



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

AB-2018-2

Report of the Appellate Body

5.5 Separate opinion of one Division member

5.5.1 Public Body

5.242. I concur with the majority in: (i) rejecting China's interpretation of the term "public body" under Article 1.1.(a)(1) of the SCM Agreement⁷⁴⁵; (ii) upholding the Panel's conclusion that China failed to demonstrate that the USDOC's public body determinations in the relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1)⁷⁴⁶; and (iii) leaving intact the Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).⁷⁴⁷

5.243. But I believe the majority has repeated an unclear and inaccurate statement of the criteria for determining whether an entity is a public body, and I disagree with the majority's implication that a clearer articulation of the criteria is neither warranted nor necessary.

5.244. I believe the continuing lack of clarity as to what is a "public body" represents an instance of undue emphasis on "precedent", which has locked in a flawed interpretation that has grown more confusing with each iteration⁷⁴⁸, as litigants and Appellate Body Divisions repeated the original flaw while trying to navigate around it. That is what I believe the majority has done here.⁷⁴⁹

5.245. The original mistake was the attempt, in *US – Anti-Dumping and Countervailing Duties (China)*, to define the term "public body" as an entity that "possesses, exercises or is vested with governmental authority".⁷⁵⁰ Certainly that is *one* way to identify a public body. But it is not the *only* way to give meaning to a concept that must be flexible because it depends for its meaning on specific circumstances. In each subsequent appeal where the issue has been presented, the Appellate Body has treated the phrase "possesses, exercises or is vested with governmental authority" as a necessary element for determining whether an entity is a public body – albeit while adding criteria that seemed to undermine the role of that element.⁷⁵¹ That has sown confusion as participants and the Appellate Body have struggled to show how situational criteria fit with a rigid and limiting phrase.

5.246. This case is the latest example. The participants and third participants all dutifully claimed that their positions fit the "possesses, exercises or is vested with governmental authority" criterion, while differing – sharply in the case of the two participants – in their understanding of what that criterion means. One participant, the United States, expressly asked us to clarify the meaning of the term "public body".⁷⁵² For this reason, and for the other reasons given above, I believe a clarification of the criteria for determining whether an entity is a public body is both necessary and warranted.

⁷⁴⁵ Para. 5.105 above.

⁷⁴⁶ Para. 5.105 above.

⁷⁴⁷ Para. 5.126 above.

⁷⁴⁸ While past Appellate Body reports may assist in clarifying the meaning of a provision in the context of a given dispute, they are not a substitute for the text that was negotiated and agreed by WTO Members.

⁷⁴⁹ Among other things, the majority has restated the following: (i) a public body is an entity that "possesses, exercises or is vested with governmental authority" (para. 5.95 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317)), or has the authority to exercise "governmental functions" (para. 5.96 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318)); (ii) the question of whether an entity is a public body is informed by what conduct or functions "are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", as well as "the classification and functions of entities within WTO Members generally" (para. 5.95 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297)); (iii) governmental exercise of "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 (para. 5.96 above (quoting Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318)); and (iv) the "relevant evidentiary elements" for a public body determination should not be conflated with "the *definition* of a public body" (para. 5.97 above (referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.37) (emphasis original)).

⁷⁵⁰ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

⁷⁵¹ See e.g. Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

⁷⁵² The United States specifically asked us to "clarify ... the interpretation of the term 'public body'" and to "confirm that a public body is any entity that a government meaningfully controls, such that when the entity conveys economic resources, it is transferring the public's resources." (United States' opening statement at the oral hearing, para. 18)

5.247. The text of Article 1.1(a)(1) does not elaborate on the meaning of the term "public body". The only textual indication is the collective reference to "a government or any public body" as comprising the entity "government", which is the subject of the disciplines of the SCM Agreement. This text does not call for a single, abstract definition or basic criterion for the term "public body". Instead, Article 1.1(a)(1) calls for an examination of whether a transfer of financial value is "by a ... public body" and can therefore be attributed to a government. As I see it, that examination involves an assessment of the relationship between the relevant entity and the government.⁷⁵³ When that relationship is sufficiently close, the entity in question may be found to be a public body and all of its conduct may be attributed to the relevant Member for purposes of Article 1.1(a)(1). The relationship between an entity and a government may take different forms, depending on the legal and economic environment prevailing in the relevant Member. Certainly, as noted above, an entity may be found to be a public body when it "possesses, exercises or is vested with governmental authority". But that is not, and should not be treated as, *the* essential criterion in every case. In my view, if a government has the ability to control the entity in question and/or its conduct, then the entity could be found to be a public body within the meaning of Article 1.1(a)(1). I do not believe the Appellate Body should elaborate on the meaning of the term "public body" in greater detail. Rather, it should leave space for domestic authorities to apply the criteria described above, and set forth in the paragraph immediately below, provided their decisions meet the requirements of objectivity, reasoned and adequate explanation, and sufficient evidence.

5.248. In the hope of providing clearer guidance to future litigants and panels, and of encouraging them not to feel unduly constrained by past statements on this subject, I offer the following restatement, which incorporates many of the concepts developed by the Appellate Body, while, I believe, clarifying the criteria properly:

Whether an entity is a public body must be determined on a case-by-case basis with due regard being had for the characteristics of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the entity operates. Just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. An entity may be found to be a public body when the government has the ability to control that entity and/or its conduct to convey financial value. There is no requirement for an investigating authority to determine in each case whether the investigated entity "possesses, exercises or is vested with governmental authority".

5.5.2 Benefit

5.249. I concur with the majority in rejecting China's interpretation of Article 14(d) of the SCM Agreement, including China's claim that circumstances justifying recourse to out-of-country prices are limited to those in which the government "effectively determines" the price at which a good is sold. But I disagree with the majority's decision to uphold the Panel's finding that China demonstrated that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings.

5.250. The relevant part of Article 14(d) provides that "[t]he adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision". It is well settled that this does not require a domestic authority to rely on in-country prices in all circumstances.⁷⁵⁴ The Panel and the majority accept this interpretation but fault the USDOC for not providing an "explanation of *how* government intervention *actually* results in price distortion"⁷⁵⁵, thereby, in my view, effectively reading Article 14(d) as imposing an obligation on investigating authorities to always justify recourse to out-of-country prices through a quantitative

⁷⁵³ See Appellate Body Reports, *US – Carbon Steel (India)*, para. 4.29; *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

⁷⁵⁴ "[A] proper market benchmark is derived from an examination of the conditions pursuant to which the goods or services at issue would, *under market conditions*, be exchanged", so that "any benchmark for conducting such an assessment must consist of market-determined prices for the same or similar goods" that relate to the prevailing market conditions in the country of provision. (Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151 (italics original; underlining added))

⁷⁵⁵ Para. 5.155 above.

analysis of in-country prices themselves, regardless of whether those prices have already been found to be distorted, including in cases where they have not even been placed on the record.⁷⁵⁶

5.251. The Panel rejected the USDOC's benchmark analysis in each of the four underlying Section 129 proceedings in a single paragraph of the Panel Report, dismissively saying that "the USDOC *did not find it necessary* to demonstrate how the actions of the GOC influenced the in-country price of the inputs at issue"; that "[t]he USDOC *did not even attempt* to provide a reasoned and adequate explanation for its determinations that in-country prices ... were distorted as a result of pervasive government intervention"; and that "the USDOC outlined governmental involvement in the relevant markets and, *on that basis alone*, determined that it could not use in-country prices of the relevant inputs to assess the adequacy of remuneration."⁷⁵⁷ The majority said it accepted that different methods – including a qualitative analysis – may serve as a basis for a domestic authority to explain how government intervention results in distortion of in-country prices, but in fact, the majority rejected the USDOC's extensive qualitative analysis and wrote an opinion that, in my view, can only be read as requiring a quantitative analysis in all cases involving resort to out-of-country prices.

5.252. Here is what the USDOC did, which the Panel dismissed in three sentences and without any objection from the majority. In its Benchmark Memorandum, the USDOC assessed a number of factors relating to the Government of the People's Republic of China's (GOC's) intervention with state-invested enterprises (SIEs) in general, and in China's steel sector specifically.⁷⁵⁸ In particular, the USDOC examined: (i) the involvement of the GOC in the functioning of China's SIEs; (ii) detailed industrial plans directing ministries to reduce the number of firms, and to increase the scale of production; (iii) government control exerted over appointments to the board of directors and corporate positions; (iv) evidence regarding controlled mergers and acquisitions; and (v) bankruptcy prevention and other indicia of government intervention with the functioning of the market. In assessing the functioning of SIEs in the steel sector in particular, the USDOC pointed to the sector's place as a "pillar" industry in which the state retains "somewhat strong influence"; evidence of increasing excess capacity; export restraints; "five-year plans" detailing favoured and unfavoured production scales, investments, technologies, products, and production locations; strict control over investments; control over SIEs' appointment processes; hindered bankruptcy of large SIEs; and preferential access to capital, land, and energy.⁷⁵⁹ With respect to the prices of private steel producers in China, the USDOC examined a number of factors, including the SIEs' significant market share, the presence of many SIE steel producers shielded from competitive market forces, export restraints on steel input products, restrictions on foreign investment, and other factors.⁷⁶⁰ In addition, in the Supporting Benchmark Memorandum, the USDOC referred to the inadequacy of questionnaire responses leading to an absence of representative price data, and a need to rely, in part, on facts available with respect to the input-specific market analysis of the three steel inputs.⁷⁶¹ In the Final Benchmark Determination, the USDOC additionally explained why it could not carry out a price alignment analysis to further support its explanation that private steel input prices in the underlying proceedings were distorted.⁷⁶² Finally, with respect to the Solar Panels investigation and in light of the GOC's failure to respond to the USDOC's request for information, the USDOC relied

⁷⁵⁶ In the Solar Panels Section 129 proceeding, the Panel found that there was no relevant information on arm's-length in-country prices of polysilicon in China before the USDOC. (Panel Report, para. 7.222)

⁷⁵⁷ Panel Report, para. 7.206. (emphasis added)

⁷⁵⁸ See e.g. Panel Report, paras. 7.186-7.188.

⁷⁵⁹ Panel Report, paras. 7.186-7.189. See Benchmark Memorandum (Panel Exhibit CHN-20), pp. 6-26.

⁷⁶⁰ Panel Report, para. 7.190 (referring to Benchmark Memorandum (Panel Exhibit CHN-20), p. 28). On this basis, the USDOC found that "the evidence on the record demonstrates that these input prices are not based on market conditions within the meaning of Article 14(d) of the SCM Agreement and, as a result, these input prices are inappropriate to use as benchmarks to determine the adequacy of remuneration." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 21)

⁷⁶¹ The USDOC found that "information necessary to an input-specific market analysis is not available on the record, within the meaning of section 776(a)(1) of the Act", given that "the GOC unequivocally responded that it did not possess the information requested by the Department, and because the information supplied is too incomplete to serve as a reliable basis upon which to evaluate the respective input markets as a whole." Therefore, "in addition to, and in the alternative to, [its] determination about the Chinese steel sector as a whole", the USDOC also relied upon "the facts otherwise available, pursuant to section 776(a) of the Act, with regard to the particular steel inputs at issue." (Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 6)

⁷⁶² Final Benchmark Determination (Panel Exhibit CHN-21), pp. 20-21.

entirely on facts available.⁷⁶³ The Benchmark Memorandum and Supporting Benchmark Memorandum, together with the underlying evidence in support of the USDOC's conclusions, ran to hundreds of pages.

5.253. The Panel professed to recognize that the type of benchmark analysis an investigating authority may conduct will vary depending on the circumstances of the case and the characteristics of the relevant market.⁷⁶⁴ Yet, somehow, the Panel discarded the entire reasoning and supporting evidence in the Benchmark Memorandum and Supporting Benchmark Memorandum in a single paragraph, characterizing the USDOC's determinations as "not even [an] attempt" to provide an explanation as to why in-country steel prices are not market-determined.⁷⁶⁵ And the majority, writing more extensively, upheld the Panel.

5.254. In finding that the USDOC "failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price"⁷⁶⁶ without any assessment of the USDOC's arguments and evidence, the Panel in effect faulted the USDOC for not having further analysed in-country prices, even where it had already found those prices to have been distorted. Why that should have been required in this case is not clear. Provided that it has sufficiently explained why it considers the respective government interventions to have distorted domestic prices, I do not see why the USDOC should have been required to rely on or further analyse such in-country prices in the context of a benchmarking analysis by, for example, comparing in-country prices with a hypothetical market-determined benchmark and finding the existence of a deviation.⁷⁶⁷ Indeed, such prices may reflect the very same government interventions that gave rise to the subsidy the USDOC sought to countervail. The Panel does not appear to have recognized this in its review of the USDOC's determinations. Nor, regrettably, have my colleagues. In any event, the result is that the Panel considered the USDOC's analysis and reasoning regarding various types of government interventions and policies affecting prices to be *a priori* insufficient to establish price distortion.

5.255. I believe the Panel and the majority were in error in many ways. Let us look at them in some detail. First, the Panel characterized the USDOC's finding as a mere "outlin[ing of] governmental involvement in the relevant markets".⁷⁶⁸ However, the USDOC's analysis led it to conclude that "*the prices of steel produced by China's SIEs in the domestic market cannot be considered to be 'market-determined' for purposes of a benchmark analysis under Article 14(d) of the SCM Agreement.*"⁷⁶⁹ Similarly, the USDOC found that "the entire structure of the steel market is distorted by longstanding, systemic and pervasive government intervention, which so diminishes the impact of market signals that, based on the records in these proceedings, *private prices cannot be considered market based or usable as potential benchmarks.*"⁷⁷⁰ The emphasis of the USDOC's

⁷⁶³ Supporting Benchmark Memorandum (Panel Exhibit USA-84), pp. 7-9. See also Final Benchmark Determination (Panel Exhibit CHN-21), p. 21.

⁷⁶⁴ Panel Report, para. 7.212.

⁷⁶⁵ United States' appellant's submission, para. 116 (quoting Panel Report, para. 7.206). The United States considers that "only the ... Panel's misunderstanding of the appropriate approach can explain its characterization of thousands of pages of evidence and analysis as having merely 'outlined government involvement' or its conclusion that the USDOC 'did not even attempt to provide a reasoned and adequate explanation for its determinations'". (Ibid., para. 117 (quoting Panel Report, para. 7.206))

⁷⁶⁶ Panel Report, para. 7.206. (emphasis original)

⁷⁶⁷ In my view, the second sentence of paragraph 4.155 of the Appellate Body report in *US – Carbon Steel (India)* – that "[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 governmental intervention in the market" – is more accurately described as one circumstance that merits a finding that prices are not market-determined. The sentence that immediately precedes it more appropriately lays out the applicable standard, namely, that "[a]lthough the benchmark analysis begins with a consideration of in-country prices for the good in question, it would not be appropriate to rely on such prices when they are not market determined." The majority lightly dismissed the United States' argument, noting that the first two sentences of paragraph 4.155 of the Appellate Body report in *US – Carbon Steel (India)* together form part of the interpretation of Article 14(d). However, it does not follow from isolated quotes taken from previous Appellate Body reports that the Panel properly interpreted Article 14(d), rather than reading into that provision a requirement to establish a "deviation" from a market benchmark as a condition for recourse to out-of-country prices.

⁷⁶⁸ Panel Report, para. 7.206.

⁷⁶⁹ Benchmark Memorandum (Panel Exhibit CHN-20), p. 26. (emphasis added) See also Panel Report, para. 7.189 (referring to Benchmark Memorandum (Panel Exhibit CHN-20), p. 26).

⁷⁷⁰ United States' appellant's submission, para. 108 (quoting Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 4). (emphasis added)

analysis in the Benchmark Memorandum was on the extent to which China's SIEs and private actors in the steel sector are insulated from market forces and not responsive to market pressures and disciplines, i.e. on a qualitative assessment of the nature and effects of the various government interventions in the steel market. These government interventions, taken together, are at the very least capable of significantly hampering competition in the market and thereby distorting firms' decision-making process with regard to prices.⁷⁷¹ This conclusion is in line with the understanding that government interventions that do not impact prices directly may distort market conditions to such an extent that prices can no longer be considered as market-determined.⁷⁷² Therefore, only a meaningful examination by the Panel of the USDOC's analysis, reasoning, and underlying evidence could allow for a conclusion as to whether or not the USDOC provided in this case a sufficient explanation for its decision to have recourse to out-of-country prices. Yet, the Panel did not carry out any such review of the USDOC's analysis. With respect to the Solar Panels investigation, there is no mention whatsoever of the USDOC's analysis based on adverse facts available or of its conclusion that "the *prices* of polysilicon in China are not based on market conditions."⁷⁷³ Nevertheless, the Panel's conclusion in paragraph 7.206 of its Report also applies to this determination.

5.256. Significantly, the majority faulted the USDOC for an alleged failure to provide "a sufficient assessment of how the various forms of government interventions, taken individually or together, impacted upon the prices in China's steel market, and specifically the input markets at issue, and how they actually resulted in the distortion of all the SIE and private *prices* of those inputs in those markets, as opposed to more generally distorting the *market*."⁷⁷⁴ Where did the majority get this, considering that the Panel did not engage in any such assessment and indeed provided no substantive analysis of the USDOC's reasoning and underlying evidence? Rather than reviewing the Panel's findings to determine whether the Panel had erred in its interpretation and application of Article 14(d), it seems to me that the majority instead engaged in its own review of the USDOC's determinations and, based on that review, upheld the Panel's findings that were based on the wrong legal standard and reflected virtually no engagement with the USDOC's determinations. In this way, the majority appears to have assumed the role of a panel in drawing conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the Panel. In my view, that would appear to exceed the Appellate Body's mandate to review "issues of law covered in the panel report and legal interpretations developed by the panel".⁷⁷⁵

5.257. Second, the Panel recognized that "an investigating authority may carry out ... a market analysis at different levels of detail with respect to the products in question, depending on the circumstances of the case."⁷⁷⁶ Having said that, however, the Panel does not appear to have taken into account the USDOC's qualitative analysis, which led it to conclude that: (i) prices in the entire steel sector could not be considered market-determined and similar rationale applied to the markets

⁷⁷¹ Thus, for instance, government interventions with the purpose of significantly increasing production of a certain good in combination with a policy of restricting or creating disincentives for any exports of the said good, which may lead to artificially low prices even if that was not the direct result of the objective of the intervention. (See European Union's third participant's submission, para. 59 (referring to European Union's third party submission to the Panel, para. 64))

⁷⁷² See European Union's third participant's submission, para. 59 (referring to European Union's third party submission to the Panel, para. 64). As the European Union points out, price distortion may be evidenced by government interventions that have a direct impact on the price of goods in a given market (for example, "the appointment of CEOs by the government with an instruction to pursue a specific pricing policy" and/or "the manipulation by the government of prices of public tenders"). But there may also be government interventions that do not necessarily impact prices directly, but nonetheless distort "market conditions". For example, government interventions or policies that increase production and restrict exports may, taken together, lead to artificially low in-country prices such that recourse to out-of-country prices may be warranted.

⁷⁷³ Final Benchmark Determination (Panel Exhibit CHN-21), p. 21. (emphasis added)

⁷⁷⁴ Para. 5.171 above.

⁷⁷⁵ DSU, Article 17.6.

⁷⁷⁶ Panel Report, para. 7.202.

of the specific steel inputs at issue⁷⁷⁷; (ii) information needed to conduct an input-specific market analysis was not provided by China in response to the USDOC's questionnaires and, thus, was not on the record⁷⁷⁸; and (iii) the USDOC had data from the original investigations relating to the considerable market shares of SIEs in the three input markets at issue.⁷⁷⁹ This conclusion was based "on the totality of circumstances in the Chinese steel sector including, *inter alia*, the GOC's other policy interventions in the sector (*e.g.*, industrial policies affecting both the suppliers and purchasers of the steel inputs, forced mergers and acquisitions, subsidies, investment restrictions, and export restrictions), all of which serve to distort firm-level decisions thereby preventing the existence of the market conditions which are necessary for a proper benchmark under Article 14(d) of the SCM Agreement."⁷⁸⁰ In addition, the USDOC reviewed the available evidence on the record, including price evidence presented by the GOC⁷⁸¹, but concluded that "this evidence does not demonstrate that prices in the steel input markets in question in China are appropriate for use as benchmarks to determine the adequacy of remuneration in the relevant investigations."⁷⁸² As the Appellate Body has said, where 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."⁷⁸³ While the USDOC did not base, and indeed was not required to base, its analysis on *input-specific prices*, it appears, even from the Panel's description of the USDOC's analysis, that the USDOC did in fact make findings with regard to *the specific steel markets* at issue.⁷⁸⁴ The USDOC extended its finding that prices in

⁷⁷⁷ The USDOC found that "[o]verall, the entire structure of the steel market is distorted by longstanding, systemic and pervasive government intervention, which so diminishes the impact of market signals that, based on the records in these proceedings, private prices cannot be considered 'market based' or usable as potential benchmarks." The USDOC then concluded that "[t]his finding is based on evidence of pervasive government intervention in the steel sector as a whole, which necessarily includes all types of steel inputs sold in the PRC. The record evidence does not indicate that this finding applies with any less force to the three specific inputs in question in these proceedings, hot-rolled steel, steel rounds and stainless steel coils, or that the market for the three products has been insulated from these sectoral-wide distortions. Rather, the Government of the PRC (GOC) has placed on the record information regarding industrial policies that are cited in the Benchmark Memorandum and other measures that have served to further distort the market for the three inputs. For example, the records in these three cases demonstrate the existence of export restraints for these three products during the relevant periods of investigation." (Supporting Benchmark Memorandum (Panel Exhibit USA-84), pp. 4-5 (fns omitted))

⁷⁷⁸ The USDOC reasoned that, "[i]n light of the foregoing, a detailed analysis of the specific markets for hot-rolled steel, steel rounds and stainless steel coils is not integral to our finding of market distortion. However, we nonetheless considered whether to conduct such an analysis, and we concluded that the information needed to conduct an input-specific market analysis is not on the record of these proceedings. Although the Department requested information from the GOC to ascertain the structure of the hot-rolled steel, steel rounds, and stainless steel coils markets, including the identities and state ownership levels of the producers operating therein, the GOC's response was incomplete and therefore unreliable for purposes of such an analysis." (Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 5)

⁷⁷⁹ In its appellant's submission, the United States refers to the USDOC's findings in the original investigations that, in *Pressure Pipe*, China reported that it produced 82% of the input; in *Line Pipe*, based on China's incomplete responses, the USDOC concluded that the government produced 100% of the input; in *OCTG*, the USDOC relied on the finding in *Line Pipe* to conclude that China's production dominated the market for steel rounds, and, finally, China provided a declaration that "[t]aken collectively, SOEs, on an annual basis, accounted for roughly 74% to 79% of steel products sales revenues over the 2006 to 2008 period." (United States' appellant's submission, para. 169 (quoting Ordovery Report (Panel Exhibit CHN-19), p. 13)) Furthermore, in its Section 129 analysis of the private steel sector prices in China, the USDOC found that "[t]he interaction of these significant market shares and the GOC's various interventions in favor of maintaining the dominant position of the SIEs insulated from market pressures, including through industrial policies, forced mergers and acquisitions, subsidies, investment restrictions, and export restrictions, leads to a highly distorted market across all ownership types." (Benchmark Memorandum (Panel Exhibit CHN-20), p. 30 (emphasis added))

⁷⁸⁰ Final Benchmark Determination (Panel Exhibit CHN-21), pp. 18-19.

⁷⁸¹ See Final Benchmark Determination (Panel Exhibit CHN-21), pp. 9-21.

⁷⁸² Final Benchmark Determination (Panel Exhibit CHN-21), p. 21.

⁷⁸³ Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 157. (emphasis original) See also Appellate Body Report, *Japan – DRAMS (Korea)*, para. 131.

⁷⁸⁴ See Panel Report, paras. 7.192-7.195, explaining the USDOC's decision to resort to facts available in the four Section 129 proceedings at issue, as well as the conclusions reached by the USDOC in its Supporting Benchmark Memorandum. For these reasons, I also disagree with the majority's view that the USDOC did not engage in any specific assessment of the four input markets in question, and that, from its conclusions that the decision-making process of SIEs in China in general and in the steel sector as a whole was distorted by government intervention, the USDOC drew a general inference that prices in the specific markets at issue were equally distorted. (Para. 5.170 above)

China's steel market were not market-determined to these specific markets, observing that, in addition to the evidence in the Benchmark Memorandum, "the records in these cases also demonstrate the existence of additional government-caused distortions in the markets for the three specific inputs" and concluding that "[t]hese facts support a determination that the markets for hot-rolled steel, steel rounds and stainless steel coils are distorted and that domestic Chinese prices cannot be considered 'market based' such that they can be relied on to determine the adequacy of remuneration."⁷⁸⁵

5.258. Third, the Panel reached its conclusion that "the USDOC failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price"⁷⁸⁶ for all four benchmark determinations at issue, *prior to* analysing whether the USDOC disregarded certain input-specific price evidence on the record. Thus, the Panel's analysis of whether the USDOC provided a reasoned and adequate explanation for its conclusion that in-country prices are not market-determined was divorced from its discussion of the record evidence.⁷⁸⁷ As discussed above, the Panel's separate analysis of whether the USDOC disregarded price evidence for the inputs at issue suggests that, in the Panel's view, the USDOC's approach would *never* sufficiently justify recourse to out-of-country prices, independently of the evidence before it. This is particularly apparent from the Panel's review of the Section 129 proceedings concerning Solar Panels, where the Panel recognized that "there was no relevant information on arm's-length in-country prices of polysilicon in China before the USDOC", and therefore concluded that "China has not demonstrated that the USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement" by failing to consider such prices.⁷⁸⁸ Nevertheless, the Panel ultimately found that the USDOC failed to explain "how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price".⁷⁸⁹ This is perhaps the most obvious illustration of the Panel's approach. The Panel considered that, even in the absence of any relevant price data on the record, there was no need to further engage with the USDOC's analysis to determine whether it provided a sufficient basis for the USDOC's recourse to out-of-country prices, i.e. in a case where there were no in-country prices on the record at all. Indeed, in the Solar Panels proceedings, the GOC indicated that it would not be submitting a response to the USDOC's Benchmark Questionnaire, thereby failing to provide "information concerning the structure of the polysilicon market, the type of entities that operate in the polysilicon market, the role of any government intervention in the polysilicon market, and the impact of the GOC's role in SIEs and the polysilicon market on any private entities supplying the market".⁷⁹⁰ Even in this context, however, the Panel found that the USDOC failed to provide a reasoned and adequate explanation for its rejection of in-country polysilicon prices, without any analysis of the adverse facts available on which the USDOC relied.

5.259. Inexplicably, the majority upheld this finding on the basis that the absence of relevant price information on the record did not undermine the Panel's earlier finding that "the USDOC failed to explain how government intervention in the market resulted in price distortion also with respect to this investigation."⁷⁹¹ I see no basis whatsoever in Article 14(d) for this approach, nor do I agree with the manner in which the majority reviewed the Panel's analysis. The USDOC's explanation of "whether there are benchmarks within the polysilicon industry in the PRC that can reasonably be considered usable indicators of 'prevailing market conditions'" was based on record evidence available to the USDOC.⁷⁹² Moreover, China did not contest the USDOC's recourse to adverse facts available. Given that the Panel did not even begin to examine the substance of the evidence relied upon by the USDOC for purposes of establishing whether polysilicon prices are not market-determined, it is unclear on what basis the majority upheld the Panel's conclusion, or what the majority considered the USDOC was required to do in order to establish that government intervention resulted in price distortion.

⁷⁸⁵ Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 6.

⁷⁸⁶ Panel Report, para. 7.206. (emphasis original)

⁷⁸⁷ See Panel Report, sections 7.3.3.3.2-7.3.3.3.3. In addition to its finding in paragraph 7.206 of its Report, the Panel specifically concluded that, with respect to three of the investigations (Pressure Pipe, Line Pipe, and OCTG), the USDOC *also* failed to consider certain price data on the record. (Panel Report, paras. 7.220 and 7.223)

⁷⁸⁸ Panel Report, para. 7.222.

⁷⁸⁹ Panel Report, para. 7.223. (emphasis original)

⁷⁹⁰ Supporting Benchmark Memorandum (Panel Exhibit USA-84), pp. 7-8.

⁷⁹¹ Para. 5.196 above.

⁷⁹² Supporting Benchmark Memorandum (Panel Exhibit USA-84), p. 8.

5.260. With respect to the Pressure Pipe, Line Pipe, and OCTG Section 129 proceedings, the Panel expressed the view that, even though the price information provided by the petitioners and by the GOC did not distinguish between pricing data from private and government-related entities, such data may nonetheless be relevant and "[t]here is *nothing on the record* of the investigations to suggest that the USDOC considered this possibility, and *certainly no explanation* of why the information submitted was not relevant in this case, if that was its conclusion."⁷⁹³ The Panel similarly observed, with respect to the Mysteel Report, that it was "largely ignored" by the USDOC and there was no explanation "of why, in its view, the price data on the record did not relate to prevailing market conditions in the country of provision in the sense of Article 14(d)".⁷⁹⁴

5.261. While I agree that a panel should review whether the investigating authority has adequately taken into account alternative explanations presented by the parties to the investigation⁷⁹⁵, I observe that such explanations must be "plausible" and that, to be rejected, the domestic authority's explanation must "not seem adequate in the light of [an] alternative explanation".⁷⁹⁶ The Panel, however, failed to explain *how* the price evidence could have been relevant to the USDOC's own analysis, and it completely ignored the USDOC's own explanation as to its pertinence. Yet, the stated purpose of the analysis in the Benchmark Memorandum was to address the Appellate Body's finding in the original proceedings that "[p]rices of goods provided by government-related entities other than the entity providing the financial contribution at issue must also be examined to determine whether they are market determined."⁷⁹⁷ As noted above, the Panel never properly engaged with the merits of this analysis. It merely asserted that there is "nothing on the record" to suggest that the USDOC considered the possibility of using such price data, and "certainly no explanation" of why this data was not relevant. Yet, the USDOC appears to have done precisely that when it examined both SIE and private in-country prices in China through its analysis of the impact of government intervention in the relevant markets. Rather than rejecting SIE prices simply because of their source, the USDOC found that they "cannot be considered to be 'market-determined' for purposes of a benchmark analysis under Article 14(d)".⁷⁹⁸ The USDOC reasoned, in this regard, that "[t]he entire structure of the Chinese steel market is ... distorted by longstanding and pervasive government intervention [which], coupled with the Department's findings regarding the role of the GOC in SIEs, so distorts and diminishes the impact of market signals that, based on the record in these proceedings, all domestic private prices are distorted so that there are no potential benchmarks from the domestic industry that can be considered 'market based' in accordance with the SCM Agreement, the [Appellate Body]'s recent ruling, or the [Appellate Body]'s prior rulings on this issue."⁷⁹⁹ It stands to reason that price information that does not distinguish between SIE and private prices – both of which the USDOC found to be distorted – could similarly not serve as such a benchmark.⁸⁰⁰

5.262. The USDOC also addressed the Mysteel Report submitted by China as an exhibit to the Ordovery Report, which provided "an economic framework for evaluating whether market prices were 'distorted' by the government's predominant role as a supplier".⁸⁰¹ While it did "not take issue with whether Professor Ordovery's analytical framework concerning 'market power' is useful in the context of antitrust analysis", the USDOC observed that this was "not the only [analytical framework] permitted by the Appellate Body for a market distortion analysis; nor ... the most relevant or explanatory in the context of the PRC's steel industry, given the multi-faceted nature of government intervention in that industry".⁸⁰² Additionally, the USDOC referred to the indicia and supporting information in the Ordovery Report but found it unnecessary to address each of them separately.⁸⁰³ The USDOC explained, in this regard, that it did not consider "the presence or absence of Professor Ordovery's antitrust-based 'indicia'" to be "particularly telling indicia of market distortion",

⁷⁹³ Panel Report, para. 7.218. (emphasis added)

⁷⁹⁴ Panel Report, para. 7.219.

⁷⁹⁵ Para. 5.164 above.

⁷⁹⁶ Appellate Body Report, *US – Lamb*, para. 106.

⁷⁹⁷ Benchmark Memorandum (Panel Exhibit CHN-20), p. 1 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.49).

⁷⁹⁸ Benchmark Memorandum (Panel Exhibit CHN-20), p. 26.

⁷⁹⁹ Benchmark Memorandum (Panel Exhibit CHN-20), p. 30.

⁸⁰⁰ In this regard, the United States submits that "the price survey data from China was not usable because it was already established that the government's prices are not market-determined prices and that, in fact, the government prevents private prices from being determined by market conditions as well." (United States' appellant's submission, para. 156)

⁸⁰¹ Final Benchmark Determination (Panel Exhibit CHN-21), p. 12 (quoting Ordovery Report (Panel Exhibit CHN-19)).

⁸⁰² Final Benchmark Determination (Panel Exhibit CHN-21), p. 15.

⁸⁰³ Final Benchmark Determination (Panel Exhibit CHN-21), p. 17.

and that "[f]or example, the continued participation of private suppliers in the market is not particularly probative when market entry and exit decisions, and 'profitability' itself, are distorted by government intervention."⁸⁰⁴

5.263. Thus, instead of being "largely ignored"⁸⁰⁵, as the Panel asserted, and the majority appears to have implied, in-country prices and the Ordover Report were discussed by the USDOC, but their relevance was rejected. This was not only because their underlying rationale was different from that of the USDOC, but also because the evidence therein was not particularly probative for, and did not cast doubt on, its own analysis in the Benchmark Memorandum. Furthermore, even though the USDOC rejected both SIE and private prices in the entire steel sector in China as suitable benefit benchmarks, it nevertheless sought to analyse relevant price data on the record but found that this data was insufficient to conduct any meaningful analysis of whether private prices align with SIE prices.⁸⁰⁶ In its analysis, however, the Panel simply took issue with the absence of reference by the USDOC to the *prices* in the Mysteel Report, thereby disregarding the entirety of the USDOC's analysis in the Benchmark Memorandum as to why these same prices are not market-determined.⁸⁰⁷

5.264. I fail to understand *how* the Mysteel prices would have been relevant in this regard. The Panel never explained why it considered the Mysteel price information to be "on its face relevant" to the USDOC's analysis under Article 14(d).⁸⁰⁸ The Panel also never discussed any arguments or evidence in the Ordover Report, other than the Mysteel pricing data, such as the indicia related to the vibrancy of the private steel sector in China.⁸⁰⁹ Therefore, I do not believe the majority had any basis for upholding the Panel's conclusion, based on the Panel's assertion, that the USDOC did not sufficiently examine indicia such as fluctuation of steel prices over time, fragmentation of the industry, or the existence of private investment.⁸¹⁰

5.265. For all of these reasons, I disagree with the majority's view that "although the USDOC had discretion to choose its approach in establishing whether in-country prices were distorted, it would have been necessary to explain in its determinations why the approach it had adopted and the conclusions it had reached were still valid, in light of the Mysteel pricing data and the alternative narrative of the Ordover Report."⁸¹¹ That is precisely what the USDOC did. Fundamentally, it was for the Panel – not the Appellate Body – to conduct an analysis of the evidence on the record and examine it against the USDOC's analysis.

5.266. I therefore read the Panel's conclusion that "there is no explanation by the USDOC of why, in its view, the price data on the record did not relate to prevailing market conditions in the country

⁸⁰⁴ Final Benchmark Determination (Panel Exhibit CHN-21), p. 17. The USDOC also relied on additional evidence, such as the arguments and information in the Szamosszegi Report, which supported the analysis and conclusions in the Benchmark Memorandum. (Ibid.)

⁸⁰⁵ Panel Report, para. 7.219.

⁸⁰⁶ The USDOC stated that "based on the totality of circumstances present in the Chinese steel sector, we find it is not necessary to conduct an analysis of whether the prices of government and private providers align due to the market power of the government providers. Nonetheless, for the purposes of these Section 129 proceedings we have reviewed the available record information with a view towards whether it might be possible to analyze whether SIE market dominance has caused price alignment in the context of a CVD proceeding. We conclude that neither the available record evidence on prices in these three proceedings nor the evidence on prices likely to be available to an investigating authority is likely to provide additional probative insight on the question of whether private suppliers have aligned their prices with the prices charged by predominant government input providers." (Final Benchmark Determination (Panel Exhibit CHN-21), p. 19 (fn omitted))

⁸⁰⁷ In this regard, the United States argues that "[t]he Mysteel prices are precisely the subject of the USDOC's analysis in the benchmark memoranda – that is, they are among the Chinese prices the USDOC described as being distorted by the numerous government interventions identified on the record." (United States' appellant's submission, para. 151 (referring to Final Benchmark Determination (Panel Exhibit CHN-21), pp. 12-22))

⁸⁰⁸ Panel Report, para. 7.220.

⁸⁰⁹ See Panel Report, paras. 7.218-7.220.

⁸¹⁰ Para. 5.180 above.

⁸¹¹ Para. 5.185 above. The United States also points to the fact that the term "private supplier(s)" in the Ordover Report is used as shorthand to include both government-owned suppliers other than those that provided the financial contribution in question in these proceedings and privately owned suppliers. (United States' appellant's submission, para. 151) It is thus unclear to which producers the Ordover Report is referring when discussing "the indicia pertinent to the inquiry of whether private suppliers have been forced to price at artificially low levels as a result of the government's exercise of predatory market power." (Ordover Report (Panel Exhibit CHN-19), p. 16)

of provision in the sense of Article 14(d)⁸¹² as a reflection of the Panel's overly narrow application of the standard requiring the conduct of a price analysis as a condition for recourse to out-of-country prices. Despite the fact that the Panel rejected China's assertion that the only situation that merits recourse to out-of-country prices is where the government is so predominant that it effectively determines the prices of the goods in question, it appears that the Panel was looking for a kind of price alignment analysis that requires a quantification of the impact of government intervention on in-country prices by establishing the extent to which they deviate from a market-determined benchmark. In endorsing the Panel's standard, the majority appears also to have required an analysis of in-country prices as a condition for recourse to an alternative benchmark, even in cases where in-country prices are not available on the record. In this way, the result of the majority's analysis contradicts its stated understanding of Article 14(d) as allowing for different types of analysis and evidence for purposes of arriving at a proper benchmark, depending on the circumstances of the case.

5.267. In sum, the task of the Panel in the present case was to examine whether the USDOC provided a reasoned and adequate explanation for its decision to have recourse to out-of-country prices under Article 14(d). Rather than properly engaging with that question, the Panel simply found that the USDOC "did not even attempt" to provide any explanation for its rejection of in-country prices and disregarded price evidence on the record, without any substantive assessment of the USDOC's analysis and the evidence relied upon by it, including World Bank reports, Organization for Economic Cooperation and Development (OECD) working papers, economic surveys, Articles and expert opinions, and legislative and administrative documents.⁸¹³ In response to the arguments in the Ordovery Report, the USDOC also relied on evidence from certain other expert opinions that the Panel did not even mention in its Report.⁸¹⁴ The Panel's findings with regard to the USDOC's benchmark determinations therefore reflect its understanding that the type of analysis conducted by the USDOC can never satisfy the standard for recourse to out-of-country prices under Article 14(d). This, as I see it, constitutes an error in the application of this provision. Contrary to what the majority appears to have implied, the USDOC was not required to further engage with the in-country prices on the record when it had already found those prices to be distorted, and the Panel could not have properly made a finding that the United States acted inconsistently with its obligations under Article 14(d) in the absence of any substantive engagement with the USDOC's analysis or with the evidence available on the record going directly to the question of price distortion.

5.268. In light of the obvious shortcomings in the Panel's analysis, I do not agree with the majority's decision to uphold the conclusions reached by the Panel.

5.269. This should have been a relatively simple issue for the Appellate Body to decide on appeal, for the Panel did not do its job in reviewing the USDOC record, and applied the wrong legal standard. However, I believe the work of the Division was made unduly complicated by the majority's engagement with the evidence, effectively acting as a panel in the first instance, and, having done that, articulating an incoherent legal standard. I am aware that this dissent, also, does not make easy reading. But I thought it important to explain at length the errors at both the Panel and majority levels on this issue so that this dissent may serve as guidance for future litigants and panels.

5.5.3 Specificity

5.270. I believe the Panel and majority fundamentally misunderstand the role of Article 2.1 within the SCM Agreement, give the term "subsidy programme" a meaning that is not supported by the text and that is unreasonable, and ignore reasoning and analysis by the USDOC that was part of the case and should have been considered. The Panel and majority decisions, would, I believe, if followed in the future, enable circumvention of the disciplines of the SCM Agreement and even discourage the transparent management of subsidies.⁸¹⁵

5.271. A specificity inquiry under Article 2.1 of the SCM Agreement is distinct from the financial contribution and benefit analyses contemplated under Articles 1 and 14. It is not concerned with redetermining the existence of a "subsidy". As the Appellate Body has said, "Article 2.1 assumes the

⁸¹² Panel Report, para. 7.219.

⁸¹³ See Benchmark Memorandum (Panel Exhibit CHN-20).

⁸¹⁴ Such as, for instance, the Grossman and Szamosszegi Reports. (See Final Benchmark Determination (Panel Exhibit CHN-21), pp. 15-17)

⁸¹⁵ See Panel Report, *US – Countervailing Measures (China)*, para. 7.240.

existence of a financial contribution that confers a benefit, and focuses on the question of whether that subsidy is specific."⁸¹⁶ Because "financial contribution" and "benefit" are determined separately, the only question that remains for an analysis under Article 2.1 is whether a subsidy is "specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as 'certain enterprises')".⁸¹⁷

5.272. Subparagraphs (a) and (b) of Article 2.1 set forth "principles" (rather than rules) for analysing the "specificity" of a subsidy on a case-by-case basis. Article 2.1(c) addresses *de facto* specificity by providing that, "notwithstanding any appearance of non-specificity", "other factors" may be considered if there are "reasons to believe that the subsidy may in fact be specific". One factor identified in the text is "use of a subsidy programme by a limited number of certain enterprises".

5.273. The term "subsidy programme" appears only twice in the entire SCM Agreement: in the second sentence of Article 2.1(c) ("use of a subsidy programme by a limited number of certain enterprises..."), and in the third sentence ("...the length of time during which the subsidy programme has been in operation").⁸¹⁸ Its logical and linguistic purpose is simply to facilitate an inquiry into whether a financial contribution and benefit that have been identified pursuant to Article 1 have been granted to a limited number of enterprises or industries or groups of enterprises or industries (i.e. "certain enterprises"), by providing a basis, or starting point, for that inquiry. To do that, it helps to give conceptual form to the financial contribution and benefit by calling them a "subsidy programme". That, in my view, is the sole purpose and only reasonable reading of the term "subsidy programme" in Article 2.1(c). As the Appellate Body has said, Article 2.1(c) focuses on "whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in, for example, a law, regulation, or other official document."⁸¹⁹ Once a subsidy programme has been identified, then the question is whether there is "use of [that] subsidy programme by a limited number of certain enterprises". The requisite analysis should be rather straightforward where, as here, the subsidy takes the form of a government provision of goods that can be used *only* by certain downstream purchasers (i.e. a circumscribed group of entities and/or industries). Indeed, in such cases "the nature of the transfer makes the class of recipients more likely to be identified and circumscribed, [and] this ... makes it more likely that an investigating authority or panel may reach a conclusion that the subsidy is specific."⁸²⁰

5.274. Significantly, as the Appellate Body has said, "the relevant 'subsidy programme', under which the subsidy at issue is granted, often may already have been identified and determined to exist in the process of ascertaining the existence of the subsidy at issue under Article 1.1."⁸²¹ Surprisingly, the Panel and the majority seem not to have recognized this. Yet, there are several ways by which a "subsidy programme" may be implemented and, thus, evidenced. One way is "by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises".⁸²² Contrary to what the Panel and the majority appear to have found, it is this "systematic" series of actions that, *in itself, constitutes* the relevant "subsidy

⁸¹⁶ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144. (emphasis omitted)

⁸¹⁷ The *chapeau* of Article 2.1 states: "In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply". As in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body emphasized that the use of the term "principles", in the *chapeau* of Article 2, "instead of, for instance, 'rules' – suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle." (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366) Article 2.1 should therefore not be read to set out rigid postulates – instead, the principles set out are best understood as analytical tools that provide investigating authorities certain flexibility in fulfilling their task.

⁸¹⁸ The original panel in this dispute noted that "[t]he fact that, in Article 2, the term 'programme' is used only in the context of *de facto* specificity, combined with the fact that the Agreement provides no definition of the term ... suggests that 'subsidy programme' should be interpreted broadly" and that "[a] broad interpretation gives due recognition to the reality that 'subsidies can take many forms and can be provided through many different kinds of mechanisms, some more and some less explicit.'" (Panel Report, *US – Countervailing Measures (China)*, para. 7.240 (quoting Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.32))

⁸¹⁹ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

⁸²⁰ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.393.

⁸²¹ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144.

⁸²² Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

programme", particularly where, as here, the alleged subsidy consists of the "provision of goods" within the meaning of Article 1.1(a)(1)(iii), for less than adequate remuneration.⁸²³ I see no basis in Article 2.1(c) to require an investigating authority to demonstrate, *first*, "the existence of a subsidy within the meaning of Article 1.1", and, *second*, "a 'plan or scheme' pursuant to which this subsidy has been provided to certain enterprises".⁸²⁴ Instead, "to establish that the provision of financial contributions constitutes a plan or scheme under Article 2.1(c), an investigating authority must have adequate evidence of the existence of a *systematic* series of actions pursuant to which financial contributions that confer a benefit are provided to a limited number of certain enterprises."⁸²⁵ The Appellate Body, correctly, has *not* previously suggested that an investigating authority must examine the volume and/or the frequency of transactions conferring a "benefit" to determine whether "subsidies" have been "systematically" granted pursuant to a "subsidy programme". Nor has it suggested that "systematicity" of this kind must be shown to exist – contrary to what the Panel and the majority seem to have implied. In short, the Panel read into Article 2.1(c) a requirement that is not in that text and is contrary to previous Appellate Body decisions, and the majority has endorsed the Panel's doing so.

5.275. China suggests that to establish the existence of a "subsidy programme", the USDOC was required to demonstrate that the "inputs at issue are produced and provided to industrial users at subsidized prices under the instruction, guidance or intervention of the Chinese government."⁸²⁶ The specificity analysis under Article 2.1(c) is not concerned with redetermining the existence of "subsidized prices", or whether the inputs at issue are produced and provided to downstream purchasers pursuant to "government instructions".⁸²⁷ While provision of inputs at subsidized prices by a government or public body is relevant to the enquiry under Article 1 of the SCM Agreement, the question of whether a measure is consistent with Article 2.1(c) does not require a "redetermination" of the existence of a subsidy, or its constituent elements. To hold otherwise would, in effect, use Article 2.1(c) to supersede significant parts of Article 1, contrary to several principles of treaty interpretation.

5.276. Thus, I believe the Panel erred by interpreting the obligation under Article 2.1(c) as a requirement to demonstrate that subsidies have been "systematically" provided pursuant to an overarching "subsidy programme". And I believe the majority erred to the extent it agreed with the Panel on this point. If a finding of *de facto* specificity required an investigating authority to demonstrate the existence of "systematic" subsidization pursuant to a formally implemented government plan or scheme by "way of a reasoned and adequate explanation", the disciplines of the SCM Agreement could be circumvented by atomizing repeat subsidization into legally distinct acts, even though an analysis of subsidization over time would reveal *de facto* "use of a subsidy programme by a limited number of certain enterprises".

5.277. Regarding the Panel's review of the USDOC's findings, I further note that, in assessing whether the USDOC had an objective basis to carry out a specificity analysis under Article 2.1(c), the Panel made *no* reference to the reasoning and analysis provided by the USDOC in the context of the *original* investigations, other than to note that the "underlying documents from the original investigation, for the OCTG and other investigations, [had] *not* been submitted on the record of these compliance proceedings."⁸²⁸ The Panel appears thereby to have precluded the possibility that the underlying "subsidy programmes" may have already been identified in the context of the USDOC's public body, financial contribution, and benefit analyses in each investigation. Yet, as noted by the original panel, the application in each of the challenged investigations "alleges that a specific input is being provided by SOEs for less than adequate remuneration".⁸²⁹ The original panel further found that, "[i]n the absence of any written instrument or explicit pronouncement, the USDOC concluded that this type of systematic activity or series of activities – the consistent provision by the

⁸²³ See Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

⁸²⁴ See Panel Report, para. 7.267. The Panel suggested that, in order to demonstrate the existence of a "subsidy programme", an investigating authority must have "evidence of: (a) the existence of a subsidy within the meaning of Article 1.1; and (b) a 'plan or scheme' pursuant to which this subsidy has been provided to certain enterprises". (Ibid. (emphasis added))

⁸²⁵ Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143. (italics original; underlining added)

⁸²⁶ China's appellee's submission, para. 201.

⁸²⁷ United States' appellant's submission, para. 194 (quoting Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.144).

⁸²⁸ Panel Report, fn 449 to para. 7.276. (emphasis added)

⁸²⁹ Panel Report, *US – Countervailing Measures (China)*, para. 7.242.

SOEs in question of inputs for less than adequate remuneration – constituted a subsidy programme."⁸³⁰ In faulting the original panel for not providing "case-specific discussion or references to the USDOC's determinations of specificity challenged by China"⁸³¹, the Appellate Body referred specifically to the USDOC's determinations and materials from the *original investigations*. It is therefore difficult to understand how the compliance Panel could find the USDOC to have failed to have identified the underlying subsidy programmes, as required under Article 2.1(c), without any analysis of those materials.

5.278. Leaving this aside, while the focus of the USDOC's analysis in the Section 129 determinations was on establishing the "length of time during which the subsidy programme ha[d] been in operation"⁸³², the USDOC also reviewed the Appellate Body's findings in the original proceedings, quoted from them, and identified a "systematic series of actions" pursuant to which it considered the subsidies to have been provided. In doing so, the USDOC referred to the "case specific purchase information" it had compiled for each of the proceedings, broken down by the relevant: (i) input producer; (ii) respondent; (iii) input; and (iv) number of sales transactions.⁸³³ Moreover, the USDOC found, based on the GOC's responses to its questions in five of the Section 129 proceedings, and relying on "*facts available*" with respect to the remaining seven proceedings, for which the GOC had not provided adequate information, that "state-owned enterprises began producing and selling the inputs at some point during the period covered by the first Five-Year Plan (1953-1957) and possibly earlier."⁸³⁴

5.279. Rather than faulting the USDOC for not providing "a reasoned and adequate explanation for its conclusions regarding the existence of a subsidy programme", the Panel should, in my view, have carefully examined the USDOC's reasoning and analysis, including the analysis provided by the USDOC in the context of its public body, financial contribution, and benefit findings in order to assess whether the USDOC had *identified* the "subsidy programmes" that it was investigating, and thus had an objective basis to carry out a *de facto* specificity analysis under Article 2.1(c). In this regard, I note that the USDOC itself referred to the provision of inputs for less than adequate remuneration as the relevant "programmes" in each case, and posed questions in relation to those "programmes" prior to making its preliminary findings "that there is adequate evidence in each of the 12 [countervailing duty] investigations that public bodies systematically provided [the relevant inputs] for [less than adequate remuneration] to producers in the PRC."⁸³⁵ It was these "programmes" that were the very subject of the countervailing duty investigations carried out by the USDOC, including in the context of its public body and benefit analyses. What is more, the Panel does not appear to have considered the context in which the USDOC carried out its *de facto* specificity analysis, including that the USDOC was required to "make its determination based upon facts on the administrative record" due to incomplete responses submitted by the GOC.⁸³⁶ Whether an explanation by an investigating authority is "adequate" cannot be decided in a vacuum – without regard to the evidence and arguments to which it seeks to respond. This is so particularly where, as here, the investigating authority has been required to make its determination on the basis of facts available.

5.280. For all these reasons, I consider that the Panel erred in finding that China has demonstrated that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings. I also

⁸³⁰ Panel Report, *US – Countervailing Measures (China)*, para. 7.242.

⁸³¹ Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.151 and 4.171.

⁸³² This stands to reason given that the recommendations and rulings of the DSB concerned the USDOC's failure to take into account the "duration" of the alleged subsidy programmes and did not include any findings of inconsistency with respect to the USDOC's identification of a "subsidy programme" as referred to in the second sentence of Article 2.1(c).

⁸³³ The USDOC found 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 [less than adequate remuneration] to producers in [China]", and immediately thereafter referred to these as the relevant "subsidy programmes". (Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 19)

⁸³⁴ Final Section 129 Determination (Panel Exhibit CHN-5), pp. 5-6. (emphasis added)

⁸³⁵ Panel Report, para. 7.277 (quoting Preliminary Determination on Public Bodies and Input Specificity (Panel Exhibit CHN-4), p. 19). The relevant inputs cited by the USDOC were 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.

⁸³⁶ Final Section 129 Determination (Panel Exhibit CHN-5), p. 6.

consider that the majority's decision upholding the Panel's finding is wrong in several important respects and would, if followed, enable circumvention of the disciplines of the SCM Agreement and even discourage the transparent management of subsidies. I believe such a result is not contemplated under the SCM Agreement, was not intended by the SCM Agreement's drafters, and is not in accordance with customary principles of treaty interpretation.

5.5.4 Overall summary

5.281. I respectfully suggest that it would be beneficial for the dispute settlement system if future litigants, and panels in adherence to their mandate under Article 11 of the DSU, would continue to take into account separate opinions such as this along with relevant past Appellate Body reports, without regarding either as necessarily determinative.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.⁸³⁷

6.1 The Panel's terms of reference

6.2. The Panel correctly assessed the scope of the measures falling within its terms of reference in these Article 21.5 proceedings based on the criteria of their relationship in terms of nature, timing, and effects.

- a. We therefore uphold the Panel's findings, in paragraphs 7.320, 7.347, 8.1.g, and 8.1.h.i-ii, iv, and vi of the Panel Report, that the subsequent reviews at issue and the Final Determination in the original Solar Panels investigation fell within the Panel's terms of reference under Article 21.5 of the DSU.

6.2 Article 1.1(a)(1) of the SCM Agreement

6.3. The central focus of a public body inquiry under Article 1.1(a)(1) is not whether the *conduct* that is alleged to give rise to a financial contribution under subparagraphs (i)-(iii) or the first clause of subparagraph (iv) – i.e. the particular transaction at issue – is "logically connected" to an identified "government function". Rather, the relevant inquiry hinges on the *entity* engaging in that conduct, its core characteristics, and its relationship with government, seen in light of the legal and economic environment prevailing in the relevant Member. This comports with the fact that a "government" (in the narrow sense) and a "public body" share a degree of commonality or overlap in their essential characteristics – i.e. they both possess, exercise, or are vested with governmental authority. Once it has been established that an entity is a public body, then the conduct of that entity shall be directly attributable to the Member concerned for purposes of Article 1.1(a)(1). While the conduct of an entity may constitute relevant evidence to assess its core characteristics, an investigating authority need not necessarily focus on every instance of conduct in which that relevant entity may engage, or on whether each such instance of conduct is connected to a specific "government function". The Panel was thus correct in rejecting China's reading of Article 1.1(a)(1) as requiring that an investigating authority inquire into whether an entity is exercising a government function when engaging in one of the specific conducts listed in subparagraphs (i)-(iii) and the first clause of subparagraph (iv).

- a. We therefore uphold the Panel's finding, in paragraphs 7.36 and 7.106 of the Panel Report, that the legal standard for public body determinations under Article 1.1(a)(1) of the SCM Agreement does not prescribe a connection of a particular degree or nature that must necessarily be established between an identified government function and the particular financial contribution at issue.
- b. We also uphold the Panel's conclusion, in paragraph 7.36 of the Panel Report, that "China has failed to demonstrate that the USDOC's public body determinations in the

⁸³⁷ The separate opinion of one Division member regarding public body, benefit, and specificity is set forth in section 5.5 of this Report.

relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement because they are based on an improper legal standard."

- c. Having upheld the Panel's interpretive findings, we do not further address China's additional claims with respect to the Panel's findings in paragraphs 7.72, 7.103, and 7.105-7.106 of the Panel Report.

6.4. The Panel correctly found that the Public Bodies Memorandum bears a "close relationship" to the declared "measure taken to comply", namely, the USDOC's public body determinations in the relevant Section 129 proceedings, and with the recommendations and rulings of the DSB in the original proceedings. The Panel was also correct that China could not have challenged the Public Bodies Memorandum as part of its complaint in the original proceedings.

- a. We therefore uphold the Panel's finding, in paragraph 7.120 of the Panel Report, that the Public Bodies Memorandum falls, "as such", within the scope of these Article 21.5 proceedings.

6.5. China's claim on appeal with respect to the WTO-consistency of the Public Bodies Memorandum "as such" is premised on China's reading of Article 1.1(a)(1) as requiring, in each case, the establishment of a "clear logical connection" between a "government function" identified by the investigating authority and the conduct alleged to give rise to a financial contribution.

- a. Having rejected this reading of Article 1.1(a)(1), we do not further address China's claim concerning the Panel's conclusion, in paragraph 8.1.b of the Panel Report, that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1).
- b. We also do not further address the participants' claims concerning the Panel's intermediate findings leading to that conclusion, namely: (i) the Panel's finding, in paragraph 7.133 of the Panel Report, that the Public Bodies Memorandum "can be challenged 'as such' as a rule or norm of general or prospective application"; and (ii) the Panel's finding, in paragraph 7.142 of the Panel Report, that "the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1)." The Panel's conclusion that China has not demonstrated that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1), therefore, stands.

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

6.6. We disagree with China's proposition that the circumstances potentially justifying recourse to out-of-country prices under Article 14(d) of the SCM Agreement are limited to those in which the government effectively determines the price at which the good is sold, including more specifically, where the government sets prices administratively, is the sole supplier of the good, or 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. Central to the inquiry under Article 14(d) in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention. What would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, not the presence of government intervention itself. Different types of government interventions could result in price distortion, such that recourse to out-of-country prices is warranted, beyond the situation in which the government effectively determines the price at which the good is sold. The determination of whether in-country prices are distorted must be made case by case, based on the relevant evidence in the particular investigation and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record.

- a. We therefore uphold the Panel's finding, in paragraph 7.174 of the Panel Report, that Article 14(d) does not limit the possibility of resorting to out-of-country prices to the situation in which the government effectively determines the price at which the good is sold.

6.7. The specific type of analysis that an investigating authority must conduct for purposes of arriving at a proper benchmark under Article 14(d), as well as the types and amount of evidence that would be considered sufficient in this regard, will necessarily vary depending on a number of factors in the circumstances of the particular case. However, in all cases, the investigating authority has to establish and adequately explain how price distortion actually results from government intervention. There may be different ways to demonstrate that prices are actually distorted, including a quantitative assessment, price comparison methodology, a counterfactual, or a qualitative analysis. While evidence of direct impact of the government intervention on prices may make the finding of price distortion likely, evidence of indirect impact may also be relevant. At the same time, establishing the nexus between such indirect impact of government intervention and price distortion may require more detailed analysis and explanation. Independently of the method chosen by the investigating authority, it has to adequately take into account the arguments and evidence supplied by the petitioners and respondents, together with all other information on the record, so that its determination of how prices in the specific markets at issue are in fact distorted as a result of government intervention would be based on positive evidence. The Panel's reasoning is consonant with our interpretation of Article 14(d). We further agree with the Panel's conclusion that "[a]n investigating authority must explain how government intervention in the market *results* in in-country prices for the inputs at issue deviating from a market-determined price", insofar as it clarifies that the investigating authority has to make a finding of price distortion resulting from government intervention. In sum, we do not see that the Panel required one single type of quantitative or price comparison analysis in all cases.

6.8. With respect to the Panel's finding, in paragraph 7.206 of the Panel Report, that "the USDOC failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price", we understand the Panel to have rejected as insufficient and problematic the USDOC's determination that prices in the entire steel and solar-grade polysilicon sectors in China cannot be used as benefit benchmarks in the absence of a specific assessment of how government intervention had resulted in price distortion in the four input markets at issue. Furthermore, we understand the Panel to have been concerned with the focus of the USDOC's analysis in the Benchmark Memorandum on the pervasiveness of government involvement in China's SIEs' decision-making in general and in the steel sector as a whole, rather than on *how* specifically this involvement influenced pricing decisions regarding the inputs at issue and resulted in price distortion with respect to the determinations at hand. Therefore, as we see it, the Panel's analysis of the determinations at issue led it to conclude that the USDOC did not provide a reasoned and adequate explanation of how the widespread government interventions described in the Benchmark Memorandum resulted in the distortion of in-country prices in the specific input markets and regarding the specific products subject to each of the challenged USDOC determinations at issue.

6.9. With respect to the Panel's finding, in paragraph 7.220 of the Panel Report, that "the USDOC failed to adequately explain its rejection of in-country prices in light of the evidence before it", we understand the Panel to have considered that the USDOC's rejection of in-country prices was merely consequential to its findings of market distortion in the steel sector generally, which the Panel considered not to provide a reasoned and adequate explanation of how government intervention resulted in price distortion. Furthermore, although the focus of the USDOC's analysis in the Benchmark Memorandum was different from the one underlying the Ordovery Report, the alternative explanations and pricing data on the record may have nevertheless been relevant for examining whether price distortion actually existed in the input markets at issue. Yet, the USDOC determinations do not explain why, in light of the price data and alternative explanations, the conclusion it reached for the entire steel sector necessarily applies to all specific input markets. In addition, it would have been relevant for the USDOC to take into account in its analysis the input-specific Mysteel pricing data on the record and examine the extent to which it affected its conclusions of price distortion. Finally, in assessing whether it would be possible to conduct an analysis of price alignment in the Final Benchmark Determination, the USDOC dismissed the price data on the record largely on the basis of its prior conclusion that all in-country steel prices in China were distorted by government intervention, which could not in itself constitute a sufficient basis for rejecting the relevance of the Mysteel data.

- a. We therefore find that the United States has not established that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement in finding 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.

- b. In addition, we find that the United States has not established that the Panel erred in its finding that, in the Section 129 proceedings on Pressure Pipe, Line Pipe, and OCTG, the USDOC failed to consider price data on the record.
- c. Consequently, we uphold the Panel's findings, in paragraphs 7.223-7.224 and 8.1.c of the Panel Report, that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings.

6.4 Article 2.1(c) of the SCM Agreement

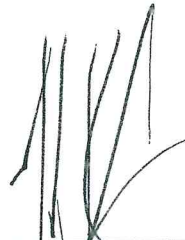
6.10. As we see it, where an investigating authority makes a finding of *de facto* specificity based on an analysis of whether there has been "use of a subsidy programme by a limited number of certain enterprises", consideration of the length of time during which the subsidy programme has been in operation presupposes that the relevant programme has been properly identified. We therefore disagree with the United States to the extent it suggests that an investigating authority can be found to have *complied* with the requirement under Article 2.1(c) to consider the "duration" of a subsidy programme *regardless* of whether it has properly identified that programme in the first place. Nor do we agree with the United States that the Panel was required to *limit* its review to the USDOC's examination of the "duration" of the relevant subsidy programmes, without considering whether the USDOC had properly identified those programmes either in the context of the original investigations or in the context of the relevant Section 129 proceedings.

6.11. With respect to the Panel's interpretation and application of Article 2.1(c), we agree with the Panel that, while "evidence of 'a systematic series of actions' may be particularly relevant in the context of an *unwritten programme*, the mere fact that financial contributions have been provided to certain enterprises is not sufficient to demonstrate that such financial contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c)." The Panel's subsequent review of the USDOC's analysis properly focused on "whether the information relied upon by the USDOC supports its finding of a systematic series of actions evidencing the existence of a plan or scheme pursuant to which subsidies have been provided". Moreover, in its findings, the Panel rightly contrasted the USDOC's failure to explain "*systematic* activity ... regarding the existence of an unwritten subsidy programme" with information before the USDOC merely indicating "*repeated* transactions". We therefore disagree with the United States insofar as it argues that the Panel erred in its articulation of the standard to be applied under Article 2.1(c). Nor do we agree with the United States that the Panel erred in its interpretation of the term "subsidy programme" by reading it to mean a "systematic subsidy programme" consisting "entirely of acts of subsidization" where *each* provision of an input by the government confers a benefit to the recipient. We also disagree with the United States to the extent it claims that the Panel's finding under Article 2.1(c) was based on an isolated reading of the USDOC's specificity analysis. Rather, we understand the Panel's concern to have been that the USDOC's reasoning and references to "subsidy programmes" were generic in nature and did not sufficiently discuss the steel sector or the provision of the inputs in the context of the specific determinations at issue. It was not for the Panel in this regard "to conduct a *de novo* review of the evidence" or "to substitute [its] own conclusions for those of the competent authorities".

- a. In light of the foregoing, we uphold the Panel's finding, in paragraphs 7.293 and 8.1.e of the Panel Report, that China has demonstrated that the United States acted inconsistently with Article 2.1(c) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.

6.12. The Appellate Body recommends that the DSB request the United States to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with its obligations under the SCM Agreement, into conformity with that Agreement.

Signed in the original in Geneva this 1st day of July 2019 by:



Thomas R. Graham
Presiding Member



Ujal Singh Bhatia
Member



Shree B. C. Servansing
Member