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Dispute Settlement Body
16 January 2015

MINUTES OF MEETING

HELD IN THE CENTRE WILLIAM RAPPARD
ON 16 JANUARY 2015

Chairman: Mr. Fernando De Mateo (Mexico)

1 UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

A. Report of the Appellate Body (WT/DS437/AB/R) and Report of the Panel (WT/DS437/R and WT/DS437/R/Add.1)

1.1. The Chairman drew attention to the communication from the Appellate Body contained in document WT/DS437/10 transmitting the Appellate Body Report on: "United States – Countervailing Duty Measures on Certain Products from China", which had been circulated on 18 December 2014 in document WT/DS437/AB/R. He noted that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. He recalled 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 China said that his country thanked the members of the Appellate Body, the Panel, and the respective Secretariats for the time and effort they had dedicated to resolving this dispute. Since 2006, when the United States had first begun to apply its countervailing duty laws to imports from China, China had been the target of more than 40 US countervailing duty investigations. In the overwhelming majority of these cases, the principal alleged subsidy found by the US Department of Commerce (USDOC) had been the alleged provision of inputs for less than adequate remuneration. It was for that reason that China had focused its claims in this dispute on the USDOC's approach to its identification of these alleged input subsidies, and it was for that reason that, at the present meeting, China would focus its statement on the Panel's and the Appellate Body's resolution of China's input subsidy claims. China believed that these findings had great significance not only for China, but also for WTO Members more broadly. When viewed together, China believed that the Appellate Body's findings, as well as the un-appealed findings of the Panel, constituted an emphatic rejection of the USDOC's entire analytical framework for determining the existence of alleged input subsidies. He said that China would address each of these findings in turn.

1.3. With regard to the issue of public body, China noted that in the DS379 dispute, China had challenged the USDOC's conclusion, based on a "rule of majority government-ownership", that state-owned enterprises (SOEs) in the four investigations at issue were "public bodies" within the meaning of Article 1.1(a)(1) of the SCM Agreement. In upholding China's claim, the Appellate Body had categorically rejected the USDOC's approach. After a comprehensive interpretative analysis, the Appellate Body had determined that "being vested with, and exercising, authority to

perform governmental functions" was the "core feature" that defined a public body.[1] The Appellate Body had explained that evidence of government ownership "cannot, without more, serve as a basis for establishing that the entity was vested with authority to perform a governmental function".[2] Likewise, "control of an entity by a government, in itself, is not sufficient to establish that an entity is a public body".[3] In the current dispute, China had challenged not only the USDOC's continued application of the rule of majority government ownership that had been rejected by the Appellate Body in the DS379 dispute, but also the USDOC's underlying "rebuttable presumption" that majority government-owned enterprises were "public bodies". China explained that despite the Appellate Body's articulation of the proper legal standard applicable to the public body inquiry in the DS379 dispute, the USDOC had made clear that it did not intend to cease the application of its "rebuttable presumption" in investigations of imports from China. China was pleased that the Panel had upheld China's "as such" claim in relation to the USDOC's "rebuttable presumption", and that the Panel had also concluded that the presumption was unlawfully applied in every investigation subject to challenge. In reaching these conclusions, the Panel had properly applied the legal standard articulated by the Appellate Body in the DS379 dispute, and had rejected the US ill-considered invitation to abandon that standard in favour of its position that a "public body" was "an entity that is controlled by a government such that the government can use the resources of that entity as its own".[4]

1.4. China noted that the United States had attempted this same tactic in another recent case, DS436, and had again been emphatically rebuffed in the process. In that dispute, the Appellate Body had stated that the US theory that a "public body" was "an entity that is controlled by a government such that the government can use the resources of that entity as its own", was "difficult to reconcile" with the Appellate Body's statement that a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement "must be an entity that possesses, exercises or is vested with governmental authority".[5] The DS436 dispute was also noteworthy for the useful guidance the Appellate Body provided in relation to the concept of "meaningful control" first articulated in the DS379 dispute. The Appellate Body had explained that the panel in that dispute had erred in its substantive interpretation of Article 1.1(a)(1) of the SCM Agreement by construing the term "public body" to mean any entity that was "meaningfully controlled" by a government.[6] As a result, the Panel had failed to evaluate whether the USDOC had properly considered the relationship between the relevant entity, the National Mineral Development Corporation (NMDC), and the Government of India within the Indian legal order, or the extent to which the Government of India "in fact 'exercised' meaningful control over the NMDC as an entity and over its conduct".[7] China welcomed these clarifications by the Appellate Body. China hoped that, in light of this further guidance, the US Department of Commerce would henceforth apply the proper legal standard in its public body determinations.

1.5. With regard to the issue of benchmark, he said that China also welcomed the Appellate Body's emphatic rejection of the USDOC's entire construct for evaluating "market distortion" in the context of determining whether the provision of a financial contribution had conferred a benefit under Article 14(d) of the SCM Agreement. When the USDOC had decided to begin applying the US countervailing duty laws to imports from China, one of the key findings that it had made in support of its decision was that "the PRC Government has eliminated price controls on most products; market forces now determine the prices of more than 90 percent of products traded in China".[8] Notwithstanding its determination that the vast majority of prices in China were "freely set" by "market forces"[9], the USDOC had repeatedly concluded in the investigations initiated since 2006 that prices in China for basic commodities were "distorted", and hence unusable as benchmarks. The USDOC had based this conclusion almost exclusively on the percentage of the relevant input produced by(SOEs). If such SOEs provided at least a "substantial portion" of the market for the

[1] Appellate Body Report, "US – Anti-Dumping and Countervailing Duties" (China), paragraph 310.
[2] Appellate Body Report, "US – Anti-Dumping and Countervailing Duties" (China), paragraph 346.
[3] Appellate Body Report, "US – Anti-Dumping and Countervailing Duties" (China), paragraph 320.
[4] Panel Report, "US – Countervailing Measures" (China), paragraph 7.74.
[5] Appellate Body Report, "US – Carbon Steel" (India), paragraph 4.19.
[6] Appellate Body Report, "US – Carbon Steel" (India), paragraph 4.36.
[7] Appellate Body Report, "US – Carbon Steel" (India), paragraph 4.43.
[8] Countervailing Duty Investigation of Coated Free Sheet Paper from the People's Republic of China – Whether Analytical Elements of the Georgetown Steel Opinion are Applicable to China's Present-Day Economy (29 March 2007) ("Georgetown Steel Memo"), p. 5 (citing The Economist Intelligence Unit, Country Commerce: China, 2006, p. 73).
[9] Georgetown Steel Memo, pp. 3, 5.

input, then the USDOC concluded, with no further analysis whatsoever, that private prices in the Chinese market for that input were distorted because of the government's alleged "predominant role" in the market. In this case, the Appellate Body had unequivocally rejected the USDOC's analytical framework for evaluating market distortion. In its Report, the Appellate Body had explained that "evidence relating to government ownership of SOEs and their respective market shares did not, in and of itself, provide a sufficient basis for concluding that in-country prices are distorted".[10] This was because "Article 14(d) established no legal presumption that in-country prices from any particular source could be discarded in a benchmark analysis without an analysis of whether they were market determined".[11] According to the Appellate Body, the issue of "whether a price may be relied upon for benefit benchmarking purposes under Article 14(d) is not a function of its source, but rather, whether the price is a market-determined price reflective of prevailing market conditions in the country of provision".[12]

1.6. In order to properly determine whether a price was a market-determined price, the Appellate Body had explained that investigating authorities could not focus exclusively on the type of entities operating in the market and their respective market shares, but also might be required to assess "the structure of the relevant market", "entry barriers", and "the behaviour of the entities operating in that market", all for the purpose of determining "whether the government itself, or acting through government-related entities, exerts market power so as to distort in-country prices".[13] Looking at the four benefit determinations that were the subject of China's appeal, the Appellate Body had concluded that the USDOC's violation of these principles was evident on the face of its determinations. The Appellate Body had found that in each of the challenged determinations, it was clear that the USDOC had simply assumed that the prices of the government-related entities were automatically distorted due to their relationship with the government, without conducting any evaluation of whether they were market-determined prices.[14] The Appellate Body explained that "a finding of government ownership and control of certain entities alone cannot serve as the sole basis for establishing price distortion".[15] The Appellate Body had emphasized the USDOC's failure to explain in its determinations whether and how the market shares held by SOEs actually resulted in the government's possession and exercise of market power, such that the price distortion occurred in a way that private suppliers aligned their prices with the "artificially low price" of the government-provided goods.[16] China appreciated the Appellate Body's decision to complete the legal analysis in relation to China's claims under Article 14(d), as well as the Appellate Body's useful clarifications of the Article 14(d) jurisprudence.

1.7. With regard to the issue of specificity, China said that in relation to the USDOC's conclusion in each of the 14 challenged determinations that the alleged provision of inputs for less than adequate remuneration was specific to an enterprise or industry, China had challenged four aspects of the USDOC's end-use approach. First, China had challenged the USDOC's failure to apply the first of the "other factors" under Article 2.1(c) in light of a prior "appearance of non-specificity" resulting from the application of the principles laid down in subparagraphs (a) and (b). Second, China had challenged the USDOC's failure to identify a "subsidy programme". Third, China had challenged the USDOC's failure to identify a "granting authority". Fourth, China had challenged the USDOC's failure to take into account the factors in the final sentence of Article 2.1(c). The Panel had agreed with China that the USDOC had acted inconsistently with Article 2.1 of the SCM Agreement by failing to take into account the factors in the final sentence of Article 2.1(c), but the Panel had rejected each of China's other claims. On appeal, the Appellate Body had reversed the Panel's findings both in relation to the proper identification of a "subsidy programme" and in relation to the identification of the "granting authority". While China regretted that the Appellate Body could not have completed the legal analysis, China welcomed the Appellate Body's interpretive analysis in relation to both of these claims. The Appellate Body had made clear that the USDOC's consistent practice of reaching specificity determinations under

[10] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.62.
[11] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.63 (quoting Appellate Body Report, "US – Carbon Steel" (India), paragraph 4.154).
[12] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.64 (quoting Appellate Body Report, "US – Carbon Steel" (India), paragraph 4.154).
[13] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.62.
[14] Appellate Body Report, "US – Countervailing Measures" (China), paragraphs 4.91, 4.96, 4.100, 4.105.
[15] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.105.
[16] Appellate Body Report, "US – Countervailing Measures" (China), paragraphs 4.96, 4.101. See also ibid. paragraph 4.50 (quoting Appellate Body Report, "US – Carbon Steel" (India), paragraph 4.155).

Article 2.1(c) without ever identifying the "granting authority" or the relevant "subsidy programme" was inconsistent with the requirements of Article 2.

1.8. With regard to the issue of facts available, China said that in addition to challenging the USDOC's analytical framework in relation to each of the three elements of an actionable subsidy – financial contribution, benefit, and specificity – China had also challenged the USDOC's pervasive use of so-called "adverse facts available" in its input subsidy determinations. Before the Panel, China had explained that the USDOC's "adverse facts available" determinations were inconsistent with Article 12.7 of the SCM Agreement, because the USDOC had consistently resorted to "adverse facts available" without actually applying facts that were available. China had argued that the USDOC's failure to apply facts available was evident on the face of the USDOC's published determinations, because in no instance did the USDOC provide a "reasoned and adequate" explanation laying out the factual basis for its conclusions. The Panel had declined to uphold China's claims under Article 12.7, but the Appellate Body had found that the cursory nature of the Panel's analysis was inconsistent with Article 11 of the DSU. The Appellate Body "disagree[d] with the United States that the Panel was not required to examine whether the USDOC provided a 'reasoned and adequate' explanation of its 'adverse' facts available determinations".[17] The Appellate Body had explained that "in order to comply with the requirements under Article 12.7 of the SCM Agreement, the USDOC was required to provide an explanation [in its published report] that was sufficient to establish that it had engaged in a process of reasoning and evaluation of the various facts before it in order to determine which of the facts available could reasonably replace the missing 'necessary' information".[18] After expressly agreeing with China that "[t]he issue before the Panel was not whether there were any facts on the record that supported the USDOC's determinations but, instead, 'whether the USDOC provided sufficient explanation of the challenged adverse facts available determinations to assess whether the USDOC based these determinations on facts'"[19], the Appellate Body had regrettably reached the conclusion that it was unable to complete the analysis on the face of the determinations at issue.

1.9. China regretted that the Appellate Body could not have completed legal analysis on specificity issue and adverse facts available issue due to the insufficient analysis by the Panel. It appeared that the divergence in quality between the reports of panels and the Appellate Body had become a systemic issue in the dispute settlement process. China had great concern on this issue taking into account that Chinese industries had been injured by the abuse of trade remedy measures by the United States. Moreover, once again it called into question the inability of the Appellate Body to remand a dispute to a panel for a proper application of the relevant provisions of the covered agreements. China believed that this issue deserved careful consideration by all WTO Members. China believed, however, that in this dispute, the Appellate Body's interpretive analysis in relation to China's facts available claims and in relation to its specificity claims plainly necessitated a significant change in the manner in which the USDOC conducted these aspects of its input subsidy investigations. When combined with the USDOC's implementation obligations in relation to its public body and benchmark distortion analyses, it was evident that the time had come for the USDOC to fundamentally rethink its entire construct for input subsidy investigations. China welcomed the Panel and the Appellate Body findings in this dispute, which had removed any doubt about the unlawful nature of the USDOC's current approach to its investigation of alleged input subsidies.

1.10. The representative of the United States said that his country would like to thank the Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this dispute. The United States appreciated their efforts in dealing with a massive dispute covering a myriad of determinations and claims. Unfortunately, and despite those efforts, the Appellate Body Report that would be adopted at the present meeting contained two categories of findings that should be of wide concern to Members: (i) the proper role of panels and the Appellate Body under the WTO dispute settlement system; and (ii) the Appellate Body's findings about how an administering authority needs to treat entities associated with the government for the purpose of determining market benchmarks.

[17] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.187.
[18] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.182. See also ibid. paragraph 4.179.
[19] Appellate Body Report, "US – Countervailing Measures" (China), paragraph 4.205 (internal citations omitted) (emphasis in original).

1.11. With respect to the first issue, the United States said that the Appellate Body Report suggested a view of dispute settlement that departed markedly from that set out in the DSU and reflected in numerous prior reports. As the United States understood it, the fundamental role of a panel was to consider the evidence and arguments put forward by the complaining party and the responses by the responding party, to make an objective assessment of the matter before it, and to issue a report explaining the basis of its findings. The Appellate Body Report had suggested that panels and the Appellate Body had a different role: namely, to conduct independent investigations and apply new legal standards, regardless of what either party actually argues to the panel. This approach would represent a fundamental departure from prior adopted reports. For example, in the "US – Gambling" dispute, the Appellate Body had found that the complaining party must make a *prima facie* case by providing evidence and arguments sufficient to "explain the basis for the claimed inconsistency of the measure".[20] And, if the complaining party had not done so, then it would be legal error for the panel to assume the role of developing the *prima facie* case for the complaining party. In this dispute, however, the Appellate Body Report had assumed the role of the complaining party by making China's *prima facie* case – for the first time – on appeal with respect to a number of different claims. The Appellate Body had then gone on to find in China's favor by upholding arguments that the Appellate Body had developed itself.

1.12. Equally remarkable, the Appellate Body had found that the Panel breached its responsibilities under Article 11 of the DSU by failing to examine arguments never presented by China. Due to China's litigation strategy, this was one of the largest disputes ever brought to a WTO panel. In its panel request, China had raised "as applied" claims concerning 17 separate countervailing duty proceedings, vaguely alleging dozens of breaches of various provisions of the SCM Agreement[21], in addition to making broad "as such" claims. In presenting its claims to the Panel, China could have approached this as any other dispute, namely, by meeting its *prima facie* burden of evidence and arguments with respect to each claim as applied to each of the subject proceedings. But China had chosen not to do so. Instead, China relied on sweeping factual and legal generalizations. The United States had responded to China's arguments in the manner that China presented them. The United States rebutted all of China's incorrect legal positions and all of China's sweeping factual characterizations. The Panel had agreed that the United States had rebutted China's arguments, and had found – with respect to the vast majority of China's claims – that China had failed to establish any breach of the SCM Agreement. In short, the Panel had done exactly what it was supposed to do under the WTO dispute settlement system – it had examined the evidence and arguments before it, had made an objective assessment, and had then issued its Report.

1.13. Regrettably, the Appellate Body had taken a very different approach. Namely, it had developed legal interpretations of the SCM Agreement, and had then sought to apply those interpretations to the US measures – without regard to the case made by China through the evidence and arguments it had actually submitted to the Panel. In doing so, the Appellate Body had assumed a role more like an investigative authority. This was not a role provided for in the DSU. The Appellate Body's troubling approach was particularly striking with respect to China's numerous facts available claims. In the Panel proceeding, both the United States and the Panel had addressed China's claims in the way that China presented them, as involving broad characterizations of numerous, unrelated determinations. Yet, the Appellate Body had found that the Panel breached its responsibility under Article 11 of the DSU by not conducting independent examinations of arguments and issues that were never raised by China. The United States did not see how a panel could be said to have failed to make an objective assessment of the matter before it by failing to consider arguments that were not before it.

1.14. Second, Members should have concerns with certain substantive findings in the Appellate Body Report, especially with respect to the treatment of entities associated with the government for the purpose of determining market benchmarks. On the positive side, the Report appropriately rejected China's central position that an investigating authority must determine that a state-owned enterprise (SOE) was a "public body" before it decided not to use the prices of SOEs as potential benchmarks. However, the Appellate Body had then gone on to repeat and rely on the problematic findings it made just ten days earlier with respect to this issue in another report in DS436[22]

[20] Appellate Body Report, "US – Gambling", paragraph 141.

[21] Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

[22] Appellate Body Report, "US – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India", WT/DS436/AB/R (adopted on 19 December 2014).

without any explanation as to why it was doing so and in a manner not even suggested by China's arguments in the dispute at issue. The United States had explained its concerns to the DSB at its meeting in December 2014 upon the adoption of the report in DS436, and it would not repeat them again at the present meeting. In short, however, the Appellate Body appeared to have departed from its well-reasoned finding in the "US – Softwood Lumber IV" dispute that the private prices from arms-length transactions in the country of provision were the "primary" benchmark.[23] And, the Appellate Body had provided no meaningful explanation about how a price by a government entity could be used to establish a market-based benchmark.

1.15. Despite those concerns, it was important to note that the United States appreciated other elements of the Appellate Body Report, such as where the Appellate Body – even when it was ultimately reversing the Panel's findings – had rejected China's most extreme legal theories. For example, on the subsidy program issue, the Appellate Body had agreed with the US position that evidence of "systematic series of actions" may provide a sufficient basis to establish the existence of an unwritten subsidy program.[24] And the Appellate Body had also rejected China's legal theory regarding an order of analysis with respect to Article 2 of the SCM Agreement, related to the issue of specificity. This theory lacked any textual basis and, if adopted, would have placed unnecessary burdens on investigating authorities.[25] Finally, the United States noted that in the Panel Report being adopted at the present meeting, the Panel had appropriately rejected China's arguments regarding the legal standard to initiate investigations.[26] This theory was not founded in the text of the SCM Agreement, and if accepted, would have significantly impaired the ability of Members to properly and thoroughly investigate subsidies.

1.16. In closing, the United States said it would like to address an important issue regarding the 90-day time-limit under Article 17.5 of the DSU. In this dispute, the Appellate Body took 118 days to circulate its Report. This marked the fourth time in the last five appeals that the Appellate Body had missed the 90-day deadline. Given the size and complexity of this dispute, as well as many other ongoing appeals, the United States of course would have been willing to positively consider a request from the Appellate Body to exceed the time-limit. However, the Appellate Body had failed to consult with the parties and simply sent out what appeared to be a form letter notifying the DSB that it would yet again breach this clear provision of the DSU. Such action regrettably did not contribute to the strengthening of the WTO as a rules-based organization. The United States urged the Appellate Body to return to its pre-2011 practice of consulting with the parties, and seeking their agreement before exceeding the 90-day time limit. The United States was also disappointed that China would not agree to a letter, as Members had done in at least seven other disputes[27], confirming that a report issued after the expiration of the 90-day deadline would be considered to be consistent with Article 17.5 of the DSU. China had previously agreed to do such a letter in three other disputes where this issue arose, such as "US – Anti-Dumping and Countervailing Duties" (China), "EC – Fasteners" (China), and "China – Raw Materials".

1.17. In more recent appeals, parties such as Argentina[28], India[29], and Japan[30] had also agreed to similar letters. Rather than continuing to address this matter on an *ad hoc* basis, which might further contribute to a lack of transparency and predictability surrounding the issue, the United States encouraged Members and the Appellate Body to work together to find a solution to this issue, such as a return to past practice, that would help restore credibility to the system. The United States said that it would like to thank the DSB for its attention to the important issues covered in its statement made at the present meeting.

1.18. The representative of Australia said that his country thanked the Appellate Body for its Report in this appeal. Australia had participated in this dispute as a third party due to its systemic interest in the interpretation and application of the SCM Agreement. Australia continued to review the Report with interest. At the present meeting, Australia would confine its comments to the delay in the completion of the appeal proceedings and the need for transparency for all WTO

[23] Appellate Body Report, "US – Softwood Lumber IV", paragraph 90.
[24] Appellate Body Report, paragraph 4.141.
[25] Appellate Body Report, paragraph 4.126.
[26] Panel Report, paragraphs 7.143-7.155.
[27] E.g., "US – Tuna II" (Mexico); "US – COOL"; "US – Carbon Steel" (India); "Argentina – Import Measures".
[28] WT/DS444/16; WT/DS445/17.
[29] WT/DS436/9.
[30] WT/DS445/17.

Members on the reasons for such delays. Australia was fully aware of the current heavy workload of the Appellate Body and the ever-increasing complexity in many of the appeals under consideration. Australia, therefore, understood that it may not always be possible to adhere to the time-frames provided for in Article 17.5 of the DSU. In Australia's view, the accuracy and high-quality of reports remained paramount in the WTO dispute settlement process. However, adherence to time-frames was also an important element that underpinned the predictability of the system and was critical in government and commercial decision-making. Australia would, therefore, encourage as few departures from normal appellate time-frames as possible, and consultation with the parties in the event that delay was likely. In Australia's view, such an approach would ensure transparency and improve predictability, and would be consistent with long-standing practice.

1.19. The representative of Canada said that, as a third party, 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, and it, therefore, wished to take this opportunity to make a few brief comments. First, with respect to benefit calculation under Article 14(d) of the SCM Agreement, Canada welcomed the Panel's and Appellate Body's rejection of China's argument that the presence of state-owned enterprises in a market could only support a finding that the market was distorted if those state-owned enterprises constituted "public bodies" within the meaning of Article 1.1(a)(1). Second, with respect to Article 2.1 of the same agreement, Canada was pleased that the Appellate Body had rejected the overly formalistic approach to the specificity analysis advocated by China in favour of a more flexible approach that allowed the authorities to perform a specificity analysis tailored to the specific circumstances of a case.

1.20. Finally, on a more institutional matter, Canada noted that this Report had been circulated after the mandatory 90 days provided for in the DSU. And Canada understood that this would also be the case for many of the reports to be circulated in the coming months. As indicated by the Director-General himself during his presentation to the DSB, Canada considered that Members must take steps to preserve the capacity of the institution to deliver prompt settlement of disputes. This fell naturally under Members' responsibility, by virtue of Article 2.1 of the DSU, to "administer the rules and procedures" of the DSU. In these circumstances, Canada, therefore, reiterated its interest in discussing with other Members practical steps to alleviate the pressure on the dispute settlement system.

1.21. The representative of India said that his country had actively participated as a third party in the DS437 dispute, since 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. This dispute along with the DS436 dispute which had been adopted by the DSB in December 2014 was critical to establish a balanced interpretation of the SCM Agreement. India wished to note that Article 3.2 of the DSU recognized that the dispute settlement system served to preserve the rights and obligations of Members, and to clarify the existing provisions of the WTO Agreements. The Appellate Body in this dispute as well as in the DS436 dispute had sought to do that – clarify various provisions of the SCM Agreement. India wished to highlight two such findings of the Appellate Body that were extremely crucial in its understanding and interpretation of the SCM Agreement.

1.22. First, India welcomed the Appellate Body's finding on benchmark prices for the purposes of determining conferment of a benefit under Article 14(d) of the SCM Agreement. The Appellate Body had stated that the proper benchmark prices would normally emanate from the market for the good in question in the country of provision. Such in-country prices could emanate from a variety of sources, including private or government-related entities. Prices of goods provided by government-related entities other than the entity providing the financial contribution at issue must also be examined to determine whether they were market determined and could, therefore, form part of a proper benchmark. The Appellate Body had rightly held that the reason why the prices of goods provided by government-related entities for which there had not been a "public body" determination needed to be examined in selecting a benefit benchmark under Article 14(d) was because there was no legal presumption under this provision that in country prices from any particular source could or should be discarded in a benchmark analysis. Rather, Article 14(d) required an analysis of the market in the country of provision to determine whether particular in-country prices could be relied upon in arriving at a proper benchmark.

1.23. Second, India appreciated the Appellate Body's effort to further clarify the legal standard under Article 12.7 of the SCM Agreement regarding application of "facts available". The Appellate Body stated that although the precise contours of the standard of review to be applied in a given case were a function of the substantive provisions of the covered agreements at issue, as well as the particular claims made, Article 11 of the DSU required, *inter alia*, that panels scrutinize whether the reasoning of an investigating authority was coherent and internally consistent, and carry out an "in-depth examination" of the explanations provided by an investigating authority. In the context of Article 12.7 of the SCM Agreement, such an "in-depth examination" by a panel would entail, *inter alia*, assessing whether an investigating authority's published report provided an explanation that sufficiently disclosed its process of reasoning and evaluation such that the panel could assess how the authority chose from the facts available those that could reasonably replace the missing information. This would increase the transparency and objectivity in the investigating process in countervailing investigations and benefit all WTO Members.

1.24. The DSB took note of the statements, and adopted the Appellate Body Report contained in document WT/DS437/AB/R and the Panel Report contained in document WT/DS437/R and Add.1, as modified by the Appellate Body Report.

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

A. Statement by the United States

2.1. The representative of the United States, speaking under "Other Business", said that on 19 December 2014, the DSB had adopted the Reports of the Panel and the Appellate Body in the dispute "United States - Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India" (DS436). As provided in the first sentence of Article 21.3 of the DSU, the United States said it would like to inform the DSB that it intended to implement the DSB's recommendations and rulings in a manner that respected the US WTO obligations. The United States would need a reasonable period of time in which to do so.

2.2. The representative of India said that his country thanked the United States for its statement regarding its intentions in respect of implementation of the DSB's recommendations and rulings. The Appellate Body and the Panel Report in the dispute under consideration had been adopted by the DSB on 19 December 2014. In accordance with Article 21.3 of the DSU, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB. India was happy to note that the United States had indicated that it intended to implement the DSB's recommendations and rulings. India urged the United States to bring its measures promptly and fully into compliance with its WTO obligations. India also stood ready to discuss with the United States a reasonable period of time for implementation. India expected the United States to implement the DSB's recommendations and rulings, to the fullest extent, as soon as possible.

2.3. The DSB took note of the statements.

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