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 Written Submission of Australia

Geneva, 22 December 2010

Table of Contents

TABLE OF CASES

Short Title	Full Case Title and Citation
Australia – Salmon (21.5 Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000.
Brazil – Aircraft (Article 22.6 – Brazil)	Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000.
Canada − Aircraft	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999.
EC – Approval and Marketing of Biotech Products	Panel Report, *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, adopted 21 November 2006.
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008.
Korea − Commercial Vessels	Panel Report, *Korea − Measures Affecting Trade in Commercial Vessels*, WT/DS237/R, adopted 7 March 2005.
Korea – Procurement	Panel Report, *Korea – Measures Affecting Government Procurement*, WT/DS163/R, adopted 19 June 2000.
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001.
US − DRAMs	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors* (DRAMS) from Korea, WT/DS296/AB/R, adopted on 20 July 2005.
US – FSC (Article 22.6 – US)	Decision by the Arbitrator, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS108/ARB, 30 August 2002.
US – Gambling	Panel Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R, adopted 20 April 2005, as modified by Appellate Body Report WT/DS285/AB/R.
US - Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996.
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002.
US – Shrimp	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, adopted 6 November 1998.

A. Introduction

1. Australia considers that these proceedings under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) raise significant systemic issues as well as important questions of legal interpretation.

2. In its written submission Australia will focus on a select few issues. However, the fact that Australia has not commented on a particular issue should not be taken as an indication that Australia accepts the views of either party on that issue.

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

B. Public Body

Defining "Public Body"

4. The Panel defined "public body" as "an entity controlled by a government".[1] This is consistent with the finding of the Panel in *Korea − Commercial Vessels* which stated that "an entity will constitute a 'public body' if it is controlled by the government (or other public bodies)".[2] The Panel, as with the panel in *Korea − Commercial Vessels*, considered it to be improper to mix considerations of behaviour of the entity with the nature of the entity.[3]

5. Australia agrees with the Panel that control may be determined principally but not solely on majority ownership. Other factors should also be considered. In *Korea − Commercial Vessels* the Panel also looked to other indicia of government control, including:

a. management of the entity (in that case the company was presided over by a president and executive directors who were appointed and dismissed by the Government of Korea);
b. government ministerial approval of the operations and programs of the entity; and
c. the ability of the government to issue instructions to the entity.[4]

The ILC Articles Reflect Customary International Law

6. China has advocated recourse to the *United Nations International Law Commission Articles on State Responsibility for Internationally Wrongful Acts*[5] (the ILC Articles), and particularly to Articles 4,[6] 5[7] and 8,[8] as relevant context for the interpretation of Article 1 of

[1] Panel Report, paragraphs 8.74-80.
[2] Panel Report, *Korea − Commercial Vessels*, paragraph 7.50.
[3] Panel Report, paragraphs 8.71 – 8.72.
[4] Panel Report, *Korea − Commercial Vessels*, paragraphs 7.50 – 7.53.
[5] *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, United Nations International Law Commission, Report on the Work of its Fifty Third Session (10 August 2001), GA Res. 56/83, para. 3 (Dec. 12, 2001).
[6] Article 4(1) addresses the issue of attribution of conduct by various organs of government to the State:
> The conduct of any State organ shall be considered as an act of that State under international law, whether the organ exercises legislative, executive, judicial or other functions, whatever position it

the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).[9] The Panel's findings in rejecting this argument go beyond those of previous Panels and the Appellate Body.

7. The Panel stated that "in some cases, panels and the Appellate Body have made explicit that the ILC Articles are not binding".[10] However, the two decisions cited by the Panel have only stated that the ILC Articles are not binding "as such", but went on to find that the relevant articles under consideration reflected customary international law. The Appellate Body in *US – Line Pipe* noted that "[a]lthough Article 51 is part of the International Law Commission's Draft Articles, which do not constitute a binding legal instrument as such, this provision sets out a recognized principle of customary international law".[11] The panel in *US – Gambling* observed, when discussing Article 4 that "[t]his provision is not binding as such, but does reflect customary principles of international law concerning attribution".[12] The panel in that case then applied that principle of customary international law to conclude that "official pronouncements by the USTIC in an area where it has delegated powers are to be attributed to the United States".[13]

8. Even though the ILC Articles themselves are not binding under international law, many of the principles they embody reflect customary international law. This customary international law has regularly been reflected in the decisions of Panels and the Appellate Body in their interpretation of the WTO Agreements. In *Australia – Salmon (21.5 Canada)* measures implemented by a provincial government were attributed to the State (reflecting the principle of customary international law embodied in Article 4).[14] In *US – Cotton Yarn* the Appellate Body relied on "the rules of general international law on state responsibility" to support their conclusion on countermeasures[15] and in *US – FSC (Article 22.6 – US)*[16] the decision of the arbitrators relied on the ILC Articles in relation to countermeasures. In *Brazil – Aircraft (Article 22.6 – Brazil)* the decision by the arbitrators stated,

> While the parties have referred to dictionary definitions for the term "countermeasures", we find it more appropriate to refer to its meaning in general international law and to the work of

---

holds in the organization of the State, and whatever its characteristics as an organ of the central government or a territorial unit of the State.

[7] Article 5 addresses the attribution of conduct by private actors to the State, when those actors are exercising government authority:

> The conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance.

[8] Article 8 addresses the attribution of conduct by private actors to the State, when those actors are under the direction or control of the State:

> The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct.

[9] Appellant Submission of China, paragraph 27, 139.

[10] Panel report, paragraph 8.89 The cases cited by the Panel are the Appellate Body report for *US – Line Pipe*, paragraph 259 and the Panel Report for *US – Gambling* paragraph 6.128.

[11] Appellate Body report, *US – Line Pipe*, paragraph 259.

[12] Panel Report, *US – Gambling*, paragraphs 6.128 - 130 (emphasis added).

[13] Panel Report, *US – Gambling*, paragraph 6.130.

[14] *Australia – Salmon (21.5 Canada)*, paragraph 7.12.

[15] Appellate Body report, *US – Cotton Yarn*, paragraph 120.

[16] *US – FSC (Article 22.6 – US)*, paragraph 5.59.

> the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures. We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law. [17]

9. Even the present Panel decision reflected these principles of customary international law when it noted that "government policies at all levels of government in China (central, provincial and municipal) effectuated policies to ensure the provision of loans to the OTR tire industry", and attributed the conduct of all levels of government to the State.[18]

Principles of Customary International Law are "relevant rules of international law applicable in the relations between the parties"

10. Principles of customary international law are "rules of international law applicable in the relations between the parties" for the purposes of Article 31.3(c) of the *Vienna Convention on the Law of Treaties*[19]. In *US – Gasoline*, the Appellate Body noted that the GATT and WTO Agreements should not be read "in clinical isolation from public international law".[20] In *US – Shrimp*, the Appellate Body recognized that Article 31(3)(c) requires general principles of international law to be taken into account when interpreting WTO provisions.[21] In *EC – Approval and Marketing of Biotech Products* the panel stated that there "can be no doubt that ... customary rules of international law are 'rules of international law' within the meaning of Article 31.3(c)"[22] and the panel in *Korea – Procurement* stated that "[c]ustomary international law applies generally to the economic relations between the WTO Members ... to the extent that the WTO Agreements do not 'contract out' from it".[23]

The ILC Articles do not Assist in Determining the Definition of "Public Body" because Article 1.1 of the SCM Agreement is not an attribution rule.

11. The question before the Panel was what constitutes a "public body". In Australia's view the similarities between the language of the ILC Articles and the language of Article 1.1 of the SCM Agreement led the Panel to err in assuming an overlap.

12. The Panel "view[ed] the taxonomy set forth in Article 1.1 of the SCM Agreement at heart as an attribution rule in the sense that it identifies what sorts of entities are and are not to be part of 'government' for the purposes of the Agreement, as well as when 'private' actors may be acting on behalf of 'government'".[24] However, to characterise Article 1.1 of the SCM Agreement as an attribution rule is an incorrect oversimplification. Defining what constitutes a "subsidy" by reference to which entity provides a financial contribution within the meaning of Article 1.1 does not determine when the granting of a subsidy will be

[17] *Brazil – Aircraft (Article 22.6 – Brazil)*, paragraph 3.44 (footnotes omitted).
[18] Panel report, paragraph 9.95.
[19] *Vienna Convention on the Law of Treaties 1969*
[20] Appellate Body report, *US – Gasoline*, paragraph 17.
[21] Appellate Body report, *US – Shrimp*, paragraph 158.
[22] Panel report, *EC – Approval and Marketing of Biotech Products*, paragraph 7.67.
[23] Panel report, *Korea – Procurement*, paragraph 7.96. 'Contracting out' will be discussed further under the part of the submission dealing with *lex specialis*.
[24] Panel report, paragraph 8.90.

attributed to a Member, but simply determines which subsidies granted by which bodies will be included in the coverage of the SCM Agreement.

13. The ILC Articles deal with the issue of attribution of conduct to States; when something done by a State Organ or non-State Organ will be attributed to the State for the purposes of international legal responsibility. The ILC Articles do not seek to address the question of the characterisation of entities covered by particular treaties and so cannot assist with a determination of the definition of "public body". The introduction to the ILC Articles states:

> (1) These articles seek to formulate, by way of codification and progressive development, the basic rules of international law concerning the responsibility of States for their internationally wrongful acts. The emphasis is on the secondary rules of State responsibility: that is to say, the general conditions under international law for the State to be considered responsible for wrongful actions or omissions, and the legal consequences which flow there-from. The articles do not attempt to define the content of the international obligations, the breach of which gives rise to responsibility. This is the function of the primary rules, whose codification would involve restating most of substantive customary and conventional international law.
> …
> (4) A number of matters do not fall within the scope of State responsibility as dealt with in the present articles:
> (a) As already noted, it is not the function of the articles to specify the content of the obligations laid down by particular primary rules, or their interpretation. Nor do the articles deal with the question whether and for how long particular primary obligations are in force for a State. It is a matter for the law of treaties to determine whether a State is a party to a valid treaty, whether the treaty is in force for that State and with respect to which provisions, and how the treaty is to be interpreted.[25]

14. The ILC Articles cannot assist with the question of what is meant by the term "public body" because they do not purport to define the content of public bodies. The ILC Articles are only concerned with whether behaviour by any body, regardless of its characterisation, will be attributed to the State. This does not assist with the specific issue of how to define the second group of the three groups identified in SCM Article 1: "government", "public bodies", and "private bodies" that have been "entrusted or directed" by government.

15. This does not mean that the SCM Agreement and the relevant provisions of the ILC Articles are inconsistent, it simply means the ILC Articles will be of little assistance in the present case. This is recognised by the ILC Articles themselves, which state at Article 56 that "[t]he applicable rules of international law continue to govern questions concerning the responsibility of a State for an internationally wrongful act to the extent that they are not regulated by these articles". Given the question in this case is not whether a Member has granted a subsidy but rather whether a public body has granted a subsidy, this would seem to be the situation in the present case.

[25](emphasis added)

Lex specialis does not Apply as the ILC Articles are not Inconsistent with Article 1.1 of the SCM Agreement

16. As discussed above, there does not seem to be any discernible overlap between Article 1.1 of the SCM Agreement and the ILC Articles. Article 1.1 of the SCM Agreement is not an attribution rule. It seeks to define the scope of the SCM Agreement by defining what constitutes a "subsidy" by reference to which entity provides the financial contribution. The ILC Articles are attribution rules and therefore determine when actions will be attributed to the State. Given the SCM Agreement is not concerned with attributing the subsidies to a Member, but rather to specifically listed entities (namely "government", "public bodies", and "private bodies" that have been "entrusted or directed") there does not seem to be any meaningful overlap.

17. However, even if the Panel was correct in finding that Article 1.1 of the SCM Agreement is an attribution rule and that there is therefore an overlap between Article 1.1 of the SCM Agreement and the ILC Articles, that alone is not sufficient for a finding of *lex specialis*. *Lex Specialis* operates where more specific, specialised rules displace the more general rules, and then only to the extent of any inconsistency.[26] For the *lex specialis* principle to apply it is not enough for the same subject matter to be dealt with by two different provisions; there must be some actual inconsistency between them, or else a discernible intention that one provision is to exclude the other.[27]

18. Thus a particular treaty might impose obligations on a State but remove the State's responsibility for the acts of certain entities. For example, the *Agreement on Technical Barriers to Trade* (TBT Agreement) distinguishes between the obligations on central and territorial governments. This is a variation to the principle of customary international law reflected in ILC Article 4 that obligations on the State are obligations on all levels of government regardless of the position they hold in the State. However, in the TBT Agreement, different obligations are imposed on central and territorial governments. Therefore, while the acts of all State Organs might still be attributed to the Member, under the TBT Agreement not all levels of government have obligations under the agreement that can be breached.

19. The ILC Articles, or the principles of customary international law they reflect, continue to operate in a residual way.[28] Therefore, in the TBT Agreement example, the customary international law reflected in Article 4 continues to operate in relation to the TBT Agreement to the extent that the actions of the various organs of the central government will continue to be attributed to the Member.

20. The SCM Agreement does not seem to evince an intention to differ from the principles of customary international law relating to the attribution of responsibility to the State. The Panel identified three possible actors which could make financial contributions: "governments", "public bodies", and "private bodies" that have been "entrusted or directed"

[26]Article 55, 'These Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law' (emphasis added).
[27]Commentary on Article 55 of the ILC Articles, paragraph 4.
[28]Commentary on Article 55 of the ILC Articles, paragraph 2.

by government to make a financial contribution.[29] Subsidies granted by "governments" are covered by the SCM Agreement pursuant to Article 1.1(a); this is not inconsistent with ILC Article 4, which attributes the conduct of State Organs to the State. "Private bodies" that have been "entrusted or directed" by government to make a financial contribution are covered by the SCM Agreement pursuant to Article 1.1(a)(1)(iv); this is not inconsistent with ILC Article 5, which attributes the conduct of private entities to the State when those entities are empowered by the State to act. "Public bodies" under Article 1.1(a), when defined by the Panel as "an entity controlled by a government"[30], seems very similar to ILC Article 8 which deals with the behaviour of persons or groups acting under the direction or control of the State.

21. Australia considers that China erred in seeking to identify a relationship between the SCM Agreement and the ILC Articles when it suggested that there is a direct correlation between ILC Article 5 and "public bodies", and ILC Article 8 and "private bodies" that have been "entrusted or directed" by government to make a financial contribution.

22. China seems to misalign these categories.[31] The principle expressed in ILC Article 5, which is targeted at entities that are "not an organ of the State ... but ... empowered by the law of that State", more closely resembles the principle of "private bodies" that have been "entrusted or directed" by government to make a financial contribution in SCM Article 1.1(a)(iv) than to a "public body" under SCM Article 1.1(a)(1). Similarly, the principle expressed in ILC Article 8 "person or group of persons ... acting on the instructions of, or under the direction or control of, that State" more closely resembles the definition of "public body" in *Korea − Commercial Vessels* than that of "private bodies" that have been "entrusted or directed" by government to make a financial contribution under SCM Article 1.1(a)(iv).

23. China's misalignment seems to result from using the findings of the Appellate Body in *US − DRAMS* on the principles of entrustment or direction to support arguments on the definition of "public body".[32] However, in *US – DRAMS* the Appellate Body referred to ILC Article 8 in relation to the actions of private, not public, bodies being attributed to a Member due to entrustment.[33] The Appellate Body was simply drawing the same distinction the Panel made (and ILC Articles 4, 5 and 8 make) between the actions of government and the actions of private bodies entrusted with responsibility by government.[34]

24. Therefore, even if the Panel was correct in finding that Article 1.1 of the SCM Agreement is an attribution rule and that there is therefore an overlap between Article 1.1 of the SCM Agreement and the ILC Articles, when the provisions are appropriately aligned there does not seem to be any inconsistency. Australia submits that the Panel should not have found that Article 1.1 of the SCM Agreement, which determines its coverage, was *lex specialis* and therefore inconsistent with principles of customary international law. Rather, Australia submits that the Panel was correct in finding that Articles 4, 5 and 8 of the ILC Articles were not of assistance to this dispute.

[29]Panel Report, paragraph 8.54
[30]Panel Report, paragraphs 8.74-80.
[31]Appellant Submission of China, paragraph 27, 139.
[32]Appellant Submission of China, paragraphs 139-147.
[33]Appellate Body report, *US – DRAMS*, paragraph 112 footnote 179.
[34]Panel Report, paragraph 8.54.

C. Regional Specificity

25. The Panel usefully clarified the terms "certain enterprises" and "designated geographical region" used in Article 2.2 and the relationship between paragraphs 1 and 2 of Article 2 of the SCM Agreement.

26. The Panel stated that the use of the term "certain enterprises" in Article 2.2 "refers to those enterprises located within, as opposed to outside, the designated geographical region in question, with no further limitation within the region being required".[35] Australia agrees that the text of Articles 2.2, 8.1(b) and 8.2(b) as well as the history of the provision support this conclusion.

27. Australia agrees with the determination of the Panel that regional specificity can be determined on the basis of a geographical limitation alone.[36] The panel found that "it is not necessary for a granting authority or the relevant legislation to identify all elements of a specific subsidy for a valid finding of *de jure* specificity" as specificity in Article 2.2 "refers to limitation of access to a subsidy on the basis of geographic location alone, and no further limitation to a subset of the enterprise in the region in question is necessary for such specificity to exist".[37]

28. Australia considers that the test for regional specificity in Article 2.2 sits separately from the tests for specificity provided in Article 2.1(a)-(c). Article 2.2 can be distinguished from the tests in Article 2.1(a)-(c), because it establishes regional locality as the limiting factor that renders a subsidy specific. Australia does not accept that Article 2.2 involves a three-step test: (i) the subsidy is limited to a designated geographic region within the jurisdiction of the granting authority; (ii) the subsidy is limited to certain enterprises; and (iii) the certain enterprises to which the subsidy is limited must be located within that designated geographic region.[38] Australia notes that if such a three-step test for regional specificity were to be adopted, it would be difficult to envisage a situation covered by Article 2.2 that would not already be covered by Article 2.1(a)-(c). Article 2.2 establishes an alternative basis upon which a subsidy might be specific. To require an additional test of limitation to certain enterprises within the regional specificity test already contained in Article 2.2, would render Article 2.2 meaningless and of no effect.

29. Australia also agrees with the Panel's finding on the phrase "designated geographical region". The Panel found that "designated geographical region" in Article 2.2 "can encompass any identifiable tract of land within the jurisdiction of a granting authority".[39]

30. Australia agrees with the Panel that the reasoning of USDOC that the provision of the land-use rights was "regionally specific because the land was physically located in the designated area within the jurisdiction of the granting authority" is "essentially circular … given that land itself is a location".[40] Australia agrees with the concern that the effect of

[35]Panel report, paragraphs 9.128 – 139.
[36]Panel report, paragraphs 9.155, 9.157.
[37]Panel report, paragraphs 9.155-157.
[38]China First Written Submission, para 283, Appellant Submission of China, paragraphs 264-265
[39]Panel report, paragraphs 9.140 – 144, 9.156.
[40]Panel report, paragraph 9.158.

such a finding of specificity would be that "land-use rights, wherever in China they were provided, would be regionally specific, given that land is by definition always limited to its geographic location".[41] Such a finding would be problematic for all countries where government owned land is reassigned, but is particularly problematic in China where "the government [is] the ultimate owner of all land".[42]

31. Australia notes the Panel's finding that it saw "no basis … to establish that the provision of land-use rights in the Industrial Park constituted a distinct regime for the provision of that financial contribution, compared with the provision of financial contributions in the form of land-use rights outside the park".[43] This leaves open the question of whether, for the area to be treated as geographically distinct, the region needs to have some character aside from the simple provision of land-use rights, or whether the land-use rights themselves can provide that distinct character as long as the particular provision of land-use rights is different for the particular area.

32. The Panel seemed to suggest that the latter would suffice; for example the Panel found that this was simply a rezoning of industrial land to agricultural land, and that all industrial land had the same policy applied to it regardless of whether it was in this particular area of not. The Panel stated that it was "not saying that the intrinsic geographic nature of land-use rights would always preclude a regional specificity finding in respect of the provision of land-use rights". For example, the Panel suggested that evidence pointing to "a unique land-use regime, as might have been indicated by special rules or distinctive pricing or other elements that distinguished the provision of land in the Park from the provision of land outside the Park … might have resulted in a finding of specificity consistent with Article 2.2 of the SCM Agreement".[44] Australia agrees with the Panel on these points.

D. Benchmark for the Determination of Benefit

33. Another important issue discussed by the Panel was the appropriate market benchmark to be applied to determine the existence of "benefit" under Article 1.1(b) of the SCM Agreement with respect to a "loan by a government" under Article 14(b) of the SCM Agreement.

34. The Panel noted that "the basic task in calculating a benefit from a government loan is to determine whether, when an investigated entity borrows from the government, the same terms are better-than-commercial, i.e., better than a commercial lender would charge for the same loan".[45] As the Appellate Body stated in *Canada − Aircraft*, "Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison".[46] The questions then become, which "marketplace"; how to determine the boundaries of the relevant market place; and whether the firm could actually obtain a commercial loan on the market.

[41]Panel report, paragraph 9.159.
[42]Panel report, paragraph 9.159 (emphasis added).
[43]Panel report, paragraph 9.159.
[44]Panel report, paragraph 9.162.
[45]Panel report, paragraph 10.108.
[46]Appellate Body report, *Canada − Aircraft*, paragraph 158.

35. The Panel questioned whether, "where there are differences in existing commercial loans held by the borrower such that in the strict sense of the term they are not 'comparable' with the investigated government loan, does Article 14(b) require an investigating authority to conclude that there simply is no benchmark, and that as a result no benefit amount can be determined (which would mean that, in effect, that the benefit amount is zero)?"[47] Australia queries whether that would necessarily mean that the benefit is zero. If there is no benchmark because, while an open market exists, no loan at all could be obtained because the company in question is not creditworthy, then the entire amount of the governmental loan would constitute the benefit. This is consistent with the Panel's statement that the requirement that "the benchmark loan should be one that the borrower 'could actually obtain on the market' … [is] a reference first and foremost to the individual characteristics of that particular borrower (essentially, its risk profile) … how would a commercial lender evaluate that borrower in deciding whether to make the investigated loan?"[48] Similarly, if there is no market for a particular type of loan at all, then the entire amount of the governmental loan would constitute the benefit.

36. However, in the present case there is a market, but it is distorted due to the heavy government involvement in the market. China submits that the Panel's approach was in error because the benchmark created by the US was not a benchmark that the loan recipients could "actually" have obtained on any market and that there are "no 'exceptions' to the express requirements of Article 14(b)".[49]

37. Australia agrees with the approach of the Panel in using a construction based on market principles in this situation. The alternatives for the Panel would have been to find that no analysis could be conducted due to the inability to find a comparable loan and thus that no benefit was conferred, or to find that no such loan existed on the market and therefore the entire amount of the loan constituted the benefit. The former would result in exempting WTO Members with distorted markets from the market based obligations under the SCM Agreement and the latter would have been to treat loans on China's distorted loan market in the same way as loans that no commercial lender would ever grant.

38. As the Panel noted,

> the benchmark established … was not perfect and could not literally represent the situation that would have been faced by any given borrower in China in the absence of the distortions that were found to exist. However, our conclusion reflects our view that the methodology seems to be based on a reasoned and even-handed approach to the unusual situation with which the USDOC was confronted, rather than appearing arbitrary, or biased.[50]

39. The Panel's approval of a benchmark loan created on market principles seems reasonable, particularly because, as the Panel notes,

> in practice the existence of such an ideal benchmark loan will be extremely rare. The commercial loans actually held by a borrower will almost inevitably have certain differences, whether in timing, size, maturity, structure, and/or currency from the investigated

[47]Panel report, paragraph 10.116.
[48]Panel report, paragraph 10.113.
[49]Appellant Submission of China, paragraph 378.
[50]Panel report, paragraph 10.208.

government loan, that would make them not perfectly comparable, or even not comparable at all, to that government loan.[51]

40. Australia also agrees with the view of the Panel that "the currency in which a loan is denominated is of course one of its most important characteristics, and that using as a benchmark a loan in another currency poses particular challenges … [however] currency differences do not necessarily pose the insurmountable hurdle that China posits … [as] there are means to determine the equivalence of loans expressed in different currencies …".[52]

E. Concurrent Application of Anti-Dumping and Countervailing Measures

41. China claims that "[w]here a subsidy that is attributable to imported products has been 'offset' through the imposition of a duty, the SCM Agreement does not authorize the importing Member to offset the same subsidy a second time [as] [t]his would convert countervailing duties from *remedial* duties, imposed solely for the purpose of offsetting subsidization that is causing injury, into *punitive* duties ...".[53]

42. China considers that the imposition of a countervailing duty on top of the subsidy-adjusted anti-dumping duty would be in excess of the subsidy found to exist, and therefore inconsistent with Article 19.4 of the SCM Agreement.[54] It also claims that the resulting countervailing duties are inconsistent with Article 19.3 of the SCM Agreement. This is on the basis that they are not levied "in the appropriate amounts", which China determines can be no greater than the amount necessary to offset the subsidy.[55]

43. In Australia's view, anti-dumping and countervailing measures are trade remedies that address two distinct trade practices and have different purposes and effects. Anti-dumping measures address dumped products that cause injury to the domestic industry in the importing country. Countervailing measures on the other hand address subsidized imports that cause injury to the domestic industry.

44. Neither the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (ADP Agreement) nor the SCM Agreement address concurrent or parallel anti-dumping and countervail 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 which may be underway in the importing country.

45. Nothing in Article VI of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) or elsewhere in the WTO Agreements prevents concurrent or parallel anti-dumping and countervailing duty investigations into the same product. Indeed, the text of GATT Article VI:5 of GATT 1994 reinforces the right of Members to do both.

46. In interpreting Article 19.3 of the SCM Agreement the Panel has read the remedy available as being limited to directly addressing the investigation in question, rather than to

[51]Panel report, paragraph 10.115.
[52]Panel report, paragraph 10.120.
[53]Appellant Submission of China, paragraph 479.
[54]Appellant Submission of China, paragraph 516.
[55]Appellant Submission of China, paragraph 552.

offsetting the injury more broadly (and considering the actual injury when both anti-dumping and countervailing investigations and remedies are taken into account).[56] The Panel's finding with respect to Article 19.3 was that the "appropriate amount" in Article 19.3 is the amount that is "proper and fitting", as per the test set out in *EC – Salmon (Norway)*. The Panel reads this test as applying to the investigation in question: i.e. what is a proper and fitting amount in light of the subsidisation, rather than, what is an appropriate and fitting amount in light of a broader consideration of injury (taking into account anti-dumping duties). That is, in *EC – Salmon (Norway)* the test is the appropriate amount to address the dumping, and thus cross applied to Article 19.3 it should be read as the appropriate amount to offset the subsidy.[57] Australia agrees that the language of Article 19.3 supports this reasoning.

47. This, coupled with the Panel's finding on Article 19.4 that "by its own terms, Article 19.4 of the SCM Agreement is oblivious to any potential concurrent imposition of anti-dumping duties",[58] contributed to the Panel finding that the agreements do allow for offsetting of dumping and countervailing duties to avoid a situation of double remedies.

48. The effect of the Panel's strict reading of these provisions may on occasion lead to a double counting of the injury which could result in remedying the same injury twice. However, the Panel's interpretation is necessary to maintain the integrity of these provisions for cases where double remedies do not arise – in such cases it will be important that the provisions only permit countermeasures for the specific subsidy or dumping that has been investigated in that particular investigation and not take into account factors outside of the investigation.

49. Australia submits that a broader reading of these provisions, as an implied mechanism to prevent double remedies, would compromise the integrity of the individual investigations in the pursuit of preventing an outcome (double remedies) that it is by no means clear the WTO Members intended in their drafting to prevent. As the Panel noted:

a. "the existence of a provision explicitly addressing the issue of the concurrent imposition of anti-dumping and countervailing duties on NME imports in the predecessor to the SCM Agreement would seem ... to lend support to our interpretation of Article 19.4 of the SCM Agreement as not addressing or encompassing the question of the permissibility of double remedies."[59]

b. "China's Protocol of Accession contains no provision explicitly addressing the issue of double remedies even though it appears to allow for the use of countervailing duties while China remains an NME."[60]

50. Australia submits that the Appellate Body might consider the question of whether Article 11.2 of the ADP Agreement could address the situation of double remedies. It seems possible that if, following the imposition of anti-dumping and countervailing duties, a review was conducted, authorities might find that the continued imposition of the duty would no

[56] Panel report, paragraphs 14.125, 14.130.
[57] Panel report, paragraphs 14.126-127.
[58] Panel report, paragraphs 14.113-114.
[59] Panel report, paragraphs 14.119 (footnote omitted).
[60] Panel report, paragraph 14.121.

longer meet the test that "the imposition of the duty is necessary to offset dumping" nor that "the injury would be likely to recur if the duty was removed or varied".

F. Conclusion

51. . In conclusion, Australia submits that:

a. it is appropriate to define "public body" as "an entity controlled by a government"[61] and that control may be determined principally but not solely on majority ownership.

b. the principles of customary international law reflected in the relevant ILC Articles are "rules of international law applicable in the relations between the parties" for the purposes of Article 31.3(c) of the *Vienna Convention on the Law of Treaties* and therefore are a relevant consideration.

c. the ILC Articles cannot assist with the question of what is meant by the term "public body" because they do not purport to define the content of public bodies. The ILC Articles are only concerned with whether behaviour by <u>any</u> body, regardless of its characterisation, will be attributed to the State. This does not assist with the specific issue of how to define "public bodies".

d. the Panel incorrectly invoked *lex specialis* because to the extent there is any overlap between Article 1.1 of the SCM Agreement and the ILC Articles, there is no inconsistency.

e. regional specificity can be determined on the basis of a geographical limitation alone and that the "designated geographical region" in Article 2.2 of the SCM Agreement "can encompass any identifiable tract of land within the jurisdiction of a granting authority".[62] However, there must be some greater identifiable feature to the land than the granting of the subsidy itself to avoid circularity of reasoning.

f. in the situation of a distorted market it is appropriate to look at foreign loans in foreign currencies in order to determine a benchmark.

g. a broader reading of the relevant provisions of the ADP Agreement and SCM Agreement, as an implied mechanism to prevent double remedies for the same injury, would compromise the integrity of the individual investigations in cases where double remedies do not arise.

[61]Panel Report, paragraphs 8.74-80.
[62]Panel report, paragraphs 9.140 – 144, 9.156.