Before the World Trade Organization

Panel Proceedings

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

(DS616)

AUSTRALIA'S RESPONSES TO QUESTIONS FROM THE PANEL FOLLOWING THE THIRD PARTY SESSION

13 May 2024

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LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

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

Australia would like to thank the Panel for the opportunity to provide responses to the questions from the Panel following the third party session in this dispute held on 18 April 2024. To facilitate the work of the Panel, Australia provides the following responses to certain questions posed by the Panel.

QUESTION 2

The European Union asserts at paragraph 79 of its first written submission that:

> If the financial support can be attributed to the government of the country of export, and when there is a benefit conferred thereby, the resulting subsidy becomes a subsidy of the exporting country for the purpose of Article 18. Moreover, such a government can agree to eliminate or limit the subsidy or take other measures concerning its effect.

Please comment on the European Union's view that the exporting Member "can agree to eliminate or limit the subsidy or take other measures concerning its effect".

Response

1. Australia understands that the EU's view is 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).[1] In contrast, Indonesia argues that 'in a situation where a financial contribution is provided by another WTO Member, and that other WTO Member would therefore be the only one capable to eliminate or limit the financial contribution, the possibility to offer an undertaking by eliminating or limiting the subsidy… would become meaningless or inutile'.[2]

2. Australia agrees with the conclusion of the EU. If the 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 relevant financial contribution, or limit the amount received. This means, by extension, that it would be capable of eliminating or limiting the subsidy or taking other measures in relation to the subsidy.

[1] European Union's first written submission, para. 79.
[2] Indonesia's first written submission, para. 114.

3. Whether a subsidy is attributable will necessarily be a fact-specific inquiry. However, if there is evidence that a WTO Member has actively sought out and implemented a particular cooperation arrangement, to such a degree that attribution is justified, it is difficult to see how that Member would subsequently become incapable of eliminating or limiting the subsidy which exists pursuant to that arrangement.

QUESTION 4

At paragraph 106 of its first written submission, the European Union asserts that:

> Article 11 of the ILC Articles corresponds to a general principle of law or customary international law as regards the attribution of actions by one State to another.

Please provide your reasoned views on whether Article 11 constitutes a customary rule of international law or a general principle of law.

Response

4. Australia refers the Panel to its previous submissions in relation to this issue.[3] We will not repeat all of those submissions here. However, in summary, Australia considers that while the ILC Articles (including Article 11) are not themselves binding, the principles they embody largely reflect customary international law. Australia observes that 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'.[4]

[3] See Australia's written submissions, paras. 22 and 23.
[4] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 313.

QUESTION 5

Please explain whether Article 11 of the ILC Articles is a "relevant" rule of international law applicable in the relations between the parties within the meaning of Article 31.3(c) of the Vienna Convention on the Law of Treaties (Vienna Convention).

Response

5. Australia refers the Panel to its previous submissions in relation to this issue.[5] Australia recalls that the Appellate Body found the requirement that a rule be 'relevant' to concern the 'subject matter of the provision at issue'.[6] Where there is no conflict or inconsistency, or where the SCM Agreement does not otherwise seek to preclude the 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 text of the SCM Agreement. Australia reiterates, however, the task of the Panel also 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.[7]

QUESTION 11

At paragraph 135 of its first written submission, the European Union asserts that:

> Indonesia faults the EU for not having carried out the attribution analysis at the level of each financial contribution in question (i.e., loans, credit lines, equity injections, provisions of capital in-kind and shareholder loans), noting that the provisions of capital in-kind and inter-company loans which were provided by the IRNC's group shareholders (as opposed to the GOC). The EU does not see any error in proceeding on the basis of a global analysis in this case. All the transactions had the same features and context. (fn omitted)

Please comment on whether the Commission was required to have carried out the attribution analysis at issue at the level of each financial contribution in question (i.e. loans, credit lines, equity injections, provisions of capital in-kind and shareholder loans), bearing in mind that the

[5] See Australia's written submissions, para. 26.
[6] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 846.
[7] Vienna Convention, Article 31(1).

provision of capital in-kind and inter-company loans were provided by the IRNC's group shareholders (as opposed to the GOC).

Response

6. Australia does not take a position on whether the European Commission correctly carried out its attribution analysis in this case. However, Australia considers that previous guidance from the Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)*, in relation to attribution in the 'public body' context, may be instructive. In that case, the Appellate Body found that the central focus of a 'public body' attribution analysis is the entity in question, rather than on the particular financial contribution. Most relevantly, the Appellate Body explained:[8]

> Just as any "act or omission" by a government in the narrow sense can be deemed to constitute a measure attributable to a Member, so any act or omission by a public body is directly attributable to a Member irrespective of the nature of the act or omission itself. Indeed, once it has been established that an entity is a public body, then "all conduct" of that entity shall be attributable to the Member concerned for purposes of Article 1.1(a)(1). When that entity's conduct "falls within subparagraphs (i)-(iii) and the first clause of subparagraph (iv)", then it will be deemed to give rise to a financial contribution for purposes of Article 1.1(a)(1). (our emphasis)

7. While these findings were made in a different attribution 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 investigation authority can properly conduct its attribution analysis at a 'global' level.

QUESTION 13

Please respond to the European Union's assertion, at paragraph 147 of its first written submission, that "[f]or the specificity analysis, it does not matter that the financial contribution is provided and administered by the GOC, since those financial contributions were made in the context of the specific project between the GOC and the GOID in the Indonesian Morowali Park".

[8] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.100.

Response

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.[9] The Appellate Body referred to the 'explicit linking' of Article 1.1 and the chapeau of Article 2.1, and went on to explain:[10]

> Indeed, in determining whether a financial contribution exists, investigating authorities must inquire into the nature of the financial contribution at issue and determine whether such contribution was provided by the "government", by "any public body within the territory of a Member", or by a "private body" entrusted or directed by the government. Such assessment, in our view, will inform the identification of the jurisdiction of the granting authority. (our emphasis)

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.

10. In Australia's view, any other approach would lead to an illogical result. If an investigating authority has determined the existence of a subsidy to producers in the territory of the subsidising Member for the purposes of Article 1.1, it would be illogical for the territory of a different Member to be the focus of its specificity analysis under Article 2.

QUESTION 28

The European Union asserts, at paragraph 601 of its first written submission, that Article 12.1 neither defines the "means of communication" by which an investigating authority must transmit a questionnaire to an interested party, nor precludes an investigating authority from "using more effective ways than direct delivery of the questionnaires to interested parties and

[9] Appellate Body Report, *US — Countervailing Measures (China)*, 4.167.
[10] Appellate Body Report, *US — Countervailing Measures (China)*, 4.167.

other parties with specific knowledge of the matter". Please respond to the European Union's assertion.

Response

11. Australia refers the Panel to its previous submissions in relation to this issue.[11] We will not repeat those submissions here. However, in summary, Australia agrees with the EU that 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.[12]

[11] See Australia's written submissions, paras. 30 to 33.
[12] See Australia's written submissions, paras. 30 to 33; Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.231.