



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

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

AB-2018-2

Report of the Appellate Body

Addendum

This Addendum contains Annexes A to C to the Report of the Appellate Body circulated as document WT/DS437/AB/RW.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of the appeal.

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ANNEX A

NOTICES OF APPEAL AND OTHER APPEAL

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ANNEX A-1**UNITED STATES' NOTICE OF APPEAL***

1. Pursuant to Article 16 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the compliance Panel in *United States – Countervailing Duty Measures on Certain Products from China: Recourse to Article 21.5 of the DSU by China* (WT/DS437/RW and WT/DS437/RW/Add.1) and certain legal interpretations developed by the compliance Panel.

2. The United States seeks review by the Appellate Body of the compliance Panel's finding that the Public Bodies Memorandum¹ is a measure within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU.² This finding is in error and is based on erroneous findings on issues of law and legal interpretations. The Public Bodies Memorandum is not a measure taken to comply with the DSB's recommendations in this dispute. Furthermore, China could have attempted to challenge the Public Bodies Memorandum "as such" in the original panel proceeding, but China opted not to do so. Accordingly, China's "as such" claim against the Public Bodies Memorandum is outside the scope of the compliance Panel's jurisdiction under Article 21.5 of the DSU. The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

3. The United States seeks review by the Appellate Body of the compliance Panel's finding that "the Public Bodies Memorandum can be challenged 'as such' as a rule or norm of general or prospective application."³ This finding is in error and is based on erroneous findings on issues of law and legal interpretations. The compliance Panel erred in its interpretation and application of Articles 3.3, 4.4, and 6.2 of the DSU in considering that the Public Bodies Memorandum is a "measure" that can be challenged. Contrary to the compliance Panel's finding, the Public Bodies Memorandum does not have normative value, does not have general application, and does not have prospective application. The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

4. The United States seeks review of the compliance Panel's findings that the U.S. Department of Commerce's benchmark determinations in the *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe* Section 129 proceedings⁴ are inconsistent with Articles 1.1(b) and 14(d) of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").⁵ These findings are in error and are based on erroneous findings on issues of law and legal interpretations. In finding that the United States "failed to explain ... how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price" and "failed to provide a reasoned and adequate explanation for its rejection of in-country prices in its benchmark determinations,"⁶ the compliance Panel erred in its interpretation and application of Articles 1.1(b) and 14(d) of the SCM Agreement.⁷ The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

5. The United States seeks review of the compliance Panel's finding that the United States failed to appropriately find specificity under Article 2.1(c) of the SCM Agreement in the *Pressure Pipe*, *Line*

* This notification, dated 27 April 2018, was circulated to Members as document WT/DS437/24.

¹ See Panel Report, para. 2.1.b.

² See, e.g., Panel Report, para. 7.120; see also *id.*, paras. 7.114-7.120.

³ See, e.g., Panel Report, para. 7.133; see also *id.*, paras. 7.124-7.133.

⁴ See Panel Report, para. 7.152.

⁵ See, e.g., Panel Report, paras. 7.199-200, 7.205-206, 7.209-211, 7.218-220, 7.223-224, and 8.1(c).

⁶ Panel Report, para. 7.223.

⁷ The United States considers these errors to be issues of law, based on the compliance Panel's erroneous findings on issues of law and legal interpretations. If the Appellate Body were to consider instead that the issues set out in this paragraph are issues of fact, then the United States requests the Appellate Body find that the compliance Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by reaching a conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.

Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.⁸ This finding is in error and is based on erroneous findings on issues of law and legal interpretations.⁹ The compliance Panel erred in its interpretation and application of Article 2.1(c) in finding that "the United States did not comply with the requirement contained in Article 2.1 (c) to 'take account of the length of time during which the subsidy programme has been in operation' because it failed to adequately explain its conclusions regarding the existence of the relevant subsidy programme."¹⁰ The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

6. The United States seeks review of the compliance Panel's finding that the final determination in the original *Solar Panels* investigation¹¹ and certain¹² subsequent administrative reviews and sunset reviews were within the scope of this proceeding under Article 21.5 of the DSU.¹³ These findings are in error and are based on erroneous findings on issues of law and legal interpretations.¹⁴ The compliance Panel erred in its interpretation and application of Article 21.5 of the DSU in finding that these proceedings "fall within [the] terms of reference under Article 21.5 of the DSU by virtue of their close relationship to the recommendations and rulings of the DSB and the relevant Section 129 determinations."¹⁵ The United States respectfully requests that the Appellate Body reverse the compliance Panel's findings.

⁸ See Panel Report, paras. 7.275-276, 7.281, and 7.292-293.

⁹ See, e.g., Panel Report, paras. 7.287-293 and 8.1(e).

¹⁰ Panel Report, paras. 7.292-293 and 8.1(e).

¹¹ See Panel Report, para. 2.1.c; see also *id.*, paras 7.319-325 and 8.1(g).

¹² See Panel Report, para. 2.1.d.

¹³ See Panel Report, paras. 7.347, 7.357, 7.361, 7.362, 7.367, 7.378, 7.379, 7.384, 7.391, 7.392, 7.401, 7.404, 7.432, 7.439, 7.443, 7.447, 7.451, 7.455, 7.458, 7.462, 7.466, 7.470, 7.471, 8.1(h)(i), 8.1(h)(ii), 8.1(h)(iv), and 8.1(h)(vi).

¹⁴ See, e.g., Panel Report, paras. 7.335-347.

¹⁵ Panel Report, para. 7.347.

ANNEX A-2**CHINA'S NOTICE OF OTHER APPEAL ***

1. Pursuant to Article 16.4 and Article 17.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and Rule 23 of the Working Procedures for Appellate Review (WT/AB/WP/6) ("Working Procedures"), China hereby notifies its decision to appeal certain issues of law and legal interpretation contained in the Report of the Panel in *United States – Countervailing Duty Measures on Certain Products from China (Article 21.5 – China)* (WT/DS437/RW) ("Panel Report").

2. Pursuant to Rule 23(1) of the Working Procedures, China files this Notice of Other Appeal with the Appellate Body Secretariat, along with a written submission prepared in accordance with Rule 21(2) of the Working Procedures as required by Rule 23(3).

3. Pursuant to Rule 23(2)(c)(ii)(C) of the Working Procedures, this Notice of Other Appeal provides an indicative list of paragraphs of the Panel Report containing the errors of law and legal interpretation alleged herein, without prejudice to China's ability to refer to other paragraphs of the Panel Report in the context of its appeal.

Review of the Panel's Findings under Article 1.1(a)(1) of the SCM Agreement

4. China seeks review by the Appellate Body of the Panel's interpretation and application of Article 1.1(a)(1) of the SCM Agreement. In particular, China seeks review of the Panel's finding that the legal standard for "public body" determinations under Article 1.1(a)(1) does not "require a particular degree or nature of connection in all cases between an identified government function and the particular financial contribution at issue". China respectfully requests that the Appellate Body *reverse* this finding, articulated in paragraphs 7.36 and 7.106, as well as the Panel's conclusion that "China failed to demonstrate that the USDOC's public body determinations in the relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement because they are based on an improper legal standard."

5. China requests that the Appellate Body *reverse* the Panel's finding in paragraph 7.72 that China "failed to demonstrate that the USDOC misconstrued the concept of 'meaningful control' and its relevance to the substantive legal standard for a public body inquiry", as well as the Panel's conclusion in paragraph 7.105 that it did "not consider that the USDOC's determinations were based on 'mere ownership or control over an entity by a government, without more'", because the Panel's conclusions were premised on its disagreement with China concerning the proper legal standard.

6. China requests that the Appellate Body *reverse* the Panel's conclusion in paragraphs 7.103 and 7.106 that China did not demonstrate that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement for having failed to consider relevant evidence on the record in the five investigations in which China participated, because this conclusion was also premised on the Panel's disagreement with China concerning the proper legal standard.

7. China requests that the Appellate Body *reverse* the Panel's ultimate conclusion in paragraphs 7.107 and 8.1(a) that China did not demonstrate that the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement in the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Aluminum Extrusions, Steel Cylinders, and Solar Panels Section 129 proceedings.

8. China further requests that the Appellate Body *complete the analysis* and find that the USDOC's public body determinations in the relevant Section 129 proceedings are inconsistent with Article 1.1(a)(1) of the SCM Agreement because they are based on an improper legal standard.

* This notification, dated 2 May 2018, was circulated to Members as document WT/DS437/25.

9. In relation to the Panel's finding that China failed to demonstrate that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement, China requests that the Appellate Body *reverse* the Panel's conclusion in paragraph 7.136 that China did not demonstrate that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement because the Public Bodies Memorandum is based on an improper legal standard. China requests that the Appellate Body *reverse* the Panel's conclusion in paragraph 7.142 that the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to act consistently with Article 1.1(a)(1), as well as the Panel's ultimate conclusion to that effect in paragraph 8.1(b).

10. China further requests that the Appellate Body *complete the analysis* and find that the Public Bodies Memorandum is inconsistent "as such" with Article 1.1(a)(1) of the SCM Agreement because it is premised on an erroneous legal standard and restricts in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement.

Review of the Panel's Findings under Articles 1.1(b) and 14(d) of the SCM Agreement

11. China seeks review by the Appellate Body of the Panel's interpretation and application of Articles 1.1(b) and 14(d) of the SCM Agreement. In particular, China seeks review of the Panel's finding that "an investigating authority may reject in-country prices if there is evidence of price distortion, and not only if there is evidence that a government 'effectively determines' the price of the goods at issue."¹ The Panel found that an investigating authority may reject available in-country benchmark prices if the investigating authority provides a sufficient explanation of "how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price".² In reaching these conclusions, the Panel failed to interpret and give effect to the term "market" in Article 14(d) of the SCM Agreement, including as that term appears within the context of the phrase "prevailing market conditions ... in the country of provision".

12. China respectfully requests that the Appellate Body correct the Panel's errors of legal interpretation and application, and accordingly *modify* the basis for the Panel's conclusion that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe Section 129 proceedings.³

¹ Panel Report, para. 7.168.

² Panel Report, paras. 7.206. See also Panel Report, paras. 7.158, 7.205, 7.223.

³ Panel Report, para. 8.1(c).

ANNEX B

ARGUMENTS OF THE PARTICIPANTS

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ANNEX B-1**EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLANT'S SUBMISSION¹**

1. The United States appeals certain of the compliance Panel's legal findings and conclusions that certain measures or items challenged by China in this compliance proceeding are inconsistent with various provisions of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and erroneous interpretations or applications of the SCM Agreement and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

2. Specifically, section II of this submission demonstrates that the compliance Panel erred in finding that the Public Bodies Memorandum² is a measure within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU. Separately, we demonstrate that the compliance Panel erred in finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application. These findings are in error and are based on erroneous findings on issues of law and legal interpretations.

3. As discussed in section II.A of this submission, the Public Bodies Memorandum is not a measure taken to comply with the recommendations of the Dispute Settlement Body ("DSB") in this dispute. Furthermore, China could have attempted to challenge the Public Bodies Memorandum "as such" in the original panel proceeding, but China opted not to do so. The Appellate Body has found previously under Article 21.5 that a complaining Member ordinarily may not raise claims in an Article 21.5 compliance proceeding that it could have pursued in the original proceedings, but did not. Accordingly, China's "as such" claim against the Public Bodies Memorandum is outside the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU. The compliance Panel, in concluding otherwise, erred in its interpretation and application of Article 21.5 of the DSU.

4. As elaborated in section II.B of this submission, the compliance Panel erred in its interpretation and application of Articles 3.3, 4.4, and 6.2 of the DSU in finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application. The compliance Panel's finding also does not accord with prior Appellate Body findings concerning when a measure can be challenged "as such" as a rule or norm of general or prospective application. The compliance Panel erred by failing to apply properly the correct legal analysis for determining whether a measure can be challenged "as such" as a rule or norm of general or prospective application, as well as by misreading the Public Bodies Memorandum and engaging in circular reasoning. Contrary to the compliance Panel's finding, the evidence establishes that the Public Bodies Memorandum does not have normative value, does not have general application, and does not have prospective application.

5. Ultimately, the compliance Panel based its conclusions regarding normative value, general application, and prospective application on just two pieces of textual evidence drawn from the Public Bodies Memorandum, namely the phrases "for the purposes of the CVD law" and "systemic analysis."³ As the United States demonstrates in this submission, these two pieces of textual evidence offer no support at all for the compliance Panel's findings. The compliance Panel engaged in circular reasoning, resulting in it misunderstanding the phrase "for the purposes of the CVD law," which, when read in context, serves on its face as a *limitation* on the analysis. A correct understanding of the phrase "systemic analysis" likewise confirms a limitation, referring only to the contents of the Public Bodies Memorandum itself. Read in full, the sentence quoted by the compliance

¹ Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 1,724 words (including footnotes), and this U.S. appellant submission (not including the text of the executive summary) contains 38,412 words (including footnotes).

² See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.b; *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Timothy Hruby Re: Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379*, May 18, 2012 ("Public Bodies Memorandum") (Exhibit CHI-1).

³ See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.127-7.129.

Panel refers to "the systemic analysis in this memorandum"⁴ and not any systemic application of that analysis. The compliance Panel misconstrued this as announcing an approach the U.S. Department of Commerce ("USDOC") intended to apply in every countervailing duty proceeding. These phrases, when correctly read in their proper context, simply provide confirmation that the Public Bodies Memorandum does not have normative value, does not have general application, and does not have prospective application. Accordingly, there is no legal basis for the compliance Panel's finding to the contrary.

6. In light of these shortcomings in the compliance Panel's analysis, as well as other errors elaborated in this submission, the compliance Panel erred in finding that the Public Bodies Memorandum is a measure challengeable "as such" within the scope of its terms of reference under Article 21.5 of the DSU, and the compliance Panel erred in finding that the Public Bodies Memorandum can be challenged "as such" as a rule or norm of general or prospective application. Accordingly, these findings should be reversed.

7. Section III of this submission demonstrates that the compliance Panel erred in its interpretation and application of Articles 1.1(b) and 14(d) of the SCM Agreement to the USDOC's benchmark determinations in *OCTG*, *Solar Panels*, *Pressure Pipe*, and *Line Pipe*,⁵ pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 determinations") using an approach that does not comport with the text of the SCM Agreement. The compliance Panel's findings are in error and are based on erroneous findings on issues of law and legal interpretations.⁶ Under Article 14(d), properly interpreted, an objective and unbiased investigating authority could have found that prices in China are distorted and therefore not suitable to measure the adequacy of remuneration. In section III.A, we set out the appropriate standard under Article 14(d) and explain how Appellate Body findings confirm that an investigating authority may consider whether benchmark prices are market determined. In section III.B, we provide an overview of the findings underlying this dispute and describe where the compliance Panel erred in applying an improper approach to the determinations at issue. We then demonstrate, in section III.C, exactly why the compliance Panel's interpretation is in error and that it cannot be reconciled with the text of Article 14. Section III.D concludes that an objective and unbiased investigating authority could have found that prices in China are distorted and therefore not suitable to measure the adequacy of remuneration under Article 14(d).

8. Section IV of this submission demonstrates that the compliance Panel erred in its interpretation and application of the third sentence in Article 2.1(c) of the SCM Agreement to the USDOC's determinations of *de facto* specificity in the *Pressure Pipe*, *Line Pipe*, *Lawn Groomers*, *Kitchen Shelving*, *OCTG*, *Wire Strand*, *Seamless Pipe*, *Print Graphics*, *Aluminum Extrusions*, *Steel Cylinders*, and *Solar Panels* section 129 proceedings.⁷ The compliance Panel further erred to the extent it made findings on a provision within Article 2.1(c) that was not covered by the DSB's recommendations and rulings, nor could serve as an appropriate basis upon which to assess the consistency of the measures with Article 2.1(c), third sentence. The compliance Panel also erred in its assessment of the "existence of a subsidy programme" by interpreting "programme" in a manner that is not consistent with the ordinary meaning of the term in Article 2.1 or the object and purpose of the SCM Agreement. As a result of applying that improper approach to the USDOC's determinations, the compliance Panel reached a conclusion that is not consistent with a proper interpretation of Article 2.1(c).

9. Finally, section V of this submission demonstrates that the compliance Panel erred in finding that subsequent administrative reviews and sunset reviews (collectively, "reviews") were within the scope of this proceeding under Article 21.5 of the DSU.⁸ The compliance Panel erred in its

⁴ Public Bodies Memorandum, footnote 48 (p. 13 of the PDF version of Exhibit CHI-1) (emphasis added).

⁵ See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.152.

⁶ The United States considers these errors to be issues of law, based on the compliance Panel's erroneous findings on issues of law and legal interpretations. If the Appellate Body were to consider instead that the issues set out in this paragraph are issues of fact, then the United States requests the Appellate Body find that the compliance Panel failed to make an objective assessment of the matter before it as called for by Article 11 of the DSU by reaching a conclusion based on factual findings that were without a sufficient evidentiary basis, without assessing the totality of the evidence, and without adequate explanation.

⁷ See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.275-276, 7.281, and 7.292-293.

⁸ See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.d; see also *id.*, paras. 7.347, 7.357, 7.361, 7.362, 7.367, 7.378, 7.379, 7.384, 7.391, 7.392, 7.401, 7.404, 7.432, 7.439,

interpretation and application of Article 21.5 of the DSU in finding that these proceedings "fall within [the] terms of reference under Article 21.5 of the DSU by virtue of their close relationship to the recommendations and rulings of the DSB and the relevant Section 129 determinations."⁹ These findings are in error and are based on erroneous findings on issues of law and legal interpretations. The subsequent reviews were not measures taken to comply, nor did the compliance Panel demonstrate that they were sufficiently connected to the measures taken to comply to be considered within the compliance Panel's terms of reference. Accordingly, those subsequent reviews were not properly within the compliance Panel's terms of reference.

7.443, 7.447, 7.451, 7.455, 7.458, 7.462, 7.466, 7.470, 7.471, 8.1(h)(i), 8.1(h)(ii), 8.1(h)(iv), and 8.1(h)(vi). In this context, the United States also seeks review of the compliance Panel's findings with respect to the final determination in the original *Solar Panels* investigation, which was completed after the original Panel was established. See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.c; see also *id.*, paras. 7.319-325 and 8.1(g).

⁹ *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.347.

ANNEX B-2

EXECUTIVE SUMMARY OF CHINA'S OTHER APPELLANT'S SUBMISSION

1. China initiated this dispute nearly six years ago in order to address certain persistent abuses of the countervailing duty mechanism by the United States Department of Commerce ("USDOC"). In particular, China brought this dispute because the USDOC has developed a pattern and practice of imposing countervailing duties in respect of alleged "input subsidies", i.e. the alleged provision of various types of industrial inputs for less than adequate remuneration. These "input subsidies" are completely fictitious. The USDOC conjures these alleged "subsidies" into existence through a series of unlawful presumptions and methodologies affecting all three elements of a countervailable subsidy: financial contribution, benefit, and specificity. Through these unlawful presumptions and methodologies, the USDOC converts ordinary commercial transactions between unrelated parties into alleged "subsidies" that are attributable to the Government of China ("GOC").

2. The compliance Panel found that the USDOC's benefit determinations in four of the principal investigations at issue remain inconsistent with Article 14(d) of the SCM Agreement.¹ In addition, the compliance Panel found that the USDOC's specificity determinations remain inconsistent with Article 2.1(c) of the SCM Agreement in eleven of the investigations at issue.² While China agrees with these ultimate findings of the Panel, China's disagreements with other aspects of the Panel Report are substantial. China's other appeal concerns two interpretations adopted by the Panel which China considers to be in error, and which China believes should be of concern to all Members.

3. The first of these errors, discussed in Section II of this submission, concerns the Panel's interpretation of the term "public body" under Article 1.1(a)(1) of the SCM Agreement. In *US – Anti-Dumping and Countervailing Duties (China)* ("DS379"), the Appellate Body concluded that a "public body" is an entity "vested with authority to exercise governmental functions".³ The issue before the compliance Panel in this dispute concerned the *nature* of the "governmental function" that an entity must be vested with authority to perform in order to be deemed a public body.

4. China argued that it cannot be the case that an entity vested with authority to perform *any* "government function" is properly deemed a public body under Article 1.1(a)(1), even if that "governmental function" is unrelated to the alleged financial contribution at issue. The Panel disagreed, and concluded that "the text of Article 1.1(a)(1) does not prescribe a 'connection' of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution."⁴

5. In this submission, China demonstrates that the Panel's finding cannot be reconciled with the Appellate Body's prior interpretation and application of Article 1.1(a)(1). In DS379, the Appellate Body explained that the context of Article 1.1(a)(1)(i)-(iii) "lends support to the proposition that a 'public body' in the sense of Article 1.1(a)(1) connotes an entity vested with *certain* governmental responsibilities, or exercising *certain* governmental authority."⁵ The Appellate Body found that "too broad an interpretation of the term 'public body'" could "risk upsetting the delicate balance embodied in the *SCM Agreement* because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies."⁶ The Appellate Body also found that its interpretation "coincide[d] with the essence of Article 5" of the International Law Commission's Articles on *Responsibility of States for Internationally Wrongful Acts* ("ILC Articles"), which attributes to the State conduct of a person or entity that is not an organ of the State if "empowered by the law of the State to exercise

¹ See Panel Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China* (WT/DS437/RW) (circulated to WTO Members 21 March 2018) ("Panel Report").

² Panel Report, para. 8.1(e).

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

⁴ Panel Report, para. 7.28.

⁵ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 296 (emphasis added).

⁶ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 303.

elements of the governmental authority ... *provided the person or entity is acting in that capacity in the particular instance*".⁷

6. The Panel's conclusion that there does not need to be a "connection" between the "government function" identified by an investigating authority and the alleged financial contribution cannot be reconciled with any of these prior Appellate Body findings. Nor can it be reconciled with the Appellate Body's prior application of its interpretive framework in relation to the USDOC's determinations that certain state-owned commercial banks ("SOCBs") examined in the *Certain New Pneumatic Off-the-Road Tires* ("OTR") investigation were public bodies.⁸

7. In relation to the SOCBs at issue in the OTR investigation, the Appellate Body found that the USDOC's public body determination in respect of SOCBs "was supported by evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government".⁹ The evidence on which the USDOC had relied pertained to the government's exercise of control over SOCBs *in making loans*, the conduct that was the subject matter of the financial contribution inquiry. Accordingly, when the Appellate Body found that the USDOC's public body determinations in respect of SOCBs were supported by evidence that SOCBs "effectively exercise certain governmental functions", the Appellate Body was not referring to "government functions" in the abstract. Rather, the Appellate Body was referring to the "governmental function" of providing loans to certain favoured industries.

8. In China's view, the Panel's interpretive conclusion cannot be reconciled with the Appellate Body's analysis, or with the fact that the Appellate Body understood that in the context of an inquiry that is about the attribution of an entity's conduct under Article 1.1(a)(1) to the government, a government must exercise control *over the conduct that is the subject of the inquiry* in order for that control to be "meaningful".

9. China believes that the implications of the Panel's sweeping interpretation should be of great concern to all Members. If an entity vested with authority to perform *any* "government function" may properly be considered a public body under Article 1.1(a)(1), regardless of whether the authority vested in the entity is at all *relevant* to the conduct that is potentially being attributed to the government, China cannot conceive of many entities that would *not* be considered public bodies. In this respect, China believes that the Panel's interpretation "upset[s] the delicate balance embodied in the *SCM Agreement*" in exactly the manner that was of concern to the Appellate Body in DS379.

10. The second error that China identifies in Section III of this submission concerns the Panel's interpretation of Article 14(d) of the SCM Agreement. Article 14(d) plainly specifies that the adequacy of remuneration is to be evaluated "in relation to prevailing market conditions ... in the country of provision". The Appellate Body held in *US – Softwood Lumber IV* that it is only in "very limited" circumstances that an investigating authority may reject domestic benchmark prices in favour of an out-of-country benchmark.

11. The compliance Panel in the present dispute found, correctly, that the USDOC did not have a valid basis under Article 14(d) for rejecting domestic Chinese prices as the benchmark for evaluating the adequacy of remuneration. The Panel's decision focuses on the failure of the USDOC to demonstrate that the alleged "government interventions" identified by the USDOC in its compliance determinations resulted in a "direct impact" on domestic Chinese prices for the inputs at issue. The Panel emphasized that the mere fact of government intervention in the domestic economy, in whatever form, is insufficient to conclude that domestic benchmark prices are not market determined. Nor may such an effect be presumed. China agrees with these findings of the Panel insofar as they go: an investigating authority's rejection of available domestic benchmark prices

⁷ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, adopted by the International Law Commission at its Fifty-third Session (2001) (United Nations International Law Commission, Report on the Work of its Fifty-third Session (23 April–1 June and 2 July–10 August 2001), General Assembly, Official Records, Fifty-fifth Session, Supplement No. 10 (A/56/10), chapter IV.E.1) ("ILC Articles"), Article 5 (emphasis added) (CHI-8).

⁸ See Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 338-359, discussing U.S. Department of Commerce Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain OTR Tires From the People's Republic of China (7 July 2008) ("OTR Final I&D Memorandum"), pp. 13-14 (CHI-7).

⁹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 355.

must be based on hard evidence, and presumptions should play no role in the investigating authority's analysis.

12. While China agrees with the Panel's ultimate findings of inconsistency under Article 14(d), China believes that the Panel nevertheless erred in its interpretation of that provision. The Panel interpreted Article 14(d) and past Appellate Body reports to mean, in essence, that a "market" price under Article 14(d) is a price that does not deviate from a "market" price. This interpretation of Article 14(d) is self-evidently circular in nature: one cannot know whether a price "deviates" from a "market" price without knowing what a "market" price is. The Panel did not answer this question. As a result, the Panel failed to interpret and give effect to the term "market" in Article 14(d), properly interpreted within the context of the phrase "prevailing market conditions ... in the country of provision".

13. In China's view, a "market" price within the meaning of Article 14(d) is a price that is determined by the interplay of supply and demand, as opposed to a price that is effectively determined by the government. This conclusion follows the ordinary meaning of Article 14(d), as well as from prior Appellate Body reports interpreting Article 14(d), all of which have equated the issue of "distortion" under Article 14(d) with the circumstance in which an investigating authority would otherwise be required to compare the price of the government-provided good to another government-determined price (i.e. to engage in a "circular" price comparison). Moreover, this interpretation is the only way to reconcile the Appellate Body's recognition that Article 14(d) does not require a market "undistorted by government intervention" with its simultaneous finding that there are "very limited" circumstances in which Article 14(d) allows an investigating authority to resort to out-of-country benchmarks. The term "market" in Article 14(d) refers to a price determined by the interplay of supply and demand, including as the forces of supply and demand may be affected by various government policies and actions, but it does not refer to a price that is effectively determined by the government.

14. The Panel appears to have rejected China's understanding of the term "market" in Article 14(d), but offered no alternative interpretation of the term "market" in its place. As best as China can discern from the Panel Report, the Panel considered that an investigating authority can reject available domestic price benchmarks whenever the investigating authority can demonstrate that government policies or actions had a "direct impact" on those prices. The Panel offered no interpretative support for this conclusion. Nor did the Panel reconcile this conclusion with the Appellate Body's prior finding that the term "market" in Article 14(d) does not refer to a market "undistorted by government intervention". The Panel's apparent understanding of Article 14(d) is devoid of any genuine substance and, unless corrected by the Appellate Body, is likely to engender further litigation over the question of "benchmark distortion" under Article 14(d).

15. China respectfully submits that the Appellate Body should take this opportunity to ensure that the circumstances in which an investigating authority may lawfully reject available in-country price benchmarks are indeed "very limited", which is what the Appellate Body originally contemplated in its decision in *US – Softwood Lumber IV*. In the fourteen years since the Appellate Body issued that report, the USDOC has disregarded the meaning and the spirit of that decision, and has, instead, adopted a regular practice of rejecting in-country prices as "distorted". The opposition of other Members to this practice is evidenced by the fact that there are no fewer than four other disputes currently pending in which Members are challenging the USDOC's practice.¹⁰ It is time for the United States to return its practice to the plain text of Article 14(d): "prevailing market conditions ... in the country of provision".¹¹

¹⁰ These are: *US – Supercalendered Paper* (DS505), *US – Carbon Steel (India)* (Article 21.5 – India) (DS436), *US – Countervailing Measures on Lumber* (DS533), and *US – Countervailing Measures on Pipe and Tube* (DS523).

¹¹ Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), China indicates that this executive summary contains 2,117 words (including footnotes), and this other appellant submission (not including the text of the executive summary) contains 26,254 words (including footnotes).

ANNEX B-3**EXECUTIVE SUMMARY OF CHINA'S APPELLEE'S SUBMISSION**

1. If there is a theme to the United States' appeal of the compliance Panel report in this dispute, it is this: the United States believes that the United States Department of Commerce ("USDOC") is entitled to assume the conclusion of its so-called "investigations" of alleged Chinese input subsidies. Because the United States is convinced that the Government of China ("GOC") provides inputs for less than adequate remuneration to downstream producers of manufactured products, it believes that the USDOC should be allowed to work backwards from that assumption to identify the "subsidies" that it assumes to exist. The United States is unhappy with the compliance Panel report because, with regard to benefit and specificity, the Panel held that the USDOC was actually required to demonstrate the existence of these alleged subsidies in accordance with the requirements of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), based on positive evidence in the record.

2. The United States further appears to believe that the USDOC should be allowed to identify these alleged input subsidies on a "cookie-cutter" basis from one investigation or review to the next, without the need to undertake a meaningful investigation in each instance. At the same time, the United States wants to force China to re-litigate the same issues of financial contribution, benefit, and specificity over and over again, tying up the dispute settlement system with new challenges each time the USDOC issues an administrative review determination in a countervailing duty proceeding that is already the subject of recommendations and rulings by the Dispute Settlement Body ("DSB"). The United States is unhappy with the compliance Panel report because the Panel applied settled jurisprudence to find that the Public Bodies Memorandum is a measure taken to comply that China could challenge "as such",¹ and because the Panel found that subsequent, closely-connected administrative review and sunset review determinations were measures taken to comply and therefore within the Panel's terms of reference.

3. China will demonstrate in this appellee's submission that the Appellate Body should reject these efforts by the United States to evade compliance with the recommendations and rulings of the DSB.

4. **Part II** of this appellee's submission demonstrates that, contrary to the United States' claim on appeal, the Panel did not err in finding: (i) that the Public Bodies Memorandum is a measure taken to comply with the recommendations and rulings of the DSB in these proceedings; and (ii) that this measure taken to comply constitutes a rule or norm of general and prospective application that can be challenged "as such".

5. The United States' appeal in respect of the first finding depends upon a false dichotomy between measures that form an "integral part" of a declared measure taken to comply and measures that can be challenged on an independent basis. The United States is simply mistaken in suggesting that these two characterizations of a measure are mutually exclusive. The United States likewise errs in arguing that China was required to challenge the Public Bodies Memorandum before the original panel, even though the Public Bodies Memorandum was not even relevant to the measures originally challenged.

6. As for the Panel's finding that the Public Bodies Memorandum constitutes a rule or norm of general and prospective application, the United States merely reprises the same arguments that it presented to the Panel, which the Panel correctly rejected. The fact that the Public Bodies Memorandum is a rule or norm of general and prospective application is evident from the text, as well as from the USDOC's consistent use of the Memorandum as the basis for its "public body"

¹ U.S. Department of Commerce Memorandum regarding "Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379" (18 May 2012) ("Public Bodies Memorandum") (CHI-1).

findings in countervailing duty investigations of Chinese products since the USDOC first issued the Memorandum in 2012.

7. **Part III** of this appellee's submission rebuts the U.S. claim that the Panel erred in its interpretation and application of Article 14(d) of the SCM Agreement. As China will demonstrate, the United States' appeal of the Panel's findings is the latest and perhaps the most brazen move by the United States in its long-running campaign to legitimize the USDOC's regular practice of resorting to out-of-country benchmarks under Article 14(d).

8. The United States' claim that the Panel erred in its interpretation and application of Article 14(d) is premised upon an interpretation of the phrase "prevailing market conditions ... in the country of provision" that the Appellate Body expressly rejected in *US – Softwood Lumber IV*, namely that this phrase refers to a market "undistorted by government intervention". The United States has not presented cogent reasons for the Appellate Body to reverse its prior interpretation, and the Appellate Body must reject the U.S. claim of error for that reason alone. China further demonstrates in Part III that if the United States is not seeking to overturn the Appellate Body's holding in *US – Softwood Lumber IV*, the United States must be advocating an interpretation of Article 14(d) under which the phrase "prevailing market conditions" is consistent with certain types of government influence over the conditions of supply and demand, but not others. The United States provides no basis for this interpretation, and, in particular, provides no basis to distinguish among all of the different ways in which government policies and actions affect market conditions, either in terms of their nature or their degree.

9. The United States also claims that the Panel erred in finding that Article 14(d) required the USDOC to demonstrate that one or more "government interventions" *actually resulted* in the "distortion" of in-country prices. Here, too, it is the United States that errs. Whatever the legal standard for finding that in-country prices were not "market-determined" – an issue implicated both by the U.S. appeal and by China's other appeal – Article 14(d) plainly requires an investigating authority to demonstrate on the basis of positive evidence that in-country prices were not market-determined as a *result* of "government intervention". As China will demonstrate, the Appellate Body has repeatedly held that an investigating authority must demonstrate a causal connection between a "government intervention", such as the possession and exercise of market power by government-related suppliers, and the actual pricing behaviour of market actors. The United States, by contrast, believes that an investigating authority should be able to reject in-country prices on the basis of mere assertion. The United States' proposed interpretation of Article 14(d) is unfounded and, if accepted, would mean that the circumstances in which investigating authorities can reject in-country prices would not be "very limited" at all. That may be what the United States wants, but it is not what Article 14(d) requires.

10. In **Part IV** of this appellee's submission, China demonstrates that the Appellate Body must reject the U.S. claim that the compliance Panel erred in its interpretation and application of Article 2.1(c) of the SCM Agreement.

11. The U.S. appeal on this issue begins with a ridiculous argument that the Panel was somehow barred from evaluating whether the USDOC properly identified the existence of one or more "subsidy programmes", even though the USDOC was required by the recommendations and rulings of the DSB to consider "the length of time during which *the subsidy programme* has been in operation". The Appellate Body addressed the meaning of the term "subsidy programme" in its original report in this dispute, and expressly recognized that the USDOC would be required to identify one or more "subsidy programmes" as part of its consideration of "the length of time during which the subsidy programme has been in operation". Even the USDOC appears to have recognized this fact in the compliance determinations at issue – the United States has invented this objection for the first time on appeal.

12. As for the Panel's interpretation and application of the term "subsidy programme", the United States continues with its failed attempt to persuade the Appellate Body that this term can refer merely to a series of *financial contributions* – which, of course, are not "subsidies" on their own. The Appellate Body should continue to reject this interpretation. The United States then proffers a set of entirely *post hoc* rationalizations for the USDOC's single-sentence "consideration" of "the length of time during which the subsidy programme has been in operation". The United States did not even present these rationalizations to the Panel, let alone set them forth in the published determinations of the USDOC as required. Rather surprisingly, the *post hoc* rationalizations that the

United States presents for the first time on appeal turn on its assertion that the GOC instructs input producers to whom they should sell their products and at what price – an assertion that the United States made before the compliance Panel and was forced to retract when China pointed out that there was no evidence to support it.

13. Finally, **Part V** of this appellee's submission rebuts the U.S. claim that the compliance Panel erred in concluding that certain administrative review and sunset review determinations issued subsequent to the original determinations found to be inconsistent were within the Panel's terms of reference under Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU").² This claim of error need not detain the Appellate Body for long. The United States is merely seeking to re-litigate issues that the Appellate Body resolved in *US – Zeroing (EC) (Art. 21.5 – EC)*. The compliance Panel applied settled jurisprudence to conclude, correctly, that the subsequent measures had a sufficiently close nexus, in terms of nature, effects and timing, with the declared measures taken to comply and the recommendations and rulings of the DSB, so as to fall within the Panel's terms of reference under Article 21.5 of the DSU.³

² Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994) ("DSU"), Article 21.5.

³ Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (11 March 2015), China indicates that this executive summary contains 1,694 words (including footnotes), and this appellee's submission (not including the text of the executive summary) contains 31,674 words (including footnotes).

ANNEX B-4**EXECUTIVE SUMMARY OF THE UNITED STATES' APPELLEE'S SUBMISSION¹**

1. China appeals certain of the compliance Panel's legal findings and conclusions related to the interpretation and application of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), and certain of the compliance Panel's findings that aspects of the U.S. implementation measures challenged by China are not inconsistent with various provisions of the SCM Agreement. This submission demonstrates that China's appeals lack merit.

2. Proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") are meant to address disagreements "as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the Dispute Settlement Body ("DSB")]." In order to bring the United States into compliance with the DSB's recommendations with respect to "as applied" findings made by the original Panel and the Appellate Body, the U.S. Department of Commerce ("USDOC") conducted proceedings pursuant to section 129 of the *Uruguay Round Agreements Act* ("section 129 proceedings"), in which the USDOC reconsidered its original determinations. In the section 129 proceedings, the USDOC supplemented its administrative records with information compiled by the USDOC as well as information that the USDOC solicited from interested parties. The USDOC also received and took into account arguments submitted by interested parties. On the basis of the new evidence and arguments on the records of the section 129 proceedings, as well as information from the original proceedings, the USDOC made and published revised determinations at the conclusion of the section 129 proceedings.

3. In order to bring the United States into compliance with the DSB's recommendations with respect to "as such" findings made by the original Panel concerning the "so-called 'rebuttable presumption' or 'Kitchen Shelving policy,'" which the USDOC applied when determining whether an entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement, the USDOC stopped applying the "rebuttable presumption" or "Kitchen Shelving policy."

4. China erroneously claims in this compliance proceeding that the United States has failed to comply with the recommendations adopted by the DSB in this dispute. In its other appellant submission, China contends that the compliance Panel erred in its interpretation and application of Articles 1.1(a)(1) and 14(d) of the SCM Agreement. As demonstrated in this submission, China's arguments lack merit.

5. The United States has structured this appellee submission as follows. Section II demonstrates that the compliance Panel did not err in its interpretation and application of Article 1.1(a)(1) of the SCM Agreement. Section II.A responds to China's arguments that the compliance Panel erred in finding that the USDOC's public body determinations in the section 129 proceedings are not inconsistent with U.S. obligations under the SCM Agreement. As explained in section II.A.1, the USDOC's public body determinations are reasoned and adequate and supported by ample record evidence relating to the core features of the entities in question and their relationship to the government. Indeed, the USDOC's public body determinations are based on analysis and explanation that, altogether, spans more than 90 pages, and in turn that analysis and explanation is founded on more than 3,100 pages of evidence that the USDOC itself compiled and placed on the record, as well as the USDOC's consideration of information and arguments submitted by the GOC and other interested parties. As can be seen on the face of the USDOC's preliminary and final determinations,

¹ Pursuant to the *Guidelines in Respect of Executive Summaries of Written Submissions*, WT/AB/23 (March 11, 2015), the United States indicates that this executive summary contains a total of 2,965 words (including footnotes), and this U.S. appellee's submission (not including the text of the executive summary) contains 46,000 words (including footnotes).

the Public Bodies Memorandum,² and the CCP Memorandum,³ China's contention that the USDOC failed to provide a reasoned and adequate explanation is absurd. The compliance Panel appropriately denied China's request that it ignore the record evidence, and thus correctly found that the USDOC's determinations are not inconsistent with Article 1.1(a)(1) of the SCM Agreement.

6. Section II.A.2 responds to China's challenge of one aspect of the compliance Panel's legal interpretation of Article 1.1(a)(1) of the SCM Agreement, namely the compliance Panel's finding that "the text of Article 1.1(a)(1) does not prescribe a 'connection' of a particular degree or nature that must necessarily be established between an identified government function and a financial contribution." China proposes a novel, flawed interpretation of the term "public body," arguing that Article 1.1(a)(1) "imposes a 'legal requirement' that the 'government function' identified by the investigating authority relate to the conduct alleged to constitute a financial contribution under Article 1.1(a)(1) – i.e. that there be a 'clear logical connection' between the two – for an entity engaged in such conduct to be considered a public body."

7. In effect, China argues that the only relevant "government function" for the purpose of a "public body" analysis is the particular conduct described in Article 1.1(a)(1)(i)-(iii) of the SCM Agreement. The implication of China's position is that an entity may be deemed a public body only where there is specific evidence that the particular activity in which the entity is engaging, e.g., selling the relevant input to the investigated purchaser or providing loans, is itself a government function, and that engaging in that activity is consistent with the government's objectives. China continues to misunderstand the meaning of the term "public body" and the concept of a "financial contribution." Once an entity has been determined to be a public body – following the required examination of the core characteristics of the entity – then any time that entity engages in any of the conduct described in Article 1.1(a)(1)(i) and (iii) of the SCM Agreement, "there is a financial contribution," per the definition set forth in Article 1.1(a)(1). As the Appellate Body explained in *US – Anti-Dumping and Countervailing Duties (China)*, "[i]f the entity is governmental (in the sense referred to in Article 1.1(a)(1)), and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution."⁴ China proposes an interpretation that is legally and logically unsound, and which also is at odds with prior Appellate Body findings. Accordingly, China's proposed interpretation should be rejected.

8. Section II.A.3 responds to China's requests for the Appellate Body to make additional findings related to China's "as applied" claims under Article 1.1(a)(1) of the SCM Agreement. China's arguments in favor of its requests lack merit; both because they are premised on China's novel, flawed interpretation of the term "public body" and because they suffer from other flaws.

9. Section II.A.4 responds to China's request for the Appellate Body to complete the legal analysis and find that the USDOC's public body determinations are inconsistent with Article 1.1(a)(1) of the SCM Agreement. The Appellate Body should reject the new, flawed interpretation of the term "public body" proposed by China, and thus there is no basis for the Appellate Body to complete the legal analysis of China's "as applied" claims. And even aside from China's flawed challenge to the compliance Panel's legal interpretation, China's claim still would fail because the USDOC did establish a clear, logical connection between the "government function" identified by the USDOC and the particular conduct at issue under Article 1.1(a)(1) of the SCM Agreement. The USDOC's determination is supported by ample record evidence even under China's proposed interpretation.

10. Section II.B demonstrates that the compliance Panel did not err in finding that the Public Bodies Memorandum is not inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement. Section II.B.1 shows that China's two arguments against the compliance Panel's findings lack merit.

² See *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 2.1.b; *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Timothy Hruby Re: Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe; Light-Walled Rectangular Pipe and Tube; Laminated Woven Sacks; and Off-the-Road Tires from the People's Republic of China: An Analysis of Public Bodies in the People's Republic of China in Accordance with the WTO Appellate Body's Findings in WTO DS379*, May 18, 2012 ("Public Bodies Memorandum") (Exhibit CHI-1).

³ See *Memorandum for Paul Piquado from Shauna Biby, Christopher Cassel, and Tim Hruby Re: The Relevance of the Chinese Communist Party for the Limited Purpose of Determining Whether Particular Enterprises Should Be Considered To Be "Public Bodies" within the Context of a Countervailing Duty Investigation*, May 18, 2012 ("CCP Memorandum") (p. 41 of the PDF version of Exhibit CHI-1).

⁴ *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284 (emphasis added).

11. First, China asserts that, "[i]f the Appellate Body reverses the Panel's conclusion regarding the proper legal standard, the Appellate Body should also reverse this basis for the Panel's rejection of China's 'as such' claim." However, the new interpretation of the term "public body" proposed by China is legally erroneous and should be rejected.

12. Second, China argues that the compliance Panel erred in finding that the Public Bodies Memorandum does not restrict in a material way the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement. If this is China's argument, it was China's burden to put before the compliance Panel evidence demonstrating that the Public Bodies Memorandum restricts, in a material way, the discretion of the USDOC to make public body determinations in a manner consistent with Article 1.1(a)(1). China did not even attempt to meet its burden. The compliance Panel did not err in rejecting China's "as such" claim.

13. Section II.B.2 responds to China's request for the Appellate Body to complete the legal analysis and find that the Public Bodies Memorandum is inconsistent, "as such," with Article 1.1(a)(1) of the SCM Agreement. The Appellate Body should reject China's request to reverse the compliance Panel's finding that the Public Bodies Memorandum is not premised on an erroneous legal standard and the compliance Panel's finding that the Public Bodies Memorandum does not restrict, in a material way, the USDOC's discretion to make a determination consistent with Article 1.1(a)(1) of the SCM Agreement. Thus, there is no basis for the Appellate Body to complete the legal analysis of China's "as such" claim. Even were the Appellate Body to reverse the compliance Panel's findings, the Appellate Body nevertheless should reject China's "as such" claim because, as demonstrated in the U.S. appellant submission, the Public Bodies Memorandum is not a measure that is challengeable "as such" within the scope of the compliance Panel's terms of reference under Article 21.5 of the DSU, and the Public Bodies Memorandum is not a rule or norm of general or prospective application.

14. Section III addresses China's claim regarding Article 14(d) of the SCM Agreement. The basis for China's appeal is an unsupportable assertion that Article 14(d) prescribes three and only three scenarios in which out-of-country prices may serve as an appropriate benchmark for determining whether a subsidized good was provided for less than adequate remuneration. Nothing in the text of Article 14(d) suggests this interpretation. And, notwithstanding China's selective quotations, the prior Appellate Body and panel reports that have addressed Article 14(d) have all recognized – in express terms – that neither Article 14(d) nor the findings in those reports purports to cover the myriad circumstances in which domestic prices may not be the appropriate basis for comparison.

15. Section III.A responds to China's argument that its overly narrow legal interpretation should be adopted by the Appellate Body. Section III.A.1 sets out the appropriate legal framework for interpreting and applying Article 14(d). We explain that, as the Appellate Body has previously recognized, an investigating authority may reject prices if they are not market determined. In section III.A.2, we address the compliance Panel's findings on this issue and demonstrate that the compliance Panel's rationale for rejecting China's argument is sound and consistent with a proper interpretation of Article 14(d). Because Article 14(d) permits the use of external benchmarks in a variety of circumstances, the compliance Panel did not err in finding it could "not accept that the narrow legal standard advocated by China is required by Article 14(d)."⁵ Finally, in section III.A.3, we address the five panel and Appellate Body reports that China argues support its contention that Article 14(d) should be interpreted as prescribing only three scenarios in which domestic prices may be considered unsuitable for benchmarking purposes. We demonstrate that the express terms of these findings contradict what China asserts.

16. Section III.B responds to China's argument that the term "market" should be turned on its head to include distortive government interventions, such that prices would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions), and that price distortion should not be a relevant consideration in the analysis under Article 14(d) of the SCM Agreement. The discussion begins in section III.B.1 by addressing, in particular, China's argument that the compliance Panel imposed a circular legal approach by requiring that distortion be examined by

⁵ *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.162.

comparison to a market price without defining what constitutes a market price.⁶ As we explain below (and previously in the U.S. appellant submission), the United States agrees, albeit for different reasons, that the compliance Panel formulated an approach that does not appropriately reflect the terms of Article 14(d). In particular, as explained in the U.S. appellant submission, the compliance Panel erred by reaching a conclusion without addressing the real question at issue, that is, whether prices were or were not market determined.⁷ Under the compliance Panel's approach, the only justification for resort to out-of-country benchmarks is evidence of the difference between the price of the good being assessed and a market-determined price in the same country. Such a demonstration, of course, would require that there are market-determined prices for the good in that country against which to compare the distorted price. Where no in-country prices are market determined, a conclusion that a benefit is being conferred could be precluded, despite the remuneration being inadequate. The compliance Panel appears to have misconstrued what the Appellate Body has articulated about the proper approach under Article 14(d) and, in doing so, the compliance Panel also foreclosed consideration of appropriate benchmarks.

17. We explain further in section III.B.2 of this submission that the remedy for the compliance Panel's error is not found in China's radical new proposal to define "market" to include distortive government interventions. China's definition is not consistent with the concept of interactions between independent buyers and sellers that is captured by the term "market." The Appellate Body has recognized that *private prices* are the starting point for determining a benchmark precisely for this reason.⁸ The fundamental concept of market prices as those which would be charged between independent enterprises acting at arm's length is recognized throughout the SCM Agreement⁹ and in other provisions of the WTO Agreement.¹⁰ In contrast, China's proposal turns the term "market" on its head, such that the market would not reflect the balance of supply and demand resulting from the interactions between market-oriented actors (as when independent buyers and sellers engage in arm's-length transactions).

18. Finally, in section III.B.3 we conclude the discussion by addressing the flaws in China's final argument that price distortion should not be a relevant consideration in the analysis under Article 14(d). The text of Article 14(d) and the approach the Appellate Body has taken in applying that text do not provide support for China's position. The Appellate Body has recognized in prior disputes that, in light of the purpose of measuring the benefit to a recipient, being able to ensure that potential benchmark prices are market-determined may be necessary in order to achieve a meaningful comparison.

⁶ See China's Other Appellant Submission, para. 137 ("the Panel's circular standard . . . states, in effect, that 'a market price is a price that doesn't deviate from a market price'").

⁷ See U.S. Appellant Submission, paras. 81-84.

⁸ *US – Carbon Steel (India)*, para. 4.154 (describing prices from "private suppliers in arm's length transactions" as "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement"); *US – Softwood Lumber IV (Canada)* ("private prices in the market of provision will *generally* represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods.").

⁹ See, e.g., SCM Agreement, Annex I Illustrative List, item (e), n. 59 (in establishing existence of export subsidies, "Members reaffirm the principle that prices . . . should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length."); SCM Agreement, Art. 29.1 (referring to transformation from centrally-planned to "market, free-enterprise economy").

¹⁰ See, e.g., Customs Valuation Agreement, Art. 1.1(d) ("The customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8, provided: ... (d) that the buyer and seller are not related, or where the buyer and seller are related, that the transaction value is acceptable for customs purposes under the provisions of paragraph 2"); Customs Valuation Agreement, Note 3 to Article 1, paragraph 2 ("Where it can be shown that the buyer and seller, although related under the provisions of Article 15, buy from and sell to each other as if they were not related, this would demonstrate that the price had not been influenced by the relationship. As an example of this, if the price had been settled in a manner consistent with the normal pricing practices of the industry in question or with the way the seller settles prices for sales to buyers who are not related to the seller, this would demonstrate that the price had not been influenced by the relationship.").

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1**EXECUTIVE SUMMARY OF CANADA'S THIRD PARTICIPANT'S SUBMISSION¹**

1. Canada's submission addresses three issues. First, Canada describes the proper legal standard for determining when an investigating authority may reject in-country prices as a benchmark for the purposes of determining whether a government's provision of goods is made for less than adequate remuneration.
2. A market need not be a "pure market" or "undistorted by government intervention".² Government regulation of a market does not in and of itself justify the rejection on in-country benchmarks. An investigating authority must demonstrate a clear evidentiary link between government intervention in the market has resulted in the distortion of in-country prices. An investigating authority's analysis must be based on positive evidence and provide an adequate explanation about how the authority reached the conclusion that in-country prices were distorted. Finally, there are instances where a government has an impact on in-country prices but they may still be market prices.
3. Second, Canada addresses the proper legal standard for establishing a rule or norm of general and prospective application. The legal standard requires the complaining Member to demonstrate with evidence the attribution, precise content, and general and prospective application of the measure.
4. Finally, Canada addresses the proper legal standard for determining when a measure has a sufficiently "close nexus" with the recommendations and rulings of the DSB and a Member's declared measure taken to comply. The correct legal standard for determining whether a measure falls within a compliance panel's terms of reference is whether there is a "close nexus" in terms of the nature, effects and timing between these measures and the rulings and recommendations of the DSB and declared measures taken to comply. Consequently, measures such as administrative and sunset reviews fall within the jurisdiction of an Article 21.5 compliance panel when the requisite "close nexus" exists.

¹ Canada's Third Participant Submission excluding this executive summary consists of 5704 words. This Executive Summary consists of 328 words.

² Appellate Body Report, *US – Softwood Lumber IV*, para. 87.

ANNEX C-2**EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION¹****1. China's Appeal of the Panel's findings related to the USDOC's public body determinations**

1. The issue of public body is connected to the broader question of attribution. Unlike private entities that are "entrusted or directed", if a public body is found to be vested with governmental authority, any financial contribution it provides in principle falls within Article 1.1(a)(1).

2. The European Union does not consider that each instance of the conduct of a public body must be assessed to determine its relationship with the governmental function the entity exercises.

3. The Panel did not find that the connection between the governmental function and the particular financial contribution at issue is, in general terms, irrelevant to the public body assessment. Rather, it disagreed with China's argument that this connection *must* be assessed in *all* cases.

2. United States' appeal of the Compliance Panel's findings related to the Public Bodies Memorandum

4. With respect to Article 21.5, the relevant question is whether the Public Bodies Memorandum satisfies the "close nexus" test.

5. As a general matter, the European Union does not see why a measure could not be considered as a "measure taken to comply" in two different disputes.

6. In a typical case, a measure that continued to exist unchanged from before the original dispute and throughout the compliance proceedings could be subject to preclusion. However, there may be reasons other than the timing of the publication of the text of a measure that would have prevented the complaining Member from raising a claim against it.

7. Regarding the issue of whether the Public Bodies Memorandum is a so-called "rule or norm of general or prospective application", the burden of proof lies on China because this is how it formulated its challenge. The text of the measure is relevant but not necessarily determinative. The same is true of the fact of repeated application of the measure in individual cases. The Panel's assessment of these factors should be reasoned, objective, and free of internal contradictions.

3. United States' appeal and China's other appeal of the Compliance Panel's findings under Articles 1.1(b) and 14(d) of the SCM Agreement

8. Both parties appeal the Panel's findings under Article 14(d). The central issue in the two appeals concerns the question under which conditions an investigating authority may use out-of-country benchmarks in case of government interventions which may distort prices, i.e. not in situations in which the government is the predominant supplier of the good in question which have been dealt with in previous disputes. The Panel found that the investigating authority must show a "direct impact" of the government intervention on the prices of the good in question. The US considers that this legal standard is too narrow, China deems the Panel's standard to be too broad and argues that external benchmarks can only be used if the government effectively determines the price.

9. The EU disagrees with the Panel to the extent that the Panel took the position that an investigating authority must establish a "direct impact" between the government intervention and price distortion. The EU's position is that an investigating authority needs to establish a link in the form of an evidentiary path between the government interventions in question and the price

¹ Total length of the submission, excluding executive summary: 9745 words. Length of the executive summary: 925 words.

distortion. Whether such a link is based on a "direct" or "indirect" impact of the government intervention on the price should not matter. What is important is for the investigating authority to adequately and plausibly explain why the respective government interventions result in prices that are no longer market determined and hence distorted. Under the Panel's approach, the use of external benchmarks under Article 14(d) would be unduly restricted because government interventions with an indirect effect may be as distortive on prices as those with a direct impact. The Panel's approach therefore would not be able to capture the myriad forms of government interventions that exist. The assessment of an evidentiary link between government intervention and price distortion will require a case-by case analysis and must be based on the totality of the evidence.

4. United States' appeal of the Compliance Panel's findings under Article 2.1 of the SCM Agreement

10. The US argues, *inter alia*, that the Panel erroneously interpreted Article 2.1(c) by requiring – for the assessment of whether a subsidy programme exists – that each financial contribution granted to a recipient under the programme (here: inputs provided for less than adequate value) must confer a benefit, a condition that is not grounded in Article 2.1(c). China considers that the US approach focusing on systematic financial contributions only runs counter to Appellate Body case law.

11. The EU submits that unwritten subsidy measures like the present input transactions pose particular evidentiary challenges in terms of identifying a subsidy programme. Under the Appellate Body's case law, one possibility to evidence a subsidy programme is to show a systematic series of actions (demonstrating a plan or scheme) pursuant to which financial contributions that confer a benefit are provided to certain enterprises. The EU does not consider that this case law requires that, in case of input provision transactions, every such transaction must be both a financial contribution and confer a benefit. In the total number of transactions, there may well be input transactions that do not confer a benefit but as long as those transactions that do confer a benefit can be qualified as systematic, they may constitute proof of a plan or scheme (programme).

ANNEX C-3**EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION*****A. Public Body Inquiry**

1. Japan disagrees with China's argument that a public body determination requires that the control by the government over the entity be exercised in relation to the conduct of "financial contribution". Rather, the focus of the analysis should be on the core characteristics and functions of the entity, its relationship with the government, and the legal and economic environment of the investigated country. An important element therein is whether an entity is structured in a manner so that it can act not solely in accordance with commercial considerations. A public body can be differentiated from private bodies by its ability to continue its existence to achieve its policy goals even if it records losses for a sustained period of time with certain financial capabilities provided by government.

B. Price Distortion

2. The Appellate Body's findings in *US – Carbon Steel (India)* do not support an interpretation of Article 14(d) that would require that deviation from market-determined prices must be quantified or specific impact on in-country transaction prices must be identified. On the contrary, the Appellate Body indicated that the analysis of price distortion must be made on a case-by-case basis, examining a variety of factors. In Japan's view, government intervention can be inferred to distort market prices if the evidence indicates that such intervention changes the conditions of competition in the market unjustifiably or arbitrarily.

3. Japan also disagrees with China's argument that an investigating authority may only resort to out-of-country benchmarks where the government effectively determines the price within the country. Rather, Japan believes that a possible approach to determine distortion is to evaluate whether the price in the market is formed through arm's length transactions based on the respective market actors' commercial considerations.

* Japan's Third Participant Submission 18,202 words, Executive Summary 1,618 words.