UNITED STATES – COUNTERVAILING DUTY MEASURES ON CERTAIN PRODUCTS FROM CHINA

(DS437)

Third Participant Oral Statement of Australia

Geneva, 30 April 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 some key issues of systemic and legal interest. I will not repeat the arguments set out in Australia's submission. Rather, I would like to highlight one of the key questions before the Panel in this dispute: 'what is a public body?'

3. Australia considers there may be benefit in this Panel helping to further clarify the meaning of the term 'public body' following the 2011 Appellate Body finding in United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China. In that dispute, 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’ (emphasis added).¹ On that basis, we consider each of the indicia to be alternative considerations. The test for ‘public body’ is not a three stage cumulative test.

4. The Appellate Body has made clear that government ownership or control of an entity is not a proxy for governmental authority. In Australia's opinion government ownership, in and of itself, is not evidence of meaningful control of an entity by a government and cannot, without more, serve as a basis for establishing that the entity possesses, exercises, or is vested with authority to perform a governmental function.

5. However, Australia considers that governmental control over an entity is
dispositive as to whether it is a public body. Government ownership of an
entity can be distinguished from governmental control of such entity.

6. Australia is concerned that in order to meet the Appellate Body’s test, if the
test were to be cumulative, the evidentiary burden for investigating authorities
in determining whether an entity possesses, exercises and is vested with
authority to perform a government function would extend beyond the ordinary
interpretation of Article 1.1(a)(1) of the Agreement on Subsidies and
Countervailing Measures (SCM Agreement). Australia considers this
interpretation is flawed because, amongst other things, it conflates the inquiry
relevant to Article 1.1(a)(1) in relation to public bodies with the test of
whether a private body is entrusted or directed by a government under Article
1.1(a)(1)(iv).

7. Australia considers that one element of an appropriate test for whether an
entity ‘possesses or exercises governmental authority’ could be to look to
governmental control over the entity. In our view, this is a multi-faceted issue
where considerations such as how the entity is managed, the degree of
Ministerial approval and whether a government issues instructions to the entity
may all be relevant considerations, whether by de jure or de facto means. In
Australia's view, the relevant inquiry under Article 1.1(a)(1) of the SCM
Agreement is: 'to what extent does the government control the entity'?
8. In Australia's view, an approach which looks at the 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 is captured by the SCM Agreement.

9. Further, Australia considers that it is not imperative for an entity to be vested with governmental authority, but also notes that the Appellate Body has recognized this as one potential consideration.

Conclusion

10. Finally, we would like to note that 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.

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