UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(DS437)

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

June 14, 2017

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Argentina – Import Measures (AB)	Appellate Body Reports, *Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Canada – Dairy (AB)	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999
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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
EC – Bananas III (AB)	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997
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
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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
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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 – 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
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

INTRODUCTION

1. In this document, the United States comments on China's responses to the Panel's written questions. To a large extent, China's responses repeat arguments that the United States has addressed previously. Rather than also repeat prior U.S. arguments on these issues, the comments below contain additional points on China's arguments. The absence of a U.S. comment on an aspect of China's response to any particular question should not be understood as agreement with China's response.

PUBLIC BODIES

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.

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

Comment:

2. In responding to this question, China once again discusses the legal standard for determining whether an entity is a "public body" within the meaning of Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). In doing so, China offers yet another new proposed interpretation of the term "public body," the most recent of the numerous proposed interpretations of that term that China has put forward throughout this dispute. None of the interpretations China has proposed is correct.

3. The United States recalls that China argued before the original Panel that "a public body … must itself possess the authority to 'regulate, control, supervise or restrain' the conduct of others."[1] The original Panel rejected China's proposed interpretation;[2] the Appellate Body rejected that interpretation as well in *US – Carbon Steel (India)*.[3]

4. Earlier in this compliance proceeding, China argued that an entity may be deemed a "public body" only when the "entity alleged to be providing a financial contribution has been vested with governmental authority to carry out governmental functions, and is exercising *that* authority to perform *those* functions, when it engages in the conduct enumerated in Article 1.1(a)(1)(i)-(iv) of the SCM Agreement."[4] The United States observed, as have certain of the third parties, that an implication of China's proposed interpretation is that the "governmental function" and the conduct under Article 1.1(a)(1) of the SCM Agreement must be the same, and that such an interpretation is not supported by the SCM Agreement or prior Appellate Body

[1] *US – Countervailing Measures (Panel)*, para. 7.35 (summarizing the main arguments of China).
[2] *See US – Countervailing Measures (China) (Panel)*, para. 7.67.
[3] *See US – Carbon Steel (India) (AB)*, para. 4.17.
[4] First Written Submission of China (January 4, 2017) ("China's First Written Submission"), para. 79.

findings.[5]

5. Now, China argues that "a public body … is an entity that is vested with authority to perform a 'government function', such that the entity is exercising that government authority when it engages in the conduct at issue," and "there must be a 'clear logical connection' between the 'government function' identified by an investigating authority and the conduct that is alleged to constitute a financial contribution."[6] China insists that it "does not mean that the 'government function' and the conduct at issue under Article 1.1(a)(1) must be identical."[7]

6. Before commenting on the latest iteration of China's proposed interpretation of the term "public body," the United States notes that China has asserted that "it appears that China, the United States, and the European Union are essentially in agreement regarding the relationship that must exist between the 'government function' identified by the [U.S. Department of Commerce ("USDOC")] and the relevant conduct."[8] That is, China asserts that the United States and the European Union agree with China that there is a legal requirement that, for an entity to be deemed a "public body," the investigating authority[9] must establish a "clear logical connection" between the government function identified and the conduct under Article 1.1(a)(1).[10] China's assertion is demonstrably false.

7. The United States explicitly rejected this very assertion when China made it during the panel meeting, calling the Panel's attention at that moment to China's mischaracterization of the U.S. position. While the United States has explained that there does exist in the section 129 proceedings at issue here a clear, logical connection between the governmental function that the USDOC identified and the conduct in which the entities were engaged, the United States does not agree with China's new argument that establishing such a connection is a legal requirement for determining that an entity is a "public body" under Article 1.1(a)(1).[11]

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[5] *See, e.g.*, First Written Submission of the United States of America (February 6, 2017) ("U.S. First Written Submission"), paras. 29-30; Third Party Written Submission by the European Union (February 13, 2017), para. 11; Third Party Submission of Japan (February 13, 2017), para. 3; Third Party Oral Statement of Australia (May 11, 2017), para. 6; Responses of Canada to Questions to the Third Parties from the Panel in Connection with the Substantive Meeting (May 31, 2017), para. 4.

[6] Answers of the People's Republic of China to Questions from the Panel (May 31, 2017) ("China's Responses to Panel Questions"), para. 4.

[7] China's Responses to Panel Questions, para. 4.

[8] China's Responses to Panel Questions, para. 14 (emphasis added).

[9] A WTO dispute settlement panel would be 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.

[10] China's Responses to Panel Questions, para. 14.

[11] *See also* China's Responses to Panel Questions, para. 17, n. 17. In that footnote, China states:

> China explained in its opening statement at the meeting of the parties that if it was in fact the U.S. position that there must be a "clear logical connection" between the "government function" and the conduct at issue under Article 1.1(a)(1), then China believed that the parties were essentially in agreement regarding the proper legal standard. See China's opening statement, para. 18. The United States made clear at the meeting of the parties that this is an accurate characterization of the U.S. view, at least for purposes of the Panel's evaluation of the USDOC's public body determinations in the Section 129 proceedings.

8. Likewise, the European Union does not appear to share China's view of the legal interpretation of the term "public body." In response to question 3 from the Panel to the third parties, the European Union explained that, "[d]epending on how the relevant governmental function is defined, similar evidence may be relevant for this issue and for the issue of financial contribution."[12] However, the European Union emphasized that "this possible overlap in the relevant evidence cannot amount to a legal requirement to link the governmental function at issue, in each and every case, with one of those three paragraphs" of Article 1.1(a)(1).[13] China has thus misunderstood or misrepresented the view of the European Union, which is set forth clearly in the European Union's written response to the Panel's question.

9. Contrary to China's assertion, China stands alone in holding its most recently articulated view of the interpretation of the term "public body." China appears to have offered this new interpretative argument regarding a "'clear logical connection' between the 'government function' … and the conduct that is alleged to constitute a financial contribution"[14] to support China's assertion that it is not arguing that "the 'government function' and the conduct at issue under Article 1.1(a)(1) must be identical."[15] But China continues to make statements demonstrating that China actually maintains the latter view. For example, China complains that the USDOC did not examine "whether '*the* function or conduct' of providing steel inputs was *of a kind* that is ordinarily classified as governmental in China – the inquiry that the Appellate Body contemplated."[16] Indeed, China argues at some length that the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* stand for precisely the proposition that the "government function" identified and the conduct under Article 1.1(a)(1) must be identical,[17] which is the very position that China now purports to disavow.

10. At this late stage of the compliance proceeding, China's view of the interpretation of the term "public body" remains unclear. China's most recent arguments, though, suffer from more than just a lack of clarity. China continues to misunderstand the Appellate Body's findings concerning the interpretation of the term "public body."

11. For example, China refers to the Appellate Body's statement in *US – Anti-Dumping and Countervailing Duties (China)* "that the context of Article 1.1(a)(1)(i)-(iii) 'lends support to the proposition that a 'public body' in the sense of Article 1.1(a)(1) connotes an entity vested with *certain* governmental responsibilities, or exercising *certain* governmental authority.'"[18] China

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China again makes an assertion that simply is not true. The United States made clear at the meeting of the parties that China's characterization of the U.S. view of the proper legal standard is not accurate. As explained above, the United States made this clear immediately following an intervention by China during which China repeated the false assertion that it had made in its opening statement.

[12] European Union Responses to the Questions from the Panel following the First Meeting with the Parties (May 31, 2017) ("EU Responses to Panel Questions"), para. 6.

[13] EU Responses to Panel Questions, para. 7.

[14] China's Responses to Panel Questions, para. 4.

[15] China's Responses to Panel Questions, para. 4.

[16] China's Responses to Panel Questions, para. 11 (italics in China's response; underlining added).

[17] *See* China's Responses to Panel Questions, paras. 6-11.

[18] China's Responses to Panel Questions, para. 8 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296; emphasis added by China).

argues that:

> There is only one plausible inference to draw from the Appellate Body's use of the term "certain", rather than "any" in the foregoing sentence: i.e. it understood that for an entity to qualify as "a 'public body' in the sense of Article 1.1(a)(1)", the "government responsibilities" with which an entity might be vested and/or the "governmental authority" that an entity might exercise necessarily would have to relate to the "functions" or "conduct" set forth in the relevant subparagraphs of Article 1.1(a)(1).[19]

12. The inference China draws is not, as China asserts, the only plausible inference to be drawn from the Appellate Body's statement. On the contrary, the inference China draws is not plausible at all. The Appellate Body explained that:

> [W]hether a particular means of making a financial contribution is more *commonly* used by public or private entities has no direct bearing on, nor allows any inference regarding, the constituent elements of a public body in the context of Article 1.1(a)(1) of the *SCM Agreement*. On the contrary, we consider relevant that, while the types of conduct listed in Article 1.1(a)(1)(i) and (iii) can be carried out by a government as well as by private bodies, a decision to forego or not collect government revenue that is otherwise due, which is set out in subparagraph (ii), appears to 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.[20]

The Appellate Body considered that the conduct under subparagraphs (i) and (iii) could be undertaken by a government and the conduct under subparagraph (ii) – relating to taxation – could only be undertaken by a government. The Appellate Body saw this as contextual support for its conclusion that "a 'public body' … connotes an entity vested with certain governmental responsibilities, or exercising certain governmental authority."[21] Thus, a far more plausible inference to draw from the Appellate Body's use of the word "certain" is that, given that each of the activities described in subparagraphs (i)-(iii) could in some way relate to government authority or a government function, the Appellate Body considered that a "public body" must be vested with some governmental authority, but need not necessarily be vested with all governmental authority.

13. This understanding of the Appellate Body's statement is consistent with the Appellate Body's finding in *US – Carbon Steel (India)*, wherein the Appellate Body rejected the contention that, "in order to be a public body, an entity must have the power to regulate, control, or

[19] China's Responses to Panel Questions, para. 8 (emphasis added).
[20] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296.
[21] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296.

supervise individuals, or otherwise restrain conduct of others."[22] The Appellate Body had described such "power" as the "essence of government,"[23] but found that an entity does not "necessarily have to possess this characteristic in order to be found to be vested with governmental authority or exercising a governmental function and therefore constitute a public body."[24] In other words, an entity needs to be vested with, possess, or exercise some or certain governmental authority, but not necessarily all governmental authority or authority related to the "essence of government."[25]

14. That being said, the Appellate Body has found 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."[26] The "power to regulate" is not conduct described in subparagraphs (i)-(iii) of Article 1.1(a)(1) of the SCM Agreement. This is a further indication that China misreads the Appellate Body's prior findings concerning the interpretation of the term "public body."

15. China also misunderstands the Appellate Body's contextual consideration of the phrase "which would normally be vested in the government" in subparagraph (iv) of Article 1.1(a)(1) of the SCM Agreement.[27] China notes that:

> The Appellate Body explains that "the reference to 'normally' in this phrase incorporates the notion of what would ordinarily be considered part of governmental practice in the legal order of the relevant Member." The Appellate Body explains that "[t]his 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."[28]

China argues that the Appellate Body was referring to "the functions or conduct of a specific entity under Article 1.1(a)(1)," and China further asserts that the Appellate Body "believed that if a specific entity's functions or conduct under Article 1.1(a)(1) were 'of a kind that are ordinarily classified as government in the legal order of the relevant Member', this could indicate that the entity was performing a 'government function' when engaged in the relevant conduct."[29] This latter observation by China is not objectionable as far as it goes.

16. But China asks the Panel to do more than find that the "government function" relates to the conduct under Article 1.1(a)(1), or that evidence that the conduct is a government function in the Member "could indicate" that the entity is a public body. China contends that the USDOC was obligated to examine "whether '*the* function or conduct' of providing steel inputs was *of a*

[22] *US – Carbon Steel (India) (AB)*, para. 4.17.
[23] *Canada – Dairy (AB)*, para. 97.
[24] *US – Carbon Steel (India) (AB)*, para. 4.17.
[25] *Canada – Dairy (AB)*, para. 97.
[26] *US – Carbon Steel (India) (AB)*, para. 4.17.
[27] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297.
[28] China's Responses to Panel Questions, para. 10 (quoting *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297; emphasis added by China; citations omitted).
[29] China's Responses to Panel Questions, para. 10.

kind that is ordinarily classified as governmental in China," and China asserts that this is "the inquiry that the Appellate Body contemplated."[30] China's argument, however, cannot be reconciled with the Appellate Body's explanation 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."[31] The implication of China's argument is that whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member necessarily would always be a relevant – and necessary and dispositive – consideration in all cases. This is a yet another indication that China's proposed approach departs from the Appellate Body's prior findings concerning the interpretation of the term "public body."

17. There is an additional flaw in the new iteration of China's argument, which the United States has addressed previously,[32] but to which China has not responded. China contends that "a public body … is an entity that is vested with authority to perform a 'government function', such that the entity is exercising that government authority when it engages in the conduct at issue."[33] China's position appears to be that an entity may be deemed a public body only when the entity is "*exercising*" governmental authority. The Appellate Body, however, has "explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'."[34] In *US – Carbon Steel (India)*, referring to these characteristics – *i.e.*, possessing, exercising, or being vested with governmental authority – the Appellate Body clarified that "[t]he substantive legal question to be answered is therefore whether one or more of these characteristics exist in a particular case."[35] Under the framework elaborated by the Appellate Body, an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue.

18. China's position simply is not supported by the Appellate Body's findings, nor is it logical. The Appellate Body's finding that an entity might be vested with governmental authority, or possess governmental authority, or be exercising governmental authority, or some combination of the above, is consistent with the Appellate Body's observation that, "[i]n 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'."[36] Nothing in the SCM Agreement or in prior reports limits the meaning of the term "public body" in the way that China now suggests.

19. In addition to presenting legal arguments, China repeats its contention that the

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[30] China's Responses to Panel Questions, para. 11 (italics in China's response; underlining added).
[31] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297 (emphasis added).
[32] *See* Second Written Submission of the United States of America (March 27, 2017) ("U.S. Second Written Submission"), para. 48.
[33] China's Responses to Panel Questions, para. 4 (emphasis added).
[34] *US – Carbon Steel (India) (AB)*, para. 4.37.
[35] *US – Carbon Steel (India) (AB)*, para. 4.37 (emphasis added).
[36] *US – Carbon Steel (India) (AB)*, para. 4.29. *See also id*., paras. 4.9, 4.42; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

government function identified by the USDOC is "so broad that it is essentially meaningless."[37] The United States addressed this contention in the U.S. first written submission, explaining that:

> China argues, for example, that "the 'government function' identified by the USDOC in the Public Bodies Memorandum – 'maintaining and upholding the socialist market economy' – is so broad and abstract that it bears no logical connection to the public body inquiry." China contends, consistent with its arguments relating to the legal interpretation of the term "public body," that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser, is a government function, and that engaging in that activity is consistent with the government's objectives. As explained above, nothing in the original Panel's findings, nor in prior findings of the Appellate Body, supports China's position.
>
> Rather, the evidence, analysis, and explanation presented by the USDOC focuses on the "evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense." The USDOC's examination and discussion of the totality of the evidence supports the conclusion that "maintaining and upholding the socialist market economy" is a government function in China and the Chinese government meaningfully controls SIEs as well as private enterprises and uses them to carry out that function. This function is not "broad and abstract" at all; it is entirely germane to the public body analysis.[38]

20. China further argues that the United States has not substantiated its assertion that "there is a 'clear logical' connection between 'maintaining and upholding the socialist market economy' and the relevant conduct."[39] China is wrong. The Public Bodies Memorandum, the CCP Memorandum, and the preliminary and final determinations in the section 129 proceedings, read together in their entirety, establish, based on the totality of the evidence, the clear, logical connection between the governmental function that the USDOC identified – maintaining and upholding the socialist market economy – and the conduct under Article 1.1(a)(1) in which the entities were engaged – providing goods. Specifically, the USDOC determined, based on substantial record evidence, that:

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

[37] China's Responses to Panel Questions, para. 3.
[38] U.S. First Written Submission, paras. 120-121 (citations omitted).
[39] China's Responses to Panel Questions, para. 16.

and upholding the socialist market economy.[40]

21. The connection between the government function identified and the conduct under Article 1.1(a)(1) is that the government meaningfully controls entities that, as their regular day-to-day business, provide goods (conduct under Article 1.1(a)(1)), and uses those entities, as goods providers, to effectuate a governmental purpose – maintaining and upholding the socialist market economy. The USDOC pointed to, among a substantial amount of other evidence, a World Bank evaluation of China's 11th Five Year Plan, which explained that the GOC intervenes "at the microeconomic, firm level," including through "indirect instruments such as tax incentives, price subsidies, and other kinds of 'favorable policies.'"[41]

22. Ultimately, China's argument – that the government function identified by the USDOC has "no discernible relevance to the conduct at issue"[42] – is premised on China's flawed legal interpretation. Despite China's protestations, China would indeed have the Panel find that the "government function" and the conduct at issue under Article 1.1(a)(1) must be identical.[43] There is, though, no support for such a finding in the SCM Agreement or in prior reports discussing the interpretation of the term "public body."

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"?

Comment:

23. For the reasons given above in the U.S. comment on China's response to question 2, China is incorrect when it suggests that there is an *a priori* limitation on what may constitute a "government function" for the purposes of a public body analysis, namely that the "government function" identified by an investigating authority must, as a legal requirement under Article 1.1(a)(1) of the SCM Agreement, have a "clear logical connection" to the relevant conduct of an entity under Article 1.1(a)(1). There is no support in the SCM Agreement or in prior reports discussing the interpretation of the term "public body" for finding that such a legal requirement exists.

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?

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[40] *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"), p. 37 (p. 38 of the PDF version of Exhibit CHI-1).

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

[42] China's Responses to Panel Questions, para. 6.

[43] *See* China's Responses to Panel Questions, para. 4.

Comment:

24. The United States appreciates China's statement that "China does not believe that the relevant 'government function' under a public body analysis must necessarily be limited to actions constituting a financial contribution under Article 1.1(a)(1) of the SCM Agreement."[44] However, as explained above in the U.S. comment on China's response to question 2, other statements China makes in its responses to the Panel's questions cast doubt on whether China actually holds this view. The U.S. comment on China's response to question 2 also demonstrates that China's new argument – that the "government function" identified by an investigating authority must, as a legal requirement under Article 1.1(a)(1) of the SCM Agreement, have a "clear logical connection" to the relevant conduct of an entity under Article 1.1(a)(1) – finds no support in the SCM Agreement or in prior reports discussing the interpretation of the term "public body."

25. In its response to this question, China discusses and "disagrees with" a hypothetical example presented by the United States. China notes that the hypothetical Committee on Public Health described in the U.S. second written submission "has been vested with authority to perform public health functions, but the United States concludes that this entity could be properly considered a public body under Article 1.1(a)(1) when engaged in the conduct of selling iron ore."[45] China contends that "[t]his is not an example where the 'government function' is 'broader' than the action that constitutes a financial contribution; this is an example where the 'government function' has no connection whatsoever to the relevant conduct."[46] China is correct, and that is why China's proposed legal interpretation is untenable.

26. Any time an entity that is a public body engages in the conduct described in Article 1.1(a)(1) of the SCM Agreement, that action, per the definition set forth in Article 1.1(a)(1), "is a financial contribution" for the purpose of the SCM Agreement. The question of whether an entity is or is not a "public body" is separate from the question of whether the entity has or has not engaged in an activity described in Article 1.1(a)(1). China's proposed legal interpretation conflates these questions.

27. China asserts that, "[i]f the 'Committee for Public Health' is vested with authority to perform public health functions, that 'government function' is 'simply not pertinent' to the conduct of providing iron ore, and it would be illogical to conclude that the Committee is a public body under Article 1.1(a)(1) when engaged in that conduct."[47] China's proposed legal interpretation is deeply problematic, as it would lead to the possibility that an entity that is unquestionably a public body could engage openly in conduct that is explicitly described under Article 1.1(a)(1), but that action would escape scrutiny under the SCM Agreement if engaging in that conduct is outside the normal, established function of the entity. If China's logic were extended, that could also be true for an organ of the "government in the narrow sense" that acts outside of its established authority. Nothing in the SCM Agreement contemplates such an

[44] China's Responses to Panel Questions, para. 18.
[45] China's Responses to Panel Questions, para. 22.
[46] China's Responses to Panel Questions, para. 22.
[47] China's Responses to Panel Questions, para. 24.

outcome.

28. Additionally, China's view is yet again at odds with prior Appellate Body findings. The Appellate Body has "explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'."[48] In *US – Carbon Steel (India)*, referring to these characteristics – *i.e.*, possessing, exercising, or being vested with governmental authority – the Appellate Body clarified that "[t]he substantive legal question to be answered is therefore whether one or more of these characteristics exist in a particular case."[49] Under the framework elaborated by the Appellate Body, an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue. These Appellate Body findings appear to contemplate precisely the situation where an entity is vested with or possesses governmental authority – and the entity is thus a public body – but the entity acts outside that governmental authority while engaging in conduct described in Article 1.1(a)(1). Nothing in the Appellate Body's findings or the SCM Agreement suggests that such conduct should not be deemed a financial contribution. China's position simply is not supported by the Appellate Body's findings or the SCM Agreement.

29. China also refers to the U.S. comparison of the evidence and analysis in the section 129 proceedings here with the evidence and analysis that the Appellate Body found sufficient in *US – Anti-Dumping and Countervailing Duties (China)*.[50] In doing so, China once again seeks to support its arguments by focusing narrowly on individual documents on the record of the section 129 proceedings, arguing that each individual piece of evidence does not, itself, support the ultimate conclusion that the USDOC reached. In doing so, China ignores the vast majority of evidence that was on the USDOC's administrative record, and on which the USDOC relied.

30. Furthermore, the determinations that the USDOC made were not based on an individual piece of evidence considered in isolation. Rather, the determinations were based on the totality of the evidence on the record.[51] The Appellate Body has found previously that "[w]hen an investigating authority relies on the totality of circumstantial evidence, this imposes upon a panel the obligation to consider, in the context of the totality of the evidence, how the interaction of

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[48] *US – Carbon Steel (India) (AB)*, para. 4.37.
[49] *US – Carbon Steel (India) (AB)*, para. 4.37 (emphasis added).
[50] *See* China's Responses to Panel Questions, paras. 28-36.
[51] *See, e.g., Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceedings: United States – Countervailing Duty (CVD) Measures on Certain Products from the People's Republic of China (WTO DS437), Final Determination of Public Bodies and Input Specificity*, March 31, 2016 ("Public Bodies Final Determination"), p. 5 (Explaining that "the *Public Bodies Memorandum* and accompanying *CCP Memorandum* set forth evidence concerning the extent to which certain categories of state-invested enterprises function as instruments of the GOC.") (p. 6 of the PDF version of Exhibit CHI-5); *Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Preliminary Determination of Public Bodies and Input Specificity*, February 25, 2016 ("Public Bodies Preliminary Determination"), p. 10 ("We analyzed the input producer information provided by the GOC, the analysis and conclusions of the Public Bodies Memorandum, and other information on the record of these proceedings, which included factual information filed by interested parties and factual information submitted in the underlying administrative investigations.") (p. 11 of the PDF version of Exhibit CHI-4).

certain pieces of evidence may justify certain inferences that could not have been justified by a review of the individual pieces of evidence in isolation."[52] The panel in *US – Anti-Dumping and Countervailing Duties (China)* followed this approach, explaining that:

> [W]e recall the Appellate Body's ruling that 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. In particular, the Appellate Body held that if an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination, rather than assessing whether each piece on its own would be sufficient to support that determination.[53]

31. Accordingly, as the Appellate Body has explained, "in order to examine the evidence in the light of the investigating authority's methodology, a panel's analysis usually should seek to review the agency's decision on its own terms, in particular, by identifying the inference drawn by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[54]

32. China's approach – focusing on selected individual pieces of evidence while ignoring other evidence and also ignoring that the USDOC's determinations are based on the totality of the evidence – would be legal error under Article 11 of the DSU, if a panel were to take the same approach.[55]

33. Furthermore, China, in effect, challenges the USDOC's weighing of the evidence and invites the Panel to undertake *de novo* review or substitute its own judgment for that of the USDOC. As the original Panel in this dispute explained, though, that is not the role of a WTO dispute settlement panel.[56]

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"?

Comment:

34. The United States has no comment on China's response to sub-part (a) of this question.

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)?

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[52] *Japan – DRAMs (Korea) (AB)*, para. 131.
[53] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.
[54] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis added).
[55] *See Japan – DRAMs (Korea) (AB)*, para. 139.
[56] *US – Countervailing Measures (China) (Panel)*, para. 7.10.

Comment:

35. The U.S. comment on China's response to question 2 above demonstrates that China's new argument – that the "government function" identified by an investigating authority must, as a legal requirement under Article 1.1(a)(1) of the SCM Agreement, have a "clear logical connection" to the relevant conduct of an entity under Article 1.1(a)(1) – finds no support in the SCM Agreement or in prior reports discussing the interpretation of the term "public body." The U.S. response to sub-part (b) of this question addresses the relevance of the term "functions" in Article 1.1(a)(1)(iv) of the SCM Agreement to the Panel's analysis under Article 1.1(a)(1).[57]

36. In its response to this question, China once again discusses certain arguments that the United States made in *US – Carbon Steel (India)*. The United States has responded to China's contentions in this regard previously.[58] As we have explained, the point of the U.S. argument in *US – Carbon Steel (India)* was that, if an entity has the authority to transfer the government's resources, then any exercise of a function described in Article 1.1(a)(1) necessarily is a governmental function, and the entity should be deemed a public body under the legal standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.

37. Whenever China has pointed to the U.S. arguments in *US – Carbon Steel (India)*, China has failed to note that the Appellate Body did not actually evaluate the U.S. legal argument in relation to an entity's authority to transfer the government's financial resources. Instead, the Appellate Body examined one articulation of the terms of Article 1.1(a)(1) of the SCM Agreement and found that "the terminology advocated by the United States – 'a public body may also include an entity controlled by the government … such that the government may use the entity's resources as its own' – is difficult to reconcile with that used by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*."[59] The Appellate Body considered that "a government's exercise of 'meaningful control' over an entity and its conduct, including control such that the government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body."[60] But the Appellate Body did not modify its prior findings concerning the legal standard for determining that an entity is a "public body." It remains unclear why China continues to refer to legal arguments that the United States made and with which the Appellate Body did not agree in *US – Carbon Steel (India)*.

38. In any event, China's response confirms that China is conflating the public body and private body analyses. China explains that:

> In China's view, the Appellate Body recognized that it would not make sense to attribute conduct of a private entity to the government in the narrow sense under Article 1.1(a)(1)(iv) only where that conduct "would normally be vested in the government", but to attribute conduct of a public body to the government in the

[57] *See* Responses of the United States to the Panel's Written Questions to the Parties (May 31, 2017) ("U.S. Responses to Panel Questions"), paras. 24-27.
[58] *See* U.S. Second Written Submission, paras. 82-86.
[59] *US – Carbon Steel (India) (AB)*, para. 4.19 (citations omitted).
[60] *US – Carbon Steel (India) (AB)*, para. 4.20 (emphasis added).

narrow sense even when that conduct does not reflect a "government function".[61]

This is a further indication that, in China's view, the legal standard for determining that an entity is a "public body" is simply the same as the legal standard for determining that an entity is a "private body." This is an untenable position. As the United States has explained previously,[62] and as certain third parties have agreed,[63] China's approach would obviate the need for an investigating authority to make a public body finding; indeed, there would be no need for a public body category at all in Article 1.1(a)(1). An interpretation that renders the term "public body" redundant is inconsistent with the principle of effectiveness and thus contrary to the customary rules of interpretation of public international law.[64]

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

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

Comment:

39. The United States agrees with a number of statements China makes in response to sub-part (d) of this question. China correctly states that "it is difficult to separate out questions that would be relevant to determining the 'core characteristics' of an entity from questions regarding the 'functions of the relevant entity' and questions regarding that entity's 'relationship with the government in the narrow sense', because these questions are all relevant to what is ultimately the 'core characteristic' of a public body."[65] The United States made this point itself in its response to sub-part (b) of this question.[66]

40. China correctly notes that "a wide range of questions could be relevant to determining the 'core characteristics' of the relevant entities," including the questions China identifies.[67] The United States identified similar questions – or evidence – as being potentially relevant to a public body analysis.[68] It is also correct that certain of the questions China identifies "may not be relevant in a particular case, and certain questions not listed … could be relevant in relation to a particular entity."[69]

41. As explained in the U.S. responses to sub-parts (a), (b), and (c) of this question, the USDOC examined precisely the kind of information that the Appellate Body has found to be relevant, and which China agrees is relevant to an analysis of the "core characteristics" of entities

[61] China's Responses to Panel Questions, para. 45.
[62] *See* U.S. First Written Submission, paras. 43-48; U.S. Second Written Submission, paras. 91-97.
[63] *See* Third-Party Submission of Canada (February 13, 2017), para. 22; Third Party Submission of Japan (February 13, 2017), para. 9; Third Party Oral Statement of Australia (May 11, 2017), para. 5.
[64] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[65] China's Responses to Panel Questions, para. 49.
[66] *See* U.S. Responses to Panel Questions, para. 42.
[67] China's Responses to Panel Questions, para. 50.
[68] *See, e.g.*, U.S. Responses to Panel Questions, para. 32.
[69] China's Responses to Panel Questions, para. 51.

for the purposes of making a public body determination.[70]

42. The United States does not agree, however, with China's criticisms of the USDOC's public body determinations.[71] As explained above, contrary to China's assertion, the evidence and analysis in the section 129 proceedings establishes that there is a clear, logical connection between the government function that the USDOC identified and the conduct under Article 1.1(a)(1), though China is incorrect when it argues that this is a legal requirement for determining that an entity is a "public body" under Article 1.1(a)(1).

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?

Comment:

43. In its response to this question, China again challenges whether the USDOC demonstrated a clear, logical connection between the government function that the USDOC identified and the provision of inputs.[72] The U.S. comment on China's response to question 2 above addresses China's arguments and demonstrates that they lack any merit.

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?

Comment:

44. China's response to this question is incorrect for the reasons given in the U.S. response to this question.[73]

45. Additionally, China's response to this question rests on flawed legal and factual premises. China incorrectly argues again that the USDOC was required, as a legal matter, to establish a "clear logical connection" between the government function identified and the conduct under Article 1.1(a)(1) in order to establish that an entity is a "public body," and China incorrectly argues again that the USDOC's public body determinations do not substantiate the U.S. assertion that such a clear, logical connection existed in these section 129 proceedings. The U.S. comment on China's response to question 2 above addresses China's arguments and demonstrates that they lack any merit.

46. Finally, China once again repeats its assertion that the USDOC "rejected or discounted"

[70] *See* U.S. Responses to Panel Questions, paras. 28-44.
[71] *See* China's Responses to Panel Questions, para. 52.
[72] *See* China's Responses to Panel Questions, paras. 57-59.
[73] *See* U.S. Responses to Panel Questions, paras. 47-48.

certain evidence submitted by the GOC.[74] The United States has explained at length in earlier submissions why this particular assertion by China is utterly devoid of merit.[75]

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?

Comment:

47. The United States notes that, in its written response to this question, China confirms the statement it made during the panel meeting, namely that China made a "choice" not to respond completely to the USDOC's public bodies questionnaire. China indicates that it "wanted to explain to the Panel why the GOC had chosen to respond to the Public Bodies Questionnaire in only certain of the relevant investigations."[76] The United States also acknowledges China's agreement that "the procedural issues that China raised are not ultimately relevant to the Panel's disposition of China's legal claims under Article 1.1(a)(1)."[77]

48. However, once again, China repeats its assertion that the USDOC "fail[ed] to consider" or "rejected or discounted" certain evidence submitted by the GOC.[78] The United States has explained at length in earlier submissions why this particular assertion by China is utterly devoid of merit.[79]

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)?

Comment:

49. China's response to this question is divided into two parts. In the first part of China's response to this question, China asserts that "[i]t is undisputed that public bodies may entrust or direct private bodies to carry out the functions illustrated in Article 1.1(a)(1)(i)-(iii)."[80] China is correct; the United States does not dispute this. As the Appellate Body has found, Article 1.1(a)(1)(iv) of the SCM Agreement "envisages that a public body may 'entrust' or 'direct' a

[74] *See* China's Responses to Panel Questions, para. 65.
[75] *See, e.g.*, U.S. First Written Submission, paras. 103-115, 130-135; U.S. Second Written Submission, paras. 113-124. *See also* U.S. Responses to Panel Questions, paras. 71-85.
[76] China's Responses to Panel Questions, para. 68 (emphasis added).
[77] China's Responses to Panel Questions, para. 68.
[78] *See* China's Responses to Panel Questions, paras. 68, 69.
[79] *See, e.g.*, U.S. First Written Submission, paras. 103-115, 130-135; U.S. Second Written Submission, paras. 113-124. *See also* U.S. Responses to Panel Questions, paras. 71-85.
[80] China's Responses to Panel Questions, para. 73.

private body to carry out the type of functions or conduct illustrated in subparagraphs (i)-(iii)."[81]

50. China further asserts, though, that "[i]t is also undisputed that in order for a public body to be able to entrust or direct a private body to perform one of the functions illustrated in Article 1.1(a)(1)(i)-(iii), the 'authority' or 'responsibility' that it possesses must relate to the performance of those same functions."[82] The United States does dispute this assertion; it is illogical and not supported by the SCM Agreement or prior Appellate Body findings.

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

> The verb "direct" is defined as to give authoritative instructions to, to order the performance of something, to command, to control, or to govern an action. The verb "entrust" means giving a person responsibility for a task. The Appellate Body has interpreted "direction" as referring to situations where a government exercises its authority, including some degree of compulsion, over a private body, and "entrustment" as referring to situations in which a government gives responsibility to a private body. Thus, pursuant to subparagraph (iv), a public body may exercise its authority in order to compel or command a private body, or govern a private body's actions (direction), and may give responsibility for certain tasks to a private body (entrustment). As we see it, for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command. Similarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility. If a public body did not itself dispose of the relevant authority or responsibility, it could not effectively control or govern the actions of a private body or delegate such responsibility to a private body. This, in turn, suggests that the requisite attributes to be able to entrust or direct a private body, namely, authority in the case of direction and responsibility in the case of entrustment, are common characteristics of both government in the narrow sense and a public body.[83]

52. In light of these Appellate Body findings, and logically, a public body can "direct" a private body as long as it has the ability "to give authoritative instructions to, to order the performance of something, to command, to control, or to govern an action," or to "exercises its authority, including some degree of compulsion, over a private body."[84] In other words, the public body simply must have authority sufficient to compel action generally. A public body need not necessarily have "authority" or "responsibility" that "relate[s] to the performance" of the functions described in Article 1.1(a)(1)(i)-(iii), as China asserts.[85] China's assertion does not logically follow from the meaning of the term "direct."

53. China's assertion may accord more closely with the Appellate Body's discussion of

[81] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 293.
[82] China's Responses to Panel Questions, para. 73.
[83] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294 (emphasis added; citations omitted).
[84] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294.
[85] China's Responses to Panel Questions, para. 73.

"entrustment," but China fails entirely to reconcile its argument with the Appellate Body's findings related to "direction," as quoted above. Thus, China's argument, which is premised on its flawed assertion, fails. Specifically, China argues that:

> If the "certain" governmental authority possessed by a public body who can entrust or direct private bodies to carry out the functions illustrated in Article 1.1(a)(1)(i)-(iii) must necessarily be related to those functions, it defies logic to think that for other public bodies, the "certain" government authority that they possess can be entirely unrelated to the relevant functions in Article 1.1(a)(1).[86]

As demonstrated above, the governmental authority possessed by a public body that can entrust or direct private bodies to carry out the functions illustrated in Article 1.1(a)(1)(i)-(iii) does not necessarily need to be related to those functions. China's argument lacks merit because it rests on a flawed premise.

54. In the second part of China's response to this question, China summarizes the oral response it gave during the panel meeting, which relates to the U.S. argument that China's approach collapses the public body and private body inquiries.[87] The United States has no further comment on China's response, but refers the Panel to the discussion of this issue in previous U.S. submissions, which demonstrate that China's new proposed interpretation of the term "public body" cannot be reconciled with the term "private body" in Article 1.1(a)(1)(iv) of the SCM Agreement.[88] The United States recalls that certain of the third parties also have addressed this issue in their submissions.[89]

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?

Comment:

55. In its response to this question, China asserts that the original Panel found that the policy articulated in the Kitchen Shelving issues and decision memorandum necessarily would result in the United States acting inconsistently with Article 1.1(a)(1) of the SCM Agreement "because the *Kitchen Shelving* policy reflected the same majority ownership and control standard that had been found by the Appellate Body in DS379 to be insufficient, as a matter of law, to establish that commercial entities are 'public bodies' within the meaning of Article 1.1(a)(1) of the SCM Agreement."[90] China misunderstands the original Panel's findings.

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[86] China's Responses to Panel Questions, para. 74 (emphasis added).
[87] *See* China's Responses to Panel Questions, paras. 75-83.
[88] *See* U.S. First Written Submission, paras. 43-48; U.S. Second Written Submission, paras. 91-97.
[89] *See* Third-Party Submission of Canada (February 13, 2017), para. 22; Third Party Submission of Japan (February 13, 2017), para. 9; Third Party Oral Statement of Australia (May 11, 2017), para. 5.
[90] China's Responses to Panel Questions, para. 86.

56. When the original Panel followed a "two-step approach"[91] 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"[92]; "[o]n the face of the text, this policy is qualified by the word 'normally'"[93]; "the consistent application of this presumption in numerous cases over a long period of time"[94]; "the policy establishes that the burden is on an interested party to provide information or evidence that would warrant consideration of any other factors"[95]; and the policy "effectively … restricts the USDOC to consider other evidence on its own initiative."[96]

57. As the United States has demonstrated,[97] the Public Bodies Memorandum, by its terms, neither "obliges" the USDOC to do anything nor "restricts" the USDOC from doing anything.[98] 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 that 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.

58. China discusses certain elements of the Public Bodies Memorandum and argues that "[t]here is nothing in the Public Bodies Memorandum that would support a conclusion that the GOC's alleged control has been exercised in … a 'meaningful way', because the USDOC failed to demonstrate that there is a 'clear logical connection' between the alleged 'government function' of 'maintaining and upholding the socialist market economy' and the conduct at issue."[99] The U.S. comment on China's response to question 2 above demonstrates that China's argument lacks merit, both as a legal matter and as a factual matter. Moreover, China's argument does not address the Panel's question. A hypothetical finding that the Public Bodies Memorandum reaches certain incorrect conclusions would not support a finding that the Public Bodies Memorandum itself, in any given situation, necessarily results in an inconsistency with Article 1.1(a)(1) of the SCM Agreement.

59. As the United States explained in response to sub-part (c) of question 16,[100] 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

[91] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[92] *US – Countervailing Measures (China) (Panel)*, para. 7.123.
[93] *US – Countervailing Measures (China) (Panel)*, para. 7.124.
[94] *US – Countervailing Measures (China) (Panel)*, para. 7.124.
[95] *US – Countervailing Measures (China) (Panel)*, para. 7.125.
[96] *US – Countervailing Measures (China) (Panel)*, para. 7.125.
[97] *See* U.S. First Written Submission, paras. 196-197. *See also* U.S. Second Written Submission, paras. 155-161.
[98] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[99] China's Responses to Panel Questions, para. 93.
[100] *See* U.S. Responses to Panel Questions, paras. 124-125.

information provided by China, concluded that two entities under examination in that proceeding were not public bodies.[101] 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.[102]

60. The outcome in the citric acid proceeding demonstrates that, where China cooperates and provides the requested entity-specific 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. Such an outcome – determining that an entity is not a public body and therefore determining not to impose countervailing duties with respect to the alleged subsidy provided by the entity – surely cannot be considered action that is inconsistent with Article 1.1(a)(1) of the SCM Agreement. Furthermore, that outcome is evidence that the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1).

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?

Comment:

61. China's response to sub-part (a) of this question refers to the reasons China described in response to question 14.[103] The United States similarly refers the Panel to the U.S. comment on China's response to question 14 above.

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?

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[101] *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).
[102] *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).
[103] *See* China's Responses to Panel Questions, para. 95.

Comment:

62. Contrary to China's assertion, the Public Bodies Memorandum does not articulate "a hard and fast rule."[104] 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 underlies the Public Bodies Memorandum.[105] That is precisely what the USDOC did in the challenged section 129 proceedings here,[106] including by requesting information "that would rebut, clarify, or correct, the factual information" in the Public Bodies Memorandum.[107]

63. To the extent that China's response to sub-part (b) of this question refers to the reasons China described in response to question 14,[108] the United States similarly refers the Panel to the U.S. comment on China's response to question 14 above.

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

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)

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

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)

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?

Comment:

64. The United States provided to the Panel an extensive response to this question and all of

[104] China's Responses to Panel Questions, para. 96.
[105] *See* Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1).
[106] *See* Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[107] *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).
[108] *See* China's Responses to Panel Questions, para. 97.

its sub-parts.[109] The few assertions that China makes in its brief response to this question are unavailing.

65. First, China asserts that "[t]he relevant inquiry is whether the Public Bodies Memorandum restricts, in a material way, the USDOC's discretion to act consistently with Article 1.1(a)(1)" and, "[f]or the reasons articulated in its response to Panel questions 14 and 15 above, China has made that showing."[110] The United States refers the Panel to the U.S. comments on China's responses to questions 14 and 15 above, which demonstrate that China has not even attempted to make the requisite showing that China simply asserts it has made.

66. Second, China asserts that "[t]he USDOC's discretion *not* to apply the Public Bodies Memorandum in a future investigation does not shield it from an 'as such' challenge."[111] The United States has not argued that it does. In connection with this assertion, China refers to the recent Appellate Body report in *US – Anti-Dumping Methodologies (China)*, suggesting that:

> [T]he Appellate Body held that a WTO Member is not required to demonstrate with "certainty" that a measure will apply in future situations in order to establish the existence of a rule or norm of general and prospective application that may be challenged "as such". The Appellate Body explained that, where the constituent elements of the measure are not sufficiently clear, other factors may be relevant in determining the prospective application of a measure. These include the existence of an underlying policy; the frequent, consistent and extended repetition of conduct; evidence of systematic application; and the provision of administrative guidance and creation of expectations among economic operators.[112]

67. The *US – Anti-Dumping Methodologies (China)* "appeal concern[ed] an 'as such' challenge to an unwritten rule or norm of general and prospective application."[113] By contrast, here, China attempts to challenge an alleged written measure "of general and prospective application … the so-called 'Public Bodies Memorandum'."[114] In *US – Anti-Dumping Methodologies (China)*, the Appellate Body explained that:

> When written rules or norms are challenged "as such", the precise content, attribution, as well as the general and prospective nature of the rule or norm may be readily discernible from the document itself, its official character, or the manner in which it was elaborated, adopted, or enacted.[115]

68. China asserts that it has "noted in its written submissions" that "the text of the Public Bodies Memorandum clearly articulates an analytical framework that is both general, because it affects an unidentified number of Chinese economic operators, and is prospective, because it

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[109] *See* U.S. Responses to Panel Questions, paras. 104-129.
[110] China's Responses to Panel Questions, para. 99.
[111] China's Responses to Panel Questions, para. 100.
[112] China's Responses to Panel Questions, para. 100 (emphasis added).
[113] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.126 (emphasis added).
[114] China's Panel Request in this compliance proceeding, para. 10.
[115] *US – Anti-Dumping Methodologies (China) (AB)*, para. 5.127 (emphasis added).

applies to future public body determinations."[116] On the contrary, China has failed to substantiate any of the assertions in the preceding sentence with evidence from the Public Bodies Memorandum. China has not even attempted to do so.

69. China's argument ultimately comes down to mere repetition. Specifically, China has repeated throughout this compliance panel proceeding its unsupported assertions regarding the contents of the Public Bodies Memorandum. Lacking any evidence from the alleged written measure itself on which to rely, China looks to the USDOC's placement of the Public Bodies Memorandum – and the massive amount of evidence underlying it – on the administrative records of a number of countervailing duty proceedings involving China. But the USDOC's action in those proceedings, as the United States has explained, was entirely reasonable given that the same facts regarding China's economic and government system prevail in all of those particular proceedings.

70. China simply has presented no support for its claim that the Public Bodies Memorandum is a measure of general and prospective application.

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?

Comment:

71. In its response to this question, China suggests that the Panel's question "would only be relevant if China had argued that this measure falls within the Panel's terms of reference in light of the particularly close nexus that it has with the recommendations and rulings of the DSB and the declared measures taken to comply," but, China asserts, "[t]his is not China's argument."[117] This new argument by China, presented late in this compliance proceeding, is flawed.

72. As an initial matter, contrary to China's suggestion, China's choice in terms of the line of argument it has presented during this compliance proceeding[118] is not determinative of whether the Public Bodies Memorandum is a declared measure taken to comply in this dispute, or whether it is within the Panel's terms of reference. The Appellate Body has explained that Article 21.5 of the DSU establishes that the panel's terms of reference are limited to those "measures taken to comply," which are "measures taken in the direction of, or for the purpose of achieving, compliance."[119] 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

[116] China's Responses to Panel Questions, para. 101.
[117] China's Responses to Panel Questions, paras. 102-103 (emphasis added).
[118] *See* China's Responses to Panel Questions, para. 102.
[119] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 66 (emphasis omitted).

of its "particularly close relationship"[120] or "sufficiently close nexus"[121] to the declared "measure taken to comply" and to the rulings and recommendations of the DSB.

73. In this dispute, the "declared"[122] measures taken to comply are those described in the U.S. communications to the DSB.[123] In none of those communications did the United States declare that the Public Bodies Memorandum is a measure taken to comply in this dispute. Throughout this compliance proceeding, the United States has denied, and continues to deny that the Public Bodies Memorandum is a measure taken to comply in this dispute.

74. China now contends that:

> The Public Bodies Memorandum is an integral part of the Section 129 determinations that constitute the *declared* measures taken to comply in this dispute, and the United States does not contend otherwise. Accordingly, the Public Bodies Memorandum is a "measure taken to comply" within the meaning of Article 21.5 of the DSU, and this Panel need *not* examine any links, in terms of nature, effects, and timing, that this measure has with either the recommendations and ruling of the DSB or the declared measures taken to comply.[124]

75. The United States agrees with China's assertion that the Public Bodies Memorandum is "an integral part of the Section 129 determinations that constitute the declared measures taken to comply in this dispute,"[125] but China's assertion does not support China's argument. Rather, China's acknowledgment that the Public Bodies Memorandum "is an integral part of the Section 129 determinations" in this dispute undermines China's argument that the Public Bodies Memorandum is itself a "measure taken to comply" under Article 21.5 of the DSU, independent of the USDOC's section 129 determinations, such that China can challenge the memorandum itself "as such."[126]

76. China's new argument appears to be a belated attempt by China to rewrite China's panel request in this compliance proceeding. This is not something that China can do.[127] China's panel request asserts that "[t]he measures at issue … include the preliminary and final Section 129 determinations set forth in Annex 2, as well as any subsequent closely connected measures that the United States issues or adopts in the Section 129 proceedings."[128] China's panel request further asserts that "[t]he measures at issue include, both as measures of general and prospective application and as measures relating to the proceedings at issue: (i) the so-called 'Public Bodies

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[120] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77. *See also US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.61.
[121] *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.
[122] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77.
[123] *See* WT/DS437/18, WT/DS437/18/Add.1, WT/DS437/18/Add.2.
[124] China's Responses to Panel Questions, para. 103.
[125] China's Responses to Panel Questions, para. 103.
[126] China's First Written Submission, para. 172.
[127] *See EC – Large Civil Aircraft (AB)*, para. 642 ("[A] party's submissions during panel proceedings cannot cure a defect in a panel request.").
[128] China's Panel Request in this compliance proceeding, para. 8.

Memorandum'…."[129] Thus, at the outset of this compliance proceeding, China distinguished between the Public Bodies Memorandum as an alleged measure relating to the section 129 proceedings at issue and the Public Bodies Memorandum as an alleged measure of general and prospective application.

77. Consistent with the generally applicable principles regarding the burden of proof in WTO disputes, it is for China to establish the WTO-inconsistency of the alleged measures identified in China's panel request.[130] China cannot avoid its burden of proving that the Public Bodies Memorandum is a measure of general and prospective application simply by asserting instead, at this late point in the proceeding, that the Public Bodies Memorandum is a "measure" relating to the section 129 proceedings. Furthermore, while the United States does not dispute that the Public Bodies Memorandum relates to the section 129 proceedings at issue, as the memorandum is an integral part of the USDOC's determinations in those proceedings, that does not mean that the Public Bodies Memorandum is itself a so-called "measure[] relating to the proceedings at issue."[131] For the purpose of China's "as applied" claims, despite the assertion in China's panel request, it is not necessary for China to establish that the Public Bodies Memorandum is, itself, a "measure" relating to the section 129 proceedings. Indeed, China has made no attempt to establish that the Public Bodies Memorandum is such an independent measure for the purpose of its "as applied" claims. As the United States has explained, the Public Bodies Memorandum is, at most, a part of the USDOC's section 129 determinations, which are themselves declared measures taken to comply,[132] and the Panel can and should examine the memorandum in connection with its review of the USDOC's section 129 determinations.

78. Additionally, China's allegation that the Public Bodies Memorandum is a measure of general and prospective application is related not to its "as applied" claims, but to its "as such" claim. This is evident when China's panel request is read together with China's first written submission. Again, China's panel request separately identifies as alleged measures, on the one hand, the final determinations in the section 129 proceedings and the Public Bodies Memorandum as it relates to those section 129 proceedings, and, on the other hand, the Public Bodies Memorandum as an alleged measure of general and prospective application.[133] China's panel request likewise separately identifies "as applied" and "as such" claims under Article 1.1(a)(1) of the SCM Agreement.[134] China's first written submission discusses the Public Bodies Memorandum as an alleged measure of general and prospective application only in connection with the elaboration of China's "as such" claim.[135] In contrast, China refers to the Public Bodies Memorandum as relating to the section 129 proceedings throughout its discussion of its "as applied" claims without ever referring to the Public Bodies Memorandum as an alleged measure of general and prospective application; indeed, China does not refer to the Public Bodies Memorandum as a measure at all in connection with its discussion of its "as applied" claims.

79. Accordingly, it simply is not credible for China to now attempt to argue that the Public

[129] China's Panel Request in this compliance proceeding, para. 10 (emphasis added).
[130] *See EU – Biodiesel (AB)*, para. 6.230.
[131] China's Panel Request in this compliance proceeding, para. 10 (emphasis added).
[132] *See, e.g.*, U.S. Responses to Panel Questions, paras. 139, 147-150.
[133] *See* China's Panel Request in this compliance proceeding, paras. 8, 10.
[134] *See* China's Panel Request in this compliance proceeding, paras. 16, 19.
[135] *See, e.g.*, China's First Written Submission, paras. 172-182.

Bodies Memorandum is itself a declared measure taken to comply, which China may challenge "as such," because the memorandum happens to be an integral part of the section 129 determinations, which are themselves declared measures taken to comply. This is a belated and transparent attempt by China to avoid its burden of proving that the Public Bodies Memorandum is itself an independent, undeclared measure of general and prospective application taken to comply in this dispute, which is what China alleged at the outset of this compliance proceeding in its panel request.

80. Finally, with respect to the relevance of the timing of the publication of the Public Bodies Memorandum to the Panel's analysis, the assertions China makes in its response to this question[136] lack merit for the reasons given in the U.S. response to this question.[137]

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?

Comment:

81. For the reasons given above in the U.S. comment on China's response to question 17, China is incorrect when it argues that the fact that the Public Bodies Memorandum constitutes an "integral part" of the section 129 determinations, which are declared measures taken to comply, suffices for the Panel to find that the memorandum is a measure that falls within its terms of reference under Article 21.5 of the DSU.[138]

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?

Comment:

82. For the reasons given above in the U.S. comment on China's response to question 17, China is incorrect when it argues that the fact that the Public Bodies Memorandum constitutes an "integral part" of the section 129 determinations, which are declared measures taken to comply, suffices for the Panel to find that the memorandum falls within its terms of reference under Article 21.5 of the DSU.[139] For the same reasons, China also is incorrect when it asserts that the Panel does not need to apply the "nexus-based" test to determine whether the Public Bodies Memorandum falls within the Panel's jurisdiction in this compliance proceeding.[140] China cannot unilaterally relieve itself of the burden of establishing the elements of the nexus-based test.

[136] *See* China's Responses to Panel Questions, para. 104.
[137] *See* U.S. Responses to Panel Questions, paras. 130-135.
[138] *See* China's Responses to Panel Questions, para. 106.
[139] *See* China's Responses to Panel Questions, para. 107.
[140] *See* China's Responses to Panel Questions, para. 107.

83. With respect to the relevance to the Panel's analysis of the overlap in subject matter between the Public Bodies Memorandum, the section 129 determinations, and the relevant DSB recommendations, the assertions China makes in its response to this question [141] lack merit for the reasons given in the U.S. response to this question.[142]

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

Comment:

84. China's assertion that the Public Bodies Memorandum "affects an unidentified number of economic operators" lacks support, and China is incorrect when it argues that its unsupported assertion "demonstrates that [the Public Bodies Memorandum] is a measure of general application."[143]

85. The Public Bodies Memorandum does not affect an unidentified number of economic operators. 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 form a part of the basis of the USDOC's determination in that countervailing duty proceeding. The Public Bodies Memorandum, in such instances, affects the respondent Chinese producers subject to that particular countervailing duty proceeding.

86. The Public Bodies Memorandum otherwise does not "affect" any economic operators. 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.[144] The Public Bodies Memorandum has no operational force and does not, in itself, constitute a determination by the USDOC in any countervailing duty proceeding.

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?

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?

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?

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[141] *See* China's Responses to Panel Questions, para. 108.
[142] *See* U.S. Responses to Panel Questions, paras. 140-143.
[143] China's Responses to Panel Questions, para. 109.
[144] *See US – Countervailing Measures (China) (Panel)*, para. 7.102.

Comment:

87. For the reasons given in the U.S. comment on China's response to question 17, China is incorrect when it asserts that the Panel does not need to examine the links, in terms of effects, between the Public Bodies Memorandum, the section 129 determinations, and the recommendations and rulings of the DSB in the original dispute.[145]

88. China also is incorrect when it asserts that "the USDOC's analytical framework and substantive analysis are entirely contained in the Public Bodies Memorandum" and there is no need for the USDOC to solicit and examine additional evidence on a case-by-case basis.[146] As the United States has explained previously, 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 that 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 underlies the Public Bodies Memorandum.[147] That is precisely what the USDOC did in the challenged section 129 proceedings here,[148] including by requesting information "that would rebut, clarify, or correct, the factual information" in the Public Bodies Memorandum.[149]

89. Finally, China is incorrect when it asserts that "[p]ursuant to the analytical framework articulated in the Public Bodies Memorandum, under *no circumstance* will the USDOC ever properly examine whether the entity in question performs a governmental function when engaging in the conduct that is the subject of the financial contribution inquiry."[150] As the United has States explained, 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.[151] The outcome in the citric acid proceeding demonstrates that, where China cooperates and provides the requested entity-specific 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. Such an outcome – determining that an entity is <u>not</u> a public body and therefore determining not to impose countervailing duties with respect to the alleged subsidy provided by the entity – surely cannot be considered action that is inconsistent with Article 1.1(a)(1) of the SCM Agreement. Furthermore, that outcome is evidence that the Public Bodies Memorandum

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[145] *See* China's Responses to Panel Questions, para. 111.
[146] China's Responses to Panel Questions, para. 114.
[147] *See* Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1).
[148] *See* Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[149] *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).
[150] China's Responses to Panel Questions, para. 115.
[151] *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).

does not necessarily result in an inconsistency with Article 1.1(a)(1).

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?***

Comment:

90. The U.S. comments on China's response to this question are included in the following comment on China's response to question 25.

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?***

Comment:

91. China's response is consistent with the U.S. response to question 25 insofar as the phrase "prevailing market conditions . . . in the country of provision" does not necessarily require a "pure" market or a market wholly free from government intervention.[152] However, it does not follow from this (as China suggests in its responses to questions 24 and 25) that *no* amount of government intervention will justify a finding that in-country prices fail to reflect the "market conditions" required by Article 14(d), regardless of the extent to which that intervention distorts supply and demand signals in the country.[153] Indeed, as explained in comments on China's response to question 31, China's position in this regard is based on an incorrect interpretation of Article 14(d).

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?***

Comment:

92. As China's response to the chapeau of this question directs the Panel to its response to question 31, the United States likewise refers the Panel to its comments on China's response to question 31.

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?***

Comment:

[152] China's Responses to Panel Questions, para. 116; *see also US – Softwood Lumber IV (AB)*, para. 87.
[153] For additional discussion, *see* U.S. First Written Submission, paras. 247-256; U.S. Second Written Submission, paras. 163-171.

93. China's response conflates two separate issues: (1) whether the prevailing market conditions relate to the good or service in question, and (2) the evidence to be used in evaluating the market conditions for the goods in question. The first question is not at issue in this dispute – Commerce looked at the prevailing market conditions for the goods in question. On the second issue, however, China's response is problematic and unpersuasive. Nothing in the text of Article 14(d) specifies the type of evidence that investigating authorities must use in analyzing the market conditions for a particular product. As the United States stated in its response to question 26(a), 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.[154]

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

Comment:

94. Part of China's response – that price distortion is not a question of a particular "degree," in the sense that the Panel need not identify a hypothetical threshold above which government intervention becomes distortive – appears similar to the U.S. response. As the United States explained, price distortion must be properly examined on the basis of the evidence and analysis on the record of a particular dispute.[155]

95. Other aspects of China's response, however, are not grounded to the actual evidence and findings that the USDOC made during the section 129 proceedings, and are not relevant to the applicable standard of review. In particular, China poses its own hypothetical questions that are not tethered in any meaningful way to the USDOC findings currently before the Panel.[156]

96. The questions that China has posed are not relevant to the USDOC's determinations at issue, and the standard of review applicable in this proceeding does not call for development of an analytical approach that might be adopted in some *de novo* review of China's level of subsidization. Rather, the question at issue is whether the analysis actually employed by USDOC was reasoned and adequate.

97. Thus, for example, the question posed by China as to whether one intervention *alone*, (*e.g.*, export restrictions) would be a sufficient basis upon which to find that in-country private prices are distorted is not pertinent to the legal question at issue. The USDOC findings in fact were not based on a single intervention alone; rather, the USDOC findings were based on the

[154] *See* U.S. Responses to Panel Questions, para. 161.
[155] *See, e.g.*, U.S. Responses to Panel Questions, para. 163.
[156] For example, China provides a lengthy discussion of U.S. export restrictions on logs harvested from certain federal lands. *See* China's Responses to Panel Questions, paras. 125-127. China inquires whether those log export restrictions could be considered a "distortion" or whether they are part of the prevailing market conditions for logs in the United States; and if they are a "distortion," China asks whether the export restrictions would be a "sufficient basis to conclude that U.S. log prices are not market-determined and therefore unsuitable as benchmarks under Article 14(d)." *See* China's Responses to Panel Questions, paras. 125-127.

totality of the record evidence – evidence which reflected broad-based intervention within the relevant markets, and that the intervention had demonstrable effects on conditions in China's steel and polysilicon sectors. It is on *this* basis that the Panel should review the evidence; not, as China suggests, "whether each piece [of evidence] *on its own* would be sufficient to support" a particular determination.[157]

98. China appears to argue that unless a government action is directly and definitively distortive, it cannot be considered within the overall distortion analysis called for in a benchmark analysis. China has no basis for this contention. As the United States explained in its first written submission, China's approach makes an arbitrary distinction between an investigating authority's ability to consider price distortion caused by *direct* government influence over pricing and price distortion caused *indirectly* by extensive government interference in a sector, including interference with the entities operating in that sector.[158] China presents no basis in law or logic for the proposition that an authority is foreclosed from conducting a holistic analysis that takes account of all types of government interference. Further, China's position is inconsistent with the object and purpose of the SCM Agreement: if accepted, it would prevent WTO Members from fully offsetting the effects of an injurious subsidy by applying countervailing duties.

99. Contrary to China's assertions, recognizing that government intervention may impact conditions in a particular market does not "take the countervailing duty mechanism into territory that it was never meant to traverse" or permit one Member to impose its policy preferences on another.[159] Rather, selection of an appropriate market benchmark involves a careful analysis of the evidence on the record in an investigation. The USDOC did not, as China suggests, evaluate evidence of government intervention in China's steel and polysilicon sectors to determine whether those interventions were consistent with U.S. policy preferences, nor did the USDOC make any unilateral assessment of the WTO-consistency of those interventions. Rather, the USDOC evaluated the evidence to determine whether prices within China's steel and polysilicon sector were distorted because of government intervention and therefore not useable as benchmarks to measure the adequacy of remuneration. Again, China's response fails to speak to the actual analysis that took place in this dispute.

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 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

[157] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52 (recognizing that "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") (emphasis added).
[158] *See, e.g.*, U.S. First Written Submission, para. 255; *see also* U.S. Second Written Submission, para. 165.
[159] China's Responses to Panel Questions, para. 129.

question, etc.?

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

Comment:

100. China's response to question 27 appears to merge two separate inquiries. In China's view, factors such as "price, quality availability, marketability, transportation, and other conditions of purchase or sale" define "what a market *is*."[160] In other words, China equates "market" with "whatever conditions exist in a particular sector." This interpretation is incorrect – rather, establishing an appropriate market based benchmark involves two sets of issues: whether a particular market is useable as a basis for a market benchmark, as well as the specific terms of sale that may affect the comparison between the transaction price and the chosen benchmark. Further, under China's interpretation, it would never be appropriate to rely upon an out-of-country benchmark because in-country prices would always reflect "prevailing market conditions." The Appellate Body has squarely rejected this position.[161]

101. The U.S. response to question 27 addresses how the parenthetical in Article 14(d) provides a non-exhaustive list of "prevailing market conditions" that an investigating authority should take into account 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).[162] But a determination that a particular source is, or is not, market-determined is a separate inquiry – and one that precedes any subsequent evaluation of these non-exhaustive factors.

102. For example, in *US – Softwood Lumber IV (AB)*, the Appellate Body found that an investigating authority may resort to an external benchmark if it substantiates that in-country private prices have been distorted because of the government's predominant role as a supplier in the market.[163] If this determination is made, then it is necessary to resort to an out-of-country or constructed benchmark "to replicate competitive market conditions that are absent in the country of purchase."[164] And in doing so, an investigating authority is "obliged, pursuant to Article 14(d), to ensure that the alternative benchmark it uses relates or refers to, or is connected with, prevailing market conditions in the country of provision, (including price, quality, availability, marketability, transportation and other conditions of purchase or sale), with a view to determining, ultimately, whether the goods at issue were provided by the government for less than adequate remuneration."[165]

103. Accordingly, the Appellate Body in that dispute did not undertake its evaluation of whether the government's predominant role in the market caused price distortion by considering

[160] China's Responses to Panel Questions, para. 132.
[161] *See, e.g.*, *US – Softwood Lumber (AB)*, para. 119.
[162] *See* U.S. Responses to Panel Questions, para. 164.
[163] *US – Softwood Lumber IV (AB)*, para. 119.
[164] *See Canada – Feed in Tariff (AB)*, para. 5.184 (stating that "[t]he very purpose of resorting to an out-of-country or to a constructed benchmark is to replicate competitive market conditions that are absent in the country of purchase").
[165] *US – Softwood Lumber IV (AB)*, para. 120.

factors such as "transportation" and "marketability." Rather, the Appellate Body addressed the distortion question separately, and only *then* turned to the non-exhaustive list enumerated in Article 14(d). In short, China has incorrectly conflated these distinct analyses.

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"?***

Comment:

104. China's response suggests that unless "very limited" is read to mean only *one* circumstance, *i.e.*, price-setting, then *all* government action will be considered distortive.[166] This argument is unpersuasive. Seemingly, China's argument is based on the premise that the WTO Agreement must be construed so as to avoid any situation in which an authority (or dispute settlement panel) must conduct a close, case-by-case factual evaluation of a particular situation. But China presents no support for this premise. Indeed, many issues involving measures challenged under the WTO Agreement – such as trade remedy measures, or SPS measures, or measures subject to *de facto* national treatment claims – require a close factual analysis. Thus, China presents no basis for its argument that a WTO discipline must be governed by simplistic tests that omit consideration of all relevant evidence.

105. In this dispute, the issue is whether China has shown based on the record that USDOC's determinations were not supported by a reasoned and adequate explanation.[167] And as the record demonstrates, the findings in this dispute were based on the totality of the record evidence, which reflected broad-based intervention within the relevant markets, and that the intervention had demonstrated effects on conditions in China's steel and polysilicon sectors.

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?***

Comment:

106. The United States addresses China's incorrect interpretation of Article 14(d), and the Appellate Body reports interpreting that provision, in its comments on China's response to question 31.

107. The United States further notes that it disagrees with China's interpretation of the relevance of footnote 530 of the Appellate Body report in *US – Countervailing Measures (China)*.[168] In the footnote itself, the Appellate Body refers to price distortion *in general*, and not

[166] *See* China's Responses to Panel Questions, para. 135.
[167] *See* U.S. Responses to Panel Questions, paras. 154-56, 170-71.
[168] *See* China's Responses to Panel Questions, para. 136.

(as China asserts) to a particular type or quality of price distortion:

> We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself.[169]

108. There is no reason to interpret the footnote as imposing additional conditions or qualifications, particularly where the same underlying question of price distortion is at issue.

109. In short, China's repeated insistence that only one particular mode of analysis may be employed is simply not borne out in the language of the SCM Agreement or relevant Appellate Body reports. Further, the third party submissions in this dispute generally confirm that China is alone in its belief that Members are limited to the particular kind of analysis China claims was lacking here.[170]

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?***

Comment:

110. China's response is based on a fundamental misreading of prior Appellate Body reports. In particular, China summarizes prior disputes where the Appellate Body addressed the discrete question of the government's predominant role as a supplier in a particular input market. From this limited set of reports, China jumps to the conclusion that the distortions applicable in those proceedings are the only types of distortions that would call for the use of out-of-country benchmarks. This type of reasoning is fundamentally flawed. Simply because the Appellate Body has not previously had occasion to consider the type of pervasive distortions at issue here provides no basis for asserting that the Appellate Body would find that those distortions are somehow irrelevant to the analysis involved in selecting a market-based benchmark.

111. Indeed, the Appellate Body reports cited by China indicate otherwise. In *US – Softwood Lumber IV*, for example, the Appellate Body cautioned that its findings were "necessarily circumscribed by the facts of that case" and that it was "expressly limited to considering only the situation of government predominance in the market as a provider of goods *because it was 'the only one raised on appeal*.'"[171] And, *the Appellate Body explicitly disclaimed "foreclosing the possibility* that there could be situations other than price distortion due to government predominance as a provider in the market, in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark."[172]

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[169] *See US – Countervailing Measures (China) (AB)*, para. 4.50, n. 530.
[170] *See, e.g.*, EU Responses to Panel Questions, paras. 26-27; Japan's Responses to Panel Questions, para. 26.
[171] *See US – Carbon Steel (India) (AB)*, para. 4.184 (emphasis added).
[172] *Id.*, para. 4.185 (emphasis added); *see also US – Countervailing Measures (China) (AB)*, para. 4.50, n. 530 ("We also do not exclude the possibility that the government may distort in-country prices through other entities or

112. Nor is there anything in the Appellate Body's prior reports that suggests – as China asserts – that there should be an arbitrary line between prices that are "effectively determined" by a government and prices that are distorted by the government's extensive interference in a sector (both as a supplier and otherwise). The Appellate Body in this very dispute recognized that "what allows an investigating authority to reject in-country prices is *price distortion*."[173] Because price distortion can exist in scenarios other than where the government has effectively set sector-wide prices, China's proposed reading of Article 14(d) would arbitrarily and incorrectly preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined.

113. The United States' position in this dispute, by contrast, is grounded in the text of Article 14(d) as interpreted by the Appellate Body. In particular, in *US – Carbon Steel (India) (AB)*, the Appellate Body found that "prevailing market conditions" under Article 14(d) consist of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[174] In *EC – Large Civil Aircraft (AB)*, the Appellate Body found that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[175] Furthermore, under *EC – Large Civil Aircraft (AB)*, this equilibrium must result from the discipline enforced by an exchange reflective of *both* supply and demand.

114. In the section 129 proceedings, the USDOC applied this analytical framework to its evaluation of the record evidence. 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."[176]

115. As USDOC found based on record evidence, China intervenes heavily in its steel and polysilicon sectors to achieve certain outcomes. The outcomes it achieves through these interventions are not consistent with or reflective of a market discipline between buyers and sellers.

116. Yet China has conspicuously avoided any refutation of these fact in this dispute. Instead, China proposes that authorities are limited in their investigation by a *per se* rule of China's own

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channels than the provider of the good itself."). Notably, the quoted sentence from *US – Carbon Steel (India) (AB)* refers to other situations "in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark," not to situations "in which a government has effectively determined prices in a sector."

[173] *US – Countervailing Measures (China) (AB)*, para. 4.59 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*).

[174] *US – Carbon Steel (India) (AB)*, para. 4.150 (quoting *US – Upland Cotton (AB)*, para 404).

[175] *EC – Large Civil Aircraft (AB)*, para. 981.

[176] Benchmark Memorandum (Exhibit CHI-20), p. 28; *accord id.* at p. 27 (finding SIE prices did not reflect "market conditions").

invention.[177]

117. China's *per se* rule, however, cannot be supported under any interpretation of the SCM Agreement. Rather, as the Appellate Body has stated, "[p]roposed in-country prices *will not be reflective of prevailing market conditions in the country of provision* when they deviate from a market-determined price *as a result of government intervention in the market*."[178] The proper focus is on the distortion that occurs "as a result" of the intervention, not on whether the government intervention took a certain form.

118. Finally, the United States observes that China's reliance on *Canada – Feed in Tariff (AB)* is misplaced.[179] Unlike the situation in that dispute, the USDOC expressly found in this case that outside of China, the nature of markets for the inputs at issue is "inherently competitive and typically not subjected to high rates of government ownership in OECD countries."[180]

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?

Comment:

119. China's response avoids answering part (a) of the Panel's question.[181] In doing so, China overlooks the fact that widespread government intervention in a particular sector can fundamentally distort market signals, regardless of whether that intervention comes in the form of direct control over prices or more general control over a company's internal business decisions. It is not necessary to demonstrate that prices have been *de jure* or *de facto* determined by the government to find that such prices are not market-determined for purposes of Article 14(d). In either scenario, conditions that result "from the discipline enforced by an exchange that

[177] Similarly, China is incorrect in arguing that USDOC employed a *per se* rule. China contends that the United States proposes an interpretation of Article 14(d) that permits investigating authorities to reject in-country prices "whenever those prices are affected by any sort of 'governmental intervention in the market.'" *See* China's Responses to Panel Questions, paras. 155, 158. China flatly misrepresents the U.S. position – the United States has not represented that "any sort of" governmental intervention justifies the rejection of in-country prices, nor does this dispute present that question.

[178] *US – Carbon Steel (India) (AB)*, para. 4.155 (emphasis added). China summarily dismisses the relevance of this statement by claiming that the Appellate Body's statement that "government intervention in the market" may justify rejection of in-country prices as potential benchmarks is meant only to "reiterate the Appellate Body's prior findings," and not to suggest that an investigating authority "may reject in-country prices in response to any sort of 'government intervention.'" *See* China's Responses to Panel Questions, para. 155. While China is correct that the Appellate Body included this statement when addressing the question of price distortion resulting from predominant government ownership of the input suppliers, it does not follow that it is irrelevant outside of that context. To the contrary, the statement indicates (1) that a price that is not market-determined is not useable as a benchmark, and (2) that "government intervention" may cause prices to deviate from a market-determined price where appropriately substantiated by record evidence and analysis.

[179] *See* China's Responses to Panel Questions, para. 153.

[180] *See* Benchmark Memorandum (Exhibit CHI-20), at p. 7, n. 23.

[181] *See* China's Responses to Panel Questions, para. 162.

is reflective of the supply and demand of both sellers and buyers in [the] market" are absent.[182]

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"?***

Comment:

120. China does not address this aspect of the USDOC's analysis, and instead focuses entirely on whether the USDOC substantiated the possession and exercise of market power by state-owned suppliers.[183] By focusing its response on this one type of analysis, China is asking the Panel to undertake an improper *de novo* review of the evidence based on China's analytical framework,[184] rather than considering whether the USDOC's holistic explanation was reasoned and adequate.[185]

121. The U.S. response to question 32, in turn, addresses how the USDOC took into account *many* aspects of the government's role in the relevant markets, including as a supplier. Thus, contrary to China's implications, the USDOC's findings were not premised on the government's possession and exercise of market power as a predominant supplier of the relevant inputs.[186] The USDOC explained 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."[187]

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

Comment:

122. China's response provides no basis for its conclusion that the USDOC's analysis was insufficient.[188] The United States addressed this issue in its comments on China's response to question 27. Factors such as "price, quality, availability, marketability, transportation and other

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[182] *EC – Large Civil Aircraft (AB)*, para. 981; *see also* Benchmark Memorandum (Exhibit CHI-20), p. 28 (finding that private prices do not reflect "market conditions); *accord id.* at p. 27 (same).
[183] *See* China's Responses to Panel Questions, para. 163.
[184] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 379.
[185] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).
[186] *See, e.g.*, Final Benchmark Determination, pp. 18-19 (contrasting the USDOC's original analysis in the underlying investigations, and explaining that the USDOC's "current finding that SIEs have a significant market share in the steel sector, although important to our overall market distortion analysis, is no longer central to our finding") (Exhibit CHI-21).
[187] Benchmark Memorandum, p. 28 (emphasis added) (Exhibit CHI-20).
[188] *See* China's Responses to Panel Questions, para. 164.

conditions of purchase or sale" do not inform an investigating authority's analysis of price distortion.[189] Further, China has not argued that the USDOC should have considered these factors as part of its determination that prices within China's steel and polysilicon sectors are distorted.

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?***

Comment:

123. The United States comments on China's response to this question together with its comments on China's response to question 36.

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?***

Comment:

124. The United States comments on China's response to this question together with its comments on China's response to question 36.

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?***

Comment:

125. China's responses to questions 34 through 36 are flawed in several key respects. First, and most fundamentally, China approaches these questions with the unjustified premise that a price not "effectively determined" by the government is necessarily an undistorted "market" price for purposes of the Article 14(d).[190] The United States has addressed this issue and explained how China's position is unfounded in the U.S. comments on China's response to question 31, and in its first and second written submissions.[191]

[189] *See* U.S. Responses to Panel Questions, para. 176; *see also* U.S. Responses to Panel Questions, paras. 164-166.
[190] For example, to answer the Panel's question regarding whether the benchmark questionnaire contained questions that were "relevant to the analysis response under Article 14(d)," China only identifies questions that it considers relevant to evaluating "whether the Government of China effectively determined the prices at which the inputs were sold." *See* China's Responses to Panel Questions, para. 165. Similarly, in response to questions 35 and 36, China states that the USDOC was required to examine prices to determine whether those prices were "effectively determined" by the government or were, instead, "determined by the interplay of supply and demand, *and therefore* suitable as a market-determined benchmark." *Id.*, para. 167; *id.*, para. 169 (stating in response to question 36 that relevant interpretive inquiry is "whether in-country prices are determined by the interplay of supply and demand, as opposed to being effectively determined by the government"). China's responses to these questions depend on an incorrect interpretation of Article 14(d), and for this reason alone, are of no assistance to the Panel.
[191] *See* U.S. First Written Submission, paras. 247-256; U.S. Second Written Submission, paras. 163-171.

126. Further, China's reliance on the spot market prices in the Mysteel report is misplaced.[192] Contrary to China's assertions, these data do not demonstrate that steel prices in China are market-determined for purposes of Article 14(d). To the contrary, the totality of the evidence[193] and analysis on the record of this dispute reflect the absence of a functioning market. The Mysteel prices, when considered in light of this evidence and analysis – as they must be – say nothing to suggest those prices were immune from the effects of sustained state intervention in the sector.[194]

127. Finally, under the correct interpretation of Article 14(d), the USDOC was not required to undertake a quantitative analysis of actual sales prices within China to assess whether such prices reflect "market conditions" for purposes of Article 14(d).[195] As the United States explained in its initial responses to questions 35 and 36, the SCM Agreement does not specify the particular mode of analysis to be used by an authority in selecting a market-based benchmark. The mode of analysis that the USDOC used—that is, analyzing China's steel and polysilicon sectors to determine whether prices in those sectors result from "the discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market"[196]—is consistent with Article 14(d) and the Appellate Body's findings in this dispute, and was supported by the available record evidence.[197]

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?***

Comment:

128. In response to question 37, as in its oral statement, China misrepresents the USDOC's findings in the section 129 proceedings.[198] We refer the Panel to the U.S. response to question 37 outlining the flaws in China's position.[199]

SPECIFICITY

38. Do the parties agree as to the nature of the subsidy programme(s) at issue? If not, is

[192] *See* China's Responses to Panel Questions, para. 172.
[193] 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." *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.
[194] U.S. Second Written Submission, paras. 184-86.
[195] China states that under its (incorrect) interpretation of Article 14(d), investigating authorities must determine whether in-country prices are determined by the interplay of supply and demand by examining "available market prices and how those prices were determined." *See* China's Responses to Panel Questions, para. 169. Although the United States did not conduct a quantitative pricing analysis of prices in China's steel and polysilicon sectors (nor was such an analysis required), the United States clarifies that the USDOC certainly analyzed evidence regarding the context in which prices are determined in China's steel sector.
[196] *EC – Large Civil Aircraft (AB)*, para. 981.
[197] *See, e.g.*, U.S. Responses to Panel Questions, paras. 179-182.
[198] *See* China's Responses to Panel Questions, para. 173.
[199] *See* U.S. Responses to Panel Questions, paras. 185-89.

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?

Comment:

129. In response to this question, China again repeats its incorrect assertion that the USDOC did not "identify" a program.[200] China also misstates the United States position, as China did repeatedly during the Panel meeting, by stating that the United States "agree[s] that . . . the USDOC was first required to identify" subsidy programs.[201] The United States does not agree with China's description of a step that is "first" required in the manner China describes. The identification step that China describes is not what the SCM Agreement provides with respect to determining specificity on a *de facto* basis. Rather, what China describes is akin to a *de jure* finding of specificity – one in which a government document clearly describes the parameters of a subsidy program. In contrast, the *de facto* specificity analysis involves review of available evidence of government actions. For example, in the investigation at issue, the USDOC found China had repeatedly provided inputs for nearly 50 years.

130. The United States has described at length the nature of the subsidy programs at issue and explained how the USDOC made its determinations in this regard. China's response to the Panel's question does not dispute the *nature* of the subsidy programs at issue. Nor does China dispute the USDOC's finding that China systematically provided inputs to key industries; nor that the inputs the USDOC found to be subsidized were provided to a limited number of recipients pursuant to that systematic series of actions. China objects to the USDOC's description of the foregoing as a subsidy program, but China does not dispute the facts. China does not provide any competing description of the nature of this systematic series of actions, nor does China provide any explanation that would justify a finding that the subsidies at issue were not specific.

131. China's complaint is ultimately superficial. The central theme of China's objection is that, notwithstanding the evidence of these unwritten subsidies, the USDOC failed to name what it found. This tactic only highlights the lack of substance in China's claim. In China's view, the subsidized inputs it provides should be exempt from the discipline of the SCM Agreement until an investigating authority divines the right label for China's particular brand of subsidization. The Appellate Body rejected this line of thinking when it stated: the "fact that . . . Article 2.1(c) refers to a 'subsidy programme' does *not* mean that a *de facto* specificity inquiry requires identification of an explicit subsidy programme implemented through law or regulation, or through other explicit means."[202]

132. Further, by continuing to argue that the USDOC did not identify a subsidy program, China is essentially demanding that a *de facto* specific subsidy be proved by pointing to the kind of evidence that would suffice for a finding of *de jure* specificity. In China's view, the method of distributing or providing a subsidy can only amount to action(s) but never a program. Indeed, applying China's logic, no series of actions could demonstrate the existence of subsidy program

[200] China's Responses to Panel Questions, paras. 177-78.
[201] China's Responses to Panel Questions, para. 177.
[202] *US – Countervailing Measures (China) (AB)*, para. 4.146.

unless "program" is defined as a series of subsidies. The text of the SCM Agreement does not support such a view.[203]

133. China's response continues to suggest new questions that might be considered, but fails to introduce any new support for its objection to the USDOC's specificity finding. A subsidy analysis need not answer all the conceivable questions that China might imagine after the fact. Rather, an investigating authority must provide a reasoned and adequate explanation for its determination – which the USDOC did in these proceedings.

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?

Comment:

134. In response to this question, China repeats its assertion that the USDOC did not identify a subsidy program before turning to the question of duration,[204]and argues that the order of analysis is somehow mandated by the SCM Agreement. But China has no legal basis for this argument – nothing in the SCM agreement requires any particular order of analysis in determining the existence of a *de facto* subsidy. Indeed, by the very nature of the *de facto* inquiry, the analysis and identification of a subsidy are likely to occur simultaneously in the process of investigating the countervailing duty allegations. As the Appellate Body recognized, "the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1."[205] As the United States has explained at length, in

[203] *See US – Countervailing Measures (China) (AB)*, para. 4.146 ("By its very nature, such an analysis normally focuses on evidence other than of the kind found in written documents or express acts or pronouncements by a granting authority.").
[204] *See* China's Responses to Panel Questions, para. 180.
[205] *US – Countervailing Measures (China) (AB)*, para. 4.144. The Appellate Body also explained that aspects of the Article 2.1(c) analysis may take place in "conjunctive" fashion. *Id.*, paras. 4.168-69. In particular, the Appellate Body explained that identifying the jurisdiction of the granting authority need not take place a separate step, but rather is likely to be part of a holistic and conjunctive analysis:

> 4.168. We understand China to argue that an investigating authority must determine the identity of the granting authority involved in the distribution of subsidies before it can identify the relevant jurisdiction of the granting authority. While an analysis of the jurisdiction of the granting authority could start with an identification of the granting authority, we do not see why the order of analysis suggested by China would always be required. Rather, as we see it, the identification of the jurisdiction of the granting authority involves a holistic analysis of the relevant facts and evidence in each case. Indeed, the notion of jurisdiction is linked to, and does not exist in isolation from, the granting authority. Thus, a proper identification of the jurisdiction of the granting authority will require an analysis of both the 'granting authority' and its 'jurisdiction' in a conjunctive manner. We therefore do not read Article 2.1 in a manner that focuses on the identity of the 'granting authority' independently from its 'jurisdiction'. A holistic analysis of the jurisdiction of the granting authority is what provides the framework within which specificity is to be analysed.
>
> 4.169. We also consider that the chapeau of Article 2.1 does not require an investigating authority to identify the jurisdiction of the granting authority in an explicit manner or in any specific form,

identifying the systematic series of actions pursuant to which the inputs were provided, the USDOC also identified and determined the existence of the relevant subsidy program.

135. China relies on various hypothetical situations in which a non-specific program might be susceptible to an unwarranted specificity finding. This reliance is misplaced. The issue in this dispute is not how various hypothetical situations might be addressed in various hypothetical proceedings, but whether the USDOC's specificity finding in the subject investigations was supported by a reasoned and adequate explanation. China has not demonstrated – or even suggested – that the programs examined in these proceedings were not specific. And more specifically, China has not addressed the fact that these programs were used by a limited number of recipients. The additional questions that China raises speak to situations in which a subsidy is widely and generally available throughout the economy but which appears limited by virtue of its duration. Apart from raising these hypothetical issues that might arise in other situations, China has not made any showing that this is the case in these circumstances.

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?

Comment:

136. The USDOC did not, as China suggests, presume specificity based on the nature of the input. Rather, the USDOC determined that each program was specific because it was used by a limited number of recipients. In any event, the Appellate Body has emphasized that the nature of the subsidy "informs the scope and content of the analysis required to establish *de facto* specificity."[206] China fails to recognize that the length of time is not the basis for finding specificity – rather, the length of time is a check against an incorrect 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?

Comment:

137. China's view that an authority must identify the total length of time is not supported by the text of Article 2.1(c).[207] China's response to this question conflates two different concepts: (1) the purpose of accounting for the length of time and (2) the basis for finding that a subsidy is provided to a limited number of users. Time is not the limiting factor.

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as long as it is discernible from the determination. This identification of the jurisdiction of the granting authority is merely a preliminary step providing a framework to conduct the specificity analysis. In this regard, it has to be kept in mind that the analysis of specificity focuses on the question of whether access to a subsidy is limited to a particular class of recipients.

US – Countervailing Measures (China) (AB), paras. 4.168-69.

[206] *US – Countervailing Measures (China) (AB)*, para. 4.140.

[207] *See* China's Responses to Panel Questions, para. 188.

138. China's response also misconstrues the USDOC's finding that subsidies need not be provided throughout the duration of the program as suggesting that the USDOC did not find that subsidies were provided pursuant to the program during the period of investigation.[208] The USDOC found the subsidies provided to respondents during the period of investigation were provided pursuant to a program of providing inputs since at least 1957.[209] The United States has addressed this issue at length.[210] The U.S. response to this question in particular addresses how 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.[211]

139. Again, to the extent other aspects of duration may be relevant, China has not demonstrated that there was anything further for the USDOC to consider with respect to the lengthy duration of the programs at issue in these proceedings.[212] By the same token, China fails to answer the Panel's question about whether finding that a subsidy program has been in operation during the period of investigation is sufficient. China claims that this question is "not ... before the Panel."[213] Yet, the fact is that the USDOC found the subsidy program to be in operation not only prior to the period of investigation, but also during the period of investigation as well. China's failure to address this fact highlights that China has no basis for disputing the WTO-consistency of the specificity findings in USDOC's section 129 determinations. While China addresses a myriad number of hypothetical situations that are not before this Panel, China fails to address a question that speaks to the facts of these proceedings that *are* before the Panel.

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

Comment:

140. The answer China provides is not responsive to the Panel's question.[214] The premise of China's answer is a scenario in which the investigating authority has not identified any subsidy but is nevertheless examining a series of actions.[215] Starting with this premise defeats the purpose of the inquiry. Indeed, China supplies the damning tautology itself, stating: "[i]f no subsidy within the meaning of Article 1 is granted, China fails to see how a . . . plan or scheme pursuant to which *subsidies have been provided*, could be seen as having been in operation."[216] The Appellate Body has addressed why this premise is not appropriate, *viz.*, "the starting point of an analysis of specificity is the measure that has been determined to constitute a subsidy under Article 1.1."[217] Because China's argument presupposes that no measure has been determined to

[208] *See* China's Responses to Panel Questions, para. 191.
[209] *See* Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).
[210] *See, e.g.*, U.S. First Written Submission, paras. 286-88, 290-95.
[211] *See* U.S. Responses to Panel Questions, para. 207.
[212] *See* China's Responses to Panel Questions, paras. 190, 192.
[213] China's Responses to Panel Questions, para. 191.
[214] *See* China's Responses to Panel Questions, para. 193.
[215] *See* China's Responses to Panel Questions, para. 193.
[216] China's Responses to Panel Questions, para. 193.
[217] *US – Countervailing Measures (China) (AB)*, para. 4.140 ("This is supported by the fact that the chapeau of Article 2.1 establishes that "a subsidy, as defined in paragraph 1 of Article 1", is the measure under scrutiny for purposes of determining whether it is specific.") (citing *US – Large Civil Aircraft (2nd complaint)*, para. 747).

constitute a subsidy, China's discussion of the specificity analysis is not relevant.

141. China takes the straw man argument even further, stating that the Article 2.1(c) "'safeguard' would be undermined if a subsidy program could be deemed in existence and operation without any evidence that subsidies have been granted under the alleged program."[218] China fails to draw any connection between the situation it describes and the facts of these proceedings. In all of these proceedings the USDOC found that subsidies had been provided. The USDOC then examined the programs pursuant to which those subsidies were provided. If the USDOC had not found evidence that subsidies had been provided in the first place, there would be no reason to undertake the "length of time" inquiry.

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

Comment:

142. China's response to part (a) of this question demonstrates a misunderstanding of Articles 1 and 2 of the SCM Agreement by asserting that "[a] 'subsidy programme' is a programme of subsidies."[219] The Appellate Body expressly stated that the subsidy program is an action or series of actions pursuant to which the subsidy in question is provided. China again suggests that the elements of a subsidy must be present in each of the actions that constitute a program, but as we have explained, the identification of a subsidy and its elements is separate from the determination of whether that subsidy is specific. The question of specificity speaks to whether there is a limitation on access to the subsidy and not whether a subsidy has been provided historically as well. Here, that limitation is evident in the number of recipients. The SCM Agreement does not provide that an additional finding of *historical* subsidization is required to establish that subsidies are provided to a limited number of users in the period of investigation.

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?

Comment:

143. China responds to part (b) of this question by underlining a phrase from the Appellate Body it purports is the definition of a subsidy program: "financial contributions that confer a benefit."[220] The phrase China underlines, however, is merely the Appellate Body's formulation of the term "subsidy." The United States has addressed this issue in its earlier submissions.[221] Read in context, the Appellate Body's full statement explains that evidence of "a systematic series of actions" may constitute the program "pursuant to which" a subsidy is provided, *i.e.*, the program "pursuant to which financial contributions that confer a benefit are provided to certain

[218] China's Responses to Panel Questions, para. 194.
[219] China's Responses to Panel Questions, para. 195.
[220] China's Responses to Panel Questions, para. 196.
[221] *See, e.g.*, U.S. Second Written Submission, paras. 237-39.

enterprises."[222]

144. In the second part of its response, China presents yet another straw man argument and again mischaracterizes the United States position.[223] China states that a financial contribution is not sufficient to demonstrate a subsidy program because the provision of goods would then constitute a subsidy program even when no benefit is conferred. But the question is, with respect to a subsidy (*i.e.*, a financial contribution that confers a benefit), has that subsidy been provided pursuant to a series of actions. The question is not whether, absent a subsidy finding, a series of actions constitutes a subsidy program. Given that the question posed by China is not the question at issue in this case, there is no risk of the dire result that China describes.[224]

145. In short, China premises all of its responses on the examination of a series of actions absent a subsidy finding. But the relevant inquiry is, having found a subsidy, whether that subsidy is specific and does the manner in which that subsidy is transacted provide evidence that it is specific.

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?

Comment:

146. China's response to this question is factually untrue.[225] The inputs in question were produced by and provided to the Chinese steel sector – a key industry expressly highlighted by the policy mandates described in the industrial goals and five-year plan documents. Questions regarding the operation of these policy mandates – or any of the actions by which China provided the inputs in question – are logically relevant to a consideration of the length of time during which such a program has been in operation.

147. With regard to China's legal arguments, China's response again conflates the identification of a subsidy with the identification of the series of actions pursuant to which that subsidy is provided. As noted, China's argument is premised on the false equivalency it promotes between a series of actions and series of subsidies. The United States has responded to this line of argument in previous submissions.[226]

148. Turning to the specific subsidies at issue – that is, the provision of LTAR inputs – an authority may identify a program involving the *repeated provisions* of inputs over the relevant period. The repeated provision of inputs need not consist exclusively of *subsidized* inputs – as noted, the existence or not of a subsidy is a three part test (contribution, benefit, specificity), and each element must be identified separately. Thus, China is wrong in asserting that the program

[222] *US – Countervailing Measures (China) (AB)*, para. 4.141.
[223] *See* China's Responses to Panel Questions, para. 197.
[224] China's Responses to Panel Questions, para. 197.
[225] *See* China's Responses to Panel Questions, paras. 198-99.
[226] *See, e.g.*, U.S. Second Written Submission, para. 235. In addition, the U.S. comment on China's response to question 42 above addresses how China's argument relies upon a false premise.

must consist only of activities that have been definitively identified as subsidies.

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?

Comment:

149. China's answer fails to respond to the Panel's question.[227] The U.S. comment on China's response to question 38 addresses China's position: China does not dispute the USDOC's finding that China systematically provided inputs to key industries in accordance with its policy plans; or that the inputs the USDOC found to be subsidized were provided to a limited number of recipients pursuant to that systematic series of actions. Rather, China objects to the USDOC's description of the foregoing as a subsidy program, but China does not dispute that those are the facts. In sum, China is unable to refute the USDOC's finding that the duration of the program did not create an artificial appearance of specificity.

150. China's response concludes that the provision of inputs over a lengthy duration does not always prove the existence or operation of a subsidy program, but China fails to provide any reasons to draw such a conclusion in relation to the investigations at issue in this dispute.[228]

151. China also argues that the lengthy duration does not prove that the use of the program was limited. But the USDOC's determination was not that the length of time proves limited use, but rather that limited use proves specificity, even taking into account the length of time during which the program was in operation.

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?

Comment:

152. China argues that the USDOC measures taken to comply were not in accord with the Appellate Body findings in this dispute.[229] China's argument, however, is based on a plain misreading of the Appellate Body report, as well as a failure to take account of the record in the redeterminations. The Appellate Body report states only that an inquiry "may require" determining what other enterprises or industries have access to that same subsidy[230] – it did not find that this inquiry is required in every possible circumstance. As explained in the U.S. response to this question, the Appellate Body's statement reflects the broad range of possibilities

[227] *See* China's Responses to Panel Questions, para. 200.
[228] *See* China's Responses to Panel Questions, para. 201.
[229] China's Responses to Panel Questions, para. 203 (citing *US – Countervailing Measures (China) (AB)*, para. 4.141).
[230] *US – Countervailing Measures (China) (AB)*, para. 4.141.

an investigating authority may encounter in conducting a *de facto* specificity analysis.[231]

153. In any event, the record in the redeterminations shows that the USDOC *did* consider more than the actual recipients of the particular subsidies. For example, the USDOC solicited information from China regarding the number of recipient companies and industries and the amount of assistance approved under each program for the year in which any mandatory company was approved for assistance, as well as each of the preceding three years.[232] In *OCTG*, for example, China reported which of its industries were users of the subsidy program in question and the USDOC determined, based on an analysis of this information, that the recipients of the subsidy were limited in number.[233]

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?

Comment:

154. China's response incorrectly states that "it is undisputed" that the provision of land-use rights "was not limited" to the zone.[234] To the contrary, the USDOC's findings in this dispute relate to evidence of preferential treatment in a particular zone – the ZETDZ – and whether access to *that* specific preferential treatment was limited as described by Article 2.2. And, it was so limited, which supported the finding of specificity. Furthermore, to the extent that China argues that China provided other types of preferential land-rights in or outside of zones, this is not pertinent to the specificity of the subsidy at issue.

155. To establish regional specificity under Article 2.2 of the SCM Agreement, an investigating authority must find that the subsidy at issue is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority. And as the original Panel indicated, there must be a limitation on access to either the financial contribution or the benefit, and such a limitation can be established by demonstrating, for instance, that the conditions for the provision of land within the park or zone were different from, and preferential to, the conditions outside of the park or zone, in terms of special rules or distinctive pricing.[235] The United States has explained in its previous submissions the analysis that was the basis of the USDOC's determination,[236] and demonstrated that the USDOC's land regime analysis comports with Article 2.2 and the DSB's recommendations and rulings in this dispute.[237] In particular, USDOC's regional specificity analysis hinges on whether there is a "distinct land regime" within the zone at issue, *i.e.*, whether the prices or terms of sale, including other incentives tied to the purchase of land, for land inside the zone at issue are different from and preferential to those offered outside of the zone at issue.[238] The USDOC, based on record

[231] *See* U.S. Responses to Panel Questions, para. 218.
[232] *See* U.S. Second Written Submission, para. 230.
[233] *See* U.S. Second Written Submission, para. 231.
[234] China's Responses to Panel Questions, para. 54.
[235] *See US – Countervailing Measures (China) (Panel)*, paras. 7.351-54.
[236] U.S. First Written Submission, para. 311; U.S. Second Written Submission, para. 252.
[237] U.S. Second Written Submission, para. 253.
[238] *See* Land Preliminary Determination, p. 6 (Exhibit CHI-24).

evidence, made such a finding here.

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

156. China cannot support its contention that the questions posed by the USDOC in its questionnaire were not relevant for consideration of these issues. To the contrary, answers to the very questions China reproduces in its response to part (a) of question 47 would have had probative value in further determining whether the provision of land-use rights within the ZETDZ was different from and preferential by comparison with the provision of land-use rights outside of the ZETDZ.[239]

157. China's response claims that evidence of a distinct land regime does not answer the question of whether the ZETDZ was the only place in China where land-use rights were provided on a subsidized basis.[240] This is an inaccurate characterization of the relevant standard and of the USDOC's analysis. As we have explained, the USDOC's "distinct land regime" analysis examined whether the provision of land-use rights for less than adequate remuneration is limited to the zone at issue, *i.e.*, whether it is regionally specific.[241] In doing so, the USDOC relied on the standard articulated by the original Panel in this dispute to determine whether the provision of land within the zone was different from and preferential by comparison with the provision outside the zone.[242]

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"?

Comment:

158. China's response to this question China repeats the same erroneous formulation of the applicable legal standard which the United States addressed in its comments on China's response to question 47. China once more asserts that the USDOC erred in applying a "distinct land regime" analysis when, instead, it should have determined whether the provision of land-use rights for less than adequate remuneration was limited to the ZETDZ. In doing so, China is proposing a distinction that is not present in the applicable standard. As addressed in the U.S. comments on China's response to question 47, examining evidence of a "distinct land regime" serves to determine whether the provision of land-use rights for less than adequate remuneration is limited to the zone at issue, *i.e.*, whether it is regionally specific, and this analysis comports

[239] For example, the USDOC asked China to "provide a listing of all incentives or preferential policies offered to firms located within the ZETDZ during the POI" and "whether the incentives or preferential policies were available to firms located outside of the [zone]." Initial Land Specificity Questionnaire, pp. 14-15 (CHI-25).
[240] *See* China's Responses to Panel Questions, para. 208.
[241] U.S. First Written Submission, para. 308; U.S. Second Written Submission, para. 250.
[242] *Id.*

with the DSB's recommendations and rulings in this dispute.

159. China's response to question 48 also repeats two erroneous statements regarding the factual basis of the USDOC's determination: (1) that the "preferential treatment" language at issue *can only be interpreted as* a meaningless term; and (2) that the record establishes that land-use rights in a location outside the ZETDZ were sold at a price that was lower than the price paid for the land-use rights at issue.[243] Both claims are wrong.

160. First, with regard to the "preferential treatment" language, China's response claims that company officials stated at verification that the appraiser considered the "preferential treatment" language to be boilerplate.[244] Because China refused to cooperate with the USDOC's Section 129 proceeding, however, the USDOC could not further investigate this assertion or any explore any further significance of the "preferential treatment" language at issue. The United States has previously addressed how the USDOC reasonably arrived at the conclusion that this language is probative of whether companies located within the ZETDZ received favorable treatment relative to companies located outside of the ZETDZ.[245]

161. Second, with respect to the land-use rights for a location outside the ZETDZ that China alleges were sold at a lower price, the record establishes that different calculation methods were used in the respective appraisals and that the USDOC was unable to resolve these discrepancies at verification.[246] Thus, because the record does not establish whether the prices included in these appraisal documents are on comparable bases, the USDOC was not in a position in its Section 129 to use the comparison appraisal as evidence of regional specificity in the manner China now suggests. The United States has explained at great length how China's claim relies on a distorted reading of the facts.[247]

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

Comment:

162. China's response to the Panel's questions introduces for *the first time in this proceeding* reference to a contract between the Land Bureau and a new company, claiming that it indicates a

[243] *See* China's Responses to Panel Questions, para. 209-12.
[244] China's response states incorrectly that "[a]ccording to an affidavit from the appraisal company, the 'preferential treatment' language was boilerplate." China's Responses to Panel Questions, para. 212. The verification report, however, states that company officials indicated that the appraiser considered the language to be boilerplate, not that the affidavit from the appraisal company did so. *See* Verification Report at 18 (Exhibit CHI-27) ("Referring to testimony in a newly obtained affidavit from the appraiser, company officials stated that the appraiser considered this to be simply 'boiler plate' language.").
[245] U.S. First Written Submission, para. 311; U.S. Second Written Submission, paras. 252-53.
[246] *See* Memorandum Accompanying Land Preliminary Determination, GG/ZG Verification Report in the 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.").
[247] U.S. First Written Submission, para. 312; U.S. Second Written Submission, para. 258.

lower price than what the respondent company paid for land inside of the zone.[248] However, the passage China refers to does not confirm the location of that parcel and rather suggests it was located within a specialized industrial area.[249] China precluded any further inquiry on this point when it declined to participate in the section 129 proceedings. Nor is there any basis to find that the USDOC should have addressed this point in its determinations, given that no party suggested the USDOC should consider it relevant to the inquiry during the 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?

Comment:

163. China's response is without merit or substance.[250] There is no dispute that the USDOC was required to evaluate all relevant evidence on the record in relation to the proper legal standard under Article 2.2 of the SCM Agreement regardless of whether China cooperated in the proceeding. And, as the United States has explained, the USDOC in fact did evaluate all relevant record evidence.

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?

Comment:

164. The United States notes that China's response to question 53, addressed below, confirms that "China is not pursuing claims under Article 12.7."[251]

165. Further, China's response to this question misstates the United States position.[252] The United States does not agree with China that the Panel can make findings under Article 12.7 when China failed to challenge the application of Article 12.7 in the first place.[253] As addressed in the U.S. response to question 52, the USDOC's determinations stand for themselves and are

[248] China also refers to this contract in its response to question 48. *See* China's Responses to Panel Questions, para. 212.
[249] *See* Verification Report at 20 (Exhibit CHI-27) ("[C]ompany officials provided a packet on land that included, for illustration, [a contract] signed between another company and the Land Bureau for another piece of land in the Pingle Industry area . . . .").
[250] *See* China's Responses to Panel Questions, para. 214.
[251] China's Responses to Panel Questions, para. 217.
[252] *See* China's Responses to Panel Questions, para. 215.
[253] *See* U.S. Responses to Panel Questions, paras. 227-29.

consistent on their own terms with the provisions of the SCM Agreement.[254]

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

Comment:

166. China's response concedes that China does not challenge what the facts are in these proceedings, but rather challenges the "legal standard."[255] China claims that, regardless of whether the USDOC relied on the facts available, its decisions are "just as inconsistent."[256] In other words, China recognizes that there is no basis upon which to make Article 12.7 findings. The U.S. response to question 51 addresses the consequences of China's failure to make a *prima facie* case with respect to these claims.[257]

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?

Comment:

167. China's response to these questions confirms that "China is not pursuing claims under Article 12.7."[258]

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?

Comment:

168. China's response again confirms that China has no claims to make under Article 12.7.[259] China simply re-asserts that, regardless of the facts on the record, China's view is that the USDOC reached the wrong conclusions because it used "the wrong lens."[260] China's argument is really an admission that China does not view the facts as relevant to any of the determinations at issue, whether or not they rely on the facts available.

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[254] *See* U.S. Responses to Panel Questions, paras. 230-34
[255] China's Responses to Panel Questions, para. 216.
[256] China's Responses to Panel Questions, para. 216.
[257] *See* U.S. Responses to Panel Questions, paras. 228-29.
[258] China's Responses to Panel Questions, para. 217.
[259] *See* China's Responses to Panel Questions, para. 219.
[260] *See id.*

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?

Comment:

169. China's response confirms that its claim under Article 32.1 is an autonomous claim.[261] Accordingly, the claim must stand on its terms, regardless of findings on any other claims. And, as the United States has explained, this autonomous claim has no legal merit.

170. China's response also confirms that its claim would lead to untenable results. Under China's theory, a panel could find that determinations are consistent with Article 14(d), but then find that a Member acted inconsistently with Article 32.1 if the *reason* prices are distorted relates to subsidization. Alternatively, under China's theory, even if a Member were to find distortion after having conducted the precise kind of market analysis that China claims is appropriate, that finding would nevertheless be susceptible to an Article 32.1 claim if subsidization contributed to domestic price distortion. Such a finding would be irreconcilable with the prior Appellate Body reports discussing the use of external benchmarks.[262] The Appellate Body has repeatedly found that the use of out-of-country benchmarks is permissible.[263]

171. China characterizes the section 129 determinations as having "countered subsidies allegedly provided to the Chinese steel industry."[264] This characterization is incorrect. Rather, the countervailing duties at issue are imposed in response to the subsidies under investigation – not in response to the range of government measures that the USDOC found contribute to price distortion affecting the market for various inputs. The United States has previously addressed how the use or rejection of in-country prices only bears on the measurement of the adequacy of remuneration for the subsidies being investigated.[265] Further, the use of out-of-country benchmarks is not an action "against" subsidization *of inputs*. A benchmark is used to determine whether inputs are provided to subject merchandise producers for adequate remuneration; the USDOC's distortion analysis and resulting benchmark determination does not offset subsidies provided to input producers. The distortion analysis is simply a part of the USDOC's assessment of the provision of inputs to downstream producers of subject merchandise for less than adequate remuneration.

172. China's response describes the specific action as "reliance" or "relying upon the existence of such subsidies (whether or not shown to be actionable subsidies) and their presumed

[261] China's Responses to Panel Questions, para. 220.
[262] *See* U.S. First Written Submission, paras. 276-77, 280 (citing *US – Softwood Lumber IV (AB)*, para. 102; *US – Countervailing Measures (China) (AB)*, para. 4.62; *U.S. – Carbon Steel (India) (AB)*, para 4.155).
[263] *See, e.g.*, *US – Softwood Lumber IV (AB)*, para. 102; *US – Countervailing Measures (China) (AB)*, para. 4.62; *U.S. – Carbon Steel (India) (AB)*, para 4.155
[264] China's Responses to Panel Questions, para. 221.
[265] *See* U.S. Responses to Panel Questions, para. 194.

effects."[266] Yet China has made no showing of any action on the part of the United States to "counteract subsidization" apart from the countervailing duties at issue.[267] Further, the use of out-of-country benchmarks is not an action that is "specific" *to input subsidies* because such action is *not* taken in response to the subsidization of the input, is not "inextricably linked" to the subsidy, nor does it have a "strong correlation with the constituent elements" of the input subsidy.[268] Indeed, the USDOC's use of an out-of-country benchmark is not limited to situations in which the constituent elements of a countervailable input subsidy are present because the USDOC relied on evidence of a variety of distortive factors.[269]

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?

Comment:

173. In response to these questions, China claims that the measures at issue are the section 129 proceedings and that the "specific action" against subsidization takes place "within" these measures.[270] China's response is perplexing. If the measures at issue are the countervailing duty determinations, those measures should be examined for consistency with the applicable provisions of the SCM Agreement governing countervailing duty investigations. Indeed, China has not identified a measure other than the countervailing duty determinations. Therefore, China has not identified any measure that is not one of the permissible responses to subsidization. The United States has previously addressed this issue at length.[271]

174. China strains to argue that there were "alleged upstream subsidies."[272] But no such finding took place[273] – thus, China is in the position of needing to prove that there were such

[266] China's Responses to Panel Questions, para. 223.
[267] China's Responses to Panel Questions, para. 223.
[268] *See US – Offset Act (Byrd Amendment) (AB)*, para. 239; *US – Offset Act (Byrd Amendment) (Panel)*, para. 7.18.
[269] *See* Benchmark Memorandum, p. 6 (Exhibit CHI-20) (finding "ample evidence of government intervention and distortions in the steel sector, including industrial policies, subsidies, and restrictions on investment, as well as additional government caused distortions."); *id.* at 7-9 (summarizing evidence demonstrating the existence of export restraints on silicon exports as well as the provision of subsidies to a polysilicon producer, in addition to the ability of the GOC to manage the polysilicon industry, impose rules and restrictions, and intervene in the operation of sectors deemed to be priority of the state, such as the renewable energy sector).
[270] *See* China's Responses to Panel Questions, para. 224.
[271] *See, e.g.*, U.S. Second Written Submission, paras. 215-22.
[272] China's Responses to Panel Questions, para. 224.
[273] The United States addressed this point in its first written submission. *See* U.S. First Written Submission, para. 270, n.505 ("*NB* China has not established that the USDOC's reference to subsidies in the Benchmark Memorandum

alleged upstream subsidies while denying their existence and then characterizing the USDOC's determination as an action against something China both denies and has failed to established occurred. As China stated during the Panel meeting, it brought this claim to explore the logic of the USDOC's benchmark determination. China's claim is nothing more than a tactic – and it has no substance of its own.

175. China considers the determinations, the distortion analysis, and the duties to constitute a single action.[274] In other words, China considers that the analysis cannot be separated from the duties imposed. As such, China cannot show that the benchmark calculation is inconsistent with Article 32.1 because the benchmark calculation is governed by Article 14(d).

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?

Comment:

176. China's answer to this question is not responsive to the Panel's inquiry.[275] Put simply, China has failed to link its claim to the elements of a subsidy. The USDOC's use of an out-of-country benchmark (to measure whether inputs are provided for less than adequate remuneration) is itself not a "measure" that is a "specific action against" input subsidies for at least two reasons. First, use of out-of-country benchmarks is not an action that is "specific" to input subsidies because such action is not taken in response to the subsidization of the input, is not "inextricably linked" to the subsidy, nor does it have a "strong correlation with the constituent elements" of the input subsidy. The benchmark determination is not a "specific" action against a subsidy because the use of out-of-country benchmarks is not limited to situations in which the constituent elements of a countervailable input subsidy are present; indeed in the covered investigations, the USDOC relied on evidence of a variety of distortive factors. Second, the use of out-of-country benchmarks is not an action "against" subsidization of inputs. Because the benchmark is used to determine whether inputs are provided to subject merchandise producers for adequate remuneration, the USDOC's distortion analysis and resulting benchmark determination does not offset subsidies provided to input producers.

177. China notes that the United States has countervailed a number of Chinese programs that overlap with the discussion of various factors contributing to price distortion.[276] China's point only serves to illustrate that where the United States in fact has taken an action against a particular subsidy, that action is reflected in a countervailing duty determination actually addressed to the product in question. The U.S. response to question 59 addresses this point in

relates to subsidies as defined in the SCM Agreement. The USDOC referred to subsidies in the form of various government incentives.").

[274] China's Responses to Panel Questions, para. 225.

[275] *See* China's Responses to Panel Questions, para. 227.

[276] China's Responses to Panel Questions, para. 228.

further detail.[277]

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?

Comment:

178. China's response does not address "design and structure," but rather claims that the use of external benchmarks "almost certainly" results in higher countervailing duty rates.[278] China's response likewise fails to demonstrate any impact resulting from the analysis. The United States has explained previously that, although "adverse bearing" can be direct or indirect,[279] a "high standard" must be met in determining whether a measure has the effect of dissuading subsidization.[280] Thus, China has failed to meet the standard for demonstrating that a measure has the effect of dissuading subsidization because it has not identified the element that is inherent in the use of an out-of-country benchmark that encourages the termination of the practice of input subsidization.[281]

179. A measure provided in response to another Member's subsidy (*e.g.* a counter-subsidy), cannot, "merely because of its impact on conditions of competition" constitute a "specific action against" subsidization, as "there must be some additional element, inherent in the design and structure of the measure, that serves to dissuade, or encourage the termination of, the practice of subsidization."[282] Here, China merely asserts that the USDOC's use of out-of-country benchmarks is opposed to, has an adverse bearing on, or has the effect of dissuading the practice of subsidizing inputs. China does not substantiate how or why this would be the case, and in the absence of any legal or evidentiary basis to support its contention, has not met the standard for establishing that a measure is "against" subsidization.

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?

Comment:

180. China's denial of the relevance of the variety of record evidence examined by USDOC is unpersuasive. China's response does not explain or address how the use of external benchmarks is a specific action against subsidization when China has failed to distinguish between evidence of subsidies and evidence of other forms of government intervention. The U.S. comment on China's response to question 57 further addresses China's failure to show a link between the constituent elements of a subsidy and the findings that show a variety of factors contributed to

[277] *See* U.S. Responses to Panel Questions, para. 196.
[278] China's Responses to Panel Questions, para. 230.
[279] *See US – Offset Act (Byrd Amendment) (Panel)*, para. 733.
[280] *EC – Commercial Vessels*, para. 7.161.
[281] *See EC – Commercial Vessels*, para. 7.161, 7.164.
[282] *EC – Commercial Vessels*, para. 7.164.

price distortion.

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

Comment:

181. As for question 59, China's denial of the relevance of key differences between a benchmark determination and a finding of subsidization is unconvincing. China cannot reconcile its claim with the fact that evidence of upstream subsidies can inform a distortion finding that *only sometimes* leads to a benefit finding and other times does not lead to a benefit finding.

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?

Comment:

182. The United States disagrees with China's argument that challenged subsequent administrative reviews (including the *Solar Panels* second administrative review and the *Aluminum Extrusions* sunset review) are closely connected in terms of effects to the section 129 determinations on grounds that they provide the basis for the continued imposition of cash deposit rates. The mere fact that subsequent reviews result in the imposition of cash deposit rates cannot mean that such reviews have a "sufficiently close nexus" in terms of effects; 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.

183. Similarly, the United States disagrees with China's assertion that the challenged subsequent administrative reviews are closely connected to the section 129 determinations because they cover the "same subject matter."[283] Underlying China's argument is the premise that the subject matter is the same merely because the challenged reviews contain public body, benchmark, input specificity, and land specificity determinations. But these are just the elements of a subsidy analysis. The phrase "subject matter" is an overly broad interpretation of the close nexus standard. Endorsement of such an interpretation would mean – illogically – that reviews would be found to cover the same "subject matter" *every time the investigating authority examines whether the constituent elements of a countervailable subsidy are present*, *i.e.*, financial contribution (including examination of whether a government or public body is making the contribution), benefit (including examination of whether the adequacy of remuneration can be measures using in-country prices), and specificity.

184. Instead, the appropriate analysis for examining whether subsequent reviews cover the same subject matter is to examine the issues and facts of each proceeding. China's response to question 61 disregards that each subsequent review relates to a different period of time, has a

[283] China's Responses to Panel Questions, paras. 234-35.

different factual record, and involves different sets of interested parties. The facts can, and do, change from administrative review to administrative review, and more importantly, the legal analysis of a given issue necessarily varies depending on the facts. China has not to put forward any affirmative analysis in this compliance dispute that would allow for the further examination of the issues and facts of each proceeding necessary to make even the initial determination that the circumstances of the subsequent proceedings are similar in all relevant aspects to the challenged investigations at issue in the Section 129 determinations.

185. Finally, in its response China incorrectly asserts that there is no distinction between sunset reviews and administrative reviews.[284] As the United States noted in its response to this question, sunset reviews are distinct because they examine whether injurious subsidization is likely to continue, rather than calculate a duty rate for the respondents subject to the review.[285] China has provided no basis to support its presumption 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. In the absence of adequate legal argument and evidentiary support to substantiate such a presumption, China's claims with respect to the sunset reviews must be rejected.

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?

Comment:

186. China's response persists in seeking to analogize the public bodies, benchmarks, input specificity, and land specificity determinations at issue in this compliance dispute to the question of zeroing examined in *US – Zeroing (Japan) (Article 21.5 – Japan)* (and in *US – Zeroing (EC) (Article 21.5 – EC)*), but the comparison remains inapposite. As we have previously explained, the zeroing methodology (the use of which hinged only on whether a respondent's sales database included sales with "negative" margins) is a vastly simpler type of "measure" than the challenged determinations, which are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding. The Appellate Body made findings in those disputes in an environment where there were no questions as to whether the action in subsequent proceedings was based on the same calculation methodology as in the original proceedings.

187. In contrast to the calculation issue in those disputes, the issue addressed in the section 129 proceedings pertains to whether or not the given facts, taken together, demonstrate a countervailable subsidy. The questions of whether there is evidence of a financial contribution by a public body, evidence that a benefit is thereby provided, and evidence that a subsidy is specific – are questions of an altogether different nature from the question of recalculating a dumping margin without zeroing.

188. Underlying China's response to this question is the incorrect presumption that the

[284] *See* China's Responses to Panel Questions, para. 236.
[285] *See* U.S. Responses to Panel Questions, para. 240; *see also id.*, para. 241 (discussing *Wire Strand* sunset review).

USDOC engaged in the rote application of a single precept in administrative and sunset reviews following the originally challenged investigations. However, the USDOC engaged in an analysis of the relevant case-specific record evidence to make its public bodies, benchmark, input specificity, and land specificity determinations in each of the subsequent reviews. Because the record evidence changes from review to review, the legal analysis of a given issue will also vary. As such, without close examination of the specific determination in each challenged proceeding, and the determinations in subsequent administrative and sunset reviews, it is not possible to establish whether a sufficiently close link exists between the section 129 determinations and the subsequent reviews.

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?

Comment:

189. In its response to question 63 China continues to repeat without support its assertion that administrative reviews and the determinations made therein have a "particularly close relationship" or "sufficiently close nexus" to the challenged section 129 determinations in terms of effects merely because the reviews result in the assessment of duties and establish cash deposits.[286] China's argument should be rejected for several reasons.

190. First, China's reliance on *US – Zeroing (EC) (Article 21.5 – EC)* is misplaced. In that compliance proceeding the Appellate Body found that certain administrative reviews had a close nexus with the challenged section 129 determinations because the "administrative reviews generated assessment rates and cash deposit rates *calculated with zeroing* that replaced those found to be WTO-inconsistent in the original proceedings with the effects of assessment rates and cash deposit rates that continued to reflect the zeroing methodology."[287] However, the issue of zeroing is a critically different issue than the issues alleged in this case, and thus the compliance considerations for zeroing are not analogous to the compliance considerations in this dispute. Crucially, the measure at issue in the *US – Zeroing (EC) (Article 21.5 – EC)* was the use of the "standard zeroing line" in the margin calculation program. As a result, there was a basis for the Appellate Body to examine the effect of the zeroing methodology on the margin (which serves as the assessment rate and cash deposit rate). In contrast, the public bodies, benchmarks, input specificity, and land specificity analyses at issue in this dispute are not themselves analyses used to calculate a subsidy rate, but rather are aspects of a determination that a particular set of facts, considered individually *and* taken together, constitutes evidence of a countervailable subsidy.

191. Second, adoption of China's broad interpretation of the Appellate Body's dispute-specific analysis in *US – Zeroing (EC) (Article 21.5 – EC)* would lead to absurd results. Specifically, it 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

[286] *See* China's Responses to Panel Questions, para. 239.
[287] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 231 (emphasis added).

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?

Comment:

192. In its response to question 64, China continues to repeat the unfounded assertion that a "substantially the same" legal standard is applied in the subsequent reviews as in the originally challenged investigations.[288] Implicit in China's argument is the presumption that identical considerations arose in the administrative and sunset reviews as in the originally challenged investigations. However, this presumption disregards what the USDOC *actually* did in each of the subsequent reviews, which was to engage in an *analysis of the relevant case-specific record evidence* to make its public bodies, benchmark, input specificity, and land specificity determinations in each of the subsequent reviews. The United States is at a loss as to how it would be possible to conclude without speculation that the USDOC's public bodies, benchmark, input specificity, and land specificity analyses are substantially the same – especially when China has failed to make a *prima facie* case with respect to this claim – given that the record evidence changes from segment to segment (*i.e.*, from the investigation to review, and between reviews). China has not shown that the facts are the same in 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?

Comment:

193. China's response avoids answering the Panel's question. China asserts that the purportedly "unlawful legal standards" applied in the subsequent reviews are "facially evident," that the application of the legal standards does not depend on the record evidence or the extent of cooperation by the respondents, and that a close nexus to the measures taken to comply exists notwithstanding the differences between the factual records.[289] These arguments have no merit for three reasons.

194. First, implicit in China's claim that the legal standards applied are "facially evident" is the presumption that it need not do anything more than direct the Panel to the USDOC's determinations in the administrative reviews to meet its burden for making a *prima facie* case.[290] However, the Appellate Body has explained that the panel may not make the case for the complaining Member,[291] and thus China must make an adequate legal argument for each of its

[288] *See* China's Responses to Panel Questions, para. 240.
[289] China's Responses to Panel Questions, para. 241.
[290] China's Responses to Panel Questions, para. 241.
[291] *See Japan – Agricultural Products II (AB)*, para. 129; *see also US – Gambling (AB)*, paras. 137, 140-41. The Appellate Body's findings in *US – Gambling* illustrate the obligation of a complaining Member to make out a *prima*

claims[292] and "adduce[] evidence sufficient to raise a presumption that what it claims is true."[293] China has failed to do so here, has not met its burden for presenting a *prima facie* case in this dispute, and is, in effect, asking the Panel to make out the case for China.

195. Second, China persists in its incorrect view that the USDOC has applied some preordained "legal standard" that necessarily results in a particular outcome. This is not at all the case. The analysis conducted by the USDOC in making its public bodies, benchmark, input specificity, and land specificity determinations is just that – *analysis of the record evidence* – and *not*, as China suggests, the sort of determination that can be made irrespective of the facts present in the proceeding. Because the facts can – and do – change from segment to segment, it would be unreasonable to find that the USDOC's public bodies, benchmark, input specificity, and land specificity analyses are same from review to review.

196. Third, because the USDOC's public bodies, benchmark, input specificity, and land specificity determinations are based on an analysis of the case-specific facts on the record of each proceeding, whether a subsequent measure has a close nexus in terms of nature and effect to the originally challenged proceedings *necessarily* requires a close examination of the specific determinations in each of the challenged subsequent administrative and sunset reviews.

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?

Comment:

197. China's answer is not responsive to the Panel's question.[294] As the United States emphasized in its responses to the Panel's questions, a measure that does not exist at the time of panel establishment is not within the terms of reference, regardless of whether or not a measure might be considered a measure taken to comply.[295]

198. With respect to proceedings completed before the Panel was established, in each of the challenged subsequent administrative reviews the USDOC engaged in an analysis of the relevant case-specific record evidence to make its public bodies, benchmark, input specificity, and land specificity determinations. Because the facts can, and do, change from administrative review to administrative review, and because the legal analysis of a given issue necessarily varies depending on the facts, China's reference to the "same" legal standard in the *Solar Panels* second administrative review is insufficient to establish a close nexus.[296] If China's efforts here were sufficient, it would suggest that a party could sweep in additional proceedings simply by

facie case. If it does not do so, the panel errs as a matter of law if it makes out the case for the complaining Member. The rationale in *US – Gambling* does not support China's argument that perfunctory reference to the elements of claim is sufficient, but rather demonstrates that China has not fulfilled its obligations with respect to these claims.

[292] *See Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134.

[293] *US – Wool Shirts and Blouses (AB)*, p. 14.

[294] *See* China's Responses to Panel Questions, para. 242.

[295] *See* U.S. Responses to Panel Questions, paras. 242-44.

[296] China's Responses to Panel Questions, para. 242.

stating that they contain the "same" inconsistencies as a challenged measure.

199. China's reference to the "same" legal standard in the *Aluminum Extrusions* sunset review is also insufficient.[297] China patently ignores that fact that 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. China also continues to presume incorrectly – and 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. 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.

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?

Comment:

200. The United States welcomes China's acknowledgment that "that it is part of the complainant's *prima facie* burden to demonstrate the content of the measure that it challenges."[298] To satisfy its burden, a complaining party 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[299] and "adduce[] evidence sufficient to raise a presumption that what it claims is true."[300] China has not done so here.

201. China's response refers to the report in *Argentina – Import Measures* for the proposition that the manner in which a measure is described or characterized by the complainant informs the constituent elements that must be substantiated. China's response, however, glosses over the more important fact in that report, namely, that the Appellate Body expressly recognized that such elements "must be substantiated with *evidence* and *arguments*."[301]

202. In this dispute China has done little more than assert that the "same" or "substantially same" "unlawful legal standards" were applied by the USDOC in successive reviews. Accordingly, China has failed to provide adequate legal argument or evidentiary support to substantiate the incorrect presumption underlying its claim, *i.e.*, that the USDOC applied some immutable precept from review to review.

203. Indeed, China continues to rely on an argument that disregards that key point: the

[297] *See* China's Responses to Panel Questions, para. 242.
[298] China's Responses to Panel Questions, para. 245.
[299] *See Chile – Price Band System (Article 21.5 – Argentina*) *(AB)*, para. 134.
[300] *US – Wool Shirts and Blouses (AB)*, p. 14.
[301] *Argentina – Import Measures (AB)*, para. 5.108.

USDOC engaged in analysis of the case-specific evidence on the record of each review to make the public bodies, benchmark, input specificity, and land specificity determinations in each of those reviews. Because the record facts change from review to review, and the legal analysis of a given issue necessarily varies depending on the facts, the USDOC's analysis cannot be said to be the "same" in each of the subsequent reviews, nor can it reasonably be characterized as applying an "unchanged legal standard."

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

Comment:

204. China's response is a belated attempt to make up for its failure to describe the "ongoing conduct" it seeks to challenge.[302] As the United States explained in its response to this question, China has not demonstrated the existence of an "ongoing conduct" "measure," *i.e.*, a string of connected and sequential determinations as conceived by the Appellate Body.[303] Heretofore, China has not only failed to identify the measures comprising its purported "ongoing conduct" "measure," but also failed to identify the conduct within such measures that is purportedly inconsistent with the SCM Agreement.

205. It is not until its response to question 69 that China – for the first time – identifies the measures it purports to challenge under its "ongoing conduct" claim.[304] However, waiting until this point in the compliance proceeding to identify the specific measures comprising its "ongoing conduct" claim only demonstrates that China's panel request is inconsistent with Article 6.2 of the DSU.

206. Article 6.2 requires that a complainant's claims "be specified sufficiently in the request for the establishment of a panel in order to allow the defending party and any third parties to know the legal basis of the complaint."[305] Absent compliance with Article 6.2 a defending party may be prejudiced by the lack of clarity because it has not been "made aware of the claims presented by the complaining party, sufficient to allow it to defend itself."[306] A decision on China's "ongoing conduct" claim cannot be made when China has only now identified the measures comprising its claim. It would be patently unreasonable to expect the United States to engage in a substantive defense of the measures comprising China's "ongoing conduct" claim for the first time in *comments on responses to Panel questions*.

207. Additionally, China's contention that it has demonstrated the existence of a string of connected and sequential determinations – by providing a chart of proceedings in response to question 69 – fails for several reasons.

208. First, implicit in China's argument is the incorrect presumption that the "same" legal standard was applied in the identified subsequent reviews. As we have explained, the USDOC

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[302] *See* China's Responses to Panel Questions, para. 249.
[303] *US – Continued Zeroing (AB)*, para. 191; *see* U.S. Responses to Panel Questions, paras. 257-60.
[304] *See* China's Responses to Panel Questions, para. 249 (providing chart of "ongoing conduct" measures).
[305] *EC – Bananas III (AB)*, para. 143.
[306] *Thailand – H-Beams (AB)*, para. 95.

did not face uniform considerations from review to review. Rather, it engaged in analysis of the case-specific record evidence to make the public bodies, benchmark, input specificity, and land specificity determinations in each of those reviews. Because the record facts change from review to review, the USDOC's analysis cannot be said to be the "same" in each of the subsequent reviews.

209. Second, China's response continues to ignore that 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. China has provided no analysis or support for its presumption 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.

210. Third, China is incorrect that the "subsequent reviews and Section 129 determinations" demonstrate the existence of a string of connected and sequential determinations.[307] In the challenged section 129 determinations the USDOC applied new public bodies, benchmark, and input specificity analyses to implement the recommendations and rulings of the DSB in *US – Anti-Dumping and Countervailing Duties (China)*. As such, the analyses applied in the section 129 determinations were distinct from the analyses applied in the reviews.

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

Comment:

211. China's answer is not responsive to the Panel's question.[308] As the United States has explained, it is not possible without speculation to conclude that the USDOC's public bodies, benchmark, input specificity, and land specificity analyses are "unchanged" when (1) the USDOC did not engage in the automatic application of a single precept in these reviews, but rather, engaged in an *analysis of the relevant case-specific record evidence* to make its public bodies, benchmark, input specificity, and land specificity determinations, and (2) that China has failed to muster an adequate legal argument and adduce sufficient evidence to show that the facts are the same in each case or that the facts in any particular case do not justify the USDOC's conclusions.

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

Comment:

212. China's response to question 71, which provides only that it is "evident on the face of the determinations," adds nothing to China's position nor does it facilitate the Panel's task.[309] China's response suffers from a number of deficiencies.

213. First, implicit in China's claim that the legal standards applied are "facially evident" is the presumption that it need do nothing more than direct the Panel to the USDOC's

[307] China's Responses to Panel Questions, para. 248.
[308] *See* China's Responses to Panel Questions, para. 250.
[309] China's Responses to Panel Questions, para. 251.

determinations in the administrative reviews to meet its burden for making a *prima facie* case. This is not correct. To meet its burden China would have had to make an adequate legal argument for each of its claims and adduce evidence sufficient to support its claim. Having failed to do so, the Panel may not make China's case for it.

214. Second, the United States disagrees with China's statement that the United States has "not . . . contested" China's claim that the "same" legal standard was repeatedly applied in the challenged subsequent reviews.[310] Indeed, the United States has consistently objected to China's assertions in this regard and demonstrated that China has failed to support its claim with sufficient evidence of any inconsistency.[311] The fact-specific nature of the USDOC's public bodies, benchmark, input specificity and land specificity determinations *necessarily* requires a close examination of the specific determinations in each of the challenged subsequent administrative and sunset reviews.[312]

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

Comment:

215. In its response to question 72, China asserts that separate "ongoing conduct" findings are necessary because the USDOC "will continue to systematically apply the same unlawful legal standards" in successive reviews of the relevant CVD orders.[313] China's assertion lacks merit. As the United States has explained, the USDOC's public bodies, benchmark, input specificity, and land specificity 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. Because the relevant available evidence changes from year to year (*e.g.*, between the investigation and the subsequent reviews), the USDOC's public bodies, benchmark, input specificity, and land specific determinations can, and do change. As such, an "ongoing conduct" finding would lead to more litigation, not less. Given the absence of any clearly defined conduct that applies regardless of differences in the factual record (as was the case with zeroing), there would be no mechanism – absent further dispute settlement proceedings – for identifying whether any particular subsidy determination involved the same conduct or different conduct from that covered by a hypothetical "ongoing conduct" finding. Accordingly, rather than assist in resolving the dispute, an ongoing conduct finding is likely to perpetuate the dispute.

[310] China's Responses to Panel Questions, para. 251.
[311] *See, e.g.,* U.S. Responses to Panel Questions, para. 239.
[312] *See* U.S. First Written Submission, paras. 331, 340; U.S. Second Written Submission, paras. 287-90.
[313] China's Responses to Panel Questions, para. 252.