UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(DS437)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

June 21, 2017

I. INTRODUCTION

1. To bring the United States into compliance with the recommendations of the Dispute Settlement Body ("DSB") with respect to "as applied" findings made by the original Panel and the Appellate Body, the U.S. Department of Commerce ("USDOC") conducted proceedings pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 proceedings"), in which the USDOC made and published revised determinations.

2. China erroneously claims that the United States has failed to comply with the recommendations and rulings adopted by the DSB in this dispute. China also attempts to expand the proper scope of this compliance proceeding by challenging purported measures that are not measures taken to comply subject to review by this Panel. The Panel's objective assessment of the matter is not assisted when, as the United States has identified in its submissions, China mischaracterizes the determinations of the USDOC; or distorts the arguments made by the United States in this compliance proceeding and in other disputes; or misstates the findings of the Appellate Body in prior reports. China's approach to this compliance proceeding places additional burdens on the Panel to sort through the accuracy of China's assertions and arguments before it can even begin to evaluate their merits. This is not an efficient use of the resources of the WTO dispute settlement system, which is under serious stress.

3. On the substance, China has failed to propose interpretations of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") that would accord with the customary rules of interpretation of public international law, and China has failed to acknowledge the extensive analysis and ample record evidence that support the USDOC's determinations in the section 129 proceedings at issue here. The United States has demonstrated that it has implemented the recommendations of the DSB and brought its measures into conformity with the SCM Agreement. The Panel therefore should reject China's claims.

II. CHINA'S ARGUMENTS CONCERNING ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT LACK MERIT

A. The United States Has Complied with the DSB's Recommendations Concerning the "As Applied" Findings with Respect to Public Bodies

4. China wrongly argues that the USDOC's public body determinations in the section 129 proceedings at issue here do not bring the United States into compliance with U.S. obligations under the SCM Agreement. China's argument is premised on a novel, flawed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Furthermore, China asks the Panel to ignore the massive amount of record evidence that the USDOC collected and analyzed, which provides ample support for the USDOC's public body determinations. China's arguments are utterly without merit.

1. China's Interpretive Arguments Lack Merit

5. The novel interpretation of the term "public body" that China proposes fails to take into account the interpretive findings of the original Panel and reflects a misreading of the original panel report and relevant Appellate Body reports. Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") instructs a panel to evaluate "the

existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. In effect, Article 21.5 takes the underlying panel findings, as modified by the Appellate Body, as a given. In the guise of a new interpretive argument, China is re-arguing an excessively narrow approach to the legal interpretation of the term "public body" that was rejected by the original Panel.

6. The original Panel understood that "the critical consideration in identifying a public body is the question of authority to perform governmental functions," and "[t]herefore, an investigating authority must evaluate the core features of the entity in question and its relationship to government, in order to determine whether it has the authority to perform governmental functions."

7. China argues, in effect, 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. China denies that its position is that the government function and the conduct under Article 1.1(a)(1) must be the same, but China's arguments belie its assertion. China's proposed approach to the public body analysis is untenable and entirely at odds with findings in prior reports.

8. Rather than focusing on the conduct undertaken by the entity, the Appellate Body has emphasized that the focus of the public body analysis is on the "evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense." China, with its focus on the particular "*conduct* that is the subject of the financial contribution inquiry," appears to suggest that an entity may be deemed a public body only when the entity is "*exercising*" governmental authority. That is contrary to the Appellate Body's findings, under which 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.

9. Again and again, the Appellate Body has emphasized the relevance of the "core features of the entity and its relationship to the government in the narrow sense," as opposed to a focus on the particular conduct in which the entity is engaged. Contrary to the narrow focus on the conduct of the entity in question that China now proposes, when the Appellate Body has provided guidance concerning the public body analysis, it consistently has called for a wider-ranging examination of a variety of kinds of evidence, which the Appellate Body has explained is "bound to differ from entity to entity, State to State, and case to case."

10. China misreads the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report. Rather than focusing its review narrowly on evidence and analysis relating to the conduct of the SOCBs when they were making particular loans, the Appellate Body observed that the USDOC had "discussed extensive evidence relating to the relationship between the SOCBs and the Chinese Government, <u>including</u> evidence that the SOCBs are meaningfully controlled by the government in the exercise of their functions." The evidence that SOCBs were meaningfully controlled in the exercise of their functions was "include[ed]" in the broader discussion of evidence relating to the relationship between the SOCBs and the Chinese Government.

11. China's argument that the "conduct" of the entity is the proper focus of the *public body* analysis also does not accord with the Appellate Body's explanation that a focus on the conduct of an entity is more relevant when examining a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement. The troubling implication of China's new proposed interpretation is that there would be no need for a public body category at all in Article 1.1(a)(1), which is inconsistent with the principle of effectiveness and thus contrary to the customary rules of interpretation.

12. The United States also has demonstrated that China's arguments related to the object and purpose of the SCM Agreement and the relevance to the Panel's interpretative analysis of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts ("ILC Articles") are at odds with Appellate Body guidance and lack merit.

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

13. The original Panel explained that "simple ownership or control by a government of an entity is not sufficient" to establish that an entity is a public body. "A further inquiry is needed." Such a "further inquiry" is precisely what the USDOC undertook in the section 129 proceedings.

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

15. The USDOC's public body determinations are set forth and explained in a preliminary determination and a final determination that the USDOC produced as part of the section 129 proceedings, as well as in memoranda analyzing public bodies in China (the Public Bodies Memorandum) and discussing the relevance of the Chinese Communist Party ("CCP") to the public body analysis (the CCP Memorandum). All of these documents, read together, present the USDOC's analysis and explanation underlying its public body determinations. The USDOC's public body determinations are based on analysis and explanation that, altogether, spans more than 90 pages, and in turn that analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record, as well as the USDOC's consideration of information and arguments submitted by the Government of China ("GOC") and other interested parties.

16. The USDOC examined the functions or conduct that are of a kind ordinarily classified as governmental in the legal order of China, the role played by the CCP in China's system of governance, and the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority. The USDOC requested information from the GOC about the relevant input providers in the section 129 proceedings and considered the information the GOC provided or failed to provide. The USDOC addressed the GOC's arguments in the Public Bodies Final Determination in the section 129 proceedings. Ultimately,

the USDOC "concluded that certain categories of state-invested enterprises (SIEs) in China properly are considered to be public bodies for the purposes of the United States CVD law, and other categories of enterprises in China may be considered public bodies under certain circumstances."

17. The USDOC's public body determinations were reasoned and adequate and included extensive analysis and explanation; they were based on the totality of the evidence on the record; and they were supported by ample record evidence of the "core features" of the entities in question and their "relationship to the government," which establishes that the entities possess, exercise, or are vested with governmental authority to perform governmental functions in China. It is clear on the face of the USDOC's determinations that the USDOC properly applied the correct interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

3. China's Arguments Against the USDOC's Public Body Determinations in the Section 129 Proceedings Lack Merit

18. China's arguments against the USDOC's public body determinations fail because they are all premised on China's new proposed interpretation of the term "public body," which the United States has shown is legally erroneous and does not accord with findings in prior reports.

19. China's arguments also are unfounded. China argues that the USDOC is required "to undertake a new analysis for each countervailing duty investigation" and further contends that the USDOC failed to "engage in a case-by-case analysis." In fact, the USDOC requested from the GOC entity-specific information about the relevant input providers in each of the section 129 proceedings, but the GOC refused to provide much of the requested information. Specifically, in seven of the twelve section 129 proceedings (*Lawn Groomers*, *Wire Strand*, *Seamless Pipe*, *Print Graphics*, *Drill Pipe*, *Aluminum Extrusions*, and *Solar Panels*), the GOC completely failed to cooperate and respond to the USDOC's request for information. In the remaining five proceedings (*Pressure Pipe*, *Line Pipe*, *Kitchen Shelving*, *OCTG*, and *Steel Cylinders*), the GOC only partially responded to the USDOC's request. As a result of the GOC's non-cooperation, the USDOC relied upon the facts that were available on the record, that is, the Public Bodies Memorandum and the CCP Memorandum, which present pertinent analysis and explanation relating to the government and economic system of China. Such analysis and explanation is relevant in a countervailing duty investigation involving allegations that an input provider in China is a public body, particularly where the GOC fails to cooperate and provide the requested entity-specific information.

20. China contends that "the GOC provided extensive evidence" to the USDOC and the USDOC "ignored" that evidence. This is untrue. Rather than failing to evaluate the evidence submitted by the GOC, and far from rejecting or discounting that evidence, the USDOC actually discussed that evidence at length and the USDOC relied on the evidence for its conclusions.

21. China asserts that "[t]he USDOC provided no … 'reasoned and adequate explanation' on the face of its published determinations, much less address 'alternative explanations that could reasonably be drawn from the evidence'." As the Panel will see for itself when it examines the USDOC's preliminary and final determinations and the Public Bodies Memorandum and the CCP Memorandum, China's assertion is absurd.

4. Even under China's New, Flawed Proposed Interpretation of the Term "Public Body," the USDOC's Section 129 Public Body Determinations that Were Based on the Facts Otherwise Available Are Not Inconsistent with the SCM Agreement

22. The USDOC requested from the GOC entity-specific information that would be relevant even under China's new proposed interpretation of the term "public body." However, as discussed above, in seven of the twelve section 129 proceedings, the GOC simply refused to respond to the USDOC's request for information. In the remaining five section 129 proceedings, the GOC, while providing responses to some questions, did not provide the entity-specific information requested by the USDOC. Thus, the GOC deprived the USDOC of the kind of entity-specific evidence contemplated by China's new proposed interpretation. Accordingly, the USDOC's determinations justifiably would have been based on facts available and an adverse inference in selecting from the facts available, as they, in fact, were.

23. Nevertheless, even under China's new proposed interpretation of the term "public body," the USDOC provided a reasoned and adequate explanation, which was supported by ample record evidence, and the analysis, explanation, reasoning, and conclusions in the USDOC's facts available determinations would be equally relevant under China's new proposed interpretation of the term "public body." Accordingly, the USDOC's discussion and the evidence underlying it was probative of and supported a public body determination even under China's proposed interpretation.

B. China's "As Such" Claim Concerning the Public Bodies Memorandum Fails

24. China's claim that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement fails for a number of reasons.

25. First, China cannot bring a challenge against the Public Bodies Memorandum within the scope of this Article 21.5 compliance proceeding because the memorandum is not a measure taken to comply in this dispute. The Public Bodies Memorandum was published in connection with measures taken to comply with the DSB's recommendations and rulings in an entirely different, earlier dispute. Article 21.5 of the DSU does not permit the kind of lateral challenge China attempts. Additionally, the Public Bodies Memorandum was published prior to the commencement of this dispute. China could have challenged the memorandum in the original proceeding, but it opted not to do so. Thus, the Public Bodies Memorandum is outside the scope of this Article 21.5 compliance proceeding.

26. Second, the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement, as confirmed when viewed in light of the analysis applied in other reports. Applying the same analysis to the Public Bodies Memorandum that the original Panel applied to the Kitchen Shelving policy reveals striking contrasts and supports the conclusion that the Public Bodies Memorandum is not "a measure susceptible to WTO dispute settlement." China makes unfounded assertions but points to no language suggesting that the USDOC intended in the Public Bodies Memorandum to describe an "approach," "policy," "long standing practice," or "methodology."

27. The Public Bodies Memorandum, on its face, does not purport to establish or describe a legal standard adopted or applied by the USDOC. Indeed, the Public Bodies Memorandum expressly states that the USDOC was not announcing through the issuance of the memorandum an approach that would be applied in every countervailing duty proceeding. The USDOC, in the Public Bodies Memorandum, presented extensive analysis and explanation and came to certain conclusions after examining voluminous evidence relating to the government and economic system of China. The analysis, explanation, and evidence in the Public Bodies Memorandum relates to China in general; it may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving China. The USDOC's decisions to incorporate by reference and rely on the Public Bodies Memorandum – and the evidence to which it refers – in subsequent countervailing duty proceedings that also involved products from China did not, after the fact, confer on the Public Bodies Memorandum a status as a "measure" for which there is no support in the text of the Public Bodies Memorandum itself.

28. The Public Bodies Memorandum is not "mandatory" as it does not have any legal effect upon the USDOC. The Public Bodies Memorandum does not, on its face, even purport to set forth an "internal policy." The Public Bodies Memorandum does not describe any rebuttable presumptions, nor any other policy.

29. Third, China argues that the Public Bodies Memorandum prescribes future conduct but China makes no attempt to "clearly establish, through arguments and supporting evidence," that the Public Bodies Memorandum is a rule or norm that has general and prospective application. Instead, China offers bare assertions without even pointing to any language in the memorandum.

30. The Public Bodies Memorandum does not announce a "policy" in a "declaratory style." At most, all that is before the Panel now is "simple repetition." That is, the USDOC has, on a number of occasions, decided to put the Public Bodies Memorandum – and all of the evidence to which it refers – on the administrative records of countervailing duty proceedings involving products from China. That is entirely appropriate given that the underlying facts regarding China's government and economic system are the same in all of those countervailing duty proceedings. In light of China's refusal to provide requested information to the USDOC in many countervailing duty proceedings, it is not surprising that the USDOC has put the Public Bodies Memorandum and supporting information on the record of subsequent countervailing duty proceedings to provide relevant facts for its determinations.

31. Fourth, and finally, China's claim fails because the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement. The Public Bodies Memorandum, by its terms, neither "obliges" the USDOC to do anything nor "restricts" the USDOC from doing anything. The Public Bodies Memorandum does not require the USDOC to reach any WTO-inconsistent determination. Rather, to the extent the USDOC places the Public Bodies Memorandum and supporting evidence onto the record of a countervailing duty proceeding, the USDOC in that proceeding would determine what significance to give to the findings in the Public Bodies Memorandum in the context of making its determination in that proceeding.

III. CHINA'S CLAIMS REGARDING BENCHMARKS LACK MERIT

32. China erroneously claims that Article 14(d) of the SCM Agreement does not permit the use of alternative benchmarks – even where prices are distorted in the country of provision – unless the government is a monopoly provider or relies exclusively on a "price-setting mechanism" to control the marketplace. But recourse to an alternative benchmark for the benefit analysis under Article 14(d) is warranted once an investigating authority has established and explained that in-country prices are not market-determined.

33. China has failed to refute the comprehensive evidence that "systemic and pervasive government intervention . . . diminishes the impact of market signals," limits private enterprise to a "subordinate" role, and results in a persistent imbalance between supply and demand. The USDOC fully explained that prices in the domestic market for steel and polysilicon inputs are not properly described as market-determined; they are distorted by virtue of the GOC's policy interventions and a number of other factors. In light of this, the USDOC determined that the relevant input prices "are not based on market conditions within the meaning of Article 14(d) of the SCM Agreement and, as result . . . are inappropriate to use as benchmarks to determine the adequacy of remuneration." This is consistent with the recommendations of the DSB.

A. Article 14(d) Permits the Use of External Benchmarks

34. Article 14(d) provides that the adequacy of remuneration for government-provided goods or services "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase." In the Appellate Body's words, a "proper finding" that "recourse to an alternative benchmark is justified requires an investigating authority to properly evaluate whether the proposed benchmark prices are market determined or distorted by governmental intervention."

35. The use or rejection of in-country prices is not a question of whether there are no "market conditions" or market forces, but rather a question of whether the market conditions allow for the use of an in-country benchmark or call for the use of an out-of-country benchmark. Here, the USDOC found that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"

36. In *US – Carbon Steel (India)*, the Appellate Body defined "prevailing market conditions" as consisting of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices." Further, in *EC – Large Civil Aircraft (AB)*, the Appellate Body clarified that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay. Rather, the equilibrium price established in the market results from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."

37. The USDOC conducted a market analysis and found that the requisite "market conditions" do not exist in China's steel and polysilicon sectors, as the Appellate Body has defined the term. Applying the standard articulated by the Appellate Body does not require a

finding that there are *no* other types of market conditions that exist in a particular sector, or that prices for the good in question are wholly unresponsive to external market forces.

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

39. China misreads the Appellate Body findings in prior disputes when it argues that the distortions evaluated in those disputes are the only types of distortions that would call for the use of out-of-country benchmarks. Simply because the Appellate Body has not previously considered the type of pervasive distortions at issue here does not support the conclusion that those distortions are irrelevant to the benchmark selection analysis. Indeed, in *US – Softwood Lumber IV*, for example, the Appellate Body cautioned that its findings were "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*.'" The Appellate Body stated explicitly that it was not *"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."

40. 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). Moreover, the Appellate Body in this very dispute recognized that "what allows an investigating authority to reject in-country prices is *price distortion*." 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.

41. The U.S. 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)*, 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." In *EC – Large Civil Aircraft*, 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." Furthermore, under *EC – Large Civil Aircraft (AB)*, this equilibrium must result from the discipline enforced by an exchange reflective of *both* supply and demand.

42. In the section 129 proceedings, the USDOC applied this analytical framework to its evaluation of the record evidence. 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.'"

43. 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. China has not even attempted to refute these facts. Instead, China proposes that authorities are limited in their investigation by a *per se* rule of China's own invention. 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*." 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.

44. 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).

45. 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. 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.

46. 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. China presents no basis for its argument that a WTO discipline must be governed by simplistic tests.

47. The Appellate Body has explained that: "the task of a panel [is] to assess whether the explanations provided by the authority are 'reasoned and adequate.'" The United States recalls that it is not the task of a panel task to evaluate the underlying evidence to make its own *de novo* findings, or to substitute its own judgment for that of the investigating authority. This type of evaluation, and the appropriate standard of review, is the same regardless of whether the issue under examination is relatively simple (such as that involving a straightforward mathematical operation), or relatively complex, such as that involving market distortion and the authority's

choice of a benchmark. Accordingly, the central point in this dispute is whether the USDOC provided a reasoned and adequate explanation for its decision to employ out-of-country benchmarks in the particular proceedings at issue.

B. The USDOC Provided a Reasoned and Adequate Explanation

48. The USDOC's benchmark determinations in the subject proceedings are well reasoned and based on the totality of the available record evidence, which includes information provided by China, evidence of broad-based intervention within the relevant markets, and the demonstrated effects that the intervention has had on conditions in China's steel and polysilicon sectors. The USDOC's redeterminations rely upon extensive evidence from a variety of sources, including reports and research from independent multilateral institutions such as the OECD and the World Bank.

49. The USDOC identified a number of organizations and enterprises that serve as "instruments for policy implementation" and "legally require SIEs to act as instrumentalities of the state to carry out its policy goals and industrial plans rather than commercial, market-oriented outcomes." The USDOC concluded that SIEs are a "unique" kind of organization, and "are considered a potent mechanism for the government to implement national policies." The USDOC concluded that these policies, actors, and actions create a "critical nexus" of policy and ownership that is unique to China. The USDOC reasoned that the "degree and nature of the GOC interventions" is unlike the "governmental regulatory frameworks [that] affect commercial enterprises in most economies" and that "the institutional framework . . . creates a *milieu* in which SIE decision-making is insulated from the disciplines of market forces."

50. Through this "critical nexus" in the steel sector, China ensures that steel prices align with policy goals. The USDOC found that in practice, active government management and the "ensuing interference in [SIE] decision-making, result in the SIEs implementing state policy, which may require pursuing actions inconsistent with market disciplines and the firm's . . . market goals." This politicization of business decisions "necessarily removes" these businesses "from the principles of the market economy and competition." The USDOC concluded that prices flowing from those entities were not reflective of "market conditions," insofar as they do not result from the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers." The USDOC also found that domestic private prices in the steel sector are not reflective of market conditions, based not only upon evidence of the "significant market share" garnered by SIEs, but also broad-based governmental intervention in favor of the state share of the economy that "goes beyond that of ownership in assets or share of production" and that "distorts market signals for all participants in the sectors, just as surely as does the presence of monopoly market power." The USDOC also cited evidence that certain governmental interventions directly extended to private enterprises and affected their pricing, such as forced mergers and acquisitions and the presence of export taxes.

51. Price operates as a signal to convey the relative supply and demand. But when "government policies inflate supply (or otherwise distort choices by market participants that would affect their pricing), the price no longer corresponds with the information it should signal." The USDOC cited extensive evidence that in China's steel sector, China intervenes heavily to achieve certain outcomes in pursuit of desired policy goals, which are not consistent

with or reflective of market disciplines between buyers and sellers. This heavy-handed intervention distorts choices by market participants, and has had the effect of inflating supply. Based on the totality of the evidence on the record, the prices at which steel goods are sold cannot fairly be viewed as "market prices."

52. With respect to *Solar Products*, the USDOC solicited detailed information but the GOC declined to respond. In the absence of market information needed to conduct further analysis, the USDOC relied on the facts available, *i.e.*, evidence of extensive Chinese governmental intervention at various levels in the polysilicon market, and the existence of export restraints that artificially depressed domestic prices for polysilicon. On this basis, the USDOC found that all domestic prices for polysilicon within China were distorted by governmental intervention and were, thus, not useable "market" benchmarks.

C. China's Arguments Have No Merit

53. Instead of engaging with the evidence, China argues that the USDOC should have taken a different approach. In China's view, the phrase "prevailing . . . conditions" in Article 14(d) means those conditions – seemingly in every possible situation, and regardless of the level of distortion – must be the conditions as affected by government policies and actions. This interpretation is untenable. If accepted, authorities would be required to ignore the existence of government-created distortions in the marketplace. The fundamental issue, however, in determining whether to rely upon an out-of-country benchmark under Article 14(d) is, in fact, the existence of price distortion. And, because price distortion can arise due to government intervention, Article 14(d) cannot be read to preclude an investigating authority from addressing situations in which government action has rendered prices not market-determined. Indeed, the Appellate Body in *US – Carbon Steel (India) (AB)* confirmed as much, stating that "in-country prices will not be reflective of prevailing market conditions . . . when they deviate from a market-determined price as a result of government intervention in the market."

54. China also insists that the USDOC should have limited its assessment to an examination of prices themselves and ignored other evidence that is relevant to an evaluation of price distortion. This argument is not supportable. Nothing in the SCM Agreement dictates the specific mode of analysis that an authority must employ in conducting a benchmark analysis. Nor has the Appellate Body prescribed a certain approach. In fact, the Appellate Body in this dispute stated that the "specific type of analysis . . . will vary." The Appellate Body even described a number of approaches that might be employed, stating, for example, that "investigating authorities may have to examine the structure of the relevant market" or the "nature" of the entities operating in that market. The Appellate Body also made clear that what ultimately determines whether "recourse to an alternative benchmark is justified" depends not on the mode of analysis, but on "whether the proposed benchmark prices are market determined or distorted by governmental intervention."

55. Price validation exercises become problematic because systemic distortions resulting from pervasive state influence throughout China's economy may preclude any meaningful quantitative analysis of prices. Any "baseline" that could be calculated to compare input prices could be influenced by the same systemic distortions as the prices themselves. Moreover, it is not necessary to look at input prices to determine that excess supply (all else being equal) has the

effect of suppressing prices for a particular product.

56. While nothing in the SCM Agreement supports China's insistence that a particular type of analysis is required, the "market power" approach that China advocates is fundamentally flawed. This approach presupposes that a government exercises market power exclusively through the economic behavior of state-owned suppliers. This, however, excludes from consideration the impact of legal and policy instruments that influence – and empower – state-invested enterprises. China's approach also depends on the assumption that state-invested enterprises operate as profit-seeking commercial actors. But this assumption is unfounded in a system where state-owned and politicized enterprises are used as tools of policy implementation and are insulated from competitive market pressures.

57. China's reliance on a certain private investments in the steel industry also is misplaced. Indeed, the USDOC's determinations were not premised on the lack of any private involvement in the sector. To the contrary, the USDOC based its determination on a thorough, holistic analysis of the sector, and found extensive evidence that the sector as a whole was distorted.

58. With respect to the *Solar Products* redetermination and the use of an external benchmark for polysilicon, the USDOC's findings were fully explained in the redetermination. In particular, the USDOC explained that China decided not to participate in the proceeding, and thereby refused to provide the requested information. In the absence of China's participation, the USDOC relied on multiple sources of evidence on the record, and reasonably found that the GOC intervened at various levels in the polysilicon market. China has done nothing to question the adequacy of the USDOC's explanation regarding the polysilicon market in China.

59. China encourages the Panel to disregard the USDOC's evidentiary findings. This is at odds with the appropriate standard of review. In the words of the original Panel in this dispute: "a panel reviewing a determination . . . based on the 'totality' of the evidence . . . must conduct its review on the same basis." Where "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." An analysis of the evidence in this dispute – when examined in light of the totality of the circumstances – demonstrates a probative and objective basis for the determination that the relevant prices in China are not market-determined. In each of the disputed proceedings, this analysis comports with Article 14(d).

IV. CHINA'S CLAIMS CONCERNING ARTICLE 32.1 OF THE SCM AGREEMENT LACK MERIT

60. China's claim under Article 32.1 that the USDOC's price distortion analysis somehow constitutes an impermissible specific action against subsidization has no merit. China has not articulated a cognizable claim nor has it identified the measure it seeks to challenge.

61. China's panel request asserts that the "benchmark determinations" in four of the section 129 proceedings are inconsistent with Article 32.1. Yet, in the course of this dispute, China's presentation of this issue has appeared in a variety of inconsistent formulations, each of which fails to identify the specific measure that China challenges. Nor has China identified any

specific action against subsidization apart from the countervailing duty determinations themselves. Given that the imposition of countervailing duties is a permissible response to injurious subsidization, China has no basis for its Article 32.1 claim.

62. As an initial matter, China has failed to comply with the requirements of Article 6.2 of the DSU to "identify the specific measures at issue." Indeed, the measure that China is challenging has been unclear and has remained a moving target throughout the course of this Article 21.5 proceeding. In its panel request, China pointed to the "benchmark determinations." In its first written submission, China asserted that "the USDOC's *reliance on subsidies* allegedly provided to upstream steel producers . . . is unquestionably 'a specific action against a subsidy.'" But even within the same paragraph China also asserted that the "rejection of in-country benchmark prices" is a "measure" that acts against subsidization. China's second written submission further confuses its Article 32.1 claim because it identifies different "measures" as being at issue in this Article 21.5 proceeding.

63. Given these inconsistent (and underdeveloped or abandoned) descriptions of the "measure," which do not correspond to the "benchmark determinations" mentioned in its panel request, this Panel should reject China's claim because China failed to comply with Article 6.2 of the DSU by not identifying any of these alleged "measures at issue." As the Appellate Body has made clear, a party cannot expand a WTO dispute to include measures which were not included within its panel request. China is now impermissibly attempting to do so.

64. An Article 32.1 claim can only succeed if, *inter alia*, the action being challenged is not in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement. In this regard, a measure is in accordance with the GATT 1994, as interpreted by the SCM Agreement, if it is one of the four permissible responses to subsidization: i) definitive countervailing duties, ii) provisional measures, iii) undertakings, and iv) countermeasures. To the extent China is challenging the imposition of countervailing duties, China is improperly attempting to challenge one of the four permissible responses to subsidization in its Article 32.1 claim.

65. Further, China's arguments, in their entirety, are based on the unsupported premise that the USDOC's discussion of subsidies is a necessary and sufficient cause for the USDOC's finding of distortion. Crucially, China cannot and does not, establish that this premise is true. China's argument also requires an assumption that the benefit amount calculated by the USDOC regarding the subsidization of the downstream product bears a specific relationship to the distortion finding rather than, for example, the benchmark price that was used in each case. China has also failed to support this proposition.

66. Article 32.1 does not contemplate challenging intermediate analytical steps that take place when carrying out a CVD investigation. In particular, the Appellate Body in *US – Softwood Lumber IV* and in other reports has recognized that calculating a benefit and using out-of-country benchmarks to do so is consistent with the obligations of the SCM Agreement.

67. The USDOC's analysis of China's steel sector discussed many aspects of government intervention; this analysis cannot be considered an "action" taken by the United States. The only "action" here – as China recognized during the Panel meeting – is the imposition of countervailing duties. Moreover, the USDOC's analysis of China's steel sector does not contain

an "upstream subsidy analysis" as China has suggested. The USDOC's analysis likewise does not have an adverse bearing on subsidies provided to upstream producers and thus does not result in an implicit upstream subsidy determination, as China claims. The use or rejection of in-country prices only bears on the measurement of the adequacy of remuneration for the subsidies being investigated.

V. CHINA'S CLAIMS CONCERNING ARTICLE 2.1(C) OF THE SCM AGREEMENT LACK MERIT

68. With respect to the USDOC's findings that the provision of material inputs for less than adequate remuneration was *de facto* specific, the United States has taken all steps necessary to bring its determinations into compliance with Article 2.1(c). The USDOC identified the subsidies at issue and the systematic series of actions pursuant to which those subsidies were provided. In doing so, the USDOC properly took account of the length of time the relevant programs have been in operation. The USDOC sought information for each subsidy program under investigation. The USDOC reviewed record evidence confirming how the subsidies were provided to a limited number of recipients over time. In each case, the USDOC provided a reasonable and adequate explanation of its determination that the systematic provision of inputs was *de facto* specific.

69. For each of the inputs at issue, the USDOC identified a series of systematic activities that demonstrate the existence of a subsidy program. The USDOC determined, "[o]n the basis of case specific input purchase information, which was reported to the Department in the 12 CVD investigations and compiled in the Department's Inputs Memorandum," that "there is adequate evidence in each of the 12 CVD investigations that public bodies systematically provided stainless steel coil, hot-rolled steel, wire rod, steel rounds, caustic soda, green tubes, primary aluminum, seamless tubes, standard commodity steel billets and blooms, polysilicon, and coking coal for LTAR to producers in the PRC."

70. Given that the subsidies at issue appeared to be provided to a limited number of producers, the USDOC considered whether this limitation might simply reflect that the subsidy programs were only recently introduced (should that be the case). The USDOC explained that it "interprets the criterion concerning the duration of a subsidy program to mean that where a new subsidy program is recently introduced, it is unreasonable to expect that use of the subsidy will spread throughout the economy in question instantaneously." Therefore, to determine whether the limited number of recipients related to the duration of the subsidies in each investigation, the USDOC requested that the GOC explain for each input at issue (1) "how long SOEs have been producing and selling the input in the PRC," (2) "how long the input has been produced in the PRC," and (3) "how long the input has been consumed in the PRC."

71. Based upon China's response, the USDOC found that, "at the latest, SOEs were producing and providing the inputs at issue in the five proceedings in which the GOC provided responses within the geographic location of China by 1957." The USDOC further explained that "for those subsidies at issue, we have preliminarily determined that the subsidy program has not been in operation 'for a limited period of time only' and, therefore, the length of time in which the subsidy program has been in operation does not change the Department's determination that the input LTAR programs in each of those cases were *de facto* specific." In other words, the

limited number of recipients did not result from a limited duration of the subsidies at issue.

72. China argues that the fact that Chinese SOEs have produced and sold a particular input over a period of time does not constitute evidence that those inputs have been sold *for less than adequate remuneration* over that period of time. China's argument, however, fundamentally misunderstands the inquiry at issue in the last sentence of Article 2.1(c) of the SCM Agreement. That provision requires that the USDOC take account of "the length of time that the subsidy programme has been in operation," where, as the Appellate Body has explained, the term "subsidy programme" "refers to *a plan or scheme* regarding the subsidy at issue." That plan or scheme, *i.e.*, the "programme," "may . . . be *evidenced by* a systematic series of actions *pursuant to which* financial contributions that confer a benefit have been provided to certain enterprises," but that is not to say that each of these actions would need to meet the definition of a "subsidy" under Article 1 of the SCM Agreement.

73. China misunderstands where the "subsidy program" element fits into the overall subsidization analysis. The identification of a subsidy requires three separate elements: a finding of a (1) financial contribution that (2) confers a benefit and (3) the subsidy is specific. As the Appellate Body stated, "the *existence* of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."

74. As one component of a *de facto* specificity analysis involving the provision of 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. Thus, China is wrong in asserting that the program must consist only of activities that have been definitively identified as subsidies. Rather, the relevant inquiry is the existence of repeated instances in which inputs were provided as the result of some sort of planned series of activities or events, which is evidence of the series of actions or activity that constitutes a program.

75. China's argument is based on an incorrect reading of Appellate Body decisions – one that ignores the substance of Articles 1 and 2 of the SCM Agreement and offers no basis upon which to undermine the USDOC's specificity findings. China cannot credibly claim that the subsidies at issue were provided to an unlimited number of users or were made widely available outside the identified industries.

76. China demonstrates a misunderstanding of Articles 1 and 2 of the SCM Agreement by asserting that "[a] 'subsidy programme' is a programme of subsidies." 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 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.

VI. CHINA'S CLAIMS CONCERNING ARTICLE 2.2 LACK MERIT

77. With respect to the land specificity determination in *Thermal Paper* – one of the section 129 proceedings in which China declined to participate – the USDOC had only limited evidence regarding "preferential treatment" in land-use rights because China refused to provide requested information. The USDOC properly relied on the available evidence; namely, a statement that the respondent received preferential treatment. The USDOC found that statement probative and tending to support a determination that that respondent received preferential treatment within the zone. When the USDOC sought to further examine the issue during the section 129 proceeding, China failed to provide requested information. China repeatedly mischaracterizes the USDOC's determination. The USDOC properly determined that the land at issue was provided pursuant to a "distinct land regime" and is therefore specific.

78. The original Panel found that a firm's presence in a zone was not enough to establish that the subsidy was provided to limited recipients. Rather, the Panel found that there must also be some "finding that the provision of land within the park or zone is distinct from the provision of land outside the park or zone." The Panel observed that the USDOC's original determinations would have been adequately supported if USDOC had established that "the conditions for the provision of land within the ... zone were different from and preferential to the conditions outside the ... zone, in terms of special rules or distinctive pricing." In the redeterminations at issue, the USDOC thus considered whether the provision of land within the park or zone is distinct from the provision of land outside the park or zone, and whether the conditions for the provision of land within the zone are different from and preferential to the conditions outside the zone.

79. At issue was the 2005 purchase of granted land-use rights by the respondent, Guangdong Guanhao High-Tech Co., Ltd. (GG), located in the Zhanjiang Economic and Technological Development Zone (ZETD Zone). With respect to GG's purchase of land-use rights in the ZETD Zone, the USDOC requested that China provide information about whether a "distinct land regime" existed, "*e.g.*, whether the prices or terms of sale, including other incentives tied to the purchase of the land inside the geographic region at issue, are different from those offered outside of the geographic region." If such differences were found, the USDOC explained, this would serve as the basis for finding regional specificity. The USDOC's analytical approach is consistent with the DSB's recommendations because, just as the Panel suggested, it evaluates whether the conditions on which land was sold inside a zone were distinct from those outside the zone.

80. China argues that the USDOC based its determination on a misplaced interpretation of the term "preferential treatment" in a government-issued land appraisal. These claims are predicated on China's misunderstanding of the USDOC's determination and a misreading of the record. The USDOC's determination relied on the facts available from the original investigation because China declined to respond to the USDOC's requests for information pertaining to land. Without this information, the USDOC found that it was unable to fully investigate certain aspects of the provision of land at issue. The investigation record indicates that the land appraisal issued to the respondent refers to "preferential treatment," but beyond this observation the USDOC was unable to further examine the exact terms of that "preferential treatment."

81. Company officials in their comparison appraisal report indicated that the government's

preferential policies resulted in an "appraisal price . . . of a particular nature," which suggests that the "preferential treatment" at issue affected pricing. The verification report also explains that the USDOC examined an appraisal for land outside of the ZETD Zone, but could not reach a resolution as to whether it presented comparable terms. Thus, the USDOC relied on this evidence of "preferential treatment" as it constituted the facts available and found that that the GOC sold the land in question to the respondent at a price and at terms that were not available to other firms, *i.e.*, firm located outside of the ZETD Zone. The record does not contain any evidence additional to the comparison appraisal from the original investigation upon which the USDOC could have relied. China had the opportunity to provide additional information, but China declined to cooperate in this proceeding.

VII. THE PANEL SHOULD REJECT CHINA'S CHALLENGE TO COMPLETED OR FUTURE REVIEWS OR SO-CALLED "ONGOING CONDUCT"

82. China seeks to expand the scope of this Article 21.5 proceeding beyond the existence or consistency of measures taken to comply with the DSB's recommendations, asserting that the Panel's terms of reference include certain additional proceedings and so-called ongoing conduct that should be adjudicated in this proceeding. China's attempt to expand the scope of U.S. implementation obligations has no basis in the DSU, and China's claims against alleged "subsequent closely connected measures" are invalid for several reasons.

83. China has failed to make out its claims or a *prima facie* case with respect to the additional reviews, sunset reviews and so-called "ongoing conduct." China's "claims" consist of little more than a list of proceedings without the evidence or argument to satisfy its burden as the complaining party. China has failed to meet its burden of argument with respect to any of these claims. These additional reviews and sunset determinations are not sufficiently closely connected because they do not, as China claims, consist of simply applying "the same" or "equally unlawful legal standards." Rather, they consist of fact-intensive determinations that in each case depend on the evidence and circumstances of the proceeding.

84. China has also not demonstrated that these subsequent proceedings are closely connected because it has not established the facts and circumstances of each of the additional proceedings. Although China refers the Panel to excerpts from each of the subsequent determinations, China neglects to provide the necessary analysis that would be required to make conclusions about the investigating authority's reasoning or evidence in each case. As the Appellate Body observed in *US – Gambling*, a claim necessarily must fail if the complaining Member does not make a *prima facie* case, and moreover, it would be legal error for a panel to make the *prima facie* case for a complaining Member.

85. The Panel should likewise reject China's attempt to expand the terms of reference to include these past proceedings given China's failure to put forth a *prima facie* case that the findings and analysis in subsequent proceedings are "closely connected" to the measures taken to comply. The United States emphasizes that the question of whether subsequent reviews are "related in nature" is not the applicable threshold for determining whether a "particularly close relationship" or "sufficiently close nexus" exists in connection with the measures taken to comply. Rather, China's claim depends on two questions: (1) whether the challenged measure existed at the time of panel establishment, and (2) whether it is closely connected with a measure

taken to comply. Here, the answer to both questions is "no," and thus China's claims fail.

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

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

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

89. Despite China's attempts to liken the question before the Panel in this dispute to the question of zeroing, China has not demonstrated – or even provided a plausible explanation – that the *nature* of the inconsistencies found in the original determinations can be found in the subsequent proceedings. When the Appellate Body discussed the nature of related proceedings in the zeroing context, the Appellate Body recognized the fact that several DSB findings had already established the existence of an "as such" measure. The Appellate Body's decisions in *US – Zeroing (Japan) (Article 21.5 – Japan)* (and in *US – Zeroing (EC) (Article 21.5 – EC)*) were decided in an environment where there were no questions as to whether the action in subsequent proceedings was of the same nature as in the original proceedings. 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.

90. 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.

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

92. China's claims with respect to "future conduct" are also not within the Panel's terms of reference. Measures that are not yet in existence at the time of panel establishment – much less those which may never come into being – cannot be within a panel's terms of reference.

93. China has likewise failed to establish that any so-called "ongoing conduct" exists that may be challenged as a rule or norm of general and prospective application. In the view of the United States, "ongoing conduct" is not cognizable as a measure that is susceptible to challenge. China has failed to establish that any such "ongoing conduct" exists or is likely to continue under the challenged orders that are at issue in this dispute. Likewise, even if the Panel were to find that China has established the subsequent reviews constitute the "ongoing conduct," China has not demonstrated a "particularly close relationship" or "sufficiently close nexus" to the declared "measure taken to comply" and it cannot be presumed that such a close connection exists.

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

VIII. FACTS AVAILABLE

95. The Panel cannot make any findings under Article 12.7 of the SCM Agreement regarding the USDOC's use of facts available in the challenged proceedings. A party claiming a breach of a provision of a WTO agreement by another Member bears the burden of asserting and proving its claim. As the Appellate Body has explained, a complaining party will satisfy its burden of proof "when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence." A "*prima facie* case is one which, in the absence of effective refutation by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case." The case presented by China fails to meet this standard. To meet its burden, China must adequately identify measures that fall within the scope of the panel's terms of reference, and it must make an adequate legal argument for each of its claims and "adduce[] evidence sufficient to raise a presumption that what it claims is true." The panel may not make the case for it.

96. China, as the complaining party in this Article 21.5 proceeding, must make a *prima facie*

case with respect to each of the measures that purportedly constitute an inconsistency with Article 12.7 of the SCM Agreement. Although China put forth various claims with respect to the USDOC's use of facts available in its panel request, it subsequently failed to make a *prima facie* case with respect to these claims. Moreover, China concedes that it does not challenge what the facts are in these proceedings, but rather challenges the "legal standard." China claims that, regardless of whether the USDOC relied on the facts available, its decisions are "just as inconsistent." In other words, China recognizes that there is no basis upon which to make Article 12.7 findings.

97. The United States notes that China's response to the Panel's questions confirms that "China is not pursuing claims under Article 12.7." 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.

IX. CONCLUSION

98. The United States respectfully requests that the Panel find that the United States has complied with the recommendations of the DSB and that the U.S. measures taken to comply are not inconsistent with the SCM Agreement.