AS 0022

ANTI-SUBSIDY INVESTIGATION CONCERNING IMPORTS OF OPTICAL FIBRE CABLES ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA

Comments on the Application and the Initiation of the Investigation

by the

Government of China

19 August 2022

OPEN

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1 INTRODUCTION

1. The present submission provides the comments of the Government of the People's Republic of China ("GOC") regarding the initiation of the anti-subsidy ("AS") investigation concerning imports of single-mode optical fibre cables ("OFC") originating in the People's Republic of China (Investigation No. AS0022) of 26 April 2022 and the application ("the Application") filed by PRYSMIAN CABLES & SYSTEMS LIMITED ("the Applicant") on 11 March 2022.

2. The GOC intends to fully cooperate in this AS investigation, and these comments constitute part of the GOC's response to the UK Trade Remedies Authority's ("TRA's") questionnaire and should be read along with that response.

3. In a nutshell, the GOC respectfully submits that, in the present case, the requirements for the initiation of an AS investigation as set out in the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), the UK Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 ("UK Regulations") and Schedule 4 to the UK Taxation (Cross-border Trade) Act 2018 ("TCBA") are not met. For this reason, the present investigation should be terminated forthwith.

4. The GOC will first provide comments on three procedural issues concerning the Application. It will then address the Applicant's allegations concerning injurious subsidization showing that the arguments and data presented in the Application do not justify the initiation and continuation of the investigation, let alone the imposition of AS measures, on OFC imports from China.

5. The GOC reserves its right to comment further on procedural and substantive issues in the course of the present investigation.

2 PROCEDURAL OBSERVATION

6. The GOC respectfully submits that:

   (i) the initiation and conduct of the present investigation are inconsistent with Article 13.1 of the SCM Agreement, as the TRA initiated the present investigation without providing the GOC a reasonable opportunity for consultations. As a result, China was precluded from clarifying the situation regarding the matters referred to in Article 11.2 of the SCM Agreement;

(ii) the initiation of the present investigation is inconsistent with Article 11.4 of the SCM Agreement because the Applicant is related to Chinese OFC producers and exporters and is likely itself an importer of OFC from China and probably did not have the standing to submit the Application as a UK producer of OFC;

(iii) contrary to Articles 12.4 and 12.4.1 of the SCM Agreement, the grant of excessive confidential treatment of key information in the Application has prevented the GOC from fully exercising its rights of defence.

2.1 Pre-initiation consultations

7. The GOC recalls that Article 13.1 of the SCM Agreement provides as follows:

> "*As soon as possible after an application under Article 11 is accepted, and in any event* ***before the initiation of any investigation****, Members the products of which* ***may be subject*** *to such investigation shall be invited for consultations* ***with the aim of clarifying the situation*** *as to the matters referred to in paragraph 2 of Article 11* ***and arriving at a mutually agreed solution****.*" (Emphasis added).

8. The matters referred to in paragraph 2 of Article 11 of the SCM Agreement concern the evidence to be provided in the application as regards injurious subsidization:

> "*An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence cannot be considered sufficient to meet the requirements on this paragraph*."[1]

9. As the WTO Appellate Body clarified in *US – Carbon Steel (India)*, "*Article 13.1 refers expressly to the investigations conducted pursuant to Article 11 and makes it mandatory for an investigating authority to provide an opportunity for consultations with the Member whose products may be subject to the Article 11 investigation.*" (Underlining added).[2]

10. Furthermore, the Panel in *Mexico – Olive Oil* held that:

> "*We do not see a requirement in the text of Article 13.1 that the Members involved must actually hold the referenced consultations. Indeed, if under Article 13.1, the Member considering whether to initiate an investigation were obligated to hold consultations with the exporting Member before it could initiate an investigation, the exporting Member could effectively block initiation simply by declining to consult. We find relevant contextual support in the language of Article 13.3 of the SCM Agreement, which reads: "...these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation..." This passage supports the view that Article 13.1 requires the Member considering whether to initiate to "invite" the exporting Member for consultations, but does not*

[1] SCM Agreement, Article 11.2.

[2] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.532.

> *require that those consultations be held. We emphasize, however, that the invitation must be a bona fides one. That is, assuming that the exporting Member accepts the invitation, the Member considering whether to initiate an investigation cannot then refuse to participate in the consultations*."[3] (Underlining added)

11. It follows that the *raison d'être* of Article 13.1 is to ensure that the investigating authorities give a meaningful opportunity to the exporting Member, through consultations, to address and discuss all matters related to, *e.g.*, the allegations of subsidy and injury claimed in the Application.

12. Against this background, the GOC recalls that, in the present case, the Application was submitted on 11 March 2022 to the TRA. On Friday, 22 April 2022, the GOC received an email from the TRA of its intention to initiate the present investigation on 26 April 2022. Through that email, the TRA also invited the GOC for consultations, but **it did not provide the GOC with a copy of the Application**. Therefore, on 22 April 2022, i.e., that same day, by way of an email, the GOC expediently (i) acknowledged receipt of the TRA's pre-initiation notification, (ii) **requested a copy of the application**, (iii) requested a date for consultations, and (iv) asked the TRA to postpone the initiation of the investigation. It is underlined that the TRA did not provide the GOC with a copy of the Application. The GOC, therefore, had no knowledge of the allegations in the Application and had no basis for conducting consultations, as it could not have consulted in the void. Indeed, how could the GOC enter into consultations on that or any other day without a copy of the Application?

13. Thereafter, only on Tuesday, 26 April 2022, the GOC received a response from the TRA explaining that it did not want to delay the initiation. The TRA also attached a copy of the Application to its response and the GOC received it only on 26 April 2022 when the case was initiated. The TRA, however, did not respond to the GOC's request to provide a date for consultations, which, in any event, was water under the bridge as far as the application of Article 13.1 was concerned.

14. While the TRA takes the position that it complied with the obligation in Article 13.1 of the SCM Agreement by inviting the GOC for consultations on 22 April 2022, the GOC considers that the initiation of the present investigation is in violation of Article 13.1 of the SCM Agreement for the reasons stated above.

[3] Panel Report, *Mexico – Olive Oil*, para. 7.35.

15. First, the GOC does not consider that Article 13.1 of the SCM Agreement is a mere formality or a procedural obligation to 'invite' the exporting Member to consult while making it impossible to hold the consultations. Indeed, such an interpretation is unlikely to be upheld by a WTO Panel.

16. As the GOC sees it, Article 13.1 of the SCM Agreement effectively serves the dual purpose of, on the one hand, allowing the exporting WTO Member to exercise its rights of defence and finding an amicable solution and, on the other hand, avoiding frivolous investigations and incorrect claims of injurious subsidization. Indeed, the evidence and views submitted prior to initiation by the exporting WTO Member need to be taken into account in order to determine whether the initiation of the investigation would be legally justified. As held by the Panel in *China – GOES*, "*Article 13.1 of the SCM Agreement also suggests that an investigating authority is required to weigh the evidence submitted prior to initiation by an exporting Member, as a part of the process of 'clarifying the situation' as to the matters in Article 11.2 of the SCM Agreement*."[4] (Underlining added).

17. The prerequisite for the proper application of this provision is that the exporting WTO Member is timely made aware of the allegations of, among others, subsidization in the application and given a genuine opportunity to 'consult' and present its views.

18. By inviting the GOC for consultations on 22 April 2022, without however providing it with a copy of the Application, the TRA made it *de facto* **impossible** for the GOC to prepare for the pre-initiation consultations. As mentioned previously, the GOC had no basis to consult in the absence of the Application which it only received on 26 April 2022, *i.e.*, on the same day as the initiation of the investigation. Thus, the GOC was denied a real opportunity for clarifying the situation and reaching a mutually agreed solution within the meaning of Article 13.1 of the SCM Agreement.

19. Second, the TRA seems to conflate the obligation in Article 13.1 with that in Article 13.2 of the SCM Agreement -- which concerns post-initiation consultations – in an attempt to rectify the illegality at hand. The non-provision of the Application to the GOC prior to the initiation of the AS investigation allowing it to consult with the TRA is simply contrary to the text, context, object, and purpose of Article 13.1 of the SCM Agreement. As the GOC indicated in its email

[4] Panel Report, *China – GOES*, footnote 74.

response of 26 April 2022, this illegality cannot be rectified by consulting after the case has been initiated.

20. Third, besides the fact that Article 13.1 of the SCM Agreement does not provide any exceptions, there were no factual circumstances justifying the delay in sending the Application to the GOC and the denial of an opportunity for the GOC to consult. Indeed, the Application was lodged on 11 March 2022 (*i.e.*, 41 calendar days before the GOC received the invitation for consultations and 45 calendar days before the GOC received a copy of the Application and the investigation was initiated). There was, therefore, sufficient time to arrange a mutually convenient date for holding consultations.

21. In summary, the obligation imposed by Article 13.1 is not a tick-the-box exercise – as the TRA appears to consider it – which is met by inviting the exporting WTO Member in a manner that makes it impossible to conduct the consultations prior to the initiation of the case and to submit evidence which should have been considered prior to initiation. Thus, the GOC respectfully submits that the TRA acted inconsistently with Article 13.1 of the SCM Agreement because, even though the TRA seemingly invited the GOC for consultations, in the absence of a copy of the Application, the GOC was not provided with an effective opportunity to consult. Given the mandatory nature of Article 13.1 of the SCM Agreement, and the fact that pre-initiation illegalities cannot be rectified subsequently, the present investigation should be terminated forthwith.

2.2 Concerns regarding the Applicant's standing

22. First, the GOC respectfully requests the TRA to investigate the Applicant's relationship/s with Chinese exporting producers of OFC before continuing the investigation further.

23. The GOC recalls that, by virtue of Article 11.4 of the SCM Agreement, "*[a]n investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. The application shall be considered to have been made 'by or on behalf of the domestic industry' if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the*

application account for less than 25 per cent of total production of the like product produced by the domestic industry." (Underlining added and footnotes omitted).

24. In *US – Offset Act (Byrd Amendment)*, the Appellate Body held that Article 11.4 of the SCM Agreement requires investigating authorities to "determine" whether an application for the initiation of an investigation has been "made by or on behalf of the domestic industry".[5] If the thresholds set out in Article 11.4 of the SCM Agreement have been met, then the "*application shall be considered to have been made by or on behalf of the domestic industry*".[6] It is only in such circumstances that an investigation may be initiated.[7]

25. Article 16.1 of the SCM Agreement defines the term "domestic industry" as:

> "[…] *referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related[48] to the exporters or importers or are themselves importers of the allegedly subsidized product or a like product from other countries, the term "domestic industry" may be interpreted as referring to the rest of the producers*.
>
> *Footnote 48: For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if (a) one of them directly or indirectly controls the other; or (b) both of them are directly or indirectly controlled by a third person; or (c) together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.*" (Underlining added).

26. Articles 11.4 and 16.1 of the SCM Agreement are transposed into the UK legal framework in paragraph 9(1)(a)(i) of Schedule 4 to the TCBA and regulation 52(2) of the UK Regulations and by regulation 29 of the UK Regulations,[8] respectively.

27. Against this legal background, it is noted that: (i) the Application was filed by the Applicant alone; and (ii) there seem to be extensive legal, financial and trade relationships between the Applicant and Chinese OFC exporting producers. In fact, the Applicant's group company (*i.e.*,

[5] Appellate Body Report, *US – Offset Act (Byrd Amendment),* para. 282. (Emphasis added).
[6] *ibid*.
[7] *ibid*.
[8] The GOC notes that, on page 45 of the Application, the TRA refers to Regulation 128 of the Customs (Import Dufy) (EU Exit) Regulations 2018. However, a reading of this provision makes clear that this is not the applicable law to determine whether a UK producer of the product concerned in this investigation is "related to" an exporter or an importer of the products concerned. By contrast, it is obvious that the applicable provision is Regulation 29 of the UK Regulations.

Prysmian S.P.A.) has twelve subsidiaries operating in China.[9] As demonstrated in its latest annual report, the Applicant's group company is a 100% shareholder of the Chinese OFC producer Prysmian Wuxi Cable Co. Ltd.[10] The Applicant and Prysmian Wuxi Cable Co. Ltd. are thus indirectly controlled by the Applicant's group company. The Applicant's group company also has a joint venture with Yangtze Optical Fibre and Cable Joint Stock Ltd. ("YOFC"), a Chinese manufacturer engaged in the production and sales of OFC.[11] YOFC is owned by China Huaxin Posts and Telecom Technologies Co. Ltd. (23.73%), Wuhan Yangtze Communications Industry Group Co. Ltd. (15.82%) and DrakaComteq B.V. (23.73%).[12] The Applicant's group company holds 100% equity interest in DrakaComteq B.V. Furthermore, according to its annual report, YOFC sells OFC to members of the Prysmian Group.[13] It cannot, therefore, be excluded that the Applicant imported and is still importing OFC from China through related companies in addition to importing optical fibres into the UK market. Accordingly, **the Applicant should not be considered a "UK producer"** for the purposes of defining the UK industry in the present investigation and does not have the standing to bring this Application.

28. Moreover, since the Applicant is the sole producer that filed the Application, the Application **was not made by or on behalf of the UK industry** and, therefore, the present investigation was likely initiated in violation of Article 11.4 of the SCM Agreement and paragraph 9(1)(a)(i) of Schedule 4 to the TCBA. Accordingly, the GOC respectfully requests the TRA to re-evaluate its decision to initiate the investigation at hand.

29. Second, and without prejudice to the above, the GOC notes that it is not clear whether the TRA undertook an independent assessment of the total UK production of OFC and the Applicant's standing. The GOC considers that such an assessment would have involved, for example, reaching out to the other UK producers of OFC to determine their production, the total UK production, and their position in relation to the Application. Indeed, the TRA was obliged under

[9] Prysmian Group, Annual Report 2021, pp. 36-39, available at <www.prysmiangroup.com/en/media/media-library/annual-report>, last accessed on 23 June 2022. See also: Prysmian Group, Annual Report 2020, p. 243, available at <www.prysmiangroup.com/sites/default/files/atoms/files/PRYSMIAN-RFA-ENG-GROUP.pdf>, last access on 19 July 2022.
[10] Prysmian Group, Annual Report 2021, pp. 36-37, available at <www.prysmiangroup.com/en/media/media-library/annual-report>, last accessed on 23 June 2022.
[11] Application, p. 45.
[12] Yangtze Optical Fibre and Cable Joint Stock Ltd, Annual Report 2021, p. 136, available at <https://www1.hkexnews.hk/listedco/listconews/sehk/2022/0428/2022042800706.pdf>, last access on 19 July 2022.
[13] *ibid*, p. 93.

Article 11.4 of the SCM Agreement to independently determine whether the Application had been made by or on behalf of the UK industry by checking the support for or opposition to the Application. If the TRA has reached out to the other UK producers, the GOC would be most grateful to be provided with the relevant assessment, as is routinely done in other jurisdictions, such as the European Union ("EU").

30. Third, it is noted that the Applicant asserts that the other three UK producers identified on page 33 of the Application are supposedly "*unable to expressly support this Complaint for fear of retaliation from Chinese entities*", without nevertheless providing any evidence in support of this serious allegation.[14] In fact, the Application does not even state what kind of retaliation is being feared – commercial retaliation by customers or in any other form. Moreover, as explained in sections 4.2.3 and 5.2 below, it is more likely that the other UK producers simply rejected the Applicant's request to support the present Application, as they seem to have a better sales and market share position compared to the Applicant. The GOC, therefore, respectfully requests the TRA to disregard the Applicant's assertion reported above for being speculative, unfounded, and unsupported by "positive evidence". To recall, "positive evidence" has been defined by the Appellate Body in several cases as evidence that is "*affirmative, objective, verifiable, and credible*".[15]

2.3 Excessive confidentiality of key information in the Application

31. The GOC is concerned that extreme confidentiality has been granted to nearly all key information in the Application in violation of Articles 12.4 and 12.4.1 of the SCM Agreement. Such extreme confidentiality has precluded the GOC from fully understanding and commenting on the allegations regarding subsidization, injury, and causation made by the Applicant.

32. To recall, Article 12.4 of the SCM Agreement[16] provides that, the grant of confidential treatment is subject to the requirement of showing good cause:

> "*Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall,* ***upon good cause shown****, be*

[14] Application, pp. 32-33.
[15] Appellate Body Report, *China – GOES*, para. 126; and Panel Report, *China – Autos (US)*, para. 7.209.
[16] Incorporated under UK law by regulation 45(1)-(3) of the UK Regulations.

> *treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it*."[17] (Emphasis added).

33. As noted by the WTO Appellate Body in *EC – Fasteners (China)* in the context of Article 6.5 of the Anti-Dumping Agreement ("ADA"), which is identical to Article 12.4 and must therefore be interpreted consistently with Article 12.4 of the SCM Agreement:[18]

> "*[...] 'good cause' must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information. 'Good cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party*."[19]

34. Furthermore, the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU),* clarified that there needs to be evidence of the objective assessment carried out by the investigating authority to determine whether the reasons advanced by a party seeking confidential treatment show "good cause" for granting confidentiality.[20]

35. If the above-mentioned threshold is met and certain information is treated as confidential, Article 12.4.1 of the SCM Agreement[21] provides that the investigating authorities must ensure that non-confidential summaries containing sufficient detail, and thus enabling a reasonable understanding of the confidential information submitted, are provided:

> "*The authorities shall require interested Members or interested parties providing confidential information to furnish **non-confidential summaries** thereof. These summaries shall be in **sufficient detail to permit a reasonable understanding** of the substance of the information submitted in confidence. [...]*." (Emphasis added).

36. WTO jurisprudence makes clear that the obligations under Article 12.4.1 of the SCM Agreement are not satisfied if the non-confidential summaries only reveal the main point of the underlying confidential information,[22] or if they require parties "*to infer, derive and piece together a possible summary of the confidential information*".[23] Indeed, as clarified by the Panel in *China – Autos (US)*, "*data gaps in non-confidential summaries may deprive respondents of a 'reasonable understanding' of the substance of the confidential information at issue*."[24] Additionally, a mere mention of "*year-over-year changes in percentage terms*" or a complete

[17] See also: Panel Report *Korea – Certain Paper*, para. 7.335; and Panel Report, *EC – Fasteners (China)*, para. 7.451.

[18] See, for example, Panel Report *Mexico – Olive Oil*, paras. 7.89-7.91, where the Panel found that the reasoning applied in Articles 6.5.1 of the ADA is applicable to Article 12.4.1 of the SCM Agreement.

[19] Appellate Body Report, *EC – Fasteners (China)*, para. 537.

[20] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.99-5.100. See also: Appellate Body Report, *EC – Fasteners (China) (Article 21.5 - China)*, paras. 5.68-5.69.

[21] Incorporated under UK law by regulation 45(6) of the UK Regulations.

[22] Panel Report, *China – GOES*, para. 7.202.

[23] Panel Report, *China – Autos (US)*, paras. 7.26, 7.45 and 7.51.

[24] *ibid*, para. 7.26.

redaction of the confidential information as done all across the annexes to the present Application is insufficient to meet the standard provided for by Article 12.4.1.[25] The purpose of providing sufficiently detailed non-confidential summaries as required by Article 12.4.1 is to preserve the balance between the interests of confidentiality and the ability of interested parties to defend their rights in an investigation.[26]

37. Furthermore, Article 12.4.1 of the SCM Agreement allows for an exemption from the requirement to provide a non-confidential summary only in "*exceptional circumstances*" if the confidential information at issue is not susceptible of summarisation. Nevertheless, if the exceptional circumstances' exemption is not invoked on the basis of duly justified grounds, as appears to be the case in the present investigation, there is no basis to conclude that purported exceptional circumstances alter the standard that applies under Article 12.4.1 and that the absence of appropriate non-confidential summaries is permitted.[27]

38. Against this background of the applicable legal standards for confidential treatment of information, some examples of the violation of the above provisions in the present case are provided.

39. First, Annex A.2.2 of the Application containing the CRU estimates regarding, *inter alia*, the production of the main UK producers of OFC is stated to be confidential because it is subject to copyrights. That Annex is completely redacted and not summarised even though clearly non-confidential data ranges and indexed data could have been provided. The data contained in Annex A.2.2 is necessary for interested parties not only to rebut the injury allegations but also to understand whether the Applicant had the standing to make the Application. It is indeed not possible for the GOC to understand, among other matters, the total UK production of OFC and whether there are UK producers of OFC other than the three producers mentioned on page 33 of the Application.

40. The Application does not provide a non-confidential summary of the CRU data or the justification for the absence of such a summary. The Panel in *China – X-Ray Equipment* made clear that a simple reference to the nature of the confidential information does not amount to

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[25] Panel Report, *China – Boiler Products*, paras 7.62-7.63; and Panel Report, *Mexico – Olive Oil*, paras. 7.87-7.88.
[26] Panel Report, *China – GOES* para. 7.213.
[27] Panel Report, *China – X-Ray Equipment*, para 7.368. See also: Panel Report, *Mexico – Olive Oil* paras. 7.89-7.91, where the Panel found that the reasoning applied in Articles 6.5.1 of the ADA is applicable to Article 12.4.1 of the SCM Agreement.

showing exceptional circumstances justifying the failure to provide non-confidential summaries of confidential information.[28]

41. Overall, this unwarranted and unjustified grant of confidentiality strongly impinges on the GOC's rights of defence because the GOC can neither comment on nor rebut key allegations in the Application. This is even more so as the non-confidential version of the Application often does not permit interested parties to distinguish the data concerning the Complaining UK industry (*i.e.*, the Applicant alone) from the data concerning the entire UK OFC industry (*i.e.*, the Applicant and the other UK OFC producers).

42. Other key information for which no data/proper non-confidential summaries have been provided (in the absence of a request for confidentiality and good cause demonstration), include, *inter alia*:

Information for which confidentiality was granted	**Good cause provided**	**Non-confidential summary provided**	**Exceptional circumstances justified**	**Relevance for rights of defence**
Basis for the adjustments made to the CRU data by the Applicant (Annex A.2.1)	No	No	No	Key element in the injury claim which cannot be challenged. The position of the Applicant and other UK producers in the market cannot be duly addressed.
Basis of the calculation of the alleged Chinese "overcapacity" (Annexes A.2.4 and A.2.5)	No	No	No	Cannot comment on and rebut the Applicant's causation allegation.
Data concerning the quantity, timing and level of trade of Chinese sales volumes from the quotations used to calculate the unit price of the imports per product type (Annex E.3)	No	No	No	Key element in the injury and undercutting examination without which the GOC cannot check the representativity of the prices and cannot challenge the Applicant's injury and undercutting calculations.
Data concerning the quantity, timing and level of trade of UK sales volumes used to calculate the unit price of the UK producers' sales prices per product type (Annexes E.3 and A.4)	No	No	No	
Information related to the price comparison conducted by the Applicant, suggesting	No	No	No	Cannot answer the TRA's request to comment on the price comparison sug-

[28] *ibid*.

the LTAR provision of raw material and inputs (Annex F8, F137 and F138)				gested by the Applicant and cannot rebut the Applicant's allegation that the alleged LTAR provision of raw materials benefitted the OFC industry.

43. In view of the above, the GOC hopes that the TRA will make available an updated version of all the key annexes, thereby allowing the GOC to file a proper rebuttal.

2.4 Interim conclusion on procedural observations

44. For the foregoing reasons, the GOC respectfully requests the TRA to re-evaluate its decision to initiate the present investigation.

45. As an aside, the GOC notes that, while the Applicant is accusing Chinese OFC producers of being subsidized, the Applicant and the UK OFC industry have been benefitting from numerous subsidies and state aid schemes. This includes schemes that were formally notified to the European Commission prior to Brexit.[29]

46. To highlight just one example, following the Applicant's logic of subsidies, through the Telecommunication Infrastructure (Relief from Non-Domestic Rates) Act 2018, the UK Government provides 100% business rates relief for new fibre infrastructure for 5 years. This scheme was implemented to support the rollout of fibre connectivity for broadband and future 5G communications to homes and businesses in the UK and likely benefitted the UK OFC producers.[30] It came into force in April 2017, lasted until 2022, and cost an estimated amount of GBP 60 million.[31]

[29] Pursuant to Article 93 of the UK-EU Withdrawal Agreement of 17 October 2019, all awards and state aid schemes made prior to the end of the Transition Period (31 December 2020) will continue to fall under the state aid regime for a period of four years. Throughout this period, the state aid schemes and awards in the UK need to comply and be managed in accordance with the existing EU state aid regime. An example of UK subsidy formally recognised by the EU Commission is the "National Broadband Scheme for the UK for 2016-2020" (see: European Commission, "SA.40720 (2016/N) – National Broadband Scheme for the UK for 2016-2020", C(2016) 3208 final, available at <https://ec.europa.eu/competition/state_aid/cases/263954/263954_1760328_135_4.pdf>, last access on 11 July 2022).

[30] UK Government, "Policy paper: Autumn Statement 2016" (23 November 2016), available at <www.gov.uk/government/publications/autumn-statement-2016-documents/autumn-statement-2016>, last access on 11 July 2022.

[31] UK Department for Communities and Local Government, "Business rates: relief for new fibre on telecommunication hereditaments" (2017), available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/640703/Consultation_on_Business_Rates_Relief_for_New_Fibre_on_Telecommunication_Hereditaments.pdf>, last access on 11 July 2022 and House of Commons, "Briefing Paper n. 08035: Telecommunications Infrastructure (Relief from Non-Domestic Rates) Bill 2017-2018" (2017), available

47. The UK has set ambitious goals for bandwidth expansion and 5G implementation as well as the gradual replacement of copper networks in favour of optical fibre networks. To support these goals, over the past few years, the UK has adopted several comprehensive subsidy programs, tax benefits, grants, loans, and other support. The non-exhaustive list below provides a few examples.

Date	Title	Description	Amount
2022	Future RAN: Diversifying the 5G supply chain[32]	Incentivises industry to create new products and services to unlock the full potential of "disaggregated networks and open architectures."	GBP 36 million[33]
2017-2021	Local Full Fibre Networks Programme: 2017–2021[34]	Stimulates demand for full-fibre network	GBP 287 million[35]
2016-2020	(Modification) of the National Broadband Scheme for the UK for 2016-2020[36]	Supports local and community roll-out of broadband networks	GBP 500 million [37] (GBP 1.2 billion in total including the original scheme)[38]
2010-2020 (although contracts undertaken under this scheme are still in place and ongoing)	Superfast Programme[39]	Subsidises the delivery of superfast broadband infrastructure to areas not reached by the private sector	GBP 1.7 billion[40]

at <https://researchbriefings.files.parliament.uk/documents/CBP-8035/CBP-8035.pdf>, last access on 11 July 2022.

[32] UK Government, "Future RAN: Diversifying the 5G Supply Chain", available at <www.gov.uk/guidance/future-ran-diversifying-the-5g-supply-chain>, last access on 11 July 2022.

[33] UK Government, "Subsidy Scheme details: Future RAN", available at <https://searchforuksubsidies.beis.gov.uk/scheme/?scheme=SC10516>, last access on 11 July 2022.

[34] UK House of Commons, "Gigabit-broadband: Funding for rural and hard to reach areas" (2022), p. 29, available at <https://researchbriefings.files.parliament.uk/documents/CBP-9207/CBP-9207.pdf>, last access on 11 July 2022.

[35] *ibid*.

[36] European Commission, "SA.40720 (2016/N) – National Broadband Scheme for the UK for 2016-2020", C(2016) 3208 final, available at <https://ec.europa.eu/competition/state_aid/cases/263954/263954_1760328_135_4.pdf>, last access on 11 July 2022.

[37] UK Government, "Subsidy Scheme details: National Broadband Scheme for the UK for 2016-2020", available at <https://searchforuksubsidies.beis.gov.uk/scheme/?scheme=SC10140>, last access on 11 July 2022.

[38] European Commission, "SA.40720 (2016/N) – National Broadband Scheme for the UK for 2016-2020", C(2016) 3208 final, available at <https://ec.europa.eu/competition/state_aid/cases/263954/263954_1760328_135_4.pdf>, last access on 11 July 2022.

[39] UK Government, "Guidance: Building Digital UK", available at <www.gov.uk/guidance/building-digital-uk>, last access on 11 July 2022.

[40] *ibid*; see also: "Building Digital UK (BDUK): Table of local broadband projects", available through the link found on the UK Government's website at <https://docs.google.com/spreadsheets/d/1Hs00bNsyRV1WoOtfow3rsNXzpcKg26AsOWvk1bvJRk/edit#gid=1411146266>, last access on 11 July 2022.

2019	UK "Project Gigabit"[41]	Provides higher broadband connections in "hard to reach parts of the UK"	GBP 5 billion[42]
2017	Digital Infrastructure Investment Fund[43]	The Fund is making investments in optical fibre-based networks and related enabling infrastructure to boost connectivity across the UK.	GBP 400 million[44]

48. In sum, it is paradoxical that, while the UK OFC producers – especially the Applicant – are themselves benefitting from massive amounts of direct and indirect subsidies in various forms, they are blaming the Chinese industry for their self-created woes.

49. Moreover, the general Chinese polies, such as the Broadband China Strategy, are alleged to be the basis of the supposed subsidization of the Chinese OFC producers even though these are just non-binding documents setting out general infrastructure development goals similar to the UK targets for broadband and 5G expansion discussed above.

50. Therefore, the allegations of subsidization made in the Application seem unnecessary and based on double standards and should be rejected by the TRA.

3 SUBSIDIZATION

51. In brief, the GOC submits that the subsidy allegations in the Application (i) are not legally justified, and (ii) misrepresent the economic framework of the Chinese OFC industry.

3.1 Applicable legal standard

52. The GOC recalls that Article 11.2 of the SCM Agreement[45] sets out the evidentiary standard that must be satisfied in an application submitted to an investigating authority by or on behalf of a domestic injury. Article 11.2 of the SCM Agreement provides as follows:

> "*An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The*

[41] UK Government, "Guidance: Building Digital UK", available at <www.gov.uk/guidance/building-digital-uk>, last access on 11 July 2022.
[42] *ibid*.
[43] AMBER Infrastructure Group, available at <www.amberinfrastructure.com/our-funds/national-digital-infrastructure-fund/>, last access on 11 July 2022.
[44] UK Government, "Business rates boost for broadband" (2018), available at <www.gov.uk/government/news/business-rates-boost-for-broadband--2>, last access on 11 July 2022.
[45] Incorporated under UK law by paragraph 9(1) of the TCBA.

> *application shall contain such information as is reasonably available to the applicant on the following:*
> *[...] (iii) evidence with regard to the existence, amount and nature of the subsidy in question; [...].*" (Underlining added).

53. In addition, Article 11.3 of the SCM Agreement requires investigating authorities to "*review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation*."

54. As noted by the Panel in *US – Supercalendered Paper*, the obligation of WTO Members in relation to the assessment of the sufficiency of evidence in an application finds expression in Article 11.3 of the SCM Agreement and must be read together with Article 11.2, meaning that "*if an investigating authority initiates an investigation without sufficient evidence, it acts inconsistently with Article 11.3 of the SCM Agreement*."[46]

55. In *China – GOES*, the Panel clarified that, as implied by the language of Article 11.3 of the SCM Agreement, a part of the investigating authority's determination of whether there is "*sufficient evidence*" to justify the initiation of an investigation must entail an "*assessment of the accuracy and adequacy of the evidence furnished*."[47] In that case, the Panel laid out certain criteria to be applied by investigating authorities to determine whether the initiation of a countervailing duty investigation is justified on the basis of the evidence submitted in an application, and it clarified that an applicant is required to provide sufficient evidence of the existence and the nature of a subsidy.[48] Evidence of the "*existence of a subsidy*" requires evidence of a financial contribution by a government or public body and a benefit to the recipient.[49] The Panel further clarified that there must be evidence of the existence of a present subsidy, including the existence of a benefit during the investigation period.[50] The evidence of the "*nature of the subsidy*" includes evidence regarding whether the subsidy is specific.[51] Accordingly, it is not enough to adduce evidence of only one of the three elements of a countervailable subsidy, *i.e.*, financial contribution by a public body, benefit, or specificity. The *GOES* Panel further noted that "*sufficient evidence*" regarding the existence, amount and nature

[46] Panel Report, *US – Supercalendered Paper*, para. 7.145.
[47] Panel Report, *China – GOES,* para. 7.52. (Underlining added).
[48] Panel Report, *China – GOES,* paras. 7.51-7.54.
[49] Panel Report, *China – GOES,* para. 7.58.
[50] Panel Report, *China – GOES,* paras. 7.71 – 7.72. The Panel in *China – GOES* underlined that the existence of subsidy refers to a present subsidy and not to some historical subsidy given to some company. See para. 7.96.
[51] Panel Report, *China – GOES,* paras. 7.60-7.61.

of the alleged subsidies implies that "*adequate evidence, tending to prove or indicating the existence of these elements, is required*".[52]

56. The above-mentioned legal standards concerning the sufficiency of the evidence in an application established by the Panel in *China – GOES* were reiterated by the Panel in *US – Countervailing Duties (China)*.[53]

57. Finally, while WTO panels and the Appellate Body have not provided an exhaustive list of evidence and circumstances that meet the "*sufficient evidence*" standard regarding the nature, existence and amount of a subsidy, their rulings indicate that certain types of statements and assertions are inadequate to meet this standard including, among others, the following:

(i) simple assertions unsubstantiated by relevant evidence;[54]

(ii) "*[g]eneral information about government policy, with no direct connection to the subsidy programme at issue, is not 'sufficient evidence' of specificity*."[55]

(iii) the fact that a company is the user of a program is not evidence that it is the sole or one of the limited users of the program thereby demonstrating specificity;[56] and

(iv) in the absence of information on the allocation of the benefit of the subsidy to the proposed investigation period, the requirement to demonstrate the existence of a benefit in the expected investigation period is not met.[57]

58. In addition, pursuant to Article 2.1(b) of the SCM Agreement, specificity does not exist if the granting authority – or the legislation pursuant to which the granting authority operates – establishes objective criteria or conditions governing the eligibility for and the amount of the subsidy, provided that (i) eligibility is automatic, (ii) such criteria or conditions are strictly adhered to, and (iii) such criteria or conditions are clearly spelt out in laws, regulations or other official documents, so as to be capable of verification.

59. Against this legal background, the GOC notes that all the claims in the Application regarding subsidization do not meet the required evidentiary standards and are inadequate for the initiation of the present investigation.

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[52] Panel Report, *China – GOES,* para. 7.55.
[53] Panel Report, *US – Countervailing Duties (China),* para. 7.146.
[54] SCM Agreement, Article 11.2.
[55] Panel Report, *China – GOES,* para. 7.66.
[56] *ibid,* para. 7.107.
[57] *ibid,* para. 7.74.

3.2 OFC is not an "encouraged" industry

60. Based on Article 11.2 of the SCM Agreement, the GOC respectfully submits that the Applicant's allegation that the OFC industry is "encouraged"[58] is incorrect and does not show that the measures at issue are specific within the meaning of Article 2 of the SCM Agreement. The Applicant has extracted certain terms and phrases out of context from various Chinese documents, misrepresented others and tried to tie them together to show that the GOC allegedly promotes the OFC industry. However, a complete reading of these documents would nevertheless demonstrate that the Applicant's statements are baseless and not supported by any evidence, let alone "positive evidence", as will be explained in more detail below.

61. First, the Applicant states that:

> "*[T]he telecommunications sector has been designated as a "strategic industry". The 12th Five-Year Plan identified new generation information technology, which includes OFC, as one of the seven "strategic industries" and stipulated that this technology should be strengthened and developed through comprehensive policy support. Similarly, the 13th Five-Year Plan aimed to further develop the strategic OFC industry through the National Broadband Agenda by establishing a high-speed, high-capacity optical telecommunications system. Additionally, the 14th Five Year Plan focuses on digital transformation and building innovative information infrastructure.*"[59] (Underlining added).

62. It is underlined that Five-Year plans are neither mandatory nor legally binding; they are merely guidance documents. As the TRA would be well aware, several Asian countries, such as India, have had five-year plans since their independence.

63. In any event, the Legislation Law of China provides that only the Constitution, laws, administrative regulations, and local regulations and rules constitute general legislation in China. The difference between these types of binding measures and non-mandatory plans is also clear from the fact that the plans do not contain actual legal provisions, sanctions, or rules on applicability. Therefore, to the extent that the Applicant has relied on these plans in its analysis of the alleged subsidization, its claims are based on a misperception of the policy and therefore not accurate and adequate evidence.

64. Without prejudice to the above, the 12th Five-Year Plan ended on 31 December 2015 and the 13th Five-Year Plan ended on 31 December 2020. Therefore, to the extent that the Applicant relies on these plans to substantiate its subsidization claims, then, with their termination,

[58] Application, pp. 63-64, 72 and 77.
[59] Application, pp. 63-64.

following the Applicant's own logic, there is no legal basis for the continued subsidization of OFC producers. Moreover, with the expiry of the 12th and 13th Five-Year Plans, the reliance on those plans to claim the existence of subsidization of OFC producers in the investigation period or in the future is purely conjecture and cannot be deemed to constitute any evidence, let alone sufficient evidence, of the existence of subsidies. It follows that such plans are completely irrelevant to the current investigation.

65. The Applicant's reliance on the 14th Five-Year Plan is also misplaced. Moreover, and in any event, this plan does not mention OFC. The Applicant bases itself on the incorrect assumption that if the *telecommunication sector* and the *information infrastructure* are supposedly encouraged, everything that makes up that sector or infrastructure is encouraged. Such an approach cannot be considered legal and is not based on any evidence whatsoever.

66. Second, the Applicant asserts that:

> "*The new generation information technology industry is also an "encouraged industry" under the "Made in China 2025" initiative and, accordingly, is eligible to benefit from considerable State funding. Relatively new products such as OFC are very much part of the "Made in China 2025" strategy*."[60]

67. The Applicant thus appears to improperly classify OFC as part of the "*new generation information technology industry*",[61] and has again drawn a conclusion based on its self-serving assumption in the absence of any evidence whatsoever. As is known, the Made in China 2025 initiative does not refer to the OFC industry at all; nor does it define such a "new generation information technology industry". The Applicant does not explain, let alone produce evidence as to, why OFC should be considered "new generation information technology". In fact, the Applicant acknowledges that the abovementioned document includes the development of polymers, which are used to manufacture polyethylene, which, in turn, is "*one of the main raw materials used in the manufacturing of OFC*."[62] Thus, while the GOC disagrees that such raw material is covered by the Made in China 2025 initiative, the point is that OFC (*i.e.*, the product under consideration) is in any event *not* covered by such an initiative.

68. Third, the product concerned in the present investigation is "*optical fibre **cables***". However, all the GOC's general documents which the Applicant relies upon concern either downstream infrastructure services (broadband/internet access networks) or, to a lesser extent, upstream

[60] Application, p. 64.
[61] Application, pp. 64 and 76.
[62] Application, p. 76.

(fibres) products – and *not* OFC. Thus, one is talking about completely different products, sectors and industries which are unrelated to OFC and about documents which are aimed at infrastructure development and services. Nothing in the Application provides the basis for concluding that the various *general* documents referred to by the Applicant concern OFC and cover OFC, let alone *specifically* support or encourage the OFC industry.

69. Fourth, and without prejudice to the above, if all the documents relied upon by the Applicant are considered holistically (*e.g.*, the Made in China 2025 plan,[63] the 14th Five-Year Plan,[64] the Broadband China Strategy,[65] the Catalogue for High-Tech Products,[66] the Law of the PRC on Progress of Science and Technology,[67] etc.), all industries and enterprises as well as sectors of the Chinese economy are covered and thus, in the Applicant's words, "encouraged". Therefore, following the Applicant's logic, there can be no specificity.

3.3 Absence of sufficient evidence as to the existence and nature of the alleged subsidies

70. The sections below provide the GOC's preliminary comments concerning several of the allegations of injurious subsidization as well as the GOC's answers pertaining to Section C1 of the TRA's questionnaire.

3.3.1 Alleged direct transfer of funds via grants

71. First, the GOC notes that the Applicant has failed to provide any evidence with respect to the existence, amount, and nature of the alleged grants. To recall, the Panel in *China – GOES* clarified that specific evidence concerning all the three elements of subsidization must necessarily be provided in relation to each subsidy even if there is a "*... pervasive government support to the [...] industry*" (*quod non*).[68] However, the Applicant mostly relied on unspecific statements in certain annual reports of certain Chinese companies.[69] As also implicitly acknowledged by the Applicant itself,[70] such reports do not contain all the necessary information and data to conclude that Chinese companies producing OFC received subsidies.

[63] Annex F36 to the Application.
[64] Annex F3.B to the Application.
[65] Annex F25 to the Application.
[66] Annex F17 to the Application.
[67] Annex F23 to the Application.
[68] Panel Report, *China – GOES,* para. 7.66.
[69] Application, pp. 86-95.
[70] See, for example, Application, p. 91, where the Applicant states that: "*not all the producers clearly identify which government subsidies are related to equipment and construction services*", and p. 111, where the Applicant

72. In fact, based on the information provided in the Application, the largest grants were received by YOFC, which – as noted above – is a company related to the Applicant.[71] It is thus ironic and paradoxical how the Applicant is falsely accusing the GOC of injurious subsidization when, in fact, the Applicant itself would be benefitting from the alleged subsidies.

73. Second, the identification of a grant and the granting authority are basic elements to be evidenced because they connect to the key assessment pillar concerning specificity of an alleged subsidy. The TRA has a certain amount of discretion to assess the adequacy and accuracy of the allegations in the Application. However, it cannot act in the absence of any evidence and base itself merely on the names of the grants, especially when the Applicant claims sweepingly that those are national, local, or regional grants.

74. Indeed, the extent that an alleged grant was given by the national authority, it was incumbent upon the Applicant to adduce evidence that the grant was specific to certain industries, *i.e.*, notably the OFC industry. However, no such evidence has been provided. The reliance on the "Broadband China Strategy", and the "*Accelerating the Construction of High-speed Broadband Networks Guiding Opinions on Promoting Network Speed Increase and Fee Reduction State Council (2015), No. 41*" ("Guiding Opinions (2015), No 41")[72] is simply wrong, as OFC is not an encouraged industry under these documents. Furthermore, and in any event, these documents do not mandate any grants.

75. The Applicant also alleges that the existence of the "Broadband China Strategy" document would constitute *prima facie* evidence that Chinese producers of OFC have received government subsidies in the form of direct transfer of funds via grants.[73] However, the "Broadband China Strategy" is a paper that was introduced to tackle the broadband underdevelopment in urban and rural areas by speeding up the construction of broadband networks and improving the capacity of information infrastructure in those areas. The objective of such strategies is for the government to provide public services to its citizens and enterprises. Similar schemes can be found not only in the EU[74] but also in the UK, such as the "Gigabit

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acknowledges that: "*Subsidies obtained in the form of a preferential tax rate or a tax deduction are not included in each company's annual and semi-annual reports*."

[71] Application, pp. 91-92.

[72] Application, p. 73.

[73] Application, p. 84.

[74] Such as "Broadband in rural areas of Germany", "High-speed broadband in Portugal" and "Broadband within the framework of rural development program in Sweden", to name just a few.

Infrastructure Subsidy Scheme”,[75] which has the specific aim of improving broadband access for rural premises,[76] and the “Future Telecoms Infrastructure Review”.[77] Ultimately, the “Broadband China Strategy” neither mentions nor suggests subsidization of the OFC industry, and nothing in the Application provides the basis for concluding that this *general* document concerning the Chinese broadband network *specifically* support or encourage the OFC industry.

76. Moreover, the Panel in *China – GOES* has clarified that the mere fact that a company is located in a province and/or is prominent in a province and may even be an eligible user of a program is not evidence of *de facto* specificity.[78] To the extent that a supposed grant was given by a regional or local authority, the grant will not be automatically specific. Indeed, in the context of regional specificity, as noted by the Appellate Body, if a subsidy is available to all enterprises in that region, it will not be specific and thus not countervailable.[79]

77. Without prejudice to the above, as regards the TRA’s specific request to comment on Article 11 of the Guiding Opinions (2015), No 41 mentioned above, the GOC wishes to make three points. First, as the name of the document suggests, and as already noted in relation to this and other documents above, the Guiding Opinions (2015), No 41 is merely a non-binding document which does not contain actual legal provisions, sanctions, or rules on applicability. It does not concern OFC and does not mandate any subsidization.

78. Second, upon a proper reading of Article 11 of that document, and the relatively imprecise translation provided in the Application, it becomes apparent that the aim of this provision, in line with the guidance as a whole, is to ensure and improve public infrastructure/broadband services for backward areas. It has nothing to do with the production or generation of OFC or other products. Moreover, the section highlighted by the Applicant clearly has no relation to subsidies within the meaning of the term and, in fact, refers to the marketplace.

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[75] UK Department for Digital, Culture, Media & Sport, “Better broadband for 500,00 rural homes in UK gigabit revolution”, available at <www.gov.uk/government/news/better-broadband-for-500000-rural-homes-in-uk-gigabit-revolution>, last accessed on 20 July 2022.
[76] UK Department for Digital, Culture, Media & Sport, “Delivering a gigabit-capable UK: Gigabit Infrastructure Subsidy”, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1068899/Gigabit_Infrastructure_Detailed_Overview_v0.6.pdf>, last accessed on 7 July 2022.
[77] UK Department for Digital, Culture, Media & Sport, “Future Telecoms Infrastructure Review”, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/732496/Future_Telecoms_Infrastructure_Review.pdf>, last access on 11 July 2022.
[78] Panel Report, *China – GOES*, para. 7.107.
[79] Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.165.

79. Third, unlike the Applicant, the TRA cannot look at one isolated phrase from this document that has been misrepresented by the Applicant. The TRA should start by reading the preamble of the document which states as follows: "*Broadband network is a national strategic public infrastructure. Building a broadband network infrastructure and service system with high-speed, smooth, urban and rural coverage, high-quality, low-cost, and convenient services will serve multiple purposes*."

80. For the reasons given above, the GOC respectfully submits that, overall, the mandatory evidentiary standard of providing evidence on the nature and existence of the alleged grants has not been met. Thus, the investigation into the grants, and consequently their possible countervailing by the TRA, will be WTO-inconsistent.

3.3.2 Alleged government revenue forgone or not collected

81. The GOC strongly objects to the investigation into the alleged tax schemes and notes that the Applicant has not provided the evidence of the existence of a benefit to the OFC producers in the investigation period with respect to any of the below-mentioned alleged subsidies, nor satisfied the specificity threshold.

3.3.2.1 Enterprise Income Tax privileges and benefits for High and New Technology Enterprises

82. According to the Applicant, the Enterprise Income Tax ("EIT") privileges and benefits for High and New Technology Enterprises constitute countervailable subsidies.[80] The GOC disagrees and maintains that this alleged subsidy scheme is not specific, as the legislation pursuant to which the granting authority operates establishes objective criteria or conditions governing the eligibility for, and the amount of, the tax reduction, eligibility is automatic, and the qualification criteria and conditions are strictly adhered to.

83. As already stated in section 3.1 above, Article 2.1(b) of the SCM Agreement provides that specificity shall not exist if the granting authority establishes objective criteria or conditions governing the eligibility for and the amount of the subsidy, provided that (i) eligibility is automatic, (ii) such criteria or conditions are strictly adhered to and (iii) such criteria or conditions are clearly spelt out in laws, regulations or other official documents, so as to be

[80] Application, p. 111.

capable of verification. This is the case of the alleged EIT privileges claimed by the Applicant for High and New Technology enterprises.

84. The legislation pursuant to which this alleged scheme operates clearly sets out objective criteria for eligibility.[81] Such criteria are applied automatically. Therefore, the tax authorities concerned have no discretion in applying the specific tax rate when the conditions for eligibility are met.

85. According to footnote 2 of the SCM Agreement, eligibility criteria are considered objective if they are neutral, do not favour certain enterprises over others, are economic in nature, and are horizontal in their application. This is the case here. Access to the specific tax rate is open to all enterprises and does not favour certain enterprises over others.

3.3.2.2 Accelerated depreciation of instruments and equipment used by High-Tech enterprises for High-Tech development and production

86. The Applicant further claims that the accelerated depreciation of instruments and equipment used by High-Technology enterprises for High-Technology development and production ("Accelerated Depreciation Programme") represents a countervailable subsidy.[82]

87. It is noted that accelerated depreciation is available to all companies across China and the scheme is operated on the basis of objective criteria. Furthermore, the State Taxation Administration has no discretion in its application. Thus, this alleged subsidy is also not specific.

88. The GOC notes that, as also acknowledged by the Applicant, Article 32 of the Enterprise Income Tax Law of the PRC provides that any enterprise which purchases new equipment and appliances whose unit value exceeds RMB 5 million is eligible for the programme.[83] In accordance with the provisions of Article 2.1(b) of the SCM Agreement, specificity cannot exist in respect of this programme.

89. The Applicant incorrectly claims that the programme is "specific" to certain industries including the OFC industry. Besides the fact that OFC is not directly or indirectly covered in the list of industries provided by the Applicant, the GOC wishes to clarify that from 1 January

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[81] Administrative Measures for the Determination of High and New Technology Enterprise, Article 11, available at <https://tkegexpat.com/foreign-investment-policy/administrative-measures-of-high-tech-enterprise>, last access on 4 July 2022.
[82] Application, p. 120.
[83] Application, p. 122.

2019, the scope of industries eligible for accelerated depreciation of fixed assets – as prescribed by the Notice by the Ministry of Finance and the State Taxation Administration of Improving the Enterprise Income Tax Policies on the Accelerated Depreciation of Fixed Assets (No. 75 [2014], MOF) and the Notice by the Ministry of Finance and the State Taxation Administration of Further Improving the Enterprise Income Tax Policies on the Accelerated Depreciation of Fixed Assets (No. 106 [2015], MOF) – has been expanded to all manufacturing industries.

90. In any event, as confirmed by the sampled exporting producer cooperating in this case, it did not resort to accelerated depreciation of assets.

3.3.2.3 Tax offset for research and development

91. In a similar manner as the schemes discussed above, the Applicant claims that research and development ("R&D") expenses incurred in the development of new technologies are additionally deductible and that this constitutes a countervailable subsidy.[84]

92. The GOC recalls that that tax offset for R&D is available to all companies across China and the scheme is operated on the basis of objective criteria. Furthermore, the State Taxation Administration has no discretion in its application. Thus, this alleged subsidy is also not specific.

93. Indeed, tax offset for R&D is based on a specific legislative source consisting of legislative provisions setting out objective criteria for eligibility that are applied consistently and automatically, just like the schemes discussed above.[85] Thus, for the same reasons set out above, the Applicant's claim that "*the OFC industry is a highly encouraged industry*" and that "*[i]t is therefore reasonable to conclude that OFC producers have also received these kinds of tax breaks*"[86] should be dismissed as incorrect and unsupported.

94. In any event, the Applicant admits that it has no proof of OFC producers benefitting from this subsidy, and it assumes that they may have or should have befitted from this supposed scheme.

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[84] Application, p. 116.
[85] Regulations on the Implementation of the Enterprise Income Tax Law of the PRC, Article 95. See also: Application, p. 116.
[86] Application, p. 119.

3.3.3 Alleged preferential financing

3.3.3.1 Alleged referential loans by state-owned commercial banks

95. The Applicant claims that supposed preferential lending by Chinese state-owned banks constitutes a countervailable subsidy,[87] but acknowledges that it failed to provide any *prima facie* evidence as to "*the provision of such preferential loans for specific OFC producers as well as the specific preferential terms which determine the existence and amount of benefit they provide*".[88] Thus, the investigation into the alleged preferential lending does not satisfy the required evidentiary standards (discussed previously) and is WTO-inconsistent.

96. Without prejudice to the above, the GOC respectfully submits that the Applicant has misrepresented the relationship between state-owned commercial banks and the GOC to claim that state-owned commercial banks are "public bodies".

97. First, it is recalled that the Appellate Body in *US – Carbon Steel (India)*, clearly established the below-mentioned criteria for assessing the existence of a "public body":

> "*4.36. We believe that the Panel, in grappling with the case-by-case nature of public body determinations, correctly articulated the appropriate standard when it observed that "evidence that a government* ***exercises*** *meaningful control over an entity and its* ***conduct*** *may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions." However, the Panel erred in its substantive interpretation of Article 1.1(a)(1) by construing the term "public body" to mean* ***any*** *entity that is "meaningfully controlled" by a government. Consequently, the Panel erred in its application of Article 1.1(a)(1) to the USDOC's public body determination in the underlying investigation, in effect treating the GOI's ability to control the NMDC as determinative for purposes of establishing whether the NMDC constitutes a public body. Moreover, the Panel failed properly to consider whether the USDOC had adequately explained and supported, in its written determination, the basis for its finding that the NMDC is a public body.*
>
> *4.37. As noted above, the Appellate Body has explained that the term public body in Article 1.1(a)(1) of the SCM Agreement means "an entity that possesses, exercises or is vested with governmental authority." The* ***substantive legal question*** *to be answered is therefore whether one or more of these characteristics exist in a particular case. This* ***substantive standard*** *should not be confused with the* ***evidentiary standard*** *required to establish that an entity is a public body within the meaning of the SCM Agreement. Although the Panel quoted extensively from the Appellate Body report in* ***US – Anti-Dumping and Countervailing Duties (China)****, it appears to have blurred the distinction drawn by the Appellate Body in that report between the existence of control by a government over an entity, on the one hand, and "meaningful control", on the other hand. Thus, the Panel did not analyse, in our view, the question of whether the GOI in fact*

[87] Application, pp. 95-100.
[88] Application, p. 98.

exercised control over the NMDC and its conduct. Nor did the Panel assess whether the USDOC had properly established that the NMDC "possesses, exercises or is vested with governmental authority", and is therefore a public body."[89] (Underlining added)

98. The Appellate Body, while faulting the Panel's assessment in that dispute, noted that the analysis as regards a "public body" is case-specific and needs to take into account several factors beyond mere government control:

> "*…the question of whether the conduct of an entity is that of a public body must in each case be determined on its own merits, with due regard being had to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates. The Panel failed to evaluate whether the USDOC had properly considered the relationship between the NMDC and the GOI within the Indian legal order, or the extent to which the GOI in fact "exercised" meaningful control over the NMDC as an entity and over its* ***conduct****. Instead, the Panel examined evidence that would, in our view, more properly be seen as evidence of mere "formal indicia of control", such as the GOI's ownership interest in the NMDC, the GOI's power to appoint and nominate directors, and the reference on the NMDC's website indicating that the NMDC is under "administrative control" of the GOI. Those indicia, insofar as they were discussed by the USDOC in its determinations, are certainly relevant to the question at issue. Yet, without further evidence and analysis, they do not provide a sufficient basis for a finding that the NMDC is a public body*."[90] [Underlining added]

99. To summarise, the Appellate Body ruling above clarifies that:

(i) The substantive legal standard for the demonstration of a "public body" is satisfied by establishing that an entity possesses, exercises or is vested with governmental authority, and it is met only if one of these characteristics exist as regards the entity in question;

(ii) An evidentiary standard further applies to establish the substantive legal standard, and this evidentiary standard cannot be met by mere statements;

(iii) In addition to government ownership, meaningful control over an entity by a government does not make an entity a "public body". In *US – Carbon Steel (India)*, the Appellate Body noted that the Indian government's ability to control NMDC on account of shareholding and the fact that NMDC was under the administrative control of the Indian government was not determinative of whether NMDC constituted a "public body";

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[89] Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.36-4.37.
[90] *ibid*, para. 4.43.

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

100. Against this background, in summary, the GOC considers that the Applicant has failed to satisfy the substantive legal and evidentiary standards that need to be satisfied with respect to each entity termed as a "public body". The Applicant did not:

(i) Indicate which state-owned commercial banks are at issue and lent to the OFC industry. Indeed, as discussed above, there can be no 'general' country-wide claim of all banks being public bodies as made by the Applicant; and

(ii) Evaluate the relationship between the state-owned commercial banks supposedly lending to the OFC industry and the GOC in the Chinese legal order nor the extent to which the GOC in fact exercises/exercised meaningful control over each of the state-owned commercial banks and their conduct in support of its claim that state-owned commercial banks are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement.

101. The Applicant's mere reliance on Article 34 of the Law of the People's Republic of China on Commercial Banks ("Chinese Commercial Banks Law"), is inadequate to claim that state-owned commercial banks are public bodies and supposedly disburse preferential loans to OFC producers in China.

102. In any event, Article 34 of the Chinese Commercial Banks Law was taken out of context by the Applicant. Indeed, Article 4 of the Chinese Commercial Banks Law provides that "*[c]ommercial banks shall follow the principles of safety, liquidity and efficiency with full autonomy and assume sole responsibility for their own risks, profits and losses. Commercial banks shall carry out business in accordance with laws, free from any interference by entities or individuals*". Article 5 clarifies that there shall be no interference by local governments and government departments at various levels, public organisations, or individuals in the business operations of the banks. Furthermore, Article 7 states that "*[c]ommercial banks shall, in ordering loans, make examination strictly on the credibility of the borrower and provide loans on guarantee to ensure timely recovery of the loan.*"

103. Accordingly, the Applicant's selective reference to a partial phrase in Article 34 of the Chinese Commercial Banks Law does not, and cannot, establish that state-owned commercial banks in China perform governmental functions and are vested with governmental authority.

104. In support of its allegations, the Applicant also relies on Article 15 of the General Rules on Loans.[91] However, this is also insufficient to show that the government exercises any control over Chinese financial institutions and their lending decisions, as the wording used in this provision makes it amply clear that it is not mandatory and does not create any binding obligations for banks. A general guideline cannot be equated to an exercise of control by the government, let alone meaningful control.

105. Moreover, none of the supposed documents referred to by the Applicant establish that the OFC industry and producers were the recipients of any preferential loans from any bank in China. As noted by the Panel in *EC and certain member States – Large Civil Aircraft*, "*... a finding of specificity under Article 2.1(a) requires the establishment of the existence of a limitation that expressly and unambiguously restricts the availability of a subsidy to 'certain enterprises', and thereby does not make the subsidy 'sufficiently broadly available throughout an economy'*."[92] Furthermore, as noted by the Appellate Body in *US – Aircraft (Second Complaint*), the specificity analysis should be focused not only on *"[...] whether the subsidy was provided to the particular recipients identified in the complaint, but [...] also on all enterprises or industries eligible to receive that same subsidy. Thus, even where a complaining Member has focused its complaint on the grant of a subsidy to one or more enterprises or industries, the inquiry may have to extend beyond the complaint to determine what other enterprises or industries also have access to that same subsidy under that subsidy scheme*."[93]

106. Additionally, while the Applicant asserts that "*borrowing costs have been kept artificially low to stimulate investment growth*" and "*Chinese credit institutions have been granting artificially low interest rates in a large number of cases*",[94] no benefit calculation for the allegedly preferential loans was provided even though this is a mandatory requirement to establish the existence of a subsidy in an application.

[91] Application, p. 96.
[92] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.919.
[93] Appellate Body Report, *US – Aircraft (Second Complaint),* para. 753.
[94] Application, pp. 95-97.

107. For the sake of completeness, the GOC notes that all loans disbursed by Chinese state-owned commercial banks are provided on commercial terms agreed upon between the parties, just like loans provided by banks in the UK and the EU. The applicable interest rates charged coincide with the market rate and are decided based on universally applied lending criteria. Indeed, state-owned commercial banks are listed on stock exchanges and are profit-oriented enterprises which aim to maintain and improve the value of their stocks and business. Thus, the Applicant's assertions are incorrect and unfounded and should not be investigated further.

3.3.3.2 Allegedly preferential credit lines

108. The Applicant claims that Chinese producers of OFC benefitted from the opening of supposedly large and economically unjustified credit lines that "*seek to limit the indebtedness*" of the OFC producers.[95] The GOC disagrees as the Application does not contain any evidence of provision of preferential credit lines to OFC producers.

109. As was the case with the supposedly preferential loans, first, there is no evidence of financial contribution to OFC producers by "public bodies", *i.e.*, credit lines given by specific banks and the demonstration that those banks were public bodies. General statements about the existence of credit lines and grant thereof by banks in China is irrelevant and not evidence of subsidization of the OFC industry.

110. Second, the GOC recalls that, contrary to the Applicant's understanding, any and every credit line or the mere opening of a credit line does not amount to a potential direct transfer of funds. In particular as noted by the Panel in *EC and certain member States – Large Civil Aircraft*, in assessing "*whether a transaction involves a 'potential direct transfer [...] of funds', the focus should be on the existence of a government practice that involves an obligation to make a direct transfer of funds which, in and of itself, is claimed and capable of conferring a benefit on the recipient that is separate and independent to the benefit that might be conferred from any future transfer of funds*."[96]

111. Furthermore, credit lines establish only a borrowing limit that a company can use; there is no financial contribution in that regard. Moreover, there are no world-wide accepted standards

[95] Application p. 101.
[96] Panel Report, *EC and certain member States – Large Civil Aircraft* paras. 7.304 and 7.735.

regarding the opening of a credit line or its operation. Universally, credit lines differ between banks and customers. Indeed, the amounts and conditions of credit lines are customer-specific.

112. Third, as confirmed by the Appellate Body in *EC and certain member States – Large Civil Aircraft*, a "benefit" only exists if the financial contribution at issue makes the recipient better off than it would otherwise have been, absent that contribution.[97] The Appellate Body further clarified that the marketplace provides an appropriate benchmark for this comparison to be made.[98] In other words, in order for a benefit to exist, the recipient must have received a financial contribution on terms more favourable than those available on the market.[99] In *EC and certain member States – Large Civil Aircraft*, the Panel held that the complainant *"adduced no evidence nor advanced any particular argument to identify and explain the alleged benefit of the promise to obtain liquidity on favourable terms for EADS. We are not convinced that simply showing that a credit line has been granted on beneficial terms is enough to establish that it has placed its recipient in a better position than it otherwise would have been in absent availability of the particular credit line. In our view, something more is required to demonstrate that a promise to provide 'cheap' financing, in and of itself, confers a benefit."*[100]

113. Additionally, in this case, the Applicant simply resorted to an out-of-country benchmark without any proper justification. However, without prejudice to the GOC's objection regarding the investigation of credit lines, it is noted that there is no need to resort to an external benchmark in this case. Indeed, it is recalled that, in the EU AS proceeding concerning *Solar Panels from China*, the European Commission used an in-country benchmark for credit lines.[101]

114. Fourth, no evidence of specificity has been provided by the Applicant. Indeed, as already discussed in section 3.2 above, OFC is not an encouraged industry, and none of the documents referred to by the Applicant in this regard show that the credit lines provided to the OFC industry are specific within the meaning of Article 2 of the SCM Agreement. To recall, general

[97] Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* para. 973.
[98] *ibid*. See also: Appellate Body Report, *US – Large Civil Aircraft*, para. 635; and Appellate Body Report, *Canada – Aircraft*, para. 157.
[99] Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* para. 973; Appellate Body Report, *US – Large Civil Aircraft*, para. 635; and Appellate Body Report, *Canada – Aircraft*, para. 158.
[100] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.884.
[101] European Commission Implementing Regulation (EU) No 1239/2013 of 2 December 2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China OJ 2013 L325/66.

information about government policy, with no direct connection to the programs at issue cannot constitute sufficient evidence of specificity. [102]

115. Moreover, the fact is that there is no preferential policy and access to the credit lines is not *explicitly limited* to the OFC industry. The GOC underlines that all enterprises in China, regardless of industry type, are equally eligible for obtaining credit lines and this is no more than a borrowing limit for companies.

116. Thus, the Application lacks evidence of the existence of subsidies in the form of preferential financing through credit lines and, as such, the initiation and continuation of the present investigation – as far as credit lines are concerned – is unjustified and WTO-inconsistent.

3.3.3.3 Preferential financing through corporate bonds and convertible corporate bonds

117. According to the Applicant, corporate bonds ("CBs") and convertible corporate bonds ("CCBs") issued by Chinese OFC producers constitute countervailable subsidies.[103] The GOC disagrees for the following reasons.

118. First, and foremost, the nature of the financial contribution in question has not been specified by the Applicant. As held by the Appellate Body in *US – CVD*, at the first step, in determining whether a financial contribution exists, "*an investigating authority must inquire into the nature of the financial contribution at issue and determine whether such contribution was provided by the 'government', by 'any public body within the territory of a Member', or by a 'private body' entrusted or directed by the government*."[104] According to the Appellate Body, the assessment of the nature of the financial contribution informs the identification of the jurisdiction of the granting authority, which is then the starting point for the specificity analysis.

119. The Applicant has, however, failed to provide the precise content of the alleged financial contribution claimed. The Applicant also does not indicate which OFC producers issued bonds, which supposed public bodies were involved and what was the nature of the financial contribution. Indeed, the Applicant has not demonstrated how the alleged subsidy programme actually operates. A general discussion of the purpose of CBs and CCBs and how they are issued in China is insufficient.

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[102] Panel Report, *China – GOES,* para. 7.66.
[103] Application, pp. 103-108.
[104] Appellate Body Report, *US – CVD*, para. 4.167.

120. Furthermore, the Applicant only speculated that, "*it appears that [in China] corporate bonds are issued with an interest rate below the level expected given the financial and credit risk situation of the companies*".[105] It then took the trouble to indicate to the TRA how the benefit should be calculated for an inexistent subsidy but failed to provide any assessment and evidence of actual benefit to the OFC producers, implicitly admitting that it is not in a position to calculate the alleged benefit and has no evidence of any benefit being received by the OFC producers.

121. Finally, the Applicant provides no evidence of specificity either. The mere statement that "*only investors in incentivised industries, such as e.g., OFC, which are pressured by the GOC and motivated by factors other than financial return, grant this type of bonds*"[106] does not establish specificity even on a *prima facie* basis. In fact, the issuance of CBs and CCBs is a regular commercial practice all over the world including in the EU and the UK.

122. In sum, the investigation of issuance CBs and CCBs will be in violation of Article 11.3 of the SCM Agreement.

3.3.3.4 Export-contingent loans

123. The Applicant claims that export credit loans granted by the Export-Import Bank of China ("EXIM") constitute countervailable subsidies.[107] The GOC considers that, as regards this alleged program, the Application suffers from the same defects as discussed above in that no evidence has been provided that OFC producers received any preferential loans from EXIM in the investigation period. The Application, while shooting in the dark, does not meet the standards under Articles 11.2 and 11.3 of the SCM Agreement.

124. First, the Applicant refers to EXIM's website and its mission statement,[108] which indeed refers to financing Chinese exports of capital goods and services.[109] The GOC notes that such a mission statement is no different from the mission statements of UK export-import bank and financiers. For example, the website of the British Business Bank explicitly states the UK Export Finance "*helps exporters access finance and insurance when there is a lack of private*

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[105] Application, p. 105. See also p. 107.
[106] Application, p. 107.
[107] Application, p. 100.
[108] Application, p. 100, footnote 251.
[109] The Export-Import Bank of China, <http://english.eximbank.gov.cn/Profile/AboutTB/Introduction/>, last accessed on 6 July 2022.

sector risk appetite or capacity."[110] The GOC further notes that policy banks such as EXIM exist all around the world. Examples include Export-Import Bank of the United States,[111] and Export-Import Bank of Korea.[112] Dozens of other examples are available on the OECD website.[113] There is, therefore, nothing unique or irregular about loans and credits granted by EXIM.

125. Second, the Applicant gives general examples of loans by the EXIM bank, but of course this does not establish even *prima facie* that those loans were preferential or resulted in a benefit.[114] The Applicant also refers to the 2016 figures of EXIM,[115] which are historic given that the investigation period in this case is 2021. In any event, the Application provides no detail as to how this would constitute evidence of subsidization of the Chinese OFC industry.

126. In light of the above, the GOC respectfully submits that the Applicant's assertions fall short of the required evidentiary standards required by Articles 11.2 and 11.3 of the SCM Agreement.

3.3.4 Alleged preferential export credit insurance and guarantees

127. The Applicant claims that preferential export credit insurance and guarantees are granted to OFC producers and constitute a countervailable subsidy because (i) the China Export & Credit Insurance Corporation ("Sinosure") "*is a policy-oriented public government body*", and (ii) Sinosure provides preferential export credit insurance and guarantees "*on a concessional basis to encouraged industries, which include the OFC industry*".[116]

128. In support of the allegation that Sinosure would be a public body, the Applicant refers to past findings of the European Commission that were made in entirely unrelated EU investigations conducted at least three-to-six years ago.[117] More specifically, the investigation period in the

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[110] The British Business Bank, "UK Export Finance", available at <www.british-business-bank.co.uk/export-finance/>, last accessed on 6 July 2022.
[111] Export-Import Bank of the United States, <www.exim.gov/>, last access on 4 August 2022.
[112] Export-Import Bank of Korea, <www.koreaexim.go.kr/index>, last access on 4 August 2022.
[113] OECD, "Official Export Credit Agencies", available at <www.oecd.org/trade/topics/export-credits/documents/links-of-official-export-credit-agencies.pdf>, last access on 4 August 2022.
[114] Application, p. 101, referring to Annexes F76.B and F7.B to the Application.
[115] Application, p. 101, referring to Annex F75.
[116] Application, p. 108.
[117] Application, p. 108-109. Specifically, the Applicant refers to: Commission Implementing Regulation (EU) 2017/1187 of 3 July 2017 imposing a definitive countervailing duty on imports of certain coated fine paper originating in the People's Republic of China following an expiry review pursuant to Article 18 of the Regulation (EU) 2016/1037 of the European Parliament and of the Council, OJ 2017 L171/134 ("CFP Regulation"); Commission Implementing Regulation (EU) 2019/72 of 17 January 2019 imposing a definitive countervailing duty on imports of electric bicycles originating in the People's Republic of China, OJ 2019 L16/5 ("Electrical Bikes case"); and

expiry review of the AS measures on coated fine paper that the Applicant refers to in order to support its claim that Sinosure acts as a public body dates back to 2015.[118]

129. The European Commission's finding that Sinosure acted as a public body in that case does not allow for the conclusion that the same can be assumed five years later for an entirely unrelated industry, especially since the quoted decision was based on facts available,[119] and, in any event, each export credit guarantee is case and product-specific. As confirmed by the Panel in *EC and certain member States – Large Civil Aircraft*, findings in previous investigations may not be used to substantiate claims of material injury if the previous investigations relate to other industries.[120]

130. The Applicant's reference to an OECD study from 2015 also does not further its case.[121] The GOC notes that the study in question concerns data reported for 2012,[122] which clearly cannot be used to assess the situation in 2021, i.e., nine years later.

131. Thus, the Applicant has not provided even *prima facie* evidence of subsidization to the OFC industry.

132. Without prejudice to the above, the GOC notes that, for an export credit guarantee or insurance program to be prohibited under the SCM Agreement, the criteria under paragraph (j) of Annex I of the SCM Agreement must be fulfilled. Paragraph (j) provides as follows:

> "*The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.*"

133. In light of the above provision, in order to claim that a supposed subsidy exists, the Applicant was required at a minimum to demonstrate that the premium rates charged by Sinosure are inadequate to cover the long-term operating costs and losses of the programs.

Commission Implementing Regulation (EU) 2017/366 of 1 March 2017 imposing definitive countervailing duties on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China following an expiry review pursuant to Article 18(2) of Regulation (EU) 2016/1037 of the European Parliament and of the Council and terminating the partial interim review investigation pursuant to Article 19(3) of Regulation (EU) 2016/1037, OJ 2017 L56/1 ("CSPMKC Regulation").

[118] Application, p. 109, footnote 295.

[119] CFP Regulation (footnote n. 118 above), recital (130).

[120] Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.2083.

[121] Application, p. 110.

[122] Annex F102 to the Application, p. 7, para. 32.

134. However, the Applicant did not provide any evidence to demonstrate that the export credit insurance or guarantee provided by the Sinosure is a prohibited subsidy under the SCM Agreement.

135. That said, the GOC notes that, according to the data of Sinosure, its overall long-term operating costs can be covered by the premiums it has been charging over the same period for the types of insurance purchased by the sampled exporting producer (short-term export credit insurance). Thus, contrary to the Applicant's allegations, there is no subsidy in the form of preferential export credit insurance and guarantees and the GOC herewith respectfully requests the TRA not to investigate this alleged subsidy program.

[Confidential data of Sinosure]

3.3.5 Alleged provision of goods and services at less than adequate remuneration ("LTAR")

3.3.5.1 Alleged Provision of Land-use rights at LTAR

136. According to the Applicant, Chinese OFC producers were **likely** subsidized through the provision of land-use rights ("LURs") by the GOC at less than adequate remuneration("LTAR").[123] Furthermore, according to the Applicant, due to the alleged absence of a functioning market for land in China, an external benchmark should be used to calculate the alleged benefit amount.[124]

137. The GOC submits that the provision of LURs does not constitute a subsidy and that, in any case, resort to an out-of-country benchmark is legally unjustified.

138. First, Article 2 of the Land Administration Law does not "*[enable] the GOC to provide land at LTAR to promoted industries, including producers of the goods concerned*."[125] In fact, the reality is that LURs are transferred by public bidding, quotation, or auction in accordance with Land Administration Law. Indeed, pursuant to Article 347 of the Civil Code of the People's Republic of China:

> "*[W]here land is used for industrial, commercial, tourist or entertaining purposes, as commodity residence, or for other profit-making purposes, or there are two or more persons who are willing to use the same piece of land, the right to the use of land for*

[123] Application, p. 126.
[124] Application, pp. 124-125.
[125] TRA's Subsidy Government Questionnaire, section C1.5(a).

> *construction shall be assigned through bid invitation, auction or other open bidding. The price of the land is established through market competition*."

139. Moreover, Article 3 of the Interim Regulations of the PRC Concerning the Assignment and Transfer of the Right to the Use of the State-owned Land in Urban provides that:

> "*[a]ny company, enterprise, other organization and individual within or outside the People's Republic of China may, unless otherwise provided by law, obtain the right to the use of the land and engage in land development, utilization and management in accordance with the provisions of these Regulations*."

140. Overall, <u>any legal person or individual in China can acquire and use LURs through fair competition and a public bidding process</u>.

141. Second, the Applicant simply asserts that because the European Commission has found, in the context of previous, completely unrelated investigations, that the provision of LURs at LTAR can amount to a countervailable subsidy, Chinese OFC producers are "likely" to benefit from this alleged subsidy program as they are part of an encouraged industry.[126] Thus, the Applicant itself admits that it has no proof that OFC producers obtained LURs at LTAR in general and in the investigation period. Such unsubstantiated assertions do not qualify as evidence.

142. Third, the Applicant's allegation of the provision of LURs at LTAR being specific to the OFC industry is factually incorrect. The Application does not demonstrate or even indicate the existence of any preferential policy for the OFC industry.

143. Fourth, as regards the existence of an alleged benefit, the Applicant has not provided any benefit calculation. The Application's suggestion of using an out-of-country benchmark to establish the benefit is furthermore based on incoherent reasoning. On the one hand, the Applicant urges the TRA to use an external benchmark on the ground that there is allegedly no functioning land market in China, and on the other hand, it claims that the supposed subsidy is specific to certain industries including OFC. If the Applicant's reasoning were to be followed, then only certain industries get LURs at LTAR whereas this is not the case for companies from other sectors or industries. The TRA should, therefore, use the LUR prices of companies from other sectors to assess the existence of the alleged subsidy.

144. Additionally, as noted by the Appellate Body in *US – Carbon Steel (India)*, Article 14(d) of the SCM Agreement does not establish any "*legal presumption that in-country prices from any*

[126] Application, p. 126.

particular source can be discarded in a benchmark analysis"[127] and "*a determination of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of any potential in-country prices, including government-related prices other than the financial contribution at issue*." [128] The Appellate Body in that case disagreed with the Panel's conclusion that "*Article 14(d) does not require the consideration of government-related prices simply because governments may set prices in pursuit of public policy objectives*."[129]

145. The GOC also notes that the Appellate Body in *US – Carbon Steel (India)* underlined that "*[p]roper benchmark prices would normally emanate from the market for the good in question in the country of provision*" and such in-country prices "*necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)*."[130] According to the Appellate Body, the "*primary*" benchmark, and "*therefore the starting point of the analysis*" for determining a benchmark, rests in the in-country benchmarks.[131] As noted by the Appellate Body in *US – Carbon Steel (India)* and *US – Softwood Lumber IV*, as well as by the Panel in *US – AD and CVD (China)*, the use of out-of-country benchmarks is "exceptional" and, if resorted to, must relate or refer to, or be connected with, the prevailing market conditions in the country of provision and must reflect price, quality, and availability and other conditions of purchase or sales pursuant to Article 14(d) of the SCM Agreement.[132]

146. The GOC also notes that, in this case, in-country prices are adequate because among others, private companies are also engaged in sub-letting or transferring LURs. The government is thus not the only player in that market. Indeed, private companies owning LURs also rent or sell these LURs to unrelated buyers in the market. In-country prices should, therefore, be used as a benchmark. With respect to producers that have gone through bidding for their LURs, in-country prices constitute an appropriate benchmark because, according to the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, "*...a benchmark may also be found in price-discovery mechanisms such as competitive bidding or negotiated prices*", as this ensures that the price paid reflects adequate remuneration.[133] Consequently, the fact that

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[127] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154.
[128] *ibid*, para. 4.168.
[129] *ibid*, para. 4.170.
[130] *ibid*, para. 4.151.
[131] *ibid*, para. 4.154.
[132] Appellate Body Report *US – Softwood Lumber IV*, para. 106; Panel Report, *US – AD and CVD (China)*, para. 10.187; Appellate Body Report *US — Carbon Steel (India)*, para.4.158.
[133] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.228.

prices are determined through competitive bidding and negotiation, ensures that they are not distorted but instead reflect an adequate market price.

147. Thus, the Applicant's suggestion of using out-of-country LUR prices is not justifiable and the LUR prices in China should be used to review whether or not the alleged remuneration is less than adequate and thereby confers a benefit to OFC producers.

148. In sum, the Application provides no evidence regarding benefit to the exporting producers of OFC and specificity. Therefore, any investigation of this alleged program is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement.

3.3.5.2 Alleged Provision of Raw Materials at LTAR

149. The Applicant alleges that, "*in line with the support provided by the GOC to the OFC industry in the 13th Five-Year Plan*", private and public entities acting as public bodies would be supplying the OFC industry with performs, polymers and steel products at LTAR.[134] The GOC firmly disagrees with the claims in the Application based on mere speculation.

150. In this regard, first, as already mentioned in section 3.2 above, the 13th Five-Year Plan ended on 31 December 2020. Therefore, following the Applicant's own logic, there is no legal basis for the continued subsidization of OFC producers in the investigation period of this case. Moreover, the Applicant has not established that each of the alleged inputs were provided at LTAR. The nature and existence of the alleged subsidy had to be established with regard to each input.

151. Second, the Applicant has not provided any evidence of the existence of this subsidy in terms of the financial contribution by a "public body". Having listed two allegedly state-owned suppliers of inputs, the Applicant concludes as follows:

[134] Application, p. 127.

223. Taking above into consideration, it is clear that both producers of raw materials and producers of OFC are State-owned companies (**see paragraph 11**).

224. As evidenced by the applicable legislation, it is clear that the GOC provides raw materials at LTAR to encouraged industries. In the present case, considering that Chinese OFC producers operate in a highly encouraged industry,[402] it is reasonable to conclude that the subsidies provided to producers of raw materials benefit Chinese OFC producers both directly, to the extent that they are vertically integrated, and indirectly, to the extent those subsidies result in lower prices for inputs on the Chinese domestic market than would otherwise be the case.

225. Therefore, measures relating to production and supply of raw materials constitute subsidies within the meaning of Paragraphs 20 of Schedule 4 and Regulations 20 of the EU

152. Apart from the fact that the mere reference to two input producers is wholly insufficient to make the broad-brush claim that all input providers provide/provided the suggested inputs to all OFC producers at LTAR, the GOC reiterates that, as noted by the Appellate Body in *US – Carbon Steel (India)*, shareholding, administrative or meaningful control is not the decisive factor for establishing the existence of a "public body".[135] Thus, the Applicant's allegation that two Chinese input providers are state-owned or invested, does not establish that those two or any other input providers are acting as public bodies. Additionally, as clarified in a long list of Appellate Body reports, including *US – Carbon steel (India)*, the finding of a "public body" needs to be made as regards each entity and, in this case, each input supplier deemed to be a "public body".[136]

153. While the Applicant states that the supposedly applicable Chinese policies make clear that the GOC provides inputs at LTAR, the Applicant does not even indicate how the GOC does that. As noted above, the Applicant has not established the existence of public bodies, and it has also not provided any evidence of entrustment and direction. The GOC underlines that the Panel in *US – DRAMs (CVD)* noted that "*[t]he evidence of entrustment or direction must in all cases be probative and compelling*."[137] However, no evidence was provided by the Applicant and, in fact, not even an example has been provided in the Application.

154. Third, as regards the benefit, the Application does not provide any evidence whatsoever. Moreover, financial contribution and benefit are two different elements to be demonstrated to establish that a subsidy is specific.[138] However, the Application intertwines the two and applies

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[135] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.20.
[136] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.36.
[137] Panel Report, *US – DRAMs (CVD)*, para. 7.35.
[138] Appellate Body Report, *US –Softwood Lumber IV*, para. 51.

a circular logic in that there is a financial contribution because of the benefit and vice versa. However, at no point in time does the Applicant give any evidence of the benefit being received by OFC producers in terms of below-market price purchases of the concerned inputs.

155. Finally, as regards the TRA's request in the questionnaire to comment on the "*price comparison suggesting the LTAR provision of raw materials and inputs*",[139] the GOC respectfully points out that, in the non-confidential version of the Application, such a comparison has been completely redacted and no non-confidential summary has been provided by the Applicant.[140] Indeed, Annexes F.8 and F.138 are completely confidential. The GOC, therefore, respectfully requests the TRA to make the relevant information available so that an appropriate answer to the question can be provided. In the absence of this information, the GOC is not in a position to respond to the TRA's request.

156. In sum, the investigation into the alleged provision of inputs at LTAR is inconsistent with Articles 11.2 and 11.3 of the SCM Agreement in this case.

3.3.5.3 Alleged Provision of Power at LTAR

157. According to the Applicant, the provision of power at reduced rates to the OFC industry qualifies as a countervailable subsidy.[141] The GOC disagrees for three reasons.

158. First, the Applicant relies on three completely unrelated EU investigations to assert that there is *prima facie* evidence that (i) the entities providing power at allegedly reduced rates are public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement, and (ii) the alleged provision of power at LTAR conferred a benefit to the OFC industry.[142] This defies all applicable evidentiary standards as the most recent of those three investigations was concluded in 2018, and the other two were concluded nine years ago. Needless to say, those investigations concerned information relating to even older investigation periods. As noted by the Panel in

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[139] TRA's Subsidy Government Questionnaire, section C1.5(b).
[140] Application p. 129 and Annex F137 to the Application.
[141] Application p. 130.
[142] Application, p. 131-132. Specifically, the Applicant refers to: Council Implementing Regulation (EU) No 215/2013 of 11 March 2013 imposing a countervailing duty on imports of certain organic coated steel products originating in the People's Republic of China, OJ 2013 L73/16 ("OCS Regulation"); CSPMKC Regulation (footnote n. 118 above); and Commission Implementing Regulation (EU) 2018/1690 of 9 November 2018 imposing definitive countervailing duties on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries and with a load index exceeding 121 originating in the People's Republic of China and amending Commission Implementing Regulation (EU) 2018/1579 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain pneumatic tyres, new or retreaded, of rubber, of a kind used for buses or lorries, with a load index exceeding 121 originating in the People's Republic of China and repealing Implementing Regulation (EU) 2018/163.

China – GOES, historical evidence of benefit cannot prove the existence of a benefit in the investigation period especially if the subsidy is non-recurring and was granted several years prior to the investigation period.[143] As already noted in relation to the alleged provision of LURs and raw materials at LTAR, the Application does not provide any *prima facie* evidence of the existence of this subsidy.

159. Second, in any case, the Applicant fails to provide any evidence of specificity within the meaning of Article 2 of the SCM Agreement. Indeed, the Applicant does not even attempt to explain how – let alone provide *prima facie* evidence that – the alleged provision of power at LTAR would be specific to the Chinese OFC producers. Instead, the Applicant merely asserts that "*some industrial users of electricity develop can purchase electricity directly from power generators*" and that "*encouraged industries, including OFC, are often entitled to discounts on electricity tariffs*".[144] The ability to directly purchase electricity from power generators does not amount to a financial contribution or benefit.

160. Third, apart from the fact that the Application does not provide any assessment of the supposed benefit, the GOC respectfully submits that the Applicant's suggestion to use Japan, the Republic of Korea or Chinese Taipei as an external benchmark to calculate the alleged subsidy amount should be rejected. Indeed, the Applicant's reliance on the previous EU investigations to claim that "*there are no 'market prices' for electricity, gas, and other power sources in China to use as a benchmark*"[145] is completely misplaced for the same reasons given in paragraph [146] above. Moreover, if all power in China is subsidized for all industries, and there are no market prices, then this supposed subsidy cannot be specific in any event.

161. Finally, as regards the TRA's request to comment on the existence of provision of power in SEZ at LTAR, the GOC respectfully points out that it was for the Applicant to adduce at least *prima facie* evidence to support such an allegation. Indeed, such a request effectively implies that the GOC is being asked to prove a negative, thereby reversing the burden of proof. The reversal of the burden of proof is a practice that has been clearly reprimanded by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.[146] Considering the lack of temporal and material correlation between the present investigation and the EU investigations which the Applicant relies upon, the GOC respectfully submits that there is no basis whatsoever to find

[143] Panel Report, *China – GOES*, paras. 7.71-7.74.
[144] Application p. 130. (Underlining added).
[145] Application p. 132.
[146] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 352.

that the Applicant adduced *sufficient evidence* as to the existence and nature of preferential LTAR provision of power, including in the SEZ.[147]

3.4 Interim conclusion on alleged subsidization

162. In summary, the GOC respectfully submits that the Applicant failed to provide sufficient evidence for its allegation that the Chinese OFC producers are subsidized.

4 INJURY

4.1 Lack of sufficient evidence of injury due to Chinese OFC imports

163. The GOC recalls that the evidentiary standard discussed in section 3.1 above in the context of subsidization applies in relation to the injury claims made in the Application. Indeed, Article 11.2(iv) of the SCM Agreement specifies that the Application shall contain *sufficient evidence* that:

> "*[the] alleged injury to a domestic industry is caused by subsidized imports through the effects of the subsidies; this evidence includes information on the evolution of the volume of the allegedly subsidized imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 15*" (Underlining added).

164. In this case, the Application does not provide *prima facie* evidence, let alone sufficient evidence, of injury to the Applicant and/or to the other UK producers of OFC on account of the OFC imports from China.

4.1.1 Chinese import volumes and UK consumption are based on uncorroborated assumptions

165. The GOC respectfully submits that the UK consumption volumes as well as the allegedly subsidized OFC import volumes from China have been calculated by the Applicant on the basis of inadequate, non-transparent and result-oriented methodologies.

166. To begin with, the Applicant based its estimate of the UK OFC consumption on confidential CRU data that was however acknowledged by the Applicant itself to be, at least partially, inaccurate. The Applicant thus decided to adjust the CRU data itself:

> "*According to the Complaining Industry's market intelligence, while CRU accurately estimated UK consumption in 2021, CRU underestimated it by at least 30% in 2018 and*

[147] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 354.

2019 and by at least 10% in 2020 (see slide 5 of Annex A.2.1). UK consumption for these years has been adjusted accordingly (see Annex G.A.2)." [148] (Underlining added).

167. Since the Annexes mentioned in the quote above (as well as the unadjusted CRU data) are completely confidential and no non-confidential summaries have been provided, it is impossible for interested parties to verify – and comment on – the accuracy of the data and calculations therein. It is also not clear why the information provided by the CRU in respect of UK consumption is considered to be accurate in respect of certain periods and inaccurate in respect of other periods. Furthermore, the Applicant does not explain, let alone provide evidence of, the methodology used to adjust the data provided by the CRU. The GOC, therefore, respectfully urges the TRA to ensure that the relevant non-confidential summaries are provided as required by Article 12.4.1 of the SCM Agreement.

168. Moving forward, in order to calculate the volume of the OFC imports from China, the Applicant made multiple assumptions, used vastly different data sets, and quantification units, mixed them all up and created the Chinese import volumes for the injury investigation period. Such data does not even remotely comply with the "positive evidence" standard set out in Article 15.1 of the SCM Agreement. The Application explains the Chinese OFC import volume estimation as follows:

"*In order to evaluate the volume of imports of optical fibre cables originating in China in fibre kilometres, the following two-step approach was used:*
1) *the ratio of the volume of imports from China was calculated by comparing the import volume from China to the total volume of imports from all countries, as extracted from UK Statistics. In 2021, the volume of imports of optical fibre cables from China represented 18.8% of total imports (2,905 tons / 15,754 tons).*
2) *This 18.8% ratio was then applied to the volume of imports (2,853 Mfkm) to estimate the volume of UK imports of optical fibre cables from China in 2021 (approx. 535,637 fkm). The same methodology was used to estimate the volume of Chinese imports for 2018, 2019 and 2020.*" [149] (Underlining added).

169. To elaborate, first, the Applicant started by calculating the ratio of Chinese imports in the total imports concerning all the products imported under the CN Code 8544.70.00 based on the UK import statistics. However, as the Applicant itself acknowledges:

"*[T]he products that are imported into the UK under the CN Code 8544.70.00 do not contain only single-mode optical fibre cables, but also other products, such as connectors, pigtails, patch-cords and termination kits which are not covered by the present Application.*"[150] (Underlining added).

[148] Application, p. 138.
[149] Application, p. 137.
[150] Application, p. 137, para 7.

170. It is of course appropriate to adjust for the fact that the product concerned does not correspond with the import data categorised by the CN Code. However, the Applicant is attempting to show *an increase over time* in imports of OFC from China. The Applicant's methodology is based on the unlikely presumption that the import volumes of all products covered by CN Code 8544.70.00 would develop in exactly the same way. However, it is not at all clear that any alleged increase in imports for CN Code 8544.70.00 was even partly due to increased imports of the product concerned. It is indeed entirely possible that changes in the imports figures are driven by changes in other product categories included in the concerned CN Code. In other words, the Applicant relies on a *static* assumption to attempt to prove *dynamic* trends. The science of this method is not only questionable but also unacceptable.

171. Next, the Applicant applied the ratio of Chinese imports calculated on the basis of the UK import statistics -- which, as noted above, relate to OFC and non-products concerned and were in tons -- to the estimated volume of all imports of OFC provided by the CRU, which however were in fibre kilometres ("fkm"). This methodology lacks logic and cannot constitute "positive evidence".

172. Moreover, the Applicant's methodology completely disregards the specifications of the various OFC products (*e.g.*: indoor or outdoor cables; fibre numbers per cable, types of fibres G.652, G.654, G.657.A1, G.657.A2), thereby further impeding the reliability of the Applicant's estimates based on the application of a ratio based on imports in tons to CRU data in fkm. While most of the relevant data provided in the Application is not available because it has been treated as confidential,[151] page 3 of Annex A.12 to the Application offers a clear example of how significantly the weight per kg does in fact vary between kg/km:

Number of fibres	n°	up to 96	up to 144
Nominal outer diameter	mm	11.5 - 16.2	17.3
Cable weight	kg/km	110 - 230	260
Minimum bend radius	mm	170 - 260	
Maximum working tension	N	up to 25000	
Operating temperature range	°C	-40°/+70°	

* For long span applications dimensions may increase.

[151] See, for example, Annex E.3, where the ratio kg/km has been conveniently blacked out for confidentiality reasons.

173. Apart from the conflation of products and quantification units, clearly the data in the UK statistics and the data provided by the CRU are collected using completely different methodologies. Therefore, it seems arbitrary and inadequate to interrelate the two sources of data to calculate OFC imports from China.

174. Finally, the Applicant further adjusted its estimates of OFC imports from China in fkm into cable kilometres ("ckm"). The Applicant, however, does not explain why the unit of the ckm is more appropriate to quantify OFC sales/production when, in fact, market publications and supposedly its own data reporting do not use ckm but rather fkm.[152] This conversion, therefore, seems to be completely unnecessary.

Annex G.A.3: Average number of fibres per cable during the IP
period: 2021

	Sales volume of optical fibre cables (in cable km)	Sales volume of optical fibre cables (in fibre km)	Average number of fibres per cable
Prymian UK	[45,000-55,000]	[2M-2.5M]	44.6

175. In addition, the GOC notes that the Applicant applied <u>only one overall average conversion key between fkm and ckm based exclusively on the products that the Applicant itself actually produces</u>, even though nothing in the Application suggests, let alone proves, that such a conversion key would in any way represent the actual OFC imports from China.[153]

176. In summary, the calculation methodology used by the Applicant not only remains unexplainable, non-verifiable but is equally unreliable. The GOC, therefore, submits that the data used by the Applicant to calculate the UK import volumes from China does not satisfy the evidentiary standards required to justify the initiation of an AS investigation. This is particularly significant considering that the import volumes calculated on this inaccurate basis are then used to determine the parameters such as the market shares, as well as the import prices (with further adjustments).

4.1.2 <u>Failure to consider intervening trends in import volumes</u>

177. The GOC recalls that the Applicant's assertion of increased OFC imports from China is simply based on a comparison of the import volume increase between 2018 and 2021.

[152] See, for example, Annexes A.2.1, A.2.2, A.2.3., and G.A.2.
[153] Application, p. 137 and Annex G.A.3.

178. However, as noted by the Panel in *Pakistan – BOPP Film* – in the context of Article 3.2 of the ADA –[154] in considering whether there has been a "*significant increase in [subsidized] imports*", investigating authorities cannot "*[focus] selectively on the only year in which imports increased*" without taking into consideration the intervening trends throughout the rest of the injury period (*i.e.*, in this case, 2018 – 2020).[155] As such, a claim of significantly increased imports cannot be made simply on the basis of an increase in the imports in one year of the injury investigation period, and on the basis of an end-point analysis.

179. Indeed, as the data in the Application shows, the Chinese OFC imports first decreased in 2019 and in 2020, they were only 3% higher than in 2018. Moreover, the increase in imports in 2021 cannot be looked at in isolation of the increase in the UK consumption in 2021, and the fact that the Chinese OFC imports increased at the expense of third country imports in that year.

Table 4: Estimated UK consumption of the product concerned (in ckm)[430]

	2018	**2019**	**2020**	**IP 2021**
Total UK sales	43,083	48,458	46,322	63,938
Index	*100*	*112*	*108*	*148*
(including sales of the Complaining UK industry)	[35,000-45,000]	[40,000-50,000]	[40,000-50,000]	[40,000-50,000]
Index	*100*	*126*	*111*	*129*
+ UK imports (China)	3,816	2,996	3,929	12,000
Index	*100*	*78*	*103*	*314*
+ UK import (Other)	42,857	45,462	42,393	51,938
Index	*100*	*106*	*99*	*121*
UK consumption of cables	**89,757**	**96,915**	**92,644**	**127,877**
Index	*100*	*108*	*103*	*142*

4.1.3 Incorrect calculation of the import prices of OFC from China

180. The Applicant alleges that "*the average value of imports of optical fibre cables from China decreased by 32% between 2018 (17,720 GBP/ton) and 2021 (11,939 GBP/ton)*" and that "*these*

[154] As clarified by the Appellate Body in *China – GOES*, Article 15.2 of the SCM Agreement and Article 3.2 of the ADA are to be interpreted consistently (see para. 200). See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, footnote 227.
[155] Panel Report, *Pakistan – BOPP*, para. 7.275.

average prices [...] provide a clear trend of decreasing prices"[156] Yet, this data is (again) extracted from the UK import statistics – with further unobjective adjustments – concerning all products covered by CN Code 8544.70.00.[157]

181. The import values and import volumes of OFC from China used by the Applicant to calculate the average price of the Chinese OFC imports do not constitute "positive evidence" due to several reasons. First, they do not pertain to OFC alone but also include much lower-priced products, such as connectors. Second, there can be no price comparison without considering the product mix of the OFC imports.[158] As confirmed by the information provided in the Application,[159] there are various product specifications of OFC with widely varying price levels. The Appellate Body in *Korea – Pneumatic Valves* confirmed that, "*to the extent that an investigating authority relies on price comparisons in its consideration of price effects of subject imports, price comparability needs to be ensured. Thus, where an investigating authority fails to ensure price comparability in price comparisons between dumped imports and the domestic like product, this undermines its findings of price effects under Article 3.2, to the extent that it relies on such price comparisons*".[160]

182. Nevertheless, the Applicant has not demonstrated, even on a *prima facie* basis, that it took into account the product mix and that the price variations between the different years was not the result of the differences in the product mix of the OFC types.

183. Additionally, and without prejudice to the above, the GOC notes that the decline in Chinese OFC import prices cannot be seen in isolation. The average value of the imports from other countries decreased too. For example, the average values of OFC imports from Germany decreased by 40% between 2020 (32,890 GBP/ton) and 2021 (19,680 GBP/ton), those from Belgium decreased by 64% between 2020 (33,541 GBP/ton) and 2021 (11,842 GBP/ton), while the average values of OFC imports from Poland decreased by 31% between 2020 (18,091 GBP/ton) and 2021 (12,461 GBP/ton). The data provided by the Applicant, therefore, clearly shows that the average price of the Chinese imports of OFC followed the price trend of other major suppliers of OFC to the UK.

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[156] Application, p. 140.
[157] Annex G.A.1 "UK Import Statistics" to the Application.
[158] Appellate Body Report, *China – GOES*, para. 200. See also Panel Report, *China – Broiler Products*, paras. 7.470, and 7.490-7.494.
[159] Application, pp. 27-28.
[160] Appellate Body Report, *Korea - Pneumatic Valves*, para. 5.234.

4.1.4 Undercutting margin calculations based on conjured-up data do not constitute "positive evidence"

184. For the undercutting margin calculation, the Applicant acknowledges that the average prices reported in the UK import statistics for CN Code 8570.44.00 "*do not fully reflect market realities since [OFC] are measured by the industry in terms of distance*" and that it was thus necessary to "*rely on market information provided by the Complainant Industry.*" [161] This market information was, however, not made available to interested parties, and no non-confidential summaries were provided.

185. Regardless of the lack of proper non-confidential summaries of the data supposedly supporting the claim of undercutting, the GOC respectfully submits that the Applicant's undercutting calculations are flawed on account of several reasons.

186. First, the Applicant appears to base its overall Chinese OFC import price estimates on one individual quote "*by the Chinese producer that the EU Complainants were able to locate.*"[162] Notably, it is not apparent from the disclosed data which prices were quoted by this exporter and in connection to which kind of tender or bidding these prices were quoted. What is clear is that the Applicant based its undercutting margin calculation on a single quote obtained by the EU Complainants which were part of a different EU investigation. This also implies that **the quote and data used, pertained to a different and old period and not 2021**:[163]

> This Annex includes business confidential information based on market intelligence gathered by the Complainant, which is not public and the disclosure of which would be of significant competitive advantage to a competitor.
>
> This Annex includes a set of dumping margin calculations based on the following data:
>
> **Sheet 1 – Summary**: an overview of dumping margins for the four most representative product types (i.e., optical fibre cables containing 12, 36, 48 and 96 fibres).
>
> **Sheet 2 – Constructed Normal Value**
>
> Normal value is based on constructed normal value for the representative product type.
>
> **Sheet 3 - Export price**
>
> Export price (CIF) is based on offer by the Chinese producer that the EU Complainants were able to locate.
>
> **Sheet 4 - Turkish import statistics**

[161] Application, p. 140.
[162] Annex E.4 to the Application.
[163] Annex E.4 to the Application.

187. Second, as confirmed by the information provided in the Application,[164] there are various product specifications of OFC with widely varying price levels, such as the types and number of optical fibres used among other critical performance and quality indicators which affect the pricing of OFC products. As the Applicant states:

> "*The type of optical fibre that is used affects the final price of the product concerned. Generally, the pricing order of optical fibre cables, from lowest to highest, is as follows: (i) optical fibre cable G.652D; (ii) optical fibre cable G.657.A1; and (iii) optical fibre cable G.657.A2.*"[165]

188. Furthermore, the Applicant acknowledges that: "*[t]he main price driver of the product concerned is the number of optical fibres it contains. Thus, the cost of production and the sales price of an optical fibre cable containing 288 fibres will be higher than an optical fibre cable containing 12 fibres*."[166]

189. It follows that the reliance on a single quote by one exporter used for the much older EU OFC complaint, and that likely did not concern the UK, cannot provide a reliable basis for the undercutting calculation. In addition, no information whatsoever has been provided, for instance, as regards the volume covered by the supposed Chinese quote among others.

190. Third, it is not clear why only four types of OFC products were taken into consideration to calculate the injury margin, and, in any event, there is no evidence that the average import price used by the Applicant is representative of the Chinese OFC imports.[167] Moreover, as found by the Panel in *China – Broiler Products (Article 21.5 – US),* Article 15.2 of the SCM Agreement requires a dynamic assessment of price developments and trends concerning the relationship between the prices of the imported products and the domestic like products.[168] The Applicant simply relied on one price comparison.

191. Moreover, the price of the imported products and the prices of the domestic products need to be at the same level of trade and thus effectively comparable.[169] The Applicant does not even consider this aspect.

[164] Application, pp. 27-28.
[165] Application, p. 10.
[166] Application, p. 28.
[167] Annexes E.3 and E.4 to the Application.
[168] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.98.
[169] Panel Report, *China – Broiler Products*, paras. 7.480-7.483.

192. In light of the above, the GOC submits that the undercutting margin calculation provided by the Applicant are not supported by sufficient evidence and cannot, therefore, substantiate the initiation of the present investigation.

4.2 Substantive issues – Incorrect claims of injury

193. At the outset, the GOC notes that the Applicant did not provide figures on return on investments and on market factors affecting domestic prices, cash flow, wages, growth, and ability to raise capital or investments, even though these factors are explicitly mentioned in Article 15.4 of the SCM Agreement and regulation 33 of the UK Regulations.

194. The GOC recalls that, according to settled WTO case law, all injury indicators listed under Article 15.4 of the SCM Agreement must be addressed and evaluated in the determination of injury. The WTO Panel in *EC – Countervailing Measures on DRAM Chips* clarified that:

> "*In light of the overarching obligation set forth in Article 15.1 of the SCM Agreement, we consider that Article 15.4 thus requires an objective examination and evaluation of all relevant factors having a bearing on the state of the industry, based on positive evidence. Article 15.4 of the SCM Agreement lists a number of these factors which are to be included in such an examination. We agree with the view expressed by the Appellate Body, when interpreting an almost identical provision in the AD Agreement, that the factors listed are deemed to be relevant in every investigation and must always be evaluated by the investigating authorities. However, the obligation of evaluation imposed by Article 15.4 is not confined to the listed factors, but extends to all relevant economic factors.*"[170] (Underlining added).

195. Furthermore, as held by the Panel in *Mexico – Steel Pipes and Tubes*, when assessing the sufficiency of evidence in an application, an investigating authority "*must have before it the same type of evidence of injury as defined in [Article 15 of the SCM Agreement] sufficient to justify the initiation of an investigation.*"[171]

196. While it is acknowledged that the Article 15.4 requirement applies to the injury determination, the GOC recalls that, in general, to make a *prima facie* claim of injury, applicants are required by investigating authorities around the globe to provide data and information on all the injury indicators. This is because, otherwise, the allegation of injury can be manipulated by deliberately withholding information on factors that do not support the injury allegation.

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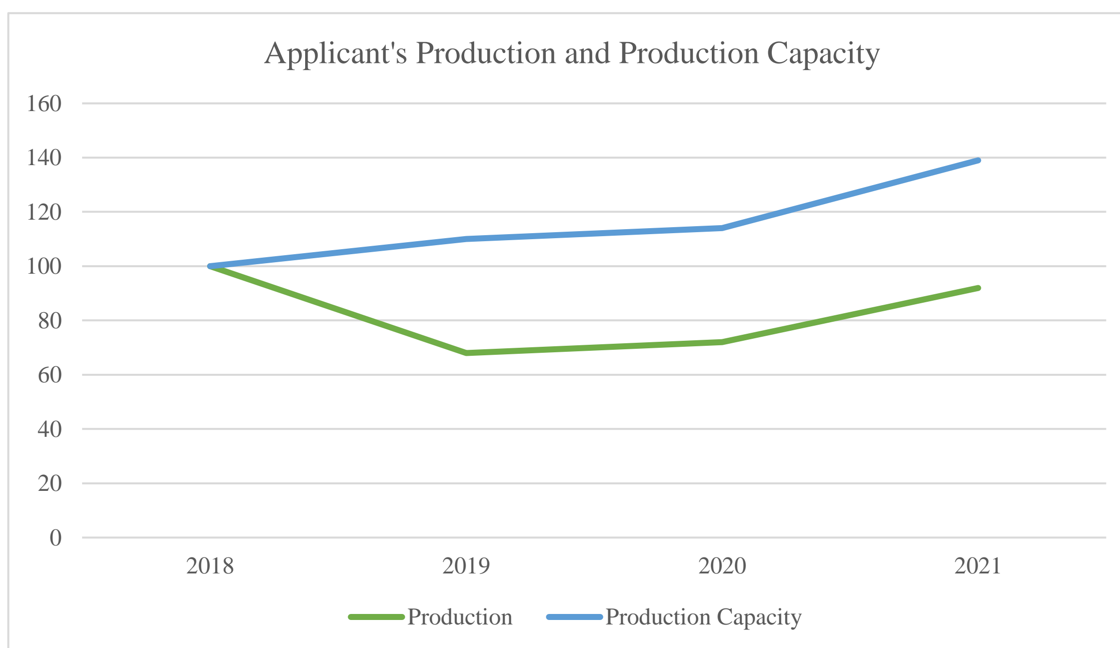
[170] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.356.

[171] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.56 (original emphasis, in the context of Article 3 of the ADA). See also: Panel Report, *US – Softwood Lumber VI*, para. 7.24 where Article 15 of the SCM Agreement and Article 3 of the ADA were found to be substantially identical.

197. It is therefore striking that, despite the Applicant being the sole complainant in this case, six out of the fifteen injury indicators have not even been discussed in the Application. Indeed, the data for those missing economic indicators would be reasonably and easily available to the Applicant.

4.2.1 Chinese OFC imports did not affect the Applicant's production and production capacity

198. First, as regards the Applicant's production, following ongoing significant investments, the Applicant increased its OFC production capacity by 39% between 2018 and 2020.[172] Against this background, it is relevant to note that the Applicant's production decreased by 38% in 2019 when, the import volume and the market share of Chinese imports fell and were at the lowest in the injury investigation period.[173] By contrast, since 2019, the Applicant's production has been constantly increasing (with an overall increase of 24%), as shown in the graph below.[174] In 2021, as the Chinese OFC imports allegedly increased, the Applicant's production increased by 20%.



199. Second, the decrease in the capacity utilisation of the Applicant is not indicative of injury, as the Applicant sharply increased its production capacity. Moreover, while the Applicant asserts that the increase in production capacity would be the result of an accurate consumption forecast but could not be utilised because of the OFC imports from China,[175] this is not supported by its

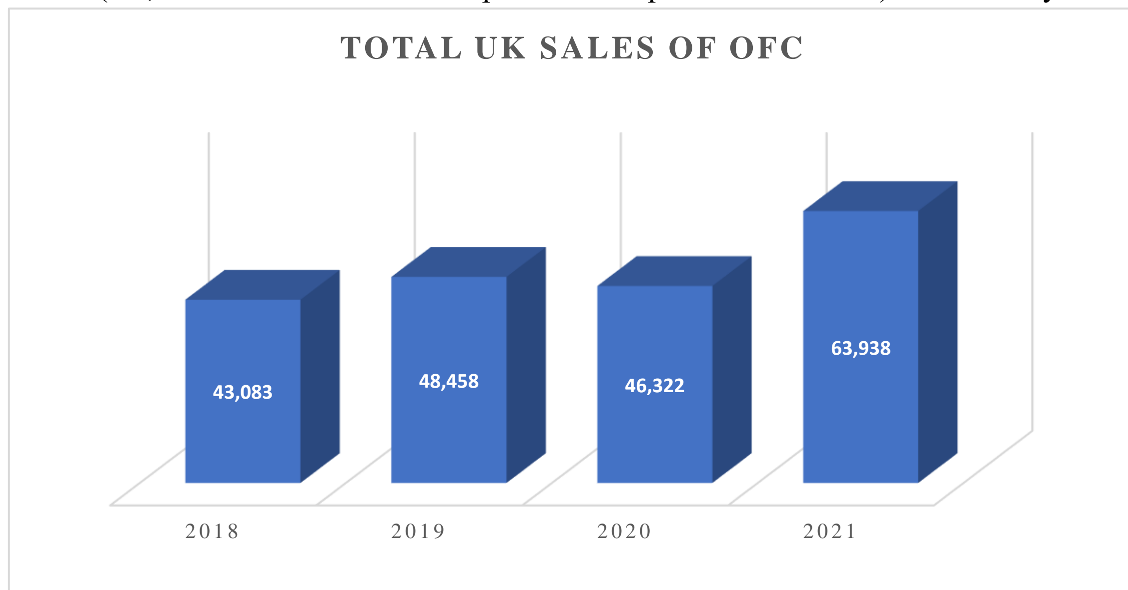
[172] Application, p. 143.
[173] Application, pp. 141-142.
[174] Application, p. 143 and Annex G.A.4 to the Application.
[175] Application, p. 143.

data. The Applicant's capacity utilisation increased by 4% between 2020 and 2021, when the Chinese imports of OFC allegedly increased.[176]

200. In addition, the Applicant does not mention the time lag between the increase in production capacity and the actual ramping up of the production, which would also supposedly affect the actual production. The GOC, therefore, submits that the Applicant's assertion is unfounded and factually incorrect.

4.2.2 Applicant's sales volumes increased despite the OFC imports from China

201. According to the data provided by the Applicant itself, the Applicant's sales volumes increased by 29% between 2018 and 2021.[177] During this period, the UK consumption of OFC increased by 42% and, as displayed in the graph below,[178] the total sales volumes of the UK OFC industry as a whole (*i.e.*, inclusive of the non-complainant UK producers of OFC) increased by 48%.



202. Therefore, the Applicant incorrectly claims that the UK industry "*barely benefitted of this increase*".[179] Clearly the UK OFC industry as a whole was able to increase sales at a rate higher than the rate of increase in the UK OFC consumption.

203. The fact that the Applicant failed to increase its sales in the same manner as the non-complaining UK producers of OFC is a different matter and cannot constitute *prima facie* evidence of injury on account of the imports from China.

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[176] Application, p. 143 and Annex G.A.4 to the Application.
[177] Application, p. 141.
[178] Application, p. 141.
[179] Application, p. 141.

4.2.3 Market share of all UK producers increased despite OFC imports from China

204. As shown in the screenshot below,[180] the data provided by the Applicant itself demonstrates that the market share of all UK producers of OFC increased by 4% between 2018 and 2021. Solely the market share of the Applicant declined in the period considered and that too between 2020 and 2021. Again, the loss of market share in one year of the injury investigation period is not indicative of injury. Indeed, as held by the Panel in *China – Autos (US)*: "*[a]n IA should analyse developments throughout the entire POI. An analysis of market share limited to consideration of starting and ending levels, would not, in our view, constitute an objective examination of the evidence*." [181]

	2018	2019	2020	2021
Market share of all UK producers	48%	50%	50%	50%
Index	100	104	104	104
Market share of the Complaining UK Industry	[40-45]%	[45-50]%	[42-47]%	[35-40]%
Index	100	116	107	90
Market share of Chinese imports	4.3%	3.1%	4.2%	9.4%
Index	100	73	100	221
Market share of third country imports	47.7%	46.9%	45.8%	40.6%
Index	100	98	96	104

205. Additionally, as is evident from the sales volumes of the Applicant discussed in section 4.2.2 above, the extent to which the Applicant could not increase or lose market share was on account of sales lost to the other non-complaining UK producers of OFC in a growing market.

206. Furthermore, while the Applicant underlines the increase in the market share of the Chinese OFC imports, it fails to note that the overall market share of the Chinese imports is significantly lower than the UK industry's market share and the market share of third countries.

207. It is also noted that the indexed data provided by the Applicant in relation to the market share of the third country imports is wrong. Indeed, if the market share of third countries amounted to 47.7% in 2018 and was indexed at 100 points, then the market share of third countries amounting to 40.6% in 2021 should be indexed at 85.1 points, and not 104 points. This also

[180] Application, p. 142.
[181] Panel Report, *China – Autos (US),* para. 7.334.

casts doubt on the other calculations provided by the Applicant and which the GOC cannot verify due to the lack of meaningful non-confidential data.

208. In sum, the GOC respectfully submits that the data on market share provided by the Applicant does not support the allegation of material injury.

4.2.4 Applicant's profitability data does not support its injury allegation

209. The indexed data in the Application does not actually indicate the sharp decline in profitability claimed by the Applicant.[182]

210. This is even more so considering that, according to the Applicant's latest Annual Report, the Applicant's "*turnover and operating profit [...] has significantly increased compared to prior year due to the recovery of the prior year COVID pandemic downturn and by price leadership in the market.*"[183] Indeed, the Applicant's UK turnover increased by 23.02% in 2021, when OFC imports from China allegedly caused injury to the Applicant.[184] Moreover, the Applicant made very high profits in 2021 compared to its loss-making situation in 2020.[185] Clearly, the Applicant's Annual Report does not show a company that is suffering material injury. By contrast, it is evidence that the industry was robust in 2021, when – the Applicant alleges – OFC imports from China increased causing injury.

211. The GOC also notes that, according to the above-mentioned Annual Report, the Applicant "*has reported exceptional costs of £0.7m (2020 £8.5m) in 2021. This figure includes a further provision related to the anti-trust legal claim in the year of £(0.5)m (2020: £6.3m)*."[186] Such one-time costs related to illegal and anti-competitive behaviour should be excluded when assessing any decline in profits allegedly suffered by the Applicant.

212. In addition, and without prejudice to the above, the GOC submits that the target profit of 20% claimed by the Applicant appears to be highly inflated. Indeed, according to the indexed data

[182] Annex G.A.8 to the Application shows that both the value of the Applicant's sales and the Applicant's cost of production remained stable throughout the entire injury period.
[183] Prysmian Cables & Systems Limited, "Strategic Report 2021" in "Full accounts made up to 31 December 2021", uploaded on 28 July 2021, p. 2, available for download from the UK Companies House website at <https://find-and-update.company-information.service.gov.uk/company/00958507/filing-history>, last access on 3 August 2022.
[184] *ibid*, p. 34.
[185] *ibid*, p. 34.
[186] *ibid*, p. 3.

in the Application, the Applicant did not obtain such profits even when Chinese imports were at very low levels.

213. That said, the Applicant justifies the high target profit by stating that "*a minimum profitability rate of 20% is required for this industry, which is particularly capital intensive and requires very high levels of investment in particular in light of the upcoming 5G revolution.*"[187] Nevertheless, in the recent EU AD investigation concerning OFC, the European Commission determined that the target profit for OFC sales was 12.4%.[188] In that case, the Applicant's group company was one of the Union producers which submitted the information upon which the Commission reached such a conclusion.[189] Thus, the target profit claimed by the Applicant is highly unrealistic if not inexistent.

Table 10

Profitability, cash flow, investments and return on investments

	2017	2018	2019	IP
Profitability of sales in the Union to unrelated customers (% of sales turnover)	8,1	8,4	8,5	7,9
Index	*100*	*104*	*104*	*97*
Cash flow (EUR)	33 254 746	48 644 480	41 707 715	39 805 852
Index	*100*	*146*	*125*	*120*
Investments (EUR)	60 405 839	67 794 023	82 761 718	59 886 812
Index	*100*	*112*	*137*	*99*
Return on investments (%)	34	36	24	20
Index	*100*	*105*	*70*	*58*

Source: Sampled Union producers

214. The Applicant also makes unfounded claims that UK producers have "*preferred to try to maintain their presence on the UK market [by] accepting loss-making projects*", "*preferred to sacrifice market share*" or "*had to curtail their investments programmes very significantly.*"[190] Not only the Applicant provides no evidence in support of these assertions, but the data that the Applicant did provide contradicts some of these statements. Indeed, as discussed above, the

[187] Application, p. 147.
[188] Commission Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2021] OJ L410/51, p. 139-140.
[189] Commission Implementing Regulation (EU) 2022/72 of 18 January 2022 imposing definitive countervailing duties on imports of optical fibre cables originating in the People's Republic of China and amending Implementing Regulation (EU) 2021/2011 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2022] OJ L12/34. See: p. 42 for the identification of the Applicant's group company as a "Union producer" in the EU investigation; and p. 126 for the average profitability of sales determined by the Commission.
[190] Application, p. 145.

sales and market share of the other UK producers of OFC increased throughout the injury investigation period. It was only the market share of the Applicant that decreased and that too at the end of the injury investigation period. The GOC thus respectfully asks the TRA to evaluate the Applicant's assertions carefully.

4.2.5 Employment

215. According to the data provided by the Applicant, employment overall increased by 6% throughout the injury period, and it increased by 8% between 2020 and 2021, when OFC imports from China allegedly caused injury to the UK industry. With the much higher increase in production, this indicates an increase in the Applicant's productivity during the injury investigation period.

4.2.6 Investments

216. The Applicant's investments increased by 119% between 2018 and 2021. This increase in investments is evidence of business confidence and good profits. Indeed, an injured and loss-making industry would not be in a position to make investments.

4.3 Interim conclusion on material injury

217. Out of the fourteen injury indicators listed under Article 15.4 of the SCM Agreement, no information has been provided as regards several of these indicators. In the absence of this information, a *prima facie* claim of injury cannot be made, let alone substantiated. In any event, most of the indicators considered by the Applicant showed a positive trend during the injury investigation period.

218. In addition, and without prejudice to the above, the GOC notes that those factors that developed negatively for the Applicant did not decline for the non-complainant OFC producers and, therefore, the UK OFC industry as a whole. Moreover, the developments affecting the injury indicators throughout the injury investigation period (*i.e.*, 2018 – 2021) must be examined.[191]

219. Finally, the undercutting margin calculated by the Applicant is incorrect and unrepresentative. Leaving aside the extreme confidentiality of the export/import data used in the Application to estimate undercutting, the Applicant did not make any adjustments for the differences in the

[191] Panel Report, *US – Carbon Steel (India)*, paras. 7.399-7.402.

product mix,[192] and level of trade among others to ensure price comparability.[193] The Appellate Body in *China — GOES*, held that "*if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices*."[194] In the absence of these adjustments, the Applicant's estimate of undercutting cannot meet the threshold of sufficient evidence.

5 **CAUSATION**

220. Pursuant to Article 11.2 of the SCM Agreement, the Application should have included "*evidence that the alleged injury is caused by subsidized imports through the effects of the subsidies*". Additionally, pursuant to Article 11.3 of the SCM Agreement, it was for the TRA to ensure that such evidence was *sufficient* to justify the initiation of the present investigation.

221. Pursuant to Article 15.5 of the SCM Agreement,[195] the demonstration of a causal link between the allegedly subsidized imports and the alleged injury to the domestic industry, "*[...] shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the subsidized imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the subsidized imports. Factors which may be relevant in this respect include, inter alia, the volumes and prices of non-subsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry*."

222. The GOC respectfully submits that, in the present case, there is no evidence of a causal link between the allegedly subsidized imports of OFC from China and the material injury that the Applicant claims to have suffered. The Applicant failed to adduce any evidence that the Chinese OFC imports were the explanatory force for the supposedly negative situation of the Applicant. Furthermore, in the section concerning "*other factors that may have caused injury to the*

[192] Appellate Body Report, *China – GOES*, para. 200. See also Panel Report, *China – Broiler Products*, para. 7.470, 7.490-7.494.
[193] Panel Report, *China – Broiler products*, para. 7.480-483.
[194] Appellate Body Report, *China – GOES*, para. 200.
[195] Incorporated under UK law by regulation 35 of the UK Regulations.

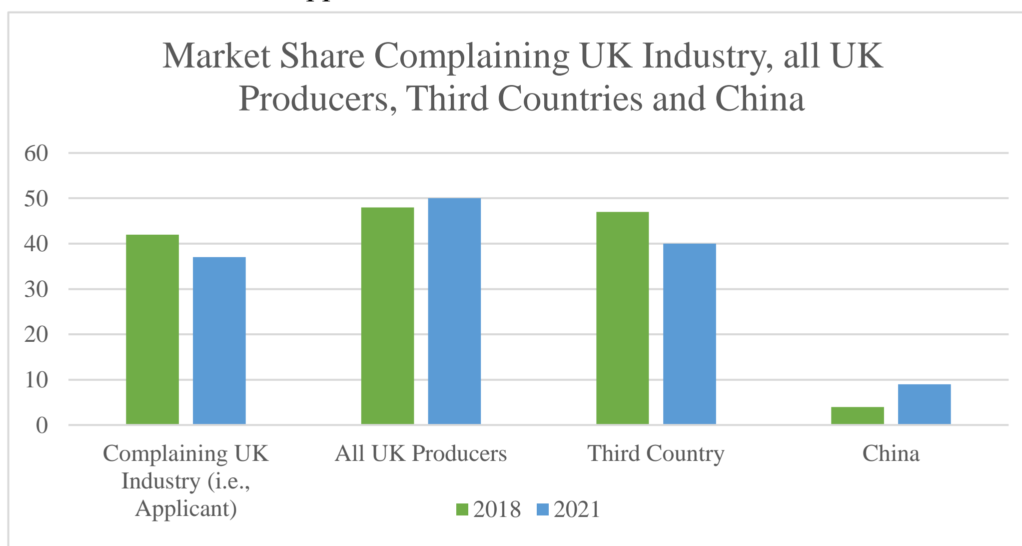
domestic industry", the Applicant merely referred to the factors listed under Article 15.5 of the SCM Agreement without properly assessing their impact on the UK OFC industry.[196]

223. The GOC notes that the factors listed under Article 15.5 of the SCM Agreement are illustrative and non-exhaustive. Consequently, the GOC trusts that the TRA will examine all other known factors that may be causing injury to the UK OFC industry and that have been made known by the interested parties.[197]

224. Listed below are several factors that might have caused the alleged injury to the Applicant.

5.1 Sales and market share lost to other UK producers

225. As already discussed above, between 2018 and 2021, the sales of the non-complaining UK producers of OFC increased significantly and at a higher rate compared to the increase in the UK consumption. Accordingly, the market share of all UK producers of OFC increased throughout the period. While the Applicant increased its sales volumes throughout the injury investigation period, it could not retain or increase its market share and, in fact, lost market share and sales to the non-complaining UK OFC producers. Indeed, as shown in the graph below, [198] the market share of all UK OFC producers increased during the injury period. It was only the market share of the Applicant that decreased.



226. The importance of considering the market share of other UK OFC producers in the causation analysis (even if they are not part of the domestic industry) was emphasised in *China – Autos (US)*, where the Panel held that:

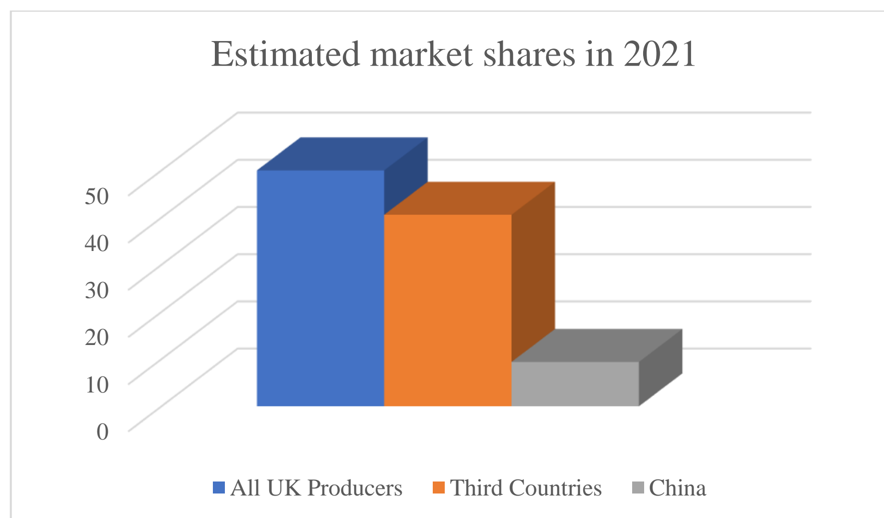
[196] Application, pp. 149-153.
[197] Appellate Body Report, *China – GOES,* paras. 150-151.
[198] Based on Application, p. 142

"[*t*]*he evidence before MOFCOM clearly shows that* *<u>the market share of Chinese producers not part of the domestic industry and third country imports during the POI were relevant to MOFCOM's analysis of causation</u>*.
Yet, the final determination contains no discussion of the role of Chinese producers not part of the domestic industry or their market share in connection with the analysis of causation. In our view, the absence of such a discussion requires us to conclude that MOFCOM's analysis of the causal relationship between subject imports and injury to the domestic industry was not reasoned and adequate."[199] (Underlining added).

5.2 Third country imports

227. The GOC respectfully submits that the Applicant was plainly incorrect in dismissing third country imports as the source of any alleged injury on the basis that "that "*the imports from these countries have been made at prices and/or volumes that would not be sufficient to break the causal link between the injury suffered by the Complaining UK Industry and the dumped imports from China*.".[200]

228. In this regard, first, as shown in the graph below,[201] the market share of the Chinese OFC imports is much smaller compared to that of the third country imports and, as such, is incapable of injuring the Applicant.



229. Indeed, as confirmed in the Application,[202] China is not even the main source of OFC. The import volumes from Poland are significantly higher compared to the Chinese OFC imports.

[199] Panel Report, *China – Autos (US),* paras 7.331-7.332.
[200] Application, p. 151.
[201] Based on Application, p. 142
[202] Application, p. 151.

	Volume of imports (in tons)	Volume of imports (in ckm, after conversion)	UK import volume (in ckm, after conversion)	%
Poland	3,889	16,065	63,938	25.1%
India	1,418	5,857		9.2%
Germany	1,246	5,146		8.0%
Belgium	1,237	5,112		8.0%
Romania	628	2,596		4.1%
Czech Republic	510	2,107		3.3%
Netherlands	663	2,739		4.3%
Japan	474	1,958		3.1%
Sweden	412	1,703		2.7%
United States	235	971		1.5%

230. Second, as already noted in section 4.2.3 above, the market share of Chinese imports increased only in 2021. However, in 2021, it was the market share of the third country imports that decreased, not the market share of the UK OFC producers. This is even more relevant considering that the increase in Chinese OFC imports' market share corresponds, in terms of both time and magnitude, to the decrease in the market share of the third country OFC imports.

231. Third, the GOC notes that the Applicant's group company produces OFC products in many of the third countries which export OFC to the UK, including Germany, the Czech Republic, Romania, the Netherlands, and Sweden.[203] Indeed, as stated by the Applicant itself:

> "*EU producers concerned generally sell optical fibre cables to their UK sales entities at intercompany transfer prices: for example, Corning imports from its production plants located in Poland and Germany, Nexans from Belgium and Prysmian from Romania.*"[204]

232. As is evident from the table above, the total volume of OFC imports from the third countries where the UK OFC producers have production is much higher than from China. Accordingly, the injury allegedly suffered by the Applicant may be, at least partially, caused by the UK OFC

[203] Prysmian Group, "International reach, local expertise," available at <www.prysmiangroup.com/en/company/global-presence>, last access on 29 June 2022.
[204] Application, p. 152.

producers' own imports from the EU. Indeed, if the Applicant has spare capacity in the UK, it is not clear why it needs to import OFC from its Romanian plant.

5.3 Trade-restrictive practices

233. The GOC considers the Applicant's questionable past and tendency to engage in anti-competitive behaviour is another factor which should be taken into account in the non-attribution analysis of the injurious effects of the other known factors. Indeed, businesses may not be inclined to establish business relationships with, or purchase OFC from, a company that is known to have engaged in price-fixing, which ultimately led to higher OFC prices to the detriment of consumers and businesses alike.

234. To recall, the Applicant was convicted and fined by the European Commission in 2014 for its active role in the long-standing price-fixing cartel concerning power cables. The Applicant was also convicted and subjected to fines imposed by other national competition authorities for its conduct. This includes fines imposed by the Spanish competition authority and by the Brazilian competition authority.

235. Thus, the Applicant's infringement of the EU and UK competition rules and the corresponding legal exposure and reputational damage that has arisen from these infringements are most likely to have affected its sales and profits.

236. In addition, while the UK public authorities are currently spending 5 billion GBP on infrastructure projects that will improve digital connectivity for UK households, the Applicant – through its active participation in the long-standing cartel agreement – forced thousands of UK households to pay extra for their electricity bills. In this context, the GOC refers to a recent application notice submitted to the UK Competition Appeal Tribunal concerning a class action suit against the Applicant and other companies that have participated in the power cables cartel.[205] The GOC also refers to the application notice, where it was held that the inflated high price that the Applicant charged to UK electric transmission and distribution companies led these companies to increase their prices, which ultimately led to the UK households having to pay for the overcharge. Furthermore, based on the Applicant's Annual Reports, the GOC understands that, since 2018, a large portion of the 33 million GBP extraordinary costs that the

[205] Competition Appeal Tribunal, Notice of an application to commence collective proceedings under section 47B of the Competition Act 1998, Case No. 1440/7/7/22, available at <www.catribunal.org.uk/sites/default/files/2022-05/2022.05.25_1440_Summary%20Notice_0.pdf>, last access on 28 June 2022.

Applicant incurred are in fact related to the antitrust legal claims (which account for approximately 21 million GBP in total).[206] It is underlined that no Chinese companies were involved in this global cartel that lasted between February 1999 and January 2009. It is thus ironic that the Applicant is accusing the Chinese exporting producers of unfair trade practices.

5.4 <u>Brexit</u>

237. The GOC considers that the UK's withdrawal from the EU and its economic consequences likely had an impact on the performance of the Applicant. Indeed, the CEO of the Applicant's group company conceded that Brexit has led to *"costs increasing on the back of a devaluing pound as Prysmian UK purchases most of its raw materials (in Euros) from European suppliers."*[207] It cannot be overlooked that this may have made the Applicant less competitive.

5.5 <u>COVID-19</u>

238. The GOC recalls that economies around the world have been disrupted by the COVID-19 health crisis throughout the entire injury period considered in the present investigation, and particularly throughout half of such period (*i.e.*, 2020-2021). The fact that the decrease in demand for OFC corresponds in terms of time to the beginning of the health crisis in 2020 proves that the injury to the Applicant, if any, may also be related to the pandemic. This has also been acknowledged by the Applicant's group company in its latest Annual Report.[208]

239. The GOC, therefore, respectfully submits that the effects of the pandemic should be considered in the non-attribution analysis.

6 <u>CONCLUSION</u>

240. For the reasons given above, the GOC considers that the AS complaint against OFC products from China does not meet the requirements of the SCM Agreement and the relevant UK provisions. Accordingly, the GOC respectfully requests the TRA to terminate the present AS investigation without imposing AS measures on OFC imports from China.

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[206] See: Prysmian Cables & Systems Limited, "Strategic Report 2018", "Strategic Report 2019", "Strategic Report 2020", and "Strategic Report 2021" in "Full accounts", available for download from the UK Companies House website at <https://find-and-update.company-information.service.gov.uk/company/00958507/filing-history>, last access on 3 August 2022.
[207] Prysmian Group, "Staying in the course in the UK", available at <www.prysmiangroup.com/staticres/insight-4-2017-en/global-scenario/staying-the-course-in-the-uk.html >, last access on 27 June 2022.
[208] *ibid*, pp. 57 and 58.

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