BEFORE THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION

United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India

(DS436)

Third Participant Oral Statement of Australia

24 September 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 United States – Carbon Steel (India), 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 interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement, in relation to which the Panel’s findings have been appealed by both India and the United States.

II. MEANINGFUL CONTROL BY GOVERNMENT AS EVIDENCE OF A PUBLIC BODY

4. The Panel in this case found that, in certain circumstances, a body may be found to be public in nature when it is subject to "meaningful control" by the government.¹

5. Australia supports the Panel’s approach in this case and considers that it is consistent with the Appellate Body’s previous guidance on this issue.

6. The Appellate Body in United States – Anti-Dumping and Countervailing Duties (China) noted that:

   evidence that a government exercises meaningful control over an entity and its conduct may serve, in certain circumstances, as evidence that the relevant entity possesses governmental authority and exercises such authority in the performance of governmental functions.²

7. In that case, the Appellate Body did not go on to consider what might constitute "meaningful control", and in which circumstances it may serve as evidence that an entity possesses governmental authority. What characteristics might evince

¹ Panel Report, United States – Carbon Steel (India), para. 7.89.
² Appellate Body Report, United States – Anti-Dumping and Countervailing Duties (China), para. 318.
"meaningful control" would therefore be left to subsequent disputes, such as the one before us today.

8. The Panel in this case found that government shareholding, when combined with other factors, may well be indicative of a government’s "meaningful control" of an entity.\(^3\) In this case, those factors were government appointment of directors, as well as "administrative control".\(^4\)

### III. STATUS AND RELEVANCE OF PREVIOUS APPELLATE BODY FINDINGS

9. Members of the Division, much of the appeal on the correct interpretation of the term "public body" concerns the status and meaning of the Appellate Body’s previous guidance on this matter in paragraph 318 of its report in United States – Anti-Dumping and Countervailing Duties (China).

10. Although the Appellate Body’s finding that a "public body is an entity that possesses, exercises or is vested with governmental authority" is oft-quoted, the two sentences that follow in the Appellate Body’s statement should not be overlooked, namely that:

   (1) "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."; and

   (2) that Panels or investigating authorities can only determine whether an entity is a public body "by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense."\(^5\)

11. By reading the Appellate Body’s findings in context, it becomes clear that while the Appellate Body considered that "governmental authority" is central to finding that an entity is a public body, the precise manner in which this governmental authority manifests may vary from entity to entity.

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\(^3\) Panel Report, United States – Carbon Steel (India), para. 7.89.

\(^4\) Ibid. paras. 7.82-7.88.

\(^5\) Appellate Body Report, United States – Anti-Dumping and Countervailing Duties (China), para. 317.
12. Moreover, the role of a WTO panel is not to start this inquiry from the beginning, but rather to review whether, in each set of factual circumstances, the investigating authority has conducted a "proper evaluation" of the entity’s core features and its relationship to the government in order to justify its findings that a given entity is a public body. Accordingly, evidence and reasoning that may have been insufficient in one scenario may be sufficient in another.

13. In view of these considerations, Australia cautions against trying to apply the notion of "governmental authority" too rigidly. This would also be consistent with the Appellate Body’s idea that the precise characteristics of a public body may vary greatly and should be assessed on a case-by-case basis, and would allow investigating authorities to accommodate the different factual circumstances that could arise from one entity to another in one Member to another.

IV. CONCLUSION

14. Members of the Division, your findings in any individual case regarding the interpretation of "public body" will provide important guidance about the kinds of factors that are relevant to satisfying the requirements of Article 1.1(a)(1) of the SCM Agreement.

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

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6 Ibid.