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Dispute Settlement Body
19 December 2014

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 19 DECEMBER 2014

Chairman: Mr. Fernando De Mateo (Mexico)

1 UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

A. Report of the Appellate Body (WT/DS436/AB/R) and Report of the Panel (WT/DS436/R and WT/DS436/R/Add.1)

1.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS436/10 transmitting the Appellate Body Report in the dispute on: "United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India", which had been circulated on 8 December 2015 in document WT/DS436/AB/R. The Chairman reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He noted that Article 17.14 of the DSU requires that: "An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to Members. This adoption procedure is without prejudice to the right of Members to express their views on an Appellate Body report".

1.2. The representative of India said that his country thanked the Appellate Body, the Panel as well as the respective Secretariats for their efforts and time devoted to assist the parties in reaching a resolution to this complex dispute. India also thanked all third parties who had participated actively in the proceedings. This was one of the most complex disputes, in recent times, involving a number of legal issues pertaining to the interpretation of the SCM Agreement. Considering the systemic implications with respect to a balanced and fair interpretation of the SCM Agreement, the impact the measures had on domestic manufacturers of a developing Member as well as the need to ensure that the United States did not continue to act in a WTO-inconsistent manner, India had decided to file a detailed and comprehensive appeal in this dispute. This dispute pertained to a number of determinations made by the US Department of Commerce (USDOC) which had imposed countervailing duty (CVD) on India's exports of hot-rolled carbon steel flat products. India challenged two types of measures related to the imposition by the United States of CVDs, namely, the relevant legislation and the specific determinations leading to the imposition of countervailing duties. Various provisions under challenge included that of the US Tariff Act and the Code of Federal Regulations as being inconsistent with the provisions of the SCM Agreement. India also challenged several measures related to the US original investigation initiated in December 2000, 2002, 2004, 2006, 2007, and 2008 administrative reviews, and the 2006 sunset review. Thus, India firmly believed, that the WTO-inconsistency of US measures was a long-standing issue and that the United States was not acting in accordance with its obligations under the SCM Agreement.

1.3. India welcomed the 284-page Appellate Body Report, which had reversed and had modified a number of findings of the Panel Report. This dispute was a significant milestone for India since the Appellate Body had held that a number of CVD measures imposed by the United States over the

years, in the determinations in question, were inconsistent with the US obligations under the SCM Agreement. It would definitely help the domestic manufacturers who had been adversely affected on account of WTO-inconsistent practices of the USDOC. Though the Panel and Appellate Body had dealt with a number of relevant issues pertaining to the interpretation of the SCM Agreement, including financial contribution, specificity, benefit analysis, facts available standard, the making of alternative findings by a Panel in response to *ex post* rationales put forward by the responding Member, India would like to express its views, at the present meeting, on a few key findings of the Appellate Body that had significance not only for India, but also for the entire Membership.

1.4. First, India wished to refer to the issue of what constituted a "public body" for the purposes of Article 1.1(a)(1) of the SCM Agreement. The issue of what constituted a "public body" under Article 1.1(a)(1) of the SCM Agreement had been addressed in detail by the Appellate Body. The Appellate Body had rightly overturned the Panel's rejection of India's claim that the USDOC's determination that the National Mineral Development Corporation (NMDC) was a "public body" was inconsistent with Article 1.1(a)(1) of the SCM Agreement, it had completed the legal analysis, and had found that the determination was inconsistent. Relying on its earlier decision in the dispute on: "United States - Definitive Anti-Dumping and Countervailing Duties on Certain Products from China" (DS379), the Appellate Body had emphatically endorsed India's position that a Public Sector Undertaking (PSU) shall be treated as a "public body" only when they possessed governmental authority and discharged governmental functions. The Appellate Body had reiterated that a public body meant "an entity that possesses, exercises or is vested with governmental authority". Whether the conduct of an entity was that of a public body must in each case be determined on its own merits, with due regard to the core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operated. In order to properly characterize an entity as a "public body" in a particular case, it may be relevant to consider "whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member", and the classification and functions of entities within WTO Members generally.

1.5. The Appellate Body had rightly observed that the Panel had erred in its application of Article 1.1 (a)(1) of the SCM Agreement to the USDOC's "public body" determination in the underlying investigation, in effect treating the Government of India's ability to control the NMDC as determinative for purposes of establishing whether the NMDC constituted a "public body". More importantly, the Appellate Body had held that mere formal indicia of control such as government's ownership interest or power to appoint and nominate directors, though relevant to the issue of determining whether an entity was a "public body", without further evidence and analysis, did not provide a sufficient basis for a finding that a particular entity was a "public body". In reviewing the Panel's analysis of the USDOC's determinations at issue, the Appellate Body had confirmed that it did not appear that the USDOC provided a reasoned and adequate explanation of the basis for its determination that the NMDC was a "public body". This finding on public body would provide significant relief to exporters who purchased raw materials from various public sector undertakings. The Appellate Body's findings recognized that merely being an entity owned by the government was not sufficient to render it a "public body" and subject it to the disciplines of the SCM Agreement. The ruling had immense significance in the context of the vital role played by public sector undertakings in the economy of developing countries.

1.6. Second, with regard to the issue of cross-cumulation, India said that under the relevant US law, cumulation of subsidized imports and dumped imports was mandated for the participating countries to arrive at the injury margin. India challenged this measure as being inconsistent, *inter alia*, with Article 15 of the SCM Agreement as such cross-cumulation was impacting the CVD investigations by the US leading to exorbitant CVD against India. The Appellate Body had rightly pointed out that Article 15.3 of the SCM Agreement referred to imports "simultaneously subject to countervailing duty investigations". The provision that investigating authorities may, if the conditions set out in the last clause of Article 15.3 were fulfilled, cumulatively assess the effects of "such" imports thus required that the imports be "subject to countervailing duty investigations". Conversely, the effects of imports other than such subsidized imports must not be incorporated in a cumulative assessment pursuant to Article 15.3. The text was clear in stipulating that being subject to countervailing duty investigations was a prerequisite for the cumulative assessment of the effects of imports under Article 15.3.

1.7. Thus, the Appellate Body had ruled, in line with the Panel's ruling, with a minor modification and had found that the USDOC determination pursuant to Section 1677(7)(G)(iii) was "as such" inconsistent with Article 15 of the SCM Agreement. The Panel's finding on inconsistency of the US application of this measure had also not been appealed by the United States. The implication of this finding was that the United States had to amend its domestic law to be WTO-consistent and as far as the pending and the future CVD investigations were concerned, the same would be subject to challenge if cross-cumulation was applied again. It had significant trade impact for India as out of the many products on which United States had imposed CVD, investigations in a significant number suffered from the same WTO-inconsistency.

1.8. Third, India referred to the issue of the benefit methodology used by the US authorities and its inconsistency with Article 14(d) of the SCM Agreement. The Appellate Body had agreed with India's position that the US benefit methodology while calculating the benefit in the case of sale of iron ore by the NMDC was unfounded. The Appellate Body had confirmed the Panel's reasoning that proxies indicating domestic prices could not be ignored in determining benchmarks under the SCM Agreement. The Appellate Body had, *inter alia*, reversed the Panel's rejection of India's claims that the USDOC's exclusion of the NMDC's export prices in determining a Tier II benchmark to be inconsistent with Article 14(d) and the chapeau of Article 14, it had completed the legal analysis, and had found that the USDOC's exclusion of such prices was inconsistent with Article 14(d) and the chapeau. It had also reversed the Panel's rejection of India's claim that the USDOC's use of "as delivered" prices from Australia and Brazil in assessing whether the NMDC provided iron ore for less than adequate remuneration was inconsistent with Article 14(d), it had completed the legal analysis, and had found that the USDOC's use of such prices was inconsistent with Article 14(d). The Appellate Body had rightly highlighted that the second sentence of Article 14(d) of the SCM Agreement clearly established that the benchmark for assessing the adequacy of remuneration for government-provided goods was a price that related or referred to, or was connected with, prevailing market conditions in the country of provision. More importantly it noted that "private prices and government-related prices can both reflect prevailing market conditions in the country of provision". The proposition that in-country private prices were the primary benchmark reflected only the fact that such prices may serve as a starting point for determining a benchmark. This did not mean, however, that government-related prices that reflected prevailing market conditions in the country of provision could not be relied upon, together with in-country private prices, to determine a benchmark for the purposes of Article 14(d).

1.9. Fourth, India referred to the issue of examination of new subsidy allegations in an administrative review under Article 21 of the SCM Agreement. The Appellate Body had ruled that investigating authorities did not have the unfettered right to add new subsidies in the course of reviews of existing CVD measures. Only new subsides that were closely linked to subsidies examined earlier could be added in a review proceeding. The Appellate Body had held that Article 21 of the SCM Agreement required an investigating authority to establish that there was a sufficiently close nexus between the subsidies that were the subject of the original investigation and the new subsidy allegations that the investigating authority proposed to examine as part of its administrative review. This had significant systemic implications for the US practice of indiscriminately including new subsidies during annual Administrative Reviews.

1.10. Fifth, India said that the Appellate Body's findings were also relevant with regard to a number of other systemic issues concerning the implementation of the SCM Agreement. For instance, in applying adverse inferences against non-cooperating parties, investigating authorities could not arbitrarily choose to apply any inference, but instead account for all substantiated facts; and in selecting one fact over another in such cases, the finding was to be supported by reasoning and evaluation. India welcomed the modification of the Panel's interpretation of Article 12.7 of the SCM Agreement and agreed with the Appellate Body's finding that Article 12.7 required an investigating authority to use facts available that reasonably replaced the missing necessary information with a view to arriving at an accurate determination, and that this also included an evaluation of available evidence. This ruling of the Appellate Body would thus usher in further transparency in the conduct of investigations by relevant US authorities

1.11. Finally, he said that India's efforts to pursue this dispute had been prompted, *inter alia*, by the determination to see a balanced and fair interpretation of the SCM Agreement. India firmly believed that the Appellate Body had made a significant contribution to the interpretation of the subsidy disciplines and would strengthen the credibility of the dispute settlement system as a whole. India was pleased that the DSB would adopt, at the present meeting, the Appellate Body

Report and the Panel Report, as modified by the Appellate Body Report. India expected and looked forward to the swift and full implementation of this ruling by the United States.

1.12. The representative of the United States said that his country thanked the Appellate Body, the Panel, and the Secretariat assisting them for their hard work in this dispute. The task that they performed here was particularly difficult in light of the number of claims that India had brought before the Panel and the number of issues it had appealed. India's panel request contained hundreds of claims under 25 separate WTO provisions. The overwhelming majority of India's claims had been rejected as baseless. Unfortunately, India then essentially appealed the Panel's findings in their entirety. This attempt to re-do the Panel proceedings had led to over 90 claims on appeal, including 24 different claims under Article 11 of the DSU. While a party of course had the right to appeal a panel report it considered erroneous, India's approach to the appeal was difficult to reconcile with the WTO dispute settlement system as designed by Members. In particular, a WTO appeal was not a chance for a Member to re-air its grievances wholesale in front of a new audience in the hopes of receiving a different outcome, but instead was an opportunity to correct legal interpretations and legal conclusions that were relevant to securing a positive solution to the dispute. Undisciplined appeals served to exacerbate the workload problems facing the system as a whole. The United States hoped other Members would show greater restraint in future appeals.

1.13. It was also worth noting that such tactics make it very difficult for the Appellate Body to comply with the 90-day deadline set out in Article 17.5 of the DSU. The Appellate Body, of course, had good reason to go beyond 90 days in this dispute. This made it disappointing that the Appellate Body, once again, had failed to follow the pre-2011 practice of exceeding this mandatory time-limit following consultations with the parties and with their agreement. When consulted, WTO Members had continuously demonstrated their flexibility and cooperation by agreeing to such extensions. And in this case, despite the lack of consultations, the United States and India had signed a letter confirming that the Report issued by 8 December 2014, would be considered consistent with Article 17.5 despite the fact that the date of circulation actually occurred 122 days after India had filed its appeal. The United States would like to make clear that it viewed this as an important systemic matter because it involved mandatory language under the DSU. But under the circumstances of this dispute, the United States also wanted to applaud the Appellate Body for resolving this massive appeal within 122 days. Those efforts were significant and were appreciated.

1.14. Turning to the substance, the United States welcomed the Panel and Appellate Body's overwhelming rejection of most of India's claims, including the Appellate Body's rejection of all 24 of India's Article 11 challenges to the objectivity of the Panel's findings. The interpretations advanced by India had largely sought to carve out certain loopholes for the provision of financial contributions in the mining and steel industry by the Government of India, to weaken the disciplines of the subsidies agreement as a whole, and to tie the hands of investigating authorities. The United States welcomed the Panel's and Appellate Body's rejection of India's efforts and the well-reasoned approach taken in most instances.

1.15. First, the United States welcomed the rejection of all of India's "as such" challenges to the US Department of Commerce's benchmark regulation under Articles 1.1 and 14(d) of the SCM Agreement. India's arguments would have carved out a cost-to-government loophole in order to allow a public body to provide a good (in this case, iron ore) for less than market value to purchasers (in this case, Indian steel manufacturers). India also argued that in situations where domestic pricing information is unavailable, investigating authorities should not be entitled to find any benefit. Such interpretations were contrary to the text of the SCM Agreement, and these claims had been rejected in their entirety. The United States further welcomed the findings that adjusting a benchmark to a delivered price level was consistent with Article 14(d). The Appellate Body had reasoned that the use of delivered prices was the relevant point of comparison in a benchmark analysis because it allowed any investigating authority to assess whether the recipient of a good was in fact better off than it would have been absent the government's financial contribution. The United States agreed that all costs incurred by the recipient, including costs of delivery, must be taken into account to determine whether the recipient received a good on terms more favorable than those otherwise available on the market. In the context of these findings, however, the United States did regret the Appellate Body's apparent departure from its report in the dispute on: "United States – Softwood Lumber IV", where it had previously established that the private prices from arms-length transactions in the country of provision were the "primary"

benchmark.[1] The Appellate Body appeared to have changed course in now requiring investigating authorities to consider not only evidence of private market prices, but also government prices in establishing a benchmark, unless those prices are shown to be non-market prices. But where private prices from an arms-length transaction existed, there would not appear to be a need to also examine government prices to determine the "market" price. Including government prices presented a risk of introducing distortions into the benchmark.

1.16. Moreover, the United States did not understand the basis for the Appellate Body's finding that Commerce should have provided additional explanation as to why it had rejected an export price from the government entity at issue for use as a benchmark in three of the administrative reviews. It appeared self-evident that comparing a government entity's price to its own price was circular and uninformative. Why should an investigating authority be required to explain that proposition any further? In spite of these concerns, the United States commended the Appellate Body's consideration of the vast number of claims regarding Commerce's benchmark regulation, rejecting India's attempts to weaken the SCM Agreement by calculating benefit from the perspective of the government provider.

1.17. Second, the United States welcomed the rejection by the Panel and Appellate Body of India's interpretation of the specificity requirement under Article 2.1(c). India had sought to carve out an exception in the subsidies disciplines for subsidies provided on an industry-wide basis, arguing that a subsidy provided to certain enterprises was not specific unless there were other "similarly situated" or comparable entities that were eligible for but did not receive the subsidy. As the Panel and Appellate Body had rightly found, Article 2.1(c) did not require a finding that there were "similarly situated" entities that were not receiving the subsidy. Rather, where a government provided a benefit to certain enterprises, that subsidy was specific.

1.18. Third, the United States would also highlight the important findings the Appellate Body made regarding an investigating authority's use of facts available in making determinations pursuant to Article 12.7. Where responding parties choose not to participate in trade remedies investigations, the ability to make findings based on facts available was essential given investigating authorities' lack of power to ensure that parties provide necessary information. India's arguments would have deprived Members of necessary information by imposing on investigating authorities an "obligation of conduct" to conduct a comparative evaluation as a necessary pre-requisite to using facts available. The Appellate Body had rightly rejected India's formalistic approach.

1.19. The Appellate Body had also rejected India's attempt to prevent investigating authorities from drawing inferences from a party's failure to cooperate. The United States was encouraged to see the Report expressly recognize the need for an investigating authority to take into account the circumstances surrounding the lack of information, including when in determining whether to draw inferences. The United States was also pleased that the Panel and Appellate Body had rejected India's "as such" claims against the US laws and regulations governing facts available in trade remedies proceedings. After reviewing both the text of the US law, as well as the other evidence raised by India, the Appellate Body confirmed the Panel's finding that the laws did not require US investigating authorities to make determinations without a factual foundation, or to apply facts available in a punitive manner.

1.20. Next, turning to the issue of public body, the United States was pleased that that the Appellate Body had decisively rejected India's proposed interpretations on appeal. India argued that, to be a public body, an entity must have the power to regulate, control, or supervise individuals, or otherwise restrain their conduct. India further argued that an entity must have the power to entrust or direct a private body to carry out the functions that are listed in Article 1.1(a)(1)(i)-(iii).[2] The Appellate Body had disagreed with both of these arguments by India, which were also advanced by China in another dispute. This was a critical, and very welcome, result. These arguments could have resulted in an approach that would have shielded transfers of a government's financial resources from key WTO subsidy disciplines. This would have undermined a key accomplishment of the Uruguay Round, the ability of the WTO (through dispute settlement) and Members (through countervailing measures) to remedy subsidization to ensure that Members' citizens are not adversely affected by trade-distorting subsidies. The Appellate Body had reversed

[1] Appellate Body Report, "United States – Softwood Lumber IV", paragraph 90.
[2] Appellate Body Report, paragraphs 4.17-4.18.

the Panel's interpretation of "public body" and the application of Article 1.1(a)(1) to the facts of this case. In so doing, however, the Appellate Body had emphasized the case-by-case nature of the analysis and, importantly, drew attention to evidence that "may certainly be relevant" to a public body finding.

1.21. For example, the examples of evidence given included: "a government's exercise of 'meaningful control' over an entity and its conduct"; that "the government can use the entity's resources as its own"; "government ownership of an entity ... in conjunction with other elements"; the "scope and content of government policies relating to the sector in which the investigated entity operates"; "whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member".[3] The United States considered that these examples provided important guidance for future public body determinations.

1.22. The United States noted that it had put forward an interpretation of public body consonant with the examples just given, but that would have provided more clarity. In particular, the US view was that where an entity was able to transfer the government's economic resources through the practices described in Article 1.1(a)(1), that entity's transfer of the resources was an exercise of governmental authority itself. Or looking at this from the perspective of the government, where the government did or could control an entity's resources as its own, those economic transfers must be attributable to the Member. In this respect, while the Appellate Body Report addressed certain, mostly secondary, arguments that the United States put forward[4], the United States was surprised that the Report did not address the core US arguments reflected in the descriptive portion of the Report.[5]

1.23. In those arguments, as further elaborated in the US oral statement and arguments at the hearing, the United States had explained that the financial contributions described in Article 1.1(a)(1) constituted the ways in which a government may transfer economic value to recipients. Therefore, these practices reflected governmental functions. Indeed, Article 1.1(a)(1)(iv) stated that the functions described in romanettes one through three were the practices "normally vested in the government". It necessarily followed, then, that the authority to perform any of the functions described in Article 1 on behalf of, or under the control of, the government, must constitute the possession, exercise, or vestment of governmental authority. That is, accepting the Appellate Body's focus on authority, the critical governmental authority for purposes of finding a financial contribution by a public body was the authority to transfer the government's economic resources. The report suggested that, with the appropriate explanation and grounding in the facts of a case, such evidence of authority over the government's resources could support a "public body" finding. The United States considered that it would have been desirable to clarify that such authority over the government's economic resources was the decisive factor in determining whether an entity was a "public body".

1.24. Finally, the United States would note the Appellate Body's mixed findings with respect to cross-cumulation. The Appellate Body had previously recognized the importance of cumulation to permit investigating authorities to fully address the cumulative effects of dumped import or subsidized imports from multiple countries that were injuring the domestic industry at the same time. The Appellate Body's findings on cross-cumulation would restrict the ability of Members to address the effects of such cumulative imports, despite the fact that cumulation was permitted under the terms of both the SCM and the Anti-Dumping Agreements.[6] The US submissions supported a reading of the SCM Agreement, together with the GATT 1994 and the AD Agreement, as permitting the use of cross-cumulation.

1.25. Regarding the US statute, the United States was pleased that the Appellate Body had reversed the Panel's "as such" finding for failing to engage in an assessment of the meaning of that statute under US municipal law. But having reversed the Panel's finding, the United States was surprised and disappointed with the approach of the Appellate Body in making out an entirely

[3] Appellate Body Report, paragraphs 4.20, 4.29.

[4] Appellate Body Report, paragraphs 4.21-4.28 (addressing US arguments at paragraphs 2.298, 2.302-2.305).

[5] Appellate Body Report, paragraphs 2.295, 2.296, 2.297, 2.299, 2.300, 2.301.

[6] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("AD Agreement").

new case for India. The Appellate Body had examined the face of the statute and had found that cross-cumulation was required in a single circumstance described in that statute – 19 USC 1677G(iii)(III). But the Appellate Body had reviewed the US law in an entirely *de novo* manner. This reading of the statute had never been assessed by the Panel; and in fact, it had not been even raised by India. Indeed, the Panel had made no findings on the interpretation of the statute. And India had offered no evidence in the course of the dispute regarding the meaning of the statute, as understood by US law. The Appellate Body had rightly chastised the Panel for its error in this respect. But the Appellate Body made no mention of India's burden of proof; nor did it evaluate whether India had succeeded in making its *prima facie* case. Unfortunately, such an approach did not sit easily with the notion of appellate review. Nor could it be reconciled with the Appellate Body's previous statements regarding the complaining party's burden of proof when challenging a measure "as such". In the dispute on: "United States – Gambling", for example, the Appellate Body had found that the complaining party failed to make a *prima facie* case because it "failed to identify how [the challenged measures] operated". To meet its burden, the complaining party would have needed to provide evidence and arguments sufficient to "identify the challenged measure and its basic import … and explain the basis for the claimed inconsistency of the measure".[7]

1.26. Under the Appellate Body's own approach in "United States – Gambling", India had not made a *prima facie* case that the US statute was inconsistent with the SCM Agreement. The "as such" finding, rather, was based on a reading of the statute developed by the Appellate Body, and thus it appeared that the Appellate Body did not consider that India was the one who was required to make out its case. Such an approach was regrettable and carried important implications for WTO dispute settlement. The United States encouraged Members to review this issue closely, as well as the many other important systemic issues that had been raised at the present meeting. To conclude, the United States thanked the Panel, Appellate Body and the Secretariat assisting them for their efforts in this dispute. The United States also encouraged Members to consider further how they could contribute to the efficient and effective use of the WTO dispute settlement system.

1.27. The representative of China said that his country wished to thank the Appellate Body, the Panel and the Secretariat for their efforts in resolving this complex dispute. China had actively participated as a third party in this dispute, because it had a systemic interest in several of the important issues of legal interpretation that had been considered by the Panel and the Appellate Body. First, China welcomed the Appellate Body's conclusion that the Panel's "public body" finding should be reversed, as well as the Appellate Body's conclusion that the USDOC's "public body" determination in relation to NMDC was inconsistent with the SCM Agreement. In China's view, the proper interpretation of the term "public body" under the SCM Agreement was of crucial importance both in relation to the SCM Agreement, and international trade rules more generally. The meaning of the term "public body" had previously been examined in detail by the Appellate Body in the dispute: "United States - Anti-Dumping and Countervailing Duties" (DS379). In that dispute, the Appellate Body had concluded that a public body "must be an entity that possesses, exercises or is vested with governmental authority". China was gratified to see the Appellate Body confirm this legal standard in the current dispute. The Appellate Body also emphasized that this substantive standard should not be confused with the evidentiary standard required to establish that an entity was a public body. The Appellate Body had explained that the existence of "mere formal indicia of control" by a government over an entity, such as shareholding and selection of directors, did not itself provide a sufficient basis for a public body finding.

1.28. China fully agreed with the Appellate Body's view that "too broad an interpretation of the term 'public body' could … risk upsetting the delicate balance embodied in the SCM Agreement because it could serve as a license for investigating authorities to … find entities with any connection to government to be public bodies".[8] China noted that, despite the Appellate Body's clear ruling in the DS379 dispute, the United States set forth precisely the same arguments in the DS436 dispute that had been expressly rejected by the Appellate Body in the DS379 dispute. In China's view, the US litigation strategy could not be reconciled with the goal of developing a coherent and predictable body of jurisprudence clarifying Members' rights and obligations under the covered agreements, as contemplated under the DSU.

[7] Appellate Body Report, "United States – Gambling", paragraph 141.
[8] Appellate Body Report, paragraph 4.28.

1.29. China also welcomed the Appellate Body's confirmation that Article 15 of the SCM Agreement did not authorize the cross-cumulation of the effects of imports that were and are not subject to simultaneous countervailing duty investigations. It was unfortunate that the Appellate Body was not equipped with sufficient facts to be able to complete the analysis in relation to certain challenged US measures. However, the Appellate Body's findings made clear that the US practice of cross cumulation was inconsistent with the SCM Agreement. This practice systematically impaired other Members' benefits under the covered agreements, including those of China. Therefore, China encouraged the United States to take all necessary steps to fully comply with the Appellate Body's finding so that future disputes confronting the same issue would not be needed.

1.30. Finally, China appreciated the Appellate Body's effort to clarify the legal standard under Article 12.7 of the SCM Agreement regarding application of "facts available". China believed that the Appellate Body's articulation of the requirements of that provision should guide investigating authorities to a more reasoned and accurate application of "facts available" in their countervailing duty investigations, bearing in mind that the purpose of "facts available" was to reasonably replace necessary information that had not been provided, and to arrive at an accurate determination. China looked forward to further guidance from panels and the Appellate Body in relation to this important provision in future cases.

1.31. The representative of Canada said that, as a third party to this dispute, Canada also wished to thank the Panel, the Appellate Body and their Secretariats for their work in these proceedings. Canada had participated in this dispute because of its substantial systemic interest in the interpretation and application of WTO rules on subsidies. Canada would like to take the opportunity of the adoption of the Appellate Body and Panel Reports to comment on an issue on which it had provided its views throughout the proceedings, namely the interpretation of the phrase "public body" in Article 1.1(a)(1) of the SCM Agreement. According to the Appellate Body in its Report, a "public body" must possess, exercise or be vested with governmental authority. However, given the existence of specific language on entrustment or direction of private bodies in Article 1.1(a)(1)(iv) of the SCM Agreement, this interpretation appeared to render the phrase "public body" redundant and eliminate the distinction between a public and private body agreed to by Members. Canada considered this interpretation to be, therefore, unduly limited. On the other hand, Canada noted that the Appellate Body had rejected India's interpretation of that phrase. Canada considered this an appropriate rejection of an even more restrictive interpretation of the term "public body".

1.32. The representative of Australia said that his country thanked the Appellate Body for its Report in this dispute. Australia would confine its comments to the Appellate Body's findings on the interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Australia welcomed the Appellate Body's elaboration of the interpretation of the term "public body" and the circumstances in which meaningful control by government may evince that a body was public in nature. In this respect, Australia would like to highlight some preliminary observations drawn from the Appellate Body's Report. First, the Report had confirmed that public body determinations were case-by-case in nature, and that the "nature and amount of evidence and analysis that was sufficient to establish that an entity possesses governmental authority or effectively exercises such authority in the performance of governmental functions" would vary from case-to-case (para. 4.42). Second, this Report had again confirmed that an entity need not possess the power to regulate to be vested with governmental authority or exercising a governmental function, and therefore to constitute a public body (para. 4.17). It also did not need to have the power to entrust or direct private bodies to carry out the governmental functions identified (para. 4.18). Third, the Appellate Body in this dispute had found that the Panel had "correctly articulated the appropriate standard when it observed 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 possess governmental authority in the performance of governmental functions'" (para. 4.36). Fourth, the Appellate Body had indicated that evidence only of "formal indicia of control" may not provide a sufficient basis for a determination that an entity was a public body (para. 4.54). Overall, in light of this Report Australia observed that "meaningful control" remained a central – but not the only – consideration in determining whether an entity was a public body. Once again, Australia thanked the Appellate Body for its Report and would continue to review its findings with interest.

1.33. The representative of Japan said that his country was not a third party in this dispute, but considered that this dispute raised a number of important legal issues which should be of concern to all Members. For example, the Appellate Body in its Report provided further clarifications of the meaning of the term "public body" under Article 1.1(a)(1) of the SCM Agreement. Japan was currently reviewing this long and complex Report, including the clarifications made and their implications. Therefore, Japan was not in a position, at the present meeting, to express views on the particular findings and conclusions made by the Appellate Body. However, Japan would like to observe that while the Appellate Body had ultimately ruled that the USDOC's determination that the entity in question was a public body was inconsistent with that provision[9], in doing so, the Appellate Body appeared to have rejected the interpretations put forward by both parties, including the narrower reading of the term "public body" proposed by India.[10]

1.34. The DSB took note of the statements, and adopted the Appellate Body Report contained in document WT/DS436/AB/R and the Panel Report contained in document WT/DS436/R and Add.1, as modified by the Appellate Body Report.

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[9] Appellate Body Report, paragraph 4.55.
[10] Appellate Body Report, e.g., paragraphs 4.17, 4.18 and 4.45.