

**Before the World Trade Organization**

**Panel Proceedings**

**EUROPEAN UNION – COUNTERVAILING DUTIES ON IMPORTS OF  
BIODIESEL FROM INDONESIA**

(DS618)

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

28 October 2024

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## TABLE OF CASES

Short Title	Full Case Title and Citation
<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , <a href="#">WT/DS273/R</a> , adopted 11 April 2005, DSR 2005:VII, p. 2749
<i>US – Countervailing Duty Investigation on DRAMS</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , <a href="#">WT/DS296/AB/R</a> , adopted 20 July 2005, DSR 2005:XVI, p. 8131
<i>US – Export Restraints</i>	Panel Report, <i>United States – Measures Treating Exports Restraints as Subsidies</i> , <a href="#">WT/DS194/R</a> and Corr.2, adopted 23 August 2001, DSR 2001:XI, p. 5767
<i>US – Hot Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , <a href="#">WT/DS184/AB/R</a> , adopted 23 August 2001, DSR 2001:X, p. 4697

## LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Commission	European Commission
CPO	Crude palm oil
GOI	Government of Indonesia
Member	Member of the World Trade Organization
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

## QUESTION 5

Would the exercise of "free choice" by actors in the market, such as the choice for a CPO producer to sell CPO to biodiesel producers, but also to producers of other downstream products, or to export CPO, preclude a finding of direction or entrustment? Please explain what circumstances would be relevant to establish that free choice would not preclude such a finding.

### Response

1. The exercise of "free choice" by actors in the market cannot of itself preclude a finding of entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement. The legal analysis of entrustment or direction - and a Member's responsibility for such - must focus on the acts of the WTO Member in question, rather than the effects of those acts, including the reactions of market actors.<sup>1</sup> Those effects may "simply be the result of happenstance or chance".<sup>2</sup>

2. Proof of the exercise of "free choice" raises evidentiary considerations in the analysis of entrustment or direction. In that regard, evidence of "free choice" is circumstantial, and should be assessed by an investigating authority in light of all of the available evidence.<sup>3</sup> As to the probative value and relevance of evidence of "free choice", the Appellate Body relevantly stated in *US – Countervailing Duty Investigation on DRAMS*:

Where a government entrusts or directs a private body—by giving responsibility to or exercising its authority over the private body—it is likely that the function that is allegedly entrusted or directed will indeed be carried out. The private body's refusal to carry out the function may be evidence that the government did not give it responsibility for such function, or that the government did not exercise the requisite authority over it such that the private body did not heed the government. *It does not, however, on its own, mean that the private body was not entrusted or directed. Depending on the circumstances, a*

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<sup>1</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.370, as follows: "[t]he object of a Member's responsibility should be its acts, as such, rather than the reactions to or consequences of those acts, as alleged reactions and consequences may simply be the result of happenstance or chance", quoting Panel Report, *US – Export Restraints*, para. 8.34: "we do not see how the reaction of private entities to a given governmental measure can be the basis on which the Member's compliance with its treaty obligations under the WTO is established". See also, para. 8.31.

<sup>2</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.370.

<sup>3</sup> See Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 150: "Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence."

*private body may decide not to carry out a function with which it was so entrusted or directed, despite the possible negative consequences that may follow.*<sup>4</sup>

## QUESTION 6

Can a set of measures taken by a government that provides *inducements* to a private body amount to an entrustment or direction for the purposes of Article 1.1(a)(1)(iv) of the SCM Agreement? Would the position be different if the set of measures provides an *incentive* to a private body?

### Response

3. Australia refers to paragraph 22 of its third party written submission on the question of inducement. As to *incentive*, Australia observes generally that entrustment and direction under Article 1.1(a)(1)(iv) imply "a more active role of the government than mere acts of encouragement".<sup>5</sup>

4. Ultimately, "[t]he determination of entrustment or direction will hinge on the particular facts of the case",<sup>6</sup> irrespective of the label that is given to the government conduct in question. Entrustment or direction under Article 1.1(a)(1)(iv) occurs where a government has given responsibility to a private body (i.e. entrustment) or exercised its authority over a private body (i.e. direction) in order to effectuate a financial contribution.<sup>7</sup>

## QUESTION 7

Is actual past practice the only basis upon which to conclude that a function is "normally vested in the government"? If not, is it a relevant consideration? If actual past practice is not

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<sup>4</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 124. (emphasis added). The Appellate Body also examine the counterfactual scenario where private actors did not comply with the entrustment or direction *at all*, at para. 125.

<sup>5</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

<sup>6</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116 and fn. 188. Australia also refers to paragraph 24 of its third party written submission, which outlines further principles on the nature of entrustment or direction.

<sup>7</sup> Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

determinative, is it necessary that the practice is a permissible governmental function within the legal order of the particular government?

## Response

5. Australia refers to paragraphs 10 – 12 of its third party written submission, including footnotes, regarding the relevance of actual past practice under Article 1.1(a)(1)(iv) of the SCM Agreement.

6. As to the Panel's final question on permissibility, logic dictates that a practice which is *not* permissible in the legal order of a particular government would not "normally be vested in the government" under Article 1.1(a)(1)(iv). However, Australia considers that such permissibility – or the lack thereof – is not necessarily determined through any one particular type of evidence nor in relation to any particular length of time. Any analysis of permissibility in this context is necessarily fact-specific.

## QUESTION 11

At recital 159 of the Definitive Regulation, the Commission noted:

[T]he questionnaires to independent CPO suppliers were part of the questionnaire addressed to the GOI, and therefore the responsibility to coordinate, collect and ensure the timely sending of complete replies lied entirely on the GOI.

In this regard, did the failure of the GOI to ensure the submission of information concerning entities unrelated to the GOI provide the Commission with a valid basis for resort to facts available under Article 12.7 of the SCM Agreement? In this context, please also comment on the findings of the Appellate Body set out in paragraph 105 of the Appellate Body Report in *US – Hot Rolled Steel* (DS184).

## Response

7. There are notable differences between the situation in the Panel's question, and the circumstances discussed in *US – Hot Rolled Steel*. These differences indicate that the findings of the Appellate Body set out in paragraph 105 of the Appellate Body Report may be of limited relevance to this dispute.

8. First, in *US – Hot Rolled Steel*, the investigating authority was requesting an "interested party" (Kawasaki Steel Corporation) to collect information from another entity (California Steel Industries Inc). Whereas, in this situation, an "interested Member" (GOI) was asked to collect information from other entities (independent CPO suppliers).

9. Second, the findings in paragraph 105 of the Appellate Body Report are made in the context of Article 6.13 of the Anti-Dumping Agreement. The equivalent provision in the SCM Agreement (Article 12.11) provides: "The authorities shall take due account of any difficulties experienced by *interested parties*, in particular small companies, in supplying information requested, and shall provide any assistance practicable" (emphasis added). Notably, Article 12.11 does not refer to the difficulties experienced by "interested Members", but solely "interested parties". Thereby, suggesting Article 12.11 is of limited relevance in a situation – such as this case – where any difficulties are being experienced by an interested Member.

10. Broadly, Australia considers the failure of an interested Member to ensure the submission of information concerning entities unrelated to the interested Member may, in some cases, provide an investigating authority with a valid basis to resort to facts available under Article 12.7 of the SCM Agreement. This assessment will depend upon the particular facts of the matter.