IN THE WORLD TRADE ORGANISATION

WT/DS437

United States – Countervailing Duty measures on Certain Products from China

Third Party Submission

by

Norway

Geneva

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US –Anti-Dumping and Countervailing Duties	Panel report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R
US – DRAMS CVD	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R
US – Export Restraints	Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R and corr.1
US — Stainless Steel (Mexico)	Appellate Body report, *United States — Final Anti-dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R

I. INTRODUCTION

1. Norway welcomes this opportunity to be heard and to present its views as a third party in this case concerning a disagreement between China and the United States as to the conformity with the covered agreements of 17 countervailing duty investigations of Chinese products initiated by the United States between 2007 and 2011.

2. Norway will not address all of the issues upon which there is disagreement between the parties to the dispute. Rather, Norway will confine itself to discuss the criteria for defining a "public body" under the *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").

II. DETERMINATION OF "PUBLIC BODY" IN ARTICLE 1.1(A)(1) OF THE SCM AGREEMENT

A. Introduction

3. For a measure to constitute a subsidy according to article 1 of the SCM Agreement it must entail a financial contribution or income or price support by a government or a public body and it must confer a benefit.

4. China claims that the United States has incorrectly found that state owned enterprises (SOEs) were "public bodies" within the meaning of Article 1.1(a)1 of the *SCM Agreement*, by focussing only on majority ownership by the government.[1] China further claims that the "Rebuttable Presumption" is, as such, inconsistent with the proper legal standard for determining whether an entity is a "public body", as established by the Appellate Body in *US –Anti-Dumping and Countervailing Duties*.[2]

5. The United States claims that the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own.[3] The United States rejects China's "as such" claim amongst others on the basis that the *Kitchen Shelving* discussion does not necessarily result in a breach of the SCM Agreement.[4]

B. Interpretation of the term "public body"

a) Introduction

6. In the dispute *US – Anti-Dumping and Countervailing Duties*, the Appellate Body conducted a thorough interpretation of the concept of "public body", within the meaning of Article 1.1(a)1 of the *SCM Agreement*. The ruling of the Appellate Body in this case has provided a number of important and useful clarifications regarding the concept of "public body", within the meaning of Article 1.1(a)1 of the *SCM Agreement*. These clarifications are relevant also in the case at hand.

7. The United States asserts that the parties are in agreement "that the findings of the Appellate Body on "public body" are important and need to be taken into account in this dispute". However, the United States also submits that "China should be understood as

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1 *China, First Written Submission ("China FWS"),* see esp. paras. 12-58.
2 *China FWS*, paras. 32-44.
3 *United States, First Written Submission* ("*US FWS"),* see, eg., para. 29.
4 *US FWS*, paras 127-137.

having agreed that in this particular dispute the Panel may and must make its own legal interpretation of the term "public body" and that "the Panel may proceed on this basis."[5]

8. In light of this and before going into the specifics of the interpretation of the term "public body" in Article 1.1(a)1 of the *SCM Agreement* in *US – Anti-Dumping and Countervailing Duties*, Norway would like to remind the Panel that the Appellate Body has held that:

> "the legal interpretation embodied in adopted panel and Appellate Body reports become 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 as in a subsequent case". [6]

9. It is Norway's view that it follows from the very construction of the WTO dispute settlement system that adopted panel and Appellate Body reports create legitimate expectations that Members must be able to rely on. Thus, it is not, as insinuated by the United States, up to the parties in any one dispute to agree otherwise, and request the panel in that particulate dispute to "proceed on that basis".

b) A «Public body» must be an Entity that Possesses, Exercises or is Vested with Governmental Authority

10. Regarding the interpretation of Article 1.1(a)(1) of the *SCM Agreement*, the United States submits that the Panel should conclude that the term "public body" in this provision means "an entity controlled by the government such that the government can use the entity's resources as its own. It is Norway's opinion that the Panel should reject the suggested interpretation by the United States for the reasons set out below.

11. The Appellate Body has already found that interpreting the term "public body" in Article 1.1(a)(1) of the *SCM Agreement* to mean "any entity controlled by a government" is wrong. In the following, Norway will set out some of the reasons why the Appellate Body's interpretation is correct and the United States' reasoning is flawed.

12. In *US – Anti-Dumping and Countervailing Duties*, the Appellate Body concluded that:

> "We see the concept of "public body" as sharing certain attributes with the concept of "government". 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."[7]

13. The Appellate Body's interpretation of the term "public body" in *US –Anti-Dumping and Countervailing Duties* entails that each case must be looked at separately, giving careful consideration to all relevant characteristics, with particular attention to whether an entity exercises authority on behalf of a government. The drafters of the WTO Agreements recognized and accepted that many types of public ownership coexist with private ownership, and focussed on whether there was proof of government intention to influence trade.

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5 *US FWS, para. 121.*
6 *US — Stainless Steel (Mexico), para. 160.*
7 Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, para. 317.

14. Norway agrees with the Appellate Body's assessment that the phrase "a government or any public body" entails two concepts with distinct meanings; "government" in the narrow sense and "government or any public body", as "government" in the collective sense.[8] These two concepts are closely linked and share a number of essential characteristics. The view that the use of the collective term "government" does not have a meaning besides facilitating the drafting of the Agreement, as advocated in the Panel report in *US –Anti-Dumping and Countervailing Duties*[9], would in our view not be in line with the principle of effective treaty interpretation.[10]

15. Norway believes that it is important to read the reference to "government or any public body" also in light of Article 1.1(a)(1)(iv) and its reference to situations where the government "entrusts or directs a private body to carry out one or more of the type of functions ... which would normally be vested in the government..." (emphasis added). Article 1.1(a)(1)(iv) provides in our view important context to the interpretation of "public body" in Article 1.1(a)(1).

16. The purpose of Article 1.1(a)(1)(iv) is to avoid circumvention of the obligations in Article 1.1(a)(1), by providing the financial contribution through non-governmental bodies.[11] By focussing on situations where a private body has been "entrusted or directed" to perform functions that would normally be vested in the government, the provision gives a clear indication of the dividing line between the "public bodies" (included in the concept of "government" in the collective sense under Article 1.1(a)(1)) and the "private bodies". This dividing line is not based on an ownership criterion, but on a functional delimitation based on whether the entity in question performs governmental functions or not. If the entity in question possesses, exercises or is vested with the authority to perform governmental functions, then it is covered by Article 1.1(a)1 directly when it acts in that capacity when it provides subsidies.

17. The United States seems to interpret this provision in an antithetic way, implying that the interpretation above must entail that it is a prerequisite for all "organs of Member governments" that they have the authority to perform the concrete functions listed in Article 1.1(a)(1)(iv).[12] This, however, is an interpretation that cannot be supported. The purpose of Article 1.1(a)(1)(iv) is, as stated above, to avoid circumvention of the obligations in Article 1.1(a)(1), by providing the financial contribution through non-governmental bodies. The purpose is not to define what "organs of Member governments" are. However it provides important context to drawing the line between "public bodies" and "private bodies" for the purpose of Article 1.1(a)(1).

18. Norway finds further support for its interpretation in paragraph 5(c) of the GATS Annex on Financial Services, where the term "Public Entity" is defined in the following manner:

> "(c) "Public entity" means:
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> (i) a government, a central bank or a monetary authority, of a Member, or an entity owned or controlled by a Member, that is principally engaged in

8 Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, paras. 286-288.
9 Panel report, *US –Anti-Dumping and Countervailing Duties*, especially paras. 8.65 and 8.66.
10 Similarily, Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, para. 289.
11 Panel Report, *US – Export Restraints*, para. 8.49; Appellate Body Report, *US – Drams CVD*, para. 113.
12 *US FWS, paras. 84-85.*

> carrying out governmental functions or activities for governmental purposes, not including an entity principally engaged in supplying financial services on commercial terms; or
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> (ii) a private entity, performing functions normally performed by a central bank or monetary authority, when exercising those functions." (emphasis added)

19. The definition in the GATS Annex on Financial Services applies the essential criterion that the entity in question must be "*engaged in carrying out governmental functions or activities for governmental purposes*". Ownership or control by a government is not sufficient in itself. Norway recognizes that the interpretation of this term is not directly applicable in a subsidy context as it is from another agreement, and the wording is not necessarily identical in all respects, but it sheds light on the intent of the Members when considering conduct that should be attributable to the governments.

20. The US claims that the term "public body" cannot be interpreted to mean an entity that performs functions of a governmental character. Were this to be the case, the US asserts, the term "public body" would be equivalent with "a government" or a part of "a government" and there would be no reason to include the term "public body" in Article 1.1(a)(1).[13] Norway begs to differ with this interpretation. In our view, this reasoning illustrates the difference between the use of "government" in the narrow and the collective sense. A public body is not a "government" in the narrow sense just because it is vested with the power to exercise certain governmental functions. It is, however, to be considered a part of government in the collective sense, and thus also subject to the restrictions in Article 1.1(a)(1) of *the SCM Agreement.*

c) Which Functions may be considered as Governmental Functions?

21. In assessing whether an entity is a "public body", the focus must be on whether the entity in question possesses, exercises or is vested with the authority to perform governmental functions when providing the financial contribution in question. This requires a factual analysis of the functions the particular entity performs, where government ownership is not dispositive in itself.

22. The context of Article 1.1(a)(1)(iv) is of relevance with regard to clarifying which functions may be considered as governmental functions. Reference is made to the phrase "which would normally be vested in the government" in subparagraph (iv). Regarding this, the Appellate Body has stated that:

> "As we see it, the reference to "normally" in this phrase incorporates the notion of what would ordinarily be considered part of governmental practice in the legal order of the relevant Member. This suggests that whether the functions or conduct are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member may be a relevant consideration for determining whether or not a specific entity is a public body. The next part of that provision, which refers to a practice that, "In no real sense differs from practices normally followed by governments", further suggests that the classification and functions of entities within WTO Members generally may also bear on the question of what features are normally exhibited by public bodies."[14]

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13 *US FWS*, paras. 50 and 57.

14 Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, para. 297.

23. Thus, both what would ordinarily be considered part of governmental practice in the legal order of the relevant Member and the classification and functions of entities within WTO Members generally are of relevance when the scope of governmental functions is addressed.

d) Assessing whether an Entity Possesses, Exercises or is Vested with Governmental Authority

24. In the analysis of whether an entity possesses, exercises or is vested with governmental authority, it is vital to consider *whether* an entity is vested with authority to exercise governmental functions, rather than *how* that is achieved.[15] In this regard we would like to direct the attention once more to the Appellate Body ruling in *US – Anti-Dumping and Countervailing Duties*, where the Appellate Body pointed out that:

> "Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense." [16] (emphasis added)

25. The United States asserts that Article 1.1(a)(1) of the *SCM Agreement* must be interpreted to mean that the term "public body" means an entity that is controlled by the government such that the government can use that entity's resources as its own. Norway fails to see that the arguments put forward by the US should lead to this conclusion. In our view, this interpretation lacks support in the *SCM Agreement.* Rather, the focus must be on whether the entity in question possesses, exercises or is vested with the authority to perform governmental functions when providing the financial contribution in question. This requires a factual analysis of the functions the particular entity performs, where government ownership is not dispositive in itself. Where the entity does not perform governmental functions, it is not a "public body" within the meaning of Article 1.1(a)(1).

III. CONCLUSION

26. Norway respectfully requests the Panel to take account of the considerations set out above in interpreting the relevant provisions of the covered agreements.

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15 Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, para. 318.

16 Appellate Body report, *US –Anti-Dumping and Countervailing Duties*, para. 317.