



C-570-931; C-570-936  
C-570-944; C-570-946;  
C-570-980  
Section 129 Proceeding  
DS 437  
Public Document  
E&C Office III, EBG

**DATE:** May 19, 2016

**MEMORANDUM TO:** Paul Piquado  
Assistant Secretary  
for Enforcement & Compliance

**FROM:** Christian Marsh   
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**RE:** Section 129 Proceeding: United States – Countervailing Duty  
Measures on Certain Products from the People’s Republic of China  
(WTO/DS 437)

**SUBJECT:** Final Determination for *Pressure Pipe, Line Pipe, OCTG, Wire  
Strand, and Solar Panels*<sup>1</sup>

## I. Summary

Section 129 of the Uruguay Round Agreements Act (URAA) governs the actions of the Department of Commerce (the Department) following adverse World Trade Organization (WTO) dispute settlement reports. Consistent with Section 129, the Department is revising the

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<sup>1</sup> This memorandum addresses the following five CVD proceedings: (1) *Circular Welded Austenitic Stainless Pressure Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 74 FR 4936 (January 28, 2009) (*Pressure Pipe*) and accompanying Decision Memorandum, (2) *Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China: Final Affirmative Countervailing Duty Determination*, 73 FR 70961 (November 24, 2008) (*Line Pipe*) and accompanying Decision Memorandum, as amended by *Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order*, 74 FR 4136 (January 23, 2009), (3) *Certain Oil Country Tubular Goods From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, Final Negative Critical Circumstances Determination*, 74 FR 64045 (December 7, 2009) (*OCTG*) and accompanying Decision Memorandum, as amended by *Certain Oil Country Tubular Goods from the People’s Republic of China: Amended Final Affirmative Countervailing Duty Determination and Countervailing Duty Order*, 75 FR 3203 (January 20, 2010), (4) *Pre-Stressed Concrete Steel Wire Strand from the People’s Republic of China: Final Affirmative Countervailing Duty Determination (Wire Strand)* and accompanying Decision Memorandum, 75 FR 28557 (May 21, 2010), as amended by *Pre-Stressed Concrete Steel Wire Strand from the People’s Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order*, 75 FR 38977 (July 7, 2010), and (5) *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People’s Republic of China: Final Affirmative Countervailing Duty Determination and Final Affirmative Critical Circumstances Determination*, 77 FR 6378 (October 17, 2012) (*Solar Panels*) and accompanying Decision Memorandum.



analyses underlying the proceedings in *Line Pipe* and *OCTG*, examined in WTO DS437, in accordance with the report adopted by the WTO Dispute Settlement Body (DSB).

Between December 31, 2015, and March 7, 2016, we issued the Input Specificity, Land Specificity, Input Specificity/Public Bodies, and Benchmark Preliminary Determination Memoranda.<sup>2</sup>

Additionally, on March 11, 2016, we announced to interested parties the schedule for the submission of case and rebuttal briefs, which were due to the Department on March 25, 2016, and March 30, 2016, respectively.<sup>3</sup> On March 25, 2016, the Government of the People's Republic of China (GOC) submitted a case brief commenting on the Department's Input Specificity Preliminary Determination, Input Specificity/Public Bodies Preliminary Determination, and Benchmark Preliminary Determination.<sup>4</sup> On March 30, Petitioners submitted rebuttal comments.<sup>5</sup>

As discussed below, we considered all the comments filed by the interested parties. After evaluating those comments, we have determined to make no change to the preliminary analyses in our Input Specificity, Input Specificity/Public Bodies, and Benchmark Preliminary Determinations. No interested parties submitted comments concerning the Land Preliminary Determination and we have made no changes to this determination. Consequently, the net subsidy rates for *Pressure Pipe*, *Line Pipe*, *OCTG*, *Wire Strand*,<sup>6</sup> and *Solar Panels*, as discussed in the Preliminary Subsidy Rates Memorandum, remain unchanged.<sup>7</sup>

The only changes with respect to net subsidy rates determined in the proceedings discussed herein are with respect to land specificity in *Line Pipe* and *OCTG*. As explained in our

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<sup>2</sup> See Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Input Specificity: Preliminary Analysis of the Diversification of Economic Activities and Length of Time," (December 31, 2015) (Input Specificity Memorandum); Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Preliminary Determination Regarding Land Specificity," (February 25, 2016) (Land Specificity Preliminary Determination); Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Preliminary Determination of Public Bodies and Input Specificity," (February 25, 2016) (Input Specificity/Public Bodies Preliminary Determination); Memorandum to Paul Piquado Assistant Secretary for Enforcement and Compliance, "Benefit (Market Distortion) Memorandum," (March 7, 2016) (Benchmark Memorandum); and Memorandum to Brendan Quinn, Acting Director, AD/CVD Enforcement III, "Supporting Memorandum to Preliminary Benefit (Market Distortion) Memorandum," (March 7, 2016) (Preliminary Benchmark Supporting Memorandum).

<sup>3</sup> See the Department's Memorandum, "Schedule for rebuttal factual information, written argument, and a hearing," (March 11, 2016).

<sup>4</sup> See the GOC's March 25, 2016, submission.

<sup>5</sup> See Petitioners' March 30, 2016, submission. Petitioners are Maverick Tube Corporation.

<sup>6</sup> For *Wire Strand*, this determination pertains solely to land specificity. The Department previously issued a final determination with respect to the input specificity and public body aspects of the *Wire Strand* 129 determination, see Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, "Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Final Determination of Public Bodies and Input Specificity," March 31, 2016 (Input Specificity/Public Bodies Final Determination), which the Office of the United States Trade Representative directed the Department to implement on April 1, 2016.

<sup>7</sup> See Memorandum to the File, from Eric B. Greynolds, Program Manager, Office III, Operations, "Net Subsidy Rates as a Result of Preliminary Analysis," (March 10, 2016).

preliminary land determination, we are no longer finding certain land subsidy programs countervailable in *Line Pipe* and *OCTG*.<sup>8</sup> As a result, the revised net subsidy rates are as follows:

<b>Case Name</b>	<b>Respondent Name</b>	<b>Rate Before/After</b>	<b>All Others' Rate Before/After</b>
<i>Line Pipe</i>	Huludao Seven-Star Steel Pipe Group Co., Ltd. (Huludao Seven Star Group), Huludao Steel Pipe Industrial Co. Ltd. (Huludao Steel Pipe), and Huludao Bohai Oil Pipe Industrial Co. Ltd. (Huludao Bohai Oil Pipe) (collectively, the Huludao Companies) *	33.43 <sup>9</sup> → 32.65	36.74 <sup>10</sup> → 36.35
<i>Line Pipe</i>	Liaoning Northern Steel Pipe Co., Ltd. (Northern Steel)**	40.05 → 40.05	
<i>OCTG</i>	Tianjin Pipe (Group) Co., Tianjin Pipe Iron Manufacturing Co., Ltd., Tianguan Yuantong Pipe Product Co., Ltd., Tianjin Pipe International Economic and Trading Co., Ltd., and TPCO Charging Development Co., Ltd. (collectively TPCO)	10.49 → 7.71	13.41 → 12.26
<i>OCTG</i>	Jiangsu Changbao Steel Tube Co. and Jiangsu Changbao Precision Steel Tube Co., Ltd. (collectively, Changbao)**	12.46 → 12.46	
<i>OCTG</i>	Wuxi Seamless Pipe Co, Ltd., Jiangsu Fanli Steel Pipe Co, Ltd., Tuoketuo County Mengfeng Special Steel Co., Ltd. (collectively, Wuxi)**	14.95 → 14.95	
<i>OCTG</i>	Zhejiang Jianli Enterprise Co., Ltd., Zhejiang Jianli Steel Steel Tube Co., Ltd., Zhuji Jiansheng Machinery Co., Ltd., and Zhejiang Jianli Industry Group Co., Ltd. (collectively, Zhejiang Jinali)**	15.78 → 15.78	

\*\*Did not use a land for less than adequate remuneration (“LTAR”) program

In accordance with sections 129(b)(4) and 129(c)(1)(B) of the URAA, if the U.S. Trade Representative, after consulting with the Department and Congress, directs the Department to implement, in whole or in part, this determination, it shall apply with respect to unliquidated entries of the subject merchandise that are entered, or withdrawn from warehouse, for consumption on or after the date on which the U.S. Trade Representative so directs us. Unless the applicable cash deposit rates have been established by intervening segments of this

<sup>8</sup> See Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, “Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People’s Republic of China (WTO/DS437): Preliminary Determination Regarding Land Specificity,” February 22, 2016 (Preliminary Land Memorandum).

<sup>9</sup> The net subsidy rate for the Huludao Companies reflects the rate established in *United States Steel Corp. et al. v. United States*, Consol. Court No. 09-00086, Final Redetermination Pursuant To Remand (October 20, 2009) (Line Pipe Final Redetermination).

<sup>10</sup> This all other rate reflects the rate established in the Line Pipe Final Redetermination.

proceeding, CBP shall require a cash deposit equal to the estimated CVD rates identified above. The suspension of liquidation instructions will remain in effect until further notice.

## II. Issues Addressed Pursuant to WTO DS 437

### A. Public Bodies

#### *GOC Comments:*

- The Department provided an insufficient and unreasonable amount of time for the GOC to prepare responses to the public bodies questionnaires.
- The Department deemed the information that the GOC provided not relevant to the preliminary public bodies determination, asserting that the preliminary determination is a copy of the Department's public bodies determination in the *Section 129 Proceedings in US – Antidumping and Countervailing Duties (China) (WT/DS379) (DS379)*.
- However, the Appellate Body has explained that “a determination of whether particular conduct is that of a public body ‘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.’”<sup>11</sup> Further, the Appellate Body has made clear that the central inquiry in respect of whether a particular entity is a “public body” is whether that entity “is vested with authority to exercise governmental functions.”<sup>12</sup>
- The questions posed in the Department's May 1, 2015, public bodies questionnaire were not calculated to elucidate whether input suppliers are “public bodies,” and were identical to the public bodies questionnaire issued in other CVD proceedings.
- Few, if any, of the Department's questions have any connection to the issue of whether the particular conduct of providing inputs is a governmental function within the domestic legal order of the People's Republic of China (PRC). Instead, the Department's questions were focused on what the Appellate Body has referred to as “indicia of control.”
- In the absence of evidence that the provision of a particular input is a governmental function within the domestic legal order of the PRC, and that particular enterprises have been vested with the authority to perform that function, no amount of control-related evidence would be sufficient to support an affirmative public body determination in respect of any input supplier.
- Further, a determination made on the basis of “facts available,” under Article 12.7 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), must be based on positive evidence on the record. The Department, therefore, should have been precluded in these Section 129 proceedings from reaching an affirmative public body determination in respect of any input supplier in the absence of positive evidence in the record that the provision of particular inputs is a governmental function within the domestic legal order of the PRC, and that particular entities have been vested with authority to perform that function. There is no evidence on the record to this effect,

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<sup>11</sup> See GOC's case brief comment citing DS379, para. 345, and *US – Carbon Steel (India) (WT/DS436) (DS436)*, para 4.52.

<sup>12</sup> See DS379, para. 318, and DS436, n. 515.

because the provision of the inputs at issue is not, in fact, a governmental function in the PRC.

*Petitioners' Rebuttal Comments:*

- The GOC implies that the Department's public bodies determination must be based on an explicit legal authority designating the provision of an individual input as a function of government and assigning that function to the specific suppliers at issue. However, such argument, Petitioners assert, mischaracterizes the Appellate Body's holdings.<sup>13</sup>
- Further, the GOC fails to address any of the record evidence which demonstrates that the input suppliers are public bodies according to the WTO's legal standard. Petitioners assert that the evidence, consisting of both primary and Chinese sources and secondary expert analysis, reveals a clear, singular objective on the part of the GOC to exercise state authority over key enterprises in strategic and pillar industries and to control the development of those industries in accordance with the state's industrial policy objectives.<sup>14</sup>

**Department's Position:** The Department provided the GOC with sufficient time to respond to its public bodies questionnaires. The time period the Department provided the GOC to respond to the May 1, 2015, questionnaire was more than reasonable, particularly given the backdrop of the very short Reasonable Period of Time (RPT) pressed for by the GOC in this dispute.<sup>15</sup> As discussed in detail below, the GOC had, in fact, 98 days, and had, effectively, nearly six months, to gather and provide to the Department the information requested in the public body questionnaire.

The GOC attempts to argue that it had only two weeks to respond to the public body questionnaires. In this regard, the GOC asserts that it "reasonably understood that the Department's decision to grant only a one-week extension to be the Department's final decision on this matter."<sup>16</sup> The Department disagrees. Although the Department provided the GOC with two weeks to respond to the questionnaires, it made clear that it would be willing to grant further extensions of time to the GOC. Specifically, the Department stated on May 20, 2015, in response to the GOC's assertion that it needed more than two weeks to respond, that the Department would consider an additional extension on the public body questionnaires depending on the RPT agreed to by the GOC in this dispute.<sup>17</sup> During the next month it became apparent

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<sup>13</sup> See *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/R (July 14, 2014) (DS437 Panel Report), para. 7.64 -7.74, and DS379, para. 317-318.

<sup>14</sup> See Department Memorandum, regarding "Public Bodies Memorandum" (October 28, 2015), which contains the Department Memorandum regarding "Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379" (May 18, 2012) (*Public Bodies Memorandum*) (Note: Appended to the Public Bodies Memorandum is the Department Memorandum regarding "The relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be 'public bodies' within the context of a countervailing duty investigation" (May 18, 2012) (*CCP Memorandum*)).

<sup>15</sup> See, e.g., *United States - Countervailing Duty Measures on Certain Products from China*, WT/DS437/16 (October 9, 2015), para. 3.15, (*Award of the Arbitrator under Article 21.3(c) of the DSU*) (noting that China argued in a WTO arbitration that the RPT should not exceed ten months) (Arbitration Award).

<sup>16</sup> See GOC Case Brief at n. 3.

<sup>17</sup> See Department Letter to the GOC, regarding "Section 129 Proceeding: United States- Countervailing Duty

that an agreed-to-RPT would not be reached in this dispute and, on June 26, 2015, the GOC requested a WTO arbitration to determine the RPT.<sup>18</sup> As a result, the Department could no longer wait for the establishment of an RPT to establish a final deadline for the public body questionnaires. Accordingly, the Department notified the GOC that it was extending this deadline to August 7, 2015.<sup>19</sup> Thus, the GOC had from May 1 to August 7, 2015 to respond to the public body questionnaires – a total of 98 days – which was more than a reasonable amount of time. Moreover, the content of the public body questionnaires was not a surprise to the GOC. The Department adopted a revised public body methodology in a Section 129 proceeding in WTO DS379<sup>20</sup> which the Department has been following for the past few years. Indeed, the GOC admits in its comments that “{t}he Department’s public body questionnaire was identical to public body questionnaires that the Department has issued in countervailing duty proceedings over the past several years.”<sup>21</sup> Thus, on February 13, 2015, the date on which the United States announced its intention to comply with the recommendations and rulings in this dispute<sup>22</sup> the GOC knew, or should have known, that the GOC would need to provide the Department with the information contained in the public body questionnaire. Thus, the GOC effectively had almost six months to prepare responses to the Department’s public bodies questionnaire.

Second, we do not agree that the Department’s approach to the public body issue fails in some regard to address the inquiry laid out by the Appellate Body. As the GOC recognizes, the Department’s analysis addresses the extent that the government exercises meaningful control over the relevant entities. In the words of the Appellate Body, this may serve “as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.”<sup>23</sup> As such, the Department’s inquiries along these lines are directly related to the question of whether the entities possess, exercise, or are vested with governmental authority within the meaning of Article 1.1(a)(1) of the SCM Agreement.

Similarly, the *Public Bodies Memorandum* and accompanying *CCP Memorandum*<sup>24</sup> set forth evidence concerning the extent to which certain categories of state-invested enterprises function

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Measures on Certain Products from the People's Republic of China (WTO/DS437): Response of the Government of the People’s Republic of China to the Public Body Questionnaire/Input Specificity: C- 570-931; C-570-936; C-570-940; C-570-942; C-570-944; C-570-946; C-570-957; C-570-959; C-570-966; C-570-968; C-570-978; C-570-980” (May 20, 2015).

<sup>18</sup> See Arbitration Award at para. 1.2.

<sup>19</sup> See Department Letter to the GOC, regarding “Section 129 Proceeding: United States- Countervailing Duty Measures on Certain Products from the People's Republic of China (WTO/DS437): Extension of Deadline for the Response of the Government of the People's Republic of China to Certain Initial Questionnaires: C-570- 931; C-570-936; C-570-940; C-570-942; C-570-944; C-570-946; C-570-957; C-570-959; C-570-966; C-570-968; C-570-978; C-570-980” (July 24, 2015).

<sup>20</sup> See, e.g., *Implementation of Determinations Under Section 129 of the Uruguay Round Agreements Act: Certain New Pneumatic Off-the-Road Tires; Circular Welded Carbon Quality Steel Pipe; Laminated Woven Sacks; and Light-Walled Rectangular Pipe and Tube from the People’s Republic of China*, 77 FR 52683, 52684 (August 30, 2012).

<sup>21</sup> See GOC Case Brief at 3.

<sup>22</sup> See *Notice of Commencement of Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements Act*, 80 FR 23254, 23254 (April 27, 2015).

<sup>23</sup> See DS379, para. 318.

<sup>24</sup> See Department Memorandum, regarding “Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People’s Republic of China: An Analysis of Public Bodies in the People’s Republic

as instruments of the GOC.<sup>25</sup> The Department discusses and analyzes a significant amount of record evidence before coming to the conclusion that certain state-invested enterprises are used “as instrumentalities to effectuate the governmental purpose of maintaining the predominant role of the state sector of the economy and upholding the socialist market economy.”<sup>26</sup> Of course, as noted above, the GOC has in some instances provided incomplete responses to these questionnaires, thus affecting the completeness of the information the Department had to analyze. However, as discussed in *Input Specificity/Public Bodies Preliminary Determination*, even where the GOC’s failure to respond resulted in the Department basing its analyses in part on the facts available, the Department’s public body determinations are supported by affirmative record evidence.<sup>27</sup> In any event, the GOC’s protestations that these facts available are somehow deficient are misplaced. The facts available in these public body determinations are explicitly premised on a lack of necessary information on the record.<sup>28</sup> Facts available are, by design, information used to fill these gaps in the record and will often be less ideal than the information requested. If the GOC wanted to ensure that the Department’s public body determinations were based on a better quality and quantity of data, it should have responded to the Department’s requests for information.<sup>29</sup>

In conclusion, we do not agree with the arguments presented in the GOC’s case brief and hereby adopt the preliminary determination with respect to public bodies described in *Input Specificity/Public Bodies Preliminary Determination* for this final determination. As a result, the Department continues to find that the relevant entities in this investigation were public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

## **B. Input Specificity**

### *GOC Comments:*

- The Department preliminarily determined that the various input for less than adequate remuneration programs have been in existence since at least 1957, because that is the latest date at which state-owned entities (SOEs) were producing and providing the inputs at issue.
- This conclusion assumes, however, that SOEs have consistently sold the relevant inputs, *i.e.*, that there has been that a “subsidy program” in place for the entire period of time.

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of China in Accordance with the WTO Appellate Body’s Findings in WTO DS379” (May 18, 2012) (*Public Bodies Memorandum*) and Department Memorandum, regarding “The relevance of the Chinese Communist Party for the limited purpose of determining whether particular enterprises should be considered to be ‘public bodies’ within the context of a countervailing duty investigation” (May 18, 2012) (*CCP Memorandum*).

<sup>25</sup> See, e.g., *Public Bodies Memorandum* at 2-3, and the resulting analysis.

<sup>26</sup> *Id.*, at 37.

<sup>27</sup> See, e.g., *Input Specificity/Public Bodies Preliminary Determination* at 13 referring to facts and analyses summarized at pp. 9-10 which are drawn from the *Public Bodies Memorandum* and the *CCP Memorandum*.

<sup>28</sup> See, e.g., *Input Specificity/Public Bodies Preliminary Determination* at 13.

<sup>29</sup> With respect to the GOC’s argument that the Department deemed the information it submitted irrelevant to the public body determinations, we disagree. As is clear from *Input Specificity/Public Bodies Preliminary Determination*, in cases where the GOC responded to requests for information, the Department considered the information submitted by the GOC and relied on that information to determine that the relevant entities were public bodies. See, e.g., *Input Specificity/Public Bodies Preliminary Determination* at pp. 14-15, n. 68 & n. 69 (citing to the GOC’s initial questionnaire responses and the Department Memorandum regarding “Input Producers and Input Purchases During the Investigations” (February 25, 2016)).

However, the GOC argues that the preliminary determination provides no evidence to support the assumption that subsidy programs have been in existence since at least 1957.

*Petitioners' Rebuttal Comments:*

- The GOC's argument conflates the WTO's requirement that the Department consider the length of time in which the subsidy program has been in operation, with the issue of demonstrating the existence of a subsidy program. Petitioners state that the Appellate Body did not complete its analysis with regard to the latter issue and, thus, did not find that the Department erred in this respect with regard to the investigations at issue.
- Further, Petitioners assert that the record evidence cited by the Department that government suppliers have produced the inputs since the founding of the PRC adequately addresses the WTO's concerns.

**Department's Position:** The GOC's comments provide no reason for the Department to modify its analysis from the preliminary determinations. As explained in the *Input Specificity Memorandum*, during the challenged investigations in which the provision of inputs for less than adequate remuneration was at issue, the Department requested three years of data regarding the industry providing the relevant input – information as to the year of receipt of the subsidy and the prior two years.<sup>30</sup> In addition, in these Section 129 proceedings, the Department also requested that the GOC provide information as to how long SOEs had been providing and selling each of the inputs at issue in the PRC; how long those inputs had been produced in the PRC; and how long those inputs had been consumed in the PRC.<sup>31</sup> Rather than provide the detailed information requested, the GOC elected in five of the proceedings to answer only 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, and for the other seven proceedings, the GOC did not respond, at all.<sup>32</sup> As a result, the Department based its determination on length of time on this statement, either as the fact provided by the GOC in five of the proceedings or, as facts available, for those seven proceedings where the GOC failed to respond.<sup>33</sup>

The Department can only make its determination based upon facts on the administrative record, and if the GOC had believed that it was important for the Department to have detailed information as to the existence of these programs three or more years prior to the periods of investigation for each of the challenged investigations, then it was incumbent upon the GOC to provide such information upon request. As it is, the Department made its determination based upon the information on the administrative record with respect to the provision of those inputs for less than adequate remuneration, both prior to and during the periods of investigation at issue.

The Appellate Body concluded that with respect to “the length of time during which the subsidy programme has been in operation,” “in order to establish” that an “unwritten subsidy programme” exists, “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

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<sup>30</sup> See *Input Specificity Memorandum* at 6 and 7, n. 25.

<sup>31</sup> See *id.* at 6-9.

<sup>32</sup> See *id.*

<sup>33</sup> *Id.*

provided to certain enterprises.”<sup>34</sup> On the basis of case specific input purchase data, which was reported to the Department in the CVD investigations at issue and compiled in the Department’s *Inputs Specificity/Public Bodies Preliminary Determination*,<sup>35</sup> we found adequate evidence in each of the investigations that public bodies systematically provided hot-rolled steel, wire rod, caustic soda, primary aluminum, seamless tubes, and standard commodity steel billets and blooms for less than adequate remuneration to producers in the PRC.<sup>36</sup> The GOC has presented no arguments to warrant a reconsideration of the Department’s preliminary findings in this regard.

In conclusion, we do not agree with arguments presented in the GOC’s case brief and hereby adopt the preliminary determination with respect to economic diversification and length of time in the *Input Specificity Memorandum* and the *Input Specificity/Public Bodies Preliminary Determination* for this final determination. As a result, the Department has examined both economic diversification and the length of time the input for LTAR subsidy programs were in existence and we have determined that neither provide a reason for us to change the Department’s original findings that these input for LTAR programs to which this memorandum applies were *de facto* specific.

### C. Benchmarks

#### *GOC Comments:*

- The Department’s preliminary findings are contrary to law and evidence and difficult to reconcile with its prior determinations.
- In 2007, the Department found that “market forces now determine the prices of more than 90 percent of products traded in China.”<sup>37</sup> It was on this basis that the Department considered it “possible to determine whether the PRC Government has bestowed a benefit upon a Chinese producer.”<sup>38</sup>
- However, in the approximately 50 CVD proceedings involving the PRC, there has not, to the GOC’s knowledge, been a single instance in which the Department has found that domestic prices may serve as a suitable benchmark under Article 14(d) of the SCM Agreement.
- Thus, according to the Department, while the PRC is a “market” for purposes of the CVD law, it is never sufficiently a “market” for any purpose that affects the calculation of CVD rates.

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<sup>34</sup> See *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (December 18, 2014) (*Appellate Body Report*) at paras. 4.143 and 4.149. In this regard, the Appellate Body also made clear that an investigating authority is *not* required to identify an “explicit subsidy programme implemented through law or regulation” when determining if a program is *de facto* specific, but instead the investigating authority must determine whether the subsidy program at issue “is used by a limited number of certain enterprises”). *Id.* at para. 4.146.

<sup>35</sup> See *Inputs Memorandum*.

<sup>36</sup> See *Input Specificity/Public Bodies Preliminary Determination* at 18-20.

<sup>37</sup> See Memorandum to David Spooner, Assistant Secretary for Import Administration, “Countervailing Duty Investigation of Coated Free Sheet Paper from the People’s Republic of China – Whether the Analytical Elements of the Georgetown Steel Opinion are Applicable to China’s Present-Day Economy,” (March 29, 2007) (Georgetown Steel Memorandum) at 5.

<sup>38</sup> *Id.* at 10.

- The Department’s Benchmark Memorandum is designed to merely serve as another one of the cookie cutter rationales that the Department will invoke going forward as justification for its arbitrary and unlawful conduct.
- Like the Public Bodies Memorandum before it, the Department’s Benchmark Memorandum is sweeping in its rationale and unconcerned with the facts and circumstances of particular markets and companies.
- The Department’s preliminary analysis seems designed to perpetuate the Department’s consistent rejection of domestic benchmark prices in the PRC, thus providing a rationale for the Department to continue using out-of-country “benchmarks” as a means of artificially inflating CVD rates.
- Article 14(d) does not require members to maintain a laissez-faire economy of the type that the United States considers itself to maintain. Moreover, the Appellate Body has made clear that Article 14(d) does not “qualify in any way the ‘market’ conditions which are to be used as the benchmark . . . as such, the text does not explicitly refer to a ‘pure’ market, to a market ‘undistorted by government intervention,’ or to a ‘fair market value.’”<sup>39</sup>
- None of the alleged distortions identified by the Department in the Benchmark Memorandum provide a basis for the Department to conclude that domestic prices in the PRC are unsuitable as benchmarks under Article 14(d).
- Further, the Department’s reliance on “subsidies” allegedly provided to upstream producers of inputs as a factor that supports its finding of “distortion” is a clearly an impermissible end-run around the disciplines that the SCM Agreement imposes for identifying and countervailing actionable subsidies.

*Petitioners’ Rebuttal Comments:*

- Rather than address the legal merits or evidence underlying the Department’s findings in the Benchmark Memorandum, the GOC resorts to speculation regarding the Department’s rationale and intentions.
- The GOC misinterprets the Appellate Body’s findings to argue in favor of a legal standard that would all but eliminate the possibility of using out-of-country benchmarks, regardless of the nature and extent of the foreign government’s intervention in the economy.
- In DS 437, the Appellate Body stated that an investigating authority may examine the conditions of competition in the relevant market in order to assess whether government actions are influencing pricing conduct.<sup>40</sup>
- In DS 437, the Appellate Body’s primary concern involved distortion findings based exclusively on the extent of government ownership in the industry under investigation. The Department has addressed this concern by conducting an analysis in the Benchmark Memorandum of the GOC’s distortions and interventions in the Chinese market.
- In the Benchmark Memorandum, the Department pointed to substantial record evidence demonstrating the existence of several significant distortions in the Chinese market.
- The Department demonstrated that the GOC intervenes in the basic microeconomic resource allocation decisions of state-invested enterprises (SIEs) and that SIEs’ allocation

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<sup>39</sup> See Appellate Body Report, US-Softwood Lumber IV, para. 87, quoting Panel Report, US-Softwood Lumber IV, paras. 7.50-7.51.

<sup>40</sup> See DS 437 at para. 4.62.

decisions are not fully responsive to market forces but, instead, react to the GOC's goals and policies;

- The GOC provides economic protection to SIEs that insulates them from the need to respond to market forces;
- SIEs, due to GOC subsidization, are not subject to the same budgetary constraints as other commercial actions, thereby allowing them to remain in the market when commercial considerations would otherwise force them to exit the market;
- The GOC's economic policies results in an overabundance of resources flowing to less efficient SIEs which encourages such firms to expand simply as a means of gaining policy support.
- Further, the Department demonstrated that the factors mentioned above are particularly acute with regard to the Chinese steel industry.<sup>41</sup>

### ***1. Department's Position:***

The Department disagrees with the GOC's assertions. Contrary to the GOC's suggestions regarding the Department's intentions, the Department's preliminary determination with respect to benchmarks is based on an analysis of substantial record evidence, including many third-party expert sources that were prepared and published for purposes other than the context of these proceedings. We note that the GOC has not challenged the accuracy of any of these sources and we continue to find that the record evidence supports the conclusions reached in our preliminary determination.

With respect to the GOC's argument that the Department has assumed that Article 14(d) of the SCM Agreement requires Members to "maintain a laissez-faire economy," the GOC has mischaracterized the Department's findings. At no point in our preliminary determination did we state that the market being examined must be "laissez-faire" or, as the GOC also suggests, "pure" or "undistorted by government intervention."<sup>42</sup> Rather, the Department's analysis followed the Appellate Body's own acknowledgment that governments may distort in-country prices for a good, either in its role as the provider of the good or, possibly, "through other entities or channels than the provider of the good itself," such that those prices are not properly considered "market-determined" for purposes of Article 14(d).<sup>43</sup> In addition, the Appellate Body has discussed that a proper market benchmark under Article 14(d) "is derived from an examination of the conditions pursuant to which the goods or services at issue would, *under market conditions*, be exchanged"<sup>44</sup> and that such conditions result "from the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in {the} market."<sup>45</sup> These concepts have guided the Department's benchmark analysis in this proceeding. The Department's determinations are supported by record evidence and consistent with the Appellate Body's guidance pertaining to Article 14(d) of the SCM Agreement.

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<sup>41</sup> See Benchmark Memorandum at 9, 17-18, and 20-31.

<sup>42</sup> See GOC Case Br. at 7.

<sup>43</sup> See DS 437 at para 4.50 and fn 530.

<sup>44</sup> See *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, para. 975. (*EC – Aircraft*) (emphasis added).

<sup>45</sup> *Id.* at para. 981.

Finally, we also disagree that the Department’s findings that input producers received “subsidies” constituted “an impermissible end-run around the disciplines that the SCM Agreement imposes for identifying and countervailing actionable subsidies.”<sup>46</sup> The Department relied upon the existence of these subsidies as one of many factors in assessing whether prices within the Chinese steel sector are distorted. But the Department did not analyze the subsidies for the purposes of finding them countervailable and applying duties; nor was it required to in this context. As such, the GOC’s arguments are misplaced.

## 2. *Evaluation of Additional Issues*

In addition to responding to comments made by the interested parties in their case briefs on our Preliminary Determinations, we are also discussing below the expert report concerning the economic framework for evaluating market distortion that was submitted by the GOC earlier in the *Pressure Pipe*, *Line Pipe*, and *OCTG* proceedings. Additionally, we are addressing the issue of conducting a price alignment analysis in these proceedings.

### a. *Evaluation of GOC Expert Report*

#### *Summary of GOC Report*

- As part of its July 6, 2015, questionnaire response, the GOC submitted an expert report authored by Professor Janusz A. Ordover, which it claimed “provides an economic framework for evaluating whether market prices were ‘distorted’ by the government’s predominant role as a supplier of the inputs in question and analyzes certain factual evidence from the Chinese marketplace during the periods of investigation (POI).”<sup>47</sup>
- In his report, Professor Ordover outlines an analytical framework that principally focuses on whether the GOC possesses and exercises “market power” through the state-owned enterprises (SOEs)<sup>48</sup> that produce steel in the People’s Republic of China (PRC), and, if so, whether “private market prices are distorted insofar as they are aligned with artificially low prices charged by a dominant government supplier.”<sup>49</sup> The analytical

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<sup>46</sup> See GOC Br. at 7.

<sup>47</sup> See Circular Welded Carbon Quality Steel Line Pipe from the People’s Republic of China Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People’s Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People’s Republic of China to the Department’s Benchmark Questionnaire, July 6, 2015, at Question 16; Certain Oil Country Tubular Goods from the People’s Republic of China Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People’s Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People’s Republic of China to the Department’s Benchmark Questionnaire, July 6, 2015, at Question 16; Circular Welded Austenitic Stainless Pressure Pipe from People’s Republic of China Section 129 Proceeding: United States – Countervailing Duty Measures on Certain Products from the People’s Republic of China (WTO/DS437): Response of the Ministry of Commerce of the People’s Republic of China to the Department’s Benchmark Questionnaire, July 6, 2015, at Question 16. The economic framework, hereinafter referred to as the “Ordover Report” is on the record of all three proceedings as Exhibit D-25 to the GOC’s July 6, 2015 questionnaire responses.

<sup>48</sup> Professor Ordover uses the term SOE to refer to government owned enterprises. The Department generally refers to these enterprises as “state-invested enterprises” or “SIE” where possible. By “state-invested enterprise,” the Department means enterprises in which the Government of China is an investor through an ownership interest of any size. The term generally has the same meaning as the term SOE, but the definition of SOE sometimes varies when used in different contexts, and the Department has adopted the term SIE to attempt to avoid possible confusion. We will use the term “SOE” when citing to the use of that term by others, such as Professor Ordover in his report.

<sup>49</sup> See Ordover Report at 7 (citation omitted).

framework posited by Professor Ordoover is commonly applied in antitrust/competition law analyses of mergers, where high and increasing levels of market concentrations may result in a firm possessing market power, which usually results in *higher* prices.<sup>50</sup> To address what Professor Ordoover describes as the Department’s “unorthodox” concern about monopoly power resulting in *lower* prices, which is the pertinent inquiry in a CVD analysis, he considers whether SOEs in the steel sector would engage in predatory pricing (pricing below marginal costs).<sup>51</sup>

- As part of that analytical framework, Professor Ordoover explains that certain market conditions can be examined to determine if dominant government suppliers exercise their market power to force private entities to align their prices at artificially low levels. These conditions include (1) whether private suppliers continue to operate and invest in new capacity; (2) the existence of private investment in Chinese steel companies; (3) steel companies’ profitability; (4) the legal framework governing business conduct of private suppliers in the PRC; (5) evidence regarding the degree of industry fragmentation and intensity of competition in the PRC’s steel market; and (6) the frequency and magnitude of price fluctuations.<sup>52</sup>
- After analyzing the degree of market concentration in the PRC, Professor Ordoover concludes that although SOEs in the PRC’s steel sector represent a large share of the marketplace when aggregated,<sup>53</sup> the industry is highly fragmented and no single government-owned supplier commands a significant market share.<sup>54</sup> He also finds that there is “no sound economic reason to treat all SOEs as a single firm for purposes of assessing market power,” even if SOEs overall represent a large share of the marketplace.<sup>55</sup> The absence of such market power alone, in Professor Ordoover’s view, negates the government’s ability to distort market prices. However, he also concludes that his analysis of the market conditions described above undermines any conclusion that the government suppliers are exercising predatory market power such that private suppliers are forced to price at artificially low levels and the prices of private suppliers in the Chinese steel market are distorted and unusable as suitable benchmarks.<sup>56</sup>

**Department Position:** As an initial matter, although the Department does not take issue with whether Professor Ordoover’s analytical framework concerning “market power” is useful in the context of antitrust analysis, we disagree that it is the *only* framework under which to assess whether and, to what extent, a government can affect the market, and thus determine if prices by private entities are distorted. Indeed, the singular focus on an antitrust paradigm is not required by Article 14(d) of the SCM Agreement or the WTO’s rulings on this issue.

The WTO Appellate Body has acknowledged that the use of in-country prices would not be appropriate when such prices are not market determined.<sup>57</sup> The Appellate Body further

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<sup>50</sup> *Id.* at 9.

<sup>51</sup> *Id.* at 9-10.

<sup>52</sup> *Id.* at 5-6 and 16-21.

<sup>53</sup> *Id.* at 13.

<sup>54</sup> *Id.* at 10-13.

<sup>55</sup> *Id.* at 22.

<sup>56</sup> *Id.*

<sup>57</sup> See *United States – Countervailing Duty Measures on Certain Products from the People’s Republic of China*, (DS437) at para. 4.50, citing *United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel*

recognized that “a government, in its role as a provider of a good, may *distort* in-country private prices for that good by setting an artificially low price with which the prices of the private providers in the market align.”<sup>58</sup> Such a finding, according to the Appellate Body, presupposes the government has sufficient “market power” to influence market outcomes, and thereby render private prices unsuitable as benchmarks.<sup>59</sup>

Notably, the Appellate Body did not exclude the possibility that “the government may distort in-country prices through *other entities or channels than the provider of the good itself*.”<sup>60</sup> Finally, in the present case, the Appellate Body found that “what an investigating authority must do in conducting the necessary analysis for the purpose of arriving at a proper benefit benchmark 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 supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record.”<sup>61</sup>

These findings make clear that there is no single analytical framework under which a market distortion analysis must be conducted, and particularly that an investigating authority need not rely on the antitrust framework advanced by Professor Ordover. Importantly, the Appellate Body’s finding that a government may distort domestic prices through entities or channels other than the provider of the good itself indicates that an investigating authority is not precluded from finding that in-country prices are distorted even if government suppliers are found to not possess “market power” in the sense contemplated under an antitrust framework.<sup>62</sup> Therefore, we disagree with Professor Ordover’s conclusion that “distortion of market-wide prices possibly can arise only in cases where the government-owned supplier possesses (or government-owned suppliers collectively possess) significant market power.”<sup>63</sup>

Indeed, the Department in its analysis considered not only the “significant market share”<sup>64</sup> held by SIEs in the steel market in China, but also the totality of circumstances present in the Chinese steel sector including the nature and extent of intervention by the GOC<sup>65</sup> itself in that market, including in ways other than as the immediate provider of the good. This intervention is a key factor in the present context because of the GOC’s longstanding and pervasive role in the Chinese steel sector, as explained in the Benchmark Memorandum, coupled with its role in the

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*Flat Products from India* (DS 436) at para 4.155.

<sup>58</sup> See *id.*, citing DS 436 at para. 4.155 (quoting Lumber AB Report, para. 90, emphasis added by the Appellate Body in its quotation).

<sup>59</sup> *Id.*

<sup>60</sup> See DS437 at fn. 530 to para. 4.50 (emphasis added).

<sup>61</sup> See DS437 at para 4.47.

<sup>62</sup> Professor Ordover explains that a fundamental premise of his analysis is that a government “possesses significant market power” when “the government is a dominant supplier of the relevant product.” See, e.g., Ordover Report at 8.

<sup>63</sup> See Ordover Report at 3.

<sup>64</sup> See Memorandum to Paul Piquado, Assistant Secretary for Enforcement and Compliance, “Benefit (Market Distortion) Memorandum,” (March 7, 2016) (Benchmark Memorandum), at 27.

<sup>65</sup> As we explained in the Benchmark Memorandum, China’s government is comprised of both the state apparatus and the Chinese Communist Party (CCP), which the Department’s assessment of the available evidence indicates are essential components that together form China’s “government” for the limited purpose of applying the CVD law. See Benchmark Memorandum, at fn. 10.

operation of SIEs in the sector. The Department found based on its analysis in the Benchmark Memorandum that “{t}his government intervention...so distorts and diminishes the impact of market signals that, based on the record in these proceedings, all domestic private {steel} prices,” as well as SIE prices, are distorted.<sup>66</sup>

As already noted, we do not take issue with Professor Ordovery’s conclusion that profit maximizing firms would generally seek to utilize their market power to elevate prices above competitive levels -- in the context of antitrust economics. The accuracy of his statement that a strategy by a dominant SIE supplier or by a group of SIEs, to lower prices would be “unorthodox” and counter to standard economic models must, therefore, be viewed through the prism of that economic paradigm. As we also explained above, that framework, however, is not the only one permitted by the Appellate Body for a market distortion analysis; nor is it 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 as described in the Benchmark Memorandum.

Furthermore, it is not uncommon for governments to pursue industrial policy objectives for specific sectors and certain entities in those sectors; nor is it uncommon that these objectives may be inconsistent with profit maximization and the market-oriented outcomes with which Professor Ordovery is concerned. Generally speaking, as part of those policies, governments might seek to utilize SIEs to pursue industrial policies, such as social and development objectives that may include employment goals, and promote these goals with direct and indirect government assistance to SIEs. They may also develop and support national champions, or restrain input prices to help develop downstream industries. In these circumstances, it would not be surprising for SIEs to reduce their prices in direct or indirect response to these governmental policies. For reasons described in the Benchmark Memorandum, it would also not be surprising for this extensive government intervention, and the significant SIE presence in the steel market, to distort private pricing downward.<sup>67</sup>

Therefore, we disagree with Professor Ordovery’s claim that a predatory pricing strategy is the only reason to expect a firm with significant market power to price its output below its expected cost of production. This type of pricing strategy would not be surprising or “unorthodox” from government-owned entities when they are consistent with government industrial policies, especially if these entities are also benefitting from various forms of government assistance, such as below market lending and other government-provided resources, like low cost inputs, cheap land, or subsidized energy.

The conclusions by the Department in the Benchmark Memorandum are further supported by the expert report authored by Professor Gene Grossman.<sup>68</sup> In his report, Professor Grossman

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<sup>66</sup> *Id.* at 30 (analyzing private producer prices); 26-27 (analyzing SIE producer prices).

<sup>67</sup> See Benchmark Memorandum at 27-30.

<sup>68</sup> See *Compliance Proceedings Pursuant to Section 129 of the Uruguay Round Agreements Act: United States - Countervailing Duty Measures on Certain Products from the People’s Republic of China (WTO/DS437)*, letter from Maverick Tube Corporation and United States Steel Corporation to rebut, clarify and correct GOC’s July, 6, 2015 questionnaire response (Grossman Report). This submission also contains a separate report authored by Mr. Andrew Szamosszegi, commissioned by counsel for the petitioners to provide additional factual information regarding the Chinese economy and to rebut the factual information advanced by Professor Ordovery (Szamosszegi Report). In his report, Professor Grossman explains that there are differences in applying the concept of “market

provides a number of important rationales for why, in the context of China, a pricing strategy that is not solely focused on profitability might be expected from SOEs. These include:

- SOEs are owned and controlled by national and regional governments. It stands to reason that their objectives would include not only profitability in the standard economic sense, but also to further the broad policy goals of the government.
- In the Chinese steel industry, the government might induce SOEs to charge low prices (by subsidizing their inputs or otherwise) in order to maintain high demand and thereby buffer the labor market from the employment effects of adverse shocks. Excess employment is quite common in sectors in China characterized by overcapacity, such as steel.
- A low price of steel and the high demand it attracts might also be favored by state and regional governments as a means to achieving their regional development goals.
- The GOC might also be eager to maintain a low price of steel as part of its broader industrial strategy, inasmuch as steel is an important input into many other manufacturing processes. The Eleventh Five Year Plan (2006-2010) designates ten “priorities” for equipment manufacturing industries and it includes action plans that seek to raise the market share of indigenous automobile manufacturers and building shipbuilding bases in various specified regions. All of these goals would be furthered by low steel prices.<sup>69</sup>

As a result, Professor Grossman disagrees with Professor Ordovery’s analysis that the only rationale why SOEs might charge artificially low prices is to pursue a predatory pricing strategy. These facts and analysis lead Professor Grossman to conclude that, in the face of this evidence of governmental industrial policies and interventions in SOEs, “{t}here is simply no reason to assume that the goal of the state-owned steel producers in China is solely (or even largely) that of maximizing profits, nor that low prices can arise only if these firms see predation and subsequent monopolization as a realistic possibility.”<sup>70</sup> Rather, SOEs in the PRC “might set low prices for their products even if such pricing is detrimental to their profitability. Moreover, low prices for SOE-provided steel products might in fact be a profit-maximizing response to the government’s provision of favorable access to important inputs (*e.g.*, below-market energy prices) or of favorable terms for financing. In either case, low prices need not be an indicator of predatory intent.”<sup>71</sup>

For the reasons outlined above, the Department disagrees with the main conclusions of the GOC’s expert report, which posits a singular, antitrust-derived analytical framework for determining whether “market power” exists, and whether such firms engage in a predatory

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power” in the antitrust and trade contexts, noting that “{a} large firm has market power in trade, if it has the *ability* to influence the price that its product fetches in the global marketplace” and “there is no requirement in the trade economist’s test for market power that the actions under consideration must be profitable.” Professor Grossman further explains that this distinction is meaningful in the context of China because “the SOE may have objectives different from profit maximization,” so that “the actions of the government or its related entities – be they pricing decisions for the good or service in question or otherwise – have the *ability* to affect prices charged by others.” Grossman Report at 4-5.

<sup>69</sup> See Grossman Report at 9-10.

<sup>70</sup> *Id.* at 10.

<sup>71</sup> *Id.*

pricing strategy to distort private prices in the market. While such an analysis might be relevant in an evaluation of market concentrations in the antitrust context, it is not the only analytical framework under which an investigating authority might analyze whether prices are distorted. As the Department has demonstrated through detailed discussion and record evidence in the Benchmark Memorandum, SIEs in the PRC do not operate as true commercial actors because they are not subject to the conditions one would expect in a commercial market. Coupled with our finding that the Chinese steel market is characterized by longstanding and pervasive government intervention in the sector as a whole, this leads to the conclusion that market signals are so distorted and diminished that the entire structure of the Chinese steel market is distorted, such that there are no potential benchmarks from the domestic industry that can be considered “market based.”<sup>72</sup>

Finally, with regards to the section of Professor Ordover’s report that examines certain factual information regarding the characteristics of the Chinese steel market, it is not necessary to address each of the indicia<sup>73</sup> and supporting information examined to assess whether private suppliers are “forced to price at artificially low levels due to the predatory market power of Chinese SOEs,” because the assessment relies on the competition/antitrust framework Professor Ordover advances as the only pertinent paradigm for this assessment. As we explain above, such a framework is not the sole basis contemplated or permitted by the Appellate Body in this context. The Department’s examination of the GOC’s intervention in the steel sector as a whole in the Benchmark Memorandum establishes that market signals—throughout the sector as a whole—are distorted by the effects of longstanding and continued pervasive government intervention. In these circumstances, the presence or absence of Professor Ordover’s antitrust-based “indicia” are not particularly telling indicia of market distortion. For 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.

Additionally, we examined Professor Ordover’s information and agree with the arguments and information outlined in the Szamosszegi Report, which supports the analysis and conclusions by the Department in the Benchmark Memorandum. As the report concludes:

The GOC continues to dictate economic outcomes for many industries and to actively pursue those outcomes through control over SOEs and market-distorting incentives provided to favored producers. The GOC’s interference in the marketplace is especially evident in the Chinese steel industry. Output is dominated by SOEs that are driven by objectives other than profit maximization. SOE steel producers benefit from subsidies including preferential access to financing from state-owned banks and artificially low input costs. Although not owned by the government, non-state firms also face many of

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<sup>72</sup> See Benchmark Memorandum.

<sup>73</sup> As noted above, Professor Ordover examined certain market features that he believes would not be observed if private suppliers were indeed being forced to price at artificially low levels due to a government’s exercise of predatory market power. These features include (1) the continued operation of private suppliers and investment in new capacity; (2) the existence of private investment in Chinese steel companies; (3) steel companies’ profitability; (4) the legal obligations of publicly-listed companies to safeguard investor interests (which would be breached by implementation of unprofitable business strategies); (5) industry fragmentation and intensity of competition in the PRC’s steel market; and (6) frequent price fluctuations.

the distortions that reduce costs for SOEs, and tend to follow the GOC's plans. As a result of this environment, the Chinese steel industry has been plagued by excess capacity for a number of years, including the entire POI. The result of all these policies is that domestic Chinese prices for many steel products, such as hot-rolled steel and steel rounds, remain highly distorted and cannot serve as reliable, market-determined benchmarks.<sup>74</sup>

*b. Pricing Analysis*

The Department has taken note of the Appellate Body's analysis focused on the alignment of private and SIE prices, and in particular where it expressly faulted the Department for failing to consider how significant SIE presence in the stainless steel coil market "actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers aligned their prices with those of the government-provide goods."<sup>75</sup> After careful consideration of this issue and for the reasons explained below, we find it is neither necessary nor feasible to conduct such a price analysis in these section 129 proceedings.

In *US-Softwood Lumber IV*, the Appellate Body recognized that in certain circumstances the government's role in providing a good may be "so predominant that private suppliers will align their prices with those of the government-provided goods."<sup>76</sup> In that scenario, the Appellate Body recognized that comparing the government input provider's price to in-country private prices to assess the amount of any benefit would be "circular" and would result in a calculation of an "artificially low, or even zero" benefit that does not fully offset the effect of the countervailable subsidy.<sup>77</sup> Our original analysis in the underlying investigations focused on this concept of SIE market predominance and market power, and that is the basis upon which the Appellate Body evaluated the GOC's claims.

However, the Appellate Body also found that it "do(es) not exclude the possibility that the government may distort in-country prices through other entities or channels than the provider of the good itself."<sup>78</sup> In addition and as discussed in more detail above, the Appellate Body has also stated that a proper market benchmark under Article 14(d) is derived from "market conditions" resulting from "the discipline enforced by an exchange that is reflective of the supply and demand of both sellers and buyers in market."<sup>79</sup> Consistent with this acknowledgment, as discussed in the Benchmark Memorandum, the Department has found in these Section 129 proceedings that the prices of all Chinese producers of steel inputs, whether SIEs or private entities, are not reflective of such market conditions because they are distorted by the GOC's significant intervention in the steel sector.<sup>80</sup> Our current finding that SIEs have a significant market share in the steel sector, although important to our overall market distortion analysis, is no longer central to our finding. Rather, the finding in our Benchmark Memorandum that all

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<sup>74</sup> See Szamoszegi Report at 8.

<sup>75</sup> See DS437 at para. 4.101.

<sup>76</sup> See Appellate Body Report, *US-Softwood Lumber IV* (WT/DS257/AB/R), at para. 101.

<sup>77</sup> *Id.* at para. 95.

<sup>78</sup> See DS 437 at fn 530.

<sup>79</sup> See discussion of *EC—Aircraft* paras. 975 & 981 *supra* at p. 10.

<sup>80</sup> The Department's findings apply to both the steel sector as a whole and the three inputs at issue in these three cases. See Preliminary Benchmark Supporting Memorandum.

prices are distorted is 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 decision thereby preventing the existence of the market conditions which are necessary for a proper benchmark under Article 14(d) of the SCM Agreement.<sup>81</sup>

Although we acknowledge that the Department's analytical framework differs from that used in the original investigations, where the analysis centered on the question of whether the market power of the SIE input suppliers (*i.e.*, "the provider of the good itself") caused the private suppliers to align their prices with the SIE prices, the Department's previous analysis is not the *only* framework for gauging whether prices are market-determined. Nor do we find that it is the most probative in these investigations, as set forth in the Benchmark Memorandum. Instead, we have now found the prices of all Chinese steel input producers to be distorted as a result the significant government interventions mentioned above—such that there are no potential in-country benchmarks that can be considered market-based— rather than due to price alignment resulting from the presence of market power by the providers of the good.

As noted, 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.<sup>82</sup> 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.

As an initial matter, there is only limited available record evidence on actual prices charged by various entities and whether those prices align. The only data on the records of the three cases that distinguishes between the prices of SIEs and private suppliers are the proprietary purchase data of the respondent companies in those proceedings. These are very limited data sets. The respondents' purchase data does not encompass the entire market for a particular input, and indeed, generally speaking may only be a fairly small percent.<sup>83</sup> The record does not contain sufficient information to assess whether such data can be fairly viewed as a representative sample. Additionally, even if the respondents' reported prices were representative, it may not

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<sup>81</sup> See Benchmark Memorandum at 27-30.

<sup>82</sup> Furthermore, analysis of any alignment between SIE and private prices in a sector may not yield meaningful results if the alignment can be explained by any number of distinct reasons. For example, prices for a good might be expected to "align" in circumstances where there is a predominant price-setting supplier *and* in circumstances where there are no price leaders and the prices of firms converge towards a single market clearing price.

<sup>83</sup> See the Memorandum to the File from Eric B. Greynolds, Acting Director, Office III, AD/CVD Operations, "Supporting Memorandum for the Final Determination for Pressure Pipe, Line Pipe, OCTG, Wire Strand, and Solar Panels," (Final Supporting Memorandum) dated concurrently with this memorandum, which indicates the total volume of steel rounds purchased by the firms examined in the OCTG investigation are small relative to the PRC's total domestic production of steel rounds during the same period. As indicated in the memorandum, the records for *Line Pipe* and *Pressure Pipe* yield similarly small ratios.

even be the case that these prices are all spot prices or are otherwise properly comparable. The reported prices may vary based on whether the respondent has long-term contracts and how those contracts are tied to the volatility of steel prices (*e.g.*, whether prices fluctuate within a band, etc.). Any comparison of the respondents' purchase experience to evaluate whether prices align would need to control for comparability issues on price and other terms.

Furthermore, from an administrative perspective, it is unlikely that in the context of a CVD investigation it would be possible to obtain sufficient information to allow the Department to perform a useful price alignment analysis. In the Department's experience, publicly available pricing information is seldom if ever segregated between SIEs and private entities; public and private data collection entities do not have a reason to so delineate the information they collect and disseminate. For example, the *OCTG* record contains a series of monthly average domestic Chinese prices compiled from the Steel Benchmark.<sup>84</sup> This price series does not indicate how much of the underlying pricing data were from sources that might be characterized as SIEs as opposed to private entities.<sup>85</sup> While the GOC has been able to provide some additional information regarding those suppliers identified by respondents, the GOC has stated that it is not able to provide such information with regard to other participants in the market because such information is not collected by its statistical agency.<sup>86</sup> Therefore, the Department does not expect that in most cases it would be able to gather pricing data for a market as a whole that distinguishes between the prices of SIE providers and private entities.

Given this data constraint, the main source of such prices available to the Department are likely to be those analyzed above—the prices paid by respondent companies to their supplier firms—which (as also explained above) may not provide a representative sample. Furthermore, any such data that is provided by respondents is usually not subject to public disclosure given the respondent's business interests in keeping such data proprietary. It would be even more difficult, if not impossible, to collect additional data from firms that are not subject to individual examination in a given proceeding, *i.e.*, firms that have not been selected as respondents. The Department, like any trade remedy investigating authority, does not have an enforceable manner

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<sup>84</sup> See Steel Benchmarker (SSB) Steel Prices - China Domestic, Exhibit 116 Attachment D of the *OCTG* Petition (April 8, 2009)

<sup>85</sup> Similar issues exist in the *Line Pipe* proceeding for a series of monthly domestic Chinese prices for hot-rolled band compiled from the Steel Benchmarker (*see* SSB - Amendment to the Petition (April 21, 2008) at Exhibit 4-A) and a series of domestic Chinese prices for hot-rolled coil and hot-rolled narrow strip compiled from MySteel (*see* GOC IQR (July 10, 2008) at Exhibit 59).

<sup>86</sup> For example, in response to the Department's request in the *OCTG* proceeding for "the total volume and value of domestic production of steel billets that is accounted for by companies in which the GOC maintains an ownership or management interest either directly or through other government entities," the GOC responded that "{t}he GOC respectfully informs the Department that all the data it has requested is simply not available to be provided. This is in significant part because steel billets are not a commodity with respect to which the National Statistics Bureau maintains specific output data." See Response of the Government of the People's Republic of China to the Department's Second Supplemental Questionnaire: Certain Oil Country Tubular Goods from the People's Republic of China, p. 3 (September 1, 2009). The GOC reaffirmed this statement in the *OCTG* Section 129 proceeding. See Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire at p. 29-30 (July 6, 2015). The GOC provided the same response in the context of the Pressure Pipe and Line Pipe Section 129 proceedings. For *Pressure Pipe*, see Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire at 32-33. For *Line Pipe*, see Response of the Ministry of Commerce of the People's Republic of China to the Department's Benchmark Questionnaire at 28-29.

in which to request this data from firms not selected to be respondents in CVD proceedings and it has no ability to compel, even selected firms, to provide information on their prices or pricing strategies.

In sum, while the Department has not conducted a price alignment analysis in this proceeding because we do not consider it necessary in light of the Department's finding that the Chinese domestic market for steel is distorted by virtue of the GOC's policy interventions in the sector and other factors, the Department has examined the records in these proceedings to ascertain whether it could perform such an analysis if it were still analyzing the question of whether SIE providers were exercising market power so as to cause the private providers to align their prices downward. Based on the issues described and discussed above, we conclude that (1) we are unable to reliably undertake such an analysis on the limited records of these investigations; and (2) it would be very difficult for the Department and interested parties to identify and obtain sufficient evidence to analyze whether SIEs were exercising market power in such a way that they were causing private supplier prices to align with the SIE prices.

### **3. Conclusion**

In conclusion, we do not agree with the arguments presented in the GOC's case brief pertaining to the appropriate benchmark to use to measure the adequacy of remuneration in *Pressure Pipe, Line Pipe, and OCTG*. We have also examined the evidence presented by the GOC in its submissions and find, for the reasons discussed above and in our preliminary determinations, 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. To the contrary and as discussed in detail in the Benchmark Memorandum, Preliminary Benchmark Supporting Memorandum, and above, we find 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 result, these input prices are inappropriate to use as benchmarks to determine the adequacy of remuneration. Instead, the Department continues to use the benchmarks from the original investigations to determine the adequacy of remuneration in the hot-rolled steel, steel rounds and stainless steel coil input markets in *Pressure Pipe, Line Pipe, and OCTG*.

With respect to the Department's benchmark analysis in *Solar Panels*, the GOC chose not to respond to the Department's request for information, the Department based its preliminary determination on adverse facts available, and the GOC did not comment on this determination. The Department's final benchmark determination with respect to *Solar Panels* remains unchanged from the preliminary determination, we continue to find that the prices of polysilicon in China are not based on market conditions within the meaning of Article 14(d) of the SCM Agreement and, as result, these prices are inappropriate to use as benchmarks to determine the adequacy of remuneration. Instead, the Department continues to use the benchmarks from the original investigation to determine the adequacy of remuneration for polysilicon.<sup>87</sup>

As a result of the Department's continued use of the benchmarks from the original investigations to determine the adequacy of remuneration in *Pressure Pipe, Line Pipe, OCTG, and Solar*

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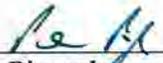
<sup>87</sup> See Preliminary Benchmark Supporting Memorandum at 2-3.

*Panels*, the net subsidy rates, as they pertain to the provision of steel inputs and polysilicon for LTAR programs in the four CVD proceedings remain unchanged.

### III. Recommendation

In light of the report adopted by the DSB in WTO DS437 and based on our analysis of the comments received, we recommend adopting the positions described above.

Agree  Disagree

  
\_\_\_\_\_  
Paul Piquado

Assistant Secretary  
for Enforcement and Compliance

19 MAY 2016  
\_\_\_\_\_  
(Date)