UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(AB-2018-2 / DS437)

APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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US – Zeroing (EC) (Article 21.5 – EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
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I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

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[2] 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

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[1] 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).

[2] *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).

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."[3] 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 it 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 Panel refers to "the systemic analysis in this memorandum"[4] 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*,[5] 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.[6] Under Article 14(d), properly interpreted, an objective and unbiased

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[3] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.127-7.129.

[4] Public Bodies Memorandum, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1) (emphasis added).

[5] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.152.

[6] 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

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.[7] 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.[8] 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."[9] These findings are in error and are based on erroneous findings on issues of

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conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.

[7] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.275-276, 7.281, and 7.292-293.

[8] *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, 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).

[9] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.347.

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.

II. U.S. APPEAL OF CERTAIN OF THE COMPLIANCE PANEL'S FINDINGS CONCERNING THE PUBLIC BODIES MEMORANDUM

10. The United States appeals the compliance Panel's 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,[10] and separately appeals 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."[11] These findings of the compliance Panel are in error.

11. As demonstrated in this submission, the Public Bodies Memorandum is not a measure challengeable "as such" within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU because 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. The Appellate Body has found previously that a complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not. 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.

12. Additionally, the Public Bodies Memorandum cannot be challenged "as such" as a "rule or norm of general or prospective application," as China attempts to do in this compliance proceeding.[12] In making a finding to the contrary, the compliance Panel erred in its application of Articles 3.3, 4.4, and 6.2 of the DSU. 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 misreading the Public Bodies Memorandum, by engaging in circular reasoning, and 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. Contrary to the compliance Panel's finding, the evidence establishes that the Public Bodies Memorandum does not have normative value; the Public Bodies Memorandum does not have general application; and the Public Bodies Memorandum does not have prospective application. Accordingly, China cannot

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[10] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.120.

[11] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.133; *see also id.*, paras. 7.124-7.133.

[12] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.133; *see also id.*, paras. 7.124-7.133.

challenge the Public Bodies Memorandum "as such" as a rule or norm of general or prospective application.

13. As explained further below, a critical flaw in the compliance Panel's reasoning is the internal inconsistency of its understanding of the purported measure before it. The compliance Panel recognized that "the Public Bodies Memorandum is an 'integral part' of the declared measure taken to comply," *i.e.*, the section 129 determinations made by the USDOC.[13] The compliance Panel concluded from this that "the Public Bodies Memorandum is a measure within the scope of [the panel's] terms of reference under Article 21.5 of the DSU"[14] and therefore it is challengeable "as such" in this compliance proceeding.[15] However, if the Public Bodies Memorandum "is *an 'integral part'* of the declared measure[s] taken to comply," then it is not separable from those measures and is not, in itself, an independent measure taken to comply *in this dispute* against which China could make an "as such" claim in this compliance proceeding.

14. Similarly, there is an internal logical inconsistency in the panel report as between the compliance Panel's conclusion about the normative value of the Public Bodies Memorandum and its later conclusion 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.[16] The compliance Panel found that "the nature of the Public Bodies Memorandum is that of *a resource available to the USDOC* for use in making public body determinations, but it does not restrict the USDOC's discretion to supplement the record or take into account and rely on additional information that is provided in a particular investigation."[17] The compliance Panel's conclusion that the Public Bodies Memorandum is "a resource available to the USDOC for use in making public body determinations"[18] – and thus it 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 – cannot be reconciled with the compliance Panel's conclusion that the Public Bodies Memorandum has normative value because it "provides 'administrative guidance and creates expectations among the public and among private actors.'"[19]

15. In light of these inconsistencies in the internal logic of the compliance Panel's findings, as well as other errors elaborated below, 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

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[13] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.116.

[14] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.116.

[15] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.120.

[16] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.134-7.141.

[17] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.141.

[18] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.141.

[19] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.132 (citations omitted).

Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application.

A. 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

16. The United States appeals the compliance Panel's 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.[20] 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 terms of reference under Article 21.5 of the DSU.

1. The Scope of a Compliance Panel's Terms of Reference under Article 21.5 of the DSU Is Limited

17. Article 21 of the DSU concerns "Surveillance of Implementation of Recommendations and Rulings." Article 21.5 of the DSU provides that:

> Where there is a 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.

The Appellate Body has explained that "characterizing an act by a Member as a measure taken to comply when that Member maintains otherwise is not something that should be done lightly by a panel."[21]

18. The Appellate Body has further explained that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a continuum of events."[22] A feature of the first sentence of Article 21.5 is "the express link between the 'measures taken to comply' and the recommendations and rulings of the DSB. Accordingly, determining the scope of 'measures taken to comply' in any given case must also involve

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[20] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.120.

[21] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 74.

[22] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 136.

examination of the recommendations and rulings contained in the original report(s) adopted by the DSB."[23]

19. The Appellate Body has found that "the scope of claims that may be raised in an Article 21.5 proceeding is not unbounded,"[24] and a complaining Member may not "raise just any claim in … Article 21.5 proceedings, without limitation."[25]

> As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be *WTO-consistent* in the original proceeding.[26]

More generally, "[a] complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."[27]

20. The reason for this principle is obvious. It would undermine the rules and procedures to which Members agreed in the DSU if a Member could short-circuit original proceedings by choosing not to pursue certain claims during original proceedings, and then raising them for the first time under the expedited timetable of a compliance proceeding. Such a tactic also would deprive a responding Member of the reasonable period of time to comply with any recommendations of the DSB.[28]

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[23] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 68.

[24] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210.

[25] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211.

[26] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210 (emphasis in original; citations omitted).

[27] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211. The exception to this general rule is that WTO Members may make a claim against "a new and different measure" in compliance proceedings, even if the measure "incorporates components from the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply." *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 432. That is not the situation here.

[28] *See, e.g., EC – Large Civil Aircraft (Article 21.5 – US) (Panel)*, para. 6.81 (reasoning that because the DSU does not afford a responding Member the right to a second reasonable period of time to bring its measures into conformity, a "finding that a measure which is neither a declared 'measure taken to comply' *nor* the subject of specific DSB recommendations and rulings (i.e. a so-called 'undeclared' measure) falls within the scope of a compliance proceeding may, therefore, have important implications for a WTO Member's rights and obligations under the DSU and the covered agreements in general.").

2. The Public Bodies Memorandum Is Not a Measure Taken To Comply in this Dispute

21. The Public Bodies Memorandum is not a measure challengeable "as such" within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU because it is not a measure taken to comply with the DSB's recommendations in this dispute.

22. China asserted before the compliance Panel that the Public Bodies Memorandum is a "measure taken to comply" under Article 21.5 of the DSU.[29] However, China has acknowledged that the Public Bodies Memorandum was adopted to achieve compliance "with the Appellate Body's findings *in DS379*",[30] *i.e.*, in *US – Anti-Dumping and Countervailing Duties (China)*, a prior dispute in which the Appellate Body and panel reports were adopted in March 2011.[31] *This* dispute commenced with China's request for consultations in May 2012, *subsequent* to the DSB's adoption of the Appellate Body and panel reports in *US – Anti-Dumping and Countervailing Duties (China)*.[32]

23. Per China's own assertions, with its "as such" claim against the Public Bodies Memorandum, China is not attempting to challenge a purported "measure" that was "adopted 'in the direction of, or for the purpose of achieving compliance' with"[33] the DSB's recommendations and rulings in *this* "particular dispute."[34] Rather, China is attempting to challenge a memorandum that was published in connection with measures taken to comply with the DSB's recommendations and rulings in an *entirely different*, earlier dispute. Article 21.5 of the DSU does not permit such a kind of lateral challenge. Rather, this proceeding is to resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with *the* recommendations and rulings" in *this* dispute, "including wherever possible [through] resort to the *original panel*" in *this* dispute.[35]

24. China cannot bring an "as such" claim against the Public Bodies Memorandum as part of *this* compliance proceeding because the Public Bodies Memorandum, in itself, is not a measure taken to comply in *this* dispute.

25. The compliance Panel disagreed, and found that because "the Public Bodies Memorandum is an 'integral part' of the declared measure taken to comply, … the Public Bodies

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[29] First Written Submission of China (January 4, 2017) ("China's First Written Submission"), para. 172.

[30] China's First Written Submission, para. 172.

[31] *See* WT/DS379/9.

[32] *See* WT/DS437/1.

[33] China's First Written Submission, para. 172 (citing *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 66).

[34] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 70.

[35] DSU, Art. 21.5 (emphasis added).

Memorandum is a measure within the scope of [the panel's] terms of reference under Article 21.5 of the DSU"[36], and therefore is challengeable "as such" in this compliance proceeding.[37] The compliance Panel's reasoning is flawed.

26. The United States did not dispute – and does not now dispute – China's right to challenge the section 129 determinations made by the USDOC in an effort to bring the U.S. measures into conformity with U.S. WTO obligations. Those section 129 determinations were based, in part, on the Public Bodies Memorandum and the evidence underlying it. In that context, China's "as applied" claims relating to the section 129 determinations necessarily would involve examination of and findings concerning the Public Bodies Memorandum, which the United States has acknowledged was an "integral part" of those determinations.[38] That naturally would be part of the compliance Panel's review to determine whether the USDOC's section 129 determinations are consistent with U.S. WTO obligations.

27. However, if the Public Bodies Memorandum "is *an 'integral part'* of the declared measure[s] taken to comply," then it is not separable from those measures and is not, in itself, an independent measure taken to comply *in this dispute* against which China could make a separate "as such" claim in this compliance proceeding. If, on the other hand, the Public Bodies Memorandum is an independent "measure" that exists and is susceptible to WTO dispute settlement, then it is a measure that was taken to comply with the DSB's recommendations in *US – Anti-Dumping and Countervailing Duties (China)*,[39] and not a measure taken to comply with the DSB's recommendations *in this dispute*. In this regard, the compliance Panel's reasoning is internally inconsistent with respect to how it conceives of a "measure" and how it justifies finding China's "as such" challenge of the Public Bodies Memorandum within the scope of its terms of reference.

28. For these reasons, the Public Bodies Memorandum cannot be the subject of an "as such" claim by China in this compliance proceeding.

3. China Could Have Attempted To Challenge the Public Bodies Memorandum in the Original Panel Proceeding in this Dispute, but China Opted Not To Do So

29. Additionally, the Public Bodies Memorandum is not a measure challengeable "as such" within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU because China could have challenged the Public Bodies Memorandum in the original panel proceeding, but opted not to do so.

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[36] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.116.

[37] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.120.

[38] *See* Responses of the United States to the Panel's Written Questions to the Parties (May 31, 2017) ("U.S. Responses to Panel Questions"), Response to Questions 20 and 23, paras. 141, 148.

[39] *See* China's First Written Submission, para. 172.

30. If the Public Bodies Memorandum has the status of an independent "measure," separate from the section 129 determinations of which it is an "integral part,"[40] then the Public Bodies Memorandum had that status immediately upon publication. As the compliance Panel recognized, "the USDOC issued the Public Bodies Memorandum on 18 May 2012 in connection with its reconsideration of countervailing duty determinations addressed in a different WTO dispute, *prior to the original WTO request for consultations in this dispute* as well as the USDOC's commencement of the Section 129 proceedings in this case."[41] In *this* dispute, China requested consultations with the United States on May 25, 2012, *after* the USDOC had issued the Public Bodies Memorandum.[42] China and the United States held consultations later in the year, on June 25 and July 18, 2012,[43] and China requested the establishment of the original Panel in this dispute on August 20, 2012.[44] Thus, China had the opportunity to raise and pursue an "as such" claim against the Public Bodies Memorandum in the original panel proceedings, but China opted not to do so. As the Appellate Body has explained, "[a] complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."[45] Following the Appellate Body's reasoning, China may not now make an "as such" claim against the Public Bodies Memorandum in this compliance proceeding.

31. The compliance Panel disagreed. The compliance Panel "[did] not consider the present case to be one in which China could have challenged the Public Bodies Memorandum in the original dispute, but did not."[46] The compliance Panel noted that "[i]t is undisputed that the original public body determinations rested on a different basis, and the Public Bodies Memorandum had no relevance to those determinations."[47] The compliance Panel reasoned that "the Public Bodies Memorandum only became relevant to the United States' implementation of the DSB rulings and recommendations in this dispute by virtue of its incorporation into the Section 129 record and its consideration by the USDOC in its public body determinations."[48]

32. The compliance Panel's reasoning is flawed. The compliance Panel's recognition that the Public Bodies Memorandum only became relevant to the United States' implementation of the DSB's recommendations in this dispute by virtue of the incorporation of the Public Bodies

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[40] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.116.

[41] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.117 (emphasis added; citations omitted). *See also* China's First Written Submission, para. 172.

[42] *See US – Countervailing Measures (China) (Panel)*, para. 1.1.

[43] *See US – Countervailing Measures (China) (Panel)*, para. 1.2.

[44] *See US – Countervailing Measures (China) (Panel)*, para. 1.3.

[45] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211.

[46] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.118.

[47] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.118.

[48] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.119.

Memorandum into the records of the section 129 proceedings undermines, rather than supports, the compliance Panel's conclusion that the Public Bodies Memorandum can be challenged separately, "as such," in this compliance proceeding. As the compliance Panel stated, the Public Bodies Memorandum "only became relevant" due to its incorporation into the records of the section 129 proceedings.[49] Accordingly, contrary to the compliance Panel's conclusion, the way that the Public Bodies Memorandum can be addressed in this compliance proceeding is through that very same link – that is, as an element of the record and reasoning used in the measures taken to comply with the DSB recommendations in this dispute, namely the section 129 proceedings.

33. China, however, attempts in this compliance proceeding to make an "*as such*" claim against the Public Bodies Memorandum as a measure taken to comply *in this dispute* that is independent of the section 129 determinations that the USDOC made in this dispute. China's "as such" claim against the Public Bodies Memorandum is *in addition to* China's "as applied" claims against the USDOC's section 129 determinations, of which the Public Bodies Memorandum is an "integral part". Nothing prevented China from attempting to make this precise "as such" claim against the Public Bodies Memorandum during the original compliance Panel proceedings.

34. The compliance Panel erred in reasoning that this issue turns on whether the purported "measure" – *i.e.*, the Public Bodies Memorandum – was part of or relevant to the original determinations that China chose to challenge in the original proceeding, rather than whether the measure, in fact, *could have been challenged* at the time China originally brought this dispute. Further, the compliance Panel *did not provide any meaningful support* for broadening its own terms of reference under Article 21.5 of the DSU in the manner that it did.[50] While the compliance Panel explained that the issue in this dispute "differs somewhat from past scenarios regarding 'unchanged aspects of the original measure' that have been challenged in original proceedings,"[51] that distinction does not provide a reasoned basis for narrowing the principle that a complaining Member may not raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not. It is irrelevant that the countervailing duty determinations that China challenged in the original proceedings were not based on the Public Bodies Memorandum; China could have challenged the Public Bodies Memorandum separately from those countervailing duty determinations as it is attempting now to challenge the Public Bodies Memorandum separately from and in addition to its challenge of the USDOC's section 129 determinations. As explained, the compliance Panel's reasoning, if upheld, would undermine the rules and procedures to which Members agreed in the DSU and would deprive a responding Member of the reasonable period of time to comply.

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[49] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.119.

[50] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.118-7.119.

[51] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.119.

35. For these reasons, China is precluded from making an "as such" claim against the Public Bodies Memorandum in this compliance proceeding. 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.[52]

B. The Compliance Panel Erred in Finding that the Public Bodies Memorandum Is a Rule or Norm of General or Prospective Application

36. The United States separately appeals 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."[53] In so finding, the compliance Panel erred in its application of Articles 3.3, 4.4, and 6.2 of the DSU, which are the provisions of the DSU that refer to "measures" that are challenged in WTO dispute settlement.[54] 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.[55]

37. The compliance Panel erred by misreading the Public Bodies Memorandum, by engaging in circular reasoning, and 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. In the following sections, the United States summarizes the compliance Panel's analysis and then demonstrates that, contrary to the compliance Panel's finding, the evidence establishes that the Public Bodies Memorandum does not have normative value; the Public Bodies Memorandum does not have general application; and the Public Bodies Memorandum does not have prospective application.

1. Summary of the Compliance Panel's Analysis

38. The compliance Panel begins its analysis by observing that:

> With regard to the precise content of the Public Bodies Memorandum as a "rule or norm", as well as its general or prospective application, we note that relevant evidence may

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[52] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.120.

[53] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.133; *see also id.*, paras. 7.124-7.133.

[54] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.122. The Appellate Body has found that the assessment of whether a measure is susceptible to challenge "as such" as a rule or norm of general or prospective application "is a legal characterization and not just a factual one," so this appeal does not call into question whether the compliance Panel made an objective assessment of the facts as required by Article 11 of the DSU. *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 188 (rejecting U.S. arguments relating to Article 11 of the DSU that the panel in that dispute did not assess objectively with the Sunset Policy Bulletin is a measure).

[55] *See, e.g., US – Anti-Dumping Methodologies (China) (AB)*, paras. 5.122 *et seq.*; *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 182 *et seq.*

> include the text of the measure as well as proof of the systematic application of the challenged "rule or norm". With specific respect to the challenge of written rules or norms "as such", the precise content, attribution, as well as the general and prospective nature of the rule or norm may be discernible from the document itself, its official character, or the manner in which it was elaborated, adopted, or enacted.
>
> We examine in particular whether the Public Bodies Memorandum has "normative value", i.e. whether it provides administrative guidance and creates expectations among the public and among private actors. We examine the element of general or prospective application as evidenced by whether the Public Bodies Memorandum is intended to apply to proceedings taking place after its issuance.[56]

In describing the analytical approach it proposed to take, the compliance Panel referenced a number of prior Appellate Body reports. The compliance Panel indicated that it took as the "starting point" of its analysis the text of the Public Bodies Memorandum "on its face".[57]

39. The compliance Panel's description of its proposed analytical approach is unobjectionable, as far as it goes. However, the compliance Panel erred when it examined the text of the Public Bodies Memorandum "on its face". The compliance Panel's analysis is brief. Despite having identified the three separate legal issues to be addressed – *i.e.*, whether the Public Bodies Memorandum has normative value, whether it has general application, and whether it has prospective application – the compliance Panel addresses all three elements simultaneously in the discussion that follows its description of its proposed approach.[58] This is not itself legal error. This mode of analysis, however, resulted in the compliance Panel's analysis being convoluted, and likely was a contributing factor in the compliance Panel's misapplication of the applicable legal standard.

40. Ultimately, the compliance Panel bases its conclusions regarding *all three* elements on two pieces of textual evidence drawn from the Public Bodies Memorandum, which the compliance Panel viewed together with the fact that the USDOC has used the Public Bodies Memorandum – and the evidence underlying it – in a number of countervailing duty proceedings involving products from China.[59] The first piece of textual evidence identified by the compliance Panel is the USDOC's use of the phrase "for the purposes of the countervailing duty

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[56] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.124-7.125 (citations omitted).

[57] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.126 (citations omitted).

[58] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.124-7.133.

[59] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.124-7.133.

(CVD) law," which appears on two pages of the Public Bodies Memorandum.[60] For example, the USDOC concluded, "for the purposes of the countervailing duty (CVD) law, that China's government has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the 'socialist market economy,' which includes maintaining a leading role for the state sector in the economy."[61] The second of the two pieces of textual evidence identified by the compliance Panel is the USDOC's use of the term "systemic analysis," which appears in one footnote in the Public Bodies Memorandum and refers to the contents of the Public Bodies Memorandum.[62]

As explained below, these two pieces of textual evidence offer no support at all for the compliance Panel's finding that the Public Bodies Memorandum is a rule or norm of general or prospective application that can be challenged "as such." In the sections that follow, the United States, unlike the compliance Panel, addresses each of the three factors independently and demonstrates that the two pieces of evidence on which the compliance Panel relied do not support its conclusion that the Public Bodies Memorandum (1) has normative value, (2) has general application, or (3) has prospective application.

2. The Public Bodies Memorandum Does Not Have Normative Value

41. The compliance Panel erroneously found, "with regard to the 'normative value' of the Public Bodies Memorandum, [that] 'the measure provides 'administrative guidance and creates expectations among the public and among private actors' by virtue of its explicit textual elements and the USDOC's consistent reliance on the Public Bodies Memorandum in Chinese investigations.'"[63] The compliance Panel reasoned that "the text of the Public Bodies Memorandum contains elements that could support a finding of normative character …", and noted that, "[i]n particular, the Public Bodies Memorandum states in several places that the analysis and conclusions therein are determinations by the USDOC 'for the purposes of [US] countervailing duty law'."[64] The compliance Panel's reasoning is flawed. In reality, the phrase to which the compliance Panel refers – "for the purposes of [US] countervailing duty law" (or variations of that phrase) – appears on *just two pages* of the Public Bodies Memorandum. Each

[60] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.127. Variations of the phrase ("for the purposes of the countervailing duty (CVD) law," "for purposes of the CVD law," or "for the purposes of the CVD law") appear on two pages of the Public Bodies Memorandum.

[61] Public Bodies Memorandum, p. 2 (p. 3 of the PDF version of Exhibit CHI-1).

[62] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.128-7.129.

[63] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.132 (citations omitted).

[64] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.126.

time, the phrase appears in a summary of the USDOC's conclusions, and each time, the phrase is used *as a qualification or a limitation* on the scope of the USDOC's conclusions.[65]

42. Specifically, in the first instance, which appears in the Executive Summary at the beginning of the Public Bodies Memorandum, the USDOC explained that:

> After a review of the system of governance and state functions in the People's Republic of China (China), we determine, *for the purposes of the countervailing duty (CVD) law*, that China's government has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the "socialist market economy," which includes maintaining a leading role for the state sector in the economy.[66]

43. This statement is evidence of the *limited* nature of the USDOC's findings in the Public Bodies Memorandum. This understanding is confirmed by a footnote included within the statement quoted above. That footnote explains that the USDOC examined "[t]he 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*."[67] In the same footnote, the USDOC further explained that:

> The Department's assessment in the CCP Memorandum of the available evidence indicates 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 CVD law.[68]

The express intention of the qualification was to make clear that the USDOC's analysis and the conclusions it drew in the Public Bodies Memorandum were "*solely*" for the purposes of the countervailing duty law, and should not be construed as having any broader implications in terms of U.S. government policy.

44. In the second instance, which appears in the "Summary of the Department's Findings" at the end of the Public Bodies Memorandum, the USDOC again states that:

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[65] *See* Public Bodies Memorandum, p. 2 and footnote 4 (in the "Executive Summary" of the Public Bodies Memorandum) and p. 37 (in the "Summary of the Department's Findings") (pp. 3 and 38 of the PDF version of Exhibit CHI-1).

[66] Public Bodies Memorandum, p. 2 (p. 3 of the PDF version of Exhibit CHI-1) (emphasis added).

[67] Public Bodies Memorandum, p. 2, footnote 4 (p. 3 of the PDF version of Exhibit CHI-1).

[68] Public Bodies Memorandum, p. 2, footnote 4 (p. 3 of the PDF version of Exhibit CHI-1) (emphasis added).

> On the basis of the foregoing discussion and analysis, the Department concludes that at least certain categories of [state-invested enterprises ("SIEs")] in China properly are considered to be public bodies *for the purposes of the CVD law* and other categories of enterprises in China may be considered public bodies under certain circumstances.[69]

When viewed together with the first instance, discussed above, it is evident that the phrase "for the purposes of the CVD law" cannot reasonably be read as broadening the scope of application of the Public Bodies Memorandum, as the compliance Panel found.[70] The compliance Panel's reading cannot be reconciled with the obvious work done by the phrase when read in context.

45. The compliance Panel addressed these arguments in its report by noting that "the United States characterizes such conclusions for the purposes of its countervailing duty law as a limitation (i.e. the analysis and conclusions in the Public Bodies Memorandum do not extend to other governmental determinations in relation to China)".[71] This is not merely a U.S. characterization; it is *the only tenable reading* of the text of the Public Bodies Memorandum. Yet, the compliance Panel took the view that:

> [T]hese examples indicate a broader application of the Public Bodies Memorandum than only to the specific investigations for which it was initially issued. This is specifically evidenced by the USDOC determinations in the Section 129 proceedings at issue, in which the relevant government function and the framework of enterprise categories are consistent elements of the USDOC's reliance on the Public Bodies Memorandum in proceedings taking place after its issuance.[72]

46. Thus, the compliance Panel came to its erroneous conclusion about the meaning of the phrase "for the purposes of the CVD law" as that phrase is used in the Public Bodies Memorandum – *i.e.*, the compliance Panel concluded that the phrase means that the Public Bodies Memorandum announces a policy that will be used in subsequent countervailing duty proceedings – by noting that the Public Bodies Memorandum was, in fact, used in subsequent countervailing duty proceedings. The compliance Panel's reasoning is circular. It does not follow from the USDOC's subsequent use of the Public Bodies Memorandum in other countervailing duty proceedings that the phrase "for the purposes of the CVD law" can be read contrary to the meaning evidenced by the context in which it is used. As demonstrated above,

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[69] Public Bodies Memorandum, p. 37 (p. 38 of the PDF version of Exhibit CHI-1) (emphasis added).

[70] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.127.

[71] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.127.

[72] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.127.

the correct understanding of the phrase "for the purposes of the CVD law" is that it serves as a limitation on the implications of the USDOC's analysis, as the United States explained to the compliance Panel.

47. The only other textual evidence from the Public Bodies Memorandum to which the compliance Panel points is the use in the Public Bodies Memorandum of the term "systemic analysis", which refers to the contents of the memorandum. Specifically, the compliance Panel notes that China "highlighted the following excerpt from the Public Bodies Memorandum in support of its arguments":

> While record evidence leads the Department to the conclusion that the *systemic* analysis in this memorandum is appropriate for understanding the institutional and SIE-focused policy setting in China, we do not reach the conclusion that such a systemic analysis is necessary in every [countervailing duty] investigation involving an allegation that an entity is a public body.[73]

48. In the passage quoted by the compliance Panel, the Public Bodies Memorandum clarifies that the USDOC "[*did] not reach the conclusion* that such a systemic analysis is necessary in every [countervailing duty] investigation."[74] That is, the USDOC expressly was *not announcing* through the issuance of the Public Bodies Memorandum an approach that the USDOC intended to apply in every countervailing duty proceeding. That is why the first part of the sentence quoted by the compliance Panel refers to "the systemic *analysis* in this memorandum"[75] and does not refer to the systemic *application* of such analysis. While the latter perhaps could be read as suggesting the announcement of a "policy" or "rule" to be applied in future proceedings, that is not what the Public Bodies Memorandum actually says.

49. On the contrary, the Public Bodies Memorandum sets forth "The Department's Findings" in "*these Section 129 proceedings*," that is, the four section 129 proceedings that the USDOC undertook to implement the DSB's recommendations and rulings relating to certain "as applied" findings in *US – Anti-Dumping and Countervailing Duties (China)*.[76] This is further confirmed by the expressly stated subject of the Public Bodies Memorandum, which is presented on the first page of the memorandum:

> SUBJECT: 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

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[73] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.128 (quoting footnote 48 of the Public Bodies Memorandum) (emphasis supplied by the panel).

[74] Public Bodies Memorandum, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1) (emphasis added).

[75] Public Bodies Memorandum, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1) (emphasis added).

[76] Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1) (emphasis added).

> 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[.][77]

The Public Bodies Memorandum presents determinations made by the USDOC in the context of four particular section 129 proceedings "[a]fter a review of the system of governance and state functions" in China.[78] Among other things, the Public Bodies Memorandum presents the USDOC's assessment of "whether the relevant entities *covered by these proceedings* 'possess, exercise or are vested with government authority' in fulfilling the government function of maintaining and upholding the socialist market economy."[79]

50. As the United States explained to the compliance Panel,[80] the USDOC, in the Public Bodies Memorandum, presented extensive analysis and explanation and came to certain conclusions after examining voluminous evidence relating to the government and economic systems of China. Of course, while the USDOC prepared and published the Public Bodies Memorandum in connection with certain section 129 proceedings involving particular products, that very same analysis, explanation, and evidence, which relates to China in general, may be relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving other products from China. The USDOC's decisions to incorporate by reference and use the Public Bodies Memorandum – and the evidence to which it refers – in subsequent countervailing duty proceedings that also involved products from China did not, after the fact, confer on the Public Bodies Memorandum a normative character for which there is no support in the text of the Public Bodies Memorandum itself.

51. The United States explained to the compliance Panel that it is plain from the context in which the USDOC used the word "systemic" that the USDOC was referring to its "systemic analysis" of "the institutional and SIE-focused policy setting in China," *i.e.*, China's government and economic *systems*. The USDOC's use of the word "systemic" cannot be read as suggesting the announcement of a "policy" or "rule" to be applied in future proceedings.

52. Again, this is confirmed by the USDOC's statement that such a "systemic analysis" may not be necessary in every countervailing duty investigation involving an allegation that an entity is a public body.[81] That statement by the USDOC is consistent with the Appellate Body's observation that, "in some cases, such as when a statute or other legal instrument expressly vests

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[77] Public Bodies Memorandum, p. 1 (p. 2 of the PDF version of Exhibit CHI-1).

[78] Public Bodies Memorandum, p. 2 (p. 3 of the PDF version of Exhibit CHI-1).

[79] Public Bodies Memorandum, p. 3 (emphasis added) (p. 4 of the PDF version of Exhibit CHI-1).

[80] *See* First Written Submission of the United States of America (February 6, 2017) ("U.S. First Written Submission"), section II.A.2.a.

[81] Public Bodies Memorandum, p. 12, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1).

authority in the entity concerned, determining that such entity is a public body is a straightforward exercise. In other cases, the picture may be more mixed, and the challenge more complex."[82] Some cases may be complex and necessitate the kind of "systemic analysis" that the USDOC undertook in the Public Bodies Memorandum. Other cases may be more straightforward, and such an analysis would not be needed. The USDOC's uncontroversial observation in this regard provides no support for China's contention or the compliance Panel's finding that the Public Bodies Memorandum has normative value.

53. The compliance Panel misconstrued the USDOC's use of the term "systemic analysis," and simply asserted that "[e]ven as clarified by the United States, the reference to 'systemic analysis' is consistent with the view that the Public Bodies Memorandum sets out an analysis that is susceptible to broader (i.e. general and prospective) application in countervailing duty investigations against Chinese enterprises."[83] Again, the compliance Panel engaged in circular reasoning, finding support for its textual interpretation – that the Public Bodies Memorandum has normative value and would be applied in the future – in the fact that "the Public Bodies Memorandum has served as the basis for numerous determinations … by the USDOC."[84]

54. Contrary to the compliance Panel's assertion that "China … adduced *substantial* evidence to support its argument"[85] that the Public Bodies Memorandum has normative value, in actuality, the compliance Panel pointed to *no textual evidence whatsoever* that supports China's contention and the compliance Panel's conclusion.

55. The compliance Panel's analysis in this compliance proceeding departs from analysis undertaken previously by the Appellate Body, and even by the original Panel in this dispute. The Appellate Body, for example, in *US – Oil Country Tubular Goods Sunset Reviews*, examined whether the USDOC's Sunset Policy Bulletin ("SPB") has normative value. The Appellate Body found that "the SPB has normative value, as it provides administrative guidance and creates expectations among the public and among private actors."[86] In reaching that conclusion, the Appellate Body noted the introductory statement of the SPB:

> This policy bulletin proposes guidance regarding the conduct of sunset reviews. As described below, the proposed policies are intended to complement the applicable statutory and regulatory

[82] *US – Carbon Steel (India) (AB)*, para. 4.9.

[83] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.129.

[84] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.130.

[85] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.132 (emphasis added).

[86] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 187.

> provisions by providing guidance on methodological or analytical issues not explicitly addressed by the statute and regulations.[87]

56. While the compliance Panel here purported to rely on the Appellate Body's reasoning in *US – Oil Country Tubular Goods Sunset Reviews*,[88] the textual evidence in the Public Bodies Memorandum on which the compliance Panel based its conclusion does not even come close to providing the level of support provided by the textual evidence in the SPB on which the Appellate Body relied, in terms of expressly establishing that the measure has normative value. To the contrary, the evidence on which the compliance Panel relied here either supports the opposite conclusion, or simply is inapposite.

57. Likewise, the compliance Panel's analysis in this proceeding stands in sharp contrast to the analysis undertaken by the original Panel in this dispute, which examined whether the "rebuttable presumption" articulated in the Kitchen Shelving countervailing duty determination ("the Kitchen Shelving Policy") could be challenged "as such". In finding that the Kitchen Shelving Policy "has normative value,"[89] the original Panel pointed to features of the Kitchen Shelving Policy that distinguish it from the Public Bodies Memorandum. The original Panel reasoned that the Kitchen Shelving Policy "provides 'administrative guidance and creates expectations among the public and among private actors,'" and this was "evident from the declaratory style of the text" and "the consistent application" of the policy by the USDOC.[90] The original Panel pointed out that the United States had admitted that "a 'policy' announcement provides 'the public with guidance as to how [the USDOC] may interpret and apply the statute and regulations in individual cases'."[91]

58. The Public Bodies Memorandum does not share these features of the Kitchen Shelving Policy. The Public Bodies Memorandum does not announce a "policy" in a "declaratory style." Rather, the Public Bodies Memorandum expressly states that the USDOC was not announcing through the issuance of the memorandum an approach that would be applied in every countervailing duty proceeding.[92] Specifically, the USDOC explained that "we do not reach the conclusion that such a systemic analysis is necessary in every CVD investigation involving an allegation that an entity is a public body."[93] In contrast to the Kitchen Shelving Policy, the Public Bodies Memorandum is "an explanation regarding the USDOC's reasoning for the specific factual and legal questions" in the section 129 proceedings in connection with which it

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[87] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 187, footnote 258 (quoting the SPB, p. 18871).

[88] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.130 and footnote 242 (citing *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 187).

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

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

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

[92] *See* Public Bodies Memorandum, p. 12, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1).

[93] Public Bodies Memorandum, p. 12, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1).

was published.[94] The Public Bodies Memorandum is not an announcement by the USDOC of a policy or legal standard to be applied in future countervailing duty proceedings.

59. Finally, there is an internal logical inconsistency in the panel report as between the compliance Panel's conclusion about the normative value of the Public Bodies Memorandum and its later conclusion 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.[95] In reaching that later conclusion, the compliance Panel highlighted that, for certain categories of enterprises, "the Public Bodies Memorandum explicitly contemplates that the USDOC's determinations will be made on a *case-by-case basis*, taking into account additional information and evidence pertaining to indicia of governmental control over the relevant entities."[96] The compliance 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 given investigation."[97] The compliance Panel further found that:

> [T]he USDOC's discretion to consider other evidence in a given investigation for all categories of enterprises, even where the Public Bodies Memorandum is on the record, is clear from the fact that the USDOC provides respondents with an opportunity "to rebut, clarify, or correct the factual information" that is placed on the record. We also consider relevant the actual practice of the USDOC in issuing questionnaires requesting information according to the different categories of entities identified in the Public Bodies Memorandum. This includes questions about the applicability of government policies (including industrial policies and plans discussed in the Public Bodies Memorandum) to all entities and industries at issue in the investigation, as well as entity-specific questions relating to various additional aspects of governmental control that are directed toward entities in the second and third categories. Moreover, we note that in at least one investigation, the USDOC concluded that certain entities were not public bodies on the basis of evidence provided by the respondent pertaining to the exercise of meaningful control by the GOC.[98]

60. Ultimately, the compliance Panel concluded that, "[t]aken together, these considerations indicate that *the nature of the Public Bodies Memorandum is that of a resource available to the*

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[94] *US – Countervailing Measures (China) (Panel)*, para. 7.118.

[95] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.134-7.141.

[96] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.139 (emphasis added).

[97] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.140.

[98] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.141.

USDOC for use in making public body determinations, but it does not restrict the USDOC's discretion to supplement the record or take into account and rely on additional information that is provided in a particular investigation."[99] The compliance Panel's conclusion that the Public Bodies Memorandum is "a resource available to the USDOC for use in making public body determinations"[100] cannot be reconciled with its conclusion that the Public Bodies Memorandum has normative value because it "provides 'administrative guidance and creates expectations among the public and among private actors' …."[101]

61. For these reasons, the compliance Panel erred in finding that the Public Bodies Memorandum has normative value.

3. The Public Bodies Memorandum Does Not Have General Application

62. The Appellate Body has explained that "a rule or norm will have 'general application' to the extent that it affects an unidentified number of economic operators, *instead of economic operators specified in that rule or norm*."[102] Under that reasoning, the Public Bodies Memorandum does not have general application.

63. On its face, the Public Bodies Memorandum sets forth determinations made by the USDOC in the context of four particular section 129 proceedings undertaken in response to the DSB's recommendations in *US – Anti-Dumping and Countervailing Duties (China)*, a dispute that concluded before this dispute began. The Public Bodies Memorandum explains that, "*[i]n these Section 129 proceedings*, the Department has analyzed the evidence surrounding *the types of enterprises that are subject to the underlying CVD proceedings* and for which a public body analysis must be conducted, and has reached certain conclusions."[103] Furthermore, as noted above, the subject of the Public Bodies Memorandum is described in the memorandum in the following terms:

> SUBJECT: 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

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[99] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.141 (emphasis added).

[100] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.141.

[101] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.132 (citations omitted).

[102] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.147 (emphasis added).

[103] Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1) (emphasis added).

> China in Accordance with the WTO Appellate Body's Findings in WTO DS379[.][104]

64. This textual evidence confirms that the Public Bodies Memorandum affects only economic operators specified in the document, *i.e.*, those Chinese producers or exporters of the four products that were the subjects of the section 129 proceedings in *US – Anti-Dumping and Countervailing Duties (China)*. The Public Bodies Memorandum does not affect an unidentified number of economic operators.[105]

65. The compliance Panel did not address this textual evidence and instead relied only on the two pieces of textual evidence discussed above, namely the use of the phrases "for the purposes of the CVD law" and "systemic analysis."[106] The compliance Panel reasoned that these phrases "*indicate* a broader application of the Public Bodies Memorandum than only to the specific investigations for which it was initially issued,"[107] that the Public Bodies Memorandum "is *susceptible* to broader (i.e. general and prospective) application in countervailing duty investigations against Chinese enterprises,"[108] and that the Public Bodies Memorandum "*[has] the potential* to be relied upon in future countervailing duty investigations."[109] The compliance Panel's reasoning is flawed. As the United States already has demonstrated, the compliance Panel misread those phrases, which offer no support for the conclusion that the Public Bodies Memorandum has general application.

66. Additionally, the compliance Panel's reasoning would be better suited to the analysis of a different type of measure; for example, a policy or legal standard *that is evidenced by* the Public Bodies Memorandum and its use in numerous investigations. The Kitchen Shelving Policy, which the original Panel examined, was such a measure. But in this compliance proceeding, China has not attempted to challenge a policy or legal standard that is evidenced by the Public Bodies Memorandum and repeated use of the Public Bodies Memorandum. Instead, China attempts to make an "as such" claim against the Public Bodies Memorandum itself. Consequently, the compliance Panel's qualified statements that the Public Bodies Memorandum "indicate[s]" or "is susceptible to" or has the "potential" for broader application are inapposite. On its face, the Public Bodies Memorandum that China attempts to challenge applies only to the economic operators identified in the Public Bodies Memorandum, and does not affect any other unidentified economic operators.

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[104] Public Bodies Memorandum, p. 1 (p. 2 of the PDF version of Exhibit CHI-1) (emphasis added).

[105] *See US – Anti-Dumping Methodologies (China) (AB)*, para. 5.147.

[106] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.127-7.129.

[107] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.127 (emphasis added).

[108] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.129 (emphasis added).

[109] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.131 (emphasis added).

67. Accordingly, the compliance Panel erred in finding that the Public Bodies Memorandum has general application.

4. The Public Bodies Memorandum Does Not Have Prospective Application

68. In *US – Anti-Dumping Methodologies (China)*, the Appellate Body explained that "a rule or norm will have 'prospective application' to the extent that it applies in the future."[110] The Appellate Body further found that:

> [A] complainant is not required to show with "certainty" that a given measure will continue to apply in the future. Rather, where prospective application is not sufficiently clear from the constitutive elements of a rule or norm, it may be demonstrated by a number of factors. These include: the existence of an underlying policy that is implemented by the rule or norm; the systematic application of the challenged rule or norm; the design, architecture, and structure of the rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.[111]

69. In *US – Anti-Dumping Methodologies (China)*, the Appellate Body pointed to the panel's observation that, "in several of the 73 USDOC anti-dumping determinations on the record, the USDOC described the selection of the highest margin in the petition or the highest rate calculated in any segment of the proceedings as a 'practice', 'standard practice', or 'normal practice', which has consistently been upheld by the USCIT and the USCAFC [the U.S. courts that review USDOC determinations]."[112] Given that evidence, the Appellate Body agreed with the panel that:

> [T]he USDOC's conduct amounted to more than mere repetition of conduct. We also agree with the Panel that the invariable application of the AFA Norm during a period of over 12 years might create expectations for economic operators that the norm will continue to apply in the future, and that prior practice may provide the USDOC with administrative guidance for future actions. As explained above, the systematic application of the challenged norm over an extended period of time, as well as the extent to which it provides administrative guidance for future

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[110] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.157.

[111] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.157.

[112] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.160.

> conduct and creates expectations among economic operators, are all relevant factors that indicate the prospective application of a rule or norm.[113]

70. The facts and evidence in this compliance proceeding stand in stark contrast to the facts and evidence in *US – Anti-Dumping Methodologies (China)*. As explained above, the compliance Panel here relied only on two pieces of textual evidence, namely the use of the phrases "for the purposes of the CVD law" and "systemic analysis,"[114] and those pieces of textual evidence, when correctly read in their proper context, do not support the conclusion that the Public Bodies Memorandum has prospective application. The compliance Panel pointed to no instances in the Public Bodies Memorandum of terms like "practice," "standard practice," or "normal practice,"[115] or anything similar to those terms.

71. The facts and evidence in this compliance proceeding also contrast with the facts and evidence relied upon by the original Panel in this dispute when it examined the Kitchen Shelving Policy. The original Panel found that the Kitchen Shelving Policy had "general and prospective application, as it is intended to apply to future investigations."[116] The original Panel found evidence to support this conclusion in "the text [of the Kitchen Shelving Policy] itself," in which:

> [T]he USDOC explains that *this policy has been applied for some time*, that *the USDOC is clarifying its policy for the public* through the Issues and Decision Memorandum and that *the USDOC will continue applying it*, hence the use of the words such as "normally" reflecting both the historic and expected approach of the USDOC in cases in the future as well as the use of the future tense in stating what the USDOC "will consider [all other information]".[117]

There is no similar language in the Public Bodies Memorandum, including the two textual points relied upon by the compliance Panel in this proceeding.

72. The original Panel also had before it evidence regarding the application of the Kitchen Shelving Policy "in all determinations challenged in this dispute that followed the Kitchen Shelving Issues and Decision Memorandum,"[118] as well as other evidence that the Kitchen

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[113] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.160.

[114] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.127-7.129.

[115] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.160.

[116] *US – Countervailing Measures (China) (Panel)*, para. 7.114.

[117] *US – Countervailing Measures (China) (Panel)*, para. 7.114 (emphasis added).

[118] *US – Countervailing Measures (China) (Panel)*, para. 7.115.

Shelving Policy "ha[d] been applied consistently over a long period of time."[119] The original Panel noted that the Kitchen Shelving Issues and Decision Memorandum, *i.e.*, the text providing the Kitchen Shelving Policy, referred to numerous other determinations in which the USDOC had applied the "rebuttable presumption" at issue, and recalled that some of the determinations made by the USDOC had been made several decades earlier.[120]

73. The Public Bodies Memorandum does not similarly make reference to any history of prior application of any purported "legal standard"[121] in earlier USDOC proceedings, nor does the Public Bodies Memorandum announce that the USDOC intends to apply the same analysis in the future. *It does the opposite*.[122] The USDOC states explicitly in the Public Bodies Memorandum that "we do not reach the conclusion that such a systemic analysis is necessary in every CVD investigation involving an allegation that an entity is a public body."[123]

74. China put before the compliance Panel here evidence of instances in which the USDOC has used the Public Bodies Memorandum – and the evidence underlying it – in subsequent countervailing duty proceedings.[124] That evidence is similar to, though significantly less extensive than, the evidence before the original Panel concerning the Kitchen Shelving Policy. The United States, though, drew the compliance Panel's attention to following statement by the USDOC, which it made in the context of the countervailing duty investigation of solar panels from China:

> [R]egarding the DSB's reports in the DS 379 proceeding, we note that, while we have reached section 129 final determinations in the four investigations at issue in that dispute, the decisions of the panel and the appellate body regarding whether a producer is an authority (a "public body" within the WTO context) were limited to those four investigations.[125]

This statement by the USDOC is an indication that the USDOC contemplated at that time *not* "apply[ing] prospectively" the "analytical framework" presented in the Public Bodies Memorandum.[126] Moreover, the statement is further evidence that the USDOC created the

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[119] *US – Countervailing Measures (China) (Panel)*, para. 7.103.

[120] *See US – Countervailing Measures (China) (Panel)*, para. 7.103.

[121] China's First Written Submission, para. 170.

[122] *See* Public Bodies Memorandum, p. 12, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1).

[123] Public Bodies Memorandum, p. 12, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1).

[124] *See* China's First Written Submission, para. 180 and Exhibit CHI-54.

[125] *US – Countervailing Measures (China) (Panel)*, para. 7.116 (citing China's First Written Submission, para. 40, citing Solar Panels, Issues and Decision Memorandum, p. 31.).

[126] China's First Written Submission, para. 178.

Public Bodies Memorandum for the four section 129 proceedings that the USDOC undertook to implement the recommendations and rulings of the DSB in *US – Anti-Dumping and Countervailing Duties (China)*, rather than as an announcement of a new approach it intended to apply in future proceedings.

75. Ultimately, the original Panel in this dispute considered that the USDOC statement in the solar panels countervailing duty investigation, "in conjunction with the manner in which the USDOC explained its policy in the Kitchen Shelving Issues and Decision Memorandum reflects … a deliberate policy."[127] That is, the original Panel relied on that USDOC statement as support for its conclusion with regard to the Kitchen Shelving Policy that "the evidence before [the panel] shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases."[128]

76. By logical extension, the text of the Public Bodies Memorandum, in conjunction with the statement made by the USDOC in the solar panels investigation to which the original Panel referred, leads to the conclusion that, at most, all that was before the compliance Panel in this proceeding is "simple repetition."[129] That is, the USDOC has, on a number of occasions, decided to put the Public Bodies Memorandum – and all of the evidence to which it refers – on the administrative records of countervailing duty proceedings involving products from China. That is entirely appropriate given that the underlying facts regarding China's government and economic systems are the same in all of those countervailing duty proceedings.[130] In light of China's refusal to provide requested information to the USDOC in many countervailing duty proceedings, it is not surprising that the USDOC has put the Public Bodies Memorandum and supporting information on the record of subsequent countervailing duty proceedings to provide relevant facts for its determinations.

77. Additionally, China has never suggested in this compliance proceeding that the Chinese laws, regulations, and industrial policies discussed in the Public Bodies Memorandum have changed since the Public Bodies Memorandum was first published, nor has China suggested that they were no longer in effect during the periods of investigation of the various section 129 proceedings at issue here, or during the periods of investigation of other countervailing duty

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[127] *US – Countervailing Measures (China) (Panel)*, para. 7.117.

[128] *US – Countervailing Measures (China) (Panel)*, para. 7.117.

[129] *US – Countervailing Measures (China) (Panel)*, para. 7.117.

[130] The panel in this compliance proceeding asked the United States: "Is the applicability of the Public Bodies Memorandum limited to a particular time period? Will the Public Bodies Memorandum become obsolete at some point?" The United States explained, *inter alia*, that "The United States cannot predict whether the USDOC will place the Public Bodies Memorandum on the administrative record of a countervailing duty proceeding in the future because new information may be presented to the USDOC, which could lead the USDOC to determine that the analysis set forth in the Public Bodies Memorandum needs to be revised." U.S. Responses to Panel Questions, Response to Question 16.d., para. 127.

proceedings to which China refers.[131] Thus, it was appropriate for the USDOC to draw on the same relevant evidence, analysis, and explanation that justified arriving at the same conclusions in those proceedings.

78. For these reasons, the compliance Panel erred in finding that the Public Bodies Memorandum has prospective application.

5. Conclusion: The Public Bodies Memorandum is Not a Rule or Norm having General or Prospective Application that Can Be Challenged "As Such"

79. For the reasons given above, the evidence before the compliance Panel – in particular the text of the Public Bodies Memorandum on its face – establishes that the Public Bodies Memorandum does not have normative value, it does not have general application, and it does not have prospective application. Accordingly, the compliance Panel erred in finding that China can challenge the Public Bodies Memorandum "as such" as a rule or norm of general or prospective application.[132]

III. U.S. APPEAL OF THE COMPLIANCE PANEL'S FINDINGS UNDER ARTICLES 1.1(b) AND 14(d) OF THE SCM AGREEMENT

80. The United States appeals the compliance Panel's finding that the USDOC's benchmark determinations in four section 129 determinations are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. The compliance Panel erred in finding that evidence of "governmental involvement in the relevant markets" was insufficient to support the USDOC's decision to use out-of-country benchmarks and that "the USDOC failed to explain . . . how government intervention in the market *results* in domestic prices for the inputs at issue deviating from a market-determined price."[133]

81. The compliance Panel's approach was predicated on two requirements that are not found in the text of Article 14(d): one, that an investigating authority must determine the impact of the distortion by identifying how "domestic prices for the inputs at issue deviate[ ] from a market-determined price;" and two, that an investigating authority must tie that deviation to specifically identified government interventions in order to "explain . . . how government intervention in the market *results*" in the deviation.[134] It appears that the compliance Panel understood its approach to be based on the approach that the Appellate Body has articulated, particularly in *US – Carbon*

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[131] *See* China's First Written Submission, para. 180 and Exhibit CHI-54.

[132] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.133; *see also id.*, paras. 7.124-7.133.

[133] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.223; *id.*, paras. 7.205-206.

[134] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.223; *id.*, paras. 7.205-206.

Steel (India).[135] However, as we demonstrate below, the compliance Panel misconstrued the Appellate Body's approach in that report. The compliance Panel's confusion suggests, moreover, that the Appellate Body should take this opportunity to clarify its articulation of the proper approach under Article 14(d) and, if necessary, modify that approach in conformity with the considerations discussed below.

82. Article 14(d) sets out a guideline for finding that a good was provided for inadequate remuneration; the guideline requires, by its terms, a determination of the adequacy of the remuneration "in relation to prevailing market conditions." This does not limit the assessment to a mere comparison with other transaction values; in order for values to yield a meaningful answer to whether the remuneration is adequate, an investigating authority may consider whether internal prices are market-determined.[136] Where they are not, prices that are market-determined may be sought in order to provide a benchmark against which the adequacy of remuneration may be assessed.

83. The compliance Panel's approach foreclosed consideration of appropriate benchmarks. For example, under a proper interpretation of Article 14(d), it is conceivable that an investigating authority could be satisfied as to whether or not there is a benefit through comparison with other local prices. Yet, while an investigating authority *could* limit its assessment in that way, an investigating authority *need not* limit the assessment in all cases. Rather, an investigating authority is permitted to examine whether prices are market-determined. Indeed, an investigating authority's decision to examine whether prices are market-determined is all the more consistent with the references to a "market" in the text of Article 14. Under the compliance Panel's approach, however, 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. 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.

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[135] *See, e.g., US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.156 ("We note that this is not the first time a panel has been called upon to consider the meaning of this provision and apply it. Panels and the Appellate Body have done so in the past, including in the original dispute. Our analysis of China's claim in this compliance proceeding will thus be guided by our understanding of Article 14(d) in light of the ordinary meaning of its terms in context and their interpretation in past disputes."); para. 7.168 ("Thus, in our view, an investigating authority may reject in-country prices if there is evidence of price distortion, and not only if there is evidence that a government 'effectively determines' the price of the goods at issue. This strikes us as appropriate in the context of the Article 14(d) comparison, because the existence of price distortion may well, in our view, preclude a proper comparison of the terms of the financial contribution with market terms. This may be the case when the government is the sole or predominant provider of a good, but it may also be the case in other circumstances that render the comparison equally impossible or irrelevant. To conclude that an investigating authority is precluded from using alternative benchmarks in these situations would be contrary to a proper interpretation of Article 14(d).") (citing *US – Carbon Steel (India) (AB)*, para. 4.189).

[136] In the case of action under Part III of the SCM Agreement, a WTO panel could make the same assessment.

84. Where no in-country prices are market determined, price distortion cannot be demonstrated under the compliance Panel's approach. In that situation, a conclusion that a benefit is being conferred could be precluded, despite the remuneration being inadequate: the seller could earn more if it sold the product in a functioning market, and the buyer would pay more if it had to purchase the product in a functioning market. As a benefit to the recipient can be objectively demonstrated, it would be erroneous and deeply troubling if the SCM Agreement were interpreted to require the use of prices conferring a benefit and thus to shield government subsidization. Yet, that is exactly what the compliance Panel did here. The compliance Panel thus erred in its interpretation and application of Article 14(d) in this dispute.

85. The record in each of the determinations at issue supports the USDOC's finding that prices in China for the inputs at issue were not market determined. In each case, the USDOC's determination provides a reasoned and adequate explanation for the choice of benchmark. In each case, the USDOC reached a conclusion that an objective and unbiased investigating authority could have reached, namely, that prices in China for the inputs at issue are distorted as a result of government intervention.

86. The government's interventions, as the evidence describes in each determination, prevent market forces from operating as they would in a functioning market – one in which the interactions between market-oriented actors result in the balance of supply and demand determining prices.[137] China does so by increasing and sustaining production in the face of overcapacity and by sustaining unprofitable production to achieve high levels of employment.[138]

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[137] *See Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Benchmark Memorandum") (Exhibit CHI-20), pp. 26-30; *Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 19, 2016 ("Final Benchmark Determination") (Exhibit CHI-21); *Memorandum to Brendan Quinn from Eric Greynolds Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Supporting Benchmark Memorandum") (Exhibit USA-84); *Memorandum to the File from Eric B. Greynolds Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Source Documents Cited in Supporting Memorandum to the Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Benchmark Source Documents Appendix") (Exhibit USA-85).

[138] *See* Benchmark Memorandum, p. 10 (describing how state "control dampens SIEs' ability to perform as market actors" in order to serve "aims other than wealth maximization" such as "maintenance of urban employment levels" and that in "enterprise administration" the state "us[es] its control for purposes other than value maximization"). It is "this situation . . . fundamentally at the heart of what allows SIEs to continue operating without regard to normal market and commercial constraints in industries such as steel, where significant overcapacity exists." Benchmark Memorandum, p. 18. *See also* Benchmark Memorandum, p. 19 ("Most other SOEs either have overcapacity or are just mismanaged. They have to rely on government subsidies and credit to survive" while, in contrast, "the state still denies private companies access to many key industries," "intervenes more vigorously into the economy," and "allocates more resources to the SOEs rather than to private companies."); *see generally* Benchmark Memorandum, pp. 6-10, 13-17 (Exhibit CHI-20).

The government is able to accomplish this through a combination of its market share – accounting for 82% of production or more in each of these cases[139] – and by force of policy, e.g., preventing market exit through bankruptcy and handicapping private competition.[140] The determinations at issue explain that, under these conditions, private prices, government-related prices, and import prices are not market determined and therefore not appropriate to use as benchmarks. The compliance Panel paid no attention to the USDOC's evaluation and reasoning based on these facts.

87. In the discussion that follows, we demonstrate how the compliance Panel reached the wrong conclusion by using an approach that does not comport with the text of the SCM Agreement. Under Article 14(d), properly interpreted, an objective and unbiased investigating authority could have found that the prices of the inputs in question in China provided inadequate remuneration; the inadequacy of remuneration could be demonstrated by comparison with out-of-country benchmarks; and such benchmarks were appropriate because the investigating authority properly found that in-country prices are distorted through governmental presence, policies, interventions, and influence.

88. In section A, we set out the appropriate approach under Article 14(d) and explain how Appellate Body findings confirm that an investigating authority may reject prices if they are not market-determined. In section B, we provide an overview of the findings underlying this dispute and describe where the compliance Panel erred in using an improper approach to examine the determinations at issue. We then demonstrate, in section C, exactly why the compliance Panel's interpretation is in error and that it cannot be reconciled with the text of Article 14. Section D then 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).

A. The Proper Interpretation of Article 14(d) of the SCM Agreement

89. Article 14(d), properly interpreted, provides guidelines for determining whether a good has been provided for less than adequate remuneration. Article 14(d) does not require that in-country prices be used as the benchmark for adequate remuneration in all cases, nor does it

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[139] *See Pressure Pipe*, Issues and Decision Memorandum, pp. 16-22 (attached to China's First Written Submission to the original Panel as Exhibit CHI-12); *Line Pipe*, Issues and Decision Memorandum, pp. 18-20 (attached to China's First Written Submission to the original Panel as Exhibit CHI-19); *OCTG*, Issues and Decision Memorandum, pp. 13-15; 75-80 (attached to China's First Written Submission to the original Panel as Exhibit CHI-45).

[140] *See* Benchmark Memorandum, p. 19 (China "places operational constraints on constraints on private and foreign enterprises that might otherwise present significant competition to SIEs in state-favored industry sectors" and "makes extensive use of what the World Bank describes as industrial interventions, which often result in what essentially are government-dictated 'market outcomes'" while other "preferences further distance the SIEs from responsiveness to market pressures and disciplines" as "highlighted by a joint Development Research Center (DRC)/World Bank report, which describes the behind-the-scenes information channels through which SIEs maintain their 'special status.'"); *see generally* Benchmark Memorandum, pp. 18-21 (Exhibit CHI-20).

prohibit the use of external benchmarks. Rather, under Article 14(d) an investigating authority may consider whether a potential benchmark consists of market-determined prices. Such an assessment comports with the references to a "market" in the text of Article 14. Although an investigating authority may not, *a priori*, exclude in-country or government-related prices as potential benchmarks, it may reject those prices if they are not market determined.

1. Article 14 of the SCM Agreement Provides "Guidelines" for Calculating a Benefit

90. A proper analysis of Article 14 of the SCM Agreement begins with the text of that provision. In the first place, Article 14 concerns the calculation of a subsidy in terms of the benefit to the recipient.[141] The chapeau of Article 14 provides that "any method used by the investigating authority to calculate the benefit to the recipient . . . 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." Further, "any such method shall be consistent with the . . . guidelines" found in subparagraphs (a) through (d) of Article 14. The Appellate Body has found that:

> Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but they do not require using only one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus, we find merit in the United States' submission that the use of the term "guidelines" in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance".[142]

91. Among those guidelines, subparagraph (d) of Article 14 provides that:

> The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).

92. The Appellate Body has found, with respect to the importance of "market conditions" reflected in the text, that "[t]his language highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, under market conditions, be exchanged."[143]

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[141] *See* Art. 14 ("*Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient*").

[142] *US – Softwood Lumber IV (AB)*, para. 92.

[143] *EC and certain member States – Large Civil Aircraft (AB)*, para. 975.

93. The phrase "in relation to" in the second sentence of Article 14(d) does not denote a rigid comparison, but rather implies a broader sense of "relation, connection, reference."[144] Likewise, the reference to "any" method implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.[145] As the Appellate Body found in *US – Softwood Lumber IV*, "that guideline does not require the use of private prices in the market of the country of provision in every situation."[146] Rather, "that guideline 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."[147]

2. Article 14(d) of the SCM Agreement Does Not Require Use of In-Country Prices, Nor Does It Prohibit External Benchmarks

94. Article 14(d) of the SCM Agreement permits the use of out-of-country prices as benchmarks.[148] For example, there was "common ground between the participants" in *US – Carbon Steel (India)* that "Article 14(d) permits the use of out-of-country benchmarks, and does so in situations where in-country prices are distorted by governmental intervention in the market."[149] In *US – Carbon Steel (India)*, the Appellate Body explained that this understanding is consistent with the text of Article 14(d). It accords with the logic the Appellate Body has articulated when applying that text in past disputes:

> In our view, the rationale underpinning the Appellate Body's findings in *US – Softwood Lumber IV* is that, properly interpreted in the light of its context and object and purpose, Article 14(d) of the SCM Agreement does not prohibit the use of alternative benchmarks in situations where in-country prices cannot properly be used as a basis for determining a benchmark.[150]

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[144] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)* at para. 89).

[145] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)* at para. 91).

[146] *US – Softwood Lumber IV (AB)*, para. 96.

[147] *US – Softwood Lumber IV (AB)*, para. 96.

[148] *See US – Carbon Steel (India) (AB)*, para. 4.188 (explaining that, in *US – Softwood Lumber IV (AB)*, "the Appellate Body interpreted Article 14(d) of the SCM Agreement, in accordance with its text, context, and object and purpose, and established that Article 14(d) does not require the use of in-country prices for benchmarking purposes in every case.").

[149] *US – Carbon Steel (India) (AB)*, para. 4.183; *see, e.g.*, *US – Softwood Lumber IV (AB)*, para. 91 ("Panel's interpretation of paragraph (d) that, whenever available, private prices have to be used exclusively as the benchmark, is not supported by the text of the chapeau, which gives WTO Members the possibility to select any method that is in conformity with the 'guidelines' set out in Article 14.").

[150] *US – Carbon Steel (India) (AB)*, para. 4.189; *cf. US – Softwood Lumber IV (AB)*, para. 90 ("This approach reflects the fact that private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods. However, this may not always be the case. As will be explained below, investigating authorities may use a benchmark other than private prices in the country of provision

95. In particular, the Appellate Body emphasized that:

> 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*.[151]

96. As these findings indicate, absent from Article 14(d) is any requirement that in-country prices be used.[152] Indeed, in many situations, imposing such a requirement would frustrate the objective of Article 14, that is, to calculate a benefit in terms of how much better off a recipient is compared to what the recipient would have paid to obtain the good under market conditions.[153]

97. Situations where in-country prices cannot properly be used as a basis for determining a benchmark include those "where in-country prices are distorted by governmental intervention in the market."[154] The Appellate Body has found that, "in accordance with the second sentence of Article 14(d), the benchmark required for the purposes of that provision consists of market-determined prices that reflect prevailing market conditions in the country of provision."[155]

98. Where market-determined prices are not available in the country of provision, prices in that country cannot be considered to reflect prevailing market conditions. The Appellate Body has explained, for example, that "where information pertaining to in-country prices cannot be verified so as to determine whether they are market determined in accordance with the second

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under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods.").

[151] *US – Carbon Steel (India) (AB)*, para. 4.155 (emphasis added).

[152] *See, e.g., US – Softwood Lumber IV (AB)*, para. 89 ("the use of the phrase 'in relation to' in Article 14(d) suggests that, contrary to the Panel's understanding, the drafters did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of the country of provision.").

[153] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)* at para. 93); *see US – Softwood Lumber IV (AB)*, para. 93 ("Panel's interpretation is not supported by the objective of Article 14. As the title indicates, Article 14 deals with the 'Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient'. As noted above, in *Canada – Aircraft* [at para. 157], the Appellate Body stated that the 'there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution'. According to Article 14(d), this benefit is to be found when a recipient obtains goods from the government for 'less than adequate remuneration', and such adequacy is to be evaluated in relation to prevailing market conditions in the country of provision. Under the approach advocated by the Panel (that is, private prices in the country of provision must be used whenever they exist), however, there may be situations in which there is no way of telling whether the recipient is 'better off' *absent the financial contribution*. This is because the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.") (internal citations omitted).

[154] *US – Carbon Steel (India) (AB)*, para. 4.183.

[155] *US – Carbon Steel (India) (AB)*, para. 4.190.

sentence of Article 14(d)," an investigating authority "would not be required to use in-country prices to determine a benchmark for the purposes of Article 14(d)."[156]

3. A Benchmark May Consist of Market-Determined Prices

99. As described above, the Appellate Body has found that Article 14(d) may call for the use of market-determined prices in determining a proper benchmark.[157] Indeed, the Appellate Body report in the original appeal in this dispute refers more than 20 times to the consideration of market-determined prices in its analysis.[158] The use of market-determined prices is a fundamental concept in the investigation of countervailable subsidies. The Appellate Body confirmed this concept in *US – Carbon Steel (India)*, stating:

> Investigating authorities bear the responsibility to conduct the necessary analysis in order to determine, on the basis of information supplied by petitioners and respondents in a countervailing duty investigation, whether proposed benchmark prices *are market determined* such that they can be used to determine whether remuneration is less than adequate.[159]

100. The Appellate Body report in *US – Carbon Steel (India)* addressed this issue at length; it bears repeating here:

> We consider it important to emphasize the market orientation of the inquiry under Article 14(d) of the SCM Agreement. As the Appellate Body stated in *EC and certain member States – Large Civil Aircraft*, the language found in the second sentence of Article 14(d) "highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, *under market conditions*, be exchanged". Because Article 14(d) requires that the assessment of the adequacy of remuneration for a government-provided good must be made in relation to *prevailing market conditions in the country of provision*, it follows that any benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in question in the country of provision. Proper benchmark prices would normally emanate from

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[156] *US – Carbon Steel (India) (AB)*, para. 4.189.

[157] *See US – Carbon Steel (India) (AB)*, para. 4.169.

[158] *See US – Countervailing Measures (China) (AB)*, paras. 4.43, 4.46, 4.47, 4.48, 4.49, 4.50, 4.52, 4.54, 4.61, 4.63, 4.64, 4.65, 4.72, 4.77, 4.79, 4.85, 4.91, 4.96, 4.100, and 4.105.

[159] *US – Carbon Steel (India) (AB)*, para. 4.152 (emphasis added).

> the market for the good in question in the country of provision. *To the extent that such in-country prices are market determined*, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d). In our view, such in-country prices could emanate from a variety of potential sources, including private or government-related entities.[160]

a. Relevance of Government-Related Prices

101. In-country prices will be suitable for establishing a benchmark to assess the adequacy of remuneration "[t]o the extent that such in-country prices are market determined". The Appellate Body has found that a "benchmark mechanism"[161] may not, as a rule, exclude consideration of government-related prices.[162] Such a rule might improperly exclude prices that are market-determined prices. Accordingly, the Appellate Body noted that "Article 14(d) requires the use of market-determined government-related prices other than the financial contribution at issue in determining a proper benchmark."[163] Thus, where a government-related entity operates in the market as any other profit-maximizing firm, and is not providing the financial contribution at issue, Article 14(d) contains no impediment to including those prices as part of a proper benchmark.

102. The Appellate Body has cautioned that the simple fact that governments in general may not be profit-maximizing does not mean that all government-related entities can be assumed to be pursuing public policy goals. The Appellate Body explained:

> The second reason that the panel gave for its finding was that, because benefit is assessed in relation to the market, and "[s]ince governments may set prices in order to pursue public policy objectives, rather than market-based profit maximization, [there is] no basis … to include government prices when determining market benchmarks in the context of Article 14(d)." In our view, the fact that governments *may* set prices in pursuit of public policy objectives, rather than market-based profit maximization, *does not permit a general inference* that there is "no basis … to include government prices" in determining a benchmark for the purposes

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[160] *US – Carbon Steel (India) (AB)*, para. 4.151 (quoting *EC and certain member States – Large Civil Aircraft (AB)*, para. 975 (emphasis added by *US – Carbon Steel (India) (AB)*) and *US – Softwood Lumber IV (AB)*, para. 89).

[161] In the *US – Carbon Steel (India)* dispute, the Appellate Body considered the USDOC's "benchmark mechanism" as set forth in the USDOC's regulations identified in India's "as such" challenge. *See US – Carbon Steel (India) (AB)*, para. 4.104 and fn 697 to para. 4.104.

[162] *US – Carbon Steel (India) (AB)*, para. 4.169.

[163] *US – Carbon Steel (India) (AB)*, para. 4.169.

> of Article 14(d) of the SCM Agreement. In particular, we consider the panel's statement to be erroneous in respect of government-related prices that have the requisite nexus with prevailing market conditions in the country of provision. Thus, we disagree with the panel's conclusion to the extent that it suggests that Article 14(d) does not require the consideration of government-related prices simply because governments may set prices in pursuit of public policy objectives.[164]

103. The distinction between profit-maximizing firms and firms that operate according to public policy requirements corresponds with the distinction between market-determined prices and those government prices that would not serve as a meaningful metric for adequate remuneration. It is also in this sense that "market" conditions (or forces) can be contrasted with those that are of the "government." Thus, assuming that some government-related entities *may* operate as market actors rather than carrying out public policy, a Member's benchmark methodology must not exclude, as rule, consideration of "government-related" prices *a priori*. In turn, an investigating authority *may* reject government-related prices if it finds that government-related prices are not market determined.

b. Conclusion

104. The Appellate Body has reasoned that, consistent with Article 14(d), an investigating authority may reject in-country prices, including from government-related entities, and resort to an out-of-country benchmark in these circumstances:

- a benchmark price may be market determined;[165]
- a Member's "benchmark mechanism" must not exclude, as rule, consideration of in-country or "government-related" prices *a priori*;[166]
- the analysis of benchmarks must be preceded by a diligent investigation and solicitation of relevant facts;[167] and

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[164] *US – Carbon Steel (India) (AB)*, para. 4.170 (quoting panel report, para. 7.39) (emphasis added).

[165] *See US – Carbon Steel (India) (AB)*, para. 4.190 ("We have found that, in accordance with the second sentence of Article 14(d), the benchmark required for the purposes of that provision **consists of market-determined prices** that reflect prevailing market conditions in the country of provision.").

[166] *See US – Carbon Steel (India) (AB),* para. 4.190 ("We have emphasized above that the analysis of prices within the country of provision **does not, at the outset, exclude prices from any particular source, including government-related prices** other than the financial contribution at issue.").

[167] *See US – Carbon Steel (India) (AB),* para. 4.190 ("Moreover, we have considered that the obligation under Article 14 to calculate the amount of subsidy in terms of the benefit to the recipient **encompasses a requirement to conduct a sufficiently diligent investigation into, and solicitation of, relevant facts**, and to base a determination

- an investigating authority must explain the basis for any decision to rely on an external benchmark.[168]

As will be demonstrated below, the findings by the USDOC in the challenged proceedings satisfy all of these circumstances, and the resort to out-of-country benchmarks to assess the adequacy of remuneration for the provision of goods was consistent with the SCM Agreement.

B. Procedural Background and Relevant Findings

105. In China's initial appeal in this dispute, China sought to challenge the original Panel's finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Articles 14(d) and 1.1(b) of the SCM Agreement by rejecting private prices in China as benchmarks in its benefit analyses in the challenged determinations. The Appellate Body concluded, in relevant part:

> [W]e do not consider that the panel applied the standard required by Article 14(d) of the SCM Agreement, as properly interpreted, to the determinations challenged by China. Instead, without properly examining the USDOC's analysis in each of the challenged determinations, the panel found that China had failed to establish that "the USDOC could, consistently with Article 14(d) of the SCM Agreement, determine that private prices were distorted and could not be used as benchmarks for assessing the adequacy of remuneration".
> * * *
> The panel failed to examine properly each of the challenged determinations in the light of the legal standard applicable under Article 14(d). In particular, the panel failed to conduct a case-by-case analysis of whether the USDOC had properly examined whether the relevant in-country prices *were market determined* or were distorted by governmental intervention. The panel simply assumed that, because the Appellate Body had faced a similar situation in *US – Anti-Dumping and Countervailing Duties (China)*, China had failed to establish that the USDOC acted

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on positive evidence on the record. To our minds, it is **only once an 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 that it may, consistently with Article 14(d) of the SCM Agreement, use alternative benchmarks.").

[168] *See US – Carbon Steel (India) (AB),* para. 4.190 ("Finally, where an investigating authority considers that it must have recourse to a benchmark other than in-country prices, **it must explain its basis** for doing so.").

> inconsistently with the obligations of the United States under Article 14(d) of the SCM Agreement.[169]

106. The Appellate Body completed the analysis with respect to four investigations: *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe*.[170] The Appellate Body observed in each case the absence of an explanation as to whether prices "were or were not market determined."[171] On that basis, by and large, the Appellate Body found the determinations to be inconsistent with the obligations under Article 14(d) and Article 1.1(b) of the SCM Agreement.[172]

107. Accordingly, the USDOC, in the course of its redeterminations in *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe*, examined whether or not prices were market determined – specifically, whether domestic prices were reflective of market conditions resulting from the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market."[173] In those redeterminations, the USDOC analyzed whether prices of both "government-related entities"[174] and private entities in the steel sector were market-determined and, thus, usable as benchmarks to measure the adequacy of remuneration for the provision of hot-rolled steel, steel rounds, and stainless steel coil.[175]

108. As established by the USDOC's extensive analysis in the challenged determinations, China's steel sector operates subject to significant government policy influence. The USDOC examined the forces distorting China's economy and found positive evidence that prices are not market determined in the relevant sectors. The USDOC explained this finding in the Benchmark Memorandum, the Supporting Benchmark Memorandum, and the Final Benchmark Determination.[176] That analysis proceeds in four parts. First, the USDOC found that China's constitution sets out a mandate to maintain and control its so-called socialist market economy.[177]

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[169] *US – Countervailing Measures (China) (AB)*, paras. 4.78-79 (emphasis added).

[170] *US – Countervailing Measures (China) (AB)*, paras. 4.81-107.

[171] *US – Countervailing Measures (China) (AB)*, para. 4.91; *see id.* at paras. 4.91 (*OCTG*), 4.95-96 (*Solar Panels*), 4.100-01 (*Pressure Pipe*), and 4.105 (*Line Pipe*).

[172] *US – Countervailing Measures (China) (AB)*, para. 4.107.

[173] *See* Benchmark Memorandum (Exhibit CHI-20), pp. 26-30; Final Benchmark Determination (Exhibit CHI-21); Supporting Benchmark Memorandum (Exhibit USA-84); Benchmark Source Documents Appendix (Exhibit USA-85).

[174] *See US – Countervailing Measures (China) (AB)*, para. 4.49 (explaining that term "government-related entities" refers to "all government bodies, whether national or regional, public bodies, and any other government-owned entities for which there has not been a 'public body' determination.").

[175] *See generally US – Countervailing Measures (China) (AB)*, para. 4.64.

[176] *See* Benchmark Memorandum (Exhibit CHI-20); Supporting Benchmark Memorandum (Exhibit USA-84); Final Benchmark Determination (Exhibit CHI-21); *see also* Benchmark Source Documents Appendix (Exhibit USA-85).

[177] Benchmark Memorandum, pp. 6-7 (Exhibit CHI-20); Articles 6, 7, 13, China Constitution (Exhibit USA-2); State Council Notice, "Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the

Second, the USDOC found that China's legal system establishes parameters and goals for the state to carry out its socialist economic mandate.[178] Third, the USDOC identified a complex array of instruments through which these goals are implemented.[179] Fourth, the USDOC examined evidence of ongoing government influence that demonstrates these goals have been realized through actively managing China's steel sector, in particular.[180] The USDOC "examined the nature and structure of the steel market to determine whether potential benchmarks from the domestic industry could be considered market-determined," and determined 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."[181] Based on its evaluation of the evidence, the USDOC concluded that domestic prices for the steel inputs at issue in the challenged determinations were not market-determined prices.[182]

109. As the United States explained before the compliance Panel,

> the USDOC examined China's constitutional mandate to maintain a socialist economy, how that mandate is enacted through state industrial and policy plans, and how a complex array of instruments are available to implement state control in the marketplace. When firms engaged in commercial activities are subject to such government policy dictates, they are unable to perform in a truly commercial, market-oriented manner.[183]

110. The United States further explained that the redeterminations contain the "USDOC's analysis of the forces distorting China's economy" and how that analysis:

SASAC about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-owned Enterprises" (2006) (Exhibit USA-17).

[178] Public Bodies Memorandum, pp. 17-18 (Exhibit CHI-4); Benchmark Memorandum, pp. 6-8 (Exhibit CHI-20); *see also* Supporting Benchmark Memorandum, p. 4, n. 16 (Exhibit USA-84) (noting that USDOC "uses the term 'state-invested enterprises' or 'SIE' where possible. By 'state-invested enterprise,' the Department means enterprises in which the Government of China is an investor through any size ownership interest. The term generally has the same meaning as the term 'state owned enterprise' (or SOE), but the definition of SOE sometimes varies when used in different contexts, and the Department has adopted the term SIE to attempt to avoid possible confusion.").

[179] Benchmark Memorandum, p. 3 n. 10, pp. 7-8, 11 (Exhibit CHI-20) ("The Department's assessment of the available evidence thus indicates that the CCP and China's state apparatus are essential components that together form China's "government" for the limited purpose of applying the CVD law.") (citing CCP Memorandum).

[180] Benchmark Memorandum, pp. 7-14 (Exhibit CHI-20).

[181] Supporting Benchmark Memorandum, p. 4 (Exhibit USA-84) (internal quotation marks omitted).

[182] *Id*.

[183] *See* U.S. First Written Submission at Section III.B.

> [L]eads to a conclusion, based on positive evidence, that prices are not market determined in the relevant sectors. The degree and nature of China's interventions is unlike the governmental regulatory frameworks that affect commercial enterprises in most economies. The institutional framework of intertwined political, social and economic goals creates an environment in which decision-making is insulated from the disciplines of market forces. Based on evidence that widespread sectoral intervention constrained public and private entities in their ability to pursue commercial outcomes, the USDOC found that these interventions in the market were of such a magnitude that they distorted firm-level decision-making and prevented the establishment of equilibrium prices determined by the forces of supply and demand. Thus, the USDOC concluded that domestic prices in the steel and renewable energy sectors are not reflective of market conditions. The USDOC determined that recourse to an alternative benchmark was therefore warranted.[184]

111. In addition to addressing the critical question of whether prices were market determined or not, the USDOC determinations also satisfy the more general considerations under Article 14(d) as properly applied. In the determinations at issue, the USDOC:

- relied on market-determined benchmark prices – and declined to use prices that were not market determined;
- allowed for consideration of in-country and "government-related" prices – and, indeed used both in-country and "government-related" prices in its benchmark calculations;
- fulfilled its duty to investigate and solicit the facts – notwithstanding repeated refusals by China and Chinese respondents to provide necessary information; and
- provided a complete explanation of the basis for its benchmark determinations – the substance of which, unfortunately, the compliance Panel (and China, for that matter) declined to engage or give due consideration.[185]

[184] *See* U.S. First Written Submission at Section III.C.

[185] *See generally* Benchmark Memorandum (Exhibit CHI-20); Supporting Benchmark Memorandum (Exhibit USA-84); Benchmark Source Documents Appendix (Exhibit USA-85); Final Benchmark Determination (Exhibit CHI-21).

112. When the compliance Panel considered China's challenge to the USDOC's redeterminations, it neglected to consider the facts described above. Instead, the compliance Panel framed its inquiry by reciting Appellate Body statements on the topic of benchmarks, but provided little analysis of those statements as they might apply to the dispute before the compliance Panel.[186] The compliance Panel proceeded to consider in this light "the parties' arguments in relation to the proper legal standard for the identification of an appropriate benchmark."[187] The compliance Panel considered that the interpretation sought by China would be improper because Article 14(d) permits the use of external benchmarks in a number of circumstances.[188] The compliance Panel thus rejected China's claims regarding the proper legal approach.[189]

113. The compliance Panel then proceeded "to consider China's arguments concerning the alleged lack of evidence supporting the USDOC's conclusion that the in-country prices of the inputs at issue were distorted."[190] In doing so, the compliance 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."[191]

114. The compliance Panel drew this approach from a misreading of prior Appellate Body reports. The compliance Panel relied primarily on a single statement from *US – Carbon Steel (India)*, recalling 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."[192] The compliance Panel took this statement

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[186] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.157 ("In particular, we recall that 'prevailing market conditions' in Article 14(d) 'consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices'. It follows that any benchmark for comparison purposes in determining the adequacy of remuneration must consist of *market-determined* prices for the same or similar goods in the country of provision.") and 7.158 ("the disagreement between the parties concerns the USDOC's determination that in-country prices in China are not 'market-determined' and thus cannot be used as a benchmark for the purpose of determining the adequacy of remuneration under Article 14(d). The focus of our consideration is thus the explanation given by the USDOC for its determination that prices in China are not 'market-determined'. In this regard, we recall that Article 14(d) does not qualify in any way the 'market' conditions which are relevant for the analysis. Article 14(d) does not refer to a benchmark derived from a 'pure' market, a market 'undistorted by government intervention', or a 'fair market value' as a requirement for determining the adequacy of remuneration. Nevertheless, an identified in-country benchmark should not, as a result of governmental intervention in the market, deviate from a market-determined price.") (internal citations omitted).

[187] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.159.

[188] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.162-64 and 7.168.

[189] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.159.

[190] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.175.

[191] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.204.

[192] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.204 (quoting *US – Carbon Steel (India) (AB)*, para. 4.155) (panel's emphasis).

as if it alone constituted a definitive and exclusive legal approach. In reality, the Appellate Body's statement only purports to illustrate one example of the kind of situation in which an investigating authority might find that prices are not market determined. When read together with the sentence that immediately precedes that statement in *US – Carbon Steel (India)*, it is evident that the *first* sentence is the one more appropriately described as the applicable approach, while the second sentence should be read as if with the introductory clause, "for example." That clause is inserted in the excerpt below to illustrate:

> 4.155. Although the benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices when they are not market determined. [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.[193]

115. The compliance Panel's report quotes both sentences in various places, but the compliance Panel erred by adopting the *second* sentence as the appropriate approach instead of recognizing it as an example. The compliance Panel should have considered the first sentence in framing its analysis. That sentence reflects the appropriate approach under Article 14(d), *viz.*, "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."[194]

116. Instead, the compliance 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. Having already adopted the incorrect approach for its analysis, the compliance Panel further erred in characterizing the USDOC's explanation as unresponsive to the question of whether prices were or were not market determined. For example, the compliance Panel noted with disapproval that, "[f]or the United States, the USDOC was 'not required to analyze specific prices for the relevant inputs to determine that SIE and private prices in China's steel and polysilicon sectors are not market-determined.'"[195] By asking the wrong question, the compliance Panel failed to engage with or even consider the explanation given and the evidence demonstrating how the relevant prices were not market determined. The conclusions that the compliance Panel drew as a result are utterly disconnected from the record of evidence and explanation provided by the USDOC:

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[193] *US – Carbon Steel (India) (AB),* para. 4.155.

[194] *US – Carbon Steel (India) (AB),* para. 4.155.

[195] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.199 (quoting United States' response to panel question No. 35, para. 179).

> The record of the four Section 129 proceedings at issue and the arguments of the United States clearly show that the USDOC did not find it necessary to demonstrate how the actions of the GOC influenced the in-country price of the inputs at issue. The USDOC did not even attempt to provide a reasoned and adequate explanation for its determinations that in-country prices . . . were distorted as a result of pervasive government intervention in the Chinese domestic markets for these inputs, and therefore were not market-determined. Rather, the USDOC outlined governmental involvement in the relevant markets and, on that basis alone, determined that it could not use in-country prices of the relevant inputs to assess the adequacy of remuneration.[196]

117. Only 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."[197] In the compliance Panel's view:

> Evidence of widespread government intervention in the economy, without evidence of a direct impact on the price of the good in question or an adequate explanation of how the price of the good in question is distorted as a result, will not suffice to justify a determination that there are no 'market-determined' prices. . . . Nor will a presumption that government intervention in the market necessarily results in price distortions for the goods in question suffice . . . . An investigating authority must explain how government intervention in the market *results* in in-country prices for the inputs at issue deviating from a market-determined price.[198]

118. Based on this improper approach, the compliance Panel concluded that the USDOC did not "explain how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price."[199]

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[196] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.206.

[197] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.206.

[198] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.205.

[199] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.206; *see id.* at para. 7.223 ("For the reasons set out above, we find that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) in concluding that there were no market-determined in-country prices for the inputs at issue that could be used as benchmarks to determine the adequacy of remuneration in the four investigations at issue. In particular, the USDOC failed to explain . . . how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price. In addition . . . the USDOC failed to consider price data on the record. For these

C. The Compliance Panel's Findings Depend on a Legal Approach that Is Not Appropriate for Determining Whether Resort to Out-of-Country Prices Is Appropriate Because Internal Prices Are Not Market Determined

119. The compliance Panel erred in finding that the USDOC's determination was somehow inconsistent with SCM Agreement Article 14 because the USDOC rejected Chinese prices without addressing how the government's involvement "*resulted* in"[200] prices "deviating"[201] from a market-determined price. As the United States will demonstrate in this section, it is the compliance Panel – and not the USDOC – that reached a conclusion without addressing the real question at issue, that is, whether prices were or were not market determined. The compliance Panel's rationale lacks any indication that the compliance Panel considered the evidence that steel prices in China are not market determined or that it considered the explanation and analysis of that evidence contained in the redeterminations. In other words, the compliance Panel failed to consider the central question under a proper reading of Article 14(d) – and the central question at the crux of the USDOC's analysis and explanation. The failure of the compliance Panel to do so evinces an erroneous interpretation of Article 14(d) and erroneous application of the correct interpretation, as articulated by the Appellate Body in *US – Carbon Steel (India)* and in other disputes.

120. In the discussion that follows, we demonstrate that the compliance Panel's legal interpretation *cannot* be correct for several reasons. *First*, the compliance Panel failed to recognize that examining prices is not – and cannot be – the only way to demonstrate price distortion. Examples such as administrative price setting make this clear. *Second*, the compliance Panel failed to recognize that the Appellate Body findings on "prevailing market conditions," on which the compliance Panel relied, assume a functioning market, as does the text of Article 14(d). As a result, the compliance Panel failed to consider whether it was warranted in this case to assume a functioning market. *Third*, without a functioning market, the "guideline" in Article 14(d) must be applied so as to appropriately measure the adequacy of remuneration. Because a functioning market did not exist in this case, the compliance Panel erred in finding that Article 14(d) required the USDOC to use internal, Chinese prices in its benefit calculations.

1. Price Distortion Can Be Evident in a Number of Ways, Including in the Structure of a Market

121. Examining prices is not – and cannot be – the only way to demonstrate price distortion. As a practical matter, it is evident that price distortion can occur in numerous ways for any number of reasons. For example, where prices are set administratively, it is the administrative

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reasons, we find that the USDOC failed to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations.").

[200] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.206.

[201] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.205-206.

act of price setting that causes price distortion.[202] In such a situation it would not be possible to use in-country prices as a benchmark because of the government's administrative control over prices for the good in that country.[203]

122. Appellate Body findings have recognized various forms of price distortion. In *US – Carbon Steel (India)* for example, the Appellate Body explained that it "[did] not see any findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* that indicate that the Appellate Body was foreclosing the possibility that there could be situations other than price distortion due to government predominance as a provider in the market."[204] In that dispute the Appellate Body likewise found it was "not persuaded by India's assertion that the Appellate Body has established that the only situation in which out-of-country prices may be used to determine a benchmark is where in-country prices are distorted by governmental intervention in the market."[205] As we have demonstrated at length in the discussion above, the appropriate approach under Article 14(d) is not limited to a specific kind of price analysis; the compliance Panel's conclusion to the contrary is in error.

123. In conjunction with the recognition that price distortion can take various forms, the Appellate Body's findings have also emphasized that the relevant inquiry will vary from case to case. For example, in *US – Carbon Steel (India)*, the Appellate Body found that, "although the Appellate Body's findings in *US – Softwood Lumber IV* are limited to the facts of that dispute," that did "'not mean that the reasoning underlying the Appellate Body's findings in that case cannot apply, with equal force, in other situations, in which the government is not a predominant provider.'"[206] The Appellate Body has emphasized that, even where it is "likely" that private prices will be distorted, the distortion of in-country private prices must be established "on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation."[207]

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[202] *See, e.g., US – Softwood Lumber IV (AB)*, para. 98 (observing that "the Panel . . . acknowledged that 'it will in certain situations not be possible to use in-country prices' as a benchmark, and gave two examples of such situations, neither of which it found to be present in the underlying countervailing duty investigation: (i) where the government is the only supplier of the particular goods in the country; and, (ii) where the government administratively controls all of the prices for those goods in the country") (quoting Panel Report, *US – Softwood Lumber IV (AB)*, para. 7.57). On appeal, the Appellate Body limited itself to considering only the situation of government predominance in the market as a provider of goods because it was "the only one raised on appeal." *Ibid.*, para. 99.

[203] *See US – Carbon Steel (India) (AB)*, para. 4.187.

[204] *US – Carbon Steel (India) (AB)*, para. 4.186.

[205] *US – Carbon Steel (India) (AB)*, para. 4.186.

[206] *US – Carbon Steel (India) (AB)*, para. 4.187 (quoting panel report at para. 7.50).

[207] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 453 (quoting *US – Softwood Lumber IV (AB)*, para. 102); *accord US – Carbon Steel (India)(AB)*, para. 4.156.

124. Accordingly, the Appellate Body's findings have also described a number of approaches that might be suitable depending on the circumstances. As the Appellate Body stated in *US – Carbon Steel (India)*:

> • In conducting the necessary analysis to determine whether proposed in-country prices can be relied upon in arriving at a proper benchmark, **an investigating authority may be called upon to examine various aspects of the relevant market**.
>
> • We further recognize that **there may be circumstances in which investigating authorities cannot verify necessary market or pricing information**.
>
> • As we have stated previously, **what an investigating authority must do** in conducting the necessary analysis for the purpose of arriving at a proper benchmark **will vary depending upon the circumstances of the case**, the **characteristics of the market** being examined, and the **nature**, **quantity**, **and quality of the information** supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.[208]

125. In this regard, the Appellate Body explained further that the "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;" and
>
> • "any entry barriers."[209]

126. It could also require assessing "the behaviour of the entities operating in that market" so as to determine "whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices."[210] Accordingly, the Appellate Body has declined to "exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself."[211] On the other hand, "depending on the particular circumstances at hand, an investigating authority may not be required to

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[208] *US – Carbon Steel (India) (AB)*, para. 4.157 (emphasis added).

[209] *US – Carbon Steel (India) (AB)*, para. 4.157, fn754.

[210] *US – Carbon Steel (India) (AB)*, para. 4.157, fn754.

[211] *US – Countervailing Measures (China) (AB)*, para. 4.50, fn530.

conduct a market analysis addressing all the elements mentioned above as examples of relevant inquiries."[212] For example, such situations "may include where the government is the sole provider of the good in question, and where the government administratively controls all of the prices for the goods at issue."[213]

127. Given the breadth of considerations that may be suitable in different circumstances, the Appellate Body in *US – Carbon Steel (India)* concluded:

> Thus . . . we do not consider that in-country prices may not be used to determine a benchmark only where such prices are distorted as a result of governmental intervention in the market. Indeed, **there may be other circumstances** where an investigating authority would not be required to use in-country prices to determine a benchmark for the purposes of Article 14(d), **for example, where information pertaining to in-country prices cannot be verified so as to determine whether they are market determined** in accordance with the second sentence of Article 14(d). As we see it, to find that an investigating authority is precluded from using alternative benchmarks in these situations would be contrary to a proper interpretation of Article 14(d).[214]

128. The common tenet among these findings is the "economic logic"[215] reflected in a proper interpretation of the text of Article 14(d) – in other words, the fundamental role of market-determined prices to serve as the basis for comparison. Ultimately, no "source can be discarded in a benchmark analysis" without an analysis of whether or not it is market determined.[216]

2. "Prevailing Market Conditions" Assumes a Functioning Market

129. The emphasis on market-determined prices highlights that an examination of "prevailing market conditions" assumes the existence of a functioning market. Where there is not a functioning market for the good in question, these guidelines are deprived of meaning. In past reports, the Appellate Body has recognized the key importance of analyzing the foundational question of the existence or not of a functioning market.

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[212] *US – Countervailing Measures (China) (AB)*, para. 4.62, fn552.

[213] *US – Countervailing Measures (China) (AB)*, para. 4.62, fn552.

[214] *US – Carbon Steel (India) (AB)*, para. 4.189 (emphasis added).

[215] *US – Softwood Lumber IV (AB)*, para. 94, fn118 (quoting panel report).

[216] *US – Countervailing Measures (China) (AB)*, para. 4.63.

130. First, in *US – Softwood Lumber IV*, the Appellate Body found that where there is no functioning domestic market for the good in question, the guidelines cannot properly be applied to the country of provision. In *US – Softwood Lumber IV*, the Appellate Body highlighted the compliance Panel's explanation that "in certain situations where government involvement in the market is substantial, the prices of private suppliers may be artificially suppressed because of the prices charged for the same goods by the government."[217] In that instance, the "USDOC [had] found that there were no 'usable' market-determined prices from transactions involving Canadian buyers and sellers that could be used to measure whether the provincial stumpage programs provide goods for less than adequate remuneration."[218] Accordingly, the "Panel itself acknowledged that there were problems of 'economic logic' inherent in its interpretation of Article 14(d)" given that its interpretation resulted in requiring the USDOC to nevertheless use those non-market determined prices.[219] Because the panel misinterpreted Article 14(d) as requiring domestic benchmarks, the panel saw a conflict between the text of the agreement and economic logic.

131. The panel in that dispute recognized that, in such cases, "a comparison of the conditions of the government financial contribution" with "the conditions prevailing in the private market" would "not fully capture the extent of the distortion arising from the government financial contribution, a result that in our view would not necessarily be the most sensible one from the perspective of economic logic."[220] On appeal, the Appellate Body clarified that a *proper* interpretation of Article 14(d) indeed takes that economic logic into account and, as a result, reversed the panel's erroneous interpretation. The Appellate Body explained that "the Panel's interpretation of Article 14(d) appears, in our view, to be overly restrictive and based on an isolated reading of the text," and that, moreover, "such a restrictive reading of Article 14(d) is not supported by the text of the provision, when read in the light of its context and the object and purpose of the *SCM Agreement*, as required by Article 31 of the *Vienna Convention*."[221]

132. Second, the Appellate Body addressed the phrase "prevailing market conditions" in *US – Carbon Steel (India)*:[222]

> In looking at the term "prevailing market conditions", we first note that the term "conditions" refers to characteristics or qualities.[735] **Importantly, such characteristics or qualities are modified by the term "market"**. In *US – Upland Cotton*, the Appellate Body endorsed the panel's finding that the meaning of the term

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[217] *US – Softwood Lumber IV (AB)*, para. 156.

[218] *US – Softwood Lumber IV (AB)*, para. 94, fn118.

[219] *US – Softwood Lumber IV (AB)*, para. 94.

[220] *US – Softwood Lumber IV (AB)*, para. 94, fn118 (quoting panel report).

[221] *US – Softwood Lumber IV (AB)*, para. 96.

[222] *US – Carbon Steel (India)(AB)*, para. 4.150 (emphasis added).

> "market", in the context of Article 6.3(c) of the SCM Agreement, is "'a place ... with a demand for a commodity or service'; 'a geographical area of demand for commodities or services'; 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices'".[736] We note that the "market conditions" are further modified by the word "prevailing", which means "predominant", or "generally accepted".[737] Taken together, these terms suggest that "prevailing market conditions", in the context of Article 14(d) of the SCM Agreement, consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices.
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> [735] Relevant definitions of the term "condition" are "[n]ature, character, quality; a characteristic, an attribute". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 483)
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> [736] Appellate Body Report, *US – Upland Cotton*, para. 404 (quoting Panel Report, *US – Upland Cotton*, para. 7.1236). Although the Appellate Body considered the term "market" in the context of Article 6.3(c), we consider that such a meaning would apply equally in the context of Article 14(d).
>
> [737] Relevant definitions of the term "prevailing" include "predominant in extent or amount; generally current or accepted". (*Shorter Oxford English Dictionary*, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2340)

In other words, the critical question is whether prices are "market" determined or are something else.[223] To this end, we note that the term "market" appears in Article 14(d) as an attributive noun, modifying "conditions," as in the phrase "market conditions." "Market-determined" prices, in turn, can be understood as defined in contrast to those prices characterized by government intervention.

[223] In considering this finding from *US – Carbon Steel (India)*, the United States notes that the Appellate Body cites to the report in *US – Upland Cotton*, a dispute which concerned a different issue regarding the evaluation of a market. *See US – Upland Cotton (AB)*, paras. 404-05 ("We accept that this is an adequate description of the ordinary meaning of the word "market" for the purposes of this dispute, and we do not understand the parties to dispute it."). *US – Upland Cotton* was concerned with describing the *geographical scope* of a market, i.e., whether markets in different geographical locations could be considered the "same" market. In the current dispute, the question is whether something shares the *qualities* conveyed by the term "market." Thus, of greater emphasis here is the *nature* of "market" -- more so than any limits to its geographical scope.

133. Third, the Appellate Body also has examined these issues, albeit in a somewhat different context, in *EC and certain member States – Large Civil Aircraft*. In that case, the Appellate Body took into account the following considerations:

> The marketplace to which the Appellate Body referred in *Canada – Aircraft* reflects a sphere in which goods and services are exchanged between willing buyers and sellers. . . . A market price is not determined solely by reference to either supply-side or demand-side considerations without reference to the other. Even where a market is limited for a particular good or service, that market price is not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market. . . .
> * * *
> Accordingly, we do not consider that it is consistent with Articles 1.1(b) and 14(d) to establish a market benchmark for a good or service by referring to the demands or expectations only of a seller or lessor, or, alternatively, only of a buyer or lessee. The price of a good or service must reflect the interaction between the supply-side and demand-side considerations under prevailing market conditions.[224]

134. The foregoing passage illustrates that, while the term "market" is not qualified in the text, a proper interpretation must give meaning to what a market really is. China, on the other hand, has suggested that interpreting the reference to "market" as requiring a *functioning* market would impermissibly add terms to the text that are not there.[225] But China is wrong. It would be contrary to the principles of treaty interpretation to construe "market" in a way that would deprive that term of its meaning – for example, if it were to be interpreted as referring to a

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[224] *EC and certain member States – Large Civil Aircraft (AB)*, paras. 981-82. *See also Japan – DRAMS (AB)*, para. 172 (discussing whether a challenged government investment conferred a benefit under Articles 1.1(b) and 14 of the SCM Agreement) ("The terms of a financial transaction must be assessed against the terms that would result from unconstrained exchange in the relevant market. . . . There is but one standard—the market standard—according to which rational investors act.").

[225] *See, e.g.*, China's First Written Submission, paras. 191, 230, 236 (characterizing USDOC's interpretation of Article 14(d) as requiring a "pure" market, a market "undistorted by government intervention," or "some minimum (but unspecified) level of government influence over the forces of supply and demand."). As the United States has noted, this is a straw man argument, premised on a mischaracterization of the USDOC's analysis in the challenged investigations. To the contrary, and as the record clearly shows, in each of the proceedings the USDOC evaluated price distortion consistent with the definition of "market conditions" supplied by the Appellate Body in various disputes. *See* Final Benchmark Determination, p. 11 (Exhibit CHI-21) (citing Appellate Body recognition that "market conditions" result "from the discipline enforced by an exchange that is reflective of the supply and demand in [the] market" (quoting *EC – Large Civil Aircraft (AB)*, para. 975)).

market that is not functioning as a market. It is a functioning market that permits the subsidized price to be compared to the price at "which the goods or services at issue would, under market conditions, be exchanged."[226]

135. Fourth, in the current dispute, the Appellate Body addressed the meaning of "prevailing market conditions" in this regard and explained that:

> Because Article 14(d) "requires that the assessment of the adequacy of remuneration for a government-provided good must be made in relation to *prevailing market conditions in the country of provision*, it follows that any benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods that relate or refer to, or are connected with, the prevailing market conditions for the good in question in the country of provision." Proper benchmark prices would normally emanate from the market for the good in question in the country of provision. To the extent that such in-country prices are market determined, they would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d).[227]

136. Thus, it is only when "market-determined prices" exist in the country of provision that prices in that country can serve to measure the adequacy of remuneration. Otherwise an investigating authority cannot be assured that "the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision," and "reflect[s] price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)."[228]

3. Absent a Functioning Internal Market, an Internal Price Cannot Serve as a Benchmark for Measuring the Adequacy of Remuneration

137. Absent a functioning internal market, an internal price does not speak to the guidelines set out in Article 14(d) for measuring the adequacy of remuneration. Market-determined prices, i.e., those that result from a functioning market, are by definition a natural benchmark against which to compare subsidized government prices. For market forces to operate and determine prices, certain market functions are essential. Bankruptcy, for example, is a market function that allows firms to exit the market when they are not profitable or otherwise unable to compete. As

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[226] *EC and certain member States – Large Civil Aircraft (AB)*, para. 975.

[227] *US – Countervailing Measures (China) (AB)*, para. 4.46 (quoting *US – Carbon Steel (India) (AB)*, para. 4.151 (referring to *US – Softwood Lumber IV (AB)*, para. 89) (emphasis original)) (internal citations omitted).

[228] *US – Carbon Steel (India) (AB)*, para. 4.284.

demonstrated by the record in the redeterminations, a number of these essential market functions are not observed in China's steel sector because the government has, for example, (1) maintained a majority market share through its own production operations, financed in perpetuity by the public fisc, and (2) has prevented, by force of law, market functions such as bankruptcy from interfering with its ever-greater output goals. In China's steel sector, market forces do not discipline supply and demand and are not the determinants of price. Pricing decisions are not driven by economics (e.g., a long-run cost advantage), but rather by government-directed overproduction and overcapacity. The United States demonstrated to the compliance Panel that the USDOC had explained in each determination how and why it considered the steel market as a whole to be distorted. The significance of these findings is that prices in China cannot be used to measure the adequacy of remuneration because those prices reflect the very same government interventions that gave rise to the subsidies the USDOC sought to measure.

138. The Appellate Body has found that this sort of circularity in the comparison defeats the intended objective of Article 14(d). In *US – Softwood Lumber IV*, the Appellate Body explained that, in such a case, "the comparison contemplated by Article 14 [may] become circular"[229] and therefore fail to "ensure . . . the provision's purposes are not frustrated" as a result.[230] Recognizing that such a result "would lead to a calculation of benefit that was artificially low, or even zero," the Appellate Body reasoned that "the right of Members to countervail subsidies could be undermined or circumvented in such a scenario."[231]

139. In the scenario at issue in the challenged determinations, using Chinese prices as a benchmark would not serve as a meaningful basis of comparison because the same government behavior that gave rise to the subsidies at issue is also the same behavior that characterizes the so-called market for steel in China. As the USDOC established, that behavior affects not just one or even many firms, but rather pervades the entire steel sector. The artificial market conditions that China has designed and implemented for its steel sector affect all of the participants in that sector. Thus, any difference observed in comparing one firm's price to another among that same cohort cannot meaningfully serve to illustrate the difference between the price the recipient paid and the price it would have paid under different – i.e., *market* – conditions. As noted, the reference to "market conditions" in Article 14 rather "highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, under market conditions, be exchanged."[232]

140. In contrast, the focus of the requirements articulated by the compliance 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

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[229] *US – Softwood Lumber IV (AB)*, para. 93. (fn omitted)

[230] *US – Softwood Lumber IV (AB)*, para. 101.

[231] *US – Carbon Steel (India) (AB)*, para. 4.284 (quoting *US – Softwood Lumber IV (AB)*, para. 93).

[232] *EC and certain member States – Large Civil Aircraft (AB)*, para. 975.

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)[233] unless it could identify the effect of such interventions (*i.e.*, determine the impact on in-country prices). Given the difficulty of identifying the effect of government intervention on in-country prices and conducting such a counter-factual analysis, the compliance Panel's interpretation of Article 14(d) might result in precluding an investigating authority from ever finding that in-country prices are distorted. Such a result would stand in direct contrast to the text of Article 14 and with the approach of the Appellate Body in prior reports.

141. What the compliance Panel in this dispute dismissed as merely "[e]vidence of widespread government invention in the economy"[234] 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).

D. 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) of the SCM Agreement

142. In this section we address separately the compliance Panel's erroneous findings on *Solar Panels* and then proceed to address a number of erroneous observations the compliance Panel relied upon in reaching the conclusion that the USDOC's determinations in the three proceedings involving steel subsidies – *OCTG*, *Pressure Pipe*, and *Line Pipe* – were not consistent with Article 1.1(b) and Article 14(d).

1. The Compliance Panel's Findings on *Solar Panels* Are Incoherent and Cannot Be Sustained

143. In the *Solar Panels* investigation, the USDOC relied on facts available because China failed to respond to the USDOC's benchmark questionnaire.[235] In selecting from the facts available, the USDOC considered public information on the record. This information included: factual findings from a WTO panel report; published articles, including a journal article demonstrating that China maintains restraints on silicon exports operating to artificially depress the domestic price of polysilicon and that China manages several key aspects of the solar grade polysilicon industry); and other publicly available evidence that the largest polysilicon producer

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[233] *See* Final Benchmark Determination at 7-20, 24-27 (Exhibit CHI-21).

[234] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.205.

[235] Final Benchmark Determination, p. 21 (Exhibit CHI-21).

is able to sell at prices below the break-even point due to subsidies.[236] In light of this evidence on the record in the proceeding, the USDOC declined to use Chinese prices to determine the adequacy of remuneration for sales of polysilicon and instead relied on prices outside of China. Therefore, even if Article 14(d) did require the analysis articulated by the compliance Panel, there was no information regarding either the "market price" for polysilicon or polysilicon prices in the Chinese market on the record of the *Solar Panels* section 129 proceeding for USDOC to consider in such an analysis.

144. With regard to the *Solar Panels* determination, the compliance Panel concluded:

> we find that there was **no relevant information on arm's-length in-country prices of polysilicon** in China before the USDOC **on the basis of which it could have considered a proper benchmark** for purposes of determining whether goods are provided for less than adequate remuneration within the meaning of Article 14(d). We therefore find that **China has not demonstrated that the USDOC acted inconsistently** with Articles 1.1(b) and 14(d) of the SCM Agreement **for failing to consider in-country prices** that were available on the record in this Section 129 proceeding.[237]

145. To be clear, in other words, the compliance Panel found that there were no in-country prices the USDOC should have considered for polysilicon and that the USDOC *did not* act inconsistently by not relying on non-existent Chinese prices. But in the very next paragraph, the compliance Panel stated the opposite, namely, that "the USDOC acted inconsistently with Articles 1.1(b) and 14(d) in concluding that there were no market-determined in-country prices for the inputs at issue that could be used as benchmarks to determine the adequacy of remuneration in the four investigations at issue."[238] Despite having found that the *Solar Panels* determination was *not inconsistent*, the compliance Panel then included *Solar Panels* among the determinations it ultimately found to be inconsistent, stating: "[i]n particular, the USDOC failed to explain, in the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* Section 129 proceedings, how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price."[239] The compliance Panel's conclusion is incoherent and unsupported by any rationale. It also reflects an erroneous interpretation of Article 14(d) and application of that interpretation, as explained above. Accordingly, the compliance Panel's finding on *Solar Panels* should be reversed.

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[236] *See Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Supporting Benchmark Memorandum"), pp. 8-9 (Exhibit USA-84).

[237] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.222.

[238] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.223.

[239] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.223.

2. As a Result of Employing the Wrong Approach, the Compliance Panel Erred in Assessing the Adequacy of the USDOC'S Explanation and Evidence in *OCTG, Pressure Pipe,* and *Line Pipe*

146. In the following discussion we discuss the erroneous observations the compliance Panel made in applying its improper legal test to examine whether the USDOC (a) considered in-country prices; (b) considered government-related prices; (c) analyzed specific input markets on a standalone basis; and (d) conducted a diligent investigation and solicited relevant facts.

147. The compliance Panel did acknowledge, nominally, that government intervention can impact prices. In applying its legal analysis, however, the compliance Panel ignored the USDOC's explanation of "how the price of the good in question is distorted as a result [of government intervention]."[240] As a result, the compliance Panel never acknowledged or discussed any of the evidence supporting USDOC's findings that:

- overcapacity distorts steel prices in China;
- the government caused and continues to sustain that overcapacity;
- the government continues to produce excess steel despite overcapacity;
- the government prevents market forces from correcting overcapacity by, *inter alia*, preventing firm closures or bankruptcies; and
- private and foreign competition is prohibited unless some degree of control is first ceded to the government.[241]

148. Based on this record evidence, 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 because of the absence of a functioning market for the relevant inputs. The compliance Panel's rationale, in contrast, ignores whether there was a functioning market for the relevant inputs and instead relies on a series of isolated inquiries and incomplete conclusions that take place outside the analytical framework pertinent to Article 14(d). We address each such aspect of the compliance Panel's rationale, in turn, below.

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[240] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.205.

[241] *See generally* Benchmark Memorandum (Exhibit CHI-20); Supporting Benchmark Memorandum (Exhibit USA-84); Benchmark Source Documents Appendix (Exhibit USA-85); Final Benchmark Determination (Exhibit CHI-21); U.S. First Written Submission at Section III.

a. In-Country Private Prices

149. *First*, the compliance Panel concluded, incorrectly, that the USDOC did not consider prices in China, focusing in particular on the USDOC's rejection of information from Mysteel.[242] But the compliance Panel's observation is contradicted by the record on its face – the record is clear that the USDOC provided the requisite explanation for rejecting in-country data provided by China. In particular, after considering import pricing data that China submitted on the record of the original investigations, the USDOC concluded that it could not be used and explained its reasoning as follows:

> Further . . . the GOC reported aggregate import data for the POI, as reported by its Customs Service. However, these aggregate import data do not delineate the prices by grade or month. In the *Preliminary Determination*, we excluded the Customs Services' aggregate import pricing data from the benchmark calculations because the data did not delineate the prices by grade or month. *See Preliminary Determination*, 73 FR at 39665. In the final determination, we have continued to exclude these data from the benchmark calculations.[243]

150. Moreover, the USDOC actually *used* Chinese prices where appropriate. In *Pressure Pipe*, for example, 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.[244] The USDOC rejected other pricing data based on the question of market-determined pricing, not as the result of a failure to consider Chinese prices.

151. With respect to the Mysteel data, the compliance Panel stated that "it seems clear that the USDOC failed to consider the price data placed on the record by the GOC."[245] The compliance Panel stated that the "record of the Section 129 proceedings shows that the Mysteel Report was largely ignored by the investigating authority"[246] and that "[none of the three benchmark memoranda] refer to the prices for the inputs at issue set out in the Mysteel Report."[247] But the compliance Panel's conclusion is incorrect. The Mysteel prices are precisely the subject of the

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[242] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.218-20.

[243] *Pressure Pipe*, Issues and Decision Memorandum, p. 20 (attached to China's First Written Submission to the original Panel as Exhibit CHI-12).

[244] *See Pressure Pipe*, Issues and Decision Memorandum, p. 21 (calculating benchmarks by "relying on the simple average of the company-specific import prices, MEPS, and SBB.") (attached to China's First Written Submission to the original Panel as Exhibit CHI-12).

[245] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.219.

[246] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.219.

[247] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.219.

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.[248] Because the compliance Panel took an isolated view of the question, the compliance Panel overlooked the context within which the USDOC addressed the Mysteel evidence. For example, a copy of the Mysteel report was submitted as evidence supporting a declaration that China put on the record to accompany its declarant's own analysis of those prices.[249] The USDOC addressed that submission at length in the benchmark memoranda, explaining not only why the proposed Chinese prices were not suitable benchmarks, but also explaining why the declarant's analysis of those prices was not persuasive.[250] Because the compliance Panel took an approach that ignored the central question of market-determined pricing, it also ignored relevant considerations that the USDOC took into account in that regard – for example, the declarant's assertion that Chinese prices (including Mysteel) are not distorted by government intervention relies on a caveat: his analysis refers to government-owned suppliers as "*private suppliers*."[251] This example illustrates the compliance Panel's failure to properly apply the legal standard to the record before it.

152. On 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. For example, 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. Moreover, the report itself states that China asked Mysteel to prepare the report – and to do so in 2015, nearly 10 years after the period of investigation, presumably for this proceeding. Given its lack of probative value and in light of the broader explanation the USDOC provided to address the basis for its finding that Chinese steel prices were not suitable benchmarks for subsidized Chinese steel, the USDOC provided a reasoned and adequate explanation for its decision not to rely on such data.

b. Government-Related Prices

153. *Second*, the compliance Panel concluded, without justification, that the USDOC automatically rejected government prices.[252] The compliance Panel reached this conclusion based on a rote invocation of the Appellate Body's statement in *US – Carbon Steel (India)* that

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[248] *See* Final Benchmark Determination, pp. 12-22 (Exhibit CHI-21).

[249] *See* Final Benchmark Determination, pp. 12-22 (Exhibit CHI-21).

[250] *See* Final Benchmark Determination, pp. 12-22 (Exhibit CHI-21).

[251] GOC Exhibit D-25, p. 2 at fn1, attached to *Response of the Ministry of the USDOC of the People's Republic of China to the Department's Benchmark Questionnaire* (July 6, 2015) (Exhibit CHI-19) (emphasis added) (explaining that the declarant's analysis of private suppliers in China's steel sector will "use the term 'private supplier(s)' as a short hand to include suppliers in categories (ii) and (iii)," meaning, "privately-owned suppliers" *and* "government-owned suppliers of the same inputs.").

[252] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.218.

prices from government firms cannot, as a rule, be excluded *a priori*.[253] But the compliance Panel did not actually apply the reasoning of that statement to the USDOC's determinations. In the compliance Panel's view:

> Given 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. There is nothing on the record of the investigations to suggest that the USDOC considered this possibility.[254]

154. However, the USDOC explained its concerns with using government-related prices and in the very same passage explained that it was nevertheless relying on benchmark prices that in fact included some government-related prices – the key difference being that the USDOC had not identified the same non-market problems with those government-related prices. In other words, the USDOC did not exclude government-related prices automatically. The USDOC explained, in particular, that:

> In the Department's experience, publicly available pricing information is seldom if ever segregated between SIEs and private entities; public and private data collection entities do not have a reason to so delineate the information they collect and disseminate. For example, the *OCTG* record contains a series of monthly average domestic Chinese prices compiled from the Steel Benchmarker. This price series does not indicate how much of the underlying pricing data were from sources that might be characterized as SIEs as opposed to private entities.[255]

155. The USDOC observed that it had the same concerns in other proceedings as well, stating:

> Similar issues exist in the *Line Pipe* proceeding for a series of monthly domestic Chinese prices for hot-rolled band compiled from the Steel Benchmarker (*see* SSB - Amendment to the Petition (April 21, 2008) at Exhibit 4-A) and a series of domestic Chinese

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[253] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.218 (citing *US – Carbon Steel (India) (AB)*, paras. 4.169-170).

[254] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.218.

[255] *See* Final Benchmark Determination, p. 20 (Exhibit CHI-21).

> prices for hot rolled coil and hot-rolled narrow strip compiled from MySteel (*see* GOC IQR (July 10, 2008) at Exhibit 59).[256]

156. Thus, the USDOC acknowledged the concern and explained that survey data rarely distinguish between government prices and private prices, but nevertheless emphasized that this fact does not prevent the USDOC from relying on those prices when they are market determined.[257] Here, 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.

157. The USDOC provided an extensive explanation as to why it rejected "government-related" prices. In the Final Benchmark Memorandum, for example, the USDOC explained that the government in China maintains an "administrative monopoly" such that government-related prices could not be considered market determined.[258] The USDOC's explanation included an analysis of what the World Bank describes as "[t]he most problematic form of government intervention in competition and administrative monopoly in China."[259] Myriad examples like these[260] make clear that the USDOC did not reject these prices because of their source, but rather because of their *nature,* consistent with the Appellate Body's findings in this regard. In this case, government-driven excess production is the *source of the distortions* in the first place. In particular, distortion in China's steel sector is caused in large part by government-driven overproduction. Assuming that a market would correct these distortions would also require assuming that certain market functions, such as bankruptcy and market exit, were possible. But China's interventions have, thus far, foreclosed that possibility.

c. Analysis of the Specific Input Markets

158. *Third*, with respect to the compliance Panel's statement that the USDOC did not consider an analysis of the specific input markets to be necessary,[261] the compliance Panel's observation is contradicted by the record on its face. The USDOC explained that it would consider such an analysis, but nevertheless found that no party or independent source in this case could collect or provide the data necessary for such a granular analysis.[262] The USDOC then addressed whether

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[256] *See* Final Benchmark Determination, p. 20 at fn85 (Exhibit CHI-21).

[257] *See* Final Benchmark Determination, p. 20 (Exhibit CHI-21).

[258] *See* Benchmark Memorandum, pp. 20-21 (Exhibit CHI-20); Final Benchmark Determination, p. 20 (Exhibit CHI-21) (citing Declaration of Andrew Szamosszegi (addressing Grossman Report); Attachment 2, Exhibit 4: *China 2030: Building a Modern, Harmonious, and Creative Society, World Bank and Development Research Center of the State Council of the People's Republic of China* (2013) (excerpt from "Structural Reforms for a Modern, Harmonious, Creative Society").

[259] Benchmark Memorandum, p. 21 (quoting joint *DRC/World Bank Report* at pp. 105-106) (Exhibit CHI-20).

[260] *See generally*, Benchmark Memorandum, pp. 6-10, 13-22 (Exhibit CHI-20).

[261] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.200.

[262] *See* Supporting Benchmark Memorandum, pp. 5-6 (Exhibit USA-84).

the inability to conduct that particular analysis would be problematic and explained that because these steel inputs are but a subset of the sector the USDOC had analyzed, it was not reasonable to expect that conditions in the sector's subset could operate under different conditions given the nature of the products.[263]

159. The compliance Panel considered 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"[264] and quoted the following sentence from the USDOC's memorandum:

> In light of the foregoing, a detailed analysis of the specific markets for hot-rolled steel, steel rounds and stainless steel coils is not integral to our finding of market distortion.[265]

160. But the compliance Panel's observation is contradicted by the very next sentence of the USDOC memorandum. In the next sentence, the USDOC stated:

> 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.[266]

161. The USDOC further explained:

> Additionally . . . the records in these cases also demonstrate the existence of additional government-caused distortions in the markets for the three specific inputs. These 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.

162. The USDOC concluded:

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[263] *See id.*

[264] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.200.

[265] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.200 (quoting Supporting Benchmark Memorandum, p. 5 (Exhibit USA-84)).

[266] *See* Supporting Benchmark Memorandum, p. 5 (Exhibit USA-84).

> To summarize, in response to our request for 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 provided incomplete information . . . . too incomplete to serve as a reliable basis upon which to evaluate the respective input markets as a whole.[267]
> * * *
> [Thus] we find that information necessary to an input-specific market analysis is not available on the record [and] in addition to, and in the alternative to, our determination about the Chinese steel sector as a whole . . . we are also relying upon the facts otherwise available . . . with regard to the particular steel inputs at issue.
> * * *
> As facts available, we are relying upon evidence of distortion and widespread governmental interference in the steel sector to conclude that these same conditions exist with respect to the three input markets.[268]

163. The compliance Panel's characterization of the USDOC's explanation is, evidently, erroneous.

d. Diligent Investigation and Solicitation of Relevant Facts

164. *Fourth*, the compliance Panel considered that the USDOC did not investigate sufficiently,[269] but only reached this conclusion because of its failure to recognize what questions an investigation is properly concerned with under Article 14(d). Specifically, the compliance Panel misapplied the legal standard when it stated that:

> It is not disputed that in the underlying investigations, the USDOC did not request evidence of actual prices for the goods at issue in China.[270]

165. The compliance Panel's reference to "did not request" is misleading because the parties – petitioners and respondents – had already put evidence on the record containing actual prices for the goods at issue in China and elsewhere. As explained above, for example, China put certain pricing data on the record of original investigations and the USDOC addressed why it was not

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[267] *See* Supporting Benchmark Memorandum, p. 6 (Exhibit USA-84).

[268] *See* Supporting Benchmark Memorandum, p. 6 (Exhibit USA-84).

[269] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.203.

[270] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.209.

useable in each case, i.e., because the data did not provide grade-specific prices on a monthly basis.[271]

166. What is more troubling is that the compliance Panel's citation does not support the compliance Panel's characterization, but rather reflects China's arguments on the issue.[272] The United States attempted to alert the compliance Panel to a pattern now established, in which "China mischaracterizes the determinations of the USDOC; or distorts the arguments made by the United States in this compliance proceeding and in other disputes; or misstates the findings of the Appellate Body in prior reports."[273] Accordingly, the United States cautioned that "China's approach to this compliance proceeding makes the Panel's work more difficult, and places additional burdens on the Panel to sort through the accuracy of China's assertions and arguments before it can even begin to evaluate their merits" and "is not an efficient use of the resources of the WTO dispute settlement system, which is under serious stress from the number and scope of disputes."[274] It is unfortunate to see that the misstatements and mischaracterizations put forth by China had the effect of warping the compliance Panel's view of a number of otherwise straightforward issues

167. Continuing in that key, the compliance Panel also stated, incorrectly, that:

> There is no indication that the USDOC tried to obtain information on arm's length prices for the inputs at issue from sources in China other than the GOC or respondents.[275]

168. As noted, the parties to the investigation had already submitted relevant information in response to the USDOC's questionnaires as well as of their own volition in accordance with the regulatory deadlines for submitting evidence for potential benchmark prices. The overwhelming indication from the evidence was that China in its role as a provider accounted for a majority of

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[271] *See Pressure Pipe*, Issues and Decision Memorandum, p. 20 (attached to China's First Written Submission to the original Panel as Exhibit CHI-12).

[272] The compliance Panel cites, for example, to China's Second Written Submission at para. 154, which states:

> Of course, the USDOC did not "observe" or "examine" any prices in the Chinese steel sector whatsoever. In fact . . . the USDOC did not even request information concerning Chinese prices for the inputs at issue. It was the Government of China that placed these prices on the record of the Section 129 proceedings, on its own initiative.

[273] U.S. Second Written Submission, para. 3; *see ibid.* at paras. 3-8 ("For example, the USDOC's public body determinations in the section 129 proceedings are based on analysis and explanation that, altogether, spans more than 90 pages. 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," yet "China mischaracterizes the USDOC's public body determinations as being limited to *just five pages*. . . . China's contentions simply lack any credibility.").

[274] U.S. Second Written Submission, para. 4.

[275] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.210.

the market share in the relevant sector. In this regard, the United States observes that, with respect to the need for "diligent investigation and solicitation of relevant facts," the Appellate Body has explained its understanding that where a government provider has a predominant market share, additional evidence is likely to be less probative. Specifically, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, acknowledged there may be cases "where the government's role as a provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."[276]

169. The determinations in this dispute provide a perfect example of that scenario. First, in *Pressure Pipe*, China reported that it produced 82 percent of the input.[277] Then, in *Line Pipe*, based on China's incomplete responses to requests for information, the USDOC concluded that the government produced 100 percent of the input.[278] In *OCTG*, when China again refused to provide requested information, the USDOC relied on the finding in *Line Pipe* to conclude that China's production dominated the market for steel rounds.[279] Finally, the declaration provided by China's own expert states, as an uncontested fact, that:

> Taken collectively, SOEs, on an annual basis, accounted for roughly 74% to 79% of steel products sales revenues over the 2006 to 2008 period.[280]

170. Despite these telling numbers, the compliance Panel never took into account how the evidence of market share was relevant in this regard. Under any fair assessment, the USDOC had no obligation to seek additional pricing information given what it already knew from these responses provided by China and its experts.

3. On Appeal, the Compliance Panel's Findings Should Be Reversed

171. For the foregoing reasons, the United States respectfully requests the Appellate Body to find that the compliance Panel erred in its interpretation and application of Article 14(d) to the benchmark determinations in this dispute by failing to consider whether, based on the reasons actually given, the relevant prices in China were market determined. The compliance Panel erroneously considered, based on a misunderstanding of Article 14(d) and the approach

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[276] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

[277] *See Pressure Pipe*, Issues and Decision Memorandum, pp. 16-22 (attached to China's First Written Submission to the original Panel as Exhibit CHI-12).

[278] *See Line Pipe*, Issues and Decision Memorandum, pp. 18-20 (attached to China's First Written Submission to the original Panel as Exhibit CHI-19).

[279] *See OCTG*, Issues and Decision Memorandum, pp. 13-15; 75-80 (attached to China's First Written Submission to the original Panel as Exhibit CHI-45).

[280] GOC Exhibit D-25, p. 13, attached to *Response of the Ministry of the USDOC of the People's Republic of China to the Department's Benchmark Questionnaire* (July 6, 2015) (Exhibit CHI-19).

articulated in past Appellate Body reports, that an investigating authority could resort to out-of-country benchmarks only if it conducted a certain kind of price analysis that is not reflected in the text of Article 14(d). To this end, we request that the Appellate Body reverse the findings of the compliance Panel in paragraphs 7.205, 7.206, 7.220, 7.223, 7.224, and 8.1(c) of its compliance report.

IV. U.S. APPEAL OF CERTAIN OF THE COMPLIANCE PANEL'S FINDINGS UNDER ARTICLE 2.1 OF THE SCM AGREEMENT

172. The United States appeals the compliance Panel's finding that the measures taken to comply are not consistent with the third sentence of Article 2.1(c) regarding "the length of time the subsidy programme has been in operation."[281] The compliance Panel erred when it found "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."[282]

173. The compliance Panel's finding is erroneous for two reasons. *First*, neither the original Panel nor the Appellate Body made findings of inconsistency regarding the "existence of a subsidy programme"[283] when presented with that issue in this dispute. Accordingly, that issue was not among those covered by the DSB's recommendations and rulings, nor is it 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. In particular, the compliance Panel erred in its assessment of the third sentence by transposing the function from Article 2.1(c), second sentence, which refers to identifying "use of a subsidy programme" as part of a broader *de facto* inquiry, to Article 2.1(c), third sentence, which refers only to certain factors the investigating authority shall take into account in conducting that inquiry. Whether or not that inquiry results in finding a subsidy program does not bear on whether an investigating authority complied with its obligation to take account of the factors in the third sentence when conducting that inquiry. The compliance Panel's application of a contrary approach is in error.

174. *Second*, in its assessment of the "existence of a subsidy programme,"[284] the compliance Panel erred 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.[285] In

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[281] Art. 2.1(c), SCM Agreement; *see US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.292; *see id.* at paras. 7.291-93 and 8.1(e).

[282] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.292 (emphasis added).

[283] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.291.

[284] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.291.

[285] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.282-91.

particular, the compliance Panel read into the text a requirement that "systematic" subsidization be shown in order to demonstrate specificity. As a result of applying this 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).

175. In the discussion below, we begin with the relevant text of Article 2.1 and then address each of the compliance Panel's errors in turn.

A. Article 2.1 of the SCM Agreement

176. Article 2 of the SCM Agreement is concerned with "*Specificity*."[286] It is in this regard that Article 2.1 describes principles that apply in order to determine whether a subsidy is specific to certain enterprises, namely by virtue of being provided to an enterprise, industry, or group of enterprises or industries (collectively, "certain enterprises").

177. The chapeau of Article 2.1 provides, in its entirety:

> 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.[287]

178. The Appellate Body has found that this chapeau "offers interpretative guidance with regard to the scope and meaning of the subparagraphs that follow."[288] It "frames the central inquiry as a determination as to whether a subsidy is specific to 'certain enterprises' . . . and provides that, in an examination of whether this is so, the 'principles' set out in subparagraphs (a) through (c) 'shall apply'."[289] In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body further explained: "We consider that the use of the term 'principles'—instead of, for instance, 'rules'—suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle."[290]

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[286] Art. 2, SCM Agreement.

[287] Art. 2.1, SCM Agreement.

[288] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.

[289] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366.

[290] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 366; *US – Countervailing Measures (China) (AB)*, para. 4.117.

179. Among the applicable principles, subparagraph (c) of Article 2.1 contains the provision at issue in this appeal.[291] It consists of the following three sentences:

> • If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered.
>
> • Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.[FN][292]
>
> • In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

180. In terms of the relevant framework for analysis in this dispute, the Appellate Body explained in China's initial appeal of the original panel report:

> • That the *de facto* specificity of a subsidy is to be **assessed in an even broader analytical framework** is borne out in the first factor listed in Article 2.1(c) – "use of a subsidy programme by a limited number of certain enterprises".
>
> • The **ordinary meaning** of the word "programme" refers to "a **plan or scheme of any intended proceedings (whether in writing or not)**; an outline or abstract of something to be done".
>
> • 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

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[291] *See, e.g., US – Countervailing Measures (China) (AB)*, para. 4.129 ("a *de facto* specificity analysis under subparagraph (c) would appear to be most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are *not* explicitly provided for in a law or regulation.").

[292] The footnote to this sentence states: "In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered."

> 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.[293]

181. Given that the existence of the subsidy itself is established through application of Article 1.1,[294] these observations help to elucidate that the *de facto* specificity inquiry is concerned with the *provenance* of the subsidy and the *manner* in which it is provided. Without some consideration of its provenance, the analysis would lack a point of reference against which to distinguish a broadly available subsidy from one that benefits only certain groups. For example, if a subsidy were provided to all enterprises in the economy, a showing that all the respondents under investigation used that subsidy would not suffice to establish "use of a subsidy programme by a limited number of certain enterprises." Thus, where it is known that all the respondents under investigation used a subsidy there must logically be some consideration of the manner in which that kind of subsidy was provided in order to establish that the recipients are limited in number.

182. In terms of discerning the provenance of such a subsidy or the manner in which that subsidy is provided, the very mechanism by which the subsidy is identified (and the nature of that type of subsidy) may provide all the information that is necessary to answer this question.[295] In other cases it might not. As the Appellate Body has noted, where a subsidy appears to be broadly available, the "mere fact" of the government's contribution does not suffice to establish "a plan or scheme" in itself.[296] However, depending on the analysis required to establish which government entity or public body provided the subsidy (for example where the public bodies are steel input producers under the control of the government) and the type of contribution being

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[293] *US – Countervailing Measures (China) (AB)*, para. 4.141 (emphasis added) (citations omitted).

[294] *US – Countervailing Measures (China) (AB)*, para. 4.144 (emphasis added) ("In any event, we recall that the *existence* of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*.").

[295] *See US – Countervailing Measures (China) (AB)*, para. 4.144 ("It stands to reason, therefore, that the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1.").

[296] *US – Countervailing Measures (China) (AB)*, para. 4.143.

provided (for example, steel input producers providing steel inputs to downstream steel product manufacturers) and whether that subsidy was observed as an isolated transaction or rather provided repeatedly and always by the same mechanism (for example, where steel inputs are produced by the same government-controlled producers and provided to the same downstream manufacturers continually throughout the year and every year past for decades), it stands to reason that the relevant "subsidy programme" may have already been identified and determined to exist in the process of ascertaining the existence of the subsidy in the first place under Article 1.1.[297] Indeed, the Appellate Body in this dispute found that this may "often" be how the Article 2.1(c) and Article 1.1 analyses are satisfied by the same set of observations.[298]

183. The Appellate Body in this dispute also explained that:

> [T]he fact that the first factor in Article 2.1(c) refers to a "subsidy programme" does *not* mean that a *de facto* specificity inquiry requires identification of an explicit subsidy programme implemented through law or regulation, or through other explicit means. Rather, the relevant inquiry with respect to the first of the "other factors" under Article 2.1(c) seeks to determine whether the subsidy at issue is, in fact, specific by considering whether the relevant subsidy programme is used by a limited number of certain enterprises. By its very nature, such an analysis normally focuses on evidence other than of the kind found in written documents or express acts or pronouncements by a granting authority.[299]

184. In sum, the nature of an unwritten subsidy program, plan or scheme of any intended proceedings (whether in writing or not), or systematic series of actions pursuant to which the subsidy was conveyed, means that evidence regarding the nature and scope of a subsidy program may be found in a wide variety of forms and often may already have been identified and

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[297] Compare with paragraph 7.291 of the panel report:

> With respect to establishing the existence of an "unwritten subsidy programme", the USDOC stated in its preliminary input specificity determination that, "[o]n the basis of case specific input purchase information, which was reported to the [USDOC] in the 12 [countervailing duty] investigations and compiled in the Department's Inputs Memorandum, we preliminarily find that there is adequate evidence in each of the 12 [countervailing duty] investigations that public bodies systematically provided [the relevant inputs] for [less than adequate remuneration] to producers in the PRC.

US – Countervailing Measures (Article 21.5 – China) (Panel), para. 7.291 (quoting Preliminary Determination on Public Bodies and Input Specificity at 19 (Exhibit CHN-4)) (panel's alterations).

[298] *US – Countervailing Measures (China) (AB)*, para. 4.144 ("It stands to reason, therefore, that the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1.").

[299] *US – Countervailing Measures (China) (AB)*, para. 4.146.

determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1. With that said, we turn to address the compliance Panel's errors.

B. 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

185. The compliance Panel fundamentally 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."[300] As noted, the DSB's recommendations and rulings concern the consistency of the USDOC's determinations with the obligations contained in the third sentence of Article 2.1, subparagraph (c). The third sentence provides for certain factors of which "account shall be taken" "[i]n applying . . . subparagraph [(c)]." The reference to identifying "use of a subsidy programme" is not contained in that provision, but rather appears in the second sentence of Article 2.1, subparagraph (c). The final sentence elaborates that "[i]n applying [Article 2.1(c)], account shall be taken of . . . the length of time during which *the* subsidy programme has been in operation" (emphasis added). The transition from the indefinite article "a" in the second sentence to the definite article "the" in the final sentence is critical. Whereas the indefinite article "a" marks "an indefinite noun phrase referring to something not specifically identified (and, frequently, mentioned for the first time)," the definite article "the" marks "an object as before mentioned or already known."[301] In other words, the drafting of Article 2.1(c) of the SCM Agreement indicates that whereas the subsidy program at issue has not been determined prior to a consideration of the limited use factor provided in the second sentence of this provision, the subsidy program at issue *is* already known prior to consideration of the factors identified in the final sentence of Article 2.1(c) of the SCM Agreement. The structural relationship of these provisions is based on sound logic.[302]

186. Taken together, the terms of subparagraph (c) describe a process in which "use of a subsidy programme" is assessed in conducting the broader *de facto* inquiry and, as a part of that process, an investigating authority should take account of the length of time in considering the "other factors" referred to in the first and second sentences. Thus, to comply with the first and second sentence requires that an investigating authority has taken account of the considerations

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[300] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.292.

[301] Online Oxford English Dictionary.

[302] The Appellate Body has recognized that the logic of this kind of textual structure in *US – Countervailing Measures (China)*, for example, noting that: "In any event, we recall that the *existence* of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*." *US – Countervailing Measures (China) (AB)*, para. 4.144 (emphasis added).

in the third sentence, but, conversely, compliance with the third sentence cannot be determined by reference to the first and second sentences. To read somehow, as the compliance Panel apparently did, a requirement to establish the existence of "*a* subsidy programme" in applying the final sentence misinterprets that provision to require an investigating authority to identify a subsidy program *for a second time*. The compliance Panel's conclusion is internally inconsistent with its own explication of the text. Indeed, the original Panel correctly explained that "[it] considered the last sentence of Article 2.1(c) to function *as a safeguard* that keeps in check th[e] flexibility [provided by the second sentence of this provision]."[303]

187. In this case, the compliance Panel's finding is based on its erroneous conclusion that, to determine whether the measures taken to comply were consistent with the recommendations and rulings of the DSB regarding Article 2.1(c), it was "not . . . necessary, for the resolution of this dispute, to further consider whether the USDOC took into account the length of time during which the subsidy programme had been in operation."[304] However, as noted, the DSB's recommendations and rulings in this case 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). The compliance Panel's ultimate conclusion "that the United States did not comply with the requirement contained in [the third sentence of] Article 2.1(c) to 'take account of the length of time during which the subsidy programme has been in operation'" therefore has no basis upon which it can be sustained.[305] The compliance Panel reached that conclusion not based on a finding that the USDOC failed to take account of the length of time – which it did not fail to do – but rather based on the compliance Panel's view that "the existence of a subsidy programme" had not been adequately explained.[306] Pursuant to the compliance Panel's own explanation of the how Article 2.1(c) works, however, the issue of the "existence of a subsidy programme" arises under the second sentence of Article 2.1(c) rather than under the third sentence. The compliance Panel's analysis is inconsistent with its own reasoning and its conclusion is in error.

188. In the first stages of this dispute, the original Panel made a finding of inconsistency only with respect to "the obligations of the United States under the last sentence of Article 2.1(c) . . . to take account of the two factors listed therein," i.e., duration and economic diversification.[307] With respect to the identification of "a subsidy program" in the second sentence of Article 2.1(c), the original Panel found that "the USDOC sufficiently identified subsidy programmes for the

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[303] *US – Countervailing Measures (China) (Panel)*, para. 7.252 (emphasis added).

[304] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.291.

[305] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.292; *see id.* at paras. 7.291-93 and 8.1(e).

[306] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.291.

[307] *US – Countervailing Measures (China) (Panel)*, para. 7.257 ("The Panel finds that the USDOC acted inconsistently with the obligations of the United States under the last sentence of Article 2.1(c) of the SCM Agreement by failing to take account of the two factors listed therein when making the relevant specificity determinations.").

purposes of the first of the 'other factors' under Article 2.1(c),"[308] i.e., "use of a subsidy programme" in Article 2.1(c), second sentence. On appeal, the Appellate Body found the original Panel had erred "[b]y not providing case-specific discussion or references to the USDOC's determinations of specificity challenged by China" and reversed on those grounds.[309] However, over China's objection, the Appellate Body declined to complete the analysis on that issue. The Appellate Body explained:

> [W]e see limited value, for purposes of resolving the dispute between the parties, in completing the legal analysis with respect to the issue of whether the USDOC sufficiently identified and substantiated the existence of a "subsidy programme" in each of the determinations at issue. . . . In these circumstances, we do not complete the legal analysis with respect to this particular aspect of China's appeal.[310]

189. Accordingly, the Appellate Body made no finding of inconsistency with regard to the USDOC's identification of a subsidy program in the challenged determinations. The DSB's recommendations to comply in respect of Article 2.1 thus relate only to the third sentence in subparagraph (c) of that article.

190. The existence of a program, however, is not a question that is to be resolved within the confines of the third sentence of Article 2.1(c). Rather, the third sentence of Article 2.1(c) serves to *inform* the broader inquiry found in the second sentence, i.e., whether "use of a subsidy programme by a limited number of certain enterprises" indicates specificity or not. As a constituent part of that inquiry, the third sentence cannot itself be judged by the conclusions reached as a part of that broader inquiry. Thus, the compliance Panel erred when it relied on the opposite rationale, stating: "we do not find it necessary, for the resolution of this dispute, to further consider whether the USDOC took into account the length of time during which the

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[308] *US – Countervailing Measures (China) (Panel)*, para. 7.258 ("the Panel finds that, in the specificity determinations at issue, the USDOC did not act inconsistently with Article 2.1 by analysing specificity exclusively under Article 2.1(c); that the USDOC sufficiently identified subsidy programmes for the purposes of the first of the 'other factors' under Article 2.1(c); and that China has failed to establish that the USDOC acted inconsistently with Article 2.1 by failing to explicitly identify the relevant granting authority.").

[309] *US – Countervailing Measures (China) (AB)*, para. 4.151.

[310] *US – Countervailing Measures (China) (AB)*, paras. 4.156-57 ("Moreover, it would seem to us that much of the evidence regarding the existence of the alleged subsidy programmes in this dispute has not been subject to the Panel's scrutiny . . . . As noted, the Panel, however, did not refer to any of the challenged countervailing duty determinations on the record in reaching its finding that the provision of inputs was 'systematic'. Nor do we consider the participants to have addressed sufficiently, in their submissions, the issues of whether the USDOC sufficiently identified and substantiated the existence of a 'subsidy programme' in each of the determinations at issue. In these circumstances, we do not complete the legal analysis with respect to this particular aspect of China's appeal.").

subsidy programme had been in operation."[311] As a result of failing to fully consider whether the USDOC took account of the length of time during which the subsidy programme had been in operation, the compliance Panel had no basis upon which to conclude that the USDOC's determinations failed to comply with the requirement in Article 2.1(c), third sentence. It would be appropriate to reverse the compliance Panel's finding on this basis alone. This conclusion is reinforced by the compliance Panel's own acknowledgment that the issue of the "existence of a subsidy programme" had been and is properly examined under the second sentence of Article 2.1(c), and that the third sentence fulfills a different function. The compliance Panel contradicted this framework in finding inconsistency with the third sentence without having examined the relevant issue.

C. The Compliance Panel Erred in Its Interpretation of the Term "Subsidy Programme" in Applying Article 2.1(c) of the SCM Agreement to the USDOC's Determinations

191. The compliance Panel further erred in its interpretation of the term "subsidy programme" when it applied the provisions of Article 2.1(c) to the USDOC's determinations.

1. The Compliance Panel Misapplied the Approach Articulated by the Appellate Body

192. As an initial matter, the compliance Panel framed its inquiry as follows:

> We are thus called upon to address what is required in the identification of a subsidy programme under Article 2.1(c), and particularly:
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> > [Option A:] whether an investigating authority is required to show that subsidies (i.e. financial contributions conferring a benefit) are systematically granted as part of this programme, or
> >
> > [Option B:] whether the systematic granting of a financial contribution [subsidized or not] will suffice to identify a subsidy programme.[312]

193. As formulated by the compliance Panel, neither of these options reflect an appropriate approach to identifying a subsidy program, as articulated by the Appellate Body in this dispute or as applied by the USDOC in its determinations. Option A is incorrect because it interprets "subsidy programme" as "systematic subsidization." But the "systematic series of actions" need not consist entirely of acts of subsidization; rather, the subsidy in question must be provided

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[311] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.291.

[312] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.263 (formatting altered for clarity).

"pursuant to" a series of actions that qualifies as a "program." Option B is incorrect because it interprets financial contribution alone as sufficient to demonstrate a subsidy program. This formulation does not include a link between the series of actions and the subsidy at issue. Both options, therefore, would not necessarily capture elements of a "subsidy program". In particular, the Appellate Body explained:

> 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.[313]

194. As discussed above, the inquiry under "Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."[314] Because contribution and benefit are analyzed separately from this inquiry, the only remaining question is whether these were provided "pursuant to" "a systematic series of actions."[315] The identification of a plan or scheme **pursuant to which** the subsidies in question are provided serves a particular purpose in this context because, in an analysis of *de facto* specificity, it is not the financial contribution or benefit in question, but rather "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 [law]."[316] As both the Appellate Body and the original Panel observed, a systematic activity or series of activities may be evidence of an unwritten subsidy program.[317]

195. The relevant inquiry is focused on *de facto* limitation, taking into consideration the type of subsidy in question. In this case, the subsidy in question is the provision of inputs for less than adequate remuneration, and the essential specificity question is whether it is generally available or *de facto* limited to certain enterprises. In the context of a public body providing inputs for less than adequate remuneration as financial contribution, account must be taken of what the features of such a subsidy program are. A public body's manufacture and provision of inputs to a limited number of certain enterprises in a repetitive manner, as has been found in these proceedings, does constitute a "systematic activity or series of actions" pursuant to which

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[313] *See US – Countervailing Measures (China) (AB)*, para. 4.143 (emphasis added).

[314] *US – Countervailing Measures (China) (AB)*, para. 4.144.

[315] The United States makes these observations in the sense of their application to the provision of inputs for less than adequate remuneration of the sort found in the USDOC's determinations here. In other circumstances, such as in the case of a single grant, it would not necessarily be appropriate to limit consideration of the word "programme" to the interpretation we focus on in this appeal.

[316] *US – Countervailing Measures (China) (AB)*, para. 4.141.

[317] *See US – Countervailing Measures (China) (AB)*, para. 4.149; *US – Countervailing Measures (China) (Panel)*, para. 7.239.

financial contributions have been provided. Indeed, in the context of a subsidy provided by means of inputs for less than adequate remuneration, the manufacture and provision of the inputs to the recipient by the public body is precisely the "systematic series of actions" that constitutes this variety of subsidy program. Accordingly, the approach that the compliance Panel should have taken in examining the USDOC's determinations is concerned with evidence of the systematic series of actions demonstrated by the manner in which the subsidies were provided in these circumstances, rather than looking for a program consisting solely of financial contributions that confer a benefit.

196. Instead, under the compliance Panel's approach, because "program" can be defined as a series of actions that is "systematic," the compliance Panel improperly interpreted the language in Article 2.1(c) to read as if a "systematic subsidy program" were required. In doing so, the compliance Panel interpreted the term "program" in a manner that effectively added an additional condition or limitation. This interpretation erroneously introduces an obligation that is not found in the text and would limit the application of the WTO subsidy disciplines in a manner not set out in the SCM Agreement.

2. By Applying an Improper Approach, the Compliance Panel Failed to Consider Evidence that Was Relevant on Its Face

197. The compliance Panel further erred by conducting its analysis of the programs at issue in isolation from relevant facts that were discussed in the USDOC's analysis of public bodies, financial contribution, benefit, and price distortion. These facts cannot justifiably be separated from questions of specificity, and the compliance Panel's decision to exclude them from its analysis constitutes error.

198. In particular, the compliance Panel should have taken notice that, when the USDOC determined that input producers are public bodies, the basis for that conclusion relied in large part on evidence that the inputs those firms produced or supplied were inputs *covered by an industrial plan to carry out sector-specific goals*.[318] That the USDOC highlighted these issues in other areas of the determination does not preclude consideration of these facts. Moreover, these facts contradict the compliance Panel's conclusion that there was no evidence on the record of a plan or scheme related to the provision of inputs. In this regard, the compliance Panel stated:

> Based on the USDOC record, it is unclear how the USDOC, relying on some number of transactions between certain producers and respondents, substantiated the existence of the unwritten subsidy programme in question. In this regard, while the information before the USDOC clearly indicates *repeated*

[318] *See Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Preliminary Determination of Public Bodies and Input Specificity*, February 25, 2016 ("Input Specificity Preliminary Determination") at 10, 16-17 (Exhibit CHI-4).

> transactions, it is unclear on what basis the USDOC concluded that these transactions were conducted pursuant to a plan or scheme of some kind.[319]

199. Yet, the systematic aspect of the transactions in this case is evident on its face – specifically, the evidence the USDOC relied on to substantiate its findings about the government's extensive apparatus of control and its interventions in the relevant sectors. Given that China subsidizes entire industries, and does so through an array of mechanisms according to the needs of each industry, the scale of its planned interventions are of a magnitude that can be difficult to comprehend – for example, its creation of an artificial market for the inputs at issue. Throughout this dispute, the United States has demonstrated how the extent of such intervention distorts entire sectors of the economy and that through these interventions China ensures that, *inter alia*, inputs are produced and provided to industrial users at subsidized prices. For the compliance Panel to have failed to consider any of this evidence of systematic activity when assessing whether the USDOC had any basis for concluding that inputs were provided in accordance with a plan or scheme suggests the compliance Panel took an overly restrictive approach to its analysis of *de facto* specificity.

200. Where the path of an investigating authority's determination is reasonably discernable, an adjudicator should meet with that reasoning rather than avoid it on the basis of form. This principle is apparent in past cases. For example, the panels in *US – Softwood Lumber IV* and *EC – Countervailing Measures on DRAM Chips* both upheld the investigating authority's consideration of the factors provided in the final sentence of Article 2.1(c) where such consideration was implicit.[320] Likewise, in *US – DRAMS*, the Appellate Body found that an investigating authority need not cite or discuss every piece of record evidence supporting its conclusion where at least some supporting record evidence is cited.[321] The Appellate Body similarly found in *EC – Measures Concerning Meat and Meat Products (Hormones)* that if an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality to assess its probative value, rather than narrowly assessing whether each piece of evidence of its own would be sufficient to support the finding at issue.[322]

201. The compliance Panel acknowledged that "the information before the USDOC clearly indicates *repeated* transactions," but found it "unclear on what basis the USDOC concluded that

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[319] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.288 (quoting China's second written submission, para. 201).

[320] *See US – Softwood Lumber IV (Panel)*, para. 7.124; *EC – Countervailing Measures on DRAM Chips (Panel)*, para. 7.229.

[321] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 164.

[322] *See EC – Measures Concerning Meat and Meat Products (Hormones) (AB)*, para. 133 ("The deliberate disregard of, or refusal to consider, the evidence submitted to a panel is incompatible with a panel's duty to make an objective assessment of the facts.").

these transactions were conducted pursuant to a plan or scheme of some kind."[323] On this basis, the compliance Panel concluded that "the USDOC's determination fails to explain how the evidence on the record supports its factual findings of *systematic* activity."[324] However, in reaching this conclusion the compliance Panel failed to address evidence that was, on its face, directly relevant to the compliance Panel's inquiry – for example, the USDOC's explanation of the nature of the input producers and their role in carrying out state industrial policies.

202. In particular, the USDOC explained that the inputs at issue are produced and sold by government-controlled producers that the USDOC found to be "producing . . . or . . . supplying inputs . . . covered by an industrial plan."[325] "Through these plans, the government issues instructions regarding sector-specific goals."[326] It is "these plans . . . that . . . help to ensure the predominance of the state sector."[327] What this means, in other words, is that the same facts that formed the basis for finding that input producers are public bodies provide evidence that those government producers were producing or supplying inputs covered by an industrial plan to carry out sector-specific goals as instructed by the government. These facts are directly responsive to the compliance Panel's concerns regarding the existence of a "subsidy programme."

203. The compliance Panel incorrectly assumed that, in examining whether the USDOC identified a "program," it could begin the analysis by clearing the slate and divorcing that inquiry from the remainder of the USDOC's findings – particularly when those findings spoke directly to a systematic series of actions through which "the government uses SIEs to fulfill its mandate to uphold the socialist market economy" in these sectors.[328] As we have explained, the nature of the USDOC's finding was plain: the USDOC identified a "systematic activity or series of actions" in the *repeated* provision of the inputs at issue *by public bodies*.[329] Indeed, the input producers – all of whom were found to be public bodies – are in the business of producing and providing inputs in accordance with the "plans" and "instructions" such as befit their role in "ensuring the predominance of the state sector."[330]

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[323] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.288.

[324] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.288.

[325] *See* Input Specificity Preliminary Determination at 10, 16-17 ("Through these plans, the government issues instructions regarding sector-specific goals . . . that guide resource allocations and help to ensure the predominance of the state sector") (Exhibit CHI-4).

[326] *See* Input Specificity Preliminary Determination at 10, 16-17 (Exhibit CHI-4).

[327] *See* Input Specificity Preliminary Determination at 10, 16-17 (Exhibit CHI-4).

[328] Input Specificity Preliminary Determination at 9 (Exhibit CHI-4).

[329] *See* Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).

[330] *See* Input Specificity Preliminary Determination at 10, 16-17 (Exhibit CHI-4).

3. Conclusion

204. In sum, the compliance Panel erred to the extent it interpreted the obligation in Article 2.1(c) as a requirement to demonstrate "systematic" subsidization. Rather, as the Appellate Body previously concluded in this dispute, identifying a subsidy program means finding evidence of a systematic series of acts pursuant to which a subsidy is provided. In each Section 129 determination, USDOC did just that, including through the evidence considered as part of its evaluation of the public bodies and benefit issues. The compliance Panel erred by assuming that its assessment of Article 2.1(c) should not take into account the evidence and explanations it considered in the course of its assessment of the issues arising under Articles 1 and Article 14 as part of the same Section 129 determination in each case. Given the discussion of the government's interventions above, for example, and within the context of China's distorted sectors, it need not be demonstrated that some additional and independent program *within* that framework was in operation.

205. Indeed, the Appellate Body has been clear that "the . . . 'subsidy programme'. . . at issue . . . 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."[331] Accordingly, and as the Appellate Body findings discussed in this section demonstrate, a "program" need not have a standalone existence; nor is it necessary to identify actions in addition to the actions by which the subsidy is provided.[332] The compliance Panel erred in this regard when it disregarded evidence that was relevant on its face and dismissed the explanations provided by the United States as "*ex post*."[333] An investigating authority may organize evidence relating to different issues without excluding appreciation of that evidence for other issues and the terms of Article 2.1(c) do not include an obligation for the investigating authority to expound upon the meaning of the term "program" at the level of detail required by the compliance Panel's restrictive approach.

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[331] *US – Countervailing Measures (China) (AB)*, para. 4.144.

[332] *US – Countervailing Measures (China) (AB)*, para. 4.144 ("It stands to reason, therefore, that the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1.").

[333] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.290 ("Before us, the United States has referred to the "systematic provision of inputs for nearly 50 years" and "a regularized and well-planned series of actions"; "a program of action" according to which those inputs were provided; and the potential relevance of the operation of "policy mandates" or "actions by which China provided the inputs in question". However, we do not find any such explanations in the investigating authority's determinations, and recall that an investigating authority's determinations may not be justified by an *ex post* rationale. In keeping with the applicable standard of review, we therefore decline to consider such arguments to the extent they are not reflected, even implicitly, in the USDOC's explanations with respect to the identification of the relevant subsidy programme.") (internal citations omitted).

V. U.S. APPEAL OF THE COMPLIANCE PANEL'S FINDING THAT CERTAIN REVIEWS WERE WITHIN ITS TERMS OF REFERENCE UNDER ARTICLES 6.2 AND 21.5 OF THE DSU

206. The United States appeals the compliance Panel's finding that subsequent administrative reviews and sunset reviews (collectively, "reviews") were within its terms of reference under Articles 6.2 and 21.5 of the DSU.[334] The subsequent completed reviews were not measures taken to comply and therefore not within the compliance Panel's terms of reference. The compliance Panel concluded that subsequent reviews were within its terms of reference "by virtue of their close relationship" to the DSB's recommendations and rulings and the section 129 determinations.[335] The compliance Panel's analysis, however, is overly broad and does not satisfy the approach the Appellate Body has articulated for determining whether a sufficiently "close nexus" exists between the subsequent proceedings and the measures taken to comply. In the circumstances of this dispute, the record does not justify a conclusion that the subsequent proceedings are measures taken to comply because they do not have a sufficiently close nexus in terms of nature, timing, and effects. Accordingly, those subsequent reviews are not within the compliance Panel's terms of reference.

A. A Compliance Panel's Terms of Reference under Articles 6.2 and 21.5 of the DSU

207. In a compliance dispute, a panel's terms of reference under Article 6.2 of the DSU are informed by the language of Article 21.5 of the DSU. Article 21.5 of the DSU provides that "[w]here 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." Article 21.5 therefore establishes that a compliance panel's terms of reference are limited to "measures taken to comply," which are those "measures taken in the direction of, or for the purpose of achieving, compliance."[336] While certain reports have asserted that a measure that is not in itself a "measure taken to comply" may nonetheless fall within the terms of reference by virtue of its "particularly close relationship"[337] or "sufficiently close nexus"[338] to the declared "measure taken to comply" (although in the case of measures with the "same essence", these would by definition effectively be the same measure taken to comply), it cannot be presumed that such a close connection exists. "Determining whether this is the case

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[334] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.347.

[335] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.347.

[336] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 66 (emphasis omitted).

[337] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77; *see US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.61.

[338] *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.

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."[339]

208. With regard to the nature and effects aspects of this "nexus text," it is "only where a specific aspect of the 'subsequent' determination is closely related to the violation found in the original dispute, *and affects the Member's implementation* of the DSB's recommendations and rulings in respect of that violation," that the specific aspect of a subsequent determination "may, under certain circumstances, be subject to review in the context of a compliance proceeding."[340]

209. With regard to timing, the Appellate Body has stated that "the timing of a measure remains a relevant factor in determining whether they are sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB."[341] Although the Appellate Body has recognized there may be instances where the adoption of a measure "simultaneously with, shortly before, or shortly after" specific compliance actions may support a finding that the measures are closely connected, it has also recognized that there may be situations where "the fact that the alleged 'closely connected' measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between the measure and a Member's implementation obligations."[342]

210. Finally, the Appellate Body has found 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."[343] The Appellate Body has emphasized that its findings "*should not be read to mean that every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel*."[344]

B. The Compliance Panel's Findings

211. The compliance Panel set out the following framework for its analysis:

> We recall that the timing of a measure alone is not a decisive factor in establishing whether it has a sufficiently close nexus with a Member's implementation of the recommendations and rulings of the DSB so as to fall within the scope of an Article 21.5

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[339] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 (emphasis added); *see also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 196, 202.

[340] *US – Zeroing (EC) (Article 21.5 – EC) (Panel)*, para. 8.101 (emphasis added).

[341] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.

[342] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.

[343] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 239.

[344] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 93 (emphasis added).

> proceeding . . . . Rather, whether such earlier measures are properly within the scope of an Article 21.5 proceeding depends on other aspects of the "close nexus" test in relation to a Member's implementation of the recommendations and rulings of the DSB.[345]
> * * *
> We are of the view that measures with a "particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB" may also fall within the limited circumstances in which measures that come into being after establishment of a compliance panel fall within that panel's terms of reference. Accordingly, we proceed to consider the nature and effects of the various measures at issue before us to determine whether they have a sufficiently close nexus with the DSB's recommendations and rulings in this case and the United States' implementation of those recommendations and rulings.[346]

212. The compliance Panel proceeded to apply – not the "close nexus" test – but rather what it referred to as a "close relationship" test.[347] In applying that test with respect to "nature," the compliance Panel explained that it equated the "nature of the measures in question" with "their subject matter."[348] The compliance Panel considered that, in this dispute, "the overlap of subject matter extends beyond merely an identity of product and country coverage" because "China has identified determinations made in administrative and sunset reviews conducted under the same countervailing duty orders" and has "alleged application of the same legal standard."[349]

213. With respect to "effects," the compliance Panel explained that, in these proceedings, "subject matter overlap (resulting from the application of a particular legal standard under the same countervailing duty order concerning the same products from China) bears on the effects of the relevant measures because it is reflected in the resulting determination."[350]

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[345] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.337 (citing *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 224).

[346] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.339 (citing *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77; *Australia – Salmon (Article 21.5 – Canada) (Panel)*, para. 22).

[347] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.339.

[348] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.340.

[349] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.341.

[350] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.344.

214. With respect to "timing," the compliance Panel merely adverted to the issue in a footnote, concluding that the timing was not "so long" as to "sever the connection."[351]

215. On this basis, the compliance Panel concluded that the reviews "fall within [its] terms of reference under Article 21.5 of the DSU by virtue of their close relationship."[352] The compliance Panel also provided a *proviso* along with its conclusion, reproduced here in its entirety:

> We note in this regard that the jurisdictional question before us is to be distinguished from the substantive question of whether the subsequent administrative and sunset reviews are themselves inconsistent with the provisions of the SCM Agreement as claimed by China. Therefore, **in concluding that there is a close nexus** in terms of the nature and effects of the relevant measures and DSB rulings and recommendations, **we are not inquiring whether or finding that China has demonstrated that the subsequent review determinations are inconsistent** with the provisions of the SCM Agreement raised by China. Rather, at this stage of our analysis, **we consider that the overlapping subject matter identified by China in respect of subsequent reviews has implications** in terms of the effects of those measures that, in turn, have a close relationship to the United States' implementation of the relevant DSB recommendations and rulings.[353]

216. This *proviso* confirms in clear terms that the compliance Panel's conclusion did not involve a serious inquiry into the nature, timing, or effects of the subsequent reviews, but was rather based on the "implications" of "overlapping subject matter."[354] With this in mind, we turn to address the errors in the compliance Panel's analysis.

C. The Compliance Panel's "Close Relationship" Analysis Was Superficial and Inadequate to Demonstrate that Subsequent Reviews Could Properly Be Treated as Measures Taken to Comply

217. The summary of the compliance Panel's analysis outlined above demonstrates that the compliance Panel's finding that the subsequent reviews were within its terms of reference is based on a superficial examination of the measures China sought to add in to this compliance

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[351] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.337 at fn532 (quoting *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225).

[352] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.347.

[353] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.346 (emphasis added) (internal footnote omitted).

[354] *Ibid.*

proceeding. The compliance Panel's analysis is overly broad and does not reflect the application of a proper approach or the approaches articulated by the Appellate Body in past disputes.

218. 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. Indeed, the compliance Panel noted, but did not heed, the Appellate Body's emphasis in *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.'"[355] The compliance Panel's analysis of "nature" simply equated the "nature of the measures in question" with "their subject matter"[356] and concluded it was therefore sufficient that China had identified "reviews conducted under the same countervailing duty orders" and had "alleged application of the same legal standard."[357] Such an assessment does not provide adequate justification, as the compliance Panel asserted it did, for the compliance Panel's conclusion that "the overlap of subject matter extends beyond merely an identity of product and country coverage."[358]

219. Likewise, the compliance Panel's conclusion regarding "effects" is based on the flimsy assertion "that the overlapping subject matter identified by China in respect of subsequent reviews has *implications* in terms of the effects."[359] The compliance Panel's assessment of "effects" was apparently limited to mere "implications" because, as the compliance Panel noted, it was "not inquiring whether" the allegations regarding the subsequent reviews could be demonstrated[360] – even though the compliance Panel's conclusion as to "nature" was based on "the alleged application of the same legal standard."[361] Understandably, the compliance Panel wanted to be clear that it had not pre-judged any issues, but it is also clear that the compliance Panel did not sufficiently examine the measures it found to be so closely connected to the measures taken to comply.

220. Indeed, the compliance Panel dismissed any concerns in that respect. The compliance Panel explained that it did not regard the alleged "differences" between the segments of the proceedings as undermining the "close nexus" because "each review takes as its basis, and

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[355] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.341 at fn544 (quoting *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 93).

[356] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.340.

[357] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.341.

[358] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.341.

[359] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.346 (emphasis added).

[360] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.346.

[361] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.341.

thereby reflects, and to some extent incorporates, the USDOC's earlier determinations."[362] The compliance Panel likewise dismissed any concerns regarding "timing," as noted above.[363]

221. Ultimately, this sort of approach to a jurisdictional question of this importance and complexity is not consistent with the basic approach the Appellate Body has articulated. It cannot be presumed that such a close connection exists, as the compliance Panel appears to have done in this dispute. Rather, the appropriate approach "requires a panel to *scrutinize* these relationships."[364] The compliance Panel here cannot be said to have scrutinized the relationships in a meaningful way. Rather, despite acknowledging the clear admonition that Appellate Body findings on this question "should not be read to mean that every assessment review will necessarily fall within the jurisdiction of an Article 21.5 panel,"[365] the compliance Panel erred by doing exactly that.

D. The Subsequent Reviews Are Not Closely Related Nor Did the Compliance Panel Find a Sufficiently Close Nexus

222. In the circumstances of this dispute, the record does not justify a conclusion that the subsequent proceedings are measures taken to comply nor do they have a sufficiently close nexus in terms of nature, timing, and effects. In its panel request for this compliance proceeding, China identified 12 administrative reviews and 10 sunset reviews and claimed that these reviews had a sufficiently close relationship to the measures taken to comply and the DSB's recommendations and rulings such that these reviews fall within the scope of the compliance Panel's terms of reference.[366] Nine of the annual administrative reviews and five of the sunset reviews were completed prior to the DSB's adoption of the Appellate Body report in the prior dispute.[367] Eleven of the administrative reviews and all of the sunset reviews concluded prior to the expiration of the "reasonable period of time" for the United States to comply with the DSB's recommendations and rulings.[368] Two administrative reviews and five sunset reviews were completed after the DSB's adoption of the Appellate Body report, but before the expiration of the reasonable period of time. All of the challenged reviews were completed prior to the establishment of the compliance panel.[369] In its first written submission, China identified the final results for the second administrative review for *Solar Panels*, one of the original 12

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[362] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.345.

[363] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.337 at fn532 (quoting *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225).

[364] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 (emphasis added); *see also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 196, 202.

[365] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 93.

[366] China's Panel Request at Annex 3 and Annex 4.

[367] The DSB adopted the original panel report, as modified by the Appellate Body report, on January 16, 2015.

[368] The reasonable period of time expired on April 1, 2016.

[369] The Director-General composed the compliance panel on October 5, 2016.

identified administrative reviews, which concluded after the reasonable period of time, but prior to the establishment of the compliance panel.[370] Similarly, China also identified an additional, eleventh sunset review in its first written submission that was completed after the reasonable period of time, but before the establishment of the compliance panel.[371]

1. China's Mere Allegations Did Not Provide a Sufficient Basis for the Compliance Panel to Assess the Nature of the Reviews

223. As noted, the compliance Panel erred in its analysis by not appropriately scrutinizing the relationship between the identified measures and the DSB's recommendations and rulings. The compliance Panel found that because the 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 rulings and recommendations. However, neither China nor the compliance Panel engaged with each factual scenario in the various determinations to analyze whether there, in fact, existed a close nexus regarding their "nature." The compliance Panel erred by accepting China's mere allegation that such a close connection existed and failed to scrutinize these relationships based on the particular facts of each proceeding.

224. Instead, the compliance Panel erroneously found that the challenged administrative and sunset reviews had a close nexus in terms of nature because "each review takes as its basis, and thereby reflects, and to some extent incorporates, the USDOC's earlier determinations with respect to countervailable subsidies."[372] The compliance Panel's statement is overly broad and does not subsequently explain the basis for this conclusion. Further, it incorrectly presumes – without any explanatory support and notwithstanding the substance of the individual reviews themselves – that all subsequent reviews necessarily reflect and incorporate prior determinations. This presumption ignores that each of these reviews is based on a different factual record, and is contradicted by the compliance Panel's own findings that the USDOC applied different legal standards in certain administrative reviews.[373] More importantly, the various analyses applied in

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[370] *See* China's First Written Submission at n.450. The final results for the second administrative review on solar panels published on July 12, 2016.

[371] *See* China's First Written Submission at n.451. The final results for the expedited sunset review of aluminum extrusions published on August 1, 2016.

[372] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.345.

[373] With each subsequent review, the record develops anew. Thus, the record that forms the basis of the USDOC's analysis may change for various reasons (*e.g.*, different mandatory respondents, differing levels of participation between interested parties and those from prior reviews, and differing information provided by the interested parties), and, it is the records of each segment of a proceeding that are the basis for the USDOC's analysis. To say that each review "takes as its basis" the earlier determinations is, therefore, inaccurate and contradicts the compliance Panel's findings on the substance regarding several reviews. For example, although the compliance Panel found that China had made a *prima facie* case regarding whether the USDOC's public body determination in the first administrative review of *OCTG*, it found that the USDOC had applied a different legal standard in the second administrative review of *OCTG*, and so concluded that China had not made a *prima facie* case regarding the USDOC's public body determination in the OCTG second administrative review. *See US – Countervailing*

the subsequent reviews in these proceedings are fact-dependent and do not necessitate the same result. The determinations of the various subsequent reviews are highly fact intensive and require a detailed consideration of the facts of the record.

225. To the extent that the compliance Panel examined the contents of these measures at all, the compliance Panel relied largely on China's cursory descriptions of alleged inconsistencies.[374] However, China did not adduce sufficient evidence and argument to show that the USDOC's findings in these administrative reviews are WTO-inconsistent, nor did it elaborate on the nature, timing, and effects of the reviews. Rather, China merely cited to the determinations and provided cursory discussions of the administrative reviews. China cross-referenced the legal arguments made in its submission with respect to the section 129 determinations and, without more, asserted that the concluded administrative reviews purportedly reflect the "exact same" or "equally unlawful" legal standards as those that the DSB found to be inconsistent with the SCM Agreement in the original dispute.[375] Even putting aside the substantive flaws in China's legal arguments, China's inadequate presentation of its claims relating to the concluded administrative reviews failed to make out a *prima facie* case. Indeed, the compliance Panel ultimately concluded that China had not made a *prima facie* case of WTO inconsistency regarding various determinations in the challenged administrative reviews and in all of the challenged sunset reviews.[376]

226. China also failed to make its *prima facie* case with respect to the concluded sunset reviews. Specifically, China did not adduce sufficient evidence and argument to show that the determinations made by the USDOC in the identified sunset reviews are WTO-inconsistent, nor did it elaborate on the nature, timing, and effects of the reviews. Rather, China merely cited to the determinations and provided cursory discussions of the sunset reviews. China merely asserted that the USDOC's finding that revocation of the respective orders would be likely to lead to continuation or recurrence of countervailable subsidies was based in part on public body, benchmark, and input specificity determinations and that such determinations were found to be

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Measures (Article 21.5 – China) (Panel), para. 7.365. Given the differing records of these two reviews and the use of a different legal standard in the second *OCTG* administrative review, it is evident that the USDOC did not "take as its basis" prior determinations of countervailability.

[374] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.341 (relying on observation that "China has identified determinations made in administrative and sunset reviews conducted under the same countervailing duty orders" and has "alleged application of the same legal standard.").

[375] China's First Written Submission, para. 389.

[376] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.371, 7.374, 7.377, 7.387, 7.396, 7.399, 7.403, 7.415, 7.420, and 7.473; *see also id.*, para. 7.481 ("China had not made a *prima facie* case that the subsequent administrative and sunset review determinations challenged by China in this dispute were systematically inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement as a consequence of the application of an erroneous legal standard. In particular, we found that in several administrative reviews China failed to demonstrate the application of an improper legal standard. Further, we have determined that, in the Section 129 determinations at issue, China had not made a *prima facie* case that the USDOC applied an improper legal standard in each determination.").

WTO-inconsistent in the original dispute.[377] However, the DSB's findings in the original dispute related to how certain programs were found to be countervailable in the challenged investigations, whereas a similar analyses of public body, benchmark, and specificity is not conducted in sunset reviews. Thus, China's legal arguments with respect to the completed sunset reviews were also deficient in meeting the *prima facie* threshold.[378]

227. In addition to China's failure to meet its burden as a complaining party, China's failure also impacted the compliance Panel's ability to assess whether a measure falls within its terms of reference. In the absence of China putting forth adequate evidence in support of its claim, the compliance Panel was, in effect, left only with China's allegations as a basis to determine whether the challenged measures fell within its terms of reference. A mere allegation cannot be an appropriate basis for determining whether a measure has a close nexus to the measures taken to comply and the DSB's recommendations and rulings. Indeed, such an approach would mean that a complaining party need only make such allegations in its panel request in order for a panel to find that a measure is within its terms of reference under Article 21.5 – and then nearly any measure could be pulled into a compliance proceeding. Such a result would be untenable and would not comport with Article 21.5. Accordingly, China's failure to make a *prima facie* case with respect to each of the subsequent administrative and sunset reviews also resulted in providing an insufficient basis for the compliance Panel to adequately conduct its close nexus analysis.

2. The Timing of Subsequent Reviews Does Not Establish a Sufficiently Close Nexus

228. With respect to "timing," the compliance Panel failed to assess whether the challenged reviews had a sufficiently close nexus in terms of timing to the measures taken to comply and the DSB's recommendations and rulings. Rather, the compliance Panel merely found that whether measures taken before the DSB's adoption of the Appellate Body report and during the reasonable period of time depends on other aspects of the close nexus test.[379] As noted above, the vast majority of the challenged reviews fall into the pre-adoption category.[380] Because these reviews were concluded prior to the expiration of the reasonable period of time, and moreover, prior to the adoption of the DSB's recommendations and rulings, these are not subsequent

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[377] China's First Written Submission, paras. 415-424.

[378] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.473.

[379] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.337.

[380] The administrative reviews identified by China that concluded prior to the DSB's adoption of its recommendations and rulings include the Kitchen Shelving first, second, and third administrative reviews, the OCTG first and second administrative reviews, the Magnesia Bricks first and second administrative reviews, and the Aluminum Extrusions first and second administrative reviews. *See* China's Panel Request at Annex 3. The sunset reviews identified by China that concluded prior to the DSB's recommendations and rulings include the Thermal Paper, Pressure Pipe, Line Pipe, Citric Acid, and Kitchen Shelving sunset reviews. *See* China's Panel Request at Annex 4.

measures closely connected to the measures taken to comply. These measures do not constitute actions, conduct, or omissions occurring after the expiration of the reasonable period of time. China also did not explain how these measures affect the United States' implementation of the DSB's recommendations and rulings.

3. The Compliance Panel Did Not Identify Any Observed Effects that Would Indicate a Sufficiently Close Nexus

229. With respect to "effects," the compliance Panel found 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."[381] However, simply because the findings of an administrative review may supersede determinations made in a previous administrative review does not necessarily result in a change to the finding of benefit, and thus does not establish that a close nexus exists in terms of effect. As stated, the facts available on the record of a particular review are highly relevant to the determination made in each review, as is the legal analysis that is applied, and so it cannot be presumed that the same or similar results will occur in each subsequent review. Likewise, it cannot be presumed that each yearly review will result in the same assessment or cash deposit rates.

VI. CONCLUSION

230. For the foregoing reasons, the United States respectfully requests that the Appellate Body:

a. reverse the compliance Panel's 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;[382]

b. reverse 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;"[383]

c. reverse the compliance Panel's finding that the USDOC's benchmark determinations in the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section

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[381] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.344.

[382] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.120; *see also id.*, paras. 7.114-7.120.

[383] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.133; *see also id.*, paras. 7.124-7.133.

129 proceedings are inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement;[384]

d. reverse the compliance Panel's 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'" 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;[385] and

e. reverse the compliance Panel's finding that the final determination in the original *Solar Panels* investigation,[386] and certain[387] subsequent administrative reviews and sunset reviews were within the scope of this proceeding under Article 21.5 of the DSU.[388]

[384] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.223-224 and 8.1(c); *see also id.*, paras. 7.199-200, 7.205-206, 7.209-211, 7.218-220, 7.223-224, and 8.1(c).

[385] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.292-293 and 8.1(e).

[386] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.c; *see also id.*, paras 7.319-325 and 8.1(g).

[387] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.d.

[388] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, 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); *see also id.*, paras. 7.335-347.