UNITED STATES – COUNTERVAILING MEASURES ON CERTAIN HOT-ROLLED CARBON STEEL FLAT PRODUCTS FROM INDIA

(DS436)

Third Party Oral Statement of Australia

Geneva, 10 July 2013
Mr Chairman, Members of the Panel

1. Thank you for the opportunity to present Australia’s views in this dispute.
2. Australia has provided a written submission identifying a systemic and legal interest with respect to the meaning of the term “public body”.
3. Australia considers that the interpretation of “public body” could benefit from clarification following the Appellate Body’s finding in United States – Anti-Dumping and Countervailing Duties (China) (“US – AD/CVD”). We note that this same issue is currently being considered by the Panel in US – Countervailing Measures (China) (DS437).
4. In US – AD/CVD, the Appellate Body said that a public body must be an entity that “possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case”. Australia agrees with this statement. In this oral submission, Australia will firstly submit that the test for “public body” under Article 1.1(a)(1) of the SCM Agreement is not a cumulative three stage test. Secondly, Australia will underscore that whether a “public body” exists requires a case-by-case analysis.

5. Australia’s interpretation of “public body” differs to that of India’s in its First Written Submission, which suggests that the test is cumulative and that an entity must therefore possess, exercise and be vested with governmental authority to be a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement.²

6. Australia is concerned that interpreting “public body” as a cumulative test in this manner narrows the meaning of the term in Article 1.1(a)(1) of the SCM Agreement and removes the flexibility for investigating authorities to consider whether a public body exists in a range of different contexts.

7. Having said this, Australia considers that government ownership, in and of itself, is not enough to establish that an entity is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. Rather, when looking to whether a government possesses or exercises governmental authority, a key feature for establishing a public body should be the nature and extent of government control over the entity, which is a broad analysis.

8. To date, Australia’s position has been, and continues to be, that establishing the nature and extent of government control over a particular entity would require an investigation into a range of factors, including how an entity is managed, whether a government issues instructions to the entity and the degree of governmental oversight.

9. In essence, it should be possible to make a finding that a public body exists in law or in fact, so long as there is evidence to do so.

² India’s First Written Submission, para. 234.
10. In that regard, the evidence needed to establish a public body will depend on the facts of each case. It will often require an investigating authority to look beyond the formal structure of the entity. For example, an investigating authority could look to evidence such as:
   a. relevant statutes or other legal instruments;
   b. the degree of separation and independence of an entity from a government, including the appointment of Directors; or
   c. the contribution that an entity makes to the pursuit of government policies or interests.

11. These examples of evidence, which are non-exhaustive, could potentially contribute to demonstrating whether a government has control over the activities and conduct of the entity in the sense of Article 1.1(a)(1) of the SCM Agreement.

12. Australia is not suggesting that these examples should constitute formal criteria to find a public body, whether individually or as a whole. Investigating authorities need flexibility to look at the facts of each individual case, and, based on available evidence, determine whether or not a public body exists.

13. In Australia's view, an approach which looks at the nature and extent of governmental control of an entity is consistent with the object and purpose of Article 1.1, which is to ensure that a subsidy provided by any public body within the meaning of Article 1.1(a)(1) is captured by the SCM Agreement.
14. Australia, in providing the Panel with its views on the meaning of “public body”, has sought to look at the issue from a viewpoint that is both principled and practical for investigating authorities. Ultimately, investigating authorities within each Member State are the ones that need to apply these rules in the variety of different contexts in which they arise.

**Conclusion**

15. Finally, although Australia’s written submission and this oral submission do not address every issue raised by the parties in this dispute, this should not be regarded as an indication that Australia considers that the issues it has not addressed are not important. Nor does it indicate agreement, or otherwise, with any particular argument of the participants or other third parties in this dispute.

16. Australia thanks the Chairman and Members of the Panel for this opportunity to present its views in this dispute.