UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(AB-2018-2 / DS437)

APPELLEE SUBMISSION
OF THE UNITED STATES OF AMERICA

May 15, 2018

SERVICE LIST

Participant

H.E. Mr. Zhang Xiangchen, Permanent Mission of the People's Republic of China

Third Parties

H.E. Ms. Frances Mary Lisson, Permanent Mission of Australia

H.E. Mr. Stephen De Boer, Permanent Mission of Canada

H.E. Mr. Marc Vanheukelen, Permanent Mission of the European Union

H.E. Mr. J.S. Deepak, Permanent Mission of India

H.E. Mr. Junichi Ihara, Permanent Mission of Japan

H.E. Ms. Ji-ah Paik, Permanent Mission of the Republic of Korea

H.E. Mr. Gennady Ovechko, Permanent Mission of the Russian Federation

H.E. Mr. Duong Chi Dzung, Permanent Mission of Vietnam

TABLE OF CONTENTS

TABLE OF REPORTS

Short Form	Full Citation
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
Canada – Aircraft (Panel)	Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, adopted 20 August 1999, upheld by Appellate Body Report WT/DS70/AB/R
Canada – Dairy (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999
Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R
Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
EU – Biodiesel (AB)	Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R, adopted 26 October 2016
Japan – Alcoholic Beverages II (AB)	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996
Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007

Short Form	Full Citation
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (AB)	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Countervailing Measures (China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015
US – Countervailing Measures (China) (AB)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015
US – Countervailing Measures (China) (Article 21.5 – China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China: Recourse to Article 21.5 of the DSU by China*, WT/DS437/RW and Add.1, circulated 21 March 2018
US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001

Short Form	Full Citation
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Softwood Lumber VI (Article 21.5 – Canada) (Panel)	Panel Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/RW, adopted 9 May 2006, as modified by Appellate Body Report WT/DS277/AB/RW

I. INTRODUCTION AND EXECUTIVE SUMMARY[1]

1. China appeals certain of the compliance Panel's legal findings and conclusions related to the interpretation and application of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and certain of the compliance Panel's findings that aspects of the U.S. implementation measures challenged by China are not inconsistent with various provisions of the SCM Agreement. This submission demonstrates that China's appeals lack merit.

2. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") are meant to address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the Dispute Settlement Body ("DSB")]." In order to bring the United States into compliance with the DSB's recommendations with respect to "as applied" findings made by the original Panel and the Appellate Body, the U.S. Department of Commerce ("USDOC") conducted proceedings pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 proceedings"), in which the USDOC reconsidered its original determinations. In the section 129 proceedings, the USDOC supplemented its administrative records with information compiled by the USDOC as well as information that the USDOC solicited from interested parties. The USDOC also received and took into account arguments submitted by interested parties. On the basis of the new evidence and arguments on the records of the section 129 proceedings, as well as information from the original proceedings, the USDOC made and published revised determinations at the conclusion of the section 129 proceedings.

3. In order to bring the United States into compliance with the DSB's recommendations with respect to "as such" findings made by the original Panel concerning the "so-called 'rebuttable presumption' or 'Kitchen Shelving policy,'" which the USDOC applied when determining whether an entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement, the USDOC stopped applying the "rebuttable presumption" or "Kitchen Shelving policy."

4. China erroneously claims in this compliance proceeding that the United States has failed to comply with the recommendations adopted by the DSB in this dispute. In its other appellant submission, China contends that the compliance Panel erred in its interpretation and application of Articles 1.1(a)(1) and 14(d) of the SCM Agreement. As demonstrated in this submission, China's arguments lack merit.

5. The United States has structured this appellee submission as follows. Section II demonstrates that the compliance Panel did not err in its interpretation and application of Article 1.1(a)(1) of the SCM Agreement. Section II.A responds to China's arguments that the compliance Panel erred in finding that the USDOC's public body determinations in the section 129 proceedings are not inconsistent with U.S. obligations under the SCM Agreement. As

---

[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 2,965 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 46,000 words (including footnotes).

explained in section II.A.1, the USDOC's public body determinations are reasoned and adequate and supported by ample record evidence relating to the core features of the entities in question and their relationship to the government. Indeed, the USDOC's public body determinations are based on analysis and explanation that, altogether, spans more than 90 pages, and in turn that analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record, as well as the USDOC's consideration of information and arguments submitted by the GOC and other interested parties. As can be seen on the face of the USDOC's preliminary and final determinations, the Public Bodies Memorandum,[2] and the CCP Memorandum,[3] China's contention that the USDOC failed to provide a reasoned and adequate explanation is absurd. The compliance Panel appropriately denied China's request that it ignore the record evidence, and thus correctly found that the USDOC's determinations are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

6. Section II.A.2 responds to China's challenge of one aspect of the compliance Panel's legal interpretation of Article 1.1(a)(1) of the SCM Agreement, namely the compliance Panel's finding that "the text of Article 1.1(a)(1) does not prescribe a 'connection' of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution." China proposes a novel, flawed interpretation of the term "public body," arguing that Article 1.1(a)(1) "imposes a 'legal requirement' that the 'government function' identified by the investigating authority relate to the conduct alleged to constitute a financial contribution under Article 1.1(a)(1) – i.e. that there be a 'clear logical connection' between the two – for an entity engaged in such conduct to be considered a public body."

7. In effect, China argues that the only relevant "government function" for the purpose of a "public body" analysis is the particular conduct described in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement. The implication of China's position is that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser or providing loans, is itself a government function, and that engaging in that activity is consistent with the government's objectives. China continues to misunderstand the meaning of the term "public body" and the concept of a "financial contribution." Once an entity has been determined to be a public body – following the required examination of the core characteristics of the entity – then any time that entity engages in any of the conduct described in Article 1.1(a)(1)(i) and (iii) of the SCM Agreement, "there is a financial contribution," per the definition set forth in Article 1.1(a)(1). As

---

[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).

[3] *See Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Tim Hruby Re: The Relevance of the Chinese Communist Party for the Limited Purpose of Determining Whether Particular Enterprises Should Be Considered To Be "Public Bodies" within the Context of a Countervailing Duty Investigation*, May 18, 2012 ("CCP Memorandum") (p. 41 of the PDF version of Exhibit CHI-1).

the Appellate Body explained in *US – Anti-Dumping and Countervailing Duties (China)*, "[i]f the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution."[4] China proposes an interpretation that is legally and logically unsound, and which also is at odds with prior Appellate Body findings. Accordingly, China's proposed interpretation should be rejected.

8. Section II.A.3 responds to China's requests for the Appellate Body to make additional findings related to China's "as applied" claims under Article 1.1(a)(1) of the SCM Agreement. China's arguments in favor of its requests lack merit; both because they are premised on China's novel, flawed interpretation of the term "public body" and because they suffer from other flaws.

9. Section II.A.4 responds to China's request for the Appellate Body to complete the legal analysis and find that the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement. The Appellate Body should reject the new, flawed interpretation of the term "public body" proposed by China, and thus there is no basis for the Appellate Body to complete the legal analysis of China's "as applied" claims. And even aside from China's flawed challenge to the compliance Panel's legal interpretation, China's claim still would fail because the USDOC did establish a clear, logical connection between the "government function" identified by the USDOC and the particular conduct at issue under Article 1.1(a)(1) of the SCM Agreement. The USDOC's determination is supported by ample record evidence even under China's proposed interpretation.

10. Section II.B demonstrates that the compliance Panel did not err in finding that the Public Bodies Memorandum is not inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement. Section II.B.1 shows that China's two arguments against the compliance Panel's findings lack merit.

11. First, China asserts that, "[i]f the Appellate Body reverses the Panel's conclusion regarding the proper legal standard, the Appellate Body should also reverse this basis for the Panel's rejection of China's 'as such' claim." However, the new interpretation of the term "public body" proposed by China is legally erroneous and should be rejected.

12. Second, China argues that the compliance Panel erred in finding that the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement. If this is China's argument, it was China's burden to put before the compliance Panel evidence demonstrating that the Public Bodies Memorandum restricts, in a material way, the discretion of the USDOC to make public body determinations in a manner consistent with Article 1.1(a)(1). China did not even attempt to meet its burden. The compliance Panel did not err in rejecting China's "as such" claim.

---

[4] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284 (emphasis added).

13. Section II.B.2 responds to China's request for the Appellate Body to complete the legal analysis and find that the Public Bodies Memorandum is inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement. The Appellate Body should reject China's request to reverse the compliance Panel's finding that the Public Bodies Memorandum is not premised on an erroneous legal standard and the compliance Panel's finding that the Public Bodies Memorandum does not restrict, in a material way, the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement. Thus, there is no basis for the Appellate Body to complete the legal analysis of China's "as such" claim. Even were the Appellate Body to reverse the compliance Panel's findings, the Appellate Body nevertheless should reject China's "as such" claim because, as demonstrated in the U.S. appellant submission, the Public Bodies Memorandum is not a measure that is challengeable "as such" within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU, and the Public Bodies Memorandum is not a rule or norm of general or prospective application.

14. Section III addresses China's claim regarding Article 14(d) of the SCM Agreement. The basis for China's appeal is an unsupportable assertion that Article 14(d) prescribes three and only three scenarios in which out-of-country prices may serve as an appropriate benchmark for determining whether a subsidized good was provided for less than adequate remuneration. Nothing in the text of Article 14(d) suggests this interpretation. And, notwithstanding China's selective quotations, the prior Appellate Body and panel reports that have addressed Article 14(d) have all recognized – in express terms – that neither Article 14(d) nor the findings in those reports purports to cover the myriad circumstances in which domestic prices may not be the appropriate basis for comparison.

15. Section III.A responds to China's argument that its overly narrow legal interpretation should be adopted by the Appellate Body. Section III.A.1 sets out the appropriate legal framework for interpreting and applying Article 14(d). We explain that, as the Appellate Body has previously recognized, an investigating authority may reject prices if they are not market determined. In section III.A.2, we address the compliance Panel's findings on this issue and demonstrate that the compliance Panel's rationale for rejecting China's argument is sound and consistent with a proper interpretation of Article 14(d). Because Article 14(d) permits the use of external benchmarks in a variety of circumstances, the compliance Panel did not err in finding it could "not accept that the narrow legal standard advocated by China is required by Article 14(d)."[5] Finally, in section III.A.3, we address the five panel and Appellate Body reports that China argues support its contention that Article 14(d) should be interpreted as prescribing only three scenarios in which domestic prices may be considered unsuitable for benchmarking purposes. We demonstrate that the express terms of these findings contradict what China asserts.

16. Section III.B responds to China's argument that the term "market" should be turned on its head to include distortive government interventions, such that prices would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions), and that price

[5] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.162.

distortion should not be a relevant consideration in the analysis under Article 14(d) of the SCM Agreement. The discussion begins in section III.B.1 by addressing, in particular, China's argument that the compliance Panel imposed a circular legal approach by requiring that distortion be examined by comparison to a market price without defining what constitutes a market price.[6] As we explain below (and previously in the U.S. appellant submission), the United States agrees, albeit for different reasons, that the compliance Panel formulated an approach that does not appropriately reflect the terms of Article 14(d). In particular, as explained in the U.S. appellant submission, the compliance Panel erred by reaching a conclusion without addressing the real question at issue, that is, whether prices were or were not market determined.[7] Under the compliance Panel's approach, the only justification for resort to out-of-country benchmarks is evidence of the difference between the price of the good being assessed and a market-determined price in the same country. Such a demonstration, of course, would require that there are market-determined prices for the good in that country against which to compare the distorted price. Where no in-country prices are market determined, a conclusion that a benefit is being conferred could be precluded, despite the remuneration being inadequate. The compliance Panel appears to have misconstrued what the Appellate Body has articulated about the proper approach under Article 14(d) and, in doing so, the compliance Panel also foreclosed consideration of appropriate benchmarks.

17. We explain further in section III.B.2 of this submission that the remedy for the compliance Panel's error is not found in China's radical new proposal to define "market" to include distortive government interventions. China's definition is not consistent with the concept of interactions between independent buyers and sellers that is captured by the term "market." The Appellate Body has recognized that *private prices* are the starting point for determining a benchmark precisely for this reason.[8] The fundamental concept of market prices as those which would be charged between independent enterprises acting at arm's length is recognized throughout the SCM Agreement[9] and in other provisions of the WTO Agreement.[10]

---

[6] *See* China's Other Appellant Submission, para. 137 ("the Panel's circular standard . . . states, in effect, that 'a market price is a price that doesn't deviate from a market price'").

[7] *See* U.S. Appellant Submission, paras. 81-84.

[8] *US – Carbon Steel (India)*, para. 4.154 (describing prices from "private suppliers in arm's length transactions" as "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement"); *US – Softwood Lumber IV (Canada)* ("private prices in the market of provision will *generally* represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods.").

[9] *See, e.g.,* SCM Agreement, Annex I Illustrative List, item (e), n. 59 (in establishing existence of export subsidies, "Members reaffirm the principle that prices . . . should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length."); SCM Agreement, Art. 29.1 (referring to transformation from centrally-planned to "market, free-enterprise economy").

[10] *See, e.g.,* Customs Valuation Agreement, Art. 1.1(d) ("The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided: … (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2"); Customs Valuation Agreement, Note 3 to Article 1, paragraph 2 ("Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other

In contrast, China's proposal turns the term "market" on its head, such that the market would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions).

18. Finally, in section III.B.3 we conclude the discussion by addressing the flaws in China's final argument that price distortion should not be a relevant consideration in the analysis under Article 14(d). The text of Article 14(d) and the approach the Appellate Body has taken in applying that text do not provide support for China's position. The Appellate Body has recognized in prior disputes that, in light of the purpose of measuring the benefit to a recipient, being able to ensure that potential benchmark prices are market-determined may be necessary in order to achieve a meaningful comparison.

II. CHINA'S CONTENTIONS THAT THE COMPLIANCE PANEL ERRED IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT LACK MERIT

19. China argues that the compliance Panel erred in finding that the USDOC's public body determinations in the section 129 proceedings are not inconsistent with Article 1.1(a)(1) of the SCM Agreement. As the United States demonstrated to the compliance Panel, and as shown in this submission, China's argument is premised on a novel, flawed interpretation of the term "public body" in Article 1.1(a)(1). Furthermore, for China to have prevailed, the compliance Panel would have been required to ignore the massive amount of record evidence that the USDOC collected and analyzed. That evidence provides ample support for the USDOC's public body determinations, and the compliance Panel appropriately refused to ignore it.

20. On appeal, China challenges one aspect of the compliance Panel's legal interpretation of Article 1.1(a)(1) of the SCM Agreement, namely the compliance Panel's finding that "the text of Article 1.1(a)(1) does not prescribe a 'connection' of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution."[11] China mistakenly argues that Article 1.1(a)(1) "imposes a 'legal requirement' that the 'government function' identified by the investigating authority relate to the conduct alleged to constitute a financial contribution under Article 1.1(a)(1) – i.e. that there be a 'clear logical connection' between the two – for an entity engaged in such conduct to be considered a public body."[12] As explained below, China's proposed interpretation is contrary to the customary rules of interpretation of public international law, is illogical, and cannot be reconciled with Appellate Body findings in prior disputes

---

as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship.").

[11] China's Other Appellant Submission, para. 18 ("It is this finding that forms the basis of China's appeal.").

[12] China's Other Appellant Submission, para. 30.

21. China further argues that the compliance Panel erred in finding that the USDOC's public body determinations in the section 129 proceedings in this dispute are not inconsistent with Article 1.1(a)(1),[13] and China also argues that the compliance Panel erred in finding that the Public Bodies Memorandum is not inconsistent with Article 1.1(a)(1), "as such."[14] China's arguments fail; both because they are premised on China's unfounded contention that the compliance Panel's legal interpretation was erroneous, and because they suffer from other flaws, as explained below.

22. As demonstrated in this submission, China continues to misunderstand the meaning of the term "public body," and all of China's arguments lack merit. In the section 129 proceedings at issue in this compliance proceeding, the USDOC examined legal instruments and evidence of meaningful control to establish the core features of the entities in question and their relationship to the Chinese government to determine whether they possessed, were vested with, or exercised governmental authority (*i.e.*, the authority to perform governmental functions).[15] In its section 129 public body determinations, the USDOC conscientiously applied the approach from prior Appellate Body reports for determining whether an entity is a public body, it provided reasoned and adequate explanations, and its determinations were supported by ample record evidence. As the United States notes below, and has consistently maintained, under Article 1.1(a)(1) of the SCM Agreement, the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government. The conduct at issue in the financial contribution analysis necessarily will be those actions described in the subparagraphs of Article 1.1(a)(1). Where the economic value being transferred, through one of the actions described in Article 1.1(a)(1), belongs to the government, that transfer is an exercise of governmental authority – the authority over the government's own economic resources. When an entity transfers the government's resources, it is making a financial contribution, just as the government (in the narrow sense) makes a financial contribution by engaging in the identical conduct described in Article 1.1(a)(1), subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

A. The Compliance Panel Properly Found that the USDOC's Public Body Determinations in the Section 129 Proceedings Comply with the Recommendations of the DSB and Are Not Inconsistent with Article 1.1(a)(1) of the SCM Agreement

23. Before turning to the arguments China advances on appeal and demonstrating that they lack merit, this submission discusses the USDOC's public body determinations in the section 129 proceedings. The compliance Panel properly found that these determinations are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.[16]

---

[13] *See, e.g.*, China's Other Appellant Submission, para. 106.

[14] *See* China's Other Appellant Submission, paras. 115-122.

[15] *See US – Countervailing Measures (China) (Panel)*, para. 7.66.

[16] *See US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.107, 8.1(a).

24. The original Panel, relying on prior Appellate Body findings, found that "the critical consideration in identifying a public body is the question of authority to perform governmental functions," and "[t]herefore, an investigating authority must evaluate the core features of the entity in question and its relationship to government, in order to determine whether it has the authority to perform governmental functions."[17] The original Panel explained that "simple ownership or control by a government of an entity is not sufficient. A further inquiry is needed."[18] Such a "further inquiry," consistent with the findings of the original Panel, as well as prior findings of the Appellate Body, is precisely what the USDOC undertook in implementing the DSB's recommendations and rulings in the section 129 proceedings here.

25. Throughout this compliance proceeding, China has attempted to support its arguments by focusing narrowly on individual documents on the record of the section 129 proceedings. The USDOC's determinations, however, were based on the totality of the evidence on the record.[19] The Appellate Body has found previously that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the totality of the evidence, how the interaction of certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."[20]

26. The compliance Panel correctly approached the evaluation of the USDOC's public body determinations, explaining its task in the following terms:

> [W]e must determine whether the USDOC's determinations were supported by reasoned and adequate explanations in light of information provided by respondents in the course of the investigation, taking into account the totality of the evidence upon which the USDOC relied. We bear in mind our role as the reviewer of an agency decision, rather than as the initial trier of

---

[17] *US – Countervailing Measures (China) (Panel)*, para. 7.66 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*).

[18] *US – Countervailing Measures (China) (Panel)*, para. 7.72.

[19] *See, e.g., Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceedings: United States – Countervailing Duty (CVD) Measures on Certain Products from the People's Republic of China (WTO DS437), Final Determination of Public Bodies and Input Specificity*, March 31, 2016 ("Public Bodies Final Determination"), p. 5 (Explaining that "the *Public Bodies Memorandum* and accompanying *CCP Memorandum* set forth evidence concerning the extent to which certain categories of state-invested enterprises function as instruments of the GOC.") (p. 6 of the PDF version of Exhibit CHI-5); *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 ("Public Bodies Preliminary Determination"), p. 10 ("We analyzed the input producer information provided by the GOC, the analysis and conclusions of the Public Bodies Memorandum, and other information on the record of these proceedings, which included factual information filed by interested parties and factual information submitted in the underlying administrative investigations.") (p. 11 of the PDF version of Exhibit CHI-4).

[20] *Japan – DRAMs (Korea) (AB)*, para. 131.

> fact, and that we may not substitute our judgment for that of the investigating authority. Moreover, we do not consider that the USDOC was required to address every piece of evidence on its record in reaching its determinations, subject to the requirement that the conclusions reached must be reasoned and adequate, including explanations as to why alternative explanations and interpretations of the record evidence were rejected.[21]

27. The following subsections describe the USDOC's public body determinations in the section 129 proceedings and demonstrate that those determinations are "reasoned and adequate" and supported by ample record evidence of the "core features" of the entities in question and their "relationship to the government," which establishes that the entities possess, exercise, or are vested with governmental authority to perform governmental functions in China.[22]

1. The USDOC's Public Body Determinations in the Section 129 Proceedings are Reasoned and Adequate and Supported by Ample Record Evidence Relating to the Core Features of the Entities in Question and Their Relationship to the Government

28. The USDOC's public body determinations in the section 129 proceedings at issue in this compliance proceeding are set forth and explained in a preliminary determination and a final determination that the USDOC produced as part of these section 129 proceedings, as well as in memoranda analyzing public bodies in China (the "Public Bodies Memorandum")[23] and discussing the relevance of the Chinese Communist Party ("CCP") to the public body analysis (the "CCP Memorandum").[24] The USDOC produced the Public Bodies Memorandum and the CCP Memorandum in an earlier proceeding and placed them and the evidence cited therein onto the administrative record of these section 129 proceedings.[25] All of these documents, read together, present the USDOC's analysis and explanation underlying its public body determinations.

29. This is reflected in the Public Bodies Final Determination, which, in addition to addressing arguments presented by the Government of China ("GOC"), explains that the

---

[21] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.98.

[22] *US – Countervailing Measures (China) (Panel)*, para. 7.66.

[23] *See* Public Bodies Memorandum (p. 2 of the PDF version of Exhibit CHI-1).

[24] *See* CCP Memorandum (p. 41 of the PDF version of Exhibit CHI-1).

[25] *See* Public Bodies Preliminary Determination, p. 8 ("On October 28, 2015, the [USDOC] placed on the record of these Section 129 proceedings the Public Bodies Memorandum and its accompanying Chinese Communist Party (CCP) Memorandum from the DS379 Section 129 Proceeding (CVD I) and information obtained from the *China Statistical Yearbook*.") (p. 9 of the PDF version of Exhibit CHI-4).

USDOC "adopt[ed] the findings of the preliminary determinations for the[] final determinations,"[26] and further explains that:

> [T]he *Public Bodies Memorandum* and accompanying *CCP Memorandum* set forth evidence concerning the extent to which certain categories of state-invested enterprises function as instruments of the GOC. The Department discusses and analyzes a significant amount of record evidence before coming to the conclusion that certain state-invested enterprises are used "as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy."[27]

30. The USDOC's public body determinations are based on analysis and explanation that, altogether, spans more than 90 pages, and in turn that analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record,[28] as well as the USDOC's consideration of information and arguments submitted by the GOC and other interested parties.[29]

31. Ultimately, the USDOC "concluded that certain categories of state-invested enterprises (SIEs) in China properly are considered to be public bodies for the purposes of the United States CVD law, and other categories of enterprises in China may be considered public bodies under certain circumstances."[30] The USDOC explained that "there are two findings at the core of the analysis:"[31]

---

[26] Public Bodies Final Determination, p. 2 (p. 3 of the PDF version of Exhibit CHI-5).

[27] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5). *See also* Public Bodies Preliminary Determination, p. 10 ("The Department has addressed whether the input producers at issue in these DS437 Section 129 proceedings satisfy the criteria and analysis summarized above and described in greater detail in the Public Bodies Memorandum and, thus, would be considered public bodies in these proceedings." (emphasis added)) (p. 11 of the PDF version of Exhibit CHI-4).

[28] *See Memorandum to the File from Shane Subler Re: Section 129 Determination Regarding Public Bodies in the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China; Definitive Anti-Dumping and Countervailing Duties on Certain Products from China (WTO DS 379), Documents Referenced in the Memoranda*, May 18, 2012 (identifying 81 documents referenced in the Public Bodies Memorandum and the CCP Memorandum) (Exhibit USA-1). The United States provided to the compliance Panel all of the documents to which the USDOC refers in the Public Bodies Memorandum and the CCP Memorandum. *See* Exhibits USA-2 to USA-82.

[29] *See*, Public Bodies Final Determination, pp. 2-6 (pp. 3-7 of the PDF version of Exhibit CHI-5).

[30] Public Bodies Preliminary Determination, p. 9 (citing "Public Bodies Memorandum at 2-3, and the resulting analysis") (p. 10 of the PDF version of Exhibit CHI-4).

[31] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).

> First, 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. The relevant laws also grant the government the authority to use SIEs as the means or instruments by which to achieve this mandate. The actions taken by the GOC to fulfill its legal mandate in the economic sphere are functions, which in the words of the Appellate Body are "ordinarily classified as governmental in the legal order" of China.
>
> Second, the government exercises meaningful control over certain categories of SIEs in China and this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy.[32]

32. The USDOC further explained that, "[a]fter analyzing all available evidence in *CVD 1*," *i.e.*, the evidence presented and discussed in the Public Bodies Memorandum and the CCP Memorandum, which were placed onto the record of the section 129 proceedings here, the USDOC "reached certain conclusions about the categories of enterprises in China"[33]:

> First, any enterprise in China in which the government has a full or controlling ownership interest is found to be a public body. This conclusion rests not upon ownership level alone but, rather, upon the Department's finding that, in the institutional and SIE-focused policy setting of China, the government is exercising meaningful control over all such enterprises, such that these enterprises possess, exercise, or are vested with governmental authority. These are the enterprises that comprise the state sector in China. Further, this determination reflects numerous indicia of control which show that the government uses SIEs to fulfill its mandate to uphold the socialist market economy. These indicia include: placing specific demands on such SIEs, such as those embodied in government five-year plans and industrial plans; the legal requirement that all SIE investments comply with industrial policy directives; the direct supervision of State-owned Assets Supervision and Administration Commission (SASAC)[] over SIE business and investment plans; supervising and directing mergers

[32] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4).

[33] Public Bodies Preliminary Determination, p. 9 (citing to the Public Bodies Memorandum at pp. 37-38, "Summary of the Department's Findings") (p. 10 of the PDF version of Exhibit CHI-4).

> and acquisitions to restructure entire industrial sectors in line with industrial policy objectives; managing competition in certain industrial sectors; the appointment by SASAC and the CCP of all management and board members; and the presence of CCP Committees in such enterprises and evidence that such committees can and do play a role in the business operations of SIEs.
>
> Second, enterprises in China in which the government has significant ownership that are also subject to certain government industrial plans may be found to be public bodies. The circumstances under which the Department could find, on a case-by-case basis, such enterprises to be public bodies rest upon additional indicia that show whether such SIEs are used as instruments by the government to uphold the socialist market economy, such as whether the industry producing the subject merchandise or the industry supplying inputs to the production of the subject merchandise is covered by an industrial plan or plans that indicate enterprises are being used to carry out government functions; government appointed company officials; the presence of government or CCP officials on the board or in management; and the existence and role of a Party committee.
>
> Third, in light of the Chinese institutional and governance environment, the Department determined that certain enterprises that have little or no formal government ownership are public bodies if China's government exercises meaningful control over such enterprises. For example, the 2006 Company Law sets forth that "an organization of CCP shall be set up in all companies, whether state, private, domestic or foreign-invested, 'to carry out activities of the Chinese Communist Party.'" Correspondingly, the Public Bodies Memorandum observes, the CCP "has cells in most big companies—in the private as well as the state-owned sector—complete with their own offices and files on employees." More broadly, examples of indicia that, taken as a whole, could lead to such a conclusion include instances where there is a significant CCP officials or state presence on the board, in management or in the enterprises in the form of party committees, or where the enterprise was previously privatized but ties to the government continue to exist or there were other relevant restrictions on the privatization.[34]

[34] Public Bodies Preliminary Determination, pp. 9-10 (citations to the Public Bodies Memorandum omitted) (p. 10-11 of the PDF version of Exhibit CHI-4).

33. The above is merely a brief summary of the USDOC's findings, drawn from the Public Bodies Preliminary Determination in these section 129 proceedings. The USDOC went on at much greater length in the Public Bodies Memorandum and the CCP Memorandum, discussing and analyzing relevant evidence and presenting explanations for the conclusions that the USDOC drew from that evidence, and, in the Public Bodies Final Determination, the USDOC addressed arguments raised by the GOC concerning the evidence on the administrative records of the section 129 proceedings. In the following subsections, the United States provides a further elaborated, though still summary, description of the USDOC's analysis and explanation.[35]

a. The USDOC Examined the Functions or Conduct that Are of a Kind Ordinarily Classified as Governmental in the Legal Order of China

34. After recalling certain findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, findings on which the original Panel in this dispute relied,[36] the USDOC reasoned that "an important inquiry in a public body analysis is a determination of what 'functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member.'"[37] The USDOC found that "China's legal order grants China's government both the responsibility and authority to control and guide the economy towards the goal of maintaining a leading role for the state sector and that this is 'considered part of the governmental practice in the legal order' of China."[38]

35. The USDOC examined China's *Constitution* and explained that it is "the foundation of a legal regime establishing the primary role of the government in China's economy."[39] The USDOC cited Article 7 of China's *Constitution*, which provides that "[t]he state-owned economy, that is, the socialist economy with ownership by the whole people, is the *leading force* in the national economy. The state ensures the consolidation and growth of the state-owned economy."[40] The USDOC referred to Article 6 of China's *Constitution*, which provides that, "{i}n the primary stage of socialism, the *State upholds the basic economic system in which the public ownership remaining dominant* and diverse forms of ownership develop side by side . . .

---

[35] Of course, the USDOC's preliminary and final public body determinations in the section 129 proceedings, together with the Public Bodies Memorandum and the CCP Memorandum, which are incorporated into those determinations, speak for themselves and are the best evidence of the public body determinations that the USDOC made in the section 129 proceedings at issue in this compliance proceeding.

[36] *US – Countervailing Measures (China) (Panel)*, para. 7.65-66.

[37] Public Bodies Memorandum, pp. 2, 6 (quoting from paragraph 297 of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*) (pp. 3, 7 of the PDF version of Exhibit CHI-1).

[38] Public Bodies Memorandum, p. 6 (p. 7 of the PDF version of Exhibit CHI-1).

[39] Public Bodies Memorandum, pp. 6-7 (pp. 7-8 of the PDF version of Exhibit CHI-1).

[40] Public Bodies Memorandum, p. 6 (quoting Article 7 of China's *Constitution*) (emphasis supplied by the USDOC) (p. 7 of the PDF version of Exhibit CHI-1).

."[41] The USDOC explained that the CCP explicitly shares this constitutional mandate.[42] The preamble of the *Constitution of the Chinese Communist Party* provides that "[t]he Party must uphold and improve the basic economic system, with public ownership playing a dominant role and different economic sectors developing side by side."[43]

36. The USDOC found that "this legal mandate extends the government's role in China's economy beyond that of public goods provider and market regulator to also include a mandate to ensure a certain outcome with respect to the overall structure and direction of the economy."[44] The USDOC considered that "[i]mportant and wide-reaching economic legislation provides further evidence of this,"[45] including: the 2007 *Property Law of the People's Republic of China*, the 2006 *Company Law of the People's Republic of China*, the 2008 *Law on State-Owned Assets of Enterprises*, the 2003 *Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises*, and the 2006 *Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the SASAC about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-owned Enterprises*.[46]

37. The USDOC examined each of the above measures and explained that:

> These laws have wide application and affect the entire economy, either directly through interventions in the state sector, or indirectly through the impact these interventions have on other sectors of the economy that compete with the state sector. Moreover, they give the government the legal authority, and responsibility, to intervene and direct the economy to effectuate its policies and plans to secure a leading a role for the state sector. These interventions are often expressed in detailed governmental instruments such as industrial plans…[47]

38. The USDOC then examined the role of such industrial plans and policies, which the Chinese government uses "as the means (and roadmap) by which the government seeks to fulfill

---

[41] Public Bodies Memorandum, pp. 6-7 (quoting Article 6 of China's *Constitution*) (emphasis supplied by the USDOC) (pp. 7-8 of the PDF version of Exhibit CHI-1).

[42] *See* CCP Memorandum, p. 31 (p. 71 of the PDF version of Exhibit CHI-1).

[43] CCP Memorandum, p. 31 (quoting the preamble of the *Constitution of the Chinese Communist Party*) (p. 71 of the PDF version of Exhibit CHI-1).

[44] Public Bodies Memorandum, p. 7 (p. 8 of the PDF version of Exhibit CHI-1).

[45] Public Bodies Memorandum, p. 7 (p. 8 of the PDF version of Exhibit CHI-1).

[46] Public Bodies Memorandum, pp. 7-8 (pp. 8-9 of the PDF version of Exhibit CHI-1).

[47] Public Bodies Memorandum, p. 8 (p. 9 of the PDF version of Exhibit CHI-1).

its legal mandate to maintain the predominance of the state sector."[48] The USDOC explained that:

> Under the rubric of industrial policies, the government orchestrates certain outcomes on an administrative basis by, *inter alia*, managing competition in sectors, ensuring through regulations that certain SIEs are implementing industrial policies in their business plans, appointing party and state officials in management and the board of trustees throughout the state sector, and administratively guiding resource allocations.[49]

39. The USDOC concluded that, "[t]aken as a whole, the network of plans provides examples of legal and administrative measures envisioned by the government in order to ensure the continued predominance of the state sector."[50] Accordingly, the USDOC determined that:

> [G]overnment oversight and control of the economy, and in particular economic decision-making in the state sector is, consistent with the words of the [Appellate Body], "ordinarily classified as governmental in the legal order" of China and, as such, is appropriately considered to be a "government function" for purposes of the Department's analysis of public bodies in China.[51]

b. The USDOC Examined the Role Played by the Chinese Communist Party in China's System of Governance

40. As part of its public body analysis, the USDOC also assessed "the role played by the CCP in China's system of governance"[52] and undertook "an inquiry into the role of CCP representatives in enterprises, in order to develop sufficient information to enable the Department to determine whether the presence and role of any such CCP officials may inform a finding of government control over such enterprises."[53] In light of the USDOC's examination of voluminous record evidence, which it discusses at length,[54] the USDOC drew a number of well-supported conclusions, including that:

---

[48] Public Bodies Memorandum, p. 9 (p. 10 of the PDF version of Exhibit CHI-1). *See also id.*, pp. 9-11 (pp. 10-12 of the PDF version of Exhibit CHI-1).

[49] Public Bodies Memorandum, p. 9 (citations omitted) (p. 10 of the PDF version of Exhibit CHI-1).

[50] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).

[51] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).

[52] CCP Memorandum, p. 3 (p. 43 of the PDF version of Exhibit CHI-1).

[53] CCP Memorandum, p. 2 (p. 42 of the PDF version of Exhibit CHI-1).

[54] *See generally*, CCP Memorandum (p. 41 *et seq.* of the PDF version of Exhibit CHI-1).

> [T]he constitutional, legal and de facto source of authority and legitimacy for governance in China lies with the CCP, such that the CCP may properly be considered to be part of China's governance structure or, alternatively, the "government," as defined herein, for the sole purpose of determining whether a particular enterprise should be considered to be a "public body" within the meaning of the CVD law.[55]

41. The USDOC also found that:

> [T]he CCP exercises authority over the state apparatus by leading small groups, party groups and committees, controlling appointments, supervising state activity, and requiring state entities to report to (and/or take direction from) at least one corresponding CCP entity. In instances where state entities may attempt to diverge from the CCP, the information on the record indicates that the CCP possesses the legal right to intervene (through appointments and disciplinarian measures) to prevent or correct any such divergence. 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" solely for purposes of the CVD law.[56]

42. The USDOC found that evidence indicated that the CCP utilizes existing institutions within its organizational hierarchy to incentivize certain behavior and monitor compliance with CCP policies and rules.[57] For example, the USDOC noted that the Central Organization Department of the CCP holds the power of appointment and controls all appointments to Party and government/state positions.[58] The USDOC explained that:

> "The CCP's most powerful instrument in structuring its domination over the state is a system called the 'Party management of cadres' (*dangguan ganbu*), or more commonly known as the *nomenklatura* system,[] or 'name list' system." There are specific regulations that govern the appointment of such cadres, placing the responsibility for such appointments in the hands of the

[55] CCP Memorandum, p. 3 (p. 43 of the PDF version of Exhibit CHI-1).

[56] CCP Memorandum, p. 3 (p. 43 of the PDF version of Exhibit CHI-1).

[57] *See* CCP Memorandum, p. 21 (p. 61 of the PDF version of Exhibit CHI-1).

[58] *See* CCP Memorandum, p .21 (p. 61 of the PDF version of Exhibit CHI-1).

> Organization Department. These directives require cadres to closely follow Party directives in executing their responsibilities.[59]

43. This power of appointment extends to the state economic sector. Among many other things, the USDOC noted evidence indicating that:

> [C]orporate management appointments are almost entirely informed by, and shadow, Party structure arrangements and career evaluation. Said another way, senior corporate elections (directors and supervisory board members) and appointments (management) only reflect arrangements animated entirely by the continuing PRC *nomenklatura* system.[60]

44. In addition, the USDOC also pointed to evidence pertaining to the CCP's role in the Chinese economy, observing that:

> [A] number of experts have noted that the CCP's primary goal is to maintain political stability, with a particular focus on doing so through maintaining economic growth while simultaneously protecting the central role for socialism in China's economy.[61]

45. Another source cited by the USDOC noted that:

> Few modern societies have as "political" an economy as China. Even after thirty years of market reform, bureaucrats, local and national leaders, as well as new and old government regulations, still have remarkable influence over the allocation of goods and services. Similarly, because the legitimacy of the {CCP} depends so heavily on continuing economic growth; because expanding inequalities threaten social stability; and because corruption has seeped deeply into the political system, economics has enormous political significance in China.[62]

46. After examining all the evidence it had collected, the USDOC expressed the view that "the available information and record evidence indicates that the CCP meets the definition of the term 'government'" for the limited purpose of applying the U.S. CVD law to China.[63] The USDOC reasoned that:

---

[59] CCP Memorandum, p. 22 (citations omitted) (p. 62 of the PDF version of Exhibit CHI-1).

[60] CCP Memorandum, p. 24 (p. 64 of the PDF version of Exhibit CHI-1).

[61] CCP Memorandum, p. 31 (p. 71 of the PDF version of Exhibit CHI-1).

[62] CCP Memorandum, p. 32 (p. 72 of the PDF version of Exhibit CHI-1).

[63] CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1).

> Among other things, this information indicates that the CCP exercises "ultimate control over citizens and resources," including authority over issues and resources as varied as family and economic planning, as well as the military. This information further indicates that the CCP, through the Politburo and the Central Committee, governs "in the form of rules and principles," such as described in the definition of government above. The available information also indicates that the CCP exercises this authority directly over state mechanisms through small groups, party groups and committees, by exercising control over appointments, supervising state activity, and requiring state entities to report to (and/or take direction from) at least one corresponding CCP entity.[64]

47. Accordingly, the USDOC concluded that:

> [I]t is reasonable to view China's system of governance within the context of a party-state. First, as described above, the CCP and the state are organizationally separate, even though their structures generally mirror each other. Second, sources indicate that the CCP exercises authority over the formal institution of government at the national and local levels. Third, sources also indicate that the CCP makes policy and the state implements the Party's policies and that the Party directs and supervises that implementation through a number of formal and informal tools. Finally, sources indicate that the CCP is "particularly concerned with their authority over the economy because economic growth is so critical to advancing the cause of socialism and building a strong nation." As described above, the available evidence indicates that this is true at the central level and the local level of the governance structure in China.[65]

c. The USDOC Examined the Manifold Indicia of Control Indicating that Relevant Input Providers Possess, Exercise, or Are Vested with Governmental Authority

48. After (i) explaining "the basis for finding that the government of China's interventions in and control over the operations and activities of the state-owned economic sector in China are functions or conduct ordinarily classified as governmental in the Chinese legal order,"[66] and (ii)

---

[64] CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1).

[65] CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1).

[66] Public Bodies Memorandum, p. 11 (p. 12 of the PDF version of Exhibit CHI-1). Discussed in section II.A.1.a above.

establishing that the CCP is considered "government" in China,[67] the USDOC turned to the question of whether certain categories of enterprises in China "can properly be considered to possess, exercise, or be vested with governmental authority."[68] The USDOC did this by examining the "manifold" indicia of control that the government exercises over entities in China.[69]

49. The USDOC noted that the Appellate Body has described "several types of evidence that may assist in" determining that an entity possesses, exercises, or is vested with governmental authority.[70] "First, one can look at legal instruments. Second, one can look at the actions of the entity. And third, one can look into whether the government exercises meaningful control over the entity."[71] The USDOC expressed the view that "[m]eaningful control is something more than mere formal links such as majority ownership; rather, it is control related to the possession or exercise of governmental authority and governmental functions."[72]

50. As the USDOC explained:

> With respect to the first means, "legal instruments," the Department notes that some laws, as described below, specifically require SIEs to comply with government policy directives. For example, according to the *Law on State-owned Assets of Enterprises*, which applies to all enterprises with state investment, regardless of the level of ownership, SIE investments must be in-line with state industrial policies. If a legal instrument explicitly vests an individual enterprise with the obligation to carry-out government functions, such an entity may properly be considered a public body in certain circumstances, consistent with the [Appellate Body's] findings. The Department's focus here is on the breadth and depth of government control over the economy as a whole and over SIEs generally in China.[73]

---

[67] *See* CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1). Discussed in section II.A.1.b above.

[68] Public Bodies Memorandum, p. 11 (p. 12 of the PDF version of Exhibit CHI-1).

[69] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

[70] Public Bodies Memorandum, p. 11 (p. 12 of the PDF version of Exhibit CHI-1).

[71] Public Bodies Memorandum, pp. 11-12 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318 ("It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.")) (pp. 12-13 of the PDF version of Exhibit CHI-1).

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

[73] Public Bodies Memorandum, p. 12 (citations omitted) (p. 13 of the PDF version of Exhibit CHI-1).

51. The USDOC then presented a detailed analysis of evidence relating to meaningful control,[74] beginning with a discussion of the predominant role of the state sector and industrial policies,[75] including: government exercise of control through the provision of direct and indirect benefits,[76] five-year plans,[77] supporting legislation,[78] the importance of ownership levels,[79] and industry-specific plans.[80]

52. The USDOC found evidence indicating that "the state sector is explicitly granted a privileged place in the national economy under the *Constitution* and other laws."[81] The USDOC noted that the evidence illustrated that the "'leading role' for the state sector in China is reflected in the disproportionate share of resources that SIEs receive relative to other types of enterprises. . . ."[82] This finding was supported by evidence "indicate[ing] that the SIEs received preferential access to capital and production inputs, 'including priority in the allocation of raw materials and electricity supplies,' preferential tax rates, as well as grants and capital infusions."[83]

53. The USDOC also pointed to Article 11 of China's *Constitution*, which establishes "the subordinate place afforded to private, non-state entities in China's economy."[84] Specifically, Article 11 provides that "[t]he private sector of the economy is a complement to the socialist public economy."[85] The USDOC found that, "[i]n other words, the nature and very existence of the private sector is explicitly limited and circumscribed in China's Constitutional order and in a manner designed to favor and promote the state-owned and -invested economy, *i.e.*, the state sector.[86] Additionally, the USDOC found that "[c]ompetition from the non-state sector is further constrained by investment guidelines issued by the government."[87]

54. The USDOC found that:

---

[74] *See* Public Bodies Memorandum, pp. 12-14 (pp. 13-15 of the PDF version of Exhibit CHI-1).

[75] *See* Public Bodies Memorandum, p. 14 (p. 15 of the PDF version of Exhibit CHI-1).

[76] *See* Public Bodies Memorandum, pp. 14-17 (pp. 15-18 of the PDF version of Exhibit CHI-1).

[77] *See* Public Bodies Memorandum, pp. 17-19 (pp. 18-20 of the PDF version of Exhibit CHI-1).

[78] *See* Public Bodies Memorandum, pp. 19-20 (pp. 20-21 of the PDF version of Exhibit CHI-1).

[79] *See* Public Bodies Memorandum, pp. 20-21 (pp. 21-22 of the PDF version of Exhibit CHI-1).

[80] *See* Public Bodies Memorandum, pp. 21-23 (pp. 22-24 of the PDF version of Exhibit CHI-1).

[81] Public Bodies Memorandum, pp. 14-15 (pp. 15-16 of the PDF version of Exhibit CHI-1).

[82] Public Bodies Memorandum, p. 15 (p. 16 of the PDF version of Exhibit CHI-1).

[83] Public Bodies Memorandum, p. 15 (p. 16 of the PDF version of Exhibit CHI-1).

[84] Public Bodies Memorandum, p. 16 (p. 17 of the PDF version of Exhibit CHI-1).

[85] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).

[86] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).

[87] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).

> [P]lans and implementing legislation provide the government with the authority to control and guide the state-sector to engineer certain outcomes, requiring that the state sector follow the government's industrial plans. In this way, SIEs thus serve as a "potent mechanism for the government to implement national policies". . . .[88]

55. The USDOC summarized the evidence relating to the predominant role of the state sector and industrial policies in the following terms:

> [T]he enterprises that comprise the state sector are both afforded substantial benefits and protections, but also are subject to significant government requirements and directives. Further, in addition to the direct government policies that favor and promote the state sector in China's economy, the government also constrains the non-state sector from effectively competing with the state sector. Industrial plans in China thus serve as an essential tool utilized by the government at the central and sub-central government levels to fulfill its mandate to uphold the socialist market economy, with the state sector afforded a leading role. The plans not only reflect the government's broad economic development objectives, but they also provide a roadmap of often specific, state-guided interventions in a wide range of important industrial sectors and in the individual business decisions of enterprises in these sectors.
>
> Although the degree of state-directed intervention in the allocation of resources may vary from industry to industry, industrial plans provide an essential insight and backdrop to the motivations, goals and expected future outcomes of the government for the state economy in China and, as noted in the introduction to this section, SIEs are one of the key instruments by which the state may implement these policies.[89]

56. The USDOC also discussed efforts by the Chinese government to manage competition, including citing a 2012 joint report prepared by the World Bank and the Development Research Center of the State Council of China ("DRC/World Bank Report"),[90] which explains that:

---

[88] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).

[89] Public Bodies Memorandum, p. 23 (p. 24 of the PDF version of Exhibit CHI-1).

[90] *See* Public Bodies Memorandum, pp. 24-26 (quoting DRC/World Bank report at page 112) (pp. 25-27 of the PDF version of Exhibit CHI-1).

> [C]ompetition remains curtailed in one key dimension—between state-owned and non-state parts of certain sectors—especially in "strategic" industries and utilities. Large SOEs dominate certain activities not because they are competitive enough to keep the dominance, but because the market competition is restricted and they are granted oligopolistic status by the authorities (Lin, 2010). The weak and unfair competition resulting from such "administrative monopoly" has been deemed "the current problem facing private enterprise in China" (Naughton, 2011) and "the major source of monopolies in China's economy" (Owen and Zheng, 2007). The strong direct ties between the government and incumbent SOEs, especially large SOEs, limit the entry and access to resources of private firms, hampering the efficient use and allocation of resources and stifling entrepreneurship and innovation.[91]

57. The USDOC also considered that "examples of forced mergers and acquisitions in China illustrate how the Chinese government actively and meaningfully intervenes throughout many key sectors of the state economy to achieve administratively established outcomes through individual SIE decisions."[92]

58. The USDOC discussed evidence relating to SASAC's supervision as a tool of meaningful control.[93] The USDOC explained that under the 2003 *Tentative Measures*, SASAC was established for the purposes of meeting "the demand{s} of the socialist market economy, to further activate the state-owned enterprises, to promote the strategic adjustment of the layout and structure of the state-owned economy, to develop and strengthen the state-owned economy, and to try to maintain and increase the value of the state-owned assets."[94] SASAC reports directly to the State Council.[95] Likewise, the *Interim Measures for the Supervision and Administration of the Investments by Central Enterprise* articulates the principle that SASAC supervises and administers SIEs' investment activities.[96] The USDOC also examined the *Measures for the Administration of Development Strategies and Plans of Central Enterprises*, which requires SASAC to formulate a development strategy and plan, which will take into consideration "whether or not it complies with the national development planning and industrial policies," and "whether or not it complies with the strategic adjustment of the layout and structure of the state-

---

[91] Public Bodies Memorandum, pp. 24-25 (pp. 25-26 of the PDF version of Exhibit CHI-1).

[92] Public Bodies Memorandum, p. 26 (p. 27 of the PDF version of Exhibit CHI-1).

[93] Public Bodies Memorandum, pp. 26-30 (pp. 27-31 of the PDF version of Exhibit CHI-1).

[94] Public Bodies Memorandum, p. 26 (citing Article 1, *Tentative Measures*) (p. 27 of the PDF version of Exhibit CHI-1).

[95] Public Bodies Memorandum, p. 26 (p. 27 of the PDF version of Exhibit CHI-1).

[96] Public Bodies Memorandum, p. 27 (citing Article 6, *Interim Measures*) (p. 28 of the PDF version of Exhibit CHI-1).

owned economy."[97] SASAC also exercises significant control over the entire state sector through its "state assets management budget."[98] In addition, SASAC has the power to appoint SOE managers, board members, and Supervisory Board members.[99]

59. The USDOC further explained that the appointment power of SASAC is shared with, or superseded by, the CCP. Thus, the CCP remains in ultimate control of managerial personnel. In reaching this determination, the USDOC examined numerous academic and news articles, as well as the *Civil Servant Law* and the OECD Economic Survey.[100] The USDOC highlighted that the *Civil Servant Law* permits the "reshuffling" of senior figures between competing firms within the same industry, and moving firm leaders between corporate and government functions.[101] The CCP's appointment power allows it to "intervene for any reason,"[102] and "reshufflings serve as a reminder to the managers of the state sector that the government is ultimately in charge. . . ."[103]

60. With respect to the SASAC, the USDOC concluded that:

> [W]ith a vast number of SIEs from a broad cross-section of China's economy operating under SASAC's supervision, the government can ensure that sector-specific industrial plans are implemented as evidenced by the legal measures cited above, which prescribe that SASAC ensure that SIEs formulate development strategies and plans that take into consideration state industrial policies. This and other record evidence cited above, such as the role of the state budget, further support the conclusion that the role of SASAC is not limited to acting merely as a shareholder; rather, SASAC's role includes acting to advance the government's state planning goals through government-owned SIEs.[104]

---

[97] Public Bodies Memorandum, pp. 27-28 (citing Articles 13(1) and 13(2), *Measures for the Administration of Development and Plans for Central Enterprises*) (pp. 28-29 of the PDF version of Exhibit CHI-1).

[98] Public Bodies Memorandum, p. 28 (p. 29 of the PDF version of Exhibit CHI-1).

[99] Public Bodies Memorandum, p. 30 (citing Article 13, *Tentative Measures*) (p. 31 of the PDF version of Exhibit CHI-1).

[100] Public Bodies Memorandum, p. 32 (p. 33 of the PDF version of Exhibit CHI-1).

[101] Public Bodies Memorandum, p. 32 (citing Articles 63, 64, *Civil Servant Law*) (p. 33 of the PDF version of Exhibit CHI-1).

[102] Public Bodies Memorandum, p. 31 (citing *Red Capitalism, The Fragile Financial Foundation of China's Extraordinary Rise*, Walter and Howie (2011) at 24)) (p. 32 of the PDF version of Exhibit CHI-1).

[103] Public Bodies Memorandum, p. 32 (citing *A Choice of Models*, The Economist (January 2012)) (p. 33 of the PDF version of Exhibit CHI-1).

[104] Public Bodies Memorandum, p. 30 (p. 31 of the PDF version of Exhibit CHI-1).

61. The USDOC examined evidence relating to the government's control over all appointments in the state sector and how the government uses that control as a means to ensure that industrial policy objectives are being achieved.[105] The USDOC wrote:

> As one source explains, the Party "can intervene for any reason, changing CEOs, investing in new projects or ordering mergers," regardless of the laws that are in place. Another source notes that "more disorienting is the frequent interchange of senior figures in the *nomenklatura* between even competing firms in the same industry, a kind of musical chairs played not just at the very highest level, but at the operational level as well."[106]

62. The USDOC noted that a "2010 OECD report highlights the corporate governance problems created by this appointment system, explaining that continued '…direct control over business operations and government control in infrastructure sectors suggest that the line between government and the SOEs is still blurred.'"[107] The USDOC noted that the report also explains that:

> This indicates that SOE decisions still sometimes reflect the government's intentions, rather than purely commercial goals. Further reform and better implementation of existing policies is necessary to encourage greater commercialization of the SOEs and improve competition. Decisively cutting the traditional ties between SOEs, government agencies and the Communist Party is an ongoing challenge for SOE governance in China. This task is proving difficult given that almost half of the chairpersons and more than one third of chief executive officers of central SOEs were appointed by the Central Organization Department of the Communist Party and have civil servant status (Hu, 2007).[108]

63. The USDOC determined, based on the evidence it examined, that:

> [K]ey positions are filled from the ranks of party and state officials which, according to the OECD, has the effect of imposing the party-state's policy intentions on the actions of SIEs. This system of appointments thus establishes and maintains a strong, lasting and entrenched link between SIEs and the party-state, allowing the

---

[105] *See* Public Bodies Memorandum, pp. 30-33 (pp. 31-34 of the PDF version of Exhibit CHI-1).

[106] Public Bodies Memorandum, p. 31 (p. 32 of the PDF version of Exhibit CHI-1).

[107] Public Bodies Memorandum, p. 32 (p. 33 of the PDF version of Exhibit CHI-1).

[108] Public Bodies Memorandum, pp. 32-33 (quoting OECD Economic Survey: China, pp.115-116) (p. 33-34 of the PDF version of Exhibit CHI-1).

> government to use SIEs as instruments to fulfill its legal mandate, and is therefore a key indicia of government exercise of "meaningful control" over such entities.[109]

64. Finally, the USDOC examined how meaningful control is exercised through the presence of party groups and committees, both in the state sector and beyond the state sector.[110] With respect to the state sector, the USDOC noted that:

> The GOC has stated that "{b}asically, the primary Party organization within an SIE serves as a general advisory body, but has no decision making authority within the company." However, third-party commentary indicates that primary party organizations can have a great deal of influence in certain circumstances. For example, the 2010 OECD report notes that Party committees in SOEs "often play an active role in human resources and the strategic decision making of the enterprise. . . ."[111]

Additionally, the USDOC observed that:

> A recent piece of legislation (an *Opinion*) issued *jointly* by the CCP and the State Council indicates that the CCP is clearly interested in certain day-to-day commercial affairs. The legislation requires CCP leaders (including those within a firm's party committee) in firms "subject to state control" to take part in certain major decisions, including personnel decisions, investment decisions, and overall strategy. This *Opinion* taken together with the general presence of party committees in firms appears to indicate[] that the government maintains a strong infrastructure for oversight and control of enterprises in the state sector.[112]

65. With respect to CCP presence beyond the state sector, the USDOC explained that:

> In accordance with the *[CCP] Constitution*, all organizations, including private commercial enterprises, are required to establish "primary organizations of the party" (or "Party committees") if the firm employs at least three party members. The *2006 Company Law* also states that an organization of CCP shall be set up in all

---

[109] Public Bodies Memorandum, p. 33 (p. 34 of the PDF version of Exhibit CHI-1).

[110] *See* Public Bodies Memorandum, pp. 33-36 (pp. 34-37 of the PDF version of Exhibit CHI-1).

[111] Public Bodies Memorandum, p. 34 (p. 35 of the PDF version of Exhibit CHI-1).

[112] Public Bodies Memorandum, p. 35 (p. 36 of the PDF version of Exhibit CHI-1).

> companies, whether state, private, domestic or foreign-invested, "to carry out activities of the Chinese Communist Party."[113]

66. The USDOC cited an article in the Economist, which "speaks to the role of the party in SIEs *as well as private enterprises*, stating:"[114]

> The party has cells in most big companies—in the private as well as the state-owned sector -- complete with their own offices and files on employees. It controls the appointment of captains of industry and, in the SOEs, even corporate dogsbodies. It holds meetings that shadow formal board meetings and often trump their decisions, particularly on staff appointments. It often gets involved in business planning and works with management to control pay.[115]

67. The USDOC found that "[t]he importance of coming to terms with the Party's influence appears to be an economic reality that many private entrepreneurs face,"[116] and the USDOC cited the Xinhua News Agency, which reported that "there were a total of '178,000 party organs in private firms in 2006, a rise of 79.8 percent over 2002.'"[117] The USDOC considered that the party "may exert varying degrees of control in different circumstances."[118]

68. In light of all the evidence, analysis, and explanation summarized above, and which is presented more fully in the Public Bodies Memorandum and the CCP Memorandum, the USDOC "reached certain conclusions about the categories of enterprises in China."[119]

> First, any enterprise in China in which the government has a full or controlling ownership interest is found to be a public body.[120]
>
> …

---

[113] Public Bodies Memorandum, p. 35 (p. 36 of the PDF version of Exhibit CHI-1).

[114] Public Bodies Memorandum, p. 35 (emphasis in original) (p. 36 of the PDF version of Exhibit CHI-1).

[115] Public Bodies Memorandum, pp. 35-36 (quoting "A Choice of Models," The Economist (January 2012)) (pp. 36-37 of the PDF version of Exhibit CHI-1). The word "dogsbody" is a British term referring to a person who is given boring, menial tasks to do. *See* https://www.google.com/#q=dogsbodies.

[116] Public Bodies Memorandum, p. 36 (p. 37 of the PDF version of Exhibit CHI-1).

[117] Public Bodies Memorandum, p. 36 (p. 37 of the PDF version of Exhibit CHI-1).

[118] Public Bodies Memorandum, p. 36 (p. 37 of the PDF version of Exhibit CHI-1).

[119] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).

[120] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).

> Second, enterprises in China in which the government has significant ownership that are also subject to certain government industrial plans may be found to be public bodies.[121]
>
> …
>
> Third, in light of the Chinese institutional and governance environment, the Department determined that certain enterprises that have little or no formal government ownership are public bodies if China's government exercises meaningful control over such enterprises.[122]

69. In the section 129 proceedings that are the subject of this compliance proceeding, the USDOC explained that, to assess whether the input producers at issue here "satisfy the criteria and analysis summarized above and described in greater detail in the Public Bodies Memorandum and, thus, would be considered public bodies in these proceedings," the USDOC would request additional information about the input producers. [123] The USDOC's requests for additional information are described in the next section.

d. The USDOC Requested Information from the Government of China about the Relevant Input Providers in the Section 129 Proceedings and Took Appropriate Account of the Information the Government of China Provided or Failed to Provide

70. The USDOC "issued to the GOC a public bodies questionnaire for each of the 12 relevant investigations to obtain necessary ownership and corporate governance information for those enterprises that produced inputs that were purchased by respondents during the [period of investigation] of the investigations."[124] The USDOC's public bodies questionnaire consisted of two parts.[125] The first part of the questionnaire sought information regarding the producers of the inputs that were identified by the USDOC, including: industrial plans, such as national five-year plans, sector-specific industrial plans, provincial and local five-year development plans, and sector-specific industrial plans; the objectives of the government in holding shares in the enterprises; whether the input producers are covered by any of the industrial plans; whether the input producers are subject to governmental approval for any mergers, restructurings, or capacity

---

[121] Public Bodies Preliminary Determination, p. 10 (emphasis added) (p. 11 of the PDF version of Exhibit CHI-4).

[122] Public Bodies Preliminary Determination, p. 10 (emphasis added) (p. 11 of the PDF version of Exhibit CHI-4).

[123] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).

[124] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).

[125] *See Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437)*, Questionnaire Concerning "Public Bodies" ("Public Bodies Questionnaire") (Exhibit USA-83).

additions; and whether SASAC, or any other government entity, has approved mergers, acquisitions, capacity additions, or reductions for input producers.

71. In the second part of the public bodies questionnaire, the USDOC "asked the GOC to respond to the *Input Producer Appendix* for each enterprise that produced an input which was purchased by a respondent in the relevant investigations."[126] Through the *Input Producer Appendix*, the USDOC asked the GOC to provide, for all majority government-owned enterprises, the full corporate name of the company, the articles of incorporation, and capital verification reports.[127] For non-majority government-owned enterprises, in addition to the information described in the preceding sentence, the USDOC asked for additional information, including articles of groupings, company by-laws, annual reports, articles of association, business group registration, business licenses, and tax registration documents.[128] The USDOC also asked for information relating to the company's ownership, including voting shares, whether any owners were government entities, the corporate governance structure, and the role of minority shareholders.[129] Lastly, the USDOC asked for information concerning key decision-making, restructuring, and key persons.[130] The USDOC explained that it sought the above information because it was "critical to the Department's determination of whether the GOC exercises control over the enterprises"[131] "such that these entities possess, exercise, or are vested with governmental authority."[132]

72. In seven of the twelve section 129 proceedings,[133] the GOC refused to respond to the USDOC's request for information. The USDOC therefore found that the GOC failed to participate, withheld information that was requested, and significantly impeded the proceedings.[134] Accordingly, the USDOC determined that it was justified in "resorting to the use of facts otherwise available."[135] The GOC's refusal to provide requested information meant that

---

[126] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

[127] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

[128] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).

[129] *See* Public Bodies Preliminary Determination, pp. 23-24, Attachment 2 (pp. 24-25 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

[130] *See* Public Bodies Preliminary Determination, pp. 24-27, Attachment 2 (pp. 25-28 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

[131] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4).

[132] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).

[133] The seven section 129 proceedings were *Lawn Groomers*, *Wire Strand*, *Seamless Pipe*, *Print Graphics*, *Drill Pipe*, *Aluminum Extrusions*, and *Solar Panels*. *See* Public Bodies Preliminary Determination, pp. 12-14, (pp. 13-15 of the PDF version of Exhibit CHI-4).

[134] *See* Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).

[135] Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).

entity-specific "information necessary to th[e] evaluation of whether the relevant input producers qualify as 'public bodies' is not available on the record."[136] The USDOC further determined that:

> Nonetheless, the records of the seven Section 129 proceedings includes the Public Bodies Memorandum and CCP Memorandum, and thus contain factual information on which the Department can rely concerning the role played by the GOC in enterprises such as the input producers in the seven Section 129 proceedings. As discussed in more detail above, the Public Bodies and CCP Memoranda discuss evidence that the state sector maintains a leading role in the Chinese economy, the GOC exercises meaningful control over SIEs in China, the GOC maintains control over enterprises with little to no formal government ownership through the presence of the CCP in these enterprises, etc. This evidence supports [the] determination that the input producers in the seven Section 129 proceedings are public bodies.[137]

73. In the remaining five section 129 proceedings,[138] "the GOC reported that most of the input producers at issue … are majority-owned by the government", and the GOC provided information for those producers, including the "corporate name of the company and address; Articles of Incorporation; and Capital Verification Reports."[139] "Based on the GOC's public bodies responses and evidence that any enterprise in which the government has full or controlling ownership is a public body," *i.e.*, the evidence, analysis, and explanation summarized above and fully elaborated in the Public Bodies Memorandum and the CCP Memorandum, the USDOC "preliminarily determine[d] that the GOC meaningfully controlled those input producers that were majority government-owned during the relevant POIs such that they possess, exercise or are vested with government authority."[140] Accordingly, the USDOC found the majority-owned input producers in these five section 129 proceedings to be public bodies.[141]

74. In the same five section 129 proceedings, "the GOC reported that the government had minority (less than 50 percent) ownership in several input producers and provided for some enterprises Articles of Incorporation, Capital Verification Reports, and Articles of Association."[142] As described above, the USDOC asked for substantially more information

---

[136] Public Bodies Preliminary Determination, pp. 12-13 (pp. 13-14 of the PDF version of Exhibit CHI-4).

[137] Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).

[138] The five section 129 proceedings were *Pressure Pipe*, *Line Pipe, Kitchen Shelving, OCTG,* and *Steel Cylinders. See* Public Bodies Preliminary Determination, pp. 14-18 (pp. 15-19 of the PDF version of Exhibit CHI-4).

[139] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4).

[140] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4).

[141] *See* Public Bodies Preliminary Determination, pp. 14-15 (pp. 15-16 of the PDF version of Exhibit CHI-4).

[142] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

about enterprises in which the GOC has a minority ownership interest so that the USDOC could assess "the role of government and/or CCP officials in the management and operations of the input producers, and in the management and operations of the producers' owners."[143] The GOC, however, failed to provide all of the additional information that was requested. The USDOC explained that the GOC's refusal to respond fully to the USDOC's questionnaires meant that entity-specific "information necessary to the analysis of whether the producers are 'public bodies' is not available on the record."[144] The USDOC found that the GOC failed to cooperate to the best of its ability, it withheld information that was requested of it, and it significantly impeded the proceedings.[145] As a result, the USDOC determined that it was necessary to "resort[] to the use of facts otherwise available."[146]

75. The USDOC explained, *inter alia*, that:

> Because the GOC declined to provide complete responses for those input producers that are non-majority government-owned, the Department does not have the complete record of ownership and corporate governance that is necessary to conduct a public bodies analysis of the relevant input producers. However, the Department has on the record in the form of the Public Bodies and CCP Memoranda factual information on which it can rely concerning the role played by the GOC and CCP in minority-owned enterprises...
>
> …
>
> Drawing upon that evidence contained in the Public Bodies and CCP Memoranda and the GOC's failure to completely respond to the "non-majority government-owned enterprises" questions contained within the *Input Producer Appendix*, we preliminarily determine … that non-majority government-owned input producers are public bodies because enterprises that either have significant ownership or have little or no formal government ownership are public bodies if the Department determines, on a case-by-case basis that the government exercises meaningful control over such enterprises.[147]

---

[143] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

[144] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

[145] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

[146] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

[147] Public Bodies Preliminary Determination, p. 16 (p. 17 of the PDF version of Exhibit CHI-4).

76. Accordingly, the USDOC found that non-majority government-owned enterprises that produced the inputs purchased by the respondents in the five section 129 proceedings were public bodies.[148]

e. The USDOC Addressed the Government of China's Arguments in the Public Bodies Final Determination in the Section 129 Proceedings

77. In the Public Bodies Final Determination, the USDOC addressed comments made by the GOC concerning the USDOC's Public Bodies Preliminary Determination, which the GOC had submitted in a case brief.[149] After summarizing and discussing the GOC's arguments, the USDOC responded to the GOC's contentions. The USDOC explained, *inter alia*, that:

> [W]e do not agree that the Department's approach to the public body issue fails in some regard to address the inquiry laid out by the Appellate Body. As the GOC recognizes, the Department's analysis addresses the extent that the government exercises meaningful control over the relevant entities. In the words of the Appellate Body, this may serve "as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions." As such, the Department's inquiries along these lines are directly related to the question of whether the entities possess, exercise, or are vested with governmental authority within the meaning of Article 1.1(a)(1) of the SCM Agreement.[150]

78. The USDOC further explained that:

> [T]he *Public Bodies Memorandum* and accompanying *CCP Memorandum* set forth evidence concerning the extent to which certain categories of state-invested enterprises function as instruments of the GOC. The Department discusses and analyzes a significant amount of record evidence before coming to the conclusion that certain state-invested enterprises are used "as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy." Of course, as noted above, the GOC has in some instances provided incomplete responses to these questionnaires, thus affecting the

---

[148] *See* Public Bodies Preliminary Determination, p. 17 (p. 18 of the PDF version of Exhibit CHI-4).

[149] *See* Public Bodies Final Determination, pp. 2-6 (pp. 3-7 of the PDF version of Exhibit CHI-5).

[150] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).

> completeness of the information the Department had to analyze. However, as discussed in [the] *Public Bodies Preliminary Determination*, even where the GOC's failure to respond resulted in the Department basing its analyses in part on the facts available, the Department's public body determinations are supported by affirmative record evidence.[151]

79. The USDOC also explained that it disagreed with the GOC's argument that the USDOC "deemed the information [the GOC] submitted irrelevant to the public body determinations."[152] The USDOC pointed out that "in cases where the GOC responded to requests for information, the Department considered the information submitted by the GOC and relied on that information to determine that the relevant entities were public bodies."[153]

80. Ultimately, the USDOC concluded that it did not agree with the arguments presented in the GOC's case brief and therefore the USDOC adopted the preliminary determination with respect to public bodies, as described in the Public Bodies Preliminary Determination, for the final determination.[154]

f. Conclusion Concerning the USDOC's Public Body Determinations in the Section 129 Proceedings

81. As demonstrated above, the USDOC's public body determinations in the section 129 proceedings at issue in this compliance proceeding were reasoned and adequate and included extensive analysis and explanation; they were based on the totality of the evidence on the record; and they were supported by ample record evidence of the "core features" of the entities in question and their "relationship to the government," which establishes that the entities possess, exercise, or are vested with governmental authority to perform governmental functions in China.[155]

82. The compliance Panel found, based on its own evaluation of the USDOC's analysis and the evidence that was before the USDOC,[156] that "the USDOC's determinations were based on relevant legal criteria and evidence, and that China has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) by failing to consider relevant evidence on the record."[157]

---

[151] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).

[152] Public Bodies Final Determination, p. 5, note 26 (p. 6 of the PDF version of Exhibit CHI-5).

[153] Public Bodies Final Determination, p. 5, note 26 (p. 6 of the PDF version of Exhibit CHI-5).

[154] Public Bodies Final Determination, p. 6 (p. 7 of the PDF version of Exhibit CHI-5).

[155] *US – Countervailing Measures (China) (Panel)*, para. 7.66.

[156] *See US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.64-7.103 (discussing the USDOC's public body determinations and the analysis and evidence on which the USDOC's determinations were based).

[157] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.106.

The compliance Panel "thus conclude[d] that China has not demonstrated that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings."[158]

83. The compliance Panel did not err in reaching this conclusion. As demonstrated in the following sections, China's arguments on appeal lack merit.

2. The Compliance Panel Did Not Err in Its Interpretation of Article 1.1(a)(1) of the SCM Agreement

84. This section demonstrates that, contrary to China's arguments on appeal, the compliance Panel did not err in its interpretation of Article 1.1(a)(1) of the SCM Agreement. China conflates distinct concepts by equating "government function" with the particular conduct or activities described in Articles 1.1(a)(1)(i) and (iii). Whereas the Appellate Body has stressed that the focus of the public body examination properly is on the "core features of the entity concerned, and its relationship with the government in the narrow sense,"[159] China incorrectly contends that the focus of the analysis must be on the conduct in which the entity is engaged. The question is not whether the conduct under Article 1.1(a)(1) is governmental. Rather, the question is whether the entity engaging in the conduct is governmental. Because China continues to misunderstand the "public body" analysis, China proposes a novel interpretation that is legally and logically unsound, and which also is at odds with prior Appellate Body findings. As shown below, China's proposed interpretation should be rejected.

85. In this section, the United States first summarizes the compliance Panel's disagreement with China's understanding of the legal approach for public body determinations. Then, the United States demonstrates that China's arguments concerning the interpretation of the term "public body" lack merit. Following that, the United States responds to particular arguments made by China in China's other appellant submission and demonstrates that those arguments lack merit. Finally, the United States offers some concluding comments about the proper interpretation of the term "public body."

a. The Compliance Panel's Findings Concerning the Interpretation of Article 1.1(a)(1) of the SCM Agreement

86. The compliance Panel summarized its understanding of China's claim under Article 1.1(a)(1) of the SCM Agreement in the following terms:

> …China argues that the proper question for an investigating authority is whether an entity is performing a government function

---

[158] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.107.

[159] *US – Carbon Steel (India) (AB)*, para. 4.24. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 317, 345.

> when it engages in relevant conduct under Article 1.1(a)(1) of the SCM Agreement, that is, when it provides a financial contribution. China thus argues that the USDOC was required to determine "whether the enterprises *in the twelve relevant countervailing duty investigations* were performing a 'government function' when they sold *the specific inputs at issue* to particular downstream purchasers".[160]

87. The compliance Panel noted that:

> China has clarified that it does not consider the "government function" of a public body to be limited to actions constituting a financial contribution: a broader function could be identified if there is "a 'clear logical connection' between the 'government function' identified by an investigating authority and the conduct that is alleged to constitute a financial contribution".[161]

88. The compliance Panel considered that:

> The parties' disagreement raises the question of whether Article 1.1(a)(1) requires an investigating authority to establish that an entity is fulfilling a government function when providing a particular financial contribution in order to determine that the entity possesses, exercises, or is vested with governmental authority.[162]

89. The compliance Panel found that "the text of Article 1.1(a)(1) does not prescribe a 'connection' of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution."[163] The compliance Panel's conclusion was based, *inter alia*, on the following reasoning:

> The Appellate Body has clarified that to be a public body, an entity must be shown to possess, exercise, or be vested with governmental authority to perform a governmental function. The Appellate Body has also made clear that proper public body determinations may rest on a variety of considerations, with due regard for the particular circumstances of each case, based on the

---

[160] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.22 (emphasis in original; citations omitted).

[161] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.27 (citations omitted).

[162] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.24.

[163] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.28. *See also id.*, para. 7.36.

> fact that "there are different ways in which a government could be understood to vest an entity with 'governmental authority'". Further, what may constitute a "government function" may vary among Members. We do not consider there to be any *a priori* limitation on what may be the relevant government function for the purposes of a public body analysis. Rather, where an investigating authority identifies a broader government function as part of a public body analysis, it must provide a reasoned and adequate explanation, based on relevant evidence, to support that identification.[164]

90. Drawing on findings in prior Appellate Body reports, the compliance Panel stressed "the importance of a case-by-case approach to determining whether any given public body determination by an investigating authority is consistent with Article 1.1(a)(1)."[165] The compliance Panel explained that, "[i]n a public body analysis, an investigating authority must give due consideration to *all* relevant facts regarding the characteristics and functions of an entity as appropriate in the particular circumstances of the case."[166] The compliance Panel considered that:

> [T]he applicable legal standard requires a holistic assessment by an investigating authority of the evidence before it. Similarly, a panel must consider whether the public body determination is based on relevant evidence and adequate explanation in assessing whether the investigating authority properly concluded that entities possessed, exercised, or were vested with governmental authority to perform a government function.[167]

The compliance Panel also addressed the parties' arguments relating to context and the object and purpose of the SCM Agreement.[168] Ultimately, the compliance Panel concluded that it "[does] not agree with China's understanding of the legal standard for public body determinations insofar as it would require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue."[169]

91. As demonstrated in this submission, the compliance Panel's conclusion in this regard is correct, and it accords with prior findings by the Appellate Body concerning the interpretation of

---

[164] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.28 (citations omitted).

[165] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.32.

[166] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.32 (emphasis in original).

[167] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.30.

[168] *See US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.33-7.35.

[169] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.36.

the term "public body."

b. China's Arguments Concerning the Interpretation of the Term "Public Body" Lack Merit

92. As the compliance Panel noted, China argues that "the proper question for an investigating authority is whether an entity is performing a government function when it engages in relevant conduct under Article 1.1(a)(1) of the SCM Agreement, that is, when it provides a financial contribution."[170] On appeal, China takes the position that Article 1.1(a)(1) "imposes a 'legal requirement' that the 'government function' identified by the investigating authority relate to the conduct alleged to constitute a financial contribution under Article 1.1(a)(1) – i.e. that there be a 'clear logical connection' between the two – for an entity engaged in such conduct to be considered a public body."[171] In effect, despite denying that it is doing so,[172] China is arguing that the only relevant "government function" for the purpose of a "public body" analysis is the particular conduct described in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement.

93. As explained in this submission, China continues to misunderstand the meaning of the term "public body" and proposes a novel interpretation that is legally and logically unsound, and which also is at odds with prior Appellate Body findings. Accordingly, China's proposed interpretation should be rejected.

(1) China's New Proposed Interpretation of the Term "Public Body" is Legally Erroneous and Does Not Accord with Findings in Prior Reports Interpreting the Term "Public Body"

94. Before the original Panel, China argued that "[a] public body, like government in the narrow sense, … must itself possess the authority to 'regulate, control, supervise or restrain' the conduct of others."[173] The original Panel disagreed, explaining that, "[i]n our view this proposition is not supported by the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*.[174] The original Panel found that China had "misread[] the Appellate Body's reference" in *Canada – Dairy*, and China's interpretation attempted to equate the term "public body" with the term "government agency," "an approach that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* has not followed."[175] The

---

[170] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.22 (emphasis in original; citations omitted).

[171] China's Other Appellant Submission, para. 30.

[172] *See US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.27.

[173] *US – Countervailing Measures (China) (Panel)*, para. 7.67.

[174] *US – Countervailing Measures (China) (Panel)*, para. 7.67.

[175] *US – Countervailing Measures (China) (Panel)*, para. 7.67.

Appellate Body itself came to the same conclusion when India presented the very same argument in *US – Carbon Steel (India)*.[176]

95. In this compliance proceeding, China offers a different argument concerning the interpretation of the term "public body." China's new argument, though, similarly seeks to conflate distinct concepts by equating the "government function" to which the Appellate Body has referred with the particular conduct or activities described in Articles 1.1(a)(1)(i) and (iii) of the SCM Agreement. Like its old argument, China's new argument also lacks merit and should be rejected.

96. China contended before the compliance Panel that:

> The Appellate Body's interpretative analysis in DS379 makes clear that the relevant question in a public body inquiry is whether an entity alleged to be providing a financial contribution has been vested with governmental authority to carry out governmental functions, and is exercising *that* authority to perform *those* functions, when it engages in the conduct enumerated in Article 1.1(a)(1)(i)-(iv) of the SCM Agreement.[177]

China suggested before the compliance Panel that "[t]his is evident from the Appellate Body's persistent focus in its interpretative analysis on the *conduct* that is the subject of the financial contribution inquiry."[178]

97. The United States observed, as did certain of the third parties, that an implication of China's proposed interpretation is that the "governmental function" and the conduct under Article 1.1(a)(1) of the SCM Agreement must be the same, and that such an interpretation is not supported by the SCM Agreement or prior Appellate Body findings.[179] China's view that the "government function" and "conduct under Article 1.1(a)(1)" must be the same is reflected, for example, in an argument that the Government of China ("GOC") made to the USDOC in the GOC's questionnaire response in the section 129 proceedings:

---

[176] *See US – Carbon Steel (India) (AB)*, para. 4.17.

[177] First Written Submission of China (January 4, 2017) ("China's First Written Submission"), para. 79 (underlining added; italics in original).

[178] China's First Written Submission, para. 80 (emphasis in original).

[179] *See, e.g.*, First Written Submission of the United States of America (February 6, 2017) ("U.S. First Written Submission"), paras. 29-30; Third Party Written Submission by the European Union (February 13, 2017), para. 11; Third Party Submission of Japan (February 13, 2017), para. 3; Third Party Oral Statement of Australia (May 11, 2017), para. 6; Responses of Canada to Questions to the Third Parties from the Panel in Connection with the Substantive Meeting (May 31, 2017), para. 4. *See also US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, footnote 64 (Noting that "third parties in this dispute have argued that the focus of the public body analysis is the character of the relevant entity, rather than its conduct.").

> The particular conduct of supplying the inputs at issue in these investigations is not a governmental function within the domestic legal order of China. Thus, the extensive information that the USDOC requests concerning the issue of "control" would not, in any event, permit the USDOC to conclude that input suppliers performed a relevant governmental function during the period of investigation.[180]

It appears that, in China's view, the only possible "relevant governmental function" in the underlying investigations would be "[t]he particular conduct of supplying the inputs at issue."[181]

98. Late in the compliance panel proceeding, and now on appeal, China has shifted its position, and now argues that Article 1.1(a)(1) of the SCM Agreement requires that there be "a 'clear logical connection'" between "the 'government function' identified by the investigating authority" and the "conduct alleged to constitute a financial contribution under Article 1.1(a)(1)."[182] China insisted before the compliance Panel – and appears to maintain on appeal – that China "does not mean that the 'government function' and the conduct at issue under Article 1.1(a)(1) must be identical."[183] But China continues to make statements demonstrating that China actually holds this view. For example, China complains that the USDOC did not examine "whether '*the* function or conduct' of providing steel inputs was *of a kind* that is ordinarily classified as governmental in China – the inquiry that the Appellate Body contemplated."[184] Indeed, China argues at some length in its other appellant submission that the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* stand for precisely the proposition that the "government function" identified by the investigating authority and the conduct under Article 1.1(a)(1) must be identical.[185] That, of course, is the very position that China has purported to disavow.

---

[180] Response of the Ministry of Commerce of the People's Republic of China to the Department's Public Body Questionnaire (May 15, 2015) ("GOC Public Body Questionnaire Response"), p. 9 (Exhibit CHI-2) (emphasis added).

[181] GOC Public Body Questionnaire Response, p. 9 (Exhibit CHI-2). *See also* Second Written Submission of China (March 2, 2017) ("China's Second Written Submission"), para. 25 (Suggesting that the "conduct of providing loans under Article 1.1(a)(1)" would be a "relevant governmental function.").

[182] China's Other Appellant Submission, para. 30. *See also* Answers of the People's Republic of China to Questions from the Panel (May 31, 2017) ("China's Responses to Panel Questions"), para. 4.

[183] China's Responses to Panel Questions, para. 4. *See also US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.27; China's Other Appellant Submission, footnote 15.

[184] China's Other Appellant Submission, para. 69 (italics in China's submission; underlining added); China's Responses to Panel Questions, para. 11 (italics in China's response; underlining added).

[185] *See* China's Other Appellant Submission, paras. 64-71; China's Responses to Panel Questions, paras. 6-11. *See also* China's Other Appellant Submission, para. 88 (China argues that "when the Appellate Body concluded [in *US – Antidumping and Countervailing Duties (China)*] that the USDOC's public body determination in respect of SOCBs was supported by evidence that SOCBs 'effectively exercise certain governmental functions', the Appellate Body was referring to the 'governmental function' of providing loans to certain favoured industries.").

99. In this regard, even at this late stage of the compliance proceeding, China's view of the correct interpretation of the term "public body" remains unclear. China's arguments, though, suffer from more than just a lack of clarity. China continues to misunderstand the Appellate Body's findings concerning the interpretation of the term "public body."

100. The implication of China's position is that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser[186] or providing loans,[187] is itself a government function, and that engaging in that activity is consistent with the government's objectives.[188] In China's view, such direct evidence alone is a necessary and sufficient condition for making a public body determination, and without such evidence, no amount of circumstantial evidence would be enough to find that an entity is a public body. China's position is untenable, and it is entirely at odds with the Appellate Body's findings in previous reports relating to the approach to determining whether an entity is a public body.

101. Rather than focusing on the conduct undertaken by the entity, the Appellate Body has in past reports emphasized that the focus of the public body analysis is on the "evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense."[189] In *US – Carbon Steel (India)*, for example, the Appellate Body "agree[d] that the types of conduct listed in Article 1.1(a)(1)(i) and (iii) could be carried out by a government, by a public body, as well as by private bodies."[190] The Appellate Body found, though, that "it is only through 'a proper evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense', that panels and investigating authorities will be in a position to determine whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body."[191] The Appellate Body has stressed that the focus of the public body examination properly is on the "core features of the entity concerned, and its relationship with the government in the narrow sense," rather than on the conduct in which the entity is engaged.[192]

---

[186] *See* China's Other Appellant Submission, para. 37, 69.

[187] *See* China's Other Appellant Submission, paras. 87-88.

[188] *See* China's Other Appellant Submission, para. 37, 69. *See also* China's First Written Submission, para. 94 (China argued before the compliance Panel that "an entity engaged in conduct falling within the scope of Article 1.1(a)(1) may properly be considered a public body – and have its conduct attributable to a Member – only if that conduct reflects the 'particular instance' where it is exercising the governmental authority that has been vested in it.").

[189] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

[190] *US – Carbon Steel (India) (AB)*, para. 4.24.

[191] *US – Carbon Steel (India) (AB)*, para. 4.24.

[192] *US – Carbon Steel (India) (AB)*, para. 4.24. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 317, 345.

102. China, with its focus on the particular "conduct that is the subject of the financial contribution inquiry,"[193] appears to suggest that an entity may be deemed a public body only when the entity is "*exercising*" governmental authority. That is contrary to the Appellate Body's findings in prior disputes. The Appellate Body has "explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'."[194] In *US – Carbon Steel (India)*, the Appellate Body clarified that "[t]he substantive legal question to be answered is therefore whether one or more of these characteristics exist in a particular case."[195] Under the framework elaborated by the Appellate Body, an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue. China's position simply is not supported by the Appellate Body's findings.

103. Instead, as the Appellate Body summarized in *US – Carbon Steel (India)*:

> Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. For example, evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body. The absence of an express statutory delegation of governmental authority does not necessarily preclude a determination that a particular entity is a public body. Instead, there are different ways in which a government could be understood to vest an entity with "governmental authority", and therefore different types of evidence may be relevant in this regard. In order properly to characterize an entity as a public body in a particular case, it may be relevant to consider "whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", and the classification and functions of entities within WTO Members generally. In the same way that "no two governments are exactly alike, the precise contours and

[193] China's Other Appellant Submission, paras. 78. *See also id*. paras. 8, 94.

[194] *US – Carbon Steel (India) (AB)*, para. 4.37.

[195] *US – Carbon Steel (India) (AB)*, para. 4.37 (emphasis added).

> characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[196]

104. Similarly, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body described the types of evidence that may be relevant to an evaluation of the core features of an entity and its relationship to the government when determining whether the entity possesses, exercises, or is vested with governmental authority. The Appellate Body explained that, "[i]n some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise."[197] This appears to be the narrow circumstance in which China might agree that an entity is a public body. However, the Appellate Body further found that:

> There are many different ways in which government in the narrow sense could provide entities with authority . . . . Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions . . . . In some instances, … where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.[198]

105. The Appellate Body concluded that:

> [T]he determination of whether a particular conduct is that of a public body must be made by <u>evaluating the core features of the entity and its relationship to government</u> in the narrow sense. That assessment <u>must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority</u>.[199]

---

[196] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317. *See also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, and 4.42.

[197] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

[198] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

[199] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 345 (emphasis added).

106. Again and again, the Appellate Body has emphasized the relevance of the "core features of the entity and its relationship to the government in the narrow sense," as opposed to focusing on the particular conduct in which the entity is engaged.[200] When the Appellate Body does refer to "[e]vidence that an entity is, in fact, exercising governmental functions," it stresses that such evidence may be relevant to the public body analysis "particularly where such evidence points to a sustained and systematic practice," rather than as part of an analysis of the conduct in which an entity is engaged at the time of the alleged financial contribution.[201]

107. The Appellate Body has never equated the concepts of "governmental function" and the conduct described in Article 1.1(a)(1) of the SCM Agreement, as China now proposes. That makes sense, because the question is not whether the conduct under Article 1.1(a)(1) is governmental. Rather, the question is whether the entity engaging in the conduct is governmental. As the Appellate Body found in *US – Countervailing Duty Investigation on DRAMS*, "the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv) on the other, has to do with the identity of the *actor*, and not with the nature of the *action*."[202] Similarly, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body explained that, "[i]f the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution."[203]

108. A key logical flaw in China's argument can be illustrated by two hypothetical examples of entities that could be found to provide a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement. First, let us consider the example of a Member's Ministry of Health. As a government ministry, it is beyond question that the Ministry of Health is an organ of the state and a part of the government in the narrow sense. The function of the Ministry of Health may include formulating health policy for the state, and ensuring the health and wellbeing of the citizens of the state. It may be the case that there is no evidence at all that any of the conduct described in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement is among the functions of the Ministry of Health. However, it is indisputable that, as part of the government "in the narrow sense,"[204] if the Ministry of Health engages in any of the conduct described in Article 1.1(a)(1), there would be a financial contribution under Article 1.1(a)(1).

109. Similarly, let us consider the example of a Committee for Public Health, established by statute, composed of doctors and other private citizens appointed by the Minister of Health, and chaired by an official of the Ministry of Health. The statute establishing the Committee for Public Health appropriates certain funds to the committee and authorizes the committee to raise

---

[200] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 310, 317, and 345. *See also US – Carbon Steel (India) (AB)*, paras. 4.24, 4.36, and 4.52.

[201] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

[202] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 112 (emphasis in original; citation omitted).

[203] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.

[204] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 286.

additional funds through private donations. The statute also authorizes the committee to take steps, as needed, to address certain public health issues of pressing concern to the state. These facts likely would support the conclusion that the Committee for Public Health is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the committee is an entity that is vested with authority to perform a governmental function, but is not itself government in the narrow sense. Yet, nothing is known about whether the conduct under Article 1.1(a)(1) is among the functions of the Committee for Public Health. Nevertheless, if the Committee for Public Health engages in any of the conduct described in Article 1.1(a)(1), that conduct, because the Committee for Public Health is part of the "'government' in the collective sense,"[205] would constitute a financial contribution under Article 1.1(a)(1), because evidence establishes that the Committee for Public Health is a public body.

110. If the Ministry of Health or the Public Health Committee discussed above are "'government' in the narrow sense" or a public body,[206] respectively, because of the public health functions they perform, then it would be equally true that if those entities provide (contrary to their main objectives) cheap iron ore (or grants or loans), that would be a financial contribution under Article 1.1(a)(1) of the SCM Agreement. This is logical because the linkages to the "'government' in the narrow sense"[207] would make the resources conveyed those of the government.

111. China complains with regard to the Committee on Public Health that "the conduct at issue under Article 1.1(a)(1) – the provision of iron ore – has nothing whatsoever to do with the government authority vested in the entity."[208] China is correct, and that is why China's proposed legal interpretation is untenable. Simply put, any time an entity that is a public body engages in the conduct described in Article 1.1(a)(1) of the SCM Agreement, "there is a financial contribution."[209] The question of whether an entity is or is not a "public body" is separate from the question of whether the entity has or has not engaged in an activity described in Article 1.1(a)(1). China's proposed legal interpretation conflates these questions.

112. China argued before the compliance Panel that, "[i]f the 'Committee for Public Health' is vested with authority to perform public health functions, that 'government function' is 'simply not pertinent' to the conduct of providing iron ore, and it would be illogical to conclude that the Committee is a public body under Article 1.1(a)(1) when engaged in that conduct."[210] China's proposed legal interpretation is deeply problematic, as it would lead to the possibility that an entity that is unquestionably a public body could engage openly in conduct that is explicitly

---

[205] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 286.

[206] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 286.

[207] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 286.

[208] China's Other Appellant Submission, para. 23.

[209] SCM Agreement, Art. 1.1(a)(1).

[210] China's Responses to Panel Questions, para. 24.

described under Article 1.1(a)(1), but that action would escape scrutiny under the SCM Agreement if engaging in that conduct is outside the normal, established function of the entity. If China's logic were extended, that also could be true for an organ of the "government in the narrow sense" that acts outside of its established authority. Nothing in the SCM Agreement contemplates such an outcome; indeed, such an outcome would be preposterous.

113. These hypothetical examples – and China's complaints about them – reveal that China's equating of "governmental function" with the conduct under Article 1.1(a)(1) of the SCM Agreement is not logically sound. When evaluating whether an entity is a public body (or an organ of government in the narrow sense), it is not necessary to establish that the particular conduct under Article 1.1(a)(1) is a governmental function. An entity may engage in that conduct as part of its effort to effectuate some other governmental function. Under the Appellate Body's approach, where there is evidence that an entity possesses, is vested with, or exercises governmental authority (*i.e.*, the authority to perform governmental functions),[211] that is sufficient to find that the entity is a public body – even if there is no evidence that the particular conduct under Article 1.1(a)(1) is itself a governmental function.

114. As the compliance Panel observed concerning the hypothetical scenarios discussed by the parties:

> The range of hypothetical scenarios argued before us is illustrative of the broad variety of situations in which an investigating authority may have to determine whether an entity making financial contributions exercises, possesses, or is vested with governmental authority. The very fact that there are many different possible scenarios reinforces for us the importance of a case by case approach to determining whether any given public body determination by an investigating authority is consistent with Article 1.1(a)(1). … In a public body analysis, an investigating authority must give due consideration to *all* relevant facts regarding the characteristics and functions of an entity as appropriate in the particular circumstances of the case.[212]

115. The compliance Panel's ultimate conclusion accords with prior Appellate Body findings, while China's new proposed interpretation does not. As the compliance Panel correctly found, Article 1.1(a)(1) of the SCM Agreement does not, as China contends, "prescribe a 'connection' of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution."[213] Rather, "what may constitute a 'government function' may vary among Members," there is no "*a priori* limitation on what may

---

[211] *See US – Countervailing Measures (China) (Panel)*, para. 7.66.

[212] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.32.

[213] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.28.

be the relevant government function for the purposes of a public body analysis", and "where an investigating authority identifies a broader government function as part of a public body analysis, it must provide a reasoned and adequate explanation, based on relevant evidence, to support that identification."[214]

116. The Appellate Body has not found that the range of "governmental functions" with which a public body might be vested is limited in the way that China contends. For example, the Appellate Body explained in *US – Carbon Steel (India)* that "the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies."[215] This statement indicates that the spectrum of governmental functions that may be undertaken by public bodies is broad, and certainly not limited to the conduct described in Article 1.1(a)(1) of the SCM Agreement.

117. Furthermore, again, once an entity has been determined to be a public body – following the required examination of the core characteristics of the entity – then any time that entity engages in any of the conduct described in Article 1.1(a)(1)(i) and (iii) of the SCM Agreement, "there is a financial contribution," per the definition set forth in Article 1.1(a)(1). As the Appellate Body explained in *US – Anti-Dumping and Countervailing Duties (China)*, "[i]f the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution."[216]

118. China complains that "it would confound the entire purpose of [the Article 1.1(a)(1)] inquiry to attribute conduct to a WTO Member even when that conduct is unrelated to any government authority with which an entity has been vested."[217] China is plainly wrong. As explained above, China misreads Article 1.1(a)(1) and misunderstands the term "public body," and China's proposed interpretation does not accord with the Appellate Body's findings in prior disputes concerning the interpretation of the term "public body."

119. In the sections that follow, the United States responds to particular arguments made by China in China's other appellant submission and demonstrates that those arguments lack merit.

(2) The Compliance Panel Did Not Misread Paragraph 297 of the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)*

120. China argues that the USDOC's section 129 determinations – and the compliance Panel's finding that those determinations are not inconsistent with Article 1.1(a)(1) of the SCM

---

[214] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.28 (citations omitted).

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

[216] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284 (emphasis added).

[217] China's Other Appellant Submission, para. 63.

Agreement – are based on a "misreading of a single paragraph of the Appellate Body report" in *US – Anti-Dumping and Countervailing Duties (China)*, namely paragraph 297.[218] On the contrary, it is China that misreads that Appellate Body report.

121. China contends that "[p]aragraph 297 … must be understood by reference to the paragraphs that precede it,"[219] and that doing so would somehow support China's position. China highlights, for instance, a statement in paragraph 296 of that report, in which the Appellate Body explains "that the context of Article 1.1(a)(1)(i)-(iii) 'lends support to the proposition that a 'public body' in the sense of Article 1.1(a)(1) connotes an entity vested with *certain* governmental responsibilities, or exercising *certain* governmental authority.'"[220] China places emphasis on the word "certain". China argues that:

> In the context of the prior paragraphs, which are about the "functions" or "conduct" in the subparagraphs of Article 1.1(a)(1), it is clear that the Appellate Body's reference in paragraph 297 to "*the* functions or conduct" is a reference to the functions or conduct of a specific entity *under Article 1.1(a)(1)*. The Appellate Body believed that if a specific entity's functions or conduct under Article 1.1(a)(1) were "of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", this could indicate that the entity was performing a "government function" when engaged in the relevant conduct.[221]

122. China's reading of the Appellate Body report is not at all plausible. The Appellate Body did not find that an entity must be engaged in a specific government function in the course of making a financial contribution. For example, in paragraph 296 of the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report, the Appellate Body explained that:

> [W]hether a particular means of making a financial contribution is more *commonly* used by public or private entities has no direct bearing on, nor allows any inference regarding, the constituent elements of a public body in the context of Article 1.1(a)(1) of the *SCM Agreement*. On the contrary, we consider relevant that, while the types of conduct listed in Article 1.1(a)(1)(i) and (iii) can be carried out by a government as well as by private bodies, a decision to forego or not collect government revenue that is otherwise due, which is set out in subparagraph (ii), appears to

---

[218] China's Other Appellant Submission, para. 64.

[219] China's Other Appellant Submission, para. 65.

[220] China's Other Appellant Submission, para. 66 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296; emphasis added by China).

[221] China's Other Appellant Submission, para. 68.

> constitute conduct inherently involving the exercise of governmental authority. Taxation, for instance, is an integral part of the sovereign function. Thus, if anything, the context of Article 1.1(a)(1)(i)-(iii) and in particular subparagraph (ii) lends support to the proposition that a "public body" in the sense of Article 1.1(a)(1) connotes an entity vested with certain governmental responsibilities, or exercising certain governmental authority.[222]

The Appellate Body considered that the conduct under subparagraphs (i) and (iii) could be undertaken by a government and the conduct under subparagraph (ii) – relating to taxation – could only be undertaken by a government. The Appellate Body saw this as contextual support for its conclusion that "a 'public body' … connotes an entity vested with certain governmental responsibilities, or exercising certain governmental authority."[223] Thus, the Appellate Body was communicating its view that a "public body" must be vested with some governmental authority, but need not necessarily be vested with all governmental authority.

123. This understanding of the Appellate Body's statement in *US – Anti-Dumping and Countervailing Duties (China)* – that the Appellate Body was explaining that a public body need not necessarily be vested with all governmental authority – is consistent with the Appellate Body's finding in *US – Carbon Steel (India)*. There, the Appellate Body rejected the contention that, "in order to be a public body, an entity must have the power to regulate, control, or supervise individuals, or otherwise restrain conduct of others."[224] The Appellate Body had described such "power" as the "essence of government,"[225] but found that an entity does not "necessarily have to possess this characteristic in order to be found to be vested with governmental authority or exercising a governmental function and therefore constitute a public body."[226] In other words, an entity needs to be vested with, possess, or exercise some or certain governmental authority, but not necessarily all governmental authority or authority related to the "essence of government."[227]

124. The Appellate Body also has found, though, that "certain entities that are found to constitute public bodies may possess the power to regulate," though a public body does not "necessarily have to possess this characteristic."[228] The "power to regulate," of course, is not conduct described in subparagraphs (i)-(iii) of Article 1.1(a)(1) of the SCM Agreement. This is a further indication that China misreads the Appellate Body's prior findings concerning the

---

[222] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296.

[223] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296.

[224] *US – Carbon Steel (India) (AB)*, para. 4.17.

[225] *Canada – Dairy (AB)*, para. 97.

[226] *US – Carbon Steel (India) (AB)*, para. 4.17.

[227] *Canada – Dairy (AB)*, para. 97.

[228] *US – Carbon Steel (India) (AB)*, para. 4.17.

interpretation of the term "public body" when it argues that those findings support China's argument that the only relevant governmental function is the specific conduct described in subparagraphs (i)-(iii) of Article 1.1(a)(1).

(3) China's New Proposed Interpretation of the Term "Public Body" Cannot Be Reconciled with the Term "Private Body" in Article 1.1(a)(1)(iv) of the SCM Agreement

125. China argues that the compliance Panel "failed to reconcile its interpretation with the fact that public bodies may entrust or direct private bodies to carry out the functions illustrated in Article 1.1(a)(1)(i)-(iii)."[229] However, it is China's argument that the "conduct" of the entity is the proper focus of the public body analysis that cannot be reconciled with the context provided by subparagraph (iv) of Article 1.1(a)(1), nor with prior Appellate Body findings. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body explained that a focus on the conduct of an entity is more relevant when examining a private body under Article 1.1(a)(1)(iv) of the SCM Agreement, rather than as part of the public body analysis.

126. In particular, the Appellate Body found that:

> With respect to the architecture of Article 1.1 of the SCM Agreement, we note that the provision sets out two main elements of a subsidy, namely, a financial contribution and a benefit. Regarding the first element, Article 1.1(a)(1) defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member. Two principal categories of entities are distinguished, those that are "governmental" in the sense of Article 1.1(a)(1): "a government or any public body ... (referred to in this Agreement as 'government')"; and those in the second clause of subparagraph (iv): "private body". If the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution. When, however, the entity is a private body, and its conduct falls within the scope of subparagraphs (i)-(iii), then there is only a financial contribution if, in addition, the requisite link between the government and that conduct is established by a showing of entrustment or direction. Thus, the second clause of subparagraph (iv) requires an affirmative demonstration of the link between the

[229] China's Other Appellant Submission, para. 72.

> government and the specific conduct, whereas all conduct of a governmental entity constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv).[230]

127. The Appellate Body did not find that there must be an "affirmative demonstration of the link between the government and the specific conduct" as part of a public body analysis.[231] Rather, "all conduct of a governmental entity [including an entity determined to be a public body] constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)."[232]

128. Additionally, when considering the phrase "which would normally be vested in the government" in Article 1.1(a)(1)(iv) of the SCM Agreement, the Appellate Body found that "the reference to 'normally' in this phrase incorporates the notion of what would ordinarily be considered part of governmental practice in the legal order of the relevant Member. This suggests that whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body."[233] The proper focus in a public body analysis then is on what is "ordinarily" considered a governmental function in the legal order of the relevant Member, rather than, as China suggests, whether the particular entity was engaged in conduct that is a government function in a particular instance.

129. Indeed, the Appellate Body "consider[ed] that whether a particular means of making a financial contribution is more *commonly* used by public or private entities has no direct bearing on, nor allows any inference regarding, the constituent elements of a public body in the context of Article 1.1(a)(1) of the *SCM Agreement*."[234] This is a further indication that the proper focus of the public body analysis is on the "core features of the entity" in question "and its relationship to the government in the narrow sense," rather than on the conduct in which the entity is engaged at a particular moment, which, for it to be relevant to the financial contribution analysis at all, will in any event necessarily be one of the activities specified in Article 1.1(a)(1)(i)-(iii) or the first clause of subparagraph (iv).[235]

130. China's new proposed interpretation of the term "public body" is untenable because it cannot be sustained in light of the context provided by the "private body" provision in Article 1.1(a)(1)(iv) of the SCM Agreement. If China's proposed interpretation were correct, and an

---

[230] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.

[231] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.

[232] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.

[233] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297 (emphasis added).

[234] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296 (emphasis in original).

[235] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317. *See also id.*, para. 345.

investigating authority must point to evidence that the specific action in question (a transaction or class of transactions) is an exercise of governmental authority, then this also would be evidence sufficient to demonstrate entrustment or direction of a private body under Article 1.1(a)(1)(iv). In that case, there would be no need for an investigating authority to make a public body finding, and no need for a public body category at all in Article 1.1(a)(1). An interpretation that renders the term "public body" redundant is inconsistent with the principle of effectiveness and thus contrary to the customary rules of interpretation of public international law.[236]

131. China argues that "the 'certain' governmental authority possessed by a public body who can entrust or direct private bodies to carry out the functions illustrated in Article 1.1(a)(1)(i)-(iii) must necessarily be related to those functions," and thus, China suggests, "it defies logic to think that for other public bodies, the 'certain' governmental authority that they possess can be entirely unrelated to the relevant functions in Article 1.1(a)(1)."[237] China's argument fails because it rests on a flawed premise. It is not logical that "the 'certain' governmental authority possessed by a public body" "must necessarily be related to" to the conduct described in Article 1.1(a)(1)(i)-(iii), nor is that assertion supported by the SCM Agreement or prior Appellate Body findings.

132. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body explained that:

> The verb "direct" is defined as to give authoritative instructions to, to order the performance of something, to command, to control, or to govern an action. The verb "entrust" means giving a person responsibility for a task. The Appellate Body has interpreted "direction" as referring to situations where a government exercises its authority, including some degree of compulsion, over a private body, and "entrustment" as referring to situations in which a government gives responsibility to a private body. Thus, pursuant to subparagraph (iv), a public body may exercise its authority in order to compel or command a private body, or govern a private body's actions (direction), and may give responsibility for certain tasks to a private body (entrustment). As we see it, for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command. Similarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility. If a public body did not itself dispose of the relevant authority or responsibility, it could not effectively control or govern the

[236] *See Japan – Alcoholic Beverages II (AB)*, p. 12.

[237] China's Other Appellant Submission, para. 73.

> actions of a private body or delegate such responsibility to a private body. This, in turn, suggests that the requisite attributes to be able to entrust or direct a private body, namely, authority in the case of direction and responsibility in the case of entrustment, are common characteristics of both government in the narrow sense and a public body.[238]

133. In light of these Appellate Body findings, and logically, a public body can "direct" a private body as long as it has the ability "to give authoritative instructions to, to order the performance of something, to command, to control, or to govern an action," or to "exercise[] its authority, including some degree of compulsion, over a private body."[239] In other words, the public body simply must have authority sufficient to compel action generally. A public body need not necessarily have "authority" or "responsibility" that "relate[s] to the performance" of the functions described in Article 1.1(a)(1)(i)-(iii), as China asserts.[240] China's assertion does not logically follow from the meaning of the term "direct."

134. China complains that the compliance Panel "provided no explanation" for its view, which was "evidently contrary" to China's explanations.[241] In reality, the compliance Panel explained its consideration of the contextual implications of Article 1.1(a)(1)(iv) of the SCM Agreement for the interpretation of the term "public body" as follows:

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

---

[238] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294 (emphasis added; citations omitted).

[239] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294.

[240] China's Other Appellant Submission, para. 73.

[241] China's Other Appellant Submission, para. 73.

> analysis to show that an entity possesses, exercises, or is vested with governmental authority.[242]

135. The compliance Panel's discussion, in particular the suggestion that there may be "a relatively greater focus on an entity's particular conduct in an analysis of entrustment or direction of a private body," but "such evidence could also be relevant in a public body determination depending on the particular circumstances and evidence before the investigating authority,"[243] is cogent. It is China that fails to explain clearly its arguments.

136. Finally, China argues that the compliance Panel's interpretation "'upset[s] the delicate balance embodied in the *SCM Agreement*'".[244] China's argument is completely circular. Evidently, the "delicate balance" China wishes to achieve is one where China is free to use state-controlled entities to confer substantial, trade-distorting financial contributions, without other Members having any recourse to the SCM Agreement. In any event, as China itself notes,[245] the Appellate Body expressed the view in *US – Anti-Dumping and Countervailing Duties (China)* that "considerations of object and purpose are of limited use in delimiting the scope of the term 'public body' in Article 1.1(a)(1)."[246] The Appellate Body explained that "[t]his is so because the question of whether an entity constitutes a public body is *not* tantamount to the question of whether measures taken by that entity fall within the ambit of the *SCM Agreement*."[247] In the Appellate Body's view, "considerations of the object and purpose of the *SCM Agreement* do not favor either a broad or a narrow interpretation of the term 'public body'."[248] Accordingly, the Appellate Body's discussion of the object and purpose of the SCM Agreement lends no support to China's arguments here.

(4) The Compliance Panel Did Not Err by Declining to Discuss the ILC Articles in Its Interpretive Analysis of Article 1.1(a)(1) of the SCM Agreement

137. China complains that the compliance Panel did not discuss the International Law Commission's Articles on *Responsibility of States for Internationally Wrongful Acts* ("ILC Articles") despite the Appellate Body having discussed the ILC Articles in *US – Anti-Dumping and Countervailing Measures (China)*.[249] China argues that "the aspects of the Appellate Body's interpretive analysis" involving the ILC Articles "can only be understood to support China's"

---

[242] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.35.

[243] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.35.

[244] China's Other Appellant Submission, para. 76.

[245] *See* China's Other Appellant Submission, paras. 74-75.

[246] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 302.

[247] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 302 (emphasis in original).

[248] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.

[249] *See* China's Other Appellant Submission, para. 77.

proposed interpretation.[250] China is mistaken, and the compliance Panel properly declined to engage in a discussion of the ILC Articles.

138. As an initial matter, the United States recalls that, in *US – Anti-Dumping and Countervailing Duties (China)*, there was a great deal of argument by the parties and discussion by the panel and the Appellate Body of whether, when interpreting the terms of Article 1.1(a)(1) of the SCM Agreement, certain provisions of the ILC Articles, in particular Article 5, should be taken into account as one among several interpretive elements.[251] The Appellate Body, while it discussed the ILC Articles in response to arguments of the parties and the findings of the panel, did not "take[] into account"[252] the ILC Articles in its interpretation of Article 1.1(a)(1), and, ultimately, the Appellate Body concluded that the outcome of its interpretive analysis did not turn on the ILC Articles.[253]

139. China argues that the ILC Articles are relevant to addressing a particular argument that the United States did not, in fact, make. China asserts that "[t]he Appellate Body made clear that a public body is 'an entity vested with *certain* governmental responsibilities, or exercising *certain* governmental authority', and the Appellate Body made clear that its interpretation 'coincides with the essence of Article 5' of the ILC Articles, which attributes conduct of an entity to the State when the entity has been vested with authority and is acting pursuant to that authority."[254] China complains that the compliance Panel "failed to explain how its interpretation of the term 'public body' under Article 1.1(a)(1) would 'coincide with the essence of Article 5' of the ILC Articles if any entity 'empowered by the law of the State to exercise elements of the governmental authority' can be deemed a public body *regardless* of whether that entity was acting in that capacity when engaged in the conduct that is the subject of the financial contribution inquiry."[255] However, the United States does not argue, and the USDOC did not

---

[250] China's Other Appellant Submission, para. 79.

[251] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 304-316; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.84-8.91.

[252] *Vienna Convention on the Law of Treaties* ("Vienna Convention"), Art. 31(3)(c).

[253] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 311. The Appellate Body found that it was "not necessary . . . to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law." *Id.* Without first resolving the question of whether and to what extent Article 5 of the ILC Articles reflects customary international law, it is not permissible under the customary rules of interpretation reflected in the Vienna Convention to take Article 5 into account with the context of Article 1.1(a)(1) of the SCM Agreement when interpreting that provision. *See* Vienna Convention, Art. 31(3)(c). *See also, e.g.*, Dispute Settlement Body, Minutes of Meeting, March 25, 2011, 9. *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, (a) Report of the Appellate Body and Report of the Panel, Statement of Japan, WT/DSB/M/294 (June 9, 2011), paras. 121-123 (summarizing Japan's thoughts on the Appellate Body's discussion of the ILC Articles). Thus, the United States understands the Appellate Body not to have taken Article 5 of the ILC Articles into account in its interpretative analysis of Article 1.1(a)(1) of the SCM Agreement. This was appropriate because the ILC Articles are not relevant rules of international law applicable in the relations between the parties.

[254] China's Other Appellant Submission, para. 79 (emphasis added by China).

[255] China's Other Appellant Submission, para. 78 (emphasis in original).

determine in the section 129 proceedings, that "any entity 'empowered by the law of the State to exercise elements of the governmental authority' can be deemed a public body *regardless* of whether that entity was acting in that capacity when engaged in the conduct that is the subject of the financial contribution inquiry."[256] Nor did the compliance Panel make any finding in that regard, as it was not necessary for the compliance Panel to make such a finding to resolve this dispute. China's argument is beside the point.

140. Finally, the United States notes that, although the Appellate Body did not find it necessary "to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law,"[257] the Appellate Body's discussion indicates that the relevance of the ILC Articles, if any, to the issue under Article 1.1(a)(1) of the SCM Agreement is limited. The Appellate Body stated:

> The connecting factor for attribution pursuant to the ILC Articles is the particular *conduct*, whereas, the connecting factors in Article 1.1(a)(1) of the *SCM Agreement* are <u>*both* the particular *conduct* and the *type of entity*</u>. <u>Under the *SCM Agreement*, if an entity is a public body, then its conduct is attributed directly to the State, provided that such conduct falls within the scope of subparagraphs (i)-(iii), or the first clause of subparagraph (iv)</u>. Conversely, if an entity is a private body in the sense of Article 1.1(a)(1)(iv), its conduct can be attributed to the State only *indirectly* through a demonstration of entrustment or direction of that body by the government or a public body. <u>By contrast, the sole basis for attribution pursuant to the ILC Articles is the particular conduct at issue</u>. Articles 4, 5, and 8 each stipulates the conditions in which *conduct* shall be attributed to a State.[258]

141. While the Appellate Body may have identified certain "similarities"[259] between Article 1.1(a)(1) of the SCM Agreement and Articles 4, 5, and 8 of the ILC Articles, the Appellate Body pointed to important "contrast[s]"[260] between them as well. Accordingly, it was neither appropriate nor necessary for the compliance Panel to take the ILC Articles into account in its interpretive analysis of Article 1.1(a)(1) of the SCM Agreement because the ILC Articles could not help the compliance Panel ascertain the proper interpretation of Article 1.1(a)(1) of the SCM Agreement.

---

[256] China's Other Appellant Submission, para. 78.

[257] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 311.

[258] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 309 (italics in the original; underlining added).

[259] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 311.

[260] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 309.

(5) China's Reliance on the Appellate Body's Findings in Relation to State-Owned Commercial Banks in *US – Anti-Dumping and Countervailing Duties (China)* Is Misplaced

142. China argues that the Appellate Body's discussion of the USDOC's public body determinations in relation to state-owned commercial banks ("SOCBs") in *US – Anti-Dumping and Countervailing Duties (China)* supports China's proposed interpretation of the term "public body."[261] Specifically, China contends that the Appellate Body's analysis focused on "the 'governmental function' of providing loans to certain favoured industries."[262] China misreads the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report.

143. Contrary to China's assertions, the Appellate Body did not focus its review narrowly on evidence and analysis relating to the conduct of the SOCBs when they were making particular loans. Rather, the Appellate Body observed that the USDOC had "discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, including evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions."[263] The evidence that SOCBs were meaningfully controlled in the exercise of their functions was "include[ed]" in the broader discussion of evidence relating to the relationship between the SOCBs and the Chinese Government. As the Appellate Body described, that evidence consisted of the following:

> [T]he USDOC relied on information regarding ownership and control. In addition, however, it considered other factors, such as a provision in China's Commercial Banking Law stipulating that banks are required to "carry out their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies". The USDOC also took into consideration an excerpt from the Bank of China's Global Offering, which states that the "Chinese Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions", and that accordingly "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies". The USDOC also considered a 2005 OECD report, stating that "[t]he chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their choice". In addition, the

---

[261] *See* China's Other Appellant Submission, paras. 84-95.

[262] China's Other Appellant Submission, para. 88.

[263] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).

> USDOC considered evidence indicating that SOCBs still lack adequate risk management and analytical skills.[264]
>
> We also note that the present OTR determination itself contains some analysis with respect to SOCBs. It refers to the USDOC's determination in CFS Paper and states that the parties in the OTR investigation had not demonstrated that there had been significant changes in conditions in the Chinese banking sector since that determination. In addition, it refers to a statement by a Tianjin municipal government official reproduced in the Tianjin Government Verification Report, and to an International Monetary Fund working paper in support of the proposition that SOCBs are required to support China's industrial policies. [265]

144. Having reviewed the evidence described above, which the Appellate Body characterized as "extensive," the Appellate Body found that "the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions," and the Appellate Body noted that "the USDOC also referred to certain other evidence on the record … demonstrating that SOCBs are required to support China's industrial policies."[266] In the opinion of the Appellate Body, "these considerations, taken together, demonstrate that the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government."[267] China is wrong when it suggests that the Appellate Body focused on the conduct of providing specific loans.

145. In sum, China's suggestion that its new position concerning the interpretation of the term "public body" is supported by the Appellate Body's application of its interpretive framework in the context of SOCBs in *US – Anti-Dumping and Countervailing Duties (China)* is utterly without foundation. The compliance Panel's brief reference to China's argument – explaining that compliance Panel "[did] not consider that the factual circumstances and case-specific determinations in prior disputes reflect rigid legal requirements that must be applied in other circumstances involving different analytical approaches" – was sufficient to address China's flawed contention.[268]

---

[264] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.

[265] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 351.

[266] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.

[267] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).

[268] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.32. *See also* China's Other Appellant Submission, para. 92.

(6) China Is Incorrect in Asserting that Arguments Made by the United States in *US – Carbon Steel (India)* and the USDOC's Section 129 Proceeding There Support China's Position in this Compliance Proceeding

146. China argues that there are "contradictions in the U.S. arguments" in this compliance proceeding, and, to support this assertion, China discusses certain arguments the United States advanced in *US – Carbon Steel (India)*, as well as a section 129 determination made by the USDOC in that dispute.[269] China's argument lacks merit.

147. The USDOC's section 129 determination in *US – Carbon Steel (India)* is of no relevance whatsoever to this compliance proceeding. A Member's domestic determination is not germane under the customary rules of interpretation of public international law to the interpretation of the term "public body."[270] Furthermore, this compliance proceeding concerns the question of whether the implementation measures taken by the United States in this dispute are consistent with the covered agreements, and does not involve implementation measures the United States may have taken in another, unrelated dispute.

148. Even though U.S. arguments and compliance actions in *US – Carbon Steel (India)* have no legal relevance to the matters at issue in this appeal, the United States will explain why China has no basis for asserting the existence of any contradictions in the U.S. positions. The United States welcomes the opportunity to explain why U.S. positions in *US – Carbon Steel (India)* were legally sound, and why China's position in this appeal cannot be reconciled with the SCM Agreement. In *US – Carbon Steel (India)*, the United States sought:

> a modification of the Panel's interpretation … to clarify that, in certain circumstances, government control over an entity also may be sufficient to establish that an entity is a "public body," such that an additional showing of the presence of regulatory or supervisory authority is not also required. Specifically, the United States considers that governmental control over an entity, such that the government may use that entity's resources as its own, will suffice to establish the existence of a public body.[271]

149. The United States further argued that:

> Under Article 1.1(a)(1), the focus of the financial contribution analysis is whether a direct transfer or other type of financial contribution was made and can be attributable to the government or

---

[269] *See* China's Other Appellant Submission, paras. 24-27.

[270] *See* DSU, Art. 3.2.

[271] U.S. Opening Statement before the Appellate Body, *US – Carbon Steel (India)* (September 24, 2014), para. 10 (Exhibit CHI-67).

> any public body of a Member. Therefore, the key governmental functions at issue are those functions described in the subparagraphs of that article – that is, making a direct transfer of funds; foregoing government revenue; providing goods or services, or purchasing goods; or making payments to a funding mechanism. Therefore, the authority required of a public body is the authority to exercise *these* functions on behalf of the government.[272]

150. The point of the U.S. argument was that, if an entity has the authority to transfer the government's economic resources, then any exercise of a function described in Article 1.1(a)(1) necessarily is a governmental function, and the entity should be deemed a public body under the approach articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

151. A public body analysis such as that described by the United States in *US – Carbon Steel (India)* would encompass scenarios like the hypothetical example of a Member's Ministry of Health discussed above,[273] where Article 1.1(a)(1) conduct is not a function with which the Ministry of Health ordinarily is tasked, as well as the example of a Committee on Public Health, also discussed above, the government function of which is addressing certain public health issues of pressing concern to the state. That analysis would capture sales of iron ore by a Member's Ministry of Health or a Committee on Public Health. Such an analysis also would capture the entities at issue in this dispute (SOEs, SIEs, and other input producers). The analysis the United States described would be consistent with the Appellate Body's call to analyze the "core features" of an entity and whether the "functions or conduct" are ordinarily governmental in that Member. Control over and authority to dispose of the government's economic resources is a core function of government in every WTO Member.

152. The Appellate Body did not evaluate the U.S. argument in relation to an entity's authority to transfer the government's financial resources. Instead, the Appellate Body examined one articulation of the terms of Article 1.1(a)(1) of the SCM Agreement and found that "the terminology advocated by the United States – 'a public body may also include an entity controlled by the government … such that the government may use the entity's resources as its own' – is difficult to reconcile with that used by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*."[274] The Appellate Body considered that "a government's exercise of 'meaningful control' over an entity and its conduct, including control such that the government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body."[275] But the

---

[272] U.S. Opening Statement before the Appellate Body, *US – Carbon Steel (India)* (September 24, 2014), para. 11 (Exhibit CHI-67).

[273] *See supra*, section II.A.2.b(1).

[274] *US – Carbon Steel (India) (AB)*, para. 4.19 (citations omitted).

[275] *US – Carbon Steel (India) (AB)*, para. 4.20 (emphasis added).

Appellate Body did not modify its prior findings concerning the correct approach for determining that an entity is a "public body."

153. China also asserts that "the USDOC focused much of its public body analysis in the subsequent compliance proceedings" in *US – Carbon Steel (India)* on whether an Indian entity performed a government function "*when providing iron ore*" for less than adequate remuneration.[276] China completely fails, however, to show that the USDOC's analysis in the *US – Carbon Steel (India)* section 129 proceeding is in any way inconsistent with the positions taken by the United States in this compliance proceeding. On the facts of the *US – Carbon Steel (India)* dispute, the provision of the specific financial contribution was relevant to the question of whether the entity at issue was a public body. The United States never asserted that the link between specific government function and the specific financial contribution was a necessary element in determining the existence of a public body. That is China's position, and as explained throughout this submission, China's position is untenable.

154. In essence, China's argument amounts to an acknowledgment that the United States has employed a fact-specific, case-by-case analysis when identifying public bodies. This is, of course, entirely appropriate. As the Appellate Body has found, "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case."[277] Given a different set of facts concerning a different allegedly subsidized input sold by a different entity in a different country, the notion that the USDOC may have undertaken a different analysis is unremarkable. As the Appellate Body has explained, "in some cases, such as when a statute or other legal instrument expressly vests 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."[278] Those observations by the Appellate Body (as well as differences in record evidence), rather than any "contradictions in the U.S. arguments,"[279] explain the differences between the *US – Carbon Steel (India)* section 129 proceeding and the section 129 proceedings here.

c. Concluding Comments on the Proper Interpretation of the Term "Public Body"

155. China's new proposed interpretation of the term "public body" would narrow the public body concept in a way that is contrary to Article 1.1(a)(1) of the SCM Agreement. Under Article 1.1(a)(1), the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government. The conduct at issue in the financial

---

[276] China's Other Appellant Submission, para. 26.

[277] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317. *See also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, and 4.42.

[278] *US – Carbon Steel (India) (AB)*, para. 4.9 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318).

[279] China's Other Appellant Submission, para. 24.

contribution analysis necessarily will be those actions described in the subparagraphs of Article 1.1(a)(1), namely making a direct transfer of funds; foregoing government revenue; providing goods or services, or purchasing goods; or making payments to a funding mechanism.

156. Where the economic value being transferred, through one of the actions described in Article 1.1(a)(1) of the SCM Agreement, belongs to the government, that transfer is an exercise of governmental authority – the authority over the government's own economic resources.[280] When an entity transfers the government's resources, it is making a financial contribution, just as the government (in the narrow sense) makes a financial contribution by engaging in the identical conduct described in Article 1.1(a)(1), subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

157. As explained above in section II.A.1, in the section 129 proceedings at issue in this compliance proceeding, the USDOC examined legal instruments and evidence of meaningful control to establish the core features of the entities in question and their relationship to the Chinese government to determine whether they possessed, were vested with, or exercised governmental authority (*i.e.*, the authority to perform governmental functions).[281] In its section 129 public body determinations, the USDOC properly applied the approach from prior Appellate Body reports for determining whether an entity is a public body, it provided reasoned and adequate explanations, and its determinations were supported by ample record evidence. Accordingly, the compliance Panel was correct when it found that the USDOC's section 129 public body determinations comply with the DSB's recommendations and are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

158. For these reasons, China's request for the Appellate Body to reverse the compliance Panel's legal interpretation findings should be rejected.

3. The Appellate Body Should Not Make the Additional Findings that China Requests in Relation to China's "As Applied" Claims under Article 1.1(a)(1) of the SCM Agreement

159. China requests that the Appellate Body make additional findings if the Appellate Body agrees with China that the compliance Panel erred in its interpretation of the term "public body".[282] Specifically, "China requests that the Appellate Body reverse the Panel's subsequent findings in relation to China's 'as applied' claims under Article 1.1(a)(1)" because, China asserts, those findings are "tainted by the Panel's improper legal interpretive finding."[283] As

---

[280] As the Appellate Body has acknowledged, where there is evidence that a government meaningfully controls an entity, such that the government can use that entity's resources as its own, such evidence may be relevant for purposes of determining whether a particular entity constitutes a public body. *See US – Carbon Steel (India) (AB)*, para. 4.20.

[281] *See US – Countervailing Measures (China) (Panel)*, para. 7.66.

[282] *See* China's Other Appellant Submission, para. 102.

[283] China's Other Appellant Submission, para. 102.

demonstrated above, the compliance Panel did not err in rejecting China's proposed legal interpretation. Accordingly, the condition for China's request for additional findings has not been met.

160. Additionally, as demonstrated below, even if the Appellate Body were to modify the compliance Panel's legal interpretation finding, there still would be no justification for reversing the additional findings that China has identified.

a. The Findings in Paragraphs 7.72 and 7.105 of the Compliance Panel Report Concerning the USDOC's Meaningful Control Inquiry Are Not Premised on the Compliance Panel's Legal Interpretation Finding

161. China requests that the Appellate Body "reverse the Panel's finding in paragraph 7.72 that China failed to demonstrate that the USDOC misconstrued the concept of 'meaningful control' and its relevance to the substantive legal standard for a public body inquiry," and China further requests that the Appellate Body reverse "the Panel's conclusion in paragraph 7.105 that it [the compliance Panel] did 'not consider that the USDOC's determinations were based on 'mere ownership or control over an entity by a government, *without more*''."[284] China asserts that "[t]he Panel's 'meaningful control' analysis was premised on its view that there does not need to be a 'clear logical connection' between the 'government function' identified by the investigating authority and the conduct at issue."[285] China misreads the compliance Panel report and misunderstands the separate concepts of, on the one hand, "meaningful control" of an entity, and, on the other hand, the "clear logical connection" between a "government function" and the conduct under Article 1.1(a)(1)(i)-(iii), which China argues is a legal requirement.

162. Before making the finding in paragraph 7.72 that China challenges, the compliance Panel explained that, "[u]ltimately, an investigating authority examining meaningful control must answer the substantive legal question of whether an entity exercises, possesses, or has been vested with government authority. As stated by the Appellate Body, '[t]his *substantive standard* should not be confused with the *evidentiary standard* required to establish that an entity is a public body within the meaning of the SCM Agreement.'"[286] Evidence that a government exercises meaningful control over an entity and its conduct is among the "variety of criteria and evidence that may be relevant to whether an entity 'possesses, exercises or is vested with governmental authority'."[287]

---

[284] China's Other Appellant Submission, para. 103.

[285] China's Other Appellant Submission, para. 104.

[286] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.71 (quoting *US – Carbon Steel (India) (AB)*, para. 4.37) (emphasis in the original Appellate Body report).

[287] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.65.

163. China conflates the evidence of a government's meaningful control over an entity with the Appellate Body's approach for determining that an entity is a "public body." That is, China's proposed legal requirement that there be a "clear logical connection" between the specific government function or authority and the specific financial contribution involves a different issue than whether the government meaningfully controls the entity. Moreover, the legal approach for determining that an entity is a "public body" applies even in situations where evidence of meaningful control is not the basis for finding that an entity is a "public body." That is an additional indication that evidence of "meaningful control" and China's proposed legal approach of "clear logical connection" are distinct concepts.

164. Further, in the view of the compliance Panel:

> [T]he question of "meaningful control" is inherently specific to particular factual circumstances, and the existence of such control may be established through a variety of potentially relevant considerations that may be cumulatively assessed by an investigating authority. The extent to which the particular conduct of entities is relevant in the context of "meaningful control" may depend on a number of factors, including the particular government function identified by an investigating authority and the evidence in its investigation.[288]

The compliance Panel considered "the USDOC's assessment of 'meaningful control' to be consonant with the obligation to have due regard for 'the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates'."[289]

165. It was these reasons that formed the basis of the compliance Panel's conclusion that China "failed to demonstrate that the USDOC misconstrued the concept of 'meaningful control' and its relevance to the substantive legal standard for a public body inquiry, and especially with respect to the relevance of the particular environment in which investigated entities operate."[290] The compliance Panel's finding was not, as China contends, "premised on"[291] or "tainted by"[292] the compliance Panel's legal interpretation finding.

166. Neither was the compliance Panel's finding in paragraph 7.105 dependent on the compliance Panel's legal interpretation finding. In paragraph 7.105, the compliance Panel stated that "we do not consider that the USDOC's determinations were based on 'mere ownership or

---

[288] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.70.

[289] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.71.

[290] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.72.

[291] China's Other Appellant Submission, para. 104.

[292] China's Other Appellant Submission, para. 102.

control over an entity by a government, *without more*', given the legal analysis and broader factual background upon which those determinations were based."[293] The compliance Panel's finding was based on a review of the "evidence and analysis" discussed by the USDOC.[294] That evidence included, *inter alia*, the Public Bodies Memorandum, the CCP Memorandum, information provided in response to the public bodies questionnaires, legislation, industrial plans and policies, information about the GOC's role in relation to enterprises in China, and requests for information about particular enterprises in China. The compliance Panel summarized the "[e]vidence relied upon by the USDOC" in the paragraphs preceding paragraph 7.105.[295] The compliance Panel found that:

> The USDOC relied upon the evidence and analysis discussed above to reach its conclusion that "certain state-invested enterprises are used 'as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy'". The conclusions reached by the USDOC in this respect were based on its analysis of "meaningful control" as evidence that investigated entities exercise, possess, or have been vested with governmental authority to perform a government function.[296]

167. Given the compliance Panel's discussion of the evidence on which the USDOC relied, the compliance Panel's conclusion that the USDOC's determinations were not "based on 'mere ownership or control over an entity by a government, *without more*'"[297] is firmly grounded in the record evidence, including the USDOC's determinations, all of which was before the compliance Panel. China simply is incorrect when it suggests that the compliance Panel's finding in paragraph 7.105 was "premised on"[298] the compliance Panel's legal interpretation finding.

168. The United States notes that China quotes the remainder of paragraph 7.104 in its other appellant submission, and China adds emphasis as follows:

> The conclusions reached by the USDOC in this respect were based on its analysis of "meaningful control" as evidence that investigated entities exercise, possess, or have been vested with governmental authority to perform a government function. We

---

[293] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.105 (quoting *US – Carbon Steel (India) (AB)*, para. 4.10) (italics in the compliance Panel report; underlining added).

[294] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.104.

[295] *See US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.73-7.90.

[296] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.104.

[297] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.105 (quoting *US – Carbon Steel (India) (AB)*, para. 4.10) (emphasis added by the compliance Panel).

[298] China's Other Appellant Submission, para. 104.

> found that the USDOC did not misconstrue the substantive legal standard for a public body inquiry in its analysis. Moreover, within this analytical framework, we found that the evidence in the Public Bodies Memorandum and CCP Memorandum was relevant to the public body analysis, and that the USDOC requested information concerning all investigated entities that would be relevant to establishing that a particular entity possesses, exercises, or is vested with governmental authority to perform a government function.[299]

169. China emphasizes the phrase "Moreover, within this analytical framework".[300] China appears to understand that phrase to be a reference to the compliance Panel's "'meaningful control' analysis".[301] The United States reads the phrase as referring to the analytical framework of the USDOC. In any event, the compliance Panel found that "the evidence in the Public Bodies Memorandum and CCP Memorandum was relevant to the public body analysis, and that the USDOC requested information concerning all investigated entities that would be relevant to establishing that a particular entity possesses, exercises, or is vested with governmental authority to perform a government function."[302] Again, this is the foundation for the compliance Panel's finding that the USDOC's determinations were not "based on 'mere ownership or control over an entity by a government, *without more*'".[303]

170. For these reasons, China's arguments for reversing the compliance Panel's findings in paragraphs 7.72 and 7.105 lack merit.

b. The USDOC Did Not Fail to Consider Relevant Evidence

171. China requests that the Appellate Body "reverse the Panel's conclusion in paragraphs 7.103 and 7.106 that China did not demonstrate that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement for having failed to consider relevant evidence on the record in the five investigations in which China participated."[304] In support of this request, China merely asserts, without explanation, that the compliance Panel's analysis of China's claim

---

[299] China's Other Appellant Submission, para. 104 (quoting *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.014) (emphasis added by China).

[300] *See* China's Other Appellant Submission, para. 104.

[301] *See* China's Other Appellant Submission, para. 104.

[302] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.104.

[303] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.105 (quoting *US – Carbon Steel (India) (AB)*, para. 4.10) (emphasis added by the compliance Panel).

[304] China's Other Appellant Submission, para. 105.

"was tainted by the Panel's disagreement with China concerning the proper legal standard".[305] China's assertion lacks any foundation, and China's argument lacks merit.

172. In response to a question from the compliance Panel, the United States explained that "[t]he USDOC considered all of the information provided by the GOC in the five investigations."[306] The compliance Panel summarized the U.S. response in its report.[307] In the compliance Panel's view, "China's argument[s] regarding information allegedly ignored by the USDOC generally relate to the weight to be accorded to certain evidence, the closeness of the connection that must be demonstrated in relation to a particular financial contribution, and the inferences drawn by the USDOC in light of insufficient responses from the GOC."[308] The compliance Panel was "not persuaded that the lack of explicit discussion of the GOC's argument regarding the significance of industrial plans (including provincial and municipal plans) or entity-specific information undermines the USDOC's determination made in light of the totality of the evidence on the record."[309] The compliance Panel explained that:

> In this case, the USDOC noted the GOC's contentions that the questions asked during the investigation were not calculated to elucidate whether input suppliers are public bodies, and its position that the USDOC should have sought evidence that the provision of a particular input is a government function that particular enterprises were vested with authority to perform. In response, the USDOC stated in its final determinations that it was relying, as it had in the preliminary determinations, on information in the Public Bodies Memorandum. We do not consider that it was obligated to repeat the evidence in the Public Bodies Memorandum upon which it based its determinations. Moreover, we consider that the USDOC referred to specific aspects of the evidence and analysis in the Public Bodies Memorandum in its preliminary Section 129 determinations in addressing issues of meaningful governmental control about which the GOC had provided information in its responses. Furthermore, the USDOC addressed several of the GOC's criticisms in its final Section 129 determinations, including by referring to the evidence underlying its conclusion that certain SIEs are used "as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy". The

[305] China's Other Appellant Submission, para. 105.

[306] Responses of the United States to the Panel's Written Questions to the Parties (May 31, 2017) ("U.S. Responses to Panel Questions"), question 9, para. 71 *et seq.*

[307] *See US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.96.

[308] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.99.

[309] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.100.

> USDOC also stated that incomplete responses by the GOC necessitated the use of facts available that "will often be less ideal than the information requested".[310]

173. The compliance Panel noted that "the Public Bodies Memorandum addressed various provisions of the instruments and policies discussed in the GOC's responses that China contends the USDOC failed to consider."[311] Similarly, the compliance Panel found that, "[a]lthough the GOC submitted information regarding SASAC and Chinese laws on state-owned companies, we recall that these are discussed in the Public Bodies Memorandum, particularly with respect to the capability of SASAC to supervise business and investment plans, corporate and sectoral restructurings, and appointing management and board members."[312]

174. The above reasons are why the compliance Panel ultimately concluded that "China has not demonstrated that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement for having failed to consider relevant evidence on the record."[313] These findings are fully supported by the record in the compliance proceeding, and China has presented no arguments to the contrary. Further, as explained above, these findings are not "premised on"[314] the compliance Panel's legal interpretation findings.

175. Accordingly, China's arguments for reversing the compliance Panel's findings in paragraphs 7.03 and 7.106 lack merit.

c. The Appellate Body Should Not Reverse the Compliance Panel's Ultimate Conclusion in Paragraphs 7.107 and 8.1(a)

176. China requests that the Appellate Body reverse the Panel's ultimate conclusion in paragraphs 7.107 and 8.1(a) that China did not demonstrate that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels section 129 proceedings. For the reasons given above, the Appellate Body should reject the new, flawed interpretation of the term "public body" proposed by China, and the Appellate Body should reject China's request to reverse the compliance Panel's finding that the USDOC's public body determinations in the section 129 proceedings are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

177. Additionally, as demonstrated in the next section, China's request should be rejected because, even under China's new proposed interpretation of the term "public body," the

---

[310] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, paras. 7.100 (citations omitted).

[311] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, footnote 193.

[312] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.102.

[313] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.103. *See also id.*, para. 7.106.

[314] China's Other Appellant Submission, para. 104.

USDOC's public body determinations in the section 129 proceedings, which were based on the facts otherwise available, nevertheless comply with the recommendations of the DSB and are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

4. China's Arguments that the Appellate Body Should Complete the Legal Analysis and Find that the USDOC's Public Body Determinations Are Inconsistent with Article 1.1(a)(1) of the SCM Agreement Lack Merit

178. For the reasons given above, the Appellate Body should reject the new, flawed interpretation of the term "public body" proposed by China, and the Appellate Body should reject China's request to reverse the compliance Panel's finding that the USDOC's public body determinations in the section 129 proceedings are not inconsistent with Article 1.1(a)(1) of the SCM Agreement. Accordingly, there is no basis for the Appellate Body to complete the legal analysis of China's "as applied" claims, as China requests.[315]

179. If, however, the Appellate Body reverses the compliance Panel's legal interpretation findings and the compliance Panel's finding that the USDOC's public body determinations are not inconsistent with Article 1.1(a)(1) of the SCM Agreement, China's claim still fails because, even under China's new proposed interpretation of the term "public body," the USDOC's public body determinations in the section 129 proceedings, which were based on the facts otherwise available, nevertheless comply with the recommendations of the DSB and are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

180. The USDOC did establish a clear, logical connection between the "government function" identified by the USDOC and the particular conduct at issue under Article 1.1(a)(1) of the SCM Agreement. Indeed, the particular conduct at issue under Article 1.1(a)(1) was a central focus of the USDOC's analysis. The USDOC was examining whether "the provision of the inputs by the producers at issue to the company respondents in the investigations constitutes a financial contribution."[316] The provision of goods plainly is conduct described in Article 1.1(a)(1)(iii) of the SCM Agreement. Whether this conduct constitutes a "financial contribution," however, depends on whether the entity undertaking the conduct is "a government or any public body."[317] The Appellate Body has explained that that question, in turn, depends on the "core features of the entity concerned, and its relationship with the government in the narrow sense."[318]

---

[315] *See* China's Other Appellant Submission, paras. 107-114.

[316] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4).

[317] SCM Agreement, Art. 1.1(a)(1). Article 1.1(a)(1)(iv) of the SCM Agreement also provides that there may be a "financial contribution" where "a government … entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above…." The USDOC did not analyze any entities as private bodies in the section 129 proceedings at issue in this compliance proceeding.

[318] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

181. Accordingly, the USDOC examined the core features of the entities concerned and their relationship with the government in the narrow sense. The United States describes and summarizes the USDOC's analysis and determinations above in section II.A.1.[319] As the USDOC explained, "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."[320] The USDOC further found that "relevant laws also grant the government the authority to use SIEs as the means or instruments by which to achieve this mandate," and "the government exercises meaningful control over certain categories of SIEs in China and this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy."[321]

182. In other words, the USDOC found that the Chinese government meaningfully controls and uses the entities at issue – producers of inputs that provided those inputs to the company respondents in the investigations – as tools to effectuate a governmental function, maintaining the predominant role of the state sector in the economy and upholding the socialist market economy. There is a clear, logical connection between the governmental function that the USDOC identified and the conduct under Article 1.1(a)(1) in which the entities were engaged, and the USDOC established that connection on the basis of substantial record evidence.

183. As explained in detail in section II.A.1.a above, the USDOC found, among other things, that the Chinese laws it examined:

> have wide application and affect the entire economy, either directly through interventions in the state sector, or indirectly through the impact these interventions have on other sectors of the economy that compete with the state sector. Moreover, they give the government the legal authority, and responsibility, to intervene and direct the economy to effectuate its policies and plans to secure a leading a role for the state sector. These interventions are often expressed in detailed governmental instruments such as industrial plans…[322]

---

[319] Of course, the USDOC's preliminary and final public body determinations in the section 129 proceedings, together with the Public Bodies Memorandum and the CCP Memorandum, which are incorporated into those determinations, speak for themselves and are the best evidence of the public body determinations that the USDOC made in these section 129 proceedings.

[320] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4).

[321] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4) (emphasis added).

[322] Public Bodies Memorandum, p. 8 (p. 9 of the PDF version of Exhibit CHI-1).

184. The USDOC found that the Chinese government uses industrial plans and policies "as the means (and roadmap) by which the government seeks to fulfill its legal mandate to maintain the predominance of the state sector"[323] The USDOC further found that:

> Under the rubric of industrial policies, the government orchestrates certain outcomes on an administrative basis by, *inter alia*, managing competition in sectors, ensuring through regulations that certain SIEs are implementing industrial policies in their business plans, appointing party and state officials in management and the board of trustees throughout the state sector, and administratively guiding resource allocations.[324]

185. The USDOC concluded that, "[t]aken as a whole, the network of plans provides examples of legal and administrative measures envisioned by the government in order to ensure the continued predominance of the state sector."[325]

186. China asserts that "the USDOC never demonstrated that there was a 'clear logical connection' between [the] alleged 'government function' and the sale of inputs by the entities at issue in the Section 129 proceedings, and the United States never substantiated its argument by reference to the evidence on the record in the Section 129 proceedings or the USDOC's analysis of that evidence."[326] China's assertion is demonstrably wrong. The Public Bodies Memorandum, the CCP Memorandum, and the preliminary and final determinations in the section 129 proceedings, read together in their entirety, establish, based on the totality of the evidence, the clear, logical connection between the governmental function that the USDOC identified – maintaining and upholding the socialist market economy – and the conduct under Article 1.1(a)(1) in which the entities were engaged – providing goods. Specifically, the USDOC determined, based on substantial record evidence, that:

> [G]overnment oversight and control of the economy in China, and in particular economic decision-making in the state sector, are consistent with the words of the [Appellate Body], "ordinarily classified as governmental in the legal order" of China and, as such, is considered to be a government function for purposes of our analysis of public bodies in China. [T]he government exercises meaningful control over certain categories of SIEs in China and this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of

---

[323] Public Bodies Memorandum, p. 9 (p. 10 of the PDF version of Exhibit CHI-1). *See also id.*, pp. 9-11 (pp. 10-12 of the PDF version of Exhibit CHI-1).

[324] Public Bodies Memorandum, p. 9 (citations omitted) (p. 10 of the PDF version of Exhibit CHI-1).

[325] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).

[326] China's Other Appellant Submission, para. 110.

> maintaining the predominant role of the state sector in the economy and upholding the socialist market economy.[327]

187. The connection between the government function identified and the conduct under Article 1.1(a)(1) is that the government meaningfully controls entities that, as their regular day-to-day business, provide goods (conduct under Article 1.1(a)(1)(iii)), and uses those entities, as goods providers, to effectuate a governmental purpose – maintaining and upholding the socialist market economy. The USDOC pointed to, among a substantial amount of other evidence, a World Bank evaluation of China's 11th Five Year Plan, which explained that the GOC intervenes "at the microeconomic, firm level," including through "indirect instruments such as tax incentives, price subsidies, and other kinds of 'favorable policies.'"[328]

188. To the extent the Appellate Body agrees with China's argument that the "clear logical connection" China envisages may be established only on the basis of specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser[329] or providing loans,[330] is itself a government function, and that engaging in that activity is consistent with the government's objectives, [331] China's claim still fails.

189. As described above in section II.A.1.d, the USDOC requested from the GOC entity-specific information that would be relevant even under China's new proposed interpretation of the term "public body." For example, the USDOC requested from the GOC information regarding the producers of the inputs that were identified by the USDOC, including: industrial plans, such as national five-year plans, sector-specific industrial plans, provincial and local five-year development plans, and sector-specific industrial plans; the objectives of the government in holding shares in the enterprises; whether the input producers are covered by any of the industrial plans; whether the input producers are subject to governmental approval for any mergers, restructurings, or capacity additions; and whether SASAC, or any other government entity, has approved mergers, acquisitions, capacity additions, or reductions for input producers.[332] The USDOC also asked the GOC to provide other information about the entities, including: the full corporate name of the company, the articles of incorporation, and capital

---

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

[328] Public Bodies Memorandum, pp. 18-19 (quoting the World Bank evaluation; emphasis added) (pp. 19-20 of the PDF version of Exhibit CHI-1).

[329] *See* China's Other Appellant Submission, paras. 37 and 69.

[330] *See* China's Other Appellant Submission, paras. 87-88.

[331] *See* China's Other Appellant Submission, paras. 37, 69, and 87-88. *See also* China's First Written Submission, para. 94 (China argued before the compliance Panel that "an entity engaged in conduct falling within the scope of Article 1.1(a)(1) may properly be considered a public body – and have its conduct attributable to a Member – only if that conduct reflects the 'particular instance' where it is exercising the governmental authority that has been vested in it.").

[332] *See* Public Bodies Questionnaire (Exhibit USA-83).

verification reports;[333] articles of groupings, company by-laws, annual reports, articles of association, business group registration, business licenses, and tax registration documents;[334] information relating to the company's ownership, such as voting shares, whether any owners were government entities, the corporate governance structure, and the role of minority shareholders;[335] and information concerning key decision-making, restructuring, and key persons.[336] Even under China's new proposed interpretation, all of this information would be probative of whether the entities engaging in the transactions at issue, namely selling inputs to purchasers that were the subject of the countervailing duty investigations, were exercising a government function in China when they engaged in such transactions.

190. In seven of the twelve section 129 proceedings,[337] the GOC simply refused to respond to the USDOC's request for information. In the remaining five section 129 proceedings,[338] the GOC provided only partial responses to the USDOC's questionnaire.[339] Given that China failed to cooperate, refused to provide requested information, and significantly impeded the proceedings, the USDOC, in any event, would not have had before it the kind of entity-specific evidence contemplated by China's new proposed interpretation. Accordingly, the USDOC's determinations justifiably would have been based on facts otherwise available and an adverse inference in selecting from the facts otherwise available, as they, in fact, were.

191. A review of the USDOC's public body determinations reveals that, in the absence of entity-specific information, which is missing from the USDOC's administrative record because of the GOC's refusal to provide it, even under China's new proposed interpretation of the term "public body," the USDOC provided a reasoned and adequate explanation, which was supported by ample record evidence.

192. Section II.A.1 summarizes the analysis of the evidence and the explanation for its public body determinations that the USDOC provided in the section 129 proceedings. The preliminary and final public body determinations, read together with the Public Bodies Memorandum and the CCP Memorandum, present the USDOC's complete findings. The United States recalls that the

---

[333] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

[334] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).

[335] *See* Public Bodies Preliminary Determination, pp. 23-24, Attachment 2 (pp. 24-25 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

[336] *See* Public Bodies Preliminary Determination, pp. 24-27, Attachment 2 (pp. 25-28 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

[337] The seven section 129 proceedings are *Lawn Groomers, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions,* and *Solar Panels.* *See* Public Bodies Preliminary Determination, pp. 12-14 (pp. 13-15 of the PDF version of Exhibit CHI-4).

[338] The five section 129 proceedings are *Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG,* and *Steel Cylinders.* *See* Public Bodies Preliminary Determination, pp. 14-18 (pp. 15-19 of the PDF version of Exhibit CHI-4).

[339] *See* Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

USDOC analyzed the functions or conduct that are of a kind ordinarily classified as governmental in the legal order of China.[340] The USDOC examined and discussed the conclusions it drew from, *inter alia*, China's *Constitution*, the *Constitution of the Chinese Communist Party*, the 2007 *Property Law of the People's Republic of China*, the 2006 *Company Law of the People's Republic of China*, the 2008 *Law on State-Owned Assets of Enterprises*, the 2003 *Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises,* and the 2006 *Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the SASAC about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-owned Enterprises*.[341]

193. The USDOC examined and discussed the role played by the CCP in China's system of governance.[342] In light of the USDOC's examination of voluminous record evidence, which it discusses at length,[343] the USDOC drew a number of conclusions relating to the meaningful control exercised by the CCP over the economy, and individual enterprises, with the aim of effectuating government goals related to maintaining economic growth and protecting the central role of socialism in China's economy.[344]

194. The USDOC then "evaluate[d] the core features of the entity in question and its relationship to government"[345] by examining and discussing the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority.[346] The USDOC first examined Chinese legal instruments that "require SIEs to comply with government policy directives."[347] The USDOC then presented a detailed analysis of evidence relating to meaningful control,[348] beginning with a discussion of the predominant role of the state sector and industrial policies,[349] including: government exercise of control through

---

[340] *See supra*, section II.A.1.a (discussing and citing the USDOC's public body determinations in the section 129 proceedings).

[341] *See supra*, section II.A.1.a (discussing and citing the USDOC's public body determinations in the section 129 proceedings).

[342] *See supra*, section II.A.1.b (discussing and citing the USDOC's public body determinations in the section 129 proceedings).

[343] *See generally*, CCP Memorandum (p. 41 *et seq.* of the PDF version of Exhibit CHI-1).

[344] *See supra*, section II.A.1.b (discussing and citing the USDOC's public body determinations in the section 129 proceedings).

[345] *US – Countervailing Measures (China) (Panel)*, para. 7.66.

[346] *See supra*, section II.A.1.c (discussing and citing the USDOC's public body determinations in the section 129 proceedings).

[347] *See supra*, section II.A.1.c (discussing and citing the USDOC's public body determinations in the section 129 proceedings).

[348] *See* Public Bodies Memorandum, pp. 12-14 (pp. 13-15 of the PDF version of Exhibit CHI-1).

[349] *See* Public Bodies Memorandum, p. 14 (p. 15 of the PDF version of Exhibit CHI-1).

the provision of direct and indirect benefits,[350] five-year plans,[351] supporting legislation,[352] the importance of ownership levels,[353] and industry-specific plans.[354]

195. The USDOC's analysis, explanation, reasoning, and conclusions relating to all of the above issues would be equally relevant under China's new proposed interpretation of the term "public body." Accordingly, the USDOC's discussion and the evidence underlying it was probative of and supported a public body determination even under China's proposed interpretation.

196. This is particularly true in a situation, as was the case in these section 129 proceedings, where the GOC refused to provide entity-specific information, making it necessary for the USDOC to base its public body determinations on facts otherwise available and draw an adverse inference in selecting from the facts otherwise available. In the absence of entity-specific evidence that the particular activity in which the entity is engaging is a government function and that engaging in that activity is consistent with the government's objectives[355] – which evidence is not on the administrative record because of the GOC's failure to provide it when given the opportunity to do so – Article 12.7 of the SCM Agreement permits the USDOC, and all Members' investigating authorities, to make a determination based on facts otherwise available, such as the ample record evidence that the USDOC examined and discussed in the determinations and memoranda in these section 129 proceedings.

197. For these reasons, China's claim also fails because, even under China's new proposed interpretation of the term "public body," the USDOC's public body determinations relying on the facts otherwise available were reasoned and adequate in the circumstances of the section 129 proceedings.

---

[350] *See* Public Bodies Memorandum, pp. 14-17 (pp. 16-18 of the PDF version of Exhibit CHI-1).

[351] *See* Public Bodies Memorandum, pp. 17-19 (pp. 18-20 of the PDF version of Exhibit CHI-1).

[352] *See* Public Bodies Memorandum, pp. 19-20 (pp. 20-21 of the PDF version of Exhibit CHI-1).

[353] *See* Public Bodies Memorandum, pp. 20-21 (pp. 21-22 of the PDF version of Exhibit CHI-1).

[354] *See* Public Bodies Memorandum, pp. 21-23 (pp. 22-24 of the PDF version of Exhibit CHI-1).

[355] *See* China's Other Appellant Submission, paras. 37, 69, and 87-88. *See also* China's First Written Submission, para. 94 (China argued before the compliance Panel that "an entity engaged in conduct falling within the scope of Article 1.1(a)(1) may properly be considered a public body – and have its conduct attributable to a Member – only if that conduct reflects the 'particular instance' where it is exercising the governmental authority that has been vested in it.").

B. The Compliance Panel Did Not Err in Finding that the Public Bodies Memorandum Is Not Inconsistent, "As Such," with Article 1.1(a)(1) of the SCM Agreement

1. China's Arguments Against the Compliance Panel's Findings Lack Merit

198. China also appeals the compliance Panel's finding that the Public Bodies Memorandum is not inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement.[356] China advances two arguments on appeal, each of which lacks merit.

199. First, China asserts that, "[i]f the Appellate Body reverses the Panel's conclusion regarding the proper legal standard, the Appellate Body should also reverse this basis for the Panel's rejection of China's 'as such' claim."[357] As demonstrated above, the new interpretation of the term "public body" proposed by China is legally erroneous and should be rejected.

200. Second, China challenges the compliance Panel's finding that "the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement."[358] However, the compliance Panel properly addressed and assessed the USDOC's use of the Public Bodies Memorandum.[359]

201. The compliance Panel 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

---

[356] *See* China's Other Appellant Submission, paras. 115-122.

[357] China's Other Appellant Submission, para. 116.

[358] China's Other Appellant Submission, para. 115.

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

> 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. Taken together, these considerations indicate that the nature of the Public Bodies Memorandum is that of a resource available to the USDOC for use in making public body determinations, but it does not restrict the USDOC's discretion to supplement the record or take into account and rely on additional information that is provided in a particular investigation.[360]

202. The compliance Panel "accept[ed] that the Public Bodies Memorandum 'has no operational force and does not, in itself, constitute a determination by the USDOC in any countervailing duty proceeding'."[361] The compliance Panel further reasoned that:

> [T]he Public Bodies Memorandum does not, on its face, impinge upon the authority of the USDOC to disregard or supplement its content in any given investigation. In this sense, we consider that the Public Bodies Memorandum is an evidentiary analysis and framework that is *available* to the USDOC to be considered and potentially relied upon to the extent that the USDOC, in its discretion, finds it pertinent in any given investigation.[362]

203. The compliance Panel's reasoning is sound. The evidence before the compliance Panel did not support a finding that the Public Bodies Memorandum prescribes a certain determination by the USDOC. The USDOC, in the Public Bodies Memorandum, has presented extensive analysis and explanation and has set forth certain conclusions based on an examination of voluminous evidence relating to the government and economic system of China. While the USDOC prepared and published the Public Bodies Memorandum in connection with measures taken to comply in *US – Anti-Dumping and Countervailing Duties (China)*, that very same analysis, explanation, and evidence, which relates to China in general, may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving China.

204. Critically, any time the USDOC has placed the Public Bodies Memorandum and the evidence underlying it onto the administrative record of a countervailing duty proceeding, the USDOC has sought additional information, including information concerning the particular entities alleged to have provided inputs for less than adequate remuneration[363] as well as

---

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

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

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

[363] *See* U.S. First Written Submission, paras. 103-111.

information "that would rebut, clarify, or correct, the factual information" in the Public Bodies Memorandum,[364] as the compliance Panel recognized.[365]

205. The USDOC explained that, to assess whether the input producers at issue in the section 129 proceedings here "satisfy the criteria and analysis summarized [in the Public Bodies Preliminary Determination] and described in greater detail in the Public Bodies Memorandum and, thus, would be considered public bodies in these proceedings," the USDOC "issued to the GOC a public bodies questionnaire for each of the 12 relevant investigations to obtain necessary ownership and corporate governance information for those enterprises that produced inputs that were purchased by respondents during the [period of investigation] of the investigations."[366]

206. The USDOC explained that:

> [W]e issued to the GOC a public bodies questionnaire for each of the 12 relevant investigations to obtain the necessary ownership and corporate governance information for those enterprises that produced inputs that were purchased by respondents during the POI of the investigations. We analyzed the input producer information provided by the GOC, the analysis and conclusions of the Public Bodies Memorandum, and other information on the record of these proceedings, which included factual information filed by interested parties and factual information submitted in the underlying administrative investigations. Below, we group the input producers involved in these proceedings into categories based on the factual record, in particular the information provided by the GOC during the course of these Section 129 proceedings. On the basis of the record evidence, as described below, we preliminarily determine that all of the input producers under examination qualify as public bodies.[367]

207. Ultimately, the evidence before the compliance Panel supported the conclusion that the Public Bodies Memorandum does not prescribe a determination at all. Rather, it is an analysis of evidence that, together with further examination of additional evidence, may form part of the basis of a public body determination made by the USDOC in a given countervailing duty proceeding.

---

[364] *See Memorandum to Interested Parties Re: Section 129 Proceeding: United States – Countervailing Duty (CVD) Measures on Certain Products from the People's Republic of China (WTO/DS437), Placement of Factual Information on the Record with Respect to Public Bodies* (November 2, 2015) (Exhibit USA-130).

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

[366] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4). The Public Bodies Questionnaire is described above in section II.A.1.d.

[367] Public Bodies Preliminary Determination, pp. 10-11 (pp. 11-12 of the PDF version of Exhibit CHI-4) (emphasis added).

208. Additionally, nothing in the Public Bodies Memorandum precludes the USDOC from acting in a manner consistent with the relevant WTO obligation – or in the formulation of *EU – Biodiesel (AB)*, nothing "restrict[s], in a material way, the discretion of" USDOC.[368] In the *EU – Biodiesel* report, the Appellate Body recalled that:

> [C]onsistent with the generally applicable principles regarding the burden of proof in WTO disputes, it is for the complainant to establish the WTO-inconsistency of the challenged municipal law. The complainant bears the burden of introducing evidence as to the meaning of that municipal law to substantiate its claim of WTO-inconsistency.[369]

As China sought to demonstrate that the Public Bodies Memorandum restricts, in a material way, the discretion of the USDOC to make public body determinations in a manner consistent with Article 1.1(a)(1) of the SCM Agreement, it was China's 's burden to put before the compliance Panel evidence to that effect.[370] China did not even attempt to meet its burden.

209. The Public Bodies Memorandum is 38 pages long. From those 38 pages, China drew just two textual points, which China asserted support its argument that the Public Bodies Memorandum restricts, in a material way, the discretion of the USDOC to act in a manner consistent with the SCM Agreement. When presented with the opportunity during the meeting with the compliance Panel to identify additional text within the Public Bodies Memorandum that might support its position, China merely repeated its assertions related to the two textual points it had identified previously.

210. First, China asserted that the USDOC "characterize[s] its analysis in the Public Bodies Memorandum as 'systemic', and calls into question whether such 'systemic' analysis will be required in every CVD investigation involving a public body allegation."[371] China took the word "systemic" out of context and distorted the meaning of the USDOC's observation. In full, the USDOC explained, in a footnote in the Public Bodies Memorandum, that:

> While record evidence leads the [USDOC] 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

---

[368] The Appellate Body used the phrase "restrict[s], in a material way, the discretion" in *EU – Biodiesel*, citing to its report in *US – Carbon Steel*. *See, e.g., EU – Biodiesel (AB)*, paras. 6.229-6.230, 6.271, and 6.281. In using this phrase, the Appellate Body appears to be referring to the second half of the mandatory / discretionary analysis – that is, whether a measure precludes (or removes discretion to take) WTO-consistent action.

[369] *EU – Biodiesel (AB)*, para. 6.230 (citations omitted).

[370] *See EU – Biodiesel (AB)*, para. 6.281.

[371] China's Second Written Submission, para. 115.

> analysis is necessary in every CVD investigation involving an allegation that an entity is a public body.[372]

211. 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 *system*. 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, nor can it be understood as restricting, in a material way, the discretion of the USDOC in making public body determinations.

212. This is confirmed by the USDOC's statement that such a "systemic analysis" may not be necessary in every CVD investigation involving an allegation that an entity is a public body.[373] The USDOC's statement is consistent with the Appellate Body's observation that, "in some cases, such as when a statute or other legal instrument expressly vests 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."[374] 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 that the Public Bodies Memorandum restricts, in a material way, the discretion of the USDOC to act in a manner consistent with the SCM Agreement.

213. Second, China noted that "the USDOC finds, 'for the purposes of [US] countervailing duty law', that 'upholding the socialist market economy' is a governmental function in China."[375] China confirmed during the meeting with the compliance Panel that it considers that this statement evidences that the Public Bodies Memorandum has an <u>expansive</u> nature. On the contrary, this statement is evidence of the <u>limited</u> nature of the USDOC's findings in the Public Bodies Memorandum. This is confirmed by a footnote included within the statement, which explains that the USDOC examined "[t]he relevance of the Chinese Communist Party <u>for the limited purpose</u> of determining whether particular enterprises should be considered to be 'public bodies' <u>within the context of a countervailing duty investigation</u>."[376] The USDOC was attempting to clarify that it was not, on behalf of the U.S. Government, making any findings concerning the Chinese Communist Party outside the context of countervailing duty proceedings, which are the remit of the USDOC.

214. Thus, the only two evidentiary points that China made concerning the text of the Public Bodies Memorandum offer no support for China's contention that the memorandum restricts, in

---

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

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

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

[375] China's Second Written Submission, para. 115, n. 138.

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

a material way, the discretion of the USDOC to act in a manner consistent with the SCM Agreement. Ultimately, China pointed to nothing in the text of the Public Bodies Memorandum to support its "as such" claim. Accordingly, China utterly failed to meet its burden of proof, and the compliance Panel did not err in finding that China had not made out its claim in this regard.

215. On appeal, China states that it "agrees with the United States that there is an 'internal logical inconsistency' between the Panel's analysis of whether the Public Bodies Memorandum restricts in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) and the Panel's analysis of whether the Public Bodies Memorandum constitutes a 'rule or norm of general and prospective application'."[377] The United States appreciates China's concurrence. As explained in the U.S. appellant submission, the compliance Panel erred in finding that the Public Bodies Memorandum has normative value.[378] The internal logical inconsistency in the compliance Panel report can and should be resolved by reversing the compliance Panel's finding that the Public Bodies Memorandum has normative value.

216. China also argues that "[t]he fact that the USDOC could elect not to rely on the Public Bodies Memorandum in a particular investigation is not a valid basis for the Panel to conclude 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."[379] China mischaracterizes the reasoning underlying the compliance Panel's finding. *Inter alia*, the compliance Panel discusses the "actual practice of the USDOC in issuing questionnaires requesting information" and also "at least one investigation [in which] 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."[380] Additionally, as discussed above, China failed to identify anything in the text of the Public Bodies Memorandum that would support China's contention that the memorandum restricts, in a material way, the discretion of the USDOC to act in a manner consistent with the SCM Agreement.

217. Finally, China posits that "[t]he question is whether, when the USDOC *does* rely on the Public Bodies Memorandum, it will restrict, in a material way, its ability to make determinations that are consistent with Article 1.1(a)(1)."[381] In China's view, "[i]f the Appellate Body were to agree with China that the Public Bodies Memorandum is premised on a fundamentally flawed legal standard, then the answer to this question should be yes."[382] China's logic is flawed.

---

[377] China's Other Appellant Submission, para. 119.

[378] *See* U.S. Appellant Submission, paras. 41-61.

[379] China's Other Appellant Submission, para. 120.

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

[381] China's Other Appellant Submission, para. 120.

[382] China's Other Appellant Submission, para. 121.

218. First, as demonstrated above, the Public Bodies Memorandum is not premised on a flawed interpretation of the term "public body". It is China that has proposed a new, legally erroneous interpretation of the term "public body".

219. Second, even if the Appellate Body agreed with China's proposed interpretation of the term "public body," the Public Bodies Memorandum, as already shown, does not prescribe any particular determination. Rather, the Public Bodies Memorandum is an analysis of evidence that, together with further examination of additional evidence, may form part of the basis of a public body determination made by the USDOC in a given countervailing duty proceeding. Nothing about the Public Bodies Memorandum restricts, in a material way, the discretion of the USDOC to make public body determinations in a manner consistent with Article 1.1(a)(1) of the SCM Agreement.

220. For these reasons, China is incorrect when it argues that the compliance Panel erred in finding that the Public Bodies Memorandum is not inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement.

2. China's Arguments that the Appellate Body Should Complete the Legal Analysis and Find that the Public Bodies Memorandum Is Inconsistent, "As Such," with Article 1.1(a)(1) of the SCM Agreement Lack Merit

221. For the reasons given above, the Appellate Body should reject China's request to reverse the compliance Panel's finding that the Public Bodies Memorandum is not premised on an erroneous legal interpretation and the compliance Panel's finding that the Public Bodies Memorandum does not restrict, in a material way, the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement. Accordingly, there is no basis for the Appellate Body to complete the legal analysis of China's "as such" claim against the Public Bodies Memorandum, as China requests.[383]

222. Even if the Appellate Body reverses the compliance Panel findings described in the preceding paragraph, the Appellate Body nevertheless should reject China's "as such" claim against the Public Bodies Memorandum for the reasons given in the U.S. appellant submission. As demonstrated in that submission, the Public Bodies Memorandum is not a measure that is challengeable "as such" within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU,[384] and the Public Bodies Memorandum is not a rule or norm of general or prospective application.[385]

223. Accordingly, China's "as such" claim against the Public Bodies Memorandum fails.

---

[383] *See* China's Other Appellant Submission, paras. 123-126.

[384] *See* U.S. Appellant Submission, paras. 16-35.

[385] *See* U.S. Appellant Submission, paras. 36-79.

III. CHINA'S CONTENTIONS THAT THE COMPLIANCE PANEL ERRED IN ITS INTERPRETATION AND APPLICATION OF ARTICLE 14(D) OF THE SCM AGREEMENT LACK MERIT

224. In this section, we address in two parts China's contentions that the compliance panel erroneously interpreted and applied Article 14(d) and 1.1(b) of the SCM Agreement.[386] First, we demonstrate that the compliance Panel did not err in rejecting China's claim regarding the legal approach under Article 14(d) for determining when it is appropriate to use of out-of-country prices as benchmarks for determining the adequacy of remuneration.[387] The compliance Panel correctly found that "Article 14(d) does not limit the possibility of resorting to an out-of-country benchmark as advocated by China."[388] In particular, China's argument that Article 14(d) of the SCM Agreement permits out-of-country benchmarks in only three scenarios is unfounded. Rather, the guidelines in Article 14(d) allow for the use of external benchmarks in a variety of circumstances where an in-country price would not reflect the benefit to the recipient. Indeed, the text of that provision, correctly interpreted, supports the compliance Panel's decision to "reject China's view that its interpretation of Article 14(d) is the only possible way."[389] The compliance Panel thus did not err in finding it could "not accept that the narrow legal standard advocated by China is required by Article 14(d)."[390]

225. Second, we address the flaws in China's argument that the term "market" should be turned on its head to include distortive government interventions, such that prices would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions), and that price distortion should not be a relevant consideration in the analysis under Article 14(d) of the

---

[386] *See* China's Other Appellant Submission, para. 196 (2) (requesting that the Appellate Body "*modify* the basis for the Panel's conclusion in paragraph 8.1(c)").

[387] *See US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, paras. 7.160-61 ("China's claim of inconsistency with Articles 1.1(b) and 14(d) is based at the outset on the allegedly incorrect legal standard applied by the USDOC to determine whether in-country prices in China were related to 'prevailing market conditions' for the inputs in question. In particular, China argues that an investigating authority may resort to an out-of-country benchmark only when it has established that in-country prices are effectively determined by the government . . . . China itself recognizes that a government may distort prices in the market in many different ways. For China however, government intervention is itself part of the prevailing conditions in any given market. As a consequence, in China's view, evidence of government intervention cannot justify rejecting in-country prices under Article 14(d) because 'there would be no end to the factors that investigating authorities could rely upon to depart from the requirement to evaluate the adequacy of remuneration 'in relation to prevailing market conditions … in the country of provision'"") (quoting China's first and second written submissions).

[388] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.174.

[389] *See US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.174 ("We reject China's view that its interpretation of Article 14(d) is the only possible way to reconcile the recognition that Article 14(d) does not require a market 'undistorted by government intervention' with the 'very limited circumstances' in which out-of-country benchmarks may be used. While those circumstances may be very limited, they are not so limited as China argues.") (quoting China's Second Written Submission, para. 144).

[390] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.162.

SCM Agreement. The discussion begins by addressing, in particular, China's argument that the compliance Panel imposed a circular legal approach by requiring that distortion be examined by comparison to a market price without defining what constitutes a market price.[391] As we explain below (and previously in the U.S. appellant submission), the United States *agrees*, albeit for different reasons, that the compliance Panel formulated an approach that does not appropriately reflect the terms of Article 14(d). In particular, as explained in the U.S. appellant submission, the compliance Panel erred by reaching a conclusion without addressing the real question at issue, that is, whether prices were or were not market determined.[392] Under the compliance Panel's approach, the only justification for resort to out-of-country benchmarks is evidence of the difference between the price of the good being assessed and a market-determined price in the same country. Such a demonstration, of course, would require that there are market-determined prices for the good in that country against which to compare the distorted price. Where no in-country prices are market determined, a conclusion that a benefit is being conferred could be precluded, despite the remuneration being inadequate. The compliance Panel appears to have misconstrued what the Appellate Body has articulated about the proper approach under Article 14(d) and, in doing so, the compliance Panel also foreclosed consideration of appropriate benchmarks.

226. We explain further in this submission that the remedy for the compliance Panel's error is not found in China's radical new proposal to define "market" to include distortive government interventions. China's definition is not consistent with the concept of interactions between independent buyers and sellers that is captured by the term "market." The Appellate Body has recognized that *private prices* are the starting point for determining a benchmark precisely for this reason.[393] The fundamental concept of market prices as those which would be charged between independent enterprises acting at arm's length is recognized throughout the SCM Agreement[394] and in other provisions of the WTO Agreement.[395] In contrast, China's proposal

---

[391] *See* China's Other Appellant Submission, para. 137 ("the Panel's circular standard . . . states, in effect, that 'a market price is a price that doesn't deviate from a market price'").

[392] *See* U.S. Appellant Submission, paras. 81-84.

[393] *US – Carbon Steel (India)*, para. 4.154 (describing prices from "private suppliers in arm's length transactions" as "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement"); *US – Softwood Lumber IV* ("private prices in the market of provision will *generally* represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods.").

[394] *See, e.g.*, SCM Agreement, Annex I Illustrative List, item (e), n. 59 (in establishing existence of export subsidies, "Members reaffirm the principle that prices . . . should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length."); SCM Agreement, Art. 29.1 (referring to transformation from centrally-planned to "market, free-enterprise economy").

[395] *See, e.g.*, Customs Valuation Agreement, Art. 1.1(d) ("The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided: … (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2"); Customs Valuation Agreement, Note 3 to Article 1, paragraph 2 ("Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an

turns the agreement term "market" on its head, such that the market would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions).

227. Finally, we conclude the discussion by addressing the flaws in China's final argument that price distortion should not be a relevant consideration in the analysis under Article 14(d).

A. The Compliance Panel Did Not Err in Rejecting China's Argument that Article 14(d) Permits Use of Out-of-Country Benchmarks in Only Three Scenarios

228. The compliance Panel did not err in rejecting China's argument that Article 14(d) permits use of out-of-country benchmarks in only three scenarios.[396] The compliance Panel considered that "the narrow legal standard advocated by China is [not] required by Article 14(d)"[397] because Article 14(d) permits the use of external benchmarks in a variety of circumstances.[398] The compliance Panel thus rejected China's arguments regarding the proper legal approach.[399] The compliance Panel's finding in this respect is consistent with the text of the SCM Agreement. Article 14(d) does not require that in-country prices be used as the benchmark for adequate remuneration in all cases, nor does it prohibit the use of external benchmarks except in three scenarios. Rather, under Article 14(d) an investigating authority may consider, on a case-by-case basis, whether a potential benchmark consists of market-determined prices, such that the use of that price would reveal any benefit to the recipient. Accordingly, the compliance Panel correctly found that "Article 14(d) does not limit the possibility of resorting to an out-of-country benchmark as advocated by China."[400]

---

example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship.").

[396] According to China, those three scenarios are: (1) where the government sets prices administratively, (2) where the government is the sole supplier of the good, or (3) where the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods. *See* China's Other Appellant Submission, para. 189.

[397] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.162.

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

[399] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, paras. 7.162 ("we do not accept that the narrow legal standard advocated by China is required by Article 14(d)") and 7.165 ("we are not convinced by China's argument that 'panels and the Appellate Body have limited the concept of 'distortion' under Article 14(d) to situations in which the government effectively determines all in-country prices for the product in question'.") (quoting China's First Written Submission, para. 190).

[400] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.174 ("We consequently also reject China's claim that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by rejecting in-country prices without having first found that prices for the inputs in question were effectively determined by the government of China.").

229. In the discussion that follows, we explain how Article 14(d) of the SCM Agreement does not restrict the use of external benchmarks in the manner China suggests. In subsection 1, we first set out the appropriate approach under Article 14(d) and explain how, as the Appellate Body has previously recognized, an investigating authority may reject prices if they are not market-determined. In subsection 2, we address the compliance Panel's findings on this issue and demonstrate that the compliance Panel's rationale for rejecting China's argument is sound and consistent with a proper interpretation of Article 14(d). Finally, in subsection 3, we address the five panel and Appellate Body reports that China argues support its contention that Article 14(d) should be interpreted as prescribing only three scenarios in which domestic prices may be considered unsuitable for benchmarking purposes. We demonstrate that the express terms of these findings contradict what China asserts and, moreover, caution against China's interpretation.

1. Article 14(d) Does Not Preclude Use of External Benchmarks When In-Country Prices Are Not Market-Determined

230. China's claim on appeal repeats the same flawed assertion China presented to the compliance Panel, namely, that Article 14(d) permits out-of-country benchmarks in only three scenarios.[401] But Article 14(d) does not restrict the use of external benchmarks to three scenarios in the manner China suggests. 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 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 and – where they are not – an investigating authority may look to external sources where market conditions prevail in determining the proper benchmark. Such an assessment comports with the references to a "market" in the text of Article 14, ensuring that the benchmark for adequate remuneration reflects a market price resulting from arm's-length transactions between independent buyers and sellers. Such an assessment is also consistent with considering the adequacy of remuneration "in relation to" the country of provision.

a. Article 14(d) of the SCM Agreement Provides a "Guideline" for Determining Adequacy of Remuneration So that Any Benefit to the Recipient Is Assessed Against a Market-Determined Benchmark

231. A proper analysis of Article 14 of the SCM Agreement begins with the text of that provision. First, Article 14 concerns the calculation of a subsidy in terms of the benefit to the recipient.[402] 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

[401] *See* China's Other Appellant Submission, para. 189.

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

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".[403]

232. 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).

233. The Appellate Body has highlighted the importance of the use of the term "market conditions": "[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."[404]

234. 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."[405] Likewise, the reference to "any" method in the chapeau of Article 14 implies that more than one method consistent with Article 14 is available to investigating authorities for purposes of calculating the benefit to the recipient.[406] 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."[407] 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."[408]

---

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

[404] *EC – Large Civil Aircraft (AB)*, para. 975 (emphasis added).

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

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

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

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

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

235. Article 14(d) of the SCM Agreement permits the use of out-of-country prices as benchmarks.[409] 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."[410] 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.[411]

236. 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*.[412]

---

[409] *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.").

[410] *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.").

[411] *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 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.").

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

237. As these findings indicate, absent from Article 14(d) is any requirement that in-country prices must be used in all situations.[413] Indeed, in many situations, imposing such a requirement would be incompatible with the context 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.[414]

238. 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."[415] 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."[416]

239. 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 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)."[417]

c. Potential Benchmarks May Be Inappropriate for Measuring the Adequacy of Remuneration in a Variety of Situations

240. Appellate Body findings have recognized various forms of price distortion that would support a determination to use of out of country benchmarks. 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

---

[413] *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.").

[414] *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 ("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*.) (internal citations omitted).

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

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

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

to government predominance as a provider in the market."[418] 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."[419]

241. Indeed, price distortion can occur in numerous ways and for any number of reasons, as China appears to recognize.[420] For example, where prices are set administratively, it is the administrative act of price setting that causes price distortion.[421] 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.[422]

242. 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).[423]

---

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

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

[420] *See US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.161 ("China itself recognizes that a government may distort prices in the market in many different ways. For China however, government intervention is itself part of the prevailing conditions in any given market") (citing China's First Written Submission, paras. 238 and 244).

[421] *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.

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

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

243. The common tenet among these findings is the "economic logic"[424] 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.[425] Accordingly, to apply the appropriate approach it is "important to emphasize the market orientation of the inquiry under Article 14(d)" because the language of the second sentence of that provision "highlights that a proper market benchmark is derived from an examination of the conditions pursuant to which the goods at issue would, *under market conditions*, be exchanged."[426] Absent market conditions, the adequacy of remuneration may not be discernible if the examination is limited to a comparison with in-country prices.

2. The Compliance Panel Did Not Err in Rejecting China's Argument Regarding the Proper Legal Approach under Article 14(d) of the SCM Agreement

244. The compliance Panel did not err in rejecting China's argument regarding the proper legal approach under Article 14(d) of the SCM Agreement. Rather, 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 variety of circumstances.[427] The compliance Panel recognized at the outset that the analysis under Article 14(d) must be rooted in "prevailing market conditions."[428] The compliance Panel also recognized the importance of a benchmark "consist[ing] of *market-determined* prices.[429] Based on these important considerations, the compliance Panel disagreed with China's suggestion that an out-of-country benchmark may only be justified in the scenario identified by China.[430] Instead, the compliance Panel recognized that "it may be the case in other circumstances that render the comparison equally impossible or irrelevant" and that "[t]o 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)."[431] The compliance Panel thus properly rejected China's arguments regarding the proper legal approach.[432]

---

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

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

[426] *See US – Carbon Steel (India) (AB)*, para. 4.151 (quoting *EC – Large Civil Aircraft (AB)*, para. 975 (emphasis added by *US – Carbon Steel (India) (AB)*).

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

[428] *See US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.157.

[429] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.157.

[430] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, paras. 7.166-67.

[431] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.168.

[432] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, paras. 7.162 ("we do not accept that the narrow legal standard advocated by China is required by Article 14(d)") and 7.165 ("we are not convinced by China's argument that 'panels and the Appellate Body have limited the concept of 'distortion' under Article 14(d) to

a. The Compliance Panel Properly Rejected China's Overly Narrow Legal Interpretation

245. The compliance Panel agreed that "evidence of governmental intervention in the economy, or even in a specific sector of the economy, will not, in and of itself, suffice as the basis for rejecting in-country prices as benchmarks."[433] At the same time, the Panel concluded that "we do not accept that the narrow legal standard advocated by China is required by Article 14(d)."[434]

246. The compliance Panel reached this conclusion based on two primary reasons:

> First, we recall – as the panel did in the original dispute – that there is no defined, exhaustive set of circumstances in which an authority may resort to an out-of-country benchmark.[435]
>
> * * *
>
> Consistent with our understanding that Article 14(d) requires a comparison of the terms of the financial contribution provided to the producer/exporter under investigation and the terms "that would have been available to the recipient on the market", we consider that the "other circumstances" contemplated by the Appellate Body refer to the multiplicity of situations in which in-country prices might not be suitable for determining the terms on which the goods at issue are offered on the domestic market. This may encompass a variety of situations in which in-country prices for the goods at issue are either not available or not verifiable or cannot, for other reasons, be used to determine "whether the recipient is better off absent the financial contribution".[436]

247. On this first point, the compliance Panel thus concluded: "These circumstances, even if very limited, in our view go beyond the sole circumstance in which prices are determined, *de jure* or *de facto*, by the government."[437] This is consistent with the "economic logic"[438] the

---

situations in which the government effectively determines all in-country prices for the product in question'.") (quoting China's First Written Submission, para. 190).

[433] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.162.

[434] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.162.

[435] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.163 (citing *US – Countervailing Measures (China) (AB)*, para. 4.76).

[436] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.164 (citing *Canada – Aircraft (Panel)*, para. 9.112 and *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.160).

[437] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.164.

Appellate Body has found to be 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 – which, in turn, depends on the case-by-case examination of "prevailing market conditions" in each scenario.[439]

248. The compliance Panel proceeded to describe its second point as follows:

> Second, we are not convinced by China's argument that "panels and the Appellate Body have limited the concept of 'distortion' under Article 14(d) to situations in which the government effectively determines all in-country prices for the product in question". China relies on five prior WTO disputes in which, according to China, resort to an out-of-country benchmark was found to be warranted because of the government's sole or predominant role in the market as provider of the goods in question. China draws from the facts of these prior disputes a general principle according to which resort to an alternative benchmark is permitted only where it is shown that prices are effectively determined by the government.
>
> We consider that the facts of prior disputes do not preclude us from reaching the conclusion that an out-of-country benchmark may be warranted in a different factual context. The facts of the present compliance dispute are quite different from those in the disputes relied on by China, and our consideration of the USDOC's determinations must be based on the facts of this case in light of the relevant legal standard.[440]

249. On this second point, the compliance Panel concluded that it is "not only if there is evidence that a government 'effectively determines' the price of the goods at issue" that Article 14(d) permits "an investigating authority [to] reject in-country prices" but also "if there is evidence of price distortion."[441] As the United States explained before the compliance Panel,

---

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

[439] For example, to the extent country-wide or sector-wide laws, policies, or other evidence are relevant to evaluating price distortion for a particular input market, that evidence can be used to support an investigating authority's analysis of the "prevailing market conditions" for the good in question. *See, e.g.*, U.S. Responses to Panel Questions, para. 163; U.S. Comments on China's Responses to Panel Questions, para. 94.

[440] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, paras. 7.165-66 (citing China's First Written Submission, para. 190 and China's Response to Panel Question 31 (referring to *US – Softwood Lumber IV (AB)*; *US – Anti-Dumping and Countervailing Duties (China) (AB)*; *US – Carbon Steel (India) (AB)*; and *US – Countervailing Measures (China) (AB)*; and *Canada – Renewable Energy / Canada – Feed-in Tariff Program (Panel)*)).

[441] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.168.

nothing in the text of Article 14(d) specifies a particular type of evidence that investigating authorities must use in analyzing the market conditions for a particular product.[442] Rather, the existence of a situation that would render the use of in-country prices inappropriate as a benchmark must be properly examined on the basis of the evidence and analysis on the record of a particular dispute.

250. The compliance Panel's reasoning includes a recognition that rejecting the overly narrow standard advocated by China is necessary to ensure that the comparison under Article 14(d) reflects the advantage gained by the subsidy recipient over a producer facing market terms. In this regard, the compliance Panel explained:

> This [interpretation] 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).[443]

This alignment between the text of Article 14(d) and the purpose of the comparison in the first place reflects the proper application of the text; in contrast, China's interpretation not supported by the text of Article 14(d) or the overall context provided by Article 14.

251. The Appellate Body has emphasized that its findings on the use of external benchmarks in any particular dispute should not be construed as circumscribing the universe of circumstances where external benchmarks may serve as a suitable basis for comparison under the terms of Article 14(d). In *US – Carbon Steel (India)*, 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."[444] The Appellate Body likewise found in that dispute that 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."[445] As we have demonstrated in the discussion above –

---

[442] *See, e.g.*, U.S. Responses to Panel Questions, para. 161; U.S. Comments on China's Responses to Panel Questions, para. 93.

[443] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.168 (citing *US – Carbon Steel (India) (AB)*, para. 4.189).

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

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

and as the compliance Panel rightly concluded – the appropriate approach under Article 14(d) is not limited to a specific kind of analysis.[446]

b. The Compliance Panel Properly Rejected China's Flawed Arguments Regarding a "Pure Market" Price or a Fixed Threshold for "Distortive" Intervention

252. The compliance Panel also properly rejected China's characterizations of the legal approach applied by the USDOC and the legal positions of the United States in the compliance proceeding.[447] In particular, the compliance Panel highlighted China's mischaracterization of the U.S. position as requiring a "pure market":

> The United States does not purport to establish a threshold above which government interventions would always result in price distortions sufficient to warrant the conclusion that prices are not market-determined. Indeed, it specifically argues that "price distortion must be established on a case by case basis" and contends that, in the present case, the "USDOC was obligated only to determine in the Section 129 proceedings whether price distortion had been demonstrated in the steel input markets which it clearly did." The United States argues that:
>
> > The use or rejection of in-country prices is not a question of whether there are no "market conditions" or market forces, but rather a question of whether the market conditions allow for the use of an in-country benchmark or call for the use of an out-of-country benchmark.[448]

253. As the compliance Panel recognized, the United States did not take the position that Article 14(d) requires a "pure" market or a market wholly free from government intervention, and this certainly was not the basis of the USDOC's decision to employ out-of-country benchmarks.[449] Rather than speculate on all hypothetical circumstances pursuant to which

---

[446] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.163.

[447] *See US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, paras. 7.169-73.

[448] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.171 (citations omitted).

[449] *See, e.g.*, U.S. Responses to Panel Questions at Questions 24-26 and 29; *see also id.* at Question 30 ("The Panel is not tasked with finding the hypothetical tipping point at which government intervention in a market becomes distortive;" rather, "the Panel need only consider the evidence and analysis in this dispute – which here does not reflect isolated or minimal governmental intervention, but rather widespread intervention in the relevant markets.") (citing *US – Countervailing Measures (China) (AB)* at paragraphs 4.61-4.62, wherein the Appellate Body emphasized that a finding of inconsistency with Article 14(d) depends on "whether or not the investigating authority at issue conducted the necessary market analysis in order to evaluate whether the proposed benchmark prices are market determined such that they can be used to assess whether the remuneration is less than adequate" and identifying non-exhaustive factors for investigating authorities to consider in conducting a market analysis).

certain types, or degrees, of government intervention might justify a finding of price distortion, the United States explained to the compliance Panel that a determination of this nature, under Article 14(d), necessarily depends on a case-specific inquiry that will vary with the evidence and circumstances of each particular proceeding.[450] Accordingly, the United States explained to the compliance Panel that:

> This type of evaluation, and the appropriate standard of review, is the same regardless of whether the issue under examination is relatively simple (such as that involving a straightforward mathematical operation), or relatively complex, such as that involving market distortion and the authority's choice of a benchmark. In the section 129 proceedings at issue, the USDOC conducted the market analysis called for by the Appellate Body report in this dispute, and based its determinations on a holistic consideration of extensive record evidence. This evidence and analysis supported a determination that prices in China's steel and polysilicon sectors are distorted. Under the appropriate standard of review, the question is whether these determinations are supported by a reasoned and adequate explanation. To answer this question, the Panel need only consider the evidence and analysis in this dispute – which here does not reflect isolated or minimal governmental intervention, but rather widespread intervention in the relevant markets. The Panel is not tasked with finding the hypothetical tipping point at which government intervention in a market becomes distortive.[451]

254. Referring to the foregoing language from the U.S. submissions, the compliance Panel concluded that:

> This view [the U.S. view] accords with our understanding of Article 14(d) of the SCM Agreement in light of relevant prior WTO rulings. In particular, we consider that the outcome of the inquiry necessary to identify an appropriate benchmark, including the decision whether the circumstances in a particular investigation

[450] *See* U.S. Responses to Panel Questions at Question 24; *US – Carbon Steel (India) (AB)*, para. 4.156 (finding, in a case involving a predominant government supplier of the input, that "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 determination'").

[451] U.S. Responses to Panel Questions at Question 30 (citing U.S. First Written Submission, paras. 254-55; U.S. Second Written Submission, para. 170).

> justify use of an out-of-country benchmark, will depend on the facts of each case.[452]

255. As the Appellate Body observed in *US – Softwood Lumber IV (AB)*, "there may be situations in which there is no way of telling whether the recipient is 'better off' *absent the financial contribution*."[453] Thus, price distortion "must be established on a case-by-case basis."[454] The inquiry properly stated, for the purposes of this dispute, is whether the USDOC reasonably evaluated the totality of the evidence on the record of the section 129 proceedings to support a finding that prices for steel inputs within China were distorted or not market-determined and thus unusable as benchmarks for determining the adequacy of remuneration. Indeed, and as the United States argued before the compliance Panel, "the relevant inquiry is not whether the various interventions in the steel sector 'effectively determined' [as China frames the issue] prices within the sector; rather, the question is whether the distortions in the market were of such a magnitude that they distorted firm-level decision-making and prevented the establishment of equilibrium prices determined by the "forces of supply and demand."[455] The compliance Panel correctly recognized that the appropriateness of an external benchmark "must be established 'on a case-by-case basis, *according to the particular facts* underlying each countervailing duty determination.'"[456]

256. Accordingly, the compliance Panel concluded:

> We therefore do not consider that "the hypothetical tipping point at which government intervention in a market becomes distortive" is a necessary or even relevant part of either an investigating authority's decision-making process, or our consideration of the USDOC determinations in this dispute.[457]

In reaching this conclusion, the compliance Panel properly rejected China's suggestion that a question of degree should be converted to a question of kind. Such an interpretation is not called for by the text of Article 14(d), nor would it be consistent with the object and purpose of the

---

[452] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.172 (citing *US – Countervailing Measures (China)*, para. 4.61).

[453] *US – Softwood Lumber IV (AB)*, para. 93 (emphasis in original).

[454] *See US – Countervailing Measures (China) (AB)*, para. 4.59.

[455] *US – Countervailing Measures (China) (AB)*, para. 4.46 (quoting *US – Carbon Steel (India) (AB)*, para. 4.150). In the determinations at issue here, for example, such distortion is evident in the magnitude of excess capacity that has been created in China's steel sector and this fundamental imbalance is one of many signals that supply and demand did not interact to determine market prices in China's steel sector. *See* U.S. First Written Submission, para. 253 (cited in compliance panel report at para. 7.170). Thus, the USDOC appropriately concluded that those prices did not reflect the requisite "market conditions" under Article 14(d).

[456] *US – Carbon Steel (India) (AB)*, para. 4.156 (emphasis added).

[457] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.173 (citations omitted).

SCM Agreement to foreclose a case-by-case consideration of the facts that may justify the use of external benchmarks in a given situation. As demonstrated in this submission, the compliance Panel's finding, in this respect, is consistent with the text of Article 14(d) of the SCM Agreement.

3. China's Arguments Regarding Prior Disputes Do Not Support the Approach to Article 14(d) that China Advocates

257. China argues, as it did before the compliance Panel, that prior reports of panels and the Appellate Body support China's contention that Article 14(d) should be interpreted as prescribing the only three scenarios in which domestic prices may be considered unsuitable for the comparison under Article 14(d) of the SCM Agreement.[458] As we explain in the discussion that follows, China's argument is based on a fundamental misreading of those reports and the express terms of the findings in those reports contradict what China asserts. Simply because the Appellate Body has not previously had occasion to consider the type of pervasive distortions at issue here provides no basis for concluding that Article 14(d) forecloses consideration of all but three factual scenarios. Nor is there anything in the Appellate Body's prior reports that suggests – as China asserts – that there should be an arbitrary line between prices that are "*effectively determined*"[459] by a government and prices that are distorted by the government's extensive interference in a sector (both as a supplier and otherwise). The Appellate Body in this very dispute considered that "what allows an investigating authority to reject in-country prices is *price distortion*."[460] Because prices may well be distorted in scenarios other than where the government has effectively set sector-wide prices, China's proposed reading of Article 14(d) would arbitrarily and incorrectly preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined. Indeed, as discussed below, the Appellate Body's findings *caution against* China's interpretation.

258. In *US – Softwood Lumber IV*, for example, the Appellate Body cautioned that its findings were "necessarily circumscribed by the facts of that case" and that it was "expressly limited to considering only the situation of government predominance in the market as a provider of goods *because it was 'the only one raised on appeal*.'"[461] And, the Appellate Body *explicitly disclaimed* "foreclosing the possibility that there could be [other] situations . . . in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark."[462]

---

[458] *See* China's Other Appellant Submission, para. 189.

[459] China's Other Appellant Submission, para. 136.

[460] *US – Countervailing Measures (China) (AB)*, para. 4.59 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*).

[461] *See US – Carbon Steel (India) (AB)*, para. 4.184 (emphasis added).

[462] *Id.*, para. 4.185 (emphasis added); *see also US – Countervailing Measures (China) (AB)*, para. 4.50, n. 530 ("We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself."). Notably, the quoted sentence from *US – Carbon Steel (India) (AB)* refers to other situations "in which Article 14(d) permits the use of out-of-country prices for the purpose of

China nevertheless argues that the Appellate Body's reference to "very limited" circumstances in that dispute means the three scenarios that China favors in this appeal.[463] In China's imagination, to reach a different interpretation would mean that *any* government action will be considered as distortive under Article 14(d).[464] But the Appellate Body in the *US – Softwood Lumber IV* dispute provided an explicit disclaimer that it was applying the *logic* of the text to the *facts* of the dispute, and thus was not intending to describe every particular situation which might warrant the use of out-of-country benchmarks.[465]

259. China's fear, if credited as more than hyperbole, arises from its insistence on framing the question as a choice between which scenarios will justify, *per se*, the use of external benchmarks and which scenarios will not. But the relevant question is a factual one that, necessarily, cannot be answered without considering the circumstances on a case-by-case basis.[466] China's argument takes as its premise, apparently, that the WTO Agreement must be construed so as to avoid any situation in which an authority (or dispute settlement panel) must conduct a close, case-by-case factual evaluation of a particular situation. But there is no support for this position. Any number of issues involving measures challenged under the WTO Agreement – such as trade remedy measures, sanitary or phytosanitary measures, or measures subject to *de facto* national treatment claims – require a close factual analysis just as Article 14(d) requires here. The Appellate Body's caveat against construing the question otherwise has been a consistent feature of disputes addressing Article 14(d).[467]

260. China also argues that, with respect to *US – Anti-Dumping and Countervailing Duties*, "the Appellate Body did not interpret Article 14(d) to permit investigating authorities to reject in-country prices whenever there is something called 'price distortion', whatever that might

---

determining a benchmark," not to situations – as China seems to imply – "in which a government has effectively determined prices in a sector." *Id.*

[463] *See* China's Other Appellant Submission, para. 188.

[464] *See* China's Other Appellant Submission, para. 188.

[465] *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.

[466] *See, e.g., US – Carbon Steel (India) (AB)*, para. 4.156.

[467] In *US – Carbon Steel (India)*, for example, 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.'" *US – Carbon Steel (India) (AB)*, para. 4.187 (quoting panel report at para. 7.50).

mean."[468] China again misconstrues the question by framing it in categorical terms, i.e., "whenever" this or that arises. The question at issue is a question of fact – i.e, whether a proposed benchmark price is an appropriate basis for comparison "with a view to determining, ultimately, whether the goods at issue were provided by the government for less than adequate remuneration."[469]

261. Neither the compliance Panel nor the United States suggested that merely invoking the term "price distortion" is sufficient to reject in-country prices. Rather, a determination of that nature necessarily depends on a case-specific inquiry that will vary with the evidence and circumstances of each particular proceeding.[470] To be clear, the USDOC's findings in this dispute were based on a substantially developed factual record – one that demonstrated evidence of broad-based intervention within the relevant markets, and the demonstrated effects that the intervention has had on conditions in China's steel and polysilicon sectors (*e.g.*, reports of credible, independent institutions such as the World Bank and the OECD). Contrary to China's assertions, this type of predominance is far more than merely invoking the term "distortion" as postulated in China straw man argument. The Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties* do not support China's interpretation, but rather *confirm* that a case-by-case analysis must be undertaken to address whether a meaningful comparison can be achieved if in-country prices are used as a benchmark.[471]

262. With respect to *Canada – Renewable Energy / Feed-in-Tariff*, China argues that government policies and actions affect conditions and are therefore part of the prevailing market conditions.[472] The Appellate Body's finding in that dispute, however, was couched in terms of "situations where government intervenes to create markets that would not otherwise exist."[473] The issue in that dispute did not involve, as this dispute does, a question of particular distortive

---

[468] China's Other Appellant Submission, para. 176; *see also id.* at paras. 173-76 (citing *US – Anti-Dumping and Countervailing Duties (China)*, para. 446).

[469] *US – Softwood Lumber IV (AB)*, para. 120.

[470] *See, e.g., US – Carbon Steel (India) (AB)*, para. 4.156 (finding, in a case involving a predominant government supplier of the input, that "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 determination'").

[471] *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.

[472] *See* China's Other Appellant Submission, paras. 177-80.

[473] *Canada – Renewable Energy / Feed-in-Tariff (AB)*, para. 5.185; *see also id.* at para. 5.188 ("a distinction should be drawn between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein. Where a government creates a market, it cannot be said that the government intervention distorts the market, as there would not be a market if the government had not created it. While the creation of markets by a government does not *in and of itself* give rise to subsidies within the meaning of the SCM Agreement, government interventions in existing markets may amount to subsidies when they take the form of a financial contribution, or income or price support, and confer a benefit to specific enterprises or industries.").

government interventions in what otherwise could have been a functioning market. Moreover, the issue of defining the relevant market in that dispute arose from a mismatch between the input at issue and the use of a different type of input as a benchmark.[474] The discussion of the relevant "market" in that context cannot reasonably be separated from those particular and unique facts – none of which resemble the facts in this dispute, where a commodity input is at issue and no allegations of dissimilarity have been brought before the WTO.

263. With respect to *US – Carbon Steel (India)*[475] and *US – Countervailing Measures (China)*,[476] China argues that price distortion or deviation from a market price should only be understood as synonyms for price alignment. The Appellate Body's findings in those disputes, however, simply do not support such an assertion. Indeed, the Appellate Body considered a similar argument in *US – Carbon Steel (India)* and found that it was "not persuaded by [the] 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."[477] The Appellate Body in *US – Carbon Steel (India)* stated in express terms that:

> • 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.[478]

---

[474] *See Canada – Renewable Energy / Feed-in-Tariff (AB)*, para. 5.175. The "supply-mix" for electricity at issue in *Canada – Renewable Energy / Feed-in-Tariff (AB)* is like the product specifications that were addressed by the USDOC and not disputed in this forum by the parties.

[475] *See* China's Other Appellant Submission, paras. 181-83.

[476] *See* China's Other Appellant Submission, paras. 184-86.

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

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

264. The Appellate Body further stated 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."[479]

265. Thus contrary to China's characterization of the findings in these disputes, 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."[480]

B. China's Flawed Legal Approach on Appeal Does Not Provide a Basis Upon Which to Modify the Panel's Conclusion that Article 14(d) Does Not Limit the Possibility of Resorting to an Out-of-Country Benchmark

266. China's appeal, in addition to challenging the compliance Panel's decision to reject the overly narrow legal interpretation China sought, also devotes much criticism to the legal approach the compliance Panel articulated *after* it dispensed with China's flawed interpretation.[481] However, apart from the flawed interpretation examined above, China does not address or advocate for any other legal approach on appeal. As China's interpretation of Article 14(d) remains flawed and should be rejected, the Appellate Body therefore need not reach any additional issues under this part of China's appeal. For completeness, the United States goes on to rebut China's haphazard criticism and observation regarding the legal approach the compliance Panel ultimately did employ.

267. In the discussion that follows, we address the flaws in China's argument that the term "market" should be turned on its head to include distortive government interventions, such that prices do not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions), and that price distortion should not be a relevant consideration in the analysis under Article 14(d) of the SCM Agreement. The discussion begins by addressing, in particular, China's argument that the compliance Panel imposed a circular legal approach by requiring that distortion be examined by comparison to a market price without defining what constitutes a market price.[482]

---

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

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

[481] *See, e.g.*, China's Other Appellant Submission, paras. 154-58.

[482] *See* China's Other Appellant Submission, para. 137 ("the Panel's circular standard . . . states, in effect, that 'a market price is a price that doesn't deviate from a market price'").

268. As we explain below, the United States agrees, albeit for different reasons, that the compliance Panel formulated an approach that does not appropriately reflect the terms of Article 14(d). As explained in the U.S. appellant submission, the compliance Panel erred by reaching a conclusion without addressing the real question at issue, that is, whether prices were or were not market determined.[483] Under the compliance Panel's approach, the only justification for resort to out-of-country benchmarks is evidence of the difference between the price of the good being assessed and a market-determined price in the same country. Such a demonstration, of course, would require that there are market-determined prices for the good in that country against which to compare the distorted price. Where no in-country prices are market determined, a conclusion that a benefit is being conferred could be precluded, despite the remuneration being inadequate. The compliance Panel appears to have misconstrued what the Appellate Body has articulated about the proper approach under Article 14(d) and, in doing so, the compliance Panel also foreclosed consideration of appropriate benchmarks.

269. We explain further in subsection 2 that the remedy for the compliance Panel's error is not found in China's radical new proposal to define "market" to include distortive government interventions. China's definition is not consistent with the concept of interactions between independent buyers and sellers that is captured by the term "market." The Appellate Body has recognized that *private prices* are the starting point for determining a benchmark precisely for this reason.[484] The fundamental concept of market prices as those which would be charged between independent enterprises acting at arm's length is recognized throughout the SCM Agreement[485] and in other provisions of the WTO Agreement.[486] In contrast, China's proposal turns the agreement term "market" on its head, such that the market would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions).

---

[483] *See* U.S. Appellant Submission, paras. 81-84.

[484] *US – Carbon Steel (India)*, para. 4.154 (describing prices from "private suppliers in arm's length transactions" as "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement"); *US – Softwood Lumber IV (Canada)* ("private prices in the market of provision will *generally* represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods.").

[485] *See, e.g.*, SCM Agreement, Annex I Illustrative List, item (e), n. 59 (in establishing existence of export subsidies, "Members reaffirm the principle that prices . . . should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length."); SCM Agreement, Art. 29.1 (referring to transformation from centrally-planned to "market, free-enterprise economy").

[486] *See, e.g.*, Customs Valuation Agreement, Art. 1.1(d) ("The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided: … (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2"); Customs Valuation Agreement, Note 3 to Article 1, paragraph 2 ("Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship.").

270. Finally, in subsection 3 we conclude the discussion by addressing the flaws in China's final argument that price distortion should not be a relevant consideration in the analysis under Article 14(d).

1. China's Appeal Highlights the Compliance Panel's Failure to Understand the Proper Approach to Article 14(d) of the SCM Agreement as Articulated by the Appellate Body

271. China's appeal sets in relief certain of the flaws in the compliance Panel's legal approach that the United States also identified in its appeal. China's claim of error with respect to the compliance Panel's reasoning in fact supports the U.S. appeal on this same aspect of the panel report. For example, in paragraph 134 of its other appellant submission, China makes the following observation:

> While China does not wish to understate either the importance or the difficulty of demonstrating that a particular government policy or action had a "direct impact" upon observed in-country prices, China does not believe that the Panel's approach is consistent with Article 14(d) as previously interpreted by the Appellate Body.[487]

The United States appreciates China's recognition that the impracticability or difficulty of the approach envisioned by the compliance Panel cannot be understated. Likewise, the United States appreciates China's recognition that the compliance Panel's approach is not consistent with Article 14(d). In light of this mutual recognition of certain aspects of the compliance Panel's errors, it is all the more troubling that the compliance Panel appeared to believe it was applying an approach the Appellate Body has articulated with respect to Article 14(d).[488]

272. As the United States demonstrated in its Appellant Submission, the compliance Panel's approach to applying Article 14(d) led to a conclusion without addressing the real question at issue, that is, whether prices were or were not market determined.[489] China formulates the complaint somewhat differently, as a failure to *define* "what a market-determined price *is*,"[490] but recognizes an error of the same nature in the compliance Panel's legal approach:

---

[487] China's Other Appellant Submission, para. 134.

[488] China's Other Appellant Submission, para. 14; *see also, e.g.*, China's Other Appellant Submission, para. 193.

[489] *See, e.g.*, U.S. Appellant Submission, para. 119 ("the compliance Panel . . . 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.").

[490] China's Other Appellant Submission, para. 131.

> The flaw in the Panel's approach is evident even under its own formulation of the relevant inquiry under Article 14(d): one cannot know whether "government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price" without first establishing what a market-determined price *is*. The Panel never answered this question. Not only does this approach fail to give effect to the terms of Article 14(d), but it results in a standard for rejecting in-country prices that is essentially circular in nature and devoid of any real content.[491]

273. In China's words, "the Panel's circular standard . . . states, in effect, that 'a market price is a price that doesn't deviate from a market price.'"[492] For the United States, the compliance Panel's approach is erroneous because it excludes consideration of the nature of prices in the country being examined, and so never considered how that approach would apply where there are no market prices against which to compare the subsidized price or where it is not feasible to distinguish between market and non-market prices.[493] Any difference observed in comparing one domestic price to another in that scenario 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."[494]

274. In any case, both China and the United States have highlighted that the compliance's Panel's understanding of the proper approach under Article 14(d) *cannot* be correct if it requires as its basis a valid benchmark (so to speak) against which to test each *proposed* benchmark. Ultimately, the compliance Panel failed to recognize that the very 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). 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. Thus, the compliance Panel erred in taking an approach that foreclosed consideration of whether or not a functioning market existed in this case.

---

[491] China's Other Appellant Submission, para. 131.

[492] China's Other Appellant Submission, para. 137.

[493] *See, e.g.,* U.S. Appellant Submission, paras. 137-41.

[494] *EC – Large Civil Aircraft (AB),* para. 975.

2. China's Concept of "Market" Is Based on a False Premise that Distortive Government Interventions Are Market Conditions

275. China argues that to properly interpret and apply Article 14(d), the compliance Panel should have established or defined what constitutes a "market" price before evaluating whether the USDOC properly determined that no market-determined prices were available within China. But China's concept of "market" includes the same trade-distorting interventions that are intended to be countered.

276. At first glance, China appears to acknowledge a reasonable approach to the term "market." China states, in paragraph 13 of its other appellant submission that:

> In China's view, a "market" price within the meaning of Article 14(d) is a price that is determined by the interplay of supply and demand, as opposed to a price that is effectively determined by the government.[495]

But later, within the *same* paragraph, China has *shifted* the meaning of "market" to refer to something entirely different, that is, a meaning that elides the concepts of market and state:

> The term "market" in Article 14(d) refers to a price determined by the interplay of supply and demand, *including as the forces of supply and demand may be affected by various government policies and actions*, but it does not refer to a price that is effectively determined by the government.[496]

A more careful examination of China's rhetoric confirms that China argues for a definition of market that *includes* the distortive interventions in question as part of the prevailing market conditions.[497]

277. China has also suggested at various points in this dispute that interpreting the reference to "market" as requiring a *functioning* market would impermissibly add terms to the text that are not there.[498] Both of China's assertions are wrong. A proper interpretation of the term "market"

---

[495] China's Other Appellant Submission, para. 13.

[496] China's Other Appellant Submission, para. 13 (emphasis added).

[497] *See, e.g.*, China's Other Appellant Submission, para. 13.

[498] *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

must give meaning to that term, and in particular, what the term "market" means in the context of the search for an appropriate benchmark against which to evaluate the level of benefit resulting from a government subsidy. 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 market that is not functioning as a market in an economic sense. 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."[499] 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)."[500]

278. 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 prices. For market forces to operate and determine prices, certain market functions are essential. The ability to exit the market (i.e., bankruptcy, insolvency, etc.) for example, is a market function that allows firms to exit the market when they are not profitable or otherwise unable to compete. As 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 not to be a functioning market due to the nature of these government interventions. The significance of these findings is that prices in China cannot be used to measure the adequacy of remuneration because those prices are not market determined, such as would reflect arm's-length transactions between independent buyers and sellers.

279. The Appellate Body has found that the sort of circularity in the comparison advocated by China would defeat the intended objective of Article 14(d). In *US – Softwood Lumber IV*, the

---

"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)).

[499] *EC – Large Civil Aircraft (AB)*, para. 975. Even to the extent government action is included, its inclusion should not shield it from the question: is it distortive? A relevant question might be – is it the kind of government intervention over which market conditions prevail? Instead of answering these questions, China invites the Appellate Body to bless a single ordinary meaning of the word market among the various ways that term may be defined.

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

Appellate Body explained that, in such a case, "the comparison contemplated by Article 14 [may] become circular"[501] and therefore fail to "ensure . . . the provision's purposes are not frustrated" as a result.[502] 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."[503]

280. 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 distortive government interventions the USDOC identified are such that prices would not reflect arm's-length transactions between independent buyers and sellers. As the USDOC established, that government involvement 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."[504]

3. China's Remaining Arguments Should Be Dismissed

281. Throughout its submission, China makes a number of assertions in addition to its argument that the meaning of the term "market" should be revised to include distortive government interventions. These remaining arguments seek to establish that price distortion has no meaning, that whether prices are distorted or not is not relevant to whether those prices can be used to measure a benefit, and that evidence of government intervention that directly impacts prices has no probative value in the context of applying Article 14(d). China argues, in other words, that none of the relevant considerations should be taken into account and – moreover – that accepting this proposition is "the only way to reconcile" what the Appellate Body has said is the proper approach to Article 14(d).[505] We explain below why these arguments should be dismissed.

---

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

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

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

[504] *EC – Large Civil Aircraft (AB)*, para. 975.

[505] China's Other Appellant Submission, para. 136.

a. China's Price Distortion Argument Lacks Merit

282. China argues at various points in its submission that "price distortion" is not a relevant consideration.[506] China's arguments lack credibility and merit in equal proportion:

- China argues that "price distortion" is not relevant to an adjudicator's review of an investigating authority's determination of whether an in-country benchmark is useable for purposes of measuring the adequacy of remuneration because, according to China, "the Appellate Body has never articulated an *abstract* concept of 'price distortion' under Article 14(d)."[507]

- China argues that the Appellate Body's references to price distortion are merely "paraphras[ing]"[508] or "coterminous"[509] with "the problem of circular price comparisons."[510]

- China argues that "there is only one way to reconcile the Appellate Body's recognition that Article 14(d) does not require a market 'undistorted by government intervention' with its simultaneous finding that there are 'very limited' circumstances in which Article 14(d) allows an investigating authority to resort to out-of-country benchmarks" and that "this reconciliation is made possible by recognizing that *all* of the Appellate Body's prior jurisprudence on the issue of 'distortion' under Article 14(d) has related to the problem of circular price comparisons."[511]

283. However, the text of Article 14(d) and the approach the Appellate Body has taken in applying that text do not provide support for China's position, nor does the application of common sense. As the Appellate Body explained in *US – Countervailing Measures (China)*:

> [T]he Appellate Body [has] indicated that an investigating authority may reject in-country prices if there is *price distortion* and, thus, that the analysis is not limited to determining whether the government is a predominant supplier. In this regard, the Appellate Body clarified that its reasoning in *US – Softwood*

---

[506] *See, e.g.*, China's Other Appellant Submission, paras. 134-36, 175-76.

[507] China's Other Appellant Submission, para. 136.

[508] China's Other Appellant Submission, para. 176.

[509] China's Other Appellant Submission, para. 175.

[510] China's Other Appellant Submission, para. 136.

[511] China's Other Appellant Submission, para. 136.

> *Lumber IV* excluded the application of a *per se* rule according to which an investigating authority could properly conclude in every case, and regardless of any other evidence, that the fact that the government is the predominant supplier establishes that there is price distortion.
>
> Therefore, the Appellate Body has cautioned against equating the concept of government predominance with the concept of price distortion, and has highlighted that the link between the two concepts is an evidentiary one.
>
> * * *
>
> As indicated by the Appellate Body, the analysis referred to above may lead an investigating authority to conclude that in-country prices cannot be relied upon for determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, and that an alternative benchmark should be employed.[512]

284. The analysis under Article 14(d) serves to illustrate the difference between the price the recipient paid and the price it would have paid under different – i.e., *market* – conditions. Where proposed benchmark prices are distorted, they cannot serve as a meaningful basis of comparison – particularly where they incorporate the same government behavior that gave rise to the subsidies in the first place. The Appellate Body has found that this sort of circularity in the comparison defeats the intended objective of Article 14(d). Adopting China's approach would fail to "ensure . . . the provision's purposes are not frustrated."[513]

b. China's Argument that Prices Are Not Distorted When Directly Impacted by Government Intervention Lacks Merit

285. China also asserts that the compliance Panel's approach should not be adopted because it construes "*any*"[514] direct impact on prices as a distortion.[515] But in making that assertion, China mischaracterizes the compliance Panel's findings. The compliance Panel did not suggest that

---

[512] *US – Countervailing Measures (China) (AB)*, paras. 4.51-53 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446; *US – Carbon Steel (India) (AB)*, para. 4.158).

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

[514] China's Other Appellant Submission, para. 134 ("[T]he approach taken by the Panel in the present dispute suggests that *any* government policy or action is a *potential* "distortion" under Article 14(d) and that the *only* fact that an investigating authority must establish is that the policy or action had what the Panel called a 'direct impact' upon in-country prices for the good in question.").

[515] *See, e.g.*, China's Other Appellant Submission, para. 135 ("Under the Panel's approach, however, it seems that a demonstrable "effect on market prices" resulting from a government policy or action *would* suffice to exclude those prices as benchmarks under Article 14(d).").

any impact would suffice, as China argues, but rather that evidence of direct impact on prices would be relevant.[516] As noted above, the Appellate Body's earlier findings on this very issue have recognized that, in light of the purpose of measuring the benefit to a recipient, being able to ensure that potential benchmark prices are not distorted by government intervention is fundamental to the proper application of Article 14(d):

> In sum, we are of the view that an investigating authority may reject in-country private prices if it reaches the conclusion that these are too distorted due to the predominant participation of the government as a supplier in the market, thus rendering the comparison required under Article 14(d) of the SCM Agreement circular. It is, therefore, price distortion that would allow an investigating authority to reject in-country private prices, not the fact that the government is the predominant supplier *per se*.[517]

China's allegations are premised upon an incomplete understanding of Article 14(d). Prices may no longer reflect market conditions in situations other than those in which the government determines all prices in a particular market. Because price distortion must be established on a case-by-case basis, there was no need for the compliance Panel to identify a particular threshold or "degree" above which intervention in a market becomes distortive.[518] Prices may not reflect the balance of supply and demand resulting from the interactions between market-oriented actors in a sector, even where direct control over pricing is not evident. As explained above, the relevant inquiry is not whether the various interventions in the steel sector "effectively determined" prices within the sector; rather, the question is whether the distortions in the market were such that they distorted firm-level decision-making and prevented the establishment of equilibrium prices determined by the "forces of supply and demand."[519] 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.

IV. CONCLUSION

286. For the foregoing reasons, the United States respectfully requests that the Appellate Body reject all of China's claims on appeal.

---

[516] *US – Countervailing Measures (China) (Article 21.5 – China) (Panel)*, para. 7.220.

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

[518] *See US – Countervailing Measures (China) (AB)*, para. 4.59.

[519] *US – Countervailing Measures (China) (AB)*, para. 4.46 (quoting *US – Carbon Steel (India) (AB)*, para. 4.150).