UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(DS437)

FIRST WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF REPORTS vi

TABLE OF EXHIBITS x

I. INTRODUCTION 1

II. CHINA'S ARGUMENTS CONCERNING ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT LACK MERIT 4

A. The United States Has Complied with the DSB's Recommendations Concerning the "As Applied" Findings with Respect to the USDOC's Public Body Determinations in the Challenged Investigations 4

1. China's Arguments Concerning the Interpretation of the Term "Public Body" Lack Merit 5

a. China's Proposed Interpretation Fails to Take into Account the Interpretation of the Original Panel 5

b. China's New Proposed Interpretation of the Term "Public Body" is Legally Erroneous and Does Not Accord with Findings in Prior Reports Interpreting the Term "Public Body" 7

c. China's Reliance on the Appellate Body's Findings in Relation to State-Owned Commercial Banks in *US – Anti-Dumping and Countervailing Duties (China)* Is Misplaced 11

d. 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 13

e. China's Arguments Concerning the Object and Purpose of the SCM Agreement, the ILC Articles, and an Unrelated USDOC Section 129 Determination Lack Merit 15

f. Concluding Comments on the Proper Interpretation of the Term "Public Body" 16

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 17

a. The USDOC's Public Body Determinations in the Section 129 Proceedings are Reasoned and Adequate and Supported by Ample

Record Evidence Relating to the Core Features of the Entities in Question and Their Relationship to the Government 19

i. The USDOC Examined the Functions or Conduct that Are of a Kind Ordinarily Classified as Governmental in the Legal Order of China 22

ii. The USDOC Examined the Role Played by the Chinese Communist Party in China's System of Governance 24

iii. The USDOC Examined the Manifold Indicia of Control Indicating that Relevant Input Providers Possess, Exercise, or Are Vested with Governmental Authority.................... 27

iv. The USDOC Requested Information from the Government of China about the Relevant Input Providers in the Section 129 Proceedings and Took Appropriate Account of the Information the Government of China Provided or Failed to Provide 33

v. The USDOC Addressed the Government of China's Arguments in the Public Bodies Final Determination in the Section 129 Proceedings 37

vi. Conclusion Concerning the USDOC's Public Body Determinations in the Section 129 Proceedings 38

b. China's Arguments Against the USDOC's Public Body Determinations in the Section 129 Proceedings Lack Merit 39

c. 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 45

B. China's "As Such" Claim Concerning the Public Bodies Memorandum Fails.... 49

1. Article 21.5 of the DSU Precludes China from Bringing a Claim Against the Public Bodies Memorandum in this Compliance Proceeding Because the Memorandum Is Not a Measure Taken To Comply in this Dispute and China Could Have Challenged the Memorandum in the Original Proceeding, But Opted Not To Do So 49

2. The Public Bodies Memorandum is Not a Measure Susceptible to WTO Dispute Settlement 51

3. China's "As Such" Challenge to The Public Bodies Memorandum Also Fails Because It Has Not Established a Rule or Norm of General or Prospective Application 56

4. The Public Bodies Memorandum Is Not Inconsistent "As Such" Because It Does Not Necessarily Result in an Inconsistency with Article 1.1(a)(1) of the SCM Agreement 58

III. CHINA'S CLAIMS REGARDING BENCHMARKS LACK MERIT 59

A. Legal Standard 60

B. The "Critical Nexus" of Policy, Law, and Ownership Distorts Pricing in China's Steel Sector 61

1. China's Government Has a Constitutional Mandate to Manage Its Economy 62

2. China's Economy Operates Within a Legislative and Policy Framework that Ensures State Control 62

3. The Chinese Government, Public Bodies, and SIEs Serve as Instruments for Policy Implementation 63

4. The "Critical Nexus" of these Forces Causes Price Distortion 65

C. The USDOC's Revised Benchmark Determinations Are Reasoned and Adequate and Consistent with Articles 1.1(b) and 14(d) of the SCM Agreement 66

1. Positive Evidence Supports the USDOC's Analysis of Price Distortion . 66

2. The USDOC's Analysis Demonstrates that Prices Are Not Market Determined 69

a. Steel Inputs 69

b. Polysilicon 70

3. The Panel Should Reject China's "Market Pricing" Argument as Unsubstantiated 71

4. China's "Market Power" Claim Applies a Flawed Analytical Framework to the Distortion Inquiry 72

D. The USDOC's Analysis of Price Distortion Is Consistent with Article 14(d) 74

E. Conclusion 77

IV. THE USDOC'S ANALYSIS OF DISTORTION IS NOT A SPECIFIC ACTION AGAINST SUBSIDIZATION UNDER ARTICLE 32.1 OF THE SCM AGREEMENT 78

A. China Has Failed To Establish That "Reliance" on Record Evidence Is a Measure within the Meaning of the DSU ... 79

B. The USDOC's Market Distortion Analyses and Resulting Determinations to Use Out-Of-Country Benchmarks Do Not Constitute a "Specific Action Against" Input Subsidies ... 81

V. CHINA'S CLAIMS REGARDING INPUT SPECIFICITY ARE UNFOUNDED ... 84

A. China Has Not Demonstrated that the USDOC Failed To Implement the DSB's Recommendation and Rulings With Respect to the Analysis of the Length of Time China Had Provided Inputs Under the Subsidy Programs ... 86

B. China's Conception of a "Systematic Series of Actions" Has No Basis in the SCM Agreement ... 89

VI. CHINA HAS NOT DEMONSTRATED THAT THE USDOC FAILED TO IMPLEMENT THE DSB'S RECOMMENDATIONS WITH RESPECT TO THE REGIONAL SPECIFICITY OF THE LAND USE RIGHTS SUBSIDY PROGRAM IN *THERMAL PAPER* ... 91

A. The USDOC's Land Specificity Determinations Comply with the DSB's Recommendations and Rulings ... 91

B. China's Arguments Do Not Demonstrate that the USDOC Failed To Comply with the DSB's Recommendations and Rulings with respect to its Regional Specificity Determination in *Thermal Paper* ... 92

VII. THE PANEL SHOULD REJECT CHINA'S CHALLENGE TO COMPLETED OR FUTURE REVIEWS OR SO-CALLED "ONGOING CONDUCT" ... 94

A. China Has Failed to Demonstrate that Either Completed or Future Administrative Reviews and Sunset Reviews or the Purported Ongoing Conduct of Collecting Duties and Cash Deposits Are within the Panel's Terms of Reference ... 94

1. A Panel's Terms of Reference Are Governed by a Rigorous Legal Standard ... 95

2. China's Attempt to Include Reviews Completed Prior to the End of the RPT and the Measures Taken to Comply Should Be Rejected ... 97

3. China's Attempt to Include Future Administrative Reviews and Sunset Reviews Not in Existence at the Time of Panel Establishment Should Be Rejected ... 98

4. China's Attempt to Include So-Called "Ongoing Conduct" that Has Not Yet Occurred Should Be Rejected 98

B. China Cannot Establish "Ongoing Conduct" as that Concept Has Been Understood by the Appellate Body 99

C. China Has Failed To Make Out Its Claims or a *Prima Facie* Case With Respect to the Administrative Reviews, Sunset Reviews, and the Purported Ongoing Conduct of Collecting Duties and Cash Deposits 100

VIII. CONCLUSION 103

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TABLE OF EXHIBITS

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USA-113	*Under New Ownership: Privatizing China's State-Owned Enterprises*, Yusuf, Nabeshima, and Perkins (Washington, DC: The World Bank, 2006)
USA-114	Unirule Institute of Economics
USA-115	*Prospectus for the Proposed H Share Rights Issue of Angang Steel Company Limited* (October 22, 2007)
USA-116	*Prospectus for the Global Share Offering of Agricultural Bank of China Limited* (June 30, 2010)
USA-117	Benchmark Excerpts, Issues and Decision Memoranda

Exhibit No.	Description
USA-118	*Line Pipe, United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015
USA-119	*OCTG, United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015
USA-120	*Pressure Pipe, United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015
USA-121	*Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Issuance of Questionnaire Concerning the Benchmark Used to Measure Whether Certain Inputs Were Sold for Less than Adequate Remuneration*, June 5, 2016
USA-122	*United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015
USA-123	*Memorandum to the File from Team Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Placement of Factual information on the Record with Respect to Diversification of Economic Activities*, October 28, 2015
USA-124	*Memorandum to the File from Eric B. Greynolds Re: Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements Act: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Placement of Documents on Record of Proceeding*, August 3, 2015
USA-125	Online Oxford English Dictionary

Exhibit No.	Description
USA-126	*Memorandum to the File from Eric B. Greynolds Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Input Producers and Input Purchases During the Investigations*, February 25, 2016

I. INTRODUCTION

1. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") are meant to address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the Dispute Settlement Body ("DSB")]." A panel composed under Article 21.5 of the DSU, therefore, begins with the recommendations and rulings of the DSB to understand what it is the responding party has to bring into compliance and what were the findings of the DSB on the matter examined.

2. In order to bring the United States into compliance with the DSB's recommendations with respect to "as applied" findings made by the original Panel and the Appellate Body, the U.S. Department of Commerce ("USDOC") conducted proceedings pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 proceedings"), in which the USDOC reconsidered its original determinations. In the section 129 proceedings, the USDOC supplemented its administrative records with information compiled by the USDOC as well as information that the USDOC solicited from interested parties. The USDOC also received and took into account arguments submitted by interested parties. On the basis of the new evidence and arguments on the records of the section 129 proceedings, as well as information from the original proceedings, the USDOC made and published revised determinations at the conclusion of the section 129 proceedings.

3. In order to bring the United States into compliance with the DSB's recommendations with respect to "as such" findings made by the original Panel concerning the "so-called 'rebuttable presumption' or 'Kitchen Shelving policy,'"[1] which the USDOC applied when 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"), the USDOC stopped applying the "rebuttable presumption" or "Kitchen Shelving policy."

4. 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 Article 21.5 proceeding by challenging the WTO-consistency of a memorandum,[2] an action,[3] subsequent countervailing duty determinations, and a legal fiction,[4] none of which is a measure taken to comply subject to review by this Panel.

5. As demonstrated below, the United States has implemented the recommendations of the DSB and brought its measures into conformity with the SCM Agreement. The Panel therefore

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

[2] China challenges "as such" a purported "measure taken to comply," the *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Tim Hruby Re: Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379*, May 18, 2012 ("Public Bodies Memorandum"). *See* Exhibit CHI-1. *See also infra*, section II.B.

[3] China challenges as a separate "measure" the USDOC's "reliance" on record evidence of subsidies provided to SIEs as a basis to reject domestic benchmark prices. *See infra*, section IV.A.

[4] China challenges so-called "ongoing conduct." *See infra*, section VII.

should reject China's claims of non-compliance and its effort to enlarge the obligations of the United States.

6. The United States has structured its first written submission as follows. Section II responds to China's arguments related to the public bodies issue. Section II.A demonstrates that the United States has complied with the DSB's recommendations concerning the "as applied" findings with respect to the USDOC's public body determinations in the challenged investigations. As discussed in section II.A.1, China proposes a new interpretation of the term "public body" that fails to take into account the interpretive findings of the original Panel and does not accord with findings in prior reports. The Panel should reject China's self-serving effort to significantly narrow the interpretation of the term "public body," both because China's new proposed interpretation bears no relation to the interpretation developed by the Panel in the original proceeding and because China's proposed interpretation is legally flawed.

7. In addition to its attempt to re-litigate the interpretation of the term "public body," China also attacks the USDOC's public body determinations in the section 129 proceedings. Section II.A.2 demonstrates that China's arguments lack merit because they are premised on China's flawed interpretation of the term "public body." China's arguments also fail because the USDOC's public body determinations are reasoned and adequate and supported by ample record evidence relating to the core features of the entities in question and their relationship to the government. Indeed, the USDOC's public body determinations are based on analysis and explanation that, altogether, spans more than 90 pages, and in turn that analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record, as well as the USDOC's consideration of information and arguments submitted by the GOC and other interested parties. As can be seen on the face of the USDOC's preliminary and final determinations and the Public Bodies Memorandum and the CCP Memorandum, China's contention that the USDOC failed to provide a reasoned and adequate explanation is absurd.

8. Section II.B responds to China's attempt to mount an "as such" challenge against a memorandum, the Public Bodies Memorandum, in which the USDOC analyzes voluminous evidence relating to China's government and economic system and explains in detail the conclusions it draws from that evidence. China's claim fails for a number of reasons. First, China cannot bring a challenge against the Public Bodies Memorandum within the scope of this Article 21.5 compliance proceeding because, even if the memorandum were to constitute a "measure," China could have challenged this "measure" in the original proceeding, but opted not to do so. 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. Third, China has not established that the Public Bodies Memorandum is a rule or norm of general or prospective application. Fourth, and finally, the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement.

9. Section III responds to China's claim 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.

10. As discussed in section III.A, recourse to an alternative benchmark for the benefit analysis under Article 14(d) is indeed warranted once an investigating authority has established and explained that in-country prices are not market-determined but rather are distorted.

11. Section III.B demonstrates how the USDOC examined China's constitutional mandate to maintain a socialist economy, how that mandate is enacted through state industrial and policy plans, and how a complex array of instruments are available to implement state control in the marketplace. When firms engaged in commercial activities are subject to such government policy dictates, they are unable to perform in a truly commercial, market-oriented manner. China fails to engage with the substance of these findings and makes no attempt to demonstrate or explain that these findings are unsubstantiated.

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

13. Finally, Section III.D responds to China's argument that Article 14(d) should not be interpreted as requiring a "pure" market, given that all governments intervene in one way or another. China's claim fails because it equates *ad hoc* instances of intervention with China's active management of key economic sectors. The USDOC's analysis documents in great detail China's role in the economy; the resulting price distortion finding does not require a strained interpretation of Article 14(d).

14. Section IV responds to China's claim that the USDOC's "reliance" on record evidence of subsidies provided to state enterprises in the analysis of domestic benchmark prices is a "specific action against subsidization" that is inconsistent with Article 32.1 of the SCM Agreement. Section IV.A demonstrates that China has failed to establish that "reliance" on record evidence is a measure at all. Indeed, China's own statements demonstrate that the "measure" at issue is actually the countervailing duty applied to the merchandise under investigation and not the USDOC's consideration of the factual record. Section IV.B proceeds to demonstrate that, in any case, China's claim should be rejected because taking account of the economic conditions to determine if prices in the market under consideration can serve as benchmarks does not constitute a "specific action against" subsidization.

15. Section V responds to China's claims that the USDOC did not take into account the relevant factors of Article 2.1(c) of the SCM Agreement in determining that the provision of material inputs for less than adequate remuneration was *de facto* specific, namely, the "length of

time during which the subsidy programme has been in operation." As discussed in section V.A, the USDOC found that the provision of inputs had, according to China's questionnaire responses, begun under the first "five-year plan" by 1957. The Panel should reject China's claim because it relies, in large part, on an argument that China did not know its questionnaire responses would be used to answer this particular question. China's characterization of its questionnaire response cannot overcome the objective facts it conveyed. Section V.B further demonstrates that the USDOC's section 129 proceedings are consistent with the recommendations and rulings of the DSB with respect to identifying the subsidy programs at issue.

16. Section VI addresses China's challenge to the land specificity determination in *Thermal Paper* – one of the section 129 proceedings in which China declined to participate. China claims that the USDOC lacked evidence to establish that "preferential treatment" accorded to companies within a designated zone was not also available to companies outside of the zone. As discussed in this section, the USDOC indeed lacked record evidence regarding "preferential treatment" outside of the zone because China refused to provide that information when it was requested. The USDOC properly relied on the available evidence, *viz.*, a statement that the respondent received preferential treatment, and found that statement probative and tending to support a determination that that respondent received preferential treatment within the zone.

17. Section VII responds to China's claims that implementation should include certain "subsequent closely connected measures" in the form of additional periodic and sunset reviews and so-called "ongoing conduct" in the form of collecting duties and cash deposits pursuant thereto. Section VII.A establishes that China's claims are not within the Panel's terms of reference, most glaringly with respect to "future" conduct. 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. The Panel should also reject China's attempt to expand the terms of reference to include certain past proceedings that were concluded before the expiry of the reasonable period of time and are not "subsequent closely connected" measures to the measures taken to comply. Section VII.B explains that China has failed to establish that any such "ongoing conduct" exists that may be challenged as a measure or whether any such conduct is likely to continue. Section VII.C, in turn, demonstrates that China has failed to make out its claims or a *prima facie* case with respect to these additional reviews and "ongoing conduct" proceedings. 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. The Panel should likewise reject China's claims on these additional determinations and so-called "ongoing conduct."

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 the USDOC's Public Body Determinations in the Challenged Investigations

18. China 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 is wrong. As explained below, 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. As demonstrated below, China's arguments are utterly without merit.

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

19. China contends that "the 'government function' identified by an investigating authority in the context of a public body analysis must be a 'government function' that the entity at issue is performing *when it engages in the conduct that is the subject of the financial contribution inquiry* in order for that 'government function' to be relevant to an investigating authority's public body determination."[5] As explained below, the novel interpretation that China proposes fails to take into account the interpretive findings made by the original Panel in this dispute and reflects a misreading of the original panel report and relevant Appellate Body reports. Accordingly, China's proposed interpretation should be rejected.

a. China's Proposed Interpretation Fails to Take into Account the Interpretation of the Original Panel

20. As an initial matter, the United States observes that China offers the Panel a novel interpretation of the term "public body," which departs from the findings made by the original Panel in this dispute. However, Article 21.5 of the 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. Thus, the DSB recommendations, which stem from the panel and Appellate Body findings, are obviously important to an identification of whether a measure taken to comply exists, and also in evaluating whether such a measure is consistent with the covered agreements. They also can play an important role in evaluating whether a revised measure is inconsistent with the covered agreements. In short, a compliance panel evaluates whether, in response to the DSB's recommendations, the responding party has brought its measure into compliance with the covered agreements and, therefore, takes as a given the findings of the original panel and the Appellate Body.

21. The Appellate Body explained in *Chile – Price Band System (Article 21.5 – Argentina)* that:

> Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a continuum of events. The text of Article 21.5 expressly links the "measures taken to comply" with the recommendations and rulings of the DSB concerning the original measure. A panel's examination of a measure taken to comply cannot, therefore, be undertaken in abstraction from the findings by the original panel and the Appellate Body adopted by the DSB. Such findings identify the WTO-inconsistency with respect to the original

[5] First Written Submission of China (January 4, 2017) ("China's First Written Submission"), para. 74. *See also, id.*, paras. 79-95.

> measure, and a panel's examination of a measure taken to comply must be conducted with due cognizance of this background.[6]

22. Parties may also address issues related to aspects of a measure taken to comply that differ from the measure originally found inconsistent with WTO obligations.[7] However, even in the situation in which measures taken to comply raise new issues, "[t]his does not mean that a panel operating under Article 21.5 of the DSU should not take account . . . of the reasoning of the original panel."[8] Thus, the recommendations and rulings of the DSB provide the starting point for a panel's analysis under Article 21.5.

23. The limitations on the scope of an Article 21.5 proceeding also act to preclude consideration of several types of issues. In particular, Members generally may not make claims in compliance proceedings that they could have pursued during the original proceedings, but opted not to.[9] The reason for this principle is obvious: it would undermine the rules and procedures agreed by Members in the DSU if a Member could short-circuit original proceedings by choosing not to pursue certain claims during original proceedings, and then raising them for the first time under the expedited timetable of a compliance proceeding. Such a tactic would also deprive a responding Member of the reasonable period of time to comply with any recommendations and rulings of the DSU.

24. In addition, the DSU does not allow complaining Members to use compliance proceedings to re-raise claims that were rejected during the original proceedings. As the Appellate Body found in *US – Upland Cotton (Article 21.5 – Brazil)*:

> We agree with the United States that the scope of claims that may be raised in an Article 21.5 proceeding is not unbounded. As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings. Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be *WTO-consistent* in the original proceedings. Because adopted panel and Appellate Body reports must be accepted by the parties to a dispute, allowing a party in an

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

[7] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 102 (As the redetermination is "distinct from the original determination" and provides "more explanation and reasoning" based on "more information and evidence," then "we do not see why the Panel would be bound by the findings of the original panel.").

[8] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 103.

[9] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211 ("A complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."). The exception to this general rule is that WTO Members may make a claim against "a new and different measure" in compliance proceedings, even if the measure "incorporates components from the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply." *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 432.

> Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed provide an unfair "second chance" to that party.[10]

Thus, the limits of Article 21.5 proceedings operate to preclude complaining Members from re-arguing legal conclusions settled in the original proceedings. Otherwise, complaining Members would have an unfair "second chance" with respect to any claims that they lost in original proceedings.

25. As explained further in the next subsection, 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. The Panel should decline China's invitation to adopt an interpretation in this compliance proceeding that is legally erroneous, does not take into account the interpretation of the original Panel in this dispute, and which also does not accord with findings in prior reports.

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

26. The original Panel in this dispute, consistent with its duty under Article 11 of the DSU, made an objective assessment of the matter before it, including by making legal findings concerning the proper interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.[11] Referring to findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, the original Panel observed 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.
>
> … being vested with, and exercising, authority to perform governmental functions is a core feature of a 'public body' in the sense of Article 1.1(a)(1).
>
> A public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority.
>
> What matters is whether an entity is vested with authority to exercise governmental functions, rather than how that is achieved.[12]

27. 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

[10] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 210 (emphasis in original).
[11] *See US – Countervailing Measures (China) (Panel)*, paras. 7.64-7.74.
[12] *US – Countervailing Measures (China) (Panel)*, para. 7.65 (citations omitted).

governmental functions."[13] The original Panel further found that "simple ownership or control by a government of an entity is not sufficient. A further inquiry is needed."[14]

28. Before the original Panel, China argued in favor of a narrow interpretation of the term "public body." China contended that "[a] public body, like government in the narrow sense, … must itself possess the authority to 'regulate, control, supervise or restrain' the conduct of others."[15] The original Panel disagreed, explaining that, "[i]n our view this proposition is not supported by the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)*.[16] The Panel found that China had "misread[] the Appellate Body's reference" in *Canada – Dairy*, and China's interpretation attempted to equate the term "public body" with the term "government agency," "an approach that the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* has not followed."[17] The Appellate Body itself came to the same conclusion when India presented the very same argument in *US – Carbon Steel (India)*.[18]

29. In this compliance proceeding, China offers a different argument but continues to seek a narrow interpretation of the term "public body." China's new argument, too, lacks merit. China now contends that:

> The Appellate Body's interpretative analysis in DS379 makes clear that the relevant question in a public body inquiry is whether an entity alleged to be providing a financial contribution has been vested with governmental authority to carry out governmental functions, and is exercising *that* authority to perform *those* functions, when it engages in the conduct enumerated in Article 1.1(a)(1)(i)-(iv) of the SCM Agreement.[19]

China suggests that "[t]his is evident from the Appellate Body's persistent focus in its interpretative analysis on the *conduct* that is the subject of the financial contribution inquiry."[20] China misreads the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report, as well as the Appellate Body report in *US – Carbon Steel (India)*.

30. The implication of China's argument is that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser,[21] is a government function, and that engaging in that activity is consistent with the government's objectives.[22] In China's view, such evidence alone is a necessary and sufficient condition for making a public body determination,

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[13] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[14] *US – Countervailing Measures (China) (Panel)*, para. 7.72.
[15] *US – Countervailing Measures (China) (Panel)*, para. 7.67.
[16] *US – Countervailing Measures (China) (Panel)*, para. 7.67.
[17] *US – Countervailing Measures (China) (Panel)*, para. 7.67.
[18] *See US – Carbon Steel (India) (AB)*, para. 4.17.
[19] China's First Written Submission, para. 79 (underlining added; italics in original).
[20] China's First Written Submission, para. 80 (emphasis in original).
[21] *See* China's First Written Submission, para. 106.
[22] *See* China's First Written Submission, para. 104. *See also id.*, para. 94 (China argues that "an entity engaged in conduct falling within the scope of Article 1.1(a)(1) may properly be considered a public body – and have its conduct attributable to a Member – only if that conduct reflects the 'particular instance' where it is exercising the governmental authority that has been vested in it.").

and without such evidence, no amount of circumstantial evidence would be enough to find that an entity is a public body. China's position is untenable and entirely at odds with the Appellate Body's findings in previous reports relating to what is required to make a public body determination.

31. 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."[23] In *US – Carbon Steel (India)*, for example, the Appellate Body "agree[d] that the types of conduct listed in Article 1.1(a)(1)(i) and (iii) could be carried out by a government, by a public body, as well as by private bodies."[24] The Appellate Body found, though, that "it is only through 'a proper evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense', that panels and investigating authorities will be in a position to determine whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body."[25] The Appellate Body has stressed that the focus of the public body examination properly is on the "core features of the entity concerned, and its relationship with the government in the narrow sense," rather than on the conduct in which the entity is engaged.[26]

32. China, with its focus on the particular "*conduct* that is the subject of the financial contribution inquiry,"[27] 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. 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'."[28] In *US – Carbon Steel (India)*, the Appellate Body clarified that "[t]he substantive legal question to be answered is therefore <u>whether one or more of these characteristics exist in a particular case</u>."[29] Under the framework elaborated by the Appellate Body, an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue. China's position simply is not supported by the Appellate Body's findings.

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

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

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[23] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[24] *US – Carbon Steel (India) (AB)*, para. 4.24. China suggests that the Appellate Body in *US – Carbon Steel (India)* "continued to emphasize that the public body inquiry must be conducted by reference to the conduct at issue under Article 1.1(a)(1)," and that this supports "the conclusion that an entity must be performing a 'government function' when engaged in the conduct that is the subject of the financial contribution inquiry in order to be deemed a public body." China's First Written Submission, paras. 89, 91. China misreads the *US – Carbon Steel (India)* Appellate Body report.
[25] *US – Carbon Steel (India) (AB)*, para. 4.24.
[26] *US – Carbon Steel (India) (AB)*, para. 4.24. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 317, 345.
[27] China's First Written Submission, para. 80 (emphasis in original).
[28] *US – Carbon Steel (India) (AB)*, para. 4.37.
[29] *US – Carbon Steel (India) (AB)*, para. 4.37 (emphasis added).

> characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. For example, evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body. The absence of an express statutory delegation of governmental authority does not necessarily preclude a determination that a particular entity is a public body. Instead, there are different ways in which a government could be understood to vest an entity with "governmental authority", and therefore different types of evidence may be relevant in this regard. In order properly to characterize an entity as a public body in a particular case, it may be relevant to consider "whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", and the classification and functions of entities within WTO Members generally. In the same way that "no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[30]

34. Similarly, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body described the types of evidence that may be relevant to an evaluation of the core features of an entity and its relationship to the government when determining whether the entity possesses, exercises, or is vested with governmental authority. The Appellate Body explained that, "[i]n some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body may be a straightforward exercise."[31] This appears to be the narrow circumstance in which China might agree that an entity is a public body. However, the Appellate Body further found that:

> There are many different ways in which government in the narrow sense could provide entities with authority . . . . Evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice. It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions . . . . In some instances, … where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.[32]

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[30] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317. *See also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, 4.42.
[31] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[32] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.

35. The Appellate Body concluded that:

> [T]he determination of whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense. That assessment must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority.[33]

36. 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.[34] When the Appellate Body does refer to "[e]vidence that an entity is, in fact, exercising governmental functions," it stresses that such evidence may be relevant to the public body analysis "particularly where such evidence points to a sustained and systematic practice," rather than as part of an analysis of the conduct in which an entity is engaged at the time of the alleged financial contribution.[35]

37. 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."[36]

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

38. China asserts that the Appellate Body's discussion of the USDOC's public body determinations in relation to state-owned commercial banks (SOCBs) in *US – Anti-Dumping and Countervailing Duties (China)* "reinforces the conclusion" for which China argues.[37] Specifically, China contends that the Appellate Body's finding upholding the USDOC's public body determination narrowly related to evidence that SOCBs "effectively exercise certain governmental functions," in particular "when engaged in the conduct of providing loans to one … favoured industry."[38] China misreads the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report.

39. 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, including evidence that the SOCBs are meaningfully controlled by the

[33] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 345 (emphasis added).
[34] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 310, 317, 345; *see also US – Carbon Steel (India) (AB)*, paras. 4.24, 4.36 (referring with approval to the summary of the panel's description of the legal standard in para. 4.32), 4.52.
[35] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[36] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317. *See also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, 4.42.
[37] China's First Written Submission, para. 83.
[38] China's First Written Submission, para. 88.

government in the exercise of their functions."[39] The evidence that SOCBs were meaningfully controlled in the exercise of their functions was "include[ed]" in the broader discussion of evidence relating to the relationship between the SOCBs and the Chinese Government. As the Appellate Body described, that evidence consisted of the following:

> [T]he USDOC relied on information regarding ownership and control. In addition, however, it considered other factors, such as a provision in China's Commercial Banking Law stipulating that banks are required to "carry out their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies". The USDOC also took into consideration an excerpt from the Bank of China's Global Offering, which states that the "Chinese Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions", and that accordingly "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies". The USDOC also considered a 2005 OECD report, stating that "[t]he chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their choice". In addition, the USDOC considered evidence indicating that SOCBs still lack adequate risk management and analytical skills.[40]
>
> We also note that the present OTR determination itself contains some analysis with respect to SOCBs. It refers to the USDOC's determination in CFS Paper and states that the parties in the OTR investigation had not demonstrated that there had been significant changes in conditions in the Chinese banking sector since that determination. In addition, it refers to a statement by a Tianjin municipal government official reproduced in the Tianjin Government Verification Report, and to an International Monetary Fund working paper in support of the proposition that SOCBs are required to support China's industrial policies. [41]

40. Having reviewed the "extensive evidence" described above, the Appellate Body found that "the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions," and the Appellate Body noted that "the USDOC also referred to certain other evidence on the record … demonstrating that SOCBs are required to support China's industrial policies."[42] In the opinion of the Appellate Body, "these considerations, <u>taken together</u>, demonstrate that the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government."[43]

41. Thus, rather than focusing on the conduct of providing specific loans, as China suggests it did, the Appellate Body considered that the broad range of record evidence, and the USDOC's

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[39] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).
[40] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[41] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 351.
[42] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[43] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).

discussion of that evidence, "taken together,"[44] was sufficient to support a finding that the USDOC's public body determination was not inconsistent with Article 1.1(a)(1) of the SCM Agreement.[45]

42. In sum, China's suggestion that its new position concerning the interpretation of the term "public body" is supported by the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* related to the USDOC's public body determinations with respect to SOCBs is utterly without foundation.

d. 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

43. China's argument that the "conduct" of the entity is the proper focus of the *public body* analysis also is belied by the Appellate Body's explanation in *US – Anti-Dumping and Countervailing Duties (China)* that a focus on the conduct of an entity is more relevant when examining a *private body* under Article 1.1(a)(1)(iv) of the SCM Agreement, rather than as part of the public body analysis.

44. The Appellate Body explained that:

> With respect to the architecture of Article 1.1 of the SCM Agreement, we note that the provision sets out two main elements of a subsidy, namely, a financial contribution and a benefit. Regarding the first element, Article 1.1(a)(1) defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member. Two principal categories of entities are distinguished, those that are "governmental" in the sense of Article 1.1(a)(1): "a government or any public body ... (referred to in this Agreement as 'government')"; and those in the second clause of subparagraph (iv): "private body". <u>If the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution</u>. <u>When, however, the entity is a private body, and its conduct falls within the scope of subparagraphs (i)-(iii), then there is only a financial contribution if, in addition, the requisite link between the government and that conduct is established</u> by a showing of entrustment or direction. Thus, <u>the second clause of subparagraph (iv) requires an affirmative demonstration of the link between the government and the specific conduct, whereas all conduct of a governmental entity constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)</u>.[46]

[44] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[45] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 356.
[46] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.

45. The Appellate Body did not find that there must be an "affirmative demonstration of the link between the government and the specific conduct" as part of a *public body* analysis.[47] Rather, "all conduct of a governmental entity [including an entity determined to be a public body] constitutes a financial contribution to the extent that it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)."[48]

46. Additionally, when considering the phrase "which would normally be vested in the government" in Article 1.1(a)(1)(iv) of the SCM Agreement, the Appellate Body found that "the reference to 'normally' in this phrase incorporates the notion of what would ordinarily be considered part of governmental practice in the legal order of the relevant Member. This suggests that whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body."[49] The proper focus in a *public body* analysis then is on what is "ordinarily" considered a governmental function in the legal order of the relevant Member, rather than, as China suggests, whether the particular entity was engaged in conduct that is a government function in a particular instance.

47. Indeed, the Appellate Body "consider[ed] that whether a particular means of making a financial contribution is more *commonly* used by public or private entities has no direct bearing on, nor allows any inference regarding, the constituent elements of a public body in the context of Article 1.1(a)(1) of the *SCM Agreement*."[50] This is a further indication that the proper focus of the public body analysis is on the "core features of the entity" in question "and its relationship to the government in the narrow sense," rather than on the conduct in which the entity is engaged at a particular moment, which, for it to be relevant to the financial contribution analysis at all, will in any event necessarily be one of the activities specified in Article 1.1(a)(1)(i)-(iii) or the first clause of subparagraph (iv).[51]

48. China's new proposed interpretation of the term "public body" has troubling implications when considered in context with the term "private body" in Article 1.1(a)(1)(iv) of the SCM Agreement. If China's proposed interpretation were correct, and an investigating authority must point to evidence that the specific action in question (a transaction or class of transactions) is an exercise of governmental authority, then this also would be evidence sufficient to demonstrate entrustment or direction of a private body under Article 1.1(a)(1)(iv). In that case, there would be no need for an investigating authority to make a public body finding, and no need for a public body category at all in Article 1.1(a)(1). An interpretation that renders the term "public body" redundant is inconsistent with the principle of effectiveness and thus contrary to the customary rules of interpretation of public international law.[52]

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[47] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[48] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[49] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 297 (emphasis added).
[50] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 296 (emphasis in original).
[51] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317; *see also, id.*, para. 345.
[52] *See Japan – Alcoholic Beverages II (AB)*, p. 12.

e. China's Arguments Concerning the Object and Purpose of the SCM Agreement, the ILC Articles, and an Unrelated USDOC Section 129 Determination Lack Merit

49. China also advances 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").[53] These arguments, too, are at odds with previous Appellate Body guidance and lack merit.

50. With respect to the object and purpose of the SCM Agreement, China argues that its own proposed interpretation is "the only outcome consistent with the central object and purpose of the SCM Agreement in general, and Article 1.1 in particular," which China asserts is "to capture certain governmental conduct for the purpose of imposing subsidy disciplines."[54]

51. The Appellate Body considered the term "public body" in the light of the object and purpose of the SCM Agreement in *US – Anti-Dumping and Countervailing Duties (China)*.[55] After recalling previous findings it had made discussing the object and purpose of the SCM Agreement, the Appellate Body expressed the view that "considerations of object and purpose are of limited use in delimiting the scope of the term 'public body' in Article 1.1(a)(1)."[56] The Appellate Body explained that "[t]his is so because the question of whether an entity constitutes a public body is *not* tantamount to the question of whether measures taken by that entity fall within the ambit of the *SCM Agreement*."[57] In the Appellate Body's view, "considerations of the object and purpose of the *SCM Agreement* do not favor either a broad or a narrow interpretation of the term 'public body'."[58] In its first written submission, China does not discuss these Appellate Body findings, which are contrary to China's argument concerning the object and purpose of the SCM Agreement.

52. With respect to the ILC Articles, China argues that its proposed interpretation is "the only outcome consistent with the Appellate Body's observation[s]" in *US – Anti-Dumping and Countervailing Duties (China)* concerning the ILC Articles. China is mistaken. In *US – Anti-Dumping and Countervailing Duties (China)*, there was a great deal of argument by the parties and discussion by the panel and the Appellate Body of whether, when interpreting the terms of Article 1.1(a)(1) of the SCM Agreement, certain provisions of the ILC Articles, in particular Article 5, may be taken into account as one among several interpretative elements.[59]

53. The Appellate Body, while it discussed the ILC Articles in response to arguments of the parties and the findings of the panel, did not "take[] into account"[60] the ILC Articles in its interpretation of Article 1.1(a)(1). Rather, the Appellate Body found that it was "not necessary .

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[53] *See* China's First Written Submission, paras. 92-94.
[54] China's First Written Submission, para. 92.
[55] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 298-303.
[56] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 302.
[57] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 302 (emphasis in original).
[58] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.
[59] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 304-316; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.84-8.91.
[60] *Vienna Convention on the Law of Treaties* ("Vienna Convention"), Art. 31(3)(c).

. . to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law."[61] Without first resolving the question of whether and to what extent Article 5 of the ILC Articles reflects customary international law, it is not permissible under the customary rules of interpretation reflected in the Vienna Convention to take Article 5 into account with the context of Article 1.1(a)(1) of the SCM Agreement when interpreting that provision.[62] Thus, the United States understands the Appellate Body not to have taken Article 5 of the ILC Articles into account in its interpretative analysis of Article 1.1(a)(1) of the SCM Agreement. This was appropriate because the ILC Articles are not relevant rules of international law applicable in the relations between the parties.[63]

54. Finally, China discusses a section 129 determination made by the USDOC in an entirely unrelated proceeding involving steel products from India.[64] The USDOC's determination in that proceeding is of no relevance whatsoever to this compliance proceeding because that determination is not germane to the interpretation of the term "public body" under the customary rules of interpretation of public international law.[65] Furthermore, this proceeding concerns the question of whether the implementation measures taken by the United States in this dispute are consistent with the covered agreements, and does not involve implementation measures the United States may have taken in another, unrelated dispute.[66]

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

55. China's new proposed interpretation of the term "public body" is a further effort by China to narrow the public body concept in a way that is contrary to Article 1.1(a)(1) of the SCM Agreement. Under Article 1.1(a)(1), the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributable to the government. The conduct at issue in the financial contribution analysis necessarily will be those actions described in the subparagraphs of Article 1.1(a)(1): making a direct transfer of funds; foregoing

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

[62] *See* Vienna Convention, Art. 31(3)(c). *See also, e.g.*, Dispute Settlement Body, Minutes of Meeting, March 25, 2011, 9. *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, (a) Report of the Appellate Body and Report of the Panel, Statement of Japan, WT/DSB/M/294 (June 9, 2011), paras. 121-123 (summarizing Japan's thoughts on the Appellate Body's discussion of the ILC Articles).

[63] The United States discussed the status of the ILC Articles and the reasons why they should not be taken into account when interpreting Article 1.1(a)(1) of the SCM Agreement in the First Written Submission of the United States of America, submitted to the original Panel in this dispute on March 15, 2013, at paragraphs 101-112. The United States does not repeat those arguments here, but refers the Panel to the previous U.S. written submission for further explanation of the U.S. position. The United States recalls that the original Panel included no mention of the ILC Articles in the panel report.

[64] *See* China's First Written Submission, paras. 96-99.

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

[66] We also recall that the Appellate Body has explained that "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case." *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317; *see also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, 4.42. Given a different set of facts concerning a different allegedly subsidized input sold by a different entity in a different country, the notion that the USDOC may have undertaken a different analysis is unremarkable. It is no indication, as China appears to suggest, that the USDOC somehow has singled out China for unfair treatment. *See* China's First Written Submission, para. 99. Rather, it merely reflects that the USDOC had before it different evidence, and accordingly undertook an analysis of that evidence in reaching its conclusion.

government revenue; providing goods or services, or purchasing goods; or making payments to a funding mechanism.

56. Where the economic value being transferred, through one of the actions described in Article 1.1(a)(1) of the SCM Agreement, belongs to the government, that transfer is an exercise of governmental authority – the authority over the government's own economic resources.[67] When an entity transfers the government's resources, it is making a financial contribution, just as the government (in the narrow sense) makes a financial contribution by engaging in the identical conduct described in Article 1.1(a)(1), subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

57. As demonstrated in the following subsection, in the section 129 proceedings at issue here, the USDOC examined legal instruments and evidence of meaningful control to establish the core features of the entities in question and their relationship to the Chinese government to determine whether they possessed, were vested with, or exercised governmental authority (*i.e.*, the authority to perform governmental functions).[68] In its section 129 public body determinations, the USDOC properly applied the legal standard for determining whether an entity is a public body, it provided reasoned and adequate explanations, and its determinations were supported by ample record evidence. Accordingly, the Panel should find that the USDOC's section 129 public body determinations comply with the DSB's recommendations and are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

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

58. As discussed above, the original Panel found that "the critical consideration in identifying a public body is the question of authority to perform governmental functions," and "[t]herefore, an investigating authority must evaluate the core features of the entity in question and its relationship to government, in order to determine whether it has the authority to perform governmental functions."[69] The original Panel explained that "simple ownership or control by a government of an entity is not sufficient. A further inquiry is needed."[70] Such a "further inquiry," consistent with the findings of the original Panel, as well as prior findings of the Appellate Body, is precisely what the USDOC undertook in implementing the DSB's recommendations and rulings in the section 129 proceedings here.

59. Before turning to a description of the USDOC's public body determinations in the section 129 proceedings, we recall previous findings made by the Appellate Body and WTO panels

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[67] As the Appellate Body has acknowledged, where there is evidence that a government meaningfully controls an entity, such that the government can use that entity's resources as its own, such evidence may be relevant for purposes of determining whether a particular entity constitutes a public body. *See US – Carbon Steel (India) (AB)*, para. 4.20.
[68] *See US – Countervailing Measures (China) (Panel)*, para. 7.66.
[69] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[70] *US – Countervailing Measures (China) (Panel)*, para. 7.72.

concerning the standard of review to be applied by panels when reviewing an investigating authority's determination. The Appellate Body has explained that:

> [T]he task of a panel [is] to assess whether the explanations provided by the authority are "reasoned and adequate" by testing the relationship between the evidence on which the authority relied in drawing specific inferences, and the coherence of its reasoning. In particular, the panel must also examine whether the investigating authority's reasoning takes sufficient account of conflicting evidence and responds to competing plausible explanations of that evidence. This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an objective and unbiased manner, so as to reach its findings "without favouring the interests of any interested party, or group of interested parties, in the investigation."[71]

60. As discussed further below, China attempts to support its arguments by focusing narrowly on individual documents on the record of the section 129 proceedings. The USDOC's determinations, however, were based on the totality of the evidence on the record.[72] 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."[73] 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.[74]

61. 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

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[71] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).
[72] *See, e.g.,* 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); 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).
[73] *Japan – DRAMs (Korea) (AB)*, para. 131.
[74] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.

by the agency from the evidence, and then by considering whether the evidence could sustain that inference."[75]

62. The following subsection describes the USDOC's public body determinations in the section 129 proceedings and demonstrates that those determinations are "reasoned and adequate" and supported by ample record evidence of the "core features" of the entities in question and their "relationship to the government," which establishes that the entities possess, exercise, or are vested with governmental authority to perform governmental functions in China.[76] After describing the USDOC's determinations, we respond to China's specific arguments and demonstrate that they lack merit.

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

63. The USDOC's public body determinations in the section 129 proceedings at issue in this compliance proceeding are set forth and explained in a preliminary determination[77] and a final determination[78] that the USDOC produced as part of these section 129 proceedings, as well as in memoranda analyzing public bodies in China (the Public Bodies Memorandum)[79] and discussing the relevance of the Chinese Communist Party ("CCP") to the public body analysis (the CCP Memorandum).[80] The USDOC produced the Public Bodies Memorandum and the CCP Memorandum in an earlier proceeding and placed them and the evidence cited therein onto the

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[75] *Japan – DRAMs (Korea) (AB)*, para. 131.
[76] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[77] *See Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Preliminary Determination of Public Bodies and Input Specificity*, February 25, 2016 ("Public Bodies Preliminary Determination") (Exhibit CHI-4).
[78] *See 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") (Exhibit CHI-5). The United States notes that Exhibit CHI-5 includes three separate memoranda, each of which discusses the USDOC's public body final determinations in the section 129 proceedings involving 1) lawn groomers, kitchen shelving, wire strand, print graphics, aluminum extrusions, and steel cylinders (*see* pp. 2-7 of the PDF version of Exhibit CHI-5); 2) seamless pipe (*see* pp. 14-18 of the PDF version of Exhibit CHI-5); and 3) pressure pipe, line pipe, OCTG, wire strand, and solar panels (*see* pp. 23-29 of the PDF version of Exhibit CHI-5). Because the evidence and arguments submitted by the GOC with respect to the public bodies issue was similar in all of these section 129 proceedings, each of the three memoranda presents substantially similar discussions of the public body issue. Therefore, in this submission, the United States refers only to the first memorandum included in Exhibit CHI-5. Exhibit CHI-5 also includes a memorandum discussing the section 129 proceeding involving drill pipe, in which no final determination was issued because the countervailing duty order on drill pipe had been revoked previously for other reasons (*see* p. 13 of the PDF version of Exhibit CHI-5).
[79] *See* Public Bodies Memorandum (p. 2 of the PDF version of Exhibit CHI-1).
[80] *See Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Tim Hruby Re: The Relevance of the Chinese Communist Party for the Limited Purpose of Determining Whether Particular Enterprises Should Be Considered To Be "Public Bodies" within the Context of a Countervailing Duty Investigation*, May 18, 2012 ("CCP Memorandum") (p. 41 of the PDF version of Exhibit CHI-1).

administrative record of these section 129 proceedings.[81] All of these documents, read together, present the USDOC's analysis and explanation underlying its public body determinations.

64. This is reflected in the Public Bodies Final Determination, which, in addition to addressing arguments presented by the Government of China ("GOC"), explains that the USDOC "adopt[ed] the findings of the preliminary determinations for the[] final determinations,"[82] and further indicates that:

> [T]he *Public Bodies Memorandum* and accompanying *CCP Memorandum* set forth evidence concerning the extent to which certain categories of state-invested enterprises function as instruments of the GOC. The Department discusses and analyzes a significant amount of record evidence before coming to the conclusion that certain state-invested enterprises are used "as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy."[83]

65. 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,[84] as well as the USDOC's consideration of information and arguments submitted by the GOC and other interested parties.[85]

66. 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."[86] The USDOC explained that "there are two findings at the core of the analysis:"[87]

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

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

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

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

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

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

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

> First, China's government has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the "socialist market economy", which includes maintaining a leading role for the state sector in the economy. The relevant laws also grant the government the authority to use SIEs as the means or instruments by which to achieve this mandate. The actions taken by the GOC to fulfill its legal mandate in the economic sphere are functions, which in the words of the Appellate Body are "ordinarily classified as governmental in the legal order" of China.
>
> Second, the government exercises meaningful control over certain categories of SIEs in China and this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy.[88]

67. The USDOC further explained that, "[a]fter analyzing all available evidence in *CVD 1*," *i.e.*, the evidence presented and discussed in the Public Bodies Memorandum and the CCP Memorandum, which were placed onto the record of the section 129 proceedings here, the USDOC "reached certain conclusions about the categories of enterprises in China"[89]:

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

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

> public bodies. The circumstances under which the Department could find, on a case-by-case basis, such enterprises to be public bodies rest upon additional indicia that show whether such SIEs are used as instruments by the government to uphold the socialist market economy, such as whether the industry producing the subject merchandise or the industry supplying inputs to the production of the subject merchandise is covered by an industrial plan or plans that indicate enterprises are being used to carry out government functions; government appointed company officials; the presence of government or CCP officials on the board or in management; and the existence and role of a Party committee.
>
> Third, in light of the Chinese institutional and governance environment, the Department determined that certain enterprises that have little or no formal government ownership are public bodies if China's government exercises meaningful control over such enterprises. For example, the 2006 Company Law sets forth that "an organization of CCP shall be set up in all companies, whether state, private, domestic or foreign-invested, 'to carry out activities of the Chinese Communist Party.'" Correspondingly, the Public Bodies Memorandum observes, the CCP "has cells in most big companies—in the private as well as the state-owned sector—complete with their own offices and files on employees." More broadly, examples of indicia that, taken as a whole, could lead to such a conclusion include instances where there is a significant CCP officials or state presence on the board, in management or in the enterprises in the form of party committees, or where the enterprise was previously privatized but ties to the government continue to exist or there were other relevant restrictions on the privatization.[90]

68. The above is merely a brief summary of the USDOC's findings, which the USDOC included in the Public Bodies Preliminary Determination in these section 129 proceedings. The USDOC went on at much greater length in the Public Bodies Memorandum and the CCP Memorandum, discussing and analyzing relevant evidence and presenting explanations for the conclusions that the USDOC drew from that evidence. In the following subsections, the United States provides a further elaborated, though still summary, description of the USDOC's analysis and explanation.[91]

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

69. After recalling certain findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, findings on which the original Panel in this dispute relied,[92] the

[90] Public Bodies Preliminary Determination, pp. 9-10 (citations to the Public Bodies Memorandum omitted) (p. 10-11 of the PDF version of Exhibit CHI-4).
[91] Of course, the USDOC's preliminary and final public body determinations in the section 129 proceedings, together with the Public Bodies Memorandum and the CCP Memorandum, which are incorporated into those determinations, speak for themselves and are the best evidence of the public body determinations that the USDOC made in these section 129 proceedings.
[92] *US – Countervailing Measures (China) (Panel)*, para. 7.65-66.

USDOC reasoned that "an important inquiry in a public body analysis is a determination of what 'functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member.'"[93] "Analyzing the matter under this standard," the USDOC found that "China's legal order grants China's government both the responsibility and authority to control and guide the economy towards the goal of maintaining a leading role for the state sector and that this is 'considered part of the governmental practice in the legal order' of China."[94]

70. The USDOC examined China's *Constitution* and explained that it is "the foundation of a legal regime establishing the primary role of the government in China's economy."[95] The USDOC cited Article 7 of China's *Constitution*, which provides that "[t]he state-owned economy, that is, the socialist economy with ownership by the whole people, is the *leading force* in the national economy. The state ensures the consolidation and growth of the state-owned economy."[96] The USDOC referred to Article 6 of China's *Constitution*, which provides that, "{i}n the primary stage of socialism, the *State upholds the basic economic system in which the public ownership remaining dominant* and diverse forms of ownership develop side by side . . . ."[97] The USDOC explained that the CCP explicitly shares this constitutional mandate.[98] The preamble of the *Constitution of the Chinese Communist Party* provides that "[t]he Party must uphold and improve the basic economic system, with public ownership playing a dominant role and different economic sectors developing side by side."[99]

71. The USDOC found that "this legal mandate extends the government's role in China's economy beyond that of public goods provider and market regulator to also include a mandate to ensure a certain outcome with respect to the overall structure and direction of the economy."[100] The USDOC considered that "[i]mportant and wide-reaching economic legislation provides further evidence of this,"[101] including: the 2007 *Property Law of the People's Republic of China*, the 2006 *Company Law of the People's Republic of China*, the 2008 *Law on State-Owned Assets of Enterprises*, the 2003 *Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises,* and the 2006 *Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the SASAC about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-owned Enterprises.*[102]

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

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[93] Public Bodies Memorandum, pp. 2, 6 (pp. 3, 7 of the PDF version of Exhibit CHI-1).
[94] Public Bodies Memorandum, p. 6 (p. 7 of the PDF version of Exhibit CHI-1).
[95] Public Bodies Memorandum, pp. 6-7 (pp. 7-8 of the PDF version of Exhibit CHI-1).
[96] Public Bodies Memorandum, p. 6 (quoting Article 7 of China's *Constitution*) (emphasis supplied by the USDOC) (p. 7 of the PDF version of Exhibit CHI-1).
[97] Public Bodies Memorandum, pp. 6-7 (quoting Article 6 of China's *Constitution*) (emphasis supplied by the USDOC) (pp. 7-8 of the PDF version of Exhibit CHI-1).
[98] *See* CCP Memorandum, p. 31 (p. 71 of the PDF version of Exhibit CHI-1).
[99] CCP Memorandum, p. 31 (quoting the preamble of the *Constitution of the Chinese Communist Party*) (p. 71 of the PDF version of Exhibit CHI-1).
[100] Public Bodies Memorandum, p. 7 (p. 8 of the PDF version of Exhibit CHI-1).
[101] Public Bodies Memorandum, p. 7 (p. 8 of the PDF version of Exhibit CHI-1).
[102] Public Bodies Memorandum, pp. 7-8 (pp. 8-9 of the PDF version of Exhibit CHI-1).

> These laws have wide application and affect the entire economy, either directly through interventions in the state sector, or indirectly through the impact these interventions have on other sectors of the economy that compete with the state sector. Moreover, they give the government the legal authority, and responsibility, to intervene and direct the economy to effectuate its policies and plans to secure a leading a role for the state sector. These interventions are often expressed in detailed governmental instruments such as industrial plans…[103]

73. The USDOC then examined the role of such industrial plans and policies, which the Chinese government uses "as the means (and roadmap) by which the government seeks to fulfill its legal mandate to maintain the predominance of the state sector."[104] The USDOC explained that:

> Under the rubric of industrial policies, the government orchestrates certain outcomes on an administrative basis by, *inter alia*, managing competition in sectors, ensuring through regulations that certain SIEs are implementing industrial policies in their business plans, appointing party and state officials in management and the board of trustees throughout the state sector, and administratively guiding resource allocations.[105]

74. The USDOC concluded that, "[t]aken as a whole, the network of plans provides examples of legal and administrative measures envisioned by the government in order to ensure the continued predominance of the state sector."[106] Accordingly, the USDOC determined that:

> [G]overnment oversight and control of the economy, and in particular economic decision-making in the state sector is, consistent with the words of the [Appellate Body], "ordinarily classified as governmental in the legal order" of China and, as such, is appropriately considered to be a "government function" for purposes of the Department's analysis of public bodies in China.[107]

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

75. As part of its public body analysis, the USDOC also assessed "the role played by the CCP in China's system of governance"[108] and undertook "an inquiry into the role of CCP representatives in enterprises, in order to develop sufficient information to enable the Department to determine whether the presence and role of any such CCP officials may inform a finding of government control over such enterprises."[109] In light of the USDOC's examination

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[103] Public Bodies Memorandum, p. 8 (p. 9 of the PDF version of Exhibit CHI-1).
[104] Public Bodies Memorandum, p. 9 (p. 10 of the PDF version of Exhibit CHI-1). *See also id.*, pp. 9-11 (pp. 10-12 of the PDF version of Exhibit CHI-1).
[105] Public Bodies Memorandum, p. 9 (citations omitted) (p. 10 of the PDF version of Exhibit CHI-1).
[106] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).
[107] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).
[108] CCP Memorandum, p. 3 (p. 43 of the PDF version of Exhibit CHI-1).
[109] CCP Memorandum, p. 2 (p. 42 of the PDF version of Exhibit CHI-1).

of voluminous record evidence, which it discusses at length,[110] the USDOC drew a number of well-supported conclusions, including that:

> [T]he constitutional, legal and de facto source of authority and legitimacy for governance in China lies with the CCP, such that the CCP may properly be considered to be part of China's governance structure or, alternatively, the "government," as defined herein, for the sole purpose of determining whether a particular enterprise should be considered to be a "public body" within the meaning of the CVD law.[111]

76. The USDOC also found that:

> [T]he CCP exercises authority over the state apparatus by leading small groups, party groups and committees, controlling appointments, supervising state activity, and requiring state entities to report to (and/or take direction from) at least one corresponding CCP entity. In instances where state entities may attempt to diverge from the CCP, the information on the record indicates that the CCP possesses the legal right to intervene (through appointments and disciplinarian measures) to prevent or correct any such divergence. The Department's assessment of the available evidence thus indicates that the CCP and China's state apparatus are essential components that together form China's "government" solely for purposes of the CVD law.[112]

77. The USDOC found that evidence indicated that the CCP utilizes existing institutions within its organizational hierarchy to incentivize certain behavior and monitor compliance with CCP policies and rules.[113] For example, the USDOC noted that the Central Organization Department of the CCP holds the power of appointment and controls all appointments to Party and government/state positions.[114] The USDOC explained that:

> "The CCP's most powerful instrument in structuring its domination over the state is a system called the 'Party management of cadres' (*dangguan ganbu*), or more commonly known as the *nomenklatura* system,[] or 'name list' system." There are specific regulations that govern the appointment of such cadres, placing the responsibility for such appointments in the hands of the Organization Department. These directives require cadres to closely follow Party directives in executing their responsibilities.[115]

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

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[110] *See generally*, CCP Memorandum (p. 41 *et seq.* of the PDF version of Exhibit CHI-1).
[111] CCP Memorandum, p. 3 (p. 43 of the PDF version of Exhibit CHI-1).
[112] CCP Memorandum, p. 3 (p. 43 of the PDF version of Exhibit CHI-1).
[113] *See* CCP Memorandum, p. 21 (p. 61 of the PDF version of Exhibit CHI-1).
[114] *See* CCP Memorandum, p .21 (p. 61 of the PDF version of Exhibit CHI-1).
[115] CCP Memorandum, p. 22 (citations omitted) (p. 62 of the PDF version of Exhibit CHI-1).

> [C]orporate management appointments are almost entirely informed by, and shadow, Party structure arrangements and career evaluation. Said another way, senior corporate elections (directors and supervisory board members) and appointments (management) only reflect arrangements animated entirely by the continuing PRC *nomenklatura* system.[116]

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

> [A] number of experts have noted that the CCP's primary goal is to maintain political stability, with a particular focus on doing so through maintaining economic growth while simultaneously protecting the central role for socialism in China's economy.[117]

80. Another source cited by the USDOC noted that:

> Few modern societies have as "political" an economy as China. Even after thirty years of market reform, bureaucrats, local and national leaders, as well as new and old government regulations, still have remarkable influence over the allocation of goods and services. Similarly, because the legitimacy of the {CCP} depends so heavily on continuing economic growth; because expanding inequalities threaten social stability; and because corruption has seeped deeply into the political system, economics has enormous political significance in China.[118]

81. After examining all the evidence it had collected, the USDOC expressed the view that "the available information and record evidence indicates that the CCP meets the definition of the term 'government'" for the limited purpose of applying the U.S. CVD law to China.[119] The USDOC reasoned that:

> Among other things, this information indicates that the CCP exercises "ultimate control over citizens and resources," including authority over issues and resources as varied as family and economic planning, as well as the military. This information further indicates that the CCP, through the Politburo and the Central Committee, governs "in the form of rules and principles," such as described in the definition of government above. The available information also indicates that the CCP exercises this authority directly over state mechanisms through small groups, party groups and committees, by exercising control over appointments, supervising state activity, and requiring state entities to report to (and/or take direction from) at least one corresponding CCP entity.[120]

82. Accordingly, the USDOC concluded that:

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[116] CCP Memorandum, p. 24 (p. 64 of the PDF version of Exhibit CHI-1).
[117] CCP Memorandum, p. 31 (p. 71 of the PDF version of Exhibit CHI-1).
[118] CCP Memorandum, p. 32 (p. 72 of the PDF version of Exhibit CHI-1).
[119] CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1).
[120] CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1).

> [I]t is reasonable to view China's system of governance within the context of a party-state. First, as described above, the CCP and the state are organizationally separate, even though their structures generally mirror each other. Second, sources indicate that the CCP exercises authority over the formal institution of government at the national and local levels. Third, sources also indicate that the CCP makes policy and the state implements the Party's policies and that the Party directs and supervises that implementation through a number of formal and informal tools. Finally, sources indicate that the CCP is "particularly concerned with their authority over the economy because economic growth is so critical to advancing the cause of socialism and building a strong nation." As described above, the available evidence indicates that this is true at the central level and the local level of the governance structure in China.[121]

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

83. Having explained "the basis for finding that the government of China's interventions in and control over the operations and activities of the state-owned economic sector in China are functions or conduct ordinarily classified as governmental in the Chinese legal order,"[122] and also having established that the CCP is considered "government" in China for the purpose of applying the U.S. CVD law to China,[123] the USDOC "turn[ed] to the question of whether certain enterprises in China can properly be considered to possess, exercise, or be vested with governmental authority."[124]

84. The USDOC noted that the Appellate Body has described "several types of evidence that may assist in making this determination. First, one can look at legal instruments. Second, one can look at the actions of the entity. And third, one can look into whether the government exercises meaningful control over the entity."[125] The USDOC expressed the view that "[m]eaningful control is something more than mere formal links such as majority ownership; rather, it is control related to the possession or exercise of governmental authority and governmental functions."[126]

85. As the USDOC explained:

> With respect to the first means, "legal instruments," the Department notes that some laws, as described below, specifically require SIEs to comply with government policy directives. For example, according to the *Law on State-owned*

[121] CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1).
[122] Public Bodies Memorandum, p. 11 (p. 12 of the PDF version of Exhibit CHI-1).
[123] *See* CCP Memorandum, p. 33 (p. 73 of the PDF version of Exhibit CHI-1).
[124] Public Bodies Memorandum, p. 11 (p. 12 of the PDF version of Exhibit CHI-1).
[125] Public Bodies Memorandum, pp. 11-12 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318 ("It follows, in our view, that evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.")) (pp. 12-13 of the PDF version of Exhibit CHI-1).
[126] Public Bodies Memorandum, p. 12 (p. 13 of the PDF version of Exhibit CHI-1).

> *Assets of Enterprises*, which applies to all enterprises with state investment, regardless of the level of ownership, SIE investments must be in-line with state industrial policies. If a legal instrument explicitly vests an individual enterprise with the obligation to carry-out government functions, such an entity may properly be considered a public body in certain circumstances, consistent with the [Appellate Body's] findings. The Department's focus here is on the breadth and depth of government control over the economy as a whole and over SIEs generally in China.[127]

86. The USDOC then presented a detailed analysis of evidence relating to meaningful control,[128] beginning with a discussion of the predominant role of the state sector and industrial policies,[129] including: government exercise of control through the provision of direct and indirect benefits,[130] five-year plans,[131] supporting legislation,[132] the importance of ownership levels,[133] and industry-specific plans.[134]

87. The USDOC found evidence indicating that "the state sector is explicitly granted a privileged place in the national economy under the *Constitution* and other laws."[135] The USDOC noted that the evidence illustrated that the "'leading role' for the state sector in China is reflected in the disproportionate share of resources that SIEs receive relative to other types of enterprises. . . ."[136] This finding was supported by evidence "indicate[ing] that the SIEs received preferential access to capital and production inputs, 'including priority in the allocation of raw materials and electricity supplies,' preferential tax rates, as well as grants and capital infusions."[137]

88. The USDOC also pointed to Article 11 of China's *Constitution*, which establishes "the subordinate place afforded to private, non-state entities in China's economy."[138] Specifically, Article 11 provides that "[t]he private sector of the economy is a complement to the socialist public economy."[139] The USDOC found that, "[i]n other words, the nature and very existence of the private sector is explicitly limited and circumscribed in China's Constitutional order and in a manner designed to favor and promote the state-owned and -invested economy, *i.e.*, the state sector.[140] Additionally, the USDOC found that "[c]ompetition from the non-state sector is further constrained by investment guidelines issued by the government."[141]

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[127] Public Bodies Memorandum, p. 12 (citations omitted) (p. 13 of the PDF version of Exhibit CHI-1).
[128] *See* Public Bodies Memorandum, pp. 12-14 (pp. 13-15 of the PDF version of Exhibit CHI-1).
[129] *See* Public Bodies Memorandum, p. 14 (p. 15 of the PDF version of Exhibit CHI-1).
[130] *See* Public Bodies Memorandum, pp. 14-17 (pp. 15-18 of the PDF version of Exhibit CHI-1).
[131] *See* Public Bodies Memorandum, pp. 17-19 (pp. 18-20 of the PDF version of Exhibit CHI-1).
[132] *See* Public Bodies Memorandum, pp. 19-20 (pp. 20-21 of the PDF version of Exhibit CHI-1).
[133] *See* Public Bodies Memorandum, pp. 20-21 (pp. 21-22 of the PDF version of Exhibit CHI-1).
[134] *See* Public Bodies Memorandum, pp. 21-23 (pp. 22-24 of the PDF version of Exhibit CHI-1).
[135] Public Bodies Memorandum, pp. 14-15 (pp. 15-16 of the PDF version of Exhibit CHI-1).
[136] Public Bodies Memorandum, p. 15 (p. 16 of the PDF version of Exhibit CHI-1).
[137] Public Bodies Memorandum, p. 15 (p. 16 of the PDF version of Exhibit CHI-1).
[138] Public Bodies Memorandum, p. 16 (p. 17 of the PDF version of Exhibit CHI-1).
[139] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).
[140] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).
[141] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).

89. The USDOC found that:

> [P]lans and implementing legislation provide the government with the authority to control and guide the state-sector to engineer certain outcomes, requiring that the state sector follow the government's industrial plans. In this way, SIEs thus serve as a "potent mechanism for the government to implement national policies". . . .[142]

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

> [T]he enterprises that comprise the state sector are both afforded substantial benefits and protections, but also are subject to significant government requirements and directives. Further, in addition to the direct government policies that favor and promote the state sector in China's economy, the government also constrains the non-state sector from effectively competing with the state sector. Industrial plans in China thus serve as an essential tool utilized by the government at the central and sub-central government levels to fulfill its mandate to uphold the socialist market economy, with the state sector afforded a leading role. The plans not only reflect the government's broad economic development objectives, but they also provide a roadmap of often specific, state-guided interventions in a wide range of important industrial sectors and in the individual business decisions of enterprises in these sectors.
>
> Although the degree of state-directed intervention in the allocation of resources may vary from industry to industry, industrial plans provide an essential insight and backdrop to the motivations, goals and expected future outcomes of the government for the state economy in China and, as noted in the introduction to this section, SIEs are one of the key instruments by which the state may implement these policies.[143]

91. The USDOC also discussed efforts by the Chinese government to manage competition, including citing a 2012 joint report prepared by the World Bank and the Development Research Center of the State Council of China ("DRC/World Bank Report"),[144] which explains that:

> {C}ompetition remains curtailed in one key dimension—between state-owned and non-state parts of certain sectors—especially in "strategic" industries and utilities. Large SOEs dominate certain activities not because they are competitive enough to keep the dominance, but because the market competition is restricted and they are granted oligopolistic status by the authorities (Lin, 2010). The weak and unfair competition resulting from such "administrative monopoly" has been deemed "the current problem facing private enterprise in China" (Naughton, 2011) and "the major source of monopolies in China's economy" (Owen and

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[142] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).
[143] Public Bodies Memorandum, p. 23 (p. 24 of the PDF version of Exhibit CHI-1).
[144] *See* Public Bodies Memorandum, pp. 24-26 (quoting DRC/World Bank report at page 112) (pp. 25-27 of the PDF version of Exhibit CHI-1).

> Zheng, 2007). The strong direct ties between the government and incumbent SOEs, especially large SOEs, limit the entry and access to resources of private firms, hampering the efficient use and allocation of resources and stifling entrepreneurship and innovation.[145]

92. The USDOC also considered that "examples of forced mergers and acquisitions in China illustrate how the Chinese government actively and meaningfully intervenes throughout many key sectors of the state economy to achieve administratively established outcomes through individual SIE decisions."[146]

93. The USDOC discussed evidence relating to SASAC's supervision as a tool of meaningful control.[147] The USDOC explained that under the 2003 *Tentative Measures*, SASAC was established for the purposes of meeting "the demand{s} of the socialist market economy, to further activate the state-owned enterprises, to promote the strategic adjustment of the layout and structure of the state-owned economy, to develop and strengthen the state-owned economy, and to try to maintain and increase the value of the state-owned assets."[148] SASAC reports directly to the State Council.[149] Likewise, the *Interim Measures for the Supervision and Administration of the Investments by Central Enterprise* articulates the principle that SASAC supervises and administers SIEs' investment activities.[150] The USDOC also examined the *Measures for the Administration of Development Strategies and Plans of Central Enterprises*, which requires SASAC to formulate a development strategy and plan, which will take into consideration "whether or not it complies with the national development planning and industrial policies," and "whether or not it complies with the strategic adjustment of the layout and structure of the state-owned economy."[151] SASAC also exercises significant control over the entire state sector through its "state assets management budget."[152] In addition, SASAC has the power to appoint SOE managers, board members, and Supervisory Board members.[153]

94. The USDOC further explained that the appointment power of SASAC is shared with, or superseded by, the CCP. Thus, the CCP remains in ultimate control of managerial personnel. In reaching this determination, the USDOC examined numerous academic and news articles, as well as the *Civil Servant Law* and the OECD Economic Survey.[154] The USDOC highlighted that the *Civil Servant Law* permits the "reshuffling" of senior figures between competing firms within

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[145] Public Bodies Memorandum, pp. 24-25 (pp. 25-26 of the PDF version of Exhibit CHI-1).
[146] Public Bodies Memorandum, p. 26 (p. 27 of the PDF version of Exhibit CHI-1).
[147] Public Bodies Memorandum, pp. 26-30 (pp. 27-31 of the PDF version of Exhibit CHI-1).
[148] Public Bodies Memorandum, p. 26 (citing Article 1, *Tentative Measures*) (p. 27 of the PDF version of Exhibit CHI-1).
[149] Public Bodies Memorandum, p. 26 (p. 27 of the PDF version of Exhibit CHI-1).
[150] Public Bodies Memorandum, p. 27 (citing Article 6, *Interim Measures*) (p. 28 of the PDF version of Exhibit CHI-1).
[151] Public Bodies Memorandum, pp. 27-28 (citing Articles 13(1) and 13(2), *Measures for the Administration of Development and Plans for Central Enterprises*) (pp. 28-29 of the PDF version of Exhibit CHI-1).
[152] Public Bodies Memorandum, p. 28 (p. 29 of the PDF version of Exhibit CHI-1).
[153] Public Bodies Memorandum, p. 30 (citing Article 13, *Tentative Measures*) (p. 31 of the PDF version of Exhibit CHI-1).
[154] Public Bodies Memorandum, p. 32 (p. 33 of the PDF version of Exhibit CHI-1).

the same industry, and moving firm leaders between corporate and government functions.[155] The CCP's appointment power allows it to "intervene for any reason,"[156] and "reshufflings serve as a reminder to the managers of the state sector that the government is ultimately in charge. . . ."[157]

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

> [W]ith a vast number of SIEs from a broad cross-section of China's economy operating under SASAC's supervision, the government can ensure that sector-specific industrial plans are implemented as evidenced by the legal measures cited above, which prescribe that SASAC ensure that SIEs formulate development strategies and plans that take into consideration state industrial policies. This and other record evidence cited above, such as the role of the state budget, further support the conclusion that the role of SASAC is not limited to acting merely as a shareholder; rather, SASAC's role includes acting to advance the government's state planning goals through government-owned SIEs.[158]

96. The USDOC examined evidence relating to the government's control over all appointments in the state sector and how the government uses that control as a means to ensure that industrial policy objectives are being achieved.[159] The USDOC wrote:

> As one source explains, the Party "can intervene for any reason, changing CEOs, investing in new projects or ordering mergers," regardless of the laws that are in place. Another source notes that "more disorienting is the frequent interchange of senior figures in the *nomenklatura* between even competing firms in the same industry, a kind of musical chairs played not just at the very highest level, but at the operational level as well."[160]

97. The USDOC noted that a "2010 OECD report highlights the corporate governance problems created by this appointment system, explaining that continued '…direct control over business operations and government control in infrastructure sectors suggest that the line between government and the SOEs is still blurred.'"[161] The USDOC noted that the report also explains that:

> This indicates that SOE decisions still sometimes reflect the government's intentions, rather than purely commercial goals. Further reform and better implementation of existing policies is necessary to encourage greater commercialization of the SOEs and improve competition. Decisively cutting the traditional ties between SOEs, government agencies and the Communist Party is

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[155] Public Bodies Memorandum, p. 32 (citing Articles 63, 64, *Civil Servant Law*) (p. 33 of the PDF version of Exhibit CHI-1).
[156] Public Bodies Memorandum, p. 31 (citing *Red Capitalism, The Fragile Financial Foundation of China's Extraordinary Rise*, Walter and Howie (2011) at 24)) (p. 32 of the PDF version of Exhibit CHI-1).
[157] Public Bodies Memorandum, p. 32 (citing *A Choice of Models*, The Economist (January 2012)) (p. 33 of the PDF version of Exhibit CHI-1).
[158] Public Bodies Memorandum, p. 30 (p. 31 of the PDF version of Exhibit CHI-1).
[159] *See* Public Bodies Memorandum, pp. 30-33 (pp. 31-34 of the PDF version of Exhibit CHI-1).
[160] Public Bodies Memorandum, p. 31 (p. 32 of the PDF version of Exhibit CHI-1).
[161] Public Bodies Memorandum, p. 32 (p. 33 of the PDF version of Exhibit CHI-1).

> an ongoing challenge for SOE governance in China. This task is proving difficult given that almost half of the chairpersons and more than one third of chief executive officers of central SOEs were appointed by the Central Organization Department of the Communist Party and have civil servant status (Hu, 2007).[162]

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

> [K]ey positions are filled from the ranks of party and state officials which, according to the OECD, has the effect of imposing the party-state's policy intentions on the actions of SIEs. This system of appointments thus establishes and maintains a strong, lasting and entrenched link between SIEs and the party-state, allowing the government to use SIEs as instruments to fulfill its legal mandate, and is therefore a key indicia of government exercise of "meaningful control" over such entities.[163]

99. Finally, the USDOC examined how meaningful control is exercised through the presence of party groups and committees, both in the state sector and beyond the state sector.[164] With respect to the state sector, the USDOC noted that:

> The GOC has stated that "{b}asically, the primary Party organization within an SIE serves as a general advisory body, but has no decision making authority within the company." However, third-party commentary indicates that primary party organizations can have a great deal of influence in certain circumstances. For example, the 2010 OECD report notes that Party committees in SOEs "often play an active role in human resources and the strategic decision making of the enterprise. . . ."[165]

Additionally, the USDOC observed that:

> A recent piece of legislation (an *Opinion*) issued *jointly* by the CCP and the State Council indicates that the CCP is clearly interested in certain day-to-day commercial affairs. The legislation requires CCP leaders (including those within a firm's party committee) in firms "subject to state control" to take part in certain major decisions, including personnel decisions, investment decisions, and overall strategy. This *Opinion* taken together with the general presence of party committees in firms appears to indicate[] that the government maintains a strong infrastructure for oversight and control of enterprises in the state sector.[166]

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

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[162] Public Bodies Memorandum, pp. 32-33 (quoting OECD Economic Survey: China, pp.115-116) (p. 33-34 of the PDF version of Exhibit CHI-1).
[163] Public Bodies Memorandum, p. 33 (p. 34 of the PDF version of Exhibit CHI-1).
[164] *See* Public Bodies Memorandum, pp. 33-36 (pp. 34-37 of the PDF version of Exhibit CHI-1).
[165] Public Bodies Memorandum, p. 34 (p. 35 of the PDF version of Exhibit CHI-1).
[166] Public Bodies Memorandum, p. 35 (p. 36 of the PDF version of Exhibit CHI-1).

> In accordance with the *[CCP] Constitution*, all organizations, including private commercial enterprises, are required to establish "primary organizations of the party" (or "Party committees") if the firm employs at least three party members. The *2006 Company Law* also states that an organization of CCP shall be set up in all companies, whether state, private, domestic or foreign-invested, "to carry out activities of the Chinese Communist Party."[167]

101. The USDOC cited an article in the Economist, which "speaks to the role of the party in SIEs *as well as private enterprises*, stating:"[168]

> The party has cells in most big companies—in the private as well as the state-owned sector -- complete with their own offices and files on employees. It controls the appointment of captains of industry and, in the SOEs, even corporate dogsbodies. It holds meetings that shadow formal board meetings and often trump their decisions, particularly on staff appointments. It often gets involved in business planning and works with management to control pay.[169]

102. In light of the evidence it examined, the USDOC found that "[t]he importance of coming to terms with the Party's influence appears to be an economic reality that many private entrepreneurs face,"[170] and the USDOC cited the Xinhua News Agency, which reported that "there were a total of '178,000 party organs in private firms in 2006, a rise of 79.8 percent over 2002.'"[171] The USDOC considered that "[t]he role of this party presence is unclear; it may exert varying degrees of control in different circumstances."[172]

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

103. In light of all the evidence, analysis, and explanation summarized above, and which is presented more fully in the Public Bodies Memorandum and the CCP Memorandum, the USDOC "reached certain conclusions about the categories of enterprises in China."[173]

> First, any enterprise in China in which the government has a full or controlling ownership interest is found to be a public body.[174]

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[167] Public Bodies Memorandum, p. 35 (p. 36 of the PDF version of Exhibit CHI-1).
[168] Public Bodies Memorandum, p. 35 (emphasis in original) (p. 36 of the PDF version of Exhibit CHI-1).
[169] Public Bodies Memorandum, pp. 35-36 (quoting "A Choice of Models," The Economist (January 2012)) (pp. 36-37 of the PDF version of Exhibit CHI-1). The word "dogsbody" is a British term referring to a person who is given boring, menial tasks to do. *See* https://www.google.com/#q=dogsbodies.
[170] Public Bodies Memorandum, p. 36 (p. 37 of the PDF version of Exhibit CHI-1).
[171] Public Bodies Memorandum, p. 36 (p. 37 of the PDF version of Exhibit CHI-1).
[172] Public Bodies Memorandum, p. 36 (p. 37 of the PDF version of Exhibit CHI-1).
[173] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).
[174] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).

> …
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> Second, enterprises in China in which the government has significant ownership that are also subject to certain government industrial plans may be found to be public bodies.[175]
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> …
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> Third, in light of the Chinese institutional and governance environment, the Department determined that certain enterprises that have little or no formal government ownership are public bodies if China's government exercises meaningful control over such enterprises.[176]

104. The USDOC explained that, to assess whether the input producers at issue in the section 129 proceedings here "satisfy the criteria and analysis summarized above and described in greater detail in the Public Bodies Memorandum and, thus, would be considered public bodies in these proceedings," the USDOC "issued to the GOC a public bodies questionnaire for each of the 12 relevant investigations to obtain necessary ownership and corporate governance information for those enterprises that produced inputs that were purchased by respondents during the [period of investigation] of the investigations."[177]

105. The USDOC's public bodies questionnaire consisted of two parts.[178] The first part of the questionnaire sought information regarding the producers of the inputs that were identified by USDOC, including: industrial plans, such as national five-year plans, sector-specific industrial plans, provincial and local five-year development plans, and sector-specific industrial plans; the objectives of the government in holding shares in the enterprises; whether the input producers are covered by any of the industrial plans; whether the input producers are subject to governmental approval for any mergers, restructurings, or capacity additions; and whether SASAC, or any other government entity, has approved mergers, acquisitions, capacity additions, or reductions for input producers.

106. In the second part of the public bodies questionnaire, the USDOC "asked the GOC to respond to the *Input Producer Appendix* for each enterprise that produced an input which was purchased by a respondent in the relevant investigations."[179] Through the *Input Producer Appendix*, the USDOC asked the GOC to provide, for all majority government-owned enterprises, the full corporate name of the company, the articles of incorporation, and capital verification reports.[180] For non-majority government-owned enterprises, in addition to the information described in the preceding sentence, the USDOC asked for additional information,

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[175] Public Bodies Preliminary Determination, p. 10 (emphasis added) (p. 11 of the PDF version of Exhibit CHI-4).
[176] Public Bodies Preliminary Determination, p. 10 (emphasis added) (p. 11 of the PDF version of Exhibit CHI-4).
[177] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[178] *See Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437)*, Questionnaire Concerning "Public Bodies" ("Public Bodies Questionnaire") (Exhibit USA-83).
[179] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).
[180] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

including articles of groupings, company by-laws, annual reports, articles of association, business group registration, business licenses, and tax registration documents.[181] The USDOC also asked for information relating to the company's ownership, including voting shares, whether any owners were government entities, the corporate governance structure, and the role of minority shareholders.[182] Lastly, the USDOC asked for information concerning key decision-making, restructuring, and key persons.[183] The USDOC explained that it sought the above information because it was "critical to the Department's determination of whether the GOC exercises control over the enterprises"[184] "such that these entities possess, exercise, or are vested with governmental authority."[185]

107. In seven of the twelve section 129 proceedings,[186] the GOC simply refused to respond to the USDOC's request for information. The USDOC therefore found that the GOC failed to participate, it withheld information that was requested, and it significantly impeded the proceedings.[187] Accordingly, the USDOC determined that it was justified in "resorting to the use of facts otherwise available" and that "an adverse inference in selecting from among the facts otherwise available is warranted."[188] While the GOC's refusal to provide requested information meant that entity-specific "information necessary to th[e] evaluation of whether the relevant input producers qualify as 'public bodies' is not available on the record,"[189] the USDOC determined that:

> Nonetheless, the records of the seven Section 129 proceedings includes the Public Bodies Memorandum and CCP Memorandum, and thus contain factual information on which the Department can rely concerning the role played by the GOC in enterprises such as the input producers in the seven Section 129 proceedings. As discussed in more detail above, the Public Bodies and CCP Memoranda discuss evidence that the state sector maintains a leading role in the Chinese economy, the GOC exercises meaningful control over SIEs in China, the GOC maintains control over enterprises with little to no formal government ownership through the presence of the CCP in these enterprises, etc. This evidence supports an [adverse facts available] determination that the input producers in the seven Section 129 proceedings are public bodies.[190]

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[181] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).
[182] *See* Public Bodies Preliminary Determination, pp. 23-24, Attachment 2 (pp. 24-25 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).
[183] *See* Public Bodies Preliminary Determination, pp. 24-27, Attachment 2 (pp. 25-28 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).
[184] Public Bodies Preliminary Determination, p. 12 (p. 13 of the PDF version of Exhibit CHI-4).
[185] Public Bodies Preliminary Determination, p. 9 (p. 10 of the PDF version of Exhibit CHI-4).
[186] *Lawn Groomers, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions,* and *Solar Panels*. *See* Public Bodies Preliminary Determination, pp. 12-14, (pp. 13-15 of the PDF version of Exhibit CHI-4).
[187] *See* Public Bodies Preliminary Determination, p. 13, (p. 14 of the PDF version of Exhibit CHI-4).
[188] Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).
[189] Public Bodies Preliminary Determination, pp. 12-13 (pp. 13-14 of the PDF version of Exhibit CHI-4).
[190] Public Bodies Preliminary Determination, p. 13 (p. 14 of the PDF version of Exhibit CHI-4).

108. In the remaining five section 129 proceedings,[191] "the GOC reported that most of the input producers at issue … are majority-owned by the government" and the GOC provided information for those producers, including the "corporate name of the company and address; Articles of Incorporation; and Capital Verification Reports."[192] "Based on the GOC's public bodies responses and evidence that any enterprise in which the government has full or controlling ownership is a public body," *i.e.*, the evidence, analysis, and explanation summarized above and fully elaborated in the Public Bodies Memorandum and the CCP Memorandum, the USDOC "preliminarily determine[d] that the GOC meaningfully controlled those input producers that were majority government-owned during the relevant POIs such that they possess, exercise or are vested with government authority."[193] Accordingly, the USDOC found the majority-owned input producers in these five section 129 proceedings to be public bodies.[194]

109. In the same five section 129 proceedings, "the GOC reported that the government had minority (less than 50 percent) ownership in several input producers and provided for some enterprises Articles of Incorporation, Capital Verification Reports, and Articles of Association."[195] As described above, the USDOC asked for substantially more information about enterprises in which the GOC has a minority ownership interest so that the USDOC could assess "the role of government and/or CCP officials in the management and operations of the input producers, and in the management and operations of the producers' owners."[196] The USDOC explained that the GOC's refusal to respond fully to the USDOC's questionnaires meant that entity-specific "information necessary to the analysis of whether the producers are 'public bodies' is not available on the record."[197] The USDOC found that the GOC failed to cooperate to the best of its ability, it withheld information that was requested of it, and it significantly impeded the proceedings.[198] As a result, the USDOC determined that it was necessary to "resort[] to the use of facts otherwise available" and that "an adverse inference is warranted in selecting from the facts otherwise available."[199]

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

> Because the GOC declined to provide complete responses for those input producers that are non-majority government-owned, the Department does not have the complete record of ownership and corporate governance that is necessary to conduct a public bodies analysis of the relevant input producers. However, the Department has on the record in the form of the Public Bodies and CCP Memoranda factual information on which it can rely concerning the role played by the GOC and CCP in minority-owned enterprises...

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[191] *Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG,* and *Steel Cylinders. See* Public Bodies Preliminary Determination, pp. 14-18 (pp. 15-19 of the PDF version of Exhibit CHI-4).
[192] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4).
[193] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4).
[194] *See* Public Bodies Preliminary Determination, pp. 14-15 (pp. 15-16 of the PDF version of Exhibit CHI-4).
[195] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[196] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[197] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[198] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[199] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

> …
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> Drawing upon that evidence contained in the Public Bodies and CCP Memoranda and the GOC's failure to completely respond to the "non-majority government-owned enterprises" questions contained within the *Input Producer Appendix*, we preliminarily determine, as [adverse facts available], that non-majority government-owned input producers are public bodies because enterprises that either have significant ownership or have little or no formal government ownership are public bodies if the Department determines, on a case-by-case basis that the government exercises meaningful control over such enterprises.[200]

111. Accordingly, the USDOC found that non-majority government-owned enterprises that produced the inputs purchased by the respondents in the five section 129 proceedings were public bodies.[201]

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

112. In the Public Bodies Final Determination, the USDOC addressed comments made by the GOC concerning the USDOC's Public Bodies Preliminary Determination, which the GOC had submitted in a case brief.[202] After summarizing and discussing the GOC's arguments, the USDOC responded to the GOC's contentions. The USDOC explained, *inter alia*, that:

> [W]e do not agree that the Department's approach to the public body issue fails in some regard to address the inquiry laid out by the Appellate Body. As the GOC recognizes, the Department's analysis addresses the extent that the government exercises meaningful control over the relevant entities. In the words of the Appellate Body, this may serve "as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions." As such, the Department's inquiries along these lines are directly related to the question of whether the entities possess, exercise, or are vested with governmental authority within the meaning of Article 1.1(a)(1) of the SCM Agreement.[203]

113. The USDOC further explained that:

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

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[200] Public Bodies Preliminary Determination, p. 16 (p. 17 of the PDF version of Exhibit CHI-4).
[201] *See* Public Bodies Preliminary Determination, p. 17 (p. 18 of the PDF version of Exhibit CHI-4).
[202] *See* Public Bodies Final Determination, pp. 2-6 (pp. 3-7 of the PDF version of Exhibit CHI-5).
[203] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).

> of the economy and upholding the socialist market economy." Of course, as noted above, the GOC has in some instances provided incomplete responses to these questionnaires, thus affecting the completeness of the information the Department had to analyze. However, as discussed in [the] *Public Bodies Preliminary Determination*, even where the GOC's failure to respond resulted in the Department basing its analyses in part on the facts available, the Department's public body determinations are supported by affirmative record evidence.[204]

114. The USDOC also explained that it disagreed with the GOC's argument that the USDOC "deemed the information [the GOC] submitted irrelevant to the public body determinations."[205] The USDOC pointed out that "in cases where the GOC responded to requests for information, the Department considered the information submitted by the GOC and relied on that information to determine that the relevant entities were public bodies."[206]

115. Ultimately, the USDOC concluded that it did not agree with the arguments presented in the GOC's case brief and therefore the USDOC adopted the preliminary determination with respect to public bodies, as described in the Public Bodies Preliminary Determination, for the final determination.[207]

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

116. As demonstrated above, the USDOC's public body determinations in the section 129 proceedings at issue in this compliance proceeding were reasoned and adequate and included extensive analysis and explanation; they were based on the totality of the evidence on the record; and they were supported by ample record evidence of the "core features" of the entities in question and their "relationship to the government," which establishes that the entities possess, exercise, or are vested with governmental authority to perform governmental functions in China.[208]

117. 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. As discussed in the following subsection, the arguments China presents in its first written submission against the USDOC's public body determinations utterly lack merit.

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[204] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).
[205] Public Bodies Final Determination, p. 5, note 26 (p. 6 of the PDF version of Exhibit CHI-5).
[206] Public Bodies Final Determination, p. 5, note 26 (p. 6 of the PDF version of Exhibit CHI-5).
[207] Public Bodies Final Determination, p. 6 (p. 7 of the PDF version of Exhibit CHI-5).
[208] *US – Countervailing Measures (China) (Panel)*, para. 7.66.

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

118. In its first written submission, China offers numerous criticisms of the USDOC's public body determinations in the section 129 proceedings.[209] None of China's arguments has any merit.

119. As an initial matter, 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,"[210] which, as demonstrated above in section II.A.1, is legally erroneous and does not accord with findings in prior reports addressing the meaning of that term.

120. 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."[211] 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,[212] is a government function, and that engaging in that activity is consistent with the government's objectives.[213] As explained above, nothing in the original Panel's findings, nor in prior findings of the Appellate Body, supports China's position.

121. 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."[214] 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.

122. As explained above, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body upheld the USDOC's public body determination with regard to Chinese SOCBs, and the USDOC's determination there was founded on evidence and analysis similar to that here. In that dispute:

> [T]he USDOC relied on information regarding ownership and control. In addition, however, it considered other factors, such as a provision in China's Commercial Banking Law stipulating that banks are required to "carry out their loan business upon the needs of [the] national economy and the social development and under the guidance of State industrial policies". The USDOC also took into consideration an excerpt from the Bank of China's Global Offering,

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[209] *See* China's First Written Submission, paras. 100-165.
[210] *See, e.g.*, China's First Written Submission, paras. 100, 104, 106, 122, 128, 139, 156.
[211] China's First Written Submission, para. 100.
[212] *See* China's First Written Submission, para. 106.
[213] *See* China's First Written Submission, para. 104.
[214] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.

> which states that the "Chinese Commercial Banking Law requires commercial banks to take into consideration government macroeconomic policies in making lending decisions", and that accordingly "commercial banks are encouraged to restrict their lending to borrowers in certain industries in accordance with relevant government policies". The USDOC also considered a 2005 OECD report, stating that "[t]he chief executives of the head offices of the SOCBs are government appointed and the party retains significant influence in their choice". In addition, the USDOC considered evidence indicating that SOCBs still lack adequate risk management and analytical skills.[215]

123. The Appellate Body sustained the USDOC's determination because "the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions," and the Appellate Body noted that "the USDOC also referred to certain other evidence on the record … demonstrating that SOCBs are required to support China's industrial policies."[216] The Appellate Body therefore concluded that "these considerations, taken together, demonstrate that the USDOC's public body determination in respect of SOCBs was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government."[217]

124. Similarly, in the section 129 proceedings here, as summarized above and explained fully in the USDOC's preliminary and final determinations and in the Public Bodies Memorandum and the CCP Memorandum, the USDOC likewise considered and discussed evidence indicating that the relevant input suppliers in China are controlled by the government and that they effectively exercise certain governmental functions. The USDOC also referred to certain other evidence on the record demonstrating that the input providers are required to support China's industrial policies.[218] The USDOC's public body determinations thus are fully consistent with the requirements of Article 1.1(a)(1) of the SCM Agreement, as properly interpreted.

125. In addition to failing because they are premised on China's flawed proposed legal interpretation, China's arguments also lack merit simply because they are unfounded. China argues that the USDOC is required "to undertake a new analysis for each countervailing duty investigation"[219] and further contends that the USDOC failed to "engage in a case-by-case analysis."[220]

126. In fact, as explained above, 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 information that the USDOC requested.[221] Additionally, the Appellate Body has explained, *inter alia*, that the "characteristics of a public body are bound

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[215] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[216] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[217] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).
[218] *See supra*, section II.A.2.a.
[219] China's First Written Submission, para. 102.
[220] China's First Written Submission, para. 107.
[221] *See supra*, section II.A.2.a.iv.

to differ from entity to entity, State to State, and case to case."[222] As demonstrated above, the Public Bodies Memorandum and the CCP Memorandum present pertinent analysis and explanation relating to the government and economic system of China.[223] Such analysis and explanation is relevant in any countervailing duty investigation involving allegations that an input provider in China is a public body.

127. China complains that the Public Bodies Memorandum was "drafted four years ago" in 2012.[224] China does not argue, though, that the Chinese laws, regulations, and industrial policies discussed in the Public Bodies Memorandum, as well as in the CCP Memorandum, differed or were not in effect during the periods of investigation of the various section 129 proceedings at issue here. Indeed, the Public Bodies Memorandum was originally produced in connection with section 129 proceedings regarding countervailing duty investigations that were initiated in 2007,[225] and the countervailing duty investigations at issue here were initiated in the period 2007-2012.[226] Thus, China's implication that the evidence, analysis, and explanation in the Public Bodies Memorandum and the CCP Memorandum is stale lacks any merit.

128. China also complains that the Public Bodies Memorandum was drafted "in relation to four unrelated countervailing duty investigations"[227] and that "the very limited part of the USDOC's analysis in the Public Bodies Memorandum that is focused on particular industries is largely focused on industries that were relevant to the investigations at issue in DS379 (i.e. textiles and automobiles), not to those at issue in DS437."[228]

129. China omits that the Public Bodies Memorandum also was drafted in relation to investigations concerning two steel products – circular welded carbon quality steel pipe and light-walled rectangular pipe and tube – and includes discussion of various measures and evidence related to the steel sector in China. That discussion, of course, is highly relevant to a number of the investigations at issue here. In any event, as China itself acknowledges, the analysis in the Public Bodies Memorandum that is focused on particular industries is a "very limited part" of the analysis.[229] As discussed above, the Public Bodies Memorandum and the CCP Memorandum present a broad analysis of evidence related to the government and economic system in China, which, as the USDOC explained, is relevant to and constitutes part of the section 129 public body determinations here.[230]

130. China contends that "the GOC provided extensive evidence" to the USDOC and the USDOC "ignored" that evidence.[231] This is untrue. As explained in the Public Bodies Final Determination, "in cases where the GOC responded to requests for information, the Department

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[222] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317 (emphasis added). *See also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, 4.42.
[223] *See supra*, section II.A.2.a.i-iii.
[224] China's First Written Submission, para. 103. *See also, id.,* para. 123.
[225] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 2.2, 2.7, 2.11, and 2.15.
[226] *See US – Countervailing Measures (China) (Panel)*, para. 7.1.
[227] China's First Written Submission, para. 103.
[228] China's First Written Submission, para. 123.
[229] China's First Written Submission, para. 123.
[230] *See* Public Bodies Final Determination, p. 5 (p. 6 of the PDF version of Exhibit CHI-5); Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4). *See also supra*, section II.A.2.a.i-iii.
[231] *See* China's First Written Submission, paras. 108-112.

considered the information submitted by the GOC and relied on that information to determine that the relevant entities were public bodies."[232]

131. China further suggests that "the GOC provided numerous laws, regulations, and industrial plans"[233] as part of its questionnaire response and argues that the USDOC failed "to evaluate the evidence submitted by the GOC and to provide a reasoned explanation for why it 'rejected or discounted' evidence that was contrary to its determination."[234] In reality, rather than failing to evaluate the evidence submitted by the GOC, and far from rejecting or discounting that evidence, the USDOC actually discussed that evidence at length and the USDOC relied on the evidence as support for its conclusions.

132. For example, China points to "economic and sector specific plans,"[235] the *11th Five-Year Plan*,[236] the *Decision of the State Council on Promulgating the Interim Provisions on Promoting Industrial Structure Adjustment (No. 40 {2005})* ("*Decision No. 40*"),[237] and the *Iron and Steel Policy*,[238] which China submitted to the USDOC and discussed in its questionnaire response. The USDOC itself discussed precisely those documents in the Public Bodies Memorandum, as China acknowledges in its first written submission. In China's own words, "the USDOC asserts that China's industrial plans 'provide a roadmap of often specific, state-guided interventions in a wide range of important industrial sectors and the individual business decisions of enterprises in these sectors'."[239] "The USDOC asserts in relation to the *11th Five-Year Plan* that 'the government both incentivizes and demands certain firm behavior in furtherance of industrial policy goals embodied in the Eleventh FYP."[240] "According to the USDOC, *Decision No. 40* is a 'policy document meant to guide investment and restructuring of a number of industries' in relation to China's *11th Five-Year Plan*, which calls for 'a number of measures to be undertaken in order to meet the policy goals of the state and is explicit in its mandate for the State at all levels'."[241] "[T]he USDOC states that the *Iron and Steel Policy* 'contemplates numerous specific actions that will be carried out by the enterprises it covers', citing eleven different articles of the policy as examples of such directed conduct."[242]

133. In light of these statements that China made in its own first written submission, it is unclear how China can justify representing to the Panel that the USDOC failed "to evaluate the evidence submitted by the GOC."[243] China contends that "the USDOC did not address these plans, or the GOC's explanation of their nature and purpose, in any respect in its Preliminary or Final Public Bodies Determination."[244] However, as China itself explains, the USDOC did address the plans, laws, and regulations to which the GOC pointed, as well as a host of other

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[232] Public Bodies Final Determination, p. 5, note 26 (p. 6 of the PDF version of Exhibit CHI-5).
[233] China's First Written Submission, para. 109.
[234] China's First Written Submission, para. 112.
[235] China's First Written Submission, para. 116.
[236] *See* China's First Written Submission, paras. 117-118.
[237] *See* China's First Written Submission, paras. 119-120.
[238] *See* China's First Written Submission, paras. 120-121.
[239] China's First Written Submission, para. 122 (citing Public Bodies Memorandum, p. 23).
[240] China's First Written Submission, para. 117 (citing Public Bodies Memorandum, p.19).
[241] China's First Written Submission, para. 119 (citing Public Bodies Memorandum, pp. 17, 19).
[242] China's First Written Submission, para. 121 (citing Public Bodies Memorandum, pp. 22-23, nn. 86-91).
[243] China's First Written Submission, para. 112.
[244] China's First Written Submission, para. 126 (emphasis omitted).

plans, laws, regulations, articles, and various sources of information, in the Public Bodies Memorandum and the CCP Memorandum. The USDOC placed those memoranda and the evidence underlying them onto the administrative records of the section 129 proceedings, and the USDOC incorporated the memoranda by reference into the Public Bodies Preliminary Determination and the Public Bodies Final Determination.[245] All of those documents, read together, set forth the USDOC's public body determinations.

134. China also contends that the USDOC "failed to address" evidence on the record demonstrating that China's legal regime insulates SIEs from governmental interference in day-to-day operations.[246] China selectively cites to certain documents, including "[t]he instrument establishing the SASAC, the *Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises (2003)* ('*Tentative Measures*'),"[247] the 2008 *Law on State-Owned Assets of Enterprises*,[248] and the *Company Law*.[249] Yet again, however, China itself explains that the USDOC referenced these documents in the Public Bodies Memorandum.[250] China may disagree with the USDOC's analysis and the weight that the USDOC gave to certain evidence, but there is no justification for China's assertion that the USDOC "failed to address" the evidence.[251] [252]

135. China also points to other evidence that the USDOC purportedly did not take into consideration and which, in China's view, weighs against the USDOC's conclusions.[253] In this regard, the United States recalls that the USDOC explained why it was necessary to base its

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[245] *See* Public Bodies Final Determination, pp. 2, 5 (pp. 3, 6 of the PDF version of Exhibit CHI-5). *See also* Public Bodies Preliminary Determination, p. 10 ("The Department has addressed whether the input producers at issue in these DS437 Section 129 proceedings satisfy the criteria and analysis summarized above <u>and described in greater detail in the Public Bodies Memorandum</u> and, thus, would be considered public bodies in these proceedings." (emphasis added)) (p. 11 of the PDF version of Exhibit CHI-4).
[246] *See* China's First Written Submission, paras. 128-144.
[247] *See* China's First Written Submission, paras. 131-135.
[248] *See* China's First Written Submission, paras. 135-137.
[249] *See* China's First Written Submission, para. 137.
[250] *See, e.g.,* China's First Written Submission, para. 139.
[251] *See* China's First Written Submission, paras. 128-144.
[252] The United States notes that China refers to the GOC's argument to the USDOC that "the fact that SIEs 'are entitled to the right to autonomy in business operations' under Chinese law is fully consistent with China's commitment in Paragraph 46 of the Working Party Report [on China's WTO Accession] that such entities 'would make purchases and sales based solely on commercial considerations', and that China 'would not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country of origin of any goods purchased or sold'." China's First Written Submission, para. 141. China also suggests that, pursuant to the "good faith principle," "China is entitled to a presumption that it is honouring its commitment." China's First Written Submission, para. 142. China correctly observes that the USDOC did not refer to Paragraph 46 of the Working Party Report. The USDOC also did not refer to Paragraph 172 of the Working Party Report, which explains that "[s]ome members of the Working Party, in view of the special characteristics of China's economy, sought to clarify that when state owned enterprises (including banks) provided financial contributions, they were doing so as government actors within the scope of Article 1.1(a) of the SCM Agreement," and the response by the representative of China acknowledging that such transaction would constitute "financial contributions" but suggesting that they "would not necessarily give rise to a benefit." It was not necessary for the USDOC to refer to China's Working Party Report in connection with its assessment of whether the input producers at issue in the section 129 proceedings are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.
[253] *See, e.g.,* China's First Written Submission, paras. 122-126, 145-156.

public body determinations on the facts otherwise available and why drawing adverse inferences in selecting from the facts otherwise available was warranted, given the GOC's failure to provide requested information.[254] China contends that "the application of 'facts available' does not excuse the application of the wrong legal standard."[255] Here, though, is a further indication that China's criticisms of the USDOC's public body determinations are premised on China's flawed interpretation of the term "public body," and thus China's criticisms lack merit for that reason.

136. In its concluding comments on the USDOC's public body determinations in the section 129 proceedings, China recalls guidance that the Appellate Body has provided concerning determinations made by investigating authorities in countervailing duty proceedings:

> [T]he Appellate Body has explained that investigating authorities must provide a "reasoned and adequate explanation as to: (i) how the evidence on the record supported its factual findings; and (ii) how those factual findings supported the overall subsidy determination". This reasoned and adequate explanation "should be discernible from the published determination itself". Furthermore, "[t]he explanation provided by the investigating authority—with respect to its factual findings as well as its ultimate subsidy determination—should also address alternative explanations that could reasonably be drawn from the evidence, as well as the reasons why the agency chose to discount such alternatives in coming to its conclusions".[256]

137. China asserts that "[t]he USDOC provided no such 'reasoned and adequate explanation' on the face of its published determinations, much less address 'alternative explanations that could reasonably be drawn from the evidence'."[257] 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.

138. In the Public Bodies Final Determination, the USDOC explained that it did not agree with the GOC that the USDOC's "approach to the public body issue fails in some regard to address the inquiry laid out by the Appellate Body."[258] That contention made by the GOC to the USDOC – both in its questionnaire response and in its case brief – is the same argument that underlies the criticisms of the USDOC's public body determinations that China now presents in this compliance proceeding. China's arguments are now and were throughout the section 129 proceedings premised on China's flawed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

139. The USDOC discussed the evidence that the GOC submitted and, taking into account the totality of the evidence before it, came to a different conclusion than that for which the GOC argued. This was, in large part, because the GOC's arguments were flawed as a matter of law, but also because the evidence to which the GOC pointed, including its selective citation of

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[254] *See supra*, section II.A.2.a.iv.
[255] China's First Written Submission, para. 156.
[256] China's First Written Submission, para. 162 (citing Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 186).
[257] China's First Written Submission, para. 163.
[258] Public Bodies Final Determination, p. 5 (citations omitted) (p. 6 of the PDF version of Exhibit CHI-5).

various measures, simply was outweighed, in the USDOC's view, by the ample record evidence to the contrary that supported the USDOC's conclusions, and which the USDOC discussed at length, in particular in the Public Bodies Memorandum and the CCP Memorandum.

140. When it upheld the USDOC's public body determination with respect to SOCBs in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body reasoned that, "[w]hether or not we would have reached the same conclusion, it seems to us that … the USDOC did consider and discuss evidence indicating that SOCBs in China are controlled by the government and that they effectively exercise certain governmental functions."[259] Likewise, here, whether or not the Panel – or China – would have reached the same conclusion, it is undeniable that the USDOC considered and discussed a tremendous amount of record evidence indicating that the relevant input providers in China are controlled by the government and that they effectively exercise certain governmental functions.

141. The Panel should, as the Appellate Body has found previously, "seek to review the [USDOC's] decision on its own terms, in particular, by identifying the inference drawn by [*the USDOC*] from the evidence, and then by considering whether the evidence could sustain that inference."[260] The evidence before the USDOC, taken in its totality, as analyzed and discussed by the USDOC at length in the preliminary and final determinations and in the Public Bodies Memorandum and the CCP Memorandum, supports the conclusion that, consistent with the DSB's recommendations and the SCM Agreement, the USDOC "evaluate[d] 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."[261]

142. For the reasons given above, the Panel should find that the USDOC's public body determinations in the section 129 proceedings at issue here comply with the DSB's recommendations concerning the "as applied" findings with respect to the USDOC's public body determinations in the challenged investigations, and they are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

c. 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

143. As explained above, China proposes a new, flawed interpretation of the term "public body," and China premises its attacks on the USDOC's public body determinations in the section 129 proceedings on that erroneous interpretation. For the reasons given already,[262] China's claim that the United States has not complied with the recommendations of the DSB lacks merit. The Panel's analysis of China's claim should end there.

144. However, as demonstrated in this subsection, China's claim also fails because, even under China's new proposed interpretation of the term "public body," the USDOC's public body

[259] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[260] *Japan – DRAMs (Korea) (AB)*, para. 131 (emphasis in original on the "*agency*").
[261] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[262] *See supra*, sections II.A.1, II.A.2.a, and II.A.2.b.

determinations in the section 129 proceedings that were based on the facts otherwise available nevertheless comply with the recommendations of the DSB and are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

145. China argues 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,[263] is a government function, and that engaging in that activity is consistent with the government's objectives.[264] Without question, an investigating authority applying China's proposed interpretation of the term "public body" would, under ideal circumstances, base a public body determination on entity-specific information. Such entity-specific information necessarily would have to be provided to the investigating authority by interested parties during the proceeding. Article 12.7 of the SCM Agreement provides that, "[i]n cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

146. As described above in section II.A.2.a.iv, the USDOC requested from the GOC entity-specific information that would be relevant even under China's new proposed interpretation of the term "public body." For example, the USDOC requested from the GOC information regarding the producers of the inputs that were identified by USDOC, including: industrial plans, such as national five-year plans, sector-specific industrial plans, provincial and local five-year development plans, and sector-specific industrial plans; the objectives of the government in holding shares in the enterprises; whether the input producers are covered by any of the industrial plans; whether the input producers are subject to governmental approval for any mergers, restructurings, or capacity additions; and whether SASAC, or any other government entity, has approved mergers, acquisitions, capacity additions, or reductions for input producers.[265] The USDOC also asked the GOC to provide other information about the entities, including: the full corporate name of the company, the articles of incorporation, and capital verification reports;[266] articles of groupings, company by-laws, annual reports, articles of association, business group registration, business licenses, and tax registration documents;[267] information relating to the company's ownership, such as voting shares, whether any owners were government entities, the corporate governance structure, and the role of minority shareholders;[268] and information concerning key decision-making, restructuring, and key persons.[269] Even under China's new proposed interpretation, all of this information would be probative of whether the entities engaging in the transactions at issue – selling inputs to

[263] *See* China's First Written Submission, para. 106.
[264] *See* China's First Written Submission, para. 104.
[265] *See* Public Bodies Questionnaire (Exhibit USA-83).
[266] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).
[267] *See* Public Bodies Preliminary Determination, p. 23, Attachment 2 (p. 24 of the PDF version of Exhibit CHI-4).
[268] *See* Public Bodies Preliminary Determination, pp. 23-24, Attachment 2 (pp. 24-25 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).
[269] *See* Public Bodies Preliminary Determination, pp. 24-27, Attachment 2 (pp. 25-28 of the PDF version of Exhibit CHI-4). *See also* Public Bodies Questionnaire (Exhibit USA-83).

purchasers that were the subject of the countervailing duty investigations – were exercising a government function in China when they engaged in such transactions.

147. However, in seven of the twelve section 129 proceedings,[270] the GOC simply refused to respond to the USDOC's request for information. In the remaining five section 129 proceedings,[271] the GOC provided only partial responses to the USDOC's questionnaire.[272] Given that China failed to cooperate, refused to provide requested information, and significantly impeded the proceedings, the USDOC, in any event, would not have had before it the kind of entity-specific evidence contemplated by China's new proposed interpretation. Accordingly, the USDOC's determinations justifiably would have been based on facts otherwise available and an adverse inference in selecting from the facts otherwise available, as they, in fact, were.

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

149. Section II.A.2.a summarizes the analysis of the evidence and the explanation for its public body determinations that the USDOC provided in the section 129 proceedings. The preliminary and final public body determinations, read together with the Public Body Memorandum and the CCP Memorandum, present the USDOC's complete findings. The United States recalls that the USDOC analyzed the functions or conduct that are of a kind ordinarily classified as governmental in the legal order of China.[273] The USDOC examined and discussed the conclusions it drew from, *inter alia*, China's *Constitution*, the *Constitution of the Chinese Communist Party*, the 2007 *Property Law of the People's Republic of China*, the 2006 *Company Law of the People's Republic of China*, the 2008 *Law on State-Owned Assets of Enterprises*, the 2003 *Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises,* and the 2006 *Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the SASAC about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-owned Enterprises*.[274]

150. The USDOC examined and discussed the role played by the CCP in China's system of governance.[275] In light of the USDOC's examination of voluminous record evidence, which it discusses at length,[276] the USDOC drew a number of conclusions relating to the meaningful control exercised by the CCP over the economy, and individual enterprises, with the aim of

[270] *Lawn Groomers, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminum Extrusions,* and *Solar Panels. See* Public Bodies Preliminary Determination, pp. 12-14 (pp. 13-15 of the PDF version of Exhibit CHI-4).
[271] *Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG,* and *Steel Cylinders. See* Public Bodies Preliminary Determination, pp. 14-18 (pp. 15-19 of the PDF version of Exhibit CHI-4).
[272] *See* Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[273] *See supra*, section II.A.2.a.i (discussing and citing the USDOC's public body determinations in the section 129 proceedings).
[274] *See supra*, section II.A.2.a.i (discussing and citing the USDOC's public body determinations in the section 129 proceedings).
[275] *See supra*, section II.A.2.a.ii (discussing and citing the USDOC's public body determinations in the section 129 proceedings).
[276] *See generally*, CCP Memorandum (p. 41 *et seq.* of the PDF version of Exhibit CHI-1).

effectuating government goals related to maintaining economic growth and protecting the central role of socialism in China's economy.[277]

151. The USDOC then "evaluate[d] the core features of the entity in question and its relationship to government"[278] by examining and discussing the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority.[279] The USDOC first examined Chinese legal instruments that "require SIEs to comply with government policy directives."[280] The USDOC then presented a detailed analysis of evidence relating to meaningful control,[281] beginning with a discussion of the predominant role of the state sector and industrial policies,[282] including: government exercise of control through the provision of direct and indirect benefits,[283] five-year plans,[284] supporting legislation,[285] the importance of ownership levels,[286] and industry-specific plans.[287]

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

153. This is particularly true in a situation, as was the case in these section 129 proceedings, where the GOC refused to provide entity-specific information, making it necessary for the USDOC to base its public body determinations on facts otherwise available and draw an adverse inference in selecting from the facts otherwise available. In the absence of entity-specific evidence that the particular activity in which the entity is engaging is a government function and that engaging in that activity is consistent with the government's objectives[288] – which evidence is not on the administrative record because of the GOC's failure to provide it when given the opportunity to do so – Article 12.7 of the SCM Agreement permits the USDOC, and all Members' investigating authorities, to make a determination based on facts otherwise available, such as the ample record evidence that the USDOC examined and discussed in the determinations and memoranda in these section 129 proceedings.

154. For these reasons, China's claim also fails because, even under China's new proposed interpretation of the term "public body," the USDOC's public body determinations relying on the

[277] *See supra*, section II.A.2.a.ii (discussing and citing the USDOC's public body determinations in the section 129 proceedings).
[278] *US – Countervailing Measures (China) (Panel)*, para. 7.66.
[279] *See supra*, section II.A.2.a.iii (discussing and citing the USDOC's public body determinations in the section 129 proceedings).
[280] *See supra*, section II.A.2.a.iii (discussing and citing the USDOC's public body determinations in the section 129 proceedings).
[281] *See* Public Bodies Memorandum, pp. 12-14 (pp. 13-15 of the PDF version of Exhibit CHI-1).
[282] *See* Public Bodies Memorandum, p. 14 (p. 15 of the PDF version of Exhibit CHI-1).
[283] *See* Public Bodies Memorandum, pp. 14-17 (pp. 16-18 of the PDF version of Exhibit CHI-1).
[284] *See* Public Bodies Memorandum, pp. 17-19 (pp. 18-20 of the PDF version of Exhibit CHI-1).
[285] *See* Public Bodies Memorandum, pp. 19-20 (pp. 20-21 of the PDF version of Exhibit CHI-1).
[286] *See* Public Bodies Memorandum, pp. 20-21 (pp. 21-22 of the PDF version of Exhibit CHI-1).
[287] *See* Public Bodies Memorandum, pp. 21-23 (pp. 22-24 of the PDF version of Exhibit CHI-1).
[288] *See* China's First Written Submission, paras. 104, 106.

facts otherwise available were reasoned and adequate in the circumstances of the section 129 proceedings.

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

155. China claims that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement.[289] As demonstrated below, China's claim fails for a number of reasons. First, China cannot bring a challenge against the Public Bodies Memorandum within the scope of this Article 21.5 compliance proceeding because, even were the memorandum to constitute a "measure," China could have challenged this "measure" in the original proceeding, but opted not to do so. 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. Third, the Public Bodies Memorandum cannot be challenged "as such." Fourth, and finally, even if the Public Bodies Memorandum could be challenged "as such," the memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement.

1. Article 21.5 of the DSU Precludes China from Bringing a Claim Against the Public Bodies Memorandum in this Compliance Proceeding Because the Memorandum Is Not a Measure Taken To Comply in this Dispute and China Could Have Challenged the Memorandum in the Original Proceeding, But Opted Not To Do So

156. China asserts that the Public Bodies Memorandum is a "measure taken to comply" under Article 21.5 of the DSU.[290] China further asserts that the Public Bodies Memorandum was adopted to achieve compliance "with the Appellate Body's findings in DS379."[291] However, China's own assertions about the origin of the Public Bodies Memorandum demonstrate that China cannot bring a claim against the Public Bodies Memorandum as part of this compliance proceeding because the memorandum is not a measure taken to comply in this dispute and 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.

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

> Where there is a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.

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[289] *See* China's First Written Submission, paras. 166-182. The United States notes that China's discussion of its "as such" claim against the Public Bodies Memorandum makes no mention of the CCP Memorandum. The United States further notes China's explanation that, "[w]hen China refers to the 'Public Bodies Memorandum' in [its first written] submission, this reference encompasses the 'CCP Memorandum' as well." China's First Written Submission, para. 7, n. 4. The United States considers the Public Bodies Memorandum and the CCP Memorandum to be separate documents.
[290] China's First Written Submission, para. 172.
[291] China's First Written Submission, para. 172.

158. The Appellate Body has explained that "Article 21.5 proceedings do not occur in isolation from the original proceedings, but . . . both proceedings form part of a continuum of events."[292] A feature of the first sentence of Article 21.5 is "the express link between the 'measures taken to comply' and the recommendations and rulings of the DSB. Accordingly, determining the scope of 'measures taken to comply' in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB."[293] "As a whole, Article 21 deals with events *subsequent* to the DSB's adoption of recommendations and rulings in a particular dispute."[294]

159. Per China's own assertions, with its "as such" claim against the Public Bodies Memorandum, China is not attempting to challenge a purported "measure" that was "adopted 'in the direction of, or for the purpose of achieving compliance' with"[295] the DSB's recommendations and rulings in *this* "particular dispute."[296] Rather, China is attempting to challenge a memorandum that was published in connection with measures taken to comply with the DSB's recommendations and rulings in an entirely different, earlier dispute. Article 21.5 of the DSU does not permit such a kind of lateral challenge. Rather, this proceeding is to resolve the "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with *the* recommendations and rulings" in *this* dispute, "including wherever possible [through] resort to the *original panel*" in *this* dispute.[297]

160. Additionally, the Appellate Body has found that Members generally may not make claims in compliance proceedings that they could have pursued during the original proceedings, but opted not to.[298] The reason for this principle is obvious: it would undermine the rules and procedures agreed by Members in the DSU if a Member could short-circuit original proceedings by choosing not to pursue certain claims during original proceedings, and then raising them for the first time under the expedited timetable of a compliance proceeding. Such a tactic also would deprive a responding Member of the reasonable period of time to comply with any recommendations and rulings of the DSU.

161. In this regard, the United States notes that the Public Bodies Memorandum was published on May 18, 2012.[299] As China observes, it was published in connection with U.S. implementation efforts related to the DSB's recommendations and rulings in *US – Anti-Dumping and Countervailing Duties (China)*.[300] In *this* dispute, China requested consultations with the

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[292] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 136.
[293] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 68.
[294] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 70 (italics in original, underlining added).
[295] China's First Written Submission, para. 172.
[296] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 70 (italics in original, underlining added).
[297] DSU, Art. 21.5 (emphasis added).
[298] *US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211 ("A complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."). The exception to this general rule is that WTO Members may make a claim against "a new and different measure" in compliance proceedings, even if the measure "incorporates components from the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply." *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 432.
[299] *See* Public Bodies Memorandum, p. 1 (p. 2 of the PDF version of Exhibit CHI-1).
[300] *See* China's First Written Submission, para. 172.

United States on May 25, 2012, *after* the publication of the Public Bodies Memorandum.[301] China and the United States actually held consultations later in the year, on June 25 and July 18, 2012.[302] China requested the establishment of the original panel on August 20, 2012.[303]

162. If the Public Bodies Memorandum is, itself, a "measure" that exists and is susceptible to WTO dispute settlement, as China alleges,[304] then the memorandum had this status immediately upon publication, which occurred prior to China's original request for consultations or panel request in this dispute. Accordingly, China was in a position to pursue a claim against the Public Bodies Memorandum in the original proceeding, but China opted not to, so China may not now make claims against the Public Bodies Memorandum in this compliance proceeding.[305]

163. For these reasons, China is precluded from pursuing a claim against the Public Bodies Memorandum in this Article 21.5 compliance proceeding.

2. The Public Bodies Memorandum is Not a Measure Susceptible to WTO Dispute Settlement

164. China's claim against the Public Body Memorandum also fails because the Public Body Memorandum is not a measure susceptible to WTO dispute settlement.

165. When it considered the question of what can constitute a measure subject to WTO dispute settlement, the original Panel reviewed findings made by prior panels and the Appellate Body.[306] The original Panel recalled that the Appellate Body has found that, "'[i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch'."[307] The Appellate Body has acknowledged that "a 'measure' may be any act of a Member, whether or not legally binding, and it can include even non-binding guidance by a government."[308] The original Panel reasoned that, "in principle, even a policy or practice of an investigating authority could be a 'measure' subject to WTO dispute settlement proceedings."[309]

166. When the original Panel assessed whether the "so-called 'rebuttable presumption' or 'Kitchen Shelving policy' is a 'measure'," it began by looking at the available text describing the alleged measure.[310] The Panel highlighted statements made by the USDOC in the Kitchen Shelving Issues and Decision Memorandum, such as "*our approach to analyzing*" and "we are taking this opportunity to clearly state our *policy*."[311] The Panel also pointed to the USDOC's

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[301] *See US – Countervailing Measures (China) (Panel)*, para. 1.1.
[302] *See US – Countervailing Measures (China) (Panel)*, para. 1.2.
[303] *See US – Countervailing Measures (China) (Panel)*, para. 1.3.
[304] *See* China's Panel Request in this compliance proceeding, para. 10.
[305] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211.
[306] *US – Countervailing Measures (China) (Panel)*, paras. 7.95-7.101.
[307] *US – Countervailing Measures (China) (Panel)*, para. 7.96 (quoting *US – Zeroing (EC) (AB)*, para. 188).
[308] *US – Countervailing Measures (China) (Panel)*, para. 7.100 (citing *Guatemala – Cement I (AB)*, fn 47 to para. 69).
[309] *US – Countervailing Measures (China) (Panel)*, para. 7.101.
[310] *US – Countervailing Measures (China) (Panel)*, para. 7.102.
[311] *US – Countervailing Measures (China) (Panel)*, para. 7.102 (emphasis added by the Panel).

"countervailing duty Preamble," which "characterizes the approach as a 'long standing practice'" and clarifies that "these rules 'deal with countervailing duty *methodology*' and 'codify certain *administrative practices*'."[312]

167. China points to no similar language suggesting that the USDOC intended in the Public Bodies Memorandum to describe an "approach," "policy," "long standing practice," or "methodology." China merely asserts, without any foundation, that the Public Bodies Memorandum "is now the 'legal standard that the USDOC applies by default' in its public bodies determinations."[313]

168. However, the Public Bodies Determination, 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:

> While record evidence leads the [USDOC] to the conclusion that the systemic analysis in this memorandum is appropriate for understanding the institutional and SIE-focused policy setting in China, we do not reach the conclusion that such a systemic analysis is necessary in every CVD investigation involving an allegation that an entity is a public body.[314]

169. Instead, the Public Bodies Memorandum sets forth "The Department's Findings" in "these Section 129 proceedings," that is, the section 129 proceedings that the USDOC undertook to implement the DSB's recommendations and rulings relating to certain "as applied" findings in *US – Anti-Dumping and Countervailing Duties (China)*.[315] The Public Bodies Memorandum presents determinations made by the USDOC "[a]fter a review of the system of governance and state functions" in China.[316] Among other things, the Public Bodies Memorandum presents the USDOC's assessment of "whether the relevant entities *covered by these proceedings* 'possess, exercise or are vested with government authority' in fulfilling the government function of maintaining and upholding the socialist market economy."[317]

170. As explained above in section II.A.2.a, 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. Of course, while the USDOC prepared and published the Public Bodies Memorandum in connection with certain section 129 proceedings involving particular products, that very same analysis, explanation, and evidence, which relates to China in general, may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings

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[312] *US – Countervailing Measures (China) (Panel)*, para. 7.102 (emphasis added by the Panel).
[313] China's First Written Submission, para. 170.
[314] Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).
[315] Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1). *See also*, *id.*, p. 1 ("SUBJECT: Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379") (p. 2 of the PDF version of Exhibit CHI-1).
[316] Public Bodies Memorandum, p. 2 (p. 3 of the PDF version of Exhibit CHI-1).
[317] Public Bodies Memorandum, p. 3 (emphasis added) (p. 4 of the PDF version of Exhibit CHI-1).

involving other products from 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.

171. Importantly, in the original proceeding, China challenged as a measure the "rebuttable presumption." The nature of that "measure" was evidenced by the text of the issues and decision memorandum in the Kitchen Shelving countervailing duty investigation, as well as the Preamble to the USDOC's countervailing duty regulations.[318] The existence of that "measure" was evidenced by those documents as well as repeated application.[319]

172. Here, China attempts to challenge as a measure the Public Bodies Memorandum itself.[320] China's compliance panel request does not refer to the "'legal standard that the USDOC applies by default' in its public bodies determinations."[321] Thus, the nature and existence of the Public Bodies Memorandum as a measure must be ascertained by examining the text of the Public Bodies Memorandum itself.

173. The original Panel observed that the Kitchen Shelving policy "ha[d] been applied consistently over a long period of time."[322] The Panel noted that the Kitchen Shelving Issues and Decision Memorandum refers to numerous other determinations in which the USDOC had applied the "rebuttable presumption" at issue, and recalled that some of the determinations made by the USDOC had been made several decades earlier.[323]

174. The Public Bodies Memorandum does not similarly make reference to any history of prior application of any purported "legal standard"[324] in earlier USDOC proceedings, nor does the Public Bodies Memorandum announce that the USDOC intends to apply the same analysis in the future. It does the opposite.[325]

175. Additionally, as the United States noted earlier, China has not suggested that the Chinese laws, regulations, and industrial policies discussed in the Public Bodies Memorandum have changed since the Public Bodies Memorandum was first published, nor has China suggested that they were no longer in effect during the periods of investigation of the various section 129 proceedings at issue here, or during the periods of investigation of other countervailing duty proceedings to which China refers.[326] Thus, it was appropriate for the USDOC to draw on the same evidence, analysis, and explanation to justify arriving at the same conclusions in those proceedings. Furthermore, the analysis, explanation, and evidence presented in the Public Bodies Memorandum relate only to China and the Chinese government and economic system.

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[318] *See* China's Panel Request in the original proceeding, p. 2 and footnote 2.
[319] *See US – Countervailing Measures (China) (Panel)*, para. 7.103.
[320] *See* China's Panel Request in this compliance proceeding, para. 10.
[321] China's First Written Submission, para. 170.
[322] *US – Countervailing Measures (China) (Panel)*, para. 7.103.
[323] *See US – Countervailing Measures (China) (Panel)*, para. 7.103.
[324] China's First Written Submission, para. 170.
[325] *See* Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).
[326] *See* China's First Written Submission, para. 180 and Exhibit CHI-54.

The USDOC has not relied on that analysis, explanation, and evidence in countervailing duty proceedings involving products from countries other than China. Doing so would make no sense. This is a further contrast with the Kitchen Shelving policy, which the USDOC applied to all countries, not just China.[327]

176. The original Panel also found, with respect to the Kitchen Shelving policy, that:

> The language of this policy is not "mandatory" as it does not have any legal effect upon the USDOC. It is its own internal policy. It does provide, though, that the USDOC would normally apply first the "rebuttable presumption" and only if there are convincing arguments and evidence to the contrary would the USDOC reconsider its by-default approach. The text does not define what such arguments or evidence could be, nor what weight they might have over the USDOC's standard approach. On the contrary, the text presumes that such occasions would be "rare" and shifts the burden of proof on the interested parties to prove a negative.[328]

177. The Public Bodies Memorandum is not "mandatory" as it does not have any legal effect upon the USDOC.[329] The Public Bodies Memorandum does not, on its face, even purport to set forth an "internal policy."[330] As explained, the Public Bodies Memorandum is an analysis and explanation produced by the USDOC after the USDOC examined voluminous evidence relating to China's government and economic system. The Public Bodies Memorandum does not describe any rebuttable presumptions that the USDOC intends to apply, nor any other policy. Rather, the Public Bodies Memorandum explains certain findings the USDOC made based on the evidence it examined, concerning three categories of enterprises in China.

178. First, the USDOC found that:

> [I]n the institutional and SIE-focused policy setting of China, China's government is exercising meaningful control over all enterprises in which the government has maintained a full or controlling ownership interest, such that these enterprises are government authorities. These are the enterprises that comprise China's state sector. The government meaningfully controls certain key aspects, discussed below, of these enterprises, in its pursuit of the governmental objective of upholding the state sector. Thus, the Department finds that all such enterprises will be considered to be public bodies within the meaning of the SCM Agreement.[331]

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[327] *See US – Countervailing Measures (China) (Panel)*, para. 7.92 (Quoting "[t]he relevant part of the USDOC's Issues and Decision Memorandum in Kitchen Shelving," which refers to determinations involving Argentina, Canada, India, Korea, and The Netherlands.).
[328] *US – Countervailing Measures (China) (Panel)*, para. 7.104.
[329] *US – Countervailing Measures (China) (Panel)*, para. 7.104.
[330] *US – Countervailing Measures (China) (Panel)*, para. 7.104. *See also* Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).
[331] Public Bodies Memorandum, p. 5 (p. 6 of the PDF version of Exhibit CHI-1).

This is not a rebuttable presumption. It is a conclusion based on extensive analysis and explanation of ample record evidence.

179. Second, the USDOC found that:

> [I]n circumstances where the government has significant ownership in an enterprise, and such enterprises are subject to certain industrial plans, such enterprises may also be found to be public bodies. Such a conclusion, however, would be based on a case-by-case analysis of the relevant enterprises and industrial plans, and reflect an evaluation of whether additional indicia show that the enterprises are being used to carry out government functions.[332]

This, too, is not a rebuttable presumption. Rather, it is an explanation of the USDOC's conclusion that, in the section 129 proceedings it was undertaking at the time, it would need to proceed on a case-by-case basis in all instances when examining such enterprises.[333] The Public Bodies Memorandum here also explicitly describes the kind of additional evidence that the USDOC had decided to seek and how it would use that evidence to establish whether enterprises in this category are public bodies.

180. Third, the USDOC found that:

> [R]ecord evidence indicates that in the Chinese institutional setting, there may be instances in which the government may exercise meaningful control over enterprises in China even in the absence of formal government ownership. Such instances justify further inquiry on a case-by-case basis. Examples include situations in which there is a significant CCP or state presence on the board, in management or in the enterprises in the form of a party committee, or alternatively where the enterprise was previously privatized but ties to the government continue to exist or there were restrictions on the nature of the privatization.[334]

Once again, this is not a rebuttable presumption. It is a statement of a conclusion to which the USDOC came based on the evidence it examined, and it is a statement by the USDOC that it intended in the section 129 proceedings it was undertaking at the time to examine enterprises in this category on a case-by-case basis. The USDOC recognized that any determination that it makes regarding an enterprise in this category would be based, *inter alia*, on the kinds of information described above.

181. As demonstrated above, 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."[335]

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[332] Public Bodies Memorandum, p. 5 (emphasis added) (p. 6 of the PDF version of Exhibit CHI-1).
[333] *US – Countervailing Measures (China) (Panel)*, para. 7.104.
[334] Public Bodies Memorandum, p. 5 (emphasis added) (p. 6 of the PDF version of Exhibit CHI-1).
[335] *US – Countervailing Measures (China) (Panel)*, para. 7.106.

3. China's "As Such" Challenge to The Public Bodies Memorandum Also Fails Because It Has Not Established a Rule or Norm of General or Prospective Application

182. China's claim fails for a third, independent reason, because China argues that the Public Bodies Memorandum prescribes future conduct but has not established that the memorandum is a rule or norm having general and prospective application.

183. When the original Panel examined whether the Kitchen Shelving policy could be challenged as such, it again reviewed findings made by prior panels and the Appellate Body.[336] The original Panel explained that "[a] complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged 'rule or norm' is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application."[337]

184. China asserts in its first written submission that the Public Bodies Memorandum prescribes an approach to the public body analysis that the USDOC will follow,[338] but China makes no attempt to "clearly establish, through arguments and supporting evidence,"[339] 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 Public Bodies Memorandum itself.[340]

185. In finding that the "'rebuttable presumption' articulated in Kitchen Shelving has normative value,"[341] the original Panel pointed to features of the Kitchen Shelving policy that distinguish it from the Public Bodies Memorandum. The Panel reasoned that the Kitchen Shelving policy "provides 'administrative guidance and creates expectations among the public and among private actors,'" and this was "evident from the declaratory style of the text" and "the consistent application" of the policy by the USDOC.[342] The Panel pointed out that the United States had admitted that "a 'policy' announcement provides 'the public with guidance as to how [the USDOC] may interpret and apply the statute and regulations in individual cases."[343]

186. The Public Bodies Memorandum does not share these features of the Kitchen Shelving policy. The Public Bodies Memorandum does not announce a "policy" in a "declaratory style." Rather, as explained above, 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 [344] Given that the Public Bodies Memorandum presents analysis and explanations relating to particular evidence examined by the USDOC, the Public Bodies Memorandum, in contrast to the Kitchen Shelving policy, is "an explanation regarding

[336] *US – Countervailing Measures (China) (Panel)*, paras. 7.107-7.110.
[337] *US – Countervailing Measures (China) (Panel)*, para. 7.109.
[338] *See* China's First Written Submission, paras. 173, 178-179.
[339] *US – Countervailing Measures (China) (Panel)*, para. 7.109.
[340] *See* China's First Written Submission, paras. 173, 178-179.
[341] *US – Countervailing Measures (China) (Panel)*, para. 7.111.
[342] *US – Countervailing Measures (China) (Panel)*, para. 7.111.
[343] *US – Countervailing Measures (China) (Panel)*, para. 7.111.
[344] *See* Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).

the USDOC's reasoning for the specific factual and legal questions" in the countervailing duty proceedings in connection with which it was published.[345]

187. The original Panel found that the Kitchen shelving policy had "general and prospective application, as it is intended to apply to future investigations."[346] The Panel found evidence to support this conclusion in "the text itself," in which "the USDOC explains that this policy has been applied for some time, that the USDOC is clarifying its policy for the public through the Issues and Decision Memorandum and that the USDOC will continue applying it."[347] China points to no similar language in the Public Bodies Memorandum.

188. The original Panel also had before it evidence regarding the application of the Kitchen Shelving policy "in all determinations challenged in this dispute that followed the Kitchen Shelving Issues and Decision Memorandum."[348] China has put before the Panel here similar evidence of instances in which the USDOC has put the Public Bodies Memorandum on the record of subsequent countervailing duty proceedings.[349] The United States notes, though, that the original Panel recalled that:

> [T]he USDOC has stated that the findings of the panel and the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* were limited to the four investigations at issue in that dispute. The relevant text provides:
>
> > [R]egarding the DSB's reports in the DS 379 proceeding, we note that, while we have reached section 129 final determinations in the four investigations at issue in that dispute, the decisions of the panel and the appellate body regarding whether a producer is an authority (a "public body" within the WTO context) were limited to those four investigations.[350]

189. This statement by the USDOC in the solar panels countervailing duty investigation is an indication that the USDOC contemplated at that time <u>not</u> "apply[ing] prospectively" the "analytical framework" presented in the Public Bodies Memorandum.[351] Moreover, the statement is further evidence that the USDOC created the Public Bodies Memorandum for the four section 129 proceedings that the USDOC undertook to implement the recommendations and rulings of the DSB in *US – Anti-Dumping and Countervailing Duties (China)*, rather than as an announcement of a new approach it intended to apply in future proceedings.

190. Ultimately, the original Panel considered that the USDOC statement in the solar panels countervailing duty investigation, "in conjunction with the manner in which the USDOC explained its policy in the Kitchen Shelving Issues and Decision Memorandum reflects … a

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[345] *US – Countervailing Measures (China) (Panel)*, para. 7.118.
[346] *US – Countervailing Measures (China) (Panel)*, para. 7.114.
[347] *US – Countervailing Measures (China) (Panel)*, para. 7.114.
[348] *US – Countervailing Measures (China) (Panel)*, para. 7.115.
[349] *See* China's First Written Submission, para. 180, Exhibit CHI-54.
[350] *US – Countervailing Measures (China) (Panel)*, para. 7.116 (Citing China's First Written Submission, para. 40, citing Solar Panels, Issues and Decision Memorandum, p. 31.).
[351] China's First Written Submission, para. 178.

deliberate policy."[352] Hence, the Panel concluded that "the evidence before the Panel shows that what is at issue goes beyond the simple repetition of the application of a certain methodology to specific cases."[353]

191. By contrast, here, the text of the Public Bodies Memorandum, in conjunction with the statement made by the USDOC in the solar panels investigation to which the original Panel referred, leads to the conclusion that, at most, all that is before the Panel now is "simple repetition."[354] 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.

192. Accordingly, China has not established that the Public Bodies Memorandum is a rule or norm having general and prospective application, and therefore China has not established a basis for its own "as such" challenge.

4. The Public Bodies Memorandum Is Not Inconsistent "As Such" Because It Does Not Necessarily Result in an Inconsistency with Article 1.1(a)(1) of the SCM Agreement

193. Finally, China's "as such" claim against the Public Bodies Memorandum fails for a fourth, independent reason, because the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement.

194. In assessing whether the Kitchen Shelving policy was inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement, the original Panel noted that "both parties agree that for such a claim to be successful the measure should *necessarily* result in an inconsistency."[355] The Panel then proceeded to assess whether the Kitchen Shelving policy "oblige[d]" the USDOC to act inconsistently with the SCM Agreement or "restrict[ed]" the USDOC from acting consistently with the SCM Agreement.[356]

195. As an initial matter, the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement because, as demonstrated above in sections II.A.1 and II.A.2.b, China's arguments against the analysis and explanation presented in the Public Bodies Memorandum are all premised on China's new, flawed proposed interpretation of the term "public body." China makes the same flawed legal argument in connection with its "as such" challenge of the Public Bodies Memorandum,[357] and China's claim should be rejected

[352] *US – Countervailing Measures (China) (Panel)*, para. 7.117.
[353] *US – Countervailing Measures (China) (Panel)*, para. 7.117.
[354] *US – Countervailing Measures (China) (Panel)*, para. 7.117.
[355] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[356] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[357] *See, e.g.,* China's First Written Submission, paras. 168, 169, 182.

on that basis. As also demonstrated above in section II.A.2.a, the analysis and explanation presented in the Public Bodies Memorandum, and the ample record evidence on which it is founded, whether viewed under the correct legal standard or even under China's legally erroneous interpretation, is not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

196. Additionally, the Public Bodies Memorandum, by its terms, neither "obliges" the USDOC to do anything nor "restricts" the USDOC from doing anything.[358] When the original Panel followed a "two-step approach"[359] 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,"[360] "[o]n the face of the text, this policy is qualified by the word 'normally',"[361] "the consistent application of this presumption in numerous cases over a long period of time,"[362] "the policy establishes that the burden is on an interested party to provide information or evidence that would warrant consideration of any other factors,"[363] and the policy "effectively … restricts the USDOC to consider other evidence on its own initiative."[364]

197. As explained in the preceding subsections, which demonstrate that the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement and it is not a rule or norm having general and prospective application, the text of the Public Bodies Memorandum simply does not share any of the features of the text of the Kitchen Shelving policy such that the Public Bodies Memorandum could similarly be found inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement. The Public Bodies Memorandum does not require the USDOC to reach any WTO-inconsistent determination. Rather, to the extent the USDOC places the Public Bodies Memorandum and supporting evidence onto the record of a countervailing duty proceeding, the USDOC in that proceeding would determine what significance to give to the findings in the Public Bodies Memorandum in the context of making its determination in that proceeding.

198. For the reasons given above, China's "as such" claim against the Public Bodies Memorandum fails.

III. CHINA'S CLAIMS REGARDING BENCHMARKS LACK MERIT

199. China argues that the USDOC's benchmark determinations in *Line Pipe*, *Pressure Pipe*, *OCTG*, and *Solar Products* do not bring the United States into compliance with U.S. obligations under the SCM Agreement. China's claim is premised on the assumption that no amount of evidence can establish that prices in China are distorted. But the extensive evidence supporting the USDOC's determinations shows otherwise. USDOC undertook an exhaustive examination

[358] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[359] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[360] *US – Countervailing Measures (China) (Panel)*, para. 7.123.
[361] *US – Countervailing Measures (China) (Panel)*, para. 7.124.
[362] *US – Countervailing Measures (China) (Panel)*, para. 7.124.
[363] *US – Countervailing Measures (China) (Panel)*, para. 7.125.
[364] *US – Countervailing Measures (China) (Panel)*, para. 7.125.

and analysis in these proceedings, and in each determination found compelling evidence of distortion. Thus, contrary to China's depiction, USDOC did not apply a "*per se*" rule.

200. In the challenged determinations the USDOC found that China provided steel inputs and polysilicon to Chinese producers for less than adequate remuneration (LTAR). In *Line Pipe*, the USDOC found that China provided hot-rolled steel at LTAR to producers of line pipe. In *Pressure Pipe*, the USDOC found that China provided stainless steel coil at LTAR to producers of pressure pipe. In *OCTG*, the USDOC found that China provided steel rounds and billet at LTAR to producers of oil-country tubular goods. In *Solar Products*, the USDOC found that China provided polysilicon at LTAR to solar panel producers.

201. To measure the adequacy of remuneration for each input, the USDOC examined whether domestic prices were reflective of market conditions resulting from the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market."[365]

202. The USDOC determined not to use input prices as benchmarks after analyzing the steel and renewable energy sectors in China and concluding that, in relevant part, the domestic market for these inputs is "distorted by virtue of the GOC's policy interventions and other factors" described in detail below.[366] The USDOC determined, based on this analysis, 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, these input prices are inappropriate to use as benchmarks to determine the adequacy of remuneration."[367] Because the USDOC reached this conclusion only after it had "properly examined whether the relevant in-country prices were market determined or were distorted by governmental intervention," the United States stands firmly in compliance with the recommendations and rulings of the DSB.[368]

A. Legal Standard

203. 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."[369] Thus, "a finding of inconsistency with Article 14(d) in the selection of a benefit benchmark depends on whether or not the investigating authority at

[365] *See Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Benchmark Memorandum") (Exhibit CHI-20), pp. 26-30; *Memorandum to Paul Piquado from Christian Marsh Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437), Benefit (Market Distortion) Memorandum*, March 19, 2016 ("Final Benchmark Determination") (Exhibit CHI-21); *EC – Large Civil Aircraft (AB)*, paras. 975, 981.
[366] Final Benchmark Determination, p. 21 (Exhibit CHI-21).
[367] Final Benchmark Determination, p. 21 (Exhibit CHI-21).
[368] *US – Countervailing Measures (China) (AB)*, para. 4.79; *see also id.*, para. 4.77 ("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").
[369] *US – Countervailing Measures (China) (AB)*, para. 4.77.

issue conducted the necessary market analysis in order to evaluate whether the proposed benchmark prices are market determined such that they can be used to assess whether the remuneration is less than adequate."[370]

204. In *US – Carbon Steel (India)*, the Appellate Body explained that when prices "are not market determined," "it would not be appropriate to rely on such prices."[371] The Appellate Body in the current dispute recognized the "possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself."[372] In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body "emphasized that what allows an investigating authority to reject in-country prices is *price distortion*, not the fact that the government, as a provider of goods, is the predominant supplier *per se*."[373] Thus, the Appellate Body reasoned, "price distortion must be established on a case-by-case basis and [] an investigating authority . . . cannot refuse to consider evidence relating to factors other than government market share."[374]

B. The "Critical Nexus" of Policy, Law, and Ownership Distorts Pricing in China's Steel Sector

205. As established by the USDOC's extensive analysis in the challenged determinations, China's steel sector operates according to government policy. As a result, the prices in the steel sector reflect government policy – not market forces. The USDOC explains this finding in the Benchmark Memorandum, the Supporting Benchmark Memorandum, and the Final Benchmark Determination.[375] The analysis proceeds in four parts. First, the USDOC found that China's constitution sets out a mandate to maintain and control its socialist market economy. Second, the USDOC found that China's legal system establishes parameters and goals for the state to carry out its socialist economic mandate. Third, the USDOC identified a complex array of instruments through which these goals are implemented. Fourth, the USDOC examined evidence of ongoing government influence that demonstrates these goals have been realized through actively managing China's economy, particularly in the steel sector.

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[370] *US – Countervailing Measures (China) (AB)*, para. 4.61.
[371] *US – Carbon Steel (India) (AB)*; *accord US – Countervailing Measures (China) (AB)*, para. 4.50.
[372] *US – Countervailing Measures (China) (AB)*, para. 4.50, n. 530.
[373] *US – Countervailing Measures (China) (AB)*, para. 4.59 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*).
[374] *US – Countervailing Measures (China) (AB)*, para. 4.59 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*).
[375] *See* Benchmark Memorandum (Exhibit CHI-20); *Memorandum to Brendan Quinn from Eric Greynolds Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Supporting Benchmark Memorandum") (Exhibit USA-84); Final Benchmark Determination (Exhibit CHI-21); *see also Memorandum to the File from Eric B. Greynolds Re: Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Source Documents Cited in Supporting Memorandum to the Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 (Exhibit USA-85).

1. China's Government Has a Constitutional Mandate to Manage Its Economy

206. Prices in China's steel sector are not market-determined prices because Chinese governmental policy – in law and in practice – prevents market forces from operating outside a set of narrow and predetermined parameters. The operative force in China's steel sector is the government. The Chinese government, as the USDOC explained, "has a constitutional mandate, echoed throughout China's broader legal framework, to maintain and uphold the 'socialist market economy.'"[376]

207. Per this constitution, the "state-owned economy, that is, the socialist economy with ownership by the whole people, is the leading force in the national economy. The state ensures the consolidation and growth of the state-owned economy."[377] The "State upholds the basic economic system in which the public ownership remaining dominant and diverse forms of ownership develop side by side."[378] And as it "practices socialist market economy," the state "strengthens economic legislation and improves macro-regulation and control."[379] China's State Council interprets these provisions as a mandate to "uphold the basic economic system under which the public ownership plays a dominant role and diverse forms of ownership develop side by side," to "firmly consolidate and develop public ownership economy," and to "enhance the state-owned economy's controlling power, influence, driving force, [and] bring the leading role of the state-owned economy into play."[380]

2. China's Economy Operates Within a Legislative and Policy Framework that Ensures State Control

208. The USDOC identified a number of legislative instruments that enable this constitutional mandate to be carried out effectively.

209. First, the USDOC examined the role of China's five-year policy plans. Five-year plans (FYPs) are prepared by the National Development and Reform Commission (NDRC), with input from provincial and local level NDRCs and governments, academics and industry. These national plans are subject to guidance from the CCP's Central Committee and they govern a variety of industries across the economy.[381] The USDOC explained that these "plans . . . provide the government with the authority to control and guide the state-sector to engineer certain outcomes, requiring that the state sector follow the government's industrial plans."[382] The USDOC explained that China's "industrial plans play a crucial role in the institutional

[376] Benchmark Memorandum, p. 6 (Exhibit CHI-20).
[377] Article 7, China Constitution (Exhibit USA-2); *see* Benchmark Memorandum, pp. 6-7 (Exhibit CHI-20).
[378] Article 6, China Constitution (Exhibit USA-2); *see* Benchmark Memorandum, pp. 6-7 (Exhibit CHI-20).
[379] Article 15, China Constitution (Exhibit USA-2); *see* Benchmark Memorandum, pp. 6-7 (Exhibit CHI-20).
[380] State Council Notice, "*Notice of the General Office of the State Council on Forwarding the Guiding Opinions of the SASAC about Promoting the Adjustment of State-Owned Capital and the Reorganization of State-owned Enterprises*" (2006) (Exhibit USA-17); *see* Benchmark Memorandum, pp. 6-7 (Exhibit CHI-20).
[381] Public Bodies Memorandum, pp. 17-18 (Exhibit CHI-4).
[382] Public Bodies Memorandum, p. 17 (Exhibit CHI-4).

framework that guides the activities of [state-invested enterprises (SIEs)] in the place of market forces."[383]

210. Second, the USDOC examined China's industrial policy plans. The USDOC explained that "China's industrial plans are drafted, debated and ultimately adopted by various organs of the GOC (*e.g.*, the Chinese Communist Party (CCP), the State Council, and the National People's Congress)."[384] These industrial plans "encompass a set of broad economic policies that aim to control the structure of the state sector and focus state investment in certain sectors."[385]

211. Third, the USDOC examined the "strategic" and "pillar" sectors at the crux of these policies. These sectors include "iron and steel" and energy (as well as "machinery, auto, information technology, construction . . . and non-ferrous metals").[386] The USDOC explained that the government maintains "high investment levels in 'strategic' sectors that are deemed crucial to economic development and security," and maintains "significant and controlling shares of enterprises in 'pillar' or 'basic' industries that are deemed very important to economic development."[387] The list of industries in China that are "subject to high levels of government ownership, administrative guidance, and direct government interventions extends beyond those typically subject to market failure or where the provision of a public good is involved."[388]

212. In sum, the USDOC found that economic activity in China takes place within this framework. Private actors operate within these constraints and commercial exchange takes place within these parameters.

3. The Chinese Government, Public Bodies, and SIEs Serve as Instruments for Policy Implementation

213. The USDOC identified a number of organizations and enterprises that serve as "instruments for policy implementation."[389]

214. First, the government: China's government is "comprised of both the state apparatus and the Chinese Communist Party (CCP)."[390] The "CCP exercises authority over the state apparatus via 'Leading Small Groups (cross ministerial bodies that are above the ministries in terms of the government hierarchy but do not publish their membership)[,]' party groups and committees," and by "controlling appointments, supervising state activity, and requiring state entities to report

[383] Benchmark Memorandum, p. 8 (Exhibit CHI-20); *see also* Supporting Benchmark Memorandum, p. 4, n. 16 (Exhibit USA-84) (noting that USDOC "uses the term 'state-invested enterprises' or 'SIE' where possible. By 'state-invested enterprise,' the Department means enterprises in which the Government of China is an investor through any size ownership interest. The term generally has the same meaning as the term 'state owned enterprise' (or SOE), but the definition of SOE sometimes varies when used in different contexts, and the Department has adopted the term SIE to attempt to avoid possible confusion.").
[384] Benchmark Memorandum, p. 8 (Exhibit CHI-20) (internal citation omitted).
[385] *Id.*
[386] Benchmark Memorandum, p. 7, n. 23 (Exhibit CHI-20).
[387] Benchmark Memorandum, p. 7 (Exhibit CHI-20).
[388] *OECD Economic Survey: China, the Organization for Economic Co-Operation and Development* (2010), p. 116 (Exhibit USA-42); *see* Benchmark Memorandum, pp. 6-7, n. 23 (Exhibit CHI-20).
[389] Benchmark Memorandum, p. 7 (Exhibit CHI-20).
[390] Benchmark Memorandum, p. 3, n. 10 (Exhibit CHI-20).

to (and/or take direction from) at least one corresponding CCP entity."[391] The USDOC explained that in "instances where state entities may attempt to diverge from the wishes of the CCP, the information on the record indicates that the CCP possesses the legal right to intervene (through appointments and disciplinarian measures) to prevent or correct any such divergence."[392] The Central Organization Department of the CCP controls all cadre appointments to Party and government/state positions and, as such, is "one of the, if not *the,* most important organs in the CCP," supervised by the Secretariat and the Politburo.[393]

215. Second, the State Council: The State Council is the highest body of the central administrative state, and includes the Premier and heads from the ministries.[394] The State Council oversees the work of the various provincial People's Governments.[395]

216. Third, state-invested enterprises (SIEs): Under Chinese law, the term SIEs "refers to a wholly state-owned enterprise or company with the state being the sole investor, or a company in which the state has a stake, whether controlling or non-controlling."[396] SIEs are a "special type of economic actor" used as "instruments for policy implementation."[397] SIEs have a significant presence in strategic and pillar sectors. Such sectors include, for example, the steel and renewable energy sectors. In contrast, sectors that are not designated among these key industries are freer to operate independent of the government.

217. Fourth, the State-Owned Assets Supervision and Administration Commission (SASAC): SASAC was established for the purposes of meeting "the demand[s] of the socialist market economy, to further activate the state-owned enterprises, to promote the strategic adjustment of the layout and structure of the state-owned economy, to develop and strengthen the state-owned economy, and to try to maintain and increase the value of the state-owned assets."[398] Under Chinese law, the principle of "meeting the development plans and industrial policies of the State" shall be observed for the investment activities of the enterprises as well as SASAC "supervision and administration" over the enterprises' investment activities.[399] The law instructs that "SASAC shall supervise and administrate the investment activities of the enterprises, and guide them to establish and improve investment decision-making procedures and management systems."[400] The USDOC explained that "SASAC actions taken to implement [these measures], legally require SIEs to act as instrumentalities of the state to carry out its policy goals and

[391] Benchmark Memorandum, p. 3, n. 10 (Exhibit CHI-20) ("The Department's assessment of the available evidence thus indicates that the CCP and China's state apparatus are essential components that together form China's "government" for the limited purpose of applying the CVD law.") (citing CCP Memorandum).
[392] *Id.*
[393] China's Communist Party: Atrophy and Adaptation, David Shambaugh (2008) ("China's Communist Party"), p. 141 (Exhibit USA-33); *see* Benchmark Memorandum, p. 12 (Exhibit CHI-20).
[394] *See* Benchmark Memorandum, p. 8 (Exhibit CHI-20) (citing Understanding China's Political System, The U.S. Congressional Research Service (April 2010), p. 7).
[395] *Id.*
[396] Article 5, *Law on State-Owned Assets of Enterprises*; *see* Benchmark Memorandum, p. 8 (Exhibit CHI-20).
[397] Benchmark Memorandum, p. 7 (Exhibit CHI-20).
[398] Article 1, *Tentative Measures for the Supervision and Administration of State-Owned Assets of Enterprises* (2003) (Exhibit USA-10).
[399] Article 6, *Interim Measures for the Supervision and Administration of the Investments by Central Enterprises* (2006) (Exhibit USA-15); *see* Benchmark Memorandum, p. 11 (Exhibit CHI-20).
[400] Article 4, *Interim Measures for the Supervision and Administration of the Investments by Central Enterprises* (2006) (Exhibit USA-15); *see* Benchmark Memorandum, p. 11 (Exhibit CHI-20).

industrial plans rather than commercial, market-oriented outcomes."[401] For example, "SASAC issued a policy stating that the state intended to maintain absolute control over enterprises in 'strategic' sectors and significant and controlling shares of enterprises in 'basic' or 'pillar' industries" such as the steel and energy sectors.[402]

218. With this context, the USDOC ultimately concluded that SIEs are a "unique" kind of organization, "different from enterprises under other forms of ownership, for they assume not only basic economic responsibilities, but also important political and social responsibilities. SIEs are considered a potent mechanism for the government to implement national policies while being the reliable instrument for the country to cope with major economic risks."[403]

4. The "Critical Nexus" of these Forces Causes Price Distortion

219. The USDOC concluded that these policies, actors, and actions create a "critical nexus" of policy and ownership that is unique to China.[404] 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."[405] The USDOC found that "the institutional framework of intertwined political, social and economic goals creates a *milieu* in which SIE decision-making is insulated from the disciplines of market forces."[406] Notwithstanding some "rapid privatisation and widespread improvements," the "extent of state control in the Chinese economy is . . . still higher than in any OECD country."[407] This fundamental and persistent control "arises from a high degree of both public ownership and government involvement in business operations."[408] The resulting "critical nexus" between "industrial policy, law, and firm-level actions" demonstrates "that the GOC has provided itself the legal authority, responsibility, and means to guide and control economic decisions."[409]

220. Through this "critical nexus" in the steel sector, China ensures that steel prices align with policy goals. The USDOC found the same to be true with respect to solar products.[410] These goals "would not be achievable without active government management."[411] Indeed, 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."[412] This

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[401] Benchmark Memorandum, p. 11 (Exhibit CHI-20).
[402] Public Bodies Memorandum, p. 20 (Exhibit CHI-4) (quoting GOC Questionnaire Responses).
[403] *Core Capability of Leaders, Exploration and Practice of China's State-Owned Enterprises*, Zhou Xinmin (2007), p. 7 (Exhibit USA-26); *see* Benchmark Memorandum, p. 7 (Exhibit CHI-20).
[404] Benchmark Memorandum, p. 9 (Exhibit CHI-20).
[405] Benchmark Memorandum, p. 14 (Exhibit CHI-20).
[406] Benchmark Memorandum, p. 7 (Exhibit CHI-20).
[407] *OECD Economic Survey: China, the Organization for Economic Co-Operation and Development* (2010), p. 113 (Exhibit USA-42); *see* Benchmark Memorandum, p. 7 (Exhibit CHI-20).
[408] *OECD Economic Survey: China, the Organization for Economic Co-Operation and Development* (2010), p. 113 (Exhibit USA-42); *see* Benchmark Memorandum, p. 7 (Exhibit CHI-20).
[409] Benchmark Memorandum, p. 9 (Exhibit CHI-20).
[410] *See* Benchmark Memorandum, p. 8 (Exhibit CHI-20); *see also* Supporting Benchmark Memorandum, pp. 6-9 (Exhibit USA-84).
[411] Benchmark Memorandum, p. 9 (Exhibit CHI-20).
[412] Benchmark Memorandum, pp. 16-17 (Exhibit CHI-20).

politicization of business decisions "necessarily removes" these businesses "from the principles of the market economy and competition."[413] Thus, the USDOC concluded, when SIE "firms engaged in commercial activities are subject to such government policy dictates, or encumbered by the state's imperative to maintain its control over the productive economy to achieve industrial policy goals, these firms are unable to perform in a truly commercial, market-oriented manner."[414]

C. The USDOC's Revised Benchmark Determinations Are Reasoned and Adequate and Consistent with Articles 1.1(b) and 14(d) of the SCM Agreement

221. The USDOC examined the forces distorting China's economy and found positive evidence that prices are not market determined in the relevant sectors. Over the course of these proceedings, the USDOC developed a substantial factual record and vigorously sought information from Chinese respondents. On the basis of this evidence, the USDOC analyzed the nature and role of SIEs under China's socialist market economy.[415] As summarized above, the USDOC found that SIEs play a pivotal role in advancing China's socialist market economy, with the result that the GOC intervenes heavily in the micro-economic decisions of those enterprises. Based on its evaluation of this evidence, the USDOC concluded that domestic prices for steel inputs and for polysilicon in the challenged determinations are not market determined prices.

1. Positive Evidence Supports the USDOC's Analysis of Price Distortion

222. After the USDOC "examined the nature and structure of the steel market to determine whether potential benchmarks from the domestic industry could be considered market-determined," the USDOC determined that "the entire structure of the steel market is distorted by longstanding, systemic and pervasive government intervention, which so diminishes the impact of market signals that, based on the records in these proceedings, private prices cannot be considered market based or usable as potential benchmarks."[416] In conducting its evaluation, the USDOC identified and examined the detailed industrial plans governing the structure of the state sector and directing state investment in desired sectors consistent with the state's policy goals.[417] The USDOC also examined State Council policies, such as *Decision No. 40*, which identifies specific measures to be taken in furtherance of the state's industrial plans, and which is implemented through an investment catalogue regulating investment at the firm-level for all industries and all investors.[418] The USDOC likewise found that the GOC influences firm-level decision-making through SASAC, which supervises the SIEs within its purview to ensure consistency with state policy goals.[419] The USDOC found these legal instruments probative of the breadth and depth of GOC intervention in the economy.

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[413] *Reforming China's State-owned Enterprises*, Analysis by Agatha Kratz based on Lin Yongsheng, (1) "Working out once again the efficiency of SOEs," Xin shiji, 13 August 2012 (Exhibit USA-97); *see* Benchmark Memorandum, p. 16 (Exhibit CHI-20).
[414] Benchmark Memorandum, p. 14 (Exhibit CHI-20).
[415] Benchmark Memorandum, pp. 6-20 (Exhibit CHI-20).
[416] Supporting Benchmark Memorandum, p. 4 (Exhibit USA-84) (internal quotation marks omitted).
[417] Benchmark Memorandum, p. 8 (Exhibit CHI-20).
[418] Benchmark Memorandum, p. 9 (Exhibit CHI-20).
[419] Benchmark Memorandum. pp. 9-17 (Exhibit CHI-20).

223. In determining that "systemic and pervasive government intervention . . . diminishes the impact of market signals," the USDOC also relied upon evidence that the CCP exercises effective control over the appointment of senior executives in SIEs, which ensures that SIE decision-making remains responsive to the state's policy goals irrespective of ordinary market considerations.[420] The USDOC also examined evidence suggesting that the decisional process of SIEs is further distorted by the receipt of significant direct government benefits and restrictions on private-sector competition.[421] The USDOC found that this arrangement enables SIEs to operate in a "soft budget" environment insulated from normal commercial pressures.[422]

224. With respect to "private and foreign enterprises that might otherwise present significant competition to SIEs," the USDOC explained that China's constitution explicitly establishes a "subordinate" role for the private sector in China's economy.[423] Article 11 of China's constitution "permits the private sector of the economy to exist," but it must "develop within the limits prescribed by law" as "a complement to the socialist public economy."[424] The GOC thus "places operational constraints on private and foreign enterprises" to ensure the "very existence of the private sector is explicitly limited and circumscribed."[425] As a result, China's economic policies discriminate in favor of large SIEs, and the clear signal to private companies in "pillar" or "basic" industries such as steel is that "competition from private firms is not welcome."[426]

225. The USDOC also evaluated record information regarding China's steel industry documenting the fact that the steel sector is an area where state intervention has been particularly pronounced. The USDOC found that industrial plans were operative in the steel sector during the periods at issue in the *OCTG*, *Pressure Pipe*, and *Line Pipe* investigations, including the Eleventh Five Year Plan for the steel sector. The USDOC explained that the Eleventh Five Year Plan directs favored and unfavored *production scales*, *investments*, *technologies*, *products*, and even *production locations*.[427] The USDOC also examined evidence that the CCP's influence over the appointment of senior executives is equally evident in the steel sector.[428] Finally, the USDOC identified evidence of specific interventions in the steel sector related to excess capacity.

226. The USDOC found that significant overcapacity in the steel sector is both a consequence of prolonged government intervention in the sector, and a driver of continued government intervention to manage market outcomes. As evidence of China's fundamental level of control over the steel sector, the USDOC took note of the State Council's *Circular on Accelerating the Restructuring of the Industries with Production Capacity Redundancy.* This *Circular* illustrates the high level of state control of investments in the steel sector, and that the Government of

[420] Supporting Benchmark Memorandum, p. 4 (Exhibit USA-84).
[421] Benchmark Memorandum, pp. 17-21 (Exhibit CHI-20).
[422] *Id.*
[423] Benchmark Memorandum, pp. 18-20 (Exhibit CHI-20) (citing Article 11, China Constitution).
[424] Article 11, China Constitution (Exhibit USA-2); *see* Benchmark Memorandum, p. 19 (Exhibit CHI-20).
[425] Benchmark Memorandum, p. 19 (Exhibit CHI-20).
[426] *Id.*
[427] Benchmark Memorandum, p. 23 (Exhibit CHI-20).
[428] Benchmark Memorandum, pp. 25-26 (Exhibit CHI-20).

China is directly involved in making choices with regard to selection of investment projects and forced mergers and acquisitions.[429]

227. China, in its First Written Submission, challenges the USDOC's factual determinations of price distortion. As the original panel noted, however, a panel is not to conduct *de novo* review or substitute its own judgment for that of the investigating authority. Rather, a panel "must limit its examination to the evidence that was before the agency during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute."[430] The USDOC's factual determinations are exhaustively supported by the all the factual evidence cited in the Benchmark Memorandum.

228. The attacks on the Benchmark Memorandum that China presents in its First Written Submission are unconvincing and contrary to the evidence. For example, China claims that the economic planning documents do not impose binding obligations, and "serve only to provide guidance as to the desired direction of economic development."[431] In contrast to all of the evidence cited in the Benchmark Memorandum, summarized in Section III.B above, all China can point to is the self-serving, unsupported and conclusory statements in its own questionnaire responses. These self-serving statements can in no way serve to establish that USDOC well-founded factual determinations were not based on evidence and somehow inconsistent with Article 14 of the SCM Agreement.

229. Furthermore, China's assertion that particular government policies are not "binding" is not apposite to the issue at hand: *whether or not* a policy is some sense "binding" (and that term is both undefined and not an SCM Agreement term), a policy established by the Government of China cannot be dismissed by economic actors within China. Indeed, as explained in great detail in the Benchmark Memorandum, SIEs under the supervision of SASAC *must* follow the goals of the state's plans and policies.[432] The influence of CCP over corporate appointments likewise ensures that SIEs remain reliable instruments of policy implementation.[433]

230. China also argues that the goals towards which the industrial policies aim, such as curbing excess capacity and consolidating a highly fragmented industry, are "entirely legitimate goals of public policy."[434] This argument, too, is misplaced. It is irrelevant whether China's industrial policy goals are "legitimate" if they have the effect of distorting domestic prices within China's steel sector. The USDOC did not assess the wisdom (or desirability) of China's policies, merely their impact. Similarly, the Panel need not assess the wisdom of China's policies to find that the USDOC's finding of price distortion was based on positive evidence in relation to the role and influence of the state in the steel sector.

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[429] Benchmark Memorandum, pp. 23-24 (Exhibit CHI-20).
[430] *US – Countervailing Measures (China) (Panel)*, para. 7.10.
[431] *See* China's First Written Submission, para. 276.
[432] *See* Benchmark Memorandum, p. 11 (Exhibit CHI-20).
[433] *Id.*, pp. 12-16 (Exhibit CHI-20).
[434] *See* China's First Written Submission, para. 275.

2. The USDOC's Analysis Demonstrates that Prices Are Not Market Determined

a. Steel Inputs

231. With respect to pricing by different entities, the USDOC analyzed whether prices of both "government-related entities"[435] and private entities in the steel sector were market-determined and, thus, usable as benchmarks to measure the adequacy of remuneration for the provision of hot-rolled steel, steel rounds, and stainless steel coil.[436]

232. With respect to SIE prices, the USDOC concluded that widespread sectoral intervention meant that SIEs were constrained in their ability to pursue commercial outcomes, and that any commercial motivations – if extant – would be distorted by preferential treatment and subsidization. As a result, 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."[437]

233. The USDOC also found that domestic private prices in the steel sector are not reflective of market conditions. This finding was 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."[438] The USDOC found that this intervention allows SIEs to price without regard for competitive market forces and ensures that the private share of the sector remains constrained in its growth and, thus, limited in its ability to pursue competitive pricing strategies. 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.[439] Based on this analysis the USDOC found that prices charged by private steel producers in China are not usable benchmarks for measuring the extent of any benefit conferred by the provision of steel inputs.[440]

234. As a separate point of inquiry, the USDOC also examined whether subsector prices specific to each steel input (*i.e.*, the hot-rolled steel market, the stainless steel coil market, and the steel rounds market) were market determined prices such that could serve as benchmarks to determine the adequacy of remuneration. In undertaking this analysis, the USDOC observed that evidence on the record did not suggest that conditions within the individual input markets differed from conditions observed throughout the steel sector as a whole. The GOC confirmed this observation in its questionnaire responses, noting that sector-wide industrial policies and

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[435] *See US – Countervailing Measures (China) (AB)*, para. 4.49 (explaining that term "government-related entities" refers to "all government bodies, whether national or regional, public bodies, and any other government-owned entities for which there has not been a 'public body' determination.").
[436] *See generally US – Countervailing Measures (China) (AB)*, para. 4.64.
[437] Benchmark Memorandum, pp. 26-27 (Exhibit CHI-20); *see also EC – Large Civil Aircraft (AB)*, paras. 975, 981.
[438] Benchmark Memorandum, p. 28 (Exhibit CHI-20).
[439] Benchmark Memorandum, p. 29 (Exhibit CHI-20).
[440] Benchmark Memorandum, p. 30 (Exhibit CHI-20).

other government interventions applied to steel products universally, including the inputs being examined.[441]

235. The USDOC sought more detailed input-specific market information from the GOC, but received incomplete information in response to requests for information. For example, in response to the USDOC's request in *Line Pipe* that the GOC provide data for "all producers in the input product industry," the GOC stated that it was "not able to provide the information requested for *all* producers in the input product industry." The GOC instead provided a list of only 31 companies that it characterized as "major publicly listed companies based on the information in their annual reports,"[442] without otherwise explaining whether or why those companies provide a representative cross-section of the input market as a whole. The USDOC concluded that this information was too incomplete to serve as a viable measure of the relevant input market; the USDOC thus found that it was necessary to rely on the facts otherwise available.[443] The USDOC reached a similar determination with respect to the inputs at issue in *OCTG* and *Pressure Pipe*.[444] The USDOC thus found that the distortions observed in the steel sector as a whole were also relevant to the market segments for each specific inputs.

b. Polysilicon

236. With respect to *Solar Products*, the USDOC solicited detailed information from Chinese respondents regarding the structure of the Chinese polysilicon market, including information regarding polysilicon producers and the existence of any governing industrial plans or export restraints.[445] The GOC declined to respond.[446] In the absence of market information needed to conduct further analysis, the USDOC found that it was necessary to rely on the facts otherwise available. In particular, the USDOC relied on evidence of extensive Chinese governmental

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[441] *See* Supporting Benchmark Memorandum, pp. 4-5 (Exhibit USA-84); *see also Line Pipe, United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015 ("Line Pipe Benefit QR") (Exhibit USA-118), p. 3 (in part referring back to Line Pipe Public Bodies QR, pp. 12-16) and p. 5 (identifying applicable export duty); *OCTG, United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015 ("OCTG Benefit QR") (Exhibit USA-119), p. 2 (in part referring back to OCTG Public Bodies QR, pp. 12-16) and p. 4 (identifying applicable export duty); *Pressure Pipe, United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015 ("Pressure Pipe Benefit QR") (Exhibit USA-120), Question 2 at "Questions Concerning the Stainless Steel Coil Industry" (in part referring back to Pressure Pipe Public Bodies QR, pp. 12-16) and Question 7 (identifying applicable export duty).

[442] Line Pipe Benefit QR, pp. 28-29 (Exhibit USA-118).

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

[444] *See id.*; *see also* OCTG Benefit QR, pp. 28-29 (Exhibit USA-119) (containing deficient responses); Pressure Pipe Benefit QR (Exhibit USA-120), Question 1 in "Questions Regarding the Producers of the Input Products Identified Above" (containing deficient responses).

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

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

intervention at various levels in the polysilicon market, and the existence of export restraints that artificially depressed domestic prices for polysilicon.[447] The USDOC also relied upon evidence cited in the Benchmark Memorandum regarding the extensive nature of Chinese government intervention in areas of strategic priority (including the renewable energy sector).[448] On this basis, the USDOC found that all domestic prices for polysilicon within China were distorted by governmental intervention and were, thus, not useable "market" benchmarks for measuring the adequacy of remuneration paid by mandatory respondents.

3. The Panel Should Reject China's "Market Pricing" Argument as Unsubstantiated

237. China argues that the USDOC failed to link its distortion findings to pricing and that the USDOC cannot make a proper finding of price distortion if it does not include a detailed report of prices found within the market. As discussed above, the USDOC rejected private prices after its analysis established that prices observed in China's economy do not reflect the balance of supply and demand that is generally understood to result in a market-determined price. The USDOC's analysis also fully explains why USDOC was not required to conduct a separate analysis of prices within the market. Price operates as a signal to convey the relative supply and demand. 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. On the basis of this logic, the USDOC examined whether any prices within the steel sector were reflective of "market conditions" resulting from "the discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers in the market."[449] The USDOC found that prices within the steel sector did not reflect market conditions such as would be necessary to establish an equilibrium price.

238. Further, China's argument is premised on the idea that detailed information on private prices was available in the challenged administrative proceedings. This premise is false. In fact, the USDOC found that the record contained only limited evidence from which to adduce whether private and government prices were "aligned." The available purchase pricing data in the relevant investigations was not sufficient to be considered representative of the whole market. Likewise, these reported prices on the record in the proceedings were not accompanied by the detail needed to make an appropriate comparison of private and public prices. For example, it is unclear whether the reported prices were all "spot" prices or whether some subset of those prices were pertained to long-term contracts.[450]

239. China identifies no other data that the USDOC should have relied upon or analyzed in its price distortion analysis, with the exception of a report summarizing data compiled by Mysteel.[451] This price series does not indicate how much of the underlying pricing data were

[447] *See* Supporting Benchmark Memorandum, p. 8 (Exhibit USA-84).
[448] *See* Supporting Benchmark Memorandum, pp. 6-9 (Exhibit USA-84).
[449] *See* Benchmark Memorandum, pp. 26-30 (Exhibit CHI-20); Final Benchmark Determination, pp. 19-20 (Exhibit CHI-21); *EC – Large Civil Aircraft (AB)*, paras. 975, 981.
[450] *See* Final Benchmark Determination, pp. 19-20 (Exhibit CHI-21).
[451] *See United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of the USDOC of the People's Republic of China to the Department's*

from sources that might be characterized as SIEs as opposed to private entities.[452] In fact, the report actually undermines China's argument as it cites policies of the Chinese government as impacting pricing in the relevant input markets during the periods of investigation.[453] Thus, China's reliance upon the Mysteel pricing data is misplaced, and the Panel should reject China's "market pricing" argument.

4. China's "Market Power" Claim Applies a Flawed Analytical Framework to the Distortion Inquiry

240. China argues that evidence of the "market structure" of the steel industry cannot support a finding that prices within the sector do not reflect the operation of market forces,[454] and that instead, USDOC was required to find that SIE suppliers "collectively possessed and exercised market power in such a manner as to cause the prices of private producers to 'align' with the 'government-determined' price."[455] China's insistence on a particular type of "market power" analysis finds no support in the SCM Agreement. Rather, the issue is one of determining the appropriate market-based benchmark to be used for determining benefit; nothing in the SCM Agreement specifies the specific mode of analysis that must be employed by an authority.

241. The lack of any support in the SCM Agreement for China's legal position is more than sufficient to dispose of China's "market power" argument. Nonetheless, the United States notes that China's proposed mode of analysis is inherently unworkable and deficient. First, while the evidence suggests that SIEs account for a predominant share of overall production in China's steel sector, the USDOC's finding of sector-wide distortion does not depend upon the size of the SIEs' market share or the extent to which the industry is "fragmented."[456] Indeed, the USDOC noted that "the existence of a predominant government provision of the financial contribution, while sufficient, is not necessary to a determination that private prices are distorted" given all the other evidence of Chinese government intervention in privately- and publicly-owned enterprises. This extensive evidence, as discussed above, supports the USDOC's conclusion that the Chinese government has "power over and in the steel sector that goes beyond that of ownership in assets or share of production."[457]

242. China ignores this evidence and instead relies on data taken from incomplete questionnaire responses submitted by the GOC during the section 129 proceedings. The data in

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Benchmark Questionnaire, July 6, 2015, at Exhibit GOC D-25 (Exhibit CHI-19) at Exhibit-9; *see also* Final Benchmark Determination, p. 20 (Exhibit CHI-21).

[452] Final Benchmark Determination, p. 20 (Exhibit CHI-21).

[453] *See United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of the USDOC of the People's Republic of China to the Department's Benchmark Questionnaire*, dated July 6, 2015, at Exhibit GOC D-25 (Exhibit CHI-19) at Exhibit-9 (identifying changes to "export tax policies" to "adapt to" market changes (with respect to the stainless steel market); noting that steel prices dropped "due to a series of macro-control measures unveiled by the state" and supply and demand imbalances (with respect to hot-rolled steel); and identifying cuts to the export tax rebates as causing price declines (with respect to steel billet)).

[454] *See* China's First Written Submission, para. 259

[455] *See* China's First Written Submission, para. 271; *see also id.*, paras. 279-80 (arguing that the USDOC failed to link subsidies allegedly provided to SIE steel input suppliers to the pricing behavior of non-SIE steel suppliers).

[456] *See* Benchmark Memorandum, p. 27, n. 117 (Exhibit CHI-20).

[457] Benchmark Memorandum, p. 28 (Exhibit CHI-20).

these responses covers a subset of producers that the GOC chose to report as representative of the input industry.[458] On this basis alone, the analysis cannot be considered reliable. In addition to the data problems, the framework of China's proposed analysis (based on an antitrust framework) is inappropriate for the inquiry at issue.[459]

243. China's analysis suffers from a number of unsound assumptions. Most fundamentally, the very concept of an antitrust framework is premised on the existence of a market oriented economic sector. But this, of course, assumes away the fundamental issue involved in this dispute – namely, whether USDOC provided a reasoned explanation for why it decided that prices in China's steel and renewable energy sectors were not market-determined. USDOC did so with its extensive analysis, noted above, including reliance upon evidence that these sectors were not market-oriented due to governmental policies and interventions directly impacting market actors and their pricing. Thus, China's market power analysis has absolutely no relevance or force with respect to the matters at issue in this dispute.

244. Although no further elaboration is necessary, a more fine-grained way to express the irrelevance of China's analysis is as follows: China's analysis excludes from consideration the impact of legal and policy instruments influencing SIEs by presupposing that a government may exercise market power only through state-owned suppliers. The analysis was also premised on the assumption that SIEs operate as profit-seeking commercial actors. This assumption, however, is unfounded in a system where SIEs are used as tools of policy implementation and are insulated from competitive market pressures.[460]

245. In the section 129 proceedings, the USDOC recognized these errors and properly rejected China's arguments. In doing so, the USDOC noted that its reasoning was consistent with the Appellate Body's recognition that governments may distort prices in other ways beyond market share.[461] The USDOC ultimately found that "the continued participation of private suppliers in the market is not particularly probative when market entry and exit decisions, and 'profitability' itself, are distorted by government intervention."[462]

246. China also points to the presence of private investment in the steel industry as evidence that market forces are at work in China. China's argument here is misplaced. The USDOC based its determination on evidence of intervention that directly impacted private enterprises, such as forced mergers and acquisitions and other limitations on investment.[463] The USDOC's determination was *not premised* on the lack of any private involvement in the sector. To the contrary, the USDOC conducted a thorough, holistic analysis of the sector, and based on extensive evidence, found that the sector as a whole was distorted. The existence of certain

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[458] *See* Benchmark Memorandum, pp. 4-6 (Exhibit CHI-20) (identifying deficiencies in questionnaire responses).
[459] *United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of the USDOC of the People's Republic of China to the Department's Benchmark Questionnaire*, July 6, 2015, Exhibit GOC D-25 (Exhibit CHI-19).
[460] *See* Benchmark Memorandum, pp. 6-7 (Exhibit CHI-20).
[461] *See US – Countervailing Measures (China) (AB)*, para. 4.50, n. 530; *US – Carbon Steel (India) (AB)*, para. 4.184**.**
[462] Final Benchmark Determination, p. 17 (Exhibit CHI-21). As this document reflects, China's assertion that the USDOC dismissed the evidence cited in China's analysis with a "single sentence" and without any analysis is factually inaccurate. *Cf.* China's First Written Submission, para. 265.
[463] *See* Benchmark Memorandum, pp. 17-18 (Exhibit CHI-20); *see also* Exhibit USA-124.

private steel firms, or allegedly private investors, in no way undermines the USDOC's conclusions. The same logic holds for China's reference to private investment in Chinese steel enterprises by companies such as ArcelorMittal and Evraz Group. These very investments were blocked or constrained by the Chinese government, or were otherwise unprofitable.[464] The record is replete with additional evidence that the Chinese government restricts private investment in pursuit of its desired market outcomes.[465] Thus, even if SIEs represented a minority of the market, the predominant role both *de jure* and *de facto* granted by the state to SIEs ensures that the private sector remains constrained in its growth and limited in its ability to pursue competitive pricing strategies apart from the state-owned sector.

D. The USDOC's Analysis of Price Distortion Is Consistent with Article 14(d)

247. China argues at great length that the USDOC applied an incorrect legal standard under Article 14(d) in finding that domestic prices within China's steel sector are distorted. Despite the length of China's arguments, the salient issue before the Panel is simple: whether – as China argues – Article 14(d) of the SCM Agreement limits resort to out-of-country benchmarks to situations where prices are "effectively determined," either *de jure* or *de facto*, by a Member's government. As we explain below, it does not.

248. China characterizes the USDOC's interpretation of Article 14(d) as requiring a "pure" market, a market "undistorted by government intervention," or "some minimum (but unspecified) level of government influence over the forces of supply and demand."[466] This is a straw man argument, premised on a mischaracterization of the USDOC's analysis in the challenged investigations. To the contrary, and as the record clearly shows, in each of the proceedings the USDOC evaluated price distortion consistent with the definition of "market conditions" supplied by the Appellate Body in various disputes.[467]

249. In particular, in *US – Carbon Steel (India) (AB)*, the Appellate Body found for purposes of Article 14(d) that the term "conditions" refers to "characteristics or qualities" and that those "characteristics or qualities" are modified by the term "market." The Appellate Body further held that a "market" refers to "'a place . . . with a demand for a commodity or service'; 'a geographical area of demand for commodities or services'; 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices.'"[468] "Taken together, these terms suggest that 'prevailing market conditions' in the context of Article 14(d) of the SCM Agreement, consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market

[464] *See* Benchmark Memorandum, pp. 29-30; Exhibit USA-124.
[465] *See, e.g.*, Benchmark Memorandum, p. 18 (Exhibit CHI-20) (citing evidence that foreign investors are subject to investment guidelines to ensure that foreign investment does not conflict with public policy goals); *id.*, p. 29 (citing evidence that "in principle" foreign investors may not own controlling shares in an iron or steel enterprise in China); *id.*, p. 9 (citing China's investment catalogue, which specifies prohibited, restricted, and encouraged investments for all industries and all investors).
[466] *See* China's First Written Submission, paras. 191, 230, 236.
[467] *See* Final Benchmark Determination, p. 11 (Exhibit CHI-21) (citing Appellate Body recognition that "market conditions" result "from the discipline enforced by an exchange that is reflective of the supply and demand in [the] market" (quoting *EC – Large Civil Aircraft (AB)*, para. 975)).
[468] *US – Carbon Steel (India) (AB)*, para. 4.150 (quoting *US – Upland Cotton (AB)*, para 404).

prices."[469] Furthermore, 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."[470]

250. As China itself recognizes, the Appellate Body has also identified certain circumstances where in-country prices may not be market-determined for purposes of an analysis under Article 14(d).[471] First, in-country prices might be distorted "where the government is the sole provider of the good in question, and where the government administratively controls all the prices for the goods at issue."[472] Further, as the Appellate Body found in *US – Softwood Lumber IV (AB)*, the government may have such a predominant role in the market that it "effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular."[473]

251. From these findings, China erroneously concludes that the Appellate Body intended to limit a Member's ability to resort to out-of-country benchmarks to circumstances where prices are "effectively determined" by a government. But the Appellate Body in *US – Carbon Steel (India) (AB)* clarified that its findings in *US – Softwood Lumber IV (AB)* were "necessarily circumscribed by the facts of that case" and that it had not "foreclosed the possibility that Article 14(d) permits the use of alternative benchmarks in situations where the government is not a predominant provider of the good in question."[474] Similarly, in this very dispute, the Appellate Body did "not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself."[475]

252. China contends that this "possibility" cited by the Appellate Body is meant to narrowly apply only to circumstances in which a government (rather than the forces of supply and demand) determines prices.[476]

253. China has no valid basis to support its legal proposition. As noted above, the Appellate Body in this very dispute recognized that the fundamental issue is one of distortion. Distortion certainly can exist in situations other than those in which the government determines all prices in a particular market. China's allegations are premised upon an incomplete understanding of Article 14(d). The forces of supply and demand can be distorted in a sector, even where direct control over pricing is not evident. The relevant inquiry is not whether the various interventions in the steel sector "effectively determined" prices within the sector; rather, the question is whether the distortions in the market were of such a magnitude that they distorted firm-level decision-making and prevented the establishment of equilibrium prices determined by the

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[469] *Id.*; *see also US – Countervailing Measures (China) (AB)*, para. 4.46.
[470] *EC – Large Civil Aircraft (AB)*, para. 981.
[471] *See* China's First Written Submission, para. 226.
[472] *US – Countervailing Measures (China) (AB)*, para. 4.62, n. 552.
[473] *US – Countervailing Measures (China) (AB)*, para. 4.50 (quoting *US – Softwood Lumber IV (AB)*, para. 93).
[474] *US – Carbon Steel (India) (AB)*, para. 4.184
[475] *US – Countervailing Measures (China) (AB)*, para. 4.50, n. 530.
[476] China's First Written Submission, paras. 242-243.

"forces of supply and demand."[477] Such distortion is evident, for example, in the magnitude of excess capacity that has been created in China's steel sector. This fundamental imbalance is one of many signals that supply and demand did not interact to determine market prices in China's steel sector.[478]

254. Likewise, China's extensive intervention in the decision-making processes of SIEs in the steel sector results in companies that do not operate as normal "commercial" actors making profit-driven determinations on matters of corporate strategy and resource allocation. The detailed industrial policy plans examined by the USDOC and evidence of the involvement of SASAC and the CCP in the internal operations of SIEs, all function to ensure that SIE decision-making remains responsive to state policy goals over market forces.[479] Further, because SIEs are also recipients of significant government incentives and are insulated from private competition, their ability to act based on "commercial considerations" is itself distorted.[480] As the USDOC explained in the Benchmark Memorandum, this extensive intervention is "at the heart of the excess capacity that is so problematic for the sector" and precludes any finding that SIE prices in the steel sector are "market-determined" for purposes of a benchmark analysis under Article 14(d).[481] The USDOC further concluded that "[t]his substantial and pervasive government intervention distorts market signals for *all* participants in the sector," including private producers.[482]

68. Furthermore, the question before the Panel is not whether Members must maintain a "U.S.-style" of governance as China claims; rather, the fundamental question – as noted – is one of price distortion.[483] Price distortion "must be established on a case-by-case basis."[484] The inquiry properly stated is whether the USDOC reasonably evaluated the totality of the evidence on the record of the section 129 proceedings to support a finding that prices for steel inputs within China were distorted or not market-determined and thus unusable as benchmarks for determining the adequacy of remuneration. Indeed, based on its evaluation of record evidence, the USDOC preliminarily found that extensive government intervention in the steel sector distorted sector-wide market signals. The USDOC continued to find in the final determination that prices in the sector did not result from the "discipline enforced by an exchange that is reflective of supply and demand of both buyers and sellers."[485] In *EC – Large Civil Aircraft (AB)*, the Appellate Body defined the "equilibrium price established in a market" as resulting

[477] *US – Countervailing Measures (China) (AB)*, para. 4.46 (quoting *US – Carbon Steel (India) (AB)*, para. 4.150)
[478] China asserts that overcapacity only became a problem after the relevant periods of investigation. *See* China's First Written Submission, para. 210. This assertion is not supported by evidence on the record. The USDOC cited evidence of overcapacity in China's steel sector that is dated both prior and subsequent to the relevant periods of investigation. *See* Benchmark Memorandum, pp. 22-24 (Exhibit CHI-20). Further, one of the exhibits to the analysis submitted by China states that "the Chinese government has acknowledged its growing concern over industry overcapacity, which has become acute since 2006" and also contains a chart demonstrating persistent supply and demand imbalances after 2006. *See* Exhibit CHI-19, Exhibit 3, pp. 6-7, 14.
[479] Benchmark Memorandum, pp. 6-17, 21-26 (Exhibit CHI-20).
[480] *Id.*, pp. 17-20, 26 (Exhibit CHI-20).
[481] *Id.*, pp. 26-27 (Exhibit CHI-20).
[482] *Id.*, pp. 27-30 (Exhibit CHI-20) (emphasis added).
[483] *See US – Countervailing Measures (China) (AB)*, para. 4.51 (noting that what permits investigating authorities to reject in-country prices "is price distortion").
[484] *See US – Countervailing Measures (China) (AB)*, para. 4.59.
[485] Final Benchmark Determination, pp. 11-12 (Exhibit CHI-21) (quoting *EC – Large Civil Aircraft (AB)*, para. 981).

"from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[486] This equilibrium must result from the discipline enforced by an exchange reflective of *both* supply and demand. Where, as in China's steel sector, one side of the equation (supply) continually fails to respond to the other side of the equation (demand), it cannot be said that the resulting prices reflect a market equilibrium of supply and demand. Thus, the USDOC appropriately concluded that those prices did not reflect the requisite "market conditions" under Article 14(d).

255. As the Appellate Body observed in *US – Softwood Lumber IV (AB)*, "there may be situations in which there is no way of telling whether the recipient is 'better off' *absent the financial contribution*," such as when the government is so predominant in a market that it "effectively determines" private supplier prices.[487] In that scenario, reliance upon prices within that market would . . . . yield[ ] a benefit that is "artificially low, or even zero."[488] China's narrow interpretation arbitrarily draws a distinction between 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's argument is inconsistent both with the text, and 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.

256. Finally, with respect to *Solar Products*, even if one were to entertain China's interpretation of Article 14(d), China has failed to establish that prices were not "effectively determined by the GOC." As set forth above, the GOC declined to respond to the USDOC's Benchmark Questionnaire which sought detailed information regarding the polysilicon market in China. Thus, relying on the facts available, the USDOC found that there is "significant distortion in the PRC's solar grade polysilicon market" based on evidence of governmental intervention in the polysilicon sector, the existence of export restraints on a key input into polysilicon, and the fact that a large polysilicon producer is able to sell below its cost of production because of government subsidies.[489] Because this evidence was probative of, and tended to support a determination that the Chinese government effectively determined polysilicon prices in China, China fails to make a *prima facie* showing that the USDOC's benchmark determination was inconsistent with even its incorrect interpretation of Article 14(d).

E. Conclusion

257. The Panel should reject China's argument that the USDOC's distortion finding is not sufficiently linked to pricing data, or that evidence of "market structure" cannot support a finding that prices within a sector do not reflect the operation of market forces. China fails to engage with the extensive evidence supporting the USDOC's findings and China's insistence on a particular type of "market power" analysis finds no support in the SCM Agreement. China's allegations are premised upon an incomplete understanding of Article 14(d) and a mischaracterization of the USDOC's analysis in the challenged investigations. Accordingly,

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[486] In economic terms, "equilibrium" is [a] situation in which supply and demand are matched and prices stable." Online Oxford English Dictionary (Exhibit USA-125).
[487] *US – Softwood Lumber IV (AB)*, para. 93 (emphasis in original).
[488] *US – Softwood Lumber IV (AB)*, para. 95.
[489] Supporting Benchmark Memorandum, pp. 8-9 (Exhibit USA-84).

China's claims that the United States has acted inconsistently with Articles 1.1(b) and 14 should be rejected.

IV. THE USDOC'S ANALYSIS OF DISTORTION IS NOT A SPECIFIC ACTION AGAINST SUBSIDIZATION UNDER ARTICLE 32.1 OF THE SCM AGREEMENT

258. China's Article 32.1 claim consists of two distinct allegations. First, China contends that the USDOC's "reliance" on record evidence of subsidies provided to SIEs, as one factor in its market distortion analysis, constitutes a "specific action against" subsidization of inputs that is inconsistent with Article 32.1.[490] Second, China argues that the USDOC's use of an out-of-country benchmark in each of these four investigations to determine whether inputs were provided at less than adequate remuneration, based on a market distortion analysis that includes consideration of this one factor, also constitutes a "specific action against" subsidization inconsistent with Article 32.1[491] As we show below, China errs in asserting that "reliance" on record evidence is a "measure" within the meaning of Article 3.1 of the DSU. Further, China has not demonstrated that the USDOC's distortion analyses or use of out-of-country benchmarks are "specific actions against" subsidization in the input markets examined in the challenged investigations, and thus inconsistent with Article 32.1.

259. As discussed above, in four of the challenged investigations the USDOC evaluated whether it could use in-country prices to determine whether inputs used to produce the merchandise under investigation were being provided for less than adequate remuneration. In *OCTG*, *Pressure Pipe*, and *Line Pipe*, the USDOC examined record evidence regarding the steel sector (which includes the hot-rolled steel, steel rounds, and stainless steel coil markets at issue in those investigations), to determine whether Chinese steel input prices could serve as a benchmark for determining the adequacy of remuneration. In reaching its determination, the USDOC analyzed evidence demonstrating that the GOC intervenes in the steel market in a variety of ways, including industrial policies, forced mergers and acquisitions, subsidies, investment restrictions, and export restrictions.[492] In light of the distortion in these markets, the USDOC declined to use Chinese prices to determine the adequacy of remuneration for sales of the steel inputs and instead relied on prices outside of China.[493]

260. In the *Solar Products* investigation, the USDOC examined record evidence regarding the polysilicon sector to determine whether Chinese polysilicon prices could serve as a benchmark for determining the adequacy of remuneration. The GOC failed to respond to the agency's benchmark questionnaire, the USDOC relied on the facts available. In selecting from the facts available, the USDOC considered public information on the record, including an excerpt from a panel determination, published articles, and a journal article.[494] Based on this information, the USDOC determined that there is significant distortion in the polysilicon market in various ways, including export restraints, management of the industry, and maintaining manufacturing rules and restrictions, as well as evidence that the largest polysilicon producer is able to sell at prices

[490] China's First Written Submission, para. 217, 289.
[491] China's First Written Submission, para. 289.
[492] *See* Benchmark Memorandum, p. 30 (Exhibit CHI-20).
[493] *See* Final Benchmark Determination, pp. 21-22 (Exhibit CHI-21).
[494] *See* Benchmark Memorandum, pp. 8-9 (Exhibit CHI-20).

below the break-even point due to subsidies.[495] In light of this distortion, the USDOC declined to use Chinese prices to determine the adequacy of remuneration for sales of polysilicon and instead relied on prices outside of China.

261. It is these intermediate findings that the prices of relevant inputs were not market-determined that China is challenging, apart from its claims against the relevant countervailing duties that were based in part on these findings. As explained below, China's "specific action against subsidization" claims fail because these intermediate findings are not themselves "measures" and also not "specific action against subsidization."

A. China Has Failed To Establish That "Reliance" on Record Evidence Is a Measure within the Meaning of the DSU

262. Article 32.1 of the SCM Agreement provides that "[n]o specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."[496] To succeed in its challenge, China must first identify a "measure" within the meaning of the DSU.[497]

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[495] *See* Benchmark Memorandum, pp. 8-9 (Exhibit CHI-20).

[496] The Appellate Body has read Article 32.1 of the SCM Agreement together with Article VI:3 of the GATT 1994 and Part V of the SCM Agreement. *See US – Offset Act (Byrd Amendment) (AB)*, paras. 236, 266-273. Paragraph 3 of Article VI of GATT 1994 provides as follows:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly, or indirectly, upon the manufacture, production or export of any merchandise.

Similarly, Article 10 of the SCM Agreement states:

> Members shall take all necessary steps to ensure that the imposition of a countervailing duty on any product of the territory of any Member imported into the territory of another Member is in accordance with the provisions of Article VI of GATT 1994 and the terms of this Agreement. Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture.

A footnote to this provision provides: "The term 'countervailing duty' shall be understood to mean a special duty levied for the purpose of offsetting any subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in paragraph 3 of Article VI of GATT 1994."

[497] DSU Article 3.3 ("The prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential . . . . "); 3.7 ("In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements."); 4.2 ("Each Member undertakes to . . . afford adequate opportunity for consultation . . . concerning measures affecting the operation of any covered agreement taken within

263. China argues that the USDOC's "reliance" on record evidence of subsidies provided to SIEs as a basis to reject domestic benchmark prices is a "specific action against subsidization" that is inconsistent with Article 32.1 of the SCM Agreement.[498] In challenging this "reliance," China fails to identify a "measure at issue" or "specific measure at issue" taken by a Member and the Panel should therefore reject China's claim.

264. As the Appellate Body has noted, Article 3.3 of the DSU "provides that the WTO dispute settlement system exists to address 'situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired *by measures taken* by another Member.'"[499] In *US – Corrosion-Resistant Steel Sunset Review* the Appellate Body addressed, in the context of the Anti-Dumping Agreement, the scope of measures that may be the subject of WTO dispute settlement, explaining that:

> [i]n principle, any act or omission attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings. The acts or omissions that are so attributable are, in the usual case, the acts or omissions of the organs of the state, including those of the executive branch.[500]

265. Measures examined by WTO panels and the Appellate Body include "measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application."[501]

266. China has failed to meet this standard with respect to challenge of the USDOC's "reliance" on evidence of input subsidization in the context of its market distortion analysis. To do so, China must at the outset establish that "reliance" on record evidence constitutes a measure within the meaning of the DSU. China has provided no such explanation. In fact, China's use of the term "reliance" suggests the opposite conclusion – that is, the USDOC's "reliance" is an intermediate step, but only one of many, leading to an action based on those intermediate steps – the determination whether to impose a countervailing duty.

267. China's own arguments weigh against a finding that "reliance" on subsidization as a factor in a market distortion analysis is a "measure." According to China, the USDOC "effectively *countervails*"[502] the alleged input subsidies without ever undertaking an "upstream subsidy analysis".[503] As such, China asserts that "the amount of the *countervailing duty*" applied to the downstream products under investigation should have been limited to any amount of upstream subsidy that was determined to pass through.[504] China's own statements demonstrate that the "measure" at issue is actually the countervailing duty applied to the merchandise under

the territory of the former"); 4.4 (identification of the measures at issue in the consultations request); 6.2 (identification of the specific measures at issue in the panel request).

[498] China's First Written Submission, paras. 217, 289.

[499] *US – Continued Zeroing (AB)*, para. 176.

[500] *US – Corrosion-Resistant Steel Sunset Review (AB)*, para. 81 (*quoted by US – Continued Zeroing (AB)*, para. 176).

[501] *Id.*, para. 82; *US – Continued Zeroing (AB)*, para. 178.

[502] China's First Written Submission, para. 297 (emphasis added).

[503] China's First Written Submission, paras. 293-295, 296-297.

[504] China's First Written Submission, para. 296 (emphasis added).

investigation – not the USDOC's consideration of the conditions of competition in the relevant market, including input subsidization. Had the United States not imposed a countervailing duty on a Chinese product, there would be no relevant measure potentially impairing benefits under the covered agreements (DSU Article 3.3) or taken within the territory of the United States (Article 4.2).

B. The USDOC's Market Distortion Analyses and Resulting Determinations to Use Out-Of-Country Benchmarks Do Not Constitute a "Specific Action Against" Input Subsidies

268. Even aside from China's failure to identify a "measure" for purposes of its claim under SCM Agreement Article 32.1, that claim fails because an out-of-country benchmark finding for an input is not a specific action against subsidization of those inputs. This is because use of an out-of-country benchmark was not made in response to subsidization of inputs, but rather to determine whether inputs are provided to subject merchandise producers for adequate remuneration.[505]

269. The Appellate Body has explained that a two-step analysis is required to determine whether a measure is inconsistent with Article 32.1 of the SCM Agreement. First, it is necessary to examine whether the measure at issue is a "specific action against" a subsidy. Second, if the answer is affirmative, it is necessary to examine whether the action is taken in accordance with the provisions of the GATT 1994, as interpreted by the SCM Agreement.[506]

270. Under the first step, a measure will only constitute a "specific action against" subsidization if it acts (1) specifically in response to subsidization, and (2) against subsidization.[507] A measure is "specific" if it may be taken only in situations presenting (or is inextricably linked to, or has a strong correlation with) the constituent elements of subsidization.[508] The test for whether a measure is inextricably linked to, or has a strong correlation with subsidization "may be met where the constituent elements of dumping or of a subsidy 'are implicit in the express conditions for taking such action.'"[509]

271. A measure acts "against" subsidization if it has an adverse bearing on, or "has the effect of dissuading," or "creates an incentive to terminate" subsidization.[510] Although the "adverse bearing" can be direct or indirect,[511] a "high standard" must be met in determining whether a measure has the effect of dissuading subsidization.[512] Indeed, a measure will not constitute a specific action "against" a subsidy merely because of its impact on conditions of competition.

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[505] *NB* China has not established that the USDOC's reference to subsidies in the Benchmark Memorandum relates to subsidies as defined in the SCM Agreement. The USDOC referred to subsidies in the form of various government incentives.
[506] *See US – Offset Act (Byrd Amendment) (AB)*, paras. 236.
[507] *See US – Offset Act (Byrd Amendment) (Panel)*, para. 7.7, 7.18; *US – Offset Act (Byrd Amendment) (AB)*, para. 237, 239.
[508] *See US – Offset Act (Byrd Amendment) (Panel)*, para. 7.18; *US – Offset Act (Byrd Amendment) (AB)*, para. 239.
[509] *EC – Commercial Vessels*, para. 7.112.
[510] *See US – Offset Act (Byrd Amendment) (Panel)*, para. 7.18; *US – Offset Act (Byrd Amendment) (AB)*, para. 254-56.
[511] *See US – Offset Act (Byrd Amendment) (Panel)*, para. 733.
[512] *EC – Commercial Vessels*, para. 7.161.

Instead, "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."[513]

272. Under the second step of the analysis, a measure is "in accordance with GATT 1994, as interpreted by the SCM Agreement," if it is one of four permissible responses to subsidization: definitive countervailing duties, provisional measures, undertakings, and countermeasures.[514]

273. China argues that the USDOC's use of out-of-country benchmarks in the four challenged investigations constitutes a measure that is a "specific action against" the subsidies allegedly provided to the input producers, and thus is inconsistent with Article 32.1. China asserts, in particular, that use of out-of-country benchmarks is inextricably linked to the constituent elements of a subsidy, and has the effect of dissuading the practice of subsidization or creating an incentive to terminate such practice.[515]

274. Contrary to China's claim, taking account of the conditions in an economic market to determine if prices in the market under consideration can serve as benchmarks to determine the adequacy of remuneration pursuant to Article 14(d) of the SCM Agreement does not constitute a "specific action against" subsidization of upstream steel producers in China. To the contrary, the USDOC conducted the type of analysis that the Appellate Body has explained is appropriate under Article 14(d) of the SCM Agreement.

275. For instance, in *US – Softwood Lumber IV*[516] the Appellate Body stated that the determination of whether private prices are distorted because of the government's predominant role in the market as a provider or goods "must be made on a case-by-case basis, *according to the particular facts* underlying each countervailing duty investigation." Similarly, in *US – Countervailing Duty Measures (China)*, the Appellate Body explained that as part of its distortion analysis the investigating authority may have to examine the "conditions of competition in the relevant market" – including the structure of the relevant market, the nature of the entities operating in the market and their respective market shares, entry barriers, and the behavior of entities operating in the market – to determine whether the government itself, or government-related entities, exert market power that distorts in-country prices.[517]

276. In the four investigations at issue, the USDOC examined a variety of record evidence, including information regarding the provision of subsidies to input producers, and thus engaged in an analysis of the very economic conditions that the Appellate Body has found are important to consider before an investigating authority may determine that its less-than-adequate remuneration analysis may rely on out-of-country benchmarks.

277. China's claim fails because use of out-of-country benchmarks to measure the adequacy of remuneration is itself not a "measure" that is a "specific action against" input subsidies. First, use of out-of-country benchmarks is not an action that is "specific" *to input subsidies* because

[513] *EC – Commercial Vessels*, para. 7.164.
[514] *See US – Offset Act (Byrd Amendment) (AB)*, para. 269; *Mexico - Rice AD Measures (Panel)*, para. 7.276.
[515] China's First Written Submission, paras. 289-290.
[516] *See US – Softwood Lumber IV (AB)*, para. 102 (emphasis added).
[517] *See US – Countervailing Measures (China) (AB), paras*, para. 4.62.

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.[518] 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.[519] 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 neither offsets subsidies provided to input producers, nor creates an incentive for the GOC to terminate input subsidization. Instead, it is a part of the USDOC's analysis of the provision of inputs to downstream producers of subject merchandise for less than adequate remuneration.

278. China's argument also improperly characterizes the USDOC's legitimate response to a finding that a particular market is distorted – use of out of country benchmarks – as an impermissible action against subsidization. The Appellate Body has repeatedly found that the use of out-of-country benchmarks is permissible. For instance, in *U.S. - Carbon Steel (India)*, the Appellate Body explained that "[a]lthough the benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices when they are not market determined."[520] In *US – Softwood Lumber IV*, the Appellate Body reached a similar finding, stating that "prices in the market of the country of provision are the primary, but not the exclusive, benchmark for calculating benefit."[521]

279. China has also 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.[522] Indeed, the Appellate Body has explained that 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."[523] Here, China merely asserts that the USDOC's use of out-of-country benchmarks "in all likelihood" increases the amount of the allegedly subsidy benefit or identifies a benefit where none would otherwise exist.[524] 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.

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[518] *See US – Offset Act (Byrd Amendment) (AB)*, para. 239; *US – Offset Act (Byrd Amendment) (Panel)*, para. 7.18.
[519] *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).
[520] *U.S. – Carbon Steel (India) (AB)*, para 4.155.
[521] *US – Softwood Lumber IV (AB)*, para. 97.
[522] *See EC – Commercial Vessels*, para. 7.161, 7.164.
[523] *EC – Commercial Vessels*, para. 7.164.
[524] China's First Written Submission, para. 292.

280. Finally, the USDOC's benchmark determinations in the investigations at issue are distinct from measures which the DSB has previously found to be inconsistent with Article 32.1. For example, in *US – Offset Act (Byrd Amendment)*, the Appellate Body found that the challenged offset payments provided for by the Continued Dumping and Subsidy Act of 2000 were a "specific action against" dumping and subsidization. In particular, the Appellate Body found that the offset payments were inextricably linked to, and strongly correlated with, a determination of dumping or subsidization, because the payments could be made only if antidumping and countervailing duties had been collected, such duties could only be collected pursuant to an antidumping or countervailing duty order, and an order could only be imposed following a determination of dumping or subsidization.[525] The Appellate Body also found that the offset payments were an action "against" dumping or subsidization because the legislation was "designed and structured so that it dissuade[d] the practice of dumping or the practice of subsidization," and "create[d] an incentive to terminate such practices" by "effecting a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic counterparts," who could in turn use such payments to bolster their competitive position.[526]

281. In *Mexico – Rice AD Measures*, a panel found that the challenged measure, Article 93V of the Foreign Trade Act, was a "specific" action because importers could be fined only once antidumping or countervailing duties had been imposed, and fines could only be collected pursuant to an antidumping or countervailing duty order, which could only be imposed following a determination of dumping or subsidization. As a result, the panel found that there as a "clear, direct and unavoidable connection between the determination of dumping and subsidization and the imposition of fines."[527]

282. Here, the challenged action, the USDOC's use of out-of-country benchmarks in four countervailing duty investigations, is entirely distinct from the measures found to be inconsistent with Article 32.1 in *US – Offset Act (Byrd Amendment)* and *Mexico – Rice AD Measures*. It is neither predicated on there being a prior determination of subsidization or a countervailing duty order, nor does use of such a benchmark result in the transfer of financial resources between a foreign producer/exporter and the domestic competitor.

V. CHINA'S CLAIMS REGARDING INPUT SPECIFICITY ARE UNFOUNDED

283. China challenges the USDOC's input specificity determinations, claiming that the USDOC did not take into account the relevant Article 2.1(c) factors in making its findings. Article 2.1(c) of the SCM Agreement states: "account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as length of time during which the subsidy programme has been in operation." China argues that the USDOC's analyses of the length of time during which the steel input subsidy programs were in operation were inconsistent with a proper interpretation of Article 2.1(c) and were not clearly substantiated on the basis of positive evidence.[528] China does not challenge the USDOC's

[525] *US – Offset Act (Byrd Amendment) (AB)*, para. 242.
[526] *US – Offset Act (Byrd Amendment) (AB)*, para. 256-57.
[527] *Mexico – Rice AD Measures (Panel)*, para. 7.278.
[528] *See, e.g.,* China's First Written Submission, paras. 313, 344.

implementation of the DSBs' recommendations and rulings with respect to the other factors in Article 2.1(c), namely the extent of diversification of economic activities within the jurisdiction of the granting authority.[529]

284. In the 12 relevant proceedings the USDOC brought its determinations into compliance with respect to the Panel's findings under Article 2.1(c) of the SCM Agreement. The USDOC revised its analysis in each of these proceedings by "taking account of the diversity of the [Chinese] economy" and "the length of time in which the subsidies at issue were in operation," and by "identify[ing] a subsidy program in each of the specificity determinations for the various input for LTAR programs."[530]

285. The USDOC identified the "jurisdiction of the granting authority" in each of the investigations at issue" based on "the Department's questionnaires issued to the GOC."[531] The USDOC also "analyzed the issues of diversification of economic activities and determined, in reliance on the GOC's questionnaire responses."[532] The USDOC concluded that the jurisdiction of the granting authority is China itself, "because there are no restrictions on where SOEs can sell inputs within the PRC."[533] In analyzing the "economic diversification of the PRC," the USDOC "determined that there does not exist a lack of diversification within the PRC economy."[534] The USDOC also found that the subsidy programs were in operation for a significant length of time.[535]

286. Finally, in conducting its redetermination 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."[536]

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[529] *See* China's First Written Submission, para. 313, n. 319.
[530] *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 ("Preliminary Input Specificity Determination"), p. 1 (Exhibit CHI-4). The input subsidies at issue are the following: Provision of Stainless Steel Coil for LTAR, Provision of Hot-Rolled Steel for LTAR, Provision of Wire Rod for LTAR, Provision of Steel Rounds for LTAR, Provision of Caustic Soda for LTAR, Provision of Green Tubes for LTAR, Provision of Primary Aluminum for LTAR, Provision of Seamless Tubes for LTAR, Provision of Standard Commodity Steel Billets and Blooms for LTAR, Provision of Polysilicon for LTAR, and Provision of Coking Coal. *See id.*
[531] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).
[532] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).
[533] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).
[534] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).
[535] Preliminary Input Specificity Determination, pp. 19-20 (Exhibit CHI-4).
[536] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).

A. China Has Not Demonstrated that the USDOC Failed To Implement the DSB's Recommendation and Rulings With Respect to the Analysis of the Length of Time China Had Provided Inputs Under the Subsidy Programs

287. China challenges the USDOC's input specificity determinations, claiming that the USDOC did not take into account the "length of time during which the subsidy programme has been in operation" as prescribed by Article 2.1(c) in making its findings. China's claim fails because the USDOC expressly addressed the "length of time" aspect of Article 2.1(c) in great detail and considered it along with the other Article 2.1(c) factors in reaching its specificity determinations.

288. With respect to each of the twelve underlying countervailing duty investigations, the USDOC reconsidered its inputs for LTAR specificity determinations by explicitly taking account of the length of time during which the subsidy programs had been in operation.[537] 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).[538] 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."[539] 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."[540] The USDOC in the original investigations asked for three years of data on each industry providing the relevant input or inputs in each investigation.[541]

289. In the five cases in which the GOC cooperated, *i.e.*, *Pressure Pipe*, *Line Pipe*, *Kitchen Shelving*, *OCTG*, and *Steel Cylinders*, the GOC responded to the USDOC's questionnaire by explaining that:

> the PRC was created on October 1, 1949, and that SOEs began producing and selling the inputs at issue in the PRC at some point during the period covered by the first Five-Year Plan (1953-1957), and possibly earlier.[542]

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[537] *See United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Input Specificity: Preliminary Analysis of the Diversification of Economic Activities and Length of Time*, December, 31 2015 ("Preliminary Input Specificity Memorandum"), pp. 6-9 (Exhibit CHI-23).
[538] *See* Preliminary Input Specificity Memorandum, p. 7 (Exhibit CHI-23) ("The 'length of time' language instructs the investigating authority to account for the fact that there may be only a limited number of users because the subsidy program has only been in operation for a limited period of time. A program with a limited number of recipients may not necessarily be *de facto* specific if the subsidy program has *only* been in effect for a limited period of time. For example, a program may only have 50 users because the program has only been in operation for a few months").
[539] Preliminary Input Specificity Memorandum, p. 7 (Exhibit CHI-23).
[540] Preliminary Input Specificity Memorandum, p. 7 (Exhibit CHI-23).
[541] Preliminary Input Specificity Memorandum, p. 6 (Exhibit CHI-23).
[542] Preliminary Input Specificity Memorandum, p. 7 (Exhibit CHI-23).

290. Based upon this 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."[543] 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."[544] In other words, the limited number of recipients did not result from a limited duration of the subsidies at issue.

291. With respect to the seven cases where the GOC did not cooperate, *i.e.*, *PC Strand*, *Solar Products*, *Seamless Pipe*, *Coated Paper*, *Lawn Groomers*, *Drill Pipe* and *Aluminum Extrusions*, the USDOC found that, as a result of the GOC's decision not to participate, necessary information related to this issue was missing from the record.[545] Therefore, as facts available, the USDOC selected the GOC's own answers in the five proceedings in which it cooperated to determine the length of time in which the subsidy program has been in operation.[546] On this basis the USDOC arrived at the same determination with respect to these seven cases, *i.e.*, that the limited number of recipients did not result from a limited duration of the subsidies at issue.[547]

292. China begins its submission on this issue by claiming that the USDOC did not ask any questions of the GOC in the section 129 proceedings that the GOC at the time understood to solicit relevant information on this issue.[548] This argument has no merit. Whatever China's impression of the relevance of the USDOC's questions, China has not explained how its impression of these questions is pertinent to its allegation that the USDOC failed to implement the DSB's recommendations and rulings in this dispute.[549]

293. China next 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.[550] 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,"[551] where, as the Appellate Body has explained, the term "subsidy programme" "refers to *a plan or scheme* regarding the subsidy at issue."[552] 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,"[553] 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.

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[543] Preliminary Input Specificity Memorandum, p. 7 (Exhibit CHI-23).
[544] Preliminary Input Specificity Memorandum, pp. 7-8 (Exhibit CHI-23).
[545] Preliminary Input Specificity Memorandum, p. 9 (Exhibit CHI-23).
[546] Preliminary Input Specificity Memorandum, p. 9 (Exhibit CHI-23).
[547] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).
[548] China's First Written Submission, para. 336.
[549] *See* China's First Written Submission, paras. 336-38.
[550] China's First Written Submission, para. 340.
[551] Article 2.1(c), SCM Agreement.
[552] *US – Countervailing Measures (China) (AB)*, para. 4.142 (emphasis added).
[553] *US – Countervailing Measures (China) (AB)*, para. 4.141 (emphasis added).

294. More generally, China's reasoning is flawed. Consider, for example, the case of a granting authority that administers a subsidy program that provides preferential loans to enterprises operating within a favored industry. Nothing in the language of the SCM Agreement suggests that an investigating authority may only consider those loans that confer a benefit when analyzing the specificity of the program. Here, similarly, the USDOC need not limit its specificity analysis only to the provision of inputs that were provided for less than adequate remuneration to determine the specificity of the program.

295. The Appellate Body's reasoning in this dispute supports this reasoning. Specifically, the Appellate Body explained that in identifying whether a subsidy is specific to certain enterprises "[i]t is relevant . . . to consider not only the *actual*, but also the . . . *potential* recipients of a particular subsidy."[554] The Appellate Body's statements that an investigating authority may consider "potential recipients" make clear that a specificity analysis may include firms that may, or may not, have received a benefit when conducting a specificity analysis.

296. In addition, in *US – Anti-Dumping and Countervailing Duties*, the Appellate Body rejected a similar attempt by China to read a requirement into Article 2 of the SCM Agreement that investigating authorities must examine both the financial contribution and benefit in conducting specificity analyses. In that case, China argued that Article 2.1(a) of the SCM Agreement required a *de jure* specificity analysis that found access to both financial contribution of a subsidy and its benefit to be limited.[555] The Appellate Body rejected China's argument and instead made clear that *de jure* analyses could analyze either the financial contribution or benefit because access to the subsidy – the focus of a *de jure* analysis – could be achieved by limiting access to either element.[556] Here, China makes a similar argument to its argument in *US – Anti-Dumping and Countervailing Duties* when it states that the USDOC had to consider only those provisions of inputs that were provided for less than adequate remuneration in its length of time analysis. This Panel, like the Appellate Body in *US – Anti-Dumping and Countervailing Duties*, should reject China's attempt to interpret Article 2 of the SCM Agreement in a manner that would require specificity analyses of both the financial contribution and benefit.

297. China also asserts that the USDOC generally assumes that every sale of an input by a Chinese SOE represents the provision of an input for LTAR.[557] As an initial matter, these arguments mischaracterize the USDOC's analysis, which never presumed that every sale which China made of inputs provided a benefit. Indeed, as discussed above, there is no requirement that in examining a subsidy program, an investigating authority only consider activities that resulted in a benefit. In any event, these arguments are premised in a misunderstanding of what the last sentence of Article 2.1(c) and the Panel's guidance require. The USDOC is required only to *account for* the length of time during which the subsidy program has been in operation,

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[554] *US – Countervailing Measures (China) (AB)*, para. 4.140 (emphasis in original).
[555] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 376.
[556] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 377.
[557] China's First Written Submission, para. 342.

not to conduct an analysis *establishing* the operation of that program over that period of time to determine which sales of inputs over many decades resulted in the provision of a benefit.[558]

B. China's Conception of a "Systematic Series of Actions" Has No Basis in the SCM Agreement

298. China objects to the evidence relied upon by the USDOC to establish "a systematic series of actions," arguing that it consisted of nothing more than evidence pertaining to the specific transactions that the USDOC found to confer countervailable subsidies.[559] In so doing China repeatedly argues that this information was already on the record of the original investigations underlying this dispute.[560] However, these arguments are immaterial to the issue of whether the USDOC's section 129 determinations implement the DSB's recommendations and rulings. The identification of a "subsidy program" as part of a *de facto* specificity analysis under Article 2.1(c) must be made on the basis of record evidence. The USDOC did just that. Nowhere did the Appellate Body suggest in its report that the USDOC must solicit further information beyond what is already on the record in identifying "subsidy programmes,"[561] nor does China argue that it necessarily follows from the Appellate Body's guidance that the record must be supplemented with additional information for the USDOC to identify "subsidy programmes."[562]

299. The USDOC found 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" as part of a series of systematic activities that demonstrate the existence of a subsidy program.[563] China does not argue that the evidence on which the USDOC relied did not exist or was not useable in some way; in fact, that evidence did demonstrate the actions on which USDOC drew its conclusions.

300. China claims that by finding a "systematic series of actions" in the GOC's repeated provision of subsidies during the period of investigation of each proceeding, the USDOC has rendered the term "subsidy programme" indistinguishable from the term "subsidy."[564] This is inaccurate. A "subsidy" is a financial contribution by a public body that is specific and confers and benefit. A "subsidy programme," as we explained above is "a plan or scheme regarding the subsidy at issue [that] may . . . be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."[565] That the USDOC found the repeated provision of inputs to be such a systematic series of actions, *i.e.*, *evidence of* a subsidy programme, does not render the terms indistinguishable.

[558] *See* Article 2.1(c), SCM Agreement ("In applying this subparagraph, *account shall be taken of* . . . the length of time during which the subsidy programme has been in operation.") (emphasis added).
[559] China's First Written Submission, paras. 320.
[560] China's First Written Submission, paras. 320, 327.
[561] *See US – Countervailing Measures (China) (AB)*, para. 4.140-4.157.
[562] *See US – Countervailing Measures (China) (AB)*, para. 314-32.
[563] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).
[564] China's First Written Submission, para. 321.
[565] *US – Countervailing Measures (China) (AB)*, para. 4.141.

301. Similarly, China claims that by finding a "systematic series of actions" in the GOC's repeated provision of inputs during the period of investigation of each proceeding, the USDOC has "collapsed" the identification of a "subsidy programme" into the identification of subsidies.[566] This too is wrong. The identification of a subsidy requires finding a financial contribution by a public body that is specific and confers and benefit. The identification of a subsidy programme in the context of this dispute requires finding the *repeated provision* of inputs during the period of investigation."[567] These are plainly two different inquiries. Indeed, we note that the Appellate Body itself contemplated that the process of identifying and analyzing the subsidy at issue might very well lead to the identification of the relevant subsidy programme.[568]

302. China also argues that the USDOC's reasoning invariably leads to the conclusion that the "subsidy programme" identified in an investigation is "use[d] . . . by a limited number of certain enterprises."[569] This analysis is flawed. The USDOC's questions to the GOC regarding the production and sale of the inputs at issue by SOEs, and its analysis, was not limited to the particular products under investigation or to the producers or exporters selected as mandatory respondents.[570]

303. Finally, the USDOC's length of time analysis and the evidence it relies upon would withstand scrutiny even under the incorrect legal standard that China advances in this compliance dispute. Under China's incorrect legal theory, the USDOC should have identified the length of time China provided the relevant input only for less than adequate remuneration. Had the GOC responded to the USDOC's extensive questionnaires in *PC Strand*, *Solar Products*, *Seamless Pipe*, *Coated Paper*, *Lawn Groomers*, *Drill Pipe*, and *Aluminum Extrusions*, the USDOC would have had sufficient information to pinpoint the historical provision of inputs at less than adequate remuneration. Because the GOC did not cooperate in those investigations, the USDOC did not have the necessary information to produce as nuanced a finding as China demands in its first written submission. Instead, the USDOC relied on the facts available to conclude that China had been "producing and selling the inputs at issue in the PRC at some point during the period covered by the first Five-Year Plan (1953-1957), and possibly earlier."[571] This information was probative of, and tended to support a determination that the provision of inputs only for less than adequate remuneration had not been in operation 'for a limited period of time. The GOC, in declining to provide more detailed information, invited the conclusion that China has been providing the inputs over that period for less than adequate remuneration. China has not challenged USDOC's use of facts available in relation to its finding on the length of time over which input sales occurred. Thus, even under China's incorrect legal interpretation of the

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[566] China's First Written Submission, para. 321-22; *see also* China's First Written Submission, para. 321 ("If the Panel were to accept the USDOC's reasoning, the identification of subsidies provided to individual companies would *always* be sufficient to identify a "subsidy programme.") (emphasis in original).
[567] Preliminary Public Bodies Determination, p. 19 (Exhibit CHI-4).
[568] *US – Countervailing Measures (China) (AB)*, para. 4.144 ("It stands to reason . . . that the relevant 'subsidy programme,' under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue . . . .").
[569] China's First Written Submission, para. 323.
[570] *See* China's First Written Submission, para. 336.
[571] Preliminary Input Specificity Determination, p. 7 (Exhibit CHI-4).

length of time analysis, the USDOC's determinations in *PC Strand*, *Solar Products*, *Seamless Pipe*, *Coated Paper*, *Lawn Groomers*, *Drill Pipe*, and *Aluminum Extrusions* are WTO-consistent.

VI. CHINA HAS NOT DEMONSTRATED THAT THE USDOC FAILED TO IMPLEMENT THE DSB'S RECOMMENDATIONS WITH RESPECT TO THE REGIONAL SPECIFICITY OF THE LAND USE RIGHTS SUBSIDY PROGRAM IN *THERMAL PAPER*

A. The USDOC's Land Specificity Determinations Comply with the DSB's Recommendations and Rulings

304. In CVD investigations involving products from China, the USDOC has evaluated the provision of land use rights in designated geographical regions for many years. The USDOC's original regional specificity analyses of land subsidies were determined to be WTO-inconsistent in *US – Anti-Dumping and Countervailing Duties*, and when the USDOC implemented the DSB's recommendations and rulings in response to that dispute, it developed a new, WTO-consistent regional specificity approach for land subsidies. The investigations that China challenged in this dispute predate the USDOC's implementation of the DSB's recommendations and rulings in *US – Anti-Dumping and Countervailing Duties*. Thus, the USDOC followed its original approach to determining regional specificity for land subsidies in the investigations that were subject to the original Panel findings in this dispute. Following the reasoning developed in *US – Anti-Dumping and Countervailing Duties*, the Panel found that the fact that the land in question is located within an industrial park or economic development zone within the seller's jurisdiction is insufficient by itself to establish a limitation of access to the subsidy absent a finding that the provision of land within the park or zone is distinct from the provision of land outside of the park or zone.[572] The Panel further explained that establishing that the conditions within the park or zone were differential and preferential to those outside of the park or zone, in terms of special rules or pricing, for example, would have been sufficient.[573]

305. Here, upon implementation, the USDOC reconsidered its land use rights subsidy analyses in the *Thermal Paper*, *Line Pipe*, *Citric Acid*, *OCTG*, *Wire Strand*, and *Seamless Pipe* investigations.[574] The USDOC employed the same approach as it had in the implementation proceeding in *US – Anti-Dumping and Countervailing Duties*.[575] Accordingly, the USDOC issued questionnaires to the GOC soliciting information to determine whether, with regard to each given area of land under the control of the administering authority, a "distinct land regime" existed within the relevant industrial park or economic zone relative to the areas outside of each zone.[576] For example, the USDOC asked the GOC to identify industries that are encouraged, restricted, or prohibited from locating to or operating in each park or zone, and to identify all incentives or preferential policies offered to firms located within the park or zone and whether these incentives or policies were available to firms located outside of the zone or park.[577] The GOC provided substantive responses with respect to the *Line Pipe*, *OCTG*, and *Seamless Pipe*

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[572] *US – Countervailing Measures (China) (Panel)*, para. 7.352.
[573] *US – Countervailing Measures (China) (Panel)*, para. 7.352.
[574] *See* Land Preliminary Determination, p. 1 (Exhibit CHI-24).
[575] *See* Land Preliminary Determination, p. 3 (Exhibit CHI-24).
[576] Land Preliminary Determination, p. 6 (Exhibit CHI-24).
[577] *See, e.g.*, Land Questionnaire, p. 15 (Exhibit CHI-25).

investigations, but did not respond for the *Thermal Paper*, *Citric Acid*, and *Wire Strand* investigations.[578]

306. Based on the record developed in each investigation, the USDOC made specificity determinations for each of the land subsidy programs.[579] With respect to the *Line Pipe*, *OCTG*, and *Seamless Pipe* investigations, the USDOC found that although the information from the GOC indicated that the relevant administering authorities offered financial incentives to firms located within each zone or park, the GOC's questionnaire response did not indicate that these incentives were provided exclusively within the park or zone or were tied to the purchases of land themselves.[580] Therefore, the USDOC determined that a "distinct land regime" did not exist in the zone or parks at issue.[581] With respect to the *Thermal Paper* and *Citric Acid* investigations, the USDOC found that record information indicating preferential pricing established a distinct land regime and, therefore, was *de facto* specific.[582] With respect to *Wire Strand*, the USDOC found as facts available that the program at issue was *de jure* specific because the name of the zone at issue suggested that access was limited to technology firms.[583]

B. China's Arguments Do Not Demonstrate that the USDOC Failed To Comply with the DSB's Recommendations and Rulings with respect to its Regional Specificity Determination in *Thermal Paper*

307. China challenges the USDOC's determination that the land subsidy in *Thermal Paper* was regionally specific based on the facts available. This claim is based on a misunderstanding of the record evidence in *Thermal Paper*. The USDOC's regional specificity analysis is WTO-consistent and China fails to show otherwise.

308. As an initial mater, China broadly and summarily claims that the USDOC's section 129 determinations rely on an analysis that is inconsistent with the Appellate Body's guidance with respect to Article 2.2.[584] Specifically, China claims that the USDOC's analysis in *Thermal Paper* demonstrates that the USDOC generally is finding regional specificity when evidence demonstrates that an "identical subsidy" is available elsewhere in the jurisdiction of the granting authority.[585] This is simply inaccurate. As China itself acknowledges, the USDOC sought from the GOC information regarding all incentives or preferential policies offered to firms located within each industrial park or economic zone at issue *and* whether such incentives or policies were offered outside of these areas.[586] Based on this evidence, the USDOC did *not* find regionally specific subsidies with respect to the proceedings in which the GOC chose to participate—namely, *Line Pipe*, *OCTG*, and *Seamless Pipe*.[587] Moreover, with the exception of its challenge to the USDOC's section 129 determination with respect to *Thermal Paper*, which

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[578] Land Preliminary Determination, p. 4 (Exhibit CHI-24).
[579] Land Preliminary Determination, pp. 6-13 (Exhibit CHI-24).
[580] Land Preliminary Determination, p. 7 (Exhibit CHI-24).
[581] Land Preliminary Determination, pp. 7-8 (Exhibit CHI-24).
[582] Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[583] Land Preliminary Determination, p. 12 (Exhibit CHI-24).
[584] China's First Written Submission, para. 353.
[585] China's First Written Submission, para. 353.
[586] China's First Written Submission, para. 357.
[587] Land Preliminary Determination, p. 7 (Exhibit CHI-24).

we address below, China identifies no instance where the USDOC found regional specificity where evidence demonstrated that an "identical subsidy was available elsewhere in the jurisdiction of the granting authority.[588] This claim is thus baseless.

309. With respect to *Thermal Paper*, China argues that the USDOC based its determination on a misplaced interpretation of the term "preferential treatment" in a government-issued land appraisal.[589] Specifically, China argues that although the USDOC relied on the facts available to determine that the preferential treatment referenced in the appraisal concerned a preferential price, record information indicated that this preferential treatment did not concern the price of the land and that land-use prices outside of the economic zone at issue were lower than the price at issue.[590] These claims are predicated on China's misunderstanding of the USDOC's determination and a misreading of the record.

310. As China acknowledges, the land appraisal is unclear as to the meaning of "preferential treatment."[591] And, the term remains unclear because China failed to cooperate with respect to this investigation when it did not respond to USDOC's request for information. Because the record is incomplete as a result, the USDOC lacked the record information needed to complete its analysis.[592] The USDOC asked the GOC to provide, among other things, a listing of *all* incentives or preferential policies offered to firms inside of the zone at issue and to indicate whether the incentives or preferential policies were available to firms located outside of the zone.[593] The GOC refused to provide the USDOC with this information and, astonishingly, takes the view that, despite this lack of cooperation, the USDOC was required to base its finding on one piece of information that China argues weighs in favor of finding no regional specificity.[594]

311. Because the necessary information was missing from the record and the GOC failed to cooperate in *Thermal Paper*, the USDOC determined that the preferential treatment to which China refers supported a determination that preferential pricing existed within the zone at issue relative to pricing outside of the zone and thus supported a regional specificity determination.[595] The USDOC never made a determination that such preferential pricing conclusively existed inside the zone because, due to the GOC's lack of cooperation, such a conclusive determination was not possible. However, a statement that the respondent received preferential treatment is probative of, and tends to support a determination that the respondent received preferential prices within the zone. As such, the USDOC's facts available determination is supported by the record evidence and consistent with Article 12.7 of the SCM Agreement.

312. China is incorrect in arguing that the record evidence establishes that preferential prices did not exist within the zone. The pricing datum to which China cites related to merely one sale of land in the zone. There is no analysis on the record of all the prices for land inside the zone, nor would one be possible given the GOC's lack of cooperation. In addition, China fails to

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[588] *See* China's First Written Submission, paras. 345-70.
[589] China's First Written Submission, para. 364-66.
[590] China's First Written Submission, para. 364-66.
[591] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[592] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[593] Land Questionnaire, pp. 15 (Exhibit CHI-25).
[594] China's First Written Submission, paras. 361-69.
[595] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).

mention that company officials indicated in their comparison appraisal report that the government's preferential policies resulted in an "appraisal price . . . of a particular nature," suggesting that these policies did affect pricing.[596] Furthermore, China also fails to mention that the comparison appraisal for the land outside of the economic zone was made using a different calculation methodology and, therefore, did not allow for a clear comparison of prices inside and outside the zone.[597] Thus, China is simply incorrect to argue that the record evidence establishes that there were not preferential land prices within the zone. Rather, the USDOC determination of regional specificity provides a reasoned and adequate explanation that the GOC's sale of the land in question on preferential terms not available to other firms constitutes a "distinct land regime" and is therefore specific. Accordingly, China's claim that the evidence does not support a finding of regional specificity fails.

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

A. China Has Failed to Demonstrate that Either Completed or Future Administrative Reviews and Sunset Reviews or the Purported Ongoing Conduct of Collecting Duties and Cash Deposits Are within the Panel's Terms of Reference

313. 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 "subsequent closely connected measures" that purportedly constitute a failure by the United States to bring itself into conformity. China contends that these measures include: (1) completed administrative reviews and sunset reviews, (2) future administrative and sunset reviews, *i.e.* reviews completed during the course of these compliance panel proceedings, and (3) purported "ongoing conduct" of collecting duties and cash deposits.

314. China has not demonstrated that the concluded or future administrative reviews and sunset reviews, or the purported ongoing conduct, are within the panel's terms of reference. Specifically, China has not identified any actions, conduct, or omissions occurring after the expiration of the RPT and before the establishment of the Article 21.5 panel that are measures taken to comply or sufficiently closely connected to in effect be such measures. China has also failed to explain how the so-called "ongoing conduct" "measures" can be subject to WTO dispute settlement, given that they appear to be composed of an indeterminate number of potential future measures. 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. China's attempt to include such measures must be rejected.

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[596] *Thermal Paper* Memorandum, p. 19 (Exhibit CHI-27). The USDOC also noted that its interpreter explained that the term "particular" could also be translated as "specific," "uncommon," or "atypical." *Thermal Paper* Memorandum, p. 19.

[597] *Thermal Paper* Memorandum, p. 19 (Exhibit CHI-27).

1. A Panel's Terms of Reference Are Governed by a Rigorous Legal Standard

315. Article 21.5 of the DSU provides that "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel." Article 21.5 therefore establishes that the panel's terms of reference is limited to those "measures taken to comply," which are "measures taken in the direction of, or for the purpose of achieving, compliance."[598] In addition, a measure that is not in itself a "measure taken to comply" may nonetheless fall within the terms of reference by virtue of its "particularly close relationship"[599] or "sufficiently close nexus"[600] to the declared "measure taken to comply" and to the rulings and recommendations of the DSB. "Determining whether this is the case requires a panel to scrutinize these relationships, which may, depending on the particular facts, call for an examination of the *timing, nature, and effects* of the various measures."[601] Additionally, a panel's authority under Article 21.5 of the DSU extends not only to acts taken to comply, but also to acts that the Member should have taken to bring itself into compliance."[602]

316. With regard to the nature and effects aspects of this "nexus text," it is "only where a specific aspect of the 'subsequent' determination is closely related to the violation found in the original dispute, *and affects the Member's implementation* of the DSB's recommendations and rulings in respect of that violation" that the specific aspect of a subsequent determination "may, under certain circumstances, be subject to review in the context of a compliance proceeding."[603]

317. With regard to timing, the Appellate Body has stated that "the timing of a measure remains a relevant factor in determining whether they are sufficiently closely connected to a Member's implementation of the recommendations and rulings of the DSB."[604] Although the Appellate Body has recognized there may be instances where the adoption of a measure "simultaneously with, shortly before, or shortly after" specific compliance actions may support a finding that the measures are closely connected, it has also recognized that there may be situations where "the fact that the alleged 'closely connected' measure was taken a considerable time before the adoption of the recommendations and rulings of the DSB will be sufficient to sever the connection between the measure and a Member's implementation obligations."[605]

318. Further, the timing of the measure vis-à-vis the Member's obligation to implement the DSB's recommendations and rulings also informs the panel's terms of reference. A Member's obligation to comply with the DSB"s recommendations and rulings "arises once the DSB has

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[598] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 66 (emphasis omitted).
[599] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77; *see US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.61.
[600] *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.
[601] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77 (emphasis added); *see also US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 196, 202.
[602] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 282.
[603] *US – Zeroing (EC) (Article 21.5 – EC) (Panel)*, para. 8.101 (italics added).
[604] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.
[605] *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 225.

adopted a panel or Appellate Body report that has concluded that a measure is inconsistent with the covered agreement."[606] Articles 21.1 and 21.3 of the DSU address the timeframe within which compliance must be effected, providing that compliance must be "prompt," and that"[i]f it is impracticable to comply immediately with the recommendations and rulings [of the DSB], the Member concerned shall have a reasonable period of time in which to do so." Accordingly, the Appellate Body has found that Article 21.3 "requires that the obligation to implement fully the DSB's recommendations and rulings be fulfilled by the end of the reasonable period time at the latest, and consequently, the WTO-inconsistent conduct must cease at the latest by that time."[607]

319. In addition to the limitation on the scope of this proceeding pursuant to Article 21.5, the DSB referred the matter in China's panel request to the compliance panel for examination. A panel's terms of reference are set out in Articles 7.1 and 6.2 of the DSU. Specifically, when the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless otherwise decided) "[t]o examine . . . the matter referred to the DSB" by the complainant in its panel request. Under DSU Article 6.2, the "matter" to be examined by the DSB consists of "the specific measures at issue" and "brief summary of the legal basis of the complaint." The panel's terms of reference under the DSU are to examine those "specific measures at issue" as set out in China's panel request that were in existence at the time of the establishment of the panel.[608]

320. In *EC – Selected Customs Matters*, the panel and Appellate Body were presented with the precise question of what legal situation a panel is called upon, under Article 7.1 of the DSU, to examine. The panel and Appellate Body both concluded that, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "at the time of establishment of the Panel."[609] It is thus the challenged measures, as they existed at the time of the Panel's establishment, when the "matter" was referred to the Panel, that are properly within the Panel's terms of reference and on which the Panel should make findings.

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[606] *US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 154 (citing Articles 16.4 and 17.14 of the DSU).
[607] *US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 158; *see also id.* at para. 169.
[608] *See* DSU, Articles 7.1, 6.2; *EC – Chicken Cuts (AB)*, para. 156 (*quoted by US – Zeroing (Japan) (Article 21.5 – Japan) (AB)*, para. 121); *China – Raw Materials (AB)*, paras. 251-255; *US – Animals SPS*, paras. 7.118, 7.447; *see also US – Zeroing (EC) (Article 21.5 – EC) (Panel)*, para. 8.249 (finding that the section 129 determinations at issue where within its terms of reference because they were in effect on the date of the establishment of the panel); *US – Upland Cotton (Panel)*, para. 7.158 (finding measure implemented under legislation which at the time of the panel "did not exist, had never existed, and might not subsequently have come into existence," was not within the panel's terms of reference); *EC – Commercial Vehicles (Panel)*, para 7.30 (noting that the time of writing the report, the measures in question remained "hypothetical future measures").
[609] *See, e.g., EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly should "have focused on these legal instruments as they existed and were administered at the time of establishment of the Panel"); *id.*, para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration at the time of the establishment of the Panel"); *see also China – Raw Materials (AB)*, para. 264; *EC – Approval and Marketing of Biotech Products*, para. 7.456.

2. China's Attempt to Include Reviews Completed Prior to the End of the RPT and the Measures Taken to Comply Should Be Rejected

321. In this Article 21.5 proceeding China identifies certain administrative review and sunset reviews as purportedly "subsequently closely connected measures" falling within the Article 21.5 panel's terms of reference.[610] However, nearly all of the measures that China identifies were concluded prior to the end of the RPT on April 1, 2016, and thus were not "subsequently closely connected" to the measures taken to comply in this dispute.[611] In this regard, China has not demonstrated how any of these measures which pre-date the expiry of the RPT constitute actions, conduct, or omissions occurring after the expiration of the RPT. Nor has China alleged, much less demonstrated, that they "affect[] [U.S.] implementation of the DSB's recommendations and rulings" resulting from the measures taken to comply.[612] China has thus not established that any of these measures are within the panel's terms of reference.

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[610] China's First Written Submission, para. 390-424; CHI-30 to CHI-34, CHI-36 to CHI-53.

[611] *See* Final Results of the Countervailing Duty Administrative Review of Certain Kitchen Appliance Shelving from the People's Republic of China (April 4, 2012) (Exhibit CHI-30); Final Results of the Countervailing Duty Administrative Review of Certain Kitchen Appliance Shelving from the People's Republic of China (April 5, 2013) (Exhibit CHI-31); Preliminary Results of the Countervailing Duty Administrative Review of Certain Kitchen Appliance Shelving from the People's Republic of China (September 30, 2013) (Exhibit CHI-32); Final Results of the Countervailing Duty Administrative Review of Certain Kitchen Appliance Shelving from the People's Republic of China (March 10, 2014) (Exhibit CHI-33); Final Results of the Countervailing Duty Administrative Review of Certain Oil Country Tubular Goods from the People's Republic of China (August 7, 2013) (Exhibit CHI-34); Final Results of the Countervailing Duty Administrative Review of Certain Oil Country Tubular Goods from the People's Republic of China (August 25, 2014) (Exhibit CHI-36); Final Results of the Countervailing Duty Administrative Review of Certain Magnesia Carbon Bricks from the People's Republic of China (April 9, 2013) (Exhibit CHI-37); : Final Results of the Countervailing Duty Administrative Review of Certain Magnesia Carbon Bricks from the People's Republic of China (October 7, 2014) (Exhibit CHI-38); Final Results of the Countervailing Duty Administrative Review of Aluminum Extrusions from the People's Republic of China (December 26, 2013) (Exhibit CHI-39); Final Results of the Countervailing Duty Administrative Review of Aluminum Extrusions from the People's Republic of China (December 22, 2014) (Exhibit CHI-40); Final Results of the Countervailing Duty Administrative Review of Aluminum Extrusions from the People's Republic of China (December 7, 2015) (Exhibit CHI-41); Final Results of the Countervailing Duty Administrative Review of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from the People's Republic of China (July 7, 2015) (Exhibit CHI-42); Final Results of the Countervailing Duty Expedited First Sunset Review of Lightweight Thermal Paper from the People's Republic of China (February 14, 2014) (Exhibit CHI-44); Final Results of the Countervailing Duty Expedited Sunset Review of Circular Welded Austenitic Stainless Pressure Pipe from the People's Republic of China (June 2, 2014) (Exhibit CHI-45); Final Results of the Countervailing Duty Expedited Sunset Review of Certain Circular Welded Carbon Quality Steel Line Pipe from the People's Republic of China (March 11, 2014) (Exhibit CHI-46); Final Results of the Countervailing Duty Sunset Review of Certain Kitchen Appliance Shelving and Racks from the People's Republic of China (December 1, 2014) (Exhibit CHI-47); Final Results of the Countervailing Duty Expedited First Sunset Review of Oil Country Tubular Goods from the People's Republic of China (March 31, 2015) (Exhibit CHI-48); Final Results of the Countervailing Duty Expedited First Sunset Review of Prestressed Concrete Steel Wire Strand from the People's Republic of China (August 31, 2015) (Exhibit CHI-49); Final Results of the Countervailing Duty Expedited First Sunset Review of Certain Magnesia Carbon Bricks from the People's Republic of China (December 1, 2015) (Exhibit CHI-50); Final Results of the Countervailing Duty Expedited Sunset Review of Certain Seamless Carbon and Alloy Steel Standard, Line, and Pressure Pipe from the People's Republic of China (January 28, 2016) (Exhibit CHI-51); Final Results of the Countervailing Duty Expedited Sunset Review of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China (March 4, 2016) (Exhibit CHI-52).

[612] *See US – Zeroing (EC) (Article 21.5 – EC) (Panel)*, para. 8.101.

3. China's Attempt to Include Future Administrative Reviews and Sunset Reviews Not in Existence at the Time of Panel Establishment Should Be Rejected

322. China also seeks to include in this proceeding future administrative reviews and sunset reviews, *i.e.* those issued during the course of these compliance panel proceedings. However, the determinations resulting from those proceedings necessarily did not exist at the time of the panel's establishment – October 5, 2016. Accordingly, they are not measures within the panel's terms of reference. As discussed above, under the DSU, the task of a panel is to determine whether the measures at issue are consistent with the relevant obligations "at the time of establishment of the Panel."[613] The legal issue is, therefore, the situation as it existed as of panel establishment. Thus, a panel's review of the consistency of a challenged measure – here, the future administrative and sunset reviews – should "focus[] on these legal instruments as they existed and were administered at the time of establishment of the Panel."[614] As these future measures were not in existence as of the date this panel was established, they are outside the panel's terms of reference.

323. China has not alleged, much less explained, how these future measures would affect the United States' implementation of the DSB's recommendations. Nor could China successfully do so because those measures do not exist. In other words, China could not explain how future measures – without knowing their content – would relate to the measures taken to comply. China's attempt to include future administrative reviews and sunset reviews should be rejected.

4. China's Attempt to Include So-Called "Ongoing Conduct" that Has Not Yet Occurred Should Be Rejected

324. As a fundamental matter, the purported "ongoing conduct" "measures" cannot be subject to WTO dispute settlement because it appears to be composed of an indeterminate number of potential future measures. Measures that are not yet in existence at the time of panel establishment cannot be within a panel's terms of reference under the DSU.[615] Although the Appellate Body has recognized that "in certain limited circumstances" measures enacted subsequent to the establishment of the panel may fall within the panel's terms of reference,[616] this exception is bounded by the timing of the dispute. Indeed, "a measure needs to come into existence in order for a panel to make a ruling on it,"[617] and a challenge must be raised in relation to the measure with sufficient time for the panel to include a ruling on it within its report.[618] Article 3.3 of the DSU provides that:

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[613] *See, e.g., EC – Selected Customs Matters (AB)*, para. 187; *see also China – Raw Materials (AB)*, para. 264; *EC – Approval and Marketing of Biotech Products*, para. 7.456.
[614] *EC – Selected Customs Matters (AB)*, para. 187.
[615] *See, e.g., US – Upland Cotton (Panel)*, para. 7.158 (finding that a measure that had not yet been adopted could not form a part of the Panel's terms of reference); *Indonesia – Autos*, para. 14.3 (agreeing with the responding party that a measure adopted after the establishment of a panel was not within the panel's terms of reference).
[616] *EC – Chicken Cuts (AB)*, para. 156.
[617] *US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.116
[618] *See id.*

> [t]he prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements *are being impaired* by *measures taken* by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. (emphasis added).

325. Not only would it be impossible to consult on a measure that does not exist, because it is not a measure "taken by another Member," a non-existent measure cannot meet the requirement of Article 4.2 of the DSU that the measure be "affecting" the operation of a covered agreement. As the *Upland Cotton* panel found, the legislation challenged in that dispute could not have been impairing any benefits accruing to the complainant because it was not in existence at the time of the request for the establishment of a panel.[619] Similarly, in this dispute, indeterminate future measures that did not exist at the time of China's panel request (and may never exist) could not be impairing any benefits accruing to China.

326. Because the purported "ongoing conduct" "measure" consists of an indeterminate number of future measures not manifest at the time of China's panel request, the United States respectfully requests that the Panel find that any alleged "ongoing conduct" is not a measure that is within the Panel's terms of reference, and China's claims against such alleged "ongoing conduct," accordingly, must fail.

B. China Cannot Establish "Ongoing Conduct" as that Concept Has Been Understood by the Appellate Body

327. Even aside from the fact that "ongoing conduct" is not a measure in existence as of the time of the Panel's establishment, and so is not within its terms of reference, China's claims relating to such a "measure" also fail because 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.[620]

328. The United States has serious concerns about the rationale articulated by the Appellate Body in *US – Continued Zeroing* for finding an entirely new type of "measure" to be subject to WTO dispute settlement. And finding a new type of "measure" in that proceeding was also unnecessary – any finding of breach was entirely consequential to the findings of inconsistency in relation to the series of existing determinations, adding nothing to the DSB recommendations. But, in any event, that dispute concerned "the use of the zeroing methodology in a string of connected and sequential determinations, in each of the 18 cases, by which the duties are maintained."[621] The facts in this dispute are markedly different from the facts in *US – Continued Zeroing* and therefore, even on the Appellate Body's approach in that dispute, China's claim fails.

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[619] *US – Upland Cotton (Panel)*, paras. 7.158-7.160.

[620] When bringing a challenge against an unwritten measure, a complaining party must clearly establish, through arguments and supporting evidence, both the existence of the alleged measure, and its precise content. *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, paras. 196-98.

[621] *US – Continued Zeroing (AB)*, para. 180.

329. In *US – Continued Zeroing*, the Appellate Body found that the record supported findings of inconsistency in only four of the eighteen cases challenged, *i.e.*, where "the zeroing methodology was repeatedly used in a string of determinations made sequentially in periodic reviews and sunset reviews over an extended period of time."[622] Each of the four cases where the Appellate Body concluded that there was "a sufficient basis for [the Appellate Body] to conclude that the zeroing methodology would likely continue to be applied in successive proceedings"[623] included: (1) the use of the zeroing methodology in the initial less than fair value investigation; (2) the use of the zeroing methodology in four successive administrative reviews; and (3) reliance in a sunset review upon rates determined using the zeroing methodology.

330. Where there was "a lack of evidence showing that zeroing was used in one periodic review listed in the panel request" or "the sunset review determination was excluded from the Panel's terms of reference," the Appellate Body found that "the Panel made no finding confirming the use of the zeroing methodology in successive stages over an extended period of time whereby the duties are maintained."[624] Consequently, the Appellate Body was "unable to complete the analysis on whether the use of the zeroing methodology exists as an ongoing conduct in successive proceedings."[625]

331. China has failed to even identify the indeterminate number of future 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"[626] 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."[627] For this reason as well, China's claims in relation to "ongoing conduct" must be rejected.

C. China Has Failed To Make Out Its Claims or a *Prima Facie* Case With Respect to the Administrative Reviews, Sunset Reviews, and the Purported Ongoing Conduct of Collecting Duties and Cash Deposits

332. 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 a conformity failure. It has failed to do so. China's submission fails to adequately identify, or adduce evidence concerning, the measures falling within the panel's terms of reference (*i.e.*, actions, conduct, or omissions occurring after the expiration of the RPT and before the Article 21.5 panel's establishment) that it contends constitute a failure to comply. Further, China's submission fails to explain how such post-RPT action, conduct, or omissions are not in conformity with the SCM Agreement. For the reasons described below, China's submission lacks legal arguments and evidence sufficient to make out China's claims or a *prima facie* case.

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[622] *US – Continued Zeroing (AB)*, para. 191.
[623] *US – Continued Zeroing (AB)*, para. 191.
[624] *US – Continued Zeroing (AB)*, para. 194.
[625] *US – Continued Zeroing (AB)*, para. 194.
[626] *US – Continued Zeroing (AB)*, para. 191.
[627] *US – Continued Zeroing (AB)*, para. 191.

333. In *Canada – Wheat*, the Appellate Body addressed the consistency of a piece of legislation with the covered agreements.[628] The Appellate Body noted that:

> [I]t is incumbent upon a party to identify in its submissions the *relevance* of the provisions of legislation—the evidence—on which it relies to supports its arguments. It is not sufficient merely to file an entire piece of legislation and expect a panel to discover, on its own, what relevance the various provisions may or may not have for a party's legal position.[629]

334. Similarly, in *US – Gambling*, the Appellate Body found that the Panel erred in examining certain U.S. state laws because Antigua's "general discussion of state gambling laws" and inclusion of the measures as exhibits failed to establish its *prima facie* case with respect to those measures.[630] Therefore, it is not sufficient for China to make vague references to unidentified, and non-existent future administrative reviews and sunset reviews and expect the panel to discern, on its own, the specific measures being challenged and the relevance of those measures to China's legal position.

335. 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."[631] 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."[632] The case presented by China fails to meet this standard. To meet its burden in this stage of the dispute, 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[633] and "adduce[] evidence sufficient to raise a presumption that what it claims is true."[634] The panel may not make the case for it.[635]

336. China has failed to make its *prima facie* case with respect to the concluded administrative reviews. Specifically, China has not adduced sufficient evidence and argument that the methodologies used by the USDOC in these administrative reviews are WTO-inconsistent. Rather, China has merely cited to the determinations and provided very cursory discussions of the administrative reviews. Similarly, China has failed to provide a sufficient legal argument with respect to how the methodologies in the concluded administrative reviews were inconsistent with the SCM Agreement. China merely cross-references legal arguments made in its submission with respect to the section 129 determinations and asserts that the concluded administrative reviews purportedly reflect the "exact same" or "equally unlawful" legal standards as those that the DSB found to be inconsistent with the SCM Agreement in the original

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[628] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191.
[629] *Canada – Wheat Exports and Grain Imports (AB)*, para. 191 (emphasis added).
[630] *US – Gambling (AB)*, paras. 151-54.
[631] *Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134 (internal footnotes omitted).
[632] *EC – Hormones (AB)*, para. 104.
[633] *See Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 134.
[634] *US – Wool Shirts and Blouses (AB)*, p. 14.
[635] *See Japan – Agricultural Products II (AB)*, para. 129.

dispute.[636] Even aside from the substantive flaws in China's legal arguments relating to each legal claim it asserts, which (as explained above) would compel rejecting its claim, China's inadequate presentation of its claims relating to concluded administrative review fails even to make out a *prima facie* case.

337. China has also failed to make its *prima facie* case with respect to the concluded sunset reviews. Specifically, China has not adduced sufficient evidence and argument that the methodologies used by the USDOC in the identified sunset reviews are WTO-inconsistent. Rather, China has merely cited to the determinations and provided very cursory discussions of the sunset reviews. China has also failed to provide a sufficient legal argument with respect to the methodologies in the concluded sunset reviews that they were inconsistent with the SCM Agreement. China merely asserts that the USDOC's finding that revocation of the respective orders would be likely to lead to continuation or recurrence of countervailable subsidies based in part on specificity and/or public body, benchmark and input specificity determinations and that such determinations were found to be WTO-inconsistent in the original dispute.[637] However, the DSB's findings in the original dispute related to methodologies used in the challenged CVD investigations, and methodologies like public body, benchmark, and specificity are not employed in sunset reviews. Thus, China's legal arguments with respect to the completed sunset reviews are also deficient in meeting the *prima facie* standard.

338. China has also failed to make out its claim with respect to the future administrative reviews and sunset reviews that it purports to challenged. To meet its burden of proof China would have to, (1) identify the specific action, conduct, or omission, if any, that occurred after the RPT and before panel establishment, and (2) apply the relevant provisions of the SCM agreement to the specific conduct it purports is WTO-inconsistent. Instead of doing so, China leaves it to the Panel to discover for itself what future administrative and sunset reviews fall within China's challenge, and which challenged measures relate to the obligations of the SCM Agreement. China therefore fails to provide the panel with a sufficient evidentiary basis on which to make findings. Additionally, China fails to link its legal challenges to the facts and evidence of each challenged future measures – nor could it, given that they are not yet in existence – and thus has not provided a sufficient legal argument that explains how these measures are inconsistent with the WTO agreements.

339. Both the legal arguments and evidence must be present for a panel to address a claim, because "when a panel rules on a claim in the absence of evidence and supporting arguments, it acts inconsistently with its obligations under Article 11 of the DSU."[638]

340. Finally, China fails to make a *prima facie* case with respect to the "ongoing conduct" involving the imposition, assessment, and collection of countervailing duties and cash deposits. First, China has failed to identify the instances of collection of duties and cash deposits, as well as instances of assessments, that it is challenging. Second, China has failed to adduce evidence with respect to the content and nature of the instances of alleged ongoing conduct for the panel to be able to make findings in relation to that content and nature. Further, China has failed to

[636] China's First Written Submission, para. 389.
[637] China's First Written Submission, paras. 415-424.
[638] *US – Gambling (AB)*, para. 281.

provide the panel with sufficient legal arguments to rule upon, as it merely asserts that such ongoing conduct is purportedly based on the application of erroneous legal standards.[639] However, without identification of which instances of collection or assessment are at issue, it is impossible to know whether allegedly erroneous legal standards are relevant. This line of reasoning is inadequate.[640] Thus, China's claim that the ongoing conduct is purportedly based on the "application of erroneous legal standards" under the SCM Agreement is particularly deficient in meeting the *prima facie* standard.

VIII. CONCLUSION

341. For the foregoing reasons, 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, and the United States further respectfully requests that the Panel reject China's claims to the contrary.

[639] China's First Written Submission, paras. 426-432.
[640] China's First Written Submission, paras. 415-424.