UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
(AB-2014-7/DS436)

OTHER APPELLANT SUBMISSION OF THE UNITED STATES OF AMERICA

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SERVICE LIST

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I. INTRODUCTION AND EXECUTIVE SUMMARY

1. The United States requests that the Appellate Body review three aspects of the Panel's findings in this dispute. First, the United States requests that the Appellate Body modify the Panel's interpretation of the term "public body" in Article 1.1(a)(1) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[1] Second, the United States requests that the Appellate Body reverse the Panel's finding that 19 U.S.C. § 1677(7)(G) is inconsistent, "as such" and "as applied" in the underlying original investigation, with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.[2] Third, the United States requests that the Appellate Body reverse the Panel's finding that U.S. law 19 U.S.C. §1677(7)(G) is "as such" inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement based on the Panel's failure to comply with its duties under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").[3] In the remainder of this section, we summarize the arguments that support these requests. We set forth our arguments in greater detail in the sections that follow.

A. The Appellate Body Should Modify the Panel's Interpretation of "Public Body" in Article 1.1(a)(1) of the SCM Agreement

2. As the Appellate Body is aware, India has appealed the Panel's interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.[4] The United States, in its appellee submission, will explain how the Panel has correctly understood and applied the approach to "public body" elaborated in the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*. However, India's appeal suggests that both the Panel's interpretation and the Appellate Body's approach may give rise to misunderstanding. The Panel explained its view that "governmental authority" is "the critical consideration in identifying a public body."[5] And the Appellate Body has previously stated that the "essence" of "government" is that it has "the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority" and that a public body shares this "essence."[6] India, for its part, considers that the Appellate Body has found that, not only must an entity have the power to regulate, control, or supervise individuals, or otherwise restrain the conduct of others, *and* derive this power from a governmental source, *but also* that the entity must have the power to give "responsibility" to a private body or exercise "authority" over a private body.[7]

3. Respectfully, the United States considers that these statements focusing on "governmental authority" and the "power to regulate, control, or supervise individuals" could be taken to move the understanding of "public body" not only far from the meaning given to that term in the SCM Agreement, but even from the application of that term by the Appellate Body in

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[1] *See* Panel Report, para. 7.80.
[2] *See* Panel Report, paras. 7.356, 7.369, 8.2(c), and 8.2(d); *see also, id.*, paras. 7.339-7.341, 7.343, 7.346-7.351, 7.358, and 7.360.
[3] Panel Report, paras. 7.322, 7.339, 7.340, and 7.358.
[4] *See* India's Notice of Appeal, paras. 17-20.
[5] Panel Report, para. 7.80.
[6] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.
[7] *See* India's Appellant Submission, para. 318.

US – Anti-Dumping and Countervailing Duties (China). Given the potential consequences, the United States respectfully requests that the Appellate Body modify and clarify the interpretation of "public body" given by the Panel, which relies on the approach in the *US – Anti-Dumping and Countervailing Duties (China)* Appellate Body report.

4. In this appeal, the United States proposes a clarification of the term "public body" that follows from the application of customary rules of interpretation of public international law, and that fundamentally accords with the core logic of the SCM Agreement. Through the agreement, Members have agreed that, beyond certain limits, their industries should not be compelled to compete with the financial resources of another Member. For that reason, pursuant to agreed rules and procedures, certain subsidies by Members are prohibited; Members also should not cause adverse effects through the use of any subsidy; and adverse effects or material injury to a domestic industry caused or threatened by subsidized imports may be remedied through WTO dispute settlement or the imposition of countervailing duties. The very first element in the definition of a "subsidy" in the SCM Agreement is a "financial contribution" by a government. Thus, at its core, the subsidies that are disciplined by the SCM Agreement are transfers by a government of value, or of the government's own economic resources.

5. The clarification sought by the United States follows from this core logic. Where the government (understood narrowly) conveys something of economic value (makes a financial contribution), it is the government's resources that are being transferred. Where the government (narrowly understood) controls an entity that conveys something of economic value (makes a financial contribution), it is equally the government's resources that are being transferred. Any such conveyance may then also be a subsidy (if the other elements of the definition are met). It is the entity in this second situation that is captured by the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

6. To explain how a "public body" differs from "government" in that provision, the United States proposes that the Appellate Body clarify that an entity that is controlled by the government, such that the government may use the entity's resources as its own, is a "public body" for purposes of the SCM Agreement. In that circumstance, when the entity conveys economic resources, it is the government's own resources that are being conveyed, and therefore those financial contributions are attributable to the government. Such an entity transfers the government's economic resources, irrespective of whether the entity also possesses "governmental authority" or exercises this authority in the performance of governmental functions.

7. As the United States will explain, this logic comports with a proper interpretation of the elements of a "subsidy" at the heart of the SCM Agreement. Article 1.1 states that, "[f]or purposes of this Agreement, a subsidy shall be deemed to exist if… there is a financial contribution by a government or any public body within the territory of a Member", and "a benefit is thereby conferred." The definition is not formalistic. It is not contingent on whether the government action constitutes a subsidy under a Member's domestic law, for example; nor does it depend on the stated intention of the government. Rather, the existence of a subsidy depends on an objective assessment of the presence of two elements – a financial contribution by a government or any public body and a benefit conferred. If these elements exist, the measure will be "deemed" a subsidy under the SCM Agreement.

8. Similarly, the actions by a government or public body that may constitute a "financial contribution" for purposes of the definition are not formalistic. The broad list provided in Article 1.1(a)(1) reveals an emphasis on substance and suggests an intent on the part of the negotiators to capture a wide array of forms of government transfers of economic resources to ensure robust application of the disciplines found in the Agreement. In keeping with this purpose, Article 1.1(a)(1)(i) provides that any government "practice" that "involves" a direct transfer of funds or even potential transfer will constitute a financial contribution. Under subpart (ii), no direct transfer is required. There, if revenue is foregone or funds on which the government has a claim are not collected, a subsidy may exist. Similarly, under subpart (iii), if the government provides goods or services other than general infrastructure, or if it purchases goods, a subsidy can be found to exist. Under subpart (iv), where a government makes payments to a funding mechanism, which would then convey value to recipients, a subsidy can be found to exist. Subpart (iv) also provides that, even where a private entity transfers resources through any of the above means, if the government has entrusted or directed the private entity to use its resources, the government will be responsible for that financial contribution. Hence, based on the text of Article 1.1(a)(1), a wide array of activities that bestow value on a recipient can constitute a financial contribution.

9. Where the drafters of the SCM Agreement have ensured that a wide range of economic transfers can constitute a financial contribution, it is equally important to ensure that the term "any public body" is not understood in a way that exempts certain financial contributions from attribution to a Member. In the U.S. view, the Panel's interpretation,[8] and the Appellate Body approach on which it relies,[9] could be read as allowing for that possibility. One might take from certain statements by the Panel, and in the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*, that an entity that lacks regulatory or supervisory authority – but which nonetheless has the authority to make transfers of the government's economic resources – is permitted to provide subsidies that would not be governed by the SCM Agreement. Such an interpretation would undermine the emphasis in the text of Article 1.1(a)(1) on substance in identifying financial contributions, and would raise the troubling possibility that not all transfers of a government's own economic resources – transactions that if made directly by a government would be financial contributions attributable to a Member – are potentially subject to discipline under the SCM Agreement.

10. To the extent the Panel's interpretation of Article 1.1(a)(1) of the SCM Agreement could be read as allowing formalistic differences between entities to result in financial contributions being placed outside the disciplines of the SCM Agreement, the United States respectfully requests the Appellate Body to clarify the interpretation set forth in *US – Anti-Dumping and Countervailing Duties (China)*, to make clear that an entity that is controlled by the government, such that the government may use the entity's resources as its own, is a "public body" for purposes of the SCM Agreement. In the U.S. view, where the government has such control over an entity, it is not necessary that the entity *also* possess "governmental authority," such as the

[8] Panel Report, paras. 7.79-7.81.

[9] *See* Panel Report, paras. 7.79-7.80, where the Panel reviews "the most relevant findings made by the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*," including excerpts from paragraphs 288, 290 and 317-319 of the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*; *see also, id.*, para. 7.80, where the Panel summarizes what it considers the Appellate Body to have found in *US – Anti-Dumping and Countervailing Duties (China)*.

authority to regulate or supervise individuals, or that it exercise this authority in the performance of governmental functions. Equally, it should not be necessary to find that the government expressly entrusted or directed such an entity to provide a subsidy. Rather, where the government controls an entity, such that transfers of economic resources by the entity can be said to have been made on behalf of the government, those transfers are financial contributions attributable to the government. If they confer a benefit, they shall be deemed a subsidy.

11. As panels and the Appellate Body have found many times, the SCM Agreement balances the right of Members to use subsidies under certain conditions and the right of Members harmed by such subsidies to avail themselves of the WTO dispute settlement mechanism or employ countervailing measures.[10] The SCM Agreement sets out rules and procedures designed to safeguard this balance. But the very premise of permitting countermeasures or countervailing duties – and establishing rules and procedures for their application – is that subsidies by Members that cause harm to other Members undermine the goal of increasing trade to enhance joint economic prosperity. If the SCM Agreement were interpreted to prevent a WTO dispute settlement finding, or a domestic countervailing duty determination, on a subsidy that is provided by a government through an entity not found to be "governmental" in the narrowest sense, the balance of the SCM Agreement would be disrupted. WTO rules would then countenance serious distortions in the world economy, contrary to the SCM Agreement rules that were one of the great achievements of the Uruguay Round. For what good are WTO rules on government subsidization if the same transfer of value from a government to a recipient can easily be moved outside of WTO disciplines through mere formalistic changes to the structure of the transaction?

B. The Appellate Body Should Reverse the Panel's Finding that "Cross-Cumulation" Is Inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement

12. The United States appeals the Panel's finding that "cross-cumulation" is inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, "as such" and "as applied" in the original investigation.[11] The United States submits that the Panel erred, and that cross-cumulation in injury determinations is not inconsistent with the SCM Agreement when relevant provisions of the SCM Agreement are read in context and in light of the object and purpose of the Agreement. The United States therefore respectfully requests that the Appellate Body reverse the Panel's legal conclusion under Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, and related interpretations in section 7.6.1 of the panel report.

13. The Panel found that Article 15.3 of the SCM Agreement allows an investigating authority to cumulatively assess the effects of imports subject to simultaneous countervailing duty investigations.[12] However, the Panel erred when it limited Article 15.3 by imposing an obligation on Members not to cumulate subsidized imports with dumped imports. The Panel went on to make similar findings under Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

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[10] *See, e.g.*, *US – Softwood Lumber IV (AB)*, para. 95; *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 115.
[11] *See, e.g.*, Panel Report, paras. 7.356 and 7.369.
[12] Panel Report, section 7.6.1.5, paras. 7.338-7.355.

14. Article 15.3 of the SCM Agreement addresses the conditions under which an authority "may cumulatively assess" imports from all countries that are found to be subsidized. It does not address the circumstance in which simultaneous countervailing duty investigations *and* antidumping investigations may be taking place. Nor, by its terms, does it impose an obligation on an investigating authority not to cumulatively assess subsidized imports with imports that are dumped. Rather, Article 15.3 is *silent* on the issue of whether cumulation of dumped and subsidized imports is permissible. In similar circumstances, the Appellate Body has found that the silence of an agreement on the permissibility of a particular methodological approach does not indicate that the methodology is prohibited.[13] The United States suggests a similar finding here.

15. As the Appellate Body has acknowledged previously in the context of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement"), the ability to cumulate the injurious effects of dumped imports is a "useful tool" for an investigating authority "to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination."[14] That rationale applies with equal force to a situation in which subject imports are dumped and subsidized, as was the case in the investigation at issue here.

16. A proper interpretation of Article 15 of the SCM Agreement must take account of the context offered both by Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and the provisions of the AD Agreement. Article 15.1 of the SCM Agreement expressly references Article VI of the GATT 1994, stating that the injury findings prescribed in Article 15 of the Agreement relate to a "determination for purposes of Article VI of GATT 1994."[15] In interpreting Article VI:6(a), the phrase "as the case may be" acknowledges that cumulation of dumped and subsidized imports may be appropriate in particular injury investigations, depending on the circumstances involving the injury to the domestic industry caused by the unfair trade practices. Very often, a domestic industry will be faced with both dumped and subsidized imports, and it would be appropriate to interpret Article VI:6(a) as contemplating a cumulative analysis of injury based on these circumstances.

17. The Panel's interpretation – focusing solely on the injurious effects of either dumped imports or subsidized imports alone – would have the effect of forcing a Member to make a country-specific analysis in circumstances in which cumulation might otherwise be permitted. The United States believes that denying the right to cross-cumulate, such that the same volume of subsidized imports from a country can be countervailed in some circumstances but not in others, will impair the right afforded to Members under the SCM Agreement to countervail injurious subsidized imports. For, while the obligations applicable in the context of anti-dumping and countervailing duty investigations are legally distinct, the injury that has occurred to an industry, from the perspective of the relevant domestic industry, is cumulative. Therefore, the Appellate Body should reverse the Panel's findings in section 7.6.1 of the panel report.

[13] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[14] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 297.
[15] SCM Agreement, Article 15.1. The AD Agreement contains the same language in reference to Article VI.

C. The Appellate Body Should Reverse the Panel's Finding that 19 U.S.C. §1677(7)(G) Is "As Such" Inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, Because the Panel Failed to Comply With Its Duties under Article 11 of the DSU

18. The United States also appeals the Panel's conclusion that 19 U.S.C. §1677(7)(G) "requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports,"[16] because the Panel's findings in this respect were not made in conformity with the requirements of Article 11 of the DSU. Where a Member challenges a measure "as such," a party bears the burden of demonstrating its interpretation of the measure,[17] and Article 11 requires a panel "to examine the meaning and scope of the municipal law at issue."[18] The Panel in this dispute failed to make substantive findings on the U.S. law at issue to support the conclusions it made in respect of that law. Instead, the Panel made mere assertions, without referring to the statute itself or providing any analysis or findings that support the conclusion that the U.S. statute "requires" anything. The United States therefore respectfully requests that the Appellate Body find that the Panel did not meet the standard set out in DSU Article 11 and reverse the Panel's findings that 19 U.S.C. §1677(7)(G) is "as such" inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

II. INTERPRETATION OF ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

19. Before the Panel, India claimed that the U.S. Department of Commerce ("Commerce") erred in finding that two entities were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. In making its findings, the Panel relied upon the Appellate Body's interpretation of "public body" in *US – Anti-Dumping and Countervailing Duties (China)*, and found that India failed to demonstrate that Commerce's findings were inconsistent with the SCM Agreement. While the United States agrees with the Panel's ultimate conclusions with respect to these particular claims, the United States considers that it would be useful for the Appellate Body to review the Panel's interpretation of Article 1.1(a)(1), and to clarify certain aspects of the interpretation in *US – Anti-Dumping and Countervailing Duties (China)*, upon which it was based. Specifically, the United States requests that the Appellate Body clarify that a "public body" under Article 1.1(a)(1) of the SCM Agreement includes an entity controlled by the government such that the government can use the entity's resources as its own. Such a clarification follows from application of customary rules of interpretation of public international law to the term "public body" and comports with the fundamental logic underlying the SCM Agreement.

A. The Panel's Interpretation of Article 1.1(a)(1) of the SCM Agreement

20. In interpreting Article 1.1(a)(1) of the SCM Agreement, the Panel first recalled the relevant findings of the Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)*, reciting several paragraphs from that report. The Panel summarized that interpretation as follows:

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[16] Panel Report, paras. 7.322, 7.339, 7.340, and 7.358.
[17] Panel Report, para. 157.
[18] *US – Countervailing and Anti-Dumping Measures on Certain Products from China (AB)*, para. 4.98.

> We understand the Appellate Body to have found that the critical consideration in identifying a public body is the question of governmental authority, i.e. the authority to perform governmental functions. In the Appellate Body's own words, "being vested with governmental authority is the key feature of a public body".[FN 239] The relevant entity must be shown to have been vested with such authority, or to have actually exercised such authority through the performance of governmental functions. To determine whether an entity has governmental authority, an investigating authority must evaluate the core features of the entity and its relationship to government. Governmental control of the entity is relevant if that control is "meaningful". Indeed, the Appellate Body explicitly stated that "evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions".[FN 240]
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> [FN 239] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 310.
> [FN 240] Ibid. para. 318.

21. Turning to the specific facts of the underlying countervailing duty proceedings, the Panel focused on the concept of "meaningful control" described by the Appellate Body in determining whether Commerce acted consistently with Article 1.1(a)(1). The Panel stated:

> [W]e agree with the Appellate Body that, in certain circumstances, a body may be found to be public in nature when it is subject to "meaningful control" by governmental, and therefore public, authorities. We also agree with the Appellate Body that "meaningful control" may not be established on the basis of government shareholding alone, but a combination of government shareholding plus other factors indicative of control may suffice.

22. Based on this interpretation, the Panel found that Commerce did not act inconsistently with the SCM Agreement when it relied on evidence of meaningful control, including government ownership and government participation in the nomination and appointment of board directors, and the National Mineral Development Corporation's ("NMDC") website statement that the NMDC is under the "administrative control" of the Government of India, to find that the NMDC was a public body for purposes of Article 1.1(a)(1).[19] The Panel further found that Commerce was justified in finding that the Steel Development Fund ("SDF") Managing Committee was a public body based on its having been composed exclusively of government officials acting in their official capacities.[20]

B. The U.S. Request for Clarification of the Panel's Interpretation of "Public Body" in Article 1.1(a)(1) of the SCM Agreement

23. While the United States agrees with the Panel's ultimate conclusions in this dispute, we consider that it would be useful for the Appellate Body to modify the Panel's interpretation of

[19] Panel Report, paras. 7.83-7.89.
[20] Panel Report, para. 7.278.

Article 1.1(a)(1) of the SCM Agreement. The Panel focused on "meaningful control" in order to find that NMDC and the SDF Managing Committee exercised "governmental authority." The Panel was correct to focus on the control exercised over the entities by the Government of India. However, given the potential for misunderstanding, we believe it would be helpful for the Appellate Body to clarify that where sufficient government control over an entity exists, such as that found by the Panel relating to NMDC, it is not necessary also to find that the entity exercises "governmental authority." It certainly is not necessary to find that the entity has "the effective power to regulate, control or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority."[21]

24. 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 SCM Agreement. On the other hand, if an entity has no regulatory or supervisory authority, but is nonetheless controlled by the government such that the government can use the entity's resources as its own – making any transfer of economic resources by that entity a conveyance of the government's own resources – it would be anomalous to conclude that the financial contribution cannot be deemed a subsidy under Article 1.1(a)(1). The failure thus to capture a potentially vast number of government-controlled entities within the scope of the SCM Agreement would undermine the disciplines of the Agreement.

25. As explained more fully below, the United States respectfully requests that the Appellate Body clarify the interpretation of Article 1.1(a)(1) of the SCM Agreement to find that a "public body" includes an entity that is controlled by the government such that the government can use that entity's resources as its own, even where that entity does not also exercise "governmental authority," such as the ability to regulate individuals. This understanding follows from an interpretation of the term "public body" under customary rules of interpretation.

C. Interpreted in Accordance with the Customary Rules of Interpretation of Public International Law, the Term "Public Body" in Article 1.1(a)(1) of the SCM Agreement Includes an Entity Controlled by the Government Such that the Government Can Use that Entity's Resources as Its Own

26. In the analysis that follows, the United States applies customary rules of interpretation to understand the meaning of the term "public body" in Article 1.1 (a)(1) of the SCM Agreement. We first start with the relevant text of the SCM Agreement and its ordinary meaning. While dictionary definitions of the terms "public" and "body" can capture a wide range of meanings, we note that the primary definitions in the context of groups of persons would point towards ownership by the community of legal persons or organizations.

27. Next, we turn to understanding the ordinary meaning of the terms in their context. We examine the language of Article 1.1(a)(1) itself, including "government *or any* public body" (italics added), and other context in Article 1.1(a)(1), such as "private body," "financial contribution," and "funding mechanism." These contextual elements support an interpretation of "public body" as an entity that is controlled by the government. Control of such an entity means that the government can use that entity's resources as its own. In this way, the financial

[21] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290 (citing *Canada – Dairy (AB)*, para. 97).

contributions (in the ordinary sense) flowing to recipients through the economic activities of such entities are a conveyance of value from a Member to a recipient in the same way as if the government had provided the financial contribution directly.

28. Then, we turn to an understanding of the text in its context in light of the object and purpose of the SCM Agreement. We note that the SCM Agreement is intended to discipline the use of subsidies by governments so as to permit economic actors to compete in the marketplace without the effects of subsidies distorting the outcome of that competition. An understanding of "public body" as reaching financial contributions flowing from an entity that is controlled by the government such that the government can use that entity's resources as its own supports the object and purpose of the SCM Agreement. To find otherwise would permit a government to provide the same financial contribution with the same economic effects and escape the definition of a "financial contribution" merely by changing the legal form of the grantor from a government agency to, for example, a wholly-owned corporation.

1. The Ordinary Meaning of the Term "Public Body" or "Organisme Public" or "Organismo Público" as Reflected in Dictionary Definitions Supports the Conclusion that a Public Body Includes Any Entity Controlled by the Government

29. Article 1.1 of the SCM Agreement provides, in relevant part, that "a subsidy shall be deemed to exist if:"

> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or service other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments . . . .

30. While the SCM Agreement does not define the term "public body," and "public body" is not defined in dictionaries as a compound word, the definitions of the words "public" and "body" shed light on the ordinary meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

31. We start with the noun "body." While dictionary definitions cover a number of senses, as used in the construction "public body," the term refers to the sense of a group of persons or an entity (as opposed to, for example, the "material frame" of persons). This definition in the sense of "an aggregate of individuals" is: "an artificial person created by legal authority; a corporation; an officially constituted organization, an assembly, an institution, a society."[22]

32. Turning to the adjective "public," the relevant definition that pertains to a "body" as a group of individuals is the first: "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." A second definition is "carried out or made by or on behalf of the community as a whole; authorized by or representing the community."[23] However, in conjunction with the term "body" (in the sense of a legal person or corporation or organization), this second definition appears less apt.

33. Thus, the ordinary meaning of the composite term "public body" according to dictionary definitions would be "an artificial person created by legal authority; a corporation; an officially constituted organization"[24] that is "of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation." These definitions therefore convey two primary elements: first, that there is an entity; and second, that this body belongs to, pertains to, or is "of" the community or people as a whole. These elements point towards ownership by the community as one meaning of the term "public body." If an entity "belongs to" or is "of" the community, it also suggests that the community can make decisions for, or control, that entity.

34. Dictionary definitions of the corresponding words in the French and Spanish versions of Article 1.1(a)(1) of the SCM Agreement are similar. As the panel in *US – Anti-Dumping and Countervailing Duties (China)* explained:

> The French term for public body is "organisme public", and the Spanish is "organismo público". In French, the word "organisme" (in the non-biological sense) has the broad meaning of an organized grouping of elements (persons, offices, etc.) working to a common purpose (e.g., "institution formée d'un ensemble d'éléments coordonnés entre eux et remplissant des fonctions déterminées; [. . .], chacun des services ainsi coordonnés, ou des associations de personnes les constituant", and "[e]nsemble des services, des bureaux affectés à une tâche"). The French word "public" also has a broad meaning, including related to, belonging to, or controlled by the State (e.g., "d'État, qui est sous contrôle de l'État, qui appartient à l'État, qui dépend de l'État, géré par l'État"). The Spanish term "organismo" is defined similarly to the French "organisme" as referring to a grouping of elements forming a body or institution (e.g., "conjunto de oficinas, dependencias o empleos que forman un cuerpo o institución"). The

[22] *The New Shorter Oxford English Dictionary* at 253 (1993) (Exhibit USA-64). *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285 (*citing* Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 1, p. 261).

[23] *The New Shorter Oxford English Dictionary* at 2404 (1993) (Exhibit USA-64). *See also US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285 (*citing* Shorter Oxford English Dictionary, 6th edn, A. Stevenson (ed.) (Oxford University Press, 2007), Vol. 2, p. 2394).

[24] We note that the additional senses of "an assembly, an institution, a society" appear less relevant as they become increasingly general.

> Spanish term "público", like the French "public", is defined as belonging to or related to the government (e.g., "perteneciente o relativo al Estado o a otra administración").[25]

35. In light of the dictionary definitions it examined in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered that:

> The composite term "public body" could thus refer to a number of different concepts, depending on the combination of the different definitional elements. As such, dictionary definitions suggest a rather broad range of potential meanings of the term "public body", which encompasses a variety of entities, including both entities that are vested with or exercise governmental authority and entities belonging to the community or nation.[26]

36. The Appellate Body further considered that "dictionary definitions of these words in Spanish and French would accommodate a similarly broad range of potential meanings of the term 'public body'."[27]

37. The United States agrees with the observation of the Appellate Body that the dictionary definitions suggest that the ordinary meaning of the term "public body" could have a broad meaning. However, in our view, while "public body" in different contexts could "encompass[] a variety of entities," all of those entities would share the common characteristic of belonging to, or pertaining to the community as a whole. Such an entity would be owned or controlled by the community, or would be acting on its behalf. On the other hand, to limit the term "public body" only to entities vested with or exercising governmental functions would restrict its meaning to a subset of those entities captured by dictionary definitions.[28]

38. In the view of the United States, the correct conclusion to draw at this point in the interpretative analysis is that dictionary definitions of "public" and "body" suggest the ordinary meaning of those terms refers to an entity of, belonging to, or pertaining to the community as a whole. Nothing in those dictionary definitions would restrict the meaning of the term "public body" to an entity vested with, or exercising, government authority. Interpreting the term "public body" as an entity of, belonging to, or pertaining to the community as a whole (*e.g.*, through government) would provide a coherent interpretation that fully respects the broadness of the ordinary meaning of the term.

39. Had the drafters intended a narrower meaning restricting public bodies to those entities exercising governmental authority, they might have used terms like "governmental body," "public agency," "governmental agency," or "governmental authority." These terms would have, through their ordinary meaning, more clearly conveyed the sense of exercising

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[25] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.61 (citations omitted).
[26] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.
[27] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.
[28] As noted by the panel in *US – Anti-Dumping and Countervailing Duties (China)*, dictionary definitions "would appear to encompass, but could not be said to be limited to, such entities [vested with or exercising governmental authority]." *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.59.

governmental authority.[29] That they were not used does not itself determine the ordinary meaning of "public body," but the juxtaposition of those terms (governmental versus public; agency or authority versus body) does shed light on the broader concept captured by the term "public body."

40. The role of a treaty interpreter is to understand the ordinary meaning of the term "public body" in its context. Thus, with these observations on the dictionary definitions of "public" and "body," the United States now turns to an examination of those terms in their context. In our view, this context reveals that government control of an entity – and therefore its resources – is central to the proper interpretation of "public body," for in such a situation, when the entity transfers resources, it is transferring the government's resources.

2. Reading the Term "Public Body" in Context Supports the Conclusion that a "Public Body" Includes Any Entity Controlled by the Government Such that the Government Can Use that Entity's Resources as Its Own

41. The ordinary meaning of the terms of a treaty must be understood "in their context."[30] As explained below, reading the term "public body" in context supports the conclusion that a "public body" includes an entity controlled by the government such that the government can use that entity's resources as its own.

a. The Use of the Distinct Terms "Government" and "Public Body" Suggests that these Terms Have Different Meanings

42. In Article 1.1(a)(1) of the SCM Agreement, the term "public body" is part of the disjunctive phrase "by a government or any public body within the territory of a Member." The SCM Agreement thus uses two different terms – "a government" on the one hand and "any public body" on the other hand – to identify the two types of entities that can directly provide a financial contribution.[31] As a contextual matter, the use of the distinct terms "a government" and "any public body" together in this way suggests that the terms have distinct and different meanings. Treaty interpretation should seek to give meaning and effect to all terms of a treaty and not reduce terms to redundancy or inutility.[32] Accordingly, the term "public body" should not be interpreted in a manner that would render it redundant with the word "government."

43. The term "government," as the panel in *US – Anti-Dumping and Countervailing Duties (China)* found, means, among other things: "The governing power in a State; the body or

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[29] Indeed, the Appellate Body noted in *Canada – Dairy* that "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens." *Canada – Dairy (AB)*, para. 97.

[30] Vienna Convention, Article 31.

[31] A financial contribution can also be provided through the use of a "funding mechanism" or via a "private body" entrusted or directed to provide the financial contribution. *See* SCM Agreement, Article 1.1(a)(1)(iv).

[32] As the Appellate Body has explained, "the internationally recognized interpretive principle of effectiveness should guide the interpretation of the WTO Agreement, and, under this principle, provisions of the WTO Agreement should not be interpreted in such a manner that whole clauses or paragraphs of a treaty would be reduced to redundancy or inutility." *US – Offset Act (Byrd Amendment) (AB)*, para. 271. *See also US – Gasoline (AB)*, p. 23.

successive bodies of people governing a State; the State as an agent; an administration, a ministry."[33] In *Canada – Dairy*, the Appellate Body explained that "[t]he essence of 'government' is . . . that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority."[34] The Appellate Body further explained that a "'government agency' is, in our view, an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[35]

44. The term "public body," therefore, should be interpreted as meaning something *other than*, or at least *additional to*, an entity that performs "functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[36] Otherwise, a "public body" is "a government," or a part of "a government," and there is no reason for the term "public body" to have been included in Article 1.1(a)(1) of the SCM Agreement. That is, the term would be reduced to redundancy or inutility, contrary to the customary rules of interpretation.[37] Below, the United States returns to the "essence" or "essential characteristics" these concepts share, an issue explored in the Appellate Body report in *US – Anti-Dumping and Countervailing Duties (China)*.

b. The Use of the Words "A," "Any," and "Or" in Article 1.1(a)(1) of the SCM Agreement Suggests that the Term "Public Body" Should Be Interpreted as Meaning Something Different from and Broader than the Term "Government"

45. In *US – Anti-Dumping and Countervailing Duties (China)*, the panel "consider[ed] significant that in Article 1.1(a)(1) the terms 'a government' and 'any public body' are separated by the disjunctive 'or', suggesting that they are two separate concepts rather than a single concept or nearly synonymous."[38] That panel also reasoned that "the word 'any' before 'public body' suggests a rather broader than narrower meaning of that term, i.e., as referring to 'public bodies' of 'any' kind."[39] The panel concluded that:

> Taking these contextual elements together suggests a meaning of the term "public body" as something separate from and broader than "government" or "government agency", and we consider that given the use of the words "a", "or"

[33] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.57 (*citing* Shorter Oxford English Dictionary, L. Brown (ed.) (Claredon Press, 1993), Vol. I, p. 1123).
[34] *Canada – Dairy (AB)*, para. 97.
[35] *Canada – Dairy (AB)*, para. 97.
[36] *Canada – Dairy (AB)*, para. 97.
[37] Although the terms "government" and "public body" must have distinct meanings, this does not mean that the terms are completely unrelated or unconnected. As described further below, the terms are related, in that a "public body" is an entity controlled by the government, such that the government can use the entity's resources as its own. In the end, the public body's actions are attributable to the Member by virtue of government control. The terms are distinct, however, in that the public body need not have the authority to "regulate," "restrain," "supervise," or "control" the conduct of private citizens.
[38] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.
[39] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.

> and "any", this reading of the phrase "a government or any public body" gives meaning to that phrase as a whole.[40]

46. The United States agrees with this conclusion, which captures the idea that there might be different *types* of public bodies, consistent with the broad range of entities that may be a "public body" according to the dictionary definition of that term – that is, an entity of, pertaining to, or belonging to a community. Some entities that would correctly be deemed "public bodies" might be more akin to government agencies, while others might be corporations engaging in business activities.

47. Additionally, we note that the use of the term "any" draws a further contextual distinction between the terms "government" and "public body" and indicates that the term "public body" should not be interpreted as relating back to the term "government." The language in the SCM Agreement could have been written as "government or public body," or "government or its public bodies," or "government or another public body" or "government or similar public bodies." Considering the text that was chosen, however, the United States submits that the intention was to broaden the types of entities that are subject to the SCM Agreement by including additional types of entities different from government: any public body.

c. The Use of the Term "Government" as a Shorthand Reference for the Phrase "a Government or any Public Body within the Territory of a Member" in Article 1.1(a)(1) of the SCM Agreement Does Not Require a Narrow Interpretation of the Term "Public Body"

48. While the use and juxtaposition of the terms "government" and "public body" in Article 1.1(a)(1) of the SCM Agreement suggests that they are distinct terms with independent definitions, the provision in Article 1.1(a)(1) that the phrase "a government or any public body within the territory of a Member" is referred to in the SCM Agreement as "government" also suggests that the terms "government" and "public body" may be related.

49. The question is: what is the nature of the relationship of these two terms? Understanding the relationship to be only one in which the government has authorized the public body to perform governmental acts – *e.g.*, "to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens"[41] – would mean that the terms "government" and "public body" are not merely related, but that they are identical. Such an understanding would also tend to negate the dictionary definitions of "public" and "body" examined earlier, which do not suggest that these terms refer only to government or entities with governmental authority. As a matter of drafting, it would be odd to attempt to achieve a more restrictive meaning (that of government, or governmental agency) through the use of a broader, and less common, term (public body). On the other hand, understanding the relationship to include control of a "public body" by "a government" (on behalf of the community it represents) gives meaning to both terms and avoids reducing the term "public body" to redundancy.

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[40] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.65.
[41] *Canada – Dairy (AB)*, para. 97.

50. The United States considers that the use of the term "government" to refer to the phrase "a government or any public body within the territory of a Member" is a drafting technique, used so that the lengthy phrase need not be repeated throughout the SCM Agreement.[42] We note that this drafting technique is similar to that used in Article 2.1 of the SCM Agreement, which refers to "an enterprise or industry or group of enterprises or industries" as "certain enterprises." Clearly, the terms "enterprise" and "industry" (and groups thereof) have different meanings, despite being referred to collectively as "certain enterprises." The use of the term "certain enterprises" in Article 2.1 of the SCM Agreement is a drafting technique used to obviate the need to repeat the lengthy phrase "an enterprise or industry or group of enterprises or industries" throughout the text.[43]

51. We recognize that the Appellate Body disagreed with the panel in *US – Anti-Dumping and Countervailing Duties (China)* that "the use of the collective term 'government' has no meaning besides facilitating the drafting of the Agreement."[44] The Appellate Body considered that the "defining elements of the word 'government' inform the meaning of the term 'public body'" and "[t]his suggests that the performance of governmental functions, or the fact of being vested with, and exercising, the authority to perform such functions are core commonalities between government and public body."[45]

52. In the U.S. view, it would be helpful for the Appellate Body to clarify whether it is *only* the possession or exercise of governmental authority that can distinguish a public body. Or whether, as the United States asserts here, a public body may *also* include an entity controlled by the government such that financial contributions made by the entity can be said to have been made on behalf of the government, *i.e.*, such that the government can use the entity's resources as its own.

53. The United States recalls the findings of the panel in *Korea – Commercial Vessels*, which found that "[i]f an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the SCM Agreement."[46] That panel considered that such an "approach is consistent with the fact that Article 1.1(a)(1) provides that both governments and public bodies shall be referred to as 'government'."[47] Similarly, the panel in *US – Anti-Dumping and Countervailing Duties (China)* viewed "the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not part of 'government' for purposes of the Agreement, as well as when 'private' actors

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[42] The panel in *US – Anti-Dumping and Countervailing Duties (China)* came to the same conclusion. *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.66.

[43] This type of drafting technique is used elsewhere in the WTO agreements as well. "Injury" is defined in the SCM Agreement and AD Agreement to mean not only "material injury" and "threat of material injury," but also "material retardation" of the establishment of a domestic injury. *See* SCM Agreement, Article 15, note 45; AD Agreement, Article 3, note 9. The term "financial services" is defined in the GATS *Annex on Financial Services* as including not only financial and banking services, but also "insurance and insurance-related services." *See* GATS *Annex on Financial Services*, para. 5(a).

[44] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 289.

[45] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 290.

[46] *Korea – Commercial Vessels*, para. 7.50 (footnote omitted).

[47] *Korea – Commercial Vessels*, para. 7.50, note 43.

may be said to be acting on behalf of 'government'."[48] These findings suggest that government and any public body can share "core commonalities" that do not result in the two terms effectively carrying the same meaning.

54. It is logical to conclude that the incorporation of the terms "government" (in the narrow sense) and "public body" under the broader umbrella of "government" for purposes of the SCM Agreement suggests that the two terms share some essential characteristics, or "core commonalities." However, characteristics other than the possession of governmental authority suggest themselves in light of the dictionary definitions explored above. If an entity belongs to or is "of" the community as a whole – that is, if it is controlled by that community – that is an essential characteristic shared with government. Moreover, the phrase "government or any public body" in Article 1.1(a)(1) of the SCM Agreement clarifies which entities can provide a "financial contribution." This suggests that the essential characteristic the two terms share should be *whose* economic resources are being conveyed in the financial contribution. In the case of an entity controlled by the government, a transfer by that entity is a transfer of the government's resources, the same as a transfer by the government itself. This, too, suggests that the essential characteristic they share is the government's control of the entity and its resources.

d. The Context Provided by the Term "Private Body" in Article 1.1(a)(1)(iv) of the SCM Agreement Supports an Understanding of the Term "Public Body" that Includes an Entity Controlled by the Government Such that the Government Can Use the Entity's Resources as Its Own

55. The understanding of "public body" as including an entity controlled by the government such that the government can use the entity's resources as its own is further supported by the context provided in Article 1.1(a)(1)(iv) of the SCM Agreement by the use of the term "private body."

56. The terms "public body" and "private body" are juxtaposed in the same provision and are, essentially, opposites. Indeed, the dictionary definition for the term "public" includes: "In general, and in most of the senses, the opposite of *private* adj."[49] "Private," on the other hand, in the sense "[o]f a service, business, etc.," is defined as "provided or owned by an individual rather than the State or a public body."[50]

57. As the opposite of "private" in a commercial sense, then, the term "public" could be defined as *provided or owned by the State or a public body rather than an individual*. Therefore, government ownership of an entity, when accompanied by the ability to control the entity's resources as its own, would be a relevant factor in considering whether an entity is a "public body" capable of providing subsidies on behalf of the government for purposes of Article 1.1(a)(1).

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[48] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.90.
[49] *Oxford English Dictionary Online*, definition of "public, *adj.* and *n.*," at 2 (2009) (Exhibit USA-65).
[50] *The New Shorter Oxford English Dictionary* at 2359 (1993) (Exhibit USA-64).

e. The Context Provided by "Financial Contribution" in Article 1.1(a)(1) of the SCM Agreement Supports an Understanding of "Public Body" that Includes an Entity Controlled by the Government Such that the Government Can Use the Entity's Resources as Its Own

58. In seeking to understand the term "public body" in its context, it is important to recall that the SCM Agreement is identifying those entities which may make "financial contributions," as well as the varieties of activities which may constitute such financial contributions. Under Article 1.1(a)(1) of the SCM Agreement, financial contributions include "a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees)," foregone or uncollected "government revenue," "provid[ing] goods or services other than general infrastructure", "purchas[ing] goods," and "mak[ing] payments to a funding mechanism." The broad language used and multiple methods of conveying value described in this article reveal an intention to capture within the meaning of "financial contribution" a broad array of transfers of value. Entities controlled by the government can convey value just as the government can, and the value conveyed can be precisely the same as that conveyed by the government.

59. Consider, for example, a "direct transfer of funds" by a government to a recipient in the form of a grant. Conveying value in this way is plainly a "financial contribution" within the meaning of the SCM Agreement. If the government formed a legal entity (for example, a corporation), controlled the entity (for example, by holding 100 percent of the shares of the corporation), and the entity provided the same grant to a recipient, the same financial contribution (in the ordinary sense) has occurred: the government has conveyed value. Whether the funds are provided directly by the government or by an entity controlled by the community through its government, it is the Member's resources that are being transferred. Therefore, it is the Member that is making the financial contribution.[51]

60. The same logic applies to lower levels of ownership as well, so long as the government controls the entity. Irrespective of the government's ownership stake, if the government, through whatever means, controls the entity such that it can use the entity's resources as its own, then a grant provided by the entity to a recipient is a conveyance of value by the Member. The entity's transfer of its financial resources is a transfer of the government's resources (that is, financial resources the government could otherwise use as its own for other purposes). And because the government can control the entity, any transaction that conveys value to a recipient is either authorized by or not restrained by the government.

61. Article 1.1(a)(1) of the SCM Agreement illustrates a broad array of financial contributions through which value can be conveyed from a government to a recipient. Nothing in that provision suggests that the mere form a government-controlled entity takes would dictate whether a particular conveyance of value from a government falls within or without the scope of Article 1.1(a)(1). Nor would the term "financial contribution" suggest that a distinction should

[51] To simplify matters, we have used as a hypothetical example a "direct transfer of funds" in the form of a grant. The same logic applies with equal force in the case of other forms of financial contribution, such as when a government provides goods for less than adequate remuneration.

be drawn between transactions based on whether the entity or corporation is controlled by the government or is "vested with or exercising governmental authority." If in both circumstances a conveyance is made of the government's own resources, in both circumstances a "financial contribution" has been made by the government.

f. Further Context in Article 1.1(a)(1) of the SCM Agreement, Such as "Payments to a Funding Mechanism," Supports This Understanding of the Scope of Transactions That Are "Financial Contributions"

62. The understanding of "financial contribution" set out above suggests that this concept is intended to delineate economic activities of entities through which a Member may convey value to a recipient. It further underscores that the SCM Agreement reaches activities through which value may be conveyed in the same way as if the government had provided the financial contribution directly. For example, Article 1.1(a)(1)(iv) describes another means to convey value: "a government makes payments to a funding mechanism."

63. While not further elaborated in the SCM Agreement, the clause suggests that the government or any public body transfers money to a pool or instrument that then provides financial resources (funds) to recipients. The dictionary defines the noun "fund" as "a stock or sum of money, esp. as set apart for a particular purpose," "the money at a person's disposal; financial resources," and "a portion of revenue set apart as security for specified payments." As a verb, "fund" is defined as "supply with funds, finance (a person, position, or project)" and "funding" as "the action of the [verb]."[52] The word "mechanism" is defined as "a means by which a particular effect is produced."[53] The ordinary meaning of the term "funding mechanism" suggested by these dictionary definitions is a means by which money is supplied for a particular purpose.

64. However, significantly, nothing in the phrase "a government makes payments to a funding mechanism" suggests that the government makes any further decisions on what payments are made and to which recipients. The term "mechanism" rather suggests that it is that pool or instrument that undertakes to distribute the financial resources.

65. Thus, this "funding mechanism" provision indicates that the transfer of value by a government to a recipient through such a mechanism can be disciplined under the SCM Agreement. The government could have made a payment directly to a recipient, but instead used a funding mechanism. The Agreement reaches the funding mechanism transaction because, if the government makes payments to a funding mechanism and then those funds are provided to recipients, there is the same conveyance of value from the Member. And nothing in the ordinary meaning of the term "funding mechanism" indicates that the funding mechanism is vested with or exercising governmental authority when it carries out this transfer. Rather, the funding mechanism just dispenses funds.

[52] *The New Shorter Oxford English Dictionary* at 1042 (1993) (Exhibit USA-64).
[53] *The New Shorter Oxford English Dictionary* at 1728 (1993) (Exhibit USA-64).

66. The inclusion of government payments to a funding mechanism in Article 1.1(a)(1)(iv) supports a particular understanding of the meaning of "financial contribution" and this provides additional context for the interpretation of "public body," as indicated above. When a financial contribution flows to a recipient through the economic activity of an entity controlled by the government, value is conveyed from a Member to that recipient in the same way it would be if the government had provided the financial contribution directly. Thus, this element further supports the view that Article 1.1(a)(1) of the SCM Agreement is designed to capture a broad array of such conveyances of value within its definition of "financial contribution."

g. The Context Provided by the "Entrusts or Directs" Language in Article 1.1(a)(1)(iv) of the SCM Agreement Does Not Weigh Against an Understanding of "Public Body" that Includes an Entity Controlled by the Government Such that the Government Can Use the Entity's Resources as Its Own

67. Article 1.1(a)(1)(iv) of the SCM Agreement provides that "there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as 'government')" where:

> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments.

68. Analyzing this provision as part of its contextual analysis of the term "public body" in *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body considered that:

> [B]ecause the word "government" in Article 1.1(a)(1)(iv) is used in the sense of the collective term "government", that provision covers financial contributions provided by a government or any public body where "a government or any public body" entrusts or directs a private body to carry out one or more of the type of functions or conduct illustrated in subparagraphs (i)-(iii). Accordingly, subparagraph (iv) envisages that a public body may "entrust" or "direct" a private body to carry out the type of functions or conduct illustrated in subparagraphs (i)-(iii).[54]

69. The Appellate Body further reasoned that "for a public body to be able to exercise its authority over a private body (direction), a public body must itself possess such authority, or ability to compel or command" and, "[s]imilarly, in order to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility."[55] The United States agrees that this statement could describe authority possessed by some public bodies.

70. However, it does not necessarily follow that *all* public bodies must have this authority. Indeed, many organs of Member governments – including ministries, departments, and agencies

[54] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 293.
[55] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 294.

– do *not* possess the legal authority to entrust or direct private bodies to carry out the functions identified in Articles 1.1(a)(1)(i)-(iii), even if, in other respects, they may possess and exercise authority to "'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens."[56] (Still other ministries, departments, and agencies may not even have the authority to regulate, restrain, supervise, or control the conduct of private citizens – for example, libraries, or zoos, or trade agencies). The absence of authority to entrust or direct private bodies does not move these organs outside the category of "government." Similarly, the absence of authority to entrust or direct private bodies should not, as a definitional matter, move a particular entity outside the category of "public body."

71. We also recall that the term "government" in subparagraph (iv) of Article 1.1(a)(1) is used in the collective sense.[57] Thus, subparagraph (iv) provides that there is a financial contribution when a government or any public body entrusts or directs a private body:

> . . . to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the [*government or any public body within the territory of a Member*] and the practice, in no real sense, differs from practices normally followed by [*governments or any public bodies within the territory of a Member*].

72. The reference to government functions in Article 1.1(a)(1)(iv) cannot be understood as relating to the "authority to 'regulate, control, supervise or restrain' the conduct of others," because that is not supported by the text. The language in subparagraph (iv) of Article 1.1(a)(1) simply refers back to the functions described in subparagraphs (i) through (iii).

73. Consequently, reading Article 1.1(a)(1)(iv) as requiring that the term "public body" be interpreted as meaning an entity vested with or exercising authority to perform governmental functions is circular. Necessarily, an entity alleged to have taken one or more of the actions identified in Article 1.1(a)(1)(i)-(iii) possesses – at least allegedly – authority to perform such actions. So, an entity's possession of such authority tells us nothing about whether the entity is a "public body" or a "private body" – or part of "a government" for that matter.

74. However, the presence or absence of government control permits distinctions to be drawn between entities that are "public bodies" on the one hand, and those that are "private bodies" on the other, requiring a finding of entrustment or direction with respect to alleged financial contributions provided by the latter type of entity. If an entity is controlled by the government such that the government can use that entity's resources as its own, though, no finding of entrustment or direction would be necessary because it is the government's own resources that are being conveyed.

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[56] *Canada – Dairy (AB)*, para. 97.

[57] *See US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 293.

h. The Term "Organismo Público" in the Spanish Version of Article 1.1(a)(1) of the SCM Agreement Does Not Need To Be Interpreted in a Manner Identical to the Term "Organismos Públicos" in the Spanish Version of Article 9.1(a) of the Agreement on Agriculture

75. The Spanish versions of Article 1.1(a)(1) of the SCM Agreement and Article 9.1(a) of the Agreement on Agriculture both contain the term "organismo público." In these different contexts, however, this term carries different meanings. Reading all of the terms in these two provisions in the three WTO languages confirms that "public body" in Article 1.1(a)(1) of the SCM Agreement does not have the same meaning as government agency in Article 9.1(a) of the Agreement on Agriculture.

76. The Spanish version of Article 9.1(a) of the Agreement on Agriculture includes the phrase "los gobiernos o por organismos públicos." The English version of the same phrase in Article 9.1(a) is "governments or their agencies," and the French version is "les pouvoirs publics ou leurs organismes."

77. As noted above, the Spanish version of Article 1.1(a)(1) of the SCM Agreement, like Article 9.1(a) of the Agreement on Agriculture, also contains the term "organismo público." However, the English and French versions of Article 1.1(a)(1) use the terms "public body" and "organisme public," respectively, which differ from the terms used in Article 9.1(a) of the Agreement on Agriculture. The same words are used in Article 1.1(a)(1) and Article 9.1(a) in only one of the three WTO languages.

78. The presence of the same term, "organismo público," in only the Spanish versions of Article 1.1(a)(1) of the SCM Agreement and Article 9.1(a) of the Agreement on Agriculture does not lead to the conclusion that use of this term in two different provisions should be understood to carry the same meaning. For the following reasons, the Appellate Body's interpretation in *Canada – Dairy*[58] of "government agency" (organismo público) in Article 9.1(a) of the Agreement on Agriculture should not dictate the interpretation of "public body" (organismo público) in Article 1.1(a)(1) of the SCM Agreement.

79. First, as the Appellate Body recognized in *US – Anti-Dumping and Countervailing Duties (China)*, "dictionary definitions suggest a rather broad range of potential meanings of the term 'public body', which encompasses a variety of entities, including both entities that are vested with or exercise governmental authority and entities belonging to the community or nation"[59] and "dictionary definitions of these words in Spanish and French would accommodate a similarly broad range of potential meanings of the term 'public body'."[60] The mere fact that the broad term "organismos públicos" has been interpreted narrowly in Article 9.1(a) of the

[58] In *Canada – Dairy*, the Appellate Body interpreted the term "government agency" in Article 9.1(a) of the Agreement on Agriculture – or "organismo público" in the Spanish version of that provision – as "an entity which exercises powers vested in it by a 'government' for the purpose of performing functions of a 'governmental' character, that is, to 'regulate', 'restrain', 'supervise' or 'control' the conduct of private citizens." *Canada – Dairy (AB)*, para. 97.
[59] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.
[60] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 285.

Agreement on Agriculture is not inconsistent with the use of that same broad term to convey a different, broader meaning in a different context.

80. Second, the terms of Article 9.1(a) of the Agreement on Agriculture, in any language, are different from the terms of Article 1.1(a)(1) of the SCM Agreement. Article 9.1(a) of the Agreement on Agriculture refers to "governments or their agencies," "les pouvoirs publics ou leurs organismes," and "los gobiernos o por organismos públicos." Article 1.1(a)(1) of the SCM Agreement, on the other hand, refers to "a government or any public body within the territory of a Member," "des pouvoirs publics ou de tout organisme public du ressort territorial d'un Membre," and "un gobierno o de cualquier organismo público en el territorio de un Miembro." These differences in the terms used – in English, French, and Spanish – must be taken into account in the interpretive process.

81. As is clear from the language quoted in the previous paragraph, Article 9.1(a) of the Agreement on Agriculture creates a link between the term "governments" or "pouvoirs publics" and the term "agencies" or "organismes" through the use of the word "their" or "leurs." This link is noticeably absent from Article 1.1(a)(1) of the SCM Agreement. While it is true that the Spanish version of the Agreement on Agriculture appears not to have the same link as the English and French versions, the language of the Spanish version of Article 9.1(a) of the Agreement on Agriculture is nevertheless also different from the language used in Article 1.1(a)(1) of the SCM Agreement, as reflected in the quotations above.

82. Indeed, in *Canada – Dairy*, the Appellate Body itself drew a link between the definition of "their agencies" or "leurs organismes" or "organismos públicos" and the term "governments" or "les pouvoirs publics" or "los gobiernos." Earlier in its report, the Appellate Body had stated that "[t]he essence of 'government' is, therefore, that it enjoys the effective power to 'regulate', 'control' or 'supervise' individuals, or otherwise 'restrain' their conduct, through the exercise of lawful authority."[61] The Appellate Body used the same four verbs again later in elaborating the meaning of the term "government agency."[62] This confirms that the Appellate Body was drawing a link between the terms "governments" and "agencies" (in the English version), which link is suggested by the presence of the terms "their" or "leurs." Again, however, the terms "their" and "leurs" are absent from the text of Article 1.1(a)(1) of the SCM Agreement.

83. Third, the Appellate Body in *Canada – Dairy* was interpreting Article 9.1(a) of the Agreement on Agriculture, not Article 1.1(a)(1) of the SCM Agreement. This means that it was interpreting the specific term "their agencies" or "leurs organismes" or "organismos públicos" in the context of Article 9.1(a) of the Agreement on Agriculture and in light of the object and purpose of the Agreement on Agriculture. The trio of terms in Article 1.1(a)(1) is different, and situated in a different context, in a different Agreement that has its own object and purpose. Notably, in *US – Anti-Dumping and Countervailing Duties (China)*, both the panel and the Appellate Body declined to rely on Article 9.1(a) of the Agreement on Agriculture as context for the interpretation of Article 1.1(a)(1) of the SCM Agreement.[63] Nor did the Appellate Body in

[61] *Canada – Dairy (AB)*, para. 97.
[62] *Canada – Dairy (AB)*, para. 97.
[63] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.63; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, paras. 328-332.

Canada – Dairy consider Article 1.1(a)(1) relevant context for the interpretation of Article 9.1(a).

84. To conclude, the context of the term "public body" in Article 1.1(a)(1) of the SCM Agreement supports an interpretation of that term that includes entities controlled by a government such that the government can use the entity's resources as its own, but not necessarily exercising governmental functions, such as regulating, restraining, supervising, or controlling the conduct of private citizens. The term "public body" must mean something *different than* the term "government" or "government agency." The terms of Article 9.1(a) of the Agreement on Agriculture (*including* "government agency"), as interpreted by the Appellate Body in *Canada – Dairy*, do not provide relevant context that requires a different result.

3. Reading the Term "Public Body" in Light of the Object and Purpose of the SCM Agreement Supports the Conclusion that a "Public Body" Includes Any Entity Controlled by the Government Such That the Government Can Use the Entity's Resources As Its Own

85. Under the customary rules of interpretation, the terms of an international agreement also must be interpreted in light of the object and purpose of the agreement. Here, the object and purpose of the SCM Agreement support an interpretation of the term "public body" as including an entity controlled by the government such that the government can use the entity's resources as its own, without the additional requirement that the entity must be vested with authority from the government to perform governmental functions.

86. While the SCM Agreement has no preamble or explicit indication of its object and purpose, the Appellate Body has noted that the SCM Agreement "strengthen[s] and improve[s] GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions."[64] In *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body stated that the SCM Agreement "reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures."[65]

87. The Appellate Body and panels have sought to ensure that the SCM Agreement is not interpreted rigidly or formalistically in a manner that would undermine its disciplines on trade-distorting subsidization. In *Canada – Autos*, the Appellate Body rejected an interpretation of Article 3.1(b) of the SCM Agreement that "would make circumvention of obligations by Members too easy."[66] In *Australia – Automotive Leather II*, the panel declined to restrict its analysis of export contingency exclusively to the legal instruments or administrative arrangements surrounding the subsidy, stating that "[s]uch a determination would leave wide open the possibility of evasion of the prohibition of Article 3.1(a). . . ."[67] In *US – Softwood Lumber IV*, the Appellate Body explained that "the object and purpose of the SCM Agreement . . . includes disciplining the use of subsidies and countervailing measures while, at the same time,

[64] *US – Softwood Lumber IV (AB)*, para. 64.
[65] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 115.
[66] *Canada – Autos (AB)*, para. 142.
[67] *Australia – Automotive Leather II*, para. 9.56.

enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies."[68] The Appellate Body emphasized in *US – Softwood Lumber IV* the right of WTO Members to "fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement."[69]

88. Interpreting the term "public body" as including entities controlled by the government, such that the government can use the entity's resources as its own, preserves the strength and effectiveness of the subsidy disciplines. Such an interpretation ensures that government transfers of value through entities under government control, which potentially would be subject to subsidy disciplines were the governments themselves to undertake them directly, are not placed outside the reach of the subsidy disciplines due to a mere formality. By emphasizing the possession or exercise of "governmental authority," the Panel's interpretation could be read as removing a potentially broad range of subsidization from the disciplines of the SCM Agreement in a manner at odds with the object and purpose of the Agreement.

89. The Panel's interpretation relied on the Appellate Body's definition of inherent "governmental functions": to regulate, control, supervise, or restrain private persons.[70] Government-*controlled* entities, however, that do not engage in these typical "governmental functions," and do not require any express *delegation* of power, could nevertheless transfer the government's economic resources in ways that confer benefits to certain enterprises. Such subsidization might not be reachable under the Panel's interpretation.

90. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body noted the panel's concern about "what it saw as the implications of too narrow an interpretation" but cautioned that "too broad an interpretation of the term 'public body' could equally risk upsetting the delicate balance embodied in the SCM Agreement because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies."[71]

91. The United States submits that an interpretation of the term "public body" that includes entities controlled by a government such that the government can use the entity's resources as its own is not so broad that it would undermine the object and purpose of the SCM Agreement. As the panel in *US – Anti-Dumping and Countervailing Duties (China)* explained, a finding that an entity is a "public body" does not "condemn that entity, or otherwise . . . cast it in a negative light."[72] Nor would such a finding end the subsidy analysis. It would only mean that there is the potential for a financial contribution that confers a benefit.[73] These elements of a subsidy – financial contribution, benefit, as well as specificity – could then be examined. Therefore, finding entities controlled by the government to be "public bodies" would not extend the reach of the SCM Agreement in a manner that could undermine its object and purpose. To the contrary, it

[68] *US – Softwood Lumber IV (AB)*, para. 95 (*citing US – Carbon Steel (AB)*, paras. 73-74).
[69] *US – Softwood Lumber IV (AB)*, para. 95 (*citing US – Carbon Steel (AB)*, paras. 73-74).
[70] *Canada – Dairy (AB)*, para. 97.
[71] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 303.
[72] *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 8.78.
[73] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, paras. 8.80-8.81.

would ensure that subsidizing governments are subject to the disciplines of the SCM Agreement even when making financial contributions through entities they control.

III. CROSS-CUMULATION

92. The United States appeals the Panel's finding that "cross-cumulation" is inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.[74] The Panel made this finding both "as applied" in the original investigation at issue, and "as such" with respect to a provision of U.S. law – 19 U.S.C. §1677(7)(G) – which addresses cumulation in injury determinations where antidumping or countervailing duty petitions have been filed, or investigations have been initiated, simultaneously. The United States submits that the Panel erred, and that cross-cumulation in injury determinations is not inconsistent with the SCM Agreement when relevant provisions of the SCM Agreement are read in context and in light of the object and purpose of the Agreement. The United States also appeals the Panel's conclusion that 19 U.S.C. §1677(7)(G) "requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports,"[75] because the Panel's findings in this respect were not made in conformity with the requirements of Article 11 of the DSU. The United States therefore respectfully requests that the Appellate Body reverse the Panel's legal conclusion under Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, and related interpretations in section 7.6.1 of the panel report.

A. Measures at Issue

93. "Cross-cumulation" refers to the aggregation of the volume and effect of dumped and subsidized imports from all countries subject to simultaneous antidumping and countervailing duty investigations for purposes of assessing material injury. That is, where certain criteria are met, an injury determination may be made on the basis of the volume and price effects, and the impact on the domestic industry, of dumped and subsidized imports from all countries subject to investigation.

94. With respect to the "as applied" finding, petitions for antidumping and countervailing duty investigations were filed in November 2000 covering imports of hot-rolled steel products. The antidumping duty petitions covered imports from Argentina, China, India, Indonesia, Kazakhstan, Netherlands, Romania, South Africa, Taiwan, Thailand, and Ukraine. The countervailing duty petitions covered imports from Argentina, India, Indonesia, South Africa, and Thailand. That is, imports from Argentina, India, Indonesia, South Africa, and Thailand were alleged to have been both dumped and subsidized, while imports from the remaining sources (China, Kazakhstan, Netherlands, Romania, Taiwan, Ukraine) were alleged to have been dumped only. The U.S. International Trade Commission ("USITC") cumulated the volume and effect of the subsidized and dumped imports from all countries simultaneously subject to investigation when making its injury determinations. This included imports that were both subsidized and dumped as well as imports that were just dumped.

[74] *See, e.g.*, Panel Report, paras. 7.356 and 7.369.
[75] Panel Report, paras. 7.322, 7.339, 7.340, and 7.358.

95. With respect to the "as such" finding, the Panel's analysis focused on a provision of U.S. law addressed to cumulation. Specifically, section 1677(7)(G)(i) of title 19 of the U.S. Code provides that, in original injury investigations, the Commission shall cumulatively assess the volume and effect of imports of subject merchandise from all countries with respect to which:

> (I) petitions were filed under section 1671a(b)[76] or 1673a(b)[77] of this title on the same day,
>
> (II) investigations were initiated under section 1671a(a)[78] or 1673a(a)[79] of this title on the same day, or
>
> (III) petitions were filed under section 1671a(b) or 1673a(b) of this title and investigations were initiated under 1671a(a) or 1673a(a) of this title on the same day,
>
> if such imports compete with each other and with domestic like products in the United States market.[80]

96. This provision explicitly provides for cumulation with respect to all countries subject to AD petitions filed on the same day, and with respect to all countries subject to CVD petitions filed on the same day.[81] With respect to cross-cumulation, the statute on its face is not definitive. Nonetheless, the Panel found that section 1677(7)(G)(i) requires cross-cumulation and therefore is inconsistent with Article 15.3 of the SCM Agreement.

97. In sum, as long as certain conditions are met, the Panel understood the U.S. statute to require the cumulation of the volume and price effects of imports from all countries subject to investigation for purposes of assessing injury, whether the imports are all dumped or all subsidized, or are a combination of dumped and subsidized imports.

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[76] Section 1671a(b) is the section of the U.S. statute relating to the filing of a countervailing duty petition and the subsequent initiation of a countervailing duty investigation. *See* 19 U.S.C. § 1671a(b) (Exhibit USA-83).
[77] Section 1673a(b) is the section of the U.S. statute relating to the filing of an antidumping duty petition and the subsequent initiation of the antidumping duty investigation. *See* 19 U.S.C. § 1673a(b) (Exhibit USA-84).
[78] Section 1671a(a) authorizes Commerce to initiate a countervailing duty investigation on its own initiative. *See* 19 U.S.C. § 1671a(a) (Exhibit USA-83).
[79] Section 1673a(a) authorizes Commerce to initiate an antidumping duty investigation on its own initiative. *See* 19 U.S.C. § 1673a(a) (Exhibit USA-84).
[80] 19 U.S.C. § 1677(7)(G) (Exhibit USA-5). Section 1677(7)(G)(ii) further provides that the Commission may "not cumulatively assess the volume and effect of imports" in an injury investigation, if the investigation has been terminated, or if Commerce "has made a preliminary negative determination" for the imports, "unless the administering authority subsequently made a final affirmative determination with respect to those imports before the Commission's final [injury] determination is made..." Under 19 U.S.C. 1677b(b)(4), Commerce must disregard any subsidies found to be *de minimis*.
[81] *See* Panel Report, paras. 7.322 and 7.339.

B. Article 15.3 of the SCM Agreement Does Not Prohibit Cross-Cumulation

1. The Text of Article 15.3 Does Not Expressly Prohibit or Even Address Cross-Cumulation, and Its Silence Cannot Be Read as a Prohibition

98. The Panel focused its analysis of cross-cumulation on the interpretation of Article 15.3 of the SCM Agreement, which is the only provision of the SCM Agreement that specifically addresses cumulation.[82] The Panel found that Article 15.3 allows an investigating authority to cumulatively assess the effects of imports subject to simultaneous countervailing duty investigations. The United States does not disagree. However, the Panel erred when it limited Article 15.3 by imposing an obligation on Members not to cumulate subsidized imports with dumped imports. This interpretation is flawed. The text of Article 15.3 contains no such obligation, and this interpretation cannot be sustained when the text is read in light of relevant context and the object and purpose of the SCM Agreement.

99. The Panel went on to make similar findings under Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement. As we will explain below, these findings were premised on the same reasoning underlying the Panel's interpretation of Article 15.3, *i.e.*, that the use of the term "subsidized imports" constitutes an express limitation on the right to cumulate subsidized imports with dumped imports. Accordingly, the Panel's findings regarding Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement are also in error.

100. The United States will begin, as the Panel did, by addressing Article 15.3. Article 15.3 of the SCM Agreement provides that:

> Where imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

101. Contrary to the Panel's finding, the text of Article 15.3 does not prohibit cross-cumulation of subsidized imports with dumped imports. Instead, Article 15.3 addresses the conditions under which an authority "may cumulatively assess" imports from all countries that are found to be subsidized. By its terms, Article 15.3 provides that, "[w]here imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effects of *such imports* only if" certain conditions are met. By using the phrase "such imports," Article 15.3 makes clear that the only category of imports subject to the criteria contained in Article 15.3 are imports from countries that "are simultaneously subject to countervailing duty investigations."

[82] Panel Report, section 7.6.1.5, paras. 7.338-7.355.

102. Article 15.3 does not address the circumstance in which simultaneous countervailing duty investigations *and* antidumping investigations may be taking place. Nor, by its terms, does it impose an obligation on an investigating authority not to cumulatively assess subsidized imports with imports that are dumped. It does not address dumped imports at all. Rather, Article 15.3 is *silent* on the issue of whether cumulation of dumped and subsidized imports is permissible.

103. In similar circumstances, the Appellate Body has found that the silence of an agreement on the permissibility of a particular methodological approach does not indicate that the methodology is prohibited.[83] For example, in *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body rejected Argentina's claim that an investigating authority could not cumulate imports from multiple countries in sunset reviews.[84] In that dispute, Argentina argued that the cumulation of imports from multiple countries was not permitted in sunset reviews under the AD Agreement, because the practice was not specifically authorized or addressed in the sunset provisions of the Agreement.

104. The Appellate Body rejected Argentina's claim, concluding that, although cumulation was not expressly authorized in sunset reviews, it was permissible because it was consistent with the policies underlying the AD Agreement.[85] In reaching this conclusion, the Appellate Body explained that "[t]he silence of the text on this issue ... cannot be understood to imply that cumulation is prohibited in sunset reviews."[86]

105. The United States suggests a similar finding here. Article 15.3 does not expressly prohibit or even address cross-cumulation. The fact that Article 15.3 does not specifically authorize an authority to cumulate subsidized imports with imports that are dumped does not, in and of itself, indicate that such an approach is prohibited by the SCM Agreement. The Panel's view that Article 15.3's silence on this matter must be read as prohibiting this practice would read into that text an obligation that is not there. In a similar circumstance in *US – Oil Country Tubular Goods Sunset Review*, the Appellate Body has cautioned against such an approach. Accordingly, following that same approach here, the Panel's findings should be reversed.

2. The Context Provided by the AD Agreement and Article VI of the GATT 1994 Supports an Interpretation that Cross-Cumulation is Permitted by the SCM Agreement

106. As the Appellate Body has acknowledged previously in the context of the AD Agreement, the ability to cumulate the injurious effects of dumped imports is a "useful tool" for an investigating authority "to ensure that all sources of injury and their cumulative impact on the domestic industry are taken into account in an investigating authority's determination."[87] The Appellate Body explained the rationale behind cumulation in *EC – Tube or Pipe Fittings* in the context of dumped imports:

[83] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[84] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[85] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, paras. 294-300.
[86] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 294 (emphasis added).
[87] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 297.

> A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the "dumped imports" as a whole and that it may be injured by the total impact of the dumped imports, even though those dumped imports originate from various countries. If, for example, the imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not be individually identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, by expressly providing for cumulation in Article 3.3 of the Antidumping Agreement, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports.[88]

107. The Appellate Body's explanation in *EC – Tube or Pipe Fittings*, outlining why cumulation plays an important role in the context of dumped imports, applies with equal force to a situation in which subject imports are dumped and subsidized, as was the case in the investigation at issue here. In contrast, an analysis that focuses solely on the injurious effects of either dumped or subsidized imports alone when both types of unfairly traded imports are injuring the domestic industry at the same time would necessarily prevent the investigating authority from "adequately taking into account" the injurious effects of all unfairly traded imports, and would render the authority's injury analysis less than complete.

108. As the Appellate Body has recognized, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously."[89] The Appellate Body also has expressly recognized the parallel application of the AD and SCM Agreements, most recently in *China – GOES*.[90] Therefore, the obligations contained in the SCM Agreement must take account of the context offered both by Article VI of the GATT 1994 and the provisions of the AD Agreement.

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[88] *EC – Tube or Pipe Fittings (AB)*, para. 116. Although the *EC – Tube or Pipe Fittings* dispute involved the injury provisions of the AD Agreement, the cumulation provisions of the SCM and AD Agreement are nearly identical and thus the same rationale would apply to the practice of cumulation under both Agreements. *Compare* AD Agreement, Article 3.3 *with* SCM Agreement, Article 15.3.

[89] *US – Upland Cotton (AB)*, para 549 (quoting *Argentina – Footwear (EC) (AB)*, para. 81 (original emphasis)); *see also Korea – Dairy (AB)*, para. 81; *US – Gasoline (AB)*, p. 23, para. 21; *Japan – Alcoholic Beverages II (AB)*, p. 12, para. 106; and *India – Patents (US) (AB)*, para. 45).

[90] *China – GOES (AB)*, para 128 ("The paragraphs of Article 3 and 15 thus stipulate, in detail, an investigating authority's obligations in determining the injury to the domestic industry caused by subject imports. Together, these provisions provide and investigating authority with the relevant framework and disciplines for conducting an injury and causation analysis.").

109. Article VI of the GATT 1994 provides important context for considering the object and purpose of the SCM Agreement and its relationship with the AD Agreement.[91] Article 15.1 of the SCM Agreement expressly references Article VI of the GATT 1994, stating that the injury findings prescribed in Article 15 of the SCM Agreement relate to a "determination for purposes of Article VI of GATT 1994."[92] The AD Agreement contains the same language in reference to Article VI. Article VI:6(a) of the GATT 1994, in turn, provides that a Member shall not impose antidumping or countervailing duties "unless it determines that the effect of *dumping or subsidization*, as the case may be, is such as to cause or threaten to cause material injury to an established domestic industry…"

110. In interpreting Article VI:6(a) of the GATT 1994, all language in the article should be considered. The phrase "as the case may be" acknowledges that cumulation of dumped and subsidized imports may be appropriate in particular injury investigations. In particular, this language recognizes that there may be situations in which it "may be the case" that the unfair trade practices covered by an authority's injury determination may involve dumping, subsidization, or both unfair trade practices. According to most common definitions, "as the case may be" means "according to the circumstances," and therefore does not indicate a binary choice between two options.[93] Article VI:6(a) requires that the effects of "dumping or subsidization, as the case may be," must cause injury to the domestic industry. The "circumstances" invoked by this phrase are the circumstances involving the injury to the domestic industry caused by the unfair trade practices. Very often, a domestic industry will be faced with both dumped and subsidized imports, and where these circumstances exist, it would be appropriate to interpret Article VI:6(a) as contemplating a cumulative analysis of injury based on these circumstances. Therefore, the phrase "as the case may be," as used in Article VI of the GATT1994, indicates that the Agreement contemplates that an injury investigation may involve an examination of the injurious effects of dumped imports, subsidized imports, or dumped and subsidized imports. Furthermore, the use in Article VI:6(a) of the word "or" to join the phrases "dumping" and "subsidization" and the use of the phrase "as the case may be" reflects the fact that injury determinations can involve either or both unfair trade practices.

111. The Panel's interpretation – focusing solely on the injurious effects of either dumped imports or subsidized imports alone – would have the effect of forcing a Member to make a country-specific analysis in the above circumstance. As discussed above, both the text of the AD and SCM Agreements, and the Appellate Body in *EC – Tube or Pipe Fittings*, recognize the inherent limitations in such an analysis.[94] The United States believes that denying the right to cross-cumulate, such that the same volume of subsidized imports from a country can be countervailed in some circumstances but not in others, will impair the right afforded to Members under the SCM Agreement to countervail injurious subsidized imports. For, while the

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[91] The cumulation of dumped and subsidized imports is fully consistent with the object and purpose of the SCM and AD Agreements, which authorize Members to provide relief to industries that are being injured by unfairly traded imports from a variety of sources. *EC - Tube or Pipe Fittings (AB)*, para. 116.

[92] SCM Agreement, Article 15.1.

[93] *See, e.g.*, "Collins" online definition at: http://www.collinsdictionary.com/dictionary/english/as-the-case-may-be, last checked August 13, 2014; and "Oxford Dictionaries" online definition at: http://www.oxforddictionaries.com/us/definition/american_english/as-the-case-may-be?q=as+the+case+may+be, last checked August 13, 2014.

[94] *EC – Tube or Pipe Fittings (AB)*, para. 116.

obligations applicable in the context of antidumping and countervailing duty investigations are legally distinct, the injury that has occurred to an industry, from the perspective of the relevant domestic industry, is cumulative. The United States therefore urges the Appellate Body to interpret the SCM Agreement in a way that ensures that the treatment of those imports is consistent under all the applicable provisions of the WTO agreements.

112. A complete analysis of the issue of whether cross-cumulation is prohibited by the SCM Agreement is assisted by a simple example using some of the facts likely to arise in injury investigations. In the example, the result could be a situation in which the same volume and price effects of imports might be cumulated and countervailed in some circumstances, but not in others – an anomalous result that would seem to permit the same volume of imports, injuring the domestic industry in the same way, to escape remedies were cumulation not permitted.

113. To illustrate this point, assume that an injury investigation involves imports from five countries that are found to be subsidized. One of these countries, Country A, has a small volume of subsidized imports that might not itself be sufficient to cause material injury to an industry and warrant the imposition of countervailing duties under the SCM Agreement. In this circumstance, as the Panel recognized,[95] an investigating authority may cumulate subsidized imports from Country A with the subsidized imports from the other four countries for purposes of making an injury determination. That is, if the cumulated subsidized imports from all five countries are found to be materially injuring the domestic industry, countervailing duties may be imposed on the imports of each country, including those from Country A. We agree with the Panel that cumulation is permitted in this circumstance.

114. Now, assume that the injury investigation described above involves the same volume of unfairly traded imports from Country A, but under these facts the imports from the other four countries were found to be dumped and not subsidized. In this scenario, assume the domestic industry is competing with the exact same volume of unfairly traded imports as in the example above, and that the imports combined are having the exact same volume, price effects, and impact on the domestic industry. Under the Panel's interpretation, the imports from Country A may not be cumulated with the dumped imports from the four other countries and thus may not warrant imposition of countervailing duties, even though Country A's imports have been found to be subsidized and are injuring the industry in exactly the same manner as they did in the original scenario – where Country A's imports *may* be cumulated and countervailed. That is, the Panel's interpretation leads to a situation in which the identical injury caused by the identical imports can be countervailed in some circumstances but not in others.

115. We also note that, under the Panel's interpretation, the outcome of the investigation with respect to Country A does not depend on whether Country A's imports are subsidized and causing injury. Rather, if cumulation is limited to volumes of imports that are subsidized only, the outcome with respect to Country A depends on whether *other* countries' imports are subsidized. In our view, such an interpretation could lead to inconsistent and unpredictable results, which do not support the object and purpose of the SCM Agreement, or of the WTO Agreements as a whole.

[95] Panel Report, para. 7.341.

116. For these reasons, the Appellate Body should reverse the Panel's findings in section 7.6.1.5.1 of the panel report, and find that cross-cumulation is not inconsistent with Article 15.3 of the SCM Agreement, when read in context and in light of the object and purpose of the Agreement.

C. Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement Do Not Prohibit Cross-Cumulation

117. The Panel's findings with respect to Articles 15.1, 15.2, 15.4, and 15.5 are similarly flawed. The Panel found that the consistent reference to "subsidized imports" constitutes an "express limitation" under Article 15 more generally,[96] and that "the use of the term 'subsidized imports' in these provisions limits the scope of the investigating authority's injury assessment only to subsidized imports."[97]

118. These findings are made in error. As noted, the Panel's findings were based in large part on the Panel's flawed reasoning with respect to Article 15.3. Further, the Panel's narrow focus on the term "subsidized imports" is not convincing in addressing whether the drafters of the SCM Agreement intended to forbid cross-cumulation, particularly when appropriately read in context and in light of the object and purpose of the Agreement. Rather, as can be seen from the text, none of the provisions of Article 15 expressly prohibits the practice of cross-cumulation, or otherwise addresses a situation in which both antidumping and countervailing duty investigations are occurring simultaneously.

119. As described above in the context of Article 15.3, the Appellate Body has found that silence in the WTO Agreements should not necessarily be read as a prohibition. And as also described above, the issue of cross-cumulation cannot be addressed fully without considering the various scenarios that may arise in the application of the SCM Agreement. The same approach must be taken with respect to other provisions of Article 15, so that the volume and effects of dumped and subsidized imports may be fully considered throughout an injury investigation.

120. The Panel suggests in its Report that the interpretation presented by the United States might extend to imports other than dumped or subsidized imports being examined for purposes of determining injury.[98] The United States disagrees. And to be clear, the United States never suggested that any type of imports other than dumped or subsidized imports may be included in a cross-cumulated injury analysis. In response to a question by the Panel in this regard, the United States made clear that Article VI of the GATT 1994 limits the scope of any injury analysis to the effects of "dumping or subsidization."[99] The United States also emphasizes that the U.S. statute at issue limits the use of cross-cumulation to imports subject to simultaneous countervailing or antidumping duty investigations only. Therefore, the U.S. interpretation does not result in the inclusion of imports other than those found to be dumped or subsidized in the scope of an injury determination.

[96] Panel Report, paras. 7.346 and 7.360
[97] Panel Report, para. 7.360.
[98] Panel Report, para. 7.361.
[99] U.S. Response to Panel Question No. 61(b), paras. 71-73.

121. Consistent with the aims of Article 15.3 of the SCM Agreement, as articulated by the Appellate Body in *EC – Tube or Pipe Fittings* and *US – Oil Country Tubular Goods Sunset Reviews*, the United States submits that a proper interpretation of the provisions of Article 15 must allow an investigating authority to take account of the effects that all unfairly traded imports are having on a domestic industry. Where simultaneous antidumping and countervailing duty investigations are taking place, this group of unfairly traded imports must include both dumped and subsidized imports. Therefore, the Appellate Body should reverse the Panel's findings in section 7.6.1.5.2 of the Report, and find that the provisions of Article 15 do not prohibit an investigating authority from cross-cumulating dumped and subsidized imports for purposes of determining injury to a domestic industry.

D. The Panel Erred Under Article 11 of the DSU in finding that 19 U.S.C. § 1677(7)(G) is Inconsistent with Article 15 of the SCM Agreement "As Such"

122. The United States also appeals the Panel's conclusion that 19 U.S.C. §1677(7)(G) "requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports,"[100] because the Panel's findings in this respect were not made in conformity with the requirements of Article 11 of the DSU. Based on these errors as well, the United States respectfully requests that the Appellate Body reverse the Panel's findings that 19 U.S.C. §1677(7)(G) is "as such" inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement in sections 7.6.1.5.1 and 7.6.1.5.2 of the panel report.

123. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements. Where a Member challenges a measure "as such," a party bears the burden of demonstrating its interpretation of the measure,[101] and Article 11 requires a panel "to examine the meaning and scope of the municipal law at issue."[102] The Appellate Body has also emphasized that "as such" claims about another Member's laws are "serious challenges" that "seek to prevent Members ex ante from engaging in certain conduct," the implications of which "are obviously more far-reaching than 'as applied' claims."[103] Thus, "although it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law."[104]

124. The Panel in this dispute failed to make substantive findings on the U.S. law at issue to support the conclusions it made in respect of that law. The Panel addresses the meaning of the U.S. law in three places.

125. First, in section 7.6.1.2 entitled "factual background", the Panel stated:

> India's claims with respect to original investigations concern Section 1677(7)(G) which requires the USITC to cumulatively assess, for purposes of determining

[100] Panel Report, paras. 7.322, 7.339, 7.340, and 7.358.
[101] Panel Report, para. 157.
[102] *US – Countervailing and Anti-Dumping Measures on Certain Products from China (AB)*, para. 4.98.
[103] *US – Oil Country Tubular Goods Sunset Reviews (AB)*, para. 172.
[104] *US – Hot-Rolled Steel (AB)*, para. 200.

> material injury, the effects of dumped and subsidized imports on the domestic industry when certain conditions are met.[105]

The Panel then reproduced the relevant text of the statute, without more.

126. Next, in introducing the issue of cross-cumulation in the context of its interpretation of Article 15.3 of the SCM Agreement, the Panel stated:

> This issue arises because, pursuant to Section 1677(7)(G), the United States shall undertake, in certain situations, a single injury assessment for "unfairly traded imports"[FN571], that is, subsidized imports and dumped imports when there are simultaneous countervailing and anti-dumping investigations of the same product from different countries.[FN572][106]
>
> [FN 571] We note that, although this expression is not found in the US provision at issue, it is repeatedly used by the United States in its arguments. See, e.g., United States' first written submission, paras. 83, 121-122, 125-126, 130, and 134.
> [FN 572] United States' response to Panel question No. 61, para. 70.

The Panel then asserted, without addressing the terms of the statute or otherwise providing any reasoning for its assertion: "In our view, Section 1677(7)(G) requires, in certain situations, the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports."[107] The Panel made a similar assertion in the context of Articles 15.1, 15.2, 15.4, and 15.5, stating: "It is clear to us that Section 1677(7)(G) requires, in certain situations, the USITC to cumulatively assess the effects of subsidized imports with the effects of dumped, non-subsidized imports."[108]

127. The above quotations comprise the whole of the Panel's analysis with respect to the U.S. statute. None of these statements makes direct reference to the U.S. law. Moreover, none of these statements are preceded or followed by any explanation describing how the Panel came to its conclusion regarding the meaning of the law. Rather, the Panel's analysis consists of mere assertions only.

128. As the Appellate Body has found, where a claim challenges a Member's law "as such," a panel has a duty under Article 11 of the DSU to "conduct a detailed examination of that legislation in assessing its consistency with WTO law."[109] The Panel has failed to meet the standard set out under Article 11 of the DSU with respect to the U.S. law at issue. There is simply no analysis or findings that support the Panel's conclusion that the U.S. statute "requires" anything. The United States therefore respectfully requests that the Appellate Body find that the Panel did not meet the standard set out in DSU Article 11 and, accordingly, the United States further requests that the Appellate Body reverse the Panel's findings contained in sections

[105] Panel Report, para. 7.322.
[106] Panel Report, para. 7.339.
[107] Panel Report, para. 7.340.
[108] Panel Report, para. 7.358.
[109] *US – Hot-Rolled Steel (AB)*, para. 200.

7.6.1.5.1 and 7.6.1.5.2 of the panel report that 19 U.S.C. §1677(7)(G) is "as such" inconsistent with Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

IV. CONCLUSION

129. For the foregoing reasons, the United States respectfully requests that the Appellate Body modify the Panel's interpretation of Article 1.1(a)(1) of the SCM Agreement and clarify that a "public body," while also encompassing entities vested with or exercising governmental authority in the performance of governmental functions, includes an entity controlled by the government such that the government can use the entity's resources as its own.

130. The United States further respectfully requests that the Appellate Body reverse the Panel's "as such" and "as applied" findings under Articles 15.3 and 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement, as contained in section 7.6.1 of its Report.