

April 27, 2018

Re: *United States – Countervailing Duty Measures on Certain Products from China: Recourse to Article 21.5 of the DSU by China* (AB-2018-2 / DS437)

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 & 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

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.

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 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

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.

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.

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.

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.