

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

(WT/DS379)

**Executive Summary of the
Third Party Oral Statement of Australia**

Geneva, 17 July 2009

A. 'Public Body' Under Article 1.1(a)(1)

1. Australia is concerned that a definition of 'public body' that would require a body to; (i) be vested with governmental authority, and (ii) carry out governmental functions for governmental purposes,¹ has no basis in the text of the Subsidies Agreement. It instead appears to be created by conflating the test for entrustment or direction under Article 1.1(a)(1)(iv) and by using external sources of international law² which are not relevant in this instance.

The necessary distinction between 'public body' and the test for entrustment or direction

2. In Australia's view, it is necessary to maintain a distinction between the definition of 'public body' and the test for entrustment or direction. Fundamentally, the test for entrustment or direction serves a different purpose; that is, to capture those incidents when private bodies are used by governments to provide a financial contribution. This should not be conflated with the definition of 'public body,' which goes to the nature of the body in question.
3. The interpretive context that Article 1.1(a)(1)(iv) provides is a point of contrast and distinction, not one from which parallels or analogies can be drawn.³ Australia is concerned that attempts to artificially introduce the concepts of government authority and the exercise of governmental functions into a definition of 'public body' would undermine the distinction between the meaning of 'public body' and the test for entrustment or direction.

Recourse to other international texts for interpretative context

4. China has advocated recourse to Articles 5 and 8 of the *United Nations International Law Commission Draft Articles on State Responsibility for Internationally Wrongful Acts* as relevant context for the interpretation of Article 1 of the Subsidies Agreement.⁴ Australia considers that the Articles offer no interpretive assistance in this case.
5. Articles 5 and 8 of the ILC Draft Articles address the 'conduct of persons or entities exercising elements of government authority' and 'conduct directed or controlled by a State', respectively.⁵ They do not address the definition of public body. Instead they would appear to address the situation where an otherwise private or non-state actor's actions can be attributed to a government - a situation that would more closely mirror entrustment or direction, if any.
6. Similar arguments apply in relation to the attempt to use the definition of 'public entity' in paragraph 5(c) of the GATS Annex on Financial Services.⁶ The GATS

¹ See First Written Submission of China paras. 65 and 68; Third Party Submission of the Kingdom of Saudi Arabia para. 5; Third Party Submission of Norway, paras. 12-13.

² First Written Submission of China, para. 72.

³ Third Party Written Submission of Norway, para 12.

⁴ Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*: First Written Submission of China, paras. 72, 77, and 83.

⁵ Articles 5 and 8 of the *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).

⁶ China First Written Submission, para 62; Third Party Submission of Saudi Arabia, para 42-43; Third Party Submission of Norway, para. 22-23.

Annex specifically prefaces its definition of 'public entity' with the phrase '*For the purpose of this Annex...*'. The scope and purpose of the Annex as stated in paragraph 1(a) is for 'measures affecting the supply of financial services.' This points to the specialised role of the definition of a 'public entity' within the GATS.

7. More fundamentally, Australia does not agree that an apparent recourse to 'context' for the purposes of interpretation can be used to transform the scope of a provision in a way that is not otherwise available from the text. Nor can interpretative context be used to include an additional test of exercising government authority that is not apparent from the text, particularly when to include such a test would undermine a clear distinction between the definition of public body and the test for entrustment or direction.

B. Private Trading Companies and Pass-Through

8. Further to Australia's statements in section D of its written submission, Australia considers that where trading companies act as mere intermediaries in a transaction, it may be unnecessary to conduct a full pass-through analysis, particularly, where the trading companies appear to have constituted an indirect route for providing a subsidy to exporters. This approach is consistent with the Appellate Body statement in *US – Softwood Lumber* that a 'pass through analysis' is not necessary in every situation in which a subsidy is provided on the production of an input product.⁷
9. Furthermore, Australia considers that in the case of an indirect subsidy, where an intermediate act does not change the nature of the input, the benefit is most accurately calculated at the level of the exporters concerned. 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 a financial contribution⁸.

C. Article 14(d) and the use of benchmarks other than private prices in the home market

10. Australia considers that Article 14(d) permits investigating authorities to use a benchmark other than private prices in that market so long as 'investigating authorities calculate benefit "in relation to" prevailing conditions in the market of the country of provision.'⁹
11. Australia further considers that there is nothing in the Subsidies Agreement to support the argument that the provision of land should be treated differently to the provision of other goods under Article 14(d). On the contrary, the term 'goods' has been given a broad meaning under Article 1.1(a)(1)(iii) of the Subsidies Agreement to include immovable property.¹⁰ As the Appellate Body stated in *US-Softwood Lumber*, a broad interpretation, as reflected in the French and Spanish

⁷ Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, 17 February 2004, para 141.

⁸ Appellate Body Report, *United States – Countervailing Measures on Certain EC Products*, WT/DS212/AB/R, 9 December 2002, para 143.

⁹ Appellate Body Report, *United States – Softwood Lumber*, *ibid*, para 101.

¹⁰ Appellate Body Report, *United States – Softwood Lumber*, *Ibid*, at paras. 59 and 65.

language texts, suggests that land is indeed a 'good' for the purposes of the Subsidies Agreement.¹¹

D. Policy Lending and so called 'Double Remedies'

12. In relation to policy lending, Australia would like to reiterate the key point that 'statements of government policies, plans and intentions are highly relevant considerations in determining the existence of a subsidy and whether the subsidies are targeted to certain industries or enterprises.'¹²
13. In terms of the issue of so-called 'double remedies', Australia would like to reiterate that anti-dumping and countervailing duties are two separate remedies under two distinct WTO Agreements. Nothing in GATT Article VI or elsewhere in the WTO Agreements prevents concurrent or parallel anti-dumping and countervailing duty investigations with respect to the same product.

¹¹ Appellate Body Report, *United States - Softwood Lumber*, Ibid, at paras. 59 and 65.

¹² See Third Party Written Submission of Australia, para 30.