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

Executive Summary

Geneva, 22 December 2010

A. Public Body

1. It is appropriate to define "public body" as "an entity controlled by a government"[1] and that control may be determined principally but not solely on majority ownership. 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.[2]

2. The Panel's findings in rejecting China's arguments in relation to the *United Nations International Law Commission Articles on State Responsibility for Internationally Wrongful Acts*[3] (the ILC Articles) seem to go beyond those of previous Panels and the Appellate Body.[4] 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*[5] and therefore are a relevant consideration.

3. 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".

4. Article 1.1 of the *Agreement on Subsidies and Countervailing Measures* (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

[1] Panel Report, paragraphs 8.74-80.
[2] Panel Report, *Korea − Commercial Vessels*, paragraphs 7.50 – 7.53.
[3] *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).
[4] Appellate Body report, *US – Line Pipe*, paragraph 259; Panel Report, *US – Gambling*, paragraphs 6.128 – 130; *Australia – Salmon (21.5 Canada)*, paragraph 7.12; Appellate Body report, *US – Cotton Yarn*, paragraph 120; *US – FSC (Article 22.6 – US)*, paragraph 5.59; *Brazil – Aircraft (Article 22.6 – Brazil)*, paragraph 3.44; Appellate Body report, *US – Gasoline*, paragraph 17; Appellate Body report, *US – Shrimp*, paragraph 158; Panel report, *EC – Approval and Marketing of Biotech Products*, paragraph 7.67; Panel report, *Korea – Procurement*, paragraph 7.96.
[5] *Vienna Convention on the Law of Treaties 1969*

entities (namely "government", "public bodies", and "private bodies" that have been "entrusted or directed") there does not seem to be any meaningful overlap.

5. 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.[6] Australia submits that the Panel should not have found that Article 1.1 of the SCM Agreement, which determines its coverage, was inconsistent with principles of customary international law. ILC Article 5 and 8, when appropriately aligned with Articles 1.1(a)(1)(iv) ("private bodies" that have been "entrusted or directed" by government to make a financial contribution) and 1.1(a)(1) ("public bodies") respectively, are consistent. China erred in aligning these provisions.

B. Regional Specificity

6. Regional specificity can be determined on the basis of a geographical limitation alone and 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".[7] However, there must be some greater identifiable feature to the land than the granting of the subsidy itself to avoid circularity of reasoning.

C. Benchmark for the Determination of Benefit

7. 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?"[8] 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.

8. However, in the present case there is a market, but it is distorted due to the heavy government involvement in the market. Australia agrees it is appropriate to look at foreign loans in foreign currencies in order to determine a benchmark and to construct a loan on market principles in order to produce a benchmark.

D. Concurrent Application of Anti-Dumping and Countervailing Measures

9. 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

[6] 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).
[7] Panel report, paragraphs 9.140 – 144, 9.156.
[8] Panel report, paragraph 10.113.

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.

10. 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.

11. Australia submits that 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 the pursuit of preventing an outcome (double remedies) that it is by no means clear the WTO Members intended in their drafting to prevent.

12. 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 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".