Before the World Trade Organization

Panel Proceedings

EUROPEAN UNION – COUNTERVAILING DUTIES ON IMPORTS OF BIODIESEL FROM INDONESIA

(DS618)

THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

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TABLE OF CONTENTS

TABLE OF CASES

Short Title	Full Case Title and Citation
EC - Countervailing Measures on DRAM Chips	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 8671
Japan – DRAMs (Korea)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007, DSR 2007:VII, p. 2703
Japan – DRAMs (Korea)	Panel Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/R, adopted 17 December 2007, as modified by Appellate Body Report WT/DS336/AB/R, DSR 2007:VII, p. 2805
US – Anti-Dumping and Countervailing Duties (China)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
US – Carbon Steel (India),	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
US – Countervailing Duty Investigation on DRAMs	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005, DSR 2005:XVI, p. 8131
US – Countervailing Measures (China) (Article 21.5 – China)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China,* WT/DS437/AB/RW and Add.1, adopted 15 August 2019, DSR 2019:IX, p. 4737
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, p. 571
US – Softwood Lumber VI (Article 21.5 – Canada)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, 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
Provisional Regulation	Commission Implementing Regulation (EU) 2019/1344 of 12 August 2019 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia
Commission	European Commission
CPO	Crude palm oil
Definitive Regulation	Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GOI	Government of Indonesia
Member	Member of the World Trade Organization
SCM Agreement	WTO 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 regarding the application and interpretation of Article 1.1(a)(1)(iv) of the SCM Agreement. It is important that this provision is properly interpreted so that its anti-circumvention objective[1] is given meaningful effect, and is not unduly constrained by overly narrow legal interpretations.

2. In this submission, Australia will address two issues raised in this dispute concerning Article 1.1(a)(1)(iv) of the SCM Agreement:

i. the legal standard and application of "normally … vested in the government"; and

ii. the legal standard and application of "entrusts or directs".

3. 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. STANDARD OF REVIEW

4. 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".[2] In order to make that assessment, it will typically be necessary for a panel to consider the ordinary meaning of various terms under the covered agreements in their context and in light of the object and purpose of the treaty.[3] This does not require a panel in every case to delineate a general legal standard arising from the relevant phrase or term. Rather, Australia respectfully submits the Panel should confine itself to making an "objective assessment of the matter before it",[4] in order to determine whether the Commission discharged its obligations as an investigating authority.

[1] Appellate Body Report, *US – Softwood Lumber IV*, para. 52 as quoted with approval in Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.
[2] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[3] Article 31 of the Vienna Convention.
[4] Article 11 of the DSU.

III. EXISTENCE OF A FINANCIAL CONTRIBUTION UNDER ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

5. The SCM Agreement provides a framework that, *inter alia*, 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. As the Appellate Body has stated, the object and purpose of the SCM Agreement "reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures … This balance must be borne in mind in interpreting paragraph (iv) …"[5]

6. Article 1.1(a)(1)(iv) of the SCM Agreement is essentially an anti-circumvention provision,[6] which is "intended to ensure that governments do not evade their obligations under the SCM Agreement by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself".[7]

7. Australia's comments on this provision first address the phrase "normally … vested in the government", because this reflects the order of analysis of both parties.[8] We then address the phrase "entrusts or directs".

A. "NORMALLY … VESTED IN THE GOVERNMENT"

8. A key point of divergence between the parties is the standard to establish that a relevant function under Article 1.1(a)(1)(iv) "would normally be vested in the government".[9] While Indonesia's arguments centre on the requirement to address the situation *in Indonesia*,[10] Indonesia's submissions also seem to implicitly argue for a threshold requirement of "predominant" government practice. For example, Indonesia states that "[a]t a minimum, the Commission should have analyzed whether, from a traditional and historic perspective,

[5] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 115. See also, Appellate Body Report, *US – Softwood Lumber IV*, para. 64. (footnote omitted)
[6] Appellate Body Report, *US – Softwood Lumber IV*, para. 52 as quoted with approval in Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.
[7] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113.
[8] See the European Union's first written submission, para. 176.
[9] For convenience, Australia refers to this as the "normally vested" criterion, or the phrase "normally vested in the government", in this submission.
[10] See Indonesia's first written submission, paras. 185 - 186 and also para. 190.

the GOI has engaged in the provision of raw materials, and specifically, CPO …"[11] It further notes that "in Indonesia, CPO is provided predominantly by private companies and smallholders. The GOI does not control the supply of CPO, and there is no indication that CPO producers have been given responsibility for the supply of CPO by the GOI."[12] Through its arguments elevating the scope of government practice as the determining factor in the consideration of the "normally vested" criterion, Indonesia essentially imports a threshold of "predominant" government practice into that criterion.

9. The European Union argues that Article 1.1(a)(1)(iv) "should be understood as reflecting that certain functions are inherently governmental in nature. Hence, the specific practice in the WTO Member in question (even if substantiated) does not necessarily (still less automatically) operate so as to displace a finding that there has been a delegation of a function 'normally vested in the government'".[13] Such "core functions include those which have an intrinsic connection to the exercise of sovereign rights, such as the provision of raw materials."[14]

10. The phrase "normally … vested in the government" in Article 1.1(a)(1)(iv) is not defined in the SCM Agreement and nor has its meaning been comprehensively addressed in previous disputes. Australia's submissions do not seek to conclusively define this phrase. Rather, and in keeping with the necessarily fact-specific nature of that assessment, we provide our views on the relevant limits of that legal standard and its application.

11. In that regard, Australia finds no support for a narrow standard which is automatically determined by predominant government practice of the relevant function, by the Member in question. Indeed, the Appellate Body statement upon which Indonesia relies, refers to "what would ordinarily be considered governmental practice *in the legal order* of the relevant Member"[15] – and not to the concept of *actual* practice. Such a narrow interpretation is also

[11] Indonesia's first written submission, para. 190. Indonesia subsequently states that "no less than 93% of national palm oil planted land [in Indonesia] is owned by private companies and/or smallholders. This notwithstanding, [the Commission] asserts that all of these private companies and smallholders exercise a governmental function …" (para. 192).
[12] Indonesia's first written submission, para. 206.
[13] European Union's first written submission, para. 222.
[14] European Union's first written submission, para. 226.
[15] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 297 (emphasis added). See also, Indonesia's first written submission, para. 184. Australia further observes that the Appellate Body's statements were not specifically directed at the meaning of the phrase "normally … vested in the government" – but rather, were directed to a contextual examination of considerations for determining whether or not a specific entity was a "public body". In Australia's view, this reduces the persuasiveness of the Appellate Body's statement with respect to the meaning of "normally vested in the government".

inconsistent with the ordinary meaning of the word "vests", which is "[t]o place, settle or secure (something) in the possession of a person or persons."[16] That definition does not speak to, nor limit, the *evidence* through which it must be demonstrated. Finally, that interpretation is incongruous with the final line of Article 1.1(a)(1)(iv), which refers to what is "normally followed by governments" (i.e. in a broad rather than specific sense).

12. While actual practice may in certain circumstances be one evidentiary factor in considering whether a function is "normally vested in the government", it is not necessarily the *only* way of satisfying that criterion legally - or factually.[17] Nor therefore can actual practice - let alone "predominant practice" in the Member in question - automatically be the determining factor for that criterion, in every case.

13. In general terms, Australia finds the European Union's position regarding the importance of "a broader consideration of the functions which would typically be considered to have [a] 'governmental' quality"[18] in Article 1.1(a)(1)(iv) - to be logically compelling. Otherwise, that provision might be applicable only to situations where a Member's circumvention was obvious (e.g. through direct transfer of government conduct to a private entity) – effectively nullifying its anti-circumvention objective.

14. Nonetheless, in Australia's view, any reasoning based upon the "normally vested" criterion must be properly applied to the facts at question. The focus of Australia's submission in this regard concerns the concept of national sovereignty over natural resources.

15. Before setting out its views on this point, Australia first notes significant differences between Indonesia and the European Union regarding the relevant "function" identified by

[16] Oxford English Dictionary.
[17] The Panel's reasoning in Panel Report, *US – Countervailing Duty Investigation on DRAMs* supports this position. The Panel was not persuaded by the argument that a loan must be made pursuant to a governmental programme in order to be "normally vested in the government". Entrustment or direction by a government to a commercial bank, to provide a "conventional loan", could also satisfy the standard of a function "normally vested in the government": fn. 57. This reasoning was not overturned on appeal. Australia makes no comment on the Panel's reasoning that "to the extent that loans and restructuring measures involve taxation or revenue expenditure, they are capable of falling within the scope of that provision." Rather, we point to this passage to observe that the Panel did not require *actual* practice of the specific function by the government, as evidenced by a specific "governmental programme".
[18] European Union's first written submission, para. 182. (footnote omitted)

the Commission.[19] Without taking a view on either identified position, Australia makes some observations which may assist the Panel.

16. In Australia's view, sovereign rights over natural resources do not automatically extend to goods which are manufactured from those resources (i.e. "downstream goods"). This logic is broadly illustrated through the Appellate Body's related analysis of the government "making available" goods which are natural resources, under subparagraph (iii) of Article 1.1(a)(1).[20] Previous disputes addressing such facts[21] have established a requirement for a "reasonably proximate relationship" between the relevant governmental act and the output (i.e. "good" under subparagraph (iii)).[22] In those circumstances, "a government must have some control over the *availability* of a specific thing being 'made available'"[23] in order to be able to "make available" that good.

17. In the same vein, Australia finds it hard to reconcile any argument which seeks to automatically extend a "governmental function" linked to sovereignty over natural resources, to cover products manufactured by third parties, from those resources. Let alone, products which are manufactured from resources harvested from plantations. While Australia forms no conclusions on the facts, CPO would generally seem to have the characteristics of a manufactured (i.e. processed) product.

B. "ENTRUSTS OR DIRECTS"

18. The parties also diverge to some extent on the scope of the legal standard of the phrase "entrusts or directs" under Article 1.1(a)(1)(iv). Indonesia argues that a finding of entrustment or direction by the Commission in this context required "'an explicit and affirmative action of delegation or command' on the part of the GOI to the Indonesian CPO

[19] Indonesia considers that the relevant "function" under Article 1.1(a)(1)(iv) was the "supply" of CPO (i.e. under Article 1.1(a)(1)(iii)). (See Indonesia's first written submission, para. 186). The European Union argues that the relevant function identified by the Commission "is the implementation of a policy of ensuring the provision of CPO (a raw material) to local biodiesel producers for LTAR [and] which the Commission found to be a function 'normally vested in government' … In other words, the function that has been entrusted is the government policy of providing support to a specific industry and thereby sacrificing revenue." (European Union's first written submission, paras. 179. (emphasis original)) It argues that the supply of CPO for LTAR was "[o]ne measure of several", which the GOI used to achieve its policy objective (European Union's first written submission, para 251. See also, European Union's first written submission, paras. 237 and 249.

[20] Australia makes this observation for illustrative purposes and by way of comparison. We do not suggest that an analysis of the requirements under subparagraph (iii) is directly relevant to the Panel's examination under Article 1.1(a)(1)(iv).

[21] For example, the provision of timber logs and iron ore.

[22] See Appellate Body Reports, *US – Carbon Steel (India)*, paras. 4.74 - 4.75; *US – Softwood Lumber IV*, para. 71. For avoidance of doubt, Australia is not seeking to import a "reasonably proximate" requirement into the standard of "normally vested in the government". Our comments do not go to the substantive content of the "normally vested" criterion at all.

[23] Appellate Body Report, *US – Softwood Lumber IV*, para. 71. (emphasis added)

producers".[24] The European Union counters that "more subtle forms of 'direction' and 'entrustment' should not be excluded from [the standard's] scope",[25] referring, *inter alia*, to the efficacy of Article 1.1(a)(1)(iv)[26] and to the Appellate Body's statements in *US - Countervailing Duty Investigation on DRAMS* in support of its position.[27]

19. Australia agrees with the European Union's broader interpretation of entrustment or direction,[28] which is supported by the ordinary meaning of those terms. According to the Oxford English Dictionary, "entrust" means to "assign the responsibility for something …". The term "direct" can mean "to give directions", "to give authoritative instructions to", to "regulate, control, govern the actions of" and "to regulate the course of".[29] Notably, neither term excludes subtle or informal forms of communication.[30] In that connection, we agree with the Appellate Body that "an interpretation of the term 'entrusts' that is limited to acts of 'delegation' is too narrow"[31] and "an interpretation of the term 'directs' that is limited to acts of 'command' is also too narrow".[32]

20. Further, and as a previous panel stated:

> …the focus of Article 1.1(a)(1)(iv) would be significantly undermined if an "explicit" act was required in all instances. After all, this provision is supposed to encapsulate those instances where the government attempts to execute a particular policy by operating through a private body. In other words, it is trying to ensure that indirect government action does not fall outside the scope of the SCM Agreement. If we were to limit the scope of Article 1.1(a)(1)(iv) to only those instances where the government acted "explicitly", governments would be able to circumvent their commitments under this provision by removing those elements that were "explicit".[33]

21. In summary, and to refer to a statement of a previous panel, "Article 1.1(a)(1) of the SCM Agreement does not require that the government's entrustment or direction be

[24] Indonesia's first written submission, para. 211.
[25] European Union's first written submission, para. 278.
[26] European Union's first written submission, para. 278.
[27] European Union's first written submission, paras. 263 – 264.
[28] As quoted at paragraph 18 of this submission, above.
[29] Oxford English Dictionary.
[30] Australia also notes the Appellate Body statement that a finding of "entrustment or direction" requires that the government "give responsibility to a private body – or exercise its authority over a private body – in order to effectuate a financial contribution": Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.
[31] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 110.
[32] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 111.
[33] Panel Report, *EC - Countervailing Measures on DRAM Chips*, fn. 65.

conveyed to the private bodies in a particular way",[34] let alone through an "explicit" delegation or command, as advocated by Indonesia.[35]

22. Australia also observes the Commission's reference to the term "induced", in its provisional finding of entrustment or direction with respect to CPO.[36] Following from the above reasoning, Australia considers that it is possible, in appropriate circumstances, for inducement to support a finding of entrustment or direction. Subtle and informal means of "direction" and "entrustment" are not excluded from the scope of Article 1.1(a)(1)(iv), where properly supported on the evidence.

23. A critical issue is the investigative authority's assessment of the evidence in support of any such finding. As a previous panel stated:

> [t]he key is being able to identify such entrustment or direction in each factual circumstance. This will obviously need to be determined, on a case-by case basis, whether an investigating authority could reasonably have concluded on the basis of all of the relevant and probative evidence before it that such entrustment or direction existed.[37]

24. In that connection, a guiding principle is that evidence in support of "entrustment or direction" should support a "demonstrable link between the government and the conduct of the private body".[38] The Appellate Body has elaborated upon this as a requirement for "an affirmative demonstration of the link between the government and the specific conduct [of the private body]".[39] As the Appellate Body has also stated, "government 'entrustment' or 'direction' cannot be inadvertent or a mere by-product of governmental regulation."[40]

25. Finally, Australia briefly addresses the type of evidence which might support a finding of entrustment or direction. As the panel observed in *Japan – DRAMs (Korea),* "entrustment or direction of a private body will rarely be formal, or explicit. For this reason, allegations of government entrustment or direction are likely to be based on pieces of circumstantial

[34] Panel Report, *EC - Countervailing Measures on DRAM Chips* para. 7.57, on the "form" of entrustment or direction.
[35] Indonesia's first written submission, para. 212.
[36] Provisional Regulation, recital (203), as confirmed in the Definitive Regulation (see recital (161)).
[37] Panel Report, *EC - Countervailing Measures on DRAM Chips*, para. 7.57. (footnote omitted)
[38] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 112. See also, Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China),* para. 5.103.
[39] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 284. (emphasis removed)
[40] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114. (footnote omitted)

evidence".[41] Therefore, in the context of such an examination, Australia notes the following guidance provide by the panel *in Japan – DRAMs (Korea)*:

> [i]n the case of alleged government entrustment or direction, it reasonable for an investigating authority to seek to determine the motivations behind certain actions or statements by government agencies or representatives … **Identifying motive and intent can assist** in determining whether such [a message] was conveyed. Provided appropriate caution is exercised in assessing the reliability of evidence, in our view an investigating authority may do so on the basis of statements properly attributed to named government agencies or representatives, in the absence of express denials, corrections, or other evidence to the contrary.[42]

IV. CONCLUSION

26. 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.[43] Systemically, it is therefore of fundamental importance that the anti-circumvention objective in Article 1.1(a)(1)(iv) is given meaningful effect, and is not unduly constrained by overly narrow interpretations. Conversely, Australia also respectfully recalls that the Panel should limit its analysis to the specific facts at issue in this dispute - and not engage in broader analysis than is required to discharge that function.

27. Australia thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.

[41] Panel Report, *Japan – DRAMs (Korea)*, para. 7.73. See also, Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, fn. 277: "… [a holistic] approach is particularly relevant **in cases of entrustment or direction under Article 1.1(a)(1)(iv), where much of the evidence that is publicly-available, and therefore readily accessible to interested parties and the investigating authority, will likely be of a circumstantial nature**." (emphasis added)
[42] Panel Report, *Japan – DRAMs (Korea)*, para. 7.104 (emphasis added). The Appellate Body did not criticise this approach, on appeal. See for example, Appellate Body Report, *Japan – DRAMs (Korea)*, para. 134.
[43] This is general comment, and not an observation on the facts of this dispute.