

**BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION**

*United States – Definitive Anti-Dumping and Countervailing Duties on
Certain Products from China*

(DS379/AB-2010-3)

Third Participant Oral Submission of Australia

Geneva, 13 January 2011

A. Introduction

1. Mr Chairman, Members of the Division, Australia welcomes this opportunity to present its views on some of the issues in this dispute.
2. Australia believes that these proceedings raise core definitional issues relating to the Agreement on Subsidies and Countervailing Measures. These include: the definition of “public body” and the concurrent application of anti-dumping and countervailing measures.

B. Public Body

3. There are three terms of relevance in Article 1 of the Subsidies Agreement: “governments”, “public body”, and “private body” that has been entrusted or directed by a government to make a financial contribution. Australia notes the Panel’s finding in *Japan – Alcoholic Beverages II* that “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”¹ Australia also notes the statement of the Appellate Body in *US – Upland Cotton* that “a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.”² These statements are consistent with fundamental principles of treaty interpretation.
4. In its Appellate submission China argued that the actions of a publicly owned or controlled enterprise should be presumed private, and only fall within the scope of the Subsidies Agreement if such an enterprise is exercising powers vested in it by government.³ A private entity falls within the scope of Article 1.1(a)(1)(iv) of the Subsidies Agreement if it is entrusted or directed by government to make a financial contribution which would “normally be vested in the government”. If, as China submits, a “public body” must exercise powers vested in it by government, the test for a “public body” would overlap to such an extent with the test for “private body” under Article 1.1(a)(1)(iv) of the Subsidies Agreement as to render the term of “public body” inutile.⁴

Factors to be considered in determining government control

5. Australia agrees that the criterion concerning “government control” set forth by the Panel in this dispute is a proper basis for determining whether an entity is a “public body” within the meaning of Article 1.1(a)(1)(i) of the Subsidies Agreement.
6. However, Australia agrees with the concerns expressed by the EU,⁵ Brazil⁶, and Japan⁷ in their Third Participant Written Submissions that while government ownership may be highly relevant evidence of “government control”, it is not necessarily dispositive and other

¹ Panel Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by Appellate Body Report WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125, Para.6.22

² China Appellant Submission, para. 94, quoting Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3, para. 549.

³ China Appellant Submission, paras 28 – 30.

⁴ Following the argument in Brazil’s Third Party Written Submission para 22, the only difference between a “public body” and “private body” covered by Article 1.1(a)(1)(iv) of the Subsidies Agreement would seem to be whether the activity is engaged in by the entity on a regular or occasional basis.

⁵ EU Third Participant Written Submission para 19.

⁶ Brazil Third Participant Written Submission para 26.

⁷ Japan Third Participant Written Submission para 14.

factors should also be considered.⁸ This is consistent with the panel decision in *Korea – Commercial Vessels*, which considered not only government ownership but also the government’s authority over an entity’s operations in determining whether it was controlled by the government.⁹

The ILC Articles

7. Australia submits that the ILC Articles offer no interpretive assistance in this case. Further, Australia submits that the ILC Articles do not have to be found to be inconsistent with Article 1.1(a)(1) of the Subsidies Agreement, under the principle of *lex specialis*, in order not to apply in the present case.

8. As Australia discussed in its written submission, in its view Article 1 of the Subsidies Agreement is not an attribution rule.¹⁰ However, even if Article 1 of the Subsidies Agreement were found to be an attribution rule, as the Panel in this case seemed to suggest,¹¹ it is not inconsistent with the ILC Articles. The ILC Articles only *appear* to be inconsistent due to China’s misapplication of them.¹²

9. As the US noted in its Appellate Submission “... there is simply no indication that the Appellate Body or any prior panel has accepted or endorsed the proposition that the Draft Articles prevent government-owned or government-controlled entities from being considered public bodies unless they are performing governmental functions pursuant to government authority, as China argues”.¹³

C. Concurrent Application of Anti-Dumping and Countervailing Measures

10. Neither the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* nor the Subsidies Agreement address concurrent or parallel anti-dumping and countervailing investigations. The Agreements do not specify that consideration of the imposition of the full dumping margin or the full amount of the subsidy must take into account other trade remedy actions that may be underway in the importing country.

11. In Australia’s view, a strict reading of these provisions, as carried out by the Panel at first instance, is necessary to maintain the integrity of these provisions. Australia submits that the provisions should only be read to permit countermeasures for the specific subsidy or dumping that has been investigated in that particular investigation and not take into account factors outside the investigation.

12. A broader reading of the relevant provisions of the Anti-Dumping and Subsidies Agreements as an implied mechanism to prevent double remedies for the same injury, would

⁸ Such a view should also allay the concerns of Brazil in its Third Party Written Submission para 8, that ownership will automatically deem a body to be a “public body”.

⁹ Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749, para.7.50.

¹⁰ Australia Third Participant Written Submission paras 12 – 15.

¹¹ Panel Report para 8.90.

¹² Australia Third Participant Written Submission paras 22 - 24. Note in the EU Third Participant Written Submission footnote 43 that the EU looks to Article 8 when interpreting “public bodies”, not to Article 5 as China suggests.

¹³ US Appellee Submission para 132.

in Australia’s view, compromise the integrity of the link between the injury and the investigation.

13. Australia submits that the Appellate Body might consider the question of whether Article 11.2 of the Anti-Dumping Agreement could address the situation of double remedies. If, following the imposition of anti-dumping and countervailing duties, a review were to be conducted, authorities might find that the continued imposition of the anti-dumping duty would no longer meet the Article 11.2 test that “the continued imposition of the duty is necessary to offset dumping” nor that “the injury would be likely to continue or recur if the duty were removed or varied”.

14. Australia submits that the Appellate Body might also consider the question of whether Article 21.2 of the Subsidies Agreement could similarly address the situation of double remedies. If, following the imposition of anti-dumping and countervailing duties, a review were to be conducted, authorities might find that the continued imposition of the countervailing duty would no longer meet the Article 21.2 test that “the continued imposition of the duty is necessary to offset subsidization” nor that “the injury would be likely to continue or recur if the duty were removed or varied”.

Conclusion

15. Australia thanks the Chairman and Members of the Division for this opportunity to present its views on some of the issues in this dispute.