Statements by the United States at the Meeting of the WTO Dispute Settlement Body

Geneva, August 15, 2019

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

   A. UNITED STATES – ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN: STATUS REPORT BY THE UNITED STATES (WT/DS184/15/ADD.198)

- The United States provided a status report in this dispute at the DSB meeting three weeks ago and again two weeks ago on August 2, 2019, in accordance with Article 21.6 of the DSU.

- The United States has addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue.

- With respect to the recommendations and rulings of the DSB that have yet to be addressed, the U.S. Administration will work with the U.S. Congress with respect to appropriate statutory measures that would resolve this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

B. UNITED STATES – SECTION 110(5) OF THE US COPYRIGHT ACT: STATUS REPORT BY THE UNITED STATES (WT/DS160/24/ADD.173)

- The United States provided a status report in this dispute at the DSB meeting three weeks ago and again two weeks ago on August 2, 2019, in accordance with Article 21.6 of the DSU.

- The U.S. Administration will continue to confer with the European Union, and to work closely with the U.S. Congress, in order to reach a mutually satisfactory resolution of this matter.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

C. EUROPEAN COMMUNITIES - MEASURES AFFECTING THE APPROVAL AND MARKETING OF BIOTECH PRODUCTS: STATUS REPORT BY THE EUROPEAN UNION (WT/DS291/37/ADD.136)

- The United States thanks the European Union ("EU") for its status report and its statement today.

- The United States remains concerned with the EU's approval of biotech products. While we appreciate and welcome the European Commission's approval of several soy and corn products in July 2019, we continue to see delays that affect dozens of applications that have been awaiting approval for months or years, or that have already received approval.

- Even when the EU finally approves a biotech product, EU member States continue to impose bans on the supposedly approved product. The amendment of EU Directive 2001/18, through EU Directive 2015/413, permits EU member States to, in effect, restrict or prohibit cultivation of genetically-modified organisms ("GMOs"), even where the European Food Safety Authority ("EFSA") has concluded that the product is safe.

- This legislation permits EU member States to restrict for non-scientific reasons certain uses of EU-authorized biotech products in their territories by demanding that EU cultivation authorizations be adjusted to exclude portions of an EU member State's territory from cultivation. At least seventeen EU member States, as well as certain regions within EU member States, have submitted such requests with respect to MON-810 maize.

- We again emphasize the public statement issued by the EU's Group of Chief Scientific Advisors on November 13, 2018, in response to the July 25, 2018, European Court of Justice (ECJ) ruling that addresses the forms of mutagenesis that qualify for the exemption contained in EU Directive 2001/18/EC. The Directive was a central issue in dispute in these WTO proceedings, and concerns the deliberate release into the environment of genetically modified organisms, or GMOs. Contrary to the EU's statement at prior DSB meetings, this ECJ ruling relates to previously authorized GMOs.

- The EU Group of Chief Scientific Advisors' statement speaks to the lack of scientific support for the regulatory framework under EU Directive 2001/18. The message provided in that statement is clear: "in view of the Court's ruling, it becomes evident that new scientific knowledge and recent technical developments have made the GMO Directive no longer fit for purpose." The statement further advises that current scientific knowledge calls into question the definition of "GMOs" under the Directive and notes that mutagenesis, as well as transgenesis, occurs naturally. The EU should take this guidance into account in its reconsideration of the GMO Directive, in light of the evident advancements in scientific knowledge and technology.

- The United States urges the EU to ensure that all of its measures affecting the approval of biotech products, including measures adopted by individual EU member States, are based on scientific principles, and that decisions are taken without undue delay.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

D. UNITED STATES – ANTI-DUMPING AND COUNTERVAILING MEASURES ON LARGE RESIDENTIAL WASHERS FROM KOREA: STATUS REPORT BY THE UNITED STATES (WT/DS464/17/ADD.20)

- The United States provided a status report in this dispute at the DSB meeting three weeks ago and again two weeks ago on August 2, 2019, in accordance with Article 21.6 of the DSU.

- On May 6, 2019, the U.S. Department of Commerce published a notice in the U.S. Federal Register announcing the revocation of the antidumping and countervailing duty orders on imports of large residential washers from Korea (84 Fed. Reg. 19,763 (May 6, 2019)). With this action, the United States has completed implementation of the DSB recommendations concerning those antidumping and countervailing duty orders.

- The United States continues to consult with interested parties on options to address the recommendations of the DSB relating to other measures challenged in this dispute.

Second Intervention

- The United States recalls that Canada has commenced a dispute settlement proceeding against the United States concerning the use of a differential pricing analysis and zeroing.

- Canada lost that dispute before the panel.

- The United States is willing, of course, to discuss Canada's concerns bilaterally.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

E. UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION TO ANTI DUMPING PROCEEDINGS INVOLVING CHINA: STATUS REPORT BY THE UNITED STATES (WT/DS471/17/ADD.12)

- The United States provided a status report in this dispute at the DSB meeting three weeks ago and again two weeks ago on August 2, 2019, in accordance with Article 21.6 of the DSU.

- As explained in that report, the United States continues to consult with interested parties on options to address the recommendations of the DSB.

1. SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS ADOPTED BY THE DSB

F. INDONESIA – IMPORTATION OF HORTICULTURAL PRODUCTS, ANIMALS AND ANIMAL PRODUCTS: STATUS REPORT BY INDONESIA (WT/DS477/21 – WT/DS478/22/ADD.7)

- Indonesia continues to fail to bring its measures into compliance with WTO rules.
- The United States and New Zealand agree that significant concerns remain with the measures at issue, including the continued imposition of: harvest period restrictions, import realization requirements, warehouse capacity requirements, limited application windows, limited validity periods, and fixed licensed terms.
- The United States remains willing to work with Indonesia to fully and meaningfully resolve this dispute.
- We are still waiting to hear from Indonesia the concrete actions it will take to bring its measures into full compliance. The scope of Indonesia's "further amendment" to Measures 1-17 is remains unclear, and it is not clear that Indonesia intends to make any changes with regard to Measure 18.
- The United States looks forward to receiving further detail from Indonesia regarding the planned changes to its regulations and laws.

2. UNITED STATES – CONTINUED DUMPING AND SUBSIDY OFFSET ACT OF 2000: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

- As the United States has noted at previous DSB meetings, the Deficit Reduction Act – which includes a provision repealing the Continued Dumping and Subsidy Offset Act of 2000 – was enacted into law in February 2006. Accordingly, the United States has implemented the DSB's recommendations and rulings in these disputes.

- We recall, furthermore, that the EU has acknowledged that the Deficit Reduction Act does not permit the distribution of duties collected on goods entered after October 1, 2007, more than 11 years ago.

- Even aside from this, we question the trade rationale for inscribing this item. In May 2019, the EU notified the DSB that disbursements related to EU exports to the United States totaled $4,660.86 in fiscal year 2018. As such, the level of countermeasures under the Arbitrator's formula in relation to goods entered before 2007 is $3,355.82. The EU announced it would apply an additional duty of 0.001 percent – that is, one-one thousandth of a percent – on certain imports of the United States. These values are no doubt outweighed by the associated costs resulting from the application of these countermeasures – or the DSB's taking up this agenda item.

- With respect to the EU's request for status reports in this matter, as we have already explained at previous DSB meetings, there is no obligation under the DSU to provide further status reports once a Member announces that it has implemented the DSB recommendations, regardless of whether the complaining party disagrees about compliance.

- The practice of Members – including the European Union as a responding party – confirms this widespread understanding of Article 21.6. Accordingly, since the United States has informed the DSB that it has come into compliance in this dispute, there is nothing more for the United States to provide in a status report.

3. EUROPEAN COMMUNITIES AND CERTAIN MEMBER STATES – MEASURES AFFECTING TRADE IN LARGE CIVIL AIRCRAFT: IMPLEMENTATION OF THE RECOMMENDATIONS ADOPTED BY THE DSB

A. STATEMENT BY THE UNITED STATES

- The United States notes that once again the European Union has not provided Members with a status report concerning the dispute *EC – Large Civil Aircraft* (DS316).

- As we have noted at several recent DSB meetings, the EU has argued – under a different agenda item – that where the EU as a complaining party does not agree with another responding party Member's "assertion that it has implemented the DSB ruling," "the issue remains unresolved for the purposes of Article 21.6 DSU."

- Under this agenda item, however, the EU argues that by submitting a compliance communication, the EU no longer needs to file a status report, even though the United States as the complaining party disagrees that the EU has complied.

- At recent DSB meetings, the European Union has attempted to reconcile this view with the EU's longstanding, contrary position. The EU argues that the situation in CDSOA differs from *EC – Large Civil Aircraft* because, in CDSOA, the dispute has been adjudicated and there are no further proceedings pending. With this statement, the EU suggests that the issue of compliance in CDSOA has been adjudicated; in fact, it has not. The United States repealed the CDSOA measure after all of the proceedings in the dispute.

- By way of contrast, in DS316, the EU's claim of compliance has already been rejected by the DSB through its adoption of compliance panel and appellate reports.

- The EU has also erroneously argued that where "a matter is with the adjudicators, it is temporarily taken out of the DSB's surveillance."

- The EU provides no explanation for how it reads DSU Article 21.6 to contain this limitation. The EU essentially reads the DSU as though the authorities given to the DSB are mutually exclusive rather than mutually complementary – but points to nothing in the text of the DSU to support that argument.

- Under the EU's own view, the EU should be providing a status report. Yet it has failed to do so, demonstrating the inconsistency in the EU's position depending on its status as complaining or responding party.

- The U.S. position has been consistent and clear: Under Article 21.6 of the DSU, once a responding Member provides the DSB with a status report that announces compliance, there is no further "progress" on which it can report, and therefore no further obligation to provide a report.

- But as the EU allegedly disagrees with this position, it should for future meetings provide status reports in this DS316 dispute.

4. UNITED STATES – SAFEGUARD MEASURE ON IMPORTS OF CRYSTALLINE SILICON PHOTOVOLTAIC PRODUCTS

A. REQUEST FOR THE ESTABLISHMENT OF A PANEL BY CHINA (WT/DS562/8)

- As the United States stated at the July 22 meeting of the DSB:
  - The WTO Agreement recognizes the right of Members to temporarily suspend concessions and other obligations when a product is being imported into its territory in such increased quantities and under such conditions as to cause serious injury or threat of serious injury to the Member's domestic industry.
  - The United States has exercised this right with respect to imports of crystalline silicon photovoltaic products. The United States imposed a safeguard measure after the competent authority, the U.S. International Trade Commission, determined that increased imports of CSPV products were the substantial cause of serious injury to the domestic industry producing like or similar products.
- Accordingly, the United States regrets that China has chosen for a second time to request establishment of a panel with regard to this matter.
- The United States is prepared to engage in these proceedings and to explain to the panel that China has no legal basis for its claim.
- In light of China's stated confidence in the claims brought, the United States would expect China to support, in the context of this dispute, making the panel meetings open to observation by other WTO Members and the public and to making China's submissions publicly available.
- Indeed, we note that China has made publicly available a submission in one recent dispute, *European Union – Measures Related to Price Comparison Methodologies* (DS516),[1] and we see no reason why China would be less transparent in this dispute, challenging a safeguard measure, than in that dispute, challenging antidumping measures.

[1] Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the dispute: European Union – Measures Related to Price Comparison Methodologies (DS516) (Geneva, 6 December 2017), available at: http://images.mofcom.gov.cn/wto2/201712/20171213174424357.pdf .

10. UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA: RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

A. REPORT OF THE APPELLATE BODY (WT/DS437/AB/RW AND WT/DS437/AB/RW/ADD.1) AND REPORT OF THE PANEL (WT/DS437/RW AND WT/DS437/RW/ADD.1

- This proceeding involved important questions concerning the types of analysis that the Subsidies Agreement[2] requires for the imposition of countervailing duties in order to address injury caused by subsidized imports. In the original proceeding, the Appellate Body found that the U.S. Department of Commerce ("Commerce") had not adequately explained its countervailing duty determinations in certain respects.

- The United States strongly criticized that Appellate Body report on two grounds.[3]

    - First, because the Appellate Body report adopted an approach suggesting that WTO adjudicators are to conduct *independent* investigations and apply new legal standards, regardless of what a party *actually* argues to the panel.

    - Second, because the Appellate Body found that an administering authority needs to examine prices from State-Owned Enterprises (SOEs) for the purpose of determining market benchmarks, rather than looking primarily to *private* prices from arms-length transactions.

- Despite these criticisms, to implement the DSB's recommendations, Commerce made revised determinations, adding detailed analysis that the DSB had found lacking in the original determinations.

- Under any fair reading of the Commerce determinations, the Subsidies Agreement, and the DSB recommendations in this dispute, the United States brought the challenged measures into compliance with WTO rules. Regrettably, the compliance Panel and two of three persons on appeal continued to find fault with certain aspects of Commerce's determinations.

- The three issues on appeal involved the compliance Panel's findings on (1) public body, (2) third-country benchmarks and market distortion, and (3) de facto specificity.

- On the issue of public body, although the appellate report recognizes that Commerce has proved through an exhaustive analysis that China uses SOEs to subsidize and distort its economy, the report has repeated an unclear and inaccurate statement of the criteria for determining whether an entity is a public body. Rather than clarify how that approach is

[2] *Agreement on Subsidies and Countervailing Measures* ("Subsidies Agreement").
[3] See U.S. Statement at January 26, 2015, Meeting of WTO Dispute Settlement Body (https://geneva.usmission.gov/wp-content/uploads/sites/290/Jan16.DSB_.Stmt_.as-delivered.Fin_.Public.pdf).

mistaken, the appellate report continues to endorse an approach that is nowhere reflected in the text of the Subsidies Agreement. The result is to significantly limit the ability of governments to effectively combat unfairly subsidized imports.

- On the issue of out-of-country benchmarks and market distortion, the appellate report found that, notwithstanding that China uses SOEs to subsidize and distort its economy, Commerce must use distorted Chinese prices to measure subsidies, unless Commerce provides even more analysis than the hundreds of pages in these investigations. This conclusion ignores the findings of the World Bank, OECD working papers, economic surveys, and other objective evidence, all cited by Commerce in the determinations at issue.

- On the issue of *de facto* specificity, the report proceeded to find that evidence of a "systematic series of actions" is required and agreed with the compliance Panel that Commerce had not adequately explained the "systematic" nature of subsidies at issue. Yet none of these so-called requirements is reflected in the Subsidies Agreement.

- On each of these three issues, the dissent strongly criticized the findings as, among other things, reflecting a fundamental misunderstanding of the Subsidies Agreement, exceeding the mandate of the Appellate Body to review issues of law covered in the panel report, and articulating an incoherent legal standard that is not in accordance with the ordinary principles of treaty interpretation.

- Through the interpretations applied in this proceeding, based primarily on erroneous approaches by the Appellate Body in past reports, the WTO dispute settlement system is weakening the ability of WTO Members to use WTO tools to discipline injurious subsidies.

- The Subsidies Agreement is not meant to provide cover for, and render untouchable, one Member's policy of providing massive subsidies to its industries through a complex web of laws, regulations, policies, and industrial plans. Finding that the kinds of subsidies at issue in this dispute cannot be addressed using existing WTO remedies, such as countervailing duties, calls into question the usefulness of the WTO to help WTO Members address the most urgent economic problems in today's world economy.

- In today's statement, the United States will address specific aspects of the findings of the appellate report that are erroneous and undermine the interests of all WTO Members in a fair trading system. These serious substantive concerns include erroneous interpretations of "public body" and out-of-country benchmark, diminishing U.S. rights and adding to U.S. obligations, engaging in fact-finding, and treating prior reports as "precedent."

1. PUBLIC BODY

- First, with respect to the issue of public body, the United States is pleased that the compliance Panel and the appeal decisively rejected China's proposed interpretation.

China argued that an investigating authority must, in all cases, establish a "clear logical connection" between an identified "government function" and the conduct alleged to constitute a financial contribution.[4] The compliance Panel rejected China's contention and found that Article 1.1(a)(1) of the Subsidies Agreement "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".[5] The appellate report agreed and found that "the relevant inquiry hinges on the *entity*", the "core characteristics" of the entity, and the entity's "relationship with the government".[6]

- While it was correct to reject the interpretation that China proposed on appeal, the approach of the so-called "majority" to the interpretation of the term "public body" continues to be deeply problematic. As the dissenting member emphasized, "the majority has repeated an unclear and inaccurate statement of the criteria for determining whether an entity is a public body, and [the dissenting member] disagree[d] with the majority's implication that a clearer articulation of the criteria is neither warranted nor necessary."[7]

- The dissent continued that "the continuing lack of clarity as to what is a 'public body' represents an undue emphasis on 'precedent', which has locked in a flawed interpretation that has grown more confusing with each iteration, as litigants and Appellate Body Divisions repeated the original flaw while trying to navigate around it."[8]

- The "original mistake", as the dissent put it,[9] was the Appellate Body's attempt, in *US – Anti-Dumping and Countervailing Duties (China)* (DS379), to define the term "public body" as "an entity that possesses, exercises or is vested with *governmental authority*," including because the entity has "the effective power to regulate, control or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."[10] Under the Appellate Body's interpretation, even where a government owns or controls an entity, that would not be sufficient to hold the government responsible for any injurious subsidies the entity provides.

- The Appellate Body's "governmental authority" test significantly limits the ability of governments to effectively combat unfairly subsidized imports. The Appellate Body's approach is nowhere reflected in the text of the Subsidies Agreement. If an entity has no regulatory or supervisory authority, but is nonetheless able to be controlled by the government – making any transfer of economic resources by that entity a conveyance of

[4] Appellate report, para. 5.90.
[5] *US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.28.
[6] Appellate report, para. 5.100.
[7] Appellate report, para. 5.243 (separate opinion of one Division member).
[8] Appellate report, para. 5.244 (separate opinion of one Division member).
[9] Appellate report, para. 5.245 (separate opinion of one Division member).
[10] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290 (citing *Canada – Dairy (AB)*, para. 97).

the government's own resources – it would make no sense to conclude that this transfer of public resources is not a financial contribution under Article 1.1(a)(1).

- On the other hand, if an entity has the power to "regulate" individuals or "otherwise restrain their conduct," but not the power to provide financial contributions of government resources, its regulatory powers are not relevant to the Subsidies Agreement. The Appellate Body's interpretation therefore does not reflect the structure of either Article 1.1(a)(1) or of the Subsidies Agreement. The failure of the Appellate Body's interpretation to capture a potentially vast number of government-controlled entities undermines the disciplines of the Subsidies Agreement.

- The Appellate Body's "original mistake"[11] also has led to no end of confusion for WTO Members and panels. For its part, China advocated throughout this dispute for three different incorrect interpretations of the term "public body", all of which China argued were consistent with the Appellate Body's prior findings.

- Before the original Panel, China argued that "a public body … must itself possess the authority to 'regulate, control, supervise or restrain' the conduct of others."[12] The original Panel rejected China's proposed interpretation.[13] The Appellate Body rejected that interpretation as well in *US – Carbon Steel (India)*.[14]

- Early in this compliance Panel proceeding, China argued that an entity may be deemed a "public body" only when the "entity alleged to be providing a financial contribution has been vested with governmental authority to carry out governmental functions, and is exercising *that* authority to perform *those* functions, when it engages in the conduct enumerated in Article 1.1(a)(1)".[15]

- The United States observed, as did certain of the third parties, that an implication of China's proposed interpretation was that the "governmental function" and the conduct under Article 1.1(a)(1) must be the same, but such an interpretation is not supported by the Subsidies Agreement or findings in prior reports.[16] China abandoned that proposed interpretation.

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[11] Appellate report, para. 5.245 (separate views of one Division member).
[12] *US – Countervailing Measures (Panel)*, para. 7.35 (summarizing the main arguments of China).
[13] *See US – Countervailing Measures (China) (Panel)*, para. 7.67.
[14] *See US – Carbon Steel (India) (AB)*, para. 4.17.
[15] First Written Submission of China (January 4, 2017) ("China's First Written Submission"), para. 79 (italics in original).
[16] *See, e.g.*, First Written Submission of the United States of America (February 6, 2017) ("U.S. First Written Submission"), paras. 29-30; Third Party Written Submission by the European Union (February 13, 2017), para. 11; Third Party Submission of Japan (February 13, 2017), para. 3; Third Party Oral Statement of Australia (May 11, 2017), para. 6; Responses of Canada to Questions to the Third Parties from the Panel in Connection with the Substantive Meeting (May 31, 2017), para. 4.

- Late in the compliance panel proceeding, and on appeal, China shifted its position again, arguing that Article 1.1(a)(1) requires that there be "a 'clear logical connection'" between "the 'government function' identified by the investigating authority" and the "conduct alleged to constitute a financial contribution under Article 1.1(a)(1)."[17] China insisted before the compliance Panel and on appeal that it "[did] not mean that the 'government function' and the conduct at issue under Article 1.1(a)(1) must be identical."[18] But China continued throughout to make statements demonstrating that China actually holds this incorrect view.[19]

- As explained earlier, the compliance Panel and the appeal came to the correct conclusion, and rightly rejected China's proposed interpretations. It is evident, though, that WTO Members and panelists remain confused by interpretive findings in prior Appellate Body reports concerning the meaning of the term "public body."

- As noted, China has engaged in various misguided efforts to further misinterpret the term "public body." And the panel in *US – Pipe and Tube Products* earlier this year did misinterpret the term "public body" on the basis of past reports, finding, *inter alia*, that the ability of the government to intervene in an entity's critical operations and key decisions was not relevant to a public body determination; that panel required evidence that the government actually had exercised that control.[20] Such a requirement is not supported by prior Appellate Body findings, and conflates the analysis of entrustment or direction of a private body with a public body analysis. The United States has appealed that panel's findings.

- The United States explained during the oral hearing in this appeal that, because of prior Appellate Body findings, clarification is sorely needed. Such clarification can be found by returning to the text of the Subsidies Agreement itself.

- Article 1.1(a)(1) of the Subsidies Agreement concerns whether there is a "financial contribution" by a government or any public body. The broad language used and multiple methods of conveying value described in Article 1.1(a)(1) reveal an intention to capture within the meaning of "financial contribution" a wide array of transfers of value.

- That is, the purpose of the financial contribution analysis is to determine whether a transfer of value was made and can be attributed to the government. As explained in an earlier Appellate Body report, Article 1.1(a)(1):

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[17] China's Other Appellant Submission, para. 30. *See also* Answers of the People's Republic of China to Questions from the Panel (May 31, 2017) ("China's Responses to Panel Questions"), para. 4.
[18] China's Responses to Panel Questions, para. 4. *See also US – Countervailing Measures (China) (Article 21.5 – US) (Panel)*, para. 7.27; China's Other Appellant Submission, footnote 15.
[19] *See* U.S. Appellee Submission, para. 98.
[20] *US – Pipe and Tube Products (Turkey) (Panel)*, para. 7.42. On January 30, 2019, the United States appealed the findings of the panel in *US – Pipe and Tube Products (Turkey) (Panel)*. WT/DS523/5.

> defines and identifies the governmental conduct that constitutes a financial contribution. It does so both by listing the relevant conduct, and by identifying certain entities and the circumstances in which the conduct of those entities will be considered to be conduct of, and therefore be attributed to, the relevant WTO Member.[21]

- If the entity is "a government or any public body," and its conduct falls within the scope of subparagraphs (i)-(iii) or the first clause of subparagraph (iv), there is a financial contribution.[22] The use of distinct terms in Article 1.1(a)(1) to describe the relevant entities – "a government" and "any public body" – suggests that these terms have distinct meanings.[23] That both entities are referred to collectively as "government" and are capable of making a "financial contribution" suggests that the core attribute they share is the ability to convey the economic resources of the public. After all, control over and authority to dispose of the public's economic resources is a core function of government in every WTO Member.

- The context supplied by the term "financial contribution" is a further indication of the common concept between "government" and "public body." The list of actions described in the subparagraphs of Article 1.1(a)(1) demonstrates that to make a "financial contribution" is to convey value. Thus, if a "financial contribution" means to convey something of value, this suggests that the concept that the Subsidies Agreement term seeks to capture is the use by a government of its resources, or resources it controls, to convey value to economic actors.

- If a government undertakes the activities described in Article 1.1(a)(1), there is a conveyance of value from a Member to a recipient. Equally, when there is an entity with resources the Member can control, and the entity engages in the same activities, there is a conveyance of value from a Member to a recipient.

- Indeed, even under the Appellate Body's approach of seeking an "exercise of governmental authority," an entity that is able to be controlled by the government has "authority" over government resources – and thus should be found to be a "public body".

- The United States called upon the Appellate Body to clarify findings in prior Appellate Body reports regarding the interpretation of the term "public body." Specifically, the United States requested that the Appellate Body confirm that a public body is any entity that a government meaningfully controls, such that when the entity conveys economic resources, it is transferring the public's resources. Under such circumstances, the transfer

[21] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[22] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 284.
[23] *See US – Countervailing Duty Measures on Certain Products from China (Panel)*, para. 7.68.

of financial resources would constitute a "financial contribution" attributable to the government.

- Regrettably, the appeal has not clarified the Appellate Body's interpretation[24] but has stuck with an approach that has no basis in the text of the Subsidies Agreement.[25]

- One Division member, though, "[i]n the hope of providing clearer guidance to future litigants and panels, and of encouraging them not to feel unduly constrained by past statements on this subject," offered a "restatement, which incorporates many of the concepts developed by the Appellate Body, while … clarifying the criteria properly".[26]

- The "restatement" reads as follows:

> Whether an entity is a public body must be determined on a case-by-case basis with due regard being had for the characteristics of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the entity operates. Just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. An entity may be found to be a public body when the government has the ability to control that entity and/or its conduct to convey financial value. There is no requirement for an investigating authority to determine in each case whether the investigated entity 'possesses, exercises or is vested with governmental authority'.[27]

- The United States encourages all WTO Members – as well as future WTO adjudicators – to reflect on this "restatement", which reflects the notion that a "public body" is an entity that can convey the government's financial resources – the very issue the Subsidies Agreement was intended to discipline.

2. BENCHMARKS

- Second, turning to Article 14(d) of the Subsidies Agreement and the use of out-of-country benchmarks, "[t]his should have been a relatively simple issue for the Appellate Body to decide on appeal, for the Panel did not do its job in reviewing the USDOC

[24] Appellate report, para. 5.97 (views of two Division members; italics in original).
[25] *See* Cartland, Depayre, & Woznowski, *Is Something Going Wrong in the WTO Dispute Settlement?* Journal of World Trade 46, no. 5 (2012), at 1004-05 ("Article 1 of the SCMA is not about restraining behaviour of anyone; to the contrary, in some sense it is about describing *what kinds of entities might provide 'gifts' to certain other entities*, with disciplines where those gifts distort trade. It is simply not necessary for a particular entity to have regulatory power (to constrain others' behaviour) for that entity to be able to provide gifts that might distort trade, *that is, to channel trade distorting government resources to particular recipients in an economy*.") (italics added).
[26] Appellate report, para. 5.248 (separate views of one Division member).
[27] Appellate report, para. 5.248 (separate views of one Division member).

record, and applied the wrong legal standard."[28] But "[r]ather than reviewing the Panel's findings to determine whether the Panel had erred in its interpretation and application of Article 14(d), it seems . . . that the majority instead engaged in its own review of the USDOC's determinations and, based on that review, upheld the Panel's findings that were based on the wrong legal standard and reflected virtually no engagement with the USDOC's determinations."[29] Instead of undertaking "an analysis of the reasoning provided by the Panel,"[30] the majority "effectively acted as a panel in the first instance, and, having done that, articulat[ed] an incoherent legal standard."[31]

- The strong language of this criticism comes from the separate opinion of the dissent. The separate opinion recognizes that it "does not make for easy reading," but concludes that it is nonetheless "important to explain at length the errors at both the Panel and majority levels on this issue so that this dissent may serve as guidance for future litigants and panels."[32]

- The United States agrees that it is important to take the time to understand and reflect upon these errors. The United States, too, recognizes that it would be easier to simply accept the conclusions of the appellate report. But it is precisely that kind of uncritical and unquestioning approach, coupled with reliance on certain words in past Appellate Body reports, that led the compliance Panel to apply the wrong legal interpretation in this dispute. The effectiveness of WTO subsidies disciplines will be seriously undermined if this erroneous approach to Article 14(d) is applied in future disputes.

- The ability to use out-of-country benchmarks when prices are distorted in the country where the subsidy is provided is critical to the proper functioning of the agreed disciplines on subsidies. This is because Article 14 contemplates market-determined prices as the appropriate benchmark for measuring the adequacy of remuneration.

- Prior reports have consistently reached the same conclusion that, properly interpreted, Article 14(d) refers to market-determined prices and permits out-of-country prices to be used as a benchmark where market-determined prices are not found in the country of provision.

- This approach comports with the references to a "market" in the text of Article 14 and ensures that any benchmark used to measure the adequacy of remuneration reflects a market price resulting from arm's-length transactions between independent buyers and sellers.

[28] Appellate report, para. 5.268.
[29] Appellate report, para. 5.256.
[30] Appellate report, para. 5.256.
[31] Appellate report, para. 5.268.
[32] Appellate report, para. 5.269.

- And indeed, as an initial matter, the compliance Panel first considered and correctly rejected China's argument that out-of-country benchmarks could only be used if domestic prices were effectively determined by the government.[33] The compliance Panel report, like the appellate report, correctly found that Article 14(d) does not support such an interpretation – and we note there is no dissent on that point.[34]

- However, the compliance Panel then proceeded to find that the USDOC had failed to "explain how government intervention in the market resulted in domestic prices for the inputs at issue deviating from a market-determined price."[35] The compliance Panel never questioned the extensive evidence the USDOC relied on, but rather faulted the USDOC because it did not rely upon a *quantitative* price analysis. By limiting itself to such an approach, the compliance Panel set aside, without examining, the USDOC's comprehensive analysis of the evidence that these prices in China cannot be considered market-determined.

- The dissent in the appellate report explains that:

    - "[T]he USDOC's analysis led it to conclude that '*the prices* of steel produced by China's SIEs in the domestic market cannot be considered to be 'market-determined' for purposes of a benchmark analysis under Article 14(d) of the Subsidies Agreement.'"

    - "Similarly, the USDOC found that 'the entire structure of the steel market is distorted by longstanding, systemic and pervasive government intervention, which so diminishes the impact of market signals that, based on the records in these proceedings, *private prices* cannot be considered market based or usable as potential benchmarks.'"

    - "The emphasis of the USDOC's analysis in the Benchmark Memorandum was on the extent to which China's SIEs and private actors in the steel sector are insulated from market forces and not responsive to market pressures and disciplines, i.e. on a qualitative assessment of the nature and effects of the various government interventions in the steel market."

    - "These government interventions, taken together, are at the very least capable of significantly hampering competition in the market and thereby distorting firms' decision-making process with regard to prices. This conclusion is in line with the understanding that government interventions that do not impact prices directly

[33] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.174.
[34] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.174; appellate report, para. 5.148; *see also* 5.249 ("I concur with the majority in rejecting China's interpretation of Article 14(d) of the Subsidies Agreement, including China's claim that circumstances justifying recourse to out-of-country prices are limited to those in which the government 'effectively determines' the price at which a good is sold.").
[35] *US – Countervailing Measures (Article 21.5 – China) (Panel)*, paras. 7.204-206; *see id.* at para. 7.223.

may distort market conditions to such an extent that prices can no longer be considered as market-determined."

- "Therefore, only a meaningful examination by the Panel of the USDOC's analysis, reasoning, and underlying evidence could allow for a conclusion as to whether or not the USDOC provided in this case a sufficient explanation for its decision to have recourse to out-of-country prices. Yet, the Panel did not carry out any such review of the USDOC's analysis."[36]

- As the United States explained during the appeal, "[i]t appears that the compliance Panel understood its approach to be based on the approach that the Appellate Body has articulated, particularly in *US – Carbon Steel (India)*. However . . . the compliance Panel misconstrued the Appellate Body's approach in that report."[37] In doing so, the compliance Panel examined the USDOC's determinations by looking only for a single kind of price analysis, specifically, one that would demonstrate the "deviat[ion]" from "in-country prices" and "a market-determined price."[38] Effectively, the compliance Panel considered that the only way to show whether price is a valid benchmark price is to compare it to a valid benchmark price.

- Of course, where there is no valid benchmark prices, that approach makes no sense. And such a nonsensical interpretation of Article 14(d) cannot be the correct interpretation. Yet the compliance Panel believed it was following what the Appellate Body had said in prior reports. The United States highlighted this misapprehension in the appeal and explained that "[t]he compliance Panel's confusion suggests . . . that the Appellate Body should take this opportunity to clarify its articulation of the proper approach under Article 14(d) and, if necessary, modify that approach" to ensure that panels can apply it in a manner that reflects the correct interpretation of that provision.[39]

- Yet instead of clarifying the matter, the so-called "majority" committed the same error as the compliance Panel. Both findings *purport* not to require a quantitative price analysis, but in effect both require exactly that.

- The dissent sets out how the compliance Panel and the majority have erred by "effectively reading Article 14(d) as imposing an obligation on investigating authorities to always justify recourse to out-of-country prices through a quantitative analysis of in-country prices themselves, regardless of whether those prices have already been found to be distorted, including in cases where they have not even been placed on the record."[40]

[36] Appellate report, para. 5.255 (italics in original) (citations omitted).
[37] *See* U.S. Appellant Submission, para. 81.
[38] *See US – Countervailing Measures (Article 21.5 – China) (Panel)*, para. 7.204.
[39] *See* U.S. Appellant Submission, para. 81.
[40] Appellate report, para. 5.250.

- It is all the more troubling that the compliance Panel and the majority "professed" to recognize that the type of benchmark analysis an investigating authority may conduct will vary depending on the circumstances of the case and the characteristics of the relevant market.[41] The dissent explains that:

> "The majority said it accepted that different methods – including a qualitative analysis – may serve as a basis for a domestic authority to explain how government intervention results in distortion of in-country prices, but in fact, the majority rejected the USDOC's extensive qualitative analysis and wrote an opinion that, in my view, can only be read as requiring a quantitative analysis in all cases involving resort to out-of-country prices."[42]

- The dissent, at paragraph 5.252, illustrates how both the compliance Panel and the majority dismissed the "extensive qualitative analysis" as inadequate while they never engaged with or questioned the validity of the evidence.

    - "Here is what the USDOC did, which the Panel dismissed in three sentences and without any objection from the majority."
    - "In its Benchmark Memorandum, the USDOC assessed a number of factors relating to the Government of the People's Republic of China's (GOC's) intervention with state-invested enterprises (SIEs) in general, and in China's steel sector specifically."
    - "In particular, the USDOC examined: (i) the involvement of the GOC in the functioning of China's SIEs; (ii) detailed industrial plans directing ministries to reduce the number of firms, and to increase the scale of production; (iii) government control exerted over appointments to the board of directors and corporate positions; (iv) evidence regarding controlled mergers and acquisitions; and (v) bankruptcy prevention and other indicia of government intervention with the functioning of the market."
    - "In assessing the functioning of SIEs in the steel sector in particular, the USDOC pointed to the sector's place as a 'pillar' industry in which the state retains 'somewhat strong influence'; evidence of increasing excess capacity; export restraints; "five-year plans" detailing favoured and unfavoured production scales, investments, technologies, products, and production locations; strict control over investments; control over SIEs' appointment processes; hindered bankruptcy of large SIEs; and preferential access to capital, land, and energy."
    - "With respect to the prices of private steel producers in China, the USDOC examined a number of factors, including the SIEs' significant market share, the

[41] *See* Appellate report, para. 5.253.
[42] Appellate report, para. 5.251.

presence of many SIE steel producers shielded from competitive market forces, export restraints on steel input products, restrictions on foreign investment, and other factors."

- "In addition, in the Supporting Benchmark Memorandum, the USDOC referred to the inadequacy of questionnaire responses leading to an absence of representative price data, and a need to rely, in part, on facts available with respect to the input-specific market analysis of the three steel inputs."
- "In the Final Benchmark Determination, the USDOC additionally explained why it could not carry out a price alignment analysis to further support its explanation that private steel input prices in the underlying proceedings were distorted."
- "Finally, with respect to the Solar Panels investigation and in light of the GOC's failure to respond to the USDOC's request for information, the USDOC relied entirely on facts available."
- "The Benchmark Memorandum and Supporting Benchmark Memorandum, together with the underlying evidence in support of the USDOC's conclusions, ran to hundreds of pages."[43]

- The dissent explained further that "somehow, the Panel discarded the entire reasoning and supporting evidence in the Benchmark Memorandum and Supporting Benchmark Memorandum in a single paragraph, characterizing the USDOC's determinations as 'not even [an] attempt' to provide an explanation as to why in-country steel prices are not market-determined. And the majority, writing more extensively, upheld the Panel."[44]

- The dissent is right to be alarmed and perplexed at this outcome.[45] For example, with respect to the *Solar Panels* determination, the dissent states:

> "Inexplicably, the majority upheld this finding . . . . I see no basis whatsoever in Article 14(d) for this approach, nor do I agree with the manner in which the majority reviewed the Panel's analysis. . . .

[43] Appellate report, para. 5.252 (citations omitted).
[44] Appellate report, para. 5.253.
[45] *See* Appellate report, para. 5.254 ("In finding that the USDOC 'failed to explain how government intervention in the market *resulted* in domestic prices for the inputs at issue deviating from a market-determined price' without any assessment of the USDOC's arguments and evidence, the Panel in effect faulted the USDOC for not having further analysed in-country prices, even where it had already found those prices to have been distorted. Why that should have been required in this case is not clear. Provided that it has sufficiently explained why it considers the respective government interventions to have distorted domestic prices, I do not see why the USDOC should have been required to rely on or further analyse such in-country prices in the context of a benchmarking analysis by, for example, comparing in-country prices with a hypothetical market-determined benchmark and finding the existence of a deviation. Indeed, such prices may reflect the very same government interventions that gave rise to the subsidy the USDOC sought to countervail. The Panel does not appear to have recognized this in its review of the USDOC's determinations. Nor, regrettably, have my colleagues. In any event, the result is that the Panel considered the USDOC's analysis and reasoning regarding various types of government interventions and policies affecting prices to be *a priori* insufficient to establish price distortion.").

> Given that the Panel *did not even begin* to examine the substance of the evidence . . . it is unclear on what basis the majority upheld the Panel's conclusion, or what the majority considered the USDOC was required to do."[46]

- It is also important to note, however, that the dissent does much more than simply disagree with the conclusions of the panel and the majority. In fact, the dissent takes on the majority's analysis at every point along the way to the majority's erroneous conclusion.[47] And the dissent shows how the majority erred in each and every one of those points.

- The United States appreciates the diligent approach that was undertaken in the dissent and regrets that we can only summarize three main points in this meeting.

- First, the USDOC's analysis may have been qualitative, but it expressly states that it was focused on *prices* of SIEs and private *prices*.[48] Second, the USDOC's analysis did, in fact, consider the specific input markets.[49] Third, the compliance Panel and the majority have applied the standard in an impossible way – a way which "suggests that, in the Panel's view, the USDOC's approach would *never* sufficiently justify recourse to out-of-country prices, independently of the evidence before it."[50]

- The dissent further explains that the compliance Panel's "analysis of whether the USDOC provided a reasoned and adequate explanation for its conclusion that in-country prices are not market-determined was divorced from its discussion of the record evidence" and, therefore, *cannot* be considered to reflect the correct interpretation of Article 14(d).[51]

- This result diminishes the rights of WTO Members to counteract subsidies that are resulting in harms to their workers and businesses and imposes additional obligations that are not found in the text of the agreement.[52]

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[46] Appellate report, para. 5.259 (italics added).
[47] *See, e.g.*, Appellate report, para. 5.263 ("Thus, instead of being 'largely ignored as the Panel asserted, and the majority appears to have implied, in-country prices and the Ordover Report were discussed by the USDOC, but their relevance was rejected. This was not only because their underlying rationale was different from that of the USDOC, but also because the evidence therein was not particularly probative for, and did not cast doubt on, its own analysis in the Benchmark Memorandum.").
[48] *See* Appellate report, para. 55.256 ("Where did the majority get this, considering that the Panel did not engage in any such assessment and indeed provided no substantive analysis of the USDOC's reasoning and underlying evidence?").
[49] Appellate report, para. 5.257 ("While the USDOC did not base, and indeed was not required to base, its analysis on input-specific prices, it appears, even from the Panel's description of the USDOC's analysis, that the USDOC did in fact make findings with regard to the specific steel markets at issue.").
[50] Appellate report, para. 5.258.
[51] Appellate report, para. 5.258-259.
[52] Appellate report, para. 5.266 ("[The compliance Panel engaged in an] overly narrow application of the standard requiring the conduct of a price analysis as a condition for recourse to out-of-country prices. Despite the fact that the Panel rejected China's assertion that the only situation that merits recourse to out-of-country prices is where the

- Ultimately, the compliance Panel in this dispute sought to avoid error by simply reciting what prior appellate reports have said about benchmarks. And, ultimately, the compliance Panel was successful in avoiding reversal by taking this approach.

- But in doing so the compliance Panel failed to interpret the text of Article 14(d) and to consider whether it was applying an interpretation that made any sense under the facts of this case.

- And it is that kind of approach that leads panels to confusion and error when they simply attempt to apply what the Appellate Body has said in prior reports as if those words constitute "precedent" that must be followed absent "cogent reasons".[53]

- As this dispute illustrates, taking this approach led the compliance Panel to forego engaging with the question at issue and thus appeared to encourage the Appellate Body to step in the shoes of the panel at the appellate stage and, "[i]n this way . . . assume[] the role of a panel in drawing conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the Panel".[54] As the dissent points out, "that would appear to exceed the Appellate Body's mandate."[55]

3. SPECIFICITY

- Third, turning to the issue of specificity under Article 2.1(c) of the Subsidies Agreement, the United States is concerned that the findings of the compliance Panel and the so-called majority evince a similarly problematic approach.

- The United States appealed the compliance Panel's finding that the USDOC needed more evidence of a "plan or scheme" to establish that the subsidies at issue were provided pursuant to a subsidy "program." The compliance Panel 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 Subsidies Agreement.

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government is so predominant that it effectively determines the prices of the goods in question, it appears that the Panel was looking for a kind of price alignment analysis that requires a quantification of the impact of government intervention on in-country prices by establishing the extent to which they deviate from a market-determined benchmark. In endorsing the Panel's standard, the majority appears also to have required an analysis of in-country prices as a condition for recourse to an alternative benchmark, even in cases where in-country prices are not available on the record. In this way, the result of the majority's analysis contradicts its stated understanding of Article 14(d) as allowing for different types of analysis and evidence for purposes of arriving at a proper benchmark, depending on the circumstances of the case.").

[53] *See* Appellate report, para. 5.244 ("I believe the continuing lack of clarity as to what is a 'public body' represents an instance of undue emphasis on "precedent", which has locked in a flawed interpretation that has grown more confusing with each iteration, as litigants and Appellate Body Divisions repeated the original flaw while trying to navigate around it. That is what I believe the majority has done here.") (citations omitted).

[54] Appellate report, para. 5.256.

[55] Appellate report, para. 5.256.

- Specifically, the compliance Panel erred by interpreting the obligation under Article 2.1(c) as a requirement to demonstrate that subsidies have been "systematically" provided pursuant to an overarching "subsidy programme."[56]

- The majority explained that it disagreed with the premise of the U.S. claim on appeal, i.e., that the compliance Panel had required a demonstration of "systematic subsidization."[57] The majority states that "[i]n our view, the United States draws inferences from the Panel's statement it references that the Panel did not make."[58] Yet, later within the very same paragraph, the majority concedes, "[t]hat said, in establishing an unwritten subsidy programme, adequate evidence is required of a *systematic* series of actions."[59] In other words, the majority actually considers that evidence of *systematic* subsidization is required, even though no such obligation is found in the text of the Subsidies Agreement.

- The United States agrees with the dissent that "the Panel and majority fundamentally misunderstand the role of Article 2.1 within the Subsidies Agreement, give the term 'subsidy programme' a meaning that is not supported by the text and that is unreasonable, and ignore reasoning and analysis by the USDOC that was part of the case and should have been considered."[60]

- The dissent goes further, warning Members that "[t]he Panel and majority decisions, would, I believe, if followed in the future, enable circumvention of the disciplines of the Subsidies Agreement and even discourage the transparent management of subsidies."[61]

- The United States urges other Members to read closely the concerns that are expressed in the dissent on this issue. The dissenting opinion expresses grave concern with the approach taken by the majority, stating:

> "I also consider that the majority's decision upholding the Panel's finding is wrong in several important respects and would, if followed, enable circumvention of the disciplines of the Subsidies Agreement and even discourage the transparent management of subsidies. I believe such a result is not contemplated under the Subsidies Agreement, was not intended by the Subsidies Agreement's drafters, and is not in accordance with customary principles of treaty interpretation."[62]

[56] *See* U.S. Appellant Submission, paras. 192-195 (quoting Panel Report, para. 7.263).
[57] Appellate report, para. 5.233.
[58] Appellate report, para. 5.233.
[59] Appellate report, para. 5.233 (underline added; italics in original).
[60] Appellate report, para. 5.270.
[61] Appellate report, para. 5.270.
[62] Appellate report, para. 5.280.

- The United States shares these concerns. Any other Member that considers subsidies to be a major contributor to tensions in the global trading system today should be concerned as well. It is difficult to view this appeal, and past Appellate Body reports on these issues, as anything other than a serious weakening of WTO subsidy disciplines.

4. STATUS OF THE APPELLATE REPORT

- The United States views the document before the DSB today as not a valid Appellate Body report and objects to its adoption. The United States wishes to raise two important systemic concerns.

- The first concern regards the service on this appeal of an ex-Appellate Body member whose term had expired on September 30, 2018.[63] The DSB had taken no action to permit him to continue to serve as an Appellate Body member. Therefore, he was not an Appellate Body member on the date of circulation of this document.

- As the United States has explained with respect to prior reports for appeals on which an ex-Appellate Body member served, under these circumstances, the appellate "report" has not been provided and circulated on behalf of three Appellate Body members, as required under DSU Article 17.1.[64]

- In fact, given that the two valid Appellate Body members may have voted in opposite ways on the issues of public body, benchmark, and specificity, there may not even be a "majority" view in the document, only two separate opinions.

- With regard to the second systemic concern, mandatory language in Article 17.5 of the DSU states: "In no case shall the proceedings exceed 90 days." And that provision specifically states that "the proceedings" encompass "the date the Appellate Body circulates its report." The Appellate Body notified the DSB through a letter dated June 26, 2018, that it would not be able to complete its report within 60 days. The letter went on to state that it would not be possible for the Appellate Body to circulate a report within the 90-day timeframe required by Article 17.5. And, in fact, 446 days passed between the date of the Notice of Appeal in this dispute and circulation of the document as a purported Appellate Body report.

- As the document has not been issued by three Appellate Body members and was not issued within 90 days, consistent with the requirements of Article 17 of the DSU, it is not an "Appellate Body report" under Article 17, and therefore it is not subject to the adoption procedures reflected in Article 17.14. Rather, the DSB would consider its

[63] Dispute Settlement Body, Minutes of Meeting Held on 26 September 2014, paras. 2.2-2.3 ("[2.2] Therefore, he wished to propose that, at the present meeting, the DSB take a decision to appoint Mr. Servansing as a member of the Appellate Body for a four-year term starting on 1 October 2014. [2.3.] The DSB so agreed.").
[64] DSU Art. 17.1 ("The Appellate Body shall hear appeals from panel cases. It shall be composed of seven persons, three of whom shall serve on any one case.").

adoption subject to the positive consensus rule applicable to DSB decisions, pursuant to DSU Article 2.4 and WTO Agreement Article IX:1, note 3.

5. CONCLUSION

- In closing, it is deeply troubling that China is using the WTO dispute settlement system to seek to evade the disciplines on subsidies that all WTO Members agreed to in the Subsidies Agreement. While the United States has been the responding Member in several disputes China has brought, China has been – and continues to be – the serial offender.

- The continuing and increasing role that the Chinese government takes in managing the economy in China, including by providing massive subsidies that distort both China's economy and the world economy, is a fact widely known by observers, commentators, and WTO Members. China's assertion during this proceeding that the subsidies that Commerce found to exist are "completely fictitious" is patently absurd.

- In the section 129 proceedings to implement the original DSB recommendations, the U.S. Department of Commerce explained its conclusions in preliminary and final determinations and supporting analysis memoranda that, altogether, span almost 150 pages. Commerce's determinations are supported by literally thousands of pages of evidence, which Commerce discussed at length, and Commerce's determinations are based on the totality of that evidence. It is clear on the face of Commerce's determinations that they are unbiased and objective, they present reasoned and adequate explanations for the conclusions that Commerce reached, and those conclusions are supported by ample – truly massive amounts of – evidence on the administrative record. An unbiased and objective investigating authority in any WTO Member could have reached the same conclusions.

- The idea that what Commerce did in the section 129 determinations is not sufficient to meet the requirements of the Subsidies Agreement is, simply put, incredible. The dissent is correct that, if followed, the approach of the compliance Panel and the appellate report would enable circumvention of the disciplines of the Subsidies Agreement, discourage the transparent management of subsidies, and that such a result is not contemplated under the Subsidies Agreement, was not intended by the Subsidies Agreement's drafters, and is not in accordance with customary principles of treaty interpretation.

- The approach in the appellate report calls into question the ability of Members to use WTO tools to counteract subsidies provided by a Member like China that are damaging a Member's workers and businesses.

- That is a very serious problem, with grave implications for the global trading system.

Second Intervention

- The United States has described serious substantive concerns, including erroneous interpretations of "public body", out-of-country benchmark, and specificity; diminishing U.S. rights and adding to U.S. obligations; engaging in fact-finding; and treating prior reports as "precedent."

- Given these concerns, the United States does not endorse the findings set out in the document circulated as a purported Appellate Body report. Nor can the United States support an ex-Appellate Body member's continuation of service without authorization by the DSB, or a failure to adhere to the deadline in Article 17.5.

- Accordingly, the United States reiterates its view that the document before the DSB today is not a valid Appellate Body report, objects to adoption of the document, and does not join a consensus to adopt it.

11. APPELLATE BODY APPOINTMENTS: PROPOSAL BY SOME WTO MEMBERS (WT/DSB/W/609/REV.13)

- The United States thanks the Chair for the continued work on these issues.
- As we have explained in prior meetings, we are not in a position to support the proposed decision.
- The systemic concerns that we have identified remain unaddressed.
- As the United States has explained at recent DSB meetings, for more than 16 years and across multiple U.S. Administrations, the United States has been raising serious concerns with the Appellate Body's overreaching and disregard for the rules set by WTO Members, and the DS437 appellate document discussed earlier is another egregious example of many of the concerns we have been raising.
- The United States will continue to insist that WTO rules be followed by the WTO dispute settlement system, and will continue our efforts and our discussions with Members and with the Chair to seek a solution on these important issues.