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Dispute Settlement Body
25 March 2011

MINUTES OF MEETING

Held in the Centre William Rappard
on 25 March 2011

Chairperson: Mrs. Elin Østebø Johansen (Norway)

Prior to the adoption of the Agenda, the item concerning the Panel Report in the case on: "European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China" (DS397) was removed from the proposed Agenda following the EU's decision to appeal the Report.

Subjects discussed: Page

[1] On 1 December 2009, the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (done at Lisbon, 13 December 2007) entered into force. On 29 November 2009, the WTO received a verbal note (WT/L/779) from the Council of the European Union and the Commission of the European Communities stating that, by virtue of the Treaty of Lisbon, as of 1 December 2009, the European Union replaces and succeeds the European Community.

1. Surveillance of implementation of recommendations adopted by the DSB

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.100)

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.100)

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.75)

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.38)

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.18)

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.15)

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.9)

(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.2)

1. The Chairperson recalled that Article 21.6 of the DSU required that unless the DSB decided otherwise, the issue of implementation of the recommendations or rulings shall be placed on the Agenda of the DSB meeting after six months following the date of establishment of the reasonable period of time and shall remain on the DSB's Agenda until the issue was resolved. She proposed that the eight sub-items under Agenda item 1 be considered separately.

(a) United States – Section 211 Omnibus Appropriations Act of 1998: Status report by the United States (WT/DS176/11/Add.100)

2. The Chairperson drew attention to document WT/DS176/11/Add.100, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US Section 211 Omnibus Appropriations Act of 1998.

3. The representative of the United States said that his country had provided a status report in this dispute on 14 March 2011, in accordance with Article 21.6 of the DSU. As had been noted, a number of legislative proposals that would implement the DSB's recommendations and rulings in this dispute had been introduced in the 111th Congress. The US administration would continue to work with Congress to implement the DSB's recommendations and rulings.

4. The representative of the European Union said that his delegation thanked the United States for its 101 status report pertaining to this dispute. The EU hoped that the US authorities would very soon take steps towards implementing the DSB's ruling and resolve this matter.

5. The representative of Cuba said that the WTO was currently at a critical juncture: the Doha Round was trapped in a vicious circle and Members were faced with a long list of cases concerning the US non-compliance. It was nine years and 34 days since the United States had informed the DSB on 19 February 2002 that it needed a reasonable period of time to implement the DSB's recommendations and rulings pertaining to the Section 211 dispute. At the present meeting, the 101 status report presented by the United States did not contain any change. Since the purpose of the DSU provisions was, *inter alia,* to ensure the credibility of the system, it was hard to understand the US non-compliance. This negative precedent would not encourage other non-complying Members to act promptly. The United States should explain why it continued to disregard the rules of international law. Thus Cuba urged the United States to provide reasons for its actions. The US authorities had not taken a single step to repeal Section 211, and avoided the consideration of bills aimed at rectifying this violation of international law. There was no justification for keeping this matter on the DSB's Agenda indefinitely, given that this dispute was not as technically or legislatively complex to resolve as some other disputes that had been resolved. The solution to this dispute was to repeal Section 211.

6. At the beginning of 2011, Cuba had warned that the US non-compliance and its lack of action regarding the Section 211 dispute encouraged enforcement claims by US citizens who benefited from politicized and biased court rulings against Cuba, at the cost of trademark and patent rights of Cuban owners that were duly registered and recognized in the United States. To allow such misappropriation for the claimants would set another negative precedent. The ongoing enforcement of Section 211 also encouraged unlawful use of the Havana Club trademark in the United States by the Bacardi company regarding a rum not produced in Cuba and had been conducive to spurious rulings by US courts in favour of Bacardi, which had no rights of ownership over a trademark, which had been abandoned by its original owner and was duly registered by the Cuban company Cubaexport. Contrary to what had taken place in the United States with the Havana Club, the Supreme Court of Spain had recently found against Bacardi and had confirmed that the trademark belonged to the Pernod Ricard and Cubaron joint venture. This was the third time that the Spanish court had rejected Bacardi's attempt to unduly claim ownership of the brand and its unlawful use in Spain. In Cuba's view, this constituted a sound precedent to prevent the infringement of intellectual property rights from being repeated in

Spain. The United States should follow suit by repealing Section 211, which only served to accommodate the commission of fraudulent acts in its territory.

7. The representative of China said that her country thanked the United States for its status report and noted that the United States had, once again, reported non-compliance. Nine years had passed since the adoption of the DSB's recommendations and rulings in this dispute. In China's view, such a situation violated the principle of prompt implementation stipulated in the DSU provisions. It was also highly inappropriate for a developed-country Member to maintain, for such a long period of time, a WTO-inconsistent measure that affected the interests of a developing-country Member. China, therefore, supported Cuba and urged the United States to implement the DSB's rulings without any further delay.

8. The representative of the Bolivarian Republic of Venezuela said that her country supported Cuba's statement and reiterated its request that the United States put an end to its policy of economic, commercial and financial blockade to the detriment of Cuba. That blockade was reflected in the numerous actions taken by the United States over the past 60 years. In particular, the United States had failed to implement the Appellate Body's ruling that Section 211 was inconsistent with the TRIPS Agreement and the Paris Convention and should therefore be repealed. As a WTO Member and a DSB participant, Venezuela, once again, regretted that the US status report repeated, as it had for many years and most recently on 15 March 2011, that "t]he US Administration will continue to work with the US Congress with respect to appropriate statutory measures that would resolve this matter". In Venezuela's view, this qualified as "action without results". Apart from the harm caused to the Cuban people, Venezuela was concerned that the non-compliance with multilateral trading rules would undermine the credibility of the DSB. As it had done on previous occasions, Venezuela urged the United States to comply with the DSB's recommendations.

9. The representative of Uruguay said that, on a number of occasions, his country had expressed its systemic concern about the US failure to comply with the DSB's rulings pertaining to this dispute. In Uruguay's view, it was important to preserve the credibility of the dispute settlement system. Thus, Uruguay urged the United States to make greater efforts to comply with the DSB's rulings.

10. The representative of Brazil said that his country thanked the United States for its status report pertaining to the Section 211 dispute. Brazil remained concerned about the prolonged situation of non-compliance with the DSB's recommendations and rulings. Brazil urged the United States to expedite its efforts and to comply with its WTO obligations.

11. The representative of Nicaragua said that her country thanked the United States for its status report, but regretted that the report confirmed the continued failure by the United States to comply with the DSB's recommendations and rulings. Nicaragua hoped that the United States would soon take the necessary steps to comply with the DSB's ruling and resolve this long-standing dispute. Nicaragua supported Cuba's statement and, once again, urged the United States to implement the DSB's recommendations and rulings so as to preserve the credibility of the DSB.

12. The representative of Mexico said that the discussion under this Agenda item could provide useful input for the on-going discussions carried out in the context of the DSU negotiations. If Members wished to amend the DSU provisions, they should do so by taking into account their practical experience. Any Member could initiate its own dispute if it considered that it was affected by the failure of another Member to resolve a dispute or to comply with the DSB's recommendations. Mexico urged the parties to resolve this dispute through the legal remedies provided for under the DSU. Members expected that the United States would comply with the DSB's recommendations.

13. The representative of Angola said that her country thanked the United States for providing information on the implementation of the DSB's decision and the Appellate Body's recommendations of 12 February 2002 regarding Section 211. Angola recalled that prompt compliance with the DSB's rulings and recommendations was fundamental to ensuring an effective resolution of disputes to the benefit of all Members. The delay in the implementation of the DSB's decision affected the efficiency and the predictability of the multilateral trading system and set a negative precedent for other cases. Angola hoped that the parties to the dispute would demonstrate concrete will and take actions in order to send a signal of respect for WTO rules.

14. The representative of Zimbabwe said that his country thanked the United States for its status report on compliance with the Appellate Body's decision of 2002. Zimbabwe noted that, although this decision had been taken almost a decade ago, there appeared to have been no interest on the part of the United States to implement it. He said that the US continued non-compliance undermined the credibility of the WTO and the DSB. Zimbabwe supported Cuba's statement and, once again, urged the United States to comply with the DSB's recommendations and rulings.

15. The representative of Ecuador said that his country supported Cuba's statement and wished to point out that Article 21 of the DSU referred to prompt compliance with the DSB's rulings and recommendations, in particular with regard to matters affecting the interests of developing countries. In that regard, Ecuador urged the United States to accelerate its efforts to ensure the full and prompt implementation of the DSB's rulings and recommendations, in particular with regard to Section 211.

16. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(b) United States – Anti-dumping measures on certain hot-rolled steel products from Japan: Status report by the United States (WT/DS184/15/Add.100)

17. The Chairperson drew attention to document WT/DS184/15/Add.100, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US anti-dumping measures on certain hot-rolled steel products from Japan.

18. The representative of the United States said that his country had provided a status report in this dispute on 14 March 2011, in accordance with Article 21.6 of the DSU. As of November 2002, the US authorities had addressed the DSB's recommendations and rulings with respect to the calculation of anti-dumping margins in the hot-rolled steel anti-dumping duty investigation at issue in this dispute. Details were provided in document WT/DS184/15/Add.3. With respect to the recommendations and rulings of the DSB that had not already been addressed by the US authorities, the US Administration would work with the US Congress with respect to appropriate statutory measures that would resolve this matter.

19. The representative of Japan said that his country thanked the United States for its statement and its most recent status report. Japan took note of the US report that the United States had taken certain measures to implement part of the DSB's recommendations in November 2002. As for the remaining part of the DSB's recommendations, Japan hoped that the United States would soon be in a position to report to the DSB on more tangible progress. Full and prompt implementation of the DSB's recommendations and rulings was "essential to the effective functioning of the WTO and the maintenance of a proper balance of the rights and obligations of Members".[2] Japan called on the United States to fully implement the DSB's recommendations in this long-standing dispute without further delay.

[2] Article 3.3 of the DSU.

20. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(c) United States – Section 110(5) of the US Copyright Act: Status report by the United States (WT/DS160/24/Add.75)

21. The Chairperson drew attention to document WT/DS160/24/Add.75, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning Section 110(5) of the US Copyright Act.

22. The representative of the United States said that his country had provided a status report in this dispute on 14 March 2011, in accordance with Article 21.6 of the DSU. The US Administration would continue to confer with the EU, and to work closely with the US Congress, in order to reach a mutually satisfactory resolution of this matter.

23. The representative of the European Union said that the EU thanked the United States for its status report and noted that the United States was again reporting non-compliance. The EU remained keen to work with the US authorities towards the complete resolution of this case.

24. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(d) European Communities – Measures affecting the approval and marketing of biotech products: Status report by the European Union (WT/DS291/37/Add.38)

25. The Chairperson drew attention to document WT/DS291/37/Add.38, which contained the status report by the European Union on progress in the implementation of the DSB's recommendations in the case concerning its measures affecting the approval and marketing of biotech products.

26. The representative of the European Union said that, once again, the EU noted that its regulatory procedures on biotech products continued to work as foreseen in the legislation. The number of GMOs authorized since the date of establishment of the Panel was thirty-four. In 2010, 11 applications had been authorized, more than double the number of authorizations in 2009, including one authorization for cultivation. At the Agriculture Council held on 17 March 2011, two authorizations[3] had been examined, together with the renewal of the authorization of maize 1507. Progress had also been made on other applications for authorization. Four more draft applications had been voted in the Standing Committee in February 2011[4] and the Council would examine those applications in the coming weeks. The EU welcomed the continuation of the constructive technical dialogue with the United States regarding issues related to biotechnology. The next meeting was scheduled for 28 March 2011. The EU hoped that this constructive approach based on dialogue would allow the parties to leave litigation aside.

27. The representative of the United States said that his country thanked the EU for its status report and its statement at the present meeting. The United States remained concerned with delays in the EU's approval system for biotech products and the resulting effects on trade. The United States was likewise concerned with bans adopted by EU member States on biotech products approved at the EU level. In just a few days, as had been mentioned by the EU, a US delegation would be meeting

[3] Maize MON89034xMON88017 and cotton GHB614MON89034.

[4] MIR604×GA21 maize, BT11×MIR604 maize, 281-24-236/3006-210-23 cotton, Bt11×MIR604×GA21 maize.

with EU officials in Brussels to discuss these matters and related issues. The United States looked forward to a constructive discussion.

28. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(e) United States – Measures relating to zeroing and sunset reviews: Status report by the United States (WT/DS322/36/Add.18)

29. The Chairperson drew attention to document WT/DS322/36/Add.18, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US measures relating to zeroing and sunset reviews.

30. The representative of the United States said that his country had provided a status report in this dispute on 14 March 2011 in accordance with Article 21.6 of the DSU. As the United States had explained in its status report and at the January and February 2011 DSB meetings, in December 2010 the US Department of Commerce had announced a proposal to change the calculation of weighted average dumping margins and assessment rates in certain anti-dumping proceedings. Details of that proposal had been published in the Federal Register.[5] As had been explained in the notice, the proposal required a period for public comment and would involve consultations with appropriate committees in the US Congress. At the present time, the US Department of Commerce was continuing with its ongoing work on the December proposal. Because of the US concerns about the findings regarding zeroing in this and other disputes, responding to those findings had presented substantial challenges for the United States and had required significant resources. The proposal reflected that effort, and addressed adverse findings on zeroing in reviews, sunset reviews, and transaction-to-transaction comparisons in investigations.

31. The representative of Japan said that his country thanked the United States for its statement and its most recent status report. Japan took note of the statements that the internal consultation process and ongoing work was underway, based on the proposal announced by the US Department of Commerce on 28 December 2010. While taking the US implementation efforts as a positive step forward, Japan continued to seek prompt and full compliance by the United States with respect to all of the measures at issue that were subject to the recommendations in this dispute. Japan looked forward to an ongoing dialogue with the United States and would closely monitor any developments on this matter. Japan reserved its right under the DSU to take appropriate action, if necessary.

32. The representative of China said that her country welcomed the positive steps taken by the United States towards the implementation of the DSB's recommendations and rulings on zeroing issues. With respect to the proposal of the US Department of Commerce (USDOC) to end the practice of using zeroing methodology in reviews, which had appeared on the US Federal Register of 28 December 2010, China wished to make some comments. First, with regard to the prior original anti-dumping investigations and reviews, the USDOC should provide exporters with the opportunity to petition a revised dumping margin calculation. This would require the USDOC to adopt guidelines for the transition period from the prior methodology to the revised methodology. China believed that currently effective dumping margins calculated using zeroing methodology should be eligible for revision to ensure fairness and to avoid prolonged and unnecessary litigations.

33. Second, the United States should take this opportunity to clarify important issues concerning the use of targeted dumping, and communicate its intention to abide by clear international obligations and prohibit the use of zeroing methodology. The USDOC proposal of 28 December 2010 did not identify the issue of targeted dumping by name, but did clearly refer to it when explaining the

[5] 75 Federal Register 81533 (28 December 2010).

proposed methodology. Specifically, the USDOC had indicated that the revised methodology would be used in administrative reviews, "except where the Department determines that application of a different comparison method is more appropriate". In a series of recent original investigations, the USDOC had taken the position that a finding of targeted dumping produced broad discretions for the dumping margin calculation, and the average-to-transaction comparison methodology used in the targeted dumping context incorporated the zeroing methodology. China had serious concerns about the appropriateness of this recently-developed practice. China wished to ask the United States to clarify how the USDOC used the targeted dumping methodology to calculate dumping margins, and why the zeroing methodology was necessary in connection with this alternative method. China looked forward to the clarification by the United States of its proposal in light of those comments.

34. The representative of the United States said that a number of substantive comments had just been made, and he looked forward to receiving that statement and reviewing those comments. He said that, at this point, the US Department of Commerce had issued a proposal which was not final, and did not prejudge what might happen in any specific past review. The proposal was subject to comment and the United States was reviewing the comments it had received.

35. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(f) United States – Continued existence and application of zeroing methodology: Status report by the United States (WT/DS350/18/Add.15)

36. The Chairperson drew attention to document WT/DS350/18/Add.15, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning the existence and application of zeroing methodology by the United States.

37. The representative of the United States said that his country had addressed the issue of compliance with the findings in this dispute in the status report provided on 14 March 2011 and earlier under Agenda item 1(e) of the present meeting. The United States referred Members to that statement for further details.

38. The representative of the European Union said that the EU thanked the United States for its status report. The EU had commented on the US proposal of 28 December 2010 at the DSB meetings in January and February 2011. Thus, the EU had little to add to what it had stated at those previous meetings. The EU simply reiterated its request that the United States ensure that unduly collected duties imposed and collected from the expiry of the deadline for implementation until full compliance were refunded, and that the proposal that it adopted would ensure full compliance with WTO rules. The EU remained ready to engage with the United States so that these objectives could be achieved.

39. The representative of the United States said that, as explained at prior DSB meetings, the United States was not aware of any other instances in which a Member had refunded duties in response to an adverse finding in a WTO dispute. As it had explained at the January and February 2011 DSB meetings, the United States understood that the EU had taken a very different approach in the Bananas dispute than the one suggested at the present meeting.

40. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(g) United States – Laws, regulations and methodology for calculating dumping margins ("zeroing"): Status report by the United States (WT/DS294/38/Add.9)

41. The Chairperson drew attention to document WT/DS294/38/Add.9, which contained the status report by the United States on progress in the implementation of the DSB's recommendations in the case concerning US laws, regulations and methodology for calculating dumping margins.

42. The representative of the United States said that his country had addressed the issue of compliance with the findings in this dispute in the status report provided on 14 March 2011, and earlier under Agenda item 1(e) of the present meeting. The United States referred Members to that statement for further details.

43. The representative of the European Union said that the EU thanked the United States for its status report and referred Members to its statement made under Agenda item 1(f) concerning the US proposal of 28 December 2010.

44. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

(h) China – Measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products: Status report by China (WT/DS363/17/Add.2)

45. The Chairperson drew attention to document WT/DS363/17/Add.2, which contained the status report by China on progress in the implementation of the DSB's recommendations in the case concerning China's measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products.

46. The representative of China said that her country had presented its status report in accordance with Article 21.6 of the DSU. China respected the DSB's rulings and recommendations, despite its reservations regarding the Reports of the Appellate Body and the Panel in this dispute. As China had stated before, this dispute involved a number of Chinese administrative measures on cultural products and was embodied with more complexity and sensitivity than other disputes. In that regard, China hoped that relevant WTO Members could understand the difficult and complicated situation that China was facing during the process of implementation. China had made tremendous efforts to implement the DSB's rulings and recommendations in this dispute, and had thus far completed amendments to most measures at issue, including Regulations on the Management of Publications and Regulations on the Management of Audiovisual Products and a number of rules at ministerial level. This demonstrated China's sincerity towards the implementation of the DSB's rulings and recommendations. China believed that this matter would be resolved properly through joint efforts and mutual cooperation with relevant parties.

47. The representative of the United States said that his country thanked China for its status report and its statement. The United States was troubled by the lack of any apparent progress by China in bringing its measures relating to films for theatrical release into compliance with the DSB's recommendations and rulings. The United States also had significant concerns about the incomplete progress relative to China's measures relating to audiovisual home entertainment products, reading materials, and sound recordings. The United States and China were in discussions regarding how to handle any eventual request for a compliance proceeding under Article 21.5 of the DSU and any eventual request for authorization to suspend concessions under Article 22.6 of the DSU. The United States hoped to report progress in those discussions in the coming days. The United States wished to recall, as China and other Members were aware, that the United States did not consider that the DSU required a complaining party to request an Article 21.5 compliance proceeding before pursuing a request pursuant to Article 22.2 of the DSU.

48. The representative of the European Union said that the EU thanked China for its most recent status report. The EU was glad that China had made important efforts in order to implement the DSB's recommendations and rulings in this dispute, which, the EU acknowledged, touched upon complex issues. The EU was nonetheless concerned that full implementation had not been achieved by the expiry of the reasonable period of time, and also by China's comments in its status report. In particular, China referred to implementation issues that were still outstanding, which it apparently suggested to address via joint efforts and cooperation. The EU called on China to expeditiously and fully implement the DSB's recommendations in order to remove any remaining shortcomings in China's import and distribution regime. Compliance with the DSB's recommendations and rulings was essential to the functioning of the system and to ensuring a proper balance of rights and obligations. Compliance required full implementation of the findings of the Reports, which were unconditionally accepted by the parties to the dispute. The EU remained convinced that China's cultural policies could be developed and implemented within the boundaries set by full implementation of China's WTO obligations.

49. The DSB took note of the statements and agreed to revert to this matter at its next regular meeting.

2. United States – Use of zeroing in anti-dumping measures involving products from Korea

(a) Implementation of the recommendations of the DSB

50. The Chairperson recalled that in accordance with the DSU provisions, the DSB was required to keep under surveillance the implementation of recommendations and rulings of the DSB, in order to ensure effective resolution of disputes to the benefit of all Members. In this respect, Article 21.3 of the DSU provided that the Member concerned shall inform the DSB, within 30 days after the date of adoption of the panel or Appellate Body report, of its intentions in respect of implementation of the recommendations and rulings of the DSB. She recalled that at its meeting on 24 February 2011, the DSB had adopted the Panel Report pertaining to the dispute on: "United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea". She invited the United States to inform the DSB of its intentions in respect of implementation of the DSB's recommendations.

51. The representative of the United States said that, on 24 February 2011, the DSB had adopted the Panel Report in the dispute: "United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea" (DS402). At the present meeting, as provided in the first sentence of Article 21.3 of the DSU, the United States wished to state that it intended to implement the recommendations and rulings of the DSB in a manner that respected its WTO obligations. The United States would need a reasonable period of time in which to implement.

52. The representative of Korea said that his country thanked the United States for its statement regarding its intentions regarding the implementation of the DSB's recommendations and rulings in this dispute. Korea noted that the DSU called for immediate implementation of the DSB's recommendations and rulings and proper implementation in this case would require the re-calculation of dumping margins and revocation of anti-dumping order. Korea would consider the US statement carefully in this regard. He said that the DSU allowed a reasonable period of time for implementation if immediate compliance was impracticable and Korea looked forward to entering into bilateral discussions regarding the reasonable period of time. In the meantime, Korea reserved its rights under Articles 21 and 22 of the DSU.

53. The DSB took note of the statements, and of the information provided by the United States regarding its intentions in respect of implementation of the DSB's recommendations.

3. United States – Continued Dumping and Subsidy Offset Act of 2000: Implementation of the recommendations adopted by the DSB

(a) Statements by the European Union and Japan

54. The Chairperson said that this item was on the Agenda of the present meeting at the request of the European Union and Japan. She then invited the respective representatives to speak.

55. The representatives of the European Union said that, as it had done many times before, the EU wished to ask the United States when it would effectively stop the transfer of anti-dumping and countervailing duties to the US industry and, hence, put an end to the condemned measure. The fact that the United States had stopped disbursing duties collected after a certain point in time did not achieve full compliance. Every disbursement that still took place was clearly an act of non-compliance with the DSB's recommendations. Once again, the EU renewed its call on the United States to abide by its clear obligation under Article 21.6 of the DSU and to submit status reports pertaining to this dispute.

56. The representative of Japan said that, as the latest distributions showed[6], the CDSOA remained operational. According to US Customs and Border Protection, "the distribution process will continue for an undetermined period".[7] Japan urged the United States to stop the illegal distributions and repeal the CDSOA, not just in form but in substance, so as to resolve this dispute. According to Article 21.6 of the DSU, the United States was under obligation to provide the DSB with a status report in this dispute.

57. The representative of China said that her country thanked the EU and Japan for bringing this item before the DSB at the present meeting. China shared the concerns of the EU and Japan and wished to join them in urging the United States to fully comply with the DSB's rulings on this matter. China also believed that this matter should remain under the surveillance of the DSB until the United States fully complied with the DSB's rulings.

58. The representative of Brazil said that his country thanked the EU and Japan for keeping this item on the Agenda of the DSB. As at previous DSB meetings, Brazil urged the United States to stop making disbursements pursuant to the CDSOA. Only then would the issue in this dispute be "resolved" and the United States would no longer be required to provide status reports pursuant to Article 21.6 of the DSU.

59. The representative of Canada said that her country thanked the EU and Japan for placing this item on the Agenda of the present meeting. As stated at previous meetings, Canada agreed with the EU and Japan that the CDSOA remained subject to the surveillance of the DSB until the United States ceased to administer it.

60. The representative of India said that his country thanked the EU and Japan for regularly bringing this issue before the DSB. India remained disappointed about the US continued operation of the CDSOA and shared the concerns expressed by previous speakers. As previously stated, India was concerned that continued non-compliance by Members led to a growing lack of credibility of the dispute settlement system. India agreed with the EU and Japan that the Byrd Amendment should continue to remain under the surveillance of the DSB until the United States ceased to administer it.

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[6] See US Customs and Border Protection's website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/annual_report/

[7] See US Customs and Border Protection's website at: http://www.cbp.gov/xp/cgov/trade/priority_trade/add_cvd/cont_dump/cont_dump_faq.xml

61. The representative of Thailand said that his country thanked the EU and Japan for continuing to bring this item before the DSB. Thailand supported the statements made by previous speakers and continued to urge the United States to fully comply with the DSB's recommendations and rulings on this matter.

62. The representative of the United States said that, as his country had explained at previous DSB meetings, the US President had signed the Deficit Reduction Act into law on 8 February 2006. That Act included a provision repealing the Continued Dumping and Subsidy Offset Act of 2000. Thus, the United States had taken all actions necessary to implement the DSB's recommendations and rulings in these disputes. Furthermore, the United States recalled that Members had acknowledged during previous DSB meetings that the 2006 Deficit Reduction Act did not permit the distribution of duties collected on goods entered after 1 October 2007. With respect to comments regarding further status reports in this matter, as the United States had already explained at previous DSB meetings, the United States failed to see what purpose would be served by further submission of status reports repeating the progress the United States had made in the implementation of the DSB's recommendations and rulings.

63. The DSB took note of the statements.

4. European Communities – Certain measures prohibiting the importation and marketing of seal products

(a) Request for the establishment of a panel by Canada (WT/DS369/2)

64. The Chairperson recalled that the DSB had considered this matter at its meeting on 24 February 2011 and had agreed to revert to it. She drew attention to the communication from Canada contained in document WT/DS369/2, and invited the representative of Canada to speak.

65. The representative of Canada said that, at the 24 February 2011 DSB meeting, her country had made its first request for the establishment of a panel to examine Belgian and Dutch measures that prohibited the importation and the marketing of seal products. Canada considered that the Belgian and Dutch measures were inconsistent with the EU's obligations under the GATT 1994 and the TBT Agreement, and the reasons for this were set out in Canada's panel request. Since making its first request for the establishment of a panel, Canada had been informed that the Dutch Government had proposed the adoption of a decision to repeal the Decree of 4 July 2007 in relation to the ban on trade in products originating from harp and hooded seals. While Canada welcomed this move, it understood that the decision had not yet been adopted. As such, both the Belgian and Dutch measures remained in force. Further to its request of 24 February 2011, Canada requested, once again, that the DSB establish a panel, with standard terms of reference. Given the close relation between this dispute and DS400, which would be considered under the next item of the Agenda of the present meeting, Canada reiterated its preference to have the two disputes heard by a single set of panelists.

66. The representative of the European Union said that the EU took note of Canada's second request for the establishment of a panel. As regards the Dutch measures subject to the panel request, the EU wished to inform Members that, on 15 March 2011, the Dutch Government had signed a decree whereby the national prohibition on certain seal products would be withdrawn. The decree would be published in the Dutch Official Bulletin within two weeks and would enter into force after a period of eight weeks following its publication. Within that period, the decree would be presented to parliament. As regards the Belgian measures, the Belgian authorities had indicated that they would repeal the measure, or amend it, so that it would be limited to implementing the provisions of the EU Regulation. In that regard, the EU considered that pursuing this dispute would serve no useful purpose and hoped that Canada would be able to abandon its claims as soon as the repeal of the measures became effective.

67. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

68. The representatives of China, Colombia, Japan, Mexico, Norway and the United States reserved their third-party rights to participate in the Panel's proceedings.

5. European Communities – Measures prohibiting the importation and marketing of seal products

(a) Request for the establishment of a panel by Canada (WT/DS400/4)

69. The Chairperson recalled that the DSB had considered this matter at its meeting on 24 February 2011 and had agreed to revert to it. She drew attention to the communication from Canada contained in document WT/DS400/4, and invited the representative of Canada to speak.

70. The representative of Canada said that, as in the DS369 dispute, her country had made its first request for the establishment of a panel regarding the EU measures that banned the trade in seal products at the 24 February 2011 DSB meeting. At that meeting, Canada had outlined the various reasons for proceeding with this case which it did not wish to repeat at the present meeting. Nevertheless, Canada wished to reiterate that it believed that trade restrictions could not be justified by relying on myths and misinformation, and Canada encouraged people to form their opinions based on the facts. The facts were that the Canadian seal harvest was lawful, sustainable, strictly regulated and guided by rigorous animal welfare principles that were internationally recognized by virtually all independent observers. The Atlantic harp seal population was healthy and abundant. It was currently estimated at around 9.1 million animals, which was more than four times what it had been in the 1970s, while supporting high harvest levels over much of that period. Furthermore, the Canadian seal harvest helped to provide thousands of jobs in Canada's remote coastal and northern communities where few economic opportunities existed. Further to its request of 24 February 2011, Canada requested, once again, that the DSB establish a panel to examine this dispute, with standard terms of reference.

71. The representative of the European Union said that the EU took note of Canada's second request for the establishment of a panel. The EU also noted that Canada's request simply listed a series of WTO provisions with which the EU measures would, in Canada's view, appear to be inconsistent. Canada had provided no meaningful explanation of the reasons why the EU measures were deemed inconsistent with each of those provisions. The EU considered that the request lacked the degree of specificity required by the DSU. The EU, therefore, reserved the right to raise this issue with the panel. The EU was strongly convinced of the strength of its case and stood ready to defend its measures which it considered to be fully consistent with WTO law.

72. The representative of Iceland said that his country took note of the requests made by Canada for the establishment of a panel in this long-standing dispute concerning the EU measures prohibiting the importation and marketing of seal products. The measures were also a source of concern to Iceland. As Norway had rightfully observed at the 24 February 2011 DSB meeting, this dispute was not just about seal products, but more importantly about the principle of sustainable utilization of all living marine resources, and the ability to market the products resulting from such practices, both from hunting and fishing. Iceland agreed with Canada that there were no justifiable grounds for the ban introduced by the EU. The seal populations around Iceland were subject to management and their existence was not threatened in any way. Moreover, their utilization was considered desirable. Iceland, therefore, had a substantial interest in the matter and sympathized with Canada's request. Iceland wished to participate in the Panel's proceedings as a third party.

73. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

74. The representatives of China, Colombia, Iceland, Japan, Mexico, Norway and the United States reserved their third-party rights to participate in the Panel's proceedings.

6. China – Certain measures affecting electronic payment services

(a) Request for the establishment of a panel by the United States (WT/DS413/2)

75. The Chairperson recalled that the DSB had considered this matter at its meeting on 24 February 2011 and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS413/2, and invited the representative of the United States to speak.

76. The representative of the United States said that, as his country had explained at the 24 February 2011 DSB meeting, for several years the United States had been concerned about certain measures maintained by China affecting suppliers of electronic payment services. In the financial services sector, as had been set out in China's services Schedule[8], China had undertaken both market access and national treatment commitments with respect to these services. Despite its GATS commitments, however, China imposed market access restrictions and requirements on service suppliers of other Members seeking to supply electronic payment services in China. The United States considered that the measures identified in the US panel request were inconsistent with China's obligations under the GATS. In particular, China's measures appeared to breach its obligation under Article XVI of the GATS to accord services and services suppliers of any other Member treatment no less favourable than that provided for in China's Schedule, and its obligations under Article XVII of the GATS to accord to services and service suppliers of any other Member treatment no less favourable than that it accorded to its own like services and service suppliers. The United States also wished to note that it disagreed with the assertion that China had made at the 24 February 2011 DSB meeting that the US panel request incorporated measures which had not been identified in the US request for consultations. Accordingly, the United States again requested that the DSB establish a panel to examine the matter set out in its panel request, with standard terms of reference.

77. The representative of China said that her country regretted that the United States pursued this matter by requesting the establishment of a panel for the second time. After receiving the request for consultations, China had held sincere consultations with the United States and was disappointed that no positive solution was achieved. Contrary to what the United States had stated, China consistently observed the WTO Agreement and the commitments undertaken upon its accession to the WTO. China would strongly defend its interests in accordance with relevant WTO rules.

78. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

79. The representatives of Australia, the European Union, Guatemala, Japan and Korea reserved their third-party rights to participate in the Panel's proceedings.

[8] Schedule of Specific Commitments on Services annexed to the Protocol on the Accession of the People's Republic of China.

7. China – Countervailing and anti-dumping duties on grain oriented flat-rolled electrical steel from the United States

(a) Request for the establishment of a panel by the United States (WT/DS414/2)

80. The Chairperson recalled that the DSB had considered this matter at its meeting on 24 February 2011 and had agreed to revert to it. She drew attention to the communication from the United States contained in document WT/DS414/2, and invited the representative of the United States to speak.

81. The representative of the United States said that China had imposed anti-dumping and countervailing duties on grain-oriented electrical steel, known as GOES, from the United States. As the United States had explained at the 24 February 2011 DSB meeting, China's dumping and subsidy determinations in the GOES investigation appeared to breach a number of its obligations under the GATT 1994, the Anti-Dumping Agreement, and the Subsidies Agreement. The apparent inconsistencies were set out in detail in the US request for the establishment of a panel. The US concerns related to every phase of China's investigation. In short, the United States believed that there had been profound procedural and substantive deficiencies in the investigation, and these made the determinations unsustainable under WTO rules. Accordingly, the United States requested that the DSB establish a panel to examine the matter set out in the US panel request, with standard terms of reference.

82. The representative of China said that her country regretted that the United States had submitted its request for panel establishment for the second time. As stated at the 24 February 2011 DSB meeting, China firmly believed that its anti-dumping and countervailing measures were fully consistent with WTO rules. China wished to point out again that the US panel request contained claims that were not listed in the US request for consultations and those claims had not been subject to consultations. China understood that a panel would be established at the present meeting and that it would vigorously defend its rights and interests in accordance with WTO rules.

83. The DSB took note of the statements and agreed to establish a panel in accordance with the provisions of Article 6 of the DSU with standard terms of reference.

84. The representatives of the European Union, Honduras, India, Japan, Korea and Viet-Nam reserved their third-party rights to participate in the Panel's proceedings.

8. European Communities – Measures prohibiting the importation and marketing of seal products

(a) Request for the establishment of a panel by Norway (WT/DS401/5)

85. The Chairperson drew attention to the communication from Norway contained in document WT/DS401/5, and invited the representative of Norway to speak.

86. The representative of Norway said that, at the present meeting, her country was requesting the establishment of a panel in the long-standing dispute with the EU regarding its ban on trade in seal products, which had come into effect on 20 August 2010. As outlined in its request of 14 March 2011, it was Norway's firm view that the Seal Regulation and its implementing regulation were inconsistent with the EU's WTO obligations, including the Agreement on Agriculture, the TBT Agreement and the GATT 1994. Norway saw no justification for the EU ban on trade in seal products. Moreover, this dispute was not just about seal products, but more importantly about a Member's right, under the WTO Agreements, to trade in the marine resources it chose to harvest in a sustainable manner.

87. Without entering into the merits of its claims, Norway wished to emphasize that none of the species hunted by Norway were endangered and were not listed by CITES. The Norwegian quotas for its seal catch were set in line with advice from the International Council for the Exploration of the Sea, and the catch in recent years had been well below the total allowable catch. The hunt was, in other words, a sustainable part of the livelihood of coastal communities and founded in science. Furthermore, Norway took animal welfare very seriously. The Norwegian hunt was subject to strict, detailed regulation regarding the killing of animals, training of marksmen, surveillance and monitoring, which was strictly enforced and ensured high animal welfare standards. Studies by the European Food Safety Authority and Consultancy within Engineering, Environmental Science and Economics confirmed that the Norwegian hunt conformed to the highest standards. Norway's panel request was the latest step in a long line of engagements with the EU on this issue. On numerous occasions over the past few years, Norway had voiced its concerns over the Seal Regulation and its implementing regulation, both at a political level and at a working level. Norway had made several statements regarding this issue in the TBT Committee, most recently on 2 November 2010. Norway had held two rounds of consultations with the EU, on 15 December 2009 and on 1 December 2010 respectively. Unfortunately, those consultations had not resolved the dispute. Norway, therefore, found itself with no choice but to request the establishment of a panel, with standard terms of reference, in order to resolve this dispute.

88. The representative of the European Union said that the EU regretted that, after the rounds of consultations held in the past few years, Norway was requesting the establishment of a panel at the present meeting. The EU was strongly convinced of the strength of its case and stood ready to defend its measures which it considered to be fully consistent with WTO law. The EU could not agree to the establishment of a panel at the present meeting.

89. The representative of Canada said that her country welcomed Norway's decision to request the establishment of a panel on the same EU measures in question as those in the DS400 dispute. This request reaffirmed Canada's conviction that the EU ban was inconsistent with the EU's WTO obligations.

90. The representative of Iceland said that, rather than repeating the explanations it had already provided, Iceland wished to refer delegations to its statement made under Agenda item 5. On the same grounds as in the case of Canada's panel request, Iceland sympathized with Norway's request.

91. The DSB took note of the statements and agreed to revert to this matter.

9. United States – Definitive anti-dumping and countervailing duties on certain products from China

(a) Report of the Appellate Body (WT/DS379/AB/R) and Report of the Panel (WT/DS379/R)

92. The Chairperson drew attention to the communication from the Appellate Body contained in document WT/DS379/8 transmitting the Appellate Body Report on: "United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China", which had been circulated on 11 March 2011 in document WT/DS379/AB/R, in accordance with Article 17.5 of the DSU. She reminded delegations that the Appellate Body Report and the Panel Report pertaining to this dispute had been circulated as unrestricted documents. As Members were aware, Article 17.14 of the DSU required 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".

93. The representative of China said that her country thanked the Appellate Body, the Panel and the respective Secretariats for the time and effort that they had dedicated to resolve this dispute. China welcomed the Appellate Body's reversal of the Panel's findings concerning double remedy and public body. In 2006, the US Department of Commerce (USDOC) had changed its long-standing policy of not applying countervailing measures to countries that it designated as non-market economies. Since that reversal in policy, China's exports to the United States had been subjected to over twenty parallel anti-dumping and countervailing duty investigations. Even before the USDOC's policy reversal, it had been widely recognized in the United States that the imposition of countervailing duties in conjunction with the imposition of anti-dumping duties calculated under a non-market economy (NME) methodology would likely result in measures that offset the same subsidies twice – a "double remedy". This fact had been recognized by the US Government Accountability Office, the US Congress, the US Court of International Trade and now in this dispute by the Appellate Body. It was deeply regrettable that, notwithstanding its own acknowledgement of the double remedy problem, the USDOC had persistently refused to avoid the imposition of double remedies in cases involving Chinese exports. In China's view, the USDOC had breached the fundamental principles of fairness and reasonableness that should have been adhered to by all investigating authorities. China considered that the position taken by the United States in this dispute – that it had no obligation under the covered agreements to avoid offsetting the same subsidies twice – was one of the more extreme positions taken by a Member in the history of dispute settlement. The US position was fundamentally incompatible with the remedial purpose of countervailing measures. For those reasons, China was grateful for the Appellate Body's decision to reject the legal arguments put forward by the United States, and to find that double remedies were inconsistent with Article 19.3 of the SCM Agreement. Just as an investigating authority was subject to an affirmative obligation to ascertain the precise amount of the subsidy, so too was it subject to an affirmative obligation to establish the appropriate amount of the duty. The Appellate Body had correctly recognized that the use of a NME methodology to calculate anti-dumping duties presumptively offset any subsidies conferred in respect of the same product. The investigating authority, therefore, had an affirmative legal obligation to investigate and avoid the imposition of double remedies in those circumstances.

94. China also wished to stress another systemically important finding of the Appellate Body. In all four countervailing duty investigations at issue in this dispute, the USDOC had determined that state-owned enterprises were "public bodies" under Article 1.1 of the SCM Agreement based on nothing more than a rule of majority government ownership. The Appellate Body had correctly reversed this interpretation, and had held that the "core feature" of a public body was that it had been vested with and exercised authority to perform governmental functions. The Appellate Body's examination of this interpretative issue was thorough and incisive. China welcomed, in particular, the Appellate Body's affirmation of the requirement under Article 31(3)(c) of the Vienna Convention to take into account relevant rules of international law as part of the process of treaty interpretation. The Appellate Body's interpretation of the term "public body" was entirely consistent with the well-established principle of customary international law that the actions of state-owned corporate entities were *prima facie* private. Consistent with this principle, which the Appellate Body had previously recognized in its Report pertaining to the dispute "US - DRAMS", the actions of state-owned corporate entities were presumptively not attributable to a Member under Article 1.1 of the SCM Agreement.

95. China's principal reservation in respect of the Appellate Body's Report concerned its interpretations of Article 14(b) and (d) of the SCM Agreement. In China's view, the question of whether a particular benchmark was "distorted" could not be separated from economic considerations. "Distortion", as a concept, had no meaning apart from an economic analysis of how markets ordinarily behaved. China hoped that, in the future interpretation and application of these provisions, investigating authorities and WTO dispute settlement panels would ensure that economics played a greater role in evaluating whether particular benchmarks were "distorted". With this limited reservation in mind, China was pleased to request the adoption of the Appellate Body Report and the

Panel Report, as modified by the Appellate Body. China believed that the Appellate Body Report had made a significant contribution to the interpretation of subsidy disciplines, and would strengthen the credibility of the WTO dispute settlement system as a whole. China expected and looked forward to prompt and full implementation of the Report by the United States.

96. The representative of the United States said that his country thanked the Panel, the Appellate Body, and the Secretariat staff assisting them for their work in this proceeding. Although the United States disagreed with several of the Panel's findings, it recognized the Panel's efforts in grappling with the numerous complex issues in this dispute, including, in particular, the use of out-of-country benchmarks to measure benefit under Article 14 of the SCM Agreement, the determination of whether a subsidy was specific within the meaning of Article 2 of the SCM Agreement, the proper interpretation of the term "public body" under Article 1 of the SCM Agreement, and China's novel claims relating to the concurrent application of countervailing duties (CVDs) and anti-dumping duties (ADs) calculated using a non-market economy (NME) methodology. The United States considered that the Panel's findings with respect to those four issues reflected a proper legal analysis of the SCM Agreement. On appeal, the Appellate Body had upheld in part and reversed in part the findings relating to the use of out-of-country benchmarks to measure benefit, upheld the determination of specificity, and reversed the Panel's findings relating to the interpretation of the term "public body" and relating to China's claims regarding the concurrent application of CVDs and NME ADs. The United States was deeply disappointed with the findings in the Appellate Body Report related to the interpretation of the term "public body" and China's claims related to the concurrent application of CVDs and NME ADs, and considered that the Report's reasoning was based on a number of problematic assertions and assumptions. At the present meeting, the United States wished to discuss a few key issues that it believed should be of serious concern to all Members.

97. The US concerns with the interpretation of the term "public body" in Article 1 of the SCM Agreement extended both to the legal reasoning employed in the Appellate Body Report and to its real-world ramifications. Under the SCM Agreement, a Member may countervail a subsidy by "a government or any public body within the territory of a Member". In the underlying investigations, the United States had determined that certain state-owned enterprises (SOEs) were public bodies, because the Chinese Government was the majority owner of those enterprises and therefore controlled them. Prior panels in "Korea - Commercial Vessels" and "EC - Large Civil Aircraft", like the Panel in this dispute, had interpreted the term "public body" as meaning an entity controlled by the government.[9] Despite acknowledging that the ordinary meaning of "public body" could encompass entities controlled by the government[10], the Appellate Body Report had concluded that government ownership and control did not make an entity a "public body", but that the entity must possess, exercise, or be vested with "governmental authority" and be performing a "governmental function".[11] To reach that result, the Report had relied in part on context, in particular a sub-paragraph in the definition of a subsidy that established that financial contributions could also be provided through private bodies when they were entrusted or directed to do so by a government or a public body. The Report then asserted that every public body must, therefore, be able to entrust or direct private bodies to provide financial contributions, and concluded that public bodies must necessarily possess governmental authority in order to do so.[12] In the view of the United States, this conclusion was a non-sequitor. While it may be the case that some public bodies would have authority to entrust or direct a private body, nothing in the text of the SCM Agreement required that all public bodies would have the authority to do so. Indeed, it should be plain to all Members that not even all organs of a government would have authority to entrust or direct a private body to make a financial contribution.

[9] See "Korea - Commercial Vessels", paras. 7.50, 7.172, 7.353 and 7.356; "EC - Large Civil Aircraft" (Panel), para. 7.1359; Panel Report, para. 8.94.

[10] Appellate Body Report, para. 285.

[11] Appellate Body Report, paras. 317 and 318.

[12] Appellate Body Report, paras. 291-297.

98. The United States noted that, in addition, the Report had reasoned that, because a particular action listed in the definition of a subsidy – "a decision to forego or not collect government revenue that is otherwise due" – "appears to constitute conduct inherently involving the exercise of governmental authority", then a public body must be an entity vested with certain governmental responsibilities, or exercising certain governmental authority.[13] That, once again, was a non-sequitor, and the Report had offered no explanation for why the functions other than foregoing government revenue that were identified in Article 1 of the SCM Agreement should be considered "governmental functions". The United States also noted that the Appellate Body Report had rejected the Panel Report's conclusion that the term "or" in the definition of a subsidy indicated that the terms "government" and "public body" were separate concepts with distinct meanings.[14] Ultimately, it appeared that the interpretation in the Appellate Body Report collapsed the terms "government" and "public body", such that there was no purpose for the term "public body" to have been included by Members in the SCM Agreement at all. Reading terms out of an agreement was contrary to the customary rules of treaty interpretation. In moving away from an objective "control" standard, as adopted by this Panel and previous panels, the Appellate Body Report adopted an undefined "governmental authority" standard. The test created by the Appellate Body Report appeared to require an additional analysis into what constituted "governmental authority" within the domestic legal system of the exporting Member. There was, in addition, no elaboration in the Report as to how to determine whether the entity in question possessed or exercised such authority. In a CVD case, such an analysis could place a considerable additional burden on the responding companies and governments to provide appropriate data, as well as on administering authorities to collect and analyze all of the appropriate data. It may be difficult in many instances to identify concrete evidence establishing that state-owned enterprises (SOEs) were vested with or exercising "governmental authority", despite the fact that they were owned by the government. Yet at the same time, governments could and did use SOEs as key instruments through which to manage national economic activity. In such cases, the pricing policies of SOEs in NMEs could be very trade distorting, primarily the provision of inputs and financing at below market rates. Consequently, the Appellate Body Report could make it much more difficult to address trade-distorting subsidies provided through SOEs.

99. The United States was similarly concerned with both the legal reasoning and the real-world implications of the findings in the Appellate Body Report related to the concurrent application of CVDs and NME ADs. The United States was concerned that those findings did not appear to derive from the text of the SCM Agreement, and that the reasoning employed did not seem to support the findings in the Report. The Appellate Body Report had found that a Member may not concurrently impose CVDs and NME ADs without taking affirmative steps to ensure that concurrent application did not result in a so-called "double remedy". It was important to bear a few things in mind when considering this result. First, no provision of either the AD or SCM Agreement restricted a Member's ability to apply NME ADs and CVDs concurrently. Each of the two Agreements disciplined a different remedy, and neither Agreement conditioned or limited the ability of a Member to apply a CVD on whether or not the AD was calculated using an NME approach. Second, the Panel Report had noted that a predecessor agreement, the Tokyo Round Subsidies Code, expressly limited the ability of parties to that Agreement to apply a CVD concurrently with an NME AD, but WTO Members had not agreed to include such a limitation in the WTO Agreements. The Appellate Body Report had found this irrelevant, even though in other contexts it had stated that omission of language or silence on an issue must be given some meaning.[15] The United States was puzzled by the different approach in this dispute.

[13] Appellate Body Report, para. 296.
[14] Appellate Body Report, para. 289.
[15] Appellate Body Report, paras. 579-581.

100. Third, the Panel had correctly noted that Article VI:5 of the GATT 1994 prohibited the application of anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization and had found it significant that no similar prohibition existed in the covered agreements with respect to domestic subsidization.[16] However, despite recognizing that, "in the case of domestic subsidies, an express prohibition is absent" from the text of the covered agreements[17], the Appellate Body Report had nevertheless created a prohibition on the imposition of a so-called "double remedy" through the concurrent application of CVDs and NME ADs. The conclusion in the Appellate Body Report was based entirely on Article 19.3 of the SCM Agreement. That Article provided that, where CVDs were imposed, they shall be levied in the "appropriate amounts in each case".[18] The Appellate Body Report's expansive interpretation of the term "appropriate amounts" ignored the fact that Article 19 of the SCM Agreement was not concerned with the definition or calculation of CVDs, still less with the existence of concurrent anti-dumping proceedings, but rather was concerned with the "[i]mposition and [c]ollection" of CVDs. Article 19.3 of the SCM Agreement directed importing Members to impose CVDs on imports from "all sources found to be subsidized and causing injury" except producers who had renounced subsidies or entered into undertakings. The reference to assessing CVDs in "appropriate amounts" referred simply to the fact that the CVD on particular imports may vary, even though a CVD should be imposed in a non-discriminatory manner. The Report turned this clause in Article 19.3 of the SCM Agreement into an obligation concerning the amount of the CVD. In the process, the Report created a subjective standard for what was an "appropriate" amount, derived from a wide variety of unrelated provisions, for example, the "desirab[ility]" of a lesser duty rule.[19] None of these provisions, though, addressed the concurrent application of ADs and CVDs. As a result, the Report introduced unpredictability into the SCM Agreement. Members had no certainty in determining what would constitute an "appropriate" amount of a CVD in any given situation. To compound the problem, the Report appeared to impose the entire burden of proving that there was no "double remedy" on the importing Member. Contrary to other situations, the exporting Member seemingly did not need to demonstrate that the CVD was in excess of the "appropriate" amount. It would appear to be enough that the exporting NME Member simply demonstrated that both CVDs and NME ADs were applied concurrently.[20] Because the Report imposed new obligations that did not appear to derive from the text of the covered agreements, its findings in this regard appeared to be inconsistent with Article 19.2 of the DSU.

101. The United States also wished to express its concerns with the decision to complete the analysis with respect to this claim. Despite the fact that the Panel Report had expressly made no findings with respect to the existence of any actual "double remedy" in any of the investigations at issue, and despite the fact that China had presented no evidence regarding the existence of any specific instance of a "double remedy" in any of the investigations, the Appellate Body Report, nonetheless, had completed the analysis and had found the US measures to be inconsistent with Article 19.3 of the SCM Agreement. In doing so, the Report stated that USDOC had dismissed the arguments of Chinese respondents and the Government of China on the ground that it had no statutory authority to make any adjustment and that USDOC "refused outright to afford any consideration to the issue".[21] The Report did not cite any findings in the Panel Report to support these factual statements. What the Panel Report actually said was that, in the context of the anti-dumping

[16] Panel Report, paras. 14.117-118.
[17] Appellate Body Report, para. 567.
[18] Appellate Body Report, paras. 547-563, 582-583.
[19] See SCM Agreement, Article 19.2.
[20] Appellate Body Report, paras. 602, 605-606.
[21] Appellate Body Report, para. 604.

investigations, the United States had rejected China's suggestion that the USDOC had made any broad pronouncement as to whether it lacked legal authority.[22]

102. In addition, the United States rejected the suggestion that the USDOC had refused to afford any consideration to the issue in its determination. The United States had explained that the USDOC had considered what facts and argumentation had been offered. The assertions in the Appellate Body Report did not accurately characterize USDOC's actions and were not the type of uncontested facts upon which the analysis had been completed in other Appellate Body reports. The United States again noted certain practical concerns that arose from these findings, which could seriously hinder Members' ability to address trade-distorting subsidies by a NME Member. The Appellate Body Report appeared to impose significant administrative burdens on Members' trade remedy administrators in the situation of concurrent application of CVDs and NME ADs. If required, measuring the effect of a subsidy on the export price of a good and other components of the dumping margin may involve highly complex economic and econometric analysis. The difficulties associated with such measurement could be significant. This raised serious questions about whether Members would be able to address trade-distorting subsidies by NME Members. In conclusion, the United States believed that the findings of the Appellate Body Report should be of concern to all Members, both because of the legal analysis from which they had resulted, and also the potentially serious limitations they could impose on Members' ability to address trade-distorting subsidies.

103. The representative of Mexico said that his country had participated as a third party in this dispute given the systemic relevance of the issues involved. The findings of the Appellate Body Report would serve as a reference for the conduct of any investigating authority faced with requests for both anti-dumping and subsidies investigations on the same products. In light of the systemic relevance of this Appellate Body Report, Mexico wished to comment on three specific issues contained in the Report. First, with regard to the interpretation of the term "public body" within the scope of Article 1.1(a)(1) of the SCM Agreement, Mexico understood that the Appellate Body, in general terms, had concluded 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". However, as expressed in its third party oral statement before the Appellate Body, it was Mexico's view that Article 1.1 of the SCM Agreement did not refer to the authority, functions or attributions of the government in general, exercised by either the government itself, or through agencies, entities or any other type of public bodies, or, in some occasions, private bodies. Article 1.1 of the SCM Agreement provided the definition of a subsidy, and Article 1.1(a)(i) defined the types of subsidies through a financial contribution. Indeed, Article 1.1(a)(1)(iv) did not refer to functions of a governmental character or functions vested by the government in general, rather, when it used the term "functions" with regard to public bodies, it was strictly limited to those described in sub-paragraphs (i)-(iii). In that sense, the term "public body" must be given a broad meaning. It must be understood that there was a subsidy within the meaning of Article 1.1 of the SCM Agreement, when a body controlled by the government granted a financial contribution and a benefit was thereby conferred. Although Mexico had expressed this view during the proceedings, and would find it possible to consider that the term "public body" should be given a broader meaning, this opinion was without prejudice to the Appellate Body's reasoning which, Mexico considered, had its own merits and showed adequate reasoning.

104. Second, with regard to the issue of "double remedies", it was Mexico's understanding that the Appellate Body's reasoning could be summarized as follows. The concurrent imposition of an anti-dumping duty calculated on the basis of a NME methodology, and a countervailing duty on the same product was likely but would not necessarily result in the offsetting of the same subsidization twice, in other words, in a double remedy. The existence of a double remedy would depend on whether and to what extent domestic subsidies had lowered the export price of a product, and on whether the

[22] Panel Report, para. 14.16.

investigating authority had taken the necessary corrective step to adjust its methodology to take account of this factual situation. The imposition of a double remedy was inconsistent with Article 19.3 of the SCM Agreement, because the countervailing duty was not being levied "in the appropriate amount". Mexico understood this to mean that an investigating authority was allowed to concurrently impose an anti-dumping duty calculated on the basis of a NME methodology, and a countervailing duty on the same product, as long as it assessed whether it was offsetting the same subsidization twice from that concurrent imposition, and took the necessary steps to avoid this situation, or in other words, as long as it took the necessary steps to avoid a double remedy. Mexico was still reviewing the implication of this decision domestically. In particular, Mexico was analyzing if it was possible for an investigating authority, in practice, to assess whether it was offsetting the same subsidization twice from a concurrent imposition of an anti-dumping duty calculated on the basis of a NME methodology, and a countervailing duty on the same product.

105. Finally, Mexico wished to comment on the issue of the systemic importance of accepting the reasoning provided by the Appellate Body in its Report. There might be occasions whereby a WTO Member did not agree with the decision of a panel or the Appellate Body. However, Mexico recognized that the objective of the dispute settlement mechanism was to provide "security and predictability to the multilateral trading system". In that sense, Mexico gave great importance to the decisions issued by panels and the Appellate Body. Those decisions were not only binding for the disputing parties, but also had implications for future disputes and internal issues, where identical or similar situations that had previously been solved were cited. As the Appellate Body had recognized, in paragraph 160 of its Report pertaining to the dispute "United States – Final Anti-Dumping Measures on Stainless Steel from Mexico"(DS344), "dispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."

106. The representative of Turkey said that his country thanked the Appellate Body members and the Secretariat for their hard work in preparing the Report. Turkey had participated as a third party in this dispute due its systemic interest in the correct interpretation of the covered agreements. Turkey had submitted its views on two issues: "public body" and "external benchmark". In that regard, Turkey wished to limit its comments only with regard to the determination of a "public body" in the Appellate Body's decision. Turkey had serious concerns about the latest decision of the Appellate Body regarding the determination of a "public body". The Appellate Body had concluded that government ownership and control were not sufficient to make an entity a "public body," but that the entity must possess, exercise, or be vested with governmental authority in order to be deemed as public under the SCM Agreement. The ruling of the Appellate Body equated the term "public body" to "government" and annulled the difference between them. However, the SCM Agreement stated that a subsidy should be provided by a "government" or a "public body". It was an undisputed fact that the definition of a "public body" should not be same as the definition of a "government". The drafters of the SCM Agreement had made a clear distinction between the terms "government" and "public body". However, the Appellate Body's decision on this issue had overreaching results that were not intended by the drafters of the SCM Agreement. If the aim of the drafters had been the same, it was obvious that there would have been no need to have two separate terms. Since the drafters had used two distinct terms, there should also have been a clear distinction between the

definitions and functions of these two terms. Therefore, institutions falling under the definition of the term "government" could not be classified under the term "public body".

107. However, the Appellate Body had ruled that, in order to deem an entity as a "public body" under the SCM Agreement, it had to perform governmental functions. Turkey reiterated that this erroneous interpretation equated these two distinct terms to each other and this would render the term "public body" meaningless. Turkey considered that the Appellate Body ruling may frustrate the subsidy investigations, especially against NME countries. It was a well-known fact that, in NME countries, the government had a predominant role in the market. As a result of the Appellate Body's decision, the entities owned and controlled by the government could not be deemed as "public body" if it was not determined that they possessed, exercised, or were vested with governmental authority. As a result of this ruling, in every investigation, the investigating authorities had to make an additional analysis of whether an entity possessed, exercised, or was vested with governmental authority. This additional analysis would add to the investigating authorities' undue burden that was not required under the SCM Agreement. Apart from this additional burden, it would be almost impossible to prove the governmental authority of the entity, since in many cases it was hard to find a paper trail demonstrating this issue. Consequently, Turkey fully agreed with the US conclusion that the Appellate Body had effectively transformed the "public body" test into a "government action" test without any substantial basis in the SCM Agreement. It would be more difficult than ever and almost impossible to remedy those kinds of subsidies. Turkey considered that the Appellate Body's ruling on this issue struck a blow to fair trade and promoted unfair trade.

108. The representative of the European Union said that the EU welcomed many of the findings of the Panel and the Appellate Body Reports in this case. The EU noted that, on a number of issues, the Panel and the Appellate Body had confirmed the right of investigating authorities to take reasonable steps in order to ensure the imposition of effective countervailing measures, which were consistent with the SCM Agreement. In particular, concerning the provision of goods and services and government loans, there was recognition of the right of investigating authorities to reject domestic prices or interest rates when they were distorted by government intervention and to use external benchmarks in those circumstances. There was also some clarification of the type of situations in which this could be done. For example, the Appellate Body had described circumstances where a predominant government market share would lead to a distortion of private-sector prices or interest rates, thus rendering any purely domestic comparison with government prices or interest rates circular. This would justify recourse to an out-of-country benchmark or some other benchmark not based on domestic prices or rates. Furthermore, the Appellate Body had confirmed that *de-jure* specificity could be inferred in circumstances where the totality of the evidence, including government planning documents, led to the conclusion that government subsidies were being directed or targeted towards certain industries. In addition, it was now clear that appropriate conclusions could be drawn from non-cooperation by responding governments when determining the existence of governmental financial contributions or the existence of a benefit.

109. With respect to the Appellate Body's decision to reject the Panel's findings on "public body", the EU felt compelled to make the following comments. It seemed that, in the particular circumstances of the countervailing duty measures at issue, including the level of non-cooperation by the responding government indicated in the measures at issue, the Panel's findings could have been appropriate and would have ensured that actions taken by such bodies were attributable to the government. In that regard, the EU was concerned to preserve the separate nature of "public bodies", as distinct from "government", in the definition of a subsidy in Article 1 of the SCM Agreement. The EU noted that the Appellate Body had determined that the standard was one under which a public body must possess, exercise or be vested with government authority. The EU also noted that the Appellate Body had acknowledged that application of this standard may in some cases be a challenge for investigating authorities which was "more complex", a statement the EU would agree with but which, at the same time, caused some concern on how to properly apply this standard in trade defence

investigations. The EU, therefore, considered that it was important that the standard clarified by the Appellate Body should be interpreted in a flexible manner appropriate to the situation of the investigation and the totality of the evidence presented. In that regard, the EU was heartened by the Appellate Body's finding in this case that state-owned commercial banks, in the context of the facts on record concerning government interference in the financial market, were public bodies. The EU looked forward to the same common sense approach being adopted for state-owned enterprises and other entities whose actions were attributable to the state.

110. The EU also noted that the application of the clarified standard in an individual case would not only impact on the scope of evidence to be sought out by investigating authorities, but would also have to factor in the level of cooperation by exporters and the government concerned. The EU did not understand the standard to mean that investigating authorities would have to surrender their duty to draw the appropriate inferences from non-cooperation as the appropriate means to address the "complexities" of the situation. Applying the standard differently would give a license to exporters and their governments to undermine the efficiency of anti-subsidy disciplines through non-cooperation, and the EU did not read the Appellate Body Report to endorse such an approach. In future investigations, the EU would seek out information on the ownership, structure and purpose of such entities, as well as of the legislative and practical environment in which they operated. It should also be noted that such entities, even if not public bodies, still fell within the scope of the SCM Agreement if they were entrusted or directed by government, a matter which also required a detailed and searching examination by the investigating authority.

111. With regard to "double remedies", the EU noted that the Appellate Body, unlike the Panel, had chosen to address this issue under Article 19.3 of the SCM Agreement. However, the EU noted that the Appellate Body had accepted that a double remedy would not occur in all cases of concurrent imposition of a countervailing duty and an anti-dumping duty based on a non-market economy methodology and that each case had to be examined on the basis of the specific facts. In particular, it had to be examined whether the subsidy in question had any impact on the export price. The EU welcomed this flexibility accorded to investigating authorities and trusted that future determinations made under such guidelines would be reviewed in a common sense manner, in order to preserve the right of investigating authorities to offset both injurious dumping and subsidization when the case arose.

112. Finally, the EU felt obliged to react to the view expressed at the present meeting, that the Appellate Body Report might be inconsistent with Article 19.2 of the DSU, at least in some respects. In light of the wording of Article 19.2 of the DSU, it was difficult to interpret this otherwise than as questioning the legitimacy of the Appellate Body Report, at least with regard to some points. Any WTO Member was entitled to disagree with the concrete results reached by the adjudicator in a particular dispute, and the EU had also done this. Moreover, WTO Members could give their firm views on what the implications of such findings were – or should not be – for the future, as the EU had done at the present meeting. However, Members should – this was at least the EU's view – distinguish this very carefully from a situation where they would question the legitimacy of a decision itself. This was a very high threshold to reach in general, and certainly not the case with regard to the Reports which were being considered and would be adopted at the present meeting.

113. The representative of Norway said that her country thanked the Appellate Body, the Panel and the Secretariat for their work on this dispute, and welcomed the adoption of the Panel and Appellate Body Reports at the present meeting. Norway noted that the Appellate Body had reached the same conclusion as those put forward by Norway in its third-party submission on two important issues of interpretation. The first one was the definition of "public body" under the SCM Agreement, where the Appellate Body had confirmed that a public body in this context must be "an entity that possesses, exercises or is vested with governmental authority", and that the mere government control through ownership was not sufficient to conclude on this question. Norway saw this as an important

clarification. The Appellate Body's acceptance that each case must be looked at separately, giving careful consideration to all relevant characteristics, with particular attention given to whether an entity exercised authority on behalf of a government, was entirely in line with Norway's view on this issue. Second, the Appellate Body had reversed the Panel's findings on the issue of "double remedies", and had confirmed that the imposition of double remedies was inconsistent with Article 19.3 and Article 32.1 of the SCM Agreement. The Appellate Body had pointed out that the Anti-Dumping Agreement and the SCM Agreement should be interpreted together in a coherent and consistent manner, in order to avoid any possible circumvention. Norway welcomed the Appellate Body's finding on this issue.

114. The representative of Canada said that her country thanked the Panel, the Appellate Body and the Secretariat for their work in the proceedings. Canada was a third participant in this dispute, due to a systemic interest in the various provisions of the SCM Agreement that had been considered. Canada wished to register its views on three of the systemic issues that had been considered by the Appellate Body. First, Canada was disappointed with the Appellate Body's interpretation of the phrase "public body" in Article 1.1(a)(1) of the SCM Agreement. According to the Appellate Body, a "public body" must possess, exercise or be vested with governmental authority. 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 eliminated the distinction between a public and private body agreed to by Members.

115. Second, on the acceptable use of out-of-country benchmarks, Canada welcomed the Appellate Body's confirmation that an investigating authority could not reject in-country private prices as an appropriate benchmark under Article 14(d) of the SCM Agreement solely on the basis of a government's predominant role as a supplier in the market. Canada considered the Appellate Body's conclusion that, a "somewhat cursory" examination of other evidence had been acceptable, was limited to the factual situation present in the investigations at issue in this case. Canada also noted that the Appellate Body had not questioned the clear requirement, set out in the "US - Softwood Lumber IV" dispute and not at issue in this appeal, that out-of-country benchmarks, when justified under Article 14(d), must be adjusted to account for the prevailing market conditions in the country of provision.

116. Third, Canada was concerned with the Appellate Body's finding that the determination of the appropriate amount of countervailing duties under Article 19.3 of the SCM Agreement must take into account the amount of anti-dumping duties concurrently imposed on imports pursuant to a non-market economy methodology. This finding appeared inconsistent with the fact that Article VI:5 of the GATT 1994 identified specifically the limited circumstances where amounts of anti-dumping and countervailing duties imposed on imports may influence each other. These limited circumstances were where countervailing duties addressing export subsidies were imposed concurrently with anti-dumping duties. Those circumstances were not present in this case.

117. The representative of Australia said that her country had participated as a third party in this dispute because it had considered that the dispute raised important questions of legal interpretation under the SCM Agreement. Australia wished to make brief comments on the Appellate Body's findings in relation to two systemic issues, namely, the meaning of "public body" in Article 1.1(a)(1) of the SCM Agreement and the issue of "double remedies". With regard to "public body", Australia noted that in its Report, the Appellate Body had referred to an array of factors that may be considered in determining whether an entity was a "public body" within the meaning of Article 1.1(a)(1) of the SCM Agreement. These included: (i) a body vested with authority to exercise governmental functions; (ii) a body vested with authority to exercise governmental functions and capable itself of re-vesting that governmental authority; (iii) a body exercising governmental functions; or (iv) a body

subject to government control if that control was exercised in a meaningful way.[23] Australia considered that greater clarification of the textual basis for developing those factors and of the meaning of requirements such as "meaningful control", "governmental functions" and "governmental authority" would assist Members in making assessments as to whether an entity fell within the meaning of "public body" under the SCM Agreement. The requirement that a public body be vested with authority to exercise governmental functions in order to be considered a public body within the meaning of Article 1.1(a)(1) was of particular concern to Australia, given the diverse range of views expressed in a number of third-party submissions and interventions on the meaning of governmental authority and functions under those third-parties' respective municipal laws. It was also of concern given that, potentially, the only financial contributions that may be covered under the SCM Agreement were those from entities with, vested with, or carrying out governmental functions, whether governmental, public or private bodies.

118. With regard to "double remedies", she said that the Appellate Body had found that the imposition of "double remedies" in this dispute was inconsistent with the requirement under Article 19.3 of the SCM Agreement that the remedy be "appropriate". In Australia's view, this finding created the risk of de-linking the direct relationship between the outcome of the investigation and the remedy that could be imposed, by allowing matters outside the investigation to be taken into account under this broader scope of appropriateness. It may result in uncertainty as to what other factors, outside of the investigation conducted under the SCM Agreement, should now be considered by investigating authorities under the term "appropriate" in Article 19.3 of the SCM Agreement.

119. The representative of Japan said that his country thanked the Appellate Body, the Panel and their respective Secretariats for their work in this dispute. As an interested third party and third participant, Japan had actively participated in and contributed to the discussions in these proceedings. Although Japan was still carefully examining the Appellate Body Report and its legal and practical implications for the future operations of the SCM Agreement, Japan wished to offer some preliminary observations on the Report, focusing in particular on the issue of "public body". First, the Appellate Body had appeared to focus its textual analysis primarily on the "structure"[24] of the phrase at issue, by joining the terms "government" and "public body" under the word "government".[25] Although this "structure" may "suggest[] certain commonalities"[26] and hierarchical relationship between those two terms, it was not clear to Japan whether and how this structure alone would compel the reading that commonality must be "essential characteristics an entity must share with government".[27] Even assuming that sharing "essential characteristics" was relevant, Japan wondered why "essential characteristics" of government would necessarily be limited to "the performance of governmental functions, or the fact of being vested with, and exercising the authority to perform such function".[28] Furthermore, seeking commonalities between the two terms "government" and "public body" would not appear to squarely address the Panel's textual, structural and contextual discussions on the separateness or distinctiveness of those two terms or concepts. In that respect, it appeared to Japan that the Appellate Body had dismissed the Panel's textual and contextual analysis on the words "a", "or" and "any" in the phrase "a government or any public body" in Article 1.1(a)(1)[29] of the SCM Agreement and some of the Panel's other discussions that had distinguished the terms "government"

[23] Appellate Body Report, "United States − Definitive Anti-Dumping and Countervailing Duties on Certain Products from China", (WT/DS379/AB/R, 11 March 2011), paras. 294, 318 - 320.
[24] Appellate Body Report, para. 289.
[25] Appellate Body Report, paras. 288-290. Japan notes that while the Appellate Body formally distinguishes between the terms "government" in the narrow sense and "government" in the collective sense (para. 286), it does not appear to make a conceptual distinction between them (para. 290).
[26] Appellate Body Report, para. 288.
[27] Appellate Body Report, para. 290.
[28] Appellate Body Report, para. 290
[29] Appellate Body Report, para. 289.

and "public body"[30] without explanation. Japan wished to know the rationale behind the Appellate Body's rejection of the Panel's discussions.

120. Second, on the attribution rules in the ILC Articles on Responsibility of States for International Wrong Acts (the "ILC Articles"), the Appellate Body had stated essentially that those attribution rules would be relevant within the meaning of Article 31(3) (c) of the Vienna Convention because both those rules and Article 1.1(a)(1) of the SCM Agreement concerned the same subject matter; i.e. "the question of attribution of conduct to a State"[31]; although there were "certain differences in the approach reflected in those two sets of rules"[32], Article 5 of the ILC Articles would support the Appellate Body's analysis on Article 1.1(a)(1) of the SCM Agreement because the Appellate Body "see(s) similarities in the core principles and functions of the respective provisions"; but eventually "because the outcome of [its] analysis does not turn on Article 5, it is not necessary" to decide whether Article 5 reflected customary international law.

121. Japan had a few thoughts. To begin with, the Appellate Body appeared to consider that Article 5 of the ICL Articles would "provide guidance for the interpretation of the term 'public body' in Article 1.1 (a)(1) of the SCM Agreement" because those two rules had "similarities in the core principles and functions".[33] Even assuming that those two rules shared the core principles, Japan was not quite sure that having such similarities would necessarily mean that the type of the public body contemplated in Article 1.1(a)(1) of the SCM Agreement must be circumscribed to those with the "common feature of the entities covered by"[34] Article 5 of the ILC Articles. In that connection, Japan noted that the Appellate Body had recognized "certain differences in the approach" between those two rules, notably that while the attribution rules under the ILC Articles specifically addressed "the particular conduct" at issue, Article 1.1(a)(1) of the SCM Agreement's primary focus was on the "type of entity".[35] These appeared to be critical and possibly decisive differences. Yet, the Appellate Body had summarily dismissed such differences as "any details or 'fine line distinctions'"[36] without any further explanation. Japan wished to know how the similarities, if any, between Article 1.1(a)(1) of the SCM Agreement and Article 5 of the ILC Articles would outweigh their differences.

122. Second, in paragraph 313 of the Report, the Appellate Body had stated that if "certain ILC Articles have been 'cited as containing similar provisions to those in certain areas of the WTO Agreement' … this evinces that these ILC Articles have been 'taken into account' in the sense of Article 31(3)(c) by panels and the Appellate Body". This appeared to be exactly what the Appellate Body had done in paragraphs 309 to 311 of the Report. Yet, the Appellate Body in the end had declined to rule on the core issue regarding the status of Article 5 of the ILC Articles.[37] This raised at least the following questions: How could certain rules of international law (Article 5 of the ILC Article) be "taken into account within the meaning of Article 31(3)(c) of the Vienna Convention without first deciding on its status as customary international law? Or had the Appellate Body implicitly or otherwise decided that Article 5 of the ILC Articles reflected public international law somewhere in the Report? If so, where was such a finding? If the analysis on Article 5 of the ILC Articles in paragraphs 309 to 311 had not been made pursuant to Article 31(3)(c) of the Vienna Convention, then what was the basis for, and any relevance of, such consideration under customary rules of treaty interpretation? Under Article 31(3)(c) of the Vienna Convention, "any relevant rules of

[30] Those include, *inter alia*, the panel's discussions on the collective term "certain enterprises" in Article 2.1 (para. 8.66); those on the phrase "within the territory of a Member" (para. 8.67); and those on distinction between the two concepts "financial contribution" and "benefit" (para. 8.71).
[31] Appellate Body Report, para. 309.
[32] Appellate Body Report, para. 309.
[33] Appellate Body Report, para. 311.
[34] Appellate Body Report, para. 310.
[35] Appellate Body Report, para. 309 (original emphasis).
[36] Appellate Body Report, para. 311.
[37] Appellate Body Report, para. 311.

international law applicable in the relations between the parties" were required to "be taken into account, together with the context". Given the mandatory nature of this interpretive rule, how could the Appellate Body decline, as unnecessary, to resolve the issue of whether Article 5 of the ILC Articles reflected customary international law? In any event, because the Appellate Body had not resolved the question of whether Article 5 reflected customary international law, that rule could not be and had not been "taken into account" within the meaning of Article 31(3)(c) of the Vienna Convention. Given also the Appellate Body's statement that "the outcome of [its] analysis does not turn on Article 5", the Appellate Body's analysis on Article 5 in paragraphs 308 to 311 appeared to be unnecessary and had no legal significance.

123. Third, the Appellate Body had stated that "Article 55 of the ILC Articles does not speak to the questions of whether, for the purpose of interpreting Article 1.1(a)(1) of the SCM Agreement, a panel or the Appellate Body can take into account provisions of the ILC Articles", because "[t]he question in the present case … is not whether certain of the ILC Articles are to be applied".[38] Japan agreed that the rights and obligations enforceable in the WTO dispute settlement were those provided in the WTO Agreement, and "the provision being applied in the present case is Article 1.1(a)(1)"[39], not Article 5 of the ILC Articles. That being said, if Article 5 of the ILC Articles did not apply by virtue of lex specialis provision in Article 55, this rule would not be "applicable in relations between the parties" and could not be "taken into account" pursuant to Article 31(3)(c) of the Vienna Convention. Thus, Article 55 of the ILC Articles appeared to speak to the question which had been before the Appellate Body, unless the issue of whether Article 5 reflected customary international law was affirmatively resolved.

124. Fourth, although it may not have been intended, Japan was concerned that some part of the Report could be read to indicate that the principle of good faith interpretation under Article 31(1) of the Vienna Convention and the mere existence of an anti-circumvention provision (Article 1.1(a)(1)(iv)) would categorically preclude any consideration of circumvention in the interpretation of the provision, circumvention of which was sought to be prevented.[40] In that connection, Japan wished to recall that the Appellate Body had recognized in a previous dispute that, "in cases of entrustment or direction under Article 1.1 (a)(1)(iv), … much of the evidence that is publicly available, and therefore readily accessible to interested parties and the investigating authority, will likely be of a circumstantial nature".[41] Japan wished to simply note that the concern about circumventions was not merely a theoretical one, considering the challenge that investigating authorities could face in establishing entrustment or direction with positive evidence depending on accessibility of relevant information in specific cases.

125. Fifth, while Japan agreed that adopted panel reports and the Appellate Body reports as such do not fall within the definition of "context" under Article 31 (2) of the Vienna Convention, the relevant part of the Panel Report discussing the concern of the panel in "Korea - Commercial Vessels" appeared to relate to the contextual analyses regarding the interpretation of "public body" in Article 1.1(a)(1) of the SCM Agreement, specifically that Panel's analysis based on the distinction between two concepts "financial contribution" and "benefits", the distinction between public and private body, and the distinction between the nature and behaviour of the entity (the actor) under Article 1.1 of the SCM Agreement.[42] In any event, Japan recalled that the Appellate Body had

[38] Appellate Body Report, para. 316 (original emphasis).
[39] Appellate Body Report, para. 316.
[40] See Appellate Body Report, paras. 326-327 and also para. 302.
[41] Appellate Body Report, "US – Countervailing Duty Investigation on DRAMS", footnote 277 (emphasis added).
[42] Panel Report, paras. 8.71 and 8.72. As stated in para. 3 *supra*, Japan wishes to know why the Appellate Body did not address the Panel's discussions on the reasoning of the panel in "Korea - Commercial Vessels" regarding the interpretation of Article 1.1 of the SCM Agreement.

explained in a previous dispute that "[i]nterpretation pursuant to the customary rules codified in Article 31 of the Vienna Convention is ultimately a holistic exercise that should not be mechanically subdivided into rigid components. Considering particular surrounding circumstances under the rubric of ordinary meaning or in the light of its context would not, in our view, change the outcome of treaty interpretation".[43]

126. Finally, the Appellate Body had explained that "all conduct of a governmental entity constitutes a financial contribution to the extent that it falls within sub-paragraphs (i)-(iii) and the first clause of sub-paragraph (iv)".[44] Given the Appellate Body's clear recognition that the relevant factor in Article 1.1(a)(1) of the SCM Agreement was the "type of entity"[45], Japan understood the Appellate Body's statements to mean that once a particular entity was determined to be a public body that "is vested with authority to exercise governmental functions"[46], any conduct of that entity, no matter whether it be an exercise of governmental authority or not, shall be attributed to the government and be deemed to be a subsidy if such conduct fell within sub-paragraphs (i)-(iii) of Article 1.1(a)(1) of the SCM Agreement. The Appellate Body had further explained that "the determination of whether a particular conduct is that of a public body must be made by evaluating the core features of the entity and its relationship to government in the narrow sense".[47] According to the Appellate Body, "[t]he same entity may possess certain features suggesting it is a public body, and others that suggest that it is a private body"[48] and "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".[49] These statements raised the questions: What was the conceptual relationship or distinction between an entity being under "meaningful control" by a government over itself and its conduct, and an entity being vested with and exercising governmental authority? With respect to the application of the Appellate Body's standards in practice to determine what entity be qualified as a "public body": (a) should the "core features" of the entity exhibit the characteristics suggesting it was a public body, or was it sufficient that the entity was vested with authority to exercise governmental functions only in some part (possibly non-essential part) of its activities? And, (b) what range and types of activities must be under "meaningful control" of the government: should the wide range of activities be covered or would only a small portion of the activities be enough; and should the "core" activities of the entity be under "meaningful control" of the government? In conclusion, Japan said that the Appellate Body Report raised a number of legal and practical questions.

127. The representative of Argentina said that his country thanked the Appellate Body, the Panel and the Secretariat for their work in this dispute. At the present meeting, Argentina wished to make only preliminary comments since the Reports were still being examined in capital. Argentina considered that the Appellate Body Report contained some very important and useful interpretations, in particular with regard to the term "specificity" under Article 2.1 of the SCM Agreement. However, like other delegations, Argentina had some concerns with regard to two issues which had been put forward in its third-party submission. Argentina shared the views expressed by Canada and Australia with regard to the interpretation of the term "public body" in the context of the SCM Agreement and the conditions, according to which two concurrent anti-dumping and countervailing duties should be applied under the non-market economy methodology. In this regard, Argentina wished to point out that the Appellate Body had concluded that the Panel's interpretation with regard to the term "public body" was incorrect, as it was based on the concept of "any entity controlled by a government". In

[43] Appellate Body Report, "EC - Chicken Cuts", para. 176.
[44] Appellate Body Report, para. 284 (emphasis added); see also *id*. para. 309.
[45] Appellate Body Report, para. 309 (original emphasis).
[46] Appellate Body Report, para. 318; see also e.g. para. 317.
[47] Appellate Body Report, para. 345 (emphasis added); see also *id*. para. 317.
[48] Appellate Body Report, para. 381; see also *id*. para. 345.
[49] Appellate Body Report, para. 318 (emphasis added); see also *id*. paras. 346 and 355.

Argentina's view, the most relevant interpretation in this regard was whether or not there was a financial contribution, and in that context, the concept of controlling stake would appear more relevant than the performance of governmental function. Argentina believed that the interpretation as to whether a "public body" was given governmental functions had serious systemic implications. With regard to the conditions where both measures could be applied using a non-market economy methodology, like Canada, Argentina believed that Article VI:5 of the GATT 1994 should have been given more attention. As stated by Australia, Argentina also considered that the way in which the Appellate Body had interpreted the term "appropriate" under Article 19 of the SCM Agreement would have serious implications for the investigating authorities.

128. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS379/AB/R and the Panel Report contained in WT/DS379/R, as modified by the Appellate Body Report.

10. Proposed nomination for the indicative list of governmental and non-governmental panelists (WT/DSB/W/445)

129. The Chairperson drew attention to document WT/DSB/W/445, which contained an additional name proposed for inclusion on the indicative list of governmental and non-governmental panelists, in accordance with Article 8.4 of the DSU. She proposed that the DSB approve the name contained in document WT/DSB/W/445.

130. The DSB so agreed.