20

The Appellate Body's use of the Articles on State responsibility in *US – Anti-dumping and Countervailing Duties (China)*

ISABELLE VAN DAMME*

Introduction

In this chapter, I examine the World Trade Organization (WTO) Appellate Body's interpretation in its report *US – Anti-dumping and Countervailing Duties (China)*[1] of 'public body' in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).[2] Under this provision, a subsidy shall be deemed to exist if 'there is a financial contribution by a government or any public body within the territory of a Member (referred to in [the SCM Agreement] as "government")' and a benefit is thereby conferred. The Appellate Body was asked to review the Panel's interpretation of 'public body' so as to mean 'any entity controlled by a government' and the Panel's application of that interpretation to the facts at issue. In the appeal, James Crawford acted as counsel for China, the appellant on this issue. It was his first appearance before the Appellate Body.[3]

Before the Appellate Body, China complained that the Panel had not taken account of the defining characteristic of a 'public body', that is to

* I am grateful to the editors, Dr Holger Hestermeyer and an anonymous reviewer for the comments which I received on earlier drafts of this chapter. The views expressed in this chapter are personal and do not reflect the views of the institution at which I am employed.

[1] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China* WT/DS379/AB/R, adopted 25 March 2011.

[2] The SCM Agreement forms part of Annex 1A (containing the multilateral agreements on trade in goods) to the WTO Agreement. See WTO, *The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations* (Cambridge University Press, 1999).

[3] I wrote my PhD thesis on treaty interpretation by the Appellate Body under the supervision of James Crawford. See Isabelle Van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford University Press, 2009).

say the exercise of authority vested in that body by the government for the purposes of performing functions of a governmental character. On appeal, China sought to obtain an interpretation of the SCM Agreement that was fully consistent with the rules of attribution in the International Law Commission's (ILC) Articles on Responsibility of States for Internationally Wrongful Acts of 2001 (ILC Articles),[4] in particular Article 5 which concerns the attribution of conduct of persons or entities exercising elements of governmental authority.[5]

Unlike the Panel, the Appellate Body was receptive to using the ILC Articles in interpreting 'public body' by virtue of Article 31(3)(c) of the Vienna Convention on the Law of Treaties (Vienna Convention).[6] It was hesitant however to declare the customary international law status of Article 5 of the ILC Articles. It therefore first examined the substance of Article 5 and its relevance to the interpretation of Article 1.1(a)(1) of the SCM Agreement. Whilst the rules on attribution inspired the entire interpretive reasoning of the Appellate Body, it ultimately concluded that 'because the outcome of [its] analysis does not turn on Article 5, it is not necessary for [it] to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law'.[7]

The focus of this chapter is on the interpretation of 'public body' in the light of the ILC Articles. The results of that interpretation raise significant challenges in terms of defining the applicable standard of review of investigating authorities and evidentiary standards but are not discussed here.[8]

[4] Articles on Responsibility of States for Internationally Wrongful Acts of 2001, Annexed to GA Res. 56/83, 12 December 2001.

[5] Art. 5 of the ILC Articles states: 'The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.'

[6] Vienna Convention on the Law of Treaties (Vienna, adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 331.

[7] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 316.

[8] On that standard of review, see e.g. Tegan Brink, 'What Is a "Public Body" for the Purpose of Determining a Subsidy after the Appellate Body Ruling in *US – AD/CVD*?', *Global Trade and Customs Journal*, 6 (2011), 313–15; Michel Cartland, Gérard Depayre and Jan Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?', *Journal of World Trade*, 46 (2012), 1006, 1010–14.

The Panel's interpretation of 'public body'

A premise for several claims made by China was the issue of the qualification of an entity such as a State-owned enterprise (SOE) and a State-owned commercial bank (SOCB) as a 'public body' within the meaning of Article 1.1(a)(1) of the SCM Agreement. Article 1.1 of that agreement, entitled 'Definition of a subsidy', defines a subsidy; other provisions set out different obligations with regard to different types of subsidy. It states:

> 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:
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
> (ii) government revenue that is otherwise due is forgone or not collected (e.g. fiscal incentives such as tax credits);
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
> (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 in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
> or
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
> and
> (b) a benefit is thereby conferred.

Based on the text of that provision, the Panel found that Article 1.1 identifies three types of actor that can convey government financial contributions within the meaning of the SCM Agreement, namely: (i) governments (Article 1.1(a)(1)); (ii) public bodies (Article 1.1(a)(1)); and (iii) private bodies that have been entrusted and directed by the government to make a financial contribution (Article 1.1(a)(1)(iv)).[9] The United States, in particular the United States Department of Commerce, had found that Chinese SOEs and SOCBs were public bodies. In the Panel's own words, the issue before it was 'whether wholly or majority government-owned

[9] Panel Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 8.54.

enterprises that produce and sell goods and services are more appropriately categorized' as one of the types of actor described in Article 1.1.[10] In particular, the question before it was whether the SOEs and SOCBs were private or public bodies. Depending on their proper characterisation, a separate test applied for defining a subsidy. In particular, entrustment or direction needed to be proven with regard to private bodies whilst that was not needed for government or public bodies.

According to the Panel, the three types of actors described in Article 1.1 encompassed 'the complete universe of all potential actors' and 'every entity (individual, corporation, association, agency, Ministry, etc.) must fall into one of these three categories'.[11] It followed that the SCM Agreement did 'not *a priori* rule out any entity from potentially coming within its scope'.[12]

The Panel found that the SCM Agreement defined neither the term 'government' nor the term 'public body'. It therefore used dictionary definitions of the terms in their three authentic languages,[13] whilst accepting that there existed no universally accepted definition or a uniform and narrowly drawn meaning of the latter term.[14] Those dictionary definitions appeared to suggest, without deciding the matter conclusively, that the meaning of 'public body' was wider than that suggested by China, namely 'government agency' or other entity vested with and exercising governmental authority.[15] The Panel then turned to the immediate context of 'any public body', which included the word 'government' and the disjunctive 'or', and took those contextual elements to suggest that the term had a separate and broader meaning than 'government' or 'government agency'.[16] Apart from those contextual elements, the Panel further considered the collective expression between brackets in the final part of Article 1.1(a)(1), '(referred to in this Agreement as "government")', but it refused to give substantive content to that expression. Rather, it was 'more likely that [its] use . . . [was] merely a device to simplify the drafting'.[17] With regard to the remaining phrase in that provision, 'within the territory of a Member', the Panel said that this phrase meant that 'in essence, . . . where the author of the financial contribution is either an executive organ of any level of government, or a public body of any kind at any level of government within the territory, the [SCM] Agreement considers the financial contribution to have been made by the

[10] *Ibid.*, para. 8.68. [11] *Ibid.* [12] *Ibid.* (original emphasis).
[13] *Ibid.*, paras. 8.57, 8.61 and 8.62. [14] *Ibid.*, paras. 8.59 and 8.60. [15] *Ibid.*, para. 8.63.
[16] *Ibid.*, para. 8.65. [17] *Ibid.*, para. 8.66.

"government" of that "Member" (directly)'.[18] That phrase thus appeared 'to connote a broad reading of the term "a government" to cover whatever forms and organs of government, be they national, provincial, municipal, etc., that may be present within the territory of a given Member'.[19]

However, according to the Panel, the most important contextual element for interpreting the terms 'government' and 'any public body' was the term 'private body' in Article 1.1(a)(iv).[20] At that stage in its analysis, it identified the issue before it as being whether the Chinese SOEs and SOCBs were private or public bodies and then focused on the definition of the term 'private body'. The Panel used the dictionary definitions of the terms 'private enterprise' and 'public sector' to understand the meaning of the term 'private body'; they suggested that the latter was 'an entity not controlled by the State, and that ownership is highly relevant to the question of control'.[21] The Panel refused to read the term 'public body' as meaning 'government agencies and other entities vested with and exercising governmental authority' and 'as presumptively excluding government-owned and/or government-controlled enterprises' because that would imply that government-owned and government-controlled enterprises would be private bodies and would result therefore in 'a complete reversal of the ordinary meaning of the term "private body"'.[22] Such an interpretation would also deprive the list of types of financial contribution in Article 1.1(a)(1)(i)–(iii) of its common-sense meaning and role.[23]

The Panel then provisionally concluded that the term 'public body' appeared to extend to 'entities controlled by governments, and [was] not limited to government agencies and other entities vested with and exercising governmental authority'.[24]

When next reading the relevant terms in the light of the object and purpose of the SCM Agreement, the Panel based its analysis on past case law of the Appellate Body and other panels. It found that Article 1.1(a)(1) should not be read as allowing 'avoidance of the SCM Agreement's disciplines by excluding whole categories of government non-commercial behaviour undertaken by government-controlled entities'.[25] That consideration was reinforced by the fact that the categorisation of an entity was just the first step in a multi-part analysis; that first step involved an inquiry into whether an entity undertaking a behaviour or measure was or was not the WTO Member, that is to say, an entity covered by the

[18] *Ibid.*, para. 8.67. [19] *Ibid.* [20] *Ibid.*, para. 8.68. [21] *Ibid.*, para. 8.69.
[22] *Ibid.*, para. 8.69. [23] *Ibid.*, para. 8.70. [24] *Ibid.*, para. 8.73. [25] *Ibid.*, para. 8.76.

WTO Agreement.[26] The Panel thus read 'any public body' as meaning 'any entity that is controlled by the government'.[27] A narrower interpretation would enable governments to hide behind the so-called private character of government-controlled entities whilst controlling them in a manner so as to deliberately provide trade-distorting subsidies.[28]

The final step in the Panel's interpretive analysis was to consider whether (i) the ILC Articles and (ii) the General Agreement on Trade in Services (GATS)[29] and its Annex on Financial Services showed, as China had argued, that the Panel should adopt a different (and, in fact, a narrower) interpretation.

Unlike the Appellate Body later on, the Panel first considered the status of the ILC Articles before addressing the substance of China's argument. According to the Panel, China had overstated the status accorded to the ILC Articles in WTO dispute settlement because in no previous panel or Appellate Body report had those articles been identified as 'relevant rules of international law applicable in the relations between the parties' within the meaning of Article 31(3)(c) of the Vienna Convention.[30] Rather, where they had been used, they offered 'conceptual guidance only to supplement or confirm, but not to replace, the analyses based on the ordinary meaning, context and objective and purpose of the relevant covered Agreements'.[31] That being the case, the Panel added that the ILC Articles themselves made it clear that they concerned whether or not a State is responsible for a given action that might constitute a substantive breach of an underlying international obligation. In that regard, the Panel found that Article 1.1 of the SCM Agreement was *lex specialis* in relation to the ILC Articles.[32] On the basis of these considerations, the ILC Articles could not be characterised as falling within the scope of Article 31(3)(c) of the Vienna Convention.[33] With regard to the use of the term 'public entity' in the Annex on Financial Services to the GATS, the Panel was relatively brief and found that that term and the term 'public body' in the SCM Agreement were very different terms used in separate agreements and there was no indication in either agreement of any conceptual or other link between them.[34]

[26] *Ibid.* [27] *Ibid.*, para. 8.79. [28] *Ibid.*, para. 8.82.

[29] The GATS is included as Annex 1B to the WTO Agreement. See WTO, *The Legal Texts: The Results of the Uruguay Round.*

[30] Panel Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 8.87.

[31] *Ibid.* [32] *Ibid.*, para. 8.90. [33] *Ibid.*, para. 8.91. [34] *Ibid.*, para. 8.92.

China appealed the Panel's interpretation of 'public body' in Article 1.1(a)(1) of the SCM Agreement, asking the Appellate Body to reverse that interpretation and to find that a public body is an entity that exercises authority vested in it by the government for the purposes of performing functions of a governmental character.[35]

The Appellate Body's interpretation of 'public body'

The Appellate Body reversed the Panel's interpretation of the term 'public body' in Article 1.1(a)(1) of the SCM Agreement. It first focused on the architecture and function of Article 1.1(a)(1). That provision in essence defines and identifies the governmental conduct that constitutes a financial contribution by identifying what conduct of what entities in what circumstances can be attributed to a WTO Member and therefore constitute governmental conduct.[36] Unlike the Panel, the Appellate Body identified only two categories of entity described in Article 1.1(a)(1) – that is to say, governmental bodies or 'a government or any public body' and 'private body'.[37] With regard to the former, it held that all their conduct constitutes a financial contribution to the extent that the conduct falls within subparagraphs (i)–(iii) and the first clause of subparagraph (iv), whereas for the latter an affirmative demonstration of the link between the government and the specific conduct was needed.[38]

Against that background, the Appellate Body interpreted the term 'public body'. It started its analysis with the dictionary definitions of the different terms used in Article 1.1(a)(1) and with how the terms 'government', 'public body' and 'private body' were used together in that provision. In that regard, it did not share the Panel's position that the phrase '(referred to in this Agreement as "government")' was merely a drafting tool and therefore irrelevant. The Panel had thus ignored the structure and the wording of the treaty.[39] The section of the report setting out the Appellate Body's position on the ordinary meaning and dictionary definitions concluded with a restatement of its report in *Canada – Dairy*, namely that 'the essence of government is that it enjoys the effective power to regulate, control, or supervise individuals, or otherwise restrain their conduct, through the exercise of lawful authority', adding that 'performance of governmental functions, or the fact of being vested with, and exercising, the

[35] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 279 (referring to China's appellant's submission, para. 30).
[36] *Ibid.*, para. 284. [37] *Ibid.* [38] *Ibid.* [39] *Ibid.*, para. 289.

authority to perform such function appeared to be core commonalities between government and public body'.[40]

Next, the Appellate Body turned to context in order to refine its interpretation of 'public body' and of the core characteristics that such a body must share with government.[41] The first contextual element was the term 'private body' in Article 1.1(a)(1)(iv) of the SCM Agreement because it described a body that is not 'a government or any public body'.[42] In particular, Article 1.1(a)(1)(iv) foresees that a public body may 'entrust' or 'direct' a private body to carry out the type of functions or conduct listed in subparagraphs (i)–(iii).

The Appellate Body refused to accept the unqualified and unsupported statement of the Panel that certain acts listed in subparagraphs (i)–(iii) were in essence the core business of firms and corporations rather than of governments. It appeared to consider that this issue had no direct bearing on the constituent elements of a 'public body' within the meaning of Article 1.1(a)(1) of the SCM Agreement.[43] In fact, the functions described in (i)–(iii) appeared to support the idea that a 'public body' 'connote[d] an entity vested with certain governmental responsibilities, or exercising certain governmental authority'.[44] The remaining part of subparagraph (iv) also suggested 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' and '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'.[45]

The Appellate Body found that considerations regarding the object and purpose of the SCM Agreement were 'of limited use in delimiting the scope of the term "public body"'.[46] Whether an entity was a public body did not necessarily determine whether measures taken by that entity fell within the scope of the SCM Agreement.[47] That being so, the Appellate Body nonetheless faulted the Panel for not taking full account of the SCM Agreement's disciplines in interpreting the term 'public body' in the light of the object and purpose. The Panel had focused only on the consequences of interpreting the term too narrowly, whereas it should have taken into account also the risks of an overly broad interpretation because 'it could serve as a license for investigating authorities to dispense

[40] *Ibid.*, para. 290. [41] *Ibid.*, para. 291. [42] *Ibid.* [43] *Ibid.*, para. 296. [44] *Ibid.*
[45] *Ibid.*, para. 297. [46] *Ibid.*, para. 302. [47] *Ibid.*

with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies'.[48]

The Appellate Body then finally turned to China's argument that the rules of attribution in the ILC Articles reflected customary international law or general principles of law and should be taken into account under Article 31(3)(c) of the Vienna Convention as 'any relevant rules of international law applicable in the relations between the parties'. According to China, the rules of attribution in Articles 4, 5 and 8 closely resembled the attribution of financial contributions to WTO Members under the SCM Agreement when provided by a government, a public body or a private body entrusted or directed by a government or a public body. In particular, Article 5 encompassed the type of entity described as a 'public body' in Article 1.1(a)(1) of the SCM Agreement.

The Appellate Body first considered whether Article 31(3)(c) of the Vienna Convention applied to the particular provisions of the ILC Articles on which China relied. In its view, Article 31(3)(c) had three constituent elements: (i) the provisions must be 'rules of international law', (ii) the rules must be 'relevant' and (iii) those rules must be 'applicable in the relations between the parties'.[49] Applied to Articles 4, 5 and 8 of the ILC's Articles, this meant that, first, Article 31(3)(c) referred to the sources of international law in Article 38(1) of the Statute of the International Court of Justice which include customary international law and general principles of law recognised by civilised nations. Secondly, those provisions were 'relevant' to the extent that they concerned the same subject matter as Article 1.1(a)(1) of the SCM Agreement. Thirdly, insofar as Articles 4, 5 and 8 reflected customary international law or general principles of law, they were 'applicable in the relations between the parties'.[50]

Before turning to the issue of the status of Articles 4, 5 and 8 of the ILC Articles (which, if they were found to reflect customary international law, controlled the first and third elements of Article 31(3)(c) of the Vienna Convention), the Appellate Body considered the second element: the extent to which these rules provided guidance and thus were relevant to interpreting 'public body' in Article 1.1(a)(1) of the SCM Agreement.[51]

The Appellate Body accepted the commonality between those rules because they 'set out rules relating to the question of attribution of conduct to a State'.[52] Yet, there existed also differences: in the ILC Articles the connecting factor for attribution was the particular conduct, whereas

[48] *Ibid.*, para. 303. [49] *Ibid.*, para. 307. [50] *Ibid.*, para. 308.
[51] *Ibid.*, para. 309. [52] *Ibid.*

in Article 1.1(a)(1) the connecting factors were both the particular conduct and the type of entity. Despite those differences, the Appellate Body accepted that its interpretation of 'public body' coincided with the essence of Article 5 of the ILC Articles. This was especially so taking into account the commentary on Article 5 which stated that that provision 'refers to the true common feature of the entities covered by that provision, namely that they are empowered, if only to a limited extent or in a specific context, to exercise specified elements of governmental authority' and that greater or lesser State participation in its capital or ownership of its assets were not decisive criteria.[53] That consideration was based on the similarities in the core principles and functions of the ILC Articles and Article 1.1(a)(1) of the SCM Agreement and not on 'any details' or 'fine line distinctions' under Article 5 of the ILC Articles.[54]

At that stage, the Appellate Body in essence concluded that the fact that Article 5 supported, but did not control, its analysis meant that it did not need to consider whether, and possibly to what extent, Article 5 reflected customary international law. It said as follows:

> Yet, because the outcome of our analysis does not turn on Article 5, it is not necessary for us to resolve definitively the question of to what extent Article 5 of the ILC Articles reflects customary international law.[55]

Despite that conclusion, the Appellate Body then continued to address the Panel's statement that the ILC Articles had been cited in previous reports 'as conceptual guidance only to supplement or confirm, but not to replace, the analysis based on the ordinary meaning, context and objective and purpose of the relevant covered Agreements'.[56] In particular the fact that, as the Panel had observed, the ILC Articles had been cited as containing similar provisions as those in certain WTO agreements, whereas in other disputes those articles were cited by way of contrast with WTO provisions, showed that, in those previous reports, the ILC Articles had been 'taken into account' in the sense of Article 31(3)(c) of the Vienna Convention.[57]

The Appellate Body then turned to the Panel's position that, pursuant to Article 55 of the ILC Articles, Article 1.1(a)(1) of the SCM Agreement superseded Articles 4, 5 and 8 of the ILC Articles because it constituted

[53] *Ibid.*, para. 310. [54] *Ibid.*, para. 311.

[55] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 311, adding in footnote 222 that 'with respect to Article 4 of the ILC Articles, the Panel in *US – Gambling* stated that the principle set out in Article 4 of the ILC Articles reflected customary international law concerning attribution'.

[56] *Ibid.*, para. 313. [57] *Ibid.*

lex specialis regarding attribution. Under Article 55, the ILC Articles 'do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law'. To the Appellate Body, it was clear that Article 55 concerned solely the question of 'which rule to *apply* where there are multiple rules addressing the same subject matter'.[58] That was not the question being considered in the case under appeal. Rather, the question was 'whether, when interpreting the terms of Article 1.1(a)(1), the relevant provisions of the ILC Articles may be taken into account as one among several interpretative elements'.[59]

Assessment

Introduction

I do not consider this report to be a 'bad decision' as some have called it,[60] though it could have been clearer. The Appellate Body's use of the ILC Articles was hesitant but not necessarily incorrect.[61]

[58] *Ibid.*, para. 316. [59] *Ibid.*

[60] John D. Greenwald, 'A Comparison of WTO and CIT/CAFC Jurisprudence in Review of U.S. Commerce Department Decisions in Antidumping and Countervailing Duty Proceedings', available at www.cit.uscourts.gov/Judicial_Conferences/17th_Judicial_Conference/17th_Judicial_Conference_Papers/GreenwaldPaper.pdf.

[61] Other reports in which the ILC Articles were (positively) used include e.g. Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ('*US – Cotton Yarn*'), WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027, para. 120; Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea* ('*US – Line Pipe*'), WT/DS202/AB/R, adopted 8 March 2002, DSR 2002:IV, 1403, para. 259; Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan* ('*US – Zeroing (Japan) (Article 21.5 – Japan)*'), WT/DS322/AB/RW, adopted 31 August 2009, DSR 2009:VIII, 3441, para. 183 and footnote 466; Appellate Body Report, *United States – Continued Suspension of Obligations in the EC – Hormones Dispute* ('*US – Continued Suspension*'), WT/DS320/AB/R, adopted 14 November 2008, DSR 2008:X, 3507, para. 382; Panel Report, *United States – Measures Affecting the Cross-border Supply of Gambling and Betting Services* ('*US – Gambling*'), WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R, DSR 2005:XII, 5797 paras. 6.127–6.129; Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products* ('*Canada – Dairy*'), WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by Appellate Body Report WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097 para. 7.77, footnote 427; Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada* ('*Australia – Salmon (Article 21.5 – Canada)*'),

Whilst the Appellate Body's interpretation of 'public body' corresponds with the head of attribution set out in Article 5 of the ILC Articles, it neglected to clarify how secondary rules (of State responsibility) are relevant to interpreting a provision which sets out the scope of primary rules, the breach of which results in a finding of State responsibility (but does not itself contain an obligation the breach of which might result in State responsibility). Nor did it convincingly establish the basis in the Vienna Convention for interpreting the term 'public body' against the background of Article 5 of the ILC Articles.

Article 31(3)(c) of the Vienna Convention sets forth three elements ('rules of international law', 'relevant' and 'applicable in the relations between the parties'). Yet the third element becomes obsolete if the rule is accepted as reflecting customary international law or a general principle of (international) law. In those circumstances, the rule evidently applies in the relations between the parties because of its general application (and irrespective of whether 'the parties' is held to mean 'the parties to the dispute' or 'the parties to the treaty being interpreted').[62]

WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031, para. 7.12, footnote 146; Panel Report, *Korea – Measures Affecting Government Procurement* ('*Korea – Government Procurement*'), WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541, para. 6.5, footnote 683; Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* ('*Brazil – Aircraft (Article 22.6 – Brazil)*'), WT/DS46/ARB, 28 August 2000, DSR 2002:I, 19 para. 3.44; Decision by the Arbitrator, *United States – Subsidies on Upland Cotton – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* ('*US – Upland Cotton (Article 22.6 – US I)*'), WT/DS267/ARB/1, 31 August 2009, DSR 2009:IX, 3871 paras. 4.40 to 4.42. See also Alejandro Sánchez, 'What Trade Lawyers Should Know about the ILC Articles on State Responsibility', *Global Trade and Customs Journal*, 7 (2012), 292.

[62] The meaning of that element of Art. 31(3)(c) VCLT has been widely documented and debated. See e.g. Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 360–6 and 368–76; Richard Gardiner, *Treaty Interpretation* (Oxford University Press, 2008), chs. 7.3 and 7.4; Report of the ILC Study Group, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law – Finalized by Martti Koskenniemi and Draft Conclusions of the Work of the Study Group, Doc. A/CN.4/L.682 and Add.1 and Corr.1, 2 May 2006 [and taken note of by the UNGA 6th Committee, Doc. A/61/454, para III.4], paras. 470–2. In *EC and Certain Member States – Large Civil Aircraft*, the Appellate Body addressed the parties' disagreement on 'whether the reference is to all the parties to the treaty being interpreted, or a smaller sub-set of parties including, for instance, the parties to the dispute in which the interpretative issue arises'. Whilst the Appellate Body did not consider it necessary to take a final position on the meaning of 'the parties', it appeared to suggest that the term might be interpreted and applied differently depending on the context at issue or, as the Appellate Body put it, 'a delicate balance must be struck between, on the one hand, taking due account of an

Based on that consideration, the Appellate Body rightly focused on two elements: the status of the ILC Articles and their relevance to the question being considered. Logically, the Appellate Body first examined the second element because the issue of the status of the ILC Articles is inconsequential if those articles are found not to be relevant to the meaning of the term 'public body'.

Relevance of the ILC Articles

The Appellate Body defined relevance in function of the subject matter of both Article 1.1(a)(1) of the SCM Agreement and Articles 4, 5 and 8 of the ILC Articles: all set out rules relating to the attribution of conduct to a State.[63] Leaving aside conceptual distinctions between the character of each set of rules, the status of the ILC Articles and the extent to which each set was defined by reference to conduct and/or entity, it appears clear that the Appellate Body accepted the relevance of, in particular, Article 5 to interpreting the term 'public body' in Article 1.1(a)(1). Yet, despite the ILC Articles' relevance, the Appellate Body decided to forego determining the status of Article 5 as a matter of public international law because the outcome of its interpretive exercise did 'not turn on' it. That reasoning enabled the Appellate Body to avoid basing its analysis more firmly on Article 31(3)(c) of the Vienna Convention. In so doing, the Appellate Body injected a high standard of relevance into Article 31(3)(c) without explaining either the basis for that standard, or how to distinguish it from the normative weight that is to be given to a rule satisfying the conditions set out in Article 31(3)(c). Nor did it reflect upon how that standard affects the relationship between the general rule of interpretation in Article 31 of the Vienna Convention and that in Article 32. Those matters are discussed in the following section of this chapter.

Under the SCM Agreement, WTO Members can be held responsible for violating that agreement if they made a financial contribution, thereby

individual WTO Member's international obligations and, on the other hand, ensuring a consistent and harmonious approach to the interpretation of WTO law among all WTO Members'. In any event, the Appellate Body avoided taking a clearer position on the matter based on the consideration that the treaty at issue was not relevant to the specific question before it. Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft* ('*EC and Certain Member States – Large Civil Aircraft*'), WT/DS316/AB/R, adopted 1 June 2011, paras. 842–6 and 851.

[63] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 309.

conferring a benefit, which is contrary to the substantive obligations set out in that agreement. Article 1 of the SCM Agreement defines a 'subsidy' by reference to (i) certain types of conduct, (ii) the entity performing the conduct and (iii) the conferral of a benefit as a result of that conduct. Under Article 1.1(a)(1), the types of conduct described in items (i)–(iv) all involve 'government' conduct for the purposes of the SCM Agreement. The use of the word 'government' in each of the items makes that plain. The meaning of that word is further explained in Article 1.1(a)(1) as meaning 'a government or any public body within the territory of a Member'. Evidently, Article 1 of the SCM Agreement forms part of the description of the scope of application of the obligations under the SCM Agreement the breach (or rather nullification or impairment) of which may entail the responsibility of the WTO Member awarding the subsidy. Those obligations apply to 'government' conduct as defined in items (i)–(iv) in Article 1.1(a)(1).

Thus, it appears undisputed that contributions that cannot be linked to a WTO Member cannot constitute a subsidy for which that Member can be held responsible because it violates the substantive obligations in the remainder of the SCM Agreement.[64] That required link is expressed in three different forms in Article 1.1 of the SCM Agreement: (i) the government itself, (ii) any public body within the territory of a Member and (iii) a private body entrusted or directed to carry out one or more of the functions illustrated in (i)–(iii) of Article 1.1(a)(1) of the SCM Agreement which would normally be vested in the government.[65] The first and second forms are collectively named 'government' in the SCM Agreement.

The Appellate Body appeared to take the same starting point: the measure defined under Article 1.1(a)(1) of the SCM Agreement is a subsidy only if it is attributable to a State. Thus, the element of attribution was

[64] The Appellate Body appears to have confirmed that principle when stating that 'situations involving exclusively private conduct – that is, conduct that is not in some way attributable to a government or public body – cannot constitute a "financial contribution" for purposes of determining the existence of a subsidy under the *SCM Agreement*'. Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea* ('*US – Countervailing Duty Investigation on DRAMS*'), WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, 8131, para. 107.

[65] Situations listed in items (i)–(iii) describe financial contributions directly provided by the government. That listed in item (iv) refers to financial contributions indirectly provided, that is to say the situation where a private body is used as a proxy by the government. See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 108.

treated as an intrinsic element of the definition. According to the Appellate Body, the connecting factor in the ILC Articles was conduct, whereas under Article 1.1(a)(1) of the SCM Agreement it was both the particular conduct and the type of entity.[66] It did not appear to recognise that, for example, the distinction made between Articles 4 and 5 of the ILC Articles is based also on the character of the entity performing the conduct, in particular whether or not that entity qualifies as an organ of State.[67] Nor did the Appellate Body take account of the separate functions of both types of rule – one being secondary norms and the other being primary rules (though of a type affecting the scope of application of an agreement). Whilst that distinction might be, as James has pointed out, somewhat artificial,[68] the respective functions of each type arguably cannot be ignored in determining whether one set is relevant to interpreting the other.

However, the Appellate Body was correct in characterising, albeit in an indirect manner, the matter under appeal as one regarding the attribution of conduct. Conduct that is not that of a WTO Member and, in particular, conduct that is not government conduct as defined in Article 1.1 cannot lead to consequences under the SCM Agreement. It is in this context that questions of attribution arise and that the ILC Articles' provisions on attribution became materially relevant. That context is not confined to

[66] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 309.

[67] Art. 8 of the ILC Articles – also accepted as reflecting customary international law (see *Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Judgment, ICJ Reports (2007), 43, para. 398) – foresees that conduct is attributed to a State 'if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'. Its application depends on whether conduct can be attributed to the State on the basis of, among others, Arts. 4 and 5 of the ILC Articles. The commentary to Art. 8 expressly addresses the position of State-owned and -controlled companies or enterprises. The sole fact that a State established an enterprise is an insufficient basis for attributing conduct of that enterprise to that State. Instructions, direction or control must relate to the conduct that is allegedly an internationally wrongful act. 'Effective control' in that context has been interpreted by the ICJ to mean that 'the State's instructions were given, in respect of each operation in which the alleged violations occurred, not generally in respect of the overall actions taken by the persons or groups of persons having committed the violations' (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 400). See also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), 112 and 113.

[68] See e.g. James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), 540.

the issue of the scope of the SCM Agreement. In principle, attribution underlies most findings of inconsistency with WTO obligations because the latter are mostly obligations owed by WTO Members and in principle a nexus between a measure and a Member is required in order for those measures to be subject to dispute settlement proceedings.[69] However, Article 1.1(a)(1) of the SCM Agreement is distinct, though not unique, when compared to many other WTO provisions in that it expressly internalises attribution in defining the material scope of application of that agreement.[70] On that basis, the argument according to which the ILC Articles, and thus also the rules on attribution, become relevant only if something wrongful has happened lacks merit.[71] Indeed, the characterisation of a measure as a subsidy is separate from the determination of whether that measure is inconsistent with the substantive obligations set out in the SCM Agreement (that is, whether the subsidy is wrongful as a matter of WTO law). In the context of the SCM Agreement, the issue of attribution pertains to the former inquiry but not to the latter.

The Appellate Body has been criticised for using in this decision the ILC Articles that 'have nothing to do with international trade'.[72] That argument fails to acknowledge that the Appellate Body's reasoning reflects the logic that if WTO Members are to be held responsible for breaches

[69] See also e.g. Santiago M. Villalpando, 'Attribution of Conduct to the State: How the Rules of State Responsibility May Be Applied within the WTO Dispute Settlement System', *Journal of International Economic Law*, 5 (2002), 396–7. As regards that nexus, see e.g. Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ('*US – Corrosion-Resistant Steel Sunset Review*'), WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, 3, para. 81; Panel Report, *Canada – Certain Measures Affecting the Automotive Industry* ('*Canada – Autos*'), WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by Appellate Body Report WT/DS139/AB/R, WT/DS142/AB/R, DSR 2000:VII, 3043, para. 10.107; Panel Report, *Japan – Measures Affecting Consumer Photographic Film and Paper* ('*Japan – Film*'), WT/DS44/R, adopted 22 April 1998, DSR 1998:IV, 1179, para. 10.52.

[70] See also Luigi Condorelli and Claus Kress, 'The Rules of Attribution: General Considerations' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 222.

[71] That argument was advanced in Cartland, Depayre and Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?', 997, 999.

[72] Greenwald, 'A Comparison of WTO and CIT/CAFC Jurisprudence in Review of U.S. Commerce Department Decisions in Antidumping and Countervailing Duty Proceedings'. That author suspects that use of the ILC Articles was very much the doing of the Belgian member of the Appellate Body whom he describes as having 'an academic interest in injecting concepts taken from public international law into WTO agreements whether or not they lend themselves to practical application in laws specifically meant to regulate international trade'. He offers no support for that allegation, rendering it incredible.

of the treaties to which they consented to be bound, rules on attribution are indispensable for determining whose or what entity's conduct entails that responsibility. In that regard, WTO law is not distinct from public international law in general. In most cases decided before panels and the Appellate Body, that question of attribution is taken for granted because the measure at issue is obviously one that can be attributed to the State (usually because, on its face, it falls under the general rule of attribution set out in Article 4). Yet, with respect to certain provisions or agreements, such as the SCM Agreement, the issue of attribution is internalised in the terms defining the scope of (the obligations assumed under) the treaty.[73] In those circumstances, it becomes difficult to distinguish, in conceptual terms, the material scope of the primary rules the breach of which results possibly in State responsibility and the secondary rules offering the background against which to assess whether the conduct is that which can be attributed to the State.

Here, the Appellate Body thus accepted that attribution formed part of the material definition of a subsidy. However, whilst the SCM Agreement sets out the types of entity whose conduct, if corresponding with the forms of financial contribution listed in items (i)–(iii) and resulting in conferral of a benefit, can entail the responsibility of a WTO Member under that agreement when that conduct is inconsistent with the substantive obligations in the SCM Agreement, it did not define the terms 'government' and 'public body'.

The text of Article 1.1(a)(1) of the SCM Agreement, when read in isolation, can be interpreted in two ways. First, financial contributions made by a government, defined as encompassing both 'a government' and 'any public body within the territory of a Member', result in the responsibility of the WTO Member concerned for violating the SCM Agreement if found to be inconsistent with substantive obligations in that agreement independently from whether that 'government' was entrusted with the exercise of governmental authority. By contrast, financial contributions made by a 'private body' lead to the same result only if it was entrusted or directed to carry out a governmental function. However, that interpretation does not to distinguish 'government' from 'public body'. Nor does it

[73] See e.g. under the Agreement on Technical Barriers to Trade ('TBT Agreement'), WTO Members have assumed certain obligations with regard to (for example) the preparation, adoption and application of technical regulations by non-governmental bodies, which are defined, in Annex 1(8) to that agreement, as bodies 'other than a central government body or a local government body, including a non-governmental body *which [have] legal power to enforce a technical regulation*' (emphasis added).

explain why collectively they are termed 'government' for the purpose of the SCM Agreement. Secondly, 'government' and 'any public body within the territory of a Member' can be read as having separate meanings (despite their collective denomination as 'government'), which are also distinct from those given to the term 'private' bodies described in Article 1.1(a)(iv). Whilst the text does not prescribe that public bodies must be directed or entrusted to perform certain functions in the same manner as private bodies, nor is their conduct or status as such sufficient to characterise them as belonging to the government. However, that interpretation does not resolve how to interpret the term 'public body' as meaning something different from the term 'government' as it first appears in Article 1.1(a)(1).

The Appellate Body opted for the second reading. It appears to have accepted that the first type of 'government' reflected the notion of the government in the strict sense or of those entities whose conduct is described in Article 4.1 of the ILC Articles – that is to say, 'conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions'. That provision 'defines the core cases of attribution'.[74] If the body is a State organ under internal law,[75] then its conduct is attributable to the State under Article 4.1. Under the most basic rule of attribution – which is accepted as reflecting customary international law[76] – that conduct must be exercised in official capacity.[77] The second type was read by the Appellate Body as broadly corresponding to the conduct described in Article 5, which applies only if the entity or person is not an organ of State under Article 4 and apparently has a legal personality separate from that of the State.[78]

[74] Crawford, *The International Law Commission's Articles on State Responsibility*, 94.

[75] Art. 4.2 of the ILC Articles.

[76] See e.g. *Difference Relating to Immunity From Legal Process of a Special Rapporteur of The Commission on Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports (1999) (I), 87, para. 62; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 385. In *US – Gambling Services*, the Panel accepted that Art. 4 reflects customary international law. Panel Report, *US – Gambling Services*, para. 6.128.

[77] Crawford, *Brownlie's Principles of Public International Law*, 94, 96, 99.

[78] See also Djamchid Momtaz, 'Attribution of Conduct to the State: State Organs and Entities Empowered to Exercise Elements of Governmental Authority' in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford University Press, 2010), 244. Exceptionally, the conduct of *de facto* organs of State can be equated to that of organs of the State for purposes of international responsibility if they are deemed to have been completely dependent on the State. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 393.

Article 5 of the ILC Articles applies to a person or entity that is 'empowered by the law of [a] State to exercise elements of the governmental authority . . . provided the person or entity is acting in that capacity in the particular instance'. The provision is intended to cover 'para-statal entities, which exercise elements of governmental authority in place of State organs . . . [and] situations where former State corporations have been privatized but retain certain public or regulatory functions'.[79] According to its commentary, such entities may include 'public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies'.[80] In all circumstances, Article 5 applies solely if those entities are 'empowered by the law of the State to exercise functions of a public character . . . and the conduct of the entity relates to the exercise of the governmental authority concerned'.[81] It can cover conduct of private and public entities.[82] What constitutes 'governmental authority', according to the commentary, depends on 'the particular society, its history and traditions' and 'the content of the powers, but [also] the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government to their exercise'.[83]

Leaving aside how the Appellate Body formally used the ILC Articles in order to interpret 'public body' in Article 1.1(a)(1) of the SCM Agreement and its focus on Article 5 of those articles, it thus appears to have read the terms 'government' (the first form) and 'public body' (the second form) as reflecting the distinction between the conduct described in Article 4.1 of the ILC Articles (conduct of State organs) and Article 5 of the same articles (conduct of persons and entities that are not State organs within the meaning of Article 4.1).

That leaves the question of how Article 1.1(a)(1)(iv) of the SCM Agreement (conduct of a private body entrusted or directed to carry out one or more of the type of functions illustrated in (i)–(iii) which would normally be vested in the government) fits in that structure. Article 5 of the ILC Articles makes no distinction between private and public entities. In principle, a private body can also be empowered by the law of a State to exercise elements of the governmental authority. In its report in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body

[79] Crawford, *The International Law Commission's Articles on State Responsibility*, 100; see also, for example, Crawford, *Brownlie's Principles of Public International Law*, 544.
[80] Crawford, *The International Law Commission's Articles on State Responsibility*, 100.
[81] *Ibid.* [82] *Ibid.* [83] *Ibid.*, 101.

accepted that position.[84] There, it held that '"entrustment" occurs where a government gives responsibility to a private body, and "direction" refers to situations where the government exercises its authority over a private body', and whether either form of instruction occurs 'will hinge on the particular facts of the case'.[85] At first glance, it thus would seem that Article 1.1(a)(1)(iv) of the SCM Agreement also describes heads of attribution which can be characterised as corresponding with that set out in Article 5 of the ILC Articles – at least on the understanding that transfer of authority resembles entrustment or direction. If that is indeed the consequence of reading together the Appellate Body's decisions in both cases, do the qualitative tests for attributing conduct of a 'public body' and a 'private body' differ?

That remains unclear. Whilst the Appellate Body in *US – Anti-dumping and Countervailing Duties (China)* considered what it called the juxtaposition of the collective term 'government' and 'private body', it did so to draw conclusions on the apparent 'nexus' between the term 'government' in the strict sense and the term 'public body'.[86] In that context, it did identify one distinction between a 'public body' and a 'private body' within the meaning of Article 1.1(a) of the SCM Agreement: a public body, just like 'government' in the strict sense, has 'the requisite attributions to be able to entrust or direct a private body, namely, authority in the case of direction and responsibility in the case of entrustment'[87] and this cannot be an attribute of a private body. The use of the term 'requisite' suggests that the governmental functions, which the public body must be authorised to exercise, must include this attribute. That might also indicate that (without having been expressly articulated by the Appellate Body in that manner) – in terms of heads of attribution – three different forms of government authority are reflected in the text of Article 1.1(a)(1) of the SCM Agreement and that the form relevant to the attribution of conduct by a public body is considerably stricter than those forms expressed in Article 1.1(a)(iv) and possibly stricter than that articulated in Article 5 of the ILC Articles. The first form, with respect to 'public body', appears to be wider than that described in Article 1.1(a)(iv) and includes also the attribute described above. Against that background, future controversies

[84] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 112, footnote 179.
[85] *Ibid.*, para. 116.
[86] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 288.
[87] *Ibid.*, para. 294.

will thus concern evidentiary standards for establishing each form and the applicable standard of review. Only then will it become clear what the proper standards are for determining whether an entity is a 'public body' or a 'private body' within the meaning of Article 1.1(a)(1) of the SCM Agreement.

Status of the ILC Articles

The Appellate Body's decision to forgo determining the status of in particular Article 5 of the ILC Articles is unhelpful but not surprising.[88] Had the outcome of the Appellate Body's interpretation of the term 'public body' turned on Article 5, it would have been necessary for it 'to resolve definitively' whether and to what extent Article 5 of the ILC Articles reflected customary international law.[89] That was the Appellate Body's explanation for not examining the legal status of Article 5: the provision, whatever its status, provided 'further support' for its analysis.[90]

This explanation is difficult to reconcile with the Appellate Body's so-called holistic approach to interpreting the covered agreements based on the ordinary meaning of their wording, context, object and other elements of interpretation included in the general rule in Article 31 of the Vienna Convention. It is also an unhelpful contribution to the wider debate about how to interpret those agreements against the background of international law and the incomplete case law addressing that question. By refusing to determine the status of Article 5, whilst accepting that that status of being a rule of international law is an essential element for applying Article 31(3)(c) of the Vienna Convention,[91] the Appellate Body thus accepted, albeit in an implicit manner, that it did not interpret on the basis of Article 31(3)(c) the term 'public body' against the background of Article 5 which, as is also apparent from its analysis, it nonetheless took to be relevant in that regard.[92]

[88] See also, with respect to the uncertainty resulting from the Appellate Body's position, Cartland, Depayre and Woznowski, Michel Cartland, Gérard Depayre and Jan Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?', 998, 999.

[89] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 311.

[90] *Ibid.*

[91] See also Cartland, Depayre and Woznowski, Michel Cartland, Gérard Depayre and Jan Woznowski, 'Is Something Going Wrong in the WTO Dispute Settlement?', 998.

[92] In that regard, see also Dukgeun Ahn, 'United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China', *American Journal of International Law*, 105 (2011), 761, arguing that 'this ruling needs further elaboration in future cases

What was then the basis for the Appellate Body's use of Article 5 of the ILC Articles? Possibly Article 32 of the Vienna Convention which provides for recourse to supplementary means of interpretation in order to, inter alia, 'confirm the meaning resulting from the application of article 31'. If that is, indeed, how the Appellate Body used Article 5 of the ILC Articles, then the interpretation of the covered agreements against the background of public international law:

(a) is subject to the conditions of Articles 31(3)(c) of the Vienna Convention only if the interpretation turns on, in the sense of depending on, those rules of public international law; but
(b) is subject to no conditions under Article 32 of the Vienna Convention if the interpretation is merely supported or confirmed by those rules of public international law.

The distinction between approaches (a) and (b) would then be based on the degree to which a rule of international law is accepted to be 'relevant'. The Appellate Body appears to read that term in Article 31(3)(c) of the Vienna Convention as implying a high standard so as to mean: pertinent to or bearing upon, or possibly decisively important to the meaning of, a term or phrase in the covered agreements. Yet, that reading of Article 31(3)(c) of the Vienna Convention is at odds with how the Appellate Body uses the different elements of interpretation in the general rule in Article 31. In general, its position has been that, for example, the ordinary meaning, the intent of the parties, the factual context and the circumstances surrounding the conclusion of the treaty are not 'rigid components', thus confirming the holistic approach towards treaty interpretation.[93] In principle, none of the elements is controlling even if the weight to be given to each element, with respect to a particular text, might not be the same. In that regard, the Appellate Body did not explain how its position on the meaning of 'relevant' in Article 31(3)(c) of the Vienna Convention can be reconciled with the distinction it made in *EC and Certain Member States – Large Civil Aircraft* between the three elements for applying

about what should suffice "taking into account" the relevant international law in legal interpretation of the WTO Agreements'.

[93] See e.g. Appellate Body Report, *European Communities – Customs Classification of Frozen Boneless Chicken Cuts* ('*EC – Chicken Cuts*'), WT/DS269/AB/R, WT/DS286/AB/R, adopted 27 September 2005, and Corr.1, DSR 2005:XIX, 9157, para. 176; also Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology* ('*US – Continued Zeroing*'), WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, 1291, paras. 268 and 273.

Article 31(3)(c) of the Vienna Convention and the normative weight to be ascribed to a rule satisfying those elements: the latter was controlled by the introductory phrase to Article 31(3) '[t]here shall be taken into account, together with the context'.[94]

But perhaps the Appellate Body did not intend its statement on the status and relevance of Article 5 of the ILC Articles to have such a wider implication on the meaning of Article 31(3)(c) of the Vienna Convention and the relationship between that provision and Article 32 of the Vienna Convention. Rather, the statement might need to be taken as an expression of the Appellate Body's reluctance to examine what constitutes customary international law. Where the status of a norm under international law is not definitely settled elsewhere, and in particular in the form of a pronouncement of the International Court of Justice, the Appellate Body is hesitant, if not defiant, to inquire itself into the evidence of that status.[95] So far, the Appellate Body has not exposed the theoretical underpinning for that position. An inquiry into evidence of the customary international law status of a rule requires an in-depth analysis of the material sources showing State practice and that the rule is accepted as international law (*opinio iuris*), involving possibly a considerable body of factual elements requiring sorting for determining their legal relevance.[96] That material evidence must be put before the Appellate Body and possibly be subject to a debate between parties that, so far, is usually lacking from submissions to interpret the WTO agreements against the background of customary international law by virtue of Article 31(3)(c) of the Vienna Convention. Jurisdictional limitations to the Appellate Body's inquiry in that regard do not appear to exist. If the Appellate Body is tasked to interpret the WTO agreements by using customary principles of treaty interpretation, including Articles 31–3 of the Vienna Convention, it must properly apply

[94] Appellate Body Report, *EC and Certain Member States – Large Civil Aircraft*, para. 841.

[95] A false example of the exercise of that type of inquiry is its position in *EC – Hormones* on the principle of *in dubio mitius*. See Van Damme, *Treaty Interpretation by the WTO Appellate Body*, 61–5. In that same decision, the Appellate Body considered that it was 'unnecessary, and probably imprudent', for it to take a position on the abstract question of whether the precautionary principle 'has been widely accepted by Members as a principle of *general* or *customary international law*'. In its view, the principle still awaited 'authoritative formulation'. Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)* ('*EC – Hormones*'), WT/DS26/AB/R, adopted 13 February 1998, DSR 1998:I, 135, para. 123.

[96] Those material sources can include diplomatic correspondence, statements made by state organs or opinions of government legal advisers, and legislation. See, generally, Crawford, *Brownlie's Principles of Public International Law*, 24.

those principles, including the conditions set forth in Article 31(3)(c) of the Vienna Convention. Examining and taking a position on the evidence of the existence of a norm of customary international law are part of the judicial function upon which the Appellate Body acts in that context.

Putting aside those jurisdictional issues, the Appellate Body's avoidance of that type of inquiry could also be taken to signal a degree of judicial comity:[97] it prefers to defer to the judgment of other international courts and tribunals, in particular the International Court of Justice, on what is customary international law. That position might become difficult to sustain in the light of the growing body of dispute-settlement activity in the context of which material sources are examined and positions are taken on what constitutes customary international law. It is no longer possible or necessary to await, in relation to a particular rule, a pronouncement of the ICJ on that question.[98] Leaving aside the reasons of the Appellate Body for avoiding that inquiry, it should not ignore the question of whether a provision is a norm of customary international law or decide on the uncertainty regarding that status without at least appreciating the landscape of the available case law in that regard. Indeed, one Panel has suggested that the text of draft Article 7.2 'might be considered as reflecting customary international law'.[99] In particular with regard to the ILC Articles, there is a significant body of awards of arbitral tribunals in which the status of those provisions is considered. For example, the Iran–United States Claims Tribunal appears to consider that Part One of the ILC Articles, including Article 5, is an authoritative statement of current international law on State responsibility.[100] Other arbitral tribunals under

[97] See e.g. Daniel Terris, Cesare P. R. Romano and Leigh Swigart, *The International Judge: An Introduction to the Men and Women who Decide the World's Cases* (Oxford University Press, 2007), 121 quoting also an Appellate Body member admitting that 'I think we would never take on the ICJ. Whenever there is a reference, it is a reference as an authority.'

[98] Indeed, in the *Genocide* case, the ICJ expressly stated that it would leave it to another day to decide whether the ILC's Articles on attribution, other than Arts. 4 and 8, reflect customary international law (para. 414).

[99] Panel Report, *Canada – Dairy*, para. 7.77, footnote 427. Draft Art. 7(2) stated: 'The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question' (Report of the ILC on the Work of its 48th Session, General Assembly, Official Records, 51st Session, Supplement No. 1 (A/51/10), under Chapter III).

[100] See Iran – United States Claims Tribunal, *Rankin* v. *Islamic Republic of Iran*, Award No. 326–10913–2, 3 November 1987, 17 IRAN-US CTR 135, 141.

the ICSID Convention have accepted that Article 5 reflects a 'generally recognized rule' or established customary international law.[101] Without taking a position on its status, other international tribunals, courts or other bodies have also referred to Article 5.[102]

Whilst the Appellate Body's avoidance of inquiring itself into whether a rule or principle reflects customary international law (or a general principle of international law) might imply that a considerable body of normative activity and developments in international law are excluded from the scope of Article 31(3)(c) of the Vienna Convention (when used in the context of WTO dispute settlement), its interpretation of 'public body' in *US – Anti-dumping and Countervailing Duties (China)* shows that that formal impediment need not be an obstacle to using, for example, Article 5 provided that the latter is sufficiently relevant. Even if the Appellate Body's use of Article 5 in this case does not contribute to a better understanding of its position on the meaning of Article 31(3)(c) of the Vienna Convention, it nonetheless shows that, in the practice of WTO dispute settlement, the technical and often theoretical debate about the meaning of Article 31(3)(c) of the Vienna Convention increasingly is of little use. Instead, whether to use public international law and the weight to attribute to it (and possibly normatively relevant instruments that cannot (yet) be characterised as a source of public international law within the meaning of Article 38(1) of the ICJ Statute) depend, just like with all other elements of interpretation, on its relevance and the context in which it might be used.

Conclusion

Article 5 of the ILC Articles was undoubtedly relevant to the Appellate Body's interpretation of 'public body' in *US – Anti-dumping and Countervailing Duties (China)*. Yet it remains uncertain whether, and if so to what extent, there exists an analogy between the rules of attribution in the ILC

[101] See e.g. ICSID, *Noble Ventures, Inc.* v. *Romania*, Case No. ARB/01/11, Award, 12 October 2005, para. 70; ICSID, *Jan de Nul NV and Dredging International NV* v. *Arab Republic of Egypt*, Case No. ARB/04/13, Decision on Jurisdiction of 16 June 2006, para. 89.

[102] See UN General Assembly, Responsibility of States for Internationally Wrongful Acts – Compilation of Decisions of International Courts, Tribunals and Other Bodies – Report of the Secretary-General, A/62/62, 1 February 2007; and UN General Assembly, Responsibility of States for Internationally Wrongful Acts – Compilation of Decisions of International Courts, Tribunals and Other Bodies – Report of the Secretary-General, A/65/76, 30 April 2010. When compiling the decisions of international courts, tribunals and other bodies referring to the ILC, the UN Secretariat considered also the reports of the Appellate Body and GATT and WTO panels.

Articles and the three forms of attribution described in Article 1.1(a)(1) of the SCM Agreement. The Appellate Body dealt with, or rather avoided addressing, that question by defining the issue before it as regarding the interpretation of Article 1.1(a)(1) against the background of the ILC Articles rather than the application of special rules of attribution within the meaning of Article 55 of the ILC Articles.[103] However, when reading its interpretation of 'public body' in this case together with the meaning of 'private body', it becomes difficult to find a full correspondence between Article 1.1(a)(1) of the SCM Agreement and the ILC Articles, suggesting that the former is after all to some degree special and separate in relation to the latter. It is also in this context that the statement of the Appellate Body to the effect that its analysis did not turn on Article 5 of the ILC Articles becomes valid. However, it made that point for a different purpose, namely to justify its decision not to resolve the question of the extent to which Article 5 reflects customary international law. In that way, it implicitly appeared to inject a high standard of relevance for using, for interpretive purposes, other rules of international law on the basis of Article 31(3)(c) of the Vienna Convention. That decision might be explained on the basis of the particular sensitivity surrounding the Appellate Body's willingness, and WTO Members' perception of its competence, to analyse the material evidence regarding the status of a norm as customary international law. If that is the case, the need to show that a rule of international law is relevant insofar as it definitively resolved the interpretive question before a panel or the Appellate Body might not become a permanent feature of the use of Article 31(3)(c) of the Vienna Convention in treaty interpretation by the WTO dispute settlement bodies.

[103] Appellate Body Report, *United States – Definitive Anti-dumping and Countervailing Duties (China)*, para. 316.