United States – Countervailing Duty Measures on Certain Hot-Rolled Carbon Steel Flat Products from India (WT/DS436)

Third Party Written Submission of Australia

13 May 2013
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I. INTRODUCTION

1. Australia considers that these proceedings initiated by India under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant issues of legal interpretation of the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

2. In this submission, Australia addresses the meaning of the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

3. Australia reserves the right to raise other issues in the third party hearing with the Panel.

I. THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT

A. THE MEANING OF THE TERM “PUBLIC BODY”

4. A material issue in this matter is the interpretation of the term “public body” in Article 1.1(a)(1) of the SCM Agreement. In United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, the Appellate Body reversed the Panel’s finding that the term “public body” in Article 1.1(a)(1) of the SCM Agreement means “any entity controlled by a government.” The Appellate Body considered that this interpretation of “public body” lacked a proper legal basis.1

5. The Appellate Body concluded that a public body is an entity that possesses, exercises or is vested with governmental authority, which is to be determined on a case-by-case basis having regard to all the relevant facts, which may point in different directions.

6. Australia considers that the Appellate Body’s conclusion suggests that a public body must meet one of three descriptions – an entity that possesses governmental authority, an entity that exercises governmental authority, or an entity that is vested with governmental authority. In Australia's view, these descriptions are alternatives to one another and are not cumulative. However, Australia acknowledges that the Appellate Body guidance on this is not clear.

7. For example, a statement was made by the Appellate Body that “being vested with, and exercising, authority to perform governmental functions is a core feature of a public body in the sense of Article 1.1(a)(1)”2. It is not clear whether possessing government authority is included in this description of “a core feature of a public body”. This statement also appears to suggest that in order to meet this description, an entity must both be vested with, and exercise, authority to perform governmental functions, whereas the Appellate Body’s conclusion, as noted above, expressed these features as alternatives to each other.

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1 Appellate Body Report, US – AD/CVDs, para. 322.
8. In the same paragraph, the Appellate Body also made a statement that “being vested with government authority is the key feature of a public body”. It is not clear whether possessing government authority, or exercising government authority are also included in this description of “the key feature of a public body”.

9. Another statement made by the Appellate Body in its analysis in forming its conclusion, was that in order for an entity to be able to give responsibility to a private body (entrustment), it must itself be vested with such responsibility. This appears to suggest that in order to give responsibility to a private body (entrustment), it may not be sufficient if an entity possesses and/or exercises such responsibility. Rather, it must be vested with it.

10. Australia would not support a view that an entity must be vested with governmental authority in order to be regarded as a “public body”. This is because Australia considers that public bodies have government authority (without having to be vested with it). Australia is concerned to ensure that a focus on the idea of entities being vested with government authority is not used to artificially transpose the test for “entrustment or direction” onto the definition of “public body”.

11. The discussion does not fully explain what the other features of a public body might be, and whether an entity might be considered a public body if it has other features even if not the core or key feature.

12. Therefore, Australia’s view is that the discussion around core and key features is not clear. Australia considers that it may be useful for the Panel in this dispute to carefully examine again the term “public body” in the context of existing jurisprudence. One relevant criteria for examining a “public body” under Article 1.1(a)(1) of the SCM Agreement should be to what extent does the government control the entity.

13. India suggests the appropriate test for public body under Article 1.1(a)(1) for an entity is that:

   (a) the entity has been vested with the power and authority to perform government functions; and
   (b) the entity has the power and authority to direct or entrust a private body; and
   (c) the entity is, in fact, exercising governmental functions, i.e. they can regulate control or supervise individuals, or otherwise constrain conduct.

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5 India First Written Submission, para. 234.
14. Australia considers that India’s test does not reflect the jurisprudence on this issue. There is an important distinction between exercising governmental authority and whether an entity is performing governmental functions. In Australia’s view, the Appellate Body’s test for whether an entity exercises, possesses or is vested with governmental authority, does not require a determination by a competent authority as to whether an alleged public body is carrying out a governmental function for governmental purposes.

15. The Appellate Body has said that "Panel’s or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with the government in the narrow sense". Australia considers that this principle should frame the pursuit for clarity over the test for public bodies under Article 1.1(a)(1).

II. CONCLUSION

16. Central to this dispute are important issues of legal interpretation concerning aspects of the SCM Agreement, principally the meaning of the term “public body” as used in Article 1.1(a)(1). Australia is of the view that an entity should not be required to be vested with governmental authority in order to be regarded as a public body, but notes that the broad conclusion reached by the Appellate Body in United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China can accommodate Australia’s view.

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