Intervention of Australia to the Dispute Settlement Body on adoption of the Appellate Body’s report.

US – Countervailing Measures on Certain Hot-Rolled Flat Steel Products from India – DS436

19 December 2014

Australia thanks the Appellate Body for its report with respect to US – Countervailing Measures on Certain Hot-Rolled Carbon Flat Steel Products from India.

At this stage, we will confine our comments to the Appellate Body’s findings on the interpretation of the term ‘public body’ in Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures.

We welcome the Appellate Body’s elaboration of the interpretation of ‘public body’ and the circumstances in which meaningful control by government may evince that a body is public in nature.

In this respect, Australia would like to highlight some preliminary observations drawn from the Appellate Body’s report.

Firstly, public body determinations are case-by-case in nature, and that the “nature and amount of evidence and analysis that is sufficient to establish that an entity possesses governmental authority or effectively exercises such authority in the performance of governmental functions” will vary from case to case. [4.42]

Secondly, that an entity need not possess the power to regulate to be vested with governmental authority or exercising a governmental function, and therefore to constitute a public body. [4.17]

– It also does not need to have the power to entrust or direct private bodies to carry out the governmental functions identified. [4.18]

Thirdly, that the Panel in this case had “correctly articulated the appropriate standard when it observed 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 possess governmental authority in the performance of governmental functions.’” (emphasis in original) [4.36]

Fourthly and finally, that evidence only of “formal indicia of control” may not provide a sufficient basis for a determination that an entity is a public body that possesses, exercises or is vested with governmental authority. [4.54]

Overall, Australia observes that “meaningful control” remains a central – but not the only – consideration in determining whether an entity is a public body.

Once again, we thank the Appellate Body for its report and we will continue to review its findings with interest.