Before the World Trade Organization

Panel Proceedings

EUROPEAN UNION – COUNTERVAILING DUTIES ON IMPORTS OF BIODIESEL FROM INDONESIA

(DS618)

THIRD PARTY EXECUTIVE SUMMARY OF AUSTRALIA

4 November 2024

TABLE OF CASES

Short Title	Full Case Title and Citation
Canada – Renewable Energy	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
EU and Certain Member States — Palm Oil (Malaysia)	Panel Report, *European Union and Certain Member States – Certain Measures Concerning Palm Oil and Oil Palm Crop-Based Biofuels*, WT/DS600/R and Add.1, adopted 26 April 2024
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, p. 2749
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
US — Softwood Lumber VII	Panel Report, *United States – Countervailing Measures on Softwood Lumber from Canada*, WT/DS533/R and Add.1, circulated to WTO Members 24 August 2020, appealed 28 September 2020

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Commission	European Commission
CPO	Crude palm oil
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
SCM Agreement	Agreement on Subsidies and Countervailing Measures
WTO	World Trade Organization

I. EXECUTIVE SUMMARY OF AUSTRALIA'S THIRD PARTY WRITTEN SUBMISSION

A. STANDARD OF REVIEW

1. The Panel is required to make an "objective assessment of the matter before it"[1] and to determine whether the Commission discharged its obligations as an investigating authority by making "reasoned and adequate" conclusions, "in the light of the evidence on the record".[2]

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

2. It is important that Article 1.1(a)(1)(iv) of the SCM Agreement is properly interpreted so that its anti-circumvention objective[3] is given meaningful effect, and is not unduly constrained by overly narrow legal interpretations.

3. 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**". That phrase is not defined in the SCM Agreement and nor has its meaning been comprehensively addressed in previous disputes.

4. Australia finds no support for a narrow legal standard which is automatically determined by government practice, as argued by Indonesia. 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 [WTO] Member"[4] – and not to the concept of *actual* practice. Such a narrow interpretation is also inconsistent with the ordinary meaning of the word "vests", which does not limit the *evidence* through which it must be demonstrated. A narrow interpretation is also incongruous with the final line of Article 1.1(a)(1)(iv), which broadly refers what is "normally followed by governments".

[1] Article 11 of the DSU.
[2] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 93.
[3] 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.
[4] 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". This reduces the persuasiveness of the Appellate Body's statement, in relation to the meaning of that term.

5. Any reasoning based upon the "normally vested" criterion must also be properly applied to the facts at question. Australia finds it hard to reconcile the Commission's reasoning – which seeks to define "provision of raw materials" as governmental function through the "exercise of sovereign rights" – with the actual good that was supplied (i.e. CPO). While Australia forms no conclusions on the facts, CPO would generally seem to have the characteristics of a manufactured (i.e. processed) product, rather than a raw material.

6. 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). In Australia's view, the ordinary meaning of those terms do not exclude subtle or informal forms of communication, where properly supported on the evidence.

7. Accordingly, Australia agrees with the Appellate Body that "an interpretation of the term 'entrusts' that is limited to acts of 'delegation' is too narrow"[5] and "an interpretation of the term 'directs' that is limited to acts of 'command' is also too narrow".[6] Following from that reasoning, Australia considers that it is possible, in appropriate circumstances, for inducement to support a finding of entrustment or direction.

8. Evidence in support of "entrustment or direction" should support a "demonstrable link between the government and the conduct of the private body".[7] As the Appellate Body as also stated, "government 'entrustment' or 'direction' cannot be inadvertent or a mere by-product of governmental regulation."[8] In some cases, "[i]identifying [governmental] motive and intent" through reliable evidence, may assist in the examination of entrustment and direction.

II. EXECUTIVE SUMMARY OF AUSTRALIA'S ORAL STATEMENT

A. FINANCIAL CONTRIBUTION "OR" INCOME OR PRICE SUPPORT

9. The parties disagree over whether the concepts of "financial contribution" and "income or price" support in Article 1.1 of the SCM Agreement are mutually exclusive. In the

[5] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 110.
[6] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 111.
[7] 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.
[8] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 114. (footnote omitted)

context of Articles 1.1(a)(1) and 1.1(a)(2), Australia considers that those concepts are *not* mutually exclusive. The word "or" sits between those two provisions; the former provision is closed list of subsidies and the latter is an open concept that broadens that list. Australia considers in order for those concepts to be mutually exclusive, both provisions would need to be closed concepts. Given this is not the case, the context supports an *inclusive* interpretation of the word "or" between sub-paragraphs (1) and (2) of Article 1.1(a) of the SCM Agreement.[9]

B. THE CALCULATION OF "BENEFIT"

10. 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.

11. To determine whether a benefit exists, Article 14 is "relevant context" for interpreting Article 1.1(b). 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 good and an appropriately selected benchmark.[10]

12. 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".[11] However, alternative benchmarks to in-country prices may be appropriate in certain circumstances.[12] The analysis necessary to arrive at 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.[13]

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[9] This understanding is supported by the Panel's findings in Panel Report, *EU and Certain Member States — Palm Oil (Malaysia)*, para. 7.1354, which determined that income support as direct government intervention in the market could also, depending on the circumstances, amount to a direct transfer of funds under Article 1.1(a)(1)(i) of the SCM Agreement.
[10] 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.
[11] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.154, (emphasis added).
[12] See e.g. Panel Report, *US — Softwood Lumber VII*, para. 7.145; Appellate Body Report, *US – Softwood Lumber IV*, para. 106. 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: Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.
[13] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157. 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. Appellate Body Report, *US – Softwood Lumber IV*, para. 103. See also, Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150, which reinforces the need for benchmark prices to be market-determined.

III. EXECUTIVE SUMMARY OF AUSTRALIA'S RESPONSES TO PANEL QUESTIONS TO THE THIRD PARTIES

13. Response to Question 5: 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 WTO Member's responsibility for such - must focus on the acts of the WTO Member in question, rather than the effects of those acts, such as the reactions of market actors.[14]

14. Response to Question 6: 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.[15] That determination "hinge[s] on the particular facts of the case",[16] irrespective of the label that is given to the government conduct in question (e.g. "inducement" or "incentive" etc), and implies "a more active role of the government than mere acts of encouragement".[17]

15. Response to Question 7: While actual governmental practice might be a relevant evidentiary factor in considering whether a function is "normally vested in the government" under Article 1.1(a)(1)(iv), it is not automatically the determining factor for that criterion.

16. Evidence that a practice is not permissible in the legal order of a government would also logically tend to suggest that such a practice is not "normally vested in the government". The analysis of any such evidence of permissibility – or lack thereof - is fact-specific and is not necessarily determined through any one particular type of evidence.

17. Response to Question 11: 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.

[14] Panel Report, *Korea – Commercial Vessels*, para. 7.370.
[15] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.
[16] 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.
[17] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.