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 Written Submission of Australia

3 September 2014
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I. INTRODUCTION

1. This appeal in respect of 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).

2. Australia’s third participant submission focusses on issues of legal interpretation in relation to the term "public body" in Article 1.1(a)(1) of the SCM Agreement.

3. Australia reserves the right to raise other issues at the oral hearing before the Appellate Body.

II. AUSTRALIA’S SUBMISSION ON THE PANEL’S FINDINGS

a. Article 1.1(a)(1) of the SCM Agreement

4. The Panel in this dispute considered the proper interpretation of the term "public body" in Article 1.1(a)(1) of the SCM Agreement. Clarity in the interpretation and application of this provision is important to all WTO Members, as these rules guide investigating authorities in determining which entities are capable of providing subsidies that are able to be disciplined under the SCM Agreement in the form of countervailing duties.

5. Article 1.1(a)(1) of the SCM Agreement states:

1.1 For the purpose of this Agreement, a subsidy shall be deemed to exist if:

   (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:

      (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);

      (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);

      (iii) a government provides goods or services other than general infrastructure, or purchases goods;

      (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments; …
b. Review of jurisprudence on the proper interpretation of the term "public body" for the purposes of Article 1.1(a)(1)

6. WTO Panels and the Appellate Body have considered the meaning of "public body" in a few previous disputes.

7. The Panel in Korea – Commercial Vessels considered that an entity would be a "public body" if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government. The Panel then referred to a number of factors indicating that the entity in that dispute was controlled by the government and was therefore a "public body". These factors were that the entity was 100% owned by the government; that the entity’s operations were controlled by a President who was appointed and dismissed by the President of the Republic of Korea; that the President was assisted by a Deputy President and Executive Directors who were appointed and dismissed by the Minister of Finance and Economy upon the recommendation of the President of the entity, and that the entity’s annual operation programs were subject to Ministerial approval.

8. Following the Panel’s decision in Korea – Commercial Vessels, the issue of interpretation of "public bodies" was again considered by the Panel in United States – Anti-Dumping and Countervailing Duties (China). The Panel in this dispute agreed with the Panel in Korea – Commercial Vessels, finding that an interpretation of "public body" as any entity controlled by the government would best serve the object and purpose of the SCM Agreement.

9. Most recently, the Appellate Body in United States – Anti-Dumping and Countervailing Duties (China) considered the findings of the Panel on this matter and came to a different conclusion about the relationship between formal government ownership by way of a majority shareholding and "public body" for the purpose of Article 1.1(a)(1). In its view, this was not sufficient to justify such a finding. It went on to state:

We see the concept of "public body" as sharing certain attributes with the concept of "government". 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. 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. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1(a)(1) is that of a public body will be in a position to answer that question only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.

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1 Panel Report, Korea – Commercial Vessels, para. 7.50.
2 Ibid.
3 Panel Report, United States – Anti-Dumping and Countervailing Duties (China), para. 8.79.
4 Appellate Body Report, United States – Anti-Dumping and Countervailing Duties (China), para. 318.
5 Ibid. para. 317.
10. The Appellate Body in *United States – Anti-Dumping and Countervailing Duties (China)* also 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.  

11. 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. For the purposes of that dispute, it simply found that majority shareholding was an insufficient basis upon which to determine that an entity was a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement. What characteristics might evince "meaningful control" would therefore be left to subsequent disputes.

c. Status and relevance of previous Appellate Body findings in relation to the meaning of "public body"

12. India has relied heavily on the Appellate Body’s findings in *United States – Anti-Dumping and Countervailing Duties (China)* in its submissions concerning alleged deficiencies in the determinations of the United States Department of Commerce (USDOC) in the investigations in question.

13. While there is no formal rule of precedent in WTO law, the Appellate Body has stated that that "[e]nsuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case." By finding that "absent cogent reasons", the same legal question should be resolved in the same manner in subsequent cases, the Appellate Body has sought to give considerable weight to its prior decisions, while at the same time recognising that where factual circumstances are not the same, WTO panels and the Appellate Body may arrive at different conclusions.

14. For Australia, this qualification is particularly relevant in a case concerning the interpretation of "public body" in Article 1.1(a)(1) of the SCM Agreement. 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

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6 Ibid. para. 318.  
features of the entity concerned, and its relationship with government in the narrow sense.\[8\]

15. 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.

16. 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.

17. 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,\[9\] and would allow investigating authorities to accommodate the different factual circumstances that could arise from one entity to another in one Member to another.

\textit{d. Evidence of governmental authority: exercising governmental functions in fact or the existence of "meaningful control"}

18. The Appellate Body has clarified that although "being vested with governmental authority is the key feature of a public body"\[10\], what matters is "whether an entity is vested with authority to exercise governmental functions, rather than \textit{how} that is achieved."\[11\]

19. Importantly, nothing in the text of the SCM Agreement or in the Appellate Body’s previous statements suggests that the entity must be an agent of the government in order to perform or exercise governmental functions. An express delegation of power from the government to regulate, control or supervise individuals or conduct is therefore not required in order to find that an entity is a public body.

20. The Appellate Body has acknowledged that determining whether an entity is vested with governmental authority in the absence of an express instrument to this effect may be a "more complex" exercise to which "different types of evidence may be relevant".\[12\] To date, the Appellate Body has identified evidence that an entity is ‘in fact’ exercising governmental functions or evidence that a government exercises "meaningful control" over an entity and its conduct as examples that may demonstrate that an entity possesses governmental authority.\[13\] In Australia’s view, the exercise of

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\[8\] Appellate Body Report, United States – Anti-Dumping and Countervailing Duties (China), para. 317.
\[9\] Ibid.
\[10\] Ibid. para. 310.
\[11\] Ibid. para. 318.
\[12\] Ibid.
\[13\] Ibid.
governmental functions through the pursuit of government policies and interests may also be relevant.\textsuperscript{14}

21. In this dispute, the Panel focused on evidence of meaningful control in upholding the USDOC’s determinations that the bodies in question were public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement. It found that "government involvement in the appointment of an entity’s directors… is extremely relevant to the issue of whether that entity is meaningfully controlled by the government, because … [it] suggests that the relationship between the government and that entity is closer than it would be if the government simply held a shareholding in that entity."\textsuperscript{15} The Panel also found that "administrative control" of an entity through the entity being "governed by" the government may provide "additional support for a finding than an entity is under the 'meaningful control' of the government."\textsuperscript{16} That is, the Panel found that "government shareholding, when combined with other factors, may well be indicative of the government’s 'meaningful control' of an entity."\textsuperscript{17}

22. Consistent with its submissions before the Panel,\textsuperscript{18} Australia agrees with the Panel’s approach to the relevance of "meaningful control" in an assessment of whether an entity is a public body, and considers the Panel’s approach to be consistent with the Appellate Body’s previous guidance on this issue.

23. As noted by the Appellate Body in \textit{United States – Anti-Dumping and Countervailing Duties (China)}, evidence that a government exercises meaningful control over an entity can serve as evidence that the entity possesses governmental authority.\textsuperscript{19} Although government shareholding in the entity by itself would not be sufficient to establish "meaningful control", the addition of other factors indicating the existence of such control would be highly relevant.

\textbf{III. CONCLUSION}

24. In this submission, Australia has commented on some issues of legal interpretation in relation to Article 1.1(a)(1) of the SCM Agreement, and specifically in relation to the meaning of the term "public body".

25. Overall, Australia emphasises that the fact that a public body must be an entity that possesses, exercises or is vested with governmental authority should not be cited in isolation from the Appellate Body’s subsequent statements. These statements were that an investigating authority’s role is to conduct a proper evaluation of the core features of the entity and its relationship to government and that a case by case analysis is unavoidable. Accordingly, Australia cautions against trying to apply the notion of "governmental authority" too narrowly.

\textsuperscript{14}See, for example, United States’ Appellee Submission, paras. 567-575.
\textsuperscript{15}Panel Report, \textit{United States – Carbon Steel (India)}, para. 7.85.
\textsuperscript{16}Ibid. para. 7.87.
\textsuperscript{17}Ibid. para. 7.89.
\textsuperscript{18}Australia’s Third Party Written Submission to the Panel, para. 12; Australia’s Third Party Oral Submission to the Panel, para. 8.
\textsuperscript{19}Appellate Body Report, \textit{United States – Anti-Dumping and Countervailing Duties (China)}, para. 318.
26. The Panel in this case found that an entity may be found to be a public body when it is subject to "meaningful control" by the government, and that government shareholding, when combined with other factors "may well be indicative of the government’s ‘meaningful control’ of an entity." Australia supports this approach.

27. The Appellate Body’s findings in any individual case regarding the interpretation of "public body" may provide guidance about the kinds of factors that are relevant to satisfying the requirements of Article 1.1(a)(1) of the SCM Agreement. This guidance must be capable of practical application by investigating authorities in diverse contexts to remedy injurious subsidies.

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20 Panel Report, United States – Carbon Steel (India), para. 7.89.