

and 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 Panel

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

(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.

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

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 _____ 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 _____ 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 _____ 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.

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 k]h]b`h\Y`W`bhYI h`cZ`h\Y`d`fUgY`"dfYj U]]b[`a Uf_Yh`W`bX]h]cbg`A `]b`h\Y`W`i bhfm`cZ`dfc`vision".

12. China respectfully requests that the Appellate Body correct the Panel's errors of legal interpretation and application, and accordingly _____ 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).

ARGUMENTS OF THE PARTICIPANTS



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 ("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 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 "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 governmental responsibilities".

Y'Ya Ybhg'cZ'h\Y' [c] Yfba YbhU'Ui h\cf]hm'Å'
".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 (" ") investigation were public bodies.⁸

7. In relation to the SOCBs at issue in the 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 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 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 "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 to the conduct that is potentially being attributed to the government, China cannot conceive of many entities that would be considered public bodies. In this respect, China believes that the Panel's interpretation "upset[s] the delicate balance embodied in the " 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 UXYei UW'ri cZ' fYa i bYfUH]cb']g' hc' VY'Yj U'i UhYX' "]b' fY'UH]cb' hc' dfYj U]]b[' a Uf_Yh Wc' bX]h]cbg' Å']b' h\Y' country of provision". The Appellate Body held in 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

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 price 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

EXECUTIVE SUMMARY OF CHINA'S APPELLEE'S SUBMISSION

1. If there is a theme to the United States' appeal

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

7. 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 d95.32 841.9.t7d2p9rate. te

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 É 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,

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

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)-

11. First, China asserts that, "[i]f the Appellate Body reverses the Panel'

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

ARGUMENTS OF THE THIRD PARTICIPANTS

Annex C-1	Executive summary of Canada's third participant's submission	23
Annex C-2	Executive summary of the European Union's third participant's submission	24
Annex C-3	Executive summary of Japan's third participant's submission	26

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S THIRD PARTICIPANT'S SUBMISSION¹

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 be assessed in .
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.
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

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 t

