

Before the World Trade Organization

Panel Proceedings

**EUROPEAN UNION – COUNTERVAILING AND ANTI-DUMPING
DUTIES ON STAINLESS STEEL COLD-ROLLED FLAT PRODUCTS
FROM INDONESIA
(DS616)**

**EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTY WRITTEN
SUBMISSION, THIRD PARTY ORAL STATEMENT AND RESPONSES TO
QUESTIONS FROM THE PANEL TO THIRD PARTIES**

20 May 2024

CONTENTS

TABLE OF CASES.....	3
LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS	3
I. SYSTEMIC IMPLICATIONS	4
II. ATTRIBUTION	4
A. THE TASK BEFORE THE PANEL.....	4
B. THE RELEVANCE OF ARTICLE 11 OF THE ILC ARTICLES	5
C. ATTRIBUTION AND ARTICLE 2.1 OF THE SCM AGREEMENT	6
D. ATTRIBUTION AND ARTICLE 18 OF THE SCM AGREEMENT	6
III. SPECIFICITY.....	7
IV. NOTICE REQUIREMENTS	7

TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Brazil – Aircraft</i>	Panel Report, <i>Brazil – Export Financing Programme for Aircraft</i> , WT/DS46/R, adopted 20 August 1999, as modified by Appellate Body Report WT/DS46/AB/R, DSR 1999:III, p. 1221
<i>China – Broiler Products (Article 21.5 – US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS427/RW and Add.1, adopted 28 February 2018, DSR 2018:II, p. 839
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Mexico – Olive Oil</i>	Panel Report, <i>Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 21 October 2008, DSR 2008:IX, p. 3179
<i>US – Countervailing Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/AB/R, adopted 16 January 2015, DSR 2015:I, p. 7
<i>US – Countervailing Measures (China) (Article 21.5 – China)</i>	Appellate Body Report, <i>United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS437/AB/RW and Add.1, adopted 15 August 2019, DSR 2019:IX, p. 4737
<i>US – Softwood Lumber VI (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1, DSR 2006:XI, p. 4865

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Commission	European Commission
EU	European Union
GOID	Government of Indonesia
Member	Member of the World Trade Organization
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

I. SYSTEMIC IMPLICATIONS

1. This dispute raises issues of fundamental importance to the effective functioning of the rules-based multilateral trading system. The object and purpose of the SCM Agreement is to discipline subsidies which distort international trade.¹ In Australia's view, an interpretation which constrains Members' ability to use the SCM Agreement to properly address trade-distortive subsidies risks undermining the credibility of the rules-based trading system. The Panel should therefore be careful to avoid endorsing any interpretation of the SCM Agreement which unduly reduces the ability of WTO Members to discipline these types of arrangements.

II. ATTRIBUTION

A. THE TASK BEFORE THE PANEL

2. The task of the Panel is to assess whether the Commission's conclusions were 'reasoned and adequate' in light of the evidence on the record.² The Panel's role is not to undertake a *de novo* review, and neither should it defer to the conclusions of an investigating authority.³ In the event that the Panel takes the view that the Commission did *not* meet that standard in this case, the Panel need not delineate a general test or threshold that would need to have been met in order for attribution to have been permissible under the SCM Agreement.

3. In making its findings on the issue of attribution, the Panel should not foreclose an interpretation of the SCM Agreement that would allow for attribution, if doing so would provide a pathway for the circumvention of the WTO subsidy rules. Australia recalls that the SCM Agreement expressly contemplates the risk that its disciplines may be circumvented through various funding arrangements. The anti-circumvention elements of the subsidy definition are broadly framed to encompass a wide range of actions and conduct that may be attributed to a WTO Member. Australia also emphasises that the SCM Agreement does not contain an exhaustive list of the factual circumstances that will justify the attribution of conduct to a WTO Member.

¹ Panel Report, *Brazil – Aircraft*, para. 7.26.

² Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

³ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

4. Equally, the Panel should ensure its findings do not result in undue expansion of WTO subsidy rules in a way that would impact the ability of WTO Members to attract investment, including through the use of regular, commonplace funding arrangements. The Panel's focus should remain on the specific bilateral arrangements at issue in this dispute, and whether the Commission's conclusions were 'reasoned and adequate'.

5. As to whether attribution must be assessed at the level of each financial contribution,⁴ Australia refers to guidance from the Appellate Body in relation to attribution in the 'public body' context.⁵ While these findings on attribution were made in a different context, Australia considers that they support a conclusion that, for the purposes of Article 1.1(a)(1) of the SCM Agreement, it is not always necessary to conduct an attribution analysis at the level of each financial contribution in question. That is, there are circumstances where an investigating authority can properly conduct its attribution analysis at a 'global' level.⁶

B. THE RELEVANCE OF ARTICLE 11 OF THE ILC ARTICLES

6. Australia observes that while ILC Articles are not themselves binding, the principles they embody largely reflect customary international law.⁷ WTO panels and the Appellate Body have long cited and relied on the ILC Articles in their interpretation of WTO law. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* confirmed that 'if...certain ILC Articles have been "cited as containing similar provisions to those in certain areas of the WTO Agreement" or "cited by way of contrast with the provisions of the WTO Agreement", this evinces that these ILC Articles have been "taken into account" in the sense of Article 31(3)(c) by panels and the Appellate Body in these cases'.

7. The Appellate Body has found the requirement that a rule of international law be 'relevant' to concern the 'subject matter of the provision at issue'.⁸ Where there is no conflict or inconsistency, or where the SCM Agreement does not otherwise seek to preclude the

⁴ See the Panel's questions to third parties – question no. 11.

⁵ Appellate Body report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para 5.100. See also Australia's response to the Panel's questions to third parties – question no. 11.

⁶ See also Australia's response to the Panel's questions to third parties – question no. 11.

⁷ See Australia's response to the Panel's questions to third parties – question no. 4; Australia's written submissions, paras. 22 and 23.

⁸ Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 846. See also Australia's response to the Panel's questions to third parties – question no. 5; Australia's written submissions, para. 26.

application of customary rules of international law, Article 11 of the ILC Articles could be considered to be a relevant rule for the purposes of Article 31.3(c) of the Vienna Convention which can be taken into account, together with the context, in the interpretation of the words 'by a government' in Article 1.1(a)(1). Australia reiterates, however, the task of the Panel remains to interpret the treaty terms in good faith in accordance with the ordinary meaning to be given to the terms of the treaty, in their context and in light of its object and purpose.⁹

C. ATTRIBUTION AND ARTICLE 2.1 OF THE SCM AGREEMENT

8. Australia recalls that the WTO Appellate Body in *US – Countervailing Measures (China)* confirmed that an investigating authority's determination under Article 1.1 as to the existence of a subsidy 'will inform' the assessment of whether such subsidy is specific to certain enterprises within the jurisdiction of the granting authority.¹⁰

9. In this dispute, the Commission's inquiries resulted in a determination that the relevant financial contributions were provided by a 'government' – specifically, the GOID. Australia considers it is reasonable that the Commission's assessment that the GOID was the 'government' providing financial contributions for the purposes of Article 1.1 informed its identification of the 'jurisdiction of the granting authority' for the purposes of the specificity analysis. In Australia's view, any other approach would lead to an illogical result.¹¹

D. ATTRIBUTION AND ARTICLE 18 OF THE SCM AGREEMENT

10. Australia agrees with the EU's view that, in cases where a financial contribution is attributable to the exporting WTO Member, and a benefit is conferred, that Member is capable of agreeing to eliminate or limit the subsidy (even if the relevant financial contribution comes from a different WTO Member) for the purposes of Article 18 of the SCM Agreement.¹²

11. Australia considers that if a financial contribution provided by another Member is properly attributable to the exporting Member (as the EU argues in this dispute), it is logical to conclude that the exporting Member would be capable of deciding to no longer receive the

⁹ Vienna Convention, Article 31(1).

¹⁰ Appellate Body report, *US – Countervailing Measures (China)*, 4.167.

¹¹ See also Australia's response to the Panel's questions to third parties – question no. 13.

¹² European Union's first written submission, para. 79.

relevant financial contribution, or limit the amount received. This means, by extension, that it would be capable of eliminating or limiting the subsidy for the purposes of Article 18 of the SCM Agreement.¹³

III. SPECIFICITY

12. Where a good has been provided for less than adequate remuneration, specificity may be evident from the 'inherent characteristics' of the relevant good. Australia recalls that the Panel in *US – Softwood Lumber IV* provided helpful examples of when the provision of natural resources for less than adequate remuneration would and would not be considered a 'specific' subsidy.¹⁴ It first clarified that '[we] do not consider that... any provision of a good in the form of a natural resource automatically would be specific'.¹⁵ It then distinguished between different types of natural resources, remarking that goods such as oil, gas and water 'may be used by an indefinite number of industries', while the 'inherent characteristics' of standing timber 'limit its possible use to "certain enterprises" only'.¹⁶ The relevant question is therefore, in Australia's view, whether a relevant natural resource may be used by an 'indefinite number of industries', or whether its use is limited to 'certain enterprises' only. Australia considers that it is difficult to see how the natural resource at issue in this dispute, nickel ore, could be used by an 'indefinite number of industries'.

IV. NOTICE REQUIREMENTS

13. In Australia's view, Article 12.1 of the SCM Agreement does not define the 'means of communication' which must be used by an investigating authority, and nor does it preclude the investigating authority from choosing a manner of delivery that imposes less of an administrative burden than direct delivery.¹⁷ Members have 'considerable discretion' under Article 12 to 'define their own procedures'.¹⁸

¹³ See also Australia's response to the Panel's questions to third parties – question no. 2.

¹⁴ Panel Report, *US – Softwood Lumber IV*, para. 7.116.

¹⁵ Panel Report, *US – Softwood Lumber IV*, para. 7.116.

¹⁶ Panel Report, *US – Softwood Lumber IV*, para. 7.116.

¹⁷ See also Australia's response to the Panel's questions to third parties – question no. 28; Australia's written submissions, paras. 30 to 33; Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.231.

¹⁸ Panel Report, *Mexico – Olive Oil*, fn. 63.