UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

Recourse to Article 21.5 of the DSU by China

(DS437)

SECOND WRITTEN SUBMISSION OF THE UNITED STATES OF AMERICA

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Exhibit No.	Description
USA-127	Definition of "preferential" from Oxford English Dictionary (www.oed.com)
USA-128	Issues and Decision Memorandum for Final Determination; Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China (May 14, 2010)

I. INTRODUCTION

1. The U.S. first written submission demonstrates that the determinations made by the U.S. Department of Commerce ("USDOC") in the proceedings undertaken here pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 proceedings") are not inconsistent with the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and the United States has implemented the recommendations of the Dispute Settlement Body ("DSB") in this dispute.[1]

2. In the U.S. first written submission, in this second written submission, and throughout this compliance proceeding, the United States seeks to assist the Panel in completing its task of assessing "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]."[2] To be of assistance to the Panel in its objective assessment of the matter,[3] the United States has articulated the proper interpretative analysis of the provisions of the covered agreements under consideration, explained the reasoning underlying the challenged determinations, and demonstrated how the USDOC's determinations are not inconsistent with the requirements of the SCM Agreement.

3. In contrast, the United States does not see how the arguments presented by China could be of assistance to the Panel. In particular, the Panel's objective assessment is not assisted when, as specifically identified throughout this submission, China mischaracterizes the determinations of the USDOC; or distorts the arguments made by the United States in this compliance proceeding and in other disputes; or misstates the findings of the Appellate Body in prior reports.

4. China's approach to this compliance proceeding makes the Panel's work more difficult, and places additional burdens on the Panel to sort through the accuracy of China's assertions and arguments before it can even begin to evaluate their merits. This is not an efficient use of the resources of the WTO dispute settlement system, which is under serious stress from the number and scope of disputes, as the Panel is well aware.

5. On the substance, China has failed to propose interpretations of the SCM Agreement that would accord with the customary rules of interpretation of public international law, and China has failed to acknowledge the extensive analysis and ample record evidence that support the USDOC's determinations in the section 129 proceedings at issue here.

6. For example, the USDOC's public body determinations in the section 129 proceedings are based on analysis and explanation that, altogether, spans more than 90 pages.[4] In turn, that

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[1] *See* First Written Submission of the United States of America (February 6, 2017) ("U.S. First Written Submission").
[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Art. 21.5.
[3] *See* DSU, Art. 11.
[4] The USDOC's public body determinations in the section 129 proceedings at issue in this compliance proceeding are set forth and explained in a preliminary determination and a final determination that the USDOC produced as part of these section 129 proceedings, as well as in memoranda analyzing public bodies in China (the Public Bodies Memorandum) and discussing the relevance of the Chinese Communist Party ("CCP") to the public body analysis (the CCP Memorandum). *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

analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record,[5] as well as the USDOC's consideration of information and arguments submitted by the Government of China ("GOC") and other interested parties.[6] China ignores virtually all of the USDOC's analysis and the evidence underlying it. Instead, China mischaracterizes the USDOC's public body determinations as being limited to just five pages of conclusions, which China wrongly asserts are unsupported.[7] China's contentions simply lack any credibility.

7. Similarly, with respect to the benchmark analysis, China makes a number of assertions that misstate the U.S. position. For example, China states that "the United States does not contest that domestic Chinese prices for the inputs in question were determined by the forces of supply and demand and are therefore 'market' prices within the agreed ordinary meaning of this term."[8] This statement is false. The U.S. first written submission clearly states: "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."[9] The United States also explained that "[p]rices in China's steel sector are not market-determined prices."[10]

8. Likewise, China misstates the U.S. position when it contends that: "the United States does not even attempt to demonstrate that domestic prices for these products were *not* determined by market forces."[11] Yet, the U.S. first written submission clearly states: "[t]he USDOC examined the forces distorting China's economy and found positive evidence that prices are not market determined in the relevant sectors. . . . Based on its evaluation of this evidence, the USDOC concluded that domestic prices for steel inputs and for polysilicon in the challenged

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Bodies Preliminary Determination") (Exhibit CHI-4); *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); *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") (Exhibit CHI-1); *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).

[5] *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 has provided to the Panel all of the documents to which the USDOC refers in the Public Bodies Memorandum and the CCP Memorandum. *See* Exhibits USA-2 –USA-82.

[6] *See* U.S. First Written Submission, paras. 63-117.

[7] *See* Second Written Submission of China (March 2, 2017) ("China's Second Written Submission"), paras. 99-100.

[8] China's Second Written Submission, para. 126.

[9] U.S. First Written Submission, para. 237 (emphasis added).

[10] U.S. First Written Submission, para. 206 (emphasis added).

[11] China's Second Written Submission, para. 127.

determinations are not market determined prices."[12] Again, China's second written submission is replete with mischaracterizations that cannot be relied upon when evaluating China's claims.

9. Ultimately, as the U.S. first written submission demonstrates, an examination of the USDOC's determinations in the section 129 proceedings, and the substantial amount of record evidence that supports those determinations, shows that the United States has implemented the recommendations of the DSB and brought its measures into conformity with the SCM Agreement. The Panel therefore should reject China's claims of non-compliance and its effort to enlarge the obligations of the United States.

10. This U.S. second written submission responds to arguments presented in China's second written submission, and is organized as follows. Section II responds to China's rebuttal arguments related to the public bodies issue. Section II.A presents additional discussion that supports finding 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, and Section II.B further discusses China's misguided attempt to mount an "as such" challenge against the Public Bodies Memorandum.

11. In particular, Section II.A.1 further discusses China's new proposed interpretation of the term "public body." China continues to fail to take into account the interpretive findings of the original Panel, and China's new proposed interpretation does not accord with findings in prior reports. China also mischaracterizes the U.S. legal argument in this compliance proceeding and misrepresents the USDOC's public body analysis in the section 129 proceedings. China further distorts the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Carbon Steel (India)*. China persists in its unavailing effort to rely on arguments made by the United States in *US – Carbon Steel (India)*, as well as a section 129 determination made by the USDOC in connection with that unrelated dispute. China discusses, but does not respond to, the U.S. demonstration that China's new proposed interpretation of the term "public body" cannot be reconciled with the term "private body" in Article 1.1(a)(1)(iv) of the SCM Agreement. And China presents supposedly problematic implications of the U.S. interpretation of the term "public body" that do not, upon examination, provide any support for China's position. Ultimately, as shown in this submission, China's position remains legally and logically flawed.

12. Section II.A.2 addresses China's discussion of the U.S. demonstration that, 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. Contrary to China's argument, the United States does not offer a *post hoc* rationalization for the USDOC's public body determinations in the section 129 proceedings. The USDOC's public body determinations speak for themselves. The analysis, explanation, reasoning, and conclusions that the USDOC presented would be equally relevant under China's new proposed interpretation of the term "public body," and the USDOC's discussion and the evidence underlying it was probative of and supported a public body determination, even under China's proposed interpretation. China misrepresents the U.S. first written submission, which does not ignore evidence submitted by the GOC. Nor, contrary to

[12] U.S. First Written Submission, para. 221.

China's depiction, does the U.S. first written submission ignore China's description of such evidence in China's first written submission. In sum, China has offered no credible response to the U.S. argument that China's claim under Article 1.1(a)(1) of the SCM Agreement fails even under China's new proposed interpretation of the term "public body."

13. Section II.B, as noted above, further responds to China's "as such" challenge against the Public Bodies Memorandum. China's second written submission does not rebut the U.S. demonstration that China's claim fails. In particular, China has not rebutted the U.S. demonstration that the Public Bodies Memorandum is outside the scope of this Article 21.5 compliance proceeding; China has not rebutted the U.S. demonstration that the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement; China has not rebutted the U.S. demonstration that China has failed to establish the existence of a rule or norm of general or prospective application; and China has not rebutted the U.S. demonstration that the Public Bodies Memorandum does not necessarily result in an inconsistency with Article 1.1(a)(1) of the SCM Agreement. Despite having been given the opportunity to do so, China, to a large extent, just avoids responding to many of the arguments presented by the United States. This suggests that China has no response to these U.S. arguments.

14. Section III addresses China's argument that Article 14(d) of the SCM Agreement does not permit an investigating authority to consider government policies and actions that affect conditions in the relevant industry when examining whether in-country prices are market-determined or distorted. As discussed in section III.A, there is no basis for China's argument that an investigating authority must limit its examination to prices alone. Indeed, the Appellate Body has confirmed that in-country prices are not reflective of prevailing market conditions in the country of provision when they deviate from a market-determined price as a result of government intervention. Section III.B responds to China's arguments that sample pricing data and instances of private investment activity provide a sufficient basis to conclude that domestic prices are not distorted. The USDOC considered the facts that China points to, and found them unpersuasive in light of the extensive evidence of the forces distorting China's economy which prevent the establishment of equilibrium prices determined by supply and demand. As with its first written submission, China has declined to engage with the evidence. Finally, section III.C clarifies, with respect to *Solar Panels*, that even under China's articulation of the relevant legal standard, the USDOC's determination is supported by the facts available.

15. Section IV responds to China's claim under Article 32.1 relating to the USDOC's price distortion analysis. China has not articulated a cognizable claim nor has it identified the measure it seeks to challenge. China's conception of this issue has appeared in a variety of inconsistent formulations in its panel request, first written submission, and second written submission. As explained in this section, China's Article 32.1 claim fails to identify the specific measure that China challenges, and China has failed to identify any specific action against subsidization apart from the countervailing duty determinations themselves. Because the imposition of countervailing duties is a permissible response to subsidization, China has no basis for its Article 32.1 claim.

16. Section V addresses China's argument that, under Article 2.1(c), the USDOC did not identify a subsidy program or properly take account of the length of time the relevant programs have been in operation. China's argument is based on an incorrect reading of the relevant

Appellate Body decisions and offers no basis upon which to undermine the USDOC's evaluation of the subsidy programs that have been providing inputs for nearly 50 years in China's steel sector.

17. Section VI responds to China's argument that the USDOC did not have sufficient evidence to establish that "preferential treatment" accorded to companies within a designated zone was not available to companies outside of the zone. As explained in this section, the USDOC's determination was based on a careful examination of the factual evidence available. And, when the USDOC sought to further examine the issue during the section 129 proceeding, China failed to provide the requested information.

18. Section VII addresses China's arguments that additional proceedings and so-called ongoing conduct should be adjudicated in this proceeding. As demonstrated in this section, China has failed to advance a basis upon which its claims could be adjudicated. China has not identified the precise content of the measures it seeks to challenge, nor has it demonstrated that those so-called measures could be considered to be within the Panel's terms of reference. Despite multiple opportunities to do so, China has not put forward a legal theory or analysis that would support the inclusion of the undefined, unidentified, or not yet extant "measures" that China asks this Panel to adjudicate. China's second written submission fails to advance its position on any of these issues, and its claims should be rejected.

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

19. The U.S. first written submission demonstrates that the USDOC's public body determinations in the challenged section 129 proceedings have brought the United States into compliance with U.S. obligations under Article 1.1(a)(1) of the SCM Agreement. China has presented the Panel a novel, flawed interpretation of the term "public body," and China asks the Panel to ignore the massive amount of record evidence that the USDOC collected and analyzed in the section 129 proceedings, which provides ample support for the USDOC's public body determinations. As explained below, China's second written submission has not cured the defects in China's arguments.

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

20. China's second written submission confirms that, under China's new proposed interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, the only "relevant government function" that could justify finding that an entity is a public body is the particular conduct described in subparagraphs (i)-(iii) of Article 1.1(a)(1). As demonstrated in the U.S. first written submission, and as explained further 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

21. The U.S. first written submission demonstrates that, in this compliance proceeding, China has proposed an interpretation of the term "public body" that departs from the findings made by the original Panel in this dispute.[13] China argues for an excessively narrow approach to the legal interpretation of the term "public body," but the original Panel rejected arguments in favor of a narrow approach,[14] as did the Appellate Body in *US – Carbon Steel (India)*.[15]

22. In its second written submission, China suggests that it "does not understand the U.S. argument" concerning China's failure to take into account the findings of the original Panel.[16] China asserts that "[t]he Panel's 'legal conclusion' that was 'settled in the original proceedings' is that 'the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement….'"[17] China misses the point. The United States refers to the original Panel's legal interpretation of the term "public body," not the original Panel's ultimate conclusion with respect to a breach of Article 1.1(a)(1). The U.S. first written submission summarizes the original Panel's findings of legal interpretation and demonstrates that the interpretation of "public body" that China now proposes departs from those findings, as well as those of the Appellate Body in other disputes.[18]

23. China contends that it is "not 'rearguing legal conclusions settled in the original proceedings' by arguing that the 'government function' identified by the investigating authority in a public body analysis must be *related* to the conduct under Article 1.1(a)(1) of the SCM Agreement."[19] But that is precisely what China is attempting, because China does more than argue that the "government function" and "conduct under Article 1.1(a)(1)" must be "related." China contends that they must be one and the same. This is reflected in an argument that the GOC made to the USDOC in the GOC's questionnaire response in the section 129 proceedings:

> The particular conduct of supplying the inputs at issue in these investigations is not a governmental function within the domestic legal order of China. Thus, the extensive information that the USDOC requests concerning the issue of "control" would not, in any event, permit the USDOC to conclude that input suppliers performed a relevant governmental function during the period of investigation.[20]

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[13] *See* U.S. First Written Submission, paras. 20-25. *See also id.*, paras. 26-37.
[14] *See* U.S. First Written Submission, para. 28. *See also US – Countervailing Measures (China) (Panel)*, para. 7.67.
[15] *See US – Carbon Steel (India) (AB)*, para. 4.17.
[16] China's Second Written Submission, para. 22.
[17] China's Second Written Submission, para. 22.
[18] *See* U.S. First Written Submission, paras. 26-37.
[19] China's Second Written Submission, para. 24 (emphasis supplied by China).
[20] Response of the Ministry of Commerce of the People's Republic of China to the Department's Public Body Questionnaire (May 15, 2015) ("GOC Public Body Questionnaire Response"), p. 9 (Exhibit CHI-2) (emphasis added).

24. It appears that, in China's view, the only possible "relevant governmental function" in the underlying investigations would be "[t]he particular conduct of supplying the inputs at issue."[21] China's narrow understanding of what may constitute a "public body" is not consistent with the original Panel's interpretation of Article 1.1(a)(1) of the SCM Agreement, nor does China's view accord with findings in prior reports. Additionally, as the United States has demonstrated,[22] and as explained further below, China's proposed interpretation is flawed as a matter of law.

25. As explained in the U.S. first written submission, the limits of proceedings under Article 21.5 of the DSU operate to preclude complaining Members from re-arguing legal conclusions settled in the original proceedings.[23] Otherwise, complaining Members would have an unfair "second chance" with respect to any claims that they lost in original proceedings. The Panel should decline China's invitation to adopt an interpretation in this compliance proceeding that is legally erroneous, that fails to take into account the interpretation of the original Panel in this dispute, and that 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 U.S. first written submission demonstrates that 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."[24] In its second written submission, China argues that the U.S. interpretation cannot be reconciled with the Appellate Body's interpretation of the term "public body" in *US – Anti-Dumping and Countervailing Duties (China)* and *US – Carbon Steel (India)*.[25] China's rebuttal arguments are unavailing.

i. China Mischaracterizes the U.S. Argument in this Compliance Proceeding and the USDOC's Public Body Analysis in the Section 129 Proceedings

27. Contrary to what China asserts, the United States does not argue that an investigating authority "should analyse the 'core features of the entity and its relationship to the government in the narrow sense' in *isolation* from the conduct at issue under Article 1.1(a)(1)."[26] That does not correctly describe the position of the United States in this compliance proceeding, nor does it correctly describe what the USDOC did in the section 129 proceedings at issue here. Indeed, whether the approach that China describes would be permissible under Article 1.1(a)(1) of the SCM Agreement is not an issue before the Panel in this dispute.

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[21] GOC Public Body Questionnaire Response, p. 9 (Exhibit CHI-2). *See also* China's Second Written Submission, para. 25 (suggesting that the "conduct of providing loans under Article 1.1(a)(1)" would be a "relevant governmental function.").
[22] *See* U.S. First Written Submission, paras. 26-57.
[23] *See* U.S. First Written Submission, paras. 20-25.
[24] *See* U.S. First Written Submission, paras. 26-57.
[25] *See* China's Second Written Submission, paras. 27-50.
[26] China's Second Written Submission, para. 29 (emphasis in original).

28. Rather than analyzing "the 'core features of the entity and its relationship to the government in the narrow sense' in *isolation* from the conduct at issue under Article 1.1(a)(1),"[27] the particular conduct at issue under Article 1.1(a)(1) was a central focus of the USDOC's analysis. The USDOC was examining whether "the provision of the inputs by the producers at issue to the company respondents in the investigations constitutes a financial contribution."[28] The provision of goods plainly is conduct described in Article 1.1(a)(1)(iii) of the SCM Agreement. Whether this conduct constitutes a "financial contribution," however, depends on whether the entity undertaking the conduct is "a government or any public body."[29] The Appellate Body has explained that that question, in turn, depends on the "core features of the entity concerned, and its relationship with the government in the narrow sense."[30]

29. Accordingly, the USDOC examined the core features of the entities concerned and their relationship with the government in the narrow sense. The United States describes and summarizes the USDOC's analysis and determinations in the U.S. first written submission.[31] As the USDOC explained, "China's government has a constitutional mandate, echoed in China's broader legal framework, to maintain and uphold the 'socialist market economy', which includes maintaining a leading role for the state sector in the economy."[32] The USDOC further found that "relevant laws also grant the government the authority to use SIEs as the means or instruments by which to achieve this mandate," and "the government exercises meaningful control over certain categories of SIEs in China and this control allows the government to use these SIEs as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy."[33]

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

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[27] China's Second Written Submission, para. 29 (emphasis in original).
[28] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4)
[29] SCM Agreement, Art. 1.1(a)(1). Article 1.1(a)(1)(iv) of the SCM Agreement also provides that there may be a "financial contribution" where "a government … entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above…." The USDOC did not analyze any entities as private bodies in the section 129 proceedings here.
[30] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[31] *See* U.S. First Written Submission, paras. 63-117. 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.
[32] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4).
[33] Public Bodies Preliminary Determination, p. 9 (citations to the Public Bodies Memorandum omitted) (p. 10 of the PDF version of Exhibit CHI-4) (emphasis added).

31. As explained in detail in the U.S. first written submission, the USDOC found, among other things, that the Chinese laws it examined:

> have wide application and affect the entire economy, either directly through interventions in the state sector, or indirectly through the impact these interventions have on other sectors of the economy that compete with the state sector. Moreover, they give the government the legal authority, and responsibility, to intervene and direct the economy to effectuate its policies and plans to secure a leading a role for the state sector. These interventions are often expressed in detailed governmental instruments such as industrial plans…[34]

32. In light of its examination of industrial plans and policies, which the USDOC found 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,"[35] the USDOC determined 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.[36]

33. 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."[37]

ii. China's Position is Legally Flawed and Illogical

34. China argues that "the USDOC identifies a 'government function' that has no conceivable relationship to a public body analysis under Article 1.1(a)(1)."[38] China further contends that "the USDOC's failure to identify a government function that is *relevant* to the public body inquiry under Article 1.1(a)(1) [is] fatal to its public body determinations in the Section 129 proceedings."[39] As just explained in the preceding subsection, China's arguments – as a factual matter – utterly lack merit given the analysis that the USDOC undertook and the explanations that the USDOC provided for its determinations. Additionally, China's position is untenable as a legal matter.

35. As noted earlier, China's position appears to be that the "government function" and the particular conduct under Article 1.1(a)(1) that is at issue are – and must be – the same. Thus, in

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[34] Public Bodies Memorandum, p. 8 (p. 9 of the PDF version of Exhibit CHI-1).
[35] 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).
[36] Public Bodies Memorandum, p. 9 (citations omitted) (p. 10 of the PDF version of Exhibit CHI-1).
[37] Public Bodies Memorandum, p. 11 (citations omitted) (p. 12 of the PDF version of Exhibit CHI-1).
[38] China's Second Written Submission, para. 32.
[39] China's Second Written Submission, para. 33.

China's view, to find that an entity is a public body, there must be evidence specifically establishing that the particular conduct under Article 1.1(a)(1) is itself a "governmental function." China's position is not consistent with what the original Panel found; it does not accord with the findings in prior reports; it is not supported by the text of Article 1.1(a)(1) of the SCM Agreement; and it is not logical.

36. The Appellate Body has 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."[40] This appears to be the narrow circumstance in which China might agree that an entity is a public body, ***i.e.***, wherein a statute or other legal instrument expressly provides that one or more of the activities identified in Article 1.1(a)(1) of the SCM Agreement is a "governmental function" and a function of the entity. The Appellate Body, however, has recognized that "[t]here are many different ways in which government in the narrow sense could provide entities with authority."[41]

37. As the Appellate Body summarized in *US – Carbon Steel (India)*:

> Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. For example, evidence regarding the scope and content of government policies relating to the sector in which the investigated entity operates may inform the question of whether the conduct of an entity is that of a public body. The absence of an express statutory delegation of governmental authority does not necessarily preclude a determination that a particular entity is a public body. Instead, there are different ways in which a government could be understood to vest an entity with "governmental authority", and therefore different types of evidence may be relevant in this regard. In order properly to characterize an entity as a public body in a particular case, it may be relevant to consider "whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", and the classification and functions of entities within WTO Members generally. In the same way that "no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case".[42]

38. The Appellate Body has never equated the concept of "governmental function" with the conduct described in Article 1.1(a)(1) of the SCM Agreement, as China asks the Panel to do now. That makes sense, because the question is not whether the *conduct* under Article 1.1(a)(1) is governmental. Rather, the question is whether the *entity* engaging in the conduct is governmental. As the Appellate Body found in *US – Countervailing Duty Investigation on DRAMS*, "the difference between subparagraphs (i)-(iii) on the one hand, and subparagraph (iv)

[40] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[41] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318.
[42] *US – Carbon Steel (India) (AB)*, para. 4.29 (emphasis added).

on the other, has to do with the identity of the *actor*, and not with the nature of the *action*."[43] Similarly, in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body explained that, "[i]f the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution."[44]

39. Furthermore, 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."[45] 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."[46] 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."[47] 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.[48]

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

41. Similarly, let us consider the example of a Committee for Public Health, established by statute, composed of doctors and other private citizens appointed by the Minister of Health, and chaired by an official of the Ministry of Health. The statute establishing the Committee for Public Health appropriates certain funds to the committee and authorizes the committee to raise additional funds through private donations. The statute also authorizes the committee take steps, as needed, to address certain public health issues of pressing concern to the state. These facts likely would support the conclusion that the Committee for Public Health is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement, because the committee is an entity that is vested with authority to perform a governmental function, but is not itself government in the

[43] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 112 (emphasis in original; citation omitted).
[44] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[45] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317.
[46] *US – Carbon Steel (India) (AB)*, para. 4.24.
[47] *US – Carbon Steel (India) (AB)*, para. 4.24.
[48] *US – Carbon Steel (India) (AB)*, para. 4.24. *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 317, 345.

narrow sense. Yet, nothing is known about whether the conduct under Article 1.1(a)(1) is among the functions of the Committee for Public Health. Nevertheless, if the Committee for Public Health engages in any of the conduct described in Article 1.1(a)(1), that would constitute a financial contribution under Article 1.1(a)(1), because evidence establishes that the Committee for Public Health is a public body.

42. These examples reveal that China's equating of "governmental function" with the conduct under Article 1.1(a)(1) of the SCM Agreement is not logically sound. When evaluating whether an entity is a public body (or an organ of government in the narrow sense), it is not necessary to establish that the particular conduct under Article 1.1(a)(1) is a governmental function. An entity may engage in that conduct as part of its effort to effectuate some other governmental function. Where there is evidence that an entity possesses, is vested with, or exercises governmental authority (*i.e.*, the authority to perform governmental functions),[49] that is sufficient to find that the entity is a public body – even if there is no direct evidence that the particular conduct under Article 1.1(a)(1) explicitly is itself a governmental function.

43. China complains that, "[u]nder the U.S. interpretation, a public body is an entity vested with authority to perform *any* function that is ''ordinarily' considered a governmental function in the legal order of the relevant Member'."[50] China once again misstates the U.S. position. The United States does not argue that "a public body is an entity vested with authority to perform *any* function that is ''ordinarily' considered a governmental function,"[51] nor is that the approach the USDOC took in the section 129 proceedings.[52] The legal interpretation China describes is not at issue in this dispute.

44. The United States notes, though, that the Appellate Body has not found that the range of "governmental functions" with which a public body might be vested is limited in the way that China contends it is. For example, in *US – Carbon Steel (India)*, the Appellate Body summarized its earlier findings in *US – Anti-Dumping and Countervailing Duties (China)* in the following terms:

> Regarding the meaning of the term "public body", the Appellate Body found, in *US – Anti Dumping and Countervailing Duties (China)*, that 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." In determining whether or not a specific entity is a public body, it may be relevant to consider "whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member." The Appellate Body stated that the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies. The Appellate Body added that "just as 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."

[49] *See US – Countervailing Measures (China) (Panel)*, para. 7.66.
[50] China's Second Written Submission, para. 37 (emphasis in original).
[51] China's Second Written Submission, para. 37 (emphasis in original).
[52] *See supra*, section II.A.1.b.i.

> The Appellate Body explained that, in some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body is a straightforward exercise. In other cases, the picture may be more mixed, and the challenge more complex.[53]
>
> The Appellate Body further stressed that 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. The Appellate Body stated that evidence that "an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority". The Appellate Body added 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." The Appellate Body stressed, however, that "the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority". Instead, "[a]n investigating authority must, in making its determination, evaluate and give due consideration to all relevant characteristics of the entity and, in reaching its ultimate determination as to how that entity should be characterized, avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant". Thus, the mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body.[54]

45. The Appellate Body's discussion in *US – Carbon Steel (India)* neither explicitly nor implicitly suggests any *a priori* limitation on the functions that "ordinarily" might be considered governmental functions in the legal order of a Member. Furthermore, the Appellate Body's statement that "the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies" indicates that the spectrum of governmental functions that may be undertaken by public bodies is broad, and certainly not limited to the conduct described in Article 1.1(a)(1) of the SCM Agreement.

46. In its second written submission, China refers to a number of hypothetical scenarios, including a company vested with authority to operate a public health clinic on behalf of the government,[55] an airline vested with authority to carry the mail,[56] a railway vested with police powers,[57] and private companies withholding money from their employees for tax purposes.[58] China asks, "[w]ould all such companies be deemed public bodies because they exercise a

[53] *US – Carbon Steel (India) (AB)*, para. 4.9.
[54] *US – Carbon Steel (India) (AB)*, para. 4.10.
[55] *See* China's Second Written Submission, paras. 4, 82.
[56] *See* China's Second Written Submission, para. 82.
[57] *See* China's Second Written Submission, para. 81.
[58] *See* China's Second Written Submission, para. 81.

particular 'government function'?"[59] The United States takes no position as to whether a panel or investigating authority would be justified under Article 1.1(a)(1) in deeming these companies public bodies, and the status of these hypothetical entities is not an issue before the Panel in this dispute. Indeed, the facts of China's hypothetical scenarios are substantially different from the facts here. The USDOC did not find that entities in China are vested with governmental authority to perform a discrete task, as in China's hypotheticals. Rather, the USDOC found that the government of China meaningfully controls and uses the entities at issue – producers of inputs that provided those inputs to the company respondents in the investigations – as tools to effectuate the governmental function of maintaining and upholding the socialist market economy. The USDOC's conclusion is supported by ample record evidence, as the United States has demonstrated.

47. That being said, it would appear that at least three of China's hypothetical scenarios easily could involve the provision of a financial contribution and a subsidy. If the company operating the public health clinic pays more than adequate remuneration for medical supplies, if the airline charges less than adequate remuneration to carry the mail, or if the railway pays more than adequate remuneration for police equipment, then it certainly is conceivable that these scenarios would involve a subsidy addressable under the SCM Agreement. Given that, as China has presented the scenarios, the government appears to have specifically directed the companies to take the actions described, perhaps an investigating authority or a WTO panel would undertake a "private body" analysis under Article 1.1(a)(1)(iv) of the SCM Agreement, though the facts as presented, together with additional facts, might also warrant a "public body" analysis.

48. China also indicates that its "position is that it is *necessary* for an investigating authority to examine whether there is evidence that the entities subject to a public body inquiry are performing a 'government function' when they are engaged in the conduct at issue under Article 1.1(a)(1) of the SCM Agreement."[60] As explained in the U.S. first written submission, China's position does not accord with prior Appellate Body findings.[61] China's position appears to be that an entity may be deemed a public body only when the entity is "*exercising*" governmental authority. The Appellate Body, however, has "explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means 'an entity that possesses, exercises or is vested with governmental authority'."[62] In *US – Carbon Steel (India)*, referring to these characteristics – *i.e.*, possessing, exercising, or being vested with governmental authority – the Appellate Body clarified that "[t]he substantive legal question to be answered is therefore whether one or more of these characteristics exist in a particular case."[63] 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.

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[59] *See* China's Second Written Submission, para. 81.
[60] China's Second Written Submission, para. 30 (italics in the original; underlining added).
[61] *See* U.S. First Written Submission, paras. 32-37.
[62] *US – Carbon Steel (India) (AB)*, para. 4.37.
[63] *US – Carbon Steel (India) (AB)*, para. 4.37 (emphasis added).

49. For these reasons, China's position is legally and logically flawed.

c. China's Suggestion that the United States Misreads the Appellate Body's Interpretative Analysis in *US – Anti-Dumping and Countervailing Duties (China)* Is Unfounded

50. China asserts that the United States errs "in reading the Appellate Body's discussion of the overall *structure* of Article 1.1 in paragraph 284 [of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*] in isolation from the Appellate Body's lengthy analysis relating to 'the correct interpretation of the term 'public body.'"[64] China further asserts that the Appellate Body's interpretative analysis "fully supports China's interpretation of the term 'public body', and not the broad interpretation now proposed by the United States."[65] China presents six arguments, none of which supports China's assertions.

51. First, China argues that "the Appellate Body's statement makes clear that an investigating authority's examination of the 'core features of the entity concerned, and its relationship with the government in the narrow sense' is necessarily framed by the relevant inquiry – namely, to 'determine whether the conduct falling within the scope of Article 1.1(a)(1) is that of a public body.'"[66] This is another iteration of China's argument that the "governmental function" and the conduct under Article 1.1(a)(1) must be the same thing. We demonstrate above that China's argument is flawed.[67]

52. China suggests that "[i]t would confound the entire purpose of [the] inquiry to attribute conduct to a WTO Member even when that conduct is unrelated to any government authority with which an entity has been vested."[68] China asserts that, with respect to the "governmental function" analysis, "the United States maintains that the Appellate Body meant for this to be an abstract inquiry."[69]

53. As explained above, China mischaracterizes the U.S. argument and the analysis that the USDOC undertook in the section 129 proceedings.[70] The United States does not argue that the governmental function analysis should be an "abstract inquiry." The U.S. position is that China is incorrect when it argues that "governmental function" and the conduct under Article 1.1(a)(1) necessarily must be identical. China's view is not supported by the text of Article 1.1(a)(1) of the SCM Agreement, nor does it accord with the findings in prior reports.

54. Additionally, the governmental function that the USDOC identified in the section 129 proceedings and the conduct under Article 1.1(a)(1) in which the entities were engaged were not "unrelated."[71] Accordingly, the question of whether an investigating authority's "abstract inquiry" of a "governmental function" that is "unrelated" to the conduct under Article 1.1(a)(1)

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[64] China's Second Written Submission, para. 38 (emphasis in original).
[65] China's Second Written Submission, para. 38.
[66] China's Second Written Submission, para. 40 (emphasis added).
[67] *See supra*, section II.A.1.b.ii.
[68] China's Second Written Submission, para. 40.
[69] China's Second Written Submission, para. 41.
[70] *See supra*, section II.A.1.b.i.
[71] *See supra*, section II.A.1.b.i.

could meet the requirements of Article 1.1(a)(1) of the SCM Agreement is not at issue in this dispute.

55. Second, China asserts that "the United States never addresses the implications of the Appellate Body's recognition that at least some public bodies have the capacity to entrust or direct private bodies to carry out the conduct illustrated in Article 1.1(a)(1)(i)-(iii)."[72] The United States did not address this issue in the U.S. first written submission because the USDOC did not find that the public bodies at issue in the section 129 proceedings entrusted or directed private bodies to provide a financial contribution. It is unclear why China believes that this issue is of any relevance at all to the Panel's resolution of this dispute. Furthermore, as the Appellate Body explained in *US – Carbon Steel (India)*, "[t]he Appellate Body did not find in *US – Anti-Dumping and Countervailing Duties (China)* that an entity must have the power to 'entrust' or 'direct' a private body to carry out functions identified in Article 1.1(a)(1)(i)-(iii) in order to constitute a public body exercising governmental functions."[73] The USDOC was not obligated to assess whether the public bodies at issue in the section 129 proceedings also possessed the power to entrust or direct private bodies, and the question of what authority or responsibility a public body must possess to entrust or direct a private body simply is not germane to this dispute.

56. Third, China discusses certain Appellate Body findings relating to "meaningful control" and indicates that "China cannot conceive of how government control would be 'exercised in a *meaningful* way' if that control was not being exercised *in relation to the conduct that is being attributed to the government*."[74] The United States does not argue that the "meaningful control" analysis is unrelated to the conduct under Article 1.1(a)(1) of the SCM Agreement, and the USDOC in the section 129 proceedings did not analyze "meaningful control" and "governmental function" in isolation from the conduct under Article 1.1(a)(1), *i.e.*, "the provision of the inputs by the producers at issue to the company respondents in the investigations."[75]

57. China, though, appears to argue that, in order to find that an entity is a public body, the only evidence that will ever be sufficient is evidence that the precise conduct under Article 1.1(a)(1) itself explicitly is a "governmental function" and that the government "meaningfully controls" an entity explicitly in connection with its performance of that particular conduct. There is no support for China's position in the text of Article 1.1(a)(1) or in the findings in prior reports. As demonstrated in the U.S. first written submission,[76] and as discussed further below,[77] China's interpretation of the term "public body" cannot be reconciled with a proper understanding of the term "private body" in Article 1.1(a)(1)(iv) of the SCM Agreement. The kind of explicit control over an entity, in terms of the particular conduct under Article 1.1(a)(1)(i)-(iii), that China envisions would appear to be entrustment or direction. China's

[72] China's Second Written Submission, para. 42.
[73] *US – Carbon Steel (India) (AB)*, para. 4.18 (emphasis added).
[74] China's Second Written Submission, para. 45.
[75] Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4). *See also supra,* section II.A.1.b.i.
[76] *See* U.S. First Written Submission, paras. 43-48.
[77] *See infra*, section II.A.1.f.

proposed interpretation of the term "public body" would render that term redundant, contrary to the customary rules of interpretation.[78]

58. Fourth, China asserts that "the Appellate Body explained in DS379 that 'too broad an interpretation of the term 'public body'' could 'risk upsetting the delicate balance embodied in the *SCM Agreement*.'"[79] China's selective quotation from the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* is misleading. After recalling that the panel in that dispute had expressed concern with what it saw as the implications of too narrow an interpretation, the Appellate Body reasoned that too broad an interpretation "could equally risk upsetting the delicate balance in the *SCM Agreement*."[80] Ultimately, the Appellate Body found that "considerations of the object and purpose of the *SCM Agreement* do not favour either a broad or narrow interpretation of the term 'public body'."[81] China fails to note this finding in its second written submission. The Appellate Body's discussion of the object and purpose of the SCM Agreement lends no support to China's arguments here.[82]

59. Fifth, China reiterates its arguments related to 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").[83] As explained in the U.S. first written submission,[84] while the Appellate Body discussed the ILC Articles in *US – Anti-Dumping and Countervailing Duties (China)*, it did not "take[them] into account"[85] in its interpretation of Article 1.1(a)(1) of the SCM Agreement. Rather, the Appellate Body found that it was "not necessary . . . to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law."[86] 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) when interpreting that provision.[87] 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.[88]

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[78] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[79] China's Second Written Submission, para. 46 (emphasis added by China).
[80] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303 (emphasis added).
[81] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.
[82] The U.S. first written submission also discusses the Appellate Body's prior consideration of the object and purpose of the SCM Agreement. *See* U.S. First Written Submission, paras. 50-51.
[83] *See* China's First Written Submission, paras. 92-94.
[84] *See* U.S. First Written Submission, paras. 52-53.
[85] *Vienna Convention on the Law of Treaties* ("Vienna Convention"), Art. 31(3)(c).
[86] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 311.
[87] *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).
[88] 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

60. Nevertheless, China notes that the Appellate Body observed that the interpretation of "public body" that it articulated in *US – Anti-Dumping and Countervailing Duties (China)* "coincides with the essence of Article 5" of the ILC Articles, and China further notes that the Appellate Body identified "similarities in the core principles and functions of [Article 5 of the ILC Articles and Article 1.1(a)(1) of the SCM Agreement]."[89] China complains that the United States has not explained how, in light of the Appellate Body's observations, a "public body" can be "any entity 'empowered by the law of the State to exercise elements of the governmental authority' *regardless* of whether that entity was acting in that capacity when engaged in the conduct that is the subject of the financial contribution inquiry."[90]

61. As an initial matter, yet again, China mischaracterizes the U.S. position. The United States does not argue, and the USDOC did not determine in the section 129 proceedings, that "any entity 'empowered by the law of the State to exercise elements of the governmental authority' [is a 'public body'] *regardless* of whether that entity was acting in that capacity when engaged in the conduct that is the subject of the financial contribution inquiry."[91]

62. Additionally, as explained above, the United States questions China's insistence that the Appellate Body's observations about the ILC Articles are relevant to the Panel's interpretative analysis. The United States notes, though, that, in addition to the observations China highlights, the Appellate Body also observed that:

> The connecting factor for attribution pursuant to the ILC Articles is the particular *conduct*, whereas, the connecting factors in Article 1.1(a)(1) of the *SCM Agreement* are <u>*both* the particular *conduct* and the *type of entity*</u>. <u>Under the *SCM Agreement*, if an entity is a public body, then its conduct is attributed directly to the State, provided that such conduct falls within the scope of subparagraphs (i)-(iii), or the first clause of subparagraph (iv)</u>. Conversely, if an entity is a private body in the sense of Article 1.1(a)(1)(iv), its conduct can be attributed to the State only *indirectly* through a demonstration of entrustment or direction of that body by the government or a public body. <u>By contrast, the sole basis for attribution pursuant to the ILC Articles is the particular conduct at issue</u>. Articles 4, 5, and 8 each stipulates the conditions in which *conduct* shall be attributed to a State.[92]

63. While the Appellate Body may have identified certain "similarities"[93] between Article 1.1(a)(1) of the SCM Agreement and Articles 4, 5, and 8 of the ILC Articles, the Appellate Body pointed to important "contrast[s]"[94] between them as well. Accordingly, it is neither appropriate nor necessary for the Panel to take the ILC Articles into account in its interpretative analysis of Article 1.1(a)(1) of the SCM Agreement – not only because it would be impermissible to do so under the customary rules of interpretation, given that the ILC Articles are not relevant rules of

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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.

[89] China's Second Written Submission, paras. 47, 48.

[90] China's Second Written Submission, para. 47 (emphasis in original).

[91] China's Second Written Submission, para. 47 (emphasis in original).

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

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

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

international law applicable in the relations between the parties, but also because the ILC Articles cannot help the Panel ascertain the proper interpretation of Article 1.1(a)(1) of the SCM Agreement.

64. Sixth, and finally, China argues that the Appellate Body's "more recent articulation of the evidence that would be relevant" supports China's position.[95] As support for its contention, China asserts that "[t]he Appellate Body explained in DS436 that '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 a public body.'"[96] Once again, China does not present the complete text of the Appellate Body statement to which it refers. The Appellate Body prefaced its explanation with the words "[f]or example."[97] Furthermore, in the sentence that preceded the explanation China quotes, the Appellate Body wrote:

> Whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates.[98]

65. There is no indication, as China implies, that the Appellate Body meant to suggest that there is a limitation on the scope of evidence that a WTO panel or investigating authority might consider when undertaking a public body analysis. Indeed, the Appellate Body expressly stated that "there are different ways in which a government could be understood to vest an entity with 'governmental authority', and therefore different types of evidence may be relevant in this regard."[99]

66. Thus, China's assertion – made in connection with a discussion of a hypothetical scenario involving rubber and coal – that government policies related to coal "would have no bearing on the relevant analysis" where "the conduct at issue [is] the provision of rubber to downstream purchasers" cannot be accepted in the abstract.[100] An investigating authority's holistic analysis of "the legal and economic environment prevailing in the country in which the investigated entity operates"[101] might very well involve consideration of policies related to rubber, coal, and various other sectors, and the all of the evidence before the investigating authority, taken in its totality, could support a public body determination.

67. For the reasons given above, China's suggestion that the United States misreads the Appellate Body's interpretative analysis in *US – Anti-Dumping and Countervailing Duties (China)* lacks any foundation.

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[95] China's Second Written Submission, para. 49.
[96] China's Second Written Submission, para. 49 (emphasis added by China).
[97] *US – Carbon Steel (India) (AB)*, para. 4.29.
[98] *US – Carbon Steel (India) (AB)*, para. 4.29.
[99] *US – Carbon Steel (India) (AB)*, para. 4.29.
[100] China's Second Written Submission, para. 49.
[101] *US – Carbon Steel (India) (AB)*, para. 4.29.

d. China Misunderstands the Relevance of the Appellate Body's Findings in Relation to State-Owned Commercial Banks in *US – Anti-Dumping and Countervailing Duties (China)*

68. The U.S. first written submission responds to China's arguments concerning the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* related to the USDOC's determination that state-owned commercial banks (SOCBs) in China are public bodies, and demonstrates that China misreads the Appellate Body report in that dispute.[102]

69. In its second written submission, China continues to seek support from the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* related to the USDOC's determination that SOCBs in China are public bodies.[103] China argues that "the Appellate Body was focused on whether SOCBs were 'carrying out governmental functions' when they engaged in their lending function under Article 1.1(a)(1),"[104] and China further contends that the Appellate Body's analysis "supports China's view that an investigating authority's evaluation of whether an entity is a public body cannot be conducted in isolation from the conduct at issue under Article 1.1(a)(1)."[105] China continues to misunderstand the relevance of the Appellate Body's findings.

70. As an initial matter, as explained above, the United States does not argue that an investigating authority should evaluate whether an entity is a public body "in isolation from the conduct at issue under Article 1.1(a)(1),"[106] and the USDOC did not undertake its public body analysis in that manner in the section 129 proceedings here.[107] China has mischaracterized the U.S. position and the USDOC's analysis, and this simply is not an interpretative question that is before the Panel in this dispute.

71. Additionally, China mistakenly takes issue with "[t]he suggestion that the USDOC's analysis [in *US – Anti-Dumping and Countervailing Duties (China)*] was not focused on whether SOCBs' conduct *when they provide loans* is 'governmental' in nature."[108] In reality, the USDOC's analysis most certainly was <u>not</u> focused on whether SOCBs' conduct was governmental in nature in the investigation at issue in that dispute. In *US – Anti-Dumping and Countervailing Duties (China)*, the United States argued that "the Panel appropriately rejected China's argument that the term 'public body' must be understood as referring only to entities vested with governmental authority and performing governmental functions."[109] The position of the United States throughout that dispute – as well as the USDOC's position when it undertook its original analysis – was that the term "public body" means "any entity controlled by the government."[110] The United States was not aware that the term "public body" would be understood to refer to an entity that possesses, is vested with, or exercises governmental

[102] *See* U.S. First Written Submission, paras. 38-42.
[103] *See* China's Second Written Submission, paras. 51-59.
[104] China's Second Written Submission, para. 58.
[105] China's Second Written Submission, para. 59.
[106] China's Second Written Submission, para. 59.
[107] *See supra*, section II.A.1.b.i.
[108] China's Second Written Submission, para. 52.
[109] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 280.
[110] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 280.

authority until the Appellate Body circulated its report in *US – Anti-Dumping and Countervailing Duties (China)*. The notion that the USDOC actually undertook a "governmental function" analysis in the underlying investigation in that dispute, with a particular focus on whether the loans provided by SOCBs were "governmental" in nature, is belied by the facts, as reflected in the Appellate Body report.

72. Nevertheless, the Appellate Body found that the USDOC's public body determination with respect to SOCBs was not inconsistent with Article 1.1(a)(1) of the SCM Agreement, even though it cannot be said that the USDOC had "applied" a "governmental function" test that it did not yet know existed. The Appellate Body came to its conclusion after reviewing the USDOC's determination and the USDOC's assessment of the record evidence. The Appellate Body found that "the USDOC [] consider[ed] and discuss[ed] 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."[111] In the Appellate Body's view, "these considerations, taken together, demonstrate[d] 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."[112]

73. Rather than focusing narrowly 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 discussion of that evidence, "taken together,"[113] 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.[114]

74. The U.S. first written submission quotes the Appellate Body's summary of the evidence that was before the USDOC, and the analysis on which the USDOC's determination was based.[115] In the following table, the United States presents once again the Appellate Body's descriptions of the evidence and analysis that it found supported the USDOC's determination that SOCBs in China are public bodies. Presented next to the Appellate Body's descriptions are selected examples of evidence and analysis on which the USDOC relied in the section 129 proceedings here to determine that the input providers it examined are public bodies. As the table shows, the record evidence and analysis supporting the USDOC's public body determinations in the section 129 proceedings here is similar to, and far more voluminous than, the record evidence and analysis in *US – Anti-Dumping and Countervailing Duties (China)*, which the Appellate Body found was sufficient to justify the USDOC's public body determination there.

[111] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[112] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355 (emphasis added).
[113] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[114] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 356.
[115] *See* U.S. First Written Submission, para. 39.

Evidence and Analysis Supporting USDOC's Determination that SOCBs Are Public Bodies in *US – Anti-Dumping and Countervailing Duties (China)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations in the Section 129 Proceedings Here**
"[T]he USDOC relied on information regarding ownership and control."[116]	The USDOC examined the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority[117] 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."[118]
"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'."[119] "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	The USDOC examined the functions or conduct that are of a kind ordinarily classified as governmental in the legal order of China[122] [T]he Department notes that some laws … specifically require SIEs to comply with government policy directives. For example, according to the *Law on State-owned Assets of Enterprises*, which applies to all enterprises with state investment, regardless of the level of ownership, SIE investments must be in-line with state industrial policies.[123] [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

[116] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[117] *See* U.S. First Written Submission, paras. 83-102 (discussing the USDOC's analysis of evidence in the Public Bodies Memorandum).
[118] Public Bodies Preliminary Determination, p. 10 (p. 11 of the PDF version of Exhibit CHI-4).
[119] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[122] *See* U.S. First Written Submission, paras. 69-74 (discussing the USDOC's analysis of evidence in the Public Bodies Memorandum).
[123] Public Bodies Memorandum, p. 12 (citations omitted) (p. 13 of the PDF version of Exhibit CHI-1).

Evidence and Analysis Supporting USDOC's Determination that SOCBs Are Public Bodies in *US – Anti-Dumping and Countervailing Duties (China)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations in the Section 129 Proceedings Here**
borrowers in certain industries in accordance with relevant government policies'."[120] "In addition, [the USDOC] refers to a statement by a Tianjin municipal government official reproduced in the Tianjin Government Verification Report, and to an International Monetary Fund working paper in support of the proposition that SOCBs are required to support China's industrial policies."[121]	mechanism for the government to implement national policies". . . .[124] 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."[125] Specifically, Article 11 provides that "[t]he private sector of the economy is a complement to the socialist public economy."[126] 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.[127] Additionally, the USDOC found that "[c]ompetition from the non-state sector is further constrained by investment guidelines issued by the government."[128]
"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'."[129]	The USDOC found that SASAC has the power to appoint SOE managers, board members, and Supervisory Board members.[130] 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*

[120] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[121] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 351.
[124] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).
[125] Public Bodies Memorandum, p. 16 (p. 17 of the PDF version of Exhibit CHI-1).
[126] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).
[127] Public Bodies Memorandum, p. 16 (citations omitted) (p. 17 of the PDF version of Exhibit CHI-1).
[128] Public Bodies Memorandum, p. 17 (p. 18 of the PDF version of Exhibit CHI-1).
[129] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[130] Public Bodies Memorandum, p. 30 (citing Article 13, *Tentative Measures*) (p. 31 of the PDF version of Exhibit CHI-1).

Evidence and Analysis Supporting USDOC's Determination that SOCBs Are Public Bodies in *US – Anti-Dumping and Countervailing Duties (China)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations in the Section 129 Proceedings Here**
	and the OECD Economic Survey.[131] The USDOC highlighted that the *Civil Servant Law* permits the "reshuffling" of senior figures between competing firms within the same industry, and moving firm leaders between corporate and government functions.[132] The CCP's appointment power allows it to "intervene for any reason,"[133] and "reshufflings serve as a reminder to the managers of the state sector that the government is ultimately in charge. . . ."[134] [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.[135] 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-

[131] Public Bodies Memorandum, p. 32 (p. 33 of the PDF version of Exhibit CHI-1).
[132] Public Bodies Memorandum, p. 32 (citing Articles 63, 64, *Civil Servant Law*) (p. 33 of the PDF version of Exhibit CHI-1).
[133] 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).
[134] Public Bodies Memorandum, p. 32 (citing *A Choice of Models*, The Economist (January 2012)) (p. 33 of the PDF version of Exhibit CHI-1).
[135] Public Bodies Memorandum, p. 33 (p. 34 of the PDF version of Exhibit CHI-1).

Evidence and Analysis Supporting USDOC's Determination that SOCBs Are Public Bodies in *US – Anti-Dumping and Countervailing Duties (China)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations in the Section 129 Proceedings Here**
	invested, "to carry out activities of the Chinese Communist Party."[136]
"In addition, the USDOC considered evidence indicating that SOCBs still lack adequate risk management and analytical skills."[137]	Evidence relevant to the analysis of input suppliers is not directly parallel to this evidence. However, the USDOC did identify and consider evidence of government involvement in the management of enterprises, including industrial plans that "not only reflect the government's broad economic development objectives, but [] also provide a roadmap of often specific, state-guided interventions in a wide range of important industrial sectors and in the individual business decisions of enterprises in these sectors."[138]
"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."[139] "We do see substantive overlap between the CFS Paper and the OTR determinations, as both investigations were concerned with the nature of SOCBs in China. With respect to the temporal element, we note that there was only one year's difference between the period of investigation in CFS Paper (calendar year 2005) and the period of investigation in OTR	China complains that the Public Bodies Memorandum was "drafted four years ago" in 2012.[141] 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,[142] and the countervailing duty investigations at issue here were initiated in the period 2007-2012.[143]

[136] Public Bodies Memorandum, p. 35 (p. 36 of the PDF version of Exhibit CHI-1).
[137] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 350.
[138] Public Bodies Memorandum, p. 23 (p. 24 of the PDF version of Exhibit CHI-1).
[139] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 351.
[141] China's First Written Submission, para. 103. *See also*, *id.*, para. 123.
[142] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 2.2, 2.7, 2.11, and 2.15.
[143] *See US – Countervailing Measures (China) (Panel)*, para. 7.1.

Evidence and Analysis Supporting USDOC's Determination that SOCBs Are Public Bodies in *US – Anti-Dumping and Countervailing Duties (China)*	**Selected Examples of Evidence and Analysis Supporting USDOC's Public Body Determinations in the Section 129 Proceedings Here**
(calendar year 2006). We also note that, notwithstanding the USDOC's express acknowledgement in CFS Paper that the 'scope and extent of government control over SOCBs is changing', China has not challenged, either before the Panel or before us, the USDOC's reliance in the OTR investigation on its findings in CFS Paper."[140]	

75. The parallels between the evidence and analysis that the Appellate Body found supported the USDOC's public body determinations in *US – Anti-Dumping and Countervailing Duties (China)* and the evidence and analysis underlying the USDOC's public body determinations here are plain to see.

76. The Appellate Body's description of the evidence and analysis that it found supported the USDOC's public body determinations also plainly reveals that the Appellate Body did not focus narrowly on the governmental nature of the SOCBs' conduct of providing loans, as China asserts. Instead, the Appellate Body found that the broad range of evidence considered by the USDOC, "taken together,"[144] was sufficient to support the USDOC's public body determination.[145]

77. China asserts that "the 'governmental function' on which the Appellate Body focused was not *any* government function, but the '*certain* governmental function' of *providing loans* consistent with government policies."[146] China's assertion is unfounded. The Appellate Body's finding – 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" – was, on its face, not as specific as China suggests.[147] In any event, there is no indication that the Appellate Body considered that any particular piece of evidence that the USDOC considered was of greater relevance than the other evidence on the record. Rather, all of the evidence, "taken together,"[148] was sufficient to support the USDOC's public body determination.[149]

78. China also asserts that "the Appellate Body was focused on whether SOCBs were 'carrying out governmental functions' when they engaged in their lending function under Article

[140] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 354.
[144] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[145] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 356.
[146] China's Second Written Submission, para. 57 (emphasis added by China).
[147] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[148] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 355.
[149] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 356.

1.1(a)(1)."[150] This formulation of what the Appellate Body was doing, which is different from China's other formulation, discussed in the preceding paragraph, still does not support China's new position that "governmental function" and the conduct under Article 1.1(a)(1) necessarily must be the same thing. As the Appellate Body has explained, "the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case."[151] The particular "governmental function" of different public bodies is likely to vary as well.

79. The real relevance of the Appellate Body's findings related to the USDOC's determination that SOCBs in China are public bodies is that they provide an example of a public body determination wherein the analysis and evidence was sufficient to meet the requirements of Article 1.1(a)(1) of the SCM Agreement. As the table above shows, the USDOC's analysis in the section 129 proceedings here, and the substantial record evidence on which the USDOC relied, is comparable to, and indeed exceeds, that which the Appellate Body found sufficient in *US – Anti-Dumping and Countervailing Duties (China)*.

80. Accordingly, China is incorrect to suggest that the Appellate Body's findings in *US – Anti-Dumping and Countervailing Duties (China)* support China's arguments here.

e. Certain Arguments Made by the United States in *US – Carbon Steel (India)* and the USDOC's Section 129 Proceeding in that Dispute Are of No Relevance to this Compliance Proceeding

81. In its second written submission,[152] as in its first written submission,[153] China discusses a section 129 determination made by the USDOC in an entirely unrelated proceeding involving steel products from India. As explained in the U.S. first written submission,[154] the USDOC's determination in that proceeding is of no relevance whatsoever to this compliance proceeding. A Member's domestic determination is not germane under the customary rules of interpretation of public international law to this Panel's interpretation of the term "public body."[155] 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.

82. Nevertheless, China continues to discuss both the implementation measures the United States took and certain arguments the United States advanced in *US – Carbon Steel (India)*. For example, China asserts that the United States argued before the Appellate Body "that 'the authority required of a public body' is the authority to exercise 'key governmental functions' in the subparagraphs of Article 1.1(a)(1)."[156]

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[150] China's Second Written Submission, para. 58.
[151] *US – Carbon Steel (India) (AB)*, para. 4.29 (emphasis added).
[152] *See* China's Second Written Submission, paras. 60-67.
[153] *See* China's First Written Submission, paras. 96-99.
[154] *See* U.S. First Written Submission, para. 54.
[155] *See* DSU, Art. 3.2.
[156] China's Second Written Submission, para. 61. The United States notes that China has placed before the Panel as an exhibit the opening statement that the United States made during the Appellate Body hearing in *US – Carbon Steel (India)*. *See* Exhibit CHI-67. The United States has no objection to this and stands by the arguments presented

83. To place the U.S. arguments that China cites in context, we note that, in *US – Carbon Steel (India)*, the United States sought:

> a modification of the Panel's interpretation in this dispute, to clarify that, in certain circumstances, government control over an entity also may be sufficient to establish that an entity is a "public body," such that an additional showing of the presence of regulatory or supervisory authority is not also required. Specifically, the United States considers that governmental control over an entity, such that the government may use that entity's resources as its own, will suffice to establish the existence of a public body.[157]

84. The United States further argued that:

> Under Article 1.1(a)(1), the focus of the financial contribution analysis is whether a direct transfer or other type of financial contribution was made and can be attributable to the government or any public body of a Member. Therefore, the key governmental functions at issue are those functions described in the subparagraphs of that article – that is, making a direct transfer of funds; foregoing government revenue; providing goods or services, or purchasing goods; or making payments to a funding mechanism. Therefore, the authority required of a public body is the authority to exercise *these* functions on behalf of the government.[158]

85. The point of the U.S. argument was that, if an entity has the authority to transfer the government's resources, then any exercise of a function described in Article 1.1(a)(1) necessarily is a governmental function, and the entity should be deemed a public body under the legal standard articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*. A public body analysis such as this would encompass scenarios like the example of a Member's Ministry of Health discussed above,[159] where Article 1.1(a)(1) conduct is not a function with which the Ministry of Health ordinarily is tasked, as well as the example of a Public Health Committee, the government function of which is addressing certain public health issues of pressing concern to the state. It also would capture the entities at issue in this dispute (SOEs, SIEs, and other input producers). The analysis the United States described also would be consistent with the Appellate Body's call to analyze the "core features" of an entity and whether the "functions or conduct" are ordinarily governmental in that Member – it seems self-evident that control over and authority to dispose of government resources is a core feature of government in every WTO Member.

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in that statement. It is possible for China to put before the Panel here a statement that the United States made in another dispute because the United States makes all of its written submissions, oral statements, and written responses to questions publicly available on the Internet (with appropriate redactions to protect business confidential information). The United States encourages China and all WTO Members to do the same. This would greatly increase the transparency of the WTO dispute settlement system, and it would ensure that all WTO Members are on equal footing in their ability to refer to arguments made by Members in dispute settlement proceedings.

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

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

[159] *See supra*, section II.A.1.b.ii.

86. The Appellate Body did not evaluate the U.S. argument in relation to an entity's authority to transfer the government's financial resources. Instead, the Appellate Body examined one articulation of the terms of Article 1.1(a)(1) of the SCM Agreement and found that "the terminology advocated by the United States – 'a public body may also include an entity controlled by the government … such that the government may use the entity's resources as its own' – is difficult to reconcile with that used by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*."[160] The Appellate Body considered that "a government's exercise of 'meaningful control' over an entity and its conduct, including control such that the government can use the entity's resources as its own, may certainly be relevant evidence for purposes of determining whether a particular entity constitutes a public body."[161] But the Appellate Body did not modify its prior findings concerning the legal standard for determining that an entity is a "public body."

87. China also asserts that "the USDOC focused much of its public body analysis in the [*US – Carbon Steel (India)*] Section 129 proceedings on explaining its view that NMDC performs a 'government function' in India *when providing iron ore to downstream entities*."[162] China further asserts that:

> [I]n the Section 129 proceedings for DS436, there was evidence that it is "a function of the government of India to arrange for the exploitation of public assets, in this case iron ore". Furthermore, there was evidence that the "GOI specifically established NMDC to perform part of this [government] function, *i.e.*, 'developing all minerals other than coal, petroleum oil and atomic minerals'". In this capacity, the USDOC explained that NMDC operates several iron ore mines and sells the iron ore it obtains from those mines. Based on the evidence before it, the USDOC concluded that because NMDC is exploiting public resources on the behalf of the Indian government, NMDC is performing a "government function" when it sells iron ore.[163]

88. The United States again recalls the Appellate Body's finding 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."[164] Given a different set of facts concerning a different allegedly subsidized input sold by a different entity in a different country, the notion that the USDOC may have undertaken a different analysis is unremarkable. As the Appellate Body has explained, "in some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body is a straightforward exercise. In other cases, the picture may be more mixed, and the challenge more complex."[165] Those observations by the Appellate Body (as well as differences in record evidence), rather than some change in the U.S. position or some disparity in how the USDOC has treated India and China, explain the

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[160] *US – Carbon Steel (India) (AB)*, para. 4.19 (citations omitted).
[161] *US – Carbon Steel (India) (AB)*, para. 4.20 (emphasis added).
[162] China's Second Written Submission, para. 61.
[163] China's Second Written Submission, para. 63 (citations omitted).
[164] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 317; *see also US – Carbon Steel (India) (AB)*, paras. 4.9, 4.29, 4.42.
[165] *US – Carbon Steel (India) (AB)*, para. 4.9 (citing *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 318).

differences between the *US – Carbon Steel (India)* section 129 proceeding and the section 129 proceedings here.

89. Furthermore, just because an investigating authority may find evidence that an entity engages in Article 1.1(a)(1) conduct and that that particular conduct is a governmental function in a Member – *e.g.*, the NMDC providing iron ore – does not mean that a broader set of functions may not also be relevant to determining whether that entity or another entity is a public body. Returning to the examples of the Ministry of Health or the Public Health Committee discussed above, if those entities are government in the narrow sense or a public body, respectively, because of the public health functions they perform, then even if they provide (contrary to their main objectives) cheap iron ore (or grants or loans), that would be a financial contribution under Article 1.1(a)(1) of the SCM Agreement, and the linkages to the government in the narrow sense would make the resources conveyed those of the government.

90. Finally, we note that China also repeats its argument that "the USDOC simply concluded for the purposes of these Section 129 proceedings that the 'government function' did not need to relate to the conduct at issue."[166] The United States has already addressed this contention and demonstrated that it is unfounded.[167]

f. China Has Not Responded to the U.S. Demonstration that China's New Proposed Interpretation of the Term "Public Body" Cannot Be Reconciled with the Term "Private Body" in Article 1.1(a)(1)(iv) of the SCM Agreement

91. China's second written submission discusses the term "private body," which appears in Article 1.1(a)(1)(iv) of the SCM Agreement.[168] China expresses the "view" that the interpretation of the term "public body" proposed by the United States "renders the 'entrust or direct' standard in Article 1.1(a)(1)(iv) inutile."[169] China, however, offers no support for its view.

92. Instead, China begins by "recalling the Appellate Body's recognition in *US – Countervailing Duty Investigation on DRAMS* that the conduct of private bodies, including corporate entities owned by the state, 'is presumptively *not* attributable' to a Member under Article 1.1(a)(1) of the SCM Agreement."[170] China suggests that, in light of this Appellate Body statement, "the natural focus of the USDOC's investigation should have been on whether these entities were 'entrusted or directed' by China (or a public body) to provide the relevant inputs within the meaning of Article 1.1(a)(1)(iv)."[171]

93. In *US – Countervailing Duty Investigation on DRAMS*, the USDOC had decided to analyze the entities in question as private bodies. The panel in that dispute expressed the view that "the USDOC might have been entitled to treat these 100 per cent-owned firms as 'public

[166] China's Second Written Submission, para. 65.
[167] *See supra*, section II.A.1.b.i.
[168] *See* China's Second Written Submission, paras. 68-74.
[169] China's Second Written Submission, para. 68.
[170] China's Second Written Submission, para. 69.
[171] China's Second Written Submission, para. 69 (emphasis added).

bodies', but having refused to so classify them, the USDOC was required to establish entrustment or direction with respect to such creditors."[172] The Appellate Body expressed no objection to the panel's view, which suggests that an investigating authority has discretion in terms of how to analyze an entity under Article 1.1(a)(1) based on the facts before it, and, on review in a WTO dispute settlement proceeding, a panel should evaluate the analysis undertaken by the investigating authority on its own terms. It is not for China to suggest that the USDOC should have examined the entities here as private bodies rather than public bodies.

94. China then addresses the U.S. argument that, under China's interpretation of the term "public body," an investigating authority would have to look at particular transactions or specific loans in order to determine whether an entity is a public body, which would collapse the public body analysis with an entrustment or direction analysis under Article 1.1(a)(1)(iv).[173] China argues that, "[c]ontrary to the U.S. suggestion, China does not believe that a public body analysis would require an investigating authority to examine the particular transactions at issue, and China never suggested that the USDOC should have conducted such an analysis during the Section 129 proceedings."[174] However, two paragraphs earlier in its second written submission (as noted above), China explicitly suggests that the USDOC "should have" examined the entities at issue in the section 129 proceedings as private bodies using an "entrustment or direction" analysis,[175] which, China later explains, "*would*, in all likelihood, require an investigating authority to examine the particular transactions at issue."[176]

95. In this regard, China's discussion of Article 1.1(a)(1)(iv) in its second written submission confuses, rather than clarifies, China's position.

96. China comes closest to attempting to support its inutility argument when it asserts that the United States has proposed an "overly broad interpretation of the term 'public body'" that "'risk[s] upsetting the delicate balance embodied in the *SCM Agreement*' in *precisely* the way that the Appellate Body identified as a concern in DS379."[177] As explained above, however, China's selective quotation from the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)* is misleading. After recalling that the panel in that dispute had expressed concern with what it saw as the implications of too narrow an interpretation, the Appellate Body reasoned that too broad an interpretation "could equally risk upsetting the delicate balance in the *SCM Agreement*."[178] Ultimately, the Appellate Body found that "considerations of the object and purpose of the *SCM Agreement* do not favour either a broad or narrow interpretation of the term 'public body'",[179] and the Appellate Body's discussion of the object and purpose of the SCM Agreement lends no support to China's arguments here.

97. China's assertion that the U.S. interpretation of the term "public body" is overly broad also is unfounded. The U.S. interpretation is the same as the interpretation adopted by the

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[172] *US – Countervailing Duty Investigation on DRAMS (AB)*, footnote 225.
[173] *See* China's Second Written Submission, para. 71.
[174] *See* China's Second Written Submission, para. 71.
[175] *See* China's Second Written Submission, para. 69 (emphasis added).
[176] China's Second Written Submission, para. 73 (emphasis in original).
[177] China's Second Written Submission, para. 74.
[178] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303 (emphasis added).
[179] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.

original Panel in this dispute, and it is the same interpretation articulated by the Appellate Body in prior disputes. It is China that asks the Panel to adopt a new interpretation by finding that "governmental function" necessarily must be the same thing as the conduct described in Article 1.1(a)(1) of the SCM Agreement. The U.S. first written submission demonstrates that China's new proposed interpretation would eliminate the need for a "public body" category at all in Article 1.1(a)(1), thus rendering the term "public body" redundant.[180] Such an interpretation is inconsistent with the principle of effectiveness and contrary to the customary rules of interpretation of public international law.[181] China has not responded to the U.S. legal argument in this regard.

g. China's Discussion of Supposedly "Problematic Implications" of the U.S. Interpretation of the Term "Public Body" Does Not Support China's Position

98. China's second written submission discusses a number of supposedly "problematic implications" of the U.S. interpretation of the term "public body" and suggests that "the United States has made no effort to respond to China's arguments in this regard."[182] To ensure that there is no confusion about the U.S. position with respect to China's arguments, the United States addresses China's discussion here.

99. China begins by repeating its incorrect assertion that the USDOC identified a government function that "has no relevance to the conduct at issue in any particular countervailing duty investigation."[183] The United States has addressed this assertion above and demonstrated that it is unfounded.[184]

100. China asserts that "the USDOC has taken the *per se* rule of majority government ownership that the Appellate Body rejected and replaced it with a *per se* rule that is substantially broader."[185] The U.S. first written submission demonstrates that the USDOC's public body determinations in the section 129 proceedings were reasoned and adequate and supported by ample evidence relating to the core features of the entities in question and their relationship to the government,[186] and further demonstrates that China's "as such" claim against the Public Bodies Memorandum fails.[187] China's assertion that the USDOC applied a *per se* rule when undertook its public body analysis in the section 129 proceedings simply lacks any foundation.

101. China asserts that the USDOC did not cite evidence in its public body determinations that actually relates to the entities at issue in the section 129 proceedings.[188] The U.S. first written submission demonstrates that the USDOC relied on extensive evidence relating to China's

[180] *See* U.S. First Written Submission, paras. 43-48.
[181] *See Japan – Alcoholic Beverages II (AB)*, p. 12.
[182] China's Second Written Submission, para. 75.
[183] China's Second Written Submission, para. 76.
[184] *See supra*, section II.A.1.b.i.
[185] China's Second Written Submission, para. 76. *See also*, *id*., para. 79.
[186] *See* U.S. First Written Submission, section II.A.2.a.
[187] *See* U.S. First Written Submission, section II.B.
[188] *See* China's Second Written Submission, paras. 77-78.

government and economic system.[189] It is axiomatic that evidence that relates to all entities in China relates to the specific entities at issue here.

102. China repeats its assertion that the GOC provided entity-specific information in response to the USDOC's public body questionnaires, which China alleges the USDOC did not examine.[190] The U.S. first written submission explains that in seven of the twelve section 129 proceedings,[191] the GOC simply refused to respond to the USDOC's requests for information.[192] The USDOC therefore found that the GOC failed to participate, it withheld information that was requested, and it significantly impeded the proceedings.[193] The U.S. first written submission also explains that in the remaining five section 129 proceedings,[194] the GOC provided only partial responses to the USDOC's questionnaires, and 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."[195] 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.[196] Accordingly, 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.[197]

103. Nevertheless, as the U.S. first written submission explains,[198] "in cases where the GOC responded to requests for information, the [USDOC] considered the information submitted by the GOC and relied on that information to determine that the relevant entities were public bodies."[199] The U.S. first written submission discusses the USDOC's consideration of the documents that the GOC submitted[200] and the USDOC's response to the arguments that the GOC presented.[201]

104. China also presents various hypothetical scenarios that purportedly demonstrate that the U.S. interpretation of the term "public body" "would have significant consequences for the scope of the conduct brought within the scope of Article 1.1(a)(1)."[202] The United States addressed China's hypothetical scenarios above in section II.A.1.b.ii, and demonstrated that China's hypothetical scenarios are not relevant to the issues in dispute here because the facts in the

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[189] *See* U.S. First Written Submission, section II.A.2.
[190] *See* China's Second Written Submission, para. 77.
[191] *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).
[192] *See* U.S. First Written Submission, para. 107.
[193] *See* Public Bodies Preliminary Determination, p. 13, (p. 14 of the PDF version of Exhibit CHI-4).
[194] *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).
[195] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4). *See* U.S. First Written Submission, paras. 108-110.
[196] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[197] *See* Public Bodies Preliminary Determination, pp. 13, 15 (pp. 14, 16 of the PDF version of Exhibit CHI-4).
[198] *See* U.S. First Written Submission, paras. 130-135.
[199] Public Bodies Final Determination, p. 5, n. 26 (p. 6 of the PDF version of Exhibit CHI-5).
[200] *See* U.S. First Written Submission, paras. 130-135.
[201] *See* U.S. First Written Submission, paras. 112-115.
[202] China's Second Written Submission, paras. 81-82.

hypothetical scenarios, as China has presented them, are substantially different from the facts here.

105. Finally, China once again refers to the Appellate Body's observation in *US – Carbon Steel (India)* that "'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 a public body'."[203] As explained above, China continues to present this quotation out of context.[204] There is no indication in the *US – Carbon Steel (India)* Appellate Body report, as China implies, that the Appellate Body meant to suggest that there is a limitation on the scope of evidence that a WTO panel or investigating authority might consider when undertaking a public body analysis. Indeed, the Appellate Body expressly stated that "there are different ways in which a government could be understood to vest an entity with 'governmental authority', and therefore different types of evidence may be relevant in this regard."[205]

h. Concluding Comments on China's Rebuttal Arguments Concerning the Interpretation of the Term "Public Body"

106. China's second written submission provides further confirmation that China's new proposed interpretation of the term "public body" is just another attempt by China to narrow the public body concept in a way that is contrary to Article 1.1(a)(1) of the SCM Agreement, and which does not accord with the findings of the original Panel or prior reports. The United States has demonstrated that China's argument that the "governmental function" necessarily must be identical to the conduct under Article 1.1(a)(1) is both legally and logically flawed. For the reasons given here and in the U.S. first written submission, China's proposed interpretation should be rejected.

2. 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

107. The U.S. first written submission demonstrates that China's claim under Article 1.1(a)(1) of the SCM Agreement fails because, even under China's new proposed interpretation of the term "public body," the USDOC's public body determinations in the section 129 proceedings 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.[206]

108. China discusses the U.S. argument in its second written submission.[207] Notably, China limits its discussion to "the USDOC's public body determinations in the five investigations in

[203] China's Second Written Submission, para. 83 (emphasis added by China).
[204] *See supra*, section II.A.1.c (sixth point).
[205] *US – Carbon Steel (India) (AB)*, para. 4.29.
[206] *See* U.S. First Written Submission, paras. 143-154.
[207] *See* China's Second Written Submission, paras. 86-103.

which the GOC submitted responses to the USDOC's Public Body Questionnaire."[208] In doing so, China appears to accept that the United States is correct that the USDOC's public body determinations in the remaining seven investigations, in which the GOC completely refused to respond to the USDOC's requests for information, are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.[209]

a. The United States Does Not Offer a *Post Hoc* Rationalization for the USDOC's Public Body Determinations in the Section 129 Proceedings

109. China asserts at the outset of its discussion that the U.S. argument "is entirely *post hoc*."[210] China notes that "the United States does not suggest that the USDOC actually applied 'China's interpretation' in its determinations."[211] China's suggestion that the United States has presented a *post hoc* rationalization for the USDOC's determinations is unfounded.

110. The USDOC, like many Members' investigating authorities, applies domestic law. The USDOC does not apply the rules of the SCM Agreement directly, and it most certainly does not apply China's interpretation of those rules. The question to be addressed by a WTO panel when reviewing a determination made by the USDOC is whether the USDOC's application of U.S. domestic law is consistent with the requirements of the SCM Agreement. That may be the case even where the USDOC has not explicitly "applied" a particular interpretation of SCM Agreement rules.

111. For example, in the underlying investigation challenged in *US – Anti-Dumping and Countervailing Duties (China)*, when it determined that SOCBs in China are public bodies, the USDOC was not applying the "governmental function" test articulated by the Appellate Body. As explained above, the United States argued against the "governmental function" test throughout that dispute, and the United States was not aware that the term "public body" would be understood to refer to an entity that possesses, is vested with, or exercises governmental authority until the Appellate Body circulated its report. Nevertheless, the Appellate Body found that the USDOC's public body determination with respect to SOCBs was not inconsistent with Article 1.1(a)(1) of the SCM Agreement, as the Appellate Body had interpreted it in that dispute.

112. For similar reasons, even if the Panel were to agree with China's new, proposed interpretation of the term "public body," USDOC's determinations in the section 129 proceedings are not inconsistent with Article 1.1(a)(1) of the SCM Agreement – even though the USDOC cannot be said to have "applied" China's interpretation. The U.S. first written submission explains that 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, the USDOC provided a reasoned and adequate

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[208] China's Second Written Submission, para. 86. *See also*, *id.*, heading II.C. Those five investigations were *Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG,* and *Steel Cylinders. See* Public Bodies Preliminary Determination, pp. 14-18 (pp. 15-19 of the PDF version of Exhibit CHI-4).

[209] *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).

[210] China's Second Written Submission, para. 91.

[211] China's Second Written Submission, para. 91.

explanation, which was supported by ample record evidence, even under China's new proposed interpretation of the term "public body."[212] The analysis, explanation, reasoning, and conclusions that the USDOC presented would be equally relevant under China's new proposed interpretation of the term "public body," and the USDOC's discussion and the evidence underlying it was probative of and supported a public body determination, even under China's proposed interpretation. The USODC's public body determinations in the section 129 proceedings speak for themselves, and the United States offers no *post hoc* rationalization for the USDOC's determinations.

b. China Misrepresents the U.S. First Written Submission, Which Does Not Ignore Evidence Submitted by the GOC

113. China asserts that the U.S. first written submission "makes no mention"[213] and does not "acknowledge"[214] that the GOC submitted certain evidence to the USDOC in the five section 129 proceedings in question. China misrepresents the U.S. first written submission.

114. The U.S. first written submissions explains that, in those five section 129 proceedings, "'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.'"[215] The U.S. first written submission further explains that "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."[216] The U.S. first written submission notes "the GOC's refusal to fully respond to the USDOC's questionnaires"[217] and further notes that "the GOC provided only partial responses."[218]

115. The U.S. first written submission also notes that "the USDOC asked for substantially more information" than the GOC provided "about enterprises in which the GOC has a minority ownership interest."[219] 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.[220] 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."[221]

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[212] *See* U.S. First Written Submission, paras. 148-152.
[213] China's Second Written Submission, para. 93.
[214] China's Second Written Submission, paras. 94, 96.
[215] U.S. First Written Submission, para. 108 (quoting Public Bodies Preliminary Determination, p. 14 (p. 15 of the PDF version of Exhibit CHI-4)) (emphasis added).
[216] U.S. First Written Submission, para. 109 (quoting Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4)) (emphasis added).
[217] U.S. First Written Submission, para. 109 (emphasis added).
[218] U.S. First Written Submission, para. 147 (emphasis added).
[219] U.S. First Written Submission, para. 109.
[220] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).
[221] Public Bodies Preliminary Determination, p. 15 (p. 16 of the PDF version of Exhibit CHI-4).

116. As just explained, not only does the U.S. first written submission "mention"[222] and "acknowledge"[223] that the GOC submitted certain evidence to the USDOC in the five section 129 proceedings in question, the U.S. first written submission goes on to discuss the evidence that the GOC submitted as well as the description of that evidence presented in China's first written submission.

c. China Misrepresents the U.S. First Written Submission, Which Does Not Ignore China's Description of Evidence Submitted by the GOC

117. China complains that "[t]he United States makes no attempt to engage with China's description of the information that the GOC provided," which China asserts was presented in section II.D.4 of China's first written submission.[224] Once again, China misrepresents – or perhaps simply has failed to read – the U.S. first written submission. The United States refers the Panel to paragraphs 130-142 of the U.S. first written submission, in which the United States responds to – and cites extensively – section II.D.4 of China's first written submission. In that part of the U.S. first written submission, the United States, in fact, relies on numerous quotations taken directly from section II.D.4 of China's first written submission to demonstrate that China is wrong when it suggests that the USDOC did not address the evidence that the GOC submitted.[225]

118. China also asserts that the U.S. first written submission does not "acknowledge that the evidence provided by the GOC included 'entity-specific' plans, because the GOC provided all of the industrial plans from the provinces and municipalities where the mandatory respondents and input producers from the investigations in DS437 were located."[226] On the contrary, the U.S. first written submission does, in fact, acknowledge that the GOC submitted this information, noting that "China also points to other evidence that the USDOC purportedly did not take into consideration and which, in China's view, weighs against the USDOC's conclusions."[227] The U.S. first written submission recalls, though, that "the USDOC explained why it was necessary to base its public body determinations on the facts otherwise available and why drawing adverse inferences in selecting from the facts otherwise available was warranted, given the GOC's failure to provide requested information."[228]

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

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[222] China's Second Written Submission, para. 93.
[223] China's Second Written Submission, paras. 94, 96.
[224] China's Second Written Submission, para. 97. The United States observes that section II.D.4 of China's first written submission spans paragraphs 109-156 of that submission. The U.S. first written submission makes numerous references to those paragraphs of China's first written submission. *See* U.S. First Written Submission, paras. 130-139.
[225] *See* U.S. First Written Submission, paras. 132-134.
[226] China's Second Written Submission, para. 94.
[227] U.S. First Written Submission, para. 135 (citing to the portions of China's first written submission that discuss the information, *i.e.*, paras. 122-126, 145-156).
[228] U.S. First Written Submission, para. 135 (referring to section II.A.2.a.iv of the U.S. first written submission).

> As with the national five year plan [the *11th Five-Year Plan*], in no case do any of the identified provincial or local plans even mention the provision of steel products by any enterprise, let alone indicate or suggest that the provision of steel products constitutes a governmental function. As discussed above, these plans focus primarily on broad goals for the country and particular sectors. The plans do not bestow any authority on particular companies, industries, or sectors to exercise government authority or to undertake governmental functions.[229]

120. The USDOC discussed the *11th Five-Year Plan* in the Public Bodies Memorandum, as China itself has acknowledged.[230] The USDOC drew from its examination of the national five-year plan conclusions that differ from those for which the GOC argued during the section 129 proceeding, and for which China now argues in this compliance proceeding. If the provincial and local plans simply constitute evidence that mirrors the national five-year plan, as the GOC indicated in its questionnaire response, it is unclear why the USDOC should also have discussed the provincial and local plans in its analysis. China has offered no credible reason to believe that the USDOC's conclusion would have or should have been any different had it discussed those plans in its determinations.

121. Additionally, the United States recalls once again that the USDOC explained 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."[231] China asserts that "the United States ignores that China addressed this precise statement by the USDOC in its first written submission,"[232] and China reiterates its contention that "the only information cited by the USDOC in support of the proposition that it 'considered' and 'relied on' evidence provided by the GOC in making its public body determinations was information concerning the level of government ownership of the enterprises at issue."[233] China supports its contention by describing what it characterizes as "the precise nature of the USDOC's public body determinations in the Section 129 proceedings."[234] China points, in this regard, to just five pages of the Public Bodies Preliminary Determination.[235] China asserts that "[t]he USDOC engages in no further analysis of the evidence provided by the GOC in its final determinations."[236]

122. China misrepresents the USDOC's public body determinations in the section 129 proceedings. As explained in the U.S. first written submission, "[t]he USDOC's public body determinations in the section 129 proceedings at issue in this compliance proceeding are set forth and explained in a preliminary determination and a final determination that the USDOC produced as part of these section 129 proceedings, as well as in memoranda analyzing public bodies in China (the Public Bodies Memorandum) and discussing the relevance of the Chinese

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[229] GOC Public Body Questionnaire Response, p. 6 (Exhibit CHI-2) (emphasis added).
[230] China's First Written Submission, para. 117 (citing Public Bodies Memorandum, p.19).
[231] Public Bodies Final Determination, p. 5, n. 26 (p. 6 of the PDF version of Exhibit CHI-5).
[232] China's Second Written Submission, para. 98.
[233] China's Second Written Submission, para. 98 (emphasis in original).
[234] China's Second Written Submission, para. 99.
[235] *See* China's Second Written Submission, paras. 99-100.
[236] China's Second Written Submission, para. 101.

Communist Party ('CCP') to the public body analysis (the CCP Memorandum)."[237] Even though China does not refer to the Public Bodies Memorandum when discussing "the precise nature of the USDOC's public body determinations in the Section 129 proceedings,"[238] China itself acknowledges that the Public Bodies Memorandum "is an integral part of the Section 129 determinations" in this dispute.[239] Altogether, the USDOC's public body determinations are based on analysis and explanation that 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,[240] as well as the USDOC's consideration of information and arguments submitted by the GOC and other interested parties.[241]

123. The U.S. first written submission further explains that the USDOC, in the Public Bodies Memorandum, directly addressed certain evidence submitted by the GOC, including numerous laws, regulations, industrial plans, and other documents.[242] It is China that ignores most of the USDOC's analysis, as well as the U.S. explanations of that analysis in the U.S. first written submission.

124. As demonstrated in this section, China has offered no credible response to the U.S. argument that China's claim under Article 1.1(a)(1) of the SCM Agreement fails even under China's new proposed interpretation of the term "public body."

B. China Has Not Rebutted the U.S. Demonstration that China's "As Such" Claim Concerning the Public Bodies Memorandum Fails

125. The U.S. first written submission demonstrates that China's claim against the Public Bodies Memorandum fails.[243] As demonstrated below, China's second written submission does not rebut the U.S. demonstration in this regard. Indeed, despite having been given the opportunity to do so, China, to a large extent, just avoids responding to many of the arguments presented by the United States. This suggests that China has no response to these U.S. arguments.

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[237] U.S. First Written Submission, para. 63 (citations omitted). *See also*, *id.*, paras. 64-65.
[238] China's Second Written Submission, para. 99.
[239] China's Second Written Submission, para. 108.
[240] *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.
[241] *See*, Public Bodies Final Determination, pp. 2-6 (pp. 3-7 of the PDF version of Exhibit CHI-5).
[242] *See* U.S. First Written Submission, paras. 130-134.
[243] *See* U.S. First Written Submission, paras. 155-198. The United States recalls that the U.S. first written submission noted that China's discussion of its "as such" claim against the Public Bodies Memorandum makes no mention of the CCP Memorandum. *See* U.S. First Written Submission, para. 155, n. 289. The United States further noted 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. China does not address this issue in its second written submission.

1. China Has Not Rebutted the U.S. Demonstration that the Public Bodies Memorandum Is Outside the Scope of this Article 21.5 Compliance Proceeding

126. The U.S. first written submission demonstrates that the Public Bodies Memorandum is outside the scope of this Article 21.5 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.[244] In its second written submission, China addresses these U.S. arguments, but fails to rebut them.[245]

127. China begins its discussion by asserting that the Public Bodies Memorandum "is an integral part of the Section 129 determinations that unquestionably constitute the declared measures 'taken to comply' with the DSB's recommendations and rulings in this dispute."[246] The United States agrees with China, but China's assertion does not support China's argument. Rather, China's acknowledgment that the Public Bodies Memorandum "is an integral part of the Section 129 determinations" in this dispute undermines China's argument that the Public Bodies Memorandum is itself a "measure taken to comply" under Article 21.5 of the DSU, independent of the USDOC's section 129 determinations.[247]

128. If the Public Bodies Memorandum is, itself, an independent "measure" that exists and is susceptible to WTO dispute settlement, as China has alleged,[248] then it is a measure that was taken to comply with the DSB's recommendations in *US – Anti-Dumping and Countervailing Duties (China)*,[249] rather than a measure taken to comply with the DSB's recommendations in this dispute. Additionally, if the Public Bodies Memorandum has such status as an independent "measure," then it had that status immediately upon publication, which occurred prior to China's original request for consultations or panel request in this dispute. In that case, China was in a position to pursue a claim against the Public Bodies Memorandum in the original proceeding, but China opted not to do so. Accordingly, as demonstrated in the U.S. first written submission, China may not now make claims against the Public Bodies Memorandum in this compliance proceeding.[250]

129. China contends that "the United States is incorrect that the question of whether a Member could have challenged a measure in the original proceeding is dispositive of a Panel's terms of reference under Article 21.5 of the DSU."[251] The Appellate Body, however, 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.[252] The reason for this principle is

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[244] *See* U.S. First Written Submission, paras. 156-163.
[245] *See* China's Second Written Submission, paras. 107-109.
[246] China's Second Written Submission, para. 108.
[247] China's First Written Submission, para. 172.
[248] *See* China's Panel Request in this compliance proceeding, para. 10.
[249] *See* China's First Written Submission, para. 172.
[250] *See US – Upland Cotton (Article 21.5 – Brazil) (AB)*, para. 211.
[251] China's Second Written Submission, para. 109.
[252] *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

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 of the DSB.

130. China attempts to support its contention with a citation to the Appellate Body report in *US – Zeroing (EC) (Article 21.5 – EC)*, in which, China notes, "[t]he Appellate Body clarified that Article 21.5 of the DSU 'excludes, in principle … from Article 21.5 proceedings new claims that could have been pursued in the original proceedings, but not new claims against a measure taken to comply – that is, in principle, a new and different measure. This is so even where such a measure taken to comply incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply'."[253] China does not attempt to explain how the Public Bodies Memorandum would fit into the exceptional circumstances that the Appellate Body describes, and there is no basis for suggesting that it would.

131. Instead, China goes on to assert, without providing citations, that "the relevant inquiry … is whether the measures at issue were adopted 'in the direction of, or for the purpose of achieving, compliance', or otherwise are particularly closely related with the recommendations and rulings of the DSB and the declared measures taken to comply, so as to fall within the terms of reference of a panel under Article 21.5 of the DSU."[254] China then further asserts, without explanation, that "[t]he Public Bodies Memorandum unquestionably meets this standard."[255]

132. The U.S. first written submission not only calls into question that the Public Bodies Memorandum meets this purported standard for being a measure challengeable in this Article 21.5 proceeding, it definitively demonstrates that the Public Bodies Memorandum is outside the scope of this Article 21.5 compliance proceeding. China's second written submission fails to rebut the U.S. argument in this regard.

2. China Has Not Rebutted the U.S. Demonstration that the Public Bodies Memorandum is Not a Measure Susceptible to WTO Dispute Settlement

133. The U.S. first written submission demonstrates that China's claim against the Public Bodies Memorandum also fails because the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement.[256]

134. China, in its second written submission, makes no attempt to rebut the U.S. demonstration. Instead, China simply asserts that "the U.S. arguments … conflate the threshold

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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.

[253] China's Second Written Submission, para. 109, n. 119 (quoting *US – Zeroing (EC) (Article 21.5 – EC) (AB)*, para. 432).

[254] China's Second Written Submission, para. 109.

[255] China's Second Written Submission, para. 109.

[256] *See* U.S. First Written Submission, paras. 164-181.

question of the scope of measures susceptible to challenge in WTO dispute settlement with the substantive question of whether China has met its *prima facie* burden of demonstrating that the Public Bodies Memorandum articulates a rule or norm of general and prospective application that is 'as such' inconsistent with Article 1.1(a)(1) of the SCM Agreement."[257] China does not explain the basis for this assertion.

135. Contrary to China's unsupported assertion, the United States does not misunderstand the threshold question of the scope of measures susceptible to challenge in WTO dispute settlement, and neither did the original Panel in this dispute. In its own evaluation of the "rebuttable presumption/Kitchen Shelving discussion," the original Panel first addressed whether "the rebuttable presumption/Kitchen Shelving discussion [is] a 'measure' susceptible to WTO dispute settlement,"[258] and then separately considered whether "the rebuttable presumption/Kitchen Shelving discussion [can] be challenged 'as such'," *i.e.*, whether it is a rule or norm of general and prospective application.[259]

136. The U.S. first written submission closely tracks the original Panel's analyses of these separate questions, and finds support in the original Panel's findings.[260] China has not explained why it considers that the original Panel erred in its analysis of these questions, nor has China attempted to address the U.S. argument that, applying the original Panel's analysis, the Public Bodies Memorandum is not a measure that is susceptible to WTO dispute settlement.

137. For these reasons, China has not rebutted the U.S. demonstration that the Public Bodies Memorandum is not a measure susceptible to WTO dispute settlement.

3. China Has Not Rebutted the U.S. Demonstration that China Has Failed To Establish a Rule or Norm of General or Prospective Application

138. The U.S. first written submission demonstrates that 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.[261]

139. China responds by asserting that "[t]he U.S. arguments are unfounded."[262] China then recalls that "the Appellate Body held in *US – Corrosion-Resistant Steel Sunset Review* that the starting point of a panel's analysis must be the text of the measure itself."[263]

140. The United States agrees with the Appellate Body that the starting point of a panel's analysis must be the text of the measure itself. Accordingly, the U.S. first written submission discusses the text of the Public Bodies Memorandum and shows that the Public Bodies

[257] China's Second Written Submission, para. 112.
[258] *See US – Countervailing Measures (China) (Panel)*, paras. 7.95-7.106.
[259] *See US – Countervailing Measures (China) (Panel)*, paras. 7.107-7.119.
[260] *See* U.S. First Written Submission, paras. 164-181 and 182-192.
[261] *See* U.S. First Written Submission, paras. 182-192.
[262] China's Second Written Submission, para. 114.
[263] China's Second Written Submission, para. 114.

Memorandum does not share the features of the Kitchen Shelving policy that led the original Panel to conclude that the Kitchen Shelving policy had normative value.[264] The Public Bodies Memorandum does not announce a "policy" in a "declaratory style." On the contrary, 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.[265] 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 the USDOC's reasoning for the specific factual and legal questions" in the countervailing duty proceedings in connection with which it was published.[266]

141. By contrast, in its first written submission, China asserted that the Public Bodies Memorandum prescribes an approach to the public body analysis that the USDOC will follow,[267] but China made no attempt to "clearly establish, through arguments and supporting evidence,"[268] that the Public Bodies Memorandum is a rule or norm that has general and prospective application. Instead, China offered bare assertions without even pointing to any language in the Public Bodies Memorandum itself.[269]

142. In its second written submission, China does little more to identify language in the Public Bodies Memorandum that it considers would support its claim. China just asserts that "it is evident on the face of the Public Bodies Memorandum that neither the USDOC's findings, nor the evidence that the USDOC took into consideration in reaching such findings, are limited to the particular factual and legal circumstances at issue in the four countervailing duty determinations in DS379."[270]

143. Before turning to the two points that China makes in support of this assertion, the United States first notes that China has mischaracterized the U.S. position concerning the Public Bodies Memorandum. The United States does not argue that the analysis in the Public Bodies Memorandum and the evidence underlying it "are limited to the particular factual and legal circumstances at issue in the four countervailing duty determinations in DS379."[271] Quite the contrary, the United States has explained that:

> [T]he 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

[264] *See* U.S. First Written Submission, paras. 185-186.
[265] *See* Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).
[266] *US – Countervailing Measures (China) (Panel)*, para. 7.118.
[267] *See* China's First Written Submission, paras. 173, 178-179.
[268] *US – Countervailing Measures (China) (Panel)*, para. 7.109.
[269] *See* China's First Written Submission, paras. 173, 178-179.
[270] China's Second Written Submission, para. 115.
[271] China's Second Written Submission, para. 115.

> same conclusions in other countervailing duty proceedings involving other products from China.[272]

144. Turning now to China's two textual points, China first asserts that "[t]he USDOC even goes so far as to characterize its analysis in the Public Bodies Memorandum as 'systemic', and calls into question whether such 'systemic' analysis will be required in every CVD investigation involving a public body allegation."[273] China takes the word "systemic" out of context and distorts the meaning of the USDOC's observation. In full, the USDOC explained, in a footnote in the Public Bodies Memorandum, that:

> While record evidence leads the [USDOC] to the conclusion that the systemic analysis in this memorandum is appropriate for understanding the institutional and SIE-focused policy setting in China, we do not reach the conclusion that such a systemic analysis is necessary in every CVD investigation involving an allegation that an entity is a public body.[274]

145. It is plain from the context in which the USDOC used the word "systemic" that the USDOC was referring to its "systemic analysis" of "the institutional and SIE-focused policy setting in China," *i.e.*, China's government and economic *system*. The USDOC's use of the word "systemic" cannot be read as suggesting the announcement of a "policy" or "rule" to be applied in future proceedings.

146. This is confirmed by the USDOC's statement that such a "systemic analysis" may not be necessary in every CVD investigation involving an allegation that an entity is a public body.[275] The USDOC's statement is consistent with the Appellate Body's observation that, "in some cases, such as when a statute or other legal instrument expressly vests authority in the entity concerned, determining that such entity is a public body is a straightforward exercise. In other cases, the picture may be more mixed, and the challenge more complex."[276] Some cases may be complex and necessitate the kind of "systemic analysis" that the USDOC undertook in the Public Bodies Memorandum. Other cases may be more straightforward, and such an analysis would not be needed. The USDOC's uncontroversial observation in this regard provides no support for China's contention that the Public Bodies Memorandum has normative value.

147. China's second textual point is relegated to a footnote in its second written submission, but it is worthy of close scrutiny.[277] China notes that "the USDOC finds, 'for the purposes of [US] countervailing duty law', that 'upholding the socialist market economy' is a governmental function in China."[278] China's brief discussion of this statement appears to suggest that China considers that the statement evidences that the Public Bodies Memorandum has an *expansive* nature. On the contrary, this statement is evidence of the *limited* nature of the USDOC's findings in the Public Bodies Memorandum. This is confirmed by a footnote included within the

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[272] U.S. First Written Submission, para. 170. *See also*, *id.*, section II.A.2.a.
[273] China's Second Written Submission, para. 115.
[274] Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).
[275] Public Bodies Memorandum, p. 12, n. 48 (p. 13 of the PDF version of Exhibit CHI-1).
[276] *US – Carbon Steel (India) (AB)*, para. 4.9.
[277] *See* China's Second Written Submission, para. 115, n. 138.
[278] China's Second Written Submission, para. 115, n. 138.

statement, which explains that the USDOC examined "[t]he 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."[279]

148. Thus, the only two points China has made concerning the text of the Public Bodies Memorandum offer no support for China's contention that the memorandum has normative value.

149. China also discusses "[e]vidence of systematic application of the Public Bodies Memorandum in subsequent cases,"[280] and China suggests that the United States "does not contest" this evidence.[281] China is incorrect.

150. In reality, the U.S. first written submission discusses the evidence that China has put before the Panel of instances in which the USDOC has put the Public Bodies Memorandum on the record of subsequent countervailing duty proceedings.[282] The U.S. first written submission points out that when the original Panel found that the Kitchen shelving policy had "general and prospective application,"[283] the Panel found evidence to support this conclusion in "the text itself."[284] China has pointed to no similar language in the text of the Public Bodies Memorandum.

151. In addition, the United States has pointed to a statement by the USDOC in the solar panels countervailing duty investigation, which indicates that the USDOC contemplated at the time of that determination not applying prospectively the analytical framework presented in the Public Bodies Memorandum.[285]

152. The U.S. first written submission demonstrates that, in contrast to the Kitchen Shelving policy examined by the original Panel, 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."[286] 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.

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[279] Public Bodies Memorandum, p. 2, n. 4 (p. 3 of the PDF version of Exhibit CHI-1).
[280] China's Second Written Submission, para. 116.
[281] China's Second Written Submission, para. 117.
[282] *See* U.S. First Written Submission, paras. 187-191.
[283] *US – Countervailing Measures (China) (Panel)*, para. 7.114.
[284] *US – Countervailing Measures (China) (Panel)*, para. 7.114.
[285] *See* U.S. First Written Submission, paras. 188-189.
[286] *US – Countervailing Measures (China) (Panel)*, para. 7.117.

153. China does not contest these U.S. arguments in its second written submission.

154. For these reasons, China still 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 "as such" challenge.

4. China Has Not Rebutted the U.S. Demonstration that The Public Bodies Memorandum Does Not Necessarily Result in an Inconsistency with Article 1.1(a)(1) of the SCM Agreement

155. Finally, the U.S. first written submission demonstrates that 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.[287]

156. In response, China first notes that it "disagrees with the U.S. assertion that China's arguments are based on a flawed interpretation of the term 'public body'."[288] The United States has presented in the U.S. first written submission and in this second written submission its arguments related to the proper interpretation of the term "public body," and it is not necessary to repeat them here. It suffices to say that China's new proposed interpretation of the term "public body" is legally and logically flawed, as we have shown.

157. China also asserts that "the USDOC's theoretical discretion to refrain from applying the Public Bodies Memorandum in a future case does not shield it from an 'as such' finding."[289] The United States does not rely for its defense on "theoretical discretion." The question is whether China has adduced evidence to establish that the Public Bodies Memorandum "obliges" the USDOC to act inconsistently with the SCM Agreement or "restricts" the USDOC from acting consistently with the SCM Agreement.[290] China has not.

158. As demonstrated in the U.S. first written submission,[291] the Public Bodies Memorandum, by its terms, neither "obliges" the USDOC to do anything nor "restricts" the USDOC from doing anything.[292] When the original Panel followed a "two-step approach"[293] 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"[294]; "[o]n the face of the text, this policy is qualified by the word 'normally'"[295]; "the consistent application of this presumption in numerous cases over a long period of time"[296]; "the policy establishes that the burden is on an interested party to provide information or evidence that would warrant

[287] *See* U.S. First Written Submission, paras. 193-198.
[288] China's Second Written Submission, para. 120.
[289] China's Second Written Submission, para. 121.
[290] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[291] *See* U.S. First Written Submission, para. 196-197.
[292] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[293] *US – Countervailing Measures (China) (Panel)*, para. 7.122.
[294] *US – Countervailing Measures (China) (Panel)*, para. 7.123.
[295] *US – Countervailing Measures (China) (Panel)*, para. 7.124.
[296] *US – Countervailing Measures (China) (Panel)*, para. 7.124.

consideration of any other factors"[297]; and the policy "effectively … restricts the USDOC to consider other evidence on its own initiative."[298]

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

160. In its second written submission, China does nothing to respond to these U.S. arguments. China merely repeats its unsupported assertion that "the Public Bodies Memorandum replaced a 'rebuttable presumption' with a *per se* rule."[299] China points to no evidence in the text of the Public Bodies Memorandum that would support its assertion, because it cannot do so.

161. For the reasons given above, together with the reasons presented in the U.S. first written submission, China's "as such" claim against the Public Bodies Memorandum fails.

III. CHINA HAS NOT DEMONSTRATED THAT THE USDOC'S DETERMINATIONS TO RELY ON OUT-OF-COUNTRY BENCHMARKS WERE INCONSISTENT WITH ARTICLE 14(D) OF THE SCM AGREEMENT

162. As explained in detail in the United States' first written submission, the extensive analysis that the USDOC undertook during the section 129 proceedings fully supports its determination to use out-of-country benchmarks. In China's second written submission, China identifies nothing new in support if its positions. Instead, as set forth below, China continues to base its arguments on an incorrect reading of Article 14(d). And with respect to the factual record, China again misrepresents the significance of certain evidence and fails to engage with the totality of the evidence weighing against it.

A. China Continues To Misinterpret the WTO Agreements and Prior Panel and Appellate Body Reports

163. In its second written submission, China continues to advance an erroneous interpretation of Article 14(d). In particular, China insists that it is irrelevant to a finding of price distortion that "supply and demand may be influenced by government actions and policies."[300] China bases this interpretation on flawed reasoning. If adopted, this interpretation would effectively preclude any other determination of price distortion regardless of the degree of government intervention in the market.

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[297] *US – Countervailing Measures (China) (Panel)*, para. 7.125.
[298] *US – Countervailing Measures (China) (Panel)*, para. 7.125.
[299] China's Second Written Submission, para. 121.
[300] *See* China's Second Written Submission, para. 145.

164. At the outset, the United States notes that China does agree with certain key aspects of the U.S. interpretation of Article 14(d). First, China acknowledges that a "market" for purposes of Article 14(d) refers to the "area of economic activity in which the forces of supply and demand interact to determine market prices."[301] China also agrees that "market prices" are the equilibrium prices resulting "from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in [a] market."[302]

165. Despite this common understanding, China reaches the unsupportable and seemingly inconsistent conclusion that the phrase "prevailing market conditions" in Article 14(d) "refers to the existing conditions of supply and demand within the country of provision, including as those conditions are affected by government policies and actions."[303] As the United States explained in its first written submission, the fundamental issue in determining whether to rely upon an out-of-country benchmark under Article 14(d) is price distortion.[304] Because price distortion can exist in situations because of government intervention, China's proposed interpretation would arbitrarily preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined.

166. China purports to ground its interpretation in the text of Article 14(d). As the United States demonstrated in its first written submission, however, the USDOC's analysis in each of the disputed proceedings comports with Article 14(d). This interpretation is supported by relevant Appellant Body findings. In particular, as noted above, in *US – Carbon Steel (India) (AB)*, "prevailing market conditions" under Article 14(d) consist of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."[305] 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 a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market."[306]

167. In economic terms, "equilibrium" is [a] situation in which supply and demand are matched and prices stable."[307] Furthermore, under *EC – Large Civil Aircraft (AB)*, this equilibrium must result from the discipline enforced by an exchange reflective of *both* supply and demand. In the section 129 proceedings at issue in this dispute, the USDOC identified

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[301] *See US – Carbon Steel (India) (AB)*, para. 4.150 (quoting *US – Upland Cotton (AB)*, para 404); *see also US – Countervailing Measures (China) (AB)*, para. 4.46.
[302] *EC – Large Civil Aircraft (AB)*, para. 981.
[303] China's Second Written Submission, para. 136; *see also id.*, para. 145 ("[T]he Appellate Body's interpretation of the phrase 'prevailing market conditions' plainly recognizes that government actions and policies can influence the prices at which goods are sold in a market.")
[304] U.S. First Written Submission, para. 253; *see also US – Countervailing Measures (China) (AB)*, para. 4.51 (noting that what permits investigating authorities to reject in-country prices "is price distortion"); *US – Countervailing Measures (China) (AB)*, para. 4.59 (noting "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*") (emphasis added).
[305] *US – Carbon Steel (India) (AB)*, para. 4.150 (quoting *US – Upland Cotton (AB)*, para 404).
[306] *EC – Large Civil Aircraft (AB)*, para. 981.
[307] Online Oxford English Dictionary (Exhibit USA-125).

evidence that there is a persistent supply and demand imbalance in China's steel sector.[308] As discussed in greater detail below, the USDOC also cited evidence that this imbalance (in the form of excess capacity) is a direct consequence of extensive government intervention in the sector. In these circumstances, it cannot be said that prices in the sector reflect a market equilibrium of supply and demand.[309]

168. Acknowledgement of government-caused distortions is not a new concept.[310] Indeed, the Appellate Body confirmed this concept in *US – Carbon Steel (India) (AB),* stating, "Proposed in-country prices *will not be reflective of prevailing market conditions in the country of provision* when they deviate from a market-determined price *as a result of government intervention in the market*." [311] Thus, the USDOC appropriately concluded, on the basis of positive evidence and detailed explanations of its conclusions, that prices distorted by government intervention in the Chinese market did not reflect the requisite "market conditions" under Article 14(d).

169. The robust determination by the USDOC that domestic prices in China's steel sector are distorted is not the same as permitting investigating authorities to find price distortion – as China puts it – "whenever they wish."[312] The Appellate Body found in this dispute that distortion must be established on a case-by-case basis and investigating authorities must "conduct[] the necessary market analysis in order to evaluate whether the proposed benchmark prices are

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[308] *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), pp. 21-30 (Exhibit CHI-20); *see also United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Ministry of the USDOC of the People's Republic of China to the Department's Benchmark Questionnaire*, dated July 6, 2015, Exhibit GOC D-25 (Exhibit CHI-19) at Exhibit-3 at 6-7, 14 (stating that "the Chinese government has acknowledged its growing concern over industry overcapacity, which has become acute since 2006" and containing a chart demonstrating sustained supply and demand imbalances after 2006). The USDOC also identified ongoing efforts by China to address this overcapacity through government channels. *See, e.g.*, Circular of the State Council on Accelerating the Structure of Adjustment of the Industries with Production Capacity Redundancy, No 11 (2006) (Exhibit USA-17).

[309] China states that the United States did not "find that available domestic benchmark prices in the relevant Chinese steel markets are not 'reflective of the supply and demand of both sellers and buyers' in those markets." China's Second Written Submission, para. 133. This is inaccurate. Although the USDOC did not find that prices were effectively controlled by China, the USDOC *did* find that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market." Benchmark Memorandum, p. 28 (Exhibit CHI-20); *accord id.* at 27 (finding SIE prices did not reflect "market conditions").

[310] In *US – Countervailing Measures on Certain EC Products (AB)*, for example, the Appellate Body rejected the panel's finding that a subsidy benefit is necessarily extinguished following privatization at arms-length and for fair market value. The Appellate Body found that while "prices will reflect the relative scarcity of goods and services in the market" under certain conditions, "such market conditions are not necessarily always present and they are often dependent on government action." *US – Countervailing Measures on Certain EC Products (AB)*, para. 122. And though privatizations always take place within the prevailing market conditions in which the sale occurs, the Appellate Body recognized that "governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market. In such circumstances, the market's valuation of the state-owned property may ultimately be severely affected by those government policies…." *Id.*, para. 123.

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

[312] China's Second Written Submission, para. 147.

market determined such that they can be used to assess whether the remuneration is less than adequate."[313] The USDOC conducted the market analysis required by the Appellate Body and reviewed extensive record evidence, which led to and supported its determination that prices within China's steel sector are not "market" determined with extensive record evidence. Thus, the United States has not taken the countervailing duty "mechanism far beyond its intended purpose." Rather, the United States has interpreted Article 14(d) in a manner consistent with the object and purpose of the SCM Agreement.[314]

170. Furthermore, because price distortion must be established on a case-by-case basis, the USDOC was not (as China implies) required to identify a hypothetical threshold above which intervention in a market becomes distortive.[315] The USDOC was obligated only to determine in the section 129 proceedings whether price distortion had been demonstrated in the steel input markets which it clearly did. Neither the United States nor this Panel need opine on some theoretical dividing line at which point a market becomes distorted.

171. Finally, the United States has not effectively "read[] the terms 'prevailing' and 'in the country of provision' out of Article 14(d)."[316] 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."[317] Because the USDOC found that domestic prices in the steel sector are not market determined, the USDOC was justified in relying on prices outside of the country of provision. This result does not deprive Article 14(d) of all meaning.

B. China's Claims Misrepresent the Evidence on the Record Before the USDOC in the Section 129 Determinations

172. China makes surprisingly little effort to engage with the totality of the evidence upon which the USDOC relied in making its market distortion determinations with respect to China's steel sector. Instead, China relies upon what it describes as "three undisputed facts,"[318] and contends that these three purported facts "make it impossible" to reject domestic steel prices

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[313] *US – Countervailing Measures (China) (AB)*, para. 4.61.

[314] 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. *US – Softwood Lumber IV (AB)*, para. 93 (emphasis in original). In that scenario, reliance upon prices within that market would frustrate the object and purpose of the SCM Agreement by yielding an artificially low benefit. *Id.*, para. 95. Thus, contrary to China's claims, the United States has not "replace[d] careful evaluation of the evidence with sweeping, unsubstantiated assertions." Rather, the United States has carefully evaluated the evidence to determine whether prices in China are market-determined and usable as benchmarks for determining the adequacy of remuneration. It is *China* that categorically dismisses this extensive evidence based solely on its unduly restrictive interpretation of Article 14(d).

[315] *See, e.g.*, China's Second Written Submission, para. 142 (suggesting that the United States was obligated to "substantiate" the point at which government influence on domestic benchmark becomes distortive).

[316] China's Second Written Submission, para. 147.

[317] *U.S. – Carbon Steel (India) (AB)*, para 4.155; accord *US – Softwood Lumber IV (AB)*, para. 97.

[318] *See* China's Second Written Submission, para. 151 (asserting that (1) domestic Chinese prices for relevant steel inputs fluctuated from 2006 to 2008 in response to supply and demand conditions; (2) SIE producers represent no more than half of domestic Chinese production of relevant inputs; and (3) privately-owned steel producers invested substantial amounts of money in China's steel industry from 2006 to 2008).

under Article 14(d).[319] China is fundamentally wrong in asserting that it can pick just a few elements from an extensive factual record to support its claim of an alleged WTO breach.

173. With regard to this fundamental problem with China's argument, the Panel in the original proceeding already made findings on the importance of a holistic analysis. The original Panel in this dispute recognized 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."[320] In particular, "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."[321] Here, as established below, the "three undisputed facts" that China emphasizes – regardless of whether these facts are disputed or undisputed – nonetheless comprise only three pieces of evidence among the thousands of pages underlying the USDOC's determinations. In other words, the USDOC's determinations were based on the totality of the record. In such circumstances, China's discrete objections cannot undermine the overwhelming evidence supporting the USDOC's conclusions in this case.

174. To illustrate the totality of the circumstances, we begin the discussion below by first recalling the extensive evidence that supports the USDOC's determination, as described in our first written submission. We then address and refute each of the three points that China claims support its position. As set forth below, the supposed facts upon which China bases its contentions are not undisputed and these three matters are not supportive of China's claims. Rather, an analysis of this evidence in light of the totality of the circumstances demonstrates substantial support for the USDOC's determination that the relevant prices in China are not market-determined.

1. The USDOC's Decision to Rely Upon Out-of-Country Benchmarks in the *OCTG, Pressure Pipe*, and *Line Pipe* Section 129 Proceedings Is Supported By Extensive Evidence

175. Because China's second written submission is narrowly focused on only three "facts," it is helpful to recall at the outset a summary of the totality of the evidence upon which the USDOC relied in concluding that all domestic steel prices in the relevant input market 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."[322]

176. In the *OCTG*, *Pressure Pipe*, and *Line Pipe* section 129 proceedings, the USDOC conducted an extensive analysis of China's steel sector.[323] As a first step in this analysis, the

[319] China's Second Written Submission, para. 152.
[320] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 9.52.
[321] *Id.*
[322] *See EC – Large Civil Aircraft (AB)*, paras. 975, 981.
[323] As explained in the first written submission, 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. Although nothing on the record reflected that conditions within the individual steel markets

USDOC examined SIEs, generally, and their distortive effects on global and domestic markets.[324] The USDOC explained that SIEs may be accorded preferential treatment by their governmental owners, which may in turn cause SIEs to act contrary to market principles and stifle private-sector competition. For this reason, many countries have taken affirmative steps to address market distortions caused by these SIEs.[325]

177. Second, the USDOC analyzed the nature and role of SIEs under China's socialist market economy.[326] 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. To this end, the USDOC cited various legal instruments demonstrating the breadth and depth of this intervention. For example, USDOC cited detailed industrial plans governing the structure of the state sector and directing state investment in desired sectors consistent with the state's policy goals.[327] 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 and not necessarily to ordinary market considerations. Lastly, the USDOC cited evidence that the decisional process of SIEs is further distorted by the receipt of significant direct government benefits and restrictions on private-sector competition.[328] With respect to managing private sector competition, USDOC explained that China's constitution explicitly establishes the "subordinate" role for the private sector in China's economy. 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."[329] The USDOC found that this enables SIEs to operate in a "soft budget" environment insulated from normal commercial pressures.[330]

178. Third, the USDOC evaluated record information regarding China's steel industry, which reflected that the steel sector is an area where state intervention has been particularly pronounced. The USDOC found that industrial plans were in place for 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 discussed the provisions in the Eleventh Five Year Plan that direct favored and unfavored production scales, investments,

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differed from those observed throughout the sector, the USDOC was unable to corroborate these findings with more detailed input-specific market analyses because the GOC provided incomplete information in response to the USDOC's requests for information, Therefore, relying upon the facts available, the USDOC found that the distortions observed in the steel sector as a whole were also relevant to the market segments for each specific input. *See Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum*, March 7, 2016 ("Supporting Benchmark Memorandum"), pp. 4-6 (Exhibit USA-84); U.S. First Written Submission, para. 234.

[324] *See* Benchmark Memorandum, pp. 4-6 (Exhibit CHI-20).

[325] *Id.*, pp. 4-5.

[326] *Id.*, pp. 6-20.

[327] *Id.*, p. 8. In its second written submission, China continues to argue that these policies impose non-binding obligations. But as the United States stated in its prior submission, "*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." U.S. First Written Submission, para. 229.

[328] Benchmark Memorandum, pp. 17-21 (Exhibit CHI-20).

[329] *Id.*

[330] *Id.*

technologies, products, and even production locations.[331] The USDOC also cited evidence that the CCP's influence over the appointment of senior executives is specifically evident in the steel sector.[332] Lastly, the USDOC identified evidence of specific interventions in the steel sector related to excess capacity. 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.

179. Finally, the USDOC analyzed whether prices of both government-related entities 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.[333] With respect to SIE prices in particular, the USDOC concluded that widespread sectoral intervention meant that SIEs were constrained in their ability to pursue commercial outcomes, and even if they were not so constrained, their commercial motivations themselves 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."[334]

180. The USDOC also found that domestic private prices in the steel sector are not reflective of market conditions. To support this finding, the USDOC relied not only upon evidence of the "significant market share" garnered by SIEs, but also of 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."[335] 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.

181. The USDOC also cited evidence that certain governmental interventions directly extend to private enterprises, such as forced mergers and acquisitions and the presence of export taxes that artificially depressed prices for the relevant steel inputs during the periods of investigation across all ownership types.[336] 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.[337]

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[331] *Id.*, p. 23.
[332] Benchmark Memorandum, p. 25 (Exhibit CHI-20).
[333] *See generally US – Countervailing Measures (China) (AB)*, para. 4.64.
[334] Benchmark Memorandum, pp. 26-27 (Exhibit CHI-20); *see also EC – Aircraft (AB)*, paras. 975, 981.
[335] Benchmark Memorandum, p. 28 (Exhibit CHI-20).
[336] *Id.*, p. 29.
[337] As the Benchmark Memorandum reflects, the USDOC based its determinations with respect to SIE prices on substantial record evidence showing that SIEs do not operate on the basis of commercial considerations. Thus, contrary to China's arguments, the USDOC has not "simply assume[d]" that China failed to adhere to its commitment when joining the WTO that SIEs within China would make purchases based solely on commercial considerations. *See* China's Second Written Submission, para. 163, n. 172. China cannot hide behind this commitment in the face of overwhelming evidence to the contrary.

2. China Misinterprets the Significance of Pricing Data on the Record of the Section 129 Proceedings

182. First among the "undisputed" facts that China relies on, is China's assertion that prices fluctuated in response to supply and demand conditions during 2006 to 2008. China ignores the extensive evidence discussed above and instead contends that prices for the relevant steel inputs were determined by market forces during the relevant periods of investigation. As the sole support for this proposition, China relies upon pricing data published by Mysteel pertaining to the steel inputs at issue in the *OCTG*, *Pressure Pipe*, and *Line Pipe* investigations. China asserts that these data show that supply and demand influenced prices in the relevant input markets and that those prices are, thus, "market-determined prices."[338]

183. As an initial matter, the United States disagrees with the underlying premise of this argument. China assumes that prices which respond to global and domestic supply and demand conditions are "market determined" under Article 14(d). This assertion depends on the mistaken proposition that a price that is not set by a government is necessarily a market price. We addressed this possible interpretation of Article 14(d) above, and explained why it was incorrect.

184. When viewed against the proper interpretive standard, as reflected in Appellate Body reports (*i.e.*, whether the "equilibrium price established in the market results from a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market"), the prices in the Mysteel report do not carry the significance that China attributes to them. The mere fact that input prices fluctuated from 2006 of 2008, perhaps in partial response to external market factors, is not dispositive regarding the market orientation of those prices in the context of a market distorted by pervasive government intervention.

185. Rather, these price fluctuations are just one part of an extensive factual record. The data ultimately say nothing about whether those prices also reflect the effects of sustained state intervention in the sector. And, they are in no way inconsistent with, nor do they undermine, the lengthy analysis that the USDOC undertook in the Benchmark Memorandum, and the extensive evidence upon which that analysis was based. The data in the Mysteel report ultimately say nothing about whether those prices reflect the effects of sustained state intervention in the sector.

186. Nor is there other information to glean from the Mysteel report that would support China's contentions. Indeed, if anything, the data in the Mysteel report are supportive of the USDOC's findings regarding price distortion.[339] In particular, among various factors that influenced pricing for the inputs during the period 2006 to 2008, the Mysteel report identifies some of the very government interventions that the USDOC examined in the Benchmark Memorandum which led to the finding of price distortion.[340]

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[338] *See* China's Second Written Submission, para. 156.

[339] China dismisses the United States' arguments in this regard in a single footnote in its second written submission. In particular, China asserts that USDOC's reference to the effect of macroeconomic policies identified in the Mysteel report demonstrates the "breadth of what the United States considers to be a 'distortion." China's Second Written Submission, para. 141, n. 157. Importantly, however, China never disputes that these government interventions directly impacted supply and demand conditions in the relevant steel input markets.

[340] *See 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), at Exhibit-9 (identifying changes to "export tax

187. Perhaps recognizing the flaws in the Mysteel report, China alternatively claims that even if market forces were "potentially bounded, in some way, by the actions or policies of the Government of China," the United States was still required to demonstrate how those actions affected the prices charged by SIE suppliers. Otherwise stated, China argues that the United States has not established "any causal pathway between the 'interventions' that the USDOC relied upon and its conclusion that domestic Chinese prices were determined by market forces within 'narrow and predetermined parameters.'"[341]

188. China has failed to explain what further evidence China believes would have established that the Chinese government "affected" SIE pricing. To the extent China suggests the United States was required to show that the Chinese government set SIE prices, as established above, that is not the pertinent question in this dispute. And to the extent China suggests that the USDOC was required to demonstrate a particular kind of causal relationship between each identified intervention and pricing, the kind of analysis China contemplates is not necessary or possible in this situation – or probably in any situation involving widespread government interventions.

189. In the original dispute, the Appellate Body found that USDOC failed to analyze whether SIEs exercised market power "in a way that private suppliers aligned their prices with those of the government-provided goods."[342] But as China acknowledges, the USDOC evaluated price distortion differently during the compliance phase of this dispute. As the United States explained in the first written submission, "[p]rice operates as a signal to convey the relative supply and demand."[343] But when "government policies inflate supply (or otherwise distort choices by market participants that would affect their pricing), the price no longer corresponds with the information it should signal."[344] 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."[345] There is no need or reason for USDOC to limit its examination to

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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)).

[341] *See* China's Second Written Submission, para. 161. At various points in its second written submission, China appears to suggest that the USDOC found that the GOC permits market *prices* to fluctuate only within "narrow and predetermined parameters." To the extent there is confusion, we clarify that this is an incorrect summary of the USDOC's findings. The USDOC did not determine that the GOC directly controls pricing or limits pricing within certain parameters. Instead, the USDOC found that the GOC exercises various levers of control over commercial actors in China's steel sector, with the result that these actors operate within a set of narrow and predetermined parameters. These narrow parameters mean that these commercial actors in China are not responding to supply and demand in the market in a manner which permits an equilibrium price to be established.

[342] *See* Appellate Body Report, para. 4.101 (completing legal analysis with respect to *Line Pipe* investigation).

[343] U.S. First Written Submission, para. 237.

[344] *Id.*

[345] *See* Benchmark Memorandum, pp. 26-30 (Exhibit CHI-20); *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 – Aircraft (AB)*, paras. 975, 981.

specific pricing in this context to assess whether prices were set by the government actions or policies because that is not the relevant question.[346]

190. With regard to China's argument that the USDOC should have requested additional pricing information,[347] China does not address the USDOC's finding that there are practical limitations on the USDOC's (or any investigating authority's) ability to obtain comprehensive pricing information of the sort China describes when such information is in the proprietary possession of various parties that are not subject to individual examination in a given proceeding.[348]

191. In sum, neither China's pricing data nor the apparent price fluctuations provide a sufficient basis to reach a conclusion that Chinese prices are market-determined.

3. The "Market Structure" of the Steel Input Markets Does Not Support China's Contentions

192. China contends that the USDOC failed to come to terms with a second supposedly "undisputed fact:" namely, that SIEs "accounted for no more than half of the total production of the three steel inputs at issue during the period 2006-2008."[349] As the United States explained in its first written submission, China bases this assertion on incomplete evidence regarding the composition of the relevant input markets.[350] The Benchmark Memorandum discusses record evidence that SIEs actually account for a predominant share of overall production in China's steel sector. As the original panel noted, however, a panel is not to conduct *de novo* review but rather "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."[351] China presents no basis for finding that the USDOC did not properly reach this factual finding.

193. In addition, contrary to China's arguments,[352] the USDOC's finding of sector-wide distortion does not depend only upon the size of the SIEs' market share. Indeed, the USDOC noted that a predominant government market share for a particular input "is not necessary to a determination that private prices are distorted" given all the other evidence of Chinese government intervention in the operations of 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."[353]

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[346] *See* Final Benchmark Memorandum, pp. 18-19.
[347] China's Second Written Submission, paras. 170-171.
[348] Final Benchmark Memorandum, pp. 20-21. Indeed, China itself was unable to obtain data regarding market share for companies in the relevant input markets. *See* China's Second Written Submission, para. 166, n. 175.
[349] China's Second Written Submission, para. 166.
[350] *See* U.S. First Written Submission, paras. 241-242
[351] *US – Countervailing Measures (China) (Panel)*, para. 7.10.
[352] *See* China's Second Written Submission, paras. 169-170 (arguing that USDOC failed to establish a requisite linkage between distortion of *SIE* prices and distortion of *non-SIE* prices).
[353] Benchmark Memorandum, p. 28 (Exhibit CHI-20).

194. With regard to China's contention that the USDOC's findings in this regard are based on "airy assertions,"[354] this amounts to nothing more than name-calling, and is belied by the record. The actual record shows that the USDOC in the Benchmark Memorandum thoroughly analyzed extensive evidence. For example, though China questions how the private sector could be "constrained in its growth" when it represents a substantial portion of the steel sector, China fails to acknowledge the record evidence showing that the "very existence of the private sector is explicitly limited and circumscribed in China's constitutional order and in a manner designed to favor and promote the state-owned and -invested economy."[355] Nor does China acknowledge observations that "although formal barriers to entry may be low in the industries designated to be 'basic' or 'pillar,' such as machinery, steel, automobiles and chemicals, there is a clear policy message: 'competition from private firms is not welcome.'"[356] Likewise, China does not address the evidence of extensive overcapacity in China's steel sector, which would impact supply and demand conditions in the sector without regard to ownership type.

195. China also fails to refute evidence of government interventions that directly related to private actors. In particular, the USDOC analyzed and relied upon evidence that certain governmental interventions impacted private enterprises, such as forced mergers and acquisitions, limitations on investment, and the presence of export taxes that artificially depressed prices for the relevant steel inputs during the periods of investigation across all ownership types.[357] China's arguments fail to come to terms with these record facts.

196. With respect to the evidence related to forced mergers and acquisitions, China appears to dispute that such mergers ever happened.[358] The record shows otherwise. The USDOC explicitly cited the Rizhao Steel merger as an example of a practice that is explicitly contemplated by Chinese law.[359] Furthermore, record sources describe the Rizhao Steel merger as being "push[ed]" by authorities on Rizhao Steel as a "very reluctant stakeholder."[360] This language certainly supports a conclusion that Rizhao Steel was not a willing participant in this merger.

197. With respect to the evidence related to limitations on private investment and the existence of export taxes on the inputs in question, China states that these interventions "are part of the prevailing market conditions within a country and do not provide a basis for rejecting in-country prices as benchmarks under Article 14(d)."[361] But beyond this assertion, China does not explain why these interventions in particular should be disregarded when they bear on the question of

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[354] *See* China's Second Written Submission, para. 168.
[355] Benchmark Memorandum, p. 19 (Exhibit CHI-20), *see also id.*, p. 20 (citing *China 2030: Building a Modern, Harmonious, and Creative High-Income Society*, World Bank and the Development Research Center of the State Council of China (2012), p. 26 (Exhibit USA-41)).
[356] Benchmark Memorandum, p. 20 (Exhibit CHI-20),
[357] Benchmark Memorandum, p. 29 (Exhibit CHI-20).
[358] China's Second Written Submission, para. 160, n. 171.
[359] *See* Benchmark Memorandum, p. 24 (Exhibit CHI-20) (identifying Chinese circular that "provides that the state should promote the creation of large enterprise conglomerates through mergers and acquisitions").
[360] *See* "China Economy: Catching up," Economist Intelligence Unit ViewsWire Select (January 2012) (Exhibit USA-53); "China Energy: Shandong eyes light manufacturing; hiccups expected," Economist Intelligence Unit ViewsWire Select, (October 2009) (Exhibit USA-54).
[361] *See* China's Second Written Submission, para. 174.

whether 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."[362]

198. China also argues, as it did with respect to SIEs, that there is no evidence that the interventions cited in the Benchmark Memorandum actually impacted prices charged by private suppliers in the relevant input markets. But this assertion is contradicted even by China's own favored evidence: as noted above, the Mysteel report upon which China relies for its claim that prices in China's steel sector are market-determined reflects that domestic input prices fluctuated in response to changes in export taxes.[363] Regardless, for the reasons explained above, a detailed pricing analysis of the causal relationship between specific government interventions and prices charged by private steel suppliers is not necessary.

4. Evidence of Attempted Private Investments in China's Steel Sector Is Not Helpful to China's Position, and Instead Supports the USDOC's Findings

199. China's third supposedly "undisputed fact" was the existence of private investment in the Chinese steel sector, and in particular, China relies on ArcelorMittal's investment.

200. Evidence of private investment, however, is not inconsistent of a finding of substantial government distortions. Indeed, the specific investment upon which China relies (the ArcelorMittal investment) was blocked by the Chinese government because of a prohibition on foreign companies obtaining a "controlling share" in Chinese steel companies.[364] Furthermore, ArcelorMittal's investment in China was ultimately written off as a loss of $621 million.[365] In other words, even where a foreign steel company invested in the Chinese steel sector, the Chinese government intervened to limit the investment, and the investment in the form approved ultimately yielded a large loss.

201. Thus, China's own example simply underscores one of the many ways that the Chinese government regularly intervenes in the steel sector in pursuit of desired governmental policy-related outcomes. In these circumstances, the prices in the sector cannot be viewed as resulting "from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in [a] market."[366] Rather, in these circumstances in-country prices "will not be reflective of prevailing market conditions in the country of provision" because "they deviate from a market-determined price as a result of government intervention in the market."[367]

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[362] *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.

[363] *See 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), at Exhibit-9 (identifying price changes in response to adjustments to export tax policies for stainless steel and steel billet).

[364] *See* Benchmark Memorandum, pp. 29-30; *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 (Exhibit USA-124), at Exhibit 2.

[365] *See* Exhibit USA-124, at Exhibit 3.

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

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

202. In China's view, the fact that foreign profit-seeking companies wanted to invest in China at all belies any finding that prices are artificially low in that sector. But as the United States explained in its first written submission, the USDOC's determination was not premised on the lack of any private investment in the sector.[368]

C. The USDOC's Determination in *Solar Products* Is Supported by the Facts Available and Consistent with the SCM Agreement

203. Turning from the steel inputs at issue in the *Line Pipe*, *Pressure Pipe*, and *OCTG* investigations, the United States will address China's arguments in its second written submission related to the provision of polysilicon in the *Solar Products* investigation.

204. To recall, the USDOC solicited detailed information from the GOC regarding the structure of the Chinese polysilicon market, including information regarding polysilicon producers and the existence of any governing industrial plans or export restraints.[369] The GOC refused to respond.[370] 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.

205. In particular, the USDOC relied on at least four sources of evidence that supported a determination that the Chinese government intervened at various levels in the polysilicon market, and the existence of export restraints that artificially depressed domestic prices for polysilicon.[371] The USDOC also relied upon extensive evidence cited in the Benchmark Memorandum regarding the magnitude of Chinese government intervention in areas of strategic priority, including the renewable energy sector.[372] On this basis, as facts available, 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.

206. In its first written submission, China argued that the USDOC was required to "analyse whether the facts available on the record supported the conclusion that domestic Chinese prices for polysilicon in the year 2010 were determined by the forces of supply and demand or,

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[368] *See* U.S. First Written Submission, para. 246.

[369] *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 (Exhibit USA-121).

[370] *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).

[371] *See* Supporting Benchmark Memorandum, p. 8-9 (Exhibit USA-84); *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).

[372] *See* Supporting Benchmark Memorandum, p. 9 (Exhibit USA-84); *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) at Attachment 5.

conversely, were effectively determined by the GOC such that they could not be used as benchmarks under Article 14(d) of the SCM Agreement."[373]

207. In the United States' first written submission, we responded that because the evidence upon which the USDOC relied to support its adverse facts available determination was probative of, and tended to support a determination that the Chinese government effectively determined polysilicon prices in China, China failed to make a *prima facie* showing that the USDOC's benchmark determination was inconsistent with even its incorrect interpretation of Article 14(d).

208. In its second written submission, China responds to this argument in a single footnote. In particular, China argues that "there were no 'facts available' on the record to support a conclusion that benchmark prices for polysilicon were effectively determined by the Government of China" and appears to suggest that it was incumbent on the USDOC to find this information on its own.[374] This argument ignores that the USDOC determination was based on at least four pieces of evidence specific to the polysilicon sector, as well as extensive evidence in the Benchmark Memorandum, and also importantly fails to appreciate the fact that the limited record is directly attributable to China's refusal to provide information requested of it. Under these circumstances, China has done nothing to rebut the United States' position in its first written submission. Thus, again, China has failed to make a *prima facie* showing of WTO-inconsistency with respect to the *Solar Products* section 129 proceeding.

IV. CHINA'S ARTICLE 32.1 CLAIM IS FATALLY FLAWED

209. China's claim under Article 32.1 that the USDOC's price distortion analysis somehow translates into an impermissible specific action against subsidization has not merit. Despite having multiple opportunities to clarify or substantiate its position, China has not articulated a cognizable claim nor has it identified the measure it seeks to challenge. Below, we address China's failure to identify the specific measure at issue, China's failure to establish any basis for finding that countervailing duties constitute an impermissible action against subsidization, and China's failure to identify any aspect of the USDOC's determinations that could constitute a specific action against subsidization.

A. China Has Not Complied with the Requirement of DSU Article 6.2 to Identify the Specific Measure at Issue and Has Provided No Basis Upon Which to Proceed with an Article 32.1 Claim

210. As an initial matter, China's second written submission confirms that China has failed to comply with the requirements of Article 6.2 of the DSU to "identify the specific measures at issue." Indeed, the measure that China is challenging has been unclear and has remained a moving target throughout the course of this Article 21.5 proceeding. In its panel request, China asserted that the "benchmark determinations" in the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section 129 proceedings are inconsistent with Article 32.1.[375] In its first written submission, China asserted that "the USDOC's *reliance on subsidies* allegedly provided to

[373] *See* China's First Written Submission, para. 302.
[374] *See* China's Second Written Submission, para. 149, n. 163.
[375] *See* China Consultation Request, para. 26.

upstream steel producers . . . is unquestionably 'a specific action against a subsidy.'"[376] But even within the same paragraph China also asserted that the "rejection of in-country benchmark prices" is a "measure" that acts against subsidization, in terms of the Article 32.1 analysis, because it "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 practices.'"[377]

211. China's second written submission further confuses its Article 32.1 claim because it identifies different "measures" as being at issue in this Article 21.5 proceeding. For example, China identifies at least three distinct items as the object of its challenge: i) the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section 129 proceedings, ii) the USDOC's distortion analysis as a rationale for use of an out-of-country benchmark, and iii) the imposition of countervailing duties.[378] Given these inconsistent (and underdeveloped or abandoned) descriptions of the "measure," which do not correspond to the "benchmark determinations" mentioned in its panel request, this Panel should find that China did not comply with Article 6.2 of the DSU because it has not identified any of these alleged "measures at issue" and reject China's claim.

212. The Panel should reject China's Article 32.1 claim because what China is now claiming to challenge is not identified in its panel request. In its second written submission China states that it is challenging the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section 129 proceedings and the resulting imposition of countervailing duties as the "measures" it is challenging as a "specific action" under Article 32.1.[379] This identification of the "imposition of countervailing duties" as the measure China is challenging stands in sharp contrast to that identified in its panel request, which identifies "benchmark determinations" in the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section 129 proceedings and asserts that these determinations are inconsistent with Article 32.1.[380] As the Appellate Body has made clear, a party cannot expand a WTO dispute to include measures which were not included within its panel request.[381] Thus, because China is now impermissibly attempting to expand the scope of its panel request pertaining to its Article 32.1 claim, this Panel must reject China's claim.

B. China's Claim Must Be Rejected Because an Article 32.1 Claim Cannot Be Based on the Imposition of Countervailing Duties

213. As the United States explained in its first written submission, an Article 32.1 claim can only succeed if, *inter alia*, the action being challenged is not in accordance with the provisions of GATT 1994, as interpreted by the SCM Agreement.[382] In this regard, a measure is in accordance

[376] China's First Written Submission, para. 289 (emphasis added).
[377] China's First Written Submission, para. 289.
[378] China's Second Written Submission, paras. 185, 189, 190.
[379] *See* China's Second Written Submission, para. 185 ("the measures at issue are the USDOC's Section 129 determinations in the four investigations in which the USDOC was required to re-evaluate its benchmark findings.") and190.
[380] *See* China Consultation Request, para. 26.
[381] *US – Carbon Steel (AB)*, para. 171 (finding that where a panel request fails to adequately identify a measure or specify a claim, such measure or claim will not form part of a panel's terms of reference); *Dominican Republic – Cigarettes (AB)*, para. 120.
[382] *See*, *e.g.*, U.S. First Written Submission, para. 269.

with the GATT 1994, as interpreted by the SCM Agreement, if it is one of the four permissible responses to subsidization: i) definitive countervailing duties, ii) provisional measures, iii) undertakings, and iv) countermeasures.[383]

214. China's second written submission demonstrates that it is improperly attempting to challenge one of the four permissible responses to subsidization in its Article 32.1 claim. Specifically, China states that the benchmark distortion rationale "directly results in the imposition of a countervailing duty . . . This action is opposed to, has an adverse bearing on . . . or has the effect of dissuading the subsidies allegedly provided to upstream producers."[384] China's statement is an explicit concession that it is challenging *the imposition of countervailing duties*. However, the imposition of countervailing duties is not inconsistent with Article 32.1 because definitive countervailing duties are one of the permissible responses to subsidization. Thus, because China's 32.1 claim improperly attempts to challenge a response to subsidization that is in accordance with the GATT 1994 as interpreted by the SCM Agreement, it must be rejected.

C. China's Article 32.1 Claim Must Be Rejected Because There Is No Basis to Support China's Various Theories about Upstream Subsidies

215. To the extent that China is challenging the "upstream subsidy rationale" contained in four *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* section 129 determinations, or the USDOC's failure to conduct an upstream subsidy analysis as part of such determinations, under Article 32.1,[385] such claims are without merit. As explained above, China's second written submission makes clear that these claims are actually claims against the imposition of and basis for countervailing duties, and thus not properly raised under Article 32.1.

216. Beyond this threshold problem, China's second written submission revisits its novel Article 32.1 claim, but adds nothing of substance that would make the claim viable. China argues, in the main, that "if accepted" the USDOC "rationale" would constitute "an obvious circumvention of the disciplines" covering upstream subsidies set forth in the SCM Agreement.[386] But to determine whether the alleged USDOC rationale may be "accepted" requires China to make substantive claims under the SCM Agreement so that the Panel may evaluate whether the countervailing duties are imposed consistent with those obligations. Those substantive issues are not resolved under Article 32.1. Further, China's arguments, in their entirety, are based on the unsupported premise that the USDOC's discussion of subsidies is a necessary and sufficient cause for the USDOC's finding of distortion. Crucially, China cannot and does not, establish that this premise is true. China's argument also requires an assumption that the benefit amount calculated by the USDOC regarding the subsidization of the downstream product bears a specific relationship to the distortion finding rather than, for example, the benchmark price that was used in each case. China has also failed to support this proposition.

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[383] *See, e.g.,* U.S. First Written Submission, para. 272 & n. 514 citing to *US – Offset Act (Byrd Amendment) (AB)*, para. 269; *Mexico - Rice AD Measures (Panel)*, para. 7.276

[384] *See* China's Second Written Submission, para. 189.

[385] *See* China's Second Written Submission, para. 185, 192.

[386] *See* China's Second Written Submission, para. 191.

217. The United States has already addressed each of China's claims in its first written submission. As discussed therein, in four of the challenged investigations the USDOC evaluated whether market forces determined prices for the inputs used to produce the merchandise under investigation that were being provided for less than adequate remuneration.[387] 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. The USDOC observed that the GOC intervenes in the steel industry in a number of ways. Apart from the widely recognized existence of steel subsidies, the USDOC emphasized the critical nexus of government ownership and legislative and policy control. Ancillary examples of government interference included forced mergers and acquisitions, investment restrictions, and export restrictions.[388] Similarly, in *Solar Products*, the USDOC analyzed evidence that the GOC intervenes in the polysilicon market in a number of ways apart from the provision of subsidies, including export restraints, management of the industry, and maintaining manufacturing rules and restrictions.[389] The result of these analyses, which included the challenged "rationale," was a determination to look elsewhere for market-based steel or polysilicon benchmark prices. Beyond that point in the analysis, the fact that upstream subsidies were discussed had no further bearing on the challenged determination (the imposition of duties to countervail the subsidized downstream product) – much less on the calculation of a benefit.

218. Contrary to China's assertions, 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. In *US – Countervailing Duty Measures (China)*, for example, 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.[390]

219. Nevertheless, China mischaracterizes the position taken by the United States in its first written submission, asserting, for example, that the USDOC's distortion analysis (*i.e.*, the "rationale" for the use of an out-of-country benchmark) is designed "to counteract the assumed effects of those upstream subsidies."[391] This description does not reflect the statements made by the United States in its first written submission. Rather it reflects the lack of a substantive legal argument upon which China can proceed. As the United States explained, the USDOC's

[387] *See* U.S. First Written Submission, paras. 231-236, 259-260.
[388] *See* Benchmark Memorandum, p. 30 (Exhibit CHI-20).
[389] *See* Benchmark Memorandum, pp. 8-9 (Exhibit CHI-20).
[390] *See US – Countervailing Measures (China) (AB), paras*, para. 4.62.
[391] *See* China's Second Written Submission, para. 189.

distortion analysis and resulting use of out-of-country benchmarks cannot be a "measure" that is a "specific action against" input subsidies because the benchmark is used to determine whether inputs are provided to subject merchandise producers for adequate remuneration and not to determine whether countervailable subsidies are being provided to input producers.[392] It is plain that a benchmark is used to determine whether inputs are provided to subject merchandise producers for adequate remuneration as provided for in Article 14(d) of the SCM Agreement. Thus, China's claim that the USDOC's distortion analysis counteracts the assumed effects of the upstream subsidy is simply without merit.

220. China likewise asserts that the USDOC uses the distortion analysis to encourage the termination of the practice of input subsidization.[393] There is no basis for this assertion in the USDOC's determinations. Moreover, this sort of speculation should not be entertained in analyzing China's claim. The Appellate Body has specifically 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."[394] China's observation that the USDOC's use of out-of-country benchmarks increases the amount of the allegedly subsidy benefit or identifies a benefit where none would otherwise exist remains unsubstantiated. Thus, in addition to the fact that the benchmark determination is used to measure the benefit to downstream producers from provision of an input, and not the benefit to the input producer (as China incorrectly alleges), in the absence of any legal or evidentiary basis to support its contention, China has also not met the standard for establishing that a measure is "against" subsidization of the upstream input producers.

221. China objects that the United States "does not even acknowledge" that the SCM Agreement "contains disciplines" relating to upstream subsidies.[395] But China's objection is a red herring. The disciplines relating to upstream subsidies are not relevant to the analysis at issue – *i.e.*, whether prices in China's steel and polysilicon sectors are market-determined such that they can be used to determine whether inputs are provided for less than adequate remuneration to producers of the downstream subject merchandise.

222. China likewise objects that the United States does not address the Appellate Body's statement in *US – Softwood Lumber IV* that an investigating authority "may not presume" that an upstream subsidy passes through to downstream producers. Again, this objection is misplaced because the Appellate Body's statement that China invokes relates to the investigation of subsidies to upstream producers (logging companies), and how the subsidy benefit to the downstream subject merchandise (lumber) is measured and countervailed. The Appellate Body's statement does not relate to the analysis at issue, *i.e.*, whether prices in China's steel and polysilicon sectors are market determined such that they can be used to determine whether inputs are provided for less than adequate remuneration. China has provided no basis for its assertions that the USDOC must be making such a presumption regarding the pass-through of subsidies to

[392] *See* U.S. First Written Submission, para. 277.
[393] *See* China's Second Written Submission, para. 189-190.
[394] *EC – Commercial Vessels*, para. 7.164.
[395] *See* China's Second Written Submission, para. 192.

upstream producers. Indeed, the USDOC presumed no such thing. China likewise provided no basis for its assertion that the imposition of duties on the downstream product "offsets the presumed pass-through."[396] China's frustration has no basis in the SCM Agreement or in the reality of this proceeding.

V. CHINA'S INPUT SPECIFICITY ARGUMENTS ARE UNPERSUASIVE

223. In determining whether a subsidy is specific, 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."

224. In each of the 12 relevant proceedings the USDOC brought its determinations into compliance with respect to Article 2.1(c) of the SCM Agreement.[397] The USDOC took account of the Article 2.1(c) factors in its analysis in each of these proceedings by, *inter alia*, "identify[ing] a subsidy program in each of the specificity determinations for the various input for LTAR programs" and "taking account of . . . the length of time."[398]

225. China's second written submission reiterates its objection to the USDOC's input specificity determinations, claiming that the USDOC did not take account of the relevant Article 2.1(c) factors in making its findings.[399] China claims, in particular, that the USDOC (1) did not identify a "subsidy programme" pursuant to which the subsidized inputs were provided and (2) did not adequately take account of the length of time the relevant subsidy programs have been in operation. We address each claim in turn.

A. The USDOC Identified the Relevant Subsidy Programs in Examining *De Facto* Specificity Under Article 2.1(c)

226. In the discussion below, we first recall the findings of the original Panel and the Appellate Body in this dispute and then review the steps taken by the USDOC to comply with those findings. We then address China's arguments and explain why the USDOC's *de facto* specificity finding is justified.

1. Findings of the Original Panel and the Appellate Body

227. The original Panel in this dispute stated that:

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[396] *See* China's Second Written Submission, para. 192.

[397] To recall, 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 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).

[398] *Id.*

[399] NB China conflates the subsidy with the financial contribution at several points in its second written submission.

> With regard to the ordinary meaning of the word "programme", its dictionary definition indicates most pertinently "[a] plan or outline of (esp. intended) activities; a planned series of activities or events". This ordinary meaning must be read in light of the context of Article 2.1(c), as well as of the object and purpose of the SCM Agreement as a whole.[400]

228. On appeal, the Appellate Body stated:

> 1.149. We agree with the Panel to the extent it suggested that, in the absence of any written instrument or explicit pronouncement, evidence of a "systematic activity or series of activities" may provide a sufficient basis to establish the existence of an unwritten subsidy programme in the context of assessing *de facto* specificity under the first factor of Article 2.1(c) of the SCM Agreement.
> * * *
> 1.150. We find it troubling, however, that the Panel did not provide any case-specific discussion or references to the USDOC's determinations of *de facto* specificity at issue prior to reaching its conclusion. [401]

229. In other words, the Appellate Body agreed that evidence of a systematic activity or series of activities may be sufficient to show that a subsidy program exists, but suggested that examining this question should involve case-specific discussion or references to the determinations at issue. The Appellate Body's findings do not, as China suggests, reach a conclusion that evidence of a systematic activity or series of activities is not sufficient to show that a subsidy program exists.[402]

2. The USDOC's Examination of *De Facto* Specificity

230. To facilitate an analysis based on case-specific discussion and references to the USDOC's determinations, as described in the U.S. first written submission, we first recall the process undertaken by the USDOC in pursuing the *de facto* specificity inquiry.[403] In conducting its redetermination for each of the inputs at issue, the USDOC issued questionnaires to the GOC in *Pressure Pipe*, *Line Pipe*, *Kitchen Shelving*, *OCTG*, *Steel Cylinders, PC Strand*, *Solar Products*, *Seamless Pipe*, *Coated Paper*, *Lawn Groomers*, *Drill Pipe*, and *Aluminum Extrusions* to identify a series of systematic activities such that demonstrate the existence of a subsidy program.[404] As part of this process, the USDOC explained that:

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[400] *US – Countervailing Measures (China) (Panel)*, para. 7.239.
[401] *US – Countervailing Measures (China) (AB)*, paras. 4.149-50.
[402] *See* China's Second Written Submission, para. 201.
[403] *See* U.S. First Written Submission, paras. 288-291.
[404] *See*, *e.g.*, U.S. First Written Submission, para. 288 ("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.' The USDOC in the original investigations asked for three years of data on each industry providing the relevant input or inputs in each investigation.") (quoting Preliminary Input Specificity Memorandum, p. 7 (Exhibit CHI-23)) (internal citations omitted).

> In order to collect information . . . [the USDOC's] Standard Questionnaire for the Government of the People's Republic of China . . . solicits "a copy of bulletins of economic and/or financial statistics regarding lending, economic development, and economic planning, published during the period of investigation." [The USDOC] also solicits the relevant information regarding . . . . "a description of the program, including the purpose of the program, and the date it was established." In addition, with respect to *de facto* specificity, the *Standard Questions Appendix* . . . requests that the Government of China "provide the . . . number of recipient companies and industries and the amount of assistance approved under this program for the year in which any mandatory company was approved for assistance, as well as each of the preceding three years."[405]

231. The USDOC then analyzed any responses provided by the GOC with respect to the users of each program. For example, in the *OCTG* investigation, the GOC provided a response to the Standard Questionnaire stating that "seven industries including rebar, plain bar, merchant bar, light sections, narrow strip, wire rod, and seamless tubes used the input steel rounds and billets."[406] Based upon this statement by the GOC, the USDOC then:

> analyzed the recipients of this subsidy program and determined that a subsidy provided only to the rebar plain bar, merchant bar, light sections, narrow strip, wire rod, and seamless tubes industries was not a subsidy that was broadly available and widely used throughout the economy of the PRC. Therefore, the Department found this program *de facto* specific because the recipients were limited in number.[407]

232. The GOC provided responses to the USDOC's questionnaires in five of the redeterminations (*Pressure Pipe*, *Line Pipe*, *Kitchen Shelving*, *OCTG*, and *Steel Cylinders*) and refused to provide responses in the remaining seven proceedings (*PC Strand*, *Solar Products*, *Seamless Pipe*, *Coated Paper*, *Lawn Groomers*, *Drill Pipe*, and *Aluminum Extrusions*).[408]

233. On the basis of (i) such input purchase information that China reported to the USDOC in five of the CVD investigations, and (ii) information placed on the record in the seven investigations in which China did not cooperate, the USDOC determined that "adequate evidence in each of the 12 CVD investigations" demonstrates 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."[409] In sum, the USDOC sought information on each of the relevant subsidy programs, reviewed record evidence confirming the existence of

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[405] *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"), p. 2, n.2 (quoting USDOC Standard Questionnaire) (Exhibit CHI-23).

[406] Preliminary Input Specificity Memorandum, p. 2 (Exhibit CHI-23).

[407] Preliminary Input Specificity Memorandum, pp. 2-3 (Exhibit CHI-23).

[408] *See* U.S. First Written Submission, paras. 289, 291 (citing Preliminary Input Specificity Memorandum, pp. 7-9 (Exhibit CHI-23)).

[409] Preliminary Input Specificity Determination, p. 19 (Exhibit CHI-4).

a program in each case, and reasonably and adequately explained why it found the systematic provision of inputs to constitute a subsidy program in the 12 challenged determinations.

3. China's Arguments Are Without Merit

234. China, in its second written submission, argues that the United States sees repeated actions as equivalent to systematic series of actions and thus collapses the distinction between subsidy and subsidy program. This is incorrect. As the United States explained in its first written submission, China misunderstands where the "subsidy program" element fits into the overall subsidization analysis. The identification of a subsidy requires three separate elements: a finding of a (1) financial contribution that (2) confers a benefit and (3) the subsidy is specific. As the Appellate Body stated, "the *existence* of a subsidy is to be analysed under Article 1.1 of the SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."[410]

235. As one component of a *de facto* specificity analysis involving the provision of inputs, an authority may identify a program involving the *repeated provisions* of inputs over the relevant period. The repeated provision of inputs need not consist exclusively of *subsidized* inputs – as noted, the existence or not of a subsidy is a three part test (contribution, benefit, specificity), and each element must be identified separately. Thus, China is wrong in asserting that the program must consist only of activities that have been definitively identified as subsidies. Rather, the relevant inquiry is the existence of repeated instances in which inputs were provided as the result of some sort of planned series of activities or events. The repeated provision of inputs is evidence of the series of actions or activity that constitutes a program.

236. The logic of this standard, as the USDOC explained in the section 129 determinations, reflects "the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which are truly broadly available and widely used throughout an economy."[411] Examining the repeated provision of inputs in light of this standard guarantees against the false appearance of specificity. The repeated provision of inputs is not, as China argues, irrelevant to the identification of a program. Rather, as the Appellate Body explained, "[a]n examination of the existence of a plan or scheme regarding the use of the subsidy at issue may also require assessing the operation of such plan or scheme over a period of time."[412] The USDOC's *de facto* specificity inquiry examined more than just the repeated provision of inputs over time, despite what China claims.[413] In this case,

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[410] *US – Countervailing Measures (China) (AB)*, para. 4.144 (noting also that "[i]t stands to reason, therefore, 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 under Article 1.1.").

[411] Preliminary Input Specificity Memorandum, p. 2 (Exhibit CHI-23) (quoting Statement of Administrative Action).

[412] *US – Countervailing Measures (China) (AB)*, para. 4.142.

[413] *See*, *e.g.*, Preliminary Input Specificity Memorandum, p. 7, n.25 (Exhibit CHI-23) ("The Department normally requests *de facto* specificity data for the year of the receipt of the subsidy and the prior two years. In part, this is a practical accommodation to parties in a countervailing duty proceeding, who may find it difficult and burdensome to provide detailed usage data for several past years. More importantly, however, the Department's experience has shown that three years of data provides a reasonable reflection of the usage and distribution of the subsidy program at the time of its bestowal to the respondent.").

the systematic provision of these inputs for nearly 50 years was part of a regularized and well-planned series of activities or events and thus serves as evidence of a subsidy program.[414]

237. As the USDOC's determinations demonstrate, there is no real concern here that China's provision of inputs in the manner creates a false appearance of specificity. The provision of these inputs is *de facto* specific. China's attempts to show otherwise merely result from a misreading of the Appellate Body's statement on this issue. In particular, China relies on the following sentence of the Appellate Body report, taken in isolation: "In order to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a systematic series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises."[415]

238. China ignores the fact that this sentence is meant to clarify the immediately preceding sentence in which the Appellate Body observed: "[t]he mere fact that financial contributions have been provided to certain enterprises is not sufficient . . . to demonstrate that such contributions have been granted pursuant to a plan or scheme."[416] Identifying a plan or scheme is relevant because, in analyzing *de facto* specificity, the question is not focused on existence of financial contributions but rather on "whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in [law]."[417] As the Appellate Body and the original Panel observed, a systematic activity or series of activities may be evidence of an unwritten subsidy program.[418]

239. For the purpose of the issue at hand, the key language in the Appellate Body's statement is "a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."[419] As discussed above, the inquiry under "Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."[420] Because contribution and benefit are analyzed separately from this inquiry, the only remaining question is whether these were provided "pursuant to" "a systematic series of actions." The USDOC's analysis is therefore correct to track the systematic series of actions, rather than limit its inquiry to financial contributions that confer a benefit.

240. China's remaining arguments are likewise unpersuasive. China's position is misguided when it claims that what is missing from the USDOC's analysis is some "objective reference point" from which to establish the parameters of a "subsidy programme" focused on the eligibility of other enterprises or industries to receive the subsidy at issue. The Appellate Body's

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[414] The GOC reported that it "began producing and selling the input at issue . . . during . . . 1953-1957," and the USDOC, therefore, "determined that the subsidy program has not been in operation 'for a limited period of time only,'" but rather that "SOEs were producing and providing the inputs at issue" for nearly 50 years. Preliminary Input Specificity Memorandum, p. 8 (Exhibit CHI-23).

[415] *See US – Countervailing Measures (China) (AB)*, para. 4.143.

[416] *US – Countervailing Measures (China) (AB)*, para. 4.143.

[417] *US – Countervailing Measures (China) (AB)*, para. 4.141.

[418] *See US – Countervailing Measures (China) (AB)*, para. 4.149; *US – Countervailing Measures (China) (Panel)*, para. 7.239.

[419] *US – Countervailing Measures (China) (AB)*, para. 4.143 (emphasis added).

[420] *US – Countervailing Measures (China) (AB)*, para. 4.144.

analysis of this issue does not frame the issue as China would have it.[421] Unlike a *de jure* specific subsidy, a *de facto* specific subsidy by its nature is not likely to have clear eligibility standards or other express terms that an investigating authority can feasibly identify.[422] The Appellate Body made clear in this dispute that finding such a standard is necessarily unlikely and, in any event, unnecessary.[423]

241. Finally, in what seems to be an attempt to relitigate the underlying dispute, China claims that the USDOC and the United States offered no explanation for the USDOC's "arbitrary and unexplained conclusion that the repeated provision of each type of input constituted its own 'subsidy programme.'"[424] However, China can point to nothing in the Appellate Body's findings to suggest that framing each program by input is inconsistent with Article 2.1(c), nor does it demonstrate that this decision is somehow unreasonable. Indeed, and as the United States noted in its first written submission, the Appellate Body observed that the process of identifying the subsidy at issue might very well lead to the identification of the relevant subsidy program.[425] China's argument on this front is untethered to the DSB's recommendations and rulings and should be rejected.

B. The USDOC Took Account of the Length of Time as Contemplated by Article 2.1(c)

242. In its first written submission, the United States summarized the primary and unambiguous evidence it obtained from the GOC regarding the length of time – nearly 50 years – the relevant programs have been in operation in China. The United States described how the USDOC took account of this information as contemplated by Article 2.1(c) and in light of the Panel and Appellate Body reports in this dispute. In its section 129 determinations the USDOC expressly addressed the "length of time" aspect of Article 2.1(c) in great detail, taking account of it in the process of making its *de facto* specificity determination.

243. Although China asserts that the USDOC did not sufficiently take account of the length of time, China provides no specific argument as to how USDOC's analysis can be found wanting. To the contrary, the USDOC reasonably and adequately explained 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."[426] Thus, to determine whether the limited number of recipients related to the duration of the subsidy program in each investigation, the USDOC took into account the fact that the programs at issue had – according to the GOC – been in operation for nearly 50 years. Having taken account of "the length of time in which the subsidy program has been in operation," the USDOC concluded that "the input LTAR programs in each of those cases were *de facto* specific" because the limited number of recipients did not

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[421] *See US – Countervailing Measures (China) (AB)*, para. 4.146.
[422] *See US – Countervailing Measures (China) (AB)*, para. 4.129 ("By contrast, a *de facto* specificity analysis under subparagraph (c) would appear to be most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are not explicitly provided for in a law or regulation.").
[423] *See US – Countervailing Measures (China) (AB)*, para. 4.146.
[424] China's Second Written Submission, para. 203.
[425] U.S. First Written Submission, para. 301.
[426] Preliminary Input Specificity Memorandum, p. 7 (Exhibit CHI-23).

result from a limited duration of the subsidies at issue.[427] China provides nothing in its second written submission that calls this determination into question.

C. China Does Not Dispute the Use of Facts Available

244. Finally, China argues that if the Panel finds that the USDOC applied the wrong legal standard in the five proceedings where China cooperated, the Panel should also find that the USDOC applied the wrong legal standard in the seven proceedings in which China refused to participate. China does not object to the use of facts available in those seven proceedings, but rather disputes legal standard that the USDOC used in all 12 cases. As the United States explained in its first written submission, however, 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.[428]

245. Because China did not cooperate in those investigations, the USDOC did not have the information that would be required to produce the type of findings that China demands in its first written submission. Yet the information available from the related cases upon which the USDOC relied, was probative of and adequately supported a determination that the provision of inputs for less than adequate remuneration had not been in operation for a limited period of time. Given that the USDOC considered all the available information in making its determination, China's argument should be rejected. The USDOC's analysis of the length of time the subsidy programs had been in operation based on facts available in the seven investigation where China did not respond were consistent under China's flawed legal interpretation of Article 2.1(c) of the SCM Agreement.

VI. CHINA'S ARGUMENTS REGARDING LAND SPECIFICITY ARE UNPERSUASIVE

246. In response to the United States' first written submission, China argues that the USDOC's determination in *Thermal Paper* is not consistent with Article 2.2 because, in China's view, the USDOC should have concluded that preferential pricing was available on the same terms both inside of and outside of the special economic zone at issue. China continues to predicate its claim on an erroneous characterization of the USDOC's determination in *Thermal Paper* and ignores the fact that the GOC's own failure to cooperate prevented it from introducing evidence that would support the position China takes in this dispute.[429] Because China mischaracterizes the USDOC's determination, the discussion below first clarifies the USDOC's findings, then explains how the USDOC properly determined that the land at issue was provided pursuant to a "distinct land regime," and finally concludes that the USDOC properly relied on the available evidence in reaching its determination.

[427] Preliminary Input Specificity Memorandum, pp. 7-8 (Exhibit CHI-23).
[428] *See* U.S. First Written Submission, para. 305.
[429] China's Second Written Submission, paras. 215-22.

A. The USDOC's Determination Comports with Article 2.2 as Discussed by the Original Panel

247. To illustrate the errors in China' characterization, we first recall the basic question presented with respect to this issue. The original Panel began its analysis of this issue by observing:

> Article 2.2 of the SCM Agreement requires a subsidy to be limited to certain enterprises located within a designated geographical region in order to be specific. The Appellate Body has clarified that a limitation of access to a subsidy can be effected through a limitation on access to the financial contribution, to the benefit, or to both.[430]

248. In this regard, the Panel considered that:

> the fact that the land in question is located within an industrial park or economic development zone, and that that park or zone is within the seller's jurisdiction, is insufficient by itself to establish that there is a limitation of access to the subsidy.[431]

249. Thus, the original Panel found that a firm's presence in a zone was not enough to establish that the subsidy was provided to limited recipients. Rather, the Panel found that there must also be some "finding that the provision of land within the park or zone is distinct from the provision of land outside the park or zone."[432] The Panel observed that the USDOC's original determinations would have been adequately supported if USDOC had established that "the conditions for the provision of land within the ... zone were different from and preferential to the conditions outside the ... zone, in terms of special rules or distinctive pricing."[433]

250. In the redeterminations at issue, the USDOC thus considered whether the provision of land within the park or zone is distinct from the provision of land outside the park or zone. As the Panel indicated, such a "distinct land regime" can be demonstrated by establishing that the conditions for the provision of land within the zone are different from and preferential to the conditions outside the zone. These different conditions may be evident in terms of special rules or distinctive pricing.

251. In *Thermal Paper*, as the United States explained in its first written submission, the USDOC investigated whether there was any evidence that distinguishes the provision of land inside the zone from the provision of land outside of the zone such as would constitute a "distinct land regime."[434] At issue was the 2005 purchase of granted land-use rights by the respondent, Guangdong Guanhao High-Tech Co., Ltd. (GG), located in the Zhanjiang Economic and

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[430] *See US – Countervailing Measures (China) (Panel)*, para. 7.347.
[431] *See US – Countervailing Measures (China) (Panel)*, para. 7.352.
[432] *See US – Countervailing Measures (China) (Panel)*, para. 7.352.
[433] *See US – Countervailing Measures (China) (Panel)*, para. 7.352.
[434] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).

Technological Development Zone (ZETDZ).[435] With respect to GG's purchase of land-use rights in the ZETD Zone, the USDOC requested that China provide the following information to aid in its inquiry:

> 1. Provide a history of the establishment of the ZETDZ, including the period during the POI.
>
> 2. State whether the ZETDZ was a state-level economic and technological development zone prior to or during the POI and, if so, how this designation impacted operations in the zone and land transactions in the zone during the POI.
>
> 3. Provide translations of the regulations that governed the administration of the ZETDZ and land sales within the ZETDZ during the POI.
>
> 4. Referencing the applicable regulations, please indicate the authority that governed overall operations in the zone during the POI.
>
> 5. Referencing the applicable regulations, explain and document who administered land sales in the zone during POI and whether the administering authority was answerable or otherwise subject to review, oversight, or control by a larger governing body during the POI.
>
> 6. Referencing the applicable regulations, please explain the role that the Zhanjiang Municipal Land Bureau, the Municipal Government of Zhanjiang, and the Provincial Government of Guangdong Province had with regard to land sales and operations in the ZETDZ during the POI.
>
> 7. Provide any promotional materials, copies of information brochures/website printouts, or advertisements issued by the zone as it pertains to the years leading up to and during the POI.
>
> 8. Referencing the applicable regulations, please specify the requirements firms must meet in order to locate in the zone.
>
> > a. Specify whether any GOC regulations, decree, law, or development plan identifies certain industries that are "encouraged" to locate in the ZETDZ. If so, please provide translated copies of the relevant regulations and specify the nature of the "encouragement" that was provided leading up to and during the POI.
> >
> > b. Specify whether any GOC regulations, decree, law, or development plan identifies certain industries that are "restricted" in terms of their ability to locate/operate in the ZETDZ. If so, please provide translated copies of the relevant regulations and specify the nature of the "restrictions."

[435] *See* Land Questionnaire, pp. 14-15 (Exhibit CHI-25).

> c. Specify whether any GOC regulations, decree, law, or development plan identifies certain industries that are "prohibited" in terms of their ability to locate/operate in the ZETDZ. If so, please provide translated copies of the relevant regulations and specify the nature of the "prohibitions."
>
> 9. Provide a translated copy of the sales contract issued to GG in connection with its 2005 purchase of land-use rights in the ZETDZ.
>
> 10. Provide a translated copy of the land appraisal issued to GG in connection with its 2005 purchase of land-use rights in the ZETDZ. See page 24 of the Thermal Paper Decision Memorandum.
>
> 11. Provide translated copies of the additional appraisal (and accompanying affidavit) and contract for land acquired outside the ZETDZ, as referenced on page 24 of the Thermal Paper Decision Memorandum.
>
> 12. Referencing the applicable regulations, please provide a listing of all incentives or preferential policies offered to firms located within the ZETDZ during the POI. Further, indicate whether the incentives or preferential policies were available to firms located outside of the ZETDZ during the POI.[436]

252. The GOC declined to provide a response to any of these questions. As a result, the only relevant evidence on the record is from the original investigation.[437] In particular, the USDOC relied on the verification report from the original investigation where USDOC investigators discussed with GG company officials the terms and conditions surrounding their purchase of land-use rights in the ZETD Zone.[438] As indicated in the verification report, GG officials submitted a translated copy of an appraisal report for the relevant plot of land.[439] The USDOC explained that this appraisal report indicates "a 'preferential treatment' for the respondent.'"[440] The USDOC concluded that, given the lack of other relevant evidence in response to its questionnaire, the GOC likely "sold the land in question to the respondent at a price and at terms that were not available to other firms" such as would "constitute[] a 'distinct land regime.'"[441]

B. The USDOC Properly Determined That the Land at Issue Was Provided Pursuant to a Distinct Land Regime

253. China argues in its Second Written Submission that it explained how the "distinct land regime" legal standard is inconsistent with Article 2.2 of the SCM Agreement and the United

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[436] *See* Land Questionnaire, pp. 14-15 (Exhibit CHI-25).
[437] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[438] *See* Memorandum Accompanying Land Preliminary Determination, GG/ZG Verification Report in the Countervailing Duty Investigation of Lightweight Thermal Paper from the People's Republic of China ("Verification Report"), p. 19 (Exhibit CHI-27).
[439] Verification Report, p. 18 (Exhibit CHI-27).
[440] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[441] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).

States has not defended this standard.[442] However, as described above, and as the United States explained in its first written submission, the USDOC's land regime analysis comports with the DSB's recommendations and rulings in this dispute. As the original Panel indicated, there must be a limitation on access to either the financial contribution or the benefit and such a limitation can be established by demonstrating, for instance, that the conditions for the provision of land within the park or zone were different from, and preferential to, the conditions outside of the park or zone, in terms of special rules or distinctive pricing.[443]

254. The USDOC thus focused its inquiry on whether there a "distinct land regime" existed in *Thermal Paper*, "*e.g.*, whether the prices or terms of sale, including other incentives tied to the purchase of the land inside the geographic region at issue, are different from those offered outside of the geographic region."[444] If such differences were found, the USDOC explained, this would serve as the basis for finding regional specificity.[445] Thus, in reconsidering its determination, the USDOC issued questionnaires to China soliciting information to determine whether a "distinct land regime" existed within the relevant industrial park or economic zone relative to the area outside of each zone.[446] The USDOC's analytical approach is consistent with the DSB's recommendations and rulings because, just as the panel suggested, it evaluates whether the conditions on which land was sold inside a zone were distinct from those outside the zone.

C. The USDOC Properly Relied on the Facts Available

255. As the United States explained in our first written submission, the USDOC's determination relied on the facts available from the original investigation because China declined to respond to the USDOC's requests for information pertaining to land.[447] The absence of this information prevented that USDOC from further investigating the preferential conditions affecting the ZETD Zone. China nevertheless attacks the USDOC's reliance on facts available as insufficient to support a regional specificity determination. In doing so, China overlooks the fact that evidence was missing from the record – indeed, the vast majority of evidence requested was missing from the record – because China declined to provide such evidence to the USDOC.

256. Without this information, as the United States explained in its first written submission, the USDOC found that it was unable to fully investigate certain aspects of the provision of land at issue.[448] For example, the investigation record indicates that the land appraisal issued to the respondent refers to "preferential treatment," but beyond this observation the USDOC was unable to further examine the exact terms of that "preferential treatment."[449] The verification report explains that GG company officials in their comparison appraisal report indicated that the government's preferential policies resulted in an "appraisal price . . . of a particular nature,"

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[442] *See* China's Second Written Submission, paras. 216-17.
[443] *See Panel Report* at paras. 7.351-7.354.
[444] *See* Land Preliminary Determination, p. 6 (Exhibit CHI-24).
[445] *Id.*
[446] First Written Submission of the United States, para. 305 (citing Land Preliminary Determination at 6).
[447] *See* Land Specificity Questionnaire Response, p. 1 (Exhibit CHI-27).
[448] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[449] *Id.*

which suggests that the "preferential treatment" at issue affected pricing.[450] The verification report also explains that the USDOC examined an appraisal for land outside of the ZETD Zone, but could not reach a resolution as to whether it presented comparable terms.[451] Thus, the USDOC relied on this evidence of "preferential treatment" as it constituted the facts available and found that that the GOC sold the land in question to the respondent at a price and at terms that were not available to other firms, *i.e.*, firm located outside of the ZETD Zone.[452]

257. China argues that this evidence of preferential treatment is insufficient to support a regional specificity determination. China's argument, however, ignores the plain meaning of the term "preferential," which is defined as "[o]f, relating to, or of the nature of preference; involving or exhibiting a preference or partiality; constituting a favour or privilege."[453] Thus, the reference to "preferential treatment" in the land appraisal document for the ZETD Zone is probative of, and tends to support a conclusion that companies located inside the zone received "partiality," "favour or privileged" in treatment when purchasing land. As a result, this evidence is a sufficient facts available basis on which to determine that the provision of land use rights in the ZETD Zone was regionally specific.

258. The fact that this term also appears in an appraisal document outside the ZETD Zone does not undermine the USDOC's specificity determination. Other than the inclusion of this term, the USDOC knew nothing about what this "preferential treatment" may have been outside the zone. Indeed, it had no way of knowing whether the preferential treatment outside the ZETD Zone were the same as the treatment inside the zone because China declined to provide the USDOC with any information.[454] Because China did not provide further information, the USDOC could not infer that these preferential policies inside the ZETD Zone and outside the zone were necessarily comparable, given the scant evidence on the record. China presumably

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[450] Verification Report, 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.

[451] Verification Report, pp. 18-20 (Exhibit CHI-27).

[452] *Id.* at 12.

[453] Oxford English Dictionary, Online Version (Exhibit USA-127).

[454] China claims that the verification report establishes that both appraisals were valued used the same calculation methodology. China's Second Written Submission, para. 220. Citing an excerpt from the report, China: "explains that 'as in the calculation of the appraisal price for land parcels acquired by the respondent, the appraiser calculated a price based on the benchmark land price coefficient modification methodology and a price based on the cost approach methodology in the comparison appraisal.'" *Id.* China omits the remainder of this passage which explains:

> As in the calculation of the appraisal price for land parcels acquired by the respondent, the appraiser calculated a price based on the benchmark land price coefficient modification methodology and a price based on the cost approach methodology in the comparison appraisal. *However,* the final appraised value for the [respondent's] land appears to be an average of the benchmark price coefficient and the cost-based price, whereas the final number of the [. . .] was lower than both the cost and benchmark coefficient numbers. The [respondent's] official was not able to give us a technical explanation of the details of the *differential appraisal calculation methods or the reasons for the different approaches*, but he indicated it was his understanding that differences are probably based on the fact that the appraiser must factor in conditions that are particular to each parcel of land.

Verification Report at 19 (emphasis added) (Exhibit CHI-27). Thus, the verification report is clear that different calculation methods were employed in the land appraisals inside and outside the ZETD Zone and that the USDOC was unable to resolve these discrepancies at verification. As a result, it is unclear whether the prices included in these appraisal documents are comparable.

could have submitted information to support such a determination in response to the USDOC's questionnaire if such information existed.[455] However, given China's refusal to cooperate and provide the necessary information to further evaluate the policies inside and outside the zone, making such an inference in China's favor would have been both illogical and unreasonable. Nothing in Article 12.7 of the SCM Agreement required the USDOC to make such an inference.

VII. CHINA HAS NOT ADVANCED AN ARGUMENT TO SUPPORT ITS CLAIMS AGAINST THE ADDITIONAL PROCEEDINGS AND SO-CALLED "ONGOING CONDUCT"

259. In its second written submission, China again argues that additional proceedings should be automatically treated as measures taken to comply and that certain – but unspecified – actions constitute impermissible ongoing conduct. The United States has, in its first written submission, addressed these issues and demonstrated (1) that China had not identified the measures it seeks to include, (2) that China had not demonstrated that those so-called measures are within the Panel's terms of reference, and (3) that China had not put forward a legal theory or analysis that would support the inclusion of the undefined, unidentified, or not yet extant "measures" that China asks this Panel to adjudicate. China, in its second written submission, argues that the additional reviews and so-called "ongoing conduct" it seeks to challenge are within the Panel's terms of reference and that it has sufficiently made a *prima facie* case with respect to these issues. The arguments in China's second written submission, however, do not overcome the flaws we have already identified and instead reveal further shortcomings in China's legal theory.

260. Below, we address China's argument that the additional proceedings and conduct are within the Panel's terms of reference, demonstrating that China's reliance on the rationale from past zeroing disputes is inapposite here. We then rebut China's assertion that it has established a *prima facie* case with respect to the alleged measures. Finally, we address China's remaining arguments regarding the so-called "ongoing conduct," showing that China has failed to identify what it is precisely challenging.

A. The Additional Proceedings and Conduct Are Not Measures Taken to Comply nor Are They within the Panel's Terms of Reference

261. In its first written submission, the United States established that China has failed thus far to demonstrate that the concluded or future administrative reviews and sunset reviews, or the purported ongoing conduct, are within the panel's terms of reference.[456] 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.

[455] *See* Land Preliminary Determination, pp. 11-12 (Exhibit CHI-24).
[456] *See* U.S. First Written Submission, paras. 313-26.

262. As the United States discussed in its first written submission, a 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."[457] While certain reports have asserted that a measure that is not in itself a "measure taken to comply" may nonetheless fall within the terms of reference by virtue of its "particularly close relationship"[458] or "sufficiently close nexus"[459] to the declared "measure taken to comply" (although in the case of measures with the "same essence", these would by definition effectively be the same measure taken to comply), it cannot be presumed that such a close connection exists. "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."[460]

263. China's attempt to include such measures must be rejected. Indeed, China's second written submission does not even attempt to rebut the United States' demonstration that "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."[461] As a result of its failure to respond to the U.S. rebuttal, China has not established that the challenged reviews and sunset determinations resulted in the imposition of duties or cash deposits after the expiration of the RPT.

264. Instead of engaging with these central issues as identified by the United States, China argues in its second written submission that the Appellate Body's decision in *US – Zeroing (EC) (Article 21.5 – EC)* opens the door for <u>all</u> measures taken prior to expiry of the RPT.[462] In doing so, China mischaracterizes the Appellate Body's conclusion in that dispute. While, as China notes, the Appellate Body in that particular dispute found certain prior measures had a sufficiently close nexus, there were also a number of measures in the dispute where the Appellate Body rejected such claims.[463]

265. The foregoing example illustrates why it is important to emphasize how much the nature of the measure at issue characterizes the course of compliance and what coming into compliance requires. The issue of the timing of measures that can be found to be measures taken to comply is not "mechanistic" as China argues, but rather is a matter of substance. As we will describe below, for example, the issue of zeroing is a critically different issue than the issues alleged in this case and the implementation is likewise different. The substance underlying the timing of compliance measures has a purpose within the larger context of the DSU. This is precisely why the reports addressing subsequent measures coming within a panel's terms of reference describe this as a rare exception. The inclusion of any measures put in place subsequent to panel

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[457] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 66 (emphasis omitted).
[458] *US – Softwood Lumber IV (Article 21.5 – Canada) (AB)*, para. 77; *see US – Zeroing (Japan) (Article 21.5 – Japan) (Panel)*, para. 7.61.
[459] *US – Upland Cotton (Article 21.5 – Brazil) (Panel)*, para. 9.26.
[460] *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.
[461] *See* U.S. First Written Submission, para. 314.
[462] *See* China's Second Written Submission, para. 230 (citing *US – Zeroing (EC) (Article 21.5 – EC)*, para. 224).
[463] *See id.*

establishment – to the extent that is ever justified under the terms of the DSU – should continue to be a rare exception to the general rule.

266. China's arguments rely, for the most part, on references to the disputes in which the United States' zeroing methodology was challenged by a number of Members, namely *US – Zeroing (Japan) (Article 21.5 – Japan)* and *US – Zeroing (EC) (Article 21.5 – EC)*. China assumes that the zeroing compliance considerations are necessarily analogous to the compliance considerations in this dispute, but as we demonstrate below, they are not. Zeroing differs in several key respects. First, in the zeroing situation, prior to the finding in *US – Zeroing (EC) (Article 21.5 – EC)*, the DSB already had found in prior disputes that the United States had adopted an unwritten measure that required the use of zeroing, and the DSB had found that this measure was inconsistent with the WTO Agreement. Second, the WTO-consistency of zeroing was a matter of pure textual interpretation, not one that depended on the investigating authority's weighing of the evidence. Third, zeroing does not require the active participation of a foreign government the way countervailing duty investigations and reviews do. Fourth, the zeroing cases dealt with the withdrawal or cessation of an "as such" methodology, not myriad "as applied" claims such as those China alleges here.

267. The zeroing decisions cited by China, *US – Zeroing (Japan) (Article 21.5 – Japan)* and *US – Zeroing (EC) (Art. 21.5 – EC)*, underscore the difference in the complexity of the zeroing methodology and the measures challenged in this compliance dispute. For instance, in *US – Zeroing (Japan) (Article 21.5 – Japan)*, the panel found (and the Appellate Body did not disagree), that Japan had established a *prima facie* case based on the limited evidence it had provided, ***i.e.*** the "standard zeroing line" in the calculation program applied to certain reviews, and the decision memoranda issued in those reviews.[464] In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body also discussed the fact that several DSB findings had already established the existence of an "as such" measure.[465] For example, the Appellate Body explained that in previous findings it had already "clarified that 'zeroing ... under different comparison methodologies, and in different stages of anti-dumping proceedings ... simply reflect[s] different manifestations of a single rule or norm.'"[466] The Appellate Body in *US – Zeroing (EC) (Article 21.5 – EC)* found that the fact the declared measures taken to comply "*simply recalculated* – without zeroing – the margins of dumping in the original proceedings" tended to confirm the close nexus in terms of subject matter and nature.[467] Thus, the Appellate Body's decisions in *US – Zeroing (Japan) (Article 21.5 – Japan)* and *US – Zeroing (EC) (Article 21.5 – EC)* were decided in an environment where there were no questions as to whether the action in subsequent proceedings was of the same nature as in the original proceedings. Rather, the Appellate Body

[464] Notwithstanding the panel's *prima facie* finding, the panel nevertheless considered evidence provided by Japan establishing the quantitative impact on the duty collection rates established in challenged reviews, including margin calculations of what the margin would have been without the use of zeroing. *See US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 146.
[465] *See*, *e.g.*, US – *Zeroing (EC) (Art. 21.5 – EC)*, paras. 245, 253.
[466] US – *Zeroing (EC) (Art. 21.5 – EC)*, para. 251 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 88).
[467] *US – Zeroing (EC) (Art. 21.5 – EC)*, para. 242; *see also id.*, para. 230 ("In our view, the use of zeroing in the excluded subsequent reviews provides the necessary link, in terms of nature or subject matter, between such measures, the declared measures 'taken to comply', and the recommendations and rulings of the DSB.").

made these findings in the context of an issue (zeroing) that had already been found to exist as a norm of general application, and to be WTO-inconsistent in several prior disputes.

268. As can be seen from the foregoing discussion, the zeroing methodology is a vastly simpler type of "measure" than the challenged determinations. This is evident from the fact that the use of zeroing in the USDOC's margin calculations hinged only on whether a respondent's sales database included sales with "negative" margins. The application of the WTO-inconsistent methodology in the zeroing disputes was evident based on a line of programming code in the dumping margin program. In contrast, the USDOC's public bodies, input specificity, land, and benchmark determinations, are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding as part of its analysis and any WTO-inconsistency cannot be established without considering the totality of evidence that was before the USDOC. Because the relevant available evidence changes from year to year (*e.g.*, between the investigation and the subsequent reviews) due to, for example, differences in the selected respondents and the information those respondents submit, the USDOC's public bodies, input specificity, land, and benchmark determinations can, and do change. As a result, any determination of WTO-inconsistency would have to be demonstrated based on the record of the review before the USDOC. China's mere citation to these reviews without any discussion of the record evidence and how the USDOC's determinations are allegedly WTO-inconsistent based on those facts is plainly insufficient.[468]

269. Further in this regard, China's reference to the discussion in *EC – Chicken Cuts* regarding measures issued during the course of the proceedings is not applicable because the nature of the proceedings examined in that dispute is different from what China alleges in this dispute.[469] *EC – Chicken Cuts* concerns the question of the relationship between the challenged and subsequent measures. Here, the question is not whether an annual review is closely related to an investigation; rather, the question is whether the factual determinations in a subsequent review are identical to factual determinations made based on the different factual record in the investigation.

270. The significant difference in the complexity of the zeroing methodology and the measures challenged in this compliance proceeding is underscored by the disparate impact that the use of adverse facts available has on the USDOC's determinations. For instance, in an antidumping duty proceeding in which the respondent under individual examination did not cooperate in response to the USDOC's requests for information, an examination of the assigned adverse facts available rate would normally reveal whether zeroing could have affected the adverse facts available rate. In contrast, it is not possible to determine solely from a respondent's net countervailing subsidy rate, or even from the individual subsidy rates determined for the respondents use of each subsidy, the extent, or manner, in which the USDOC's public bodies, input specificity, land, and benchmark determinations impacted the rate. Because the USDOC's public bodies, input specificity, land, and benchmark determinations consider the totality of the

[468] For example, as we discuss below, it is unclear that the USDOC's public body and input specificity determinations with respect to the provision of wire rod for LTAR had any effect on the USDOC's affirmative sunset determination in *Wire Strand.* *See*, *infra*, section VII.C. Thus, mere citation to this sunset review, as China has done, without demonstrating how the alleged WTO-inconsistent public body and input specificity determinations affected this affirmative sunset determination is plainly insufficient.

[469] *See* China's Second Written Submission, para. 234 (citing *EC – Chicken Cuts*, para. 156).

relevant record evidence, the level of cooperation by the interested parties impacts the quantity and quality of the available evidence that the administering authority examines as part of its analysis. For example, because the GOC is generally the only party that has information necessary to the USDOC's analysis, the GOC's decision to cooperate – or not – with the USDOC's request for information has a direct impact on whether the USDOC has the information necessary to produce a nuanced finding or must reach its conclusions based on limited facts available on the record.

271. Of the myriad additional proceedings challenged, China alleges an unknown number of inconsistencies because it describes them only as being the same. Each of these proceedings is based on a different factual record and relates to a different time period. In each proceeding different questionnaires were issued and different responses were received. In each proceeding, different conclusions were reached on the basis of different evidence. Thus, China is also incorrect that the subsequent reviews and sunset determinations "replaced" the original measures in the sense that China argues.

272. Of the myriad additional proceedings challenged, China alleges an unknown number of inconsistencies because it describes them only as being the same. Each of these proceedings is based on a different factual record and relates to a different time period. In each proceeding different questionnaires were issued and different responses were received. In each proceeding, different conclusions were reached on the basis of different evidence. Thus, China is also incorrect that the subsequent reviews and sunset determinations "replaced" the original measures in the sense that China argues.

B. China Has Not Made a *Prima Facie* Case

273. In its second written submission, China argues that its perfunctory references to subsequent reviews suffice to establish a *prima facie* case.[470] In reality, neither of China's written submissions articulate *how* the subsequent reviews are inconsistent with the United States' obligations.

274. China's approach continues to be insufficient to make a *prima facie* case of any inconsistency in the additional proceedings. In China's first written submission, it failed to advance any arguments or explanation that would establish its claims in a manner that could be adjudicated by the Panel. The United States, in its first written submission, identified this deficiency and established that China did not put forth an adequate basis for its claims.[471] Yet China did not remedy this deficiency in its second written submission. Instead, China persists in vague assertions unsupported by specific evidence or explanation. At best, China is inviting the Panel to do China's work for it; at worst, China believes it can simply declare violations without having to show how such conclusions are valid.

275. China's theory is that the recitation of the basic elements of a claim, without further analysis, automatically establishes that a Member has acted in a WTO-inconsistent manner.

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[470] *See* China's Second Written Submission, para. 243.
[471] *See* U.S. First Written Submission, paras. 332-40.

Specifically, China invokes a passage from *US – Gambling* to demonstrate that several elements are required:

> [(i)] identify the challenged measure and its basic import; [(ii)] identify the relevant WTO provision and obligation contained therein; and [(iii)] explain the basis for the claimed inconsistency of the measure with that provision.[472]

The language China quotes, however, is taken from a statement by the Appellate Body explaining that these are the requirements for a panel request and that "no less" is required of the complaining party in the course of its submissions to the panel.[473] Accordingly, this language is completely inapposite to the issue of whether the complaining Member has made out a *prima facie* case.

276. However, the Appellate Body's findings in *US – Gambling* fully support the U.S. position that (1) a claim necessarily must fail if the complaining Member does not make a *prima facie* case, and (2) that it would be legal error for a panel to make the *prima facie* case for a complaining Member.

277. In the *US – Gambling* dispute, Antigua challenged a number of U.S. laws that, in its view, "constituted a 'total prohibition' on the cross-border supply of gambling services."[474] The United States appealed, arguing that Antigua failed to meet its burden of establishing a *prima facie* case of inconsistency because Antigua failed to argue before the panel "*how*" a subset of the individual challenged laws constituted a total prohibition.[475] Rather, in the United States' view, "the Panel itself improperly made Antigua's *prima facie* case of inconsistency."[476] On appeal, the Appellate Body agreed, finding that "[a] *prima facie* case must be based on 'evidence *and* legal argument' put forward by the complaining party in relation to *each* of the elements of the claim."[477] The Appellate Body stated further that:

> A complaining party may not simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency. Nor may a complaining party simply allege facts without relating them to its legal arguments.[478]

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

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[472] China's Second Written Submission, para. 240.
[473] *US – Gambling (AB)*, para. 141.
[474] *US – Gambling (AB)*, para. 137.
[475] *US – Gambling (AB)*, para. 137.
[476] *US – Gambling (AB)*, para. 137.
[477] *US – Gambling (AB)*, para. 140 (citing *US – Wool Shirts and Blouses*, p. 16) (emphasis added).
[478] *US – Gambling (AB)*, para. 140 (internal citation omitted).

279. The conclusions that China *assumes* actually cannot be reached without further analysis of the facts raised in the additional proceedings it challenges. Unlike the zeroing cases that China refers to, the issues here are fact-dependent. Indeed, in the original Panel proceeding, the Panel acknowledged that many of the questions raised in considering these issues required an examination of the particular facts underlying a given decision. In contrast, compliance with regard to zeroing presented a binary question – its presence or absence was considered determinative by the Appellate Body in those disputes. In this dispute, China points to a litany of issues that would each require careful consideration before a conclusion could be reached about any subsequent proceeding. A separate host of questions would need to be examined with respect to each proceeding and each issue even assuming such an examination could take place in course of this compliance panel proceeding. China has not presented those questions for examination before this Panel.

280. Indeed, further examination of the issues and facts of each proceeding would be required to make even the initial determination that the circumstances of the subsequent proceedings pertain to similar circumstances in the challenged investigations. For instance, did the GOC participate in each of the proceedings it challenges? Was the same evidence before the USDOC in each review or were there changes in the factual record relating to China's economy over the five-year period throughout which these determinations were made? Were additional facts considered that would change the analysis from the perspective of the investigating authority? The United States would be able to engage with China in litigating each of these questions, but China has declined to put forward an affirmative analysis of the additional proceedings that would suffice to permit panel review.

281. As it stands, China's attempt to lump together all of these determinations under the phrase the "unlawful legal standards applied" does not provide the level of detail required to advance such an argument. China cannot expect the Panel to do the work of the complainant when China has neglected to include the requisite analytical steps in declining to develop its claims.

C. China's Challenge to Sunset Reviews Ignores Critical Differences Between Countervailing Duty Proceedings and Antidumping Zeroing Determinations

282. China also errs in its arguments regarding sunset determinations. China claims that the contested sunset determinations provided the "legal basis for the continued imposition of countervailing duties and cash deposits *beyond* the expiration" of the RPT, and that these determinations were based on underlying proceedings found to be WTO-inconsistent.[479] China appears to presume, without any analysis, that the USDOC would not have continued the relevant orders but for reliance upon findings found to be WTO-inconsistent in the original investigations at issue in this dispute.

283. China's presumption is incorrect. As a fundamental matter, the sunset determinations identified by China differ in numerous respects because they concern determinations regarding the likelihood of continuation or recurrence of a countervailable subsidy and not determinations regarding the likelihood of continued dumping. The considerations that are relevant to

[479] China's Second Written Submission, para. 231 (emphasis in original).

antidumping sunset determinations cannot be assumed to have the same relevance to countervailing duty sunset determinations. The logic of zeroing and antidumping cases is not applicable because the factors considered are not the same.

284. The following example illustrates the need for a detailed analysis of each determination. In the *Wire Strand* investigation, the USDOC found that 25 programs conferred countervailable subsidies attributable to the period of investigation.[480] In the expedited sunset review of the *Wire Strand* order, the USDOC found that revocation of the order would be likely to result in continuation or recurrence of countervailable subsidy programs because "the subsidy *programs* found countervailable during the investigation continue to exist and be used."[481] This finding did not depend upon any particular program, or on the extent of the benefit conferred under a particular program. Given the USDOC's finding, and China's failure to address this finding in its first or second written submission, China has failed to demonstrate how the USDOC's public body and input specificity determinations with respect to the provision of wire rod for LTAR were determinative of the USDOC's continuation of the *Wire Strand* order. This LTAR program was only one of 24 other programs that provided above-*de minimis* countervailable benefits during the period of investigation.[482] As demonstrated by this example, China has failed to make a *prima facie* case with respect to its claims regarding this sunset review.

285. The same flaw underlies China's challenges to the remaining expedited sunset review determinations. China attempts to avoid its obligation to make a *prima facie* showing with respect to each challenged determination by relying upon the Appellate Body's findings in *US – Zeroing (EC) (Article 21.5 - EC)* and *US – Zeroing (Japan) (Article 21.5 – Japan)*. But the findings in those disputes cannot be removed from their context, which related to the use of zeroing in antidumping duty proceedings. In this dispute, by contrast, the sunset determinations that China contends are within the Panel's terms of reference related to countervailing duty orders.

286. The use of zeroing was part of the antidumping margin calculations of the dumping included in the challenged sunsets, and there was no way to determine whether there would be above *de minimis* rates if zeroing were not used, absent running the calculations again without zeroing. In contrast, in countervailing duty investigations, each countervailing duty program is considered independently and then added together to get the net countervailing duty rate. As a result, it is possible to identify the extent to which a particular program impacted the net subsidy rate and to determine whether above-*de minimis* rates would still exist even if programs that entail the challenged public body, benefit, and specificity determinations are not included. But as demonstrated above, China has not made this showing. In particular, China has not established that for each of the sunset determinations it seeks to include above-*de minimis* rates

[480] *See* Issues and Decision Memorandum: Final Results of the Countervailing Duty Expedited First Sunset Review of Prestressed Concrete Steel Wire Strand from the People's Republic of China (August 31, 2015) (Exhibit CHI-49), pp. 1-2.
[481] *Id.*, p. 5 (emphasis added)
[482] The USDOC calculated net subsidy rates of 15.31 percent (for the Xinhua Companies) and 6.18 percent (for the Fasten Companies) from the provision of wire rod for LTAR. Even removing these figures, the net subsidy rates for those companies would remain above *de minimis*. *See* Issues and Decision Memorandum for Final Determination; Pre-Stressed Concrete Steel Wire Strand from the People's Republic of China (May 14, 2010) (Exhibit USA-128).

would not exist and thus that USDOC would not have concluded that subsidization would be likely to continue.

D. China Has Failed to Put Forth Sufficient Analysis to Support its Claims Against Ongoing Collection of Duties and Deposits

287. China argues that the so-called "ongoing conduct" it alleges is within the Panel's terms of reference, but its second written submission continues to avoid specifying the measure China is challenging.[483] Likewise, China argues it has demonstrated the precise content it seeks to challenge and that it has made a *prima facie* case with respect to those issues, but China's ongoing conduct claim continues to be underdeveloped and overbroad.[484] For example, China argues that the United States is "systematically applying . . . unlawful legal standards" and assessing and collecting "unlawful countervailing duties and cash deposits."[485] China argues that "this is precisely the type of measure that the Appellate Body found consists of ongoing conduct," but China fails to define or even reasonably circumscribe what that conduct is.[486]

288. China even goes so far as to assert that its claims could also succeed if considered as challenges to "omissions."[487] China does not explain how an "omission" could simultaneously be "ongoing conduct". China's argument is also inapposite, in the context of this dispute. China is not asserting that the challenged "ongoing conduct" is an omission; rather, it is challenging actions by the USDOC. An act, must, by its nature, exist; as such, challenged acts must be in existence at the time of panel establishment.[488]

289. China incorrectly asserts that the United States conflated the legal standards for a *prima facie* case versus the evidence needed for the Appellate Body to complete its analysis as articulated in *US – Continued Zeroing*, but this is not correct.[489] The United States explicitly stated in its first written submission: "[t]he facts in this dispute are markedly different from the facts in *US – Continued Zeroing*" and that "even under the Appellate Body's approach in that dispute, China's claim fails."[490] Under any standard, China's description of the so-called ongoing conduct is not sufficient to allow a response. For example, China fails to identify which and to what extent duty amounts are in excess of the rates it believes should have been calculated in the subsequent reviews. China repeatedly lists the general objections it maintains but this list is insufficient to enable the Panel to evaluate China's claims. As with China's first written submission, China has not met its burden for making a *prima facie* case, and the broad assertions it advances in its second submission do not meet the requirement here either.

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[483] China's Second Written Submission, paras. 251-55.
[484] China's Second Written Submission, paras. 256-68.
[485] China's Second Written Submission, para. 254.
[486] China's Second Written Submission, para. 255.
[487] China's Second Written Submission, para. 253.
[488] *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*; see also, 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).
[489] *See* China's Second Written Submission, para. 257 (citing U.S. First Written Submission, para. 329).
[490] U.S. First Written Submission, para. 328.

290. China concludes with a broad pronouncement that it is "obviously challenging all instances" but overlooks that it must make the specific case in each instance.[491] China's "all instances" argument is not consistent with the DSU. A responding party cannot be obligated to establish the factual basis for "all" instances of assessment and collection alleged in this manner. Rather, if China wished to challenge liquidation and cash deposit instructions, China had the burden of identifying the challenged measures in its panel request – but it failed to do so.[492] Even aside from the failure to identify the liquidation and cash deposit instructions it wishes to challenge, China's claim also would fail because it cannot demonstrate that the purportedly WTO-inconsistent action has taken place, *i.e.*, that the United States has actually taken action to assess duties or collect cash deposits based on any identified duty instructions.

VIII. CONCLUSION

291. For the foregoing reasons, together with the reasons presented in the U.S. first written submission, 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. The United States further respectfully requests that the Panel reject China's claims to the contrary.

[491] China's Second Written Submission, para. 266.
[492] *See* DSU, Art. 6.2.