UNITED STATES – DEFINITIVE ANTI-DUMPING AND COUNTERVAILING DUTIES ON CERTAIN PRODUCTS FROM CHINA

(WT/DS 379)

RESPONSES BY AUSTRALIA TO QUESTIONS POSED BY THE PANEL TO THIRD PARTIES

I. FINANCIAL CONTRIBUTION BY A GOVERNMENT OR ANY PUBLIC BODY

1. Concerning para. 172 of the Report of the Working Party on the Accession of China:

(a) What are the implications of the exchange of views in that paragraph in respect of the status and conduct of Chinese state-owned enterprises, including banks?

AUSTRALIAN RESPONSE

Australia considers that the implication of the exchange of views reported in paragraph 172 of the Working Party Report is that, at the time of the discussions, Chinese state-owned enterprises (including banks) provided financial contributions as government actors for the purposes of Article 1.1(a)(1). However, Australia does not believe that this statement can be taken to imply that the same conditions exist today, without further examination. This is particularly so in light of the second last sentence of paragraph 172, where China states that its 'objective was that state-owned enterprises, including banks, should be run on a commercial basis…'. This would suggest that China had the intention of transitioning its state-owned enterprises, including banks, to be run on a commercial basis.

Consequently, Australia considers that paragraph 172 provides historical evidence of the nature of Chinese state-owned enterprises, including banks, but not evidence of their current nature. However, evidence of a history of government control over state-owned enterprises, including banks, could be relevant as part of the examination of whether a body is 'public' under the chapeau of Article 1.1(a)(1).[1] Australia believes that this would have to be assessed as part of the totality of evidence of government control over an entity.[2]

(b) What is the nature of the commitment undertaken by China in paragraph 172 of the Working Party Report, in respect of the behaviour of state-owned enterprises including banks, and how in practice would that commitment operate?

AUSTRALIAN RESPONSE

In the second last sentence of paragraph 172 of the Working Party Report China is reported to have stated that:

'China's objective was that state-owned enterprises, including banks, should be run on a commercial basis and be responsible for their own losses and profits.'

[1] *Korea-Commercial Vessels*, paras 7.50-7.53.
[2] See the Third Party Submission of Australia at paragraph 12.

The Working Party then 'took note of this commitment'.[3] Australia considers that China's statement is one of intention or endeavour. Thus, Australia believes that the commitment taken by China, and noted by the Working Party in paragraph 172, is to endeavour to transform state-owned enterprises and banks so that they run on a commercial basis and are responsible for their own losses and profits.

(c) Can a government undertake multilateral commitments in respect of the behaviour of "private" actors within its territory?

AUSTRALIAN RESPONSE

Yes, a government can undertake multilateral commitments in respect of the behaviour of "private" actors within its territory. Examples of this are; Article XVII of GATT 1994, Article 3 of the Agreement on Technical Barriers to Trade and Article 13 of the Agreement on the Application of Sanitary and Phytosanitary Measures.

2. Please comment on Mexico's argument (Mexico's Oral Statement para. 14 and Mexico's TPS, para. 43) that a narrow interpretation of the term "public bodies" in Article 1.1 (a)(1) of the SCM Agreement would exclude public enterprises that provide goods and services as provided for in Article 1.1(a)(1)(iii) of the SCM Agreement.

AUSTRALIAN RESPONSE

Australia considers that, as a general principle, the definition of 'public body' is important in determining the scope of the application of the obligations in the SCM Agreement. In the context of the current dispute, a countervailing duty investigation necessarily must first establish the existence of a financial contribution. In this respect, an unnecessarily narrow interpretation of 'public body' will affect the scope of the application of the SCM Agreement as a whole.

More specifically, the term 'public body' appears in the chapeau to Article 1.1(a)(1). As a matter of basic treaty interpretation, the chapeau of a provision governs the application of the sub-paragraphs to that article. In the case of Article 1.1(a)(1), the chapeau establishes who must perform the activities listed in sub-paragraphs (i)-(iv), including Article 1.1(a)(1)(iii), in order for a 'financial contribution' to be found. Consequently, an unnecessarily narrow interpretation of the term 'public body' may improperly exclude instances where goods or services have been provided from the application of Article 1.1(a)(1)(iii).

3. Please comment on Saudi Arabia's argument (Saudi Arabia's Oral Statement, para. 7) that because the *SCM Agreement* provides that public bodies can entrust or direct private bodies to provide a financial contribution, public bodies are, by definition, vested with governmental authority.

AUSTRALIAN RESPONSE

Australia considers that a 'public body' by definition has governmental authority. However, the definition of 'public body' does not require evidence of the body being vested with

[3] WTO Working Party on the Accession of China, *Report of the Working Party on the Accession of China*, WT/ACC/CHN/49, 1 October 2001, Para. 172.

government authority because its authority derives from its identity as a 'public body'. A public body is identified by evidence of government control.[4]

Australia is concerned to ensure that the notion of 'governmental authority' is not used to artificially transpose the test for 'entrustment or direction' onto the definition of 'public body'.

Australia considers that, consistent with the Appellate Body findings in *US _ DRAMs*, a clear distinction needs to be maintained between the definition of 'public body' which relates to the identity of the *actor* on the one hand, and the test for entrustment or direction, which relates to the *action* taken by a Government, on the other.[5] The test for entrustment or direction relates to the government action of entrusting or directing, where:

- a government gives a private body responsibility to perform a function, or;
- exercises its authority over a private body by directing it to perform a function.[6]

II. BENCHMARKS TO CALCULATE THE AMOUNT OF THE SUBSIDY

A. GENERAL CONSIDERATIONS

4. Please provide your views on (i) the interpretation of Section 15(b) of China's Protocol of Accession; and (ii) the relationship of that Section with Article 14 of the *SCM Agreement.* In particular, please explain:

(a) The extent to which the terms "special difficulties", "where practicable" and "should" in Section 15(b) of China's Protocol of Accession should be read as effectively imposing conditions on the use of out-of-country benchmarks by investigating authorities in situations where the use of such benchmarks is not permitted under Article 14 of the *SCM Agreement.*

(b) Whether Section 15(b) imposes certain requirements as to, e.g., factual findings that must be made before an investigating authority can resort to any additional flexibility afforded by Section 15(b).

(c) Once it has been determined, pursuant to Section 15(b) of the Protocol, that an out-of-country benchmark may be used, whether the Protocol imposes any limit on what that benchmark should be, different from any obligations imposed by Article 14 of the *SCM Agreement.*

(d) Whether Section 15(b) of China's Protocol provides an autonomous basis for a finding of inconsistency – in other words, if the Panel were to find that the USDOC could "invoke" Section 15(b) of China's Protocol of Accession, could it: (i) make a finding of violation under Article 14 of the *SCM Agreement*, (ii) would it have to conclude that China did not rely on the appropriate legal basis in its claim, or (iii) would it have to interpret Article 14 in light of Section 15(b) of China's Protocol of Accession?

[4] Korea Commercial Vessels, para. 7.50
[5] *US _DRAMs*, para. 112.
[6] US DRAMs, para. 113.

5. What, if any, is the legal force / relevance of the Working Party Report in interpreting Section 15(b) of the Protocol. Assuming that you consider the Working Party Report to be relevant in interpreting Section 15(b) of the Protocol, please explain how para. 150 of the Working Party Report affects the application of Section 15(b).

6. What are the disciplines/limits that apply to an investigating authority's selection of a benchmark, under Article 14 of the *SCM Agreement*? In other words, are there any limits to the "flexibility" afforded to investigating authorities to choose a methodology that is consistent with the specific subparagraphs of Article 14? In answering this question, please discuss the statement of the *EC – DRAMs* panel that "[i]n light of [...] problems dealing with the prescribed methodology for calculating benefit in Article 14 of the *SCM Agreement*, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology" (para. 7.213, quoted by the Appellate Body in *Japan – DRAMS*, footnote 379), noting that in that case, the panel found that the methodology used by the investigating authority did not pass "this basic reasonableness test". How do you see the relationship between this line of reasoning and that of the Appellate Body in *US - Softwood Lumber IV*?

AUSTRALIAN RESPONSE

Both the decision by the Panel in *EC-DRAMs* and the Appellate Body decision in *US-Softwood Lumber* broadly address the issue of scope of the obligations in Article 14 and the lack of detail in that Article on the precise method to be used in selecting and applying market benchmarks. However, they address different aspects of those issues. The Appellate Body in *US-Softwood Lumber* examined the effect of the chapeau of Article 14 on the interpretation of the obligations in paragraphs (a) through (d). In doing so they found that the term 'guidelines' in the chapeau to Article 14 "provides the "framework within which this calculation is to be performed", although the "precise detailed method of calculation is not determined".[7] They further concluded that:

> 'Taken together, these terms establish mandatory parameters within which the benefit must be calculated, but they do not require using one methodology for determining the adequacy of remuneration for the provision of goods by a government. Thus we find merit in the United States Submission that the use of the term "guidelines" in Article 14 suggests that paragraphs (a) through (d) should not be interpreted as "rigid rules that purport to contemplate every conceivable factual circumstance".'[8]

Conversely, the Panel in *EC-DRAMs* was addressing the far narrower question of how best to measure benefit under Article 14(b) in the absence of any comparable commercial loan actually available on the market. The text of Article 14 is silent on how benefit can be determined in the situation where the loan under examination is simply not otherwise available on the market and hence where there is no comparable market benchmark. In this very narrow set of circumstances, where the text of Article 14 provides no guidance, the Panel found that 'the investigating authority is entitled to considerable leeway in adopting a reasonable methodology'.

Australia submits that this test should not be applied more broadly than in the specific circumstances where the text of Article 14 provides no guidance. Otherwise, in terms of the

[7] Appellate Body Report, US-Softwood Lumber, para 92, quoting the Panel in that case.
[8] Appellate Body Report, US-Softwood Lumber, para 92.

interpretation of paragraphs (a)-(d) in light of the chapeau of Article 14, Australia agrees with the principles identified by the Appellate Body in *US-Softwood Lumber* that:

- Article 14 provide mandatory guidelines for the framework within which a calculation is to be performed,

- Where Article 14 does not require a particular methodology for calculating benefit, there is some flexibility for a Member to use its own methodology provided that it conforms with the guidelines, and

- paragraphs (a)-(d) in Article 14 should not be interpreted as 'rigid rules that purport to contemplate every conceivable factual circumstance'.[9]

Australia also notes that Article 14 requires that the application of the investigating authority's method "shall be transparent and adequately explained".

B. LOANS

7. What is your view of China's argument (China's FWS para. 274) that the USDOC's rejection of China's interest rates might be a second-guessing of the monetary policy choices of China?

AUSTRALIAN RESPONSE

China's argument in paragraph 274 of its written submission relates to 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. As Australia stated in its written submission, Article 14(b) states that the comparison should be with a 'comparable commercial loan' actually obtainable on 'the market'. It does not refer to 'prevailing market conditions…in the country of provision or purchase', as subparagraph (d) of Article 14 does. A key term of any commercial loan is the interest rate applicable to that loan. Consequently, if a loan is actually obtainable on the market, then the terms of that loan, including the interest rate, do not have to relate to the 'prevailing market conditions…in the country of provision or purchase'. Without making any conclusion in respect of China in this case, if a domestic market does not provide a comparable commercial loan, the domestic level of interest rates may not be relevant to determining benefit.

III. "OFFSETS" FOR UNSUBSIDIZED TRANSACTIONS

8. China refers to the Appellate Body jurisprudence on zeroing in support of its argument with respect to "offsets". Please comment on the analogy drawn by China with this jurisprudence, which concerns the treatment of subcategories of investigated products.

9. Can it be argued that determinations of benefit pursuant to *SCM* Article 14(d) that do not reflect or take into account normal fluctuations or variations in the price of a good or service do not reflect "prevailing market conditions"?

[9] Ibid.

IV. SPECIFICITY

10. What is the relevance to the issue of *de jure* specificity of the approach of the panels in *EC-DRAMs*, *US-DRAMs* and *Korea –Commercial Vessels*, i.e., that these panels considered the question of specificity as a separate and independent condition from financial contribution and benefit?

AUSTRALIAN RESPONSE

The relevance is that the Panel's approach in *EC-DRAMs*, *US-DRAMs* and *Korea –Commercial Vessels* accord with the principle that the question of *de jure* specificity does not require an analysis of the constituent elements of a subsidy. As Article 1.2 of the SCM Agreement suggests, the issue of specificity only arises once a subsidy has been established to exist. The elements of a subsidy under Article 1 of the SCM Agreement must be established first. The question of specificity only arises subsequently, as a separate enquiry into whether the subsidy is subject to Parts II, III, or V of the SCM Agreement. The Panels in *EC-DRAMs*, *US-DRAMs* and *Korea –Commercial Vessels* only addressed the question of specificity as a separate enquiry once they had found a subsidy to exist in accordance with Article 1.[10]

11. Both parties acknowledge that an explicit limitation is necessary for a subsidy to be *de jure* specific in the sense of Article 2.1 of the *SCM Agreement*. What must be explicitly limited, the financial contribution, the benefit, both, or either one?

AUSTRALIAN RESPONSE

The chapeau to Article 2.1 refers to a 'subsidy, as defined in paragraph 1 of Article 1'. Paragraph 1 of Article 1 defines a subsidy as a financial contribution provided by a government or public body (Article 1.1(a)(1)) that 'thereby' confers a benefit (Article1.1(a)(1)(2)). Article 1.1(a)(1)(2) is notably separate and uses the passive voice, so that the benefit is conferred by the 'financial contribution' as defined in Article 1.1(a)(1) and not the government directly. Conversely, the financial contribution must occur through the action of the government or a public body. So long as the government provides the financial contribution and a benefit arises, the government need not be seen to have directly supplied a benefit. This approach is consistent with the Appellate Body's findings in *US _ Countervailing Measures* that there may be a direct or indirect recipient of the benefit of the financial contribution.[11]

Consequently, Australia considers that the test for *de jure* specificity does not require a direction from the government on what the benefit will be and who it will go to. Australia would also like to reiterate the arguments made in its response to question 10, above. Article 1.2 of the SCM Agreement indicates that the issue of specificity only arises once a subsidy has been established to exist and, as a separate enquiry, does not require an analysis of the constituent elements of a subsidy.

[10] Panel Report, *EC-DRAMs*, paras 7.216-232, Panel Report, *US-DRAMs*, paras 7.192-208, Panel Report, *Korea-Commercial Vessels*, paras, 7.192 and 7.308.

[11] *US _Countervailing Measures on Certain EC Products*, para 143

V. DOUBLE REMEDY

12. Do the negotiations that led to the conclusion of the Uruguay Round – and in particular the adoption of the *SCM Agreement* – provide any information as to the reasons why Article 15 of the Tokyo Round Subsidies Code was not replicated in the *SCM Agreement*? Please provide any relevant documentary evidence to the Panel.

13. Please explain and discuss the actual or potential effects on export prices of the different subsidies and types of subsidies countervailed by the USDOC in the investigations at issue.

14. Please discuss whether, in your view, the issue of "double remedies" potentially arises in the context of simultaneous AD and CVD investigations involving producers from a "market-economy" Member, and in which (i) the normal value is determined on the basis of a constructed normal value, in totality or in part; and (ii) the subsidies countervailed are domestic subsidies. If you consider that several scenarios may arise, please discuss. Please indicate whether, in your view, the importing Member would, in such a scenario, be required, under the covered agreements, to ensure that no "double remedy" is imposed.

AUSTRALIAN RESPONSE

In Australia's view, the calculation of 'normal value' in an anti-dumping investigation is a separate enquiry to that of determining whether a subsidy exists and the amount of that subsidy (which is the focus of a countervailing duty investigation).

As Australia stated in its written submission, 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.

As provided in Article VI:1 of GATT 1994 and Article 2.1 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*, an anti-dumping investigation entails a price comparison between the normal value of the product in the home market of the exporting country and the export price in the export market. It necessarily examines company actions in producing and selling the product which is the subject of the anti-dumping investigation. This is a different exercise to determining whether a subsidy exists and the amount of that subsidy in terms of benefit under Article 14 of the SCM Agreement.

15. Would the legal analysis of the WTO-consistency of "double remedies" imposed with respect to imports from other NMEs differ from that of the WTO-consistency of "double remedies" imposed with respect to Chinese imports?

AUSTRALIAN RESPONSE

Where a Member considers China to be an NME there is no reason for the legal analysis to differ from that applied to other NMEs, unless one of the NME's Accession Protocols alters that country's obligations with respect to Article VI:5 of GATT.

16. Please discuss whether, in your view, it is for the investigating authority to examine the question of the double remedy on its own initiative, or, instead it is for an interested party to justify the need for an adjustment to avoid double remedies.

17. **(*Australia*) Please clarify your statement, at para. 51 of Australia's Third Party Submission that if a "surrogate" market is used to establish a normal value in an anti-dumping investigation because there are no sales in the ordinary course of trade, such sales do not reflect the subsidized production in the home market and that "... it could be argued that such prices are used to ensure that there is no perversion of prices in determining the normal value."**

AUSTRALIAN RESPONSE

Australia's intention in making this statement was to reiterate that the use of a surrogate market in an anti-dumping investigation is a legitimate practice in the calculation of a dumping margin and that it does not relate to an assessment of whether a subsidy exists or a calculation of the amount of that subsidy. The last line "... it could be argued that such prices are used to ensure that there is no perversion of prices in determining the normal value" is a reference to the purpose behind using a surrogate market in an anti-dumping investigation. This is in contrast to the purpose and procedures of a countervailing duty investigation under the SCM Agreement.

18. (*Japan*) Japan argues that Article VI:5 of the GATT embodies the concept that a Member may not impose a double remedy (Japan Third Party Submission, para. 7, Japan Oral Statement, para. 5). Japan also seems to argue that Articles 19.3 and 19.4 of the *SCM Agreement* are not proper legal bases for China's claims. Does Japan consider that other provisions of the covered agreements would provide a legal basis for China's "double remedy" claims?

19. Is the term "situation of export subsidization" in Article VI:5 of the GATT to be equated with "export subsidies"? Is it conceivable that it may also cover certain situations in which a domestic subsidy is provided to an exported good?

AUSTRALIAN RESPONSE

Australia considers that the meaning of the term 'situation of export subsidisation' in GATT Article VI:5 is unclear.[12] Moreover, it cannot be assumed that the term 'situation of export subsidisation' in GATT Article VI:5 can be equated with any meaning attributed to the categories of subsidies that exist under the SCM Agreement. The meaning of 'a situation of export subsidisation' as agreed to in 1947 may not correspond with the definition of a prohibited or actionable subsidy as agreed to in the SCM Agreement in 1994. As a consequence, Australia considers that it is conceivable that 'situation of export subsidisation' may also cover certain situations in which a domestic subsidy is provided to a good which is exported.

20. Assuming that, as acknowledged by China, China's Protocol of Accession contemplates the simultaneous use of the NME methodology and of CVDs, does the Protocol contain any limitation on the imposition of "double remedies"?

21. Please discuss whether it is possible to challenge under Article 19.4 of the *SCM Agreement* not only whether the CVDs imposed as a result of an investigation exceed "the amount of the subsidy found to exist" in that investigation, but also whether the "amount of the subsidy" that was "found to exist" in the investigation was determined in accordance with the provisions of the *SCM Agreement* or Article VI of the GATT.

[12] Third Party Submission of Australia, para 49.

AUSTRALIAN RESPONSE

As the title to Article 19 suggests, '*Imposition and Collection of Countervailing Duties*', Article 19.4 relates only to the amount of countervailing duty imposed. The wording of Article 19.4 and its position in the SCM Agreement reflects the fact that the question of the 'amount of the subsidy found to exist' and its calculation has already been addressed prior to a consideration of Article 19.

22. Regarding China's "as such" claims, given China's formulation of the measure at issue as an omission, please explain what China needs to demonstrate in order to meet its burden of establishing the violations of the covered agreement that it alleges with respect to its claims concerning the alleged "failure".

23. For China to succeed in demonstrating that a double remedy exists as a result of the USDOC's simultaneous application of the NME methodology and CVDs (irrespective of the WTO-consistency of such a "double remedy") is it necessary for China to establish that the *totality* of the subsidy is so "double remedied" or is it sufficient for China to demonstrate that there is some overlap when the two remedies are used together?

AUSTRALIAN RESPONSE

Article VI:5 of GATT refers to the 'same situation of dumping or export subsidisation'. As Australia stated in its written submission, the meaning and scope of 'same situation' is unclear. It is not clear whether this is referring to the existence of subsidisation or dumping or to the injurious effects. There is nothing in the text of Article VI:5 to suggest that 'same situation' requires that the whole amount of a countervailing duty address 'the same situation' that the whole amount of the anti-dumping duty addresses.

24. Does China, to succeed in its "as applied" claim under Article I:1 of the GATT 1994, need to establish "like products"?

VI. CONSULTATIONS

25. Is the focus of a CVD investigation a "product" or a "subsidy", and does this determine the focus of the consultations provided for Article 13 of the *SCM Agreement*? In answering, please draw on all the provisions of the *SCM Agreement* that you consider relevant.