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Panel Proceedings

**EUROPEAN UNION – DEFINITIVE COUNTERVAILING DUTIES ON
NEW BATTERY ELECTRIC VEHICLES FROM CHINA**
(DS630)

**THIRD PARTY ORAL STATEMENT OF AUSTRALIA
AS DELIVERED**

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Short Title	Full Case Title and Citation
<i>China – GOES</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R, DSR 2012:XII, p. 6369
<i>EC – Countervailing Measures on DRAM Chips</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, p. 86
<i>EU – Biodiesel (Indonesia)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Biodiesel from Indonesia</i> , WT/DS480/R and Add.1, adopted 28 February 2018, DSR 2018:II, p. 605
<i>EU – CVD/AD on SSCRFP (Indonesia)</i>	Panel Report, <i>European Union – Countervailing and Anti-Dumping Duties on Stainless Steel Cold-Rolled Flat Products from Indonesia</i> , WT/DS616/R and Add.1, circulated to WTO Members 2 October 2025, appealed 21 November 2025
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>Mexico – Anti-Dumping Measures on Rice</i>	Panel Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R, DSR 2005:XXIII, p. 11007
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Appellate Body Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/AB/R, adopted 25 March 2011, DSR 2011:V, p. 2869
<i>US – Anti-Dumping and Countervailing Duties (China)</i>	Panel Report, <i>United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China</i> , WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R, DSR 2011:VI, p. 3143
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014, DSR 2014:V, p. 1727
<i>US – Carbon Steel (India) (Article 21.5 – India)</i>	Panel Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS436/RW and Add.1, 15 November 2019, mutually agreed solution reported
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697

LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Commission	European Commission

Abbreviation	Full Form or Description
Member	Member of the WTO
SCM Agreement	Agreement on Subsidies and Countervailing Measures
UN	United Nations
WTO	World Trade Organization

I. INTRODUCTION

1. Chair, distinguished members of the Panel – good morning. Thank you for the opportunity to participate as a third party in this dispute, and to make an oral statement at this session.

2. This dispute raises important questions concerning the application of the SCM Agreement which are of particular relevance at this time. Australia will address four issues in this statement: first, Australia will address the approach to determining whether an entity constitutes a "public body" under Article 1.1(a)(1); second, the interpretation and function of Article 12.7, and the relationship between missing information and the use of "facts available"; third, the circumstances permitting recourse to "facts available", including the requirements governing replacement facts and the role of non-cooperation; and finally, the issues concerning confidentiality under Article 12.4 and its relationship with Article 12.7.

3. Before proceeding to set out Australia's views in this dispute, Australia would like to reiterate its ongoing support for Ukraine and to again condemn in the strongest terms Russia's illegal and immoral invasion of Ukraine. Russia's aggression is a gross violation of international law, including the UN Charter, and is inconsistent with the global rules and norms that underpin multilateral organisations such as the WTO.

II. PUBLIC BODY

4. Australia's written submission stated that a "public body" for the purposes of Article 1.1(a)(1) of the SCM Agreement has been interpreted as "an entity that possesses, exercises or is vested with governmental authority".¹ In setting out this interpretation, Australia notes that the SCM Agreement does not require an investigating authority to undertake an entity-by-entity analysis in every case.² Australia also recalls that an investigating authority is not precluded from determining that a group of entities, including entities within a particular sector, are public bodies, where that determination is based on an examination of their core characteristics and their relationship with the government.³

¹ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317; Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

² Panel Report, *EU – CVD/AD on SSCRFP (Indonesia)*, para. 7.156.

³ Panel Report, *EU – CVD/AD on SSCRFP (Indonesia)*, para. 7.156.

5. Australia maintains that no single criterion is determinative, and different types of evidence may be relevant in assessing whether an entity is a "public body" under Article 1.1(a)(1) of the SCM Agreement.

6. Previous Appellate Body decisions may provide useful guidance on how to approach this assessment. However, panels should recall that each analysis by previous panels or the Appellate Body applies only to the circumstances of the particular case and should not be applied in a rigid or overly narrow manner in new disputes. Panels must make their own assessments.

7. A "public body" determination should be a holistic assessment based on the "core characteristics and functions of the relevant entity, its relationship with the government, and the legal and economic environment prevailing in the country in which the investigated entity operates".⁴ Panels should not focus narrowly on isolated acts of conduct.⁵

8. Panels considering the "public body" issue should also ensure that their analysis remains fact-specific and responsive to the circumstances of each case, accounting for the diverse ways in which governmental authority may be exercised in practice.⁶ This includes a careful examination of:

- factors such as the exercise of governmental functions, the existence of meaningful control by the government over the entity, and the broader policy and regulatory context in the particular WTO Member;⁷
- the entity's ownership, governance structures, policy linkages, and patterns of behaviour; and
- whether the relevant entity's behaviour reflects market-based decision making or instead is shaped by governmental objectives.

III. ARTICLE 12.7 OF THE SCM AGREEMENT

9. Turning to another issue in this dispute, China submits that the European Union acted inconsistently with Article 12.7 of the SCM Agreement by: (1) resorting to "facts available" in circumstances where the relevant legal threshold was not met; or (2) selecting replacement facts that were incorrect, unreasonable, or otherwise inappropriate; and "fail[ing] to provide

⁴ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.29.

⁵ Panel Report, *EU – CVD/AD on SSCRFP (Indonesia)*, para. 7.156.

⁶ Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 317-318.

⁷ Appellate Body Report - *US – Anti-Dumping and Countervailing Duties (China)*, para. 318.

a reasoned and adequate explanation of its findings with regard to its use of the "facts available"".⁸

10. Australia emphasises that Article 12.7 does not require investigating authorities to adopt a rigid or formalistic approach in identifying or selecting replacement facts. Rather, it requires a "process of reasoning and evaluating which "facts available" reasonably replace the missing information".⁹ The evaluation will depend on the circumstances of the investigation, including the nature and quality of the information available on the record. Importantly, "all substantiated facts on the record must be taken into account".¹⁰

11. China argues that, when applying Article 12.7, "the scope of replacement facts must be identical to that of the missing information".¹¹ Australia does not consider Article 12.7 imposes such a requirement.

12. In *US – Carbon Steel (India)* the Appellate Body held that Article 12.7 "permits the use of facts on record solely for the purpose of replacing information that may be missing, in order to arrive at an accurate subsidization determination".¹² The Appellate Body clarified that "there has to be a connection between the "necessary information" that is missing and the particular "facts available" on which a determination under Article 12.7 is based".¹³

13. In this respect, Article 12.7 of the SCM Agreement requires that an investigating authority identify the missing "necessary information", explain why that information is "necessary" to its determination, and ensure that any replacement facts reasonably address the evidentiary gap.¹⁴ The assessment requires the substantiated facts on the record not be "arbitrarily excluded from consideration" and that missing information is replaced "with a view to arriving at an accurate determination".¹⁵

14. Australia next addresses China's contention that recourse to "facts available" must be exceptional and so "vitally important that without it, the investigating authority will be unable to make the determination at issue".¹⁶

15. Australia observes that Article 12.7 of the SCM Agreement does not expressly

⁸ China's first written submission, para. 943.

⁹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419.

¹⁰ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419.

¹¹ China's first written submission, para. 998.

¹² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416, quoting Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 293.

¹³ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

¹⁴ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

¹⁵ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.416.

¹⁶ China's first written submission, para. 954.

characterise the use of "facts available" as "exceptional". This understanding has been confirmed by prior Panel and Appellate Body reports.¹⁷

16. For example, the Panel in *US – Anti-Dumping and Countervailing Duties (China)* confirmed recourse to "facts available" is permissible "under the limited circumstances where an interested Member or interested party: (i) refuses access to necessary information within a reasonable period; (ii) otherwise fails to provide such information within a reasonable period; or (iii) significantly impedes the investigation".¹⁸

17. An investigating authority may resort to "facts available" only where it has identified missing "necessary information", has made reasonable efforts to obtain that information, and has explained the resulting evidentiary gap.¹⁹ Where "necessary information" is not provided despite clear requests, Article 12.7 of the SCM Agreement permits an investigating authority to proceed based on "facts available" so that the investigation may be finalised.²⁰

18. Australia recalls that while non-cooperation by an interested party to provide "necessary information" is a condition that may permit the use of "facts available" under Article 12.7 of the SCM Agreement, this mechanism is not designed to punish a non-cooperating party, but rather to enable the investigating authority to complete its determination where "necessary information" is missing.²¹ Even in circumstances of non-cooperation, the investigating authority must base its findings on facts that are supported by the record and explained through a reasoned analysis.²²

19. Australia notes that Article 12.7 of the SCM Agreement strikes a balance between the discretion the investigating authorities are afforded to conduct investigations and the legitimate interests of parties to submit information and have it taken into account.²³ That balance is reflected more broadly in Article 12, including Article 12.8 on disclosure of essential facts and Article 12.11 on taking due account of difficulties experienced by interested parties in supplying information.²⁴ The investigating authority must nonetheless assess whether non-

¹⁷ Appellate Body Report, *Japan – DRAMs (Korea)*, para. 235; Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 291; Panel Report, *Japan – DRAMs (Korea)*, para. 7.383; Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245.

¹⁸ Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 16.9.

¹⁹ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.79.

²⁰ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.79.

²¹ Appellate Report, *US – Carbon Steel (India)*, para. 4.419.

²² Appellate Body Report, *US – Carbon Steel (India)*, para. 4.419.

²³ See Appellate Body Report, *US – Hot-Rolled Steel*, paras. 86, and 102. Although these paragraphs concern Article 6.8 and Annex II of the Anti-Dumping Agreement, they provide useful guidance for the interpretation of Article 12.7 of the SCM Agreement, which is the corresponding provision for countervailing duties.

²⁴ See Articles 12.8 and 12.11 of the SCM Agreement.

confidential summaries or alternative forms of disclosure would allow the information to be taken into account before resorting to "facts available".²⁵

IV. CONFIDENTIALITY UNDER ARTICLE 12.4 OF THE SCM AGREEMENT

20. Australia briefly addresses China's claim that confidentiality requirements under Article 12.4 of the SCM Agreement provide justification for non-disclosure of information and should not, in itself, permit recourse under Article 12.7.²⁶

21. Australia recalls that requests for confidential treatment under Article 12.4 of the SCM Agreement, or claims that information cannot be provided due to confidentiality, do not, in themselves, preclude investigating authorities from seeking "necessary information" from an interested party, and do not prevent recourse to "facts available" under Article 12.7 if information is withheld after having been requested.²⁷

22. Instead, Article 12.4.1 of the SCM Agreement provides for "interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence".²⁸

23. Where the summaries are not provided, or they do not provide sufficient detail, and as a consequence the investigating authority cannot verify the information, Article 12.7 of the SCM Agreement may be engaged.

V. CONCLUSION

24. Australia thanks the Panel for its time and hopes that its observations will be useful for the Panel's consideration of this matter.

²⁵ Article 12.4.1 of the SCM Agreement.

²⁶ China's first written submission, para. 963.

²⁷ Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.80.

²⁸ Article 12.4.1 of the SCM Agreement.