Before the World Trade Organization

Panel Proceedings

EUROPEAN UNION – COUNTERVAILING DUTIES ON IMPORTS OF BIODIESEL FROM INDONESIA

(DS618)

THIRD PARTY ORAL STATEMENT OF AUSTRALIA AS DELIVERED

9 October 2024

I. INTRODUCTION

1. Chair, distinguished members of the Panel – good morning. Thank you for the opportunity for Australia to participate as a third party in this dispute, and to make an oral statement at this session.

2. Australia considers this case raises important questions in relation to the application and interpretation of the SCM Agreement. I will make two key points. First, I will discuss the relationship between "financial contribution" and "income or price support" in Article 1.1(a) of the SCM Agreement. Second, I will discuss the calculation of a "benefit" under Articles 1.1(b) and 14(d) of the SCM Agreement.

3. Before turning to those key points, Australia recalls the importance of the standard of review of the Panel. The Panel's task is to assess whether, in light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. In making an objective assessment of the matter before it, the key question for the Panel is whether the investigating authority has discharged its obligations under the Agreements.

II. FINANCIAL CONTRIBUTION "OR" INCOME OR PRICE SUPPORT

4. An issue in contention in this dispute is whether the concepts of "financial contribution" and "income or price support" in Article 1.1 of the SCM Agreement are mutually exclusive. Broadly, Indonesia takes the position they are mutually exclusive, whereas the European Union considers they are not.[1]

5. Whether this is the case depends on the meaning of the word "or" between Articles 1.1(a)(1) and 1.1(a)(2). Australia observes according to its plain and ordinary meaning, the conjunction "or" is capable of being exclusive or inclusive depending on its context.[2] In the context of Articles 1.1(a)(1) and 1.1(a)(2), Australia considers "or" is an inclusive term and, therefore, the concepts of "financial contribution" and "income or price support" are *not* mutually exclusive.

[1] See Indonesia's first written submission, paras. 243-244; European Union's first written submission, paras. 308-309.
[2] See .e.g. J. Hurford, "Exclusive or Inclusive Disjunction" (1974), Vol. 11, No. 3, *Foundations of Language*, pp. 409-411.

6. In this situation "or" exists between the concepts of "financial contribution" and "income or price support". The former is "a definitional provision that sets forth an exhaustive, closed list [...] of the types of transactions that constitute financial contributions under the SCM Agreement".[3] In contrast, the latter adopts the broad language of "*any form* of income or price support in the sense of Article XVI of GATT 1994"[4] and has been described by the Appellate Body as broadening the range of government measures capable of providing subsidies.[5] Previous panels have not suggested "income or price support" represented an exhaustive concept and have adopted a relatively broad understanding. For example, the panel in *EU and Certain Member States — Palm Oil (Malaysia)* observed that "income support" is "direct government intervention in the market to ensure that income for certain enterprises or associated with certain activities is maintained at or above a particular level."[6]

7. In other words, "or" sits between a closed list of subsidies and an open concept that broadens that list. Australia considers in order for the concepts to be mutually exclusive, both would need to be closed. Given this is not the case, the context supports an inclusive interpretation of "or".

8. This understanding is also supported by the findings of previous panels, where they provide examples of "income or price support" that could also amount to "financial contributions". For instance, the panel's example in *EU and Certain Member States — Palm Oil (Malaysia)* of income support as direct government intervention in the market could also,[7] depending on the circumstances, amount to a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement. If "financial contribution" and "income or price support" were mutually exclusive, it is improbable previous panels would have made such findings.

[3] Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 7.955.
[4] SCM Agreement, Art. 1.1(a)(2) (emphasis added).
[5] Appellate Body Report, *US – Softwood Lumber IV*, para. 52.
[6] Panel Report, *EU and Certain Member States — Palm Oil (Malaysia)*, para. 7.1354. See also Panel Report, *China – GOES*, paras. 7.83-7.88.
[7] Panel Report, *EU and Certain Member States — Palm Oil (Malaysia)*, para. 7.1354.

III. THE CALCULATION OF "BENEFIT"

9. Another issue in dispute is whether the European Union acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement in determining that the provision of CPO conferred a benefit upon Indonesian biodiesel producers.[8]

10. In order to determine whether a benefit exists, Article 14 is "relevant context" for interpreting Article 1.1(b). Article 14 contains the guidelines that an investigating authority may use to calculate the amount of a subsidy in terms of benefit to the recipient. Article 14(d), in particular, contains guidelines for determining whether government purchases or provisions of goods make a recipient "better off" than it would otherwise be in the marketplace. This is ultimately a comparative exercise between the price of the government purchased or provided good and an appropriately selected benchmark. [9]

11. The Appellate Body has stated that "the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision" are "the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement".[10]

12. However, it is important to note the Appellate Body has also emphasised the "market orientation" of this inquiry.[11] In-country prices of the relevant good will not be appropriate where they deviate from market-determined prices as a result of government intervention in the market.[12] Consequently, previous panels and the Appellate Body have also acknowledged alternative benchmarks may be appropriate in certain circumstances.[13] The analysis necessary to arrive at such an appropriate benchmark will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information.[14]

[8] Indonesia's first written submission, para. 260.
[9] See e.g. Appellate Body Reports, *Canada – Renewable Energy*, para. 5.163; *US — Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.134-5.135.
[10] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154, (emphasis added).
[11] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.151.
[12] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.
[13] See e.g. Panel Report, *US — Softwood Lumber VII*, para. 7.145; Appellate Body Report, *US – Softwood Lumber IV*, para. 106.
[14] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.

13. The Appellate Body has also recognised that the second sentence of Article 14(d) requires that the chosen benchmark must relate or refer to, or be connected with, the "prevailing market conditions" in the relevant country, and must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale.[15] In considering this requirement, the Appellate Body has observed that prevailing market conditions "consist of generally accepted characteristics of an area of economic activity in *which the forces of supply and demand interact to determine market prices*"—once again reinforcing the need for benchmark prices to be market-determined.[16]

14. In the context of this dispute, it is notable that the European Union states it was seeking to "avoid a situation in which it compared distorted prices with distorted prices."[17] Thereby, suggesting that the European Union was seeking to find a market-determined benchmark consistent with the previous findings of the Appellate Body. However, whether the relevant benchmark needed to be adjusted to reflect prevailing market conditions and what type of any such adjustments would be required are questions of fact, which Australia is not in a position to comment on.

IV. CONCLUSION

15. Australia thanks the Panel for its time and Australia hopes that its comments will be useful for the Panel's consideration of this matter.

[15] Appellate Body Report, *US – Softwood Lumber IV*, para. 103.
[16] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150, (emphasis added).
[17] European Union's first written submission, para. 361.