



世界贸易组织法律与实务教学研究文丛



WTO 中国案例精选 (二)

Selected China WTO Cases

案例在法学教育中的作用是公认的。有了案例，法律规则就“活”了起来——从抽象的概念、冷冰冰的条文，变成了社会中一个个活生生的事例。

涉及中国的案例会让学生增加一种“亲切感”——中国在 WTO 中作为“原告”或“被告”的案件，不仅事关重大，而且饶有趣味。

法律来源于丰富多彩的生活，而案例教学能够让法律回到生活，成为有血有肉的“人”。在 WTO 法中，这个“人”是理性的、讲道理的。这个“人”的一言一行，值得我们认真观察研究，认真学习效仿。

■ 杨国华 / 编



厦门大学出版社 国家一级出版社
XIAMEN UNIVERSITY PRESS 全国百佳图书出版单位



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图书在版编目(CIP)数据

WTO 中国案例精选. 2/杨国华主编. —厦门: 厦门大学出版社
(世界贸易组织法律与实务教学研究文丛)

ISBN 978-7-5615-4397-9

I. ①W… II. ①杨… III. ①世界贸易组织—贸易法—案例—汇编②贸易法—案例—汇编—中国 IV. ①D996.1②D922.294.5

中国版本图书馆 CIP 数据核字(2012)第 224318 号

厦门大学出版社出版发行

(地址:厦门市软件园二期望海路 39 号 邮编:361008)

<http://www.xmupress.com>

xmup@xmupress.com

厦门市金凯龙印刷有限公司印刷

2012 年 10 月第 1 版 2012 年 10 月第 1 次印刷

开本:787×1092 1/16 印张:17 插页:2

字数:413 千字 印数:1~3 000 册

定价:37.00 元

本书如有印装质量问题请直接寄承印厂调换

一座法律教学与研究的宝库

中国加入 WTO 十周年,给我们提供了 16 份争端解决裁决报告。这些报告不仅对中国与美国和欧盟等其他 WTO 成员之间的贸易争端作出了裁判,而且向我们展现了一系列精彩的法律分析。例如,采取“保障措施”,应当如何对“未预见的发展”进行分析?《补贴与反补贴措施协定》中的“公共机构”,是指“政府控制”的机构,还是“履行政府职能”的机构?对中国的产品同时采取反倾销和反补贴措施,为何要考虑“双重救济”问题?为何美国有关行政部门拨款的法案属于“卫生与植物卫生措施”?为何专家组认定欧盟单独税率的规定不符合《反倾销协定》,而上诉机构又是如何“基于不同理由”维持了专家组裁决?在针对中国产品采取“特殊保障措施”时,应当如何分析进口与产业损害之间的因果关系?再如,中国对构成整车特征零部件的税收为何属于“国内费用”,而不是“普通关税”?中国知识产权法律中的刑事门槛为何没有违反《与贸易有关的知识产权协定》第 61 条的“商业规模”之规定?《中国加入 WTO 议定书》承诺中的“sound recordings”,为何既包括物理形态(CD、DVD)也包括电子形态(网络音乐),而上诉机构又如何解决了一个“复杂的法律问题”,即议定书承诺能否援用 GATT 第 20 条例外的问题?但在另外一个案件中,为何中国关于出口税承诺又无权援引 GATT 第 20 条例外?

在这些法律分析中,专家组和上诉机构不仅对案件事实(“措施”)进行了详细的描述和准确的归纳,而且对相关法律,即 WTO 协定的相关条款进行了明确的解释。更为重要的是,对于“法律为何适用于案件事实”,裁决报告中有充分翔实的论证,常常达到几十页的篇幅!这些是真正意义上的法律分析,体现了法律的严谨和理性。

WTO 中涉及中国的争端解决裁决报告,只是 WTO 裁决的一小部分。自 1995 年成立以来,WTO 争端解决机构已经作出了 200 余份裁决报告,有更多更为精彩的法律分析。

而且,随着全球化和各国经济贸易交往的增加,WTO 争端解决裁决报告的数量还在不断增加……

WTO 裁决报告仿佛一座宝库,亟待法律教学和研究的挖掘。

法律教学应当使用 WTO 案例,因为研读这样的法律分析,学生必定会得到很好的法律训练。此外,对于中国是当事方的案件,裁决涉及中国的贸易法律和政策以及中国的经济利益,因此使用这些案件教学是饶有趣味的。对于中国并非当事方的案件,由于它们涉及国民待遇、最惠国待遇和取消数量限制等重要的国际贸易规则,覆盖了货物贸易、服务贸易和知识产权等主要的国际贸易领域,而中国作为一个贸易大国,有短期或长期的利益,因此使用这些案件教学,不会让学生有“事不关己”的“陌生感”。这也契合了国家实



施卓越法律人才教育培训计划的要求,有助于培养一批具有国际视野、通晓国际规则、能够参与国际法律事务和维护国家利益的涉外法律人才。而对于研究者,研究这些案件所涉及的国际规则和中国利益,提出对策建议,对中国法律 and 政策的制定以及“全球治理”的参与,都有非常重要的意义。

更为重要的是,这些裁决得到了 154 个 WTO 成员的充分尊重,按照 WTO 的法律程序得到了执行。法律的权威在这里得到了体现。法律是管用的,能给法律的学习者和研究者带来无穷的动力,也为我国建设法治社会提供了借鉴。

开启这座宝库的大门,只需举手之劳:钥匙就是每个人手中的鼠标,只要对着 WTO 官方网站轻轻一点,全部案例就会出现在屏幕上!我们这套丛书,不过是在为这座宝库做个广告。

是为序。

商务部条约法律司副司长 杨国华

西南政法大学国际法学院院长 张晓君

2012 年 3 月 31 日

让法律活起来

——WTO 案例在法学教育中的作用

案例在法学教育中的作用是公认的。有了案例,法律规则就“活”了起来——从抽象的概念、冷冰冰的条文,变成了社会中一个个活生生的事例。通过对这些事例的研究,学生们就开始看到了法律的“用处”,进而对条文的含义和理念有了清晰、深刻的认识,同时培养了独特的法律思维。这样,当他们走向社会、遇到一件件具体的事情时,脑海里就会浮现一个个案及其背后所体现的法律原则,并且迅速将之运用于解决眼前的问题。因此,在法学教育中,应当大量使用案例教学,使得学生的法律知识和法律思维得到反复强化和巩固。

然而,选择好的案例何其难也!国内法院判决大多过于简单,对法律条文为何适用于本案事实所言甚少,仿佛将事实查明后,就有现成的、毋庸置疑的条文等着。英美法传统的法院判决也许有比较充分的说理、论证过程,但这些案件的事实离我们实在太遥远,永远给人一种“隔”的感觉。法律是“本土”的,离开了我们自己生活的法律,我们永远无法真正地理解,更不用说将其准确地运用于我们自己的生活。不仅如此,无论是国内判决还是国外判决,我们又从何处获得呢?是的,有人会出版“案例精选”,但那些是我们所需要的案例吗?那些案例能够完全反映我们所要学习的法律制度吗?

就在这个时候,我们发现了 WTO 案例。WTO 成立 15 年来,已经有了 400 多个案件、200 多份专家组和上诉机构裁决,几乎覆盖了 WTO 的所有协议。这些裁决的重大特色,是对“法律条文为何适用于本案事实”有详尽的论述。为了确定一个协议条款的含义,专家组和上诉机构往往会从词典中查找其“通常含义”,从该条款的前后左右甚至其他协议对照“上下文”,从该条款所在协议的前言和整体明确“宗旨和目的”。在此过程中,常常会参照大量的先例。这些先例为条款的理解提供了多样的思路。在初步确定了条款的含义后,专家组和上诉机构还会参考“补充资料”,例如协议谈判时的文件,以印证其理解的准确性。然后,他们会拿着“条款的含义”这个“放大镜”,仔细查看案件的事实,一点点确定两者是否相符。经过这样的法律论证、法律推理,读者会对“法律”及其“法律”适用于事实的过程,有一个清晰的了解。阅读和研究这样的案例,能够培养法律解释的能力,更能够锻炼法律适用的本领。此外,这些案例的裁决在 WTO 官方网站上可以全部免费下载,而涉及中国的案例更会让学生增加一种“亲切感”——中国在国际组织做为“原告”或“被告”的案件,不仅事关重大,而且饶有趣味。



事实上,将 WTO 案例作为法律教学的资料,还有更为深远的影响。WTO 裁决得到了 153 个成员的普遍尊重——绝大多数得到了执行,即败诉方改正了有关措施,而少数案件的“补偿”和“报复”,也是在 WTO 法律程序的框架内进行的。因此,WTO 的法律体制,是“国际法治”的体制——国际法充分表现出了法律的特征。同时,按照 WTO 裁决修改国内的立法或措施,也促进了“国内法治”的进步——中国在认真遵守国际规则。法治,即“良好的法律得到良好的执行”(亚里士多德语),无异于法律的灵魂。对于法律系学生来说,需要培育心中的这片净土,打开眼前的这片蓝天,树立坚定不移的法治理念。只有这样,当他们走向社会,面对与法治相反的现实时,才能尽心尽力地予以纠正,从而推动法治的前进。法治是一种理想,而现实往往与理想相距甚远。但只要我们胸怀理想,就能将现实一步步推向理想。因此,通过 WTO 案例,学生们能够看到这样一个实实在在的“理想国”,不会由于理想的虚幻和飘渺而丧失理想的信念。

对于使用 WTO 案例教学的可行性,本人曾经在一所大学的研究生课程中有过成功的尝试。将几个案例分给几组同学阅读,每节课由一组同学介绍案情,其他同学提问。经过一学期的讨论,同学们对专家组和上诉机构分析问题的思路有了比较清晰的把握,并且能够初步运用这一思路进行条文解读和案情分析。不仅如此,同学们还通过案例,对 WTO 的规则和知识有了一定的了解。同学们课堂热烈讨论,课后刻苦阅读,表现出了极大的学习主动性。

值得提及的是,我们倡导 WTO 案例教学,并不局限于“WTO 法”、“国际贸易法”、“国际经济法”、“国际法”等课程。专家组和上诉机构裁决中的思维,是真正的“法律思维”:逻辑严谨,论证充分,以理服人。这种法律思维的方式,是所有法律系学生都应当培养的。也正是这样一种思维方式,将法律专业与其他专业区别开来,例如文学的想象、历史的博大、哲学的深刻,以及经济学的数据分析、社会学的问卷调查、心理学的测试实验。

经过这种严谨的法律思维的训练,法律系的毕业生即使在其他行业工作(相当多的毕业生不会从事法官和律师这些纯法律的职业),也能显示出自己的特长。法律思维是一种能力,是在纷繁复杂的社会想象中敏锐地抓住本质的能力。法律思维更体现了一种理念,是借用法律分析的方法展现法律背后的法治(以及公平和正义)的理念。我们社会的各行各业都需要这样的毕业生。

法律来源于丰富多彩的生活,而案例教学能够让法律回到生活,成为有血有肉的“人”。在 WTO 法中,这个“人”是理性的、讲道理的。这个“人”的一言一行,值得我们认真观察研究,认真学习效仿。

2011 年 10 月 29 日

注:中国加入 WTO 十年,截至 2011 年 11 月 30 日,共有 22 个涉及中国的案件(8 个起诉案件,14 个被诉案件,详见本书附录“中国参与 WTO 案件统计”),其中 10 个案件作出了专家组和/或上诉机构报

告。本书所收集的内容,即为这 10 个案件中最为精彩的内容。

但需要说明的是,上文谈到“案例精选”时所提出的疑问,即“但那些是我们所需要的案例吗?那些案例能够完全反映我们所要学习的法律制度吗?”同样适用于本书。出版案例精选,为教学便利之所需。WTO 专家组报告平均 300 页,上诉机构报告平均 150 页,所以阅读全文常常为师生所不便。然而,精选就如满桌大餐中的一道菜,也如交响曲中的一个乐章,虽然能够反映精选者或大多数人的判断,但绝对不能够替代品尝全菜或聆听全曲后自己的判断。何况,所谓“精彩”的感觉,常常是在与其他“不够精彩”的部分相比较后才会产生。因此进行 WTO 案例教学,应当鼓励研读完整的报告,或者至少要研读一份完整的专家组报告和上诉机构报告。(2011 年 11 月 30 日)

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美国反倾销和反补贴案

(U. S. -Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, DS379)

一、案件背景

2008年,美国相继对来自中国的标准钢管、非公路用轮胎、薄壁矩形钢管和复合编织袋等四种产品征收反倾销税和反补贴税。中国认为,美国在进行反倾销和反补贴调查中,沿用了一贯的错误做法,违反了WTO的相关义务。9月19日,中国就此诉诸WTO争端解决机制。2010年10月22日,专家组做出裁决。2011年3月11日,上诉机构做出裁决。

本案有两个重要的问题:

第一个问题是“公共机构”问题。本案涉及反补贴调查的公司,从国有公司购买了热轧钢、橡胶和石化产品等作为原材料,并且从国有商业银行获得了贷款,那么这些国有企业和国有商业银行是否属于《补贴与反补贴措施协定》(第1条)所指的“公共机构”(public body)?专家组认为“公共机构”就是“受政府控制的任何实体”,因此本案中的国有企业和商业银行都属于“公共机构”。但上诉机构认为,“协定所指的公共机构必须是拥有、行使或被授予政府权力的实体”,因此在何为“公共机构”的问题上推翻了专家组裁决,进而认定本案中的国有企业不属于“公共机构”,但本案中的商业银行属于“公共机构”。

第二个问题是“双重救济”问题。专家组认定,使用非市场经济方法,对某种产品同时征收反补贴税和反倾销税,有可能出现“双重救济”(double remedy)问题,原因在于:使用非市场经济方法可能会就反对补贴提供某种形式的救济,因此同时征收反补贴税和使用非市场经济方法的反倾销税,就可能导致两次抵消某种产品的补贴。计算倾销幅度是将出口价格与正常价值进行比较,而非市场经济方法,正常价值的基础是来自第三国的“替代”成本或价格,因为出口国的价格和生产成本受到了政府干预的扰乱,不能反映市场经济条件。因此,使用非市场经济方法计算出来的倾销幅度,不仅反映了被调查企业在国内和出口市场的价格歧视(即倾销),而且反映了影响生产商生产成本的经济扰乱情况。给有关产品生产商提供的某项补贴,已经受到了反补贴调查,此时又属于被非市场经济倾销幅度计算所“抓住”的经济扰乱情况。换句话说,根据非



市场经济方法计算出来的倾销幅度,通常高于其他方法计算的倾销幅度,因为出口价格是与市场决定的、未补贴的生产成本相比较的,而不是与生产商实际的、经补贴的(或者说是扰乱的)生产成本相比较的。这样,如果部分倾销幅度来自对出口产品的补贴,则根据非市场经济方法计算出来的反倾销税便是既补救了倾销又补救了补贴。从这个角度看,如果同时在这种产品上适用反补贴税,该补贴就可能被“抵消”了两次,即一次是通过反倾销税,另一次是通过反补贴税。然而,专家组认为中方未能证明“双重救济”违反了 WTO 规则,但上诉机构推翻了专家组裁决,认定“双重救济”违反了 WTO 规则。

二、专家组裁决的相关部分

(一)“公共机构”问题

专家组报告第 8.53 段至第 8.144 段对“公共机构”问题做出了如下裁决:

D. ASSESSMENT BY THE PANEL

1. Interpretation of the Term “Public Body” in Article 1.1(a)(1) of the SCM Agreement

8.53 In examining China’s claims concerning the USDOC’s determinations in all four of the countervailing duty investigations at issue in this dispute that the SOEs that provided certain inputs were public bodies, and in the OTR investigation that the SOCBs that provided loans also were public bodies, the first issue that we must address is the meaning of the term “public body” in Article 1.1(a)(1) of the SCM Agreement.

8.54 The relevant text of Article 1.1 of the SCM Agreement reads as follows:

- 1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:
 - (a)(1) there is a financial contribution by a *government or any public body* within the territory of a Member (referred to in this Agreement as “government”), i. e. where:

[...]

 - (iv) a government makes payments to a funding mechanism, or *entrusts or directs a private body* to carry out one or more of the type of functions illustrated [...] above. (emphasis added)

On its face, Article 1.1 of the SCM Agreement identifies three possible types of actors that could convey government financial contributions: “governments”, “public bodies”, and “private bodies” that have been “entrusted or directed” by the government to make a financial contribution. Given that the USDOC found that the entities in question were “public bodies”,

the focus of China's claim is the meaning of the term "public body" in the SCM Agreement. We note nevertheless that we must interpret the entire phrase "a government or any public body within the territory of a Member(referred to in this Agreement as 'government') " in order to find that meaning.

8.55 We recall that China's argument is that the terms "government" and "public body" are "functional equivalents", with the meaning of the latter (while not identical to "a government")^①being "an entity which exercises powers [or authority] vested in it by a 'government' for the purpose of performing functions of a 'governmental' character" (in essence, the same definition as that given by the Appellate Body to the term "government agency" in Article 9.1 of the Agreement on Agriculture).^②For the United States, on the other hand, the terms "government" and "public body" have distinct meanings.^③The particular interpretative question thus posed by China's claim is how broad or narrow a meaning should be given to the term "public body", as used in Article 1.1(a)(1) of the SCM Agreement.

8.56 We note that the interpretative process under Article 31 of the Vienna Convention is a holistic one, that the ordinary meaning of treaty terms may be ascertained only in their context and in light of the object and purpose of the treaty^④, and that dictionary meanings alone are not necessarily capable of resolving complex questions of interpretation.^⑤That said, the task of interpreting a treaty must begin with its specific terms.^⑥

8.57 As the SCM Agreement contains no definition of either "government" or "public body", dictionary definitions provide a useful starting point. The definitions of "government" include: "The governing power in a State; the body or successive bodies of people governing a State; the State as an agent; an administration, a ministry".^⑦The definition of "to form a government" is consistent with this definition: "Establish an administration, esp. after a general election".^⑧These definitions seem to conform to the meaning of this term in common parlance as referring to the formal organs of government (agencies, offices, ministries, etc.). This is in fact the meaning ascribed to the term "government" by both parties.

① China second written submission, paras. 15-16.

② China first written submission, para. 55, paraphrasing the definition of "government agency" set forth by the Appellate Body in *Canada-Dairy*.

③ United States first written submission, para. 98.

④ Appellate Body Report on *China-Publications and Audiovisual Products*, para. 348.

⑤ Appellate Body Report on *U. S. -Gambling*, para. 164.

⑥ Appellate Body Report on *U. S. -Carbon Steel*, para. 62.

⑦ Shorter Oxford English Dictionary, L. Brown(ed.) (Claredon Press, 1993), Vol. I, p. 1123 (the "Shorter Oxford English Dictionary").

⑧ Id. , Vol. I, p. 1123.



8. 58 The dictionary definition of “public” includes the following: “Of or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation”.^① Both parties submit definitions of the term “public” that are similar to this. China also submits additional definitions which, in its view, indicate that the essential elements of a “public” body are that it acts for the welfare and best interests of a nation or community as a whole, and does so under the authority of, or officially on behalf of, the nation or community as a whole.^②

8. 59 The dictionary definition of “body” includes: “a group of individuals regarded as an entity; a corporation”^③; and “a number of individuals spoken of collectively, usually as united by some common tie, or as organized for some purpose; a collective whole or totality; a corporation; as, a legislative body, a clerical body”.^④ On the basis of these definitions, therefore, the term “public body” standing alone could include, *inter alia*, “corporations” “belonging to the community or nation”. We note here that there seems to be no universally-accepted definition of the term “public body”, and China has not put one forward. We recall that China argues that the dictionary definitions of the word “public” compel a narrow reading of the term “public body” as something functionally equivalent to “government agency” or “government”, i. e. , as an entity authorized by law to exercise functions of a governmental or public character, whose acts are performed in the exercise of such authority. We consider that the above definitions would appear to encompass, but could not be said to be limited to, such entities.

8. 60 Nor, in practice, do governments share a uniform and narrowly-drawn meaning of the term “public body” such that as proposed by China in their actual usage. To the contrary, different jurisdictions have varying definitions and practices as to what for purposes of their own domestic laws and systems are considered “public bodies”. Some of these go well beyond government agencies or similar organs of government, and include, *inter alia*,

① Id. , Vol. II , p. 2404.

② China first written submission, para. 51. The definitions submitted by China are: “of or relating to the people as a whole; that belongs to, affects or concerns the community or the nation”; “authorized by, serving or representing, the community; carried out or made on behalf of the community or State”; “aimed at or devoted to the promotion of the general welfare; committed to the best interests of the community or nation”; “[a]cting in an official capacity on behalf of the people as a whole”; “of, relating to, or affecting all the people or the whole area of a nation or state . . . of or relating to a government”; and “relating or belonging to an entire community, state, or nation”. (Id. , para. 50).

③ *Free Dictionary online* (accessed 28 April, 2010) < <http://www.thefreedictionary.com> >.

④ *Accurate and Reliable Dictionary online* (accessed 28 April, 2010) < <http://ardictionary.com/> > .
(emphasis added)

government-owned or -controlled corporations providing goods and/or services. ①

8.61 We also consider the French and Spanish versions of Article 1.1(a)(1) of the SCM Agreement, and in particular, of the term “public body”, about which the parties have presented arguments. The French term for public body is “organisme public”, and the Spanish is “organismo público”. In French, the word “organisme” (in the non-biological sense) has the broad meaning of an organized grouping of elements (persons, offices, etc.) working to a common purpose (e.g., “institution formée d’un ensemble d’éléments coordonnés entre eux et remplissant des fonctions déterminées; [...], chacun des services ainsi coordonnés, ou des associations de personnes les constituant”^②, and “[e]nsemble des services, des bureaux affectés à une tâche”).^③ The French word “public” also has a broad meaning, including related to, belonging to, or controlled by the State (e.g., “d’État, qui est sous contrôle de l’État, qui appartient à l’État, qui dépend de l’État, géré par l’État”).^④ The Spanish term “organismo” is defined similarly to the French “organisme” as referring to a grouping of elements forming a body or institution (e.g., “conjunto de oficinas, dependencias o

① We note two examples:

Example 1: (from *Free Dictionary online* (accessed 28 April, 2010) < [http://encyclopedia.thefreedictionary.com/Scottish + public + bodies](http://encyclopedia.thefreedictionary.com/Scottish+public+bodies) >): “Scottish public bodies are a group of organizations that are funded by the Scottish Government. It includes executive and advisory non-departmental public bodies [...]; tribunals, and nationalised industries. These bodies are distinct from executive agencies of the Scottish Government, as they are not considered to be part of the Government and staff of public bodies are not civil servants”. (emphasis added)

Example 2: (from EC Commission Research Directorate note on “Public bodies in FP6 contracts”, (accessed 28 April, 2010) < http://ec.europa.eu/research/fp6/model-contract/pdf/fp6-public-bodies-annex5231_en.pdf >):

“What is a public sector body?

Any public authority or entity set up under public law by a state or one of its authorities (e.g. government). Even if such an entity has a legal personality (e.g. French universities), it acts on behalf of the State with regard to and within the limits of its specific areas or competencies. Activities carried out by such authorities or entities may be of a commercial nature.” (emphasis added)

② “Institution composed of inter-related elements, and performing a specific function; each of the services thus coordinated, or of the associations of the persons comprising it.” (*Centre National de Ressources Textuelles et Lexicales* (accessed 28 April, 2010) < <http://www.cnrtl.fr/definition/organisme> >).

③ “Ensemble of services and offices devoted to a task.” (Le Nouveau Petit Robert, J. Rey-Debove and A. Rey (ed.) (Dictionnaires Le Robert, 2002), p. 1798).

④ “Of the State, that is controlled by the State, that belongs to the State, that depends on the State, that is run by the State.” (*Centre National de Ressources Textuelles et Lexicales* (accessed 28 April, 2010) < <http://www.cnrtl.fr/definition/public> >). See also Le Nouveau Petit Robert, J. Rey-Debove and A. Rey (ed.) (Dictionnaires Le Robert, 2002), p. 2114: “Qui concerne le peuple pris dans son ensemble, qui appartient à la collectivité sociale, politique et en émane; qui appartient à l’État ou à une personne administrative [...]” (“That relates to the people taken in its totality, that belongs to society, the body politic, and emanates from it; that belongs to the State or to an administrative entity”).



empleos que forman un cuerpo o institución”).^① The Spanish term “público”, like the French “public”, is defined as belonging to or related to the government (e. g., “perteneciente o relativo al Estado o a otra administración”).^② Here, as in the English, we consider that while these definitions could encompass the narrow meaning espoused by China of the term public body, or organisme public, or organismo público, we see no indication that they are limited to that meaning.

8.62 Our view is confirmed by examples that we find of uses of the terms “organisme public” and “organismo público” to cover, *inter alia*, government-owned or -controlled entities that are engaged in activities other than those of a strictly governmental character. For example, in French one use of the term “organisme public” (identified as a synonym of the term “organisme gouvernemental”) is a body or entity created by a law or decree, the majority of whose directors are appointed by the government or a minister, and which has a certain autonomy, even if a large part of its global financing comes from the State.^③ The synonymous term “organisme gouvernemental” in turn can mean “distinguished from the Ministerial apparatus, from other decentralized public entities, and from entities covered by private law”, and as including “State enterprises”, whose “main function is [...] of a commercial, financial or industrial nature, and which seeks to be self-financing”.^④ An example in Spanish is Spain’s Law 6/1997 of 14 April, 1997, on the Organization and Functioning of the General Administration of the State, which identifies three types of

① “Group of offices, dependencies or employments that form a body or institution.” (*Real Academia Española Dictionary online* (accessed 28 April, 2010) < <http://buscon.rae.es/drae/> >).

② “Belonging or related to the State or other administration.” (*Real Academia Española Dictionary online* (accessed 28 April, 2010) < <http://www.rae.es> >). We note that this is the Spanish definition put forward by China for the word “público”. While China translates the term “perteneciente a” as “pertaining to”, in fact this term connotes “belonging to”. (See, e. g., *The Oxford Spanish Dictionary*, B. Galimberti (ed.) (Oxford University Press, 2003), p. 630; *Spanish Dict online* (accessed 28 April, 2010) < <http://www.spanishdict.com/translate/perteneciente> >).

③ “Organisme créé par une loi ou un décret dont la majorité des dirigeants et des administrateurs sont nommés par le gouvernement ou par l’un de ses ministres, et qui jouit d’une certaine autonomie, même si une bonne part de son financement global provient de l’État. Synonyme : organisme gouvernemental”. (Johanne Turbide et al, HEC Montreal, Chaire de gestion des arts, “Règles de Base TPS-TVQ pour les OBNL Culturels” (accessed 28 April, 2010) < <http://www.gestiondesarts.com/index.php?id=1519> >).

④ “[...] les sociétés d’État, dont la fonction dominante est la gestion de nature commerciale, financière ou industrielle tout en poursuivant un objectif d’autofinancement”. (ENAP, L’Observatoire de l’administration publique, “Les organismes gouvernementaux” (2010) (accessed 28 April, 2010) < <http://www.etatquebecois.enap.ca/docs/ste/organisation/a-organismes.pdf> >).

“organismos públicos”: “autonomous bodies”, “public business entities”, and “State agencies”.^① Not only do the above sources showing various governments’ usages give meaning to the terms “organisme public(gouvernemental)” and “organismo público” that go well beyond government agencies and formal arms of the government as such, both also include as public bodies certain “business” entities owned and/or controlled by governments.

8.63 Given the above, we are not persuaded by China’s argument that the meaning of the terms “organisme public” and “organismo público” is limited to “government agency” or other entity vested with and exercising governmental authority, and thus that the English term “public body” must be understood to be the “functional equivalent” of “government”. China bases this argument principally on the fact that the English term “governments or their agencies” in Article 9.1 of the Agreement on Agriculture appears in the Spanish version as “gobiernos o [...] organismos públicos”, and on the French and Spanish versions of the Appellate Body Report in *Canada-Dairy*, in which the English term “government agency” is translated respectively as “organisme public” and “organismo público”. China also cites the OECD Economics Glossary which translates “organisme public” as “government agency” in this context. While these definitions and usages indicate that “public body” can have the narrow meaning of “government agency” or similar entity, as discussed above we have found other definitions and usages showing a broader possible scope. We thus do not consider this definitional analysis to give a conclusive answer to how the term “public body”, as it appears in the SCM Agreement, should be understood.

8.64 Indeed, as noted, a treaty term can only be properly understood in its context and in the light of the object and purpose of the treaty, and we thus now turn to the immediate context of the term “public body” in Article 1.1(a)(1) of the SCM Agreement, and in particular how “public body” is related to the term “a government” in the drafting of the provision. In this regard, the question raised by China’s claim is whether the clause “*a government or any public body* within the territory of a Member (referred to in this Agreement as ‘government’)”, by collectively referring to the two terms “a government” and “any public body” as “government”, means that these terms must be read as “functional equivalents”, such that a “public body” must possess characteristics similar to those of a government, i. e., must be an entity which “exercises powers [or authority] vested in it by a ‘government’ for the purposes of performing functions of a ‘governmental’ character”.

8.65 We consider significant that in Article 1.1(a)(1) the terms “a government” and “any

① In particular, Article 43.1 of this Law reads:

“1. Los Organismos públicos se clasifican en:

- a. Organismos autónomos.
- b. Entidades públicas empresariales.
- c. Agencias Estatales, que se registran por su normativa específica y, supletoriamente, por esta Ley.”



public body” are separated by the disjunctive “or”, suggesting that they are two separate concepts rather than a single concept or nearly synonymous. In addition, the use of the word “a” before “government” at the beginning of the clause, and the use of the word “any” before “public body”, further suggest that these terms have separate meanings. Furthermore, the word “any” before “public body” suggests a rather broader than narrower meaning of that term, i. e. , as referring to “public bodies” of “any” kind. Taking these contextual elements together suggests a meaning of the term “public body” as something separate from and broader than “government” or “government agency”, and we consider that given the use of the words “a”, “or” and “any”, this reading of the phrase “a government or any public body” gives meaning to that phrase as a whole.

8.66 We now turn to the collective term “government” that is equated to the entire phrase “a government or any public body within the territory of a Member” in the clause at issue. We recall that the phrase as a whole reads: “a government or any public body within the territory of a Member(referred to in this Agreement as ‘government’)”. While for China, the use of the collective expression “government” compels a reading of the terms “a government” and “any public body” as “functional equivalents”, we consider more likely that the use of the collective expression is merely a device to simplify the drafting, to avoid having to repeat the entire phrase “a government or any public body” throughout the SCM Agreement. This can easily be the case even if the two elements “a government” and “any public body” have very distinct meanings. We note that a similar drafting device is employed in Article 2.1 of the SCM Agreement, on specificity, where the undeniably very different concepts of “an enterprise or industry or group of enterprises or industries” are collectively referred to as “certain enterprises”. In our view, this collective expression is used to simplify the drafting of Article 2, as it obviates the need to repeat the entire long phrase “an enterprise or industry or group of enterprises or industries” every time this concept appears in the text. Yet, given that the term “certain enterprises” is defined as having the meaning of the longer phrase, where “certain enterprises” appears in Article 2 it must, by definition, refer to any of its underlying constituent elements. Thus, a subsidy that is limited to a single enterprise (“an enterprise”) is, for purposes of the SCM Agreement, limited to “certain enterprises”. Equally, a subsidy that is limited to, e. g. , three industries(i. e. , a “group of industries”) also is limited to “certain enterprises”. This does not mean that a single enterprise is the functional equivalent of, or synonymous with, a group of industries. Nor must this be the case for the term “certain enterprises” to make sense in the text of the Agreement. In the same way, while the drafting of the phrase that we are examining does not on its face exclude an interpretation of the terms “any public body” and “a government” as “functional equivalents”, the latter referring to entities vested with and exercising governmental authority, such an interpretation is certainly not necessary for the collective term “government” to make sense in the text of the SCM Agreement. To the contrary, entities of whatever type controlled by