

(As delivered)

IN THE WORLD TRADE ORGANIZATION
Before the Appellate Body

**United States – Definitive Anti-Dumping and Countervailing
Duties on Certain Products from China**

AB-2010-3

**Oral Statement by Norway as
Third Participant**

Hearing of the Appellate Body

Geneva
13 January 2011

Mr Chairman and Members of the Division,

1. Norway welcomes this opportunity to be heard and to present its views as a Third Participant before the Appellate Body in this appeal. In this opening statement I will not repeat the arguments presented by Norway in its written submission, but just highlight a few points that we, in light of the written submissions by other Third Participants, believe are important to stress:
2. Regarding the issue of the proper definition of “public body” in Article 1.1(a)(1) of the *Subsidies Agreement*, we believe it is important to bear in mind that the *Subsidies Agreement* is concerned with government intervention. Any subsidy must be attributable to the government of an exporting Member before the government of an importing Member is allowed to impose countervailing measures.
3. The *Subsidies Agreement* refers in Article 1.1(a)(1) to three different actors whose financial contributions may be found to constitute a subsidy. Those are: (i) "governments", (ii) "public bodies", and (iii) "private bodies" that have been "entrusted or directed" by the government to make a financial contribution. The Panel states, in paragraph 8.68, that

“From the standpoint of pure logic, this is a complete universe of all potential actors: every entity (individual, corporation, association, agency, Ministry, etc.) must fall into one of these three categories. In other words, the SCM Agreement does not *a priori* rule out any entity from potentially coming within its scope. The specific question raised in this dispute is whether wholly or majority government-owned enterprises that produce and sell goods and services are more appropriately categorized as "governments", "public bodies" or "private bodies" for purposes of the SCM Agreement.”¹

4. We agree, and with this in mind, let me set out five points:
5. *First*; the issue of legal interpretation before the Appellate Body is the proper interpretation of the term “public body” as it appears in Article 1 of the *Subsidies*

¹ Panel Report, para 8.68

Agreement. The interpretation of this term is of great systemic importance with ramifications going far beyond the case before us today.

6. *Second;* the issue before the Appellate Body is not, as the EU seems to suggest in its written submission,² whether the facts could have supported a US determination of the existence of a ‘financial contribution’ covered by Article 1.1 *even* with another interpretation of the term “public body”. There may well be other facts out there that could have supported that a particular State Owned Enterprise also fulfils the correct interpretation of “public body”. Or facts that could support that the Chinese Government “entrusted or directed” such commercial enterprises to provide a subsidy. However, Norway would caution that neither Panels nor the Appellate Body can make or repair the findings and determinations that were not made by the investigating authority.
7. *Third;* the crux of the matter is whether the term “public body” or “organisme public” (in French) or “organismo público” (in Spanish) requires that the body in question be vested with certain public functions; or whether government control determined by reference to an ownership percentage in the commercial enterprise is enough.
8. *Fourth;* importantly, should the Appellate Body agree with Norway’s submission, and conclude that the term “public body” requires that the body in question be vested with certain public functions, this interpretation does not mean that the commercial enterprise may never engage in subsidization as Canada and Argentina seem to argue³. Rather, it implies that the investigating authority cannot simply “deem” (partial) ownership to imply that the government has influenced the enterprise to provide a subsidy. Instead the investigating authority will have to determine, based on actual facts, whether the government actually “directed or entrusted” the enterprise, as with other “private bodies”, to provide a subsidy as set out in Article 1.1(a)(1)(iv).
9. Article 1.1(a)(1)(iv) contains an anti-circumvention provision, that ensures against the government providing subsidies through “private bodies”. 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

² EU Third Participant submission, para 14.

³ Canada Third Participant submission, paras. 12 – 16. Argentina Third Participant submission, paras. 6 and 11.

dividing line between the “public bodies” (that are considered on par with the government as such under Article 1.1(a)(1)) and the “private bodies”. This dividing line is not based on an ownership criterion, as stated by the Panel, but on a functional delimitation based on whether the body in question performs governmental functions or not.

10. *Fifth*: Norway agrees that it is normally easier for an investigating authority to find out the ownership percentage of the government in an enterprise, than for the investigating to find evidence of “entrustment or direction”. Nevertheless, the interpretation of the term “public body” should not be decided by reference to what makes life easier for investigating authorities, but in light of the principles of the Vienna Convention on the Law of Treaties.

11. In this respect Norway also underlines that the “object and purpose” of the *Subsidies Agreement* cannot be stated simplistically as being to discipline subsidization. The *Subsidies Agreement* contains a fine balance between the right of a Member to provide subsidies – except export subsidies – and the right of another Member to take action against such subsidization if it causes material injury to its industry. While the agreement does provide for some disciplines on subsidization, an important object and purpose of the agreement is also to discipline the actions by investigating authorities so as to avoid abuse.

Members of the Division,

12. That concludes Norway’s opening statement.