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**UNITED STATES – COUNTERVAILING DUTY MEASURES
ON CERTAIN PRODUCTS FROM CHINA**

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

FINAL REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to D to the Report of the Panel to be found in document WT/DS437/RW.

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ANNEX A

PANEL DOCUMENTS

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 13 December 2016

1. In its proceedings, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures shall apply.

General

2. The deliberations of the Panel and the documents submitted to it shall be kept confidential. Nothing in the DSU or in these Working Procedures shall preclude a party to the dispute (hereafter "party") from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted to the Panel by another Member which the submitting Member has designated as confidential. Where a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

3. The Panel shall meet in closed session. The parties, and Members having notified their interest in the dispute to the Dispute Settlement Body in accordance with Article 10 of the DSU (hereafter "third parties"), shall be present at the meetings only when invited by the Panel to appear before it.

4. Each party and third party has the right to determine the composition of its own delegation when meeting with the Panel. Each party and third party shall have the responsibility for all members of its own delegation and shall ensure that each member of such delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceedings.

Submissions

5. Before the substantive meeting of the Panel with the parties, each party shall submit to the Panel a first written submission, and subsequently a written rebuttal, in which it presents the facts of the case and its arguments, and counter-arguments, respectively, in accordance with the timetable adopted by the Panel.

6. A party shall submit any request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. If China requests such a ruling, the United States shall submit its response to the request in its first written submission. If the United States requests such a ruling, China shall submit its response to the request prior to the substantive meeting of the Panel, at a time to be determined by the Panel in light of the request. Exceptions to this procedure shall be granted upon a showing of good cause.

7. Each party shall submit all factual evidence to the Panel preferably with its first written submission and no later than during the substantive meeting, except with respect to evidence necessary for purposes of rebuttal, answers to questions or comments on answers provided by the other party. Exceptions to this procedure shall be granted upon a showing of good cause. Where such exception has been granted, the Panel shall accord the other party a period of time for comment, as appropriate, on any new factual evidence submitted after the substantive meeting.

8. Where the original language of exhibits is not a WTO working language, the submitting party or third party shall submit a translation into the WTO working language of the submission at the same time. The Panel may grant reasonable extensions of time for the translation of such exhibits upon a showing of good cause. Any objection as to the accuracy of a translation should be raised promptly in writing, no later than the next filing or meeting (whichever occurs earlier) following the submission which contains the translation in question. The Panel may grant exceptions to this

procedure upon a showing of good cause, which may include the case where issues of translation arise later in the dispute. Any objection shall be accompanied by a detailed explanation of the grounds of objection and an alternative translation.

9. To facilitate the maintenance of the record of the dispute, and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute. For example, exhibits submitted by China could be numbered CHN 1, CHN 2, etc. If the last exhibit in connection with the first submission was numbered CHN 5, the first exhibit of the next submission thus would be numbered CHN 6.

Questions

10. The Panel may at any time pose questions to the parties and third parties, orally or in writing, including prior to the substantive meeting.

Substantive meeting

11. Each party shall provide to the Panel the list of members of its delegation in advance of the meeting with the Panel and no later than 5.00 p.m. on the previous working day.

12. The substantive meeting of the Panel shall be conducted as follows:

- a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies to the interpreters. Each party shall make available to the Panel and the other party the final version of its opening statement as well as its closing statement, if available, preferably at the end of the meeting, and in any event no later than 5.00 p.m. on the first working day following the meeting.
- b. After the conclusion of the statements, the Panel shall give each party the opportunity to ask each other questions or make comments, through the Panel. Each party shall then have an opportunity to answer these questions orally. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to the other party to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to the other party's questions within a deadline to be determined by the Panel.
- c. The Panel may subsequently pose questions to the parties. Each party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the parties to which it wishes to receive a response in writing. Each party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.
- d. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first.

Third parties

13. The Panel shall invite each third party to transmit to the Panel a written submission prior to the substantive meeting of the Panel with the parties, in accordance with the timetable adopted by the Panel.

14. Each third party shall also be invited to present its views orally during a session of the substantive meeting, set aside for that purpose. Each third party shall provide to the Panel the list of members of its delegation in advance of this session and no later than 5.00 p.m. the previous working day.

15. The third party session shall be conducted as follows:

- a. All third parties may be present during the entirety of this session.
- b. The Panel shall first hear the arguments of the third parties in alphabetical order. Third parties present at the third-party session and intending to present their views orally at that session, shall provide the Panel, the parties and other third parties with provisional written versions of their statements before they take the floor. Third parties shall make available to the Panel, the parties and other third parties the final versions of their statements, preferably at the end of the session, and in any event no later than 5.00 p.m. of the first working day following the session.
- c. After the third parties have made their statements, the parties may be given the opportunity, through the Panel, to ask the third parties questions for clarification on any matter raised in the third parties' submissions or statements. Each party shall send in writing, within a timeframe to be determined by the Panel, any questions to a third party to which it wishes to receive a response in writing.
- d. The Panel may subsequently pose questions to the third parties. Each third party shall then have an opportunity to answer these questions orally. The Panel shall send in writing, within a timeframe to be determined by it, any questions to the third parties to which it wishes to receive a response in writing. Each third party shall be invited to respond in writing to such questions within a deadline to be determined by the Panel.

Descriptive part

16. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

17. Each party shall submit an integrated executive summary of the facts and arguments as presented to the Panel in its first written submissions, opening and closing oral statements and responses to questions and comments thereon following the substantive meeting, in accordance with the timetable adopted by the Panel. Each integrated executive summary shall be limited to no more than 20 pages. The Panel will not summarize in a separate part of its report, or annex to its report, the parties' responses to questions.

18. Each third party shall submit an executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This summary may also include a summary of responses to questions, where relevant. The executive summary to be provided by each third party shall not exceed 6 pages.

19. The Panel reserves the right to request the parties and third parties to provide executive summaries of facts and arguments presented by a party or a third party in any other submissions to the Panel for which a deadline may not be specified in the timetable.

Interim review

20. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

21. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

22. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

23. The following procedures regarding service of documents shall apply:

- a. Each party and third party shall submit all documents to the Panel by filing them with the DS Registry (office No. 2047).
- b. Each party and third party shall file 3 paper copies of all documents it submits to the Panel. However, when exhibits are provided on CD-ROMS/DVDs/USB keys, 2 CD-ROMS/DVDs/USB keys and 2 paper copies of those exhibits shall be filed. The DS Registrar shall stamp the documents with the date and time of the filing. The paper version shall constitute the official version for the purposes of the record of the dispute.
- c. Each party and third party shall also provide an electronic copy of all documents it submits to the Panel at the same time as the paper versions, in Microsoft Word format, either on a CD-ROM, a DVD, a USB key or as an e-mail attachment. If the electronic copy is provided by e-mail, it should be addressed to DSRegistry@wto.org, and cc'd to judith.czako@wto.org, alexis.massot@wto.org and rodd.izadnia@wto.org. If a CD-ROM, DVD or USB key is provided, it shall be filed with the DS Registry.
- d. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve on all third parties its written submissions in advance of the substantive meeting with the Panel. Each third party shall serve any document submitted to the Panel directly on the parties and all other third parties. Each party and third party shall confirm, in writing, that copies have been served as required at the time it provides each document to the Panel.
- e. Each party and third party shall file its documents with the DS Registry and serve copies on the other party (and third parties where appropriate) by 5.00 p.m. (Geneva time) on the due dates established by the Panel. A party or third party may submit its documents to another party or third party in electronic format only, subject to the recipient party or third party's prior written approval and provided that the Panel Secretary is notified.
- f. The Panel shall provide the parties with an electronic version of the descriptive part, the interim report and the final report, as well as of other documents as appropriate. When the Panel transmits to the parties or third parties both paper and electronic versions of a document, the paper version shall constitute the official version for the purposes of the record of the dispute.
- g. The Panel reserves the right to modify these procedures as necessary, after consultation with the parties.

ANNEX A-2

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this section of the Report sets out the Panel's response to the parties' requests made at the interim review stage. We modified certain aspects of the Report in light of the parties' comments where we considered it appropriate, as explained below. In addition, a number of changes of an editorial nature have been made to improve the clarity and accuracy of the Report or to correct typographical and other non-substantive errors, including those suggested by the parties.

1.2. As a result of the changes that we have made, the numbering of footnotes in the Final Report has changed from the Interim Report. References to footnotes and paragraph numbers in this section relate to the Interim Report and, where it differs, includes the corresponding footnote numbering in the Final Report.

2 REQUESTS FOR REVIEW SUBMITTED BY CHINA

Paragraph 7.6

2.1. China requests a correction of this paragraph to indicate that its claim under Article 1.1(a)(1) of the SCM Agreement was in relation to 11 (rather than 12) Section 129 proceedings.

2.2. The United States did not comment on China's request.

2.3. We have decided to grant China's request and have edited this paragraph accordingly. Consequential to this adjustment, we have also edited paragraph 7.63.

Paragraphs 7.6 and 7.7

2.4. China requests replacing the term "financial contribution" with "inputs at issue" as the use of the term "financial contribution" prejudices the question at issue, which is whether the entities providing the relevant inputs are public bodies.

2.5. The United States did not comment on China's request.

2.6. We have decided to grant China's request by replacing the term "financial contribution" in these paragraphs with "inputs at issue".

Paragraph 7.27

2.7. China suggests the insertion of the term "allegedly" in the phrase "actions constituting a financial contribution". China also suggests additional text to reflect that the "broader government function" is in relation to the specific action that is alleged to constitute a financial contribution.

2.8. The United States did not comment on China's request.

2.9. We have decided to grant China's request in part by including additional text as follows: "a broader government function than the specific action that is alleged to constitute a financial contribution". We see no need to modify the Interim Report on the basis of China's other comment on this paragraph.

Paragraph 7.31, footnote 64

2.10. China requests modification of this paragraph as it believes that the European Union did not argue that the focus of the public body analysis is the character of the relevant entity, as opposed to its conduct, but rather identified what it considered to be "the main contentious issue" in the dispute.

2.11. The United States does not agree with China's suggestion and considers that footnote 64 of the Interim Report correctly characterizes the positions of the European Union and other third parties.

2.12. We have decided to partially grant China's request by adjusting this footnote to include direct quotations from the European Union's third-party submission.

Paragraphs 7.47, 7.51, 7.185(b), and 7.190(b)

2.13. China noted the absence of citations to the relevant portions of the Public Bodies Memorandum, CCP Memorandum, and the two memoranda relating to benchmarks in these paragraphs.

2.14. The United States did not provide any comment in this respect.

2.15. We have added citations to the relevant memoranda in these paragraphs.

Paragraph 7.60

2.16. China requests modification of this paragraph to reflect that the GOC's refusal to respond to requests for information was a position taken by the USDOC that China contested during this compliance panel proceeding.

2.17. The United States does not agree with China's suggested modification of this paragraph. The United States notes the USDOC's position that the GOC declined to provide "complete" responses, and thus considers that neither the USDOC nor the United States asserted that the GOC failed to respond at all in five of the Section 129 proceedings.

2.18. We have decided to grant China's request by modifying this paragraph to directly cite the USDOC's findings in its preliminary determination, and by including a footnote referencing China's argument that the GOC provided a "substantial portion" of the requested information in certain Section 129 proceedings regarding non-majority government-owned enterprises.

Paragraph 7.75

2.19. China requests modification of this paragraph to reflect that its argument was in response to a statement made, and later retracted, by the United States at the Panel's meeting with the parties.

2.20. The United States disagrees with China's suggestion to modify this paragraph. The United States considers that a statement that was explicitly retracted does not constitute an argument of the United States, and there is no basis to include a reference to an argument that the United States did not make.

2.21. We see no need to modify the Interim Report on the basis of China's comment on this paragraph. In our view, the quoted portion of China's argument is sufficiently clear without the suggested "context" that China requests to be reflected in this paragraph. Further, the additional citations to Appellate Body statements requested by China appear in other paragraphs where relevant.

Paragraphs 7.76-7.78

2.22. China requests deletion or modification of these paragraphs as it considers that neither of the examples cited in paragraph 7.78 is relevant to the provision of inputs by SIEs or non-SIEs to respondent purchasers. China therefore does not believe that it is accurate for the Panel to cite these as examples of evidence or analysis in the Public Bodies Memorandum of the conduct at issue in the Section 129 proceedings.

2.23. The United States considers that the relevant passages are not offered as examples of evidence in the Public Bodies Memorandum relating to "the provision of inputs by SIEs or non-SIEs

to respondent purchasers", but rather are references to "interventions by the Chinese government (including the CCP)" mentioned in paragraph 7.76.

2.24. We decline China's request to delete or modify the examples cited in paragraph 7.78, which pertain to "the conduct of providing inputs, or other conduct at the firm level". We have decided to adjust the last sentence of paragraph 7.76 to correspond to the formulation in paragraph 7.78.

Paragraphs 7.146, 7.200, and 7.206

2.25. China notes that there are several references in these paragraphs to "government intervention" that should be preceded by the term "alleged".

2.26. The United States does not agree with China's suggestion to add the term "alleged" before "government intervention", as these paragraphs refer to the "findings" of the USDOC and it would not be accurate to say that the USDOC made a finding of alleged government intervention.

2.27. We see no need to modify the Interim Report on the basis of China's comment on this paragraph, as the relevant statements refer to the findings that were in fact reached by the USDOC concerning "government intervention".

Paragraph 7.183

2.28. China requests modification of the paragraph to reflect that the information provided in response to the Benchmark Questionnaires was provided by the GOC rather than by mandatory respondents.

2.29. The United States did not comment on China's request.

2.30. We have decided to grant China's request by replacing the reference to "mandatory respondents" in this paragraph with "the GOC".

Paragraph 7.184

2.31. China suggests modification of this paragraph to reflect that the cited evidence and analysis were only "purportedly" relevant to the question at issue.

2.32. The United States does not agree with China's suggestion to add the term "purportedly" before "relevant" in this paragraph because. The "question" identified in this paragraph is a quote from the Benchmark Memorandum describing the evidence considered and analysis undertaken, and the Benchmark Memorandum refers to the Appellate Body's findings as to the relevance of such evidence and analysis to the benchmark question.

2.33. We see no need to modify the Interim Report on the basis of China's comment on this paragraph. In this paragraph, the Panel describes the content of the Benchmark Memorandum in relation to the specific question that was reviewed by the USDOC. The Panel subsequently assesses whether the USDOC's analysis in relation to this question supports the determination made, in consideration of the requirements under Article 14(d).

Paragraph 7.197

2.34. China requests modification of this paragraph to reflect that the USDOC did not "establish" the existence of "pervasive government intervention".

2.35. The United States disagrees with China's suggestion as it considers that there is no dispute that the USDOC identified and established pervasive government intervention, notwithstanding China's claims about the effects of that intervention.

2.36. In light of China's comment, we have decided to replace the word "established" with "identified".

Paragraph 7.251

2.37. China suggests a revision to this paragraph to more accurately reflect China's arguments before the Panel by adding the phrase "and taking the USDOC's public body determinations at face value".

2.38. The United States does not agree with China's suggested additional phrase as it could be misconstrued as the Panel's view if it were to appear in the manner China suggests, when in fact that Panel examined the USDOC's public body determinations and found that they are not inconsistent with the SCM Agreement.

2.39. We see no need to modify the Interim Report on the basis of China's comment on this paragraph, as the paragraph in question specifically concerns the requirements under Article 2.1(c) relating to *de facto* specificity. The fact that the USDOC's public body determinations are contested by China is addressed in the relevant sections of the Report. Moreover, the current text of this paragraph accurately reflects that China considers that the information at issue "at most" constitutes evidence that the GOC has provided financial contributions, rather than subsidies, during the relevant period.

Paragraph 7.278(c)

2.40. China suggests a modification of this paragraph to accurately reflect the cited part of the Input Specificity Memorandum.

2.41. The United States did not comment on China's request.

2.42. We have decided to accept China's request by quoting directly from the relevant portion of the Inputs Specificity Memorandum.

3 REQUESTS FOR REVIEW SUBMITTED BY THE UNITED STATES**Paragraph 7.37**

3.1. The United States asks the Panel to change the reference to "Section 129 investigations" to "Section 129 proceedings" throughout the Report, in order to better distinguish original investigations from implementation proceedings conducted pursuant to section 129 of the Uruguay Round Agreements Act. The changes would affect the following paragraphs: 7.84, 7.89, 7.108, 7.143, 7.146, 7.179, 7.192, 7.206, 7.214, 7.219, 7.223, 7.227 (footnote 373 of the Interim Report, renumbered to footnote 383 of the Final Report), 7.240, 7.254, 7.294, 7.301, 7.302, 7.303 (two instances), 7.304, 7.306, 7.308, and 7.316.

3.2. China did not comment on the United States' request.

3.3. We have decided to grant the United States' request by replacing the terms "Section 129 investigation(s)" by "Section 129 proceeding(s)" throughout the Report in the paragraphs identified by the United States, including corresponding edits in paragraphs 7.213, 7.220, 7.221, and 7.222 and headings 7.3.3.3.3.1 and 7.3.3.3.3.2.

Paragraph 7.48(g)(ii)

3.4. The United States asks the Panel to delete the phrase "and the strategic decision making of the enterprise" to accurately reflect the original text of the 2010 OECD economic survey of China presented in this paragraph.

3.5. China did not comment on the United States' request.

3.6. We have decided to grant the United States' request by deleting the repetition of "and the strategic decision making of the enterprise" in paragraph 7.48(g)(ii) of the Interim Report.

Paragraph 7.147

3.7. The United States asks the Panel to modify the last sentence of this paragraph to better reflect the United States' response to Panel question No. 35.

3.8. China did not comment on the United States' request.

3.9. We have decided to edit footnote 255 (footnote 262 of the Final Report) to reflect both the United States' response to Panel question No. 35, as well as the statement in the Supporting Benchmark Memorandum that the USDOC did not need to conduct a specific analysis of the market for each input in China during the period of investigation.

Paragraph 7.161

3.10. The United States asks the Panel to replace the reference to "the market" by a reference to "a market" in this paragraph to clarify that the Panel is referring to markets in general.

3.11. China did not comment on the United States' request.

3.12. We see no need to modify the Interim Report on the basis of the United States' comment on this paragraph.

Paragraph 7.177

3.13. The United States asks the Panel to clarify that this section of the report relates not only to investigations involving steel inputs, but also to the Solar Panels investigation.

3.14. China did not comment on the United States' request.

3.15. We have decided to grant the United States' request by clarifying the first sentence of paragraph 7.177 as follows:

We recall that in the Section 129 determinations at issue, the USDOC concluded with respect to the Pressure Pipe, Line Pipe, and OCTG proceedings ...

We have also added the following text after the discussion of steel inputs in paragraphs 7.177-7.178:

With respect to the Solar Panels investigation, the USDOC concluded that the GOC "significantly distorts prices in this industry such that there are no potential benchmarks from the domestic industry."^{FN}

^{FN}: Supporting Benchmark Memorandum, (Exhibit USA-84), p. 9.

Paragraph 7.178

3.16. The United States asks the Panel to clarify that the relevant evidence on the record incorporates multiple GOC responses and three memoranda relating to benchmarks (the Benchmark Memorandum, Supporting Benchmark Memorandum, and Final Benchmark Determination).

3.17. China did not comment on the United States' request.

3.18. We have decided to grant the United States' request in part, by adding a reference to the Final Benchmark Determination in paragraph 7.178.

3.19. We see no need to modify the Interim Report on the basis of the United States' other comments on this paragraph because we consider that the wording of paragraph 7.178 of the Interim Report correctly describes the record. In particular, we consider that the reference to "the

GOC's response to Benchmark Questionnaires" in this paragraph sufficiently indicates that the GOC provided several questionnaire responses.

Paragraph 7.196

3.20. The United States asks the Panel to modify this paragraph by referring to reasoned and adequate explanations for [the USDOC's] determinations.

3.21. China did not comment on the United States' request.

3.22. We have decided to grant the United States request in part by referring to USDOC's determinations. However we see no need to modify the Interim Report with respect to the other comments made by the United States on this paragraph.

Paragraph 7.224

3.23. The United States asks the Panel to clarify, in this paragraph that China has not demonstrated an inconsistency with Articles 1.1(b) and 14(d) in the Solar Panels Section 129 proceedings.

3.24. China asks the Panel to reject the United States' request and suggests that the Panel should modify paragraph 7.222 by clarifying that the last sentence of this paragraph relates only to the question of whether the USDOC failed to consider in-country prices that were available on the record.

3.25. In view of the parties' comments, we have clarified in the second sentence of paragraph 7.223 that "the USDOC failed to explain, in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings, how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market – determined price." We have also modified the last sentence of paragraph 7.222 to clarify that this paragraph relates only to the question of whether the USDOC failed to consider in-country prices that were available on the record.

Paragraph 7.228

3.26. The United States asks the Panel to clarify that the USDOC analysed a range of evidence – including the granting of subsidies – in order to determine if input prices were market-determined for purposes of measuring the adequacy of remuneration.

3.27. China did not comment on the United States' request.

3.28. We see no need to modify the Interim Report on the basis of the United States' comment on this paragraph as we consider that the paragraph in question is sufficiently clear.

Paragraph 7.241

3.29. The United States asks the Panel to quote the full sentence extracted from the Benchmark Memorandum.

3.30. China did not comment on the United States' request.

3.31. We have decided to grant the United States request by quoting the sentence in its entirety.

Paragraph 7.245

3.32. The United States asks the Panel to clarify that the alleged subsidies were one of the many factors that were the basis of the USDOC's benchmark determinations.

3.33. China did not comment on the United States' request.

3.34. We have decided to grant the United States request by editing the relevant paragraph accordingly.

Paragraph 7.343 and footnote 537 (footnote 547 of the Final Report)

3.35. The United States asks the Panel to modify footnote 537 to better reflect the explanation given by the United States in paragraph 270 of its second written submission.

3.36. China did not comment on the United States' request.

3.37. We have decided to grant the United States request by editing the relevant footnote to include a more complete quotation of the United States' second written submission.

Paragraph 7.349

3.38. The United States asks the Panel to refer to administrative reviews and sunset reviews as being conducted in "proceedings" rather than "investigations", in order to more clearly reflect the distinction between these types of proceedings and original investigations.

3.39. China did not comment on the United States' request.

3.40. We have decided to grant the United States' request and have modified accordingly the following paragraphs of the Interim Report, as well as associated headings: 7.351, 7.363, 7.364, 7.374, 7.381, 7.385, 7.394, 7.395, 7.399, 7.401, 7.406, 7.407, 7.409, 7.415, 7.428-7.434, 7.437, 7.439-7.441, 7.443-7.445, 7.447-7.449, 7.451-7.453, 7.455, 7.459, 7.460, 7.462-7.464, 7.466-7.468, and 7.470.

Paragraph 7.375

3.41. The United States asks the Panel to replace "original OCTG determination" and "original determination" with the terms "OCTG investigation".

3.42. China did not comment on the United States' request.

3.43. We have decided to grant the United States request and have thus edited this paragraph accordingly.

Paragraph 7.385 and footnote 581 (footnote 591 of the Final Report)

3.44. The United States asks the Panel to add references to the Public Bodies and CCP Memoranda in footnote 581.

3.45. China did not comment on the United States' request.

3.46. We have decided to grant the United States request and have thus edited this paragraph accordingly.

Paragraph 7.431

3.47. The United States asks the Panel to refer specifically to the two separate questions examined by the USDOC in sunset reviews: (a) whether revocation of the CVD order would be likely to lead to continuation or recurrence of a countervailable subsidy and (b) which rate to report to the US International Trade Commission as the net countervailable subsidy rate likely to prevail if the order were revoked.

3.48. China did not comment on the United States' request.

3.49. We have decided to grant the United States request in part and have thus edited paragraph 7.431 accordingly. Having clarified the USDOC's analysis in this paragraph, we do not see the need to also edit paragraphs 7.438, 7.442, 7.446, 7.450, 7.454, 7.461, and 7.469.

Paragraph 7.457

3.50. With regard to the nature of the USDOC determination in the context of sunset reviews, the United States asks the Panel to refer to "the determination of the net countervailable subsidy rates likely to prevail" rather than to the "calculation" of a subsidy rate.

3.51. China did not comment on the United States' request.

3.52. We have decided to grant the United States request and have thus edited this paragraph accordingly.

ANNEX B

ARGUMENTS OF CHINA

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ANNEX B-1**INTEGRATED EXECUTIVE SUMMARY OF CHINA****21 June 2017****I. The Section 129 Public Body Determinations Do Not Bring the United States into Compliance with Its Obligations Under the SCM Agreement****A. Introduction**

1. It has been more than five years since the Appellate Body rejected the USDOC's application of a *per se* rule of majority government ownership to determine whether Chinese enterprises are "public bodies" under Article 1.1(a)(1) of the SCM Agreement. In *US – Anti-Dumping and Countervailing Duties (China)* ("DS379"), the Appellate Body explained that an investigating authority conducting a public body analysis must instead determine whether the entity is "vested with authority to exercise governmental functions".¹ The Appellate Body explained that an investigating authority must "engage in a careful evaluation of the entity in question" in order to "identify its common features and relationship with government in the narrow sense, having regard, in particular, to whether the entity exercises authority on behalf of government".²

2. In the more than five years since the Appellate Body issued its report in DS379, the USDOC has never once engaged in the "careful evaluation" described by the Appellate Body when conducting a public body analysis of Chinese enterprises. To the contrary, what the USDOC has done is take the *per se* rule of majority government ownership that the Appellate Body rejected and replace it with a *per se* rule that is substantially broader. Whereas the old *per se* rule led the USDOC to conclude that all majority government-owned entities in China are public bodies, the new *per se* rule leads the USDOC to conclude that all companies in China, regardless of ownership, are public bodies.

3. The new framework applied by the USDOC is described in its "Public Bodies Memorandum", which the USDOC first issued in 2012 during the Section 129 proceedings that followed the adoption of the reports in DS379. The Public Bodies Memorandum begins with the USDOC's assertion that "an important inquiry in a public body analysis is a determination of 'what functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member'".³ Based on its review of certain of China's legal instruments and policies, the USDOC concludes that "government oversight and control of the economy, and in particular economic decision-making in the state sector", is a "government function" in China for purposes of its public bodies analysis.⁴ The USDOC also refers to this function as "maintaining and upholding the socialist market economy".⁵

4. After identifying this alleged "government function", the USDOC then analyses whether state-invested enterprises ("SIEs") possess, exercise, or are vested with authority to "maintain and uphold the socialist market economy".⁶ The USDOC explains that the evidence relevant to this determination concerns "the breadth and depth of government control over the economy as a whole and over SIEs generally in China".⁷ Based on its review of certain "indicia" of alleged "control", the USDOC concludes that "the government exercises meaningful control over certain categories of SIEs in China, and that 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".⁸

¹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 319.

³ Public Bodies Memorandum, p. 2, quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297 (CHI-1).

⁴ Public Bodies Memorandum, p. 11 (CHI-1).

⁵ Public Bodies Memorandum, p. 6 (CHI-1).

⁶ Public Bodies Memorandum, p. 12 (CHI-1).

⁷ Public Bodies Memorandum, p. 12 (CHI-1).

⁸ Public Bodies Memorandum, p. 37 (CHI-1).

5. Since the USDOC issued the Public Bodies Memorandum in 2012, the USDOC has routinely conducted its public body "analysis" within the framework of this Memorandum. The outcome has been the same in each instance, including in the Section 129 proceedings under review here. For all companies that are majority government-owned, the USDOC has concluded on the basis of its analysis in the Public Bodies Memorandum that the companies are public bodies. For all companies that are not majority government-owned, the USDOC has resorted to "adverse facts available" based on the GOC's failure to respond to certain questions regarding the Chinese Communist Party (CCP). On the basis of the "facts available" in the Public Bodies Memorandum, the USDOC has then concluded that all non-majority government-owned enterprises are also public bodies.

6. Accordingly, the result of the USDOC's "refined" analytical framework for determining whether companies in China are public bodies is that, since 2012, the USDOC has consistently concluded that all input suppliers in countervailing duty investigations of imports from China are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. The USDOC has reached this conclusion without ever once considering the relevance of any of the evidence that the GOC and the mandatory respondents have placed on the record calling into question the legitimacy of the USDOC's analysis, including the evidence provided by the GOC in the context of these Section 129 proceedings.

7. In DS379, the Appellate Body made clear that "control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body".⁹ Nonetheless, the USDOC spends the vast majority of the Public Bodies Memorandum analysing "the breadth and depth of government control over the economy as a whole and over SIEs generally in China".¹⁰ It appears to be the USDOC's view that what distinguishes its new control-based standard from the control-based standard that the Appellate Body expressly rejected in DS379 is the USDOC's explanation that the control that it purports to identify "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".¹¹ This is the alleged "government function" that Chinese enterprises are "performing", and it is the performance of this function that makes the "indicia of control" identified by the USDOC "meaningful".

8. The glaring defect in the USDOC's analysis is that the USDOC fails to explain how the "government function" it has identified is relevant to the public body inquiry. The USDOC's conclusion that "maintaining and upholding the socialist market economy" is a "government function" amounts to a conclusion that China is a socialist market economy – a fact which is undisputed. Broadly speaking, a purpose of the Chinese government is undoubtedly to "maintain and uphold" China's economy, just as other WTO Member governments "maintain and uphold" their economies. This conclusion has no discernible relevance, however, to "whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body".¹²

9. In China's view, both the Appellate Body's interpretative analysis of the term "public body" in DS379 and *US – Carbon Steel (India)* ("DS436"), and the Appellate Body's application of its analytical framework to state-owned commercial banks (SOCBs) in DS379, demonstrate that there must be a "clear logical connection" between the "government function" identified by an investigating authority and the conduct that is alleged to constitute a financial contribution.¹³

⁹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 320.

¹⁰ Public Bodies Memorandum, p. 12 (CHI-1).

¹¹ Public Bodies Memorandum, p. 37 (CHI-1).

¹² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

¹³ China notes that the "clear logical connection" standard was introduced by the United States in its second written submission, and is not language that China used in its own written submissions. See United States' second written submission, para. 30; see also United States' opening statement, para. 18. However, China explained in its opening statement at the meeting of the parties that if it was in fact the U.S. position that there must be a "clear logical connection" between the "government function" and the conduct at issue under Article 1.1(a)(1), then China believed that the parties were essentially in agreement regarding the proper legal standard. See China's opening statement, para. 18. The United States made clear at the meeting of the parties that this is an accurate characterization of the U.S. view, at least for purposes of the Panel's evaluation of the USDOC's public body determinations in the Section 129 proceedings. Accordingly, China adopted the U.S. terminology, because China believes that it is an effective (and shorter) way to explain China's view, which is that an entity must be vested with authority that it exercises when engaged in the conduct at issue under Article 1.1(a)(1), but that the authority vested in the entity may be for the purpose of performing a "government function" that is broader than the particular conduct at issue under

10. In the United States' view, "it is not necessary for the Panel to define the outer bounds of what may constitute 'governmental authority' or a 'governmental function' for the purpose of resolving this dispute", because "the 'governmental function' identified by the USDOC – maintaining and upholding the socialist market economy – has a clear, logical connection to the particular conduct under Article 1.1(a)(1) of the SCM Agreement – providing goods."¹⁴ The United States maintains that "[t]he producers of inputs that provided those inputs to the company respondents in the investigation were, in doing so, acting to maintain the predominant role of the state sector in the economy, and upholding the socialist market economy."¹⁵

11. In order to support this assertion, the United States explains as follows:

Ample record evidence supports the USDOC's conclusion that the Government of China exercises meaningful control over the entities at issue such that the government can use the entities "to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy." Thus, any time the entities provided inputs to the company respondents in the investigation – the activity in which the entities engaged on a day-to-day basis and also conduct that is described under Article 1.1(a)(1) of the SCM Agreement – the entities were acting in support of a governmental function in China.¹⁶

However, the use of the word "[t]hus" at the beginning of the second sentence above does not change the fact that the conclusion that follows is a complete non sequitur. Even if it were true that the GOC can "use the entities at issue 'to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy'", it does not automatically follow that the entities' conduct of providing the relevant inputs was in support of this function.¹⁷

12. In fact, in the *Pressure Pipe, Line Pipe, Kitchen Shelving, OCTG, and Steel Cylinders* investigations, the GOC provided extensive evidence in response to the Public Body Questionnaire that cuts directly against the conclusion that the entities' conduct of providing the relevant inputs was in support of this function. Yet the USDOC ignored this information in its public body determinations.¹⁸

13. Specifically, as China explained in detail in Section II.D.4 of its first written submission, the USDOC failed to consider the various laws and regulations submitted by the GOC that specifically insulate SIEs from government interference in their day-to-day business operations. The USDOC ignored all of the industrial plans from the provinces and municipalities where the respondents and input producers from the investigations at issue were located, and the fact that none of these plans support the conclusion that the entities at issue were performing a "government function" when they provided inputs. The USDOC also ignored the entity-specific information submitted in the *Kitchen Shelving* and *OCTG* investigations that likewise indicated that the entities at issue were not vested with relevant government authority, simply asserting that the GOC "refused to respond to the Department's requests" and that "information necessary to the analysis of whether the producers are 'public bodies' is not available on the record".¹⁹

Article 1.1(a)(1). See, e.g. China's response to Panel Question 4. China also believes that the idea that the "government function" must have a "clear logical connection" to the relevant conduct of that entity under Article 1.1(a)(1) is consistent with the European Union's view that an investigating authority should examine whether the "alleged financial contribution falls within the scope of the governmental function said to make the entity a public body." See European Union oral statement, para. 7.

¹⁴ United States' response to Panel question 3, para. 20.

¹⁵ United States' response to Panel question 12, para. 89.

¹⁶ United States' response to Panel question 12, para. 92.

¹⁷ As China discussed in response to Panel question 4, the USDOC cites evidence that SIE *investments* must be in-line with state industrial policies, but cites no evidence supporting the same conclusion in relation to the provision of inputs.

¹⁸ 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. See China's first written submission, paras. 160-161.

¹⁹ See Preliminary Public Bodies Determination, p. 15 (CHI-4).

14. The United States has provided no compelling justification for the USDOC's failure to comply with its obligation to provide a reasoned explanation for why it "rejected or discounted" evidence that was contrary to a conclusion that there was a "clear logical connection" between the alleged "government function" that it identified and the conduct at issue.

15. The United States has also steadfastly refused to answer China's questions regarding how such a sweeping conclusion would make sense. For example, despite repeated prompting by China, the United States has never explained how an SIE selling inputs to a *private* company for less than adequate remuneration would be "acting in support" of the alleged function of "maintaining the predominant role of the *state* sector in the economy". Such a conclusion is even less plausible when the input producer is itself a private company, as were many in the Section 129 proceedings at issue.

16. Furthermore, despite its agreement that "evidence regarding the scope and content of government policies relating to the sector in which an investigated entity operates" is relevant to an investigating authority's public body analysis²⁰, the United States never explained how government policies relating to a particular sector would possibly be relevant under the USDOC's framework. If *all* entities providing *all* inputs are acting in support of the alleged "government function" of "maintaining the predominant role of the state sector in the economy", it seems clear to China that sector-specific evidence is utterly irrelevant to the USDOC.

17. In light of the fact that the United States' assertion that the USDOC established a "clear logical connection" between the alleged "government function" and the conduct at issue cannot be substantiated based on the record of the Section 129 proceedings, the United States has also suggested that there may not need to be a "clear logical connection" in all cases.

18. In this respect, the United States highlights the Appellate Body's observation that "there are different ways in which a government could be understood to vest an entity with 'governmental authority', and therefore different types of evidence may be relevant in this regard".²¹ The United States explains that in its view, this indicates that the Appellate Body "has understood the concepts of 'governmental authority' and 'governmental function' as being more open-ended than China suggests"²², and that "a wide range of governmental functions could be relevant to the public body analysis."²³

19. While the United States has repeatedly emphasized the fact that an entity may be vested with authority in "different ways", the United States has never explained *why* this leads to the conclusion that the concepts of "governmental authority" and "governmental function" are "more open-ended than China suggests". In light of the Appellate Body's emphasis that the relevant *legal standard* is always the same²⁴, China does not understand *why* the *manner* in which an entity is vested with authority to perform government functions should change whether or not there needs to be a "clear logical connection" between the authority vested in the entity and the conduct at issue under Article 1.1(a)(1).

20. Furthermore, while the United States argues that "a wide range of governmental functions could be relevant to the public body analysis", the United States has also emphasized that its argument is not that "a public body is an entity vested with authority to perform *any* function that is 'ordinarily' considered a governmental function".²⁵ However, the United States has never articulated how it proposes to distinguish between the "wide range of governmental functions" that it believes would be relevant to the public body analysis, and those "governmental functions" that it believes would not be relevant to such an analysis. Rather, in relation to the proper analytical framework for determining whether an entity is a public body, the United States has left the Panel with numerous contradictory statements and unanswered questions.

²⁰ United States' response to Panel question 5, para. 32, citing Appellate Body Report, *US – Carbon Steel*, para. 4.29.

²¹ United States' response to Panel question 3, paras. 18-19, quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

²² United States' response to Panel question 3, para. 19.

²³ United States' response to Panel question 3, para. 19, quoting Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

²⁴ See Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37.

²⁵ United States' second written submission, para. 43.

21. For example, the United States maintains that it is not arguing 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."²⁶ Yet the United States maintains that an entity vested with authority to "take steps, as needed, to address certain public health issues of pressing concern to the state" would properly be considered a public body even if it were providing "cheap iron ore".²⁷

22. Accordingly, contrary to the initial statement above, the United States *does* appear to believe that an entity can be a public body under Article 1.1(a)(1) regardless of whether the entity is acting pursuant to the authority with which it has been vested, *at least in some instances*. But the United States has provided no basis for the Panel to distinguish these instances from those where it believes that an entity must be empowered to exercise elements of governmental authority and must be "*acting in that capacity*" in order to be a public body.

23. The United States has repeatedly noted throughout these proceedings that "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.'"²⁸ Yet the United States does not dispute that when an investigating authority evaluates evidence of "meaningful control" as part of its evaluation of the "core features of the entity concerned", as the USDOC did in the Public Bodies Memorandum, any alleged government control must be exercised *in relation to the conduct at issue under Article 1.1(a)(1)* in order for such alleged control to be "meaningful".²⁹ The United States' insistence that an investigating authority must focus on the "core features of the entity" rather than on the conduct at issue cannot be reconciled with the United States' acknowledgment that the conduct at issue is an essential element of a proper "meaningful control" analysis.

24. The United States maintains that "China's attack on Commerce's public body determinations in the section 129 proceedings here is, in reality, an attack on the findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*" in relation to SOCBs.³⁰ Yet as China explained in detail in response to Panel question 4, the United States' own chart in its second written submission highlights the difference between the evidence that the Appellate Body focused on in its evaluation of whether SOCBs were performing a "government function" when they provided loans, and the evidence that the USDOC relied upon to determine that every single entity at issue in the Section 129 proceedings was a public body.³¹ The United States' insistence that the Appellate Body was not focused on evidence related to the conduct of SOCBs when they provided loans is also belied by the United States' own understanding that the Appellate Body was examining whether there was sufficient evidence before the USDOC to conclude that the banks were "effectively carrying out government functions" when they "'exercise[d] ... their functions' (*lending*)".³²

25. Finally, the United States maintains that China's position regarding the nature of the government authority that must be vested in an entity in order for that entity to be a public body is "not in accord with the findings in prior reports", "is not supported by the text of Article 1.1(a)(1) of the SCM Agreement", and "is not logical."³³ Yet China's position is indistinguishable from the United States' own position in DS436, where the United States argued before the Appellate Body that "the authority required of a public body" is the authority to exercise the "key governmental functions" in the subparagraphs of Article 1.1(a)(1).³⁴ If the United States believes that China's position in these proceedings is unsupported and illogical, then it is likewise

²⁶ United States' second written submission, para. 61 (emphasis added).

²⁷ United States' second written submission, paras. 41, 89.

²⁸ See, e.g. United States' second written submission, para. 39, quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

²⁹ See United States' second written submission, para. 56.

³⁰ United States' response to Panel question 3, para. 19.

³¹ See China's response to Panel question 4.

³² United States' second written submission, *US – Countervailing Measures (China)* (31 May 2013), para. 37 (CHI-68) (emphasis added).

³³ United States' opening statement, para. 20.

³⁴ See United States' opening statement before the Appellate Body, *US – Carbon Steel (India)* (24 September 2014), para. 11 (CHI-67).

condemning its own position before the Appellate Body in the last dispute to examine the meaning of the term "public body".

26. In China's view, the contradictory nature of the U.S. submissions reflects the fact that while the United States recognizes the palpably absurd consequences that would flow from the conclusion that a public body is an entity vested with *any* government authority whatsoever, the United States is still trying to defend the USDOC's public body determinations in the Section 129 proceedings at issue. And despite the Appellate Body's unambiguous rejection of the USDOC's *per se* control-based rule in DS379, the USDOC remains unwilling to relinquish a *per se* control-based rule when it comes to a public body analysis of Chinese enterprises.

27. In order to maintain such a *per se* rule, the USDOC has identified a "government function" that is so broad that the USDOC believes that it covers any and all conduct by any and all companies in China.³⁵ As is evident in these Section 129 proceedings, the USDOC believes that the expansive "government function" it has identified permits it to ignore any evidence relevant to the particular enterprises or industries at issue.

28. The USDOC's analysis bears no relationship to the case-by-case inquiry that the Appellate Body described in DS379. China recalls the Appellate Body's statement in DS379 that a public body is an entity "vested with *certain* governmental responsibilities, or exercising *certain* governmental authority".³⁶ The United States has not explained how an investigating authority would determine whether the government authority vested in an entity is relevant to the public body inquiry, and part of the "certain government authority" identified by the Appellate Body, if not by reference to whether that authority is logically connected to the conduct that is potentially being attributed to the government.

29. The USDOC's failure to demonstrate a "clear logical connection" between the alleged "government function" and the conduct at issue, and the USDOC's failure to consider evidence to the contrary, renders the USDOC's public body determinations inconsistent with Article 1.1(a)(1) of the SCM Agreement. The USDOC's Section 129 public body determinations have not brought the United States into compliance with its obligations under the SCM Agreement.

B. The Public Bodies Memorandum Is Inconsistent "As Such" with Article 1.1(a)(1) of the SCM Agreement

30. Before the original Panel, China challenged the USDOC's "rebuttable presumption", articulated in the context of the *Kitchen Shelving* investigation, that majority government-owned entities in China are public bodies. The original Panel found that the *Kitchen Shelving* policy was "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement, because it reflected the same government ownership and control standard that had been found by the Appellate Body in DS379 to be insufficient, as a matter of law, to establish a "public body" within the meaning of that provision.

31. In the Section 129 determinations at issue in this dispute, the USDOC stopped relying on the *Kitchen Shelving* framework and relied instead on the Public Bodies Memorandum to find that all entities at issue were "public bodies". Like the "rebuttable presumption", the Public Bodies Memorandum is "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement for the following four reasons.

³⁵ The logical extension of the U.S. arguments before the Panel is that the United States believes that the evidence that the Appellate Body emphasized in relation to SOCBs in DS379 – that SOCBs were required to take into account government industrial policies *when making loans* – would be unnecessary to support a finding that every SOCB in China is a public body. Instead, the United States believes that it would be sufficient for the USDOC to cite the Public Bodies Memorandum for the proposition that all SOCBs in China are performing the function of "maintaining and upholding the socialist market economy", without ever demonstrating that this alleged "government function" has anything to do with the provision of loans by the relevant entities. The United States believes that because the GOC can allegedly use SIEs "to effectuate the governmental purpose of maintaining the predominant role of the state sector in the economy and upholding the socialist market economy", it follows that these entities are performing this "government function" when engaged in *any* conduct.

³⁶ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 296 (emphasis added).

32. First, China demonstrated that the Public Bodies Memorandum is a measure "taken to comply" that falls within this Panel's terms of reference under Article 21.5 of the DSU. Despite the fact that the Public Bodies Memorandum was adopted ostensibly to implement the DSB recommendations and rulings in DS379, it was the basis for *each* of the USDOC's determinations in the Section 129 determinations that constitute the *declared* measures taken to comply in *this dispute*.³⁷ The fact that the Public Bodies Memorandum was issued seven days prior to the filing of consultations request in the original dispute is immaterial, because it is undisputedly "part of each of the administrative records of each of the section 129 proceedings that the USDOC undertook to implement the recommendations and rulings of the DSB in this dispute."³⁸

33. Second, China established that the Public Bodies Memorandum is a measure susceptible to challenge in WTO dispute settlement proceedings. The scope of measures that may be challenged before a WTO panel is, in principle, broad, and "any acts or omissions attributable to a WTO Member can be a measure of that Member for purposes of dispute settlement proceedings."³⁹ It is undisputed that the Public Bodies Memorandum is an act attributable to the United States, and China had no obligation to demonstrate that it establishes a "practice" or "methodology", as the United States argues.⁴⁰

34. Third, China demonstrated that the Public Bodies Memorandum provides a rule or norm of general and prospective application that is challengeable "as such". By its express terms, the Public Bodies Memorandum articulates an analytical framework that is general, because it applies to an unidentified number of Chinese economic operators, and prospective, because it applies to all future CVD investigations of Chinese imports. As such, the Public Bodies Memorandum has normative value, because it provides administrative guidance and creates expectations among the public and private actors as to the USDOC's public body analysis. The existence of a rule or norm of general and prospective application is corroborated by evidence that the USDOC has systematically applied the Public Bodies Memorandum to make public body determinations since its publication.⁴¹

35. Fourth and finally, the Public Bodies Memorandum is "as such" inconsistent with Article 1.1(a)(1) of the SCM Agreement because it restricts, in a material way, the USDOC's discretion to act *consistently* with Article 1.1(a)(1) of the SCM Agreement. Pursuant to the Public Bodies Memorandum framework, commercial entities in China are divided in three categories: (i) all entities in which the Government of China has a controlling ownership interest are irrebuttably presumed to be "public bodies"; (ii) entities in which the government of China retains a "significant ownership interest" are "public bodies", where there are "additional indicia that show whether such SIEs are used as instruments by the government to uphold the socialist market economy"; and (iii) entities with "little or no formal government ownership" are "public bodies", where there is evidence that the government exercises "meaningful control" over the entity. The USDOC's conclusions in relation to all three "categories" of entities are necessarily inconsistent with Article 1.1(a)(1) in each instance in which the Public Bodies Memorandum is applied, because the USDOC's conclusions are based on a flawed understanding of what constitutes "meaningful control", and in the absence of any determination that a particular entity is performing a "government function" when engaged in the conduct that is the subject of the financial contribution inquiry.

II. The USDOC's Decision to Reject In-Country Benchmark Prices Is Inconsistent with Articles 14(D), 1.1(B) and 32.1 of the SCM Agreement

A. Articles 14(d) and 1.1(b) of the SCM Agreement

36. In the original proceedings before the Panel, the United States defended the USDOC's findings of "distortion" on the grounds that the Government of China played "a predominant role ... in the market" as a provider of the inputs in question. On appeal, the Appellate Body reaffirmed that, under this rationale, an investigating authority must demonstrate that the government

³⁷ China's second written submission, para. 108.

³⁸ China's responses to Panel questions, para. 48 (referring to United States' response to Panel question 19, para. 139. See also United States' response to Panel question 23, para. 148).

³⁹ China's second written submission, para. 111, quoting Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

⁴⁰ United States' first written submission, para. 167.

⁴¹ China's second written submission, para. 117 (referring to Exhibit CHI-54).

possessed and exercised market power so as to cause the prices of other suppliers to align with a government-determined price. Because the USDOC had made no such showing, the Appellate Body found that the determinations at issue were inconsistent with Article 14(d) of the SCM Agreement.

37. In the Section 129 determinations before the Panel, the USDOC abandoned its rationale based on the government's role as a provider of the good. The reason for this abandonment is clear: the record evidence demonstrated that the Government of China did not possess and exercise market power in the markets for hot rolled steel, steel rounds and billets, stainless steel coil, or polysilicon (the relevant inputs at issue). The facts and economics simply did not support the USDOC's original rationale. The United States' submissions to the Panel confirm that the United States has abandoned this rationale.

38. In place of its original rationale, the USDOC adopted a sweeping new theory for rejecting available domestic benchmark prices under Article 14(d). The USDOC's determinations, and the United States' defence of those determinations as set forth in submissions to the Panel, make clear that this new theory is not constrained in any meaningful way either by the text of the treaty or by facts. It is a theory that replaces customary rules of treaty interpretation with terms and distinctions that are entirely of the United States' own invention, and that replaces careful evaluation of the evidence with sweeping, unsubstantiated assertions.

39. Article 14(d) of the SCM Agreement requires an investigating authority to evaluate the adequacy of remuneration for the provision of a good "in relation to prevailing market conditions for the good ... in the country of provision ... (including price, quality, availability, marketability, transportation and other conditions of purchase and sale)". As a result of the parties' submissions, the Panel has before it two competing interpretations of what this provision means and, in particular, when this provision permits an investigating authority to resort to a benchmark outside the country of provision.

40. Consistent with the ordinary meaning of its terms, as confirmed by prior panel and Appellate Body reports, China considers that the phrase "prevailing market conditions ... in the country of provision" refers to prices that are determined by the interplay of supply and demand within the country of provision. The Appellate Body has found that the term "market" in Article 14(d) refers to "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".⁴² Domestic benchmark prices are "market" prices when they are "between independent buyers and sellers in a competitive market where prices are determined by the forces of supply and demand".⁴³

41. Article 14(d) further specifies that the adequacy of remuneration shall be determined in relation to *prevailing* market conditions within the country of provision. The ordinary meaning of the term "prevailing" is "as they exist" or "which are predominant".⁴⁴ Article 14(d) therefore requires the investigating authority to evaluate the adequacy of remuneration in relation to the existing or predominant market conditions within the country of provision. The Appellate Body has held that to the extent that in-country prices are market determined, i.e. determined by the forces of supply and demand, such prices "would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)".⁴⁵

42. In the five Appellate Body reports to have addressed the issue of "distortion" under Article 14(d), the Appellate Body has consistently referred to "distortion" as the circumstance in which the government effectively determines the price at which the good is sold, thus rendering the comparison required by Article 14(d) circular. This is the "very limited" circumstance that the Appellate Body first identified in *US – Softwood Lumber IV* as justifying the use of out-of-country benchmarks. The three circumstances that panels and the Appellate Body have identified as potentially justifying the use of out-of-country benchmarks are all circumstances in which the

⁴² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150, citing Appellate Body Report, *US – Upland Cotton*, para. 404. See also Appellate Body Report, *EC – Aircraft*, para. 981 (finding that the term "market" refers to "a sphere in which goods and services are exchanged between willing buyers and sellers").

⁴³ Panel Report, *US – Softwood Lumber IV*, para. 4.154.

⁴⁴ Panel Report, *US – Softwood Lumber III*, para. 7.50 (quoting Concise Oxford English Dictionary, p. 1084).

⁴⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.

government effectively determines the price at which the good is sold, either *de jure* or *de facto*. These circumstances are: (1) where the government sets prices administratively; (2) where the government is the sole supplier of the good; and (3) where the government possesses and exercises market power as a provider of the good so as to cause the prices of private suppliers to align with a government-determined price.

43. It is undisputed that Chinese prices for the inputs at issue are not set administratively, and the USDOC made no finding that they are. It is likewise undisputed that the GOC is not the sole provider of these inputs. Nor did the USDOC find that the GOC possessed and exercised market power in the relevant input markets during the periods of investigation so as to cause the prices of other input suppliers to align with a government-determined price. The USDOC's Section 129 determinations are therefore not based upon any of the three rationales that the DSB has previously recognized as a potential basis for rejecting in-country benchmark prices under Article 14(d). Nor do the USDOC's Section 129 determinations relate, more generally, to the DSB's concern with circular price comparisons.

44. The USDOC's Section 129 determinations are, instead, based on a different interpretation of Article 14(d), one that the United States has struggled to articulate coherently during the course of these proceedings. To the extent that the United States' proposed interpretation can be inferred from its submissions, it appears to be the United States' position that Article 14(d) allows an investigating authority to go beyond the question of whether in-country prices were determined by the interplay of supply and demand and undertake an *additional* inquiry into whether any type of government policy or action "affected" the conditions of supply and demand within the relevant market. The United States appears to consider that an investigating authority may evaluate the "nature" of any type of government policy or action and the "degree" of its influence upon the conditions of supply and demand, and on that basis find that available benchmark prices were not *sufficiently* determined by the interplay of supply and demand to require their use under Article 14(d).

45. The United States does not offer an interpretative basis for its belief that Article 14(d) permits an additional inquiry into whether government policies or actions "affect conditions" in the market. The United States does not contest the finding of the panel and Appellate Body in *US – Softwood Lumber IV* that the term "market" in Article 14(d) does not "refer to a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'".⁴⁶ Nor does the United States contest that a wide variety of government policies and actions have the potential to "affect conditions" in a market. Most importantly, the United States offers no basis to distinguish, either as a matter of treaty interpretation or in practice, among all of the different ways in which government policies and actions "affect conditions" in markets, based either on the "nature" of those policies and actions or the "degree" of influence that they have on market conditions.

46. Beginning with the "nature" of different types of government policies or actions that affect market conditions, the United States offers no interpretative basis for the suggestion that the term "market" in Article 14(d) allows the forces of supply and demand to be influenced by certain types of government policies or actions, but not others. Governments "affect conditions" in the marketplace in a myriad of different ways, from the macro (e.g. monetary and fiscal policies) to the micro (e.g. laws and regulations that affect particular products or industries). The United States offers no interpretation of the term "market" that would allow only some of these government policies or actions to affect the conditions of supply and demand within a market.

47. The United States likewise offers no explanation or interpretative support for its suggestion that government policies and actions may affect the forces of supply and demand only to some "degree". What is this "degree", and how would it be expressed? How is this "degree" discernible in the phrase "prevailing market conditions"? The United States' emphasis on the "degree" of government influence upon the forces of supply and demand is particularly troubling in light of the fact that the United States eschews any obligation to examine actual domestic benchmark prices or to identify any causal pathway by which government policies or actions affected those prices. The United States seems to consider that the "degree" of government influence upon domestic benchmark prices is relevant, but then wants to avoid any obligation to evaluate and substantiate what that "degree" of influence actually was.

⁴⁶ Appellate Body Report, *US – Softwood Lumber IV*, para. 87 (quoting Panel Report, *US – Softwood Lumber IV*, paras. 7.50-7.51).

48. In sum, the interpretation of Article 14(d) on which the USDOC's Section 129 determinations are based is unfounded as a matter of treaty interpretation. Because the determinations at issue are based on the United States' erroneous interpretation of Article 14(d), the Panel must find that the determinations are inconsistent with Article 14(d) for this reason alone.

49. Under a proper interpretation of Article 14(d), the evidence on the record of the Section 129 proceedings demonstrated that prices for the inputs at issue were determined by the interplay of supply and demand and therefore constituted "market" prices within the meaning of Article 14(d). Notwithstanding the fact that the USDOC did not even bother to solicit information concerning Chinese prices for the inputs at issue – the very prices that the USDOC found to be "distorted" – the Government of China placed spot market prices for the three steel products on the record. These prices, along with the market commentary accompanying these prices, plainly evinced the operation of market forces for these products. Neither the USDOC in its determinations, nor the United States in seeking to defend those determinations, offered any basis in the record evidence to reject the operation of market forces evident in these pricing data.

50. The operation of market forces in the Chinese steel sector was further evidenced by the market structure of the steel industry during the period 2006-2008 and, in particular, by the rapidly growing levels of private investment in the steel industry during that period. SIE producers of the products at issue represented no more than half of domestic Chinese production of these products, with non-SIE producers and foreign-invested producers accounting for the remainder of the market. Privately-owned steel producers, both Chinese and non-Chinese, invested billions of dollars in the Chinese steel industry during the period 2006-2008. These undisputed facts cannot be reconciled with the USDOC's conclusion that private Chinese prices for the inputs at issue were not market-determined prices.

51. At no point in its determinations did the USDOC identify a causal relationship between the "distortion" factors that it claimed to identify and the prices charged by Chinese suppliers of the inputs in question, whether SIE or non-SIE suppliers. During the course of the Panel proceedings, the United States made clear that, in its view, it was neither "necessary nor possible" for the USDOC to demonstrate a causal relationship between the "distortion" factors that it relied upon, on the one hand, and the domestic benchmark prices that it chose to reject, on the other. This means that the USDOC's findings of "distortion" are based on nothing more than assertion. In the absence of any evidence that the factors identified by the USDOC had *any* effect on available benchmark prices, the USDOC's findings of "distortion" cannot be sustained under any conceivable interpretation of Article 14(d).

52. For these reasons, the Panel should find that the Section 129 determinations at issue remain inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

B. Article 32.1 of the SCM Agreement

53. Article 32.1 of the SCM Agreement imposes limits on "the range of actions that a Member may take unilaterally to counter ... subsidization".⁴⁷ Under Part V of the SCM Agreement, the permissible responses to injurious subsidization are definitive countervailing duties, provisional measures, and price undertakings.⁴⁸ In the Section 129 determinations at issue, the United States countered subsidies allegedly provided to the Chinese steel industry by relying upon these alleged subsidies as a basis for rejecting available in-country benchmarks when evaluating the adequacy of remuneration for steel inputs provided to downstream producers of finished products. This is not one of the permissible responses to subsidization, and this action is therefore inconsistent with Article 32.1.

54. Central to the USDOC's rationale for rejecting available in-country benchmarks in the Section 129 determinations at issue is its finding that Chinese steel producers receive "subsidies". If the United States believes that Chinese steel producers receive "subsidies", the steps that the SCM Agreement permits it to take are: (1) impose definitive countervailing duties, provisional

⁴⁷ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 252.

⁴⁸ Appellate Body Report, *US – Offset Act (Byrd Amendment)*, para. 231. Part III of the SCM Agreement allows a Member to take countermeasures if a subsidizing Member fails to withdraw a prohibited subsidy or fails to take appropriate steps to remove the adverse effects of an actionable subsidy or withdraw the actionable subsidy.

measures, or price undertakings in respect of any steel products imported into the United States that the United States properly determines to be subsidized and causing injury; (2) undertake a proper upstream subsidy analysis to determine whether Chinese producers of the relevant steel products did, in fact, receive actionable subsidies and, if so, how much of the subsidy (if any) passed through to downstream purchasers of these products; or (3) request consultations and, if necessary, initiate dispute settlement proceedings under Part III of the SCM Agreement if the United States considers that subsidies allegedly provided to Chinese steel producers are prohibited subsidies or cause adverse effects.

55. The SCM Agreement does not contemplate that a Member may counteract subsidization by relying upon the existence of such subsidies (whether or not shown to be actionable subsidies) and their presumed effects as a basis for rejecting in-country benchmarks under Article 14(d). This action would circumvent the disciplines that the SCM Agreement imposes upon the steps that a Member may take to counteract subsidization. This action against subsidization is not contemplated by the SCM Agreement and, in fact, directly contravenes the disciplines that the SCM Agreement imposes upon actions against alleged upstream subsidies. The Panel must therefore find that the USDOC's Section 129 determinations are inconsistent with Article 32.1 of the SCM Agreement.

III. The USDOC's Section 129 Determinations Remain Inconsistent with Article 2.1(c) of the SCM Agreement

56. In the original proceedings, the Panel found that 12 of the countervailing duty determinations at issue were inconsistent with Article 2.1(c) of the SCM Agreement because the USDOC had failed to take into account "the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation", as required by the last sentence of that provision. The United States did not appeal these findings of the Panel. As a result, the USDOC was required to reconsider its findings of specificity in respect of the alleged provision of inputs for less than adequate remuneration in each of the investigations at issue.

57. The second of the two factors in the last sentence of Article 2.1(c) requires the investigating authority to take into account "the length of time during which the subsidy programme has been in operation". It is evident that, in order to take this factor into account, the investigating authority must first identify the relevant "subsidy programme", and then determine the length of time during which that subsidy programme, so identified, has been in operation. Only then can the investigating authority evaluate whether a subsidy programme has been "use[d] ... by a limited number of certain enterprises" taking into account "the length of time during which the subsidy programme has been in operation".

58. The Appellate Body has stated that the term "programme" refers to "a plan or scheme of any intended proceedings (whether in writing or not); an outline or abstract of something to be done".⁴⁹ While a "subsidy programme" would ordinarily be evidenced in writing, "[a] subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises."⁵⁰ The "evidence" that the USDOC relied upon in the Section 129 determinations to establish the existence and content of twelve input-specific "subsidy programmes" consisted of nothing more than the fact that the respondent producers had received these alleged subsidies over the course of the one-year period of investigation.

59. The inescapable logic of the USDOC's reasoning is that the provision of a *subsidy* would be sufficient to establish the existence of a *subsidy programme*. In addition, the *subsidy* that gave rise to the specificity inquiry in the first place would define the content and scope of the *subsidy programme*, so that the two become coterminous. This reasoning, if accepted, would collapse the distinction between a "subsidy" and a "subsidy programme", and would render meaningless the separate and independent requirement of identifying a "subsidy programme" pursuant to which the subsidies at issue were granted. Specificity under Article 2.1(c) would become a circular and self-fulfilling inquiry. Not only is this a nonsensical result, but it cannot be reconciled with the

⁴⁹ Appellate Body Report, para. 4.141.

⁵⁰ Appellate Body Report, para. 4.141.

Appellate Body's prior findings. The mere *repetition* of actions, without a showing of any systematic feature, cannot establish "a systematic series of actions" probative of a plan or scheme.

60. Because the USDOC's Section 129 determinations did not properly identify and substantiate on the basis of positive evidence the existence, scope, and content of a "subsidy programme" or "subsidy programmes", it follows that the USDOC did not properly evaluate "the length of time during which the subsidy programme has been in operation" as required by the recommendations and rulings of the DSB. The USDOC could not have identified the length of time during which a "subsidy programme" has been in operation without properly identifying what that "subsidy programme" is. However, even if the Panel were to accept the USDOC's identification of input-specific "subsidy programmes", the Panel would still need to reject the USDOC's evaluation of "the length of time during which" these alleged "subsidy programmes" have been in operation.

61. The evidentiary basis for the USDOC's finding that the "subsidy programmes" at issue had not been in operation "for a limited period of time only" was based on China's explanation that SOEs "began producing and selling the inputs" at issue in the PRC "at some point during the period covered by the first Five-Year Plan (1953-1957) and possibly earlier". The problem with the USDOC's conclusion is that the fact that Chinese SOEs have *produced and sold* a particular input over a long period of time does not constitute evidence that those inputs have been sold *for less than adequate remuneration* over the same period of time.

62. At the very most, and taking the USDOC's public body determinations at face value, the fact that Chinese SOEs have produced and sold a particular input over a long period of time serves only as evidence that the GOC has provided *financial contributions* over that period, not evidence that the GOC has provided *subsidies* over that period. As the Appellate Body has found, "[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 for purposes of Article 2.1(c) of the SCM Agreement".⁵¹ This would include for the purpose of determining "the length of time during which the subsidy programme has been in operation". Thus, the fact that Chinese SOEs have produced and sold the inputs at issue since at least 1957 is insufficient, on its face, to establish the length of time during which the alleged "subsidy programmes" have been in operation.

IV. The USDOC's Section 129 Land Specificity Determination in Thermal Paper Remains Inconsistent with Article 2.2 of the SCM Agreement

63. In DS379, the Appellate Body explained that under Article 2.2 of the SCM Agreement, "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both".⁵² The Appellate Body also explained that it did not read the panel report in DS379 as implying that "the mere existence of a 'distinct' regime would enable a subsidy to be found to be specific to a designated geographical region, even if the identical subsidy were also available to enterprises outside that designated geographical region".⁵³

64. Despite the Appellate Body's clear message in DS379 that the "mere existence of a 'distinct' regime" does not permit an investigating authority to conclude that an alleged land-use rights subsidy is regionally specific under Article 2.2⁵⁴, the USDOC explained in these Section 129 proceedings that, since DS379, it has "hinged its regional specificity analysis on whether there is a 'distinct land regime' within [a designated geographical region]".⁵⁵

65. In relation to the *Thermal Paper* investigation, the GOC did not respond to the USDOC's Section 129 land specificity questionnaire, and so the USDOC concluded based on "adverse facts available" that "the LTAR program at issue constitutes a 'distinct land regime' and is therefore specific".⁵⁶ It is well established, however, that the application of "facts available" does not excuse the application of an improper legal standard.

⁵¹ Appellate Body Report, para. 4.143.

⁵² Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 378. See *ibid.* para. 413.

⁵³ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 421.

⁵⁴ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 421.

⁵⁵ See Preliminary Land Specificity Determination, p. 6 (CHI-24).

⁵⁶ See Preliminary Land Specificity Determination, pp. 9-12 (CHI-24).

66. Based on the investigation record, the USDOC knew that the granting authority did not provide land-use rights at a *price* that was not available to companies outside of the relevant zone. The USDOC also knew that there was evidence on the record that cheaper land was available outside of the zone. Despite this evidence, the USDOC still concluded that the provision of land-use rights for LTAR was specific to the ZETDZ because "the LTAR program at issue constitutes a 'distinct land regime' and is therefore specific".⁵⁷

67. The USDOC was able to reach this conclusion only because the USDOC applies a legal standard under Article 2.2 pursuant to which all "incentives or preferential policies" are potential evidence of a "distinct land regime" for the provision of land-use rights. This legal standard cannot be reconciled with the Appellate Body's finding that "[t]he necessary limitation on access to the subsidy can be effected through an explicit limitation on access to the financial contribution, on access to the benefit, or on access to both".⁵⁸ Accordingly, the Panel should find the legal standard applied by the USDOC in *Thermal Paper* is inconsistent with Article 2.2 of the SCM Agreement.

V. The Final Determination in the Solar Panels Investigation Is Inconsistent with Articles 1, 2, and 14 of the SCM Agreement for the Same Reasons that the Preliminary Determination Was Found Inconsistent by the DSB

68. Before the Panel in the original proceeding, China challenged the USDOC's *preliminary* public body, input specificity, and benchmark determinations. The Panel concluded that the USDOC's preliminary public body determinations were inconsistent with Article 1.1(a)(1) of the SCM Agreement⁵⁹, and that the USDOC's preliminary input specificity determinations were inconsistent with Article 2.1(c).⁶⁰ On appeal, the Appellate Body found that the USDOC's preliminary benchmark distortion determination was inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.⁶¹

69. China considers that the USDOC's *final* determination in *Solar Panels* is a measure "taken to comply" under Article 21.5 of the DSU. China believes that the USDOC's final public body, input specificity, and benchmark determinations are inconsistent with the aforementioned provisions of the SCM Agreement for the same reasons identified by the Panel and the Appellate Body in relation to the preliminary determinations. Accordingly, China believes that the Panel should conclude that the USDOC's final determinations in the *Solar Panels* investigation with regard to public body, input specificity, and benchmark distortion are inconsistent with the SCM Agreement.

VI. The United States Has Failed to Bring Itself into Conformity with the SCM Agreement in Respect of Subsequent Administrative Reviews, Sunset Reviews, and the Ongoing Conduct of Assessing and Collecting Countervailing Duties and Cash Deposits Under the Countervailing Duty Orders at Issue

70. The United States has failed to bring itself into conformity with its obligations under the SCM Agreement by continuing to issue administrative reviews and sunset reviews under the countervailing duty orders at issue in the original dispute, in each instance applying erroneous legal standards which serve as a basis for the continued assessment and collection of countervailing duties subsequent to the expiration of the RPT.

71. The subsequent administrative and sunset reviews fall within this Panel's terms of reference under Article 21.5 of the DSU because they have a sufficiently close nexus, in terms of *nature, effects and timing*, to both the DSB recommendations and rulings and to the Section 129 determinations which constitute the "declared" measures taken to comply.

72. More specifically, the use of unlawful legal standards in successive public body, benefit, and specificity determinations under the same CVD order provides a sufficiently close link, in terms of *nature* or subject matter, between the DSB recommendations and rulings, the subsequent reviews, and the Section 129 determinations. Similarly, the unlawful inclusion of the improperly initiated export restraint subsidies in the calculation of the "all others" rate in successive determinations

⁵⁷ Preliminary Land Specificity Determination, p. 12 (CHI-24).

⁵⁸ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 378 and 413.

⁵⁹ See Panel Report, paras. 7.75, 8.1(i).

⁶⁰ See Panel Report, paras. 7.257, 8.1(v).

⁶¹ See Appellate Body Report, paras. 4.97, 5.1(b).

under the *Magnesia Bricks* order provides a sufficiently close link, in terms of *nature* or subject matter, between the DSB recommendations and rulings, those subsequent reviews, and the Section 129 determination in that countervailing duty order.

73. In terms of *effects*, each of the subsequent administrative reviews at issue in this dispute has generated countervailing duty rates and cash deposit rates that replaced the effects of those determinations found to be WTO-inconsistent in the original dispute, or the effects of the Section 129 determinations. Similarly, the sunset reviews at issue have the same effects as the immediately preceding review determination, and the superseding Section 129 determinations, as a basis for the continued imposition of unlawful countervailing duties under the same CVD order.

74. Finally, each successive review is closely linked, in terms of *timing*, to the immediately preceding review, to the original countervailing duty determination, or to the Section 129 determination that it superseded. In this regard, the United States is incorrect that measures pre-dating the end of the RPT or measures post-dating panel establishment are outside this Panel's terms of reference, because both categories of measures may have a bearing on whether the United States achieved substantive compliance by the end of the RPT.⁶²

75. On substance, the subsequent reviews at issue constitute a failure by the United States to bring itself into conformity with the covered agreements by the end of the RPT because they continue to reflect legal standards that are inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3 and 14(d) of the SCM Agreement, and because they result in the assessment and collection of countervailing duties and cash deposits in a manner inconsistent with Articles 19.1, 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.

76. Finally, the subsequent administrative reviews, sunset reviews, and Section 129 determinations challenged by China in these proceedings demonstrate that the continued and systematic application of erroneous legal standards in a string of successive determinations leading to the continued assessment and collection of countervailing duties under the CVD orders at issue constitutes "ongoing conduct" that is separately challengeable in WTO dispute settlement proceedings.

77. Such "ongoing conduct" is not only a measure susceptible to challenge in WTO dispute settlement, but also a measure that falls within this Panel's terms of reference under Article 21.5 of the DSU, given the pervasive links that it has, in terms of nature, effects and timing, to both the DSB recommendations and rulings and to the declared measures taken to comply. In this regard, the United States is incorrect that the ongoing conduct challenged by China had not materialized at the time of Panel establishment or constitutes "future" conduct. To the contrary, the subsequent administrative reviews, sunset reviews, and Section 129 determinations challenged by China in these proceedings demonstrate that the United States has systematically applied the unlawful public body, benefit, and specificity legal standards in successive determinations made in each countervailing duty order at issue, leading to the continued imposition of unlawful countervailing duties and/or cash deposits under those orders. Similarly, the subsequent reviews in *Magnesia Bricks* demonstrate that the USDOC systematically included improperly initiated export restraint subsidies in the "adverse facts available" rates in a string of successive determinations issued under that CVD order. This evidence unquestionably demonstrates that the application of these unlawful legal standards in successive determinations under the CVD orders at issue constitutes "conduct that is currently taking place and is likely to continue in the future."⁶³

78. The United States is also incorrect in stating that the countervailing duty determinations at issue are more complex and fact-specific than the determinations at issue in *US – Continued Zeroing*. In fact, the subsequent reviews at issue demonstrate that the application of unlawful legal standards by the USDOC does not depend on the underlying facts in the administrative record of the investigation, or on the degree of cooperation by the respondents. To the contrary, the application of unlawful legal standards is the unchanged component in each subsequent review at issue, and the only aspect which the United States purportedly attempted to modify in the Section 129 determinations.

⁶² China's second written submission, paras. 231 and 236 (quoting Appellate Body Report, *US – Zeroing (Japan)* (Article 21.5 – Japan), para. 122.

⁶³ China's second written submission, para. 258 (quoting Appellate Body Report, *Argentina – Import Measures*, para. 5.144, in turn quoting Panel Report, *US – Orange Juice (Brazil)*, para. 7.175).

79. For the reasons articulated above, the continued and systematic application of erroneous legal standards in a string of connected and successive determinations leading to the assessment and collection of countervailing duties under the CVD orders at issue constitutes "ongoing conduct" that is inconsistent with Articles 1.1(a)(1), 1.1(b), 2.1(c), 2.2, 11.3, and 14(d) of the SCM Agreement. Such ongoing conduct is also inconsistent with Articles 19.1, 19.3, 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, because it results in the United States levying countervailing duties and cash deposits in excess of the amount of subsidization.

ANNEX C

ARGUMENTS OF THE UNITED STATES OF AMERICA

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ANNEX C-1**INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA****21 June 2017****I. INTRODUCTION**

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

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

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

II. CHINA'S ARGUMENTS CONCERNING ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT LACK MERIT**A. The United States Has Complied with the DSB's Recommendations Concerning the "As Applied" Findings with Respect to Public Bodies**

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

1. China's Interpretive Arguments Lack Merit

5. The novel interpretation of the term "public body" that China proposes fails to take into account the interpretive findings of the original Panel and reflects a misreading of the original panel report and relevant Appellate Body reports. Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") instructs a panel to evaluate "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. In effect, Article 21.5 takes the underlying panel findings, as modified by the Appellate Body, as a given. In the guise of a new interpretive argument, China is re-arguing an excessively narrow approach to the legal interpretation of the term "public body" that was rejected by the original Panel.

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

7. China argues, in effect, that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, *e.g.*, selling the relevant input to the investigated purchaser, is a government function, and that engaging in that activity is consistent with the government's objectives. China denies that its position is that the government function and the conduct under Article 1.1(a)(1) must be the same, but China's arguments belie its assertion. China's proposed approach to the public body analysis is untenable and entirely at odds with findings in prior reports.

8. Rather than focusing on the conduct undertaken by the entity, the Appellate Body has emphasized that the focus of the public body analysis is on the "evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense." China, with its focus on the particular "*conduct* that is the subject of the financial contribution inquiry," appears to suggest that an entity may be deemed a public body only when the entity is "*exercising*" governmental authority. That is contrary to the Appellate Body's findings, under which an entity might be deemed a public body when there is evidence that the entity possesses or is vested with governmental authority, even if there is no evidence that the entity is exercising governmental authority at the time of the particular transaction at issue.

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

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

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

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

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

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

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

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

16. The USDOC examined the functions or conduct that are of a kind ordinarily classified as governmental in the legal order of China, the role played by the CCP in China's system of governance, and the manifold indicia of control indicating that relevant input providers possess, exercise, or are vested with governmental authority. The USDOC requested information from the GOC about the relevant input providers in the section 129 proceedings and considered the information the GOC provided or failed to provide. The USDOC addressed the GOC's arguments in the Public Bodies Final Determination in the section 129 proceedings. Ultimately, the USDOC "concluded that certain categories of state-invested enterprises (SIEs) in China properly are considered to be public bodies for the purposes of the United States CVD law, and other categories of enterprises in China may be considered public bodies under certain circumstances."

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

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

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

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

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

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

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

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

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

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

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

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

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

27. The Public Bodies Memorandum, on its face, does not purport to establish or describe a legal standard adopted or applied by the USDOC. Indeed, the Public Bodies Memorandum expressly states that the USDOC was not announcing through the issuance of the memorandum an approach that would be applied in every countervailing duty proceeding. The USDOC, in the Public Bodies Memorandum, presented extensive analysis and explanation and came to certain conclusions after examining voluminous evidence relating to the government and economic system of China. The

analysis, explanation, and evidence in the Public Bodies Memorandum relates to China in general; it may be highly relevant to and may support the USDOC reaching the same conclusions in other countervailing duty proceedings involving China. The USDOC's decisions to incorporate by reference and rely on the Public Bodies Memorandum – and the evidence to which it refers – in subsequent countervailing duty proceedings that also involved products from China did not, after the fact, confer on the Public Bodies Memorandum a status as a "measure" for which there is no support in the text of the Public Bodies Memorandum itself.

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

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

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

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

III. CHINA'S CLAIMS REGARDING BENCHMARKS LACK MERIT

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

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

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

34. Article 14(d) provides that the adequacy of remuneration for government-provided goods or services "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase." In the Appellate Body's words, a "proper finding"

that "recourse to an alternative benchmark is justified requires an investigating authority to properly evaluate whether the proposed benchmark prices are market determined or distorted by governmental intervention."

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

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

37. The USDOC conducted a market analysis and found that the requisite "market conditions" do not exist in China's steel and polysilicon sectors, as the Appellate Body has defined the term. Applying the standard articulated by the Appellate Body does not require a finding that there are *no* other types of market conditions that exist in a particular sector, or that prices for the good in question are wholly unresponsive to external market forces.

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

39. China misreads the Appellate Body findings in prior disputes when it argues that the distortions evaluated in those disputes are the only types of distortions that would call for the use of out-of-country benchmarks. Simply because the Appellate Body has not previously considered the type of pervasive distortions at issue here does not support the conclusion that those distortions are irrelevant to the benchmark selection analysis. Indeed, in *US – Softwood Lumber IV*, for example, the Appellate Body cautioned that its findings were "expressly limited to considering only the situation of government predominance in the market as a provider of goods *because it was 'the only one raised on appeal.'*" The Appellate Body stated explicitly that it was not "*foreclosing the possibility that there could be situations other than price distortion due to government predominance as a provider in the market, in which Article 14(d) permits the use of out-of-country prices for the purpose of determining a benchmark.*"

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

41. The U.S. position in this dispute, by contrast, is grounded in the text of Article 14(d) as interpreted by the Appellate Body. In particular, in *US – Carbon Steel (India)*, the Appellate Body found that "prevailing market conditions" under Article 14(d) consist of "generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices." In *EC – Large Civil Aircraft*, the Appellate Body found that "market prices" are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to

pay. Rather, the equilibrium price established in the market results from a discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in that market." Furthermore, under *EC – Large Civil Aircraft (AB)*, this equilibrium must result from the discipline enforced by an exchange reflective of *both* supply and demand.

42. In the section 129 proceedings, the USDOC applied this analytical framework to its evaluation of the record evidence. Based on consideration of the totality of the evidence, the USDOC concluded that the "market conditions necessary to create the establishment of equilibrium prices are not present in China's steel market, *i.e.*, conditions that result 'from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market.'"

43. As USDOC found based on record evidence, China intervenes heavily in its steel and polysilicon sectors to achieve certain outcomes. The outcomes it achieves through these interventions are not consistent with or reflective of a market discipline between buyers and sellers. China has not even attempted to refute these facts. Instead, China proposes that authorities are limited in their investigation by a *per se* rule of China's own invention. China's *per se* rule, however, cannot be supported under any interpretation of the SCM Agreement. Rather, as the Appellate Body has stated, "[p]roposed in-country prices *will not be reflective of prevailing market conditions in the country of provision* when they deviate from a market-determined price *as a result of government intervention in the market.*" The proper focus is on the distortion that occurs "as a result" of the intervention, not on whether the government intervention took a certain form.

44. China overlooks the fact that widespread government intervention in a particular sector can fundamentally distort market signals, regardless of whether that intervention comes in the form of direct control over prices or more general control over a company's internal business decisions. It is not necessary to demonstrate that prices have been *de jure* or *de facto* determined by the government to find that such prices are not market-determined for purposes of Article 14(d).

45. China's approach makes an arbitrary distinction between an investigating authority's ability to consider price distortion caused by *direct* government influence over pricing and price distortion caused *indirectly* by extensive government interference in a sector, including interference with the entities operating in that sector. China presents no basis in law or logic for the proposition that an authority is foreclosed from conducting a holistic analysis that takes account of all types of government interference. Further, China's position is inconsistent with the object and purpose of the SCM Agreement: if accepted, it would prevent WTO Members from fully offsetting the effects of an injurious subsidy by applying countervailing duties.

46. China's argument is based on the premise that the WTO Agreement must be construed so as to avoid any situation in which an authority (or dispute settlement panel) must conduct a close, case-by-case factual evaluation of a particular situation. But China presents no support for this premise. Indeed, many issues involving measures challenged under the WTO Agreement – such as trade remedy measures, or SPS measures, or measures subject to *de facto* national treatment claims – require a close factual analysis. China presents no basis for its argument that a WTO discipline must be governed by simplistic tests.

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

B. The USDOC Provided a Reasoned and Adequate Explanation

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

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

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

51. Price operates as a signal to convey the relative supply and demand. But when "government policies inflate supply (or otherwise distort choices by market participants that would affect their pricing), the price no longer corresponds with the information it should signal." The USDOC cited extensive evidence that in China's steel sector, China intervenes heavily to achieve certain outcomes in pursuit of desired policy goals, which are not consistent with or reflective of market disciplines between buyers and sellers. This heavy-handed intervention distorts choices by market participants, and has had the effect of inflating supply. Based on the totality of the evidence on the record, the prices at which steel goods are sold cannot fairly be viewed as "market prices."

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

C. China's Arguments Have No Merit

53. Instead of engaging with the evidence, China argues that the USDOC should have taken a different approach. In China's view, the phrase "prevailing . . . conditions" in Article 14(d) means those conditions – seemingly in every possible situation, and regardless of the level of distortion – must be the conditions as affected by government policies and actions. This interpretation is untenable. If accepted, authorities would be required to ignore the existence of government-

created distortions in the marketplace. The fundamental issue, however, in determining whether to rely upon an out-of-country benchmark under Article 14(d) is, in fact, the existence of price distortion. And, because price distortion can arise due to government intervention, Article 14(d) cannot be read to preclude an investigating authority from addressing situations in which government action has rendered prices not market-determined. Indeed, the Appellate Body in *US – Carbon Steel (India) (AB)* confirmed as much, stating that "in-country prices will not be reflective of prevailing market conditions . . . when they deviate from a market-determined price as a result of government intervention in the market."

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

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

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

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

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

59. China encourages the Panel to disregard the USDOC's evidentiary findings. This is at odds with the appropriate standard of review. In the words of the original Panel in this dispute: "a panel reviewing a determination . . . based on the 'totality' of the evidence . . . must conduct its review on the same basis." Where "an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding, a panel reviewing such a determination normally should consider that evidence in its totality in order to assess its probative value with respect to the agency's determination." An analysis of the evidence in this dispute – when examined in light of the totality of the circumstances – demonstrates a probative and objective basis for the determination that the relevant prices in China are not market-determined. In each of the disputed proceedings, this analysis comports with Article 14(d).

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

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

61. China's panel request asserts that the "benchmark determinations" in four of the section 129 proceedings are inconsistent with Article 32.1. Yet, in the course of this dispute, China's presentation of this issue has appeared in a variety of inconsistent formulations, each of which fails to identify the specific measure that China challenges. Nor has China identified any specific action against subsidization apart from the countervailing duty determinations themselves. Given that the imposition of countervailing duties is a permissible response to injurious subsidization, China has no basis for its Article 32.1 claim.

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

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

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

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

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

67. The USDOC's analysis of China's steel sector discussed many aspects of government intervention; this analysis cannot be considered an "action" taken by the United States. The only "action" here – as China recognized during the Panel meeting – is the imposition of countervailing duties. Moreover, the USDOC's analysis of China's steel sector does not contain an "upstream subsidy analysis" as China has suggested. The USDOC's analysis likewise does not have an adverse bearing on subsidies provided to upstream producers and thus does not result in an implicit upstream subsidy determination, as China claims. The use or rejection of in-country prices

only bears on the measurement of the adequacy of remuneration for the subsidies being investigated.

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

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

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

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

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

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

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

SCM Agreement. By contrast, Article 2.1 assumes the existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is *specific*."

74. As one component of a *de facto* specificity analysis involving the provision of inputs, an authority may identify a program involving the *repeated provisions* of inputs over the relevant period. The repeated provision of inputs need not consist exclusively of *subsidized* inputs. Thus, China is wrong in asserting that the program must consist only of activities that have been definitively identified as subsidies. Rather, the relevant inquiry is the existence of repeated instances in which inputs were provided as the result of some sort of planned series of activities or events, which is evidence of the series of actions or activity that constitutes a program.

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

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

VI. CHINA'S CLAIMS CONCERNING ARTICLE 2.2 LACK MERIT

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

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

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

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

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

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

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

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

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

85. The Panel should likewise reject China's attempt to expand the terms of reference to include these past proceedings given China's failure to put forth a *prima facie* case that the findings and analysis in subsequent proceedings are "closely connected" to the measures taken to comply. The United States emphasizes that the question of whether subsequent reviews are "related in nature" is not the applicable threshold for determining whether a "particularly close relationship" or "sufficiently close nexus" exists in connection with the measures taken to comply. Rather, China's claim depends on two questions: (1) whether the challenged measure existed at the time of panel establishment, and (2) whether it is closely connected with a measure taken to comply. Here, the answer to both questions is "no," and thus China's claims fail.

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

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

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

89. Despite China's attempts to liken the question before the Panel in this dispute to the question of zeroing, China has not demonstrated – or even provided a plausible explanation – that the *nature* of the inconsistencies found in the original determinations can be found in the subsequent proceedings. When the Appellate Body discussed the nature of related proceedings in the zeroing context, the Appellate Body recognized the fact that several DSB findings had already established the existence of an "as such" measure. The Appellate Body's decisions in *US – Zeroing (Japan) (Article 21.5 – Japan)* (and in *US – Zeroing (EC) (Article 21.5 – EC)*) were decided in an environment where there were no questions as to whether the action in subsequent proceedings was of the same nature as in the original proceedings. The zeroing methodology (the use of which hinged only on whether a respondent's sales database included sales with "negative" margins) is a vastly simpler type of "measure" than the challenged determinations, which are highly fact-specific determinations that take into account the totality of the relevant evidence that is available on the record of each proceeding.

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

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

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

93. China has likewise failed to establish that any so-called "ongoing conduct" exists that may be challenged as a rule or norm of general and prospective application. In the view of the United States, "ongoing conduct" is not cognizable as a measure that is susceptible to challenge.

China has failed to establish that any such "ongoing conduct" exists or is likely to continue under the challenged orders that are at issue in this dispute. Likewise, even if the Panel were to find that China has established the subsequent reviews constitute the "ongoing conduct," China has not demonstrated a "particularly close relationship" or "sufficiently close nexus" to the declared "measure taken to comply" and it cannot be presumed that such a close connection exists.

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

VIII. FACTS AVAILABLE

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

96. China, as the complaining party in this Article 21.5 proceeding, must make a *prima facie* case with respect to each of the measures that purportedly constitute an inconsistency with Article 12.7 of the SCM Agreement. Although China put forth various claims with respect to the USDOC's use of facts available in its panel request, it subsequently failed to make a *prima facie* case with respect to these claims. Moreover, China concedes that it does not challenge what the facts are in these proceedings, but rather challenges the "legal standard." China claims that, regardless of whether the USDOC relied on the facts available, its decisions are "just as inconsistent." In other words, China recognizes that there is no basis upon which to make Article 12.7 findings.

97. The United States notes that China's response to the Panel's questions confirms that "China is not pursuing claims under Article 12.7." The United States does not agree with China that the Panel can make findings under Article 12.7 when China failed to challenge the application of Article 12.7 in the first place.

IX. CONCLUSION

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

ANNEX D

ARGUMENTS OF THE THIRD PARTIES

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ANNEX D-1**INTEGRATED EXECUTIVE SUMMARY OF AUSTRALIA****11 May 2017****I. INTRODUCTION**

1. Members of the Panel, thank you for the opportunity to present Australia's views in this dispute. While not taking a position on the particular facts at issue in this dispute, Australia considers that significant questions about the proper interpretation of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) arise regarding "public body" and "benefit".

II. PUBLIC BODY

2. Australia agrees with the approach articulated by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* and reiterated in *US – Carbon Steel (India)* for determining whether certain conduct is that of a public body. In particular, such a determination "must be made by evaluating the core features of the entity and its relationship to government" and "must focus on evidence relevant to the question of whether the entity is vested with or exercises governmental authority."¹ Based on this approach, the focus of the determination is clearly on the entity itself, and whether that entity possesses, exercises, or is vested with governmental authority.

3. China's proposed interpretation has a different focus. Under China's approach, an investigating authority must assess the particular conduct or transaction at issue – such as providing inputs or purchasing goods – and determine whether that conduct or transaction involves the performance of a governmental function.² For China, therefore, the question of whether an entity constitutes a "public body" is transaction-dependent. It can vary depending on the act in question.³ The same entity may be a "public body" for some transactions, but not for others.

4. This approach is problematic for a number of reasons. First, it does not accord with the text of Article 1.1(a)(1). In particular, the text distinguishes between "two principal categories of entities": governments and public bodies on the one hand, and private entities on the other.⁴ As the Appellate Body recognised in *US – Anti-Dumping and Countervailing Duties (China)*, all conduct of governments and public bodies constitutes a financial contribution where it falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv).⁵ There is no separate, context-specific requirement to determine whether such conduct involves the discharge of a governmental function in each instance. Rather, the "governmental" character of those entities is sufficient.⁶ By contrast, for "private entities", there must be an additional showing that the specific conduct in question results from entrustment or direction by government to carry out such conduct.⁷ Therefore, whether the conduct of a private entity is subject to Article 1.1(a)(1) is context-dependent.

5. If – as for "private entities" – the test for "public bodies" were to require a context-dependent assessment of whether the specific conduct in question flowed from the exercise of a governmental function, there would be no meaningful difference between "public bodies" and "private entities". This would render their separate inclusion in the text inutile. Further, such an interpretation would be inconsistent with the Appellate Body's distinction between the governmental character of public bodies and the non-governmental character of private entities.⁸

¹ Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 345; *US – Carbon Steel (India)*, para. 4.52.

² China's first written submission, para. 14.

³ China's first written submission, paras. 93-94.

⁴ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284.

⁵ *Ibid.*

⁶ *Ibid.* paras. 284 and 291.

⁷ *Ibid.*

⁸ *Ibid.* paras. 291-292.

6. Second, contrary to China's understanding,⁹ the Appellate Body Report in *US – Anti-Dumping and Countervailing Duties (China)* does not establish that investigating authorities must assess whether the specific conduct or transaction at issue involves the exercise of a government function as a pre-requisite to determining public body. Rather, in that case, the consideration of the specific conduct or transaction at issue was a consequence of the fact that such conduct was contained in the instrument vesting the relevant entities with governmental authority.¹⁰ There was no suggestion that, had that instrument *not* mentioned that conduct, a finding of "public body" would have been precluded.¹¹ The same is true for *US – Carbon Steel (India)*.¹²

7. Third, China's approach would impose an impractical evidentiary burden on investigating authorities by requiring an investigating authority to obtain evidence that *each* transaction or series of transactions result from a particular performance of a governmental function. In Australia's view such a requirement would make it impractical to render findings on public bodies, particularly when faced with uncooperative parties. As a result, this approach would be inconsistent with the context afforded by other elements of the SCM Agreement which affirm that investigations must be capable of rendering findings. In particular, this context includes: (i) Article 11.1, which describes the function of an investigation as to "*determine* the existence, degree and effect of any alleged subsidy"; (ii) Article 12.7, which enables an investigation to proceed even where interested Members or parties fail to provide necessary information; and (iii) Article 12.12, which clarifies that the due process safeguards contained in Article 12 are not intended to prevent an investigation "from proceeding expeditiously" in reaching determinations or applying countervailing measures. In Australia's view, the approach proposed by China would frustrate an investigating authority's discharge of its function to make determinations on "public body" and is contrary to the contextual interpretation of the obligation within the SCM Agreement.

III. BENEFIT

8. Turning to China's "benefit" claims, we understand the disagreement between the Parties regarding the interpretation of Article 14(d) in this dispute to hinge on this question: does *de jure* or *de facto* price setting by government exhaust the "very limited"¹³ circumstances in which in-country prices can be rejected or adjusted, or could such a rejection also be justified on the basis of distortions caused by other kinds of governmental measures?¹⁴

9. In Australia's view, the SCM Agreement does not define exhaustively the types of governmental measures that could justify rejecting or adjusting in-country prices. The fact that WTO jurisprudence has recognised *de jure* and *de facto* price setting as a potential basis for rejecting in-country prices does not mean that other governmental measures should necessarily be excluded in that regard.¹⁵ For instance, a governmental measure – other than price setting – could have the effect of suppressing the prices of public bodies. If that governmental measure has the same effect on private prices, it may not be appropriate to use those private prices for a comparison under Article 14(d). Instead, it may be appropriate in such circumstances to remove the price effects of the governmental measure, although we recognise that such circumstances have been described by the Appellate Body as "very limited".¹⁶

10. Australia does not express a view on whether the governmental measures at issue in the present dispute provided a sufficient basis for rejecting in-country prices. Nonetheless, Australia considers that the present dispute does not turn on whether those measures involve *de jure* or

⁹ China's first written submission, paras. 67 and 89-91; second written submission, paras. 25, 30, and 40-50.

¹⁰ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 349.

¹¹ See eg Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.

¹² *US – Carbon Steel (India)*, para. 4.29: '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.' (emphasis added)

¹³ Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

¹⁴ See China's first written submission, paras. 240 and 243; United States' first written submission paras. 251-255.

¹⁵ Indeed, the Appellate Body has stated that 'We also do not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself' (Appellate Body Report, *US – Countervailing Measures (China)*, fn 530 to para. 4.50).

¹⁶ Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

de facto price setting. For Australia, it is neither possible nor desirable to develop rigid legal rules for the kinds of governmental measures that might justify rejecting in-country prices. Such an assessment is necessarily case-specific.¹⁷ Therefore, the key question in the present dispute is whether the USDOC provided a reasoned and adequate explanation based on the particular record evidence in the investigation at issue for rejecting in-country prices.

IV. CONCLUSION

11. For the reasons outlined, Australia submits that the Panel find: (i) that the determination of "public body" does not require evidence that the entity is performing a governmental function when engaging in the impugned conduct or transaction; and (ii) that the question of whether a given governmental measure falls within the "very limited" circumstances that justify rejecting or adjusting in-country prices under Article 14(d) is necessarily case-specific and not susceptible to rigid legal rules.

12. Thank you for the opportunity to present Australia's views in this dispute.

¹⁷ See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.51.

ANNEX D-2**INTEGRATED EXECUTIVE SUMMARY OF CANADA****21 June 2017****I. INTRODUCTION**

1. Canada's views on public bodies, out-of-country benchmarks, ongoing conduct, and measures taken to comply are set out below.

II. PUBLIC BODIES

2. The Appellate Body has found that in making a public body determination, the core features of the entity at issue and its relationship with the government are what matter. The conduct of the entity in making financial contributions is not the focus of the analysis. Rather, the conduct is to be analyzed with regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the prevailing legal and economic environment.¹

3. Based on an evaluation of the core features of the entity and its relationship with the government, an investigating authority will determine either that an entity is a public body or that it is not, in the same way that an entity is either government or it is not. The designation of public body is not dependent on each action the entity takes in relation to its function. Rather, a public body designation should be made on the basis of evidence related to government policies, the applicable legal order, the prevailing economic environment in the country, and other evidence related to the core features of the entity and its relationship with the government.²

4. In addition, 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.³ Meaningful government control over an entity's functions need not be evaluated in relation to each financial contribution.⁴ Evidence of meaningful control relates to the legal, economic and policy framework of the entity, not its conduct in the provision of financial contributions under inquiry.⁵

5. China's interpretation that "an entity must be performing a 'government function' when engaged in the conduct that is the subject of the financial contribution inquiry"⁶ would effectively render the term "public body" redundant with the "entrusts or directs" provision of Article 1.1(a)(1)(iv).

III. OUT-OF-COUNTRY BENCHMARKS

6. Article 14(d) establishes a guideline for determining whether a benefit is conferred in the context of a government's provision of goods and services and the purchase of goods.⁷ A comparison is generally required in determining whether remuneration for the provision of a good is "less than adequate".⁸ This involves the selection of an appropriate comparator with which to

¹ Appellate Body Reports, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317 and *US – Carbon Steel (India)*, para. 4.29.

² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

³ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

⁴ *Ibid.* paras. 317-318.

⁵ *Ibid.* para. 350.

⁶ China's first written submission, para. 91.

⁷ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.84 and *US – Carbon Steel (India)*, para. 4.147.

⁸ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.44 and *US – Carbon Steel (India)*, para. 4.148.

compare the government price for the good in question.⁹ Moreover, investigating authorities may consider the possibility of using out-of-country benchmarks in very limited circumstances.¹⁰

7. The assessment of the benefit must be made in relation to prevailing market conditions in the country of provision.¹¹ As a result, any benchmark for conducting such an assessment must consist of market-determined prices under the prevailing market conditions for the good in question in the country of provision".¹²

8. The primary benchmark and starting point in any analysis must be prices from arm's length-transactions in the country of provision. Nevertheless, it is not the source of the prices that is determinative, but rather whether the prices are market-determined and reflective of prevailing market conditions in the country of provision. In this respect, even the prices of government-related entities in a predominant market position could be established on market principles.¹³

9. The decision to reject in-country prices must be made on the basis of a market analysis that determines that such prices are not market determined as a result of government intervention in the market.¹⁴ The key factor, nevertheless, is not government predominance or even the possession of sufficient market power *per se*.¹⁵ Rather, the key factor is evidence of how government predominance and the possession and exercise of market power has actually been used to cause price distortion. The investigating authority must demonstrate a clear evidentiary path from the government's predominant position to its possession of market power to its exercise of that power to distort market prices.¹⁶

10. Thus, in the context of this case, this compliance Panel must examine what the USDOC has actually done to analyze the precise evidentiary path showing how the Chinese government has distorted prices in the market. Moreover, the USDOC must do so in a manner that is based on positive evidence and demonstrates an adequate explanation of this conclusion.

IV. ONGOING CONDUCT

11. The ability of Members to challenge unwritten measures, including ongoing conduct, is an important mechanism for achieving both the prompt settlement of disputes and a final resolution to the dispute and is consistent with the principle that any act or omission attributable to a WTO Member can be challenged in WTO dispute settlement proceedings.¹⁷

12. The Appellate Body has described ongoing conduct as, "conduct that is currently taking place and is *likely to continue* in the future".¹⁸ The Appellate Body has said that to establish the existence of ongoing conduct a Member must show (i) that the measure is attributable to a Member; (ii) the precise content of the measure; (iii) the repeated application of the conduct; and (iv) the likelihood that such conduct will continue.¹⁹

13. It is evident from these criteria that the analytical framework for ongoing conduct is not limited to the facts of cases (*i.e. Argentina – Import measures, US – Import Measures and US –*

⁹ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.44 and *US – Carbon Steel (India)*, para. 4.148.

¹⁰ Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

¹¹ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.46 and *US – Carbon Steel (India)*, para. 4.150.

¹² Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.46 and *US – Carbon Steel (India)*, para. 4.151.

¹³ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.48 and *US – Carbon Steel (India)*, para. 4.154.

¹⁴ Appellate Body Reports, *US – Countervailing Measures (China)*, para. 4.76 and *US – Softwood Lumber IV*, paras. 98-99.

¹⁵ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.59.

¹⁶ Appellate Body Reports, *US – Countervailing Measures (China)*, paras. 4.52, 4.59 and 4.62 and *US – Carbon Steel (India)*, fn. 754.

¹⁷ Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 81. See also Appellate Body Report, *Argentina – Import Measures*, para. 5.109.

¹⁸ Appellate Body Report, *Argentina – Import Measures*, para 5.144, citing Panel Report, *US – Orange Juice (Brazil)*, paras. 7.175-7.176 (emphasis in original).

¹⁹ Appellate Body Report, *Argentina – Import Measures*, paras 5.104 and 5.108.

Orange Juice (Brazil)) in which it has existed to date. On the contrary, the analytical framework for ongoing conduct is capable of being applied in a broad range of circumstances, including the present case, provided the above four criteria are satisfied.

14. Ongoing conduct is neither "an entirely new type of 'measure'"²⁰, nor an "indeterminate number of future measures"²¹, as the United States claims; rather, ongoing conduct is an analytical tool for understanding and evaluating certain types of measures and requires evidence of repeated past application of the conduct in question.

15. Understanding and applying the analytical device of ongoing conduct in a flexible manner is necessary to allow Members to obtain relief without having to return to dispute settlement multiple times.

V. MEASURES TAKEN TO COMPLY

16. The Appellate Body has found that under the *Dispute Settlement Understanding*, a failure to fully implement the Dispute Settlement Body's (DSB) recommendations and rulings cannot be found before the end of the reasonable period of time (RPT).²² However, once the RPT has expired, the implementing Member is obligated to fully comply with the recommendations and rulings of the DSB, and any WTO-inconsistency has to cease by the end of the RPT with prospective effect.²³ When it comes to the assessment of any duties following the end of the RPT, whether implementation is compliant should not be determined by reference to the date when liability arises, but rather by reference to the time when final duty liabilities are assessed.²⁴ Thus, any subsequent reviews or proceedings may not extend the use of WTO-inconsistent methodology beyond the end of the RPT.²⁵

17. In evaluating whether a Member has implemented the DSB's recommendations and rulings, a compliance panel is to examine "measures taken to comply with the recommendations and rulings"²⁶ of the DSB and is not limited to measures that a Member says it has taken to comply.²⁷ A panel may also examine the timing, nature, and effects of other measures to determine whether there is a close nexus between such measures and the DSB's recommendations and rulings.²⁸ This nexus-based test is principled and focuses on the substance of a respondent Member's actions or omissions rather than on formalistic labels.

18. In its argument regarding Panel jurisdiction, the United States appears to be recycling lines of reasoning that were rejected by the Appellate Body in both *US – Zeroing (EC) (Article 21.5 – EC)* and *US – Zeroing (Japan) (Article 21.5 – Japan)*, and which would effectively undermine dispute settlement concerning trade remedies measures. Relying on the past decisions of the Appellate Body, the Panel should reject the United States' assertion that measures completed during the course of compliance proceedings necessarily fall outside of the Panel's jurisdiction solely on the basis of their timing. Jurisdiction should instead be determined on the basis of all three elements of the nexus-based test. Moreover, it is not important whether any of the administrative and sunset reviews challenged by China were conducted before or after the end of the RPT.²⁹ What is significant is whether WTO-consistent methodology is being applied by the investigating authority in any action taken related to a measure subject to implementation of DSB recommendations or rulings following the end of the RPT.

19. Furthermore, a measure evidenced using the analytical tool of ongoing conduct is *in principle* susceptible to review by a compliance panel.³⁰ Whether a certain alleged ongoing conduct

²⁰ United States' first written submission, para. 328.

²¹ United States' first written submission, para. 326.

²² Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.

²³ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 299.

²⁴ *Ibid.* para. 309.

²⁵ *Ibid.*

²⁶ Article 21.5 of the DSU.

²⁷ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73.

²⁸ *Ibid.* para. 77.

²⁹ See United States' first written submission, para. 321, where the United States writes that "nearly all of the measures that China identifies were concluded prior to the end of the RPT on April 1, 2016, and thus were not 'subsequently closely connected' to the measures taken to comply in this dispute".

³⁰ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

falls within the terms of reference of a compliance panel should be evaluated on the basis of the same nexus-based test that applies to all "measures taken to comply".

20. If the Panel were to accept the interpretation advanced by the United States, Members would not be able to obtain effective relief against the United States' trade remedies system through WTO dispute settlement. If Members need to bring a new dispute for each connected stage of an investigation, such as an administrative or sunset review, the next review may have been completed before the end of the reasonable period of time to comply expires. Members seeking to challenge such a sequence of determinations would find themselves in a circular process with little prospect of ever obtaining effective relief. This interpretation could not only frustrate compliance proceedings, it would also be inconsistent with the objectives of promptly settling disputes and securing positive solutions to disputes.³¹

³¹ Appellate Body Report, *US – Zeroing (Japan) (Article 21.5 – Japan)*, para. 122.

ANNEX D-3

INTEGRATED EXECUTIVE SUMMARY OF THE EUROPEAN UNION

21 June 2017

I. CONCERNING CHINA'S CLAIMS REGARDING THE USDOC'S PUBLIC BODY DETERMINATIONS**A. "Public bodies" under Article 1.1(a)(1)**

1. In *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body found that "being vested with, and exercising, authority to perform governmental functions" is a core feature of a "public body" in the sense of Article 1.1(a)(1). An entity can be vested with authority in many different ways. Whether an entity qualifies as a "public body" is, as the Appellate Body has emphasized, closely connected to the more general issue of *attribution*. All relevant evidence should be taken into account, and a wide range of factors (e.g. the links between the entity and the State, specific regulatory frameworks etc.), may be relevant. While this assessment must always be tailored to the circumstances of the case, in the EU's view, the investigating authority may also take into account more general assessments that have been placed on the record of the investigation.

2. Demonstrating the exercise of "governmental functions" is one way of showing "governmental authority". Both parties seem to agree that, to the extent that a public body determination in a given case is based on the exercise of "governmental functions", the assessment should take into account the entity's conduct. This suggests that some nexus may need to exist between the governmental function the entity is alleged to exercise and the type of conduct the entity is actually engaged in. For example, we might ask whether the alleged financial contribution falls within the scope of the governmental function said to make the entity a public body. However, this is different from asking whether the specific financial contribution constitutes a governmental function. Unlike with private bodies, it is not necessary to show that a public body was specifically entrusted or directed to provide the financial contribution at issue. Thus, a financial contribution can be attributed to a public body not only when the government in the narrow sense entrusted or directed the entity to provide it, but also if certain indicators relevant to the entity in general show that its conduct can be attributed to the WTO Member. It should also be kept in mind that there is no *a priori* limitation on what can be a governmental function for a particular WTO Member.

3. When deciding whether a certain entity is a public body, governmental regulation may be relevant. On the other hand, the mere fact that a sector is regulated does not in itself necessarily suffice to show that all entities in that sector are vested with governmental authority. Rather, all the relevant facts and elements would need to be taken into account.

B. China's challenge against the Public Bodies Memorandum "as such"**1. The timing of measures taken to comply**

4. Compliance proceedings under Article 21.5 can only assess the WTO consistency of measures "taken to comply". The Appellate Body has made clear that even if a measure is not *declared* to be a measure taken to comply, it may also be susceptible to review by a panel acting under Article 21.5 if it is a "measure [...] with a *particularly close relationship* to the declared "measure taken to comply."

5. An aspect of the close nexus test which appears to be particularly relevant in this dispute is the element of *timing*. Proximity in time between the adoption of the measure at issue and the declared measure taken to comply speaks in favour of a finding that there was a close link. It is not, however, indispensable. In that respect, the EU would observe the following.

6. Compliance proceedings should not be used to "short-circuit" original panel proceedings. If there was nothing preventing a challenge against a measure at the time of the original panel request, then the complainant may well be precluded from challenging it in compliance proceedings.

7. However, the Appellate Body has found that measures cannot be formalistically excluded from Article 21.5 proceedings for the sole reason that they pre-date the adoption of the recommendations and rulings in the original dispute. The EU does not see why they could be

similarly formalistically excluded if they pre-date the original panel request. Whether the complaining Member could have pursued a claim in the original proceeding is a more complex matter than whether a particular legal text had been published prior to the original panel request. For example, a measure may become *de facto* WTO-inconsistent over time even while its text remains the same. The crucial question, in the EU's view, is whether the measure is indeed "taken to comply". If so, it is difficult to see how due process would be served by excluding it from the scope of Article 21.5 proceedings for reasons of timing alone. The Appellate Body has recognized as much (in *US – Zeroing (EC) (Article 21.5 – EC)*).

2. Measures subject to challenge in WTO dispute settlement, "as such" and otherwise

8. Article 3.3 of the DSU speaks simply of "measures taken by another Member". The concept of a measure is broad; it extends to any act or omission that is attributable to a WTO Member. The arguments of the United States on this point seem to be more pertinent to a different, more specific issue: whether the measure has "general and prospective application".

9. The evidence and arguments that must be supplied to show the existence of a measure are a function of how the measure is described or characterized by the complainant. A range of factual elements may come into play when deciding whether a measure indeed has general and prospective application: for example, whether the challenged "rule or norm" is systematically applied, and what the "concrete instrumentalities" that evidence its existence are. The mere fact that the measure itself does not explicitly state that it is of general or prospective application (or, for example, that it lays down a policy that must be followed in all future cases) does not in itself settle the issue.

II. CONCERNING CHINA'S CLAIM UNDER ARTICLE 14(D) REGARDING THE USDOC'S REJECTION OF IN-COUNTRY BENCHMARK PRICES

10. The EU recalls that Article 14(d) SCM stipulates that the determination of benefit in case of the provision of goods by a government depends on whether the remuneration is less than adequate which shall be determined "in relation to prevailing market conditions for the good in the country of provision." It follows that in-country prices must be "market-determined."

11. The EU recalls the Appellate Body's statement that what permits the use of out-of-country benchmarks is price distortion which must be established on a case-by-case basis. The EU considers that a finding of price distortion may be the result of the market power of the government as a supplier of the good in question or the result of other government interventions not related to the government's market power, or be based on a combination of both elements. While the EU considers that the legal and evidentiary threshold for a finding of price distortion is high because out-of-country benchmarks may only be used in "very limited circumstances", it does not agree with China that the individual price must be "effectively determined" in the sense of being set or fixed by the government. The distortion by the government of important parameters that are relevant for price-building, for example government interventions affecting demand or supply, may also be considered in this regard. At the other end of the spectrum, the EU does not believe that a mere "change in the conditions of competition" would, in itself and without more, necessarily always be enough for an inference of price distortion as proposed by Japan.

12. The EU considers that an evidentiary link is required that leads from the government interventions in question to the distortion of the domestic price. Such evidentiary link will depend on the particular circumstances of each case.

13. According to the EU several considerations may be relevant for establishing such an evidentiary link. First, evidence relating to government interventions that are directly relevant for prices or price-setting will normally carry more weight than evidence relating to government interventions that only have an indirect impact on prices. Second, and in a similar vein, the closer the relevant evidence is related to the product or sector in question, the more weight it will normally carry. For example, evidence regarding government interventions directly impacting the product or sector in question will carry more weight than evidence regarding government interventions regarding the overall economy, for example monetary policy. Third, the level of evidence required to demonstrate price distortion through government interventions may depend on the degree of market power of the government as a supplier. In particular, the more market power a government exercises as supplier of the product in question, the less additional evidence regarding other government interventions will normally be required to show price distortion. The

EU agrees with the United States that the "totality of the evidence" will be relevant for an assessment of price distortion.

14. The EU does not take position whether the USDOC discharged its burden in the present case.

III. CONCERNING CHINA'S CLAIM OF INCONSISTENCY WITH ARTICLE 2.1(C)

A. China's claims regarding "subsidy programmes"

15. The EU recalls that the Panel found in the original proceedings that "the consistent provision by the State-owned enterprises ("SOEs") in question of inputs for less than adequate remuneration" provided a sufficient basis for the USDOC's identification of subsidy programmes.

16. The EU disagrees with China's argument that the USDOC, by finding a "subsidy programme" through the mere identification of subsidies provided to individual companies, would "render meaningless" the distinction between the term "subsidy" and "subsidy programme" that would have been established by the Appellate Body. The EU considers that although Article 1.1 does not refer expressly to the term "programme", a number of terms in Article 1.1 indicate that the definition extends both to a subsidy in the form of a subsidy to one enterprise, and a subsidy in the form of a subsidy programme.

17. The main issue in this dispute appears to be not so much an issue of the correct definition of the term "subsidy" or "subsidy programme" as China seems to argue, but rather an evidentiary issue that is rooted in the particular situation of "unwritten" subsidies which are the subject of the present case.

18. A different question and the issue which – at least in case of written measures - is usually the main focus of Article 2.1(c), is the question whether the subsidy programme so established, is "used by a limited number of enterprises". The EU considers that both issues should be kept strictly separate.

B. China's claims regarding the "duration" of the subsidy programmes

19. The EU recalls the statement of a previous panel which found that the notion of specificity has to do with whether a subsidy is sufficiently broadly available throughout an economy so as not to benefit "certain enterprises". The need to take account of "the length of time during which the subsidy programme has been in operation" must be understood in this context.

20. In deciding whether the USDOC adequately took into account the length of the subsidy programme, the EU considers that the Panel may take into account: (i) the fact that it is uncontested by China that the subsidy programme existed for at least one year; (ii) the fact that the USDOC requested, and presumably analysed, data for a 3-year period; (iii) the fact that the inputs in question have been provided for a long period of time in a mature industry and (iv) the fact that China has not put forward any argument or evidence that the subsidy programme was only in existence of a short time period.

IV. CONCERNING CHINA'S CLAIM OF INCONSISTENCY WITH ARTICLE 2.2

21. The EU recalls that the question of the legal relevance of a "distinct land regime" under Article 2.2 was brought before the Appellate Body by China in *US – Anti-Dumping and Countervailing Duties (China)*. While the Appellate Body did not rule on this issue, its statements in this respect imply support for the position that the mere existence of a "distinct land regime" within a wider geographical area of the granting authority, does not suffice to demonstrate regional specificity. The EU considers that the mere existence of a distinct land regime may normally not in itself be sufficient for a finding of regional specificity. An investigating authority must take into account all relevant evidence, notably evidence that land is provided for less than adequate remuneration also outside the industrial park in question.

ANNEX D-4**INTEGRATED EXECUTIVE SUMMARY OF JAPAN****21 June 2017**

1. In this proceeding, Japan addresses the interpretation and application of the term "public body" in Article 1.1(a)(1) and the calculation of the amount of the subsidy under Article 14(d).

I. PUBLIC BODY INQUIRY

2. The standard for the analysis of "public body" that has been established in prior cases is whether the entity at issue "possesses, exercises or is vested with governmental authority."

3. The issue raised by China in these proceedings concerns the relationship between the government function and the conduct that allegedly constitutes a financial contribution. China's position is that the government function identified by an investigating authority, in the context of a public body analysis, must be the same government function that the entity at issue is performing when it engages in the conduct that is the subject of the financial contribution inquiry.

4. In Japan's view, an investigating authority is not required to establish such a link between the relevant government function and the conduct that is the subject of the financial contribution inquiry, as the relevant analysis must focus on the characteristics, features or nature of the relevant entity and not on its specific conduct or transaction it engages in. To require such a link would conflate two distinct requirements, namely, whether an entity is a "public body" and whether such entity's conduct is a "financial contribution."

5. The focus on the characteristics or features of the relevant entity is evident throughout the Appellate Body's analysis. For example, in *US — Anti-Dumping and Countervailing Duties (China)*, the Appellate Body clearly stated that "[p]anel or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of *the core features of the entity concerned*, and its relationship with government in the narrow sense,"¹ and that an investigating authority must "evaluate and give due consideration to all relevant characteristics of the entity" and must "avoid focusing exclusively or unduly on any single characteristic without affording due consideration to others that may be relevant."²

6. The Appellate Body further found, in *US — Carbon Steel (India)*, that "[w]hether 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."³

7. With regard to specific elements or evidence to be evaluated, a flexible approach and an examination of different types of evidence are required given 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."⁴ In this regard, the Appellate Body further explained that "[t]here are many different ways in which government in the narrow sense could provide entities with authority" and "[a]ccordingly, different types of evidence may be relevant to showing that such authority has been bestowed on a particular entity."⁵

8. From the standpoint of Japan, an important element in the evaluation of the "core features of the entity concerned, and its relationship with government in the narrow sense" is whether such an entity is structured in a manner that allows it to act not solely in accordance with commercial

¹ Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 317. (emphasis added)

² *Ibid.*, para. 319.

³ Appellate Body Report, *US — Carbon Steel (India)*, para. 4.29. (emphasis added)

⁴ Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 317.

⁵ Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 318.

considerations. Where an entity is structured in a manner that enables it to engage in activities that a private market actor (in particular, a private company) is unable to reasonably and sustainably engage in, this would constitute a strong indication that the entity is vested with a governmental function, even if that entity is not vested with any *de jure* governmental authority, e.g. a regulatory power.

9. What private entities can reasonably and sustainably engage in and what they are incapable of doing (i.e. what only the government can do) may be objectively distinguished since, for example, private entities' financial capabilities are limited unlike entities that have recourse to financial capabilities provided by the government. Therefore, Japan considers that whether an entity is structured to act not solely in accordance with commercial considerations could bring an objective and strongly probative perspective to the "public body" analysis.

10. Having said that, Japan would like to note that the analysis of governmental function must always involve looking at the relationship between the entity and the government in the narrow sense, and if there is no such a relationship found, it is difficult to say a "government" function exists.

11. China's proposed interpretation is problematic since it would require a twofold assessment of whether a private body has been entrusted or directed to carry out a government function: first, as part of the evaluation of whether the relevant SOEs are public or private bodies; and, second, after they have been found to be private bodies, to determine whether there is entrustment or direction of such SOEs to carry out the particular conduct that is subject to financial contribution inquiry, as provided for in Article 1.1(a)(1)(iv). Thus, China's argument would result in drawing an arbitrary requirement that is specific to subparagraph (iv) and apply it to the whole of Article 1.1(a)(1) in the context of the independent requirement of "public body." Such an approach is not consistent with the customary rules of interpretation of international law reflected in the Vienna Convention.⁶

II. THE CALCULATION OF THE AMOUNT OF A SUBSIDY UNDER ARTICLE 14(D)

12. Article 14 of the SCM Agreement sets out guidelines for the calculation of benefit. Subparagraph (d) of Article 14 concerns the provision of goods or services or the purchase of goods by a government. According to the guidelines provided in Article 14(d) of the SCM Agreement, the provision of goods or services or purchase of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration, or the purchase is made for more than adequate remuneration. Article 14(d) further explains that the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase.

13. With respect to these guidelines, the Appellate Body in *US — Softwood Lumber IV* has found that prices in the market of the country of provision or purchase are "the primary, but not the exclusive benchmark" for the calculation of benefit under Article 14(d) and has confirmed that "an investigating authority may use a benchmark other than private prices of the goods in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods".

14. China and the United States disagree with respect to the interpretation and application of the phrase "prevailing market conditions" and, in particular, as to the circumstances in which an investigating authority may depart from in-country prices to determine the adequacy of remuneration.

15. China argues for a very strict standard in which in-country prices must be used except when the investigating authority determines that "the government action or policy, whatever it is, effectively determined all other domestic prices for the same or similar goods, such that a

⁶ See Appellate Body Report, *India — Patents (US)*, para. 45.

comparison between the price of the government-provided good and a domestic benchmark price would amount to a circular comparison between two government-determined prices."⁷

16. The United States, for its part, submits that the fundamental issue in determining whether to rely on an out-of-country benchmark under Article 14(d) is price distortion. The United States argues that China's proposed interpretation would arbitrarily preclude investigating authorities from addressing situations in which government action has rendered prices not market-determined.⁸

17. Japan agrees with the United States that Article 14(d) does not establish that price distortion can be found only when an investigating authority finds that the government effectively determined all other domestic prices for the same or similar goods. China's overly demanding test is not required by either the text of Article 14(d) or prior rulings.

18. Japan recalls the Appellate Body's finding in *US — Anti-Dumping and Countervailing Duties (China)* that the key question to be determined is whether there is "price distortion" in the market, and "price distortion must be established on a case-by-case basis."⁹ The Appellate Body in *US — Carbon Steel (India)* has further explained that, in the context of Article 14(d), prevailing market conditions "consist of generally accepted characteristics of an area of economic activity in which the forces of supply and demand interact to determine market prices."¹⁰ The Appellate Body in *EC and certain member States — Large Civil Aircraft* has also explained that market prices are "not dictated solely by the price a seller wishes to charge, or by what a buyer wishes to pay."¹¹ Instead, "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."¹² In economic terms, as the United States noted, "equilibrium" is "[a] situation in which supply and demand are matched and prices are stable."

19. Japan notes that, with regard to specific elements to consider in finding "price distortion", the Appellate Body in *US — Carbon Steel (India)* has stated that "an investigating authority may be called upon to examine various aspects of the relevant market."¹³ This examination may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers. It could also require assessing the behavior of the entities operating in that market in order to determine whether the government itself, or acting through government related entities, exerts market power so as to distort in-country prices.

20. It is also notable that the Appellate Body in *US — Countervailing Measures (China)* has made clear that what an investigating authority must do "will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information". Thus, as the Appellate Body in *US — Softwood Lumber IV* and *US — Countervailing Measures (China)* has stated, the assessment of price distortion is fact-specific and must be conducted on a "case-by-case basis", taking into account "all of the evidence". These Appellate Body findings support Japan's views that, for purposes of Article 14(d), "distortion" may be established through a holistic assessment of the market. Thus, even in cases where an investigating authority cannot find that the government effectively determined prices for the good in question, "distortion" of the relevant market may be established when there is other evidence that, considered through a holistic analysis of the market, indicates so.

21. China's position seems to be based on the misunderstanding that in-country prices can only be found to be distorted in situations in which the government administratively determines prices or is the provider of the good. However, the Appellate Body in *US — Countervailing Measures*

⁷ China's second written submission, para. 148.

⁸ United States' second written submission, para. 165.

⁹ Appellate Body Report, *US — Anti-Dumping and Countervailing Duties (China)*, para. 446.

¹⁰ Appellate Body Report, *US — Carbon Steel (India)*, para. 4.150.

¹¹ Appellate Body Report, *EC and certain member States — Large Civil Aircraft*, para 981.

¹² *Ibid.*

¹³ Appellate Body Report, *US — Carbon Steel (India)*, para. 4.157.

(China) expressly left open the possibility "that the government may distort in-country prices through other entities or channels than the provider of the good itself."¹⁴

22. Japan also believes that a possible approach to determine distortion is to evaluate whether the price in the market is formed through arm's length transactions based on the respective market actors' commercial considerations. A "market" should in principle consist of actors that act solely in accordance with commercial considerations, as opposed to non-commercial considerations, such as the achievement of governmental policy objectives. Evidence that actors do not operate on the basis of commercial considerations will provide a strong indication that prices resulting from interactions of these operators are distorted, and consequently may cause a price distortion of the relevant market.

23. Finally, Japan agrees with Canada that "the investigating authority must demonstrate a clear evidentiary path". However, in Japan's view, this "evidentiary path" should be between the government intervention (more broadly defined than predominance) and the distortion of market prices.

¹⁴ Appellate Body Report, *US — Countervailing Measures (China)*, footnote 530 to para. 4.50.