

**Statements by the United States at the Meeting of the WTO Dispute Settlement Body
Geneva, December 19, 2014**

1. US – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA
 - A. REPORT OF THE APPELLATE BODY (WT/DS436/AB/R) AND REPORT OF THE PANEL (WT/DS436/R and WT/DS436/R/Add.1)
 - The United States thanks the Appellate Body, the Panel, and the Secretariat assisting them for their hard work in this dispute.
 - The task that they performed here was particularly difficult in light of the number of claims India brought before the Panel and the number of issues it appealed.
 - India’s panel request contained hundreds of claims under 25 separate WTO provisions. The overwhelming majority of India’s claims were rejected as baseless. Unfortunately, India then essentially appealed the Panel’s findings in their entirety. This attempt to redo the panel proceedings led to over 90 claims on appeal, including 24 different claims under DSU Article 11.
 - While a party of course has the right to appeal a panel report it considers erroneous, India’s approach to the appeal is difficult to reconcile with the WTO dispute settlement system as designed by Members. In particular, a WTO appeal is not a chance for a Member to re-air its grievances wholesale in front of a new audience in the hopes of receiving a different outcome, but instead is an opportunity to correct legal interpretations and legal conclusions that are relevant to securing a positive solution to the dispute. Undisciplined appeals serve to exacerbate the workload problems facing the system as a whole. We hope other Members will show greater restraint in future appeals.
 - It is also worth noting that such tactics make it very difficult for the Appellate Body to comply with the 90-day deadline set out in Article 17.5 of the DSU. The Appellate Body, of course, had good reason to need to go beyond 90 days in this dispute. This makes it disappointing that the Appellate Body once again failed to follow the pre-2011 practice of exceeding this mandatory time limit following consultations with the parties and with their agreement.
 - When consulted, WTO Members have continuously demonstrated their flexibility and cooperation by agreeing to such extensions. And in this case, despite the lack of consultations, the United States and India signed a letter confirming that a report issued by December 8, 2014, would be considered consistent with Article 17.5 despite the fact that the date of circulation actually occurred 122 days after India filed its appeal.
 - The United States wishes to make clear that we view this as an important systemic matter because it involves mandatory language under the DSU. But under the circumstances of

this dispute, we also want to applaud the Appellate Body for resolving this massive appeal within 122 days. Those efforts were significant and are appreciated.

- Turning to the substance, the United States welcomes the Panel and Appellate Body’s overwhelming rejection of most of India’s claims, including the Appellate Body’s rejection of all 24 of India’s Article 11 challenges to the objectivity of the Panel’s findings.
- The interpretations advanced by India largely sought to carve out certain loopholes for the provision of financial contributions in the mining and steel industry by the Government of India, to weaken the disciplines of the subsidies agreement as a whole, and to tie the hands of investigating authorities. The United States welcomes the Panel’s and Appellate Body’s rejection of India’s efforts and the well-reasoned approach taken in most instances.
- First, the United States welcomes the rejection of all of India’s “as such” challenges to the U.S. Department of Commerce’s benchmark regulation under Articles 1.1 and 14(d) of the SCM Agreement.¹ India’s arguments would have carved out a cost-to-government loophole in order to allow a public body to provide a good (in this case, iron ore) for less than market value to purchasers (in this case, Indian steel manufacturers). India also argued that in situations where domestic pricing information is unavailable, investigating authorities should not be entitled to find any benefit. Such interpretations are contrary to the text of the SCM Agreement, and these claims were rejected in their entirety.
- The United States further welcomes the findings that adjusting a benchmark to a delivered price level is consistent with Article 14(d). The Appellate Body reasoned that the use of delivered prices is the relevant point of comparison in a benchmark analysis because it allows any investigating authority to assess whether the recipient of a good is in fact better off than it would have been absent the government’s financial contribution. We agree that all costs incurred by the recipient—including costs of delivery—must be taken into account to determine whether the recipient received a good on terms more favorable than those otherwise available on the market.
- In the context of these findings, however, the United States does regret the Appellate Body’s apparent departure from its report in *US – Softwood Lumber IV*, where it previously established that the *private* prices from arms-length transactions in the country of provision are the “primary” benchmark.² The Appellate Body appears to have changed course in now requiring investigating authorities to consider not only evidence of *private* market prices, but also government prices in establishing a benchmark, unless those prices are shown to be non-market prices. But where private prices from an arms-length transaction exists, there would not appear to be a need to also examine government prices to determine the “market” price. Including government prices presents a risk of introducing distortions into the benchmark.

¹ *Agreement on Subsidies and Countervailing Measures*.

² See Appellate Body Report, *US – Softwood Lumber IV*, para. 90.

- Moreover, we do not understand the basis for the Appellate Body’s finding that Commerce should have provided additional explanation as to why it rejected an export price from the government entity at issue for use as a benchmark in three of the administrative reviews. It appears self-evident that comparing a government entity’s price to its own price is circular and uninformative. Why should an investigating authority be required to explain that proposition any further?
- In spite of these concerns, we commend the Appellate Body’s consideration of the vast number of claims regarding Commerce’s benchmark regulation, rejecting India’s attempts to weaken the SCM Agreement by calculating benefit from the perspective of the government provider.
- Second, the United States welcomes the rejection by the Panel and Appellate Body of India’s interpretation of the specificity requirement under Article 2.1(c). India sought to carve out an exception in the subsidies disciplines for subsidies provided on an industry-wide basis, arguing that a subsidy provided to certain enterprises is not specific unless there were other “similarly situated” or comparable entities that were eligible for but did not receive the subsidy. As the Panel and Appellate Body rightly found, Article 2.1(c) does not require a finding that there are “similarly situated” entities that are not receiving the subsidy. Rather, where a government provides a benefit to certain enterprises, that subsidy is specific.
- Third, we would also highlight the important findings the Appellate Body made regarding an investigating authority’s use of facts available in making determinations pursuant to Article 12.7. Where responding parties choose not to participate in trade remedies investigations, the ability to make findings based on facts available is essential given investigating authorities’ lack of power to ensure that parties provide necessary information.
- India’s arguments would have deprived Members of necessary information by imposing on investigating authorities an “obligation of conduct” to conduct a comparative evaluation as a necessary pre-requisite to using facts available. The Appellate Body rightly rejected India’s formalistic approach.
- The Appellate Body also rejected India’s attempt to prevent investigating authorities from drawing inferences from a party’s failure to cooperate. We were encouraged to see the report expressly recognize the need for an investigating authority to take into account the circumstances surrounding the lack of information, including when in determining whether to draw inferences.
- We were also pleased that the Panel and Appellate Body rejected India’s “as such” claims against the U.S. laws and regulations governing facts available in trade remedies proceedings. After reviewing both the text of the U.S. law, as well as the other evidence raised by India, the Appellate Body confirmed the Panel’s finding that the laws do not

require U.S. investigating authorities to make determinations without a factual foundation, or to apply facts available in a punitive manner.

- Next, turning to the issue of public body, we are pleased that the Appellate Body decisively rejected India's proposed interpretations on appeal. India argued that, to be a public body, an entity must have the power to regulate, control, or supervise individuals, or otherwise restrain their conduct. India further argued that an entity must have the power to entrust or direct a private body to carry out the functions that are listed in Article 1.1(a)(1)(i)-(iii).³
- The Appellate Body disagreed with both of these arguments by India, which were also advanced by China in another dispute. This is a critical, and very welcome, result. These arguments could have resulted in an approach that would have shielded transfers of a government's financial resources from key WTO subsidy disciplines. This would have undermined a key accomplishment of the Uruguay Round, the ability of the WTO (through dispute settlement) and Members (through countervailing measures) to remedy subsidization to ensure that Members' citizens are not adversely affected by trade-distorting subsidies.
- The Appellate Body did reverse the Panel's interpretation of "public body" and the application of Article 1.1(a)(1) to the facts of this case. In so doing, however, the Appellate Body emphasized the case-by-case nature of the analysis and, importantly, drew attention to evidence that "may certainly be relevant" to a public body finding.
- For example, the examples of evidence given include: "a government's exercise of 'meaningful control' over an entity and its conduct"; that "the government can use the entity's resources as its own"; "government ownership of an entity . . . in conjunction with other elements"; the "scope and content of government policies relating to the sector in which the investigated entity operates"; "whether the functions or conduct [of the entity] are of a kind that are ordinarily classified as governmental in the legal order of the relevant Member"; etc.⁴ We consider that these examples provide important guidance for future public body determinations.
- The United States notes that it had put forward an interpretation of public body consonant with the examples just given, but that would have provided more clarity. In particular, the U.S. view is that where an entity is able to transfer the government's economic resources through the practices described in Article 1.1(a)(1), that entity's transfer of the resources is an exercise of governmental authority itself.
- Or looking at this from the perspective of the government, where the government does or can control an entity's resources as its own, those economic transfers must be attributable to the Member. In this respect, while the Appellate Body report addresses certain, mostly

³ Appellate Body Report, paras. 4.17-4.18.

⁴ Appellate Body Report, paras. 4.20, 4.29.

secondary, arguments that the U.S. put forward,⁵ we were surprised that the report does not address the core U.S. arguments reflected in the descriptive portion of the report.⁶

- In those arguments, as further elaborated in the U.S. oral statement and arguments at the hearing, the United States explained that the financial contributions described in Article 1.1(a)(1) constitute the ways in which a government may transfer economic value to recipients. Therefore, these practices reflect *governmental* functions. Indeed, Article 1.1(a)(1)(iv) states that the functions described in romanettes one through three are the practices “normally vested in the government”.
- It necessarily follows, then, that the authority to perform any of the functions described in Article 1 on behalf of, or under the control of, the government, must constitute the possession, exercise, or vestment of *governmental* authority.
- That is, accepting the Appellate Body’s focus on authority, the critical governmental authority for purposes of finding a financial contribution by a public body is the *authority* to transfer *the government’s economic resources*. The report suggests that, with the appropriate explanation and grounding in the facts of a case, such evidence of authority over the government’s resources could *support* a public body finding. The United States considers that it would have been desirable to clarify that such authority over the government’s economic resources is the *decisive* factor in determining whether an entity is a public body.
- Finally, the United States would note the Appellate Body’s mixed findings with respect to cross-cumulation.
- The Appellate Body has previously recognized the importance of cumulation to permit investigating authorities to fully address the cumulative effects of dumped import or subsidized imports from multiple countries that are injuring the domestic industry at the same time.
- The Appellate Body’s findings on cross-cumulation would restrict the ability of Members to address the effects of such cumulative imports, despite the fact that cumulation is permitted under the terms of both the SCM and the AD Agreements.⁷ The U.S. submissions support a reading of the SCM Agreement, together with the GATT 1994 and the AD Agreement, as permitting the use of cross-cumulation.
- Regarding the U.S. statute, we were pleased that the Appellate Body reversed the Panel’s “as such” finding for failing to engage in an assessment of the meaning of that statute under U.S. municipal law. But having reversed the Panel’s finding, we were surprised and disappointed with the approach of the Appellate Body in making out an entirely new case for India.

⁵ See Appellate Body Report, paras. 4.21-4.28 (addressing U.S. arguments at paras. 2.298, 2.302-2.305).

⁶ See Appellate Body Report, paras. 2.295, 2.296, 2.297, 2.299, 2.300, 2.301

⁷ *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (“AD Agreement”).

- The Appellate Body examined the face of the statute and found that cross-cumulation is required in a single circumstance describe in that statute – 19 USC 1677G(iii)(III). But the Appellate Body reviewed the U.S. law in an entirely *de novo* manner. This reading of the statute was never assessed by the Panel; and in fact, it was not even *raised* by India.
- Indeed, the Panel made *no* findings on the interpretation of the statute. And India offered *no* evidence in the course of the dispute regarding the meaning of the statute, as understood by U.S. law. The Appellate Body rightly chastised the Panel for its error in this respect. But the Appellate Body made no mention of India’s burden of proof; nor did it evaluate whether India had succeeded in making its *prima facie* case.
- Unfortunately, such an approach does not sit easily with the notion of appellate review. Nor can it be reconciled with the Appellate Body’s previous statements regarding the complaining party’s burden of proof when challenging a measure “as such”. In *US – Gambling*, for example, the Appellate Body found that the complaining party failed to make a *prima facie* case because it “failed to identify how [the challenged measures] operated.” To meet its burden, the complaining party would have needed to provide evidence and arguments sufficient to “identify the challenged measure *and its basic import... and explain the basis for* the claimed inconsistency of the measure.”⁸
- Under the Appellate Body’s own approach in *US – Gambling*, India *did not* make a *prima facie* case that the U.S. statute was inconsistent with the SCM Agreement. The “as such” finding, rather, was based on a reading of the statute developed by the Appellate Body, and thus it appears that the Appellate Body did not consider that India was the one who was required to make out its case.
- Such an approach is regrettable and carries important implications for WTO dispute settlement. We encourage Members to review this issue closely, as well as the many other important systemic issues that we’ve raised today.
- To conclude, we thank the Panel, Appellate Body and Secretariat assisting them for their efforts in this dispute. We also encourage Members to consider further how they can contribute to the efficient and effective use of the WTO dispute settlement system.

⁸ Appellate Body Report, *US – Gambling*, para. 141.