

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

(WT/DS379)

Third Party Submission of Australia

Geneva, 5 June 2009

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Short Title	Full Case Title and Citation
<i>Canada – Aircraft</i>	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft</i> , WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377.
<i>EC _ DRAMs</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>Japan _ DRAMs</i>	Panel Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/R, circulated 13 July 2007
<i>Korea _ Commercial Vessels</i>	Panel Report, <i>Korea _ Measures Affecting Trade in Commercial Vessels</i> , WT/DS237/R, adopted 7 March 2005.
<i>Mexico _ Olive Oil</i>	Report of the Panel, <i>Mexico _ Definitive Countervailing Measures on Olive Oil from the European Communities</i> , WT/DS341/R, adopted 4 September 2008.
<i>US _ DRAMs</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMs) from Korea</i> , WT/DS296/AB/R, adopted on 20 July 2005.
<i>US _ Countervailing Measures</i>	Appellate Body Report, <i>United States — Countervailing Measures on Certain EC Products</i> , WT/DS212/AB/R, adopted 9 December 2002.
<i>US _ Lead Bismuth</i>	Panel Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/R, Adopted 23 December 1999, Modified by the Appellate Body Report, WT/DS138/AB/R, 10 May 2000.
<i>US _ Lead Bismuth (AB)</i>	Appellate Body Report, <i>United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom</i> , WT/DS138/AB/R, 10 May 2000.
<i>US – Softwood Lumber IV</i>	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> ,WT/DS257/R and Corr. 1, adopted 17 February 2004, modified by Appellate Body Report, WT/DS257/AB/R.
<i>US – Softwood Lumber IV (AB)</i>	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada</i> , WT/DS257/AB/R, adopted 17 February 2004, DSR 2004:II, 571
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R, 21 March 2005.

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 particular, these proceedings raise core definitional issues relating to the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) and their application in the conduct of countervailing duty investigations. A countervailing duty investigation necessarily must establish the existence, degree and effect of a subsidy. Australia is concerned that the obligations in the SCM Agreement not be undermined by efforts at circumventing the fundamental requirements of Articles 1 and 2 of the SCM Agreement.
3. 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.
4. The issues which Australia addresses in this submission are:
 - a) the appropriate definition of ‘public body’ under Article 1.1(a)(1) of the SCM Agreement;
 - b) the test for entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement;
 - c) the appropriate treatment of subsidized inputs purchased from trading companies under Article VI:3 of GATT 1994 and Article 10 of the SCM Agreement;
 - d) the appropriate treatment of ‘policy lending’ programmes under Article 2 of the SCM Agreement;
 - e) the meaning of regional specificity under Article 2.2 of the SCM Agreement;
 - f) the benchmark for determination of benefit under Article 14(b) of the SCM Agreement; and
 - g) the concurrent application of anti-dumping and countervailing measures under Article VI:5 of GATT 1994.
5. Australia reserves the right to raise other issues in the third-party hearing with the Panel.

B. Public Body

6. A significant issue that arises in this case is whether State Owned Commercial Banks (SOCBs) should properly be characterised as ‘public bodies’ for the purposes of Article 1.1(a)(1) of the SCM Agreement. Australia notes China’s

emphasis on a public body carrying out ‘functions of a governmental character.’¹ In particular, China argues that a link exists between the characterisation of public body under Article 1.1(a)(1) and the functions exercised by the entity. It erroneously relies on findings of the Appellate Body in its report on *US – DRAMS* on the principles of entrustment or direction to support arguments on the definition of public body.²

7. In order to establish the existence of a subsidy under Article 1 of the SCM Agreement, and specifically the first element of a subsidy, Article 1.1(a)(1) of the SCM Agreement requires that a financial contribution be “by a government or any public body”. The Panel in *Korea – Commercial Vessels* stated that ‘an entity will constitute a “public body” if it is controlled by the government (or other public bodies)’.³ It noted that this was consistent with the fact that Article 1.1(a)(1) provides that both governments and public bodies are referred to as “government” in the SCM Agreement.⁴ It went on to note that the actions of any entity controlled by government or other public bodies are attributable to government.
8. In Australia’s view, the term ‘public body’ is treated as an equivalent of government in Article 1.1(a)(1) because public bodies, by their very nature, are an extension of government for the purposes of implementing government policy. Therefore, the actions of a public body are directly attributable to government. Conversely, Article 1.1(a)(1)(iv) recognises that private bodies can be used indirectly by governments to provide a financial contribution. Consequently, Article 1.1(a)(1)(iv) imposes an additional test to attribute the actions of a private body to the government – that of entrustment or direction.
9. Australia submits that the Panel should be mindful not to conflate the test for entrustment or direction under Article 1.1(a)(1)(iv) with the definition of a public body for the purposes of Article 1.1(a)(1)(i)-(iii).
10. Australia considers that, consistent with the Appellate Body findings in *US – DRAMS*, a clear distinction needs to be maintained between the test required in subparagraphs (i)-(iii) which relate to the identity of the *actor* (public body) on the one hand, and subparagraph (iv) which relates to the nature of the *action* (including entrustment or direction), on the other.⁵ The Panel in *Korea – Commercial Vessels* considered similar arguments which conflated the definition of ‘public body’ with the notion of an entity exercising ‘official capacity’ or performing functions that can be recognised as being of a governmental character.⁶
11. In that case the Panel highlighted the difficulty that could arise in defining an entity as public or private depending on the functions it was exercising at the time.⁷ An entity can exercise dual government and non-government functions

¹ First Written Submission of China, para 68

² First Written Submission of China, para 72.

³ *Korea – Commercial Vessels*, para. 7.50

⁴ *Korea – Commercial Vessels*, Footnote 43; see also *EC – DRAMS*, para. 7.49.

⁵ *US – DRAMS*, para. 112.

⁶ *Korea – Commercial Vessels*, para. 7.48.

⁷ *Korea – Commercial Vessels*, para. 7.45.

intermittently, in that private bodies can exercise public functions and public bodies can exercise ostensibly private commercial functions. Ultimately, a body's activities are not conclusive of that body's character at any given time. Contrary to the test for entrustment or direction, which hinges on the particular activity being exercised, the definition of public body relates to the fundamental character of that entity. Consequently, the Panel in *Korea – Commercial Vessels* instead focused on the defining characteristic of a public body, which it determined to be government control.⁸

12. Australia submits that the test for identifying whether an entity is a public body should relate to evidence of government control over the entity and not the daily functions or actions of the entity. Government ownership of an entity is strong evidence of government control but should be considered among other factors and evidence of control.⁹ In *Korea – Commercial Vessels* the Panel also looked at other indicia of government control, including:

- 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);
- government ministerial approval of the operations and programs of the entity; and
- the ability of the government to issue instructions to the entity.¹⁰

13. The Panel identified other factors that may be used to support the argument of government control but that should be used with caution, including the extent to which a company is driven by a public policy objective. Ultimately, while no one factor would necessarily be determinative, 'public status can be determined on the basis of government control'.¹¹

C. Entrustment or Direction of a Private Body

14. However, Article 1.1(a)(1)(iv) recognises that private bodies can also be an indirect channel through which governments can provide a financial contribution. Consequently, Article 1.1(a)(1)(iv) provides for a financial contribution provided by a private body to be attributed to a government if the private body is entrusted or directed by the government to carry out a type of function that, if undertaken directly by government or a public body, would constitute a financial contribution by a government.

15. For Article 1.1(a)(1)(iv) to apply, there must be "entrustment or direction" of a private body by a government. Further, Australia notes that the test of entrustment or direction of a private body under Article 1.1(a)(1)(iv) is distinct from the meaning of a public body for the purposes of Article 1.1(a)(1)(i)-(iii).

⁸ *Korea – Commercial Vessels*, para. 7.50.

⁹ The Panel in *Korea – Commercial Vessels* stated that in that case government Control was "primarily evidenced by the fact that KEXIM is 100% owned by GOK or other public bodies" at paragraph 7.50.

¹⁰ *Korea – Commercial Vessels*, paras. 7.50 – 7.53.

¹¹ *Korea – Commercial Vessels*, para. 7.55.

An important issue that arises is the appropriate evidentiary standard to be applied to determine the existence of entrustment or direction.

16. In Australia's view, the text of Article 1.1(a)(1)(iv) relates to the government action of entrusting or directing a private body to carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii).¹² The Appellate Body in *US – DRAMs* articulated a test for 'entrustment and direction' that, in Australia's view, is an accurate interpretation of the SCM Agreement. According to the Appellate Body:

- i. 'entrustment' 'requires that the government give responsibility to a private body'¹³, and
- ii. 'direction' requires a government to 'exercise its authority over a private body'.¹⁴

The Appellate Body found that government direction could be more subtle than a command but involves some form of compulsion or enticement by the government.¹⁵ Hence, in Australia's view, entrustment or direction will not necessarily arise only in terms of a direct instruction to act or through the creation of a law by government.

17. The Panel in *EC – DRAMs* also noted that entrustment or direction 'does not necessarily need to be "explicit".' It elaborated that Article 1.1(a)(1)(iv) is to ensure that indirect government action is also captured by the SCM Agreement. If the scope of Article 1.1(a)(1)(iv) were limited to only explicit government acts, governments would be able to circumvent their commitments under this provision.¹⁶ The Appellate Body in *US – DRAMs* recalled this provision is in effect an anti-circumvention provision.¹⁷

18. The Panel in *Japan – DRAMs* stated that 'since entrustment or direction of a private body will rarely be formal, or explicit... allegations of government entrustment or direction are likely to be based on pieces of circumstantial evidence.'¹⁸ This is consistent with the earlier Appellate Body statement in *US – DRAMs* that 'entrustment or direction need not be determined on the basis of explicit acts.'¹⁹ Instead, the Appellate Body determined in that case that a Panel's assessment requires 'a consideration of the inferences that might reasonably have been drawn... on the basis of the *totality* of the evidence.'²⁰

19. Article 1.1(a)(1)(iv) does not require that there be an explicit command or instruction to a private body in terms which satisfy the requisite elements of a subsidy under the SCM Agreement. Rather, a complaining party must provide evidence sufficient in its totality to justify a finding of entrustment or direction to

¹² *US – DRAMs*; *Japan – DRAMs*, paras 7.62-7.78; *EC – DRAMs*, para 7.56.

¹³ *US – DRAMs*, para. 113.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, para 111.

¹⁶ *EC – DRAMs*, para 7.57 and footnote 65.

¹⁷ *US – DRAMs*, para 113

¹⁸ *Japan – DRAMs*, para. 7.73.

¹⁹ *US – DRAMs*, para. 136.

²⁰ *US – DRAMs*, para. 154.

carry out one or more of the type of functions illustrated in subparagraphs (i) to (iii).

D. Subsidized Inputs Purchased from Trading Companies

20. A further issue is the treatment of subsidized inputs purchased from a trading company by the producer of the imported product. Broadly, China claims that where there are sales of inputs purchased from public bodies by trading companies, (i) a financial contribution to the input producer must be established²¹; (ii) a finding that a benefit was received by the input producer must also be made²²; and (iii) a pass-through analysis is required. China has not made reference to the appropriate provisions in the WTO Agreements in support of this approach.
21. In Australia's view, and as the Appellate Body noted in *US – Softwood Lumber IV*²³, Article 10 of the SCM Agreement and Article VI:3 of GATT 1994 are relevant provisions when examining subsidization of inputs to produce the imported product. The Appellate Body in that case found that a 'pass through analysis' is not necessary in every situation in which a subsidy is provided on the production of an input product.²⁴
22. Australia notes that the Panel in *Mexico – Olive Oil*, in recalling the Appellate Body's analysis in *US – Softwood Lumber IV*, summarised the principles for when a pass-through analysis would be necessary stating that 'a pass through analysis is required in circumstances in which *both* of the following conditions are present:
1. A subsidy is provided in respect of a product that is an input into the processed, imported product that is the subject of the countervail investigation; and
 2. The producer of the input product and the producer of the imported product subject to the countervail investigation are unrelated.'²⁵
23. 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.²⁶ Therefore, the direct recipient of the benefit may be the input producer and the indirect recipient may be the producer of the imported product.
24. Notwithstanding the issue of whether or not a pass-through analysis must be made, Australia is of the view that the Panel could also examine what could constitute a pass-through analysis. Such an analysis could include examination: (i) establishing the existence of a subsidy provided to an input product; and (ii) of the price paid by the producer of the imported product subject to the countervail investigation compared with an appropriate benchmark price, to reveal the benefit

²¹ China First Written Submission, paras 103-104

²² China First Written Submission, para 134-136

²³ *US – Softwood Lumber IV (AB)*, para 134

²⁴ *US – Softwood Lumber IV (AB)*, para 141.

²⁵ *Mexico – Olive Oil*, para. 7.142.

²⁶ *US – Countervailing Measures on Certain EC Products*, para 143

conferred to that producer. In Australia's view, this would reflect the understanding of 'countervailing duty' as defined in footnote 36 of Article 10 of the SCM Agreement and Article VI:3 of GATT 1994, that countervailing duties are intended to offset subsidies bestowed directly or indirectly.

E. Policy Lending

25. A further important issue that arises in this case is the treatment of 'policy loans' provided by China's SOCBs and policy banks and the appropriate test to be applied to demonstrate the existence of a subsidy and specificity in cases of 'policy lending'. In Australia's view 'policy lending' is a term that has been applied to describe a certain type of subsidy program whereby a government makes a policy decision to provide loans to certain industries on preferential terms.
26. China argues that the test for *de jure* specificity in relation to 'policy lending' requires three elements be established:
- 'the legislation must specify a "subsidy"...identify the relevant financial contribution, and provide an indication of the benefit.';
 - 'the legislation must "explicitly limit access" to the "subsidy" to "certain enterprises"... to the exclusion of other "certain enterprises"';
 - 'the specific transaction...must have been made pursuant to the legislation that the investigating authority finds to be *de jure* specific.'²⁷
27. In Australia's view, this does not reflect the requirements of establishing *de jure* specificity under Article 2.1(a). China erroneously conflates elements of Article 2.1(a) and Article 1 for determining *de jure* specificity. Article 2.1(a) provides that specificity is established where (i) the granting authority explicitly limits access to a subsidy to certain enterprises; or (ii) the legislation pursuant to which the granting authority operates explicitly limits access to a subsidy to certain enterprises. *De jure* specificity does not require that there be legislation that identifies the elements of a subsidy.
29. Australia considers that a subsidy provided through a policy lending program is subject to the same fundamental requirements under Articles 1 and 2 of the SCM Agreement as all other subsidies. In particular, the test for the existence of a subsidy under Article 1 of the SCM Agreement and for specificity under Article 2 of the Agreement, are separate tests. Consequently, where a financial contribution pursuant to a policy lending program is not provided by the government or a public body, it must be demonstrated that the relevant private body was entrusted and directed according to Article 1.1(a)(1)(iv). The question of entrustment and direction and the existence of benefit relate to an analysis of the existence of a subsidy under Article 1 of the SCM Agreement and not the question of specificity in Article 2. As discussed above in Section B of Australia's Submission, entrustment and direction does not need to be explicit in terms of specifying a 'subsidy' and providing 'an indication of the benefit.'²⁸ It can be determined on

²⁷ China First Written Submission, para. 209.

²⁸ China First Written Submission, para. 209.

the basis of ‘a consideration of the inferences that might reasonably have been drawn... on the basis of the *totality* of the evidence.’²⁹

30. Statements of government policies, plans and intentions are highly relevant considerations in determining the existence of a subsidy and that the subsidies are targeted to certain industries or enterprises. In terms of *de jure* specificity under a policy lending program, Australia considers that the policy statement that forms the basis of the program must ‘explicitly limit access to a subsidy to certain enterprises.’ Australia finds no basis for the assertion that it must explicitly be ‘to the exclusion of other certain enterprises’.³⁰ Australia submits that if a program is explicitly only available to certain enterprises or where eligibility is explicitly limited to certain enterprises, it is implicit that this will be to the exclusion of other certain enterprises. Thus a policy statement will be *de jure* specific if it explicitly refers to supplying loans only with respect to ‘particular forms or branches of productive labour; a trade; a manufacture’ as opposed to being ‘broadly available’ throughout the economy.³¹
31. China states that the policy banks have an express mandate from the central government to provide loans to targeted industries and ‘state-supported’ projects.³² In Australia’s view, while commercial banks may take account of government policies when evaluating risks associated with loans, it is an entirely different matter for a commercial bank to be given, to take into account, and to act on a government direction in determining or evaluating lending decisions.³³
32. Once the existence of a subsidy is established in accordance with Article 1 of the SCM Agreement and specificity is established in accordance with Article 2 of the SCM Agreement, there is no need to impose an additional third requirement on instances of policy lending in terms of the ‘transaction’ being ‘made pursuant to’ the legislation.³⁴ The issue of the connection between the policy statement and the provision of the financial contribution is addressed through the analysis of ‘entrustment or direction’ under an Article 1 analysis.

F. Regional Specificity

32. An important issue that arises in this case is the appropriate test to be applied to establish regional specificity. In order for a subsidy within the meaning of Article 1 of the SCM Agreement to be countervailable under Part V of the SCM Agreement, it must be established to be ‘specific’ within the meaning of Article 2 of the Agreement. Article 2 provides that specificity may be enterprise specific, industry specific, regional specific or specific on the grounds that the subsidy is prohibited.
33. Regional specificity under Article 2.2 of the SCM Agreement provides that a ‘subsidy which is limited to certain enterprises located within a designated

²⁹ *US – DRAMs*, para. 154.

³⁰ China First Written Submission, para. 209.

³¹ *US – Cotton*, paras 7.1140 and 7.1143.

³² China First Written Submission, paras 166-167

³³ China First Written Submission, para 196

³⁴ China First Written Submission, para. 209

geographical region within the jurisdiction of the granting authority shall be specific’ (emphasis added). 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 specifically establishes regional locality as the limiting factor that renders a subsidy specific. Article 2.2 does not, as China seems to suggest, state that a subsidy is non-specific if it is available to all enterprises located within a designated geographic region under the jurisdiction of the granting authority.³⁵ On the contrary, specificity under Article 2.2 stems from its limited application within a designated geographic region.

34. 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.³⁶ 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.
35. Australia agrees with the United States³⁷ that Article 8.1(b) and Article 8.2(b) may provide relevant context in determining regional specificity under Article 2.2.
36. Article 2.1 provides that “an enterprise or industry or group of enterprises or industries” be referred to in the SCM Agreement as “certain enterprises”. In Australia’s view, ‘certain enterprises’ in the Agreement should be read as “an enterprise or industry or group of enterprises or industries”. Australia submits that this interpretation, in particular with respect to “certain enterprises” in Article 2.2, would be relevant to the Panel’s examination. The Panel could also usefully clarify whether the use of the term “certain enterprises” in Article 2.2 is descriptive to distinguish between enterprises that are located within the designated geographical region and those that are outside.

G. Benchmark for the Determination of Benefit

37. Another important issue that arises in this case is 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.
38. 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

³⁵ China First Written Submission, para 284.

³⁶ China First Written Submission, para 283.

³⁷ United States First Written Submission, paras 376-377.

marketplace is an appropriate basis for comparison.³⁸ The question then becomes, which ‘marketplace’; how to determine the boundaries of the relevant market place; and whether the firm could actually obtain a comparable commercial loan on the market. Article 14(b) clearly distinguishes between the appropriate market comparisons for government loans and those for ‘equity capital’ (subparagraph (a)), ‘loan guarantees’ (subparagraph (c)) and ‘goods and services’ (subparagraph (d)).

39. 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) does. This distinction is due to the fact that subparagraph (b) relates to ‘loans’ and not to ‘goods and services’ as in subparagraph (d). Consequently, Australia submits that the Appellate Body decision in *US – Soft Wood Lumber IV* on Article 14(d) does not support an argument that Article 14(b) also requires the market benchmark to ‘relate or refer to, or be connected with the conditions prevailing in the market of the country of provision.’³⁹ Article 14(b) simply does not have the same explicit connection to the ‘country of provision or purchase.’ This is because ‘loans’ are available on an international financial market that is subject to international influences.
40. Furthermore, Australia considers that there is no basis in the text of Article 14(b) of the SCM Agreement to limit consideration of a comparable market benchmark to loans in the same currency as the RMB-denominated government loans under investigation. Loans obtained in one currency can be used to purchase any particular currency at rates determined by international markets. Again, Australia considers there is no basis to impose an Article 14(d) market comparison that relates or refers to, or is connected with the conditions prevailing in the market of the country of provision.

H. Concurrent Application of Anti-Dumping and Countervailing Measures

41. China claims that the ‘simultaneous’ application of both anti-dumping and countervailing duties following concurrent or parallel countervailing and anti-dumping investigations ‘results in an impermissible double remedy for the same alleged acts of subsidization’.⁴⁰ Further, China argues that any alleged subsidies are offset through two separate duties: an anti-dumping duty where an anti-dumping margin is based on the cost of production in a surrogate market and a countervailing duty. 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.⁴¹ 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 it determines can be no greater than the amount necessary to offset the subsidy. China has not made reference to the relevant provision of Article VI:5 of GATT 1994.

³⁸ *Canada – Aircraft*, para 158.

³⁹ China First Written Submission, para 247.

⁴⁰ China First Written Submission para 6.

⁴¹ China First Written Submission, paras 375-379

42. 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.
43. 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* (the AD Agreement), 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.
44. Article VI:2 of GATT 1994 provides that an anti-dumping duty may be levied to offset or prevent dumping and that such a duty may be imposed to the full margin of dumping (that is, the difference between the normal value and the export price). Article 9.1 of the AD Agreement provides that the imposition of the full margin of dumping is a decision to be made by the investigating authorities.
45. As provided under Article VI:3 of GATT 1994, a countervailing investigation will determine the existence, degree and effect of alleged subsidies which are provided by governments or public bodies. Article VI:3 of GATT 1994 further provides that a countervailing duty may be imposed to the amount of the subsidy, granted directly or indirectly on the manufacture, production or export of the product. Article 19.2 of the SCM Agreement provides that the imposition of the full amount of the subsidy is a decision to be made by the investigating authorities.
46. Neither the AD Agreement nor the SCM Agreement address concurrent or parallel anti-dumping and countervail investigations. They 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.
47. Nothing in GATT Article VI or elsewhere in the WTO Agreements prevents concurrent or parallel anti-dumping and countervailing duty investigations into the same product. Indeed, the text of Article VI:5 reinforces the right of Members to do both.
48. Article VI:5 of GATT 1994 provides that:
- ‘[n]o product of the territory of any Member imported into the territory of any other Member shall be subject to both anti-dumping and countervailing duties to *compensate for the same situation of dumping or export subsidization.*’
(emphasis added)
49. The Panel could usefully examine the following aspects of Article VI:5 of 1994:

- a) Whether the meaning of ‘situation’ refers to the existence of dumping or subsidisation or to the injurious effects of those actions;
 - b) Whether the meaning of ‘compensate’ relates to the level of the dumping and subsidy margins;
 - c) Whether ‘export subsidization’ has a different meaning to ‘manufacture, production or export’ of a product under Article VI:3 of GATT 1994;
 - d) Whether the meaning and use of ‘export subsidization’ is distinct from determining whether a subsidy is an export subsidy or a subsidy provided for the manufacture or production of a product;
 - e) Whether the meaning and use of ‘export subsidization’ limits its application to export subsidies; and
 - f) Whether the meaning and use of ‘export subsidization’ may also capture subsidies provided for the manufacture or production of a product which is nevertheless exported.
50. Australia fails to see that there is a ‘double remedy’ of the effect of any subsidy provided where there are concurrent investigations. It could be entirely consistent for investigating authorities to make determinations of subsidization by an exporting Member and at the same time, determine that there are no sales in the ordinary course of trade in the domestic market of the exporting country due to a particular market situation where, for example, government influences prices.
51. 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, Australia is of the view that such sales do not reflect the subsidized production in the home market. Indeed, it could be argued that such prices are used to ensure that there is no perversion of prices in determining the normal value.

I. Conclusion

52. For the reasons set out in this Submission, Australia submits that the Panel in this dispute should:
- a) Take into account Australia’s observations on the appropriate definition of ‘public body’ under Article 1.1(a)(1) of the SCM Agreement;
 - b) Draw on guidance provided by the highlighted WTO cases on the appropriate test for entrustment or direction under Article 1.1(a)(1)(iv) of the SCM Agreement;
 - c) Consider what elements of an examination would constitute a pass-through analysis in determining whether a subsidy is provided on production of an input product;
 - d) Note that China has conflated the elements of Article 2.1(a) and Article 1 of the SCM Agreement for determining *de jure* specificity when considering ‘policy loans’;
 - e) When interpreting Article 2.2 of the SCM Agreement, be mindful of its relationship with Article 2.1(a) of the SCM Agreement;
 - f) Take into account Australia’s observations on the proper market benchmark for a ‘loan by a government’ when determining the existence of benefit under Article 14(b) of the SCM Agreement; and

- g) Note Australia's observations when interpreting Article VI:5 of GATT 1994 when considering China's claims about the concurrent application of anti-dumping and countervailing duties.