United States – Countervailing Duty Measures on Certain Products from China
(WT/DS437)

Third Party Written Submission of Australia

22 March 2013
TABLE OF CONTENTS

TABLE OF WTO DISPUTE SETTLEMENT CASES ................................................................. 3
I. INTRODUCTION ........................................................................................................ 4
II. THE SUBSIDIES AND COUNTERVAILING MEASURES AGREEMENT ... 4
   A. The meaning of the term “public body” ............................................................... 4
   B. The use of out-of-country benchmarks to calculate the benefit to the recipient under the SCM Agreement ............................................................................. 6
   C. Whether export restraints can constitute a financial contribution under Article 1.1(a)(1) of the SCM Agreement ................................................................. 6
III. CONCLUSION ......................................................................................................... 7
## TABLE OF WTO DISPUTE SETTLEMENT CASES

<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
</table>
I. INTRODUCTION

1. Australia considers that these proceedings initiated by China 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 a number of issues relating to the interpretation of the provisions of the SCM Agreement, with a particular focus on:

   (a) the meaning of the term “public body” in Article 1.1(a)(1) of the SCM;

   (b) the use of out-of-country benchmarks to calculate the benefit to the recipient under Article 14(d) of the SCM Agreement; and

   (c) whether export restraints can constitute a countervailable subsidy under the SCM Agreement.

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

II. 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. 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. Australia notes that China’s submission states that after a comprehensive interpretative analysis, the Appellate Body determined that “being vested with, and exercising, authority to perform governmental functions” is the “core feature” that defines a public body.2 However, while the Appellate Body did make a statement similar to this, that statement was made as part of its analysis, following which it stated its conclusion that “a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority”.3

6. As such, Australia’s view is that the Appellate Body’s conclusion is broader than is indicated in China’s submission. Australia considers that the Appellate Body’s

1 Appellate Body Report, US – AD/CVDs, para. 322.
2 China’s first written submission, para. 15. (emphasis added)
3 Appellate Body Report, US – AD/CVDs, para. 317. (emphasis added)
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. These descriptions appear to be alternatives to one another.

7. However, as part of its analysis in forming this conclusion, the Appellate Body made a number of statements that require further analysis.

8. 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)”.

9. 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”.

10. Australia’s view is that the discussion of core and key features 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 of a public body even if not the core or key feature.

11. 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.

12. Australia considers that it may be useful for the Panel in this dispute to carefully examine again the term “public body”. 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”.

---

B. THE USE OF OUT-OF-COUNTRY BENCHMARKS TO CALCULATE THE BENEFIT TO THE RECIPIENT UNDER THE SCM AGREEMENT

13. Australia notes the view of the United States that the use of out-of-country benchmarks is not inconsistent with Article 14(d) of the SCM Agreement.\(^7\)

14. Australia agrees with this statement. In *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, the Appellate Body acknowledged that Article 14(d) allows investigating authorities to use a benchmark other than private prices in that market.\(^8\)

15. However, Australia notes that the Appellate Body also made the statement that “we emphasise once again that the possibility under Article 14(d) for investigating authorities to consider a benchmark other than private prices in the country of provision is very limited.”\(^9\)

16. Australia agrees with both the United States and China that when the Appellate Body reaffirmed these interpretative findings in *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, it emphasised the case-by-case nature of the distortion inquiry.\(^10\)

C. WHETHER EXPORT RESTRAINTS CAN CONSTITUTE A FINANCIAL CONTRIBUTION UNDER ARTICLE 1.1(a)(1) OF THE SCM AGREEMENT

17. In its submission, the United States has argued that “export restraints can constitute a financial contribution under Article 1.1(a)(1)(iv). Through measures implementing export restraints, a government can entrust or direct private enterprise to provide a good to a domestic marketplace if they are going to sell it at all, in accordance with Article 1.1(a)(1)(iii).”\(^11\)

18. The United States’ submission further argues that “as a result of these explicit policies, the private entities are “caused to move in a specified direction”; if they are to continue the sales of their products, they must sell the good to the domestic market. Additionally, through these explicit measures, private entities are “invested with a trust” that they will sell the good to the domestic market. At a minimum, these policies represent a *prima facie* case of entrustment or direction of a private entity.”\(^12\)

19. In relation to Article 1.1(a)(1)(iv), Australia notes the arguments made by the United States that entrustment or direction is not necessarily explicit.\(^13\)

\(^7\) United States' First Written Submission, para. 146.
\(^10\) Appellate Body Report, *United States – AD/CVDs*, para. 446.
\(^11\) United States’ first written submission, para. 302.
\(^12\) United States’ first written submission, para. 299.
\(^13\) United states’ first written submission, para 300.
20. However, even if the arguments of the United States are accepted, Australia notes that Article 1.1(a)(1)(iv) requires that a private body is entrusted or directed by a government “to carry out one or more of the type of functions illustrated in (i) to (iii)”. While the United States has referred briefly to the function illustrated in Article 1.1(a)(1)(iii), this element is not analysed and the focus has been on the “entrustment or direction” element. Australia does not rule out the possibility that an export restraint may constitute a financial contribution, but notes that in order for an export restraint to constitute a financial contribution under Article 1.1(a)(1)(iv), both elements of Article 1.1(a)(1)(iv) must be satisfied.

III. CONCLUSION

21. 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). 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. Australia has also commented on a number of other issues of interpretation, including whether export restraints can be regarded as a financial contribution under Article 1.1(a)(1).