BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

United States – Countervailing Duty Measures on Certain Products from China

(DS437)

Third Participant Oral Statement of Australia

16 October 2014
I. INTRODUCTION

1. Members of the Division, thank you for the opportunity to present Australia’s views in this appeal.

2. This appeal, which concerns aspects of the Panel’s findings in *US – Countervailing Measures (China)*, raises systemic issues concerning the rights and obligations of WTO Members under the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).

3. I will confine my remarks in this opening statement to the following three issues: the interpretation of the identical terms "government" in Article 1.1(a)(1) and Article 14(d) of the SCM Agreement; the use of out-of-country benchmarks for calculating benefit; and the interpretation of Article 2.1 of the SCM Agreement.

II. A FINDING THAT AN ENTITY IS NOT A GOVERNMENT OR PUBLIC BODY DOES NOT PRECLUDE CONSIDERATION OF THAT ENTITY’S CONDUCT FROM THE ANALYSIS OF THE ADEQUACY OF REMUNERATION IN RELATION TO PREVAILING MARKET CONDITIONS UNDER ARTICLE 14(D)

4. Australia observes that in making submissions on the Panel’s application of Article 14(d) of the SCM Agreement, two separate issues may have been conflated. The first issue is the meaning of the term "government" in Articles 1.1(a)(1) and 14(d). The second is, if an entity is not a "government or public body" under Article 1.1(a)(1) of the SCM Agreement, whether that entity’s behaviour or actions are automatically excluded from the analysis of the quantity of any benefit under Article 14(d), in particular, under the second sentence.

5. With regard to the first question, Australia notes that a treaty must be interpreted in accordance with the ordinary meaning given to the treaty terms in their context and in light of the object and purpose of the treaty. Where the same term is used in different provisions of the same treaty, that term should be given the same meaning absent an indication to the contrary. In Article 14(d) of the SCM Agreement, the term

"government" is used in the context of reciting the elements of a certain kind of subsidy, set out in Article 1.1(a)(1)(iii). Australia considers the term "government" in Article 14(d) clearly has the same meaning as in Article 1.1(a)(1), that is, that "government" means both "government (or any public body within the territory of the Member) ".

6. However, with regard to the second question, Australia considers that a finding that a specific entity is not a "government or public body" under Article 1.1(a)(1) would not automatically require competent authorities to disregard the activities or features of that entity when examining "prevailing market conditions" for the purposes of establishing government predominance in the market, under the second sentence of Article 14(d). This is because governments can distort a market without providing a subsidy. For instance, significant governmental regulation of a market or restrictions on operators in the market may lead to price distortion. Therefore, regardless of whether a state-owned enterprise (SOE) is a "public body" providing a financial contribution pursuant to Article 1.1(a)(1) of the SCM Agreement, the behaviour of that SOE may still be relevant for determining whether the government has a predominant role in the market for the purposes of Article 14(d).

7. The guideline in Article 14(d) determines whether a financial contribution has conferred a benefit in comparison to "prevailing market conditions for the good or service in question in the country of provision or purchase". These "prevailing market conditions" may include where the government’s actions have influenced private prices.2 As we have already stated, the term "government" in the first component of Article 14(d) should be given the same meaning as in Article 1.1. However, this does not preclude consideration of whether the government’s predominance in the market may have distorted market prices or the "prevailing market conditions" when considering whether the government has provided goods or services or purchased goods for "less than adequate remuneration", or purchased goods for "more than adequate remuneration".

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8. To this end, Australia agrees with the Panel’s reasoning in this case that the Appellate Body’s findings in US – AD/CVD (China) "did not concern whether or not SOEs are public bodies (and thus government) but rather whether the extent of SOE involvement in a marketplace supports a determination consistent with Article 14(d) that prices in that market were distorted and thus the use of out-of-country benchmarks was appropriate."³

III. OUT-OF-COUNTRY BENCHMARKS MAY BE USED WHERE THE GOVERNMENT’S PREDOMINANT ROLE IN THE MARKET MEANS THAT PRIVATE PRICES ARE DISTORTED, AS ASSESSED ON A CASE-BY-CASE BASIS

9. In calculating benefit under Article 14(d) of the SCM Agreement, out-of-country benchmarks may be used in certain circumstances to determine whether the recipient of a subsidy is "better off than it would otherwise have been absent a contribution."⁴

10. The Appellate Body stated that a benchmark other than private prices of the goods in the country of provision may be used "when it has been established that those private prices are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods."⁵

11. The relevant question when determining when an out-of-country benchmark may be used is therefore whether private prices are distorted. This distortion may occur because of the government’s predominant role in the market as a provider of the same or similar goods. The Appellate Body made clear in US – AD/CVD (China) that this analysis would need to be conducted on a case-by-case basis, "based on all of the evidence that is put on the record, including evidence regarding factors other than government market share."⁶

12. In Australia’s view, government ownership or control of an SOE could be relevant to whether the government has a predominant role in the market, but would depend on the particular circumstances of that market.

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⁴ Appellate Body Report, Canada – Aircraft, para. 157.
IV. ARTICLE 2.1(C) OF THE SCM AGREEMENT DOES NOT CREATE A MANDATORY ORDER OF ANALYSIS FOR THE SUBPARAGRAPHS OF ARTICLE 2.1

13. Australia considers that there is no requirement to consider sub-paragraphs (a) and (b) of Article 2.1 before turning to Article 2.1(c). Rather, the "principles" in these three subparagraphs should be considered holistically. Moreover, the actual weight given to consideration of one or other principle may depend on the particular facts of the case.

14. Australia notes that Article 2.1(c) states that "notwithstanding any appearance of non-specificity resulting from the application of … sub-paragraphs (a) and (b)". This suggests that the principle in this paragraph could be applied whether or not the other principles have been applied.

15. In both US – AD/CVD and EC and certain member States – Large Civil Aircraft, the Appellate Body cautioned against only applying a specific subparagraph of Article 2.1 in isolation from the other subparagraphs "when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case."\(^7\) The Appellate Body in US – AD/CVD also stated that an examination of specificity under Article 2.1 "must allow for the concurrent application of [Article 2.1] principles to the various legal and factual aspects of a subsidy in any given case."\(^8\)

16. In US – AD/CVD, the Appellate Body also noted that in the chapeau of Article 2.1, "the use of the term 'principles' – instead of, for instance, 'rules' – suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle. Consequently, the application of one of the subparagraphs of Article 2.1 may not by itself be

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\(^7\) Appellate Body Report, US – Anti-Dumping and Countervailing Duties (China), para. 371; Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 945.  
determinative in arriving at a conclusion that a particular subsidy is or is not specific.\textsuperscript{9}

17. Together, the Appellate Body’s comments suggest that the order of application or weight given to the subparagraphs may depend on the particular factual circumstances. In some circumstances, it may be evident that a subsidy is specific solely based on consideration of Articles 2.1(a) and (b). In other circumstances, the absence of any explicit restrictions or objective criteria may mean that competent authorities may focus their analysis on Article 2.1(c). As such, Australia considers that these subparagraphs should be considered holistically to determine whether one subparagraph may be more relevant than the others, and that an authority will not necessarily have to apply Articles 2.1(a) and (b) in order to apply Article 2.1(c).

V. CONCLUSION

18. Members of the Division, in our submission, Australia has emphasised that the question of the interpretation of the same term "government" in Articles 1.1(a)(1) and 14(d) of the SCM Agreement is separate to the question of whether the behaviour of SOEs can affect "prevailing market conditions" under Article 14(d) of the SCM Agreement. Australia has also submitted that Articles 2.1(a) and (b) do not need to be applied before Article 2.1(c) can be considered, and that the actual weight given to consideration of one or other principle may depend on the particular facts of the case.

19. Australia would be pleased to answer questions on this or other matters in the course of this appeal. Thank you, Members of the Division.

\textsuperscript{9} Appellate Body Report, \textit{US – AD/CVD (China)}, para. 366.