

AS0022

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

*Comments on the Statement of Essential Facts*

by

The Government of the People's Republic of China

18 July 2023

OPEN

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## **1 INTRODUCTION**

1. This submission presents the comments of the Government of the People's Republic of China ("GOC") on the Statement of Essential Facts ("SEF") issued by the UK Trade Remedies Authority ("TRA") on 20 April 2023, in the context 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).
2. The GOC respectfully submits that there is no legal or factual basis for the imposition of AS duties on OFC from China. Any duties imposed would be contrary to the law of both the United Kingdom ("UK") and the World Trade Organization ("WTO"), for the reasons explained in the present submission. In particular, such duties will violate (i) various provisions of the Trade Remedies (Dumping and Subsidisation) (EU Exit) Regulations 2019 ("basic Regulations"), and (ii) various provisions of the WTO Agreement on Subsidies and Countervailing Measures ("SCM Agreement"). To ensure completeness and to avoid repetition, the GOC incorporates herein by reference the previous comments submitted by it in the context of the present investigation.
3. The present comments highlight both substantive and procedural errors pertaining to the TRA's findings. The GOC will focus on six main issues: (i) the absence of pre-initiation consultations; (ii) the denial of the GOC's rights of defence; (iii) the incomplete and inadequate disclosure of "*essential facts*"; (iv) incorrect determination regarding the existence and extent of the alleged subsidization; (v) incorrect determination regarding the existence of alleged injury; (vi) inconsistent findings in the AS and anti-dumping ("AD") OFC investigations; and (vii) the double remedies. As a general note, the GOC in this submission is not challenging every aspect of the SEF that it disagrees with. Therefore, the GOC's silence on any matter should not be taken as implicit approval or agreement.

## **2 LACK OF PRE-INITIATION CONSULTATIONS**

4. As noted in the GOC's previous comments, the OFC AS investigation was flawed from the start since the TRA initiated (and continued with) the investigation without holding pre-initiation consultations with the GOC. Thus, the present investigation contravenes Article 13.1 of the SCM Agreement, as the GOC was not provided with a meaningful opportunity to

engage in pre-initiation consultations.<sup>1</sup> Article 13.1 of the SCM Agreement requires that "[a]s soon as possible after an application ... 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 ... and arriving at a mutually agreed solution." [Emphasis added] The purpose of this provision is clear, in that it ensures that the exporting Member has a meaningful opportunity to explain to the investigating authority why, for example, the latter's concerns regarding alleged subsidization and injury are misplaced or groundless.

5. Pre-initiation consultations are "*mandatory*" in nature,<sup>2</sup> and no derogations are allowed. Moreover, the investigating authority is required to hold these consultations in good faith.<sup>3</sup>
6. A brief restatement of the relevant facts is appropriate here. The Application for an AS investigation was submitted to the TRA on 11 March 2022. On 22 April 2022, the GOC was invited by the TRA to participate in consultations. However, on that date, a copy of the Application was not provided to the GOC. Without the underlying application, the GOC was unaware of the substance of the allegations against it and could not have commented on any substantive issue. To remedy the situation, on 22 April 2022 itself, the GOC requested the TRA for a copy of the Application. However, it was only on 26 April 2022 that the TRA sent the GOC a copy of the Application, but the TRA initiated the investigation on the same day, without any consultations (having) being held. In this regard, the GOC would like to make three points.
7. First, Article 13.1 of the SCM Agreement does not represent a mere procedural formality or a box that needs to be ticked by the investigating authority.<sup>4</sup> It consists of (and grants) a real procedural right to the exporting WTO Member – namely, the right to make a case to the investigating authority, before any investigatory procedure has started, to the effect that there is nothing that needs to be investigated in the first place or that, for example, insufficient evidence is presented regarding certain subsidy programmes. This provision ensures that the

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<sup>1</sup> See in this regard: GOC's Initial Comments of 19 August 2022 ("GOC's Initial Comments"), pp. 5-8.

<sup>2</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.532.

<sup>3</sup> In general, investigating authorities are required to conduct their investigations in good faith. See for example, the discussion in: Appellate Body Report, *US – Hot-Rolled Steel*, paras. 100-101.

<sup>4</sup> Indeed, the GOC does not believe that such an interpretation would be upheld by a WTO Panel.

exporting Member and exporting producers (and for that matter, the investigating authority) do not waste precious time, resources and effort on a matter or matters that can be mutually settled *via* bilateral consultations, without having to run through the rigmarole of an investigation.<sup>5</sup> In the OFC AS investigation, however, the requirement in Article 13.1 of the SCM Agreement was seen as something that can be disposed of merely by virtue of the TRA's invitation (to the GOC) of 22 April 2022. The GOC disagrees. What is required is the granting of an *effective* procedural right.<sup>6</sup> Such a right could not have been exercised by the GOC as the underlying Application required to study and analyse the substance of the allegations of injurious subsidization was not made available to the GOC in a timely manner. Thus, in the OFC AS investigation, it was impossible for the GOC to participate in any meaningful consultations.

8. Second, the aforementioned violation of Article 13.1 of the SCM Agreement cannot be made good *post*-initiation and cured subsequently in the proceeding, for instance, by inviting the GOC for consultations pursuant to Article 13.2 of the SCM Agreement. The TRA's understanding of the law conflates Articles 13.1 and 13.2 of the SCM Agreement, since it appears that the TRA believes that *any* consultations with the GOC (regardless of timing) will suffice. However, the Article 13.2 of the SCM Agreement post-initiation consultations have no relevance to the issue at hand, *i.e.*, the failure to consult prior to the initiation of the investigation. Once the investigatory "gun" has been fired, and no pre-initiation consultations have first been held, a violation of Article 13.1 stands, regardless of whether (and however more) post-initiation consultations are offered or held with the exporting country government.
9. Indeed, an investigation is generally understood to start from (*i.e.*, after) the initiation phase,<sup>7</sup> whereas Article 13.2 of the SCM Agreement requires the TRA to consult with the GOC "throughout the period of investigation" [Emphasis added]. These are independent obligations, as is clear from the opening word of Article 13.2 ("*Furthermore*"). Thus, it is clear that Article 13.1 concerns pre-initiation consultations while Article 13.2 concerns post-initiation

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<sup>5</sup> As the Panel stated in footnote 74 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."

<sup>6</sup> In the past, the Appellate Body has spoken of the need to ensure an "effective" right for parties to an investigation to defend their interests. *See*: Appellate Body Report, *China – GOES*, footnote 390.

<sup>7</sup> Panel Report, *US – Zeroing (EC)*, para. 7.159 and footnote 254.

consultations, and that the TRA was required to ensure that both are held. However, it did not do so.

10. In sum, the offering/holding of consultations under Article 13.2 of the SCM Agreement does not excuse an investigating authority's failure to hold genuine consultations under Article 13.1.
11. As a final point, the GOC would like to emphasize its disappointment regarding the absence of meaningful pre-initiation consultations in this first AS case against China, given that the TRA had more than sufficient time to set a convenient date for the consultations, while also ensuring that there was no delay in the initiation of the investigation (which seems to be the only response from the TRA in this regard). The GOC notes that the Application was lodged on 11 March 2022. This is 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). Thus, if there was any supposed delay in the initiation of the OFC investigation (or concern thereof), the fault lay with the TRA. Having been non-proactive in sending out an invitation for consultations, and then keeping a buffer of only three days, including a weekend, (22 April – 26 April) between the invitation and initiation led to the denial of a fundamental right to the GOC.
12. In sum, the GOC considers that since no meaningful pre-initiation consultations were held, and Article 13.1 of the SCM Agreement is a "*mandatory*" provision, the OFC AS investigation was illegal *ab initio*, and should now be terminated without any measures.

### **3 INADEQUATE DISCLOSURE OF ESSENTIAL FACTS**

13. On 26 June 2023, the GOC requested the TRA to disclose the "*essential facts*" forming the basis for various TRA determinations ("GOC's Request for Information").<sup>8</sup> However, the TRA did not provide the relevant information to the GOC. This constitutes a violation of the first sentence of Article 12.8 of the SCM Agreement, as well as of Regulation 62(1) of the basic Regulations.<sup>9</sup> For the legal and factual basis of this claim, the GOC incorporates by reference herein its arguments from its submission of 26 June 2023.

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<sup>8</sup> GOC's Request for Information of 26 June 2023.

<sup>9</sup> GOC's Request for Information of 26 June 2023, pgs. 7 – 20.

14. The GOC notes in this regard that the basic Regulations go beyond the SCM Agreement, in that Regulation 62(2) requires the TRA to disclose not just essential facts, but also to "*inform interested parties who have supplied information that has been considered by the TRA— **how** it has used the information supplied by that party in making the intended final determination; and of the details of the TRA's **analysis** forming the basis of the intended final determination*". [Emphasis added] Therefore, per UK law, there is ideally an "*analysis*" aspect to the SEF disclosure as well.
15. Thus, for example, the very brief reply received from the TRA on 30 June 2023 merely stated that "*the benchmark loan interest rate used from the Turkish Central Bank was 20.78%*".<sup>10</sup> However, no factual basis for the calculation of this figure of "20.78%" has been provided to the GOC, nor has the actual calculation of the benchmark been provided. The issue of inadequate disclosure regarding the calculation of the benchmark for the loans at issue, therefore, continues to create problems. Moreover, the TRA's reply does not even touch upon the numerous other issues raised by the GOC in its Request for Information. In other words, most of the essential facts forming the basis of the TRA's finding of injurious subsidization have, as yet, not been disclosed. This constitutes a violation of Article 12.8 of the SCM Agreement and Regulation 62(1) of the basic Regulations.
16. Relatedly, the SEF omits any information or explanation regarding the methodology adopted by the TRA for calculating the alleged benefit with respect to *inter alia* the provision of loans and land use rights ("LUR"). With respect to the former, for example, there is no information in the SEF regarding how the Turkish interest rate used by the TRA was adjusted for the differing loan conditions, duration, timing, etc. The methodology employed by an investigating authority has been found to be an "*essential fact*", since (mere) access to underlying data or figures alone is usually not sufficient for parties to defend their interests in an investigation.<sup>11</sup> The GOC notes that all essential facts underlying the benefit calculation must be disclosed by an investigating authority.<sup>12</sup>

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<sup>10</sup> TRA reply to GOC Request for Information, 30 June 2023, p. 1.

<sup>11</sup> See as an analogy (under the Anti-Dumping Agreement ("ADA")): Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.218.

<sup>12</sup> See: Panel Report, *US – Ripe Olives from Spain*, para. 7.386; Panel Report, *China – GOES*, para. 7.465.

17. Furthermore, the TRA's response to the GOC's Request for Information notes that "[m]ore detail will be added to the [Final Determination]".<sup>13</sup> However, once again, this demonstrates a conflation between distinct procedural obligations. The TRA seems to be merging its obligations regarding disclosure and final determination. Notably, Article 12.8 of the SCM Agreement and Regulation 62(1) of the basic Regulations require (respectively) the disclosure of essential facts "before a final determination is made" or "before ... a final affirmative or final negative determination [is made]". [Emphasis added] Thus, it is clear that this obligation is distinct (and independent) from the obligation under Article 22.3 of the SCM Agreement, which requires the TRA to provide "sufficient detail ... on all [material] issues of fact and law" in the final determination, which also serves as the public notice.
18. The Panel in *China – HP-SSST (Japan) / China – HP-SSST (EU)* has explicitly distinguished the scope and substance of the disclosure and final determination obligations.<sup>14</sup> Similarly, the Panel and the Appellate Body in *China – GOES* have contrasted the two obligations, in particular with respect to timing, *i.e.* first the independent disclosure obligation applies, and then the obligation with respect to the final determination comes into play.<sup>15</sup>
19. This distinction is important from a practical perspective as well. The purpose of adequate disclosure of essential facts is to enable interested parties to "*comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts*".<sup>16</sup> Parties cannot comment (except through judicial recourse) on the final determination. Therefore, the disclosure stage represents the last time that parties can comment on the "*completeness and correctness*" of the facts being considered by the authority, *before* these get crystalized in the final determination. By failing to adequately disclose essential facts (and regardless of the supposed "*more detail*" to be provided in the final determination) the TRA has violated its obligations under Article 12.8 of the SCM Agreement and Regulation 62(1) of the basic Regulations.

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<sup>13</sup> TRA reply to GOC Request for Information, 30 June 2023, p. 1.

<sup>14</sup> Panel Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.274-7.275.

<sup>15</sup> Panel Report, *China – GOES*, para. 7.672; Appellate Body Report, *China – GOES*, para. 256.

<sup>16</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.805; Panel Report, *China – HP-SSST (Japan)/China – HP-SSST (EU)*, para. 7.237

#### **4 COMMENTS ON ALLEGED SUBSIDISATION**

20. The GOC disagrees with the TRA's findings and conclusions regarding the subsidization of the OFC sector in China.

##### **4.1 Generic references in the SEF to general documents are not sufficient**

21. As a preliminary point, the GOC would like to underline that OFC is not an encouraged sector/industry in China. The GOC notes with concern that the TRA's determination that "*OFC producers in the PRC are an encouraged industry*" is based on generic policy statements and programs of the GOC. These GOC documents are not geared towards the targeted aiding of the OFC sector, as the TRA presumes, and the SEF does not demonstrate otherwise. The GOC recalls the Panel's ruling in *China – GOES* that "*general information about governmental policy, with no direct connection to [a] program at issue, is not "sufficient evidence" of specificity*".<sup>17</sup>
22. The SEF misconstrues the nature, purpose and content of various general GOC documents – which do not have any mandatory legal effect – in order to reach (what seems to be) a predetermined conclusion – namely, that the OFC sector in China is specifically encouraged by the GOC. However, a close scrutiny of these general documents reveals that they do not even concern the OFC sector/industry in the first place. The SEF unfairly and in a biased manner cherry-picks certain pieces of Chinese documents and tosses them together in a haphazard manner in an attempt to demonstrate that the GOC specifically subsidizes the OFC sector. However, this assertion remains untrue and, in any case, unproven.
23. First, the GOC notes the references to the 14<sup>th</sup> Five-year Plan and the "*Made in China 2025*" initiative.<sup>18</sup> However, as stated by the GOC in previous submissions, these plans/initiatives are neither mandatory nor legally binding. These are merely guidance documents, providing the general developmental direction for certain industries. Five-year plans, moreover, are not unique to China, and have been a feature of the legal landscape of many Asian and Commonwealth countries, including India and Bhutan.

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<sup>17</sup> Panel Report, *China – GOES*, para. 7.66

<sup>18</sup> AS SEF, pgs. 92 and 92, and para. 103.

24. The fact that the 14<sup>th</sup> Five-year Plan does not constitute a binding, mandatory measure is evidenced by the absence of actual legal provisions, sanctions, or rules on applicability. The 14<sup>th</sup> Five-year Plan also does not mention OFC. The "*Made in China*" initiative also does not concern the OFC industry; it only concerns infrastructure. Thus, as a preliminary step, the SEF fails to evidence the "*proper legal characterization*" of these documents; the TRA was required to properly scrutinize and analyse the "*design and operation*" of the documents so as to identify their "*principal characteristics*".<sup>19</sup> Had this been done, it would have become more than evident that neither the Plan nor the initiative specifically support OFC.
25. Nonetheless, the TRA seems to be convinced that these general policy documents are somehow linked to OFC producers. Assuming *arguendo* that this is true, the SEF does not provide anywhere the underlying factual basis and related explanations regarding this position. In other words, the SEF does not establish, with facts and properly applied law, that the general GOC documents specifically support the OFC industry – through *inter alia* preferential financing, provision of goods at less than adequate remuneration, etc. The GOC notes that a similar failure to connect a "*general ... obligation*" in national law to the alleged recipient of preferential treatment (constituting a subsidy) was found to be illegal in *US – Supercalendered Paper*. The Panel in that case held that the US investigating authority failed to properly demonstrate the existence of a subsidy (through entrustment/direction by the Canadian government), since the Panel did not "*see how the high-level general service obligation at issue here could be considered to entrust or direct NSPI – within the meaning of Article 1.1(a)(1)(iv) – to necessarily provide electricity to any customer, in any circumstances, under any conditions.*"<sup>20</sup> Thus, the TRA should have, in the very least, connected the general GOC documents to the OFC industry. This has not been done.
26. Second, the TRA attempts to classify, without any underlying proof or reasoning, the OFC sector as "*New Generation Information Technology Industry*". However, none of the programs that the TRA refers to in this regard reference the OFC sector. For example, in its discussion on alleged grants provided by the GOC, the TRA relies on "*Notice of the Municipal Bureau of Industry and Information Technology on the announcement of the first batch of projects to be funded by the 2021 New Generation Information Technology Industry*

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<sup>19</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 5.120.

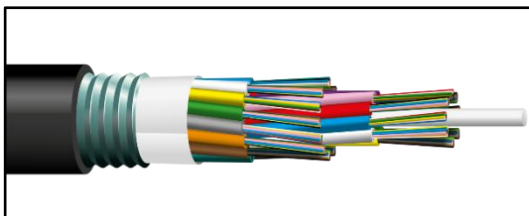
<sup>20</sup> Panel Report, *US – Supercalendered Paper*, para. 7.61. [Emphasis added]

*Support Plan*".<sup>21</sup> However, the notice does not refer to OFC at all. Point 10 of the annex attached to this Notice specifically speaks of optical "*interconnection*", which demonstrates that what is at issue is the meta-network for internet connection, not the *cables* that undergird the system.

27. In fact, the SEF itself states that:

*"In our examination of a single grant programme, we identified that the proceeds of the first batch of funding released from the programme are detailed in the Notice of the Municipal Bureau of Industry and Information Technology on the announcement of the first batch of projects to be funded by the 2021 New Generation Information Technology Industry Support Plan, published by the Shenzhen Bureau of Industry and Information Technology. From the annex in this announcement, which identifies the projects funded, we have determined that the overwhelming majority of projects funded were related to high-technology products, such as 5G communication networks and LED visual display equipment. Based on the concentration of funding to a small subset of industries, we have determined that the subsidy has in fact been applied in a specific manner (regulation 22(2)(b) of the Regulations) due to being granted disproportionately to certain groups and industries (regulation 22(3)(a) of the Regulations), **which include OFC producers.**"*<sup>22</sup> [Emphasis added]

28. The SEF does not demonstrate how the Notice or its annex "*include[s] OFC producers*". No evidence or proof has been adduced to show that OFC is one of these "*New Generation Information Technology Industr[ies]*". In such circumstances, the TRA's determination regarding subsidization rests, improperly, on *assumptions* and not on actual *facts*.<sup>23</sup> Moreover, the parallel drawn between OFC and "*LED visual display equipment*" is factually incorrect and legally irrelevant.<sup>24</sup> How or why the TRA believes that there is an equivalence between the two products below is beyond comprehension:



<sup>21</sup> AS SEF, pgs. 31 and 35.

<sup>22</sup> AS SEF, para. 123.

<sup>23</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.80.

<sup>24</sup> AS SEF, para. 123.

29. In any event, if a program were to (*quod non*) provide support to everything from OFC (and its networks) to LED visual display equipment, it can hardly be said to be specific.<sup>25</sup>
30. Moreover, the SEF correctly notes (and therefore acknowledges) that the aforementioned Notice (as well as other documents referred to in the SEF) concern "*5G communication networks*", and not the actual optical fibre cables [Emphasis added]; the inclusion of the latter into the program is just an assumption of the TRA. If the argument implicitly contained (and endorsed) in the SEF is that some alleged support (*quod non*) given to the meta-network somehow trickles back to the constituent OFC and their producers, this "*pass-back*" of benefit is required to be demonstrated by the TRA. However, such an assessment is missing in the SEF. The same issue plagues the TRA's reliance on the "*Guiding opinions on promoting the internationalization of strategic emerging industries*", in the context of alleged financing through export credit insurance.<sup>26</sup> Aside from its non-binding (hortatory) nature, this document does not concern OFC, but rather refers to the need to develop "*information networks*".<sup>27</sup>
31. The GOC furthermore notes in this regard that internet access networks and broadband infrastructure are properly classified as "*general infrastructure*", which is exempt from the scope of subsidization (through provision of goods by a government) *vide* Article 1.1(a)(1)(iii) and Regulation 20(1)(c) of the basic Regulations. The Panel in *EC and certain Member States – Large Civil Aircraft* provided the following interpretation of "*general infrastructure*":

*"Dictionaries define the term 'infrastructure' as, inter alia, 'installations and services (power stations, sewers, roads, housing, etc.) regarded as the economic foundation of a country,' the 'underlying foundation or basic framework (as of a system or organization),' and the 'system of public works of a country, state, or region.' The term 'general' is defined as 'including, involving, or affecting all or nearly all the parts of a (specified or implied) whole as a territory, community, organization, etc.; completely or nearly universal; not partial, particular, local, or sectional' and 'involving, applicable to, or affecting the whole; involving, relating to, or applicable to every member of a class, kind, or group'. We consider that the term 'general infrastructure', taken in its ordinary and natural meaning, refers to infrastructure that is not provided to or for the advantage of only a single entity or limited group of entities, but rather is available to*

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<sup>25</sup> See in this regard: Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140. The program is therefore "*sufficiently broadly available*" throughout the Chinese economy. Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 7.1237.

<sup>26</sup> AS SEF, pgs. 90-91 and 95.

<sup>27</sup> *Guiding opinions on promoting the internationalization of strategic emerging industries*, Operative Point 3.

*all or nearly all entities. In our view, this interpretation is consistent with the ordinary meaning of the term 'general' when used to modify the word 'infrastructure.'*"<sup>28</sup>  
[Emphasis added]

32. The Appellate Body in *US – Softwood Lumber IV* also confirmed that the "*only explicit exception to the general principle that the provision of "goods" by a government will result in a financial contribution is when those goods are provided in the form of "general infrastructure."*"<sup>29</sup> The meta-networks and broadband systems at issue do not confer advantages to any one particular producer or industry. Indeed, as is clear from various GOC documents at issue, the purpose of the support is to ensure access to 5G connectivity to Chinese citizens.<sup>30</sup> Any alleged advantage received by OFC producers is presumptive and lacks evidence.<sup>31</sup>
33. Fourth, in response to the GOC's earlier submission noting that "*several Measures of Suzhou Industrial Park on Promoting High-quality Development of Manufacturing Industry*" are based around "*biomedicine, nanotechnology, and artificial intelligence (AI)*" industries and therefore do not provide evidence of the OFC industry falling into the category of 'high tech industry'", the SEF notes that the TRA "*reviewed the associated list of high-tech fields supported by the state and identified [certain] fields as relevant to the status of OFC producers in the PRC*".<sup>32</sup> However, none of the fields noted in the SEF concern OFC directly. The fields identified in the SEF either concern the meta-network/system (when the SEF refers to "*metro networks and access networks ... optical transmission ... systems*") or services (when the SEF refers to "*software*" or "*technology*").<sup>33</sup> Similarly, the SEF refers to "*internet-related projects*",<sup>34</sup> which not only demonstrates the improperly wide net that has been cast in order to (one way or the other) capture the OFC industry in some category, it also shows that the documents at issue are actually about the network/infrastructure for internet provision,

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<sup>28</sup> Panel Report, *EC and Certain member States – Large Civil Aircraft*, para. 7.1036.

<sup>29</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 60. [Emphasis added]

<sup>30</sup> See: PRC's Ministry of Industry and Information Technology, "Notice of the Ministry of Industry and Information Technology on Printing and Distributing the "Action Plan for the Coordinated Development of "Double Gigabit" Networks (2021-2023)", available at <[www.gov.cn/zhengce/zhengceku/2021-03/25/content\\_5595693.htm](http://www.gov.cn/zhengce/zhengceku/2021-03/25/content_5595693.htm)>.

<sup>31</sup> Alternatively, the alleged support provided by the GOC can be seen as bolstering the *services* industry; countervailing such support is not allowed by either the SCM Agreement or the basic Regulations.

<sup>32</sup> AS SEF, paras. 117-118. [Emphasis added]

<sup>33</sup> AS SEF, para. 118, first and second indent. [Emphasis added]

<sup>34</sup> AS SEF, paras. 125 and 126.

rather than about OFC. Since only "*relevant*" evidence matters in proving subsidisation,<sup>35</sup> the SEF's reference to the list of non-OFC related fields and technologies as well as services is immaterial in determining whether the OFC sector has specifically been supported by the GOC.

34. Similarly, the TRA seeks to posit that the OFC is an "encouraged" sector since it is "*listed in the Catalogue of Chinese New and High-tech Export Products (2003) [and] as high-tech products in the 2006 version of the Export Catalogue of China's High-tech Products*".<sup>36</sup> However, it is clear from the content of these documents that these are merely guidance instruments with no legal or binding effect.
35. In sum, the TRA has not demonstrated how any of these general policy documents "*explicitly ... limit[s] [access] to*"<sup>37</sup> the OFC industry. The GOC recalls that the demonstration of this limitation must be "*express ... unambiguous and clear*".<sup>38</sup> The SEF, however, fails in this regard.

## **4.2 Preferential lending**

36. The GOC disagrees with the TRA's assessment that OFC producers in China have benefitted from preferential financing – particularly, in the form of loans from state-owned banks. The GOC takes issue with both the understanding of the relevant law (as observable in the SEF), and the application of the law to the facts at hand.

### 4.2.1 Preliminary comments

37. At the outset, the GOC would like to express its dissatisfaction with the entirely unclear manner in which the issue of – what the SEF calls – "*foreign authority*" has been dealt with. According to paragraph 3(4) of Schedule 4 to the Act, a "*foreign authority*" means "*a government or public body within the territory of a foreign country or territory*". While the analysis in the SEF is muddled and lacking, the GOC understands that the allegation pressed

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<sup>35</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.19.

<sup>36</sup> AS SEF, para. 305.

<sup>37</sup> SCM Agreement, Article 2.1(a) and Regulation 22 (2)(a)(i) of the basic Regulations.

<sup>38</sup> Appellate Body Report, *EC and Certain member States – Large Civil Aircraft*, para. 949.

by the SEF is that the GOC is a "*foreign authority*" that allegedly entrusts or directs commercial banks in China to provide loans to OFC producers at preferential rates.

38. While this allegation will be rebutted below, for now, the GOC notes that the TRA has not made any analysis towards the conclusion that the banks at issue themselves are "*public bodies*" within the meaning of Article 1.1(a)(1) of the SCM Agreement (in contrast to the explicit statement made for Sinosure).<sup>39</sup>
39. In any event, mere formal links such as (alleged) state ownership and state shareholding are insufficient to categorize a bank as a public body.<sup>40</sup> There needs to be more than just the existence of such "*formal indica*". Rather, an authority has to prove that there is "*evidence that [governmental] control has been exercised in a meaningful way*".<sup>41</sup> State ownership is not a "*decisive criterion*" for the classification of an entity as a public body.<sup>42</sup> Moreover, as the Panel in *US – Carbon Steel (India)* noted: "*a government's power to appoint directors to the board of an entity, and the issue of whether those directors are independent, would seem to be **distinct** factors in assessing whether an entity is a public body.*"<sup>43</sup> The Appellate Body has furthermore clarified that the power to appoint and nominate directors to the board of an entity "*[a]nd the issue of whether those directors are independent, would seem to be **distinct** factors in assessing the governmental character of an entity*".<sup>44</sup> In other words, it is entirely plausible that a board member is government-appointed, yet acts independently. Thus, even if the TRA were to seek to conclude that the banks at issue were public bodies, the analysis contained in the SEF is insufficient and is in any event contrary to the applicable legal standard.
40. Thus, the GOC understands that the TRA has attempted to prove that the "*foreign authority, the GOC*"<sup>45</sup> has entrusted or directed banks to provide loans at certain allegedly preferential rates. This conclusion comes out clearly in paragraph 194 of the SEF, wherein it is stated that

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<sup>39</sup> AS SEF, para. 297.

<sup>40</sup> This is the only factor that has been properly considered by the TRA.

<sup>41</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

<sup>42</sup> Panel Report, *US – Countervailing Measures (China)*, para. 7.70, referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310.

<sup>43</sup> Panel Report, *US – Carbon Steel (India)*, para. 4.45. See also: Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.39 referring to Appellate Body Report, *US – Carbon Steel (India)*, para. 4.45. [Emphasis added]

<sup>44</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China) (DS379)*, para. 318 [Emphasis added]

<sup>45</sup> AS SEF, para. 191. [Emphasis added]

"[t]he GOC possess and exercises the authority to instruct commercial banks regarding their lending practices. Commercial banks provide finance to companies in the PRC based on the instructions communicated through GOC policies and guidance. Consequently, we have concluded that the financing provided to OFC producers in the PRC constitutes a financial contribution through the direct transfer of funds in the form of loans and credit lines (Regulations 20(1)(a) and 20(3)(a) of the Regulations), at the direction of a foreign authority, the GOC (Regulation 20(1)(e) of the Regulations)".<sup>46</sup>

41. However, the GOC notes that the examination of entrustment and direction (of financial institutions in China) – as contained in the SEF – is based entirely on the statements made and the general behaviour exhibited by the *entity* in question, rather than on any specific *action of the GOC*. In other words, rather than focusing on the alleged action of the GOC which would entrust or direct the entities, the SEF has instead analysed (and that too, rather superficially) the statements/behaviour of the entity itself.
42. As clarified by the Panel in *US – Export Restraints*, the focus of the analysis is on the action of the government, and not the effect of that action or the reactions to it by those affected.<sup>47</sup> However, in the relevant assessment, the TRA has only looked into (i) certain statements allegedly made by the financial entities in question, and (ii) the fact that certain board members of the financial entities may have political links.<sup>48</sup> Nothing at all in the analysis speaks to any specific action by the GOC that would (*quod non*) entrust/direct the financial entities to allegedly provide preferential loans.
43. The SEF only generally mentions certain Chinese laws relating to the banking and credit system,<sup>49</sup> without demonstrating how any of them specifically result in the entrustment/direction of the financial entities such that the latter provide preferential loans/credits to OFC producers. The GOC notes that entrustment/direction "*cannot be inadvertent or a mere by-product of governmental regulation*".<sup>50</sup> The SEF's exclusive focus

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<sup>46</sup> AS SEF, paras. 192, 194.

<sup>47</sup> Panel Report, *US – Export Restraints*, paras. 8.33-8.35, 8.42, 8.44.

<sup>48</sup> See generally: AS SEF, Section F5.2.2.

<sup>49</sup> AS SEF, Section F5.2.1. Furthermore, these regulations merely provide "*guidance*" to the institutions. AS SEF, para. 163.

<sup>50</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114. [Emphasis added]

on the behaviour of private entities is therefore inadequate.<sup>51</sup> In the absence of attributability to governmental action or regulation, such behaviour cannot be considered a financial contribution by a government within the meaning of Article 1.1(a)(1) of the SCM Agreement.<sup>52</sup> Therefore, the SEF's analysis of entrustment/direction is generally flawed and inadequate pursuant to Article 1.1(a)(1)(iv) of the SCM Agreement.

*4.2.2 Assessment regarding financial contribution and entrustment/direction is inconsistent with Article 1.1(a)(1) and Article 1.1(a)(1)(iv) of the SCM Agreement*

44. The GOC takes issue with the TRA's conclusion that the financial entities in China (mainly banks) are entrusted/directed by the GOC to provide preferential loans to OFC producers.
45. As to the applicable legal standard, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* has ruled that a finding of entrustment or direction within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement requires "*an affirmative demonstration of the link between the government and the specific conduct*" of the entity concerned".<sup>53</sup> As noted above, the focus of the entrustment/direction analysis should be on the specific "*action*" of the government which allegedly entrusts/directs private entities to behave in a certain way.<sup>54</sup> That is, "*the ordinary meanings of the words "entrusts" and "directs" require an explicit and affirmative action of delegation or command*".<sup>55</sup> The GOC recalls that entrustment occurs when a government gives a private body a responsibility, and direction occurs when the government exercises authority over the private body.<sup>56</sup> Mere guidance or encouragement is not sufficient to show entrustment/direction,<sup>57</sup> and there must be some form of threat or inducement.<sup>58</sup>
46. The TRA has also not provided "*reasoned and adequate*" explanations for its determination regarding entrustment/direction. The GOC recalls that this is a general obligation imposed on

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<sup>51</sup> In this regard, the Panel in *EC – Countervailing Measures on DRAM Chips* stated on para. 7.105 that "*the fact that private parties act in a strange or not commercially reasonable manner is (...) not enough to establish government entrustment or direction*".

<sup>52</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 107.

<sup>53</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. [Emphasis added]

<sup>54</sup> Panel Report, *US – Export Restraints*, paras. 8.33-8.35, 8.42, 8.44.

<sup>55</sup> Panel Report, *US – Export Restraints*, para. 8.44. [Emphasis added]

<sup>56</sup> Appellate Body Report, *US – DRAMs*, para. 116.

<sup>57</sup> Appellate Body Report, *US – DRAMs*, para. 114.

<sup>58</sup> Appellate Body Report, *US – DRAMs*, para. 116.

investigating authorities, and it applies throughout the investigation.<sup>59</sup> An authority must provide a "*reasoned and adequate explanation*" as to "(a) how the evidence on the record supported its factual findings; and (b) how those factual findings supported its overall determination".<sup>60</sup> The Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* has adeptly captured what it expected from an authority in this regard:

*A panel must examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are **reasoned and adequate**. ... The panel's scrutiny should test whether the **reasoning of the authority is coherent and internally consistent**. The panel must undertake an in-depth examination of **whether the explanations given disclose** how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine **whether the explanations provided demonstrate** that the investigating authority took proper account of the complexities of the data before it, and that it **explained why** it rejected or discounted alternative explanations and interpretations of the record evidence. [...]*

*This task may also require a panel to consider whether, in analyzing the record before it, the investigating authority evaluated all of the relevant evidence in an **objective and unbiased manner**, so as to reach its findings "without favoring the interests of any interested party, or group of interested parties, in the investigation."<sup>61</sup> [Emphasis added]*

47. In light of the above, first, as noted by the GOC,<sup>62</sup> a proper reading of the Law on Commercial Banks demonstrates that Chinese financial institutions are to "*follow the principles of safety, liquidity and efficiency with full autonomy and assume sole responsibility for their own risks, profits and losses*". Moreover, these banks are to conduct business "*free from any interference by entities or individuals*".<sup>63</sup> As per this law, no interference by any form and level of government on the operation of the banks is to be allowed.<sup>64</sup> The banks are furthermore

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<sup>59</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.13 and 7.16

<sup>60</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186; Appellate Body Report, *US – Lamb*, para. 103. [Emphasis added]

<sup>61</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93, referring to Appellate Body Report, *US – Lamb*, para. 106; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97, referring to Appellate Body Report, *US – Hot-Rolled Steel*, para. 193.

<sup>62</sup> GOC's Initial Comments, para. 102.

<sup>63</sup> Law of the PRC on Commercial Banks, Article 4.

<sup>64</sup> Law of the PRC on Commercial Banks, Article 5.

required to be diligent in their assessment of the credibility of the borrower and associated risks.<sup>65</sup>

48. Thus, the TRA has taken the relevant law entirely out of context (particularly Article 34 of the Chinese Commercial Banking Law).<sup>66</sup> The Chinese Commercial Banking Law (including Article 34) does not at all prove that the banks and financial institutions are required to act in a manner mandated by the GOC. Moreover, there is no sanction of any kind applicable against banks. There are over 3,800 banks in China and it absurd to claim that the GOC is entrusting and directing each and every bank.
49. Similarly, the GOC is concerned by the fact that while the SEF admits that the phrasing of Article 15 of the General Rules on Loans is such that it evidences its non-mandatory and non-binding nature (it uses the term "*may*"), the SEF nonetheless concludes that "*any voluntary aspects introduced by the inclusion of "may" cannot be considered absolute*".<sup>67</sup> This is particularly troubling since the SEF gives no particular reason for this defiance of logic, save to refer back to other GOC documents (which, as stated before and elsewhere in this submission, do not *require* banks and institutions to do anything).
50. Second, the GOC underlines that all loans disbursed by Chinese state-owned commercial banks are (required by law to be) provided on commercial terms agreed upon between the parties, as is the case with loans provided by banks in *inter alia* the UK. The applicable interest rates charged coincide with the prevailing market rate and are determined based on universally applied lending criteria. Indeed, Chinese state-owned commercial banks are listed on stock exchanges and are profit-oriented enterprises which aim to maintain and improve the value of their business.
51. Third, the SEF places much stock in the supposed appointment of officials by the GOC or the appointment of personnel that is somehow related to the government.<sup>68</sup> Indeed, for each bank, this aspect forms at least half of the basis for the TRA's conclusion that the entity in question was entrusted/directed by the GOC. However, the GOC notes that in *US – Pipes and Tubes*

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<sup>65</sup> Law of the PRC on Commercial Banks, Article 7.

<sup>66</sup> AS SEF, para. 164.

<sup>67</sup> AS SEF, para. 166.

<sup>68</sup> AS SEF, para. 192.

(Turkey), the Panel held that there was "[n]othing in the evidence that the USDOC considered in its analysis of OYAK to suggest that military and government personnel within OYAK have made decisions under the direction of the GOT in pursuit of governmental economic policies".<sup>69</sup> This was even though, according to the facts available, "OYAK's governing bodies [were] comprised of military and certain governmental personnel, which elect[ed] the eight-person board of directors, that OYAK [was] ensured mandatory contributions for pension purposes, and that OYAK [could] benefit from its certain property and tax status".<sup>70</sup> The SEF should have thus included an analysis of whether the board members were acting independently, or whether they were indeed simply following the GOC's alleged direction.

52. Fourth, as noted in Section 5.2.1 above, the SEF puts much emphasis on the statements/actions of the commercial entities (banks/financial institutions). For each bank/institution analysed, the SEF makes note of the "public statements" made by the entity,<sup>71</sup> or the entity's involvement in a particular development project.<sup>72</sup> This makes up for the other half of the SEF's entrustment/direction analysis (the first half being alleged governmental presence or shareholding). However, as noted above, the proper focus of an entrustment/direction analysis has to be the (nature of the) action of the government. The action/reaction of the private entities (to the governmental action) is irrelevant or at best only incidentally relevant. As the Panel in *US – Export Restraints* put it:

*"We consider that it cannot be the case that the nature of a Member government's measure under the SCM Agreement is to be determined solely on the basis of the reaction to that measure by those it affects. Rather, the existence of a financial contribution by a government must be proven by reference to the action of the government. To determine whether a financial contribution exists under subparagraph (iv) solely by reference to the reaction of affected entities would mean in practice that a different standard would apply under that provision as compared to the standard under subparagraphs (i)-(iii), which involves consideration of the action of the government first. Similarly, we do not see how the reaction of private entities to a given*

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<sup>69</sup> Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.39.

<sup>70</sup> Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.39. While this decision was made in the context of a "public body" finding, the GOC believes that it is applicable here as well since the concepts of "governmental control" (public body) and "governmental direction" (entrustment/direction) are closely related if not identical. To this end, the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, on para. 294, specifically uses the term "control" to define the verb "to direct".

<sup>71</sup> See for example: AS SEF, paras. 175 (for Bank of Communications), 176 (for Agricultural Development Bank of China), 177 (for Bank of China), 185 (for Shenzhen Hi Tech Investment Micro Loan Co., Ltd.)

<sup>72</sup> AS SEF, para. 184 (for China Everbright Bank).

governmental measure can be the basis on which the Member's compliance with its treaty obligations under the WTO is established. [...]

*The Appellate Body [in Canada - Aircraft] ... essentially agreed with Brazil and the United States that the focus of the SCM Agreement's obligations is on the granting government. The Appellate Body stated that "[i]t does not suffice to demonstrate solely that a government granting a subsidy anticipated that exports would result", and elaborated that, while "[a] subsidy may well be granted in the knowledge, or with the anticipation, that exports will result . . . that alone is not sufficient, because that alone is not proof that the granting of the subsidy is tied to the anticipation of exportation". In other words, the Appellate Body found that a cause and effect relationship between the subsidy and actual or anticipated trends in exports was not sufficient to satisfy the "tied to" standard of conditionality for export contingency to exist. Similarly, in the case before us, for the "entrusts or directs" standard to be met, i.e., for there to be a financial contribution in the sense of subparagraph (iv), the government's action must be the focus, rather than the possible effects of the action on, or the reactions to it by, those affected, even if those effects or reactions are expected."<sup>73</sup> [Footnotes omitted and emphasis added]*

53. However, the SEF is an example of precisely the opposite. The entire focus of the TRA's entrustment/direction analysis, with regard to loans, is on the private entity, i.e., on what the entity has said and done. There is no reference at all to governmental action, save for a few uncritical references to generally applicable law (which, again, are not specifically geared towards, or even mention, the OFC sector). In that sense, the SEF's entrustment/direction assessment is flawed and lacking, since it fails to evidence any "affirmative demonstration of the link between the government and the specific conduct of the entity concerned"<sup>74</sup> or any "explicit and affirmative action of delegation or command [by the GOC]"<sup>75</sup>
54. Fifth, there are several factors that per WTO case law form part of an investigating authority's consideration of whether an entity has been entrusted or directed by a government. These include the level of governmental intervention in the market;<sup>76</sup> non-commercial behaviour by the entities in question;<sup>77</sup> and inducement or threat by the government in case of non-compliance with governmental diktat.<sup>78</sup> An investigating authority has to conduct a "holistic assessment" of all these applicable factors. In other words, as the Appellate Body noted in

<sup>73</sup> Panel Report, *US – Export Restraints*, paras. 8.33-8.35, 8.42, 8.44.

<sup>74</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. [Emphasis added]

<sup>75</sup> Panel Report, *US – Export Restraints*, para. 8.44. [Emphasis added]

<sup>76</sup> See: Panel Report, *US – Export Restraints*, para. 8.31.

<sup>77</sup> See: Appellate Body Report, *Japan – DRAMs (Korea)*, para. 138.

<sup>78</sup> See: Appellate Body Report, *US – DRAMs*, para. 116.

*Japan – DRAMs (Korea)*, the proper way for an authority to proceed is to base "*its finding on entrustment or direction based upon a consideration of the totality of evidence before it*".<sup>79</sup> However, there is nothing in the SEF that points to such a holistic approach taken by the TRA. None of the three factors mentioned above (or indeed, any others) have been analysed.

55. Sixth, with respect to the analysis of the Agricultural Development Bank of China, one additional factor is mentioned in the TRA's analysis. The SEF states that this Bank allegedly "*makes decisions based on non-market factors*".<sup>80</sup> However, the SEF provides absolutely no factual basis for this conclusionary statement.<sup>81</sup> To this end, the SEF fails to provide a "*reasoned and adequate explanation*" of the determination.<sup>82</sup> Indeed, it seems that the SEF bases its conclusion entirely on an assumption. It states that "*worldwide, state-owned banks ... are known to interact counter to normal commercial market terms*".<sup>83</sup> There is no indication of which (worldwide) banks the TRA has in mind. In any event, the GOC notes that non-commercial behaviour by an entity is neither "*sufficient*"<sup>84</sup> nor "*determinative*"<sup>85</sup> nor "*conclusive*"<sup>86</sup> evidence of entrustment/direction by a government.
56. In sum, the SEF does not adequately demonstrate the existence of a "*financial contribution by a government or any public body*" in the sense of Article 1.1(a)(1) of the SCM Agreement and Regulation 20 of the basic Regulations.

#### 4.2.3 Specificity assessment is inconsistent with Article 2.1 of the SCM Agreement

57. The SEF fails to demonstrate that the alleged preferential loans were provided specifically to the OFC sector (or to OFC producers) within the meaning of Article 2.1 of the SCM Agreement. There are at least two major issues with the assessment of specificity, as contained in the SEF.

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<sup>79</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 133. [Emphasis added]

<sup>80</sup> AS SEF, para. 176.

<sup>81</sup> In the absence of a disclosure of essential facts underlying this determination, Article 12.8 of the SCM Agreement and Regulation 62(1) of the basic Regulations is violated.

<sup>82</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 186.

<sup>83</sup> AS SEF, para. 210.

<sup>84</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.59.

<sup>85</sup> Panel Report, *Japan – DRAMs (Korea)*, para. 7.70.

<sup>86</sup> Appellate Body Report, *Japan – DRAMs (Korea)*, para. 138.

58. First – and in line with what has been mentioned above – the SEF simply *assumes* that the OFC sector is an "*encouraged industry*" in China.<sup>87</sup> Neither is this factually true, nor has the SEF demonstrated it to be so. The SEF simply states (with respect to loans) that the "*Catalogue for the Guidance of Industrial Structure Adjustment provides clear evidence that OFC producers in the PRC are an encouraged industry*".<sup>88</sup> However, no explanation or backing for this statement is provided, except that the Catalogue "*mentions broadband equipment, optical fibre systems and industrial internet network construction*".<sup>89</sup> The GOC presumes that the argument here is that OFC falls into one of these categories. However, this is not the case. OFC is neither a "*system*" nor is it a "*network*" that forms the broadband/industrial internet infrastructure, which is what the Catalogue is concerned with.
59. Second, the substance of the TRA's entire specificity analysis rests on one single fact, *i.e.*, that allegedly there are restrictions on the type/number of industries that can access the "*preferential*" loans. Notwithstanding the fact that there *is* no such limitation imposed or mandated by the relevant Chinese law, it is abundantly clear from WTO case law that not any and every limitation placed on access to a financial contribution renders it specific in the sense of Article 2 of the SCM Agreement. In this regard, the Panel in *EC and certain member States – Large Civil Aircraft* stated that: "*It follows from the ordinary meaning of the word 'explicit' that it is not any limitation on access to a subsidy to certain enterprises that will make it specific within the meaning of Article 2.1(a), but only a limitation that '[d]istinctly express[es] all that is meant; leaving nothing merely implied or suggested'; a limitation that is 'unambiguous' and 'clear'*".<sup>90</sup> Even more pertinently, the Panel in *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)* stated that: "*not just any limit on access to a subsidy will render it specific within the meaning of Article 2.1(a)*".<sup>91</sup> Thus, even assuming that there were some limits imposed on the access to loans on the Chinese market, this is not in itself sufficient to demonstrate that there was an "*unambiguous*" or "*clear*" limitation created in favour of OFC producers.

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<sup>87</sup> AS SEF, para. 217.

<sup>88</sup> AS SEF, para. 217. [Emphasis added]

<sup>89</sup> AS SEF, para. 217. [Emphasis added]

<sup>90</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 949. [Emphasis added]

<sup>91</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 7.190. [Emphasis added]

60. In the absence of such evidence, there is no basis in the SEF to conclude that the loans at issue were specific (to OFC producers) within the meaning of Regulation 22(2)(a)(i) of the basic Regulations and Article 2.1 of the SCM Agreement.

*4.2.4 Benefit assessment is inconsistent with Articles 1.1(b) and 14 of the SCM Agreement*

61. The SEF also does not contain a proper benefit analysis for the alleged provision of preferential loans. At the outset, the GOC would like to register its disagreement with the approach adopted, wherein the SEF heavily relies on previous investigations conducted by the European Commission, particularly with respect to the question of "benefit".<sup>92</sup> However, by doing so, the TRA has failed to provide a "reasoned and adequate" explanation for its determinations. As held by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, "merely incorporating by reference findings from one determination into another determination will normally not suffice as a reasoned and adequate explanation".<sup>93</sup> The SEF, in fact, merely refers back to "trade remedies investigations performed by the European Commission" which the "Applicant [had] cited".<sup>94</sup> Nowhere is it even disclosed which investigations the TRA is referring to. In any event, the investigations referred to by the Applicant in its application do not share a "close temporal and substantive overlap" with the investigation at hand.<sup>95</sup>
62. More specifically, the GOC takes issue with the fact that the TRA did not: (i) search for in-country loans for comparison; (ii) select a proper out-of-country benchmark; (iii) make the relevant adjustments to reflect the prevailing conditions in China; and (iv) explain its benefit assessment in a transparent and adequate manner.
63. First, the SEF concludes that "*the loans ... provided to OFC producers in the PRC do confer a benefit, in the form of lower interest rates ... compared with what would be comparable commercial borrowing that the recipient could actually obtain on the market*".<sup>96</sup> However, the SEF does not provide any analysis of whether comparable commercial loans could actually have been obtained on the (Chinese) market by the companies concerned, and at what rate.

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<sup>92</sup> AS SEF, paras. 206 and 214.

<sup>93</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 354. [Emphasis added]

<sup>94</sup> AS SEF, para. 214.

<sup>95</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 354, 502.

<sup>96</sup> AS SEF, para. 207. See also: AS SEF, para. 211.

The reasoning given is that the "*terms [of borrowing] do not reflect normal market terms and conditions*".<sup>97</sup> However, this is contrary to the Appellate Body's ruling in *US – Anti-Dumping and Countervailing Duties (China)*, wherein it was held that an investigating authority is required to look for a comparable commercial loan in China.<sup>98</sup> In this regard, the Appellate Body in *US – Countervailing Measures (China) (Article 21.5)* has stated that:

*"Only once the investigating authority has properly complied with its obligation to investigate whether there are in-country prices that reflect prevailing market conditions in the country of provision and has made a finding of price distortion, may it consistently with Article 14(d) have recourse to out-of-country prices".*<sup>99</sup> [Emphasis added]

64. Moreover, in the GOC's view, the TRA improperly resorted to an out-of-country (proxy) benchmark for calculating the alleged benefit since it did not, first, properly demonstrate the existence of distortions on the Chinese lending market, caused by governmental intervention. In the absence of such a demonstration of distortion, the TRA could have only relied on Chinese data. Resort to an external proxy benchmark (on the basis of Regulation 24(b) of the basic Regulations and Article 14(b) of the SCM Agreement) is allowed only if it is first established, on the basis of positive evidence and supported by reasoned explanations, that the financial market in China is so distorted that the TRA cannot find a "*comparable commercial loan*" on the Chinese market.
65. In particular, the TRA was required to prove the existence of the alleged distortion and alleged role and influence of the GOC on the interest rates – and specifically, how the GOC caused the rates to be lower than they would otherwise have been. The SEF does not contain any such examination of distortion or of the role of the GOC. In this regard, the Appellate Body in *US – Anti-Dumping and Countervailing Measures (China)* stated that: "*the mere fact that loans are supplied by a government is not in itself sufficient to establish that such loans are not "commercial" and thus incapable of being used as benchmarks under Article 14(b) of the SCM Agreement.*"<sup>100</sup>

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<sup>97</sup> AS SEF, para. 225.

<sup>98</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 486.

<sup>99</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5)*, para. 5.146.

<sup>100</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 479. [Emphasis added]

66. In a brief paragraph, the SEF refers to "*the under-pricing of loans to favoured industries*" and to an alleged "*prohibition on commercial banks providing loans to industries categorized as "restricted"*" as the reasons why the TRA considers there to be "*significant distortions within the commercial loan market in the PRC*".<sup>101</sup> However, aside from the fact that the GOC has demonstrated above that no such preferential lending for OFC producers exists, the TRA's assumption of alleged distortions is not enough to disregard Chinese data in favour of an external benchmark. The SEF did not, for example, examine whether there existed "*significant direct control over lending and interest rates to commercial borrowers*".<sup>102</sup> In this regard, the Appellate Body has noted as follows:

*" What would allow an investigating authority to reject in-country prices is a **finding of price distortion** resulting from government intervention in the market, **not the presence of government intervention in the market itself**. .... [T]he determination of whether in-country prices are distorted must be made case by case, based on the relevant evidence in the particular investigation, and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record".<sup>103</sup> [Emphasis added]*

67. Thus, before resorting to alternative (external) benchmarks, an investigating authority must determine whether market prices in the country of provision (*in casu*, China) are actually distorted, and adequately explain its decision.<sup>104</sup> The SEF does not contain such a proper and thorough examination. Thus, the reliance in the present case on a benchmark external to China is improper.

68. Additionally, the TRA's assessment, if accepted, also goes against its conclusion because if there is an encouraged category, there is also an opposite category which lies between encouraged and restricted categories. Hence, lending to that category could have provided a proper in-country benchmark.

69. That said, and for the sake of completeness, the GOC submits that the Chinese lending market is not distorted by government intervention. Therefore, the proper benchmark in the present investigation should have been found *within* the Chinese market. As noted above, the Chinese financial entities analysed in the SEF make lending decisions independently, *i.e.*, without

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<sup>101</sup> AS SEF, para. 212.

<sup>102</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.130.

<sup>103</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5)*, para. 5.147.

<sup>104</sup> Appellate Body Report, *US – Softwood Lumber IV (DS257)*, paras. 90 and 93.

government intervention and are obliged, under Chinese law, to base these decisions on the creditworthiness of borrowers and other market-oriented considerations. The SEF admits as much as well.<sup>105</sup> There are also no restrictions on Chinese banks with respect to lending rates. Banks are therefore free to lend at the rate they deem fit (*i.e.*, in terms of commercial considerations), and this results in significant competition amongst them. Thus, the TRA's *assumption* that loans provided by Chinese banks/financial institutes do not reflect interest in a functioning market is incorrect.

70. Second, the TRA's selection of Türkiye as a "*suitable benchmark country*" is incorrect.<sup>106</sup> As noted below (with respect to LURs), the justification for the selection of Türkiye is inadequate since the SEF only relies on one or two superficially analysed factors, while a vast number of other factors (like the economic situation in Türkiye) are ignored. A proper assessment of the additional (and significant) factors would have demonstrated to the TRA that China and Türkiye and their economies are not at all comparable. Moreover, Türkiye remains an inappropriate selection for determining an undistorted benchmark,<sup>107</sup> given that its economic system is currently plagued by instability, and it is among the countries with the highest inflation rates. In this regard, the European Commission's 2022 report on Türkiye tellingly notes:

*"Serious concerns persist over the continued proper functioning of Türkiye's market economy as there has been backsliding on important elements, such as the conduct of monetary policy and the institutional and regulatory environment. [...]"*

*The overly loose monetary policy and lack of policy credibility have **weakened the lira** and drove the official **inflation to a two-decade high of more than 80 %**. Higher prices for imported commodities widened external imbalances, which remain a major vulnerability in a situation of increased uncertainty and low level of international reserves. Budget execution outperformed plans but government debt increased and fiscal policy has come increasingly under pressure, burdened by unsuccessful attempts to curb rising inflation and underpin the domestic currency.*

*The institutional and regulatory environment remains fragile, particularly as regards the predictability, transparency, and implementation of regulations. .... Despite its gradual decline, the informal sector still accounts for a significant share of the*

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<sup>105</sup> AS SEF, para. 209, noting that "*there are laws stating that banks in the PRC should conduct their business based on commercial terms agreed upon between the parties*".

<sup>106</sup> AS SEF, para. 222.

<sup>107</sup> Note that the external benchmark cannot itself be distorted or otherwise non-commercial in nature. Panel Report, *Canada — Renewable Energy/ FIT Program (DS412/426)*, para. 9.14.

*economic activity. State intervention in price-setting mechanisms persists. The provision of State aid lacks proper implementation rules, enforcement and transparency. .... The labour market recovered from the pandemic, but deep-seated structural challenges, such as a huge gender gap, a high share of youth unemployment, and wide regional disparities remain."<sup>108</sup> [Emphasis added]*

71. Thus, even if the TRA wanted to opt for an out-of-country benchmark, its selection of Türkiye was inappropriate, both legally and factually.
72. Additionally, the TRA failed to provide any explanation as to how the proxy benchmark it uses approximates a "*comparable commercial loan*" that the sampled exporting producer could *actually* obtain on the market within the meaning of Article 14(b) of the SCM Agreement. To recall, the Appellate Body has held that only if an investigating authority establishes that "*... loans in a given market and in a given currency are distorted by government intervention ...*" the investigating authority may "*... in certain circumstances*" use a benchmark other than "*a comparable commercial loan which the firm could actually obtain on the market*." The Appellate Body unequivocally held that "*... such a benchmark would have to approximate "a comparable commercial loan which the firm could actually obtain on the market"*".<sup>109</sup>
73. Third, having selected Türkiye as the third (proxy) country, the TRA did not make the appropriate adjustments to ensure that the interest rates so selected "*approximates the conditions*" in China.<sup>110</sup> As the Appellate Body stated in *US – Carbon Steel (India)*: "*when an investigating authority resorts to a benchmark loan in another currency or to a proxy, it must ensure that such benchmark is adjusted so that it approximates the "comparable commercial loan", and that any such method, as well as how it approximates a "comparable commercial loan", must be transparent and adequately explained*".<sup>111</sup>
74. The GOC notes moreover that the Panel in *US – Anti-Dumping and Countervailing Duties (China)* held that:

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<sup>108</sup> Commission Staff Working Document, Türkiye 2022 Report, available at: <https://neighbourhood-enlargement.ec.europa.eu/system/files/2022-10/T%C3%BCrkiye%20Report%202022.pdf>, pgs. 60-61.

<sup>109</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 484.

<sup>110</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 482-483, 488.

<sup>111</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345, referring to Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 489. [Emphasis added]

*"While inherently [an external] benchmark cannot be perfect as it will never be possible to take into account all of the myriad factors that establish market conditions, and it will never be possible to know with certainty the market conditions that would prevail in the absence of the government-caused distortion, the authority must conduct a reasoned analysis based on factual information, selected and adjusted as necessary to be as comparable as possible to such market conditions."*<sup>112</sup> [Emphasis added]

75. This Panel ruled that benchmarks must be "*carefully selected*" and "*adjusted as necessary*" to represent "*as closely as possible*" the loan on undistorted market conditions.<sup>113</sup> The further an investigating authority strays from the ideal benchmark (identical/nearly identical loan), the more adjustments are required to be made in order to properly "*approximate*" the comparable commercial loan in the country of provision.<sup>114</sup>
76. In other words, even if an external (out-of-country) benchmark is used, it must be adjusted to "*reflect the "prevailing market conditions"*" in the country of provision (China).<sup>115</sup> However, the TRA did not do so in the OFC investigation. In fact, no adjustments at all seem to have been made by the TRA when using the (extremely high) interest rate from the Central Bank of Türkiye.<sup>116</sup>
77. More specifically, the TRA failed to take into account differences that existed in the size of the loans, the repayment terms and conditions and whether or not the loans were guaranteed, among other factors. Whilst each of these factors affects the interest rate charged by a financial institution, no adjustments were made in this regard, even though this is mandatory, as explained by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*.<sup>117</sup> More specifically, the Appellate Body clarified in that case that "*... the rate a borrower is able to obtain in the market will depend on many factors, including its risk profile, the size of the loan, its structure, its maturity, as well as what the borrower is able to negotiate with the lender.*"<sup>118</sup>

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<sup>112</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.187.

<sup>113</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.123.

<sup>114</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.345.

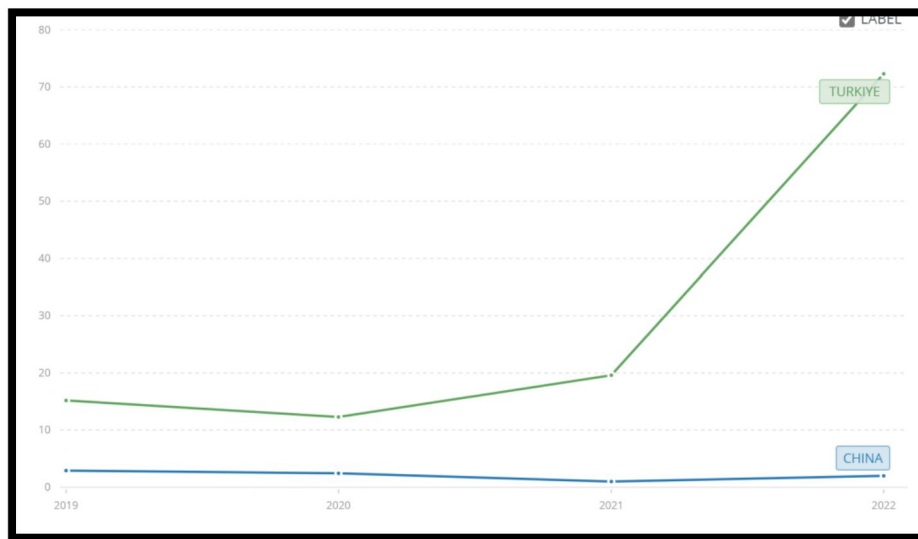
<sup>115</sup> Panel Report, *US – Softwood Lumber VII*, paras. 7.22, 7.27, 7.30, 7.507, 7.525.

<sup>116</sup> See: AS SEF, paras. 223-230, particularly para. 227 stating that "*no deductions*" were made. See also: TRA reply to MOFCOM submission dated 26 June 2023, p. 1.

<sup>117</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 485.

<sup>118</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 500.

78. Furthermore, the TRA did not make any adjustment for the extremely high inflation in Türkiye and the devaluation of the Turkish Lira, which continue to pervasively affect the country's economy and undoubtedly affected the interest rates in the RIP. In the RIP, inflation in Türkiye was dramatically above the typical inflation rate experienced in previous years.<sup>119</sup> According to the World Bank, the average inflation in Türkiye in the RIP was almost 20%. In contrast, in the RIP, the inflation in China was less than 1%.<sup>120</sup>



79. In *Canada – Renewable Energy*, the Panel (in a separate opinion) stated that in order for an external benchmark to be used, an investigating authority must show that the external benchmark, *inter alia*, "represent[s] prices established in competitive wholesale electricity markets – that is, wholesale electricity markets that are not significantly distorted [themselves]".<sup>121</sup>
80. In any event, the benchmark selected of 20.78%(!) is absurd and is simply not representative or reflective of the interest rates in China or in most parts of the world with a functioning economic system. Interest rates for loans around the world were significantly lower in the RIP than that being used by the TRA. For example, in the RIP, the average lending rate of the Bank of England was less than 1%.<sup>122</sup> According to World Bank data,<sup>123</sup> the average lending

<sup>119</sup> Trading Economics, "Turkey Inflation Rate", available at <<https://tradingeconomics.com/turkey/inflation-cpi>>.

<sup>120</sup> [Data for China, Türkiye | Data \(worldbank.org\)](https://data.worldbank.org)

<sup>121</sup> Panel Report, *Canada – Renewable Energy/ FIT Program (DS412/426)*, para. 9.14. [Emphasis added]

<sup>122</sup> <https://www.bankofengland.co.uk/monetary-policy-summary-and-minutes/2021/december-2021>;  
<https://www.bankofengland.co.uk/monetary-policy/the-interest-rate-bank-rate>.

rates in the RIP for the below-mentioned countries, which are at roughly the same level of economic development as China, were significantly lower than what is being used by the TRA:

Country	Average lending rate (2021)
Albania	6.02%
Belize	8.43%
Bosnia & Herzegovina	3.20%
Botswana	5.25%
Bulgaria	4.11%
Colombia	9.33%
Costa Rica	5.51%
Dominican Republic	9.6%
Indonesia	8.9%
India	8.6%
Malaysia	3.44%
Mexico	4.89%
Moldova	7.39%
Montenegro	5.76%
Peru	10.97%
Russian Federation	7.18%
South Africa	7.04%
Thailand	3.06%

81. Thus, the 20.78% rate is punitive and unobjective. In other words, this is not the rate that the SDG Group would pay for a comparable commercial loan obtainable on the Chinese market.
82. The GOC also notes that the Turkish Lira devalued significantly, particularly during 2021. In that year alone, the Lira lost 44% of its value.<sup>124</sup> It was one of the most rapidly devaluing currencies of the year.<sup>125</sup> By December 2021, the Lira was being traded at double-digits with respect to the USD, valued at 16.5 Lira to the USD.<sup>126</sup> This cannot be overlooked in the benchmark selection. The GOC notes in this regard that "*the currency in which a loan is*

<sup>123</sup> <https://data.worldbank.org/indicator/FR.INR.LEND>. The data is corroborated by figures from Bloomberg. <https://www.bloomberg.com/markets/rates-bonds>.

<sup>124</sup> <https://www.cnbc.com/2022/01/13/erdogan-blames-turkeys-currency-woes-on-foreign-financial-tools-as-central-bank-reserves-fall.html>.

<sup>125</sup> <https://www.cnbc.com/2022/01/13/erdogan-blames-turkeys-currency-woes-on-foreign-financial-tools-as-central-bank-reserves-fall.html>.

<sup>126</sup> <https://www.bloomberg.com/news/articles/2021-03-21/turkey-bulls-are-wrong-footed-after-central-bank-hawk-s-ouster>; <https://www.reuters.com/world/middle-east/turkey-risks-further-damage-by-using-up-borrowed-lira-reserves-sp-global-2021-12-02/>.

*denominated is one of its most important characteristics*".<sup>127</sup> However, this factor was clearly not considered by the TRA.

83. Last, the GOC submits that the SEF is contrary to the *chapeau* of Article 14 of the SCM Agreement. This provision requires that "*any method used by the investigating authority to calculate the benefit to the recipient conferred ... shall be provided for in the national legislation or implementing regulations of the Member concerned and its application to each particular case shall be transparent and adequately explained*". [Emphasis added] The Appellate Body has provided that the *chapeau* of Article 14 "*requires investigating authorities to explain adequately, consistent with the guidelines set out in Article 14, the application of the methodology applied to calculate the amount of benefit that is conferred by a government-provided financial contribution.*"<sup>128</sup> Furthermore and relatedly, "*in all cases, in arriving at a proper benchmark, an investigating authority must explain the basis for its conclusions in its determination*".<sup>129</sup> In this regard, the Panel in *US – Carbon Steel (India)* provided the following legal clarity:

*"The requirement in the chapeau of Article 14 that the application of a benefit methodology be "transparent" conveys the sense that such application should be set out in such a fashion that it can be easily understood or discerned. The obligation to "adequately explain[]" conveys the sense of making clear or intelligible, and giving details of how the methodology was applied. We agree with the United States that the adequacy of an investigating authority's explanation should be assessed on a case-by-case basis."*<sup>130</sup> (footnote omitted, emphasis added)

84. In sum, the out-of-country interest rate of 20.78%(!) used to calculate the alleged "*benefit*" accruing to OFC producers in China, absent the required adjustments, did not properly "*approximate*" a comparable commercial loan on the (Chinese) market, and the failure of the TRA to explain its underlying logic is inconsistent with Article 14(b) of the SCM Agreement.

### 4.3 LURs

85. The GOC disagrees with the TRA's conclusion that OFC producers in China have benefitted from the provision of land use rights ("UR") at less than adequate remuneration. The GOC

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<sup>127</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.120. [Emphasis added]

<sup>128</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152.

<sup>129</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.152.

<sup>130</sup> Panel Report, *US – Carbon Steel (India) (DS436)*, paras. 7.191, 7.308.

takes issue with both the understanding of the relevant law (as observable in the SEF) and the application of the law to the facts at hand.

4.3.1 Assessment of financial contribution is inconsistent with Article 1.1(a)(1) of the SCM Agreement

86. The SEF states that "*the transfer of land use rights within the PRC constitutes a financial contribution [by a foreign authority] in line with regulation 20(1)(c) of the Regulations*".<sup>131</sup> The sole basis for this determination is the fact that "*the entity providing land use rights is the relevant department of a local government body*".<sup>132</sup> However, first, the purchase of LURs is done through a process of competitive bidding. The LUR system is not – as the SEF seeks to imply<sup>133</sup> – something where GOC departments whimsically and arbitrarily allocate the LURs to a particular individual or entity. Market considerations are followed in deciding whether a sale goes through, and the conditions (including the price) are based on market factors.<sup>134</sup>
87. Second, and most importantly, the mere fact that the authority selling the LURs is a governmental authority is not enough to prove that the government is providing a financial contribution. This is too expansive an interpretation of the term "*financial contribution*". In this regard – as in the case of *US – Carbon Steel (India)*,<sup>135</sup> the SEF should have exhibited an analysis of *inter alia* the "*complexity*" of the LUR system, before reaching the conclusion that this resulted in some kind of financial contribution by the GOC. The TRA was required to demonstrate that the governmental act in question (being involved in the sale of the LUR) amounted to a provision of goods at less than adequate consideration, within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement and Regulation 20(1)(c) of the basic Regulations. Thus, the SEF also fails to provide a "*reasoned and adequate*" explanation for the ultimate conclusion that LURs present a financial contribution by the GOC.
88. In sum, the SEF does not adequately demonstrate the existence of a "*financial contribution by a government or any public body*" in the sense of Article 1.1(a)(1) of the SCM Agreement and regulation 20 of the basic Regulations.

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<sup>131</sup> AS SEF, paras. 238-239.

<sup>132</sup> AS SEF, para. 237.

<sup>133</sup> AS SEF, para. 236.

<sup>134</sup> Civil Code of the People's Republic of China, Article 347.

<sup>135</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.72-4.75.

*4.3.2 Specificity analysis is inconsistent with Article 2.1 of the SCM Agreement*

89. There are several problems with the specificity analysis regarding the provision of LUR at less than adequate remuneration, as contained in the SEF. First, none of the documents referred to in the SEF relate to (or even explicitly refer to) OFC producers. The GOC recalls that general information about government policy with no direct connection to the subsidy program at issue is not sufficient to prove the existence of specificity.<sup>136</sup>
90. Second, the TRA states in broad terms that, "[w]e have concluded that, based on the GOC's industrial policies, certain groups of industries are prevented from participating in the land use rights market at all...".<sup>137</sup> Similarly, the SEF states that "the opportunity to participate in auctions for specific land parcels is restricted based on industry".<sup>138</sup> However, not only is this incorrect (as LUR auctions are open to all types of enterprises),<sup>139</sup> more problematically, the SEF does not disclose any factual basis or explanation for such a conclusion. This is contrary to Article 12.8 of the SCM Agreement and Regulations 62(1) and 62(2) of the basic Regulations. Moreover, the SEF fails to provide any "reasoned and adequate" explanation regarding this conclusion.
91. Third, even assuming that there were some limits imposed on the access LUR auctions (*quod non*), this in itself is not sufficient to demonstrate that there was an "unambiguous" or "clear" limitation in favour of OFC producers. In the absence of such evidence, the SEF's conclusion that the LURs were specific within the meaning of Regulation 22(2)(a)(i) of the basic Regulations and Article 2.1 of the SCM Agreement is improper and without basis.
92. Moreover, taking the TRA's line of reasoning, if high-technology industries can participate in auctions, then this only goes to show that they can, and are, purchasing LURs at market prices rather than at preferential rates since participants can out bid each other. In other words, the fact that competitive bidding for LUR exists leads to at least the presumption of absence of any non-market preferential treatment (rates). The SEF does not address this point at all.

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<sup>136</sup> Panel Report, *China – GOES*, para. 7.66.

<sup>137</sup> AS SEF, para. 245.

<sup>138</sup> AS SEF, para. 247.

<sup>139</sup> The GOC would like to emphasize this point: there is no special land policy in China for any (particular) industry.

93. Fourth, with respect to Shenzhen, the SEF posits that certain Chinese regulations "*clearly state that "key industries" and projects supported by the state may be subject to preferential prices for land use*".<sup>140</sup> However, the SEF does not in any way demonstrate that the OFC producers are indeed included within the term "*key industries*" as understood by the relevant regulation(s), and by what is meant by "*preferential*" in this context. In a passing remark, the SEF refers to the "*OFC producers' status as HNTEs [High and New Technology Enterprise]*".<sup>141</sup> Elsewhere, the SEF connects the classification of "*HNTEs*" to the GOC's apparent identification of "*high-tech fields*".<sup>142</sup> However, as shown above, the OFC industry does not fall into this latter category.
94. OFC is not an "*encouraged*" industry in China, as is (incorrectly) stated in the SEF.<sup>143</sup> At most, what the GOC *is* supporting, is the construction of meta-networks and broadband systems (and related services). However, the GOC notes that the same is being done by many other countries around the world – including the UK. In this regard, reference is made to the UK's July 2023 notification to the WTO.<sup>144</sup> Moreover, simply because the GOC seeks to improve the domestic internet/broadband infrastructure for the benefit of its citizens, this does not automatically mean (as the SEF assumes it does) that every product or industry that is involved in or even remotely connected to these networks/systems is also "*encouraged*".

#### 4.3.3 Benefit assessment is inconsistent with Articles 1.1(b) and 14 of the SCM Agreement

95. There are also several issues with the benefit assessment (regarding LURs) as contained in the SEF. First, while the SEF refers to Article 10 of the Decree of the Ministry of Land and Resources of the PRC Number 39, in order to posit that the purpose of the Chinese land regulations is to "*reduce the cost of industrial land*",<sup>145</sup> Article 10 stipulates that the "*base bid or reserve price shall not be lower than the minimum price standard stipulated by the state.*" [Emphasis added] Thus, Article 10 does the opposite of what the SEF says it does, *i.e.*, rather

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<sup>140</sup> AS SEF, para. 246.

<sup>141</sup> AS SEF, para. 247.

<sup>142</sup> AS SEF, paras. 118-119.

<sup>143</sup> AS SEF, paras. 217, 265, 280, 282-283.

<sup>144</sup> WTO, Committee on Subsidies and Countervailing Measures, 'Subsidies: New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures: United Kingdom', G/SCM/N/401/GBR, 3 July 2023, p. 42.

<sup>145</sup> AS SEF, para. 241.

than lowering the price for land, this provision ensures a robust price for industrial land in China by mandating that the price does not fall below market prices.

96. Second, the SEF relies on non-binding documents with limited legal effects, such as the Policy interpretation of the Measures for the Administration of Industrial and Other Industrial Land Supply in Shenzhen, to show that (i) the GOC was allegedly involved in reducing the cost of industrial land, and (ii) this price reduction process applies "*at a national level across the PRC*".<sup>146</sup> Such documents are merely for guidance purposes, and do not conclusively demonstrate anything about the land market in China. More problematically, the SEF does not even explain how the Policy interpretation document leads to these two conclusions. The GOC recalls that Regulation 62(2) of the basic Regulations requires the SEF to contain "*details of the TRA's analysis forming the basis of the intended final determination*". While the SEF notes that the Policy interpretation document "*indicates that its purpose is to reduce the cost of industrial land*", nothing in the SEF demonstrates the connection between the document and the supposed objective of lowering land prices.
97. Third, in support of its conclusion regarding the allegedly lower LUR prices for certain industries, the SEF makes statements which are not coupled with any evidence or proof or explanation. For example, on paragraph 252, while concluding that LURs were countervailable, the SEF states that: "*we have demonstrated that despite under-pricing of land use rights by local authorities to attract investment being illegal, enforcement in this area is inconsistent*".<sup>147</sup> However, no factual evidence (for example, source) or reasoning is provided to support this statement, which ostensibly concretises the SEF's conclusion that a "*financial contribution*" was being provided by the GOC to OFC producers.
98. Fourth, similar to the assessment of loans (see above), the SEF fails to search for in-country prices for land before resorting to an external (proxy) benchmark to calculate benefit. The SEF simply states that "*as a result of all land within the PRC being owned by the GOC and any land use rights being strictly controlled by government departments, we have concluded that when calculating the amount of benefit conferred, it is appropriate to use the terms and conditions prevailing in the market of a third country (in line with regulation 21(11)(b)) since*

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<sup>146</sup> AS SEF, para. 241.

<sup>147</sup> AS SEF, para. 252. [Emphasis added]

*benchmarks from the PRC would not reflect market conditions.*"<sup>148</sup> However, the SEF does not evidence an assessment of whether comparable land prices were present on the Chinese market.

99. The GOC notes that the possibility of using an alternative benchmark is "*very limited*".<sup>149</sup> From the SEF it seems that the TRA has proceeded on the basis of an *assumption*, namely, that the LURs in China are distorted. This is inconsistent with the Appellate Body's ruling in *US – Carbon Steel (India)* that "*a determination of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of ... government-related prices other than the financial contribution at issue*".<sup>150</sup> In the same case, the Appellate Body stated that "*proper benchmark prices would normally emanate from the market for the good in question in the country of provision*." In other words, the starting point of the benefit analysis must be an in-country benchmark,<sup>151</sup> while the use of an out-of-country benchmark should be limited to "*exceptional*" circumstances.<sup>152</sup>
100. Moreover, the resort to an out-of-country (proxy) benchmark for calculating the alleged benefit was improper since, first, there was no proper establishment of the existence of distortions on the Chinese land market (caused by governmental intervention). In a brief conclusionary statement, the SEF notes that: "*the evidence reviewed in this area indicates that the provision of land use rights across the PRC is sufficiently distorted that the prevailing market terms and conditions for the acquisition of land use rights in the PRC cannot be used as an appropriate benchmark for calculating the benefit conferred through this form of subsidy, as per regulation 21(11) of the Regulations and it is appropriate to use the terms and conditions prevailing in the market of a third country*".<sup>153</sup> However, this summary statement of alleged distortions is not enough to disregard Chinese data in favour of an external benchmark.

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<sup>148</sup> AS SEF, para. 243.

<sup>149</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 102.

<sup>150</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.168. [Emphasis added]

<sup>151</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.244.

<sup>152</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 106; Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.187; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.158.

<sup>153</sup> AS SEF, para. 255.

101. In this regard, the Appellate Body underlined in *US – Countervailing Measures (China)* (Article 21.5) that, "[c]entral to the inquiry under Article 14(d) of the SCM Agreement in identifying an appropriate benefit benchmark is the question of whether in-country prices are distorted as a result of government intervention. What would allow an investigating authority to reject in-country prices is a finding of price distortion resulting from government intervention in the market, **not the presence of government intervention in the market itself.** .... [T]he determination of whether in-country prices are distorted must be made case by case, based on the relevant **evidence** in the particular investigation, and taking into account the characteristics of the market being examined, and the nature, quantity, and quality of the information on the record".<sup>154</sup>
102. The Appellate Body in *US – Countervailing Measures (China)* (Article 21.5) further held that "[o]nly once the investigating authority has properly complied with its obligation to investigate whether there are in-country prices that reflect prevailing market conditions in the country of provision and has made a finding of price distortion, may it consistently with Article 14(d) have recourse to out-of-country prices".<sup>155</sup>
103. Thus, before resorting to alternative (external) benchmarks, an investigating authority must determine whether market prices in the country of provision (*in casu*, China) can be used and adequately explain its decision (to reject such in-country prices) before resorting to alternative (external) benchmarks.<sup>156</sup> The SEF does not contain such an analysis.
104. The GOC submits that since undistorted benchmarks in China are available, the resort to a benchmark outside of China is appropriate. For the sake of completeness, the GOC notes that LURs are transferred by public bidding, quotation or auction according to the Land Administration Law. Specifically, Article 347 of the Civil Code of the People's Republic of China foresees that "*where 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*

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<sup>154</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5), para. 5.147. [Emphasis added]

<sup>155</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5), para. 5.146.

<sup>156</sup> Appellate Body Report, *US – Softwood Lumber IV*, paras. 90 and 93.

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

105. This means that land prices in China are reliable. The GOC is not the "price-setter" on the land market and the transfer of LURs is also open to private companies. These private companies (owning LURs) can (and do) rent and sell the LURs to unrelated buyers. Thus, there is even a secondary LUR market in China. The TRA could have relied on prices stemming from these transactions as the appropriate benchmark in the present case. Indeed, as the Appellate Body stated in *Canada – Renewable Energy*, a "benchmark may also be found in price-discovery mechanisms such as competitive bidding or negotiated prices".<sup>157</sup> Thus, the fact that land prices within China are determined through competitive bidding and negotiations, means that they are not distorted but rather reflect adequate market prices. These prices should have been used by the TRA as the benchmark.
106. Fifth, moving to the benchmark actually used, the selection of "*land lease costs from ... Türkiye*" is absolutely WTO-inconsistent since the TRA has not established the appropriateness of using the land lease prices in Türkiye as the benchmark. Indeed, the land markets in the two countries are not at all comparable. While Article 14(d) of the SCM Agreement allows, in limited circumstances, an alternative benchmark from a market that is not within China, this must nonetheless be the same type of market and comparable to begin with. This can be inferred from the fact that alternative benchmarks must be "[related to] or refer to, or [be] connected with, prevailing market conditions in the country of provision."<sup>158</sup> An out-of-country benchmark must reflect price, quality and availability and other conditions of purchase or sale.<sup>159</sup> In other words, the chosen alternative market should be *as similar as possible* to the LUR market in China.
107. However, that is not the case here. The land markets in China and Türkiye are incomparable. For instance, in China, the LUR is bought. However, the comparator selected by the TRA is *rented* (i.e., "leased") land. Renting land is not the same as buying an LUR, and the latter is a more long-term investment (for a period of 50 years) and hence has to be more economical

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<sup>157</sup> Appellate Body Report, *Canada – Renewable Energy*, para. 4.168. [Emphasis added]

<sup>158</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 120.

<sup>159</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 106; Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.187; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.158.

than the former. The TRA also did not consider the unstable economic situation and high inflation in Türkiye, the physical distance, and the overall demographic/linguistic/cultural differences between the two countries.

108. Indeed, nothing in the SEF evidences an analysis of the comparability of the countries and their land markets. In that sense, no explanation or justification for the selection of Türkiye is given in the SEF. Paragraph 255 – the sole paragraph under the heading "*Benchmark country*" – simply states (without any supporting justification) that:

*"The evidence reviewed in this area indicates that the provision of land use rights across the PRC is sufficiently distorted that the prevailing market terms and conditions for the acquisition of land use rights in the PRC cannot be used as an appropriate benchmark for calculating the benefit conferred through this form of subsidy, as per regulation 21(11) of the Regulations and it is appropriate to use the terms and conditions prevailing in the market of a third country. We obtained details of land lease costs from a participating OFC producer in Türkiye in order to make a comparison."*  
[Emphasis added]

109. At most, the SEF contains one paragraph (that too, in a discussion concerning the financial lending/loan market, not the land market), describing why Türkiye is a "*suitable benchmark country*".<sup>160</sup> The only reason presented in that paragraph is the allegedly similar levels of economic development between the two countries and the existence of "*active OFC manufacturing industries*" in both countries.<sup>161</sup> However, as explained above, this is not enough to establish comparability, similarity and prevailing market conditions within the meaning of Article 14(d) of the SCM Agreement.
110. Moreover, the TRA's statement obfuscates the true facts. China and Türkiye are vastly different in their economic levels. With a GDP of \$17.96 trillion, China is the 2<sup>nd</sup> largest economy in the world, compared to Türkiye's GDP of \$905 million and its 19<sup>th</sup> rank on the list of major economies.<sup>162</sup> There is also no real comparison that can be made between the OFC manufacturing industries of the two countries.<sup>163</sup> Moreover, OFC production in China and Türkiye is simply not comparable in scale, technologies and the number of producers among others factors.

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<sup>160</sup> As SEF, para. 222.

<sup>161</sup> AS SEF, para. 222.

<sup>162</sup> [https://databankfiles.worldbank.org/public/ddpext\\_download/GDP.pdf](https://databankfiles.worldbank.org/public/ddpext_download/GDP.pdf).

<sup>163</sup> News reports show that not one of the top 15 OFC producers in the world is located in Türkiye: <https://www.insidermonkey.com/blog/15-largest-fiber-optic-companies-in-the-world-894691/>.

111. Sixth, the SEF also does not demonstrate any adjustments to the out-of-country benchmark used, which would ensure that it reflects the prevailing conditions in China. As stated above, in order for an external benchmarks to be used, an investigating authority must "*conduct a reasoned analysis based on factual information, selected and adjusted as necessary to be as comparable as possible to such market conditions.*"<sup>164</sup> In other words, even if an external (out-of-country) benchmark is used, it must be adjusted to "*reflect the "prevailing market conditions"*" in the country of provision (China).<sup>165</sup>
112. However, no adjustments at all seem to have been made by the TRA when using the land lease costs from Türkiye.<sup>166</sup> Among several critical factors, there were no adjustments made for the GDP evolution as from the different dates of the respective LUR contracts. Moreover, the SEF does not take into account the fact that the OFC producers in China are in industrial zones which are likely not comparable in placement and size to the Turkish producers' leased land. Additionally, as repeatedly mentioned above, the inflation rate in Turkey is among the highest in the world and this makes any comparison of the domestic prices of land/leased land to the LUR situation in China inappropriate.
113. Thus, in the absence of the required adjustments to the out-of-country benchmark, the external benchmark selected by the TRA does not "*approximate*" the LUR prices in China. Moreover, the SEF also does not contain an explanation or justification as to why such adjustments were not made. Thus, the TRA's finding of provision of LURs at less than adequate remuneration on the basis of the Turkish land lease prices is inconsistent with Articles 1.1 and 14(d) of the SCM Agreement.

#### **4.4 Preferential tax rates**

114. As per the SEF, the privileges under the Enterprise Income Tax ("EIT") system constitute countervailable subsidies being granted to the OFC producers in China.<sup>167</sup> The GOC disagrees.
115. The alleged tax exemption/deduction at issue operates as a result of a system that "*establishes objective criteria or conditions governing the eligibility for*" access to the tax rates. Further,

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<sup>164</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 10.187. [Emphasis added]

<sup>165</sup> Panel Report, *US – Softwood Lumber VII*, paras. 7.22, 7.27, 7.30, 7.507, 7.525.

<sup>166</sup> See: AS SEF, paras. 223-230, particularly para. 227 stating that "*no deductions*" were made.

<sup>167</sup> AS SEF, para. 152.

the eligibility is "*automatic*", and the criteria and conditions laid down in the programs are "*strictly adhered to*".<sup>168</sup> In other words, the authorities concerned do not have any discretion in providing this specific tax rate when the conditions for eligibility are met.<sup>169</sup> As per Article 2.1(b) and footnote 2 of the SCM Agreement, and Regulation 22(5)(a) of the basic Regulations, the eligibility criteria with regard to the programme at issue is "*objective*" since it does not "*favour certain enterprises over others*" and are purely "*economic and horizontal in nature*". Therefore, the programme at issue is not "*specific*", as per Regulation 22(4)(a) of the basic Regulations.

116. Finally, the GOC notes that the SEF seems excessively focused (almost singularly) on certain OFC producers that may receive benefits from the alleged preferential tax programme at issue. However, the SEF does not evidence an examination of "*all enterprises or industries [that are] eligible to receive that same subsidy*".<sup>170</sup> The SEF itself acknowledges that OFC producers are **only one** "*among the industries eligible for the programme*".<sup>171</sup> Thus, without analysing further whether other enterprises/industries also benefit from the alleged programme, and how that affects the determination of specificity, the analysis contained in the SEF is incomplete. As the Panel in *US – Coated Paper (Indonesia)* stated, "*an investigating authority may have to consider whether other financial contributions may have been granted as part of the same subsidy programme, so as to render non-specific the subsidy that is the subject of the complaint.*"<sup>172</sup>
117. Thus, the SEF's analysis and conclusion regarding the existence of countervailable subsidies in China, in the form of EIT privileges, is WTO-inconsistent.

#### 4.5 Grants

118. As per the SEF, the OFC producers in China receive illegitimate grants from the GOC, which constitute countervailable subsidies.<sup>173</sup> The GOC disagrees for the following reasons.

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<sup>168</sup> Regulation 22(4)(d) and 22(4)(c) of the basic Regulations.

<sup>169</sup> See further: EU General Court, Case T-586/14, *Xinyi PV products v. Commission*, paras. 70-71.

<sup>170</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 753.

<sup>171</sup> AS SEF, para. 149.

<sup>172</sup> Panel Report, *US – Coated Paper (Indonesia)*, para.7.193 and footnote 349. [Emphasis added]

<sup>173</sup> AS SEF, para. 127.

119. First, the SEF states that "*grants reported by the SDG Group were paid by a variety of government departments; we verified that all of these were foreign authorities through open-source internet research into the awarding bodies for all grants*".<sup>174</sup> However, no factual basis or explanation is given for this determination. The SEF neither mentions the government departments analysed, nor does it speak to the evidence used to determine that these were indeed "*foreign authorities*". The GOC recalls that "*a mere conclusion is **not sufficient** to satisfy the obligation in Article 12.8 [of the SCM Agreement]; in order to enable the respondents to defend their interests, the disclosure must contain the "essential facts" supporting the authority's finding*".<sup>175</sup>
120. Second, the SEF does not provide any substantial factual basis (or reasoning) regarding the benefit assessment. The SEF merely states that: "*the direct transfer of funds from the municipal government provided greater resources without creating any specific reciprocal obligation on the part of the SDG Group. We therefore have concluded that it was a benefit received by the SDG Group in line with regulation 21(2) of the Regulations*".<sup>176</sup> The SEF fails to provide any essential facts regarding its benefit assessment.<sup>177</sup> In a similar vein, the SEF also does not provide any factual basis (much less a "*reasoned and adequate*" explanation) for concluding that funds were provided "*without creating any specific reciprocal obligation*".
121. Third, the SEF fails to demonstrate that the grants at issue are "*specific*" (*i.e.*, "*explicitly limited*") to certain enterprises – much less does it show that the grants are available specifically for OFC producers in China. Thus, the SEF does not show that there exists a limitation (in favour of OFC producers) that is "*distinctly express[ed] ..., leaving nothing merely implied or suggested*".<sup>178</sup>
122. Furthermore, while the SEF states that financing has been "*granted disproportionately to certain groups and industries (regulation 22(3)(a) of the Regulations), which include OFC*

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<sup>174</sup> AS SEF, para. 112. [Emphasis added]

<sup>175</sup> Appellate Body Report, *China – GOES*, para. 249. [Emphasis added]

<sup>176</sup> AS SEF, para. 114.

<sup>177</sup> Facts relating to the calculation of benefit (and therefore the subsidy margin) are "*essential facts*". Panel Report, *US – Ripe Olives from Spain*, para. 7.386.

<sup>178</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.919.

*producers*",<sup>179</sup> nothing in the SEF factually proves this alleged disproportionate granting to certain (much less, to OFC) producers.

123. Additionally, some GOC documents explicitly concern non-OFC industries. The relevant attachment to the Notice of the Municipal Bureau of Industry and Information Technology on the announcement of the first batch of projects to be funded by the 2021 New Generation Information Technology Industry Support Plan,<sup>180</sup> on point 10 (the closest relevant industry), refers to "*R&D and industrialization of high-speed optical interconnection products applied to 5G communication networks*". Once again, this shows that at most what the GOC is striving to do is to improve on the network systems for 5G internet in China; this does not mean that the everything involved in that process (including the manufacture of OFC) is improperly "*encouraged*".
124. For the rest of the documents, the SEF does not conduct adequate analysis. For example, it seems that the concern expressed in the SEF is that the Shenzhen Enterprise Research and Development Project and High-tech Enterprise Cultivation Project Funding Management Measures operates as some kind of regional subsidy.<sup>181</sup> The same is the case with Notice on the application of 2021 Nanshan District National High-tech Enterprise Multiplication and other support plan projects.<sup>182</sup> However, such *de facto* (regional) specificity cannot be assumed, and must be demonstrated by an investigating authority through the use of positive evidence. The GOC notes that 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.<sup>183</sup>
125. Fourth, there is an almost exclusive focus (in the SEF) on certain OFC producers that may receive benefits from the alleged grants at issue. But the SEF does not evidence an examination of "*all enterprises or industries [that are] eligible to receive that same*

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<sup>179</sup> AS SEF, para. 123. [Emphasis added]

<sup>180</sup> Referred to in: AS SEF, para. 123.

<sup>181</sup> AS SEF, para. 116, referring to the fact that one of the "*criteria that must be met to apply for project funding*" is that the enterprise must be "*lawfully registered in the city [of Shenzhen]*".

<sup>182</sup> AS SEF, para. 122, referring to the fact that the "*annex to this notice, 'Operating regulations', indicates that to apply, enterprises must be 'Registered in Nanshan'...*".

<sup>183</sup> Panel Report, *China – GOES*, para. 7.107.

*subsidy*".<sup>184</sup> The SEF itself admits that OFC producers are "amongst the industries eligible for the programme",<sup>185</sup> and that the alleged "*groups and industries*" that have been advantaged by grants "include[s] OFC producers".<sup>186</sup> Without analysing whether other enterprises/industries also benefit from the alleged grants, and how that affects the determination of specificity, the analysis contained in the SEF, is incomplete. As the Panel in *US – Coated Paper (Indonesia)* stated, "*an investigating authority may have to consider whether other financial contributions may have been granted as part of the same subsidy programme, so as to render non-specific the subsidy that is the subject of the complaint.*"<sup>187</sup>

126. Thus, the SEF's analysis and conclusion regarding the existence of countervailable subsidies in China, in the form of grants, is WTO-inconsistent.

## **5 THE FINDINGS IN THE OFC AD (0021) CASE CONFIRM THAT THE PROPOSED AS MEASURES ARE ILLEGAL**

262. The GOC notes that the TRA's findings in the AD SEF confirm that the proposed AS measure is illegal, and the TRA might be seeking to have its own cake and eat it too. In brief, in the OFC AD investigation, the TRA determined that the allegedly preferential loans and the alleged provision of LURs at less than adequate remuneration to Chinese OFC producers did not affect their OFC sales prices and costs. However, in the OFC AS investigation, the TRA then incorrectly determined that the LURs and loans were provided at less than adequate remuneration and had affected the domestic and export prices of Chinese OFC, such that they needed to be countervailed.
263. To elaborate, in the OFC AD SEF, it is noted that the alleged preferential loans at issue had no material impact on the SG&A costs, and therefore, on the production and sales costs of OFC producers.<sup>188</sup> Similarly, it is stated that the alleged provision of LURs at less than

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<sup>184</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> Complaint)*, para. 753.

<sup>185</sup> AS SEF, para. 120. [Emphasis added]

<sup>186</sup> AS SEF, para. 123 [Emphasis added]

<sup>187</sup> Panel Report, *US – Coated Paper (Indonesia)*, para.7.193 and footnote 349. [Emphasis added]

<sup>188</sup> AD SEF, para. 145, noting the "*low materiality*" of the loans.

adequate remuneration had no material impact on the "*production costs of OFC in the PRC*".<sup>189</sup>

264. Thus, the TRA found in the AD case that the alleged loans and alleged preferential provision of land did not lower the production/sales costs of the OFC producers. Therefore, the loans and LURs could not have affected the domestic and export prices of OFC and thus cannot be countervailed.
265. The TRA's finding of "*benefit*" to the OFC producers such that it could be countervailed in the OFC AS case is incoherent and lacks legal basis. In order to countervail a subsidy, it has to be demonstrated that it led to the reduction of the export price in some way, and in the absence of such a demonstration, there is no legal basis to offset that subsidy through countervailing duties.<sup>190</sup>
266. Therefore, if the TRA decides to impose countervailing duties on OFC producers on the basis of alleged preferential loans/LURs at less than adequate remuneration received by them, the TRA would impose redressive measures in a situation where one of the prerequisites for doing so, *i.e.*, the demonstration of the existence of "*benefit*" to the investigated product has not been satisfied. Doing so is inconsistent with Article 10 of the SCM Agreement which states that the imposition of a countervailing duty is lawful only if it respects the rules of the SCM Agreement.
267. As the Appellate Body has clarified in *US – Washing Machines*, the "*benefit*" resulting from a subsidy must be demonstrated to be accruing to the product under investigation.<sup>191</sup> This is why a subsidy margin is calculated for and allocated to the subject product. Therefore, in the absence of a determination that the loans/LURs specifically benefit the production or sales activities of OFC producers, the proposed countervailing duties would also be inconsistent with Article 1.1(b) of the SCM Agreement and Regulation 21 of the basic Regulations.

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<sup>189</sup> AD SEF, para. 136.

<sup>190</sup> As noted by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* in footnote 518, "*The potential for double remedies is even greater in the context of export subsidies, which benefit only exported goods and therefore presumably lower the export price*". According to the Panel in *US – Countervailing and Anti-Dumping Measures (China)*, generally, "*domestic subsidies ... lower the export price of a product*". Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.341.

<sup>191</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.300 – 5.305.

## 6 DOUBLE-COUNTING

268. The AS SEF states as follows:

*"This investigation was carried out in parallel with a separate anti-dumping investigation (AD0021) concerning the goods concerned originating from the PRC, in which the TRA is intending to recommend imposing anti-dumping measures at the level of the dumping margin. We did not identify any countervailable subsidies within this investigation that also formed the basis of adjustments that have been made when constructing the normal value within the dumping investigation. Therefore, there has been no offsetting of the same subsidisation twice (double remedies)".<sup>192</sup> [Emphasis added]*

269. The GOC respectfully disagrees, since there is a clear problem with respect to double remedies in the present case. At the outset, the GOC notes that the concept of "double remedies" was defined by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, as a situation concerning the "simultaneous application of anti-dumping and countervailing duties on the same imported products results, at least to some extent, in the offsetting of the same subsidization twice".<sup>193</sup> Such imposition of duties was found to be WTO-inconsistent,<sup>194</sup> particularly with Article 19.3 of the SCM Agreement.<sup>195</sup> The Panel in *US – Anti-Dumping and Countervailing Duties (China)* stated in this regard that:

*"[T]o the extent that a subsidy leads to a reduction in the export price of a product, that subsidy will necessarily be captured in the dumping margin if that dumping margin, and the resulting anti-dumping duty, are calculated using a nonmarket economy methodology that calculates normal value based on surrogate values from a third country. From this, it follows that if a Member imposes a CVD in an amount equivalent to the full amount of the subsidy in such circumstances, and an anti-dumping duty equivalent to the full amount of the dumping margin is concurrently imposed on the same products to offset the dumping, this will result in the subsidy being offset twice, i.e. a double remedy. Thus, whether or not a double remedy will arise in a particular case depends on whether (and to what extent) a subsidy leads to a reduction in the export price of the product at issue."<sup>196</sup>*

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<sup>192</sup> AS SEF, para. 321.

<sup>193</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 541.

<sup>194</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 143–158.

<sup>195</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.326.

<sup>196</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 7.303; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 541.

270. Thus, investigating authorities are under an "affirmative obligation to determine, based on positive evidence, whether the concurrent imposition of CVDs and anti-dumping duties calculated under an NME methodology will result in double remedies".<sup>197</sup>
271. In the GOC's view, the AS SEF incorrectly states that, *prima facie*, there was no problem of double remedies since "[the TRA] did not identify any countervailable subsidies within this investigation that also formed the basis of adjustments that have been made when constructing the normal value within the dumping investigation".<sup>198</sup> The SEF is in error in this regard because the TRA's findings with respect to an alleged "particular market situation" ("PMS") – in the OFC AD investigation – and with respect to subsidization (including its belief that there are distortions existing on the Chinese financial and land markets) are based on the same fundamental legal and factual bases, namely that of alleged direct and indirect interference by the GOC in the OFC sector, and distortion of the sales prices and costs of the OFC producers by the GOC's policies and plans as well as influence of the GOC in the OFC sector. Additionally, to give some examples, the TRA has relied on the same alleged programs and supposed governmental encouragement to the OFC sector to find PMS as it has relied in the context of loans and LURs in the AS case.

<b>GOC Document</b>	<b>In the AS SEF (for subsidisation)</b>	<b>In the AD SEF (for PMS)</b>
Enterprise Income Tax Law of the PRC	Paras. 137-142	Para. 116
Shenzhen Enterprise Research and Development Project and High-tech Enterprise Cultivation Project Funding Management Measures	Paras. 116, 119-120	Para. 116
Catalogue of Guidance for Industrial Structure Adjustment Guidance 2019	Paras. 119, 217, 245, 280, 282,	Para. 121
Land Administration Law	Para. 236	Para. 131
General Rules on Loans	Paras. 163-166, 190, 196-198, 200, 208, 214, 217	Para. 140
Made in China 2025	Para. 103	Para. 170

<sup>197</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.342.

<sup>198</sup> AS SEF, para. 321.

272. The TRA's PMS findings in the AD investigation share the same underlying logic for normal value establishment based on the surrogate country methodology, which was before the Panel and Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* as noted in the preceding paragraphs. Thus, the point about double counting noted by the Panel in that case applies to the present case as well.
273. Indeed, the alleged subsidization of the Chinese OFC producers (*quod non*) is being addressed once *via* the mechanism of PMS and the adjusted normal value which was in turn used for the dumping margin calculation. The same underlying subsidisation is again being addressed *via* the proposed countervailing duties. Thus, the alleged effects of subsidisation are being addressed (*i.e.*, taken account of) in the dumping margin calculation, and additionally, through the imposition of the AS duties, and there is double counting. The TRA's point that there is no direct double counting in terms of the programs/the cost elements adjusted pursuant to PMS is not conclusive of this issue.
274. Thus, the imposition of the OFC AD measure on the basis of a PMS and consequent adjustment of the Chinese exporting producer's costs on the one hand, and the imposition of the OFC AS measure on the other hand, are inconsistent with Articles 19.3 and 32.1 of the SCM Agreement.<sup>199</sup>

## **7 COMMENTS ON THE INJURY DETERMINATION**

### **7.1 The definition of UK industry is inconsistent with Articles 15.1 and 16.1 SCM Agreement**

120. The "*domestic industry*" – defined under Article 16.1 of the SCM Agreement, and thus also paragraph 6(1) of Schedule 4 to the Act – forms the basis of an investigating authority's injury determination, which in turn is governed by Article 15.1 of the SCM Agreement.<sup>200</sup> Therefore, an assessment of whether the production of the domestic industry represents a "*major proportion*" of total domestic production must be based on positive evidence and must involve an objective examination by the authorities.

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<sup>199</sup> Panel Report, *US – Countervailing and Anti-Dumping Measures (China)*, para. 7.326.

<sup>200</sup> See for example.: Appellate Body Report, *EC – Fasteners (China)*, para. 413 (citing footnote 9 to Article 3 of the ADA; Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.160; Appellate Body Report, *Thailand – H-Beams*, para. 106; and Panel Report, *China – Broiler Products*, paras. 7.408-7.413.

121. In this context, the Appellate Body in *EC – Fasteners (China)* held that, to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry:

*"[A]n investigating authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry."*<sup>201</sup>

122. Furthermore, as explained by the Panel in *China – Broiler Products*:

*"It is only after establishing total domestic production that an investigating authority can determine whether it can define the domestic industry as [...] those producers that represent a major proportion of total domestic production [...] within the meaning of Articles 4.1 [of the Anti-Dumping Agreement] and 16.1 [of the SCM Agreement]. This holds even if the petitioners claim to represent a major proportion of total domestic production, as without an understanding of the total universe of production an investigating authority will not be able to verify such an assertion. In light of the links between the definition of the domestic industry and the substantive provisions which require an analysis of that domestic industry, it is our view that the investigating authority must establish total domestic production in the same manner it would conduct any other aspect of the investigation, by actively seeking out pertinent information and not remaining passive in the face of possible shortcomings in the evidence submitted."*<sup>202</sup>  
 [Emphasis added]

123. The GOC considers that (i) the TRA's finding that "*the Applicant meets the definition of "UK industry" under paragraph 6(1)(b) of Schedule 4 to the Act*"<sup>203</sup> is not based on positive evidence; and (ii) in defining the domestic industry, the TRA acted in a way that gave rise to a material risk of distortion.

124. To elaborate, first, the SEF contains different data concerning the Applicant's production/output levels:

	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>POI</b>
<b>Table 5 of the AS SEF</b>	100	92	84	93
<b>Table 25 of the AS SEF</b>	100	68	72	92

<sup>201</sup> Appellate Body Report, *EC – Fasteners (China)*, paras. 416. See also: Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.41.

<sup>202</sup> Panel Report, *China – Broiler Products*, para. 7.421.

<sup>203</sup> AS SEF, Section E1.

125. Without a disclosure of actual figures or at least data-ranges, there is no way for the GOC to effectively comment on the TRA's assessment of figures at issue. The AS SEF fails to disclose not only the Applicant's production in ranges -- even though these ranges were provided by the Applicant itself in the Application, implying that there is no issue of confidentiality -- but also the calculated/estimated production of the other three UK producers and the calculated/estimated total UK production. This is a violation of Articles 12.4.1 and 12.8 of the SCM Agreement. The failure to disclose such data prevents interested parties from commenting on the completeness and correctness of the facts considered and conclusions reached by the TRA.<sup>204</sup>
126. Second, the CRU data relied upon by the TRA to estimate the total UK production is based on a different logic compared to the Applicant's production data. The denominator and numerator for the 50% calculation indeed do not derive from the same sources, data, and methodology -- and were thus not determined on the same basis. Consequently, the TRA's assessment simply cannot be considered to be based on positive evidence or on an objective examination of all the evidence on the record.
127. Third, the TRA states that it was "*unable to confirm [the] UK based production levels*" of the other three UK producers identified in the Application.<sup>205</sup> However, the TRA should have actively contacted the other producers prior to the initiation of the investigation. In any event, nothing in the AS SEF as well as in the open file evidences that the TRA contacted and sent questionnaires to the three UK producers or to any possible industry association. Furthermore, the TRA should have at least verified the accuracy and reliability of the CRU data. Clearly, no producer gives complete data regarding production and other factors to the CRU due to, *inter alia*, confidentiality and antitrust concerns. The CRU data is, to a large extent, based on estimations and is most often built on historical data. All the above aspects indicate that in defining the domestic industry, the TRA acted in a way that gave rise to a material risk of distortion and the TRA's assessment is not based on positive evidence.
128. The GOC recalls that, as explained by the Appellate Body in *Korea – Pneumatic Valves*:

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<sup>204</sup> Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

<sup>205</sup> AS SEF, para. 78.

*"[T]he term "major proportion" has "both quantitative and qualitative connotations", and [...] the process by which an investigating authority defines the domestic industry, including the degree of efforts made by the investigating authority in obtaining information, is also relevant in assessing the qualitative aspect of the requirement."*<sup>206</sup>  
[Emphasis added]

129. An authority has an "*active role*" to play in the "*search of the information*" required to make the determination(s) at issue.<sup>207</sup> A "*passive investigatory approach*" has been rejected by past Panels,<sup>208</sup> as has a "*restrictive reading*" of the obligations imposed on the authority with respect to fact-finding.<sup>209</sup> As per the Appellate Body, an authority cannot be "*passive*" in the information- and evidence-gathering process.<sup>210</sup>
130. The TRA's failure to attempt to collect the necessary data and to verify the data that it relied upon to establish the total UK production and the production of the other UK producers demonstrates that the "*UK industry*" as defined by the TRA may not be representative of the UK OFC producers as a whole.
131. Based on the above, the GOC respectfully submits that the TRA's definition of the UK industry is inconsistent with Articles 15.1 and 16.1 of the SCM Agreement, as well as paragraph 6(1) of Schedule 4 to the Act.

## **7.2 The assessment of the Chinese OFC import volumes is not based on positive evidence**

132. First, the TRA's assessment of the Chinese import volumes of OFC for the IIP is based on pure assumptions and cannot be considered as positive evidence. Indeed, the TRA simply calculated import volumes which have no connection or link to the actual Chinese imports of OFC into the UK. The TRA calculated the Chinese OFC imports by applying the percentage

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<sup>206</sup> Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.41, citing with approval Appellate Body Report, *EC – Fasteners (China)*, paras. 414 and 427. See also: Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.300 and 5.314; and Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.13 and 5.21-5.22.

<sup>207</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.185. [Emphasis added]

<sup>208</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.188.

<sup>209</sup> Panel Report, *Mexico – Anti-Dumping Measures on Rice*, footnote 187; and Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.132, stating that "all reasonable efforts" need to be made, in this regard, by the authority.

<sup>210</sup> Appellate Body Report, *EU – PET (Pakistan)*, para. 5.130; and Appellate Body Report, *US – Wheat Gluten*, para. 55.

of the import volume represented by the Chinese imports for the tariff code 8544 70 00 – that includes not only OFC but also other non-subject products – and applied it to the CRU UK consumption – which is based on unverified sources and estimates – to arrive at the yearly Chinese OFC imports. The TRA did not use any other basis or means to cross-check or verify the credibility of this approach, which involves mixing units of measurements (as the tariff code has data in Kg and the CRU has data in fkm) and products (as the tariff code includes non-products concerned), as well as the issue of data being derived from completely incomparable basis, *i.e.*, the HMRC import volumes are based on actual imports and the CRU data is basically based on unverifiable estimates.

133. Second, the GOC recalls that in its Request for Information, it requested the TRA for the HMRC import statistics used to calculate the Chinese import volumes of OFC into the UK and the ratio of Chinese OFC imports in the total imports calculated per year of the IIP. However, the TRA did not provide this information. In the absence of this essential information, the GOC cannot comment on the accuracy of the TRA's already unverifiable assessment of a sharp increase in Chinese imports.
134. In particular, the Chinese OFC import volume calculated by the TRA matches that in the Application for the POI but differs for the other years even though the same HMRC statistics and the CRU data as well as the same methodology of using the import share of the Chinese OFC in the total imports were used by the TRA and the Applicant. The TRA's calculation seems to show lower Chinese OFC imports in 2018 and, consequently, a sharper increase in the import volume, but the same market share as claimed by the Applicant. Thus, the accuracy and consistency of the Chinese OFC import volumes, the CRU data used, and the UK consumption are questionable, and the TRA's calculation of the Chinese import volumes and market share is not positive evidence, as required by Articles 15.1 and 15.2 of the SCM Agreement.

		2018	2019	2020	POI
<b>Table 2 of the Application</b>	Chinese import volumes in fkm	170,348	133,716	175,376	535,637
	Index	100	78	103	314

<b>Table 15 of the AS SEF</b>	Chinese import volumes in fkm	120,962	102,868	159,417	535,565
	Index	100	85	132	443
<b>Table 5 of the Application</b>	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 [should be 85]
<b>Paragraph 480 of the AS SEF</b>	Market share of Chinese imports	4.3%	-	-	9.4%
	Index	100	-	-	219

### 7.3 The price undercutting and depression analyses are inconsistent with Articles 15.1 and 15.2 SCM Agreement

135. In examining the effects of the allegedly dumped/subsidised imports on the prices of the domestic industry pursuant to Article 15.2 of the SCM Agreement, investigating authorities must comply with the overarching requirement in Article 15.1 of the SCM Agreement to determine injury based on positive evidence and on the basis of an objective examination. To "*perform an objective examination, an investigating authority must support its findings with reasoning that is coherent and internally consistent*."<sup>211</sup>

136. This was also confirmed by the Appellate Body in *China – GOES*:

<sup>211</sup> See for example: Panel Report, *US – Ripe Olives from Spain*, para. 7.268; Appellate Body Report, *Korea – Pneumatic Valves*, para. 5.323; Panel Report, *China – Cellulose Pulp*, para. 7.62; and Panel Report, *China – Broiler Products*, para. 7.474. [Emphasis added]

*"To the extent the panel used the words "show" and "demonstrate" to mean that the authority's consideration of price effects must be reflected in relevant documentation produced by the authority in its investigation, and must be based on positive evidence and involve an objective examination, this is consistent with the interpretation that the consideration of price effects must conform to the standard in Article 3.1 and be reflected in relevant documentation."*<sup>212</sup> [Emphasis added]

137. The Appellate Body further noted that *"[t]he requirement to consider whether subject imports have explanatory force for significant price depression or suppression occurring in the domestic market, pursuant to Articles 3.2 and 15.2, is not within the "discretion" of the investigating authority. Rather, it is an obligation that stems from the language of the provisions and forms part of the framework and relevant disciplines set out in Articles 3 and 15 for the authority's injury and causation determination."*<sup>213</sup>

138. Furthermore, as held by the Panel in *Pakistan – BOPP Film (UAE)*:

*"With regard to price undercutting, Article 3.2 requires authorities to "consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member". That is, Article 3.2 requires a comparison between the prices of the dumped imports and those of a domestic like product. As has been observed in the past, when the investigating authority must compare prices, "price comparability necessarily arises as an issue". The text of Article 3.2, which uses the present perfect ("has been") and the present participle ("undercutting"), in its context, suggests that what is at issue are price effects that continue over time, and are not limited to an isolated instance.*

*With regard to price depression, the question is "whether the effect of [the dumped] imports is ... to depress prices to a significant degree". The ordinary meaning of "depress" includes "[t]o press down ... to lower", while the ordinary meaning of "depression" includes "[t]he action of pressing down, or fact of being pressed down". In the context of Article 3.2, an investigating authority is thus required to consider whether the prices of domestic like products are being pressed down by the dumped imports.*

*For both types of price effects at issue here, the investigating authority must consider whether they are "significant", i.e. "important, notable, consequential". This will depend on the circumstances of the case. Further, the question under the second sentence of Article 3.2 is whether "the effect of the dumped imports" has been one (or more) of these price phenomena. Article 3.2 thus links the dumped imports and the price*

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<sup>212</sup> Appellate Body Report, *China – GOES*, para. 158.

<sup>213</sup> *Ibid*, para. 153.

*depression and contemplates consideration of the relationship between the two.*"<sup>214</sup>  
[Footnotes omitted and emphasis added]

139. Against this background, the GOC wishes to make the following observations.
140. First, the GOC reiterates that the AS SEF fails to disclose the essential facts underpinning the TRA's findings of price undercutting and price depression. As a result, the GOC ability to provide detailed comments and fully exercise its rights of defence is curtailed and therefore limited. In fact, as noted in the Request for Information,<sup>215</sup> neither "*the average landed price*" / "*average import price*" of the OFC imports from China nor the ranges of "*the average [UK] sales prices of the like goods*" calculated/estimated by the TRA for the purposes of the price effects analysis were disclosed in the SEF.<sup>216</sup>
141. Second, for the price undercutting and price depression analyses, the TRA has relied on different data sets as far as the Chinese OFC imports are concerned. As can be discerned from the SEF, the price undercutting calculation seems to be based on the data of the cooperating exporting producer and the price depression analysis seems to be based on the total estimated Chinese OFC imports into the UK. The TRA does not explain the reason for the use of different data sets but in any event, the use of divergent data sets is inconsistent with the positive evidence obligation in Article 15.1 of the SCM Agreement. Furthermore, the TRA also does not explain the basis and the method of calculating the Chinese import prices used for price depression calculation.
142. Third, the TRA failed to ensure price comparability in making the price comparisons. The SEF states that "*[t]o ensure price comparability, [the TRA] adjusted where needed*".<sup>217</sup> However, no adjustments seem to have been made to the Chinese OFC import prices for any differences in quality and post-importation costs to ensure the comparability of the level of trade among others.

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<sup>214</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.293-7.297, citing Appellate Body Reports, *China – GOES*, paras. 136, 144, 152 and 200; and *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.158-5.159 and 5.161; Panel Report, *China – GOES*, para. 7.530; Panel Report, *China – Broiler Products*, paras. 7.475-7.478.

<sup>215</sup> Request for Information, p. 7-8.

<sup>216</sup> AS SEF, paras. 341-348.

<sup>217</sup> AS SEF, para. 342.

143. The critical importance of ensuring price comparability was highlighted by the Panel in *Pakistan – BOPP Film (UAE)*:

*"[W]hether the prices under comparison are comparable is core to the objectivity of the analysis. Therefore, investigating authorities are required to ensure that prices are comparable, whether or not investigated exporters raise such concerns during the investigation. Failure to do so falls short of an objective examination of price undercutting."*<sup>218</sup> [Footnotes omitted and emphasis added]

144. As further noted by the Appellate Body in *China – GOES*, "the obligations under Articles 3.1 and 3.2 "must be met by every investigating authority in every injury determination", meaning that the requirement to ensure price comparability does not depend on the respondents having raised the issue before the investigating authorities."<sup>219</sup>

145. Fourth, as far as the undercutting margin calculation is concerned, there is no evidence whatsoever that the calculation made by the TRA represents positive evidence of injurious price effects. Indeed, the TRA indicates the representativeness of the PCNs in the context of the export sales, but the crucial issue is how representative the undercutting calculation is in terms of the sales of the UK industry and to what extent the PCNs of the OFC imported from China and that sold by the UK industry were comparable such that the undercutting margin calculation could be an indicator of injury. Notwithstanding the GOC's request, the TRA did not provide this information and this further puts into question the objectivity of the TRA's assessment.

146. Fifth, by limiting itself to conducting the price undercutting analysis only for one year of the IIP, *i.e.*, the POI, the TRA violated Article 15.1 of the SCM Agreement as the TRA did not consider the evidence of the interaction between domestic and import prices over the period of four years that had been placed on the record. Indeed, as noted by the Panel in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, an undercutting margin calculation for the POI alone is insufficient and in order to determine whether imports cause, through the effects of dumping (including price effects) injury, the price effects analysed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry:

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<sup>218</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.309.

<sup>219</sup> Appellate Body Report, *China – GOES*, para. 201.

*"We note that the title of Article 3 [o the ADA and 15 of the SCM Agreement] "Determination of Injury" and the wording of Article 3.5 [of the ADA] ("[i]t must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement") confirm that consideration of price effects is one of the steps in the determination of injury. As Tunisia recalls, this inquiry is part of a "logical progression ... leading to an investigating authority's ultimate injury and causation determination". Therefore, in order to determine whether imports cause, through the effects of dumping (including price effects) injury, the effects analysed must, in principle, relate to the period selected for the examination of the economic situation of the domestic industry. [...]*

*The record shows that MIICEN indicated that the period from 1 January 2013 to 30 April 2017 was the period of data collection for the purposes of the injury assessment; however, it made the price comparison for the purposes of the price undercutting analysis only on the basis of the last 12 months of that period. For the reasons outlined above, we consider that MIICEN failed to conduct an objective examination, as it selected a different period of price undercutting analysis from the one used for the rest of the injury analysis and did not show good cause in its report for selecting a different period.*

*We note that, because it limited itself to a one-year period, MIICEN did not consider the evidence of the interaction between domestic and import prices over the period of four years and four months that had been placed on the record. [...] We consider that the requirements of Article 3.1 mean that an investigating authority is obliged to ensure that the data on which it bases its injury determination accurately and credibly reflect the state of the domestic industry."<sup>220</sup> [Footnotes omitted and emphasis added]*

147. Sixth, the GOC recalls that the Appellate Body in *China – HP-SSST (Japan)* and *China – HP-SSST (EU)* held that an investigating authority's obligation under Article 3.2 of the ADA and Article 15.2 of the SCM Agreement is not satisfied by a static examination of whether there is a mathematical difference at any point in time between the import prices and the domestic industry's sales prices, in the absence of any assessment of whether or how these prices interact over time:

*"As discussed above, while price undercutting involves situations where imports are being sold at prices lower than the domestic like products, an inquiry into price undercutting under Article 3.2 [ADA and Article 15.2 SCM Agreement] is not satisfied by a static examination of whether there is a mathematical difference at any point in time during the POI without any assessment of whether or how these prices interact over time. Rather, as noted above, Article 3.2 [ADA and Article 15.2 SCM Agreement] requires a dynamic assessment of price developments and trends in the relationship*

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<sup>220</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.216, 7.217, 7.220.

*between the prices of the dumped imports and those of domestic like products over the duration of the POI.*"<sup>221</sup>

148. In the case at hand, the TRA did not conduct an analysis of the price effects over the IIP as far as price undercutting is concerned. Moreover, when considering price depression, the TRA did not take into consideration, amongst others facts, that in 2019 the average UK industry prices declined by 7%, while the average Chinese import price increased by 30%. This further indicates that the Chinese OFC import prices were not the explanatory force for the price depression found.
149. Finally, the Appellate Body in *China – HP-SSST (Japan)* and *China – HP-SSST (EU)* noted that whether the observed price undercutting is significant will depend on the circumstances of each case, but the investigating authorities must always consider whether the effects of the allegedly dumped/subsidised imports on the domestic prices are significant:

*"The significance of the price undercutting found on the basis of that dynamic assessment is a question of the magnitude of the price undercutting. What amounts to significant price undercutting that is, whether the undercutting is important, notable, or consequential will therefore necessarily depend on the circumstances of each case. In order to assess whether the observed price undercutting is significant, an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, **how long the price undercutting has been taking place** and to what extent, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting. In all cases, an investigating authority must, pursuant to Article 3.1, objectively examine all positive evidence, and may not disregard relevant evidence suggesting that prices of dumped imports have no, or only a limited, effect on domestic prices."<sup>222</sup> [Footnotes omitted and emphasis added]*

150. The TRA, however, made no assessment of the significance of the price undercutting found.
151. Additionally, as regards price depression, which refers to a situation where prices are pressed down or reduced when they should have remained stable or increased,<sup>223</sup> it is not enough to show that prices have reduced. The authority must also establish that any price depression was an effect of the dumped or subsidized imports. The TRA did not establish, as required by Article

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<sup>221</sup> Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.160.

<sup>222</sup> Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.161 and 5.180.

<sup>223</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.534.

15.2 of the SCM Agreement, that the Chinese OFC imports prevented price increases that would have otherwise occurred to a significant degree.<sup>224</sup> Indeed, the TRA did not assess what the domestic industry prices would have been absent the Chinese imports and it did not demonstrate that the sales prices of the domestic industry would have increased absent the Chinese imports.

152. For the above-mentioned reasons, the GOC submits that the TRA's findings of price undercutting and price depression on account of the OFC imports from China are inconsistent with Articles 15.1 and 15.2 of the SCM Agreement, and Regulation 32 of the basic Regulations.

#### **7.4 Incomplete and incorrect analysis of the state of the UK industry**

153. The GOC respectfully disagrees with the TRA's determination regarding injury to the domestic industry on account of the Chinese OFC imports.
154. At the outset, the GOC recalls that the Appellate Body in *China – GOES* made it clear that Article 15.4 of the SCM Agreement requires an examination of the explanatory force of subject imports for the state of the domestic industry:

*"Articles 3.4 and 15.4 thus do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of the impact of subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2. In other words, Articles 3.4 and 15.4 require an examination of the explanatory force of subject imports for the state of the domestic industry."*<sup>225</sup>

155. The TRA's assessment, however, does not establish that the Chinese OFC imports were the explanatory force for the domestic industry's injury to the extent that it existed.
156. Moreover, the TRA's finding of injury to the domestic industry is not based on positive evidence and an objective examination of all the evidence, as discussed below.

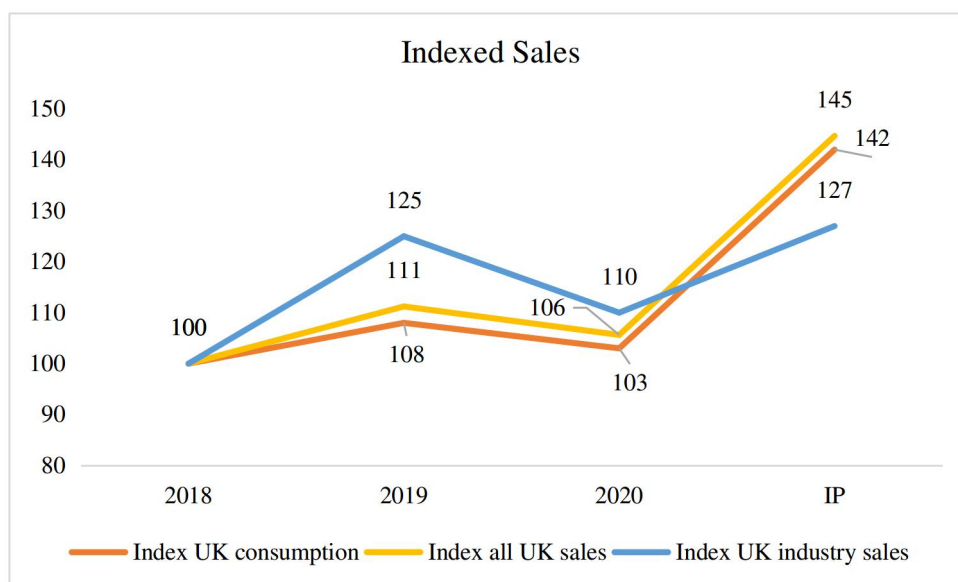
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<sup>224</sup> Appellate Body Report, *China – GOES*, para. 241.

<sup>225</sup> Appellate Body Report, *China – GOES*, para. 149. [Emphasis original]

7.4.1 Sales volumes and prices of the domestic industry were not affected by the Chinese OFC imports

157. First, overall, the sales of the domestic industry increased over the IIP and were 27% higher in the POI compared to 2018.
158. Second, as can be observed from the graph below (which is based on the information contained in Table 7 of the provisional affirmative determination ("PAD")), the sales of all the UK producers increased at a higher rate than the total UK consumption and it was only the UK industry's sales (*i.e.*, the Applicant's sales) that did not increase at the same rate as that of the other producers.



159. The TRA, however, did not consider in its assessment that (i) notwithstanding the Chinese OFC imports, the other UK producers were able to increase sales, and (ii) the much higher increase in the sales of the other UK producers could have been the explanatory force for the situation of the UK industry. In other words, the TRA should have considered whether the injury to the Applicant stemmed from the higher increase in sales and market share of *other domestic producers*, and not the OFC imports from China. In this regard, the Panel in *China – Broiler Products* held that:

"[A]n investigating authority is not allowed to ignore the situation of other domestic producers in its injury determination. An investigating authority will make its analysis under Articles 3.2 and 3.4 with reference to the defined domestic industry, but will still

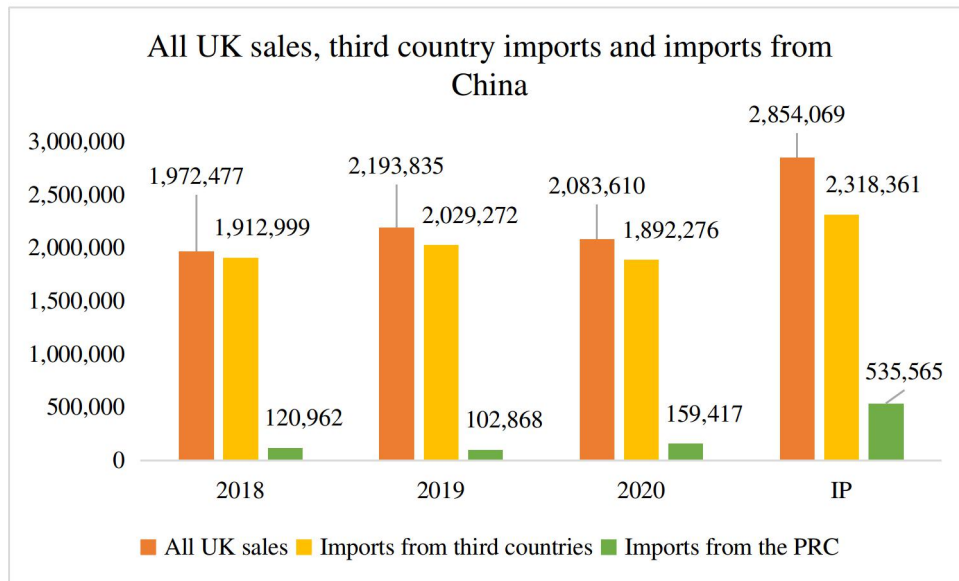
*need to assess the situation of other domestic producers in its evaluation of whether it is the impact of the subject imports that have explanatory force for the changes in the various economic factors and whether the strength of other domestic producers could be a possible separate cause of injury to the defined "domestic industry."*<sup>226</sup> [Emphasis added]

160. The GOC also reiterates that the TRA should have disclosed the UK industry's and the other UK producers' sales volumes and values in ranges, these being "*essential facts*" within the meaning of Article 12.8 SCM Agreement.<sup>227</sup> Such data was also provided by the UK industry in the Application, implying that there is clearly no issue of confidentiality.
161. Third, the TRA found that, during the POI, the UK industry's sales volumes increased "*but the increase was significantly less than the increase in overall consumption of [42%] in the UK.*" However, as discussed above, the total UK production, and accordingly also the total UK consumption, is not based on positive evidence, *i.e.*, on evidence that is variable and credible. Moreover, the sales volumes of the domestic industry representing actual data of the Applicant and the CRU consumption data which are unverifiable estimates are entirely different data sets and cannot be compared as such.
162. Fourth, as noted in the Additional Comments, the Chinese OFC imports were small in volume compared to the total UK sales and third country import volumes and could not have injured the Applicant. Indeed, the TRA has also not established how the limited volume of Chinese imports could have injured the domestic industry.

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<sup>226</sup> Panel Report, *China – Broiler Products*, para. 7.419.]

<sup>227</sup> Request for Information, p. 9.



163. With regard to the Applicant's sales value, the TRA found that "[t]he lack of increase in value" of the UK industry's sales during the POI was an indicator of injury. This assessment is not reflective of an objective examination envisaged in Article 15.1 of the SCM Agreement. Between 2018 and the POI, the domestic industry's sales value declined by a mere 2%, but this is not reflective of injury in isolation. The TRA did not consider/provide any reasoned explanation as regards the development of the production costs and whether during the relevant period, the domestic producers could have passed on higher costs to the customers. Indeed, if the production costs fell in this period, customers would not accept price increases.

164. Moreover, during the IIP, it was only in the POI that the sales value of the Applicant declined. An isolated development in one year of the IIP is insufficient to establish injury and the focus of an investigating authority on that isolated development is also inconsistent with Article 15.1 of the SCM Agreement. Indeed, as noted by the Panel in *Pakistan – BOPP Film (UAE)*, the "text of Article 3.2 [ADA and 15.2 SCM Agreement], which uses the present perfect ("has been") and the present participle ("undercutting"), in its context, suggests that what is at issue are price effects that continue over time, and are not limited to an isolated instance."<sup>228</sup>

165. The fact that during the IIP, the value of Draka Cometeq Limited's ("Draka") sales – which is also part of Prysmian UK Group<sup>229</sup> – increased by 79% also puts into question the TRA's finding of a decline in the sales value of the UK industry.

<sup>228</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.294.

<sup>229</sup> Annex A.3.2, AD questionnaire response of the Applicant.

#### 7.4.2 *Profit*

166. The GOC maintains that the TRA should have disclosed the UK industry's net profit margin and net operating profit for interested parties to understand the essential facts underpinning the TRA's findings, and a failure to disclose this information violates Article 12.8 of the SCM Agreement.<sup>230</sup>
167. That said, the SEF states that "*the decline in profits during the injury period is a clear indicator of injury.*"<sup>231</sup> However, there are several flaws in this assessment, which is not based on positive evidence and on an objective examination of the UK industry's data.
168. First, the TRA has simply relied on an end-point-to-end point analysis without considering the acknowledged significant increase in the profitability (%) of the Applicant between 2018 and 2020. The TRA was also required to explain how conflicting trends in the data (*i.e.*, between 2018-2020 and 2021) were considered in its analysis.<sup>232</sup> Indeed, as noted by the Panel in *Pakistan – BOPP Film (UAE)*, "*Article 3.4 requires an investigating authority to examine the impact of the dumped imports on the domestic industry. Thus, the text of Article 3.4 creates a link between dumped imports and the state of the domestic industry. Therefore, in our view, an investigating authority is required to identify the trends in the injury factors and place those trends in the relevant context that is informative of the injury suffered by the domestic industry, taking into account the relevant evidence and explanations that are on its record.*"<sup>233</sup>
169. Second, the AD questionnaire response of the Applicant shows that the actual profits (in GBP) of the Applicant from the sales of OFC increased over the IIP by 104%.<sup>234</sup>

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<sup>230</sup> Request for Information, p. 9.

<sup>231</sup> AS SEF, para. 360.

<sup>232</sup> Panel Reports, *Pakistan - BOPP Film (UAE)*, para. 7.352; *China – X-Ray Equipment*, paras. 7.215-7.216; *EU – Footwear (China)*, para. 7.413; and *Korea - Pneumatic Valves*, para. 7.179.

<sup>233</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.352. [Emphasis added]

<sup>234</sup> Annex 12, AD questionnaire response of the Applicant.

Profitability					
Total net operating profit after tax (NOPAT) for whole company (£)	Net operating profit after tax (NOPAT) from like goods (£)	Fibre Restatement	Average net operating profit after tax (NOPAT) margin of like goods (%)	Total interest expense incurred for whole company (£)	Finance costs (e.g. interest) incurred for like goods (GBP)
100	100	100	100	100	100
40	216	122	124	150	173
-112	321	48	110	76	81
191	204	0	43	70	59

170. Indeed, the TRA also acknowledged this in Table 31 of the AS SEF:

	Upstream businesses	UK producers
Total known businesses	3	4
Total selected	3	1
Estimated importance of OFC to this group	Not very important (UK producer raw material costs vs upstream business turnover)	Somewhat important (OFC sales revenue vs whole business turnover)
Total employment of selected businesses	N/A	1,035
Total GVA of selected businesses (£m)	N/A	88.0
Total turnover of selected businesses (£m)	N/A	543.3
Average EBITDA margin for selected businesses (%)	N/A	6.9
Vulnerability to economic shocks	Low – company profitable across the IP, with profits increasing in 2021	Low – producer remained profitable throughout the IP, with profits increasing in 2021

171. However, the TRA did not consider this positive development and the staggering 104% increase in the Applicant's profit. Instead, it referred to the same profit expressed as a % of the salves value. This is simply unobjective. The GOC recalls that, as held by the Panel in *Pakistan – BOPP Film (UAE)*, "faced with evidence that contradicts its conclusions, an investigating authority must at least explain how it took that evidence into account in reaching its conclusions."<sup>235</sup> As further noted by the Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)*, the explanations provided by an authority must "demonstrate that the investigating authority took proper account of the **complexities** of the data before it, and that it explained why it rejected or discounted **alternative explanations and interpretations** of the record evidence"; an authority must "take[] sufficient account of

<sup>235</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras 7.420.

*conflicting evidence and respond[] to competing plausible explanations of that evidence".*<sup>236</sup>

172. The failure of the TRA to take into account the actual increase in the net operating profit of the UK industry is inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.
173. Third, according to the AS SEF, "[t]he UK industry aim[s] for a minimum 15% net profit year-on-year".<sup>237</sup> However, there is no evidence that the TRA considered whether the UK industry would be able to reach such profitability levels in the first place. The SEF merely asserts that "[t]here is a requirement within the OFC industry to have a comfortable profit margin due to the industry being heavily investment driven" and that "[t]he UK industry state within its application (page 145) that it has had to accept loss-making parts of tenders to maintain its presence in the UK market". However, the TRA failed to provide any evidence, let alone positive evidence, to support the counterfactual that it bases itself on.<sup>238</sup>
174. It cannot be assumed that, but for the OFC imports from China, the UK industry's average net operating profit margin would have been 15%. Indeed, as held by the Panel in *China – X-Ray Equipment*, "an objective and even-handed examination of the expected level of profit, by which the industry's actual profit level was assessed, needs to be based on more than an assertion that the "company expected to be profitable". Some form of estimation, calculation or explanation regarding why profitability in the absence of subject imports was a reasonable expectation should have been provided as part of an objective examination."<sup>239</sup>
175. This issue is particularly relevant given that even in the EU AD investigation concerning OFC, the EU determined that the target profit for domestic OFC sales was lower than 15%.<sup>240</sup>
176. Fourth, there is no reference to the UK industry's cost of production in the TRA's assessment or elsewhere in the open files, even though an increase in costs could clearly explain the

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<sup>236</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 93 and 97. [Emphasis added]

<sup>237</sup> AS SEF, para. 258.

<sup>238</sup> AS SEF, paras. 258 and 260.

<sup>239</sup> Panel Report, *China – X-Ray Equipment*, para. 7.200.

<sup>240</sup> 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, recitals (548)-(552).

decline in the UK industry's average net profit margin. Moreover, the SEF does not address the GOC's claim that the UK industry's extraordinary expenses, capacity expansion and increase in raw material costs must be considered in the context of the profitability analysis. To recall, in its annual report and client alerts, the UK industry explicitly acknowledged the existence of these factors,<sup>241</sup> and in its previous submissions, the GOC had raised these factors as relevant.

177. The GOC recalls that in *Pakistan – BOPP Film (UAE)*, the Panel found that the Pakistani investigating authority had acted inconsistently with Articles 3.1 and 3.4 of the ADA -- *i.e.*, the parallel provisions of Articles 15.1 and 15.4 of the SCM Agreement -- by failing to consider whether the increase in raw material costs – which had been acknowledged as a problem in the domestic industry's annual report and raised by interested parties as a relevant factor to consider – was the explanatory force for the decline in the profits of the domestic industry. The Panel considered that the Pakistani authority had "*disregarded this evidence, which conflicted with its own conclusions.*"<sup>242</sup>

#### 7.4.3 Market share

178. First, the AS SEF fails to disclose the market share of the UK industry, other UK producers, OFC imports from China and third country OFC imports in terms of ranges despite these being "*essential facts*" within the meaning of Article 12.8 SCM Agreement. This is

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<sup>241</sup> See for example: Prysmian Group, "Energy Products Price Increase" (23 February 2021), available at <<https://na.prysmiangroup.com/content/en-news-prysmian-group-energy-products-price-increase>>: "The wire and cable industry is facing significant and sustained increases in key material cost inputs used in the manufacturing and distribution of our products. [...] Due to these sustained cost increases, effective March 1, 2021, Prysmian Group is announcing a 5 – 10% price increases on all Energy products. This includes all products associated with our Power Distribution, Trade & Installers, and Specialties business units."; 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](http://www.prysmiangroup.com/staticres/insight-4-2017-en/global-scenario/staying-the-course-in-the-uk.html)>: "A side effect of Brexit is that costs are increasing on the back of a devaluing pound as Prysmian UK purchases most of its raw materials (in Euros) from European suppliers. The company has to continue to aggressively manage its cost base in order to maintain competitiveness."; Prysmian Group, "Integrated Annual Report 2022", available at <[www.prysmiangroup.com/sites/default/files/pr-2302-rsg-2022-integrated-annual-report-compr\\_1.pdf](http://www.prysmiangroup.com/sites/default/files/pr-2302-rsg-2022-integrated-annual-report-compr_1.pdf)>: "[I]n the United Kingdom, (i) profit taxes borne increased by Euro 5 million due to greater profitability in 2021 compared with 2020, a year adversely affected by Covid-19 and Brexit; (ii) product taxes collected increased by Euro 30 million, as a result of higher VAT payments in 2021, which also included the payment of VAT for 2020 following a payment extension granted during the pandemic."; and A.6.3.a, AD questionnaire response of the Applicant, p. 5 (p. 3 of the Annual Report): "In 2021 profit and loss, the Company has reported exceptional costs of GBP 0.7m (2020 GBP 8.5m), this includes a reduction in provision related to the anti-trust legal claim in the year of GBP(0.5)m (2020: GBP 6.3m) included in the total exceptional costs)".

<sup>242</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.383.

particularly concerning given that the UK industry itself had disclosed such data in the Application and, as noted above, the Chinese OFC import volume and market share do not constitute positive evidence.

179. Second, the TRA's finding that "*the PRC market share increased considerably at the same time as the UK industry lost 37% share involving UK produced goods*"<sup>243</sup> does not seem to be supported by positive evidence and does not seem to be based on an objective examination in violation of Articles 15.1 and 15.4 of the SCM Agreement and Regulation 33 of the basic Regulations. To begin with, according to the Applicant's own data, its market share loss was much lower than that calculated by the TRA. Thus, the Applicant's data seems to contradict the TRA's assessment.

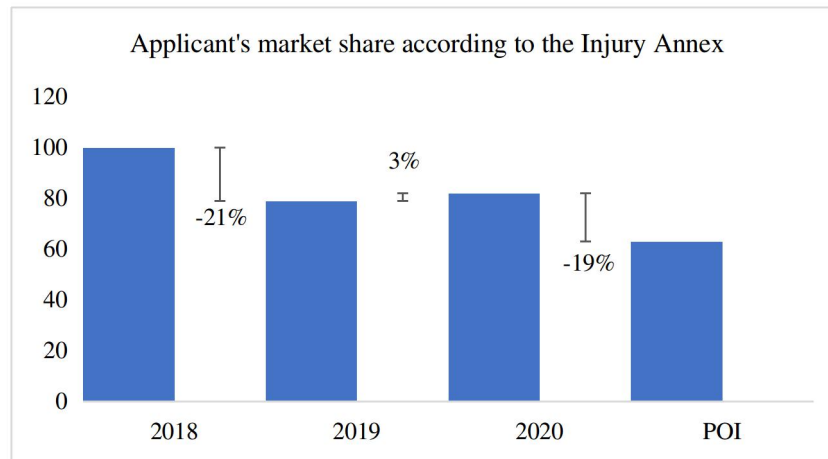
<b>Market share of the UK industry</b>	<b>2018</b>	<b>2019</b>	<b>2020</b>	<b>POI</b>
<b>Table 5 of the Application</b>	[40-45]%	[45-50]%	[42-47]%	[35-40]%
	100	116	107	90
<b>Table 21 of the AS SEF</b>	100	79	82	63

180. Additionally, during the POI, the market share of third country imports declined by 5.2%, which corresponds in terms of magnitude and timing to the market share gained by the imports from China. Thus, to the extent that the OFC imports from China gained market share, this was at the expense of the third country imports and not the UK industry.

81. Third, even considering the TRA's market share data, based on the limited information provided in the AS SEF,<sup>244</sup> it is apparent that the UK industry lost most of its market share (*i.e.*, 21%) in 2019, when the Chinese OFC imports were at their lowest and also lost market share.

<sup>243</sup> AS SEF, para. 364.

<sup>244</sup> AS SEF, Table 21.



82. The imports of OFC from China, therefore, could not have possibly had any explanatory force for the Applicant's loss of market share in 2019. The TRA limited itself to noting that *"imports from the PRC have more than doubled their market share [...] while the UK industry lost 37% of the market over the same period"*,<sup>245</sup> but did not take into account the intervening trends and whether the loss in the domestic industry's market share was due to the effect of the Chinese OFC imports. As held by the Panel in *US – Hot-Rolled Steel*, *"[a]n end-to-end point analysis, without consideration of intervening trends, is very unlikely to provide a full evaluation of all relevant factors as required."*<sup>246</sup>
83. Additionally, as noted by the Panel in *China – Autos (US)*, *"in circumstances where market shares varied significantly during the POI, an 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."*<sup>247</sup> In the present case as well, the market share of the UK industry oscillated, but the TRA did not consider the relevant facts, and focused on an end-point analysis.
84. Fourth, the SEF acknowledges that *"other UK producers appear to have increased their market share over the IP and have not been affected by the increase in the goods concerned."*<sup>248</sup> Yet, the TRA asserts that it could not reliably conclude whether the UK industry lost market share to these other UK producers, as it was *"unable to verify the*

<sup>245</sup> AS SEF, para 363

<sup>246</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.234 and footnote 163.

<sup>247</sup> Panel Report, *China – Autos (US)*, para. 7.334.

<sup>248</sup> AS SEF, para 364.

*components of the data [and] a proportion of these goods may in fact be imports.*"<sup>249</sup>

However, this is an inadequate legal basis to deduce and assume that the Chinese OFC imports impacted the domestic industry's market share.

181. Additionally, the Applicant itself stated that the UK market for OFC "*is extremely competitive: there are multiple sources of supply within the UK (several producers)*".<sup>250</sup> Therefore, the UK industry has admittedly been competing with the other UK producers (not part of the domestic industry).

193. Moreover, according to the data in the AS SEF (below),<sup>251</sup> the other UK producers gained market share at the expense of the UK industry.

*Table 21: Changes to UK market share for the UK industry, PRC imports and third country imports of OFC – 01 January 2018 to 31 December 2021*

	2018	2019	2020	POI
Market share of UK industry (Indexed)	100	79	82	63
Market share of other UK producers (Indexed)	100	160	153	193
Market share of Chinese imports (Indexed)	100	72	98	219
Market share of third country imports (Indexed)	100	98	96	85

*Source: The Applicant's submissions and HMRC*

194. These figures calculated by the TRA cannot be overlooked, and if the TRA is not certain of the market share of the other UK producers, clearly, the total UK production and consumption data is also not reliable or credible (as already mentioned above).

<sup>249</sup> AS SEF, para 364.

<sup>250</sup> UK industry's AD questionnaire response, p. 21; and UK industry's AS questionnaire responses, p. 23.

<sup>251</sup> AS SEF, para 361.

#### 7.4.4 *Growth*

195. The TRA states that it "*measured growth by comparing trends in total UK consumption of OFC with the UK industry domestic sales, UK industry's market share, production and employment figures.*"<sup>252</sup>
196. In this regard, first, the TRA's assessment of growth does not take into account the positive development of two (*i.e.*, domestic industry sales and employment) out of the four factors considered, as well as the other economic indicators that developed positively over the IIP.
197. Second, the TRA does not explain why the UK industry's employment data should have developed in the same way as the UK consumption of OFC. Moreover, the TRA does not consider the fact that employment by the UK industry increased by 7% during the IIP and by 8% between 2020 and the POI, thus reaching levels that it had never reached during the IIP, and exactly in the period when the OFC imports from China allegedly increased.
198. Third, of the two factors that supposedly developed negatively, with regard to production, the TRA notes that the UK industry's production declined over the IIP. This assessment is unobjective. The TRA does not take into account the fact that the production declined *only* in 2019, when OFC imports from China *also* declined and were in fact at their lowest, and that production has been continuously increasing since 2019. There is, therefore, no correlation between the UK industry's decline in production and the OFC imports from China. The latter could not have been the explanatory force for the UK industry's situation. As already noted above, ignoring evidence that contradicts an investigating authority's conclusions is inconsistent with the requirements of Articles 15.1 and 15.4 of the SCM Agreement.<sup>253</sup>
199. Thus, the assessment of the TRA does not seem to involve an objective examination, as required under Articles 15.1 and 15.4 of the SCM Agreement.

#### 7.4.5 *Productivity and Employment*

200. The TRA's evaluation of employment and productivity of the UK industry is also inconsistent with Articles 15.1 and 15.4 of the SCM Agreement.

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<sup>252</sup> AS SEF, para 366.

<sup>253</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, paras 7.420.

201. First, the TRA found that "*productivity is not a clear indicator of injury in this instance*".<sup>254</sup> However, in Section G8 of the SEF, the TRA listed "*productivity*" among the factors supporting its overall injury determination. Thus, the basis of the injury determination and the TRA's associated explanations are inconsistent.
202. Second, the GOC notes that the UK industry's productivity data was measured by establishing the output per employee during the IIP in cable-kilometres – rather than in fibre-kilometres. This unexplained methodology and the need to use cable-kilometres is manifestly inappropriate. Such a decision clearly does not comply with the requirement to conduct an objective analysis based on positive evidence. To recall, an examination can only be "*objective*" if it is based on data "*which provide an accurate and unbiased picture of what it is that one is examining*".<sup>255</sup>
203. As noted previously, the use of different units of measurement in the SEF makes it impossible to obtain an accurate picture of the situation of the UK industry. This is not only because the use of different units of measurement renders the data sets relied upon by the TRA incomplete (*i.e.*, productivity data is measured by reference with the UK industry's production in ckm only and other injury data is provided in fkm only), but also because it becomes impossible to evaluate the relevant injury factors "*in context and in connection with one another*".<sup>256</sup>
204. As regards employment, the SEF incorrectly states that the UK industry's employment data shows a "*fairly steady trend*".<sup>257</sup> The data provided by the TRA shows that the UK industry's employment for the production of OFC increased by 7% during the IIP and by 8% during the POI alone, *i.e.*, when the OFC imports from China had allegedly increased. This is clearly a factor that points to the absence of injury and certainly puts into question the explanatory force of the allegedly subsidized imports, if at all any.
205. Additionally, the TRA acknowledges that productivity increased by 14% during the POI but fails to take into account the fact that this corresponds to the time when imports from China

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<sup>254</sup> AS SEF, para 373.

<sup>255</sup> Panel Report, *Mexico – Olive Oil*, para. 7.255. [Emphasis added]. See also: Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 180.

<sup>256</sup> See for example: Panel Report, *Korea – Certain Paper*, para. 7.268.

<sup>257</sup> AS SEF, para 370.

had allegedly increased.<sup>258</sup> Likewise, the TRA notes that "*productivity levels had [...] dropped 25% in 2019*",<sup>259</sup> but fails to consider that in 2019, imports of OFC from China also decreased and were at their lowest level during the IIP. The TRA's finding that "*[t]he overall decrease of productivity coincides with the significant increase in PRC imports over the IP*" is thus, factually incorrect.<sup>260</sup>

206. Furthermore, the GOC recalls that the time lag between the increase in production capacity and the actual ramping up of production would also affect the UK industry's employment and productivity levels. Without considering this factual aspect, the statement that, although the UK industry's number of employees increased, "*the capacity for the UK industry increased by a much greater extent*"<sup>261</sup> is misplaced and unobjective.

#### 7.4.6 Cash flow, investments, return on investments

207. The SEF acknowledges that the UK industry's cash flow "*did increase overall during the injury period by 153%*".<sup>262</sup> Likewise, the data in the SEF establishes that the UK industry's investment increased by 233% during the IIP. These factors are clearly indicative of the domestic industry's positive economic situation. However, these factors were not put into context and accurately considered in the TRA's injury assessment.
208. As regards return on investments ("ROI"), the GOC notes that "*ROI measures business performance and earnings arising from investments*",<sup>263</sup> and the Applicant made *almost all its investments* to increase its production capacity.<sup>264</sup> Moreover, between 2018 and 2020, the UK industry increased its production capacity well beyond the level of increase in the UK OFC demand between 2018-2020.

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<sup>258</sup> AS SEF, para 372.

<sup>259</sup> AS SEF, para 373.

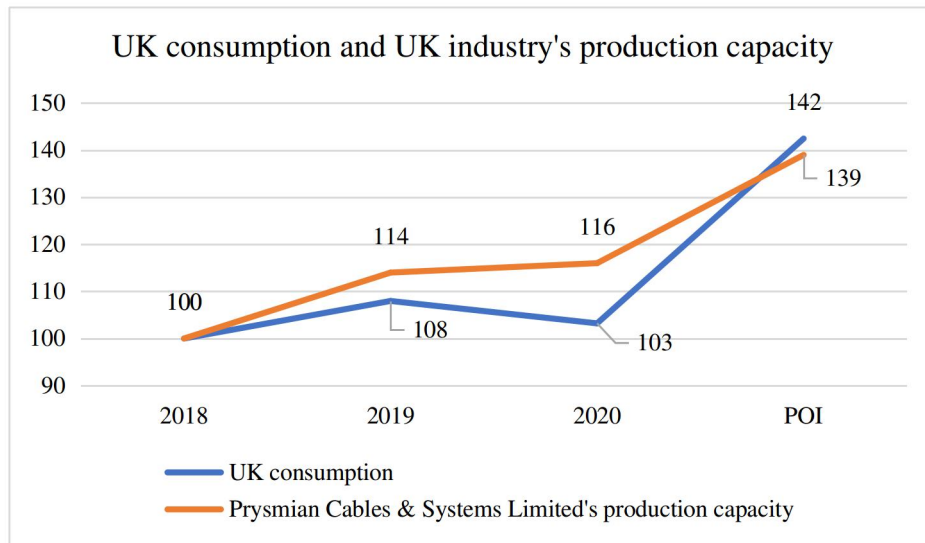
<sup>260</sup> AS SEF, para 372.

<sup>261</sup> AS SEF, para 371

<sup>262</sup> AS SEF, para 378.

<sup>263</sup> AS SEF, para 375.

<sup>264</sup> Annex 13, AD questionnaire response of the Applicant.



209. Thus, the UK industry's ROI was negative during the IIP on account of its own inappropriate business decisions.

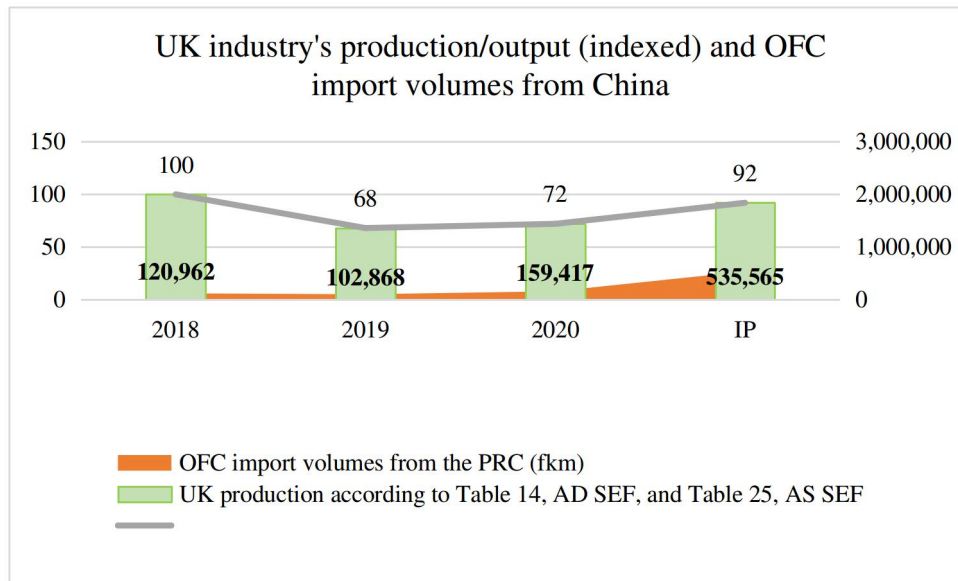
210. Moreover, the TRA failed to consider the time lag between the increase in production capacity and the actual ramping up of production, which also likely affected the actual production/output and ROI.

211. For the above reasons, the GOC maintains that the UK industry's misplaced decision to increase capacity beyond the UK consumption is the explanatory force for the decline in the ROI, and not the OFC imports from China.

#### 7.4.7 Production/output, capacity and capacity utilisation

212. First, the SEF shows that the UK industry increased production capacity by 39% during the IIP and by 23% during the POI alone. This is clear evidence that the UK industry was not injured between 2018-2021. Moreover, as noted above, the UK industry increased its capacity well beyond the level of increase in the UK OFC demand.

213. Second, as regards production/output, according to Table 25 in the SEF, the UK industry's production/output levels declined only in 2019, *i.e.*, when OFC imports from China also declined and were at their lowest, while the production/output levels increased by 20% during the POI, *i.e.*, when imports from China allegedly increased.



214. This clearly shows that there is no correlation between the alleged injury and the OFC imports from China. The latter could not have been the explanatory force for the supposedly lower production of the UK industry.

215. Third, the TRA incorrectly states that the capacity utilisation declined due to the significant rise in the imports from China. The GOC underlines that the TRA did not consider the decline in capacity utilisation against the backdrop of the significant increase in production capacity by the UK industry during each year of the IIP. Such an assessment is inconsistent with the objective examination requirement. To recall, in *China – Broiler Products (Article 21.5 – US)*, the Panel held that a determination regarding capacity utilisation is inconsistent with Articles 3.1 and 3.4 of the ADA – *i.e.*, the parallel provisions of Articles 15.1 and 15.4 of the SCM Agreement – if an investigating authority fails to analyse capacity utilisation rates in the context of the continuous increases in production capacity that were observed during the period of investigation, as in the present case.<sup>265</sup> According to the Panel in that case, “[a] capacity utilization rate involves two figures: a numerator (the volume of production) and a denominator (the available production capacity of the domestic industry). Rates may be meaningfully compared for the domestic industry over a period of time where: a. at least one factor is, or is kept, constant; b. if both factors vary over time, at least one factor is controlled or adjusted for any changes; or c. if both factors vary over time and are not controlled or

<sup>265</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.140.

*adjusted for any changes, a reasonable explanation of the circumstances and any reliance on the comparison is provided.*"<sup>266</sup>

216. Moreover, as Table 25 in the SEF shows, the UK industry's capacity utilisation dropped by 40% in 2019 compared to 2018, *i.e.*, when imports from China also declined and were at the lowest level in the IIP, but has been consistently increasing since then, *i.e.*, by 2% in 2020 and by further 5% during the POI, when the OFC imports from China also allegedly increased.

*Table 25: Output, capacity, and capacity utilisation for the production of like goods for the UK industry – 01 January 2018 to 31 December 2021*

	2018	2019	2020	POI
Output Index	100	68	72	92
Capacity Index	100	114	116	139
Utilisation of capacity Index	100	60	62	67

*Source: The Applicant's submissions and HMRC*

217. That said, the TRA's evaluation of production/output and capacity utilisation is again limited to an end point-to-end point analysis, which – as already noted above – does not satisfy the standards set by Articles 15.1 and 15.4 of the SCM Agreement.<sup>267</sup>

218. Based on the above, the GOC submits the TRA's findings that (i) "*the overall decrease in output and utilisation of capacity can be linked to the significant rise in imports from [the] PRC*" and (ii) "*the areas in table 14 indicate strong evidence that the UK industry is suffering injury from increased PRC imports*" are incorrect and contradicted by the evidence on the record.<sup>268</sup>

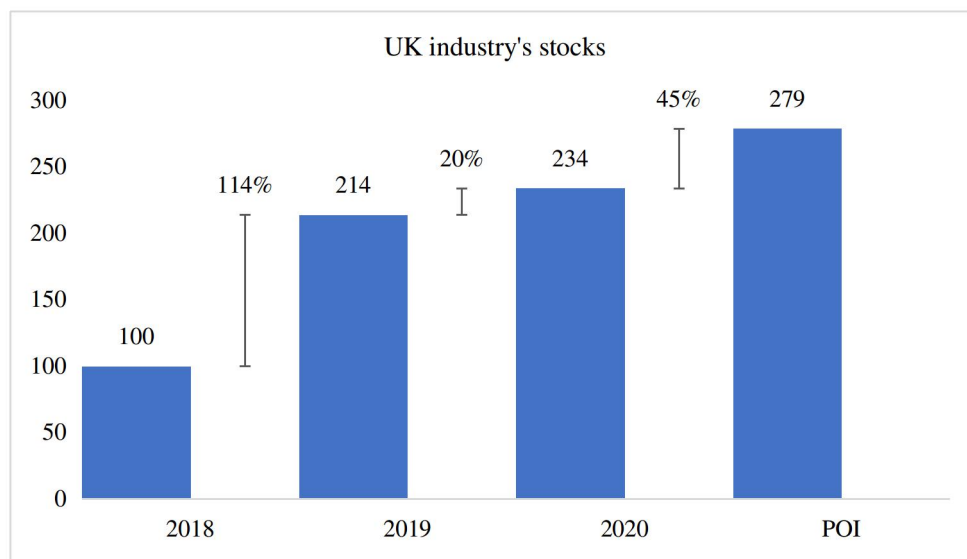
<sup>266</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.139.

<sup>267</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.234 and footnote 163.

<sup>268</sup> AS SEF, para. 385.

7.4.8 *Inventories*

219. The TRA's finding that "*increased inventory levels do indicate evidence of the UK industry suffering injury from increased PRC imports*"<sup>269</sup> does not seem to represent an objective examination of facts.
220. First, the UK industry's stock levels mainly increased (*i.e.*, by 114%) between 2018 and 2019, when the OFC imports from China decreased and were at their lowest level in the IIP.



221. This suggests that, as for other injury factors that showed a decline at the beginning of the IIP, the OFC imports from China could not have been the explanatory force for the UK industry's increased stocks.
222. Second, and without prejudice to the above, the TRA itself acknowledges that "*a large proportion of OFC goods are made to order based on precise specifications through the awarded tendering process.*"<sup>270</sup> Indeed, as also found by the European Commission in the context of the EU OFC AD investigation, "*inventories do not constitute a main indicator of injury.*"<sup>271</sup>

<sup>269</sup> AS SEF, para. 388.

<sup>270</sup> AS SEF, para. 388.

<sup>271</sup> Commission Implementing Regulation (EU) 2021/2011 of 17 November 2021 imposing a definitive anti-dumping duty on imports of optical fibre cables originating in the People's Republic of China [2021] OJ L410/51, recital (483).

223. Third, what is clear is that the increase in the UK industry's inventory levels coincided with and correlate to the increase in the sales and market share of the other UK producers and increased imports from third countries.

		2018	2019	2020	POI
<b>Table 26 of the AS SEF</b>	UK industry's inventory	100	214	234	279
<b>Table 21 of the AS SEF</b>	Market share of other UK producers	100	160	153	193
<b>Table 17 of the AS SEF</b>	Imports from the PRC	100	85	132	443
	Imports from third countries	100	106	99	121

7.4.9 Wages

224. The TRA decided "*not to consider wage levels as an injury indicator.*"<sup>272</sup> In any event, as the data of the UK industry shows, the median average wage remained stable, and therefore wages do not indicate an injured UK industry.

7.4.10 Failure to consider the interaction between the positive and negative factors

225. The GOC recalls that several of the economic factors pertaining to the UK industry reflected positive developments such as the sales volume, production capacity, profitability in GBP, investments, cash flow and wages. Moreover, some other factors did not show a negative development, such as the sales value. However, these positive developments were not taken into account by the TRA in making the injury determination.

226. In this regard, as noted by the Panel in *Thailand – H-Beams*, "[p]ositive movements in a number of factors would require a compelling explanation of why and how, in light of such

<sup>272</sup> AS SEF, para. 390.

*apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement[s]."*<sup>273</sup>

227. Additionally, as also noted by the Panel in *China – X-Ray Equipment*, an investigating authority ignoring the trends in certain injury factors and failing to explain the basis for some of its conclusions, for instance the basis for 'expected profits', undermines the overall assessment of the state of the industry.<sup>274</sup>
228. Given the absence of any such compelling explanation, the TRA's injury determination does not comply with the requirements of Articles 15.1 and 15.4 of the SCM Agreement.

## **8 FAILURE TO CONDUCT A PROPER CAUSATION ANALYSIS AND TO CONSIDER ALL KNOWN FACTORS IN THE NON-ATTRIBUTION ANALYSIS**

### **8.1 Failure to conduct a proper causation analysis**

229. Several WTO reports confirm that the provisions of Article 15 of the SCM Agreement "*contemplate a logical progression of inquiry leading to an investigating authority's ultimate injury and causation determination.*"<sup>275</sup>
230. The wording of Article 15.5 of the SCM Agreement makes it clear that the last stage of this "*logical progression of inquiry*" (*i.e.*, the causation analysis) requires investigating authorities to (i) first, establish the causal link, *i.e.*, demonstrate that the allegedly subsidised imports caused injury to the domestic industry; and (ii) second, conduct a non-attribution analysis to ensure that injury caused by other known factors is not attributed to the allegedly subsidised imports.<sup>276</sup>

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<sup>273</sup> Panel Report, *Thailand – H-Beams*, para. 7.249. [Emphasis added]

<sup>274</sup> Panel Report, *China – X-Ray Equipment*, paras. 7.214-7.215.

<sup>275</sup> See for example: Appellate Body Report, *China – GOES*, para 128; Appellate Body Report, *Korea – Pneumatic Valves*, paras. 5.191 and 5.193; Appellate Body, *Russia – Commercial Vehicles*, para 5.49; Panel Report, *US – Ripe Olives from Spain*, para 7.257; Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.216; Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.430; and Panel Report, *China – Cellulose Pulp*, para. 7.14. [Emphasis added]

<sup>276</sup> See for example: Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.397.

231. That the causation analysis involves two interlinked, yet distinct, steps is also apparent from the wording of the applicable UK law. To recall, Regulation 27(2) of the basic Regulations provides that:

*"Where the TRA has determined that goods have been or are being dumped (in accordance with Part 2) or goods that have been or are being imported into the United Kingdom benefit from a countervailable subsidy (in accordance with Part 3) it must determine whether —*

*(a) a UK industry has suffered or is suffering injury in accordance with regulation 30(determination of injury); and*

*(b) the dumped goods or subsidised imports, as the case may be, have caused or are causing that injury to that UK industry." [Emphasis added]*

232. Regulation 35 of the basic Regulations then clarifies that, "[f]or the purpose of making a determination under regulation 27(2)(b), the TRA must examine whether any known factors other than the dumped goods or subsidised imports ("other known factors") have caused or are causing injury to a UK industry."

233. Against this background, it is noted that the first sentence of Article 15.5 of the SCM Agreement requires an investigating authority to demonstrate that the allegedly subsidized imports are, through their volume, price effects, and impact on the domestic industry,<sup>277</sup> injuring the domestic industry. As noted by the Panel in *Pakistan – BOPP Film (UAE)*:

*"The first sentence of Article 3.5 [of the ADA and 15.5 of the SCM Agreement] requires that an investigating authority demonstrate that dumped imports are, "through the effects of dumping, as set forth in paragraphs 2 and 4", causing injury. This text thus requires the authority to bring together the findings arrived at under Articles 3.2 and 3.4 [of the ADA and 15.2 and 15.4 of the SCM Agreement] to ascertain whether "the dumped imports are ... causing injury"."*<sup>278</sup> [Footnotes omitted and emphasis added]

234. The second sentence of Article 15.5 of the SCM Agreement requires that the establishment of the causal link must be "based on an examination of all relevant evidence before the authorities".<sup>279</sup> Moreover, an investigating authority's "reasoning and explanations" regarding its causation determination "must be reflected in relevant documentation".<sup>280</sup>

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<sup>277</sup> Appellate Body Reports, *China – GOES*, para. 143.

<sup>278</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.430.

<sup>279</sup> Appellate Body Reports, *China – HP-SSST (Japan)*, para. 5.225.

<sup>280</sup> Panel Report, *China – Cellulose Pulp*, para. 7.30 citing Appellate Body Report, *China – GOES*, para. 131.

235. The SEF, however, does not provide any such assessment. Clearly, in the present case, the TRA failed to comply with its obligations under the first and second sentences of Article 15.5 of the SCM Agreement and also Regulation 27 of the basic Regulations. The TRA has not made any causal link determination and the TRA failed to "*bring together*" the finding arrived under Articles 15.2 and 15.4 before embarking on the non-attribution analysis. The consideration of the price effects and the impact of the subject imports on the domestic industry cannot replace the requirement to establish the causal link between the allegedly subsidized imports and injury to the domestic industry.
236. In light of the above, the GOC respectfully submits that the TRA's overall determination of injury does not comply with Article 15.5 of the SCM Agreement as well as with Regulation 27(2)(b) of the basic Regulations.

## **8.2 Failure to properly consider all known factors in the non-attribution analysis**

### *8.2.1 Failure to consider certain known factors in the non-attribution analysis*

237. Without prejudice to the above, with regard to the non-attribution analysis, the GOC submits that, as noted by the Panel in *China – GOES*, once a factor other than the subject imports becomes known to the authorities, there is an obligation on the authorities to investigate the impact of that factor.<sup>281</sup>
238. As further noted by the Panel in *EU – Footwear (China)*, "*known*" other factors would, at a minimum, include factors allegedly causing injury that are clearly raised by interested parties during the course of the ... investigation."<sup>282</sup>
239. However, the TRA failed to consider the following known factors in its non-attribution analysis which have been explicitly as well as repeatedly raised by the GOC:

- (i) Intra-UK producer competition;<sup>283</sup>

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<sup>281</sup> Panel Report, *China – GOES*, para. 7.636.

<sup>282</sup> Panel Report, *EU – Footwear (China)*, para. 7.484.

<sup>283</sup> GOC's Initial Comments, Section 5.1; and GOC's Additional Comments, Section 5.2.1.

- (ii) The Applicant's poor export performance;<sup>284</sup> and
- (iii) The Applicant's proven anti-competitive behaviour.<sup>285</sup>

240. The failure of the TRA to consider the aforementioned other known factors in its non-attribution analysis has resulted in an additional violation of Article 15.5 of the SCM Agreement.

241. Particularly as regards the competition from the other UK producers, the GOC has repeatedly raised this factor and has also demonstrated in previous sections that the UK industry lost sales and market share to the other UK producers over the IIP. The GOC underlines that in *China – Autos (US)*, the Panel found that an investigating authority fails to conduct a proper non-attribution analysis if it disregards evidence showing that the domestic industry had lost market share to producers not part of the domestic industry.<sup>286</sup>

242. Likewise, in *EU – PET (Pakistan)*, the Panel found that the EU had acted inconsistently with Article 15.5 of the SCM Agreement with respect to its analysis of competition from non-cooperating producers because "*the increase in market share of the non-cooperating producers [...] warranted more specific examination.*"<sup>287</sup> In that case, the Panel noted that: (i) "*the magnitude of the rise in market share of non-cooperating producers [...] was, at least in absolute terms, similar to the drop in market share the Commission observed pursuant to the end-point-to-end-point analysis*"; (ii) the rise in market share of the non-cooperating producers coincided with, *inter alia*, a drop in the market share of the domestic industry; and (iii) "*the domestic industry's loss of market share during the period considered was a significant consideration in the Commission's finding that the domestic industry had suffered injury.*"<sup>288</sup>

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<sup>284</sup> GOC's Additional Comments, Section 5.2.4.

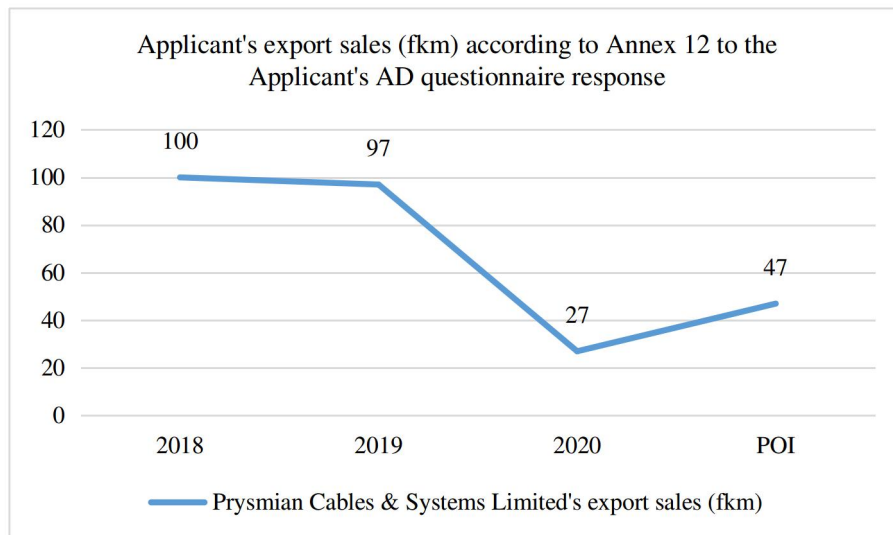
<sup>285</sup> GOC's Initial Comments, Section 5.3; and GOC's Additional Comments, Section 5.2.5.

<sup>286</sup> Panel Report, *China – Autos (US)*, paras. 7.331-7.332.

<sup>287</sup> Panel Report, *EU – PET (Pakistan)*, para. 7.150.

<sup>288</sup> Panel Report, *EU – PET (Pakistan)*, paras. 7.150-7.152.

243. Added to the above, the UK industry's export performance is a factor explicitly listed under Regulation 35 of the basic Regulations and according to the UK industry's questionnaire responses, its export sales decreased substantially throughout the IIP.<sup>289</sup>



244. The failure to consider this potential injury factor reinforces the WTO-inconsistency of the TRA's causation assessment.
245. Likewise, the TRA did not consider the impact of the UK industry's anti-competitive behaviour on its sales, market share and profits, among other factors. In this context, it is recalled that the Panel in *EC – Countervailing Measures on DRAM Chips* held that "*forces that may have caused certain negative or positive developments*" should be considered by investigating authorities within the context of their causation analysis under Article 15.5 of the SCM Agreement.<sup>290</sup> In light of the evidence submitted by the GOC, the TRA should have addressed this factor within its non-attribution analysis.

### 8.2.2 Unobjective and inadequate consideration of certain factors

246. Next, with regard to the other known factors assessed by the TRA, namely the third country imports, the GOC reiterates that the SEF fails to disclose the unit import prices of the third country imports and how these prices are calculated. Since this factual information is the basis of the TRA's finding that third country imports did not break the causal link between the

<sup>289</sup> Annex 12, AD questionnaire response of the Applicant.

<sup>290</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.364.

Chinese OFC imports and the injury to the domestic industry, it should have been disclosed pursuant to Article 12.8 (first sentence) of the SCM Agreement.

247. With regard to the third country imports, the TRA found that "*some injury to the UK industry might be caused by the Polish import volume and prices*".<sup>291</sup> Having made such a finding, the TRA was under an obligation to ensure that injury caused by the Polish imports was not attributed to the OFC imports from China.
248. In this regard, the TRA's assertion that "*there is an absence of any available pricing data that would enable further assessment*" is irrelevant. Indeed, simply on this basis, the TRA cannot circumvent the non-attribution obligation. As the Panel in *EC – Countervailing Measures on DRAM Chips* stated, "*practical evidence gathering problems [in an investigation] are not an overriding justification*" for disregarding the rules of the WTO Agreements.<sup>292</sup>
249. Indeed, as repeatedly held by the Appellate Body, "*Article 3.5 [of the ADA and 15.5 of the SCM Agreement] also requires an investigating authority to "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and to ensure that "the injuries caused by these other factors [are not] attributed to the dumped imports"*. The non-attribution language in Article 3.5 calls for an assessment that involves "*separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports*" and requires "*a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports*"."<sup>293</sup>
250. Moreover, the TRA has based its injury determination on the volume effects of the Chinese imports.<sup>294</sup> However, throughout the IIP, the Polish OFC imports were present in much higher volumes on the UK market (compared to Chinese OFC imports), especially in the POI. Indeed, in the POI, the Polish imports were 33% higher than the Chinese OFC imports. Additionally, the year-on-year increase in the OFC imports from Poland far exceeded the increase in OFC

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<sup>291</sup> AS SEF, para. 396.

<sup>292</sup> Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.109.

<sup>293</sup> Appellate Body Report, *EU – Biodiesel*, para. 6.125, citing: Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.283; *China – GOES*, para. 151; *US – Hot Rolled Steel*, para. 223 and 226, and *EC – Tube or Pipe Fittings*, para. 188. [Emphasis added]

<sup>294</sup> AS SEF, para. 396.

imports from China, and the Polish imports clearly took sales and market share from the UK industry. The growth in the Polish OFC imports also significantly exceeds the growth in the UK consumption over the IIP. Added to the above, the prices of the Polish OFC imports were similar to those of the Chinese OFC imports.

Import volumes and average import prices	2018	2019	2020	POI
Import volumes from the PRC (Table 28 of the AS SEF)	120,962	102,868	159,417	535,565
	100	85	132	443
Import volumes from Poland (Table 28 of the AS SEF)	265,170	314,184	530,816	716,988
	100	118	200	270
PRC's average import unit prices (HMRC import statistics)	17,720	20,715	17,914	11,939
Index (Table 29 of the AS SEF)	100	130	86	56
Poland's average import unit prices (HMRC import statistics)	15,859	18,213	18,091	12,461
Index (Table 29 of the AS SEF)	100	128	97	66

251. Yet, the TRA summarily found that the Polish OFC imports did not break the causal link.
252. The GOC submits that the non-consideration of compelling evidence on the record concerning the Polish OFC imports that conflicts with the TRA's conclusions is inconsistent with Articles 15.1 and 15.5 of the SCM Agreement.
253. With regard to Brexit and the raw material costs, the TRA merely referred to the **2017** Annual Report of the Applicant<sup>295</sup> and held that it did not "*find evidence that the Applicant's cost of production has increased significantly throughout the IP.*"<sup>296</sup> However, contrary to the statement of the TRA (and as noted in the Additional Comments), the Applicant's Group Company publicly acknowledged, on 23 February 2021, that "*the wire and cable industry [was] facing significant and sustained increases in key material cost inputs used in the*

<sup>295</sup> AS SEF, para. 401.

<sup>296</sup> AS SEF, para. 401.

*manufacturing and distribution of [their] products.*"<sup>297</sup> The negative effects of Brexit were also acknowledged by the Applicant's Group Company in its latest 2022 Integrated Annual Report, which was provided to the TRA as part of the UK industry's questionnaire responses.<sup>298</sup>

254. The TRA's finding concerning the impact of Brexit and increased raw material costs, therefore, is not only unsubstantiated, but also contradicted by the evidence on the record.
255. Moreover, the point is not whether the UK industry's raw material cost increased significantly but whether it increased in the first place and whether it negatively affected the sales prices and profitability of the UK industry. The magnitude of the cost increase is not necessarily decisive of whether or not it should be considered in the non-attribution analysis, as suggested in the SEF.
256. Next, with regard to COVID-19, the TRA disregarded the possibility that the pandemic caused injury to the UK industry merely on the basis that, in 2020, the UK consumption of OFC dropped by 5%, while the UK industry's sales dropped by 15%.<sup>299</sup> This assessment lacks objectivity. Indeed, the effects of the COVID-19 pandemic were not confined to 2020 but continued well into 2022 and can also not be measured simply by considering only the Applicant's sales volumes.
257. Moreover, as publicly acknowledged by both the UK industry and its Group Company (*i.e.*, the Prysmian Group), the COVID-19 pandemic "*had unprecedented negative impacts [and] severe repercussions [on] the entire manufacturing system.*"<sup>300</sup>
258. The COVID-19 pandemic caused substantial supply-chain disruptions due to the restrictive measures taken by governments worldwide. The pandemic, therefore, is most likely to have impacted the production/output, sales, capacity utilisation, employment, profitability, and

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<sup>297</sup> Prysmian Group, "Energy Products Price Increase" (23 February 2021), available at <[https://na.prysmiangroup.com/sites/default/files/atoms/files/Prysmian-Group\\_Price-Announcement-02-23-2020.pdf](https://na.prysmiangroup.com/sites/default/files/atoms/files/Prysmian-Group_Price-Announcement-02-23-2020.pdf)>. [Emphasis added]

<sup>298</sup> Prysmian Group, "Integrated Annual Report 2022", available at <[www.prysmiangroup.com/sites/default/files/pr-2302-rsg-2022-integrated-annual-report-compr\\_1.pdf](http://www.prysmiangroup.com/sites/default/files/pr-2302-rsg-2022-integrated-annual-report-compr_1.pdf)>, p. 118.

<sup>299</sup> AS SEF, para. 399-400.

<sup>300</sup> Prysmian Group, "Press release results at 31 December 2020", available at <[www.prysmiangroup.com/en/media/press-releases/press-release-results-at-31-december-2020](http://www.prysmiangroup.com/en/media/press-releases/press-release-results-at-31-december-2020)>. See also: Prysmian UK's Annual Report 2020, Annex A.6.3.a (2020), AD questionnaire response of the Applicant., p. 2 (*i.e.*, p. 4 of the PDF document).

investments of the UK industry. Indeed, the sharpest decline in the exports of the UK industry was in 2020, and even in 2021, the UK industry's OFC exports were 53% lower than in 2018.<sup>301</sup>

259. As noted in the Additional Comments by the GOC, evidence from the UK industry itself shows that the pandemic was another causal factor that adversely affected the UK industry's performance in 2020 and 2021. Thus, the TRA was obliged to properly separate and distinguish the injurious effects of the COVID-19 pandemic and to ensure that these effects are not attributed to the OFC imports from China.
260. In this context, the GOC recalls that in *Pakistan – BOPP Film (UAE)*, the Panel found that Pakistan had acted inconsistently with the requirements of non-attribution and objective examination based on positive evidence by providing merely "*a bare assertion that the trends in the size of the domestic market showed the financial crisis had not affected the domestic industry...*" and by failing "*to identify – let alone separate and distinguish – the injurious effects of the global financial crisis.*"<sup>302</sup>

### **8.3 Conclusion on causation**

261. In summary, the data in the SEF demonstrates that, to the extent that the domestic industry suffered any injury (*quod non*), it was clearly not due to the OFC imports from China but was on account of other known factors. However, the causation assessment, as contained in the SEF, is inconsistent with the requirements of Articles 15.1 and 15.5 of the SCM Agreement and Regulations 27(2)(b) and 25 of the basic Regulations.

## **9 CONCLUSION**

272. For the above reasons, the GOC requests the TRA to terminate the present investigation without imposing any measures. As explained in the present submission, any imposition of AS measures would be WTO-inconsistent.

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<sup>301</sup> Annex 12, AD questionnaire response of the Applicant.

<sup>302</sup> Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.450.