UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(DS437)

RESPONSES OF THE UNITED STATES TO THE PANEL'S WRITTEN QUESTIONS TO THE PARTIES

May 31, 2017

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Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
Dominican Republic – Import and Sale of Cigarettes (AB)	Appellate Body Report, Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes, WT/DS302/AB/R, adopted 19 May 2005
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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 – Agricultural Products II (AB)	Appellate Body Report, Japan – Measures Affecting Agricultural Products, WT/DS76/AB/R, adopted 19 March 1999
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
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

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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 – Continued Zeroing (AB)	Appellate Body Report, United States – Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R, adopted 19 February 2009
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, as modified by Appellate Body Report WT/DS437/AB/R
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 – 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 IV (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW, adopted 20 December 2005
US – Upland Cotton (Article 21.5 – Brazil) (Panel)	Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW and Corr.1, adopted 20 June 2008, as modified by Appellate Body Report WT/DS267/AB/RW
US – Upland Cotton (Article 21.5 – Brazil) (AB)	Appellate Body Report, *United States – Subsidies on Upland Cotton– Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW, adopted 20 June 2008
US – Wool Shirts and Blouses (AB)	Appellate Body Report, United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997, and Corr. 1

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US – Zeroing (EC) (Article 21.5 – EC) (AB)	Appellate Body Report, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS294/AB/RW and Corr.1, adopted 11 June 2009
US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)	Panel Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW, adopted 31 August 2009, upheld by Appellate Body Report WT/DS322/AB/RW

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Exhibit No.	Description
USA-129	*Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Citric Acid and Certain Citrate Salts;* 2012 (excerpted)
USA-130	*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)

PUBLIC BODIES

1. Is the Panel correct in understanding that the USDOC identified a government function that is "to maintain and uphold the socialist market economy"? Where in the record, and at what point in the proceedings, did the USDOC identify the relevant government function?

Response:

1. Yes. In the section 129 proceedings at issue, the U.S. Department of Commerce ("USDOC") identified "maintain[ing] and uphold[ing] the 'socialist market economy'" as a governmental function of the Government of China ("GOC").[1] The USDOC identified this governmental function in the Public Bodies Preliminary Determination in the section 129 proceedings, in which it described the "two findings at the core of [its] analysis":

> 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.[2]

2. Elsewhere in the Public Bodies Preliminary Determination, the USDOC referred to the governmental function of maintaining and upholding the socialist market economy when it summarized its findings concerning various categories of entities that could be found to be public bodies, depending on the evidence on the administrative record relating to particular entities. For example, the USDOC explained that:

> [E]nterprises 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

[1] *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. 9 (p. 10 of the PDF version of Exhibit CHI-4).

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

> 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.[3]

3. Later, in discussing the GOC's failure to cooperate to the best of its ability in the section 129 proceedings, the USDOC again referred to the governmental function of maintaining and upholding the socialist market economy, stating:

> [E]vidence contained within the Public Bodies Memorandum indicates that enterprises in which the government has significant ownership that are also subject to certain government industrial plans may be found to be public bodies on the basis of indicia that show whether such enterprises are used by the GOC to uphold the socialist market economy.[4]

4. The USDOC explained that, in making its public body preliminary determinations, it "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."[5] The USDOC "assessed whether the input producers at issue in these DS437 Section 129 proceedings 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."[6]

5. Several months before publishing its Public Bodies Preliminary Determination, the USDOC placed the Public Bodies Memorandum on the record of the section 129 proceedings, together with the CCP Memorandum and all of the evidence underlying those memoranda.[7] Section 1 of the Public Bodies Memorandum is entitled "UPHOLDING THE SOCIALIST MARKET ECONOMY -- WHICH FOCUSES ON MAINTAINING THE LEADING ROLE FOR THE STATE SECTOR -- IS A GOVERNMENTAL FUNCTION IN CHINA."[8] As the title of the section indicates, this portion of the Public Bodies Memorandum discusses in detail the evidence that supports the USDOC's finding 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

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[3] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4) (emphasis added).
[4] Public Bodies Preliminary Determination, p. 16 (p. 17 of the PDF version of Exhibit CHI-4) (emphasis added).
[5] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[6] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[7] *See* Public Bodies Preliminary Determination, p. 8 (p. 9 of the PDF version of Exhibit CHI-4). The USDOC placed the *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Tim 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") on the record of the section 129 proceedings on October 28, 2015. The Public Bodies Preliminary Determination is dated February 25, 2016. *See* Public Bodies Preliminary Determination, p.1 (p. 2 of the PDF version of Exhibit CHI-4).
[8] Public Bodies Memorandum, p. 6 (p. 7of the PDF version of Exhibit CHI-1).

and that this is 'considered part of the governmental practice in the legal order' of China."[9] That evidence includes Chinese laws, regulations, policies, and industrial plans, as well as extensive evidence from credible, third-party sources, such as the World Bank and the Organization for Economic Cooperation and Development ("OECD").

6. For example, in this portion of the Public Bodies Memorandum, the USDOC examines China's *Constitution* and explains that it is "the foundation of a legal regime establishing the primary role of the government in China's economy."[10] The USDOC cites 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."[11] The USDOC refers 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 . . . ."[12] The USDOC explains that the CCP explicitly shares this constitutional mandate.[13] 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."[14]

7. 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."[15] The USDOC considered that "[i]mportant and wide-reaching economic legislation provides further evidence of this,"[16] 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*.[17]

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

[9] Public Bodies Memorandum, p. 6 (p. 7of the PDF version of Exhibit CHI-1) (citation omitted).
[10] Public Bodies Memorandum, pp. 6-7 (pp. 7-8 of the PDF version of Exhibit CHI-1).
[11] 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).
[12] 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).
[13] *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. 31 (p. 71 of the PDF version of Exhibit CHI-1).
[14] 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).
[15] Public Bodies Memorandum, p. 7 (p. 8 of the PDF version of Exhibit CHI-1).
[16] Public Bodies Memorandum, p. 7 (p. 8 of the PDF version of Exhibit CHI-1).
[17] Public Bodies Memorandum, pp. 7-8 (pp. 8-9 of the PDF version of Exhibit CHI-1).

> 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…[18]

9. 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 its legal mandate to maintain the predominance of the state sector."[19] 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.[20]

The USDOC considered 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."[21]

10. Based on its review of the system of governance and state functions in China, the USDOC concluded that "China's government has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the 'socialist market economy,' which includes maintaining a leading role for the state sector in the economy."[22]

11. After concluding that a governmental function of the GOC is to maintain and uphold the socialist market economy, the USDOC then explained that it would assess whether the relevant entities covered by the section 129 proceedings at issue "'possess, exercise or are vested with governmental authority' in fulfilling the government function of maintaining and upholding the socialist market economy."[23]

12. The USDOC further explained 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

[18] Public Bodies Memorandum, p. 8 (p. 9 of the PDF version of Exhibit CHI-1).
[19] 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).
[20] Public Bodies Memorandum, p. 9 (citations omitted) (p. 10 of the PDF version of Exhibit CHI-1).
[21] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).
[22] Public Bodies Memorandum, p. 2 (p. 3 of the PDF version of Exhibit CHI-1) (emphasis added).
[23] Public Bodies Memorandum, p. 3 (p. 4 of the PDF version of Exhibit CHI-1) (emphasis added).

> such, is appropriately considered to be a "government function" for purposes of the Department's analysis of public bodies in China.[24]

13. In the Public Bodies Final Determination, after addressing arguments presented by the GOC, the USDOC "adopt[ed] the findings of the preliminary determinations for the[] final determinations,"[25] and 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."[26]

14. As demonstrated above, throughout the section 129 proceedings, the USDOC, at numerous points, identified maintaining and upholding the socialist market economy as a relevant governmental function of the GOC – a conclusion that is supported by a substantial amount of evidence on the administrative record. In light of its identification of that governmental function, the USDOC solicited from the GOC additional information relevant to its analysis of whether the GOC exercised meaningful control over the entities at issue – producers of inputs that provided those inputs to the company respondents in the investigation – and used those entities "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] As the USDOC explained:

> [T]he GOC has in some instances provided incomplete responses to [the USDOC's] questionnaires, thus affecting the 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.[28] [29]

2. Is upholding and maintaining the socialist market economy a government function?

a. Does China consider the government function identified by the USDOC to be invalid per se for the purposes of a public body analysis? If so, please explain the specific grounds for this view.

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[24] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).
[25] Public Bodies Final Determination, p. 2 (p. 3 of the PDF version of Exhibit CHI-5).
[26] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5) (emphasis added).
[27] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).
[28] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).
[29] In addition to the U.S. response to this question, the United States also refers the Panel to the summary of the USDOC's findings presented in the U.S. first written submission. *See* U.S. First Written Submission, paras. 63-74. *See also* Public Bodies Memorandum, pp. 6-11 (pp. 7-12 of the PDF version of Exhibit CHI-1).

b. On what specific grounds does China consider the identified government function to be "irrelevant"?

Response:

15. With respect to the chapeau of this question, as explained in response to question 1 above, the USDOC found, based on substantial evidence on the administrative record, that upholding and maintaining the socialist market economy is a governmental function of the GOC. In response to question 3 below, the United States explains that there are no limitations *a priori* on what may constitute a governmental function for the purposes of determining whether an entity is a "public body" under Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

16. The United States understands that the sub-parts of this question are directed to China.

3. Are there any limitations a priori on what may constitute a "government function" for the purposes of determining whether an entity is a "public body"?

Response:

17. No. The SCM Agreement does not establish any limitations *a priori* on what may constitute a "government function" for the purposes of determining whether an entity is a "public body," and the Appellate Body has not articulated any such limitations in its findings concerning the interpretation of the term "public body." The Appellate Body has found – as did the original Panel – that the term "public body" means an entity that possesses, is vested with, or exercises "governmental authority."[30] The Appellate Body has not further expressed its views on the meaning of the terms "governmental authority" or "governmental function."

18. The findings in prior reports, though, support that a wide variety of types of governmental authority or governmental functions could be relevant in a public body analysis, and the government functions that might be relevant are not limited to the few activities described in the subparagraphs of Article 1.1(a)(1) of the SCM Agreement. For example, the Appellate Body has indicated 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."[31] The "power to regulate" is not conduct described in subparagraphs (i)-(iii) of Article 1.1(a)(1) of the SCM Agreement. The Appellate Body also has said 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."[32] And the Appellate Body has explained that:

> Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core

[30] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 296, 317. *See also US – Countervailing Measures (China) (Panel)*, para. 7.65-7.66.
[31] *US – Carbon Steel (India) (AB)*, para. 4.17.
[32] *US – Carbon Steel (India) (AB)*, para. 4.20.

> 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 characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[33]

19. The Appellate Body's findings, in particular its observation that "there are different ways in which a government could be understood to vest an entity with 'governmental authority', and therefore different types of evidence may be relevant,"[34] indicate that the Appellate Body has understood the concepts of "governmental authority" and "governmental function" as being more open-ended than China suggests. The Appellate Body's reference to functions or conduct that "'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,'"[35] likewise suggests that a wide range of governmental functions could be relevant to the public body analysis. Nothing in the Appellate Body's findings suggests that the Appellate Body has taken the view that the only "relevant" governmental functions are the few particular activities described in Article 1.1(a)(1) of the SCM Agreement.

20. In any event, it is not necessary for the Panel to define the outer bounds of what may constitute "governmental authority" or a "governmental function" for the purpose of resolving this dispute. As the United States has demonstrated, the "governmental function" identified by the USDOC – maintaining and upholding the socialist market economy – has a clear, logical connection to the particular conduct under Article 1.1(a)(1) of the SCM Agreement – providing goods.

21. Furthermore, the United States has shown that the USDOC's public body determinations in the section 129 proceedings at issue here are based on analysis and evidence that are very similar to, though more voluminous than the analysis and evidence in *US – Anti-Dumping and Countervailing Duties (China)*, wherein the Appellate Body upheld the USDOC's public body determination with respect to state-owned commercial banks ("SOCBs"). The outcome here

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[33] *US – Carbon Steel (India) (AB)*, para. 4.29 (emphasis added). *See also id*., paras. 4.9, 4.42; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[34] *US – Carbon Steel (India) (AB)*, para. 4.29.
[35] *US – Carbon Steel (India) (AB)*, para. 4.29.

should, in that regard, be the same as the outcome in *US – Anti-Dumping and Countervailing Duties (China)*.

4. Is the relevant "government function" under a public body analysis limited to actions constituting a financial contribution under Article 1.1(a)(1) of the SCM Agreement? Alternatively, is an investigating authority permitted to identify a potentially broader "government function" as part of its public body analysis?

Response:

22. The United States refers the Panel to the U.S. response to question 3 above, which explains that nothing in the Appellate Body's findings concerning the interpretation of the term "public body" suggests that the Appellate Body has taken the view that the relevant "government function" under a public body analysis is limited to actions constituting a financial contribution under Article 1.1(a)(1) of the SCM Agreement. Rather, the Appellate Body's findings suggest that an investigating authority is permitted to identify a potentially broader "government function" as part of its public body analysis; for example, "the power to regulate."[36]

a. In this context, can China comment on the GOC's responses to the public body questionnaire that "[p]revention of environmental degradation and the regulation of energy usage are areas broadly recognized as governmental functions"?

Response:

23. The United States understands that sub-part (a) of this question is directed to China.

b. What is the relevance of the term "functions" in Article 1.1(a)(1)(iv) of the SCM Agreement for our analysis under Article 1.1(a)(1)?

Response:

24. The term "functions" in Article 1.1(a)(1)(iv) of the SCM Agreement appears in the phrase "one or more of the type of functions illustrated in (i) to (iii) above." On its face, that phrase establishes a link between Article 1.1(a)(1)(iv) and subparagraphs (i)-(iii) of Article 1.1(a)(1). Per the terms of Article 1.1(a)(1)(iv), the investigating authority must establish that a private body has been entrusted or directed to engage in one or more of the activities described in subparagraphs (i)-(iii) of Article 1.1(a)(1), which are the activities that may constitute a "financial contribution" under Article 1.1(a)(1).[37]

25. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered Article 1.1(a)(1)(iv) of the SCM Agreement as context for the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.[38] In the course of its discussion,

[36] *US – Carbon Steel (India) (AB)*, para. 4.17.
[37] A WTO dispute settlement panel is subject to the same requirement when considering a Member's claims against an alleged subsidy provided by another Member in a WTO dispute settlement proceeding.
[38] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 291-297.

the Appellate Body touched on "the question as to what kind of authority or responsibility an entity must exercise or be vested with to constitute a public body in the sense of the *SCM Agreement*."[39] The Appellate Body considered 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 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.[40]

26. In the passage quoted above, the Appellate Body distinguishes between the "conduct" listed in subparagraphs (i)-(iii) of Article 1.1(a)(1) of the SCM Agreement, *i.e.*, the "particular means of making a financial contribution," and the separate concept of "governmental responsibilities, or exercising certain governmental authority."[41] While the Appellate Body observed that taxation "is an integral part of the sovereign function," the Appellate Body characterized that as contextual support for its interpretation of the term "public body," and did not indicate that it is necessary to establish that the types of conduct listed in Article 1.1(a)(1)(i) and (iii), which can be carried out by a government as well as by private bodies, are themselves government functions.[42]

27. The Appellate Body went on to consider as a contextual element the phrase "which would normally be vested in the government," which also appears in subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement.[43] The Appellate Body explained that:

> [T]he 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. The next part of that provision, which refers to a practice that, "in no real sense, differs from practices normally followed by governments", further suggests that the classification and functions of entities

[39] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 295.
[40] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296 (emphasis added).
[41] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296.
[42] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296.
[43] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297.

> within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies.[44]

The Appellate Body did not find, though, that it is necessary, for the purpose of a "public body" analysis, to establish that the "particular means of making a financial contribution"[45] described in subparagraphs (i)-(iii) of Article 1.1(a)(1) themselves constitute a government function.

5. Has the USDOC addressed the "core characteristics" of the relevant entities, as described in past Appellate Body rulings?

Response:

28. Yes. The USDOC addressed the "core characteristics" of the relevant entities, as described in past Appellate Body reports. Indeed, the Public Bodies Memorandum reflects the USDOC's effort to undertake "An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in [*US – Anti-Dumping and Countervailing Duties (China)*]".[46] In the Public Bodies Memorandum and the CCP Memorandum, the USDOC explicitly referred to the findings of the Appellate Body concerning the interpretation of the term "public body."[47] The USDOC noted, in particular, that the Appellate Body "emphasized that investigating authorities undertaking a public body analysis must conduct 'a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.'"[48]

29. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body applied its own interpretation of the term "public body" when it reviewed the USDOC's determination that SOCBs in China are public bodies. After finding that an investigating authority should evaluate "the core features of the entity concerned, and its relationship with the government in the narrow sense,"[49] 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."[50] 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 GOC. 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

[44] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297 (emphasis added).
[45] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296.
[46] Public Bodies Memorandum, p. 1 (p. 2 of the PDF version of Exhibit CHI-1).
[47] *See, e.g.*, Public Bodies Memorandum, pp. 1-2 (p. 2-3 of the PDF version of Exhibit CHI-1); CCP Memorandum, pp. 1-2 (pp. 41-42 of the PDF version of Exhibit CHI-1).
[48] CCP Memorandum, p. 2 (p. 42 of the PDF version of Exhibit CHI-1) (emphasis added).
[49] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[50] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).

> 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 USDOC considered evidence indicating that SOCBs still lack adequate risk management and analytical skills.[51]
>
> ...
>
> In addition, [the USDOC] 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.[52]

30. Having reviewed the "extensive evidence" described above, 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."[53] In the view 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."[54]

31. In *US – Carbon Steel (India)*, the Appellate Body summarized its interpretative findings concerning the term "public body" as follows:

> 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",

[51] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350 (emphasis added).
[52] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 351.
[53] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[54] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).

> 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 characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[55]

32. These Appellate Body findings in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Carbon Steel (India)* offer guidance as to what may be relevant in an examination of the "core characteristics" of an entity in the context of a public body analysis. Those findings suggest that relevant evidence may include, *inter alia*:

- information relating to government ownership and control of entities[56];
- laws, regulations, policies, or plans requiring entities to carry out their business based upon the needs of the national economy and consistent with government industrial policies[57];
- information on the legal and economic environment prevailing in the country in which the entities operate[58];
- evidence regarding the scope and content of government policies relating to the sector in which an investigated entity operates[59];
- evidence showing government-appointment of executives and board members of entities[60]; and
- evidence showing government involvement in the management of entities.[61]

33. As the United States has demonstrated,[62] and as discussed further in response to the sub-parts of this question, the USDOC, in the section 129 proceedings at issue, examined precisely the kind of information that the Appellate Body has found relevant to an analysis of the "core characteristics" of entities for the purposes of making a public body determination.

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[55] *US – Carbon Steel (India) (AB)*, para. 4.29 (emphasis added).
[56] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[57] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 350, 351.
[58] *See US – Carbon Steel (India) (AB)*, para. 4.29.
[59] *See US – Carbon Steel (India) (AB)*, para. 4.29.
[60] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[61] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[62] *See, e.g.*, First Written Submission of the United States of America (February 6, 2017) ("U.S. First Written Submission"), paras. 38-42, 63-117; Second Written Submission of the United States of America (March 27, 2017) ("U.S. Second Written Submission"), paras. 68-80.

a. What are the "core characteristics" of the relevant entities in this case?

Response:

34. The "core characteristics" of the relevant entities in the section 129 proceedings at issue here are very similar to the types of "core characteristics" identified by the Appellate Body in prior reports.

35. For example, the USDOC solicited from the GOC and, for some entities, received information relating to government ownership and control of the entities.[63] As explained further in response to question 8 below, 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.[64] The USDOC also 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.[65] 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.[66] 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.[67] Lastly, the USDOC asked for information concerning key decision-making, restructuring, and key persons.[68] The GOC largely failed to respond to the USDOC's public bodies questionnaire, as explained in response to question 8 below.

36. Despite the GOC's failure to cooperate, the USDOC nevertheless had before it a massive amount of record evidence relevant to the "core characteristics" of the entities at issue in the section 129 proceedings, which permitted the USDOC to examine the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority.[69] This evidence included information on the legal and economic environment

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[63] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[64] *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"), Part 1 (Exhibit USA-83).
[65] *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).
[66] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).
[67] *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).
[68] *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).
[69] *See* U.S. First Written Submission, paras. 83-102 (discussing the USDOC's analysis of evidence in the Public Bodies Memorandum).

prevailing in China,[70] as well as laws, regulations, policies, or plans requiring entities to carry out their business based upon the needs of the national economy and consistent with government industrial policies.[71]

37. The USDOC discussed this information, *inter alia*, in the Public Bodies Memorandum and the CCP Memorandum.[72] The USDOC "note[d] that some laws … 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."[73] The USDOC found that "plans 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.'"[74]

38. 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."[75] Specifically, Article 11 provides that "[t]he private sector of the economy is a complement to the socialist public economy."[76] 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."[77] Additionally, the USDOC found that "[c]ompetition from the non-state sector is further constrained by investment guidelines issued by the government."[78]

39. The USDOC examined evidence showing government-appointment of executives and board members of entities.[79] The USDOC found that SASAC has the power to appoint SOE managers, board members, and Supervisory Board members.[80] 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.[81] 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.[82] The CCP's appointment power

[70] *US – Carbon Steel (India) (AB)*, para. 4.29.
[71] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 350, 351.
[72] *See* U.S. First Written Submission, paras. 69-74 (discussing the USDOC's analysis of evidence in the Public Bodies Memorandum); U.S. Second Written Submission, para. 74 (presenting a summary table of some of the evidence examined by the USDOC).
[73] Public Bodies Memorandum, p. 12 (citations omitted) (p. 13 of the PDF version of Exhibit CHI-1).
[74] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).
[75] Public Bodies Memorandum, p. 16 (p. 17 of the PDF version of Exhibit CHI-1).
[76] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).
[77] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).
[78] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).
[79] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[80] Public Bodies Memorandum, p. 30 (citing Article 13, *Tentative Measures*) (p. 31 of the PDF version of Exhibit CHI-1).
[81] Public Bodies Memorandum, p. 32 (p. 33 of the PDF version of Exhibit CHI-1).
[82] Public Bodies Memorandum, p. 32 (citing Articles 63, 64, *Civil Servant Law*) (p. 33 of the PDF version of Exhibit CHI-1).

allows it to "intervene for any reason,"[83] and "reshufflings serve as a reminder to the managers of the state sector that the government is ultimately in charge. . . ."[84] The USDOC found that "key 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 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."[85] The USDOC found that, "[i]n 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 companies, whether state, private, domestic or foreign-invested, 'to carry out activities of the Chinese Communist Party.'"[86]

40. The USDOC examined evidence showing government involvement in the management of entities.[87] This evidence included industrial plans that "not only reflect the government's broad economic development objectives, but [] 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."[88]

41. As described above, the "core characteristics" of the entities that the USDOC examined in the section 129 proceedings are the very same types of "core characteristics" that the Appellate Body has identified in prior reports.

b. At paragraph 17 of its oral statement, the United States asserts that the USDOC examined the core features of the entities concerned and their relationship with the government. The United States goes on to refer to China's constitutional mandate, broader legal framework, maintaining a leading role for the state sector, etc. Is it the United States' view that these relate to the core characteristics of the entities?

Response:

42. Yes. As noted above, the Appellate Body, in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Carbon Steel (India)*, discussed, *inter alia*, information on the legal and economic environment prevailing in the country in which the entities operate[89] and laws, regulations, policies, or plans requiring entities to carry out their business based upon the needs of the national economy and consistent with government industrial policies.[90] The Appellate

[83] 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).
[84] Public Bodies Memorandum, p. 32 (citing *A Choice of Models*, The Economist (January 2012)) (p. 33 of the PDF version of Exhibit CHI-1).
[85] Public Bodies Memorandum, p. 33 (p. 34 of the PDF version of Exhibit CHI-1).
[86] Public Bodies Memorandum, p. 35 (p. 36 of the PDF version of Exhibit CHI-1).
[87] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[88] Public Bodies Memorandum, p. 23 (p. 24 of the PDF version of Exhibit CHI-1).
[89] *See US – Carbon Steel (India) (AB)*, para. 4.29.
[90] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 350, 351.

Body's findings in those disputes indicate that such information is relevant to an analysis of the "core characteristics" of entities for the purposes of a public body determination. This is logical, given the Appellate Body's explanation that the purpose of examining the core characteristics of an entity in a public body analysis is to ascertain the entity's "relationship with the government in the narrow sense."[91]

43. In the section 129 proceedings here, the USDOC found, *inter alia*, 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.[92] The USDOC also found that the GOC meaningfully controls entities in China and uses them "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."[93] China's *Constitution* and the host of laws, regulations, policies, and industrial plans, as well as credible, third-party sources, such as the World Bank and the OECD, which the USDOC examined, shed light on the "core characteristics" of entities in China and their relationship to the government, as a general matter. The USDOC requested from the GOC additional entity-specific information, as described in response to question 8 below, and elsewhere. Such information, had the GOC provided it, may have shed additional light on the "core characteristics" of particular entities and their relationship to the government.

c. Could the United States point to specific evidence concerning the "core characteristics" of the relevant entities, including questions asked and responses provided, and the USDOC's consideration of such evidence?

Response:

44. The United States refers the Panel to the U.S. responses to the earlier sub-parts of this question. In particular, the U.S. response to sub-part (a) of this question discusses certain specific evidence concerning the "core characteristics" of the relevant entities on which the USDOC relied in making its public body determinations, and explains how the "core characteristics" that the USDOC examined here are very similar to the types of "core characteristics" identified by the Appellate Body in prior reports. The United States also refers the Panel to the U.S. response to question 9 below, which explains that the USDOC considered all of the information that the GOC provided in its partial response to the USDOC's questionnaires.

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

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

[93] *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 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5). *See also* Public Bodies Memorandum, p. 8 (p. 9 of the PDF version of Exhibit CHI-1); Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).

d. What does China consider would be relevant questions in determining the "core characteristics" of the relevant entities?

Response:

45. The United States understands that sub-part (d) of this question is directed to China.

6. Does China contend that the factual evidence set out in the Public Bodies Memorandum and CCP Memorandum (rather than the identified government function) is irrelevant to a public body inquiry?

a. Is this evidence relevant to examining "meaningful control" as an element of the public body analysis?

Response:

46. The United States understands that this question is directed to China.

7. Does the evidence relied upon by the USDOC in the Public Bodies Memorandum and CCP Memorandum support the USDOC's conclusions with respect to the different categories of entities in China based on the extent of government ownership?

Response:

47. Yes. The massive amount of record evidence relied upon by the USDOC in the Public Bodies Memorandum and the CCP Memorandum provides ample support for the USDOC's conclusions concerning different categories of entities in China. As the USDOC explained in both the Public Bodies Preliminary Determination and in the Public Bodies Memorandum:

> [A]ny enterprise in China in which the government has a full or controlling ownership interest is found to be a public body. This conclusion rests 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 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.[94]

48. As is plain from the USDOC's summary of its findings, the evidence discussed in the Public Bodies Memorandum supports the USDOC's findings with respect to the different categories of entities based on the extent of government ownership, but the USDOC's conclusions did not rest on the level of government ownership alone. Rather, the USDOC examined a massive amount of evidence, including Chinese laws, regulations, policies, and industrial plans, as well as information from reliable third-party sources, before reaching its conclusions concerning the different categories of entities in China.

8. Did the mandatory respondents and the GOC cooperate to the best of their ability in the Section 129 investigations?

Response:

49. As an initial matter, the United States observes that this question and its sub-parts appear to relate to Article 12.7 of the SCM Agreement, which provides that, "[i]n cases in which any

[94] Public Bodies Preliminary Determination, pp. 9-10 (citations to the Public Bodies Memorandum omitted) (pp. 10-11 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Memorandum, pp. 37-38 (pp. 38-39 of the PDF version of Exhibit CHI-1).

interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available." The United States recalls that China did not advance any claims under Article 12.7 in its written submissions, and China confirmed during the panel meeting that it does not seek findings from the Panel that the USDOC's reliance on facts available in the section 129 proceedings is inconsistent with Article 12.7.

50. That being said, as explained further below, the USDOC found that the GOC did not cooperate to the best of its ability in the section 129 proceedings.[95] Indeed, during the panel meeting, China confirmed that the GOC made a "choice" not to respond completely to the USDOC's public bodies questionnaire.

51. Based on the evidence, analysis, and explanation set forth in the Public Bodies Memorandum and the CCP Memorandum, the USDOC "reached certain conclusions about the categories of enterprises in China,"[96] including, *inter alia*:

> First, any enterprise in China in which the government has a full or controlling ownership interest is found to be a public body.[97]
>
> …
>
> 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.[98]
>
> …
>
> 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.[99]

52. The USDOC explained that, to assess whether the input producers at issue in the section 129 proceedings 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 "issued to the GOC a public bodies questionnaire for each of the 12 relevant investigations to obtain necessary ownership and corporate governance information

[95] In the twelve section 129 proceedings that involved public body determinations, the USDOC issued its public bodies questionnaire only to the GOC – and not to any mandatory respondents – because the USDOC was seeking information concerning the extent of the GOC's involvement in the entities at issue in order to determine whether such entities were public bodies. The USDOC found that the GOC did not cooperate to the best of its ability. Thus, the USDOC's reliance on facts available in its public body analysis was a result of the GOC's failure to cooperate, and did not reflect the extent of the mandatory respondents' participation in the section 129 proceedings.
[96] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).
[97] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).
[98] Public Bodies Preliminary Determination, p. 10 (emphasis added) (p. 11 of the PDF version of Exhibit CHI-4).
[99] Public Bodies Preliminary Determination, p. 10 (emphasis added) (p. 11 of the PDF version of Exhibit CHI-4).

for those enterprises that produced inputs that were purchased by respondents during the [period of investigation] of the investigations."[100]

53. The USDOC's public bodies questionnaire consisted of two parts.[101] 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, 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.

54. 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."[102] 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.[103] 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.[104] 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.[105] Lastly, the USDOC asked for information concerning key decision-making, restructuring, and key persons.[106] 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"[107] "such that these entities possess, exercise, or are vested with governmental authority."[108]

55. In seven of the twelve section 129 proceedings,[109] the GOC simply refused to respond to the USDOC's request for information. The USDOC therefore found that the GOC failed to

[100] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[101] *See* Public Bodies Questionnaire (Exhibit USA-83).
[102] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).
[103] *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).
[104] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).
[105] *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).
[106] *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).
[107] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4).
[108] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).
[109] *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).

participate, it withheld information that was requested, and it significantly impeded the proceedings.[110]

56. In the remaining five section 129 proceedings,[111] "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."[112] As described above, the USDOC asked for substantially more information 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,"[113] but the GOC failed to provide the requested information. 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."[114] 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.[115]

a. Could the United States explain what the USDOC considered was missing in the GOC's responses?

Response:

57. As described further below, all of the entity-specific information that the USDOC requested from the GOC was missing from the GOC's responses in certain of the section 129 proceedings. In other section 129 proceedings, the missing information included articles of groupings, company by-laws, annual reports, articles of association, business group registration, business licenses, and tax registration documents; 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; and information concerning key decision-making, restructuring, and key persons.

58. As noted above, in seven of the twelve section 129 proceedings,[116] the GOC simply refused to respond to the USDOC's requests for information. Thus, all of the entity-specific information that the USDOC requested from the GOC was missing from the GOC's responses for those proceedings.

59. In the remaining five section 129 proceedings,[117] "the GOC reported that most of the input producers at issue … are majority-owned by the government" and, as the USDOC had

[110] *See* Public Bodies Preliminary Determination, p. 13, (p. 14 of the PDF version of Exhibit CHI-4).
[111] *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).
[112] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[113] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[114] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[115] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[116] *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).
[117] *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).

requested, the GOC provided information for those producers, including the "corporate name of the company and address; Articles of Incorporation; and Capital Verification Reports."[118]

60. However, 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."[119] For other enterprises, the GOC did not even provide the requested Articles of Incorporation, Capital Verification Reports, and Articles of Association.

61. As described above, the USDOC asked for substantially more information 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."[120] The information that the USDOC requested included articles of groupings, company by-laws, annual reports, articles of association, business group registration, business licenses, and tax registration documents;[121] 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;[122] and information concerning key decision-making, restructuring, and key persons.[123] All such information was missing from the GOC's responses.

62. China has suggested that the GOC provided "a substantial portion" of the requested entity-specific information in the *Kitchen Shelving* and *OCTG* section 129 proceedings.[124] As an initial matter, China's own assertion demonstrates that the GOC's responses, which purportedly provided "a substantial portion" of the requested information, did not provide all of the information requested. Rather, the GOC made a "choice" about what information it would provide and what information it would withhold.

63. Furthermore, the information that the GOC provided was not responsive to the USDOC's requests for information, nor was it specific to the entities under examination. In the cover letter accompanying its questionnaire response in the *OCTG* section 129 proceeding, the GOC took issue with the questions that the USDOC had posed, asserting that, in the GOC's view, the USDOC's "questions concerning non-majority input suppliers would not be sufficient, on their face, to resolve the question of whether these input suppliers were public bodies during the period of investigation."[125] Accordingly, the GOC unilaterally decided that, in response to the

[118] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4).
[119] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4) (emphasis added).
[120] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[121] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).
[122] *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).
[123] *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).
[124] *See* Second Written Submission of China (March 2, 2017) ("China's Second Written Submission"), para. 96.
[125] Cover Letter Accompanying the 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 Bodies Questionnaire Response"), p. 8 (p. 9 of the PDF version of Exhibit CHI-2).

USDOC's questions concerning non-majority owned enterprises, it would simply cite to portions of Chinese laws, or assert that it was unable to provide the information requested.

64. For example, the USDOC asked the GOC for information concerning key decision-making and asked for an explanation of how and by whom corporate decisions are taken in the entity with respect to appointment of senior managers, appointment of board members, voting rights of board members, investments, distribution of profits, production and marketing, financing and use of funds, mergers and acquisitions, and change in capital structure. Instead of providing information specific to the entities at issue, the GOC simply cited to the 2006 *Company Law*.[126] The USDOC examined and analyzed the 2006 *Company Law* in both the Public Bodies Preliminary Determination and the Public Bodies Memorandum.[127] The GOC's "choice" not to provide the entity-specific information that the USDOC requested meant that that information was missing from the GOC's responses.

b. Was the Public Bodies Memorandum intended to replace this missing information?

Response:

65. The Public Bodies Memorandum was not "intended to replace … missing information." The Public Bodies Memorandum is, *inter alia*, "a review of the system of governance and state functions" in China[128] and an analysis of "evidence surrounding the types of enterprises that are subject to the underlying CVD proceedings and for which a public body analysis must be conducted,"[129] including evidence that enterprises are meaningfully controlled by the GOC.[130] The Public Bodies Memorandum presents and explains certain conclusions based on evidence that the USDOC examined, but the memorandum also explicitly contemplates that the USDOC will solicit additional information about specific entities that are being examined to determine whether they are public bodies.[131] The Public Bodies Memorandum, as well as the CCP Memorandum and the evidence underlying those memoranda, are part of the records of the section 129 proceedings at issue and constitute factual information on which the USDOC appropriately could rely when making determinations concerning the role played by the GOC in enterprises such as the input producers examined in the section 129 proceedings.[132]

66. As explained above, the USDOC found that the GOC did not cooperate to the best of its ability in the section 129 proceedings, and the GOC refused to provide much of the information that the USDOC had requested. Indeed, during the panel meeting, China confirmed that the GOC made a "choice" not to respond completely to the USDOC's public bodies questionnaire.

[126] *See* GOC Public Bodies Questionnaire Response, p. 29 (p. 45 of the PDF version of Exhibit CHI-2).
[127] *See, e.g.*, Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4); Public Bodies Memorandum, pp. 33-35 (pp. 34-36 of the PDF version of Exhibit CHI-1).
[128] Public Bodies Memorandum, p. 2 (p. 3 of the PDF version of Exhibit CHI-1).
[129] Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1).
[130] *See* Public Bodies Memorandum, pp. 11-37 (pp. 12-38 of the PDF version of Exhibit CHI-1).
[131] *See* Public Bodies Memorandum, p. 38 (p. 39 of the PDF version of Exhibit CHI-1).
[132] *See* Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).

67. Given the "choice" that the GOC made, the USDOC determined that it was necessary – in seven of the twelve section 129 proceedings in which China provide no responses at all[133] – to "resort[] to the use of facts otherwise available" and that "an adverse inference in selecting from among the facts otherwise available is warranted."[134] While the GOC's refusal to provide requested information meant that entity-specific "information necessary to th[e] evaluation of whether the relevant input producers qualify as 'public bodies' is not available on the record,"[135] the USDOC 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 an [adverse facts available] determination that the input producers in the seven Section 129 proceedings are public bodies.[136]

68. In the remaining five section 129 proceedings,[137] "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."[138] "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 in the U.S. written submissions 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."[139] Accordingly, the USDOC found the majority-owned input producers in these five section 129 proceedings to be public bodies.[140]

69. 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."[141] As described above, the USDOC asked for substantially more information

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[133] *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] Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).
[135] Public Bodies Preliminary Determination, pp. 12-13 (pp. 13-14 of the PDF version of Exhibit CHI-4).
[136] Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).
[137] *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).
[138] Public Bodies Preliminary Determination, p. 14 (p. 15 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] *See* Public Bodies Preliminary Determination, pp. 14-15 (pp. 15-16 of the PDF version of Exhibit CHI-4).
[141] 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."[142] 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."[143] 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.[144] As a result, the USDOC determined that it was necessary to "resort[] to the use of facts otherwise available" and that "an adverse inference is warranted in selecting from the facts otherwise available."[145]

70. 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, as [adverse facts available], 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.[146]

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.[147]

9. Did the USDOC consider information provided by the GOC in five investigations? Please indicate whether, and if so where, this information was considered and used in the USDOC's determinations.

[142] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[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. 16 (p. 17 of the PDF version of Exhibit CHI-4).
[147] *See* Public Bodies Preliminary Determination, p. 17 (p. 18 of the PDF version of Exhibit CHI-4).

Response:

71. Yes. The USDOC considered all of the information provided by the GOC in the five investigations. For example, in the Public Bodies Preliminary Determination in the section 129 proceedings, the USDOC explained that, to perform the public body analysis:

> [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.[148]

72. The USDOC explicitly discussed its consideration of the information provided by the GOC in the five investigations in which the GOC responded to the USDOC's public bodies questionnaire, explaining that:

> In its Public Bodies Responses for Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders, the GOC reported that most of the input producers at issue in these five Section 129 proceedings are majority-owned by the government and provided the following information for those input producers: corporate name of the company and address; Articles of Incorporation; and Capital Verification Reports. The information on the record demonstrates that the GOC had full or controlling ownership interest in these producers during the respective POIs. This record evidence and the evidence discussed and analyzed in the Public Bodies Memorandum indicate that these majority-government-owned enterprises are "public bodies."[149]

73. The USDOC further explained that:

> 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, we preliminarily determine 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. Accordingly, we preliminarily determine that the majority government-owned producers which provided the inputs purchased by the respondents under the various input for

[148] Public Bodies Preliminary Determination, pp. 10-11 (pp. 11-12 of the PDF version of Exhibit CHI-4) (emphasis added).
[149] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4) (emphasis added).

> LTAR programs in the five investigations are government authorities within the meaning of section 771(5)(8) of the Act, and thus "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement.[150]

74. Additionally, the USDOC noted that:

> In its Public Bodies Responses for Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders, 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.[151]

75. 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.[152] 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.[153]

76. 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 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

[150] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4) (emphasis added).
[151] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4) (emphasis added).
[152] *See* Public Bodies Final Determination, pp. 2-6 (pp. 3-7 of the PDF version of Exhibit CHI-5).
[153] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).

> the Department basing its analyses in part on the facts available, the Department's public body determinations are supported by affirmative record evidence.[154]

77. 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."[155] 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."[156]

78. China has suggested that "the GOC provided numerous laws, regulations, and industrial plans"[157] as part of its questionnaire response and argues that the USDOC failed "to evaluate the evidence submitted by the GOC and to provide a reasoned explanation for why it 'rejected or discounted' evidence that was contrary to its determination."[158] In reality, rather than failing to evaluate the evidence submitted by the GOC, and far from rejecting or discounting that evidence, the USDOC actually discussed that evidence at length and the USDOC relied on the evidence as support for its conclusions. China appears to disagree with the weight that the USDOC gave certain evidence, but there is no justification for China's assertion that the USDOC "failed to address" the evidence.[159]

79. For example, China points to "economic and sector specific plans,"[160] the *11th Five-Year Plan*,[161] the *Decision of the State Council on Promulgating the Interim Provisions on Promoting Industrial Structure Adjustment (No. 40 {2005})* ("*Decision No. 40*"),[162] and the *Iron and Steel Policy*,[163] which China submitted to the USDOC and discussed in its questionnaire response. The USDOC itself discussed precisely those documents in the Public Bodies Memorandum, as China acknowledges in its first written submission. In China's own words, "the USDOC asserts that China's industrial plans 'provide a roadmap of often specific, state-guided interventions in a wide range of important industrial sectors and the individual business decisions of enterprises in these sectors'."[164] "The USDOC asserts in relation to the *11th Five-Year Plan* that 'the government both incentivizes and demands certain firm behavior in furtherance of industrial policy goals embodied in the Eleventh FYP."[165] "According to the USDOC, *Decision No. 40* is a 'policy document meant to guide investment and restructuring of a number of industries' in relation to China's *11th Five-Year Plan*, which calls for 'a number of measures to be undertaken in order to meet the policy goals of the state and is explicit in its mandate for the State at all levels'."[166] "[T]he USDOC states that the *Iron and Steel Policy* 'contemplates numerous specific

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[154] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5) (emphasis added).
[155] Public Bodies Final Determination, p. 5, note 26 (p. 6 of the PDF version of Exhibit CHI-5).
[156] Public Bodies Final Determination, p. 5, note 26 (p. 6 of the PDF version of Exhibit CHI-5) (emphasis added).
[157] First Written Submission of China (January 4, 2017) ("China's First Written Submission"), para. 109.
[158] China's First Written Submission, para. 112.
[159] *See* China's First Written Submission, paras. 128-144.
[160] China's First Written Submission, para. 116.
[161] *See* China's First Written Submission, paras. 117-118.
[162] *See* China's First Written Submission, paras. 119-120.
[163] *See* China's First Written Submission, paras. 120-121.
[164] China's First Written Submission, para. 122 (citing Public Bodies Memorandum, p. 23).
[165] China's First Written Submission, para. 117 (citing Public Bodies Memorandum, p.19).
[166] China's First Written Submission, para. 119 (citing Public Bodies Memorandum, pp. 17, 19).

actions that will be carried out by the enterprises it covers', citing eleven different articles of the policy as examples of such directed conduct."[167]

80. In light of these statements that China made in its own first written submission, it is unclear how China can justify representing to the Panel that the USDOC failed "to evaluate the evidence submitted by the GOC."[168] China contends that "the USDOC did not address these plans, or the GOC's explanation of their nature and purpose, in any respect in its Preliminary or Final Public Bodies Determination."[169] However, as China itself explains, the USDOC did address the plans, laws, and regulations to which the GOC pointed, as well as a host of other plans, laws, regulations, articles, and various sources of information, in the Public Bodies Memorandum and the CCP Memorandum. The USDOC placed those memoranda and the evidence underlying them onto the administrative records of the section 129 proceedings, and the USDOC incorporated the memoranda by reference into the Public Bodies Preliminary Determination and the Public Bodies Final Determination.[170] All of those documents, read together, set forth the USDOC's public body determinations.

81. China asserts that the United States has failed to "acknowledge that the evidence provided by the GOC included 'entity-specific' plans, because the GOC provided all of the industrial plans from the provinces and municipalities where the mandatory respondents and input producers from the investigations in DS437 were located."[171] On the contrary, the U.S. first written submission does, in fact, acknowledge that the GOC submitted this information, noting that "China also points to other evidence that the USDOC purportedly did not take into consideration and which, in China's view, weighs against the USDOC's conclusions."[172] The U.S. first written submission recalls, though, that "the USDOC explained why it was necessary to base its public body determinations on the facts otherwise available and why drawing adverse inferences in selecting from the facts otherwise available was warranted, given the GOC's failure to provide requested information."[173]

82. China appears to disagree with the weight that the USDOC gave to certain evidence and the USDOC's selection of evidence from the facts otherwise available. However, the United States notes that the GOC appears to have proffered the provincial and local plans primarily to support the following proposition:

> As with the national five year plan [the *11th Five-Year Plan*], in no case do any of the identified provincial or local plans even mention the provision of steel products by any enterprise, let alone indicate or suggest that the provision of steel

[167] China's First Written Submission, para. 121 (citing Public Bodies Memorandum, pp. 22-23, nn. 86-91).
[168] China's First Written Submission, para. 112.
[169] China's First Written Submission, para. 126 (emphasis omitted).
[170] *See* Public Bodies Final Determination, pp. 2, 5 (pp. 3, 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).
[171] China's Second Written Submission, para. 94.
[172] U.S. First Written Submission, para. 135 (citing to the portions of China's first written submission that discuss the information, *i.e.*, paras. 122-126, 145-156).
[173] U.S. First Written Submission, para. 135 (referring to section II.A.2.a.iv of the U.S. first written submission).

> products constitutes a governmental function. As discussed above, these plans focus primarily on broad goals for the country and particular sectors. The plans do not bestow any authority on particular companies, industries, or sectors to exercise government authority or to undertake governmental functions.[174]

83. The USDOC discussed the *11th Five-Year Plan* in the Public Bodies Memorandum, as China itself has acknowledged.[175] The USDOC drew from its examination of the national five-year plan – and the other evidence on the administrative records – conclusions that differ from those for which the GOC argued during the section 129 proceeding, and for which China now argues in this compliance proceeding. If the provincial and local plans simply constitute evidence that mirrors the national five-year plan, as the GOC indicated in its questionnaire response, it is unclear why the USDOC should also have discussed the provincial and local plans in its analysis. China has offered no credible reason to believe that the USDOC's conclusion would have or should have been any different had it discussed those plans in its determinations.

84. China also contends that the USDOC "failed to address" evidence on the record demonstrating that China's legal regime insulates SIEs from governmental interference in day-to-day operations.[176] China selectively cites to certain documents, including "[t]he instrument establishing the SASAC, the *Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises (2003)* ('*Tentative Measures*')," [177] the 2008 *Law on State-Owned Assets of Enterprises*,[178] and the *Company Law*.[179] Yet again, however, China itself explains that the USDOC referenced these documents in the Public Bodies Memorandum.[180] China may disagree with the USDOC's analysis and the weight that the USDOC gave to certain evidence, but there is no justification for China's assertion that the USDOC "failed to address" the evidence.[181]

85. As explained above, the USDOC's preliminary and final determinations, read together with the Public Bodies Memorandum and the CCP Memorandum, demonstrate that the USDOC considered all of the information provided by the GOC during the section 129 proceedings.

10. What is the relevance, if any, of China's criticisms regarding the procedure and timing of the USDOC's questions?

a. The Panel understands that the parties disagree as to how much time was given to the respondents. Could the parties elaborate on this, and its relevance for the Panel's analysis?

Response:

[174] GOC Public Bodies Questionnaire Response, p. 6 (Exhibit CHI-2) (emphasis added).
[175] China's First Written Submission, para. 117 (citing Public Bodies Memorandum, p. 19).
[176] *See* China's First Written Submission, paras. 128-144.
[177] *See* China's First Written Submission, paras. 131-135.
[178] *See* China's First Written Submission, paras. 135-137.
[179] *See* China's First Written Submission, para. 137.
[180] *See, e.g.,* China's First Written Submission, para. 139.
[181] *See* China's First Written Submission, paras. 128-144.

86. China's criticisms of the procedure and timing of the USDOC's questions do not appear to have any relevance whatsoever to any legal claims raised in China's request for the establishment of a panel in this compliance proceeding. The SCM Agreement includes various provisions governing the amount of time that must be afforded to interested parties to respond to an investigating authority's questions and relating to the opportunity that an investigating authority must afford interested parties to provide evidence and information during countervailing duty proceedings.[182] China has not raised claims under any of those provisions of the SCM Agreement.

87. With respect to the amount of time given to the GOC and interested parties to respond to the USDOC's questionnaires during the section 129 proceedings, the United States refers the Panel to the USDOC's Public Bodies Preliminary Determination, which explains in detail the process and timing of the USDOC's issuance of questionnaires and supplemental questionnaires, China's requests for additional time, the USDOC's partial granting of those requests, and the "choice" that China made, as China put it during the panel meeting, to respond to the USDOC's questionnaires only partially and only in certain of the section 129 proceedings.[183]

11. How does China's approach to the determination of "public body" apply in the context of a government or public body entrusting or directing "a private body to carry out one or more of the type of functions illustrated in (i) to (iii)" of Article 1.1(a)(1)?

Response:

88. The United States understands that this question is directed to China.

12. Is it the United States' view that the producers of inputs that provided those inputs to the company respondents in the investigation were, in doing so, acting to maintain the predominant role of the state sector in the economy, and upholding the socialist market economy?

Response:

89. Yes. The producers of inputs that provided those inputs to the company respondents in the investigation were, in doing so, acting to maintain the predominant role of the state sector in the economy, and upholding the socialist market economy.

90. The USDOC examined the "core features" of the entities in question and determined that the government of China 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 the governmental function of maintaining and upholding the socialist market economy. The USDOC's conclusion is supported by ample record evidence, as the United States has demonstrated. For example, as the USDOC explained:

> [T]he *Public Bodies Memorandum* and accompanying *CCP Memorandum* set forth evidence concerning the extent to which certain categories of state-invested

[182] *See, e.g.*, SCM Agreement, Art. 12.1.
[183] *See* Public Bodies Preliminary Determination, pp. 5-8 (pp. 6-9 of the PDF version of Exhibit CHI-4).

> 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."[184]

91. Ultimately, based on its analysis of the evidence on the administrative record, 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."[185] The USDOC explained that "there are two findings at the core of the analysis:"[186]

> 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.[187]

92. Ample record evidence supports the USDOC's conclusion that the Government of China exercises meaningful control over the entities at issue such that the government can use the entities "to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy."[188] Thus, any time the entities provided inputs to the company respondents in the investigation – the activity in which the entities engaged on a day-to-day basis and also conduct that is described under Article 1.1(a)(1) of the SCM Agreement – the entities were acting in support of a governmental function in China.

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[184] 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 (p. 11 of the PDF version of Exhibit CHI-4).
[185] 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).
[186] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).
[187] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4).
[188] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4).

93. The U.S. first written submission provides a detailed summary of the USDOC's public body determinations in the section 129 proceedings,[189] and those determinations are fully explained in the USDOC's preliminary and final determinations, and in the accompanying Public Bodies Memorandum and CCP Memorandum, all of which must be read together. 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.[190]

13. Referring to paragraph 17-18 of the United States' oral statement, does the United States consider that being used as a tool or instrumentality to maintain the predominant role of the state sector in the economy, and uphold the socialist market economy, is the same as being vested with, exercising, or possessing governmental authority to carry out that function?

Response:

94. The Appellate Body has explained that, *inter alia*,:

> [E]vidence 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.[191]

95. The Appellate Body's discussion of "meaningful control" suggests that the Appellate Body has not understood "meaningful control" by the government of an entity to be "the same" as the entity being vested with, exercising, or possessing governmental authority to carry out a governmental function, but rather such "meaningful control" can be evidence that an entity "possesses governmental authority and exercises such authority in the performance of governmental functions."[192]

96. When the United States has explained that the Chinese government used the entities in question as "instrumentalities" or "tools to effectuate a governmental function," we have been referring to the concept of "meaningful control," as elaborated by the Appellate Body. As explained in the U.S. opening statement during the panel meeting:

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[189] *See* U.S. First Written Submission, paras. 63-117.
[190] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[191] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[192] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

> Commerce examined the core features of the entities concerned and their relationship with the government. As Commerce 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." Commerce 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."
>
> In other words, Commerce 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.[193]

97. The U.S. first written submission discusses at greater length the evidence on which the USDOC relied concerning "manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority," *i.e.*, evidence of "meaningful control" by the Chinese government.[194]

98. The USDOC also relied on evidence relating to government ownership of entities in China; laws, regulations, policies, and industrial plans requiring entities in China to support China's industrial policies; government-appointment of executives and board members of entities; and government involvement in the management of entities.[195] The Appellate Body, in *US – Anti-Dumping and Countervailing Duties (China)*, found that the record evidence before USDOC in the investigation at issue in that dispute, and the USDOC's analysis of that evidence, was sufficient to justify the USDOC's public body determination with respect to SOCBs in China.[196] As the United States has shown, the parallels between the evidence and analysis that the Appellate Body found supported the USDOC's public body determinations in *US – Anti-Dumping and Countervailing Duties (China)* and the evidence and analysis underlying the USDOC's public body determinations here are plain to see.[197]

99. The Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* provide an example of a public body determination wherein the analysis and evidence was sufficient to meet the requirements of Article 1.1(a)(1) of the SCM Agreement. The USDOC's

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[193] Opening Statement of the United States of America at the Meeting of the Panel and the Parties (May 10, 2017) ("U.S. Opening Statement"), paras. 17-18 (citations omitted; original underlining removed; emphasis added).
[194] *See* U.S. First Written Submission, paras. 83-102. *See also id.*, paras. 75-82 (discussing the role of the Chinese Communist Party in China's system of governance, including control exercised over the types of entities at issue in the section 129 proceedings).
[195] *See* U.S. First Written Submission, paras. 69-117, 122-124; U.S. Second Written Submission, paras. 72-79.
[196] *See* U.S. First Written Submission, paras. 38-42; U.S. Second Written Submission, paras. 68-80 (discussing and citing the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*).
[197] *See* U.S. Second Written Submission, paras. 72-79.

analysis in the section 129 proceedings here, and the substantial record evidence on which the USDOC relied, is comparable to, and indeed exceeds, that which the Appellate Body found sufficient in *US – Anti-Dumping and Countervailing Duties (China)*.

PUBLIC BODIES MEMORANDUM "AS SUCH"

14. Do the parties take the view that for China's "as such" claim to be successful, the application of the Public Bodies Memorandum in any given investigation should necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement?

Response:

100. In assessing whether the Kitchen Shelving policy was inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement, the original Panel noted that "both parties agree that for such a claim to be successful the measure should *necessarily* result in an inconsistency."[198] The United States continues to hold this view.

101. As the United States has demonstrated,[199] the Public Bodies Memorandum, by its terms, neither "obliges" the USDOC to do anything nor "restricts" the USDOC from doing anything.[200] When the original Panel followed a "two-step approach"[201] in assessing whether the Kitchen Shelving policy was inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement, it pointed to evidence, including the following: the policy "clearly instructs USDOC to consider by priority evidence of majority-ownership by the government"[202]; "[o]n the face of the text, this policy is qualified by the word 'normally'"[203]; "the consistent application of this presumption in numerous cases over a long period of time"[204]; "the policy establishes that the burden is on an interested party to provide information or evidence that would warrant consideration of any other factors"[205]; and the policy "effectively … restricts the USDOC to consider other evidence on its own initiative."[206]

102. Nothing in the text of the Public Bodies Memorandum is comparable to the features of the text of the Kitchen Shelving policy such that the Public Bodies Memorandum could similarly be found inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement. The Public Bodies Memorandum does not require the USDOC to reach any WTO-inconsistent determination. Rather, to the extent the USDOC places the Public Bodies Memorandum and supporting evidence onto the record of a countervailing duty proceeding, the USDOC in that proceeding would determine what significance to give to the findings in the Public Bodies Memorandum in the context of making its determination in that proceeding.

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[198] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[199] *See* U.S. First Written Submission, para. 196-197. *See also* U.S. Second Written Submission, paras. 155-161.
[200] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[201] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[202] *US – Countervailing Measures (China) (Panel)*, para. 7.123.
[203] *US – Countervailing Measures (China) (Panel)*, para. 7.124.
[204] *US – Countervailing Measures (China) (Panel)*, para. 7.124.
[205] *US – Countervailing Measures (China) (Panel)*, para. 7.125.
[206] *US – Countervailing Measures (China) (Panel)*, para. 7.125.

15. Is China's claim that the application of the Public Bodies Memorandum would result in an inconsistency because:

a. It does not prescribe an examination of whether an entity performs a governmental function when "engaging in the conduct that is subject of the financial contribution inquiry"? If not, what would be the basis for "as such" inconsistency?

b. It is "a hard and fast rule in every instance" of majority government-ownership, and further provides the analytical basis to conclude that all companies in China, regardless of government ownership, are public bodies?

Response:

103. The United States understands that this question is directed to China.

16. Does the evidence before the Panel support a finding that the Public Bodies Memorandum prescribes a certain determination by the USDOC?

Response:

104. No. The evidence before the Panel does 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.

105. 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[207] as well as information "that would rebut, clarify, or correct, the factual information" in the Public Bodies Memorandum.[208]

106. 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

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

[208] *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).

ownership and corporate governance information for those enterprises that produced inputs that were purchased by respondents during the [period of investigation] of the investigations."[209]

107. The USDOC's public bodies questionnaire consisted of two parts.[210] The first part of the questionnaire sought information regarding the producers of the inputs that were identified by USDOC, including: industrial plans, such as national five-year 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.

108. 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."[211] 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.[212] 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.[213] 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.[214] Lastly, the USDOC asked for information concerning key decision-making, restructuring, and key persons.[215] 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"[216] "such that these entities possess, exercise, or are vested with governmental authority."[217]

109. 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

[209] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[210] *See* Public Bodies Questionnaire (Exhibit USA-83).
[211] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).
[212] *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).
[213] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).
[214] *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).
[215] *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).
[216] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4).
[217] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).

> 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.[218]

110. Accordingly, the evidence before the Panel supports 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.

a. Does the categorization of enterprises in the Public Bodies Memorandum "restrict, in a material way, the discretion of" the USDOC to act in a manner consistent with the relevant WTO obligation? (See, e.g. Appellate Body Report, EU – Biodiesel (Argentina), para. 6.281)

Response:

111. No. Nothing in the Public Bodies Memorandum "restrict[s], in a material way, the discretion of" the USDOC to act in a manner consistent with the relevant WTO obligation.[219]

112. In *EU – Biodiesel*, the Appellate Body explained 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

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

[219] 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, 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 WTO-consistent action. In *US – Carbon Steel*, for example, the Appellate Body affirmed the panel's rejection of a claim relating to a measure, finding "[n]or did the [complaining party] explain how this provision operates to preclude [the investigating authority] from making a determination consistent with Article 21.3 of the *SCM Agreement*." *US – Carbon Steel (AB)*, para. 152. The Appellate Body rejected a claim on a second measure where the complaining party alleged "three main characteristics which effectively remove [the investigating authority's] discretion to make a determination consistent with the requirements of Article 21.3 of the *SCM Agreement*." *US – Carbon Steel (AB)*, para. 158. After reviewing the arguments of the participants and the panel's findings, the Appellate Body concluded that the complaining party "did not satisfy its burden of proving either that [the measure] mandates [the investigating authority] to act inconsistently with Article 21.3 of the *SCM Agreement*, or that such law restricts in a material way [the investigating authority's] discretion to make a determination consistent with Article 21.3 in a sunset review." *US – Carbon Steel (AB)*, para. 162; *see also id.*, para. 158. Thus, the phrase "restricts in a material way [the investigating authority's] discretion" refers to a measure's precluding (or removing discretion to take) WTO-consistent action.

> evidence as to the meaning of that municipal law to substantiate its claim of WTO-inconsistency. Such evidence will typically be produced in the form of the text of the relevant legislation or legal instrument, and may be supported by evidence of other elements such as the consistent application of such law, the pronouncements of domestic courts on the meaning of such law, the opinions of legal experts, and the writings of recognized scholars. Precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure and the WTO obligations at issue.[220]

113. It is China's burden to introduce evidence demonstrating that the Public Bodies Memorandum precludes USDOC from making – that is, 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.[221] China has not even attempted to meet its burden.

114. The Public Bodies Memorandum is 38 pages long. From those 38 pages, China has drawn just two textual points, which China asserts 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 panel meeting 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.

115. First, China asserts 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."[222] China takes the word "systemic" out of context and distorts 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 analysis is necessary in every CVD investigation involving an allegation that an entity is a public body.[223]

116. 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.

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[220] *EU – Biodiesel (AB)*, para. 6.230 (emphasis added; citations omitted).
[221] *See EU – Biodiesel (AB)*, para. 6.281.
[222] China's Second Written Submission, para. 115.
[223] Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).

117. 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.[224] 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."[225] 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.

118. Second, China notes that "the USDOC finds, 'for the purposes of [US] countervailing duty law', that 'upholding the socialist market economy' is a governmental function in China."[226] China confirmed during the panel meeting that it considers that this statement evidences that the Public Bodies Memorandum has an *expansive* nature. On the contrary, this statement is evidence of the *limited* 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>."[227] 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.

119. Thus, the only two evidentiary points China has made concerning the text of the Public Bodies Memorandum offer no support for 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. Ultimately, China has pointed to <u>nothing</u> in the text of the Public Bodies Memorandum to support its "as such" claim. Accordingly, China has utterly failed to meet its burden of proof.

b. Does the USDOC have discretion not to rely on the Public Bodies Memorandum for any determination?

<u>Response:</u>

120. Yes. There is no evidence before the Panel indicating that the Public Bodies Memorandum, or anything else, limits the USDOC's discretion not to rely on the Public Bodies Memorandum for any determination.

121. That being said, the Public Bodies Memorandum presents extensive analysis and explanation, based on the USDOC's examination of voluminous evidence relating to the

[224] Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).
[225] *US – Carbon Steel (India) (AB)*, para. 4.9.
[226] China's Second Written Submission, para. 115, n. 138.
[227] Public Bodies Memorandum, p. 2, n. 4 (p. 3 of the PDF version of Exhibit CHI-1).

government and economic system of 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. Thus, where the Public Bodies Memorandum is placed on the record in a proceeding, it is logical and appropriate for the USDOC to rely on the analysis and explanation in the Public Bodies Memorandum, and the evidence underlying it, whenever it is relevant, *e.g.*, when the GOC fails to cooperate to the best of its ability, as it did in some of the section 129 proceedings at issue in this compliance proceeding.

c. Have there been any CVD investigations involving China since 18 May 2012 in which the USDOC did not rely on the Public Bodies Memorandum in its public body determinations? (See, e.g. Exhibit CHN-54)

Response:

122. In the solar panels countervailing duty investigation, which was concluded on October 9, 2012, after the May 18, 2012 publication of the Public Bodies Memorandum, the USDOC did not place the Public Bodies Memorandum and the evidence underlying it on the administrative record.[228] In that regard, the original Panel observed:

> [T]he USDOC has stated that the findings of the panel and the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* were limited to the four investigations at issue in that dispute. The relevant text provides:
>
> > [R]egarding the DSB's reports in the DS 379 proceeding, we note that, while we have reached section 129 final determinations in the four investigations at issue in that dispute, the decisions of the panel and the appellate body regarding whether a producer is an authority (a "public body" within the WTO context) were limited to those four investigations.[229]

123. Thus, as the original Panel acknowledged, this statement by the USDOC in the solar panels countervailing duty investigation is an indication that the USDOC contemplated at that time not "apply[ing] prospectively" the purported "analytical framework" presented in the Public Bodies Memorandum.[230] Moreover, the statement is further evidence that the USDOC created the Public Bodies Memorandum for the four section 129 proceedings that the USDOC undertook to implement the recommendations and rulings of the DSB in *US – Anti-Dumping and Countervailing Duties (China)*, rather than as an announcement of a new approach it intended to apply in future proceedings.

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[228] The preliminary determination in that investigation was published on March 25, 2012, prior to the original publication of the Public Bodies Memorandum. *See Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China* (October 9, 2012), p. 1 (Exhibit CHI-28).

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

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

124. The United States further observes that, in the 2012 countervailing duty administrative review of citric acid and certain citrate salts from China, the USDOC, based on the Public Bodies Memorandum and the evidence underlying it, together with information provided by China, concluded that two entities under examination in that proceeding were not public bodies.[231] As the USDOC explained there:

> Regarding Companies B and C, we determine that the two input producers are not "authorities" within the meaning of section 771(5)(B) of the Act. While the owner of these two enterprises was reported to be the Secretary for the Party Committee of a village in the PRC, the GOC provided a certified letter from the Party Committee stating the individual's dates of service in this role. Because the dates of service ended prior to the POR and the village does not geographically overlap with the locations of the producers' operations, we determine that the GOC did not exercise meaningful control over these input producers through this individual during the POR.[232]

125. The outcome in the citric acid proceeding demonstrates that, where China cooperates and provides requested information to the USDOC, the USDOC may determine, on the basis of evidence on the administrative record, that a given entity is not a public body, even where the Public Bodies Memorandum and the evidence underlying it have been placed on the administrative record.

d. Is the applicability of the Public Bodies Memorandum limited to a particular time period? Will the Public Bodies Memorandum become obsolete at some point?

Response:

126. The "applicability" of the Public Bodies Memorandum is limited to circumstances where the USDOC places the memorandum on the administrative record in a particular countervailing duty proceeding. Where the USDOC has placed the Public Bodies Memorandum on the administrative record of a proceedings, the USDOC has offered the GOC the opportunity to submit information "that would rebut, clarify, or correct, the factual information" in the Public Bodies Memorandum.[233] The GOC did not avail itself of this additional opportunity to provide information to the USDOC in the section 129 proceedings at issue here.

127. The United States cannot predict whether the USDOC will place the Public Bodies Memorandum on the administrative record of a countervailing duty proceeding in the future

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[231] *See Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Citric Acid and Certain Citrate Salts;* 2012, p. 24 (Exhibit USA-129).

[232] *Issues and Decision Memorandum for the Final Results of the Countervailing Duty Administrative Review: Citric Acid and Certain Citrate Salts;* 2012, p. 24 (Exhibit USA-129).

[233] *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).

because new information may be presented to the USDOC, which could lead the USDOC to determine that the analysis set forth in the Public Bodies Memorandum needs to be revised.

128. In this regard, we recall that the Public Bodies Memorandum was originally produced in connection with section 129 proceedings regarding countervailing duty investigations that were initiated in 2007,[234] and the countervailing duty investigations at issue here were initiated in the period 2007-2012.[235] China does not argue that the Chinese laws, regulations, and industrial policies discussed in the Public Bodies Memorandum differed or were not in effect during the periods of investigation of the various section 129 proceedings at issue here.

129. That being said, the Public Bodies Memorandum presents analysis and explanation related to a certain body of evidence. If, for example, the GOC or any interested party submitted additional evidence showing that the Chinese laws, regulations, and industrial policies discussed in the Public Bodies Memorandum have been modified, repealed, or replaced, then the USDOC certainly would take such evidence into consideration, and the USDOC potentially could find that the analysis and explanation in the Public Bodies Memorandum may need to be modified or updated to reflect any such changes.

17. Is the fact that the Public Bodies Memorandum was issued several years before the adoption of recommendations and rulings by the DSB sufficient "to sever the connection" between the Public Bodies Memorandum and the United States' implementation obligations? Does the United States contend that timing alone is determinative in this case?

Response:

130. Article 21.5 of the DSU provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." The Appellate Body has explained that Article 21.5 establishes that the panel's terms of reference is limited to those "measures taken to comply," which are "measures taken in the direction of, or for the purpose of achieving, compliance."[236] In addition, the Appellate Body has found that a measure that is not in itself a "measure taken to comply" may nonetheless fall within the terms of reference by virtue of its "particularly close relationship"[237] or "sufficiently close nexus"[238] to the declared "measure taken to comply" and to the rulings and recommendations of the DSB. "Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures."[239] Given these findings in prior reports, the United States does not take the position

[234] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 2.2, 2.7, 2.11, and 2.15.
[235] *See US – Countervailing Measures (China) (Panel)*, para. 7.1.
[236] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 66 (emphasis omitted).
[237] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77. *See also US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.61.
[238] *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.
[239] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 (emphasis added). *See also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 196, 202.

that the timing of the publication of the Public Bodes Memorandum alone is determinative. The analysis that the Appellate Body has described involves "an examination of the *timing, nature, and effects* of the various measures."[240]

131. However, as the United States has shown, the timing of the publication of the Public Bodies Memorandum is an important consideration in this case.[241] The Appellate Body has explained that "the timing of a measure remains a relevant factor in determining whether they are sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB."[242] Although the Appellate Body has recognized there may be instances where the adoption of a measure "simultaneously with, shortly before, or shortly after" specific compliance actions may support a finding that the measures are closely connected, it has also recognized that there may be situations where "the fact that the alleged 'closely connected' measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between the measure and a Member's implementation obligations."[243]

132. China has acknowledged that the Public Bodies Memorandum was published in connection with measures that the United States took to comply in the light of "the Appellate Body's findings in DS379."[244] Per China's own assertions, with its "as such" claim against the Public Bodies Memorandum, China is not attempting to challenge a purported "measure" that was "adopted 'in the direction of, or for the purpose of achieving compliance' with"[245] the DSB's recommendations and rulings in *this* "particular dispute."[246] Rather, China is attempting to challenge a memorandum that was published in connection with measures taken to comply with the DSB's recommendations and rulings in an entirely different, earlier dispute. Article 21.5 of the DSU does not permit such a kind of lateral challenge. This proceeding is to resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with *the* recommendations and rulings" in *this* dispute, "including wherever possible [through] resort to the *original panel*" in *this* dispute.[247]

133. It is undisputed that the Public Bodies Memorandum was published not only long before the adoption of the DSB's recommendations in this dispute, but even before this dispute came into existence. The Public Bodies Memorandum was published on May 18, 2012.[248] China requested consultations with the United States in *this* dispute on May 25, 2012, *after* the publication of the Public Bodies Memorandum.[249] China and the United States actually held

[240] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 (emphasis added). *See also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 196, 202.
[241] *See* U.S. First Written Submission, paras. 156-163.
[242] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.
[243] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.
[244] China's First Written Submission, para. 172.
[245] China's First Written Submission, para. 172.
[246] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 70 (italics in original, underlining added).
[247] DSU, Art. 21.5 (emphasis added).
[248] *See* Public Bodies Memorandum, p. 1 (p. 2 of the PDF version of Exhibit CHI-1).
[249] *See US – Countervailing Measures (China) (Panel)*, para. 1.1.

consultations later in the year, on June 25 and July 18, 2012.[250] China requested the establishment of the original panel on August 20, 2012.[251]

134. If the Public Bodies Memorandum is, itself, a "measure" that exists and is susceptible to WTO dispute settlement, as China alleges,[252] then the memorandum had this status immediately upon publication, which occurred prior to China's original request for consultations or panel request in this dispute. Accordingly, China was in a position to pursue a claim against the Public Bodies Memorandum in the original proceeding, but China opted not to do so, and therefore China may not now make claims against the Public Bodies Memorandum in this compliance proceeding.[253]

135. These considerations support the conclusion that the timing of the publication of the Public Bodies Memorandum – long before the DSB adopted its recommendations in this dispute and even prior to the commencement of this dispute – is "sufficient to sever the connection between the measure and a Member's implementation obligations."[254] For this reason, as well as the other reasons that the United States has articulated,[255] China is precluded from pursuing a claim against the Public Bodies Memorandum in this Article 21.5 compliance proceeding.

18. Regarding China's opportunity to challenge the Public Bodies Memorandum in the original proceedings, was the Public Bodies Memorandum relevant in any way to the CVD determinations challenged in the original DS437 proceedings?

Response:

136. As the original Panel explained, in the countervailing duty determinations that China challenged in the original panel proceedings, "the USDOC found that SOEs were public bodies by relying on a concept of control based, in most cases, on (majority) ownership of an entity by the government. In none of [those] investigations did the USDOC rely on evidence of the kind that led the Appellate Body to conclude in *US – Anti-Dumping and Countervailing Duties (China)* that the USDOC had before it evidence indicating that state-owned commercial banks exercised 'governmental functions.'"[256]

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

138. That being said, China could have attempted to challenge the Public Bodies Memorandum "as such" during the original proceeding – but China chose not to do so. If the

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[250] *See US – Countervailing Measures (China) (Panel)*, para. 1.2.
[251] *See US – Countervailing Measures (China) (Panel)*, para. 1.3.
[252] *See* China's Panel Request in this compliance proceeding, para. 10.
[253] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211.
[254] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.
[255] *See, e.g.*, U.S. First Written Submission, paras. 164-198.
[256] *US – Countervailing Measures (China) (Panel)*, para. 7.73.

Public Bodies Memorandum is, itself, a "measure" that exists and is susceptible to WTO dispute settlement, as China alleges,[257] then the memorandum had this status immediately upon publication, which occurred prior to China's original request for consultations or panel request in this dispute. As the Appellate Body has explained, "a measure need not have been applied to be the subject of an 'as such' challenge."[258] Accordingly, the mere fact that the countervailing duty determinations that China challenged in the original panel proceeding were not based, in part, on the Public Bodies Memorandum, does not support China's argument that it should now, at this late stage of this dispute, be permitted to challenge an alleged "measure" that existed at the time of the commencement of the dispute, which China could have challenged from the outset, but opted not to do so.

19. Given that the Public Bodies Memorandum was "placed on the record" of the Section 129 investigations at issue, is it "separable" from other aspects of the measures taken to comply?

Response:

139. The Public Bodies Memorandum is a part of each of the administrative records of each of the section 129 proceedings that the USDOC undertook to implement the recommendations of the DSB in this dispute. The Public Bodies Memorandum, and the evidence underlying it, forms a part of the basis of each of those determinations. The Public Bodies Memorandum itself has no independent, operational force, and it is not "separable" from other aspects of the measures the United States has taken to comply in this dispute.

20. Does the overlap in subject matter, i.e. public body determinations for Chinese enterprises, suffice to establish a close nexus between the nature of the Public Bodies Memorandum, the Section 129 determinations, and the relevant DSB rulings and recommendations?

Response:

140. As noted earlier in response to question 17, an application of the "close nexus" test described by the Appellate Body in prior reports to the Public Bodies Memorandum in this compliance proceeding should involve "an examination of the *timing, nature, and effects*"[259] of the memorandum. It would not be appropriate to suggest that an overlap in subject matter alone suffices to establish a "close nexus" between the Public Bodies Memorandum, the section 129 determinations, and the relevant DSB recommendations.

141. That being said, it is self-evident that there is overlap in subject matter between the analysis and explanation presented in the Public Bodies Memorandum (and the evidence underlying it) and the section 129 determinations and the relevant DSB recommendations. Indeed, the Public Bodies Memorandum and the evidence underlying it is an integral part of each of the section 129 determinations. Additionally, as the United States has demonstrated, the

[257] *See* China's Panel Request in this compliance proceeding, para. 10.
[258] *EU – Biodiesel (AB)*, para. 6.226.
[259] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 (emphasis added); *see also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 196, 202.

analysis and explanation in the Public Bodies Memorandum, and the evidence underlying it, is similar to, though more voluminous than the analysis, explanation, and evidence that the Appellate Body found sufficient to justify the USDOC's public body determinations concerning SOCBs in *US – Anti-Dumping and Countervailing Duties (China)*. In its report, the original Panel specifically referred to the Appellate Body's findings in that regard,[260] and those findings of the original Panel are part of the recommendations adopted by the DSB in this dispute.

142. It is logical that there is substantive overlap between the Public Bodies Memorandum and the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*, because the Public Bodies Memorandum, as even China acknowledges,[261] was originally published as part of measures the United States took to comply in that dispute.

143. The United States has demonstrated why China is precluded from challenging the Public Bodies Memorandum in this compliance proceeding, and why China's "as such" challenge of the Public Bodies Memorandum fails.[262] The overlap in subject matter that exists between the Public Bodies Memorandum, the section 129 determinations, and the DSB's recommendations does not change the outcome of the analysis.

21. Is the analysis affected by the fact that the Public Bodies Memorandum does not apply to any specific product or industry?

Response:

144. As the United States has explained, the Public Bodies Memorandum, as is clear on the face of the memorandum, presents extensive analysis and explanation, based on the USDOC's examination of voluminous evidence relating to the government and economic system of China. This analysis is not limited or specific to any particular product or industry. The analysis, explanation, and evidence in the Public Bodies Memorandum, which relates to China in general, may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving other products from China, which are produced in the same economic and government environment discussed in the Public Bodies Memorandum. Thus, it is logical and appropriate for the USDOC to rely on the analysis and explanation in the Public Bodies Memorandum, and the evidence underlying it, whenever it may be relevant.

145. However, the likelihood that the Public Bodies Memorandum may be relevant to a countervailing duty analysis of any product from China does not inform the analysis of whether the Public Bodies Memorandum is a measure taken to comply in this dispute, or whether it is a measure that is susceptible to WTO dispute settlement, or whether it is inconsistent with the SCM Agreement "as such." Accordingly, this feature of the Public Bodies Memorandum has no affect on those analyses.

[260] *See, e.g., US – Countervailing Measures (China) (Panel)*, para. 7.73.
[261] *See* China's First Written Submission, para. 172.
[262] *See* U.S. First Written Submission, paras. 155-198; U.S. Second Written Submission, paras. 125-161.

22. Does the United States contend that the Public Bodies Memorandum is not closely linked in terms of subject matter with the Section 129 determinations and the relevant DSB rulings and recommendations?

Response:

146. The United States refers the Panel to the U.S. response to question 20 above.

23. What are the "effects" of the Public Bodies Memorandum and how do they relate to the Section 129 determinations at issue and to the relevant rulings and recommendations of the DSB?

Response:

147. The Public Bodies Memorandum has no "effects." The memorandum does not announce a policy or practice, it does not describe or prescribe an "approach," "policy," "long standing practice," or "methodology," and nothing in the Public Bodies Memorandum purports to establish or describe a legal standard adopted or applied by the USDOC.[263] The Public Bodies Memorandum has no operational force and does not, in itself, constitute a determination by the USDOC in any countervailing duty proceeding.

148. Rather, where the USDOC has placed the Public Bodies Memorandum, and the evidence underlying it, on the administrative record of a countervailing duty proceeding, the Public Bodies Memorandum, and the evidence underlying it, forms a part of the basis of the USDOC's determination in that countervailing duty proceeding. That is how the Public Bodies Memorandum relates to the section 129 determinations at issue in this compliance proceeding and to the recommendations adopted by the DSB. The Public Bodies Memorandum is an integral part of the USDOC's public body determinations in the section 129 proceedings and forms a part of the basis of those determinations. The section 129 determinations constitute the measures taken by the United States to implement the recommendations of the DSB concerning the "as applied" findings regarding the USDOC's public body determinations in the original challenged investigations.

a. Is it correct that the Public Bodies Memorandum merely summarizes evidence, while Section 129 determinations, and the rulings and recommendations of the DSB, involve an evaluation of this evidence?

Response:

149. The Public Bodies Memorandum does not merely summarize evidence. Rather, the Public Bodies Memorandum, on its face, presents analysis and explanation of the evidence underlying the Public Bodies Memorandum, and the USDOC, in the memorandum, has set forth and explained certain conclusions it has drawn about the economic and government system in China, and certain types of entities that operate within that system, based on the evidence it has examined. The Public Bodies Memorandum explicitly contemplates that, in any given case, it will be necessary for the USDOC to solicit and evaluate additional evidence, beyond that which

[263] *See US – Countervailing Measures (China) (Panel)*, para. 7.102.

underlies the Public Bodies Memorandum.[264] That is precisely what the USDOC did in the challenged section 129 proceedings here.[265]

b. Is the effect of the Public Bodies Memorandum to (i) lay out an analytical framework for public body determinations regarding Chinese enterprises OR (ii) lay out evidence which is relevant for making such public body determinations? Or both?

Response:

150. The United States again observes that, on its face, the Public Bodies Memorandum sets forth analysis and explanation, and it also articulates certain conclusions of the USDOC regarding the economic and government system in China and certain categories of entities in China. The USDOC's analysis, explanation, and conclusions are based on examination of the massive amount of evidence that underlies the Public Bodies Memorandum and that is referenced in the memorandum. As explained above, the Public Bodies Memorandum explicitly contemplates that, in any given case, it will be necessary for the USDOC to solicit and evaluate additional evidence, beyond that which underlies the Public Bodies Memorandum, before the USDOC can make a public body determination. That includes information concerning the particular entities alleged to have provided inputs for less than adequate remuneration[266] as well as information "that would rebut, clarify, or correct, the factual information" in the Public Bodies Memorandum.[267]

BENCHMARKS

24. Do the parties take the view that the phrase "prevailing market conditions in the country of provision" does not refer to a "pure" market in which supply and demand are undistorted by government intervention?

Response:

151. As discussed below, the United States does 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.

152. In *US – Softwood Lumber IV (AB)*, the Appellate Body explained that the phrase "prevailing market conditions" in Article 14(d) is not qualified in such a way as to "explicitly refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'."[268] However, it is important to recall that the Appellate Body in *US – Softwood Lumber IV (AB)* also accepted that there may be circumstances where extensive government involvement in a market precludes use of in-country prices as benchmarks for determining the

[264] *See* Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1).
[265] *See* Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[266] *See* Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1).
[267] *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).
[268] *US – Softwood Lumber IV (AB)*, para. 87.

adequacy of remuneration.[269] Therefore, while Article 14(d) may not require a "pure" market or a market wholly free from government intervention, it does not follow that investigating authorities may *never* resort to an out-of-country benchmark regardless of the degree of government interference in a market. To the contrary, as the Appellate Body confirmed in *US – Carbon Steel (India) (AB)*, "{p}roposed in-country prices *will not be reflective of prevailing market conditions* in the country of provision when they deviate from a market-determined price *as a result of government intervention in the market*."[270]

153. Furthermore, the United States would highlight that the USDOC, in determining that the requisite market conditions did not exist in the steel and polysilicon sectors in China, did not apply a "pure" market standard in its analysis of the market conditions in China.[271] Rather, in each of the section 129 proceedings, the USDOC evaluated price distortion consistent with the definition of "market conditions" supplied by the Appellate Body in various disputes.[272] The USDOC reached its determinations in the *OCTG*, *Pressure Pipe*, *Line Pipe*, and *Solar Panels* section 129 proceedings only after conducting the required analysis of the relevant input markets, consistent with the framework that the Appellate Body supplied in this dispute.[273]

25. Do the parties take the view that the adequacy of remuneration can still be determined "in relation to prevailing market conditions" when supply and/or demand for the good at issue are affected to some extent by government intervention?

Response:

154. With respect to whether the adequacy of remuneration can still be determined "in relation to prevailing market conditions" when supply and/or demand are affected to "some extent" by government intervention, the United States respectfully declines to speculate on the hypothetical circumstances pursuant to which certain types, or degrees, of government intervention might justify, or not justify a finding of price distortion. A determination of that extent or degree necessarily depends on a case-specific inquiry that will vary with the evidence and circumstances of each particular proceeding.[274] Accordingly, the central point in this dispute is whether the USDOC provided a reasoned and adequate explanation for its decision to employ out-of-country benchmarks in the particular proceedings at issue. As the United States has demonstrated, the USDOC's benchmark determinations in the subject proceedings were based on extensive record evidence and well-reasoned analysis. Further, to be clear, the USDOC's findings in this dispute were not based on isolated or insignificant governmental intervention. Rather, the findings were based on the totality of the record evidence, which included any information provided by China,

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[269] *Id.*, paras. 93-96.
[270] *US – Carbon Steel (India) (AB)*, para. 4.155 (emphasis added).
[271] *See, e.g., Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 19, 2016 ("Final Benchmark Determination") (Exhibit CHI-21), p. 11.
[272] *See, e.g.*, U.S. First Written Submission, paras. 248-256; U.S. Second Written Submission, paras. 163-171.
[273] *See, e.g., US – Countervailing Measures (China) (AB)*, para. 4.62 (enumerating certain analyses that investigating authorities may undertake in conducting a market analysis for purposes of Article 14(d)); *US – Carbon Steel (India)*, para. 4.157, n.754.
[274] *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'").

as well as 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).

155. In *US – Carbon Steel (India) (AB)*, the Appellate Body found for purposes of Article 14(d) that the term "conditions" refers to "characteristics or qualities" and that those "characteristics or qualities" are modified by the term "market." The Appellate Body further held that a "market" refers to "'a place . . . with a demand for a commodity or service'; 'a geographical area of demand for commodities or services'; 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices.'"[275] "Taken together, these terms suggest that 'prevailing market conditions' in the context of Article 14(d) of the SCM Agreement, consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[276] Furthermore, in *EC – Large Civil Aircraft (AB)*, the Appellate Body held that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[277]

156. The determinations at issue provide a reasoned and adequate explanation for the USDOC's conclusion that prices in China's steel and polysilicon sectors do not reflect the requisite "market conditions" under Article 14(d). In particular, the USDOC demonstrated, based on a reasoned and adequate analysis, that the market conditions needed to establish "equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"[278] The United States has described at length how the record supports this determination.[279] The United States made the same showing with respect to polysilicon, albeit based on a limited record due to the Government of China's non-cooperation.[280]

26. Does rejection of in-country prices require a determination that there are no "market conditions" for the good in question? Was this the approach taken by the USDOC in this case?

Response:

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

[275] *US – Carbon Steel (India) (AB)*, para. 4.150 (quoting *US – Upland Cotton (AB)*, para 404).
[276] *Id.*; *see also US – Countervailing Measures (China) (AB)*, para. 4.46.
[277] *EC – Large Civil Aircraft (AB)*, para. 981.
[278] *See Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Benchmark Memorandum") (Exhibit CHI-20), pp. 26-30.
[279] *See, e.g.*, U.S. First Written Submission, paras. 205-220.
[280] *See* U.S. Second Written Submission, paras. 203-208.

USDOC determined that the requisite market conditions were not present. In particular, the USDOC found that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"[281]

158. Pursuant to Article 14(d), 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."[282] Where prices are not market-determined, investigating authorities are permitted to resort to out-of-country benchmarks.[283] As noted above in response to Question 25, the Appellate Body has defined "prevailing market conditions" as consisting of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[284] Further, in *EC – Large Civil Aircraft (AB)*, the Appellate Body clarified that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[285]

159. In the relevant proceedings, the USDOC conducted a market analysis and found that the requisite "market conditions" do not exist in China's steel and polysilicon sectors, as the Appellate Body has defined the term.[286] Applying the standard articulated by the Appellate Body does not require a finding that there are *no* other types of market conditions that exist in a particular sector, or that prices for the good in question are wholly unresponsive to external market forces. The USDOC did not take such an approach in the underlying proceedings, nor has China identified any such findings by the USDOC.

160. Furthermore, an interpretation of Article 14(d) that requires the total absence of *any* market conditions would effectively equate to a situation where, through government regulation or administrative fiat, the price for the good in question is set by the government. Although this is one situation identified by the Appellate Body in which domestic prices can be disregarded for the benefit analysis under Article 14(d), it is not a determination that is required for other situations where, as here, pervasive government intervention in the sector is determined to distort prices for the good in question.

a. Must the analysis of "prevailing market conditions" relate only to the market for the particular good in question, or can it be sufficient to examine "prevailing market conditions" in the economy of the country as a whole?

[281] Benchmark Memorandum (Exhibit CHI-20), p. 28; *accord id.* at p. 27 (finding SIE prices did not reflect "market conditions").
[282] Article 14(d) of the SCM Agreement (emphasis added).
[283] For instance, in *U.S. - Carbon Steel (India)*, the Appellate Body explained that "[a]lthough the benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices when they are not market determined." *U.S. – Carbon Steel (India) (AB)*, para 4.155.
[284] *Id.*, para. 4.150; *see also US – Countervailing Measures (China) (AB)*, para. 4.46.
[285] *EC – Large Civil Aircraft (AB)*, para. 981.
[286] *See* Benchmark Memorandum, pp. 26-30 (Exhibit CHI-20).

Response:

161. An analysis of "prevailing market conditions" for the good in question and the analysis of such conditions in the broader economy are not mutually exclusive analyses. To the extent country- or sector-wide laws, policies, or other evidence are relevant to evaluating price distortion for a particular input market, that evidence can be used to support an investigating authority's analysis of the "prevailing market conditions" for the good in question. For example, in the Benchmark Memorandum, the USDOC examined evidence regarding the general institutional framework within which companies operate in China, including, notably, state-invested enterprises,[287] and corroborated this analysis with other evidence specific to the relevant markets at issue (in particular, steel and polysilicon).[288]

162. This approach is consistent with the SCM Agreement and the Appellate Body's discussion of this issue. Article 14(d) provides that the adequacy of remuneration shall be determined, in relevant part, "in relation to prevailing market conditions for the good or service in question in the country of provision or purchase." The Appellate Body has defined "prevailing market conditions" for purposes of Article 14(d) to "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[289] Neither the text of Article 14(d), nor the Appellate Body's definition of "prevailing market conditions" require that an investigating authority *limit* its analysis and the evidence upon which it relies to a particular level of specificity.

b. What degree of distortion would be sufficient to find that there are no "market conditions" for the good in question?

Response:

163. Because price distortion must be established on a case-by-case basis,[290] the Panel need not identify a hypothetical threshold or "degree" above which intervention in a market becomes distortive. Further, as explained in response to question 26, a determination that there are "no market conditions" at all for the good in question is also not required to find price distortion. Rather, the issue in 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 relevant prices within China do not result from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market and are, thus, unusable as benchmarks for determining the adequacy of remuneration.

27. What is the relevance, for understanding what a market determined price is, of the factors describing "prevailing market conditions for the good or service in question in

[287] *Id.*, pp. 6-20.
[288] *See id.*, pp. 21-25 (discussing steel); *see also Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Supporting Benchmark Memorandum") (Exhibit USA-84), pp. 6-10 (discussing polysilicon).
[289] *US – Carbon Steel (India) (AB)*, para. 4.150; *see also US – Countervailing Measures (China) (AB)*, para. 4.46.
[290] *See US – Countervailing Measures (China) (AB)*, para. 4.59.

the country of provision", at the end of Article 14(d) – "including price, quality, availability, marketability, transportation and other conditions of purchase or sale"?

a. Do they imply that an investigating authority considering "prevailing market conditions" in the country of provision should review the conditions of purchase or sale for the good in question? For example, would it imply an analysis of the prevailing price for the good in question? An analysis of the prevailing quality of the good in question, of the availability of the good in question, etc.?

Response:

164. Under Article 14(d), an investigating authority's consideration of "price, quality, availability, marketability, transportation and other conditions of purchase or sale" arises only after there has been a threshold determination that a particular benchmark source is "market-determined." In other words, these criteria are intended to ensure appropriate comparability between the input allegedly provided for less than adequate remuneration and the benchmark source against which that price is compared (whether that benchmark be in-country or out-of-country); the criteria do not inform the threshold inquiry into whether a particular source is an appropriate "market" benchmark in the first instance. Indeed, it is unclear how consideration of factors such as product quality or "transportation" would in any way inform an investigating authority's analysis of price distortion in a particular market. By contrast, these factors would be relevant to ensuring an evenly-matched comparison between the input allegedly being provided for less than adequate remuneration and a market-determined benchmark price.

165. This interpretation is supported by the Appellate Body's analysis in *US – Softwood Lumber IV (AB)*. In that dispute, the Appellate Body found that investigating authorities are permitted to rely on out-of-country benchmarks in cases where a government is so predominant in providing a good that any comparison with private prices would become circular.[291] After concluding that in-country prices were distorted, the Appellate Body considered alternative, external benchmarks and found that investigating authorities must "ensure that the resulting benchmark relates or refers to, or is connected with, prevailing market conditions in the country of provision, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d)."[292] In other words, the Appellate Body only considered "price, quality, availability, marketability, transportation and other conditions of purchase or sale" after evaluating the separate question of whether in-country prices were distorted.

166. That these purchase-and-sale criteria only come into play after the threshold question is examined is further supported by the fact that, in this very dispute, the Appellate Body did not analyze or otherwise address these criteria. Instead, the Appellate Body held that a finding of consistency with Article 14(d) hinges on whether the investigating authority at issue conducted the necessary market analysis.[293] As part of this analysis, the Appellate Body identified certain

[291] *See, e.g., US – Softwood Lumber IV (AB)*, para. 93.
[292] *Id.*, para. 106.
[293] *US – Countervailing Measures (China) (AB)*, para. 4.61.

non-exhaustive factors that investigating authorities may need to consider depending on the circumstances of the case, such as "the structure of the relevant market, including the nature of the entities operating in that market, their respective market shares, as well as any entry barriers."[294] In contrast, the Appellate Body did not highlight or otherwise reference "price, quality, availability, marketability, transportation and other conditions or purchase of sale" as among the factors that investigating authorities must examine in assessing price distortion.

b. What are possible sources of information for this type of information?

Response:

167. In applying a benchmark, whether relying on domestic prices or out of country prices where an investigating authority has determined that in-country prices are distorted, the authority must take into account factors such as price, quality, availability, marketability, transportation, or other conditions of purchase or sale. The available sources of information will vary depending on the facts and circumstances of the case. Possible sources might include, for example, government-collected statistics, industry-specific press and publications, as well as other information submitted by domestic and foreign interested parties, or collected by an investigating authority and placed on the record.

28. Did the USDOC examine the conditions of purchase or sale for the goods in question in China? If so, could the United States point to specific examples in the record?

Response:

168. The United States refers the Panel to its response to Question 27. The USDOC conducted the market analysis discussed by the Appellate Body in this dispute. As part of this analysis, the USDOC was not required to consider the "conditions of purchase or sale" (or price, quality, availability, marketability, or transportation). These factors relate to the comparability between the input allegedly provided for less than adequate remuneration and the benchmark source against which that price is compared. Nonetheless, in the section 129 proceedings, the USDOC certainly examined the conditions under which companies in China's steel and polysilicon sectors operate for purposes of finding price distortion. To this end, the USDOC refers the Panel to the Benchmark Memorandum and the Supporting Benchmark Memorandum.[295]

29. In view of the Appellate Body's ruling that in-country prices can be rejected only in "very limited" circumstances, would any type of government intervention be sufficient to find that the adequacy of remuneration cannot be determined "in relation to prevailing market conditions in the country of provision"?

Response:

[294] *Id.*, para. 4.62.

[295] *See generally* Benchmark Memorandum (Exhibit CHI-20); *see also* Supporting Benchmark Memorandum (USA-84) (explaining why the USDOC did not examine the specific steel inputs at issue in the section 129 proceedings, and why the record was limited with respect to the polysilicon sector).

169. As explained in response to Question 25, above, the United States respectfully declines to speculate on all hypothetical circumstances pursuant to which certain types, or degrees, of government intervention might justify a finding of price distortion. A determination of that nature necessarily depends on a case-specific inquiry that will vary with the evidence and circumstances of each particular proceeding.[296] And, to be clear, the USDOC's findings in this dispute were not based on isolated or insignificant governmental intervention, which, depending on the circumstances, may not be sufficient to make a determination of price distortion. Rather, the findings were based on the totality of the record evidence, which included any information provided by China, as well as 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).

30. If a government can distort market prices through other channels than as a supplier of the good, and if market distortion is a question of degree, then how can a panel evaluate whether an investigating authority has properly substantiated a sufficient degree of market distortion?

Response:

170. To answer this question, the United States directs the Panel to the standard of review that it will apply in evaluating the USDOC's findings. In particular, the Appellate Body has explained that:

> [T]he task of a panel [is] to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."[297]

Further, the United States recalls that it is not the task of a panel task to evaluate the underlying evidence to make its own *de novo* findings, or to substitute its own judgment for that of the investigating authority.[298]

171. 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

[296] *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'").
[297] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).
[298] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 379.

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,[299] 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.[300] The Panel is not tasked with finding the hypothetical tipping point at which government intervention in a market becomes distortive.

31. Is it China's position that, in order for an investigating authority to determine that the adequacy of remuneration cannot be determined "in relation to prevailing market conditions in the country of provision", the authority would have to find that prices for the good in question are "effectively determined", de jure or de facto by the government?

a. Could widespread government intervention (in the overall or sectoral market) be sufficient to demonstrate that prices for the good in question are determined de facto by the government? If so, in what circumstances?

Response:

172. The United States understands that these questions are directed to China.

32. Was the significance of the government's role as a supplier of the good a factor in the USDOC's benchmark determinations? If so, did the significance of the government's role as a supplier of the good at issue have any impact on the evidentiary threshold required to establish that the adequacy of remuneration cannot be determined "in relation to prevailing market conditions in the country of provision"?

Response:

173. The USDOC took into account many aspects of the government's role, including as a supplier, but did not limit its analysis to evaluating the "significance" of the government's role as a supplier as that term is understood. The USDOC's analysis also considered the *nature* of the government's participation in the sector, through its policy interventions, and through other channels of influence. For example, in the Benchmark Memorandum, the USDOC found that "the record evidence shows that SIEs possess a significant market share of overall production in

[299] *See US – Countervailing Measures (China) (AB)*, paras. 4.61-4.62 (concluding 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).

[300] *See, e.g.*, U.S. First Written Submission, p. 76 (paragraph 68); U.S. Second Written Submission at para. 170.

China's steel sector."[301] The USDOC held that this evidence, "while sufficient," was "not necessary to a determination that private prices are distorted."[302] The USDOC continued that "where, as here, the market structure is characterized by the presence of many SIE steel producers that are shielded from competitive market forces, *and where the record evidence shows that the GOC intervenes heavily in the both the public and privately-owned enterprises in the industry to achieve public policy outcomes*, it can be concluded that even a minority presence of such SIEs leads to the distortion of private prices to such a finding."[303]

174. In sum, the Chinese government's role through its ownership interest in input suppliers was relevant to the USDOC's analysis, but it was certainly not the *only* factor upon which the USDOC relied, nor were the USDOC's findings dependent on a precise quantification of the Chinese government's market share. As the USDOC explained, these findings were consistent with the Appellate Body's recognition in this dispute that "the government may distort in-country prices through other entities or channels than the provider of the good itself."[304]

33. Did the USDOC sufficiently analyse relevant aspects of "prevailing market conditions" for the goods in question in the country of provision?

Response:

175. Yes. The United States refers the Panel to the Benchmark Memorandum (Exhibit CHI-20), Supporting Benchmark Memorandum (Exhibit USA-84), and the Final Benchmark Determination (Exhibit CHI-21). Regarding whether this analysis was "sufficient," we recall that "the task of a panel [is] to assess whether the explanations provided by the authority are 'reasoned and adequate' by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning."[305] Further, as the original Panel in this dispute recognized, "a panel reviewing a determination on a particular issue that is based on the 'totality' of the evidence relevant to that issue must conduct its review on the same basis."[306] The USDOC's analysis in the section 129 proceedings was "reasoned and adequate,"[307] was supported by ample record evidence, and comported with the Appellate Body's findings in this dispute. Therefore, the USDOC sufficiently analyzed relevant aspects of "prevailing market conditions" for the goods in question in the country of provision.

176. The United States further notes that the USDOC's analysis was intended to determine, as a threshold matter, whether the requisite "prevailing market conditions" existed in the relevant input markets. As discussed further in response to Question 27, the question of whether such conditions exist in the country of provision precedes any subsequent analysis of "price, quality, availability, marketability, transportation and other conditions of purchase or sales" within that

[301] *See* Benchmark Memorandum, p. 27 (Exhibit CHI-20).
[302] *Id.* at 28; *see also* Final Benchmark Determination, p. 19 (Exhibit CHI-21).
[303] Benchmark Memorandum, p. 28 (emphasis added) (Exhibit CHI-20).
[304] *See, e.g., id.*, p. 27; *see also US – Countervailing Measures (China) (AB)*, para. 450, n.530.
[305] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).
[306] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.
[307] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

country for purposes of Article 14(d). In other words, once an investigating authority has established a potential market-determined benchmark price, then the investigating authority must undertake further analysis to assure comparability between the prices being compared to determine the adequacy of remuneration.

34. Were the questions asked by the USDOC in the benchmark questionnaires relevant to the analysis needed under Article 14(d)? Did the USDOC make an effort to determine whether prices in China were market-determined?

Response:

177. Yes. The questions asked by the USDOC were relevant to the analysis needed under Article 14(d). The United States refers the Panel to Exhibit USA-121 for a copy of the questionnaire that the USDOC sent to the Government of China. To summarize, the USDOC requested information regarding the structure of the relevant input industry, as well as information regarding all industrial laws, plans, and policies that applied to the input markets during the relevant periods of investigation.[308] The USDOC additionally requested information regarding any export restrictions on the relevant inputs during the periods of investigation and barriers to market entry and exit.[309] Further, the USDOC requested information on any domestic or foreign investment restrictions and any other "market conditions, trends, and developments" for the goods.[310] In addition to considering China's responses (to the extent they were responsive to the questions posed), the USDOC collected third-party evidence so that it could "base its determination on positive evidence on the record."[311] All of this information was relevant to conducting the market analysis required by the Appellate Body.[312]

178. The USDOC expended significant effort in collecting and analyzing this information, to evaluate whether prices within China were market-determined and useable as benchmarks to determine the adequacy of remuneration. Therefore, to answer the Panel's question, the USDOC certainly made an effort to determine whether prices in China were market-determined.

35. Was an actual analysis of input prices and/or an analysis of the determinants of such prices required in these cases? If so, did the USDOC undertake such an analysis?

Response:

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[308] *See Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Issuance of Questionnaire Concerning the Benchmark Used to Measure Whether Certain Inputs Were Sold for Less than Adequate Remuneration*, June 5, 2016 (Exhibit USA-121), pp. 14-15. The USDOC also requested information regarding the producers in the relevant input industries. *See id.*, pp. 17-18.

[309] *Id.*, pp. 15-16.

[310] *Id.*, p. 16.

[311] *See US – Countervailing Measures (China) (AB)*, para. 4.47 (finding that what investigating authorities must do in "conducting the necessary analysis for purpose of arriving at a proper benefit benchmark will vary depending on 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").

[312] *See, e.g., US – Countervailing Measures (China) (AB)*, para. 4.62.

179. No. The SCM Agreement does not prescribe the specific mode of analysis that an authority must use in deciding on an appropriate benchmark. Rather, the question in a WTO dispute settlement proceeding is whether the analysis used by the authority was part of a reasoned and adequate explanation for its determination. Accordingly, and specifically, the USDOC was not required to analyze specific prices for the relevant inputs to determine that SIE and private prices in China's steel and polysilicon sectors are not market-determined.

180. The specific mode of analysis used by USDOC in the determinations at issue was to examine whether prices within the steel sector were reflective of "market conditions," using the standard of the Appellate Body in *EC-Large Civil Aircraft (AB)*. In particular, the USDOC determined whether prices in China's steel sector result from "the discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market."[313] And based on consideration of the totality of the evidence, the USDOC concluded that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market."[314]

181. As the United States explained in the first written submission, "[p]rice operates as a signal to convey the relative supply and demand."[315] But when "government policies inflate supply (or otherwise distort choices by market participants that would affect their pricing), the price no longer corresponds with the information it should signal."[316] The USDOC cited extensive evidence that in China's steel sector, China intervenes heavily to achieve certain outcomes in pursuit of desired policy goals, which are not consistent with or reflective of market disciplines between buyers and sellers. This heavy-handed intervention distorts choices by market participants, and has had the effect of inflating supply. For example, the USDOC cited evidence that there is chronic excess capacity in China's steel sector, and that this excess capacity is a direct consequence of sustained government intervention in the sector.[317] Furthermore, rather than allowing the market to correct these supply and demand imbalances,[318] China's government developed *additional* policies aimed at addressing excess capacity through state channels.[319] In this scenario, based on the totality of the evidence on the record, the prices at which steel goods are sold cannot fairly be viewed as "market prices."

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[313] *EC – Large Civil Aircraft (AB)*, para. 981.
[314] Benchmark Memorandum (Exhibit CHI-20), p. 28; *accord id.* at p. 27 (finding SIE prices did not reflect "market conditions").
[315] U.S. First Written Submission, para. 237.
[316] *Id.*
[317] *See, e.g.*, Benchmark Memorandum (Exhibit CHI-20), pp. 21-23; *see also United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of the USDOC of the People's Republic of China to the Department's Benchmark Questionnaire*, dated July 6, 2015, Exhibit GOC D-25 (Exhibit CHI-19) at Exhibit-3 at 6-7, 14 (stating that "the Chinese government has acknowledged its growing concern over industry overcapacity, which has become acute since 2006" and containing a chart demonstrating sustained supply and demand imbalances after 2006).
[318] Indeed, as one commentator noted, "{i}f there is one solution the country has not pushed, it is allowing the worst performers in the steel sector to go out of business." *See* Benchmark Memorandum (Exhibit CHI-20), p. 25 (quoting "In China's Floundering Steel Sector, the Burden of Politics," The New York Times, (May 3, 2012) (Exhibit USA-93)).
[319] *See* Benchmark Memorandum (Exhibit CHI-20), pp. 23-26.

182. The USDOC's finding that prices within China's steel sector do not reflect market conditions necessary to establish an equilibrium price was unrelated to the precise prices being charged. Price validation exercises become problematic because systemic distortions resulting from pervasive state influence throughout China's economy may preclude any meaningful quantitative analysis of prices. Any "baseline" that could be calculated to compare input prices could be influenced by the same systemic distortions as the prices themselves. Thus, regardless of whether a particular input is sold for $5 or $50, the fact remains that the price was determined in a sector where market outcomes are heavily influenced by the hand of the government to the point that such prices do not reflect the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market."[320] Moreover, it is not necessary to look at input prices to determine that excess supply (all else being equal) has the effect of suppressing prices for a particular product.

36. Was the USDOC required to seek sample market prices for the inputs at issue? If so, did the USDOC seek such information, and did the mandatory respondents and/or the GOC provide information on prices which could serve as a benchmark?

Response:

183. No. As noted in response to Question 35, the SCM Agreement does not specify the particular mode of analysis to be used by an authority in selecting a market-based benchmark.

184. The United States also notes that a review of the limited pricing information on the record in each of these proceedings, in light of the totality of the record evidence regarding government distortion, would not be informative. For example, China places heavy emphasis on a price report published by Mysteel. However, as the United States explained in the second written submission, these "data ultimately say nothing about whether those prices also reflect the effects of sustained state intervention in the sector."[321] Likewise, these data "are in no way inconsistent with, nor do they undermine, the lengthy analysis that the USDOC undertook in the Benchmark Memorandum, and the extensive evidence upon which that analysis was based."[322] As the United States stated, "[t]he mere fact that input prices fluctuated from 2006 [to] 2008, perhaps in partial response to external market factors, is not dispositive regarding the market orientation of those prices in the context of a market distorted by pervasive government intervention."[323]

37. At paragraph 38 of its oral statement, China stated that "the USDOC was able to identify only two factors that allegedly affected the prices charged by [privately owned companies]". Is this correct, and if not, could you please point to the record evidence that shows this?

Response:

[320] *EC – Large Civil Aircraft (AB)*, para. 981.
[321] United States Second Written Submission, para. 185.
[322] United States Second Written Submission, para. 185.
[323] *Id.*

185. No. As an initial matter, China's assumption that privately-owned companies comprised "at least half of the relevant input markets" such that state-invested suppliers could not exercise market power to distort the pricing of private sector participants is not supported by the evidence on the record. In this regard, the United States directs the Panel to paragraph 192 of the United States' Second Written Submission, noting the US objection to China's assumption regarding the size of the state-owned market share.

186. But more fundamentally, China fails to appreciate that the USDOC did not base its findings regarding private price distortion on a particular market share garnered by state-invested suppliers. Rather, the USDOC found that China has power in the steel sector that "goes beyond that of ownership of assets or share of production."[324] In particular, the USDOC found that where a sector "is characterized by the presence of many SIE steel producers that are shielded from competitive market forces, and where the record evidence shows that the GOC intervenes heavily in the both the public and privately-owned enterprises in the industry to achieve public policy outcomes, it can be concluded that even a minority presence of such SIEs leads to the distortion of private prices."[325] This is because "the market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result "from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market."[326] China cites no evidence or rationale supporting a finding that private sector participants are insulated from these distortions simply by virtue of their private ownership. For example, the excess capacity in China's steel sector necessarily impacts *all* market participants.

187. China likewise fails to acknowledge the USDOC's finding that the "GOC places operational constraints on private and foreign enterprises that might otherwise present significant competition to SIEs in state-favored industry sectors."[327] Indeed, the "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."[328] This structure ensures that private sector participants remain constrained in their growth, and is evident from, for example, restrictions that China places on private investment.[329]

188. Similarly, the USDOC cited evidence that the Government of China "makes extensive use of what the World Bank describes as industrial interventions, which often result in what essentially are government-dictated 'market-outcomes'" and that these interventions "favor size and state investment."[330] In the steel sector, specifically, the USDOC cited a State Council

[324] Benchmark Memorandum, p. 28 (Exhibit CHI-20).
[325] *Id.* (Exhibit CHI-20).
[326] *Id.* (Exhibit CHI-20).
[327] *See id.*, p. 19 (Exhibit CHI-20).
[328] *Id.*; *see also id.*, p. 20 (citing *China 2030: Building a Modern, Harmonious, and Creative High-Income Society*, World Bank and the Development Research Center of the State Council of China (2012) (Exhibit USA-41), p. 26).
[329] *See, e.g.*, Benchmark Memorandum, p. 18 (Exhibit CHI-20) (citing evidence that foreign investors are subject to investment guidelines to ensure that foreign investment does not conflict with public policy goals); *id.*, p. 29 (citing evidence that "in principle" foreign investors may not own controlling shares in an iron or steel enterprise in China); *id.*, p. 9 (citing China's investment catalogue, which specifies prohibited, restricted, and encouraged investments for all industries and all investors).
[330] *See id.*, p. 19 (citing China 2030: Building a Modern, Harmonious, and Creative High-Income Society, the World Bank and the Development Research Center of the State Council of China (2012) (Exhibit USA-41), pp. 114, 117).

Circular on Accelerating the Restructuring of the Industries with Production Capacity Redundancy, which identifies a number of steps to be undertaken to curb excess capacity. One policy feature of the *Circular* is the promotion of large enterprise conglomerates through forced mergers and acquisitions (including mergers of privately-owned companies, such as the forced merger of Rizhao Steel with a larger "financially unstable SIE" to create an even larger state-invested enterprise).[331]

189. As the foregoing demonstrates, the USDOC did not base its findings regarding private price distortion on only two pieces of evidence (namely, the existence of forced mergers and acquisitions and export taxes[332]). The Panel should reject China's efforts to mischaracterize the evidence and the USDOC's analysis in the section 129 proceedings.

SPECIFIC ACTION AGAINST SUBSIDIES (ARTICLE 32.1)

55. Is China's claim under Article 32.1 of the SCM Agreement an autonomous claim or a consequential claim following from China's claim under Article 14(d) of the SCM Agreement?

Response:

190. The United States understands that this question is directed to China.

56. Is it China's position that the measure which is allegedly inconsistent with Article 32.1 consists of "the … determinations, including the upstream subsidy rationale contained therein and the countervailing duties resulting from that rationale" ?

a. Does China challenge these three elements as a single "action" within the meaning of Article 32.1?

b. Is the measure as defined by China encompassed by the reference to "benchmark determinations" in its panel request and thus within the scope of the Panel's terms of reference under Article 6.2 of the DSU?

Response:

191. The United States understands that these questions are directed to China.

[331] Although China claims in paragraph 38 of its oral statement that the USDOC did not substantiate that forced mergers and acquisitions occurred in China's steel sector, the United States refers the Panel to paragraph 196 of the United States' Second Written Submission. China has failed to explain why the USDOC did not properly reach this factual finding.

[332] Although China claims in paragraph 38 of its oral statement that the USDOC's reliance on export taxes "simply underscores the absurd breadth of the types of factors that the United States asks the Panel to accept as 'distortion,'" the United States clarifies that it is not requesting that the Panel accept each piece of evidence as a sufficient basis *on its own* to establish price distortion. Rather, the United States made its determination based on the totality of the evidence; that is the basis upon which the Panel should evaluate the evidence. *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52; *Japan – DRAMs (Korea) (AB)*, para. 131.

57. Is the measure as defined by China inextricably linked to or have a strong correlation with the constituent elements of a subsidy? In particular, has China demonstrated that the "action" taken by the United States is correlated to the existence of an upstream subsidy? Is it relevant to the analysis that in-country prices may be rejected, even in the absence of an upstream subsidy?

Response:

192. As a preliminary matter, China has failed to identify what it defines as the "measure," and thus has failed to comply with the requirements of Article 6.2 of the DSU to "identify the specific measures at issue." Throughout the course of this dispute China has described the alleged measure in a variety of inconsistent ways, and so fails to identify precisely what supposed measure China seeks to challenge.[333] China has also failed to identify any "action" taken by the United States apart from the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section 129 proceedings and the resulting imposition of countervailing duties.[334] Further, the imposition of countervailing duties is not inconsistent with Article 32.1 because definitive countervailing duties are one of the permissible responses to subsidization.

193. China's claim, as most recently articulated, is also inconsistent with the claim China identified in its panel request, *i.e.*, that the "the benchmark determinations" in the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section 129 proceedings are inconsistent with Article 32.1.[335] The Appellate Body has made clear that a party cannot expand a WTO dispute to include measures that were not included within its panel request.[336] Further, Article 32.1 does not contemplate challenging intermediate analytical steps that take place when carrying out a CVD investigation. In particular, the Appellate Body in *US – Softwood Lumber IV* and in other reports has recognized that calculating a benefit and using out-of-country benchmarks to do so is consistent with the obligations of the SCM Agreement.

194. The USDOC's analysis of China's steel sector discussed many aspects of government intervention; this analysis cannot be considered an "action" taken by the United States. The only "action" here – as China recognized during the Panel meeting – is the imposition of countervailing duties. Moreover, the USDOC's analysis of China's steel sector does not contain an "upstream subsidy analysis" as China has suggested. The USDOC's analysis likewise does not have an adverse bearing on subsidies provided to upstream producers and thus does not result in an implicit upstream subsidy determination, as China claims. The use or rejection of in-country prices only bears on the measurement of the adequacy of remuneration for the subsidies being investigated. The USDOC's reference to government intervention, including widespread subsidization, does not have a transitive property that would carry it forward to other aspects of the determination, nor is it reflected in the benefit calculation. Rather, the analysis of that

[333] The United States refers the Panel to its Second Written Submission at paragraphs 210-11.
[334] *See* China's Second Written Submission, para. 185 ("the measures at issue are the USDOC's Section 129 determinations in the four investigations in which the USDOC was required to re-evaluate its benchmark findings.") and 190.
[335] China Consultation Request, para. 26.
[336] *US – Carbon Steel (AB)*, para. 171 (finding that where a panel request fails to adequately identify a measure or specify a claim, such measure or claim will not form part of a panel's terms of reference); *Dominican Republic – Cigarettes (AB)*, para. 120.

evidence informs the question of whether prices are distorted; beyond that question, there is no more relevance to that information. Certainly no "action" is being taken against that information or evidence as China claims.

58. Is "the design and structure" of the measure as defined by China such that the measure is opposed to, has an adverse bearing on, has the effect of dissuading the practice of subsidization of inputs, or creates an incentive to terminate such practices?

Response:

195. As noted above in response to question 57, China has failed to identify what it defines as the measure. Consequently, China has made no showing that there is a measure that is opposed to, has an adverse bearing on, has the effect of dissuading the practice of subsidization of inputs, or creates an incentive to terminate such practices.

59. Is it relevant to the Panel's consideration of this claim that the USDOC, in its benchmark analysis in the Section 129 determinations, relied on "a variety of record evidence" not limited to information regarding the provision of subsidies to input producers?

Response:

196. The USDOC's reliance on a variety of record evidence further highlights that China has no basis for its contention that the USDOC in essence made an upstream subsidy finding. Evidence of subsidies to input producers, like evidence of other government intervention, serves to illustrate the array of non-market forces distorting prices in China's steel sector. This range of evidence was considered for the purpose of determining whether in-country prices were market-determined such that they could be used to measure the adequacy of remuneration. The United States emphasizes that the USDOC did not make findings of subsidization with regard to subsidies provided to input producers, nor was there a need to engage in such an inquiry for purposes of measuring the adequacy of remuneration. In *OCTG*, *Pressure Pipe*, and *Line Pipe* section 129 determinations the USDOC reviewed evidence demonstrating that China intervenes in the steel sector in a variety of ways, including through industrial policies, forced mergers and acquisitions, subsidization and other incentives that insulate SIEs from normal commercial considerations, investment restrictions, and export restrictions.[337] Indeed, an analysis of China's steel sector that ignored the widely recognized fact of such government interventions would be incomplete.

197. Likewise in the *Solar Panels* section 129 proceeding (where the record was more limited as a result of China's failure to respond to the benchmark questionnaire), the USDOC considered the available record evidence demonstrating that the government intervenes in polysilicon sector in a variety of ways, including by export restraints, management of the industry, maintaining manufacturing rules and restrictions, and subsidization.[338]

[337] *See* Benchmark Memorandum, p. 30 (Exhibit CHI-20).
[338] *See* Benchmark Memorandum, pp. 8-9 (Exhibit CHI-20).

60. Is it relevant that recourse to out-of-country benchmarks will not necessarily lead to a finding that a benefit has been conferred?

Response:

198. Yes. As the Panel's question recognizes, the use of out-of-country benchmarks will not necessarily lead to a finding that a benefit has been conferred. This observation is relevant because it highlights why the analysis of market conditions – even one that results in using out-of-country benchmarks – cannot be considered an action against subsidization. As discussed above, the analysis of China's steel and polysilicon sectors informs the question of whether prices are distorted. Beyond answering that question, the analysis of that evidence has no bearing on the determination.

199. Further, the USDOC did not examine the countervailability of any upstream subsidy. Even assuming *arguendo* that such subsidies could be countervailed via the subsidy rate calculated for inputs provided for less than adequate remuneration, China's logic fails. The fact that reliance on an out-of-country benchmark could result in the calculation of zero benefit (or a benefit amount less than the putative benefit conferred by an upstream subsidy) demonstrates that the subsidy actually being countervailed is the benefit conferred by the provision of inputs for less than adequate remuneration. In other words, even if one were to entertain China's argument that the USDOC is attempting to address "upstream subsidies," the benefit calculation for the provision of inputs is not connected to the measurement of any upstream subsidies (nor are any such upstream subsidies included in the benefit calculation). This fact, among others, undermines China's theory that the United States is countervailing those upstream subsidies.

SPECIFICITY

38. Do the parties agree as to the nature of the subsidy programme(s) at issue? If not, is this compliance Panel required to determine what the subsidy programme(s) at issue is/are, given the findings on subsidy programme in the original Panel Report?

Response:

200. As for most any issue in a WTO trade remedy dispute, a WTO panel is not required to conduct a *de novo* analysis of any issue, including the parameters of a subsidy subject to countervailing duties. Rather, the complaining Member has the burden of showing that the authority's determination was inconsistent with WTO rules. Here, China objects to the USDOC's subsidy program findings, but has not provided an explanation of how China's repeated systematic provision of inputs for nearly 50 years could be considered anything other than a program of action pursuant to which the subsidized inputs were provided.

201. The Panel is not required to make a new determination of what the subsidy programs at issue are, but rather may rely upon the case-specific discussion in the USDOC's determinations themselves.[339] The USDOC in its Section 129 proceedings identified *de facto*-specific subsidy programs for the provision of various inputs for less than adequate remuneration by identifying a

[339] *See* U.S. First Written Submission, paras. 288-91; U.S. Second Written Submission, paras. 230-233, 243.

systematic series of actions pursuant to which the underlying subsidies at issue were provided.[340] The USDOC's analysis in each of these proceedings is consistent with the Panel's and Appellate Body's discussion of the definition of a program.[341]

202. China has not explained how an analysis of *de facto* specificity should be conducted differently. Indeed, China can point to nothing in the text of Article 2.1(c) that would suggest otherwise. Thus, while we seem to disagree with China as to the nature of the subsidy programs at issue, we are unable to articulate what China's position as to the nature of the subsidy programs at issue actually is.

203. The investigation of each subsidy program at issue in the proceedings reflects the necessary evaluation by the USDOC, identifying the program of action in each case and taking account of the length of time during which the subsidy program was in operation, the Panel will find ample evidence in each case by looking at USDOC's determinations regarding the subsidy programs at issue. In doing so, the Panel will observe that the necessary analysis is present in each of the subsidy program(s) at issue given the findings on *de facto* specificity consistent with the original Panel Report and the Appellate Body's guidance on this issue.[342] The United States' view is that the USDOC's determinations regarding the existence and specificity of the subsidy program at issue properly implement the DSB's recommendations and rulings.

39. Do the parties agree that the question before this compliance Panel is limited to determining whether the USDOC took account of the length of time during which the subsidy programme has been in operation?

Response:

204. The question before this compliance Panel is limited to determining whether the USDOC took account of the length of time during which the subsidy program has been in operation. That is the provision under which China has challenged the USDOC's Section 129 proceedings,[343] *i.e.*, the last sentence of Article 2.1(c), notwithstanding China's conflation of the various considerations identified in Article 2.1(c).[344]

205. In its submissions, China also seems to present arguments pertaining to other elements of a specificity analysis.[345] Those arguments, however, do not pertain to the claims actually presented in China's panel request, which in turn serves to establish the terms of reference in this proceeding. Accordingly, the panel report should simply note that these other arguments are not relevant to any legal issue within the terms of reference.

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[340] *See* Preliminary Determination of Public Bodies and Input Specificity, p. 19 (Exhibit CHI-4); Input Producers and Input Purchases (Exhibit US-126).
[341] *See* U.S. Second Written Submission, paras. 227-29 (citing *US – Countervailing Measures (China) (AB)*, paras. 4.149-51; *US – Countervailing Measures (China) (Panel)*, para. 7.239).
[342] *US – Countervailing Measures (China) (AB)*, para. 4.150-51.
[343] China's First Written Submission, para. 434
[344] *See* Third Party Written Submission of the European Union, para. 76 ("China seems to mix the various types of arguments under the heading 'subsidy programme' which makes its exact line of reasoning difficult to follow.").
[345] *See* China's First Written Submission, paras. 434(h)-(j).

40. When access to a subsidy is already limited by the nature of the input provided, how and to what extent is an authority to take account of the length of time during which a subsidy programme has been in operation?

Response:

206. The nature of the input provided does not necessarily inform the analysis of the length of time during which a subsidy program has been in operation. The length of time may be more or less relevant to determining specificity depending on any number of factual circumstances. Article 2.1(c) includes reference to factors that must be taken into account due to the nature of a *de facto* specificity inquiry. The purpose of the length of time analysis identified in the last sentence of Article 2.1(c) is to safeguard against the possibility of an erroneous *de facto* specificity finding caused by the subsidy program having been in operation for a limited period of time only.[346] In any case, access to a subsidy that is limited by the nature of the subsidy does not preclude a finding of specificity.

41. Is an investigating authority required to establish the total length of time during which the subsidy programme has been in operation? Is a finding that the subsidy programme has been in operation during the period of investigation sufficient?

Response:

207. Article 2.1(c) does not require an investigating authority to establish the total length of time during which the subsidy program has been in operation. Rather, the length of time language in Article 2.1(c) instructs the investigating authority to account for the fact that there may only be a limited number of users because the subsidy program has only been in operation for a limited period of time. As the original panel in this dispute recognized, the last sentence of Article 2.1(c) functions as a safeguard that keeps in check the flexibility conceded to investigating authorities under subparagraph (c) so that a program that has been in operation for limited period of time would not by default be found specific because of a limited number users.[347]

208. Article 2.1(c) cannot be interpreted, as China contends, to compel investigating authorities assemble and analyze the additional body of evidence that such an approach would require. The context and object and purpose of the SCM Agreement support an interpretation in which countervailing duties are a usable remedy. China's interpretation would render that remedy inutile, that is, if an investigating authority were required to conduct a full subsidy investigation across decades of history covering every element of a subsidy – financial contribution, benefit, and specificity – simply because a subsidy program had been in existence for a long time. Reading the text of the agreement this way would be counterintuitive and at cross-purposes with the aim of the specificity analysis.

209. A finding that the subsidy program has been in operation during the period of investigation may be sufficient to satisfy the requirement that the investigating authority take account of the length of time during which the subsidy program has been in operation *when*

[346] *See US – Countervailing Measures (China) (Panel)*, para. 7.252.
[347] *See US – Countervailing Measures (China) (Panel)*, para. 7.252.

made in conjunction with, for example, an additional finding indicating that the subsidy program at issue has been in place for a longer period. Here, the USDOC made the additional finding that China's SOEs began producing and selling the inputs at issue in China at some point during the period of 1953 to 1957. Such a finding, while not establishing that the subsidy program at issue has been in operation since at least 1957, is probative of that issue. The combination of these two elements is sufficient to satisfy the requirements of the last sentence of Article 2.1(c) and to resolve the concerns that motivate that requirement, *i.e.*, that the investigating authority might otherwise reach an erroneous specificity finding because the subsidy program at issue has been in place for a narrow period of time.

42. Does the operation of a subsidy programme entail that subsidies have been granted under that programme during the time period under consideration?

Response:

210. No. The operation of a subsidy program does not entail that subsidies have been granted under that program throughout the period of time under consideration.[348] The purpose of the "length of time" language in Article 2.1(c) is to ensure that an administering authority takes into account the length of time that a program has been in operation in order to ensure that a program is not by default found specific due to a limited number of recipients for programs that have only been in operation for a limited period of time. This analysis of specificity is by its very nature separate from the analysis as to whether the program resulted in the provision of a benefit. Assessing the adequacy of remuneration is the analysis that speaks to the benefit calculation – a necessary condition to the subsidy finding, but not a component of the specificity analysis.

211. In the case of a subsidy program for the provision of inputs for less than adequate remuneration, each provision of an input made under that program need not comprise a countervailable subsidy before considering the subsidy program to be in operation, or for such provisions to properly be considered made pursuant to that program. For all sorts of reasons, there may be situations in which certain provisions will confer a benefit and others will not. For this reason, the last sentence of Article 2.1(c) does not require the investigating authority to consider the question of adequacy of remuneration during the time period under consideration, *i.e.*, the period of time of which the investigating authority is taking account. The issue of adequacy of remuneration relates to whether a benefit has been conferred as described within Article 1.1(b), not the Article 2 specificity inquiry.

a. Is the investigating authority required to consider the question of adequacy of remuneration during the time period under consideration?

Response:

212. No. For purposes of the last sentence of Article 2.1(c), the investigating authority is not required to consider the question of adequacy of remuneration during the time period under consideration, *i.e.*, the period of time of which the investigating authority is taking account. The issue of adequacy of remuneration is properly within the Article 1 subsidy inquiry, not the

[348] The United States understands the Panel's reference to the "time period under consideration" to refer to the length of time a subsidy program has been in operation and not as a reference to the period of investigation.

Article 2 specificity inquiry, which follows the Article 1 subsidy inquiry and assumes an affirmative subsidy determination under Article 1.

b. Is a finding that financial contributions have been made during the time period under consideration sufficient to demonstrate the existence of a subsidy programme?

Response:

213. No. A finding that financial contributions have been made during the time period under consideration is not sufficient to demonstrate the existence of a subsidy program. However, the combination of such a finding and a finding that financial contributions have been made during each period of investigation is probative of the existence of subsidy program during the time period under consideration and sufficient for the investigating authority to account for the length of time during which the subsidy program at issue has been in existence.

43. Were the questions asked by the USDOC in the questionnaires relevant to a consideration of the length of time during which the subsidy programme has been in operation?

Response:

214. Yes. The questions asked by the USDOC in the Section 129 questionnaires were relevant to a consideration of the length of time during which the subsidy program has been in operation. Specifically, the USDOC asked China to indicate how long SOEs have been producing and selling the input at issue in China, how long the input at issue has been produced in China, and how long the input at issue has been consumed in China.[349] These questions are probative of the length of time during which a subsidy program has been in operation and therefore relevant to a consideration of that inquiry.

44. How do the factual findings made by the USDOC support its determination that the length of time during which the subsidy programme has been in operation has not limited the number of beneficiaries?

Response:

215. The USDOC determined that the subsidy programs at issue have been in existence since at least 1957, *i.e.*, for over 50 years, based on China's statement that its SOEs began producing and selling the inputs at issue sometime during the period of 1953 to 1957. This finding supports a determination that the length of time during which the subsidy program has been in operation has not limited the number of beneficiaries because 50 years is more than a long enough period of time to resolve such a concern.

45. How is the systematic provision of inputs for nearly 50 years connected to a subsidy programme? Could the United States specify what evidence on the USDOC record

[349] *See* Public Body Questionnaire Response, pp. 18-19 (Exhibit CHI-2).

shows the "regularized and well-planned series of actions", referred to in paragraph 39 of its oral statement? How is this series of actions connected to a subsidy programme?

Response:

216. The systematic provision of inputs for nearly 50 years reflects a program of action by which those same inputs were found to have been repeatedly provided for less than adequate remuneration during the period of investigation in each respective proceeding. Evidence on the USDOC record supporting the "regularized and well-planned series of actions" referred to in paragraph 39 of the United States' oral statement includes the repeated provision of subsidies documented during the period of investigation in each Section 129 proceeding and China's representation that its SOEs have been producing and selling these inputs since at least 1957.[350]

217. China's policy and industrial plans set out their intent to operationalize and achieve policy goals such as producing and providing subsidized inputs through SOE and SIE operations. The resulting series of actions reflects a subsidy program as the Appellate Body has described it, that is, "a plan or scheme regarding the subsidy at issue" that "may . . . be evidenced by a systemic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."[351] Thus, in identifying the series of actions referenced in the Panel's question, the USDOC was following the Appellate Body's guidance as to how the USDOC might evaluate whether a subsidy program exists.

46. The Appellate Body stated that in an inquiry into specificity under Article 2.1(c), "[i]t is relevant therefore to consider not only the actual, but also the past and potential recipients of a particular subsidy." What information would be relevant to this consideration, and where would an investigating authority obtain such information?

Response:

218. The Appellate Body's statement reflects the broad range of possibilities an investigating authority may encounter in conducting a *de facto* specificity analysis. This general comment allows for the kinds of case-by-case considerations that may arise when examining whether an unwritten but operational program of subsidization is in effect. In a particular case, information relevant to the consideration of not only the actual, but also the past and potential recipients of a particular subsidy would include information about which industries use the input at issue and, by implication, which industries did not. The USDOC's standard questionnaire elicits this information. The USDOC reaches a determination based on any information provided in response to this question, as well as other relevant information on the record, such as information contained in the underlying petition. Thus, relevant information may come from both the foreign government or interested parties.

[350] *See* Input Producers and Input Purchases (Exhibit US-126); Public Body Questionnaire Response, pp. 18-19 (Exhibit CHI-2).
[351] *US – Countervailing Measures (China) (AB)*, paras. 4.141, 4.149-50.

47. Do the parties take the view that, in order to establish regional specificity, the USDOC had to show that provision of land within the zone was different from and preferential by comparison with the provision of land outside the zone?

a. Were the questions posed by the USDOC in its questionnaire relevant for consideration of these issues?

Response:

219. Yes. Identifying a distinct land regime required determining whether the provision of land within the zone was different from and preferential by comparison with the provision of land outside the zone. As the original Panel observed, the USDOC's original determination would have been adequately supported if USDOC had established that "the conditions for the provision of land within the . . . zone were different from and preferential to the conditions outside the . . . zone, in terms of special rules or distinctive pricing."[352]

220. Likewise, the questions posed by the USDOC in its questionnaire were relevant for consideration of these issues. For example, the USDOC's questionnaire requested translated copies of the land appraisals in the original investigation to serve as a basis for comparison.[353] Such a comparison likely would have had probative value in determining whether the provision of land within the zone was different from, and preferential by comparison with, the provision of land outside the zone. Further, the USDOC's questionnaire requested "a listing of all incentives or preferential policies offered to firms located within the ZETDZ during the POI" and to "indicate whether the incentives or preferential policies were available to firms located outside of the ZETDZ during the POI."[354] Responses to these questions likely would have had probative value in determining whether the provision of land within the zone was different from and preferential by comparison with the provision of land outside the zone.

48. Does the explanation given by the United States before this Panel – that the USDOC interpreted the term "preferential" as referring to the existence of a "distinct land regime" within the zone relative as compared to the land regime prevailing outside of the zone – sufficiently support a determination of regional specificity? Or does this interpretation of the term "preferential" amount to "non-factual assumptions or speculations"?

Response:

221. The United States' explanation before the Panel – that the USDOC interpreted the term "preferential" as referring to the existence of a "distinct land regime" within the zone as compared to the land regime prevailing outside of the zone – sufficiently supports the determination of regional specificity at issue. That term, as well as additional language indicating that this "preferential" treatment resulted in an "appraisal price . . . of a particular nature," is located in an appraisal report concerning the land in question.[355] The USDOC

[352] *US – Countervailing Measures (China) (Panel)*, para. 7.352; *see* U.S. Second Written Submission, para. 249.
[353] *See* Land Questionnaire, pp. 14-15 (Questions 9-11) (Exhibit CHI-25).
[354] *Id.* at 15 (Question 12) (Exhibit CHI-25)
[355] *See* Memorandum Accompanying Land Preliminary Determination, GG/ZG Verification Report in the

determined that this evidence was probative of and tending to support a conclusion that companies located within the zone received preferential treatment when purchasing land-use rights and, therefore, evidenced a distinct land regime. This interpretation of the record evidence is reasonable and is neither a non-factual assumption nor speculation.

49. Does the record contain any evidence additional to "the comparison appraisal" from the original investigation which could have reasonably replaced the missing facts?

Response:

222. No, the record does not contain any evidence additional to the comparison appraisal from the original investigation upon which the USDOC could have relied.

223. Furthermore, the United States recalls that China failed to cooperate to the best of its ability by either outright declining or failing to respond to the USDOC's requests for information. Accordingly, the USDOC was forced to rely upon the relevant facts that were available to it on the record of the section 129 proceedings and/or on the record of the underlying investigations, as appropriate. As noted, the record does not contain any evidence additional to the comparison appraisal from the original investigation upon which the USDOC could have relied. China had the opportunity to provide additional information, but China decided to not cooperate in this proceeding.

50. Was the authority obliged to consider other evidence on the record pertaining to the issue of preferential land use in the zone in the Section 129 determination in the absence of any arguments from Chinese respondents on this issue?

Response:

224. As a general matter, an authority in a trade remedy proceeding should consider all relevant evidence on the record. With respect to specificity, Article 2.4 of the SCM Agreement provides that a specificity determination should be "clearly substantiated on the basis of positive evidence."

225. Here, the USDOC did consider all of the relevant record evidence available including evidence that may detract from its determination, and based its specificity finding on positive evidence. In particular, after weighing the evidence, the USDOC reasonably concluded that land was offered within the ZETDZ on a preferential basis and that, therefore, the ZEDTZ constituted a distinct land regime.[356]

226. China's *post hoc* arguments in no way support a finding that the USDOC's specificity determination is somehow inconsistent with the SCM Agreement. The USDOC determination could not have anticipated and addressed China's characterizations of specific pieces of record

Countervailing Duty Investigation of Lightweight Thermal Paper from the People's Republic of China ("Verification Report"), p. 19 (Exhibit CHI-27) ("This appraisal fully considered . . . government preferential policies to attract industry, commerce and investments, thus the appraisal price is of a particular nature.").

[356] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).

evidence, when no interested party in the 129 proceeding put forth any explanation or argumentation that called into question the relevant record evidence regarding land specificity.

FACTS AVAILABLE

NB: These questions relate generally to all instances in which issues concerning the use of facts available have been raised in this proceeding.

51. In the absence of any claim under Article 12.7, can the Panel make any findings regarding the USDOC's use of facts available in the proceedings at issue? What is the relevant provision under which the Panel should assess the use of facts available in such a situation?

Response:

227. No, the Panel cannot make any findings regarding the USDOC's use of facts available in the challenged proceedings under Article 12.7 of the SCM Agreement. A party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim. As the Appellate Body has explained, a complaining party will satisfy its burden of proof "when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence."[357] A "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case."[358] The case presented by China fails to meet this standard. To meet its burden, China must adequately identify measures that fall within the scope of the panel's terms of reference, and it must make an adequate legal argument for each of its claims[359] and "adduce[] evidence sufficient to raise a presumption that what it claims is true."[360] The panel may not make the case for it.[361]

228. China, as the complaining party in this Article 21.5 proceeding, must make a *prima facie* case with respect to each of the measures that purportedly constitute an inconsistency with Article 12.7 of the SCM Agreement. Although China put forth various claims with respect to the USDOC's use of facts available in its panel request,[362] it subsequently failed to make a *prima facie* case with respect to these claims. Article 12.7 provides that a Member may make its determinations on the basis of the facts available "[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation."

229. China has failed to advance the Article 12.7 claims made in its panel request in either of its written submissions. Indeed, China declined to adduce sufficient evidence and argument to establish that each of the public bodies, input specificity, land specificity, and benchmark determinations in which the USDOC relied upon the facts available, or that the "adverse facts

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[357] *Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134 (internal footnotes omitted).
[358] *EC – Hormones (AB)*, para. 104.
[359] *See Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134.
[360] *US – Wool Shirts and Blouses (AB)*, p. 14.
[361] *See Japan – Agricultural Products II (AB)*, para. 129.
[362] China's Panel Request, paras. 18, 23-24, 28, 30.

available rate" used in the Magnesia Bricks proceeding, are WTO-inconsistent. China has made no showing that the USDOC erred in resorting to the facts available in the challenged public bodies, input specificity, land specificity, and benchmark determinations. China likewise has made no showing that the USDOC erred in making an adverse inference when relying on the facts available after finding that an interested party refused access to or otherwise failed to provide information requested by the USDOC. In the absence of China putting forth adequate legal arguments and citing evidence sufficient to support an Article 12.7 claim, the Panel may not make any findings as to whether the USDOC's reliance on the facts available in the proceedings at issue is consistent with Article 12.7.

52. If the Panel does address this issue, did the USDOC err in relying on facts available in the Section 129 proceedings at issue?

Response:

230. The USDOC properly relied on the facts available in each proceeding. The USDOC relied on facts available to make its public bodies determinations in all of the section 129 proceedings at issue, its benchmark determination in the *Solar Panels* section 129 proceeding, its input specificity determinations in seven of the proceedings at issue, and its regional specificity determinations in the relevant section 129 proceedings. In each instance the USDOC's reliance on the facts available was consistent with Article 12.7 of the SCM Agreement, which provides that an investigating authority may make its determinations on the basis of facts available in cases in which an interested party "party refuses access to, or otherwise does not provide, necessary information" or "significantly impedes" the proceeding. The USDOC properly determined to rely on the facts available in making these respective determinations as a result of China's failure to provide some or any of the relevant information requested by the USDOC.

231. Specifically, with respect to public bodies, China refused to provide any response to the USDOC's request for information (the public bodies questionnaire) in seven of the twelve section 129 proceedings concerning public bodies. The USDOC therefore found that China failed to participate, it withheld information that was requested, and it significantly impeded the proceedings.[363] Thus, in these seven proceedings, the USDOC determined that the entities were public bodies based on the facts available, *i.e.*, the Public Bodies and CCP Memoranda, which demonstrated that the state sector maintains a leading role in the Chinese economy, that the government exercises meaningful control over SIEs in China, and that government maintains control over enterprises with little to no formal government ownership through the presence of the CCP in these enterprises. In the remaining five proceedings, China did not provide complete information for the non-majority owned entities at issue, *i.e.*, China did not provide information concerning ultimate ownership, corporate governance, the decision-making process and the extent which the government, CCP and related entities exerted control or influence over the input producers.[364] As result of China's failure to provide complete responses, the USDOC was again forced to rely upon the Public Bodies and CCP Memoranda, which discussed and analyzed factual information assessing the role played by the government and CCP in minority-owned

[363] *See* Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).
[364] *See* Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4); *see also* Public Bodies Questionnaire (Exhibit USA-83).

enterprises. Thus, in the remaining five proceedings the USDOC also determined that the entities at issue were public bodies on the basis of the facts available.

232. With respect to the benchmark determination in the *Solar Panels* section 129 proceeding, the USDOC solicited detailed information from Chinese respondents regarding the structure of the Chinese polysilicon market, including information regarding polysilicon producers and the existence of any governing industrial plans or export restraints.[365] China declined to respond to the Department's requests for information, stating that it would "not be submitting a response to the benchmark questionnaire issued by the USDOC" in that proceeding.[366] In the absence of market information needed to conduct further analysis, the USDOC found that it was necessary to rely on the facts otherwise available. In particular, the USDOC relied upon public information from the countervailing duty investigation covering certain crystalline silicon photovoltaic products from China placed on the record of the section 129 proceeding, information in the Benchmark Memorandum, and information from the record of the underlying *Solar Panels* investigation.[367] On this basis, the USDOC found that all domestic prices for polysilicon within China were distorted by governmental intervention and were, thus, not useable "market" benchmarks for measuring the adequacy of remuneration paid by mandatory respondents.

233. With respect to input specificity, the USDOC relied on facts available in seven section 129 proceedings – *PC Strand*, *Solar Products*, *Seamless Pipe*, *Coated Paper*, *Lawn Groomers*, *Drill Pipe* and *Aluminum Extrusions* – because China did not cooperate and thus did not respond to USDOC's request for information. If China had provided information in response to the USDOC's extensive questionnaires in these proceedings, the USDOC may have had sufficient information to pinpoint the historical provision of inputs at less than adequate remuneration.[368] As a result of China's decision not to participate, necessary information related to input specificity was missing from the record.[369] Therefore, as facts available, the USDOC selected China's own answers in the five proceedings in which it cooperated to determine the length of time in which the subsidy program has been in operation.[370] Specifically, the USDOC relied on the facts available to conclude that China had been "producing and selling the inputs at issue in the PRC at some point during the period covered by the first Five-Year Plan (1953-1957), and possibly earlier."[371]

234. With respect to its regional specificity findings, the USDOC relied on the facts available because China failed to cooperate when it did not respond to USDOC's request for information. Because China did not respond to the USDOC's questions concerning regional specificity, *e.g.*,

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[365] *See generally Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Issuance of Questionnaire Concerning the Benchmark Used to Measure Whether Certain Inputs Were Sold for Less than Adequate Remuneration*, June 5, 2016 ("Benchmark Questionnaire") (Exhibit USA-121).

[366] *See United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015, p. 1 (Exhibit USA-122).

[367] *See* Supporting Benchmark Memorandum (Exhibit USA-84), pp. 8-10.

[368] Alternatively, if China had responded but was justifiably unable to provide the requested information, the USDOC may not have made an adverse inference, but nevertheless would have had to rely upon the facts available.

[369] Preliminary Input Specificity Memorandum, p. 9 (Exhibit CHI-23).

[370] Preliminary Input Specificity Memorandum, p. 9 (Exhibit CHI-23).

[371] Preliminary Input Specificity Determination, p. 7 (Exhibit CHI-4).

the USDOC's request for a listing of *all* incentives or preferential policies offered to firms inside of the zone at issue and information on whether the incentives or preferential policies were available to firms located outside of the zone,[372] the information available to the USDOC was limited to information on the record.[373] Thus, as explained above in response to Questions 47-50, the USDOC relied on the verification report from the original investigation where USDOC investigators discussed with GG company officials the terms and conditions surrounding their purchase of land-use rights in the ZETD Zone.[374] The USDOC concluded that, given the lack of other relevant evidence in response to its questionnaire, the government likely "sold the land in question to the respondent at a price and at terms that were not available to other firms" such as would "constitute[] a 'distinct land regime.'"[375]

53. Assuming the provisions of Article 12.7 and relevant prior decisions are the relevant framework for analysis of this issue:

a. did the USDOC use "facts available" that "reasonably" replaced the allegedly missing information?

b. did the "facts available" support the determination reached by the investigating authority in the investigations at issue?

Response:

235. The United States refers the Panel to its response to Question 52. To recall, China failed to cooperate to the best of its ability by either outright refusing to respond to the USDOC's requests for information, or by declining to provide complete responses to the USDOC's requests for information. Accordingly, the USDOC was forced to rely upon the relevant facts that were available to it on the record of the section 129 proceedings and/or on the record of the underlying investigations, as appropriate.

236. The facts available support each of the determinations made by the USDOC and the USDOC considered and discussed that available relevant record evidence to make its determinations. Furthermore, to the extent China's asks the Panel to engage in a re-weighing of the evidence that was on the record in the proceedings, such a request does not comport with the applicable standard of review. Rather, consistent with the Appellate Body's findings in *US – Countervailing Duty Investigation on DRAMS*, the Panel should examine whether the USDOC provided a "reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination."[376]

[372] Land Questionnaire, pp. 15 (Exhibit CHI-25).
[373] Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[374] *See* Verification Report, p. 19 (Exhibit CHI-27).
[375] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[376] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186.

237. The United States has previously addressed how the facts available support its determinations, and so refers the Panel to the following discussions in its first and second written submissions:

- Public bodies determinations: paras. 107-111, 135-142, 144-154 of the United States' First Written Submission; paras. 107-108, 114-115 of the United States' Second Written Submission;
- Benchmark determination in the *Solar Panels* section 129 proceeding: para. 256 of the United States' First Written Submission; paras. 203-208 of the United States' Second Written Submission;
- Input specificity determinations: para. 303 of the United States' First Written Submission; paras. 244-245 of the United States' Second Written Submission; and
- Regional specificity determination in *Thermal Paper*: paras. 307-312 of the United States' First Written Submission, paras. 255-258 of the United States' Second Written Submission.

54. Did the USDOC fail to investigate elements which should have been investigated and considered in establishing the facts? In the establishment of the facts, did the USDOC fail to consider certain elements on the record?

Response:

238. No. The USDOC did not fail to consider or investigate any additional elements. The USDOC's investigation concerning public bodies, benchmarks, input specificity, and regional specificity in the challenged section 129 proceeding is consistent with the requirements in the SCM Agreements, and comports with the relevant analyses used in the original Panel and or Appellate Body reports.[377]

SUBSEQUENT MEASURES

61. To what extent do the subsequent reviews identified by China supersede, or otherwise relate to, any of the Section 129 determinations at issue in this case? Is there any difference between sunset and periodic reviews in this regard?

Response:

239. Each of the subsequent reviews relates to a different period of time. Each different period of review has a different factual record. Each different period of review involves different sets of interested parties. Subsequent reviews cannot be said to "supersede" the section 129 determinations because they relate to different periods of time. The subsequent reviews *relate* to

[377] The United States has previously addressed this point and so refers the Panel to the following discussions in its first and second written submissions: paras. 58, 63-117 of the United States' First Written Submission and paras. 78-80 of the United States' Second Written Submission (public bodies analysis); para. 256 of the United States' First Written Submission; paras. 203-208 of the United States' Second Written Submission (benchmark analysis); paras. 284-86 and 288-91 of the United States' First Written Submission (input specificity); paras. 304-306 of the United States' First Written Submission (regional specificity).

the investigation in the sense that they relate to the same countervailing duty order, but as the United States has explained, further examination of the issues and facts of each proceeding would be required to make even the initial determination that the circumstances of the subsequent proceedings – as relevant to each of China's several legal claims – are similar in all relevant respects to the challenged investigations. For instance, did China participate in each of the proceedings it challenges? Was the same evidence before the USDOC in each review or were there changes in the factual record relating to China's economy over the five-year period throughout which these determinations were made? Were additional facts considered that would change the analysis from the perspective of the investigating authority? A separate host of questions would need to be examined with respect to each proceeding and each claim, even assuming – which is incorrect – that a panel's term of reference could extend to measures adopted after panel establishment. Yet China has not put forward an affirmative analysis of the additional proceedings that in any way connects subsequent measures to the specific claims raised in this proceeding.

240. Sunset reviews are different from the periodic reviews because they do not calculate a duty rate, but rather examine whether injurious subsidization is likely to continue. In this regard, China appears to presume, without any analysis, that the USDOC would not have continued the relevant orders but for reliance upon findings found to be WTO-inconsistent in the original investigations at issue in this dispute. This presumption is incorrect and fails to consider the distinct considerations relevant to countervailing duty sunset determinations.

241. The following example illustrates the need for a detailed analysis of each determination. In the *Wire Strand* investigation, the USDOC found that 25 programs conferred countervailable subsidies attributable to the period of investigation.[378] In the expedited sunset review of the *Wire Strand* order, the USDOC found that revocation of the order would be likely to result in continuation or recurrence of countervailable subsidy programs because "the subsidy *programs* found countervailable during the investigation continue to exist and be used."[379] This finding did not depend upon any particular program, or on the extent of the benefit conferred under a particular program. Given the USDOC's finding, and China's failure to address this finding in its first or second written submission, China has failed to demonstrate how the USDOC's public body and input specificity determinations with respect to the provision of wire rod for LTAR were determinative of the USDOC's continuation of the *Wire Strand* order. This LTAR program was only one of 24 other programs that provided above-*de minimis* countervailable benefits during the period of investigation.[380] Thus, that the subsequent sunset reviews challenged by China may involve public body, input specificity, or benchmark determinations does not in itself establish that the determinations of likelihood to continue would not otherwise have been affirmative.

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[378] *See Issues and Decision Memorandum: Final Results of the Countervailing Duty Expedited First Sunset Review of Prestressed Concrete Steel Wire Strand from the People's Republic of China* (August 31, 2015) (Exhibit CHI-49), pp. 1-2.

[379] *Id.*, p. 5 (emphasis added) (Exhibit CHI-49).

[380] The USDOC calculated net subsidy rates of 15.31 percent (for the Xinhua Companies) and 6.18 percent (for the Fasten Companies) from the provision of wire rod for LTAR. Even removing these figures, the net subsidy rates for those companies would remain above *de minimis*. *See Issues and Decision Memorandum for Final Determination; Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China* (May 14, 2010) (Exhibit USA-128).

62. In the context of the present dispute, what elements are relevant to establish that the subsequent reviews are related in nature to the measures declared to be measures taken to comply and the relevant DSB recommendations and rulings?

Response:

242. The United States would like to emphasize that the question of whether subsequent reviews are "related in nature" is not the applicable threshold for determining whether a "particularly close relationship" or "sufficiently close nexus" exists in connection with the measures taken to comply. Rather, China's claim depends on two questions: (1) whether the challenged measure existed at the time of panel establishment and (2) whether it is closely connected with a measure taken to comply. Here, neither question can be answered in the affirmative. China's attempt to include the subsequent reviews must therefore fail.

243. The first question – whether the measure exists at the time of panel establishment – is fundamental to any WTO proceeding. A complaining party may wish to cover measures that may be adopted in the future, but the DSU does not contemplate such an approach. To do so would be to require a panel to chase after a moving target and the panel process could not function effectively if that were the case. The only exception is in the case of a measure with the "same essence," which is not the case in this dispute.

244. With respect to the second question, a measure that exists at the time of panel establishment – even if not labeled as a compliance measure – may fall within the terms of reference of a compliance proceeding under Article 21.5 as a "measure taken to comply" by virtue of its "particularly close relationship"[381] or "sufficiently close nexus"[382] to a compliance measure. "Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures."[383]

245. China's core argument is that the subsequent reviews are related in nature because they are related to the same countervailing duty orders. However, the mere fact that the reviews are related to the same order is insufficient to establish that the determinations made therein have the same nature such that the reviews have a "particularly close relationship" or "sufficiently close nexus" with the section 129 proceedings at issue in this dispute. Rather, it would be necessary to establish that the nature of the analyses and individual findings within each review are of the same nature. Here, China has failed to do so. The nature of the findings made in the challenged subsequent reviews vary according to the facts of each given proceeding, the time period at issue, the sequence of questionnaires issued and responses provided, and the analysis of the evidence in each case.

246. Despite China's attempts to liken the question before the Panel in this dispute to the question of zeroing, China has not demonstrated – or even provided a plausible explanation –

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[381] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77; *see US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.61.
[382] *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.
[383] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 (emphasis added); *see also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 196, 202.

that the *nature* of the inconsistencies found in the original determinations can be found in the subsequent proceedings. As we have explained, when the Appellate Body discussed the nature of related proceedings in the zeroing context, the Appellate Body recognized the fact that several DSB findings had already established the existence of an "as such" measure.[384] The Appellate Body's decisions in *US – Zeroing (Japan) (Article 21.5 – Japan)* (and in *US – Zeroing (EC) (Article 21.5 – EC)*) were decided in an environment where there were no questions as to whether the action in subsequent proceedings was of the same nature as in the original proceedings.

247. Here, given that the public bodies, input specificity, land, and benchmark determinations, are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding as part of its analysis, it cannot reasonably be found, without close examination of the specific determination in each challenged proceeding, that the determinations in subsequent administrative and sunset reviews are of the same nature as the originally challenged proceedings.

63. In the context of the present dispute, what elements are relevant to establish that the subsequent reviews are related in their effects to the measures declared to be measures taken to comply and the relevant DSB recommendations and rulings?

Response:

248. As noted above, China's argument is premised on the existence of the countervailing duty orders, but the effects of the findings contained within the determinations that were challenged are something different. For example, the "effect" of the public body analysis is a determination that an entity is or is not a public body. China has not shown that any "effect" in a subsequent determination is inconsistent with the SCM Agreement.

249. The mere fact that subsequent reviews result in the imposition of countervailing duties cannot meant that such reviews have a "sufficiently close nexus" in terms of effects with the section 129 proceedings at issue in this dispute. Such a broad interpretation would mean that potentially *any* analysis or determination made within a subsequent review would fall within the panel's terms of reference even if the analysis or determination was distinct in terms of effects from the measures taken to comply.

64. Is the application of the same legal standard in subsequent reviews relevant to establish a "close nexus" in nature and/or effects in the context of highly fact-specific determinations?

Response:

250. China's references to the "same" legal standard in subsequent reviews remains undefined. It is certainly not sufficient to establish a close nexus. If China's efforts here were sufficient, it would suggest that a party could sweep in additional proceedings simply by stating that they contain the "same" inconsistencies as a challenged measure. The legal analysis of a given issue necessarily varies depending on the facts. China has not shown that the facts are the same in

[384] *See, e.g., US – Zeroing (EC) (Article 21.5 – EC)*, paras. 245, 253.

each case or that the facts in any particular case do not justify the investigating authority's conclusions drawn in that instance.

65. Do potential differences in the factual records of future reviews (or the need to have recourse to facts available) affect whether future determinations are in the scope of these compliance proceedings?

Response:

251. If the facts were identical, China would have had an easier time showing a connection; however the facts are not identical and China did not even attempt to show that they are. This is not a case consisting of the rote application of a single precept to each proceeding irrespective of the facts. The determinations at issue are only reached by taking into consideration the universe of facts present within the record of an individual proceeding.

66. With regard to "future administrative and sunset reviews", on what basis could the Panel determine that the basis for a "close nexus" is the "same errors" that are alleged against the Section 129 determinations?

Response:

252. The Panel cannot determine that a "close nexus" exists with respect to those proceedings regarding the inconsistencies alleged by China. The nature of the "errors" alleged by China are fact-specific determinations. There has been no showing that some particular precept will be applied to future cases irrespective of the universe of facts present on a given administrative record.

67. Is the United States of the view that possible differences in the factual records of future reviews (or the need to have recourse to facts available) affect whether future determinations are in the scope of these compliance proceedings?

Response:

253. The scope of these compliance proceedings extends only to factual determinations made by the USDOC. It could not be the case that factual determinations not yet considered could be within the scope of these compliance proceedings.

ONGOING CONDUCT

68. With regard to "ongoing conduct", Canada notes at paragraph 12 of its oral statement that this requires evidence of "repeated past application of the conduct in question and evidence that such conduct is likely to continue". Do the parties agree with Canada in this regard? Must the "conduct in question" in each instance be the same conduct, or can there be variations in the conduct and, if so, to what degree?

Response:

254. In the view of the United States, "ongoing conduct" is not cognizable as a measure that is susceptible to challenge. China has failed to establish that any such "ongoing conduct" exists or is likely to continue under the challenged orders that are at issue in this dispute.[385] Likewise, even if the Panel were to find that China has established the subsequent reviews constitute the "ongoing conduct," China has not demonstrated a "particularly close relationship"[386] or "sufficiently close nexus"[387] to the declared "measure taken to comply" and, as noted in response to Question 62, it cannot be presumed that such a close connection exists.

255. Further, as we explained in our written submissions, the United States has serious concerns about the rationale articulated by the Appellate Body in *US – Continued Zeroing* for finding an entirely new type of "measure" to be subject to WTO dispute settlement. To the extent such a rationale has validity, it is limited to the particular circumstances of zeroing, which the DSB had previously found to be an unwritten measure that could be challenged as such, and which involved a well-specified mathematical calculation. And finding a new type of "measure" in that proceeding was also unnecessary – any finding of breach was entirely consequential to the findings of inconsistency in relation to the series of existing determinations, adding nothing to the DSB recommendations.

256. In particular, the *US – Continued Zeroing* dispute concerned "the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained."[388] As we explained in our written submissions, the zeroing methodology is a vastly simpler type of "measure" than the challenged determinations. The use of zeroing in the USDOC's margin calculations hinged only on whether a respondent's sales database included sales with "negative" margins, and the application of the WTO-inconsistent methodology in the zeroing disputes was evident based on a line of programming code in the dumping margin program. The facts in this dispute are markedly different from the facts in *US – Continued Zeroing.* Here, the USDOC's public bodies, input specificity, land, and benchmark determinations, are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding as part of its analysis and any WTO-inconsistency cannot be established without considering the totality of evidence that was before the USDOC. Because the relevant available evidence changes from year to year due to, for example, differences in the selected respondents and the information those respondents submit, the USDOC's public bodies, input specificity, land, and benchmark determinations can, and do change. Therefore, even on the Appellate Body's approach in that dispute, China's claim fails.

69. Has China demonstrated the existence of a "string of connected and sequential determinations"?

[385] When bringing a challenge against an unwritten measure, a complaining party must clearly establish, through arguments and supporting evidence, both the existence of the alleged measure, and its precise content. *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, paras. 196-98.
[386] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77; *see US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.61.
[387] *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.
[388] *US – Continued Zeroing (AB)*, para. 180.

Response:

257. China has not demonstrated the existence of a string of connected and sequential determinations as conceived by the Appellate Body. China refers to an archipelago of fact-specific determinations spread across a sea of uncertainty.

258. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time."[389] Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings"[390] included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

259. Where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained."[391] Consequently, the Appellate Body was "unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings."[392]

260. In construing its "ongoing conduct" claim, China has failed to even identify the indeterminate number of measures comprising the purported "ongoing conduct" "measure," much less identify the conduct within such measures that is purportedly inconsistent with the SCM Agreement. Thus, China has not only failed to establish the "string of determinations, made sequentially. . . over an extended period of time"[393] that would be required to support its claims related to alleged "ongoing conduct," but also has failed to establish that the challenged practices "would likely continue to be applied in successive proceedings."[394] China's claims in relation to "ongoing conduct" must be rejected.

70. If so, what would be the "unchanged component" in that string of determinations?

Response:

261. The United States understands this question to be directed to China.

[389] *US – Continued Zeroing (AB)*, para. 191.
[390] *US – Continued Zeroing (AB)*, para. 191.
[391] *US – Continued Zeroing (AB)*, para. 194.
[392] *US – Continued Zeroing (AB)*, para. 194.
[393] *US – Continued Zeroing (AB)*, para. 191.
[394] *US – Continued Zeroing (AB)*, para. 191.

71. How can the "systematic application of erroneous legal standards" be established in the case of ongoing conduct?

Response:

262. The United States understands this question to be directed to China.

72. Would separate findings on "ongoing conduct" assist the parties in the resolution of the dispute?

Response:

263. No, separate findings on "ongoing conduct" would not assist the parties in the resolution of the dispute.