panel, paras. 320-322; second written submission to the Panel, paras. 199-201).

<sup>659</sup> Panel Report, para. 7.252 (referring to United States' second written submission to the Panel, para. 233).

<sup>660</sup> Panel Report, para. 7.263.

Appellate Body to have distinguished "the 'systematic series of actions' demonstrating a programme from the mere grant of financial contributions to the recipients".<sup>661</sup> As noted by the Panel, 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."<sup>662</sup> Consequently, "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."<sup>663</sup> The Panel found, in this regard, 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."<sup>664</sup>

5.219. Turning to the USDOC's analysis, the Panel noted that, as part of its Section 129 proceedings, the USDOC had "revisited" its specificity determinations, and had explained its "preliminary analysis of the diversification of economic activities and length of time".<sup>665</sup> The Panel identified as the "key question" in this case "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".<sup>666</sup> However, the Panel did "not find any explanation on the USDOC record as to how the information on the record 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".<sup>667</sup> In particular, the Panel considered that, while the USDOC's Input Specificity Memorandum, prepared in the context of the relevant Section 129 proceedings, "designate[d] certain information as an 'example of systematic activity' (or 'series of activities')", there was "no explanation as to how such information (dealing with the number of transactions between input producers and respondents) inform[ed] the existence or nature of the relevant subsidy programme".<sup>668</sup> The Panel added that "while the information before the USDOC clearly indicate[d] *repeated* transactions, it [was] unclear on what basis the USDOC [had] concluded that these transactions were conducted pursuant to a plan or scheme of some kind."<sup>669</sup> The Panel further noted that the USDOC had, in the course of its investigation, 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*".<sup>670</sup> However, the Panel considered that the USDOC's findings with respect to the existence of the relevant subsidy programmes "as part of its *de facto* specificity analysis" did not appear to rely on such evidence, or on "information regarding how long the relevant inputs have been produced and sold in China".<sup>671</sup> The Panel further noted that the United States had referred, in the panel proceedings, to the "systematic provision of inputs for nearly 50 years" and "a regularized and well-planned series of actions"<sup>672</sup>, "a program of action" according to which those inputs were provided<sup>673</sup>, and the potential relevance of the operation of "policy mandates" or "actions by which China provided the inputs in question".<sup>674</sup> However, the Panel said it did "not find any such explanations in the investigating authority's determinations", and recalled that "an investigating authority's determinations may not be justified by an *ex post* rationale."<sup>675</sup> The Panel found therefore that the United States had not complied with the requirement in Article 2.1(c) to "take account of the length of time during which the subsidy programme has been in operation" because the USDOC

<sup>661</sup> Panel Report, para. 7.266.

<sup>662</sup> Panel Report, para. 7.266.

<sup>663</sup> Panel Report, para. 7.266.

<sup>664</sup> Panel Report, para. 7.267.

<sup>665</sup> Panel Report, para. 7.275 (quoting Input Specificity Memorandum (Panel Exhibit CHN-23)).

<sup>666</sup> Panel Report, para. 7.286.

<sup>667</sup> Panel Report, para. 7.287. (emphasis original)

<sup>668</sup> Panel Report, para. 7.287.

<sup>669</sup> Panel Report, para. 7.288. (emphasis original)

<sup>670</sup> Panel Report, para. 7.289 (quoting Input Specificity Memorandum (Panel Exhibit CHN-23), p. 6). (emphasis original)

<sup>671</sup> Panel Report, para. 7.289.

<sup>672</sup> Panel Report, para. 7.290 (quoting United States' opening statement at the Panel meeting, para. 39).

<sup>673</sup> Panel Report, para. 7.290 (quoting United States' response to Panel question No. 45, para. 216).

<sup>674</sup> Panel Report, para. 7.290 (quoting United States' comments on China's response to Panel question No. 43, para. 146).

<sup>675</sup> Panel Report, para. 7.290 (referring to Appellate Body Reports, *US – Tyres (China)*, para. 329; *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).



had "failed to adequately explain its conclusions regarding the existence of the relevant subsidy programme".<sup>676</sup>

#### 5.4.2.2 Claims and arguments on appeal

5.220. Referring to the Appellate Body's findings in the original dispute, the United States submits that the term "subsidy programme" in Article 2.1(c) refers to a systematic series of actions pursuant to which subsidies are provided to certain enterprises.<sup>677</sup> For the United States, it is this "systematic" series of actions that *constitutes* the relevant "subsidy programme", and the compliance Panel erred "to the extent it interpreted the obligation in Article 2.1(c) as a requirement to demonstrate 'systematic' subsidization".<sup>678</sup> The United States further argues that, insofar as "subsidies are provided by means of inputs for less than adequate remuneration", the manufacture and provision of the inputs to the recipient by a public body are "precisely the 'systematic series of actions' that constitutes this variety of subsidy program".<sup>679</sup> According to the United States, the Panel should therefore have considered evidence regarding "the systematic series of actions demonstrated by the manner in which the subsidies were provided"<sup>680</sup>, including the USDOC's finding that the input producers at issue are public bodies, and that those inputs were "covered by an industrial plan to carry out sector-specific goals".<sup>681</sup> The United States adds that "the nature of the USDOC's findings was plain: the USDOC identified a 'systematic activity or series of actions' in the repeated provision of the inputs at issue by public bodies."<sup>682</sup>

5.221. For its part, China agrees with the Panel that, in order to establish the existence of a "subsidy programme" for purposes of Article 2.1(c), an investigating authority is required to establish (i) "a subsidy", (ii) "a programme", and that (iii) the subsidy is granted "pursuant to" a programme.<sup>683</sup> In China's view, the Panel rightly found that the USDOC failed to demonstrate how the evidence before the USDOC supported "its factual findings of systematic activity", and how those findings in turn supported the USDOC's "determination regarding the existence of an unwritten subsidy programme and the *de facto* specificity of the relevant subsidies".<sup>684</sup> China adds that, in any event, the USDOC did not rely on the same facts in the context of its specificity analysis as in the context of its public body and benefit analyses. Instead, it treated these issues as separate<sup>685</sup> and relied only on "input purchase information" to support its specificity determinations.<sup>686</sup> China further underscores that, insofar as the United States considers that the Panel erred by failing to "consider evidence that was relevant on its face"<sup>687</sup>, it should have brought a claim under Article 11 of the DSU – which is not the case here.

5.222. In its third participant's submission, the European Union submits that the term "subsidy programme" in Article 2.1(c) should be read in a way that "gives due recognition to the reality that 'subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit'".<sup>688</sup> For the European Union, the Panel should have assessed whether "financial contributions" that confer a benefit are "sufficiently systematic on their own so as to constitute adequate evidence of a plan or scheme", and thus a "subsidy programme".<sup>689</sup> Under

<sup>676</sup> Panel Report, para. 7.292.

<sup>677</sup> See United States' appellant's submission, para. 193 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143).

<sup>678</sup> United States' appellant's submission, para. 204.

<sup>679</sup> United States' appellant's submission, para. 195.

<sup>680</sup> United States' appellant's submission, para. 195.

<sup>681</sup> United States' appellant's submission, para. 198 (referring to Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), pp. 16-17). (emphasis omitted)

<sup>682</sup> United States' appellant's submission, para. 203 (referring to Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 19). (emphasis omitted)

<sup>683</sup> China's appellee's submission, para. 189.

<sup>684</sup> China's appellee's submission, para. 195 (quoting Panel Report, para. 7.288).

<sup>685</sup> China's appellee's submission, para. 198.

<sup>686</sup> China's appellee's submission, para. 199.

<sup>687</sup> China's appellee's submission, para. 190 (quoting United States' appellant's submission, section IV.C.2).

<sup>688</sup> European Union's third participant's submission, para. 65 (quoting Panel Report, *US – Countervailing Measures (China)*, para. 7.240).

<sup>689</sup> European Union's third participant's submission, para. 69.



such an approach, "the fact that there are also other financial contributions that do not confer a benefit would not necessarily prevent the existence of a plan or scheme."<sup>690</sup>

5.223. With these considerations in mind, we turn to address the participants' arguments on appeal, beginning with the Panel's reading of the term "subsidy programme" in Article 2.1(c) of the SCM Agreement.

#### 5.4.2.3 Analysis

5.224. We consider it helpful to begin by surveying the main features of the specificity inquiry contemplated under Article 2.1 of the SCM Agreement, before providing a more detailed assessment of discrete requirements of Article 2.1(c), including the significance of the reference to the term "subsidy programme" in that provision.

5.225. The *chapeau* of Article 2.1 of the SCM Agreement establishes that the analysis of specificity is directed at "a subsidy, as defined in paragraph 1 of Article 1". This suggests that an analysis of specificity must be preceded by an assessment of whether a measure involves a financial contribution of the kind listed in Article 1.1(a)(1) or income or price support as referred to in Article 1.1(a)(2), and a benefit is thereby conferred. In turn, the specificity analysis under Article 2 focuses on whether there is a *de jure* or *de facto* limitation on access to the use of the relevant subsidy. The reference to Article 1.1 in Article 1.2, as well as the overall architecture of Articles 1 and 2, suggests a logical order of analysis pursuant to which a finding of specificity can be reached only after the existence of a financial contribution that confers a benefit has been determined. In particular, with respect to *de facto* specificity, the Appellate Body also stated 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."<sup>691</sup>

5.226. Subparagraphs (a) and (b) of Article 2.1 set forth the principles applicable to, respectively, a determination of *de jure* specificity and non-specificity. Article 2.1(a) provides that a subsidy is "specific" if the granting authority, or the legislation pursuant to which the granting authority operates, *explicitly* limits access to that subsidy to eligible enterprises or industries. In turn, Article 2.1(b) stipulates that specificity "shall not exist" if the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, the subsidy, provided that eligibility is automatic, that such criteria or conditions are strictly adhered to, and that they are clearly spelled out in an official document so as to be capable of verification.<sup>692</sup> Article 2.1(a) thus covers explicit limitations on eligibility that favour certain enterprises, whereas Article 2.1(b) describes objective criteria or conditions (which could form part of a subsidy programme, for example) that guard against selective eligibility.<sup>693</sup>

5.227. 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."<sup>694</sup> The focus of Article 2.1(c), the provision at issue here, is on *de facto* limitations of access to the use of a subsidy, even though there is no explicit limitation of access to that subsidy expressed in law.<sup>695</sup>

<sup>690</sup> European Union's third participant's submission, para. 69.

<sup>691</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

<sup>692</sup> Footnote 2 further states that these criteria or conditions must be neutral, do not favour certain enterprises over others, and are economic in nature and horizontal in application, such as the number of employees or size of enterprise.

<sup>693</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.145. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 367.

<sup>694</sup> The second sentence of Article 2.1(c) identifies four such factors: (i) use of a subsidy programme by a limited number of certain enterprises; (ii) predominant use by certain enterprises; (iii) the granting of disproportionately large amounts of subsidy to certain enterprises; and (iv) the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. The third sentence adds that, in examining these factors, diversification of the relevant economy and the "duration" of the relevant "subsidy programme" shall be considered.

<sup>695</sup> See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.145.

5.228. In sum, the specificity inquiry under Article 2 therefore involves a consideration of whether there is a *limitation on access to the relevant subsidy*. Once an investigating authority has established the existence of a subsidy, it may consider whether, despite the appearance of non-specificity under Article 2.1(a) and (b), the subsidy is *de facto* specific, for instance, because a subsidy programme has been used "by a limited number of certain enterprises".<sup>696</sup> In doing so, it must take into account, *inter alia*, the "length of time during which the relevant subsidy programme has been in operation" as contemplated under the third sentence of Article 2.1(c).

5.229. In this appeal, there is no disagreement between the participants that a *de facto* specificity analysis requires the identification of a "subsidy programme". Indeed, both China and the United States referred to the Appellate Body's statement in the original proceedings in this dispute regarding the notion of "subsidy programme" in Article 2.1(c):

The ordinary meaning of the word "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done". The reference to "use of a subsidy programme" suggests that it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind. Evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. A subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises. This is so particularly in the context of Article 2.1(c), where the inquiry focuses on whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in, for example, a law, regulation, or other official document.

...

The mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement. In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a *systematic* series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises.<sup>697</sup>

5.230. Referring to this language from the Appellate Body report in the original proceedings, the Panel understood the Appellate Body to have distinguished "the 'systematic series of actions' demonstrating a programme from the mere grant of financial contributions to the recipients."<sup>698</sup> The Panel found this to be "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'."<sup>699</sup> The Panel further reasoned that the "mere grant of financial contributions is not enough", and that instead those "grants must be in the context of a programme pursuant to which subsidies are granted."<sup>700</sup> On this basis, the Panel found 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."<sup>701</sup>

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<sup>696</sup> This sequence of analysis is important especially in the context of a *de facto* specificity analysis involving the provision of goods within the meaning of Article 1.1(a)(1)(iii) for less than adequate remuneration. If the series of inputs provided by upstream producers of the product under investigation to their downstream customers is defined as the unwritten subsidy programme, then the recipients are by definition a limited number, and *de facto* specificity results almost automatically.

<sup>697</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.141 and 4.143. (emphasis original; fn omitted)

<sup>698</sup> Panel Report, para. 7.266.

<sup>699</sup> Panel Report, para. 7.266 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, fn 674 to para. 4.141).

<sup>700</sup> Panel Report, para. 7.266.

<sup>701</sup> Panel Report, para. 7.266.

5.231. As we see it, the Panel's understanding of the term "subsidy programme" in Article 2.1(c) comports with our own. The Panel correctly observed that, "although evidence of 'a systematic series of actions' may be particularly relevant in the context of an *unwritten programme*, 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)."<sup>702</sup> The Panel's subsequent analysis properly focused on the "key question", that 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".<sup>703</sup> Finally, in its findings, the Panel contrasted the USDOC's failure to explain "*systematic activity ... regarding the existence of an unwritten subsidy programme*" with information before the USDOC merely indicating "*repeated transactions*".<sup>704</sup>

5.232. In light of the above, we disagree with the United States insofar as it argues that the Panel erred in its articulation of the standard to be applied under Article 2.1(c) in identifying the existence of a subsidy programme. In faulting the Panel for having done so, the United States refers to certain statements by the Panel, for example, in paragraphs 7.265-7.267 of its Report, that quote or rely on statements of the Appellate Body from the original proceedings where the Appellate Body interprets Article 2.1(c) and explains how the existence of an unwritten subsidy programme can be established.<sup>705</sup> We disagree with the United States that any of these Panel statements required a demonstration of "systematic subsidization" or a "systematic subsidy programme", nor is it clear to us what the United States meant in imputing such an articulation to the Panel.<sup>706</sup> We note that, referring to the same paragraphs of the Appellate Body report as the Panel did<sup>707</sup>, the United States itself states that "the subsidy in question must be provided 'pursuant to' a series of actions that qualifies as a 'program'"<sup>708</sup> and that the "identification of a plan or scheme pursuant to which the subsidies in question are provided serves a particular purpose" in an analysis of *de facto* specificity.<sup>709</sup>

5.233. Nor do we agree with the United States that the Panel erred in its interpretation of the term "subsidy programme" by reading it to mean a "systematic subsidy programme" consisting "entirely of acts of subsidization" where *each* provision of an input by the government confers a benefit to the recipient.<sup>710</sup> In our view, the United States draws inferences from the Panel's statement it references that the Panel did not make.<sup>711</sup> In this statement, the Panel merely summarizes its understanding of the gist of the parties' positions and disagreements – with which, however, the United States disagrees – before the Panel begins to discuss past Appellate Body pronouncements regarding an unwritten subsidy programme and how its existence can be established. That said, in establishing an unwritten subsidy programme, adequate evidence is required of a *systematic* series of actions pursuant to which financial contributions that *confer a benefit* are provided to certain enterprises.<sup>712</sup> In our view, the Panel correctly assessed whether the USDOC had identified a systematic series of actions evidencing the existence of an unwritten subsidy programme, plan, or scheme "of some kind".<sup>713</sup> This accords with the Appellate Body's statements that, while 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", the reference to "use of a subsidy programme" in Article 2.1(c) suggests that it is relevant to consider "whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind".<sup>714</sup> Particularly where the existence of an unwritten "subsidy programme" is established on the basis of a "series of actions", it is important that the investigating authority properly explain why it considers that series

<sup>702</sup> Panel Report, para. 7.283 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141). (emphasis original; fn omitted)

<sup>703</sup> Panel Report, para. 7.286.

<sup>704</sup> Panel Report, para. 7.288. (emphasis original)

<sup>705</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.141 and 4.143.

<sup>706</sup> United States' appellant's submission, para. 196.

<sup>707</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.141 and 4.143.

<sup>708</sup> United States' appellant's submission, para. 193.

<sup>709</sup> United States' appellant's submission, para. 194. (emphasis omitted)

<sup>710</sup> See United States' appellant's submission, paras. 192-195 (quoting Panel Report, para. 7.263).

<sup>711</sup> Panel Report, para. 7.263.

<sup>712</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

<sup>713</sup> Panel Report, para. 7.288.

<sup>714</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

of actions to be "systematic", so as to evidence the existence of a *de facto* scheme or plan.<sup>715</sup> This avoids that mere repeat action of upstream producers providing inputs to downstream recipients invariably leads to a finding of *de facto* specificity, which would circumvent the legal disciplines of Article 2.1(c). Moreover, the recognition that a *systematic* series of actions may evidence the existence of an *unwritten* subsidy programme avoids that Members that fail to disclose their subsidy programmes or practices, or otherwise adopt less transparent approaches to the provision of subsidies, would be unfairly advantaged compared to Members with more transparent systems that formally publish their programmes.

5.234. That said, we note that the United States further claims that the Panel erred by not considering evidence before the USDOC regarding "the systematic series of actions demonstrated by the manner in which the subsidies were provided"<sup>716</sup>, including the USDOC's finding that the input producers at issue are public bodies, and that those inputs were "covered by an industrial plan to carry out sector-specific goals".<sup>717</sup> According to the United States, this evidence was "directly relevant" to the USDOC's determination of the relevant "subsidy programme", and it should therefore have been considered by the Panel.<sup>718</sup> For its part, China argues that the Panel rightly found that the USDOC failed to show how the evidence supported "its factual findings of systematic activity", and how those findings supported the USDOC's "determination regarding the existence of an unwritten subsidy programme and the *de facto* specificity of the relevant subsidies".<sup>719</sup> China adds that, in any event, the USDOC did not provide any explanation of how that information "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." Nor did the USDOC rely, in its specificity analyses, on the same facts it had relied on in its public body determinations.<sup>720</sup>

5.235. As an initial matter, we note that the United States has not raised a claim under Article 11 of the DSU challenging the objectivity of the Panel's analysis or its failure to consider the totality of the USDOC's reasoning and analysis. In any event, we disagree with the United States to the extent it claims that the Panel's finding under Article 2.1(c) was based on an isolated reading of the USDOC's specificity analysis. Rather, we understand the Panel's concern to have been that the USDOC's reasoning and references to "subsidy programmes" were general in nature and did not sufficiently discuss the steel sector or the provision of the inputs in the context of the specific determinations at issue.

5.236. The Panel found, for example, that the USDOC had failed "to explain how the evidence on the record support[ed] its factual findings of *systematic* activity, and how those factual findings support[ed] its determination regarding the existence of an unwritten subsidy programme and the *de facto* specificity of the relevant subsidies".<sup>721</sup> The Panel added that, "while the information before the USDOC clearly indicate[d] *repeated* transactions, it [was] unclear on what basis the USDOC [had] concluded that these transactions were conducted pursuant to a plan or scheme of some kind."<sup>722</sup>

5.237. In keeping with the applicable standard of review, in the absence of a narrative linking the text of the Section 129 determinations to the original determinations, the Panel did not discuss the USDOC's original determinations or underlying data in detail. While the USDOC had 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*", the Panel observed that the USDOC's findings with respect

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<sup>715</sup> The Appellate Body noted in the original proceedings: "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." (Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141)

<sup>716</sup> United States' appellant's submission, para. 195.

<sup>717</sup> United States' appellant's submission, para. 198 (referring to Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), pp. 16-17). (emphasis omitted)

<sup>718</sup> United States' appellant's submission, para. 201.

<sup>719</sup> China's appellee's submission, para. 195 (quoting Panel Report, para. 7.288).

<sup>720</sup> China's appellee's submission, para. 198.

<sup>721</sup> Panel Report, para. 7.288 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186). (emphasis original)

<sup>722</sup> Panel Report, para. 7.288. (emphasis original)

to the existence of the relevant subsidy programmes did not appear to rely on the evidence.<sup>723</sup> The Panel also concluded that the "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."<sup>724</sup> More specifically, the Panel considered that the USDOC had failed "to explain how the evidence on the record support[ed] its factual findings of *systematic* activity, and how those factual findings support[ed] its determination regarding the existence of an unwritten subsidy programme and the *de facto* specificity of the relevant subsidies".<sup>725</sup>

5.238. As we see it, the Panel rightly focused on the issue of "whether the information relied upon by the USDOC support[ed] its finding of a systematic series of actions evidencing the existence of a plan or scheme pursuant to which subsidies have been provided."<sup>726</sup> Moreover, in its findings, the Panel correctly contrasted the USDOC's failure to explain "*systematic activity ... regarding the existence of an unwritten subsidy programme*" with information before the USDOC merely indicating "*repeated transactions*".<sup>727</sup> It was not for the Panel in this regard "to conduct a *de novo* review of the evidence", or "to *substitute* [its] own conclusions for those of the competent authorities".<sup>728</sup> Rather, it is the *investigating authority* that reviews the submissions and evidence presented by the interested parties, poses questions and collects additional evidence, and draws factual conclusions from that evidence and submissions. It is for the panel to review whether the investigating authority provided a reasoned and adequate explanation of: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination.<sup>729</sup> Importantly, the relevant explanation must be "given by the authority in its published report" and must be "discernible from the published determination itself".<sup>730</sup>

5.239. We note the United States' contention that the Panel should have had regard to the totality of the USDOC's reasoning and analysis in other parts of its determinations and supporting memoranda and should have taken into account the information that was on the record before the USDOC in the Section 129 proceedings.<sup>731</sup> However, it was not for the Panel to rectify the absence of the case-specific analysis and explanations regarding the existence of an unwritten subsidy programme in the challenged determinations by drawing its own inferences regarding specificity from the sections of the USDOC determinations that contain findings on public bodies and benefit benchmarks, or from submissions or evidence on the record relating to the latter issues. The Panel found, in this regard, that "[w]hile the Inputs Memorandum designate[d] certain information as an 'example of systematic activity' (or 'series of activities'), [it found] no explanation as to how such information (dealing with the number of transactions between input producers and respondents) inform[ed] the existence or nature of the relevant subsidy programme."<sup>732</sup> The Panel added that "the USDOC [had] cite[d] such information as evidence that 'public bodies systematically provided' inputs for less than adequate remuneration, without further elaboration."<sup>733</sup> The Panel rightly therefore did "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".<sup>734</sup> Had the Panel itself engaged in an analysis of other parts of the USDOC's determinations, including the original determinations, and information on the USDOC record, for purposes of assessing whether an unwritten subsidy programme exists, it would have substituted its own judgement for that of the investigating authority instead of limiting itself to reviewing the determinations made by that authority.

<sup>723</sup> Panel Report, para. 7.289 (referring to Input Specificity Memorandum (Panel Exhibit CHN-23), p. 6). (emphasis original) The Panel also summarized, in paras. 7.278 through 7.281, the questions the USDOC had posed and answers it had received in these proceedings.

<sup>724</sup> Panel Report, para. 7.289.

<sup>725</sup> Panel Report, para. 7.288 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186). (emphasis original)

<sup>726</sup> Panel Report, para. 7.286.

<sup>727</sup> Panel Report, para. 7.288. (emphasis original)

<sup>728</sup> Appellate Body Report, *US – Lamb*, para. 106. (emphasis original)

<sup>729</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

<sup>730</sup> Appellate Body Reports, *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Tyres (China)*, para. 329 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93); *US – Wheat Gluten*, para. 160.

<sup>731</sup> United States' appellant's submission, paras. 195, 197-198, and 201 (referring to Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), pp. 16-17).

<sup>732</sup> Panel Report, para. 7.287.

<sup>733</sup> Panel Report, para. 7.287.

<sup>734</sup> Panel Report, para. 7.287.

5.240. We further note that it was only during these Article 21.5 Panel proceedings that the United States referred to a "systematic provision of inputs for nearly 50 years" and "a regularized and well-planned series of actions"<sup>735</sup>, "a program of action" according to which those inputs were provided<sup>736</sup>, and the potential relevance of the operation of "policy mandates" or "actions by which China provided the inputs in question".<sup>737</sup> However, the Panel did "not find any such explanations in the investigating authority's determinations", and recalled that "an investigating authority's determinations may not be justified by an *ex post* rationale."<sup>738</sup> Nor do these general programmes or practices, or the USDOC's determination, explain how they relate to the specific products under investigation and determination at issue. In any event, we do not see how generic references to "programs of action" or "policy mandates" could, in themselves, suffice to provide a reasoned and adequate explanation as to the identification of an unwritten subsidy programme.<sup>739</sup>

5.241. We see no error in the Panel's decision to decline considering these arguments by the United States on the basis that they were "not reflected, even implicitly, in the USDOC's explanations with respect to the identification of the relevant subsidy programme".<sup>740</sup> Indeed, "it follows from the requirement that the investigating authority provide a reasoned and adequate explanation for its conclusions, that the underlying rationale behind those conclusions be set out in the investigating authority's determination."<sup>741</sup> Moreover, "[j]ust as a panel must focus in its review on the rationale or explanation provided by the investigating authority in its report, so, too, is the respondent Member precluded during the panel proceedings from offering a new rationale or explanation *ex post* to justify the investigating authority's determination."<sup>742</sup> In the same vein, because a panel's review must focus on the rationale or explanation provided by the investigating authority in its report, it would not have been appropriate for the Panel to have considered whether missing explanations in the redetermination could be complemented with reasoning or evidence<sup>743</sup> contained in the original determinations.<sup>744</sup> For all these reasons, we uphold the Panel's finding, in paragraph 7.293 of its Report, 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.

<sup>735</sup> Panel Report, para. 7.290 (quoting United States' opening statement at the Panel meeting, para. 39).

<sup>736</sup> Panel Report, para. 7.290 (quoting United States' response to Panel question No. 45, para. 216).

<sup>737</sup> Panel Report, para. 7.290 (quoting United States' comments on China's response to Panel question No. 43, para. 146).

<sup>738</sup> Panel Report, para. 7.290 (referring to Appellate Body Reports, *US – Tyres (China)*, para. 329; *US – Countervailing Duty Investigation on DRAMS*, para. 186; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93).

<sup>739</sup> We note that in paragraph 7.290 of its Report, the Panel stated that "[i]n 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."

<sup>740</sup> Panel Report, para. 7.290.

<sup>741</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 159.

<sup>742</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 159 (referring to Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 159 and fn 293 thereto).

<sup>743</sup> We note in this respect that China challenged in the original proceedings the USDOC's specificity analysis including the "subsidy programme" findings. The Appellate Body reversed the panel findings, but this claim was left unresolved since the Appellate Body could not complete the analysis. The original USDOC and panel findings therefore cannot be considered as undisputed for purposes of these Article 21.5 proceedings.

<sup>744</sup> The Panel was "mindful of the requirement to limit [its] examination to the evidence that was before the USDOC during the course of the investigation." It further noted 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*.'" (Panel Report, para. 7.289 (referring to Input Specificity Memorandum (Panel Exhibit CHN-23), p. 6) (emphasis original)) However, the Panel stated that "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." (Ibid.) The Panel also noted that the "underlying documents from the original investigation, for the OCTG and other investigations, [had] not been submitted on the record of these compliance proceedings." (Ibid., fn 449 to para. 7.276 (referring to Input Specificity Memorandum (Panel Exhibit CHN-23), pp. 2-3)) That said, we do not exclude that the investigating authority may, in a Section 129 redetermination for purposes of Article 21.5 proceedings, refer to or incorporate into its reasoning data from the original investigation or findings that were not found to be inconsistent in the original WTO proceedings.

## 5.5 Separate opinion of one Division member

### 5.5.1 Public Body

5.242. I concur with the majority in: (i) rejecting China's interpretation of the term "public body" under Article 1.1.(a)(1) of the SCM Agreement<sup>745</sup>; (ii) upholding the Panel's conclusion that China failed to demonstrate that the USDOC's public body determinations in the relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1)<sup>746</sup>; and (iii) leaving intact the Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).<sup>747</sup>

5.243. But I believe the majority has repeated an unclear and inaccurate statement of the criteria for determining whether an entity is a public body, and I disagree with the majority's implication that a clearer articulation of the criteria is neither warranted nor necessary.

5.244. I believe the continuing lack of clarity as to what is a "public body" represents an instance of undue emphasis on "precedent", which has locked in a flawed interpretation that has grown more confusing with each iteration<sup>748</sup>, as litigants and Appellate Body Divisions repeated the original flaw while trying to navigate around it. That is what I believe the majority has done here.<sup>749</sup>

5.245. The original mistake was the attempt, in *US – Anti-Dumping and Countervailing Duties (China)*, to define the term "public body" as an entity that "possesses, exercises or is vested with governmental authority".<sup>750</sup> Certainly that is *one* way to identify a public body. But it is not the *only* way to give meaning to a concept that must be flexible because it depends for its meaning on specific circumstances. In each subsequent appeal where the issue has been presented, the Appellate Body has treated the phrase "possesses, exercises or is vested with governmental authority" as a necessary element for determining whether an entity is a public body – albeit while adding criteria that seemed to undermine the role of that element.<sup>751</sup> That has sown confusion as participants and the Appellate Body have struggled to show how situational criteria fit with a rigid and limiting phrase.

5.246. This case is the latest example. The participants and third participants all dutifully claimed that their positions fit the "possesses, exercises or is vested with governmental authority" criterion, while differing – sharply in the case of the two participants – in their understanding of what that criterion means. One participant, the United States, expressly asked us to clarify the meaning of the term "public body".<sup>752</sup> For this reason, and for the other reasons given above, I believe a clarification of the criteria for determining whether an entity is a public body is both necessary and warranted.

<sup>745</sup> Para. 5.105 above.

<sup>746</sup> Para. 5.105 above.

<sup>747</sup> Para. 5.126 above.

<sup>748</sup> While past Appellate Body reports may assist in clarifying the meaning of a provision in the context of a given dispute, they are not a substitute for the text that was negotiated and agreed by WTO Members.

<sup>749</sup> Among other things, the majority has restated the following: (i) a public body is an entity that "possesses, exercises or is vested with governmental authority" (para. 5.95 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317)), or has the authority to exercise "governmental functions" (para. 5.96 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318)); (ii) the question of whether an entity is a public body is informed by what conduct or functions "are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", as well as "the classification and functions of entities within WTO Members generally" (para. 5.95 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297)); (iii) governmental exercise of "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 (para. 5.96 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318)); and (iv) the "relevant evidentiary elements" for a public body determination should not be conflated with "the *definition* of a public body" (para. 5.97 above (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37) (emphasis original)).

<sup>750</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

<sup>751</sup> See e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

<sup>752</sup> The United States specifically asked us to "clarify ... the interpretation of the term 'public body'" and to "confirm that a public body is any entity that a government meaningfully controls, such that when the entity conveys economic resources, it is transferring the public's resources." (United States' opening statement at the oral hearing, para. 18)

5.247. The text of Article 1.1(a)(1) does not elaborate on the meaning of the term "public body". The only textual indication is the collective reference to "a government or any public body" as comprising the entity "government", which is the subject of the disciplines of the SCM Agreement. This text does not call for a single, abstract definition or basic criterion for the term "public body". Instead, Article 1.1(a)(1) calls for an examination of whether a transfer of financial value is "by a ... public body" and can therefore be attributed to a government. As I see it, that examination involves an assessment of the relationship between the relevant entity and the government.<sup>753</sup> When that relationship is sufficiently close, the entity in question may be found to be a public body and all of its conduct may be attributed to the relevant Member for purposes of Article 1.1(a)(1). The relationship between an entity and a government may take different forms, depending on the legal and economic environment prevailing in the relevant Member. Certainly, as noted above, an entity may be found to be a public body when it "possesses, exercises or is vested with governmental authority". But that is not, and should not be treated as, *the* essential criterion in every case. In my view, if a government has the ability to control the entity in question and/or its conduct, then the entity could be found to be a public body within the meaning of Article 1.1(a)(1). I do not believe the Appellate Body should elaborate on the meaning of the term "public body" in greater detail. Rather, it should leave space for domestic authorities to apply the criteria described above, and set forth in the paragraph immediately below, provided their decisions meet the requirements of objectivity, reasoned and adequate explanation, and sufficient evidence.

5.248. In the hope of providing clearer guidance to future litigants and panels, and of encouraging them not to feel unduly constrained by past statements on this subject, I offer the following restatement, which incorporates many of the concepts developed by the Appellate Body, while, I believe, clarifying the criteria properly:

Whether an entity is a public body must be determined on a case-by-case basis with due regard being had for the characteristics of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the entity operates. 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. An entity may be found to be a public body when the government has the ability to control that entity and/or its conduct to convey financial value. There is no requirement for an investigating authority to determine in each case whether the investigated entity "possesses, exercises or is vested with governmental authority".

### 5.5.2 Benefit

5.249. I concur with the majority in rejecting China's interpretation of Article 14(d) of the SCM Agreement, including China's claim that circumstances justifying recourse to out-of-country prices are limited to those in which the government "effectively determines" the price at which a good is sold. But I disagree with the majority's decision to uphold the Panel's finding that China 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.

5.250. The relevant part of Article 14(d) provides that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision". It is well settled that this does not require a domestic authority to rely on in-country prices in all circumstances.<sup>754</sup> The Panel and the majority accept this interpretation but fault the USDOC for not providing an "explanation of *how* government intervention *actually* results in price distortion"<sup>755</sup>, thereby, in my view, effectively reading Article 14(d) as imposing an obligation on investigating authorities to always justify recourse to out-of-country prices through a quantitative

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<sup>753</sup> See Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.29; *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

<sup>754</sup> "[A] proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, *under market conditions*, be exchanged", so that "any benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods" that relate to the prevailing market conditions in the country of provision. (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151 (italics original; underlining added))

<sup>755</sup> Para. 5.155 above.



analysis of in-country prices themselves, regardless of whether those prices have already been found to be distorted, including in cases where they have not even been placed on the record.<sup>756</sup>

5.251. The Panel rejected the USDOC's benchmark analysis in each of the four underlying Section 129 proceedings in a single paragraph of the Panel Report, dismissively saying 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"; that "[t]he USDOC *did not even attempt* to provide a reasoned and adequate explanation for its determinations that in-country prices ... were distorted as a result of pervasive government intervention"; and that "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."<sup>757</sup> The majority said it accepted that different methods – including a qualitative analysis – may serve as a basis for a domestic authority to explain how government intervention results in distortion of in-country prices, but in fact, the majority rejected the USDOC's extensive qualitative analysis and wrote an opinion that, in my view, can only be read as requiring a quantitative analysis in all cases involving resort to out-of-country prices.

5.252. Here is what the USDOC did, which the Panel dismissed in three sentences and without any objection from the majority. In its Benchmark Memorandum, the USDOC assessed a number of factors relating to the Government of the People's Republic of China's (GOC's) intervention with state-invested enterprises (SIEs) in general, and in China's steel sector specifically.<sup>758</sup> In particular, the USDOC examined: (i) the involvement of the GOC in the functioning of China's SIEs; (ii) detailed industrial plans directing ministries to reduce the number of firms, and to increase the scale of production; (iii) government control exerted over appointments to the board of directors and corporate positions; (iv) evidence regarding controlled mergers and acquisitions; and (v) bankruptcy prevention and other indicia of government intervention with the functioning of the market. In assessing the functioning of SIEs in the steel sector in particular, the USDOC pointed to the sector's place as a "pillar" industry in which the state retains "somewhat strong influence"; evidence of increasing excess capacity; export restraints; "five-year plans" detailing favoured and unfavoured production scales, investments, technologies, products, and production locations; strict control over investments; control over SIEs' appointment processes; hindered bankruptcy of large SIEs; and preferential access to capital, land, and energy.<sup>759</sup> With respect to the prices of private steel producers in China, the USDOC examined a number of factors, including the SIEs' significant market share, the presence of many SIE steel producers shielded from competitive market forces, export restraints on steel input products, restrictions on foreign investment, and other factors.<sup>760</sup> In addition, in the Supporting Benchmark Memorandum, the USDOC referred to the inadequacy of questionnaire responses leading to an absence of representative price data, and a need to rely, in part, on facts available with respect to the input-specific market analysis of the three steel inputs.<sup>761</sup> In the Final Benchmark Determination, the USDOC additionally explained why it could not carry out a price alignment analysis to further support its explanation that private steel input prices in the underlying proceedings were distorted.<sup>762</sup> Finally, with respect to the Solar Panels investigation and in light of the GOC's failure to respond to the USDOC's request for information, the USDOC relied

<sup>756</sup> In the Solar Panels Section 129 proceeding, the Panel found that there was no relevant information on arm's-length in-country prices of polysilicon in China before the USDOC. (Panel Report, para. 7.222)

<sup>757</sup> Panel Report, para. 7.206. (emphasis added)

<sup>758</sup> See e.g. Panel Report, paras. 7.186-7.188.

<sup>759</sup> Panel Report, paras. 7.186-7.189. See Benchmark Memorandum (Panel Exhibit CHN-20), pp. 6-26.

<sup>760</sup> Panel Report, para. 7.190 (referring to Benchmark Memorandum (Panel Exhibit CHN-20), p. 28). On this basis, the USDOC found that "the evidence on the record demonstrates that these input prices are not based on market conditions within the meaning of Article 14(d) of the SCM Agreement and, as a result, these input prices are inappropriate to use as benchmarks to determine the adequacy of remuneration." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 21)

<sup>761</sup> The USDOC found that "information necessary to an input-specific market analysis is not available on the record, within the meaning of section 776(a)(1) of the Act", given that "the GOC unequivocally responded that it did not possess the information requested by the Department, and because the information supplied is too incomplete to serve as a reliable basis upon which to evaluate the respective input markets as a whole." Therefore, "in addition to, and in the alternative to, [its] determination about the Chinese steel sector as a whole", the USDOC also relied upon "the facts otherwise available, pursuant to section 776(a) of the Act, with regard to the particular steel inputs at issue." (Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 6)

<sup>762</sup> Final Benchmark Determination (Panel Exhibit CHN-21), pp. 20-21.

entirely on facts available.<sup>763</sup> The Benchmark Memorandum and Supporting Benchmark Memorandum, together with the underlying evidence in support of the USDOC's conclusions, ran to hundreds of pages.

5.253. The Panel professed to recognize that the type of benchmark analysis an investigating authority may conduct will vary depending on the circumstances of the case and the characteristics of the relevant market.<sup>764</sup> Yet, somehow, the Panel discarded the entire reasoning and supporting evidence in the Benchmark Memorandum and Supporting Benchmark Memorandum in a single paragraph, characterizing the USDOC's determinations as "not even [an] attempt" to provide an explanation as to why in-country steel prices are not market-determined.<sup>765</sup> And the majority, writing more extensively, upheld the Panel.

5.254. In finding 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"<sup>766</sup> without any assessment of the USDOC's arguments and evidence, the Panel in effect faulted the USDOC for not having further analysed in-country prices, even where it had already found those prices to have been distorted. Why that should have been required in this case is not clear. Provided that it has sufficiently explained why it considers the respective government interventions to have distorted domestic prices, I do not see why the USDOC should have been required to rely on or further analyse such in-country prices in the context of a benchmarking analysis by, for example, comparing in-country prices with a hypothetical market-determined benchmark and finding the existence of a deviation.<sup>767</sup> Indeed, such prices may reflect the very same government interventions that gave rise to the subsidy the USDOC sought to countervail. The Panel does not appear to have recognized this in its review of the USDOC's determinations. Nor, regrettably, have my colleagues. In any event, the result is that the Panel considered the USDOC's analysis and reasoning regarding various types of government interventions and policies affecting prices to be *a priori* insufficient to establish price distortion.

5.255. I believe the Panel and the majority were in error in many ways. Let us look at them in some detail. First, the Panel characterized the USDOC's finding as a mere "outlin[ing of] governmental involvement in the relevant markets".<sup>768</sup> However, the USDOC's analysis led it to conclude that "*the prices of steel produced by China's SIEs in the domestic market cannot be considered to be 'market-determined' for purposes of a benchmark analysis under Article 14(d) of the SCM Agreement.*"<sup>769</sup> Similarly, the USDOC found that "the entire structure of the steel market is distorted by longstanding, systemic and pervasive government intervention, which so diminishes the impact of market signals that, based on the records in these proceedings, *private prices* cannot be considered market based or usable as potential benchmarks."<sup>770</sup> The emphasis of the USDOC's

<sup>763</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), pp. 7-9. See also Final Benchmark Determination (Panel Exhibit CHN-21), p. 21.

<sup>764</sup> Panel Report, para. 7.212.

<sup>765</sup> United States' appellant's submission, para. 116 (quoting Panel Report, para. 7.206). The United States considers that "**only the ... Panel's misunderstanding of the appropriate** approach can explain its characterization of thousands of pages of evidence and analysis as having merely 'outlined government involvement' or its conclusion that the USDOC 'did not even attempt to provide a reasoned and adequate explanation for its determinations'". (Ibid., para. 117 (quoting Panel Report, para. 7.206))

<sup>766</sup> Panel Report, para. 7.206. (emphasis original)

<sup>767</sup> In my view, the second sentence of paragraph 4.155 of the Appellate Body report in *US – Carbon Steel (India)* – that "[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 governmental intervention in the market" – is more accurately described as one circumstance that merits a finding that prices are not market-determined. The sentence that immediately precedes it more appropriately lays out the applicable standard, namely, that "[a]lthough 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." The majority lightly dismissed the United States' argument, noting that the first two sentences of paragraph 4.155 of the Appellate Body report in *US – Carbon Steel (India)* together form part of the interpretation of Article 14(d). However, it does not follow from isolated quotes taken from previous Appellate Body reports that the Panel properly interpreted Article 14(d), rather than reading into that provision a requirement to establish a "deviation" from a market benchmark as a condition for recourse to out-of-country prices.

<sup>768</sup> Panel Report, para. 7.206.

<sup>769</sup> Benchmark Memorandum (Panel Exhibit CHN-20), p. 26. (emphasis added) See also Panel Report, para. 7.189 (referring to Benchmark Memorandum (Panel Exhibit CHN-20), p. 26).

<sup>770</sup> United States' appellant's submission, para. 108 (quoting Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 4). (emphasis added)

analysis in the Benchmark Memorandum was on the extent to which China's SIEs and private actors in the steel sector are insulated from market forces and not responsive to market pressures and disciplines, i.e. on a qualitative assessment of the nature and effects of the various government interventions in the steel market. These government interventions, taken together, are at the very least capable of significantly hampering competition in the market and thereby distorting firms' decision-making process with regard to prices.<sup>771</sup> This conclusion is in line with the understanding that government interventions that do not impact prices directly may distort market conditions to such an extent that prices can no longer be considered as market-determined.<sup>772</sup> Therefore, only a meaningful examination by the Panel of the USDOC's analysis, reasoning, and underlying evidence could allow for a conclusion as to whether or not the USDOC provided in this case a sufficient explanation for its decision to have recourse to out-of-country prices. Yet, the Panel did not carry out any such review of the USDOC's analysis. With respect to the Solar Panels investigation, there is no mention whatsoever of the USDOC's analysis based on adverse facts available or of its conclusion that "the *prices* of polysilicon in China are not based on market conditions."<sup>773</sup> Nevertheless, the Panel's conclusion in paragraph 7.206 of its Report also applies to this determination.

5.256. Significantly, the majority faulted the USDOC for an alleged failure to provide "a sufficient assessment of how the various forms of government interventions, taken individually or together, impacted upon the prices in China's steel market, and specifically the input markets at issue, and how they actually resulted in the distortion of all the SIE and private *prices* of those inputs in those markets, as opposed to more generally distorting the *market*."<sup>774</sup> Where did the majority get this, considering that the Panel did not engage in any such assessment and indeed provided no substantive analysis of the USDOC's reasoning and underlying evidence? Rather than reviewing the Panel's findings to determine whether the Panel had erred in its interpretation and application of Article 14(d), it seems to me that the majority instead engaged in its own review of the USDOC's determinations and, based on that review, upheld the Panel's findings that were based on the wrong legal standard and reflected virtually no engagement with the USDOC's determinations. In this way, the majority appears to have assumed the role of a panel in drawing conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the Panel. In my view, that would appear to exceed the Appellate Body's mandate to review "issues of law covered in the panel report and legal interpretations developed by the panel".<sup>775</sup>

5.257. **Second, the Panel recognized that "an investigating authority may carry out ... a market analysis at different levels of detail with respect to the products in question, depending on the circumstances of the case."**<sup>776</sup> Having said that, however, the Panel does not appear to have taken into account the USDOC's qualitative analysis, which led it to conclude that: (i) prices in the entire steel sector could not be considered market-determined and similar rationale applied to the markets

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<sup>771</sup> Thus, for instance, government interventions with the purpose of significantly increasing production of a certain good in combination with a policy of restricting or creating disincentives for any exports of the said good, which may lead to artificially low prices even if that was not the direct result of the objective of the intervention. (See European Union's third participant's submission, para. 59 (referring to European Union's third party submission to the Panel, para. 64))

<sup>772</sup> See European Union's third participant's submission, para. 59 (referring to European Union's third party submission to the Panel, para. 64). As the European Union points out, price distortion may be evidenced by government interventions that have a direct impact on the price of goods in a given market (for example, "the appointment of CEOs by the government with an instruction to pursue a specific pricing policy" and/or "the manipulation by the government of prices of public tenders"). But there may also be government interventions that do not necessarily impact prices directly, but nonetheless distort "market conditions". For example, government interventions or policies that increase production and restrict exports may, taken together, lead to artificially low in-country prices such that recourse to out-of-country prices may be warranted.

<sup>773</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 21. (emphasis added)

<sup>774</sup> Para. 5.171 above.

<sup>775</sup> DSU, Article 17.6.

<sup>776</sup> Panel Report, para. 7.202.

of the specific steel inputs at issue<sup>777</sup>; (ii) information needed to conduct an input-specific market analysis was not provided by China in response to the USDOC's questionnaires and, thus, was not on the record<sup>778</sup>; and (iii) the USDOC had data from the original investigations relating to the considerable market shares of SIEs in the three input markets at issue.<sup>779</sup> This conclusion was based "on the totality of circumstances in the Chinese steel sector including, *inter alia*, the GOC's other policy interventions in the sector (*e.g.*, industrial policies affecting both the suppliers and purchasers of the steel inputs, forced mergers and acquisitions, subsidies, investment restrictions, and export restrictions), all of which serve to distort firm-level decisions thereby preventing the existence of the market conditions which are necessary for a proper benchmark under Article 14(d) of the SCM Agreement."<sup>780</sup> In addition, the USDOC reviewed the available evidence on the record, including price evidence presented by the GOC<sup>781</sup>, but concluded that "this evidence does not demonstrate that prices in the steel input markets in question in China are appropriate for use as benchmarks to determine the adequacy of remuneration in the relevant investigations."<sup>782</sup> As the Appellate Body has said, where 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."<sup>783</sup> While the USDOC did not base, and indeed was not required to base, its analysis on *input-specific prices*, it appears, even from the Panel's description of the USDOC's analysis, that the USDOC did in fact make findings with regard to *the specific steel markets* at issue.<sup>784</sup> The USDOC extended its finding that prices in

<sup>777</sup> The USDOC found that "[o]verall, the entire structure of the steel market is distorted by longstanding, systemic and pervasive government intervention, which so diminishes the impact of market signals that, based on the records in these proceedings, private prices cannot be considered 'market based' or usable as potential benchmarks." The USDOC then concluded that "[t]his finding is based on evidence of pervasive government intervention in the steel sector as a whole, which necessarily includes all types of steel inputs sold in the PRC. The record evidence does not indicate that this finding applies with any less force to the three specific inputs in question in these proceedings, hot-rolled steel, steel rounds and stainless steel coils, or that the market for the three products has been insulated from these sectoral-wide distortions. Rather, the Government of the PRC (GOC) has placed on the record information regarding industrial policies that are cited in the Benchmark Memorandum and other measures that have served to further distort the market for the three inputs. For example, the records in these three cases demonstrate the existence of export restraints for these three products during the relevant periods of investigation." (Supporting Benchmark Memorandum (Panel Exhibit USA-84), pp. 4-5 (fns omitted))

<sup>778</sup> The USDOC reasoned that, "[i]n 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. However, we nonetheless considered whether to conduct such an analysis, and we concluded that the information needed to conduct an input-specific market analysis is not on the record of these proceedings. Although the Department requested information from the GOC to ascertain the structure of the hot-rolled steel, steel rounds, and stainless steel coils markets, including the identities and state ownership levels of the producers operating therein, the GOC's response was incomplete and therefore unreliable for purposes of such an analysis." (Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 5)

<sup>779</sup> In its appellant's submission, the United States refers to the USDOC's findings in the original investigations that, in *Pressure Pipe*, China reported that it produced 82% of the input; in *Line Pipe*, based on China's incomplete responses, the USDOC concluded that the government produced 100% of the input; in *OCTG*, the USDOC relied on the finding in *Line Pipe* to conclude that China's production dominated the market for steel rounds, and, finally, China provided a declaration that "[t]aken collectively, SOEs, on an annual basis, accounted for roughly 74% to 79% of steel products sales revenues over the 2006 to 2008 period." (United States' appellant's submission, para. 169 (quoting Ordover Report (Panel Exhibit CHN-19), p. 13)) Furthermore, in its Section 129 analysis of the private steel sector prices in China, the USDOC found that "[t]he interaction of these significant market shares and the GOC's various interventions in favor of maintaining the dominant position of the SIEs insulated from market pressures, including through industrial policies, forced mergers and acquisitions, subsidies, investment restrictions, and export restrictions, leads to a highly distorted market across all ownership types." (Benchmark Memorandum (Panel Exhibit CHN-20), p. 30 (emphasis added))

<sup>780</sup> Final Benchmark Determination (Panel Exhibit CHN-21), pp. 18-19.

<sup>781</sup> See Final Benchmark Determination (Panel Exhibit CHN-21), pp. 9-21.

<sup>782</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 21.

<sup>783</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 157. (emphasis original) See also Appellate Body Report, *Japan – DRAMS (Korea)*, para. 131.

<sup>784</sup> See Panel Report, paras. 7.192-7.195, explaining 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 in its Supporting Benchmark Memorandum. For these reasons, I also disagree with the majority's view that the USDOC did not engage in any specific assessment of the four input markets in question, and that, from its conclusions that the decision-making process of SIEs in China in general and in the steel sector as a whole was distorted by government intervention, the USDOC drew a general inference that prices in the specific markets at issue were equally distorted. (Para. 5.170 above)

China's steel market were not market-determined to these specific markets, observing that, in addition to the evidence in the Benchmark Memorandum, "the records in these cases also demonstrate the existence of additional government-caused distortions in the markets for the three specific inputs" and concluding that "[t]hese facts support a determination that the markets for hot-rolled steel, steel rounds and stainless steel coils are distorted and that domestic Chinese prices cannot be considered 'market based' such that they can be relied on to determine the adequacy of remuneration."<sup>785</sup>

5.258. Third, the Panel reached its conclusion 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"<sup>786</sup> for all four benchmark determinations at issue, *prior to* analysing whether the USDOC disregarded certain input-specific price evidence on the record. Thus, the Panel's analysis of whether the USDOC provided a reasoned and adequate explanation for its conclusion that in-country prices are not market-determined was divorced from its discussion of the record evidence.<sup>787</sup> As discussed above, the Panel's separate analysis of whether the USDOC disregarded price evidence for the inputs at issue suggests that, in the Panel's view, the USDOC's approach would *never* sufficiently justify recourse to out-of-country prices, independently of the evidence before it. This is particularly apparent from the Panel's review of the Section 129 proceedings concerning Solar Panels, where the Panel recognized that "there was no relevant information on arm's-length in-country prices of polysilicon in China before the USDOC", and therefore concluded that "China has not demonstrated that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement" by failing to consider such prices.<sup>788</sup> Nevertheless, the Panel ultimately found 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".<sup>789</sup> This is perhaps the most obvious illustration of the Panel's approach. The Panel considered that, even in the absence of any relevant price data on the record, there was no need to further engage with the USDOC's analysis to determine whether it provided a sufficient basis for the USDOC's recourse to out-of-country prices, i.e. in a case where there were no in-country prices on the record at all. Indeed, in the Solar Panels proceedings, the GOC indicated that it would not be submitting a response to the USDOC's Benchmark Questionnaire, thereby failing to provide "information concerning the structure of the polysilicon market, the type of entities that operate in the polysilicon market, the role of any government intervention in the polysilicon market, and the impact of the GOC's role in SIEs and the polysilicon market on any private entities supplying the market".<sup>790</sup> Even in this context, however, the Panel found that the USDOC failed to provide a reasoned and adequate explanation for its rejection of in-country polysilicon prices, without any analysis of the adverse facts available on which the USDOC relied.

5.259. Inexplicably, the majority upheld this finding on the basis that the absence of relevant price information on the record did not undermine the Panel's earlier finding that "the USDOC failed to explain how government intervention in the market resulted in price distortion also with respect to this investigation."<sup>791</sup> I see no basis whatsoever in Article 14(d) for this approach, nor do I agree with the manner in which the majority reviewed the Panel's analysis. The USDOC's explanation of "whether there are benchmarks within the polysilicon industry in the PRC that can reasonably be considered usable indicators of 'prevailing market conditions'" was based on record evidence available to the USDOC.<sup>792</sup> Moreover, China did not contest the USDOC's recourse to adverse facts available. Given that the Panel did not even begin to examine the substance of the evidence relied upon by the USDOC for purposes of establishing whether polysilicon prices are not market-determined, it is unclear on what basis the majority upheld the Panel's conclusion, or what the majority considered the USDOC was required to do in order to establish that government intervention resulted in price distortion.

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<sup>785</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 6.

<sup>786</sup> Panel Report, para. 7.206. (emphasis original)

<sup>787</sup> See Panel Report, sections 7.3.3.3.2-7.3.3.3.3. In addition to its finding in paragraph 7.206 of its Report, the Panel specifically concluded that, with respect to three of the investigations (Pressure Pipe, Line Pipe, and OCTG), the USDOC *also* failed to consider certain price data on the record. (Panel Report, paras. 7.220 and 7.223)

<sup>788</sup> Panel Report, para. 7.222.

<sup>789</sup> Panel Report, para. 7.223. (emphasis original)

<sup>790</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), pp. 7-8.

<sup>791</sup> Para. 5.196 above.

<sup>792</sup> Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 8.

5.260. With respect to the Pressure Pipe, Line Pipe, and OCTG Section 129 proceedings, the Panel expressed the view that, even though the price information provided by the petitioners and by the GOC did not distinguish between pricing data from private and government-related entities, such data may nonetheless be relevant and "[t]here 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."<sup>793</sup> The Panel similarly observed, with respect to the Mysteel Report, that it was "largely ignored" by the USDOC and there was no explanation "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)".<sup>794</sup>

5.261. While I agree that a panel should review whether the investigating authority has adequately taken into account alternative explanations presented by the parties to the investigation<sup>795</sup>, I observe that such explanations must be "plausible" and that, to be rejected, the domestic authority's explanation must "not seem adequate in the light of [an] alternative explanation".<sup>796</sup> The Panel, however, failed to explain *how* the price evidence could have been relevant to the USDOC's own analysis, and it completely ignored the USDOC's own explanation as to its pertinence. Yet, the stated purpose of the analysis in the Benchmark Memorandum was to address the Appellate Body's finding in the original proceedings that "[p]rices of goods provided by government-related entities other than the entity providing the financial contribution at issue must also be examined to determine whether they are market determined."<sup>797</sup> As noted above, the Panel never properly engaged with the merits of this analysis. It merely asserted that there is "nothing on the record" to suggest that the USDOC considered the possibility of using such price data, and "certainly no explanation" of why this data was not relevant. Yet, the USDOC appears to have done precisely that when it examined both SIE and private in-country prices in China through its analysis of the impact of government intervention in the relevant markets. Rather than rejecting SIE prices simply because of their source, the USDOC found that they "cannot be considered to be 'market-determined' for purposes of a benchmark analysis under Article 14(d)".<sup>798</sup> The USDOC reasoned, in this regard, that "[t]he entire **structure of the Chinese steel market is ... distorted by longstanding and pervasive government** intervention [which], coupled with the Department's findings regarding the role of the GOC in SIEs, so distorts and diminishes the impact of market signals that, based on the record in these proceedings, all domestic private prices are distorted so that there are no potential benchmarks from the domestic industry that can be considered 'market based' in accordance with the SCM Agreement, the [Appellate Body]'s recent ruling, or the [Appellate Body]'s prior rulings on this issue."<sup>799</sup> It stands to reason that price information that does not distinguish between SIE and private prices – both of which the USDOC found to be distorted – could similarly not serve as such a benchmark.<sup>800</sup>

5.262. The USDOC also addressed the Mysteel Report submitted by China as an exhibit to the Ordovery Report, which provided "an economic framework for evaluating whether market prices were 'distorted' by the government's predominant role as a supplier".<sup>801</sup> While it did "not take issue with whether Professor Ordovery's analytical framework concerning 'market power' is useful in the context of antitrust analysis", the USDOC observed that this was "not the only [analytical framework] permitted by the Appellate Body **for a market distortion analysis; nor ... the most relevant or** explanatory in the context of the PRC's steel industry, given the multi-faceted nature of government intervention in that industry".<sup>802</sup> Additionally, the USDOC referred to the indicia and supporting information in the Ordovery Report but found it unnecessary to address each of them separately.<sup>803</sup> The USDOC explained, in this regard, that it did not consider "the presence or absence of Professor Ordovery's antitrust-based 'indicia'" to be "particularly telling indicia of market distortion",

<sup>793</sup> Panel Report, para. 7.218. (emphasis added)

<sup>794</sup> Panel Report, para. 7.219.

<sup>795</sup> Para. 5.164 above.

<sup>796</sup> Appellate Body Report, *US – Lamb*, para. 106.

<sup>797</sup> Benchmark Memorandum (Panel Exhibit CHN-20), p. 1 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.49).

<sup>798</sup> Benchmark Memorandum (Panel Exhibit CHN-20), p. 26.

<sup>799</sup> Benchmark Memorandum (Panel Exhibit CHN-20), p. 30.

<sup>800</sup> In this regard, the United States submits that "the price survey data from China was not usable because it was already established that the government's prices are not market-determined prices and that, in fact, the government prevents private prices from being determined by market conditions as well." (United States' appellant's submission, para. 156)

<sup>801</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 12 (quoting Ordovery Report (Panel Exhibit CHN-19)).

<sup>802</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 15.

<sup>803</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 17.

and that "[f]or example, the continued participation of private suppliers in the market is not particularly probative when market entry and exit decisions, and 'profitability' itself, are distorted by government intervention."<sup>804</sup>

5.263. Thus, instead of being "largely ignored"<sup>805</sup>, as the Panel asserted, and the majority appears to have implied, in-country prices and the Ordover Report were discussed by the USDOC, but their relevance was rejected. This was not only because their underlying rationale was different from that of the USDOC, but also because the evidence therein was not particularly probative for, and did not cast doubt on, its own analysis in the Benchmark Memorandum. Furthermore, even though the USDOC rejected both SIE and private prices in the entire steel sector in China as suitable benefit benchmarks, it nevertheless sought to analyse relevant price data on the record but found that this data was insufficient to conduct any meaningful analysis of whether private prices align with SIE prices.<sup>806</sup> In its analysis, however, the Panel simply took issue with the absence of reference by the USDOC to the *prices* in the Mysteel Report, thereby disregarding the entirety of the USDOC's analysis in the Benchmark Memorandum as to why these same prices are not market-determined.<sup>807</sup>

5.264. I fail to understand *how* the Mysteel prices would have been relevant in this regard. The Panel never explained why it considered the Mysteel price information to be "on its face relevant" to the USDOC's analysis under Article 14(d).<sup>808</sup> The Panel also never discussed any arguments or evidence in the Ordover Report, other than the Mysteel pricing data, such as the indicia related to the vibrancy of the private steel sector in China.<sup>809</sup> Therefore, I do not believe the majority had any basis for upholding the Panel's conclusion, based on the Panel's assertion, that the USDOC did not sufficiently examine indicia such as fluctuation of steel prices over time, fragmentation of the industry, or the existence of private investment.<sup>810</sup>

5.265. For all of these reasons, I disagree with the majority's view that "although the USDOC had discretion to choose its approach in establishing whether in-country prices were distorted, it would have been necessary to explain in its determinations why the approach it had adopted and the conclusions it had reached were still valid, in light of the Mysteel pricing data and the alternative narrative of the Ordover Report."<sup>811</sup> That is precisely what the USDOC did. Fundamentally, it was for the Panel – not the Appellate Body – to conduct an analysis of the evidence on the record and examine it against the USDOC's analysis.

5.266. I therefore read the Panel's conclusion that "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

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<sup>804</sup> Final Benchmark Determination (Panel Exhibit CHN-21), p. 17. The USDOC also relied on additional evidence, such as the arguments and information in the Szamosszegi Report, which supported the analysis and conclusions in the Benchmark Memorandum. (Ibid.)

<sup>805</sup> Panel Report, para. 7.219.

<sup>806</sup> The USDOC stated that "based on the totality of circumstances present in the Chinese steel sector, we find it is not necessary to conduct an analysis of whether the prices of government and private providers align due to the market power of the government providers. Nonetheless, for the purposes of these Section 129 proceedings we have reviewed the available record information with a view towards whether it might be possible to analyze whether SIE market dominance has caused price alignment in the context of a CVD proceeding. We conclude that neither the available record evidence on prices in these three proceedings nor the evidence on prices likely to be available to an investigating authority is likely to provide additional probative insight on the question of whether private suppliers have aligned their prices with the prices charged by predominant government input providers." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 19 (fn omitted))

<sup>807</sup> In this regard, the United States argues that "[t]he Mysteel prices are precisely the subject of the USDOC's analysis in the benchmark memoranda – that is, they are among the Chinese prices the USDOC described as being distorted by the numerous government interventions identified on the record." (United States' appellant's submission, para. 151 (referring to Final Benchmark Determination (Panel Exhibit CHN-21), pp. 12-22))

<sup>808</sup> Panel Report, para. 7.220.

<sup>809</sup> See Panel Report, paras. 7.218-7.220.

<sup>810</sup> Para. 5.180 above.

<sup>811</sup> Para. 5.185 above. The United States also points to the fact that the term "private supplier(s)" in the Ordover Report is used as shorthand to include both government-owned suppliers other than those that provided the financial contribution in question in these proceedings and privately owned suppliers. (United States' appellant's submission, para. 151) It is thus unclear to which producers the Ordover Report is referring when discussing "the indicia pertinent to the inquiry of whether private suppliers have been forced to price at artificially low levels as a result of the government's exercise of predatory market power." (Ordover Report (Panel Exhibit CHN-19), p. 16)

of provision in the sense of Article 14(d)<sup>812</sup> as a reflection of the Panel's overly narrow application of the standard requiring the conduct of a price analysis as a condition for recourse to out-of-country prices. Despite the fact that the Panel rejected China's assertion that the only situation that merits recourse to out-of-country prices is where the government is so predominant that it effectively determines the prices of the goods in question, it appears that the Panel was looking for a kind of price alignment analysis that requires a quantification of the impact of government intervention on in-country prices by establishing the extent to which they deviate from a market-determined benchmark. In endorsing the Panel's standard, the majority appears also to have required an analysis of in-country prices as a condition for recourse to an alternative benchmark, even in cases where in-country prices are not available on the record. In this way, the result of the majority's analysis contradicts its stated understanding of Article 14(d) as allowing for different types of analysis and evidence for purposes of arriving at a proper benchmark, depending on the circumstances of the case.

5.267. In sum, the task of the Panel in the present case was to examine whether the USDOC provided a reasoned and adequate explanation for its decision to have recourse to out-of-country prices under Article 14(d). Rather than properly engaging with that question, the Panel simply found that the USDOC "did not even attempt" to provide any explanation for its rejection of in-country prices and disregarded price evidence on the record, without any substantive assessment of the USDOC's analysis and the evidence relied upon by it, including World Bank reports, Organization for Economic Cooperation and Development (OECD) working papers, economic surveys, Articles and expert opinions, and legislative and administrative documents.<sup>813</sup> In response to the arguments in the Ordovery Report, the USDOC also relied on evidence from certain other expert opinions that the Panel did not even mention in its Report.<sup>814</sup> The Panel's findings with regard to the USDOC's benchmark determinations therefore reflect its understanding that the type of analysis conducted by the USDOC can never satisfy the standard for recourse to out-of-country prices under Article 14(d). This, as I see it, constitutes an error in the application of this provision. Contrary to what the majority appears to have implied, the USDOC was not required to further engage with the in-country prices on the record when it had already found those prices to be distorted, and the Panel could not have properly made a finding that the United States acted inconsistently with its obligations under Article 14(d) in the absence of any substantive engagement with the USDOC's analysis or with the evidence available on the record going directly to the question of price distortion.

5.268. In light of the obvious shortcomings in the Panel's analysis, I do not agree with the majority's decision to uphold the conclusions reached by the Panel.

5.269. This should have been a relatively simple issue for the Appellate Body to decide on appeal, for the Panel did not do its job in reviewing the USDOC record, and applied the wrong legal standard. However, I believe the work of the Division was made unduly complicated by the majority's engagement with the evidence, effectively acting as a panel in the first instance, and, having done that, articulating an incoherent legal standard. I am aware that this dissent, also, does not make easy reading. But I thought it important to explain at length the errors at both the Panel and majority levels on this issue so that this dissent may serve as guidance for future litigants and panels.

### 5.5.3 Specificity

5.270. I believe the Panel and majority fundamentally misunderstand the role of Article 2.1 within the SCM Agreement, give the term "subsidy programme" a meaning that is not supported by the text and that is unreasonable, and ignore reasoning and analysis by the USDOC that was part of the case and should have been considered. The Panel and majority decisions, would, I believe, if followed in the future, enable circumvention of the disciplines of the SCM Agreement and even discourage the transparent management of subsidies.<sup>815</sup>

5.271. A specificity inquiry under Article 2.1 of the SCM Agreement is distinct from the financial contribution and benefit analyses contemplated under Articles 1 and 14. It is not concerned with redetermining the existence of a "subsidy". As the Appellate Body has said, "Article 2.1 assumes the

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<sup>812</sup> Panel Report, para. 7.219.

<sup>813</sup> See Benchmark Memorandum (Panel Exhibit CHN-20).

<sup>814</sup> Such as, for instance, the Grossman and Szamosszegi Reports. (See Final Benchmark Determination (Panel Exhibit CHN-21), pp. 15-17)

<sup>815</sup> See Panel Report, *US – Countervailing Measures (China)*, para. 7.240.



existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is specific."<sup>816</sup> Because "financial contribution" and "benefit" are determined separately, the only question that remains for an analysis under Article 2.1 is whether a subsidy is "specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises')".<sup>817</sup>

5.272. Subparagraphs (a) and (b) of Article 2.1 set forth "principles" (rather than rules) for analysing the "specificity" of a subsidy on a case-by-case basis. Article 2.1(c) addresses *de facto* specificity by providing that, "notwithstanding any appearance of non-specificity", "other factors" may be considered if there are "reasons to believe that the subsidy may in fact be specific". One factor identified in the text is "use of a subsidy programme by a limited number of certain enterprises".

5.273. The term "subsidy programme" appears only twice in the entire SCM Agreement: in the second sentence of Article 2.1(c) ("use of a subsidy programme by a limited number of certain enterprises..."), and in the third sentence ("...the length of time during which the subsidy programme has been in operation").<sup>818</sup> Its logical and linguistic purpose is simply to facilitate an inquiry into whether a financial contribution and benefit that have been identified pursuant to Article 1 have been granted to a limited number of enterprises or industries or groups of enterprises or industries (i.e. "certain enterprises"), by providing a basis, or starting point, for that inquiry. To do that, it helps to give conceptual form to the financial contribution and benefit by calling them a "subsidy programme". That, in my view, is the sole purpose and only reasonable reading of the term "subsidy programme" in Article 2.1(c). As the Appellate Body has said, Article 2.1(c) focuses on "whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in, for example, a law, regulation, or other official document."<sup>819</sup> Once a subsidy programme has been identified, then the question is whether there is "use of [that] subsidy programme by a limited number of certain enterprises". The requisite analysis should be rather straightforward where, as here, the subsidy takes the form of a government provision of goods that can be used *only* by certain downstream purchasers (i.e. a circumscribed group of entities and/or industries). Indeed, in such cases "the nature of the transfer makes the class of recipients more likely to be **identified and circumscribed, [and] this ... makes it more likely** that an investigating authority or panel may reach a conclusion that the subsidy is specific."<sup>820</sup>

5.274. Significantly, as the Appellate Body has said, "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."<sup>821</sup> Surprisingly, the Panel and the majority seem not to have recognized this. Yet, there are several ways by which a "subsidy programme" may be implemented and, thus, evidenced. One way is "by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises".<sup>822</sup> Contrary to what the Panel and the majority appear to have found, it is this "systematic" series of actions that, *in itself, constitutes* the relevant "subsidy

<sup>816</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144. (emphasis omitted)

<sup>817</sup> The *chapeau* of Article 2.1 states: "In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply". As in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body emphasized that the use of the term "principles", in the *chapeau* of Article 2, "instead of, for instance, 'rules' – suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle." (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366) Article 2.1 should therefore not be read to set out rigid postulates – instead, the principles set out are best understood as analytical tools that provide investigating authorities certain flexibility in fulfilling their task.

<sup>818</sup> The original panel in this dispute noted that "[t]he fact that, in Article 2, the term 'programme' is used only in the context of *de facto* specificity, combined with the fact that the Agreement provides no definition of the term ... suggests that 'subsidy programme' should be interpreted broadly" and that "[a] broad interpretation gives due recognition to the reality that 'subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit'." (Panel Report, *US – Countervailing Measures (China)*, para. 7.240 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.32))

<sup>819</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

<sup>820</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.393.

<sup>821</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

<sup>822</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

programme", particularly where, as here, the alleged subsidy consists of the "provision of goods" within the meaning of Article 1.1(a)(1)(iii), for less than adequate remuneration.<sup>823</sup> I see no basis in Article 2.1(c) to require an investigating authority to demonstrate, *first*, "the existence of a subsidy within the meaning of Article 1.1", and, *second*, "a 'plan or scheme' pursuant to which this subsidy has been provided to certain enterprises".<sup>824</sup> Instead, "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 a limited number of certain enterprises."<sup>825</sup> The Appellate Body, correctly, has *not* previously suggested that an investigating authority must examine the volume and/or the frequency of transactions conferring a "benefit" to determine whether "subsidies" have been "systematically" granted pursuant to a "subsidy programme". Nor has it suggested that "systematicity" of this kind must be shown to exist – contrary to what the Panel and the majority seem to have implied. In short, the Panel read into Article 2.1(c) a requirement that is not in that text and is contrary to previous Appellate Body decisions, and the majority has endorsed the Panel's doing so.

5.275. China suggests that to establish the existence of a "subsidy programme", the USDOC was required to demonstrate that the "inputs at issue are produced and provided to industrial users at subsidized prices under the instruction, guidance or intervention of the Chinese government."<sup>826</sup> The specificity analysis under Article 2.1(c) is not concerned with redetermining the existence of "subsidized prices", or whether the inputs at issue are produced and provided to downstream purchasers pursuant to "government instructions".<sup>827</sup> While provision of inputs at subsidized prices by a government or public body is relevant to the enquiry under Article 1 of the SCM Agreement, the question of whether a measure is consistent with Article 2.1(c) does not require a "redetermination" of the existence of a subsidy, or its constituent elements. To hold otherwise would, in effect, use Article 2.1(c) to supersede significant parts of Article 1, contrary to several principles of treaty interpretation.

5.276. Thus, I believe the Panel erred by interpreting the obligation under Article 2.1(c) as a requirement to demonstrate that subsidies have been "systematically" provided pursuant to an overarching "subsidy programme". And I believe the majority erred to the extent it agreed with the Panel on this point. If a finding of *de facto* specificity required an investigating authority to demonstrate the existence of "systematic" subsidization pursuant to a formally implemented government plan or scheme by "way of a reasoned and adequate explanation", the disciplines of the SCM Agreement could be circumvented by atomizing repeat subsidization into legally distinct acts, even though an analysis of subsidization over time would reveal *de facto* "use of a subsidy programme by a limited number of certain enterprises".

5.277. Regarding the Panel's review of the USDOC's findings, I further note that, in assessing whether the USDOC had an objective basis to carry out a specificity analysis under Article 2.1(c), the Panel made *no* reference to the reasoning and analysis provided by the USDOC in the context of the *original* investigations, other than to note that the "underlying documents from the original investigation, for the OCTG and other investigations, [had] *not* been submitted on the record of these compliance proceedings."<sup>828</sup> The Panel appears thereby to have precluded the possibility that the underlying "subsidy programmes" may have already been identified in the context of the USDOC's public body, financial contribution, and benefit analyses in each investigation. Yet, as noted by the original panel, the application in each of the challenged investigations "alleges that a specific input is being provided by SOEs for less than adequate remuneration".<sup>829</sup> The original panel further found that, "[i]n the absence of any written instrument or explicit pronouncement, the USDOC concluded that this type of systematic activity or series of activities – the consistent provision by the

<sup>823</sup> See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

<sup>824</sup> See Panel Report, para. 7.267. The Panel suggested that, in order to demonstrate the existence of a "subsidy programme", an investigating authority must have "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". (Ibid. (emphasis added))

<sup>825</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143. (italics original; underlining added)

<sup>826</sup> China's appellee's submission, para. 201.

<sup>827</sup> United States' appellant's submission, para. 194 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144).

<sup>828</sup> Panel Report, fn 449 to para. 7.276. (emphasis added)

<sup>829</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.242.

SOEs in question of inputs for less than adequate remuneration – constituted a subsidy programme."<sup>830</sup> In faulting the original panel for not providing "case-specific discussion or references to the USDOC's determinations of specificity challenged by China"<sup>831</sup>, the Appellate Body referred specifically to the USDOC's determinations and materials from the *original investigations*. It is therefore difficult to understand how the compliance Panel could find the USDOC to have failed to have identified the underlying subsidy programmes, as required under Article 2.1(c), without any analysis of those materials.

5.278. Leaving this aside, while the focus of the USDOC's analysis in the Section 129 determinations was on establishing the "length of time during which the subsidy programme ha[d] been in operation"<sup>832</sup>, the USDOC also reviewed the Appellate Body's findings in the original proceedings, quoted from them, and identified a "systematic series of actions" pursuant to which it considered the subsidies to have been provided. In doing so, the USDOC referred to the "case specific purchase information" it had compiled for each of the proceedings, broken down by the relevant: (i) input producer; (ii) respondent; (iii) input; and (iv) number of sales transactions.<sup>833</sup> Moreover, the USDOC found, based on the GOC's responses to its questions in five of the Section 129 proceedings, and relying on "*facts available*" with respect to the remaining seven proceedings, for which the GOC had not provided adequate information, that "state-owned enterprises began producing and selling the inputs at some point during the period covered by the first Five-Year Plan (1953-1957) and possibly earlier."<sup>834</sup>

5.279. Rather than faulting the USDOC for not providing "a reasoned and adequate explanation for its conclusions regarding the existence of a subsidy programme", the Panel should, in my view, have carefully examined the USDOC's reasoning and analysis, including the analysis provided by the USDOC in the context of its public body, financial contribution, and benefit findings in order to assess whether the USDOC had *identified* the "subsidy programmes" that it was investigating, and thus had an objective basis to carry out a *de facto* specificity analysis under Article 2.1(c). In this regard, I note that the USDOC itself referred to the provision of inputs for less than adequate remuneration as the relevant "programmes" in each case, and posed questions in relation to those "programmes" prior to making its preliminary findings "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."<sup>835</sup> It was these "programmes" that were the very subject of the countervailing duty investigations carried out by the USDOC, including in the context of its public body and benefit analyses. What is more, the Panel does not appear to have considered the context in which the USDOC carried out its *de facto* specificity analysis, including that the USDOC was required to "make its determination based upon facts on the administrative record" due to incomplete responses submitted by the GOC.<sup>836</sup> Whether an explanation by an investigating authority is "adequate" cannot be decided in a vacuum – without regard to the evidence and arguments to which it seeks to respond. This is so particularly where, as here, the investigating authority has been required to make its determination on the basis of facts available.

5.280. For all these reasons, I consider that the Panel erred in finding 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. I also

<sup>830</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.242.

<sup>831</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.151 and 4.171.

<sup>832</sup> This stands to reason given that the recommendations and rulings of the DSB concerned the USDOC's failure to take into account the "duration" of the alleged subsidy programmes and did not include any findings of inconsistency with respect to the USDOC's identification of a "subsidy programme" as referred to in the second sentence of Article 2.1(c).

<sup>833</sup> The USDOC found 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 [less than adequate remuneration] to producers in [China]", and immediately thereafter referred to these as the relevant "subsidy programmes". (Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 19)

<sup>834</sup> Final Section 129 Determination (Panel Exhibit CHN-5), pp. 5-6. (emphasis added)

<sup>835</sup> Panel Report, para. 7.277 (quoting Preliminary Determination on Public Bodies and Input Specificity (Panel 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 aluminum, seamless tubes, standard commodity steel billets and blooms, polysilicon, and coking coal.

<sup>836</sup> Final Section 129 Determination (Panel Exhibit CHN-5), p. 6.

consider that the majority's decision upholding the Panel's finding is wrong in several important respects and would, if followed, enable circumvention of the disciplines of the SCM Agreement and even discourage the transparent management of subsidies. I believe such a result is not contemplated under the SCM Agreement, was not intended by the SCM Agreement's drafters, and is not in accordance with customary principles of treaty interpretation.

#### 5.5.4 Overall summary

5.281. I respectfully suggest that it would be beneficial for the dispute settlement system if future litigants, and panels in adherence to their mandate under Article 11 of the DSU, would continue to take into account separate opinions such as this along with relevant past Appellate Body reports, without regarding either as necessarily determinative.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.<sup>837</sup>

### 6.1 The Panel's terms of reference

6.2. The Panel correctly assessed the scope of the measures falling within its terms of reference in these Article 21.5 proceedings based on the criteria of their relationship in terms of nature, timing, and effects.

- a. We therefore uphold the Panel's findings, in paragraphs 7.320, 7.347, 8.1.g, and 8.1.h.i-ii, iv, and vi of the Panel Report, that the subsequent reviews at issue and the Final Determination in the original Solar Panels investigation fell within the Panel's terms of reference under Article 21.5 of the DSU.

### 6.2 Article 1.1(a)(1) of the SCM Agreement

6.3. The central focus of a public body inquiry under Article 1.1(a)(1) is not whether the *conduct* that is alleged to give rise to a financial contribution under subparagraphs (i)-(iii) or the first clause of subparagraph (iv) – i.e. the particular transaction at issue – is "logically connected" to an identified "government function". Rather, the relevant inquiry hinges on the *entity* engaging in that conduct, its core characteristics, and its relationship with government, seen in light of the legal and economic environment prevailing in the relevant Member. This comports with the fact that a "government" (in the narrow sense) and a "public body" share a degree of commonality or overlap in their essential characteristics – i.e. they both possess, exercise, or are vested with governmental authority. Once it has been established that an entity is a public body, then the conduct of that entity shall be directly attributable to the Member concerned for purposes of Article 1.1(a)(1). While the conduct of an entity may constitute relevant evidence to assess its core characteristics, an investigating authority need not necessarily focus on every instance of conduct in which that relevant entity may engage, or on whether each such instance of conduct is connected to a specific "government function". The Panel was thus correct in rejecting China's reading of Article 1.1(a)(1) as requiring that an investigating authority inquire into whether an entity is exercising a government function when engaging in one of the specific conducts listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

- a. We therefore uphold the Panel's finding, in paragraphs 7.36 and 7.106 of the Panel Report, that the legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement does not prescribe a connection of a particular degree or nature that must necessarily be established between an identified government function and the particular financial contribution at issue.
- b. We also uphold the Panel's conclusion, in paragraph 7.36 of the Panel Report, that "China has failed to demonstrate that the USDOC's public body determinations in the

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<sup>837</sup> The separate opinion of one Division member regarding public body, benefit, and specificity is set forth in section 5.5 of this Report.

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."

- c. Having upheld the Panel's interpretive findings, we do not further address China's additional claims with respect to the Panel's findings in paragraphs 7.72, 7.103, and 7.105-7.106 of the Panel Report.

6.4. The Panel correctly found that the Public Bodies Memorandum bears a "close relationship" to the declared "measure taken to comply", namely, the USDOC's public body determinations in the relevant Section 129 proceedings, and with the recommendations and rulings of the DSB in the original proceedings. The Panel was also correct that China could not have challenged the Public Bodies Memorandum as part of its complaint in the original proceedings.

- a. We therefore uphold the Panel's finding, in paragraph 7.120 of the Panel Report, that the Public Bodies Memorandum falls, "as such", within the scope of these Article 21.5 proceedings.

6.5. China's claim on appeal with respect to the WTO-consistency of the Public Bodies Memorandum "as such" is premised on China's reading of Article 1.1(a)(1) as requiring, in each case, the establishment of a "clear logical connection" between a "government function" identified by the investigating authority and the conduct alleged to give rise to a financial contribution.

- a. Having rejected this reading of Article 1.1(a)(1), we do not further address China's claim concerning the Panel's conclusion, in paragraph 8.1.b of the Panel Report, that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).
- b. We also do not further address the participants' claims concerning the Panel's intermediate findings leading to that conclusion, namely: (i) the Panel's finding, in paragraph 7.133 of the Panel Report, that the Public Bodies Memorandum "can be challenged 'as such' as a rule or norm of general or prospective application"; and (ii) the Panel's finding, in paragraph 7.142 of the Panel Report, that "the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)." The Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1), therefore, stands.

### 6.3 Articles 1.1(b) and 14(d) of the SCM Agreement

6.6. We disagree with China's proposition that the circumstances potentially justifying recourse to out-of-country prices under Article 14(d) of the SCM Agreement are limited to those in which the government effectively determines the price at which the good is sold, including more specifically, where the government sets prices administratively, is the sole supplier of the good, or 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. Central to the inquiry under Article 14(d) in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention. What would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention itself. Different types of government interventions could result in price distortion, such that recourse to out-of-country prices is warranted, beyond the situation in which the government effectively determines the price at which the good is sold. The determination of whether in-country prices are distorted must be made case by case, based on the relevant evidence in the particular investigation and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record.

- a. We therefore uphold the Panel's finding, in paragraph 7.174 of the Panel Report, that Article 14(d) does not limit the possibility of resorting to out-of-country prices to the situation in which the government effectively determines the price at which the good is sold.

6.7. The specific type of analysis that an investigating authority must conduct for purposes of arriving at a proper benchmark under Article 14(d), as well as the types and amount of evidence that would be considered sufficient in this regard, will necessarily vary depending on a number of factors in the circumstances of the particular case. However, in all cases, the investigating authority has to establish and adequately explain how price distortion actually results from government intervention. There may be different ways to demonstrate that prices are actually distorted, including a quantitative assessment, price comparison methodology, a counterfactual, or a qualitative analysis. While evidence of direct impact of the government intervention on prices may make the finding of price distortion likely, evidence of indirect impact may also be relevant. At the same time, establishing the nexus between such indirect impact of government intervention and price distortion may require more detailed analysis and explanation. Independently of the method chosen by the investigating authority, it has to adequately take into account the arguments and evidence supplied by the petitioners and respondents, together with all other information on the record, so that its determination of how prices in the specific markets at issue are in fact distorted as a result of government intervention would be based on positive evidence. The Panel's reasoning is consonant with our interpretation of Article 14(d). We further agree with the Panel's conclusion that "[a]n 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", insofar as it clarifies that the investigating authority has to make a finding of price distortion resulting from government intervention. In sum, we do not see that the Panel required one single type of quantitative or price comparison analysis in all cases.

6.8. With respect to the Panel's finding, in paragraph 7.206 of the Panel Report, 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", we understand the Panel to have rejected as insufficient and problematic the USDOC's determination that prices in the entire steel and solar-grade polysilicon sectors in China cannot be used as benefit benchmarks in the absence of a specific assessment of how government intervention had resulted in price distortion in the four input markets at issue. Furthermore, we understand the Panel to have been concerned with the focus of the USDOC's analysis in the Benchmark Memorandum on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, rather than on *how* specifically this involvement influenced pricing decisions regarding the inputs at issue and resulted in price distortion with respect to the determinations at hand. Therefore, as we see it, the Panel's analysis of the determinations at issue led it to conclude that the USDOC did not provide a reasoned and adequate explanation of how the widespread government interventions described in the Benchmark Memorandum resulted in the distortion of in-country prices in the specific input markets and regarding the specific products subject to each of the challenged USDOC determinations at issue.

6.9. With respect to the Panel's finding, in paragraph 7.220 of the Panel Report, that "the USDOC failed to adequately explain its rejection of in-country prices in light of the evidence before it", we understand the Panel to have considered that the USDOC's rejection of in-country prices was merely consequential to its findings of market distortion in the steel sector generally, which the Panel considered not to provide a reasoned and adequate explanation of how government intervention resulted in price distortion. Furthermore, although the focus of the USDOC's analysis in the Benchmark Memorandum was different from the one underlying the Ordovery Report, the alternative explanations and pricing data on the record may have nevertheless been relevant for examining whether price distortion actually existed in the input markets at issue. Yet, the USDOC determinations do not explain why, in light of the price data and alternative explanations, the conclusion it reached for the entire steel sector necessarily applies to all specific input markets. In addition, it would have been relevant for the USDOC to take into account in its analysis the input-specific Mysteel pricing data on the record and examine the extent to which it affected its conclusions of price distortion. Finally, in assessing whether it would be possible to conduct an analysis of price alignment in the Final Benchmark Determination, the USDOC dismissed the price data on the record largely on the basis of its prior conclusion that all in-country steel prices in China were distorted by government intervention, which could not in itself constitute a sufficient basis for rejecting the relevance of the Mysteel data.

- a. We therefore find that the United States has not established that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement in finding 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.

- b. In addition, we find that the United States has not established that the Panel erred in its finding that, in the Section 129 proceedings on Pressure Pipe, Line Pipe, and OCTG, the USDOC failed to consider price data on the record.
- c. Consequently, we uphold the Panel's findings, in paragraphs 7.223-7.224 and 8.1.c of the Panel Report, 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.

#### 6.4 Article 2.1(c) of the SCM Agreement


6.10. As we see it, where an investigating authority makes a finding of *de facto* specificity based on an analysis of whether there has been "use of a subsidy programme by a limited number of certain enterprises", consideration of the length of time during which the subsidy programme has been in operation presupposes that the relevant programme has been properly identified. We therefore disagree with the United States to the extent it suggests that an investigating authority can be found to have *complied* with the requirement under Article 2.1(c) to consider the "duration" of a subsidy programme *regardless* of whether it has properly identified that programme in the first place. Nor do we agree with the United States that the Panel was required to *limit* its review to the USDOC's examination of the "duration" of the relevant subsidy programmes, without considering whether the USDOC had properly identified those programmes either in the context of the original investigations or in the context of the relevant Section 129 proceedings.

6.11. With respect to the Panel's interpretation and application of Article 2.1(c), we agree with the Panel that, while "evidence of 'a systematic series of actions' may be particularly relevant in the context of an *unwritten programme*, 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)." The Panel's subsequent review of the USDOC's analysis properly focused on "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". Moreover, in its findings, the Panel rightly contrasted the USDOC's failure to explain "*systematic activity ... regarding the existence of an unwritten subsidy programme*" with information before the USDOC merely indicating "*repeated transactions*". We therefore disagree with the United States insofar as it argues that the Panel erred in its articulation of the standard to be applied under Article 2.1(c). Nor do we agree with the United States that the Panel erred in its interpretation of the term "subsidy programme" by reading it to mean a "systematic subsidy programme" consisting "entirely of acts of subsidization" where *each* provision of an input by the government confers a benefit to the recipient. We also disagree with the United States to the extent it claims that the Panel's finding under Article 2.1(c) was based on an isolated reading of the USDOC's specificity analysis. Rather, we understand the Panel's concern to have been that the USDOC's reasoning and references to "subsidy programmes" were generic in nature and did not sufficiently discuss the steel sector or the provision of the inputs in the context of the specific determinations at issue. It was not for the Panel in this regard "to conduct a *de novo* review of the evidence" or "to substitute [its] own conclusions for those of the competent authorities".

- a. In light of the foregoing, we uphold the Panel's finding, in paragraphs 7.293 and 8.1.e of the Panel Report, 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.

6.12. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under the SCM Agreement, into conformity with that Agreement.

Signed in the original in Geneva this 1st day of July 2019 by:



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Thomas R. Graham  
Presiding Member



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Ujal Singh Bhatia  
Member



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UNITED STATES – COUNTERVAILING DUTY MEASURES ON  
CERTAIN PRODUCTS FROM CHINA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

AB-2018-2

*Report of the Appellate Body*

*Addendum*

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS437/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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## ANNEX A-1

## UNITED STATES' NOTICE OF APPEAL\*

1. Pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the compliance Panel in *United States – Countervailing Duty Measures on Certain Products from China: Recourse to Article 21.5 of the DSU by China* (WT/DS437/RW and WT/DS437/RW/Add.1) and certain legal interpretations developed by the compliance Panel.

2. The United States seeks review by the Appellate Body of the compliance Panel's finding that the Public Bodies Memorandum<sup>1</sup> is a measure within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU.<sup>2</sup> This finding is in error and is based on erroneous findings on issues of law and legal interpretations. The Public Bodies Memorandum is not a measure taken to comply with the DSB's recommendations in this dispute. Furthermore, China could have attempted to challenge the Public Bodies Memorandum "as such" in the original panel proceeding, but China opted not to do so. Accordingly, China's "as such" claim against the Public Bodies Memorandum is outside the scope of the compliance Panel's jurisdiction under Article 21.5 of the DSU. The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

3. The United States seeks review by the Appellate Body of the compliance Panel's finding that "the Public Bodies Memorandum can be challenged 'as such' as a rule or norm of general or prospective application."<sup>3</sup> This finding is in error and is based on erroneous findings on issues of law and legal interpretations. The compliance Panel erred in its interpretation and application of Articles 3.3, 4.4, and 6.2 of the DSU in considering that the Public Bodies Memorandum is a "measure" that can be challenged. Contrary to the compliance Panel's finding, the Public Bodies Memorandum does not have normative value, does not have general application, and does not have prospective application. The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

4. The United States seeks review of the compliance Panel's findings that the U.S. Department of Commerce's benchmark determinations in the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* Section 129 proceedings<sup>4</sup> are inconsistent with Articles 1.1(b) and 14(d) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").<sup>5</sup> These findings are in error and are based on erroneous findings on issues of law and legal interpretations. In finding that the United States "failed to explain ... how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price" and "failed to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations,"<sup>6</sup> the compliance Panel erred in its interpretation and application of Articles 1.1(b) and 14(d) of the SCM Agreement.<sup>7</sup> The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

5. The United States seeks review of the compliance Panel's finding that the United States failed to appropriately find specificity under Article 2.1(c) of the SCM Agreement in the *Pressure Pipe*, *Line*

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\* This notification, dated 27 April 2018, was circulated to Members as document WT/DS437/24.

<sup>1</sup> See Panel Report, para. 2.1.b.

<sup>2</sup> See, e.g., Panel Report, para. 7.120; *see also id.*, paras. 7.114-7.120.

<sup>3</sup> See, e.g., Panel Report, para. 7.133; *see also id.*, paras. 7.124-7.133.

<sup>4</sup> See Panel Report, para. 7.152.

<sup>5</sup> See, e.g., Panel Report, paras. 7.199-200, 7.205-206, 7.209-211, 7.218-220, 7.223-224, and 8.1(c).

<sup>6</sup> Panel Report, para. 7.223.

<sup>7</sup> The United States considers these errors to be issues of law, based on the compliance Panel's erroneous findings on issues of law and legal interpretations. If the Appellate Body were to consider instead that the issues set out in this paragraph are issues of fact, then the United States requests the Appellate Body find that the compliance Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by reaching a conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.

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*Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels* Section 129 proceedings.<sup>8</sup> This finding is in error and is based on erroneous findings on issues of law and legal interpretations.<sup>9</sup> The compliance Panel erred in its interpretation and application of Article 2.1(c) in finding 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."<sup>10</sup> The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

6. The United States seeks review of the compliance Panel's finding that the final determination in the original *Solar Panels* investigation<sup>11</sup> and certain<sup>12</sup> subsequent administrative reviews and sunset reviews were within the scope of this proceeding under Article 21.5 of the DSU.<sup>13</sup> These findings are in error and are based on erroneous findings on issues of law and legal interpretations.<sup>14</sup> The compliance Panel erred in its interpretation and application of Article 21.5 of the DSU in finding that these proceedings "fall within [the] 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."<sup>15</sup> The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

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<sup>8</sup> See Panel Report, paras. 7.275-276, 7.281, and 7.292-293.

<sup>9</sup> See, e.g., Panel Report, paras. 7.287-293 and 8.1(e).

<sup>10</sup> Panel Report, paras. 7.292-293 and 8.1(e).

<sup>11</sup> See Panel Report, para. 2.1.c; see also *id.*, paras 7.319-325 and 8.1(g).

<sup>12</sup> See Panel Report, para. 2.1.d.

<sup>13</sup> See Panel Report, paras. 7.347, 7.357, 7.361, 7.362, 7.367, 7.378, 7.379, 7.384, 7.391, 7.392, 7.401, 7.404, 7.432, 7.439, 7.443, 7.447, 7.451, 7.455, 7.458, 7.462, 7.466, 7.470, 7.471, 8.1(h)(i), 8.1(h)(ii), 8.1(h)(iv), and 8.1(h)(vi).

<sup>14</sup> See, e.g., Panel Report, paras. 7.335-347.

<sup>15</sup> Panel Report, para. 7.347.

## ANNEX A-2

## CHINA'S NOTICE OF OTHER APPEAL \*

1. Pursuant to Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures"), China hereby notifies its decision to appeal certain issues of law and legal interpretation contained in the Report of the Panel in *United States – Countervailing Duty Measures on Certain Products from China (Article 21.5 – China)* (WT/DS437/RW) ("Panel Report").
2. Pursuant to Rule 23(1) of the Working Procedures, China files this Notice of Other Appeal with the Appellate Body Secretariat, along with a written submission prepared in accordance with Rule 21(2) of the Working Procedures as required by Rule 23(3).
3. Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures, this Notice of Other Appeal provides an indicative list of paragraphs of the Panel Report containing the errors of law and legal interpretation alleged herein, without prejudice to China's ability to refer to other paragraphs of the Panel Report in the context of its appeal.

#### Review of the Panel's Findings under Article 1.1(a)(1) of the SCM Agreement

4. China seeks review by the Appellate Body of the Panel's interpretation and application of Article 1.1(a)(1) of the SCM Agreement. In particular, China seeks review of the Panel's finding that the legal standard for "public body" determinations under Article 1.1(a)(1) does not "require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue". China respectfully requests that the Appellate Body *reverse* this finding, articulated in paragraphs 7.36 and 7.106, as well as the Panel's conclusion that "China 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."
5. China requests that the Appellate Body *reverse* the Panel's finding in paragraph 7.72 that China "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", as well as the Panel's conclusion in paragraph 7.105 that it did "not consider that the USDOC's determinations were based on 'mere ownership or control over an entity by a government, without more'", because the Panel's conclusions were premised on its disagreement with China concerning the proper legal standard.
6. China requests that the Appellate Body *reverse* the Panel's conclusion in paragraphs 7.103 and 7.106 that China did not demonstrate 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 in the five investigations in which China participated, because this conclusion was also premised on the Panel's disagreement with China concerning the proper legal standard.
7. China requests that the Appellate Body *reverse* the Panel's ultimate conclusion in paragraphs 7.107 and 8.1(a) that China did not demonstrate 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.
8. China further requests that the Appellate Body *complete the analysis* and find 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.

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\* This notification, dated 2 May 2018, was circulated to Members as document WT/DS437/25.

9. In relation to the Panel's finding that China failed to demonstrate that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement, China requests that the Appellate Body *reverse* the Panel's conclusion in paragraph 7.136 that China did not demonstrate that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement because the Public Bodies Memorandum is based on an improper legal standard. China requests that the Appellate Body *reverse* the Panel's conclusion in paragraph 7.142 that the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1), as well as the Panel's ultimate conclusion to that effect in paragraph 8.1(b).

10. China further requests that the Appellate Body *complete the analysis* and find that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement because it is premised on an erroneous legal standard and restricts in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement.

#### Review of the Panel's Findings under Articles 1.1(b) and 14(d) of the SCM Agreement

11. China seeks review by the Appellate Body of the Panel's interpretation and application of Articles 1.1(b) and 14(d) of the SCM Agreement. In particular, China seeks review of the Panel's finding that "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."<sup>1</sup> The Panel found that an investigating authority may reject available in-country benchmark prices if the investigating authority provides a sufficient explanation of "how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price".<sup>2</sup> In reaching these conclusions, the Panel failed to interpret and give effect to the term "market" in Article 14(d) of the SCM Agreement, including as that term appears **within the context of the phrase "prevailing market conditions ... in the country of provision"**.

12. China respectfully requests that the Appellate Body correct the Panel's errors of legal interpretation and application, and accordingly *modify* the basis for the Panel's conclusion 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.<sup>3</sup>

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<sup>1</sup> Panel Report, para. 7.168.

<sup>2</sup> Panel Report, paras. 7.206. See also Panel Report, paras. 7.158, 7.205, 7.223.

<sup>3</sup> Panel Report, para. 8.1(c).

## ANNEX B

## ARGUMENTS OF THE PARTICIPANTS

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## ANNEX B-1

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION<sup>1</sup>

1. The United States appeals certain of the compliance Panel's legal findings and conclusions that certain measures or items challenged by China in this compliance proceeding are inconsistent with various provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and erroneous interpretations or applications of the SCM Agreement and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. Specifically, section II of this submission demonstrates that the compliance Panel erred in finding that the Public Bodies Memorandum<sup>2</sup> is a measure within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU. Separately, we demonstrate that the compliance Panel erred in finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application. These findings are in error and are based on erroneous findings on issues of law and legal interpretations.

3. As discussed in section II.A of this submission, the Public Bodies Memorandum is not a measure taken to comply with the recommendations of the Dispute Settlement Body ("DSB") in this dispute. Furthermore, China could have attempted to challenge the Public Bodies Memorandum "as such" in the original panel proceeding, but China opted not to do so. The Appellate Body has found previously under Article 21.5 that a complaining Member ordinarily may not raise claims in an Article 21.5 compliance proceeding that it could have pursued in the original proceedings, but did not. Accordingly, China's "as such" claim against the Public Bodies Memorandum is outside the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU. The compliance Panel, in concluding otherwise, erred in its interpretation and application of Article 21.5 of the DSU.

4. As elaborated in section II.B of this submission, the compliance Panel erred in its interpretation and application of Articles 3.3, 4.4, and 6.2 of the DSU in finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application. The compliance Panel's finding also does not accord with prior Appellate Body findings concerning when a measure can be challenged "as such" as a rule or norm of general or prospective application. The compliance Panel erred by failing to apply properly the correct legal analysis for determining whether a measure can be challenged "as such" as a rule or norm of general or prospective application, as well as by misreading the Public Bodies Memorandum and engaging in circular reasoning. Contrary to the compliance Panel's finding, the evidence establishes that the Public Bodies Memorandum does not have normative value, does not have general application, and does not have prospective application.

5. Ultimately, the compliance Panel based its conclusions regarding normative value, general application, and prospective application on just two pieces of textual evidence drawn from the Public Bodies Memorandum, namely the phrases "for the purposes of the CVD law" and "systemic analysis."<sup>3</sup> As the United States demonstrates in this submission, these two pieces of textual evidence offer no support at all for the compliance Panel's findings. The compliance Panel engaged in circular reasoning, resulting in its misunderstanding the phrase "for the purposes of the CVD law," which, when read in context, serves on its face as a *limitation* on the analysis. A correct understanding of the phrase "systemic analysis" likewise confirms a limitation, referring only to the contents of the Public Bodies Memorandum itself. Read in full, the sentence quoted by the compliance

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<sup>1</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,724 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 38,412 words (including footnotes).

<sup>2</sup> See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.b; *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Timothy Hruby Re: 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: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379*, May 18, 2012 ("Public Bodies Memorandum") (Exhibit CHI-1).

<sup>3</sup> See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.127-7.129.

Panel refers to "the systemic analysis in this memorandum"<sup>4</sup> and not any systemic application of that analysis. The compliance Panel misconstrued this as announcing an approach the U.S. Department of Commerce ("USDOC") intended to apply in every countervailing duty proceeding. These phrases, when correctly read in their proper context, simply provide confirmation that the Public Bodies Memorandum does not have normative value, does not have general application, and does not have prospective application. Accordingly, there is no legal basis for the compliance Panel's finding to the contrary.

6. In light of these shortcomings in the compliance Panel's analysis, as well as other errors elaborated in this submission, the compliance Panel erred in finding that the Public Bodies Memorandum is a measure challengeable "as such" within the scope of its terms of reference under Article 21.5 of the DSU, and the compliance Panel erred in finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application. Accordingly, these findings should be reversed.

7. Section III of this submission demonstrates that the compliance Panel erred in its interpretation and application of Articles 1.1(b) and 14(d) of the SCM Agreement to the USDOC's benchmark determinations in *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe*,<sup>5</sup> pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 determinations") using an approach that does not comport with the text of the SCM Agreement. The compliance Panel's findings are in error and are based on erroneous findings on issues of law and legal interpretations.<sup>6</sup> Under Article 14(d), properly interpreted, an objective and unbiased investigating authority could have found that prices in China are distorted and therefore not suitable to measure the adequacy of remuneration. In section III.A, we set out the appropriate standard under Article 14(d) and explain how Appellate Body findings confirm that an investigating authority may consider whether benchmark prices are market determined. In section III.B, we provide an overview of the findings underlying this dispute and describe where the compliance Panel erred in applying an improper approach to the determinations at issue. We then demonstrate, in section III.C, exactly why the compliance Panel's interpretation is in error and that it cannot be reconciled with the text of Article 14. Section III.D concludes that an objective and unbiased investigating authority could have found that prices in China are distorted and therefore not suitable to measure the adequacy of remuneration under Article 14(d).

8. Section IV of this submission demonstrates that the compliance Panel erred in its interpretation and application of the third sentence in Article 2.1(c) of the SCM Agreement to the USDOC's determinations of *de facto* specificity 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.<sup>7</sup> The compliance Panel further erred to the extent it made findings on a provision within Article 2.1(c) that was not covered by the DSB's recommendations and rulings, nor could serve as an appropriate basis upon which to assess the consistency of the measures with Article 2.1(c), third sentence. The compliance Panel also erred in its assessment of the "existence of a subsidy programme" by interpreting "programme" in a manner that is not consistent with the ordinary meaning of the term in Article 2.1 or the object and purpose of the SCM Agreement. As a result of applying that improper approach to the USDOC's determinations, the compliance Panel reached a conclusion that is not consistent with a proper interpretation of Article 2.1(c).

9. Finally, section V of this submission demonstrates that the compliance Panel erred in finding that subsequent administrative reviews and sunset reviews (collectively, "reviews") were within the scope of this proceeding under Article 21.5 of the DSU.<sup>8</sup> The compliance Panel erred in its

<sup>4</sup> Public Bodies Memorandum, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1) (emphasis added).

<sup>5</sup> See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.152.

<sup>6</sup> The United States considers these errors to be issues of law, based on the compliance Panel's erroneous findings on issues of law and legal interpretations. If the Appellate Body were to consider instead that the issues set out in this paragraph are issues of fact, then the United States requests the Appellate Body find that the compliance Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by reaching a conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.

<sup>7</sup> See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.275-276, 7.281, and 7.292-293.

<sup>8</sup> See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.d; see also *id.*, paras. 7.347, 7.357, 7.361, 7.362, 7.367, 7.378, 7.379, 7.384, 7.391, 7.392, 7.401, 7.404, 7.432, 7.439,

interpretation and application of Article 21.5 of the DSU in finding that these proceedings "fall within [the] 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."<sup>9</sup> These findings are in error and are based on erroneous findings on issues of law and legal interpretations. The subsequent reviews were not measures taken to comply, nor did the compliance Panel demonstrate that they were sufficiently connected to the measures taken to comply to be considered within the compliance Panel's terms of reference. Accordingly, those subsequent reviews were not properly within the compliance Panel's terms of reference.

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7.443, 7.447, 7.451, 7.455, 7.458, 7.462, 7.466, 7.470, 7.471, 8.1(h)(i), 8.1(h)(ii), 8.1(h)(iv), and 8.1(h)(vi). In this context, the United States also seeks review of the compliance Panel's findings with respect to the final determination in the original *Solar Panels* investigation, which was completed after the original Panel was established. See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.c; see also *id.*, paras. 7.319-325 and 8.1(g).

<sup>9</sup> *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.347.

## ANNEX B-2

## EXECUTIVE SUMMARY OF CHINA'S OTHER APPELLANT'S SUBMISSION

1. China initiated this dispute nearly six years ago in order to address certain persistent abuses of the countervailing duty mechanism by the United States Department of Commerce ("USDOC"). In particular, China brought this dispute because the USDOC has developed a pattern and practice of imposing countervailing duties in respect of alleged "input subsidies", i.e. the alleged provision of various types of industrial inputs for less than adequate remuneration. These "input subsidies" are completely fictitious. The USDOC conjures these alleged "subsidies" into existence through a series of unlawful presumptions and methodologies affecting all three elements of a countervailable subsidy: financial contribution, benefit, and specificity. Through these unlawful presumptions and methodologies, the USDOC converts ordinary commercial transactions between unrelated parties into alleged "subsidies" that are attributable to the Government of China ("GOC").

2. The compliance Panel found that the USDOC's benefit determinations in four of the principal investigations at issue remain inconsistent with Article 14(d) of the SCM Agreement.<sup>1</sup> In addition, the compliance Panel found that the USDOC's specificity determinations remain inconsistent with Article 2.1(c) of the SCM Agreement in eleven of the investigations at issue.<sup>2</sup> While China agrees with these ultimate findings of the Panel, China's disagreements with other aspects of the Panel Report are substantial. China's other appeal concerns two interpretations adopted by the Panel which China considers to be in error, and which China believes should be of concern to all Members.

3. The first of these errors, discussed in Section II of this submission, concerns the Panel's interpretation of the term "public body" under Article 1.1(a)(1) of the SCM Agreement. In *US – Anti-Dumping and Countervailing Duties (China)* ("DS379"), the Appellate Body concluded that a "public body" is an entity "vested with authority to exercise governmental functions".<sup>3</sup> The issue before the compliance Panel in this dispute concerned the *nature* of the "governmental function" that an entity must be vested with authority to perform in order to be deemed a public body.

4. China argued that it cannot be the case that an entity vested with authority to perform *any* "government function" is properly deemed a public body under Article 1.1(a)(1), even if that "governmental function" is unrelated to the alleged financial contribution at issue. The Panel disagreed, and concluded that "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."<sup>4</sup>

5. In this submission, China demonstrates that the Panel's finding cannot be reconciled with the Appellate Body's prior interpretation and application of Article 1.1(a)(1). In DS379, the Appellate Body explained that the context of Article 1.1(a)(1)(i)-(iii) "lends support to the proposition that a 'public body' in the sense of Article 1.1(a)(1) connotes an entity vested with *certain* governmental responsibilities, or exercising *certain* governmental authority."<sup>5</sup> The Appellate Body found that "too broad an interpretation of the term 'public body'" could "risk upsetting the delicate balance embodied in the *SCM Agreement* because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies."<sup>6</sup> The Appellate Body also found that its interpretation "coincide[d] with the essence of Article 5" of the International Law Commission's Articles on *Responsibility of States for Internationally Wrongful Acts* ("ILC Articles"), which attributes to the State conduct of a person or entity that is not an organ of the State if "empowered by the law of the State to exercise

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<sup>1</sup> See Panel Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China* (WT/DS437/RW) (circulated to WTO Members 21 March 2018) ("Panel Report").

<sup>2</sup> Panel Report, para. 8.1(e).

<sup>3</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

<sup>4</sup> Panel Report, para. 7.28.

<sup>5</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 296 (emphasis added).

<sup>6</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 303.

elements of the governmental authority ... *provided the person or entity is acting in that capacity in the particular instance*".<sup>7</sup>

6. The Panel's conclusion that there does not need to be a "connection" between the "government function" identified by an investigating authority and the alleged financial contribution cannot be reconciled with any of these prior Appellate Body findings. Nor can it be reconciled with the Appellate Body's prior application of its interpretive framework in relation to the USDOC's determinations that certain state-owned commercial banks ("SOCBs") examined in the *Certain New Pneumatic Off-the-Road Tires* ("OTR") investigation were public bodies.<sup>8</sup>

7. In relation to the SOCBs at issue in the *OTR* investigation, the Appellate Body found that the USDOC's public body determination in respect of SOCBs "was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government".<sup>9</sup> The evidence on which the USDOC had relied pertained to the government's exercise of control over SOCBs *in making loans*, the conduct that was the subject matter of the financial contribution inquiry. Accordingly, when the Appellate Body found that the USDOC's public body determinations in respect of SOCBs were supported by evidence that SOCBs "effectively exercise certain governmental functions", the Appellate Body was not referring to "government functions" in the abstract. Rather, the Appellate Body was referring to the "governmental function" of providing loans to certain favoured industries.

8. In China's view, the Panel's interpretive conclusion cannot be reconciled with the Appellate Body's analysis, or with the fact that the Appellate Body understood that in the context of an inquiry that is about the attribution of an entity's conduct under Article 1.1(a)(1) to the government, a government must exercise control *over the conduct that is the subject of the inquiry* in order for that control to be "meaningful".

9. China believes that the implications of the Panel's sweeping interpretation should be of great concern to all Members. If an entity vested with authority to perform *any* "government function" may properly be considered a public body under Article 1.1(a)(1), regardless of whether the authority vested in the entity is at all *relevant* to the conduct that is potentially being attributed to the government, China cannot conceive of many entities that would *not* be considered public bodies. In this respect, China believes that the Panel's interpretation "upset[s] the delicate balance embodied in the *SCM Agreement*" in exactly the manner that was of concern to the Appellate Body in DS379.

10. The second error that China identifies in Section III of this submission concerns the Panel's interpretation of Article 14(d) of the *SCM Agreement*. Article 14(d) plainly specifies that the **adequacy of remuneration is to be evaluated "in relation to prevailing market conditions ... in the country of provision"**. The Appellate Body held in *US – Softwood Lumber IV* that it is only in "very limited" circumstances that an investigating authority may reject domestic benchmark prices in favour of an out-of-country benchmark.

11. The compliance Panel in the present dispute found, correctly, that the USDOC did not have a valid basis under Article 14(d) for rejecting domestic Chinese prices as the benchmark for evaluating the adequacy of remuneration. The Panel's decision focuses on the failure of the USDOC to demonstrate that the alleged "government interventions" identified by the USDOC in its compliance determinations resulted in a "direct impact" on domestic Chinese prices for the inputs at issue. The Panel emphasized that the mere fact of government intervention in the domestic economy, in whatever form, is insufficient to conclude that domestic benchmark prices are not market determined. Nor may such an effect be presumed. China agrees with these findings of the Panel insofar as they go: an investigating authority's rejection of available domestic benchmark prices

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<sup>7</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the International Law Commission at its Fifty-third Session (2001) (United Nations International Law Commission, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), chapter IV.E.1) ("ILC Articles"), Article 5 (emphasis added) (CHI-8).

<sup>8</sup> See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 338-359, discussing U.S. Department of Commerce Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain OTR Tires From the People's Republic of China (7 July 2008) ("OTR Final I&D Memorandum"), pp. 13-14 (CHI-7).

<sup>9</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.

must be based on hard evidence, and presumptions should play no role in the investigating authority's analysis.

12. While China agrees with the Panel's ultimate findings of inconsistency under Article 14(d), China believes that the Panel nevertheless erred in its interpretation of that provision. The Panel interpreted Article 14(d) and past Appellate Body reports to mean, in essence, that a "market" price under Article 14(d) is a price that does not deviate from a "market" price. This interpretation of Article 14(d) is self-evidently circular in nature: one cannot know whether a price "deviates" from a "market" price without knowing what a "market" price is. The Panel did not answer this question. As a result, the Panel failed to interpret and give effect to the term "market" in Article 14(d), properly interpreted within the context of the phrase "prevailing market **conditions ... in the country of provision**".

13. In China's view, a "market" price within the meaning of Article 14(d) is a price that is determined by the interplay of supply and demand, as opposed to a price that is effectively determined by the government. This conclusion follows the ordinary meaning of Article 14(d), as well as from prior Appellate Body reports interpreting Article 14(d), all of which have equated the issue of "distortion" under Article 14(d) with the circumstance in which an investigating authority would otherwise be required to compare the price of the government-provided good to another government-determined price (i.e. to engage in a "circular" price comparison). Moreover, this interpretation is the only way to reconcile the Appellate Body's recognition that Article 14(d) does not require a market "undistorted by government 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. The term "market" in Article 14(d) refers to a price determined by the interplay of supply and demand, including as the forces of supply and demand may be affected by various government policies and actions, but it does not refer to a price that is effectively determined by the government.

14. The Panel appears to have rejected China's understanding of the term "market" in Article 14(d), but offered no alternative interpretation of the term "market" in its place. As best as China can discern from the Panel Report, the Panel considered that an investigating authority can reject available domestic price benchmarks whenever the investigating authority can demonstrate that government policies or actions had a "direct impact" on those prices. The Panel offered no interpretative support for this conclusion. Nor did the Panel reconcile this conclusion with the Appellate Body's prior finding that the term "market" in Article 14(d) does not refer to a market "undistorted by government intervention". The Panel's apparent understanding of Article 14(d) is devoid of any genuine substance and, unless corrected by the Appellate Body, is likely to engender further litigation over the question of "benchmark distortion" under Article 14(d).

15. China respectfully submits that the Appellate Body should take this opportunity to ensure that the circumstances in which an investigating authority may lawfully reject available in-country price benchmarks are indeed "very limited", which is what the Appellate Body originally contemplated in its decision in *US – Softwood Lumber IV*. In the fourteen years since the Appellate Body issued that report, the USDOC has disregarded the meaning and the spirit of that decision, and has, instead, adopted a regular practice of rejecting in-country prices as "distorted". The opposition of other Members to this practice is evidenced by the fact that there are no fewer than four other disputes currently pending in which Members are challenging the USDOC's practice.<sup>10</sup> It is time for the United States to return its practice to the plain text of Article 14(d): "prevailing market conditions **... in the country of provision**".<sup>11</sup>

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<sup>10</sup> These are: *US – Supercalendered Paper* (DS505), *US – Carbon Steel (India) (Article 21.5 – India)* (DS436), *US – Countervailing Measures on Lumber* (DS533), and *US – Countervailing Measures on Pipe and Tube* (DS523).

<sup>11</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), China indicates that this executive summary contains 2,117 words (including footnotes), and this other appellant submission (not including the text of the executive summary) contains 26,254 words (including footnotes).

## ANNEX B-3

## EXECUTIVE SUMMARY OF CHINA'S APPELLEE'S SUBMISSION

1. If there is a theme to the United States' appeal of the compliance Panel report in this dispute, it is this: the United States believes that the United States Department of Commerce ("USDOC") is entitled to assume the conclusion of its so-called "investigations" of alleged Chinese input subsidies. Because the United States is convinced that the Government of China ("GOC") provides inputs for less than adequate remuneration to downstream producers of manufactured products, it believes that the USDOC should be allowed to work backwards from that assumption to identify the "subsidies" that it assumes to exist. The United States is unhappy with the compliance Panel report because, with regard to benefit and specificity, the Panel held that the USDOC was actually required to demonstrate the existence of these alleged subsidies in accordance with the requirements of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), based on positive evidence in the record.
2. The United States further appears to believe that the USDOC should be allowed to identify these alleged input subsidies on a "cookie-cutter" basis from one investigation or review to the next, without the need to undertake a meaningful investigation in each instance. At the same time, the United States wants to force China to re-litigate the same issues of financial contribution, benefit, and specificity over and over again, tying up the dispute settlement system with new challenges each time the USDOC issues an administrative review determination in a countervailing duty proceeding that is already the subject of recommendations and rulings by the Dispute Settlement Body ("DSB"). The United States is unhappy with the compliance Panel report because the Panel applied settled jurisprudence to find that the Public Bodies Memorandum is a measure taken to comply that China could challenge "as such",<sup>1</sup> and because the Panel found that subsequent, closely-connected administrative review and sunset review determinations were measures taken to comply and therefore within the Panel's terms of reference.
3. China will demonstrate in this appellee's submission that the Appellate Body should reject these efforts by the United States to evade compliance with the recommendations and rulings of the DSB.
4. Part II of this appellee's submission demonstrates that, contrary to the United States' claim on appeal, the Panel did not err in finding: (i) that the Public Bodies Memorandum is a measure taken to comply with the recommendations and rulings of the DSB in these proceedings; and (ii) that this measure taken to comply constitutes a rule or norm of general and prospective application that can be challenged "as such".
5. The United States' appeal in respect of the first finding depends upon a false dichotomy between measures that form an "integral part" of a declared measure taken to comply and measures that can be challenged on an independent basis. The United States is simply mistaken in suggesting that these two characterizations of a measure are mutually exclusive. The United States likewise errs in arguing that China was required to challenge the Public Bodies Memorandum before the original panel, even though the Public Bodies Memorandum was not even relevant to the measures originally challenged.
6. As for the Panel's finding that the Public Bodies Memorandum constitutes a rule or norm of general and prospective application, the United States merely reprises the same arguments that it presented to the Panel, which the Panel correctly rejected. The fact that the Public Bodies Memorandum is a rule or norm of general and prospective application is evident from the text, as well as from the USDOC's consistent use of the Memorandum as the basis for its "public body"

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<sup>1</sup> U.S. Department of Commerce Memorandum regarding "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: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379" (18 May 2012) ("Public Bodies Memorandum") (CHI-1).

findings in countervailing duty investigations of Chinese products since the USDOC first issued the Memorandum in 2012.

7. Part III of this appellee's submission rebuts the U.S. claim that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement. As China will demonstrate, the United States' appeal of the Panel's findings is the latest and perhaps the most brazen move by the United States in its long-running campaign to legitimize the USDOC's regular practice of resorting to out-of-country benchmarks under Article 14(d).

8. The United States' claim that the Panel erred in its interpretation and application of Article 14(d) is premised upon an interpretation of the phrase "prevailing market conditions ... in the country of provision" that the Appellate Body expressly rejected in *US – Softwood Lumber IV*, namely that this phrase refers to a market "undistorted by government intervention". The United States has not presented cogent reasons for the Appellate Body to reverse its prior interpretation, and the Appellate Body must reject the U.S. claim of error for that reason alone. China further demonstrates in Part III that if the United States is not seeking to overturn the Appellate Body's holding in *US – Softwood Lumber IV*, the United States must be advocating an interpretation of Article 14(d) under which the phrase "prevailing market conditions" is consistent with certain types of government influence over the conditions of supply and demand, but not others. The United States provides no basis for this interpretation, and, in particular, provides no basis to distinguish among all of the different ways in which government policies and actions affect market conditions, either in terms of their nature or their degree.

9. The United States also claims that the Panel erred in finding that Article 14(d) required the USDOC to demonstrate that one or more "government interventions" *actually resulted* in the "distortion" of in-country prices. Here, too, it is the United States that errs. Whatever the legal standard for finding that in-country prices were not "market-determined" – an issue implicated both by the U.S. appeal and by China's other appeal – Article 14(d) plainly requires an investigating authority to demonstrate on the basis of positive evidence that in-country prices were not market-determined as a *result* of "government intervention". As China will demonstrate, the Appellate Body has repeatedly held that an investigating authority must demonstrate a causal connection between a "government intervention", such as the possession and exercise of market power by government-related suppliers, and the actual pricing behaviour of market actors. The United States, by contrast, believes that an investigating authority should be able to reject in-country prices on the basis of mere assertion. The United States' proposed interpretation of Article 14(d) is unfounded and, if accepted, would mean that the circumstances in which investigating authorities can reject in-country prices would not be "very limited" at all. That may be what the United States wants, but it is not what Article 14(d) requires.

10. In Part IV of this appellee's submission, China demonstrates that the Appellate Body must reject the U.S. claim that the compliance Panel erred in its interpretation and application of Article 2.1(c) of the SCM Agreement.

11. The U.S. appeal on this issue begins with a ridiculous argument that the Panel was somehow barred from evaluating whether the USDOC properly identified the existence of one or more "subsidy programmes", even though the USDOC was required by the recommendations and rulings of the DSB to consider "the length of time during which *the subsidy programme* has been in operation". The Appellate Body addressed the meaning of the term "subsidy programme" in its original report in this dispute, and expressly recognized that the USDOC would be required to identify one or more "subsidy programmes" as part of its consideration of "the length of time during which the subsidy programme has been in operation". Even the USDOC appears to have recognized this fact in the compliance determinations at issue – the United States has invented this objection for the first time on appeal.

12. As for the Panel's interpretation and application of the term "subsidy programme", the United States continues with its failed attempt to persuade the Appellate Body that this term can refer merely to a series of *financial contributions* – which, of course, are not "subsidies" on their own. The Appellate Body should continue to reject this interpretation. The United States then proffers a set of entirely *post hoc* rationalizations for the USDOC's single-sentence "consideration" of "the length of time during which the subsidy programme has been in operation". The United States did not even present these rationalizations to the Panel, let alone set them forth in the published determinations of the USDOC as required. Rather surprisingly, the *post hoc* rationalizations that the



United States presents for the first time on appeal turn on its assertion that the GOC instructs input producers to whom they should sell their products and at what price – an assertion that the United States made before the compliance Panel and was forced to retract when China pointed out that there was no evidence to support it.

13. Finally, Part V of this appellee's submission rebuts the U.S. claim that the compliance Panel erred in concluding that certain administrative review and sunset review determinations issued subsequent to the original determinations found to be inconsistent were within the Panel's terms of reference under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").<sup>2</sup> This claim of error need not detain the Appellate Body for long. The United States is merely seeking to re-litigate issues that the Appellate Body resolved in *US – Zeroing (EC) (Art. 21.5 – EC)*. The compliance Panel applied settled jurisprudence to conclude, correctly, that the subsequent measures had a sufficiently close nexus, in terms of nature, effects and timing, with the declared measures taken to comply and the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU.<sup>3</sup>

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<sup>2</sup> Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) ("DSU"), Article 21.5.

<sup>3</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (11 March 2015), China indicates that this executive summary contains 1,694 words (including footnotes), and this appellee's submission (not including the text of the executive summary) contains 31,674 words (including footnotes).

## ANNEX B-4

EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION<sup>1</sup>

1. China appeals certain of the compliance Panel's legal findings and conclusions related to the interpretation and application of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and certain of the compliance Panel's findings that aspects of the U.S. implementation measures challenged by China are not inconsistent with various provisions of the SCM Agreement. This submission demonstrates that China's appeals lack merit.

2. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") are meant to address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the Dispute Settlement Body ("DSB)]." In order to bring the United States into compliance with the DSB's recommendations 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 reconsidered its original determinations. In the section 129 proceedings, the USDOC supplemented its administrative records with information compiled by the USDOC as well as information that the USDOC solicited from interested parties. The USDOC also received and took into account arguments submitted by interested parties. On the basis of the new evidence and arguments on the records of the section 129 proceedings, as well as information from the original proceedings, the USDOC made and published revised determinations at the conclusion of the section 129 proceedings.

3. In order to bring the United States into compliance with the DSB's recommendations with respect to "as such" findings made by the original Panel concerning the "so-called 'rebuttable presumption' or 'Kitchen Shelving policy,'" which the USDOC applied when determining whether an entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement, the USDOC stopped applying the "rebuttable presumption" or "Kitchen Shelving policy."

4. China erroneously claims in this compliance proceeding that the United States has failed to comply with the recommendations adopted by the DSB in this dispute. In its other appellant submission, China contends that the compliance Panel erred in its interpretation and application of Articles 1.1(a)(1) and 14(d) of the SCM Agreement. As demonstrated in this submission, China's arguments lack merit.

5. The United States has structured this appellee submission as follows. Section II demonstrates that the compliance Panel did not err in its interpretation and application of Article 1.1(a)(1) of the SCM Agreement. Section II.A responds to China's arguments that the compliance Panel erred in finding that the USDOC's public body determinations in the section 129 proceedings are not inconsistent with U.S. obligations under the SCM Agreement. As explained in section II.A.1, the USDOC's public body determinations are reasoned and adequate and supported by ample record evidence relating to the core features of the entities in question and their relationship to the government. Indeed, 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 GOC and other interested parties. As can be seen on the face of the USDOC's preliminary and final determinations,

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<sup>1</sup> Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 2,965 words (including footnotes), and this U.S. appellee's submission (not including the text of the executive summary) contains 46,000 words (including footnotes).

the Public Bodies Memorandum,<sup>2</sup> and the CCP Memorandum,<sup>3</sup> China's contention that the USDOC failed to provide a reasoned and adequate explanation is absurd. The compliance Panel appropriately denied China's request that it ignore the record evidence, and thus correctly found that the USDOC's determinations are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

6. Section II.A.2 responds to China's challenge of one aspect of the compliance Panel's legal interpretation of Article 1.1(a)(1) of the SCM Agreement, namely the compliance Panel's finding that "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." China proposes a novel, flawed interpretation of the term "public body," arguing that Article 1.1(a)(1) "imposes a 'legal requirement' that the 'government function' identified by the investigating authority relate to the conduct alleged to constitute a financial contribution under Article 1.1(a)(1) – i.e. that there be a 'clear logical connection' between the two – for an entity engaged in such conduct to be considered a public body."

7. In effect, China argues that the only relevant "government function" for the purpose of a "public body" analysis is the particular conduct described in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement. The implication of China's position is 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 or providing loans, is itself a government function, and that engaging in that activity is consistent with the government's objectives. China continues to misunderstand the meaning of the term "public body" and the concept of a "financial contribution." Once an entity has been determined to be a public body – following the required examination of the core characteristics of the entity – then any time that entity engages in any of the conduct described in Article 1.1(a)(1)(i) and (iii) of the SCM Agreement, "there is a financial contribution," per the definition set forth in Article 1.1(a)(1). As the Appellate Body explained in *US – Anti-Dumping and Countervailing Duties (China)*, "[i]f the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution."<sup>4</sup> China proposes an interpretation that is legally and logically unsound, and which also is at odds with prior Appellate Body findings. Accordingly, China's proposed interpretation should be rejected.

8. Section II.A.3 responds to China's requests for the Appellate Body to make additional findings related to China's "as applied" claims under Article 1.1(a)(1) of the SCM Agreement. China's arguments in favor of its requests lack merit; both because they are premised on China's novel, flawed interpretation of the term "public body" and because they suffer from other flaws.

9. Section II.A.4 responds to China's request for the Appellate Body to complete the legal analysis and find that the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement. The Appellate Body should reject the new, flawed interpretation of the term "public body" proposed by China, and thus there is no basis for the Appellate Body to complete the legal analysis of China's "as applied" claims. And even aside from China's flawed challenge to the compliance Panel's legal interpretation, China's claim still would fail because the USDOC did establish a clear, logical connection between the "government function" identified by the USDOC and the particular conduct at issue under Article 1.1(a)(1) of the SCM Agreement. The USDOC's determination is supported by ample record evidence even under China's proposed interpretation.

10. Section II.B demonstrates that the compliance Panel did not err in finding that the Public Bodies Memorandum is not inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement. Section II.B.1 shows that China's two arguments against the compliance Panel's findings lack merit.

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<sup>2</sup> See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.b; *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Timothy Hruby Re: 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: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379*, May 18, 2012 ("Public Bodies Memorandum") (Exhibit CHI-1).

<sup>3</sup> See *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Tim Hruby Re: The Relevance of the Chinese Communist Party for the Limited Purpose of Determining Whether Particular Enterprises Should Be Considered To Be "Public Bodies" within the Context of a Countervailing Duty Investigation*, May 18, 2012 ("CCP Memorandum") (p. 41 of the PDF version of Exhibit CHI-1).

<sup>4</sup> *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284 (emphasis added).

11. First, China asserts that, "[i]f the Appellate Body reverses the Panel's conclusion regarding the proper legal standard, the Appellate Body should also reverse this basis for the Panel's rejection of China's 'as such' claim." However, the new interpretation of the term "public body" proposed by China is legally erroneous and should be rejected.

12. Second, China argues that the compliance Panel erred in finding that the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement. If this is China's argument, it was China's burden to put before the compliance Panel evidence demonstrating that the Public Bodies Memorandum restricts, in a material way, the discretion of the USDOC to make public body determinations in a manner consistent with Article 1.1(a)(1). China did not even attempt to meet its burden. The compliance Panel did not err in rejecting China's "as such" claim.

13. Section II.B.2 responds to China's request for the Appellate Body to complete the legal analysis and find that the Public Bodies Memorandum is inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement. The Appellate Body should reject China's request to reverse the compliance Panel's finding that the Public Bodies Memorandum is not premised on an erroneous legal standard and the compliance Panel's finding that the Public Bodies Memorandum does not restrict, in a material way, the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement. Thus, there is no basis for the Appellate Body to complete the legal analysis of China's "as such" claim. Even were the Appellate Body to reverse the compliance Panel's findings, the Appellate Body nevertheless should reject China's "as such" claim because, as demonstrated in the U.S. appellant submission, the Public Bodies Memorandum is not a measure that is challengeable "as such" within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU, and the Public Bodies Memorandum is not a rule or norm of general or prospective application.

14. Section III addresses China's claim regarding Article 14(d) of the SCM Agreement. The basis for China's appeal is an unsupportable assertion that Article 14(d) prescribes three and only three scenarios in which out-of-country prices may serve as an appropriate benchmark for determining whether a subsidized good was provided for less than adequate remuneration. Nothing in the text of Article 14(d) suggests this interpretation. And, notwithstanding China's selective quotations, the prior Appellate Body and panel reports that have addressed Article 14(d) have all recognized – in express terms – that neither Article 14(d) nor the findings in those reports purports to cover the myriad circumstances in which domestic prices may not be the appropriate basis for comparison.

15. Section III.A responds to China's argument that its overly narrow legal interpretation should be adopted by the Appellate Body. Section III.A.1 sets out the appropriate legal framework for interpreting and applying Article 14(d). We explain that, as the Appellate Body has previously recognized, an investigating authority may reject prices if they are not market determined. In section III.A.2, we address the compliance Panel's findings on this issue and demonstrate that the compliance Panel's rationale for rejecting China's argument is sound and consistent with a proper interpretation of Article 14(d). Because Article 14(d) permits the use of external benchmarks in a variety of circumstances, the compliance Panel did not err in finding it could "not accept that the narrow legal standard advocated by China is required by Article 14(d)."<sup>5</sup> Finally, in section III.A.3, we address the five panel and Appellate Body reports that China argues support its contention that Article 14(d) should be interpreted as prescribing only three scenarios in which domestic prices may be considered unsuitable for benchmarking purposes. We demonstrate that the express terms of these findings contradict what China asserts.

16. Section III.B responds to China's argument that the term "market" should be turned on its head to include distortive government interventions, such that prices would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions), and that price distortion should not be a relevant consideration in the analysis under Article 14(d) of the SCM Agreement. The discussion begins in section III.B.1 by addressing, in particular, China's argument that the compliance Panel imposed a circular legal approach by requiring that distortion be examined by

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<sup>5</sup> *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.162.

comparison to a market price without defining what constitutes a market price.<sup>6</sup> As we explain below (and previously in the U.S. appellant submission), the United States agrees, albeit for different reasons, that the compliance Panel formulated an approach that does not appropriately reflect the terms of Article 14(d). In particular, as explained in the U.S. appellant submission, the compliance Panel erred by reaching a conclusion without addressing the real question at issue, that is, whether prices were or were not market determined.<sup>7</sup> Under the compliance Panel's approach, the only justification for resort to out-of-country benchmarks is evidence of the difference between the price of the good being assessed and a market-determined price in the same country. Such a demonstration, of course, would require that there are market-determined prices for the good in that country against which to compare the distorted price. Where no in-country prices are market determined, a conclusion that a benefit is being conferred could be precluded, despite the remuneration being inadequate. The compliance Panel appears to have misconstrued what the Appellate Body has articulated about the proper approach under Article 14(d) and, in doing so, the compliance Panel also foreclosed consideration of appropriate benchmarks.

17. We explain further in section III.B.2 of this submission that the remedy for the compliance Panel's error is not found in China's radical new proposal to define "market" to include distortive government interventions. China's definition is not consistent with the concept of interactions between independent buyers and sellers that is captured by the term "market." The Appellate Body has recognized that *private prices* are the starting point for determining a benchmark precisely for this reason.<sup>8</sup> The fundamental concept of market prices as those which would be charged between independent enterprises acting at arm's length is recognized throughout the SCM Agreement<sup>9</sup> and in other provisions of the WTO Agreement.<sup>10</sup> In contrast, China's proposal turns the term "market" on its head, such that the market would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions).

18. Finally, in section III.B.3 we conclude the discussion by addressing the flaws in China's final argument that price distortion should not be a relevant consideration in the analysis under Article 14(d). The text of Article 14(d) and the approach the Appellate Body has taken in applying that text do not provide support for China's position. The Appellate Body has recognized in prior disputes that, in light of the purpose of measuring the benefit to a recipient, being able to ensure that potential benchmark prices are market-determined may be necessary in order to achieve a meaningful comparison.

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<sup>6</sup> See China's Other Appellant Submission, para. 137 ("the Panel's circular standard . . . states, in effect, that 'a market price is a price that doesn't deviate from a market price'").

<sup>7</sup> See U.S. Appellant Submission, paras. 81-84.

<sup>8</sup> *US – Carbon Steel (India)*, para. 4.154 (describing prices from "private suppliers in arm's length transactions" as "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement"); *US – Softwood Lumber IV (Canada)* ("private prices in the market of provision will *generally* represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods.").

<sup>9</sup> See, e.g., SCM Agreement, Annex I Illustrative List, item (e), n. 59 (in establishing existence of export subsidies, "Members reaffirm the principle that prices . . . should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length."); SCM Agreement, Art. 29.1 (referring to transformation from centrally-planned to "market, free-enterprise economy").

<sup>10</sup> See, e.g., Customs Valuation Agreement, Art. 1.1(d) ("The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided: ... (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2"); Customs Valuation Agreement, Note 3 to Article 1, paragraph 2 ("Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship.").

## ANNEX C

## ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>

1. Canada's submission addresses three issues. First, Canada describes the proper legal standard for determining when an investigating authority may reject in-country prices as a benchmark for the purposes of determining whether a government's provision of goods is made for less than adequate remuneration.

2. A market need not be a "pure market" or "undistorted by government intervention".<sup>2</sup> Government regulation of a market does not in and of itself justify the rejection on in-country benchmarks. An investigating authority must demonstrate a clear evidentiary link between government intervention in the market has resulted in the distortion of in-country prices. An investigating authority's analysis must be based on positive evidence and provide an adequate explanation about how the authority reached the conclusion that in-country prices were distorted. Finally, there are instances where a government has an impact on in-country prices but they may still be market prices.

3. Second, Canada addresses the proper legal standard for establishing a rule or norm of general and prospective application. The legal standard requires the complaining Member to demonstrate with evidence the attribution, precise content, and general and prospective application of the measure.

4. Finally, Canada addresses the proper legal standard for determining when a measure has a sufficiently "close nexus" with the recommendations and rulings of the DSB and a Member's declared measure taken to comply. The correct legal standard for determining whether a measure falls within a compliance panel's terms of reference is whether there is a "close nexus" in terms of the nature, effects and timing between these measures and the rulings and recommendations of the DSB and declared measures taken to comply. Consequently, measures such as administrative and sunset reviews fall within the jurisdiction of an Article 21.5 compliance panel when the requisite "close nexus" exists.

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<sup>1</sup> Canada's Third Participant Submission excluding this executive summary consists of 5704 words. This Executive Summary consists of 328 words.

<sup>2</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 87.

## ANNEX C-2

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION<sup>1</sup>**1. China's Appeal of the Panel's findings related to the USDOC's public body determinations**

1. The issue of public body is connected to the broader question of attribution. Unlike private entities that are "entrusted or directed", if a public body is found to be vested with governmental authority, any financial contribution it provides in principle falls within Article 1.1(a)(1).

2. The European Union does not consider that each instance of the conduct of a public body must be assessed to determine its relationship with the governmental function the entity exercises.

3. The Panel did not find that the connection between the governmental function and the particular financial contribution at issue is, in general terms, irrelevant to the public body assessment. Rather, it disagreed with China's argument that this connection *must* be assessed in *all cases*.

**2. United States' appeal of the Compliance Panel's findings related to the Public Bodies Memorandum**

4. With respect to Article 21.5, the relevant question is whether the Public Bodies Memorandum satisfies the "close nexus" test.

5. As a general matter, the European Union does not see why a measure could not be considered as a "measure taken to comply" in two different disputes.

6. In a typical case, a measure that continued to exist unchanged from before the original dispute and throughout the compliance proceedings could be subject to preclusion. However, there may be reasons other than the timing of the publication of the text of a measure that would have prevented the complaining Member from raising a claim against it.

7. Regarding the issue of whether the Public Bodies Memorandum is a so-called "rule or norm of general or prospective application", the burden of proof lies on China because this is how it formulated its challenge. The text of the measure is relevant but not necessarily determinative. The same is true of the fact of repeated application of the measure in individual cases. The Panel's assessment of these factors should be reasoned, objective, and free of internal contradictions.

**3. United States' appeal and China's other appeal of the Compliance Panel's findings under Articles 1.1(b) and 14(d) of the SCM Agreement**

8. Both parties appeal the Panel's findings under Article 14(d). The central issue in the two appeals concerns the question under which conditions an investigating authority may use out-of-country benchmarks in case of government interventions which may distort prices, i.e. not in situations in which the government is the predominant supplier of the good in question which have been dealt with in previous disputes. The Panel found that the investigating authority must show a "direct impact" of the government intervention on the prices of the good in question. The US considers that this legal standard is too narrow, China deems the Panel's standard to be too broad and argues that external benchmarks can only be used if the government effectively determines the price.

9. The EU disagrees with the Panel to the extent that the Panel took the position that an investigating authority must establish a "direct impact" between the government intervention and price distortion. The EU's position is that an investigating authority needs to establish a link in the form of an evidentiary path between the government interventions in question and the price

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<sup>1</sup> Total length of the submission, excluding executive summary: 9745 words. Length of the executive summary: 925 words.



distortion. Whether such a link is based on a "direct" or "indirect" impact of the government intervention on the price should not matter. What is important is for the investigating authority to adequately and plausibly explain why the respective government interventions result in prices that are no longer market determined and hence distorted. Under the Panel's approach, the use of external benchmarks under Article 14(d) would be unduly restricted because government interventions with an indirect effect may be as distortive on prices as those with a direct impact. The Panel's approach therefore would not be able to capture the myriad forms of government interventions that exist. The assessment of an evidentiary link between government intervention and price distortion will require a case-by case analysis and must be based on the totality of the evidence.

#### 4. United States' appeal of the Compliance Panel's findings under Article 2.1 of the SCM Agreement

10. The US argues, *inter alia*, that the Panel erroneously interpreted Article 2.1(c) by requiring – for the assessment of whether a subsidy programme exists – that each financial contribution granted to a recipient under the programme (here: inputs provided for less than adequate value) must confer a benefit, a condition that is not grounded in Article 2.1(c). China considers that the US approach focusing on systematic financial contributions only runs counter to Appellate Body case law.

11. The EU submits that unwritten subsidy measures like the present input transactions pose particular evidentiary challenges in terms of identifying a subsidy programme. Under the Appellate Body's case law, one possibility to evidence a subsidy programme is to show a systematic series of actions (demonstrating a plan or scheme) pursuant to which financial contributions that confer a benefit are provided to certain enterprises. The EU does not consider that this case law requires that, in case of input provision transactions, every such transaction must be both a financial contribution and confer a benefit. In the total number of transactions, there may well be input transactions that do not confer a benefit but as long as those transactions that do confer a benefit can be qualified as systematic, they may constitute proof of a plan or scheme (programme).

## ANNEX C-3

## EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION\*

## A. Public Body Inquiry

1. Japan disagrees with China's argument that a public body determination requires that the control by the government over the entity be exercised in relation to the conduct of "financial contribution". Rather, the focus of the analysis should be on the core characteristics and functions of the entity, its relationship with the government, and the legal and economic environment of the investigated country. An important element therein is whether an entity is structured in a manner so that it can act not solely in accordance with commercial considerations. A public body can be differentiated from private bodies by its ability to continue its existence to achieve its policy goals even if it records losses for a sustained period of time with certain financial capabilities provided by government.

## B. Price Distortion

2. The Appellate Body's findings in *US – Carbon Steel (India)* do not support an interpretation of Article 14(d) that would require that deviation from market-determined prices must be quantified or specific impact on in-country transaction prices must be identified. On the contrary, the Appellate Body indicated that the analysis of price distortion must be made on a case-by-case basis, examining a variety of factors. In Japan's view, government intervention can be inferred to distort market prices if the evidence indicates that such intervention changes the conditions of competition in the market unjustifiably or arbitrarily.

3. Japan also disagrees with China's argument that an investigating authority may only resort to out-of-country benchmarks where the government effectively determines the price within the country. Rather, Japan 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.

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\* Japan's Third Participant Submission 18,202 words, Executive Summary 1,618 words.