

**Before the World Trade Organization**  
**Panel Proceedings**

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

**THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA**

2 February 2024

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**LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS**

<b>Abbreviation</b>	<b>Full Form or Description</b>
Commission	European Commission
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GOC	Government of China
GOID	Government of Indonesia
GPA	Agreement on Government Procurement
ILC Articles	International Law Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (2001)
Member	Member of the World Trade Organization
SCM Agreement	Agreement on Subsidies and Countervailing Measures
Vienna Convention	Vienna Convention on the Law of Treaties (1969)
WTO	World Trade Organization

## I. INTRODUCTION

1. Australia welcomes the opportunity to present its views to the Panel. Australia considers that the proceedings initiated by Indonesia under the DSU raise important questions of the proper application of the WTO Agreements.

2. In Australia's view, the central question in this case is whether the Commission properly concluded that funding originating in China was *attributable* to the GOID for the purposes of the SCM Agreement, such that it could be countervailed as an Indonesian subsidy. Australia will make submissions to guide the Panel's consideration of the parties' arguments with respect to attribution, emphasising that the task before the Panel is to assess whether the Commission's conclusions in this regard were 'reasoned and adequate' in light of the evidence before it. Australia will submit that the Panel should not endorse an interpretation of the SCM Agreement that unduly constrains WTO Members from taking action against trade-distortive subsidies that circumvent the disciplines in the SCM Agreement.

3. Australia will also make submissions with respect to two further issues raised in this dispute, namely the Commission's approach to determining specificity and the notice requirements under the SCM Agreement. Australia will submit that where a good is provided for less than adequate remuneration, specificity may be evident from the 'inherent characteristics' of the good. Australia will also submit that the SCM Agreement does not prescribe the manner in which investigating authorities must give notice to interested parties.

4. Australia does not present any position on the specific facts of this dispute, and reserves the right to raise other issues at the third party hearing before the Panel.

## II. ATTRIBUTION

5. Australia will make the following submissions to assist the Panel in its consideration of the parties' arguments with respect to attribution.

- a. Firstly, Australia will emphasise that 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.

- b. Secondly, Australia will submit that the SCM Agreement should not be interpreted in a way that unintentionally provides Members with a pathway to circumvent WTO subsidy rules.
- c. Thirdly, Australia will submit that the Panel should ensure that its findings do not inadvertently impact regular and commonplace funding arrangements between States.
- d. Finally, Australia will make submissions to guide the Panel should it consider it necessary to consider the relevance of Article 11 of the ILC Articles.

**A. THE TASK OF THE PANEL IS TO CONSIDER WHETHER THE COMMISSION REACHED 'REASONED AND ADEQUATE CONCLUSIONS' IN LIGHT OF THE EVIDENCE ON THE RECORD**

6. Australia recalls that a panel's role is not to undertake a *de novo* review, and neither should it defer to the conclusions of an investigating authority.<sup>1</sup> Instead, the task before the Panel is to test whether an investigating authority's reasoning is 'coherent and internally consistent', and to 'examine whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate'.<sup>2</sup>

7. Australia submits that the words 'in the light of the evidence on the record' are particularly pertinent in the present case. In this regard, Australia observes that in this case the Commission had before it a unique set of facts. Australia observes that the EU characterises the BRI arrangement at issue in this dispute as being 'remarkably different' from regular foreign direct investment arrangements.<sup>3</sup> The Commission found evidence of coordination between the governments of Indonesia and China that far surpassed general economic cooperation. Specifically, the Commission found and relied on 'extensive, detailed and unambiguous evidence demonstrating that the GOID consciously sought, acknowledged and adopted as its own financial support from the GOC'.<sup>4</sup> This included evidence that the Indonesian and Chinese governments 'agreed to join forces' to set up the Morowali Industrial

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<sup>1</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

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

<sup>3</sup> European Union's first written submission, para. 9.

<sup>4</sup> European Union's first written submission, para. 14.

Park, to support the objectives of both governments.<sup>5</sup> The extent of coordination was deep: in addition to concluding a series of bilateral cooperation agreements, the governments of Indonesia and China jointly implemented the project and monitored the operation of the Morowali Industrial Park.<sup>6</sup> The Panel should carefully consider the specific facts of this case when assessing whether the European Commission's conclusions in this dispute were 'reasoned and adequate'.

**B. THE SCM AGREEMENT SHOULD NOT BE INTERPRETED IN A MANNER THAT UNINTENTIONALLY PROVIDES MEMBERS WITH A PATHWAY TO CIRCUMVENT SUBSIDY RULES**

8. Australia observes that the SCM Agreement provides a framework that governs the application of countervailing duties by a WTO Member. It sets out the substantive and procedural requirements that must be met in order for countervailing duties to be applied. Australia also observes that the Panel in *Brazil – Aircraft* explained that 'the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade'.<sup>7</sup>

9. Australia notes that the SCM Agreement is silent on the issue of 'transnational subsidies' – that is, subsidies provided by a government or public body to a firm that is not within its territory. Importantly, however, the EU submits that the Panel in this case does not need to consider whether a 'transnational subsidy' can be validly countervailed in accordance with the SCM Agreement.<sup>8</sup> The EU argues instead that the funding originating in China is *attributable* to the GOID for the purposes of the SCM Agreement – such that there is no 'transnational subsidy'.

10. Australia recalls that the SCM Agreement expressly contemplates the risk that its disciplines may be circumvented through various funding arrangements. To address this risk, the SCM Agreement provides that the actions of certain entities can be attributed to a WTO

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<sup>5</sup> European Union's first written submission, para. 9.

<sup>6</sup> European Union's first written submission, para. 12.

<sup>7</sup> Panel Report, *Brazil – Aircraft*, para. 7.26.

<sup>8</sup> European Union's first written submission, fn. 22.



Member, such that they fall within the disciplines of the SCM Agreement. As the EU outlines,<sup>9</sup> this is explicitly contemplated by three parts of the subsidy definition:

- a. the *chapeau* of Article 1.1(a)(1), which ensures that a financial contribution by 'any public body within the territory of a Member' is captured within the subsidy definition; and
- b. Article 1.1(a)(1)(iv), an anti-circumvention provision,<sup>10</sup> which captures:
  - payments made by a government via a funding mechanism (as opposed to direct payments to the recipient); and
  - financial contributions made by a private body, where that private body has been entrusted or directed by a government to make the financial contribution.

11. Australia notes that 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. The SCM Agreement sets out, in broad terms, the legal elements that are to be satisfied in order for conduct to be attributed. 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. The Appellate Body has explained that the 'connecting factors' in the SCM Agreement, for the purposes of attribution, are 'the particular *conduct* and the *type of entity*'.<sup>11</sup> Whether or not an investigating authority is able to establish that conduct is attributable to a WTO Member under the SCM Agreement will necessarily turn on a factual assessment of the particular conduct and entity in question.

12. As outlined above, the question before the Panel in this case is whether in light of the evidence on the record, the investigating authority has reached a 'reasoned and adequate conclusion'.<sup>12</sup> Even if, *arguendo*, the Panel were to take the view in the present case that the Commission had not met this standard, the Panel need not delineate a general test or threshold that must be met in order for attribution to be permissible. Rather Australia

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<sup>9</sup> European Union's first written submission, para. 59.

<sup>10</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 52.

<sup>11</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 309.

<sup>12</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.

respectfully submits the Panel should confine itself to making an 'objective assessment of the matter before it',<sup>13</sup> in order to determine whether the Commission discharged its obligations as an investigating authority.

13. Australia considers it evident from the text of Article 1.1(a)(1) of the SCM Agreement that the negotiators of the SCM Agreement were alive to the risk that WTO Members may attempt to circumvent the disciplines in the SCM Agreement. They did not seek to define the specific factual circumstances in which conduct may be attributable, and nor should the Panel. Accordingly, Australia submits that the Panel should not endorse an interpretation of the SCM Agreement that unduly constrains WTO Members from taking action against trade-distortive subsidies that circumvent the disciplines in the SCM Agreement. To do so would fundamentally undermine the subsidy disciplines in the SCM Agreement and render Members powerless to effectively address or take action against such subsidies. To permit the circumvention of the disciplines in the SCM Agreement would run counter to the object and purpose of the SCM Agreement and have significant systemic implications.

**C. THE PANEL SHOULD ENSURE ITS FINDINGS ARE CONFINED TO THE SPECIFIC FACTS AT ISSUE  
IN THIS DISPUTE**

14. While Australia considers that the SCM Agreement should be interpreted as permitting WTO Members to address the circumvention of subsidy rules, Australia cautions the Panel against any undue expansion of the SCM Agreement that could capture regular and commonplace cooperation between States. The SCM Agreement's disciplines should not be interpreted so broadly as to limit the ability of WTO Members to attract investment. As outlined above, Australia respectfully submits that the Panel should focus its assessment on whether, given the particular evidence before it, the Commission reached a 'reasoned and adequate conclusion' that the relevant funding was attributable to Indonesia.

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<sup>13</sup> Article 11, DSU.

#### D. ARTICLE 11 OF THE ILC ARTICLES

15. Finally, Australia makes the following submissions to guide the Panel should it consider it necessary to consider the relevance of Article 11 of the ILC Articles in this dispute.

16. The EU submits that the *chapeau* of Article 1.1(a)(1) of the SCM Agreement, in view of its text, context, and object and purpose, includes situations where a financial contribution is provided by a third country government but is attributable to another government.<sup>14</sup> The EU submits that, if the Panel considers it necessary, Article 11 of the ILC Articles may be considered in accordance with Article 31.3(c) of the Vienna Convention to interpret the term 'by a government' in Article 1.1(a)(1) of the SCM Agreement. According to the EU, Article 11 of the ILC Articles provide guidance and further support to their interpretation of Article 1.1(a)(1) of the SCM Agreement.

17. Indonesia submits that Article 11 of the ILC Articles:

- a. does not constitute a rule of customary international law, and
- b. does not constitute a relevant rule of international law, in the sense of Article 31(3)(c) of the Vienna Convention,

and should therefore not apply to the Panel's interpretation of the term 'by a government', such that it is not possible to attribute a financial contribution of one government to another under Article 1.1(a)(1) of the SCM Agreement.

18. Article 31.3(c) of the Vienna Convention requires the existence of a 'rule' of international law that must be 'relevant' and 'applicable in the relations between the parties'.<sup>15</sup> Where that rule is deemed to be a relevant rule of international law applicable between the parties, the second aspect of the article requires consideration of the rule 'together with the context'.<sup>16</sup> Therefore, under Article 31.3(c) of the Vienna Convention, relevant customary international law rules play a contextualising role. In this respect, Australia notes that Article 31.3(c) cannot be used to displace the treaty provision being interpreted.

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<sup>14</sup> European Union's first written submission, para. 99.

<sup>15</sup> Vienna Convention, Article 31.3(c).

<sup>16</sup> Vienna Convention, Article 31.3(c).

19. As noted at paragraph 17, whether Article 11 can be considered a rule of customary international law that is also relevant to the interpretation of Article 1.1(a)(1) of the SCM Agreement is at issue in this case.

20. Indonesia's position, as Australia understands it, is that WTO jurisprudence does not provide any authority for the proposition that the ILC Articles, and, specifically, Article 11 are customary international law and, therefore, a relevant rule of international law in the context of Article 31.3(c) of the Vienna Convention.<sup>17</sup>

21. In response, the EU noted the finding of the Appellate Body in *US – Gasoline* that 'WTO law cannot be read in clinical isolation from general international law'<sup>18</sup> and submits that the ILC Articles represent a codification of the relevant international rules on State responsibility.<sup>19</sup>

22. Australia observes that while ILC Articles are not themselves binding, the principles they embody largely reflect customary international law. 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'.<sup>20</sup>

23. For example, in *Korea – Procurement*, the Panel observed that its finding that there is an affirmative duty on parties to the GPA to answer questions 'fully, comprehensively and on behalf of the whole government' was 'supported by the long established international law principles of State responsibility'.<sup>21</sup> Citing the ILC Articles, the Panel noted that '[t]he actions and even omissions of State organs acting in that capacity are attributable to the State as such and engage its responsibility under international law'.<sup>22</sup> Similarly, in *US – Line Pipe*, the

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<sup>17</sup> Indonesia's first written submission, para. 156.

<sup>18</sup> European Union's first written submission, para. 101, citing Appellate Body Report, *US – Gasoline*, p. 17.

<sup>19</sup> European Union's first written submission, para. 102.

<sup>20</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 313.

<sup>21</sup> Panel Report, *Korea – Procurement*, para. 6.5.

<sup>22</sup> Panel Report, *Korea – Procurement*, para. 6.5.

Appellate Body recalled and recited its view in *US – Cotton Yarn* that the rules of general international law on state responsibility supported its finding that countermeasures in response to breaches by States be proportionate to such breaches.<sup>23</sup> In doing so, the Appellate Body cited Article 51 of the ILC Articles and observed that 'although Article 51 is part of the International Law Commission's Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law'.<sup>24</sup>

24. Indonesia considers that Article 11 of the ILC Articles is not a relevant rule of international law for the purposes of Article 31.3(c) of the Vienna Convention, citing the Appellate Body's general reluctance to adopt a position in *US – Anti-Dumping and Countervailing Duties (China)* as to whether all ILC Articles are relevant rules of international law.<sup>25</sup> Indonesia also submits that Article 11 of the ILC Articles is not relevant to interpret the concept of attribution in the term 'by a government' in Article 1.1(a)(1) of the SCM Agreement where, in its view, the SCM Agreement does not contemplate attribution in the sense of States adopting the conduct of another concurrently existing State.<sup>26</sup> If it is considered to be a relevant rule of international law applicable between the parties, Indonesia submits that the EU's argument should not be accepted because it uses Article 11 of the ILC Articles to extend the scope of Article 1.1(a)(1) of the SCM Agreement 'beyond its clear and exhaustive meaning, by squeezing in new attribution scenarios which are not expressly provided for in that provision'.<sup>27</sup>

25. The EU submits that the term 'by a government' in Article 1.1(a)(1) of the SCM Agreement invites the interpretation that 'the ordinary meaning of 'by' indicates that something can be attributed/imputed to somebody as the subject matter action'.<sup>28</sup> In the EU's view, where Article 11 of the ILC Articles is placed under the chapter dealing with the

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<sup>23</sup> Appellate Body Report, *US – Line Pipe*, para. 259, citing Appellate Body Report, *US – Cotton Yarn*, para. 120.

<sup>24</sup> Appellate Body Report, *US – Line Pipe*, para. 259.

<sup>25</sup> Indonesia's first written submission, paras. 159 – 165.

<sup>26</sup> Indonesia's first written submission, paras. 166 – 175.

<sup>27</sup> Indonesia's first written submission, para. 182.

<sup>28</sup> European Union's first written submission, para. 108.

'Attribution of conduct to a State', it is therefore relevant to interpret the notion of attribution in the SCM Agreement.<sup>29</sup>

26. Australia, like the EU,<sup>30</sup> observes that the requirement that a rule be 'relevant' has been found by the Appellate Body to concern the 'subject matter of the provision at issue'.<sup>31</sup> 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 words 'by a government' in Article 1.1(a)(1). 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.<sup>32</sup>

### III. SPECIFICITY

27. Indonesia makes a number of claims concerning the Commission's findings in respect of the alleged provision of nickel ore to the stainless steel industry for less than adequate remuneration. One of Indonesia's claims is that the Commission's determination that the alleged subsidy was specific to the stainless steel industry was flawed. The crux of its complaint is that the EU failed to establish that access to the subsidy was explicitly limited to the stainless steel sector. Indonesia refers to the Appellate Body's statement in *US – Anti-dumping and Countervailing Duties (China)* that 'the limitation on access to the subsidy to certain enterprises [must be] express, unambiguous, or clear from the content of the relevant instrument, and not merely 'implied' or 'suggested''.<sup>33</sup>

28. The EU submits that the Commission explicitly found a limitation on access to the subsidy at issue.<sup>34</sup> The EU argues that the inherent characteristics of the good provided by

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<sup>29</sup> European Union's first written submission, para. 109.

<sup>30</sup> European Union's first written submission, para. 108.

<sup>31</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 846.

<sup>32</sup> Vienna Convention, Article 31(1).

<sup>33</sup> Indonesia's first written submission, para. 738; Appellate Body Report, *US – Anti-dumping and Countervailing Duties (China)*, para. 372.

<sup>34</sup> European Union's first written submission, para. 464.

Indonesia, nickel ore, limits its possible use to certain industries only (i.e. industries that are active in the nickel value chain).<sup>35</sup> The EU considers that the subsidy at issue is therefore specific.

29. Australia submits that where a good has been provided for less than adequate remuneration, specificity may be evident from the 'inherent characteristics' of a relevant good. The Panel in *US – Carbon Steel (India)* explained that 'if access is limited by virtue of the fact that only certain enterprises may use the subsidized product, the subsidy is specific'.<sup>36</sup> 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.<sup>37</sup> 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'.<sup>38</sup> 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'.<sup>39</sup> 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

30. Indonesia makes a number of procedural claims with respect to the manner in which the Commission conducted its investigation. Indonesia claims, *inter alia*, that the Commission erred by requiring the GOID to send questionnaires to nickel ore mining companies seeking certain information. Indonesia claims that this error gave rise to inconsistency with Articles 10 and 12 of the SCM Agreement. Indonesia argues that as 'interested parties', the nickel ore

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<sup>35</sup> European Union's first written submission, para. 460.

<sup>36</sup> Panel Report, *US – Carbon Steel (India)*, para. 7.131.

<sup>37</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.116.

<sup>38</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.116.

<sup>39</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.116.

mining companies were entitled to receive a notice directly from the Commission, rather than receiving a notice from the GOID.<sup>40</sup>

31. The EU argues that the Commission's approach of requesting the GOID to collect certain information from nickel ore mining companies was not inconsistent with Articles 10 and 12 of the SCM Agreement. The EU does not dispute that interested parties are entitled to receive notice 'from' the investigating authority.<sup>41</sup> However, the EU considers that Article 12.1 does not require *direct* delivery of the questionnaires to interested parties by the investigating authority.<sup>42</sup> The EU submits that it is open to an investigating authority to use 'more effective ways' to communicate the relevant notice.<sup>43</sup>

32. Australia recalls that Article 12.1 of the SCM Agreement provides that '[interested] Members and all interested parties in a countervailing duty investigation *shall be given* notice of the information which the authorities require'. Whether or not notice is given is ultimately a question of fact. Australia observes that Article 12.1 of the SCM Agreement is not prescriptive about the *manner* in which notice must be given to interested parties. In particular, Australia observes that Article 12.1 does not impose an obligation on the investigating authority to deliver questionnaires *directly* to interested parties. Australia recalls that the Panel in *Mexico – Olive Oil* emphasised the 'considerable discretion' of Members to 'define their own procedures' under Article 12.<sup>44</sup> Similarly, the Panel in *China – Broiler Products (Article 21.5 – US)* confirmed that investigating authorities have discretion under Article 12.1, observing that 'an investigating authority may choose a manner of giving the required notice that imposes less of an administrative burden'.<sup>45</sup>

33. In light of the above statements from previous panels and the text of Article 12.1, Australia does not consider that asking a foreign government to send questionnaires to companies based in its own territory is inconsistent with the SCM Agreement. Instead,

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<sup>40</sup> Indonesia's first written submission, para. 923. Australia notes that the EU disputes Indonesia's claim that the Commission should have treated nickel ore mining companies as 'interested parties' for the purposes of its investigation. Australia does not take a position on the factual question of whether the nickel ore mining companies should have been treated as 'interested parties' in the investigation.

<sup>41</sup> European Union's first written submission, para. 601.

<sup>42</sup> European Union's first written submission, para. 601.

<sup>43</sup> European Union's first written submission, para. 601.

<sup>44</sup> Panel Report, *Mexico – Olive Oil*, fn. 63.

<sup>45</sup> Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.231.



Australia submits that this approach is a sensible and reasonable means of lessening the administrative burden on an investigating authority, while discharging the notice requirement in Article 12.1 of the SCM Agreement.

## **V. CONCLUSION**

34. Australia observes that this dispute raises important systemic questions about the flexibility of current WTO rules, and the ability for Members to prevent the circumvention of the disciplines in the SCM Agreement. In this regard, as the Appellate Body has stated:<sup>46</sup>

WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.

35. Australia thanks the Panel for the opportunity to submit these views.

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<sup>46</sup> Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 31 (referring to Article 3.2 of the DSU).