BEFORE THE WORLD TRADE ORGANIZATION

China – Domestic Support for Agricultural Producers
(WT/DS511)

Third Party Written Submission of Australia

14 November 2017
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I. INTRODUCTION

1. As a major agricultural exporter, Australia has a significant interest in ensuring a transparent and predictable global trading system, underpinned by a shared understanding of Members’ obligations under WTO rules. Australia considers that this dispute raises important issues of legal interpretation of key provisions in the Agreement on Agriculture. In particular, this dispute provides an opportunity for the Panel to clarify the domestic support entitlements of Members and, specifically, to confirm the methodology used to calculate how market price support should be accounted for in the Total Aggregate Measurement of Support (AMS).

2. The issues that Australia addresses in this submission are:

   (a) domestic support under Articles 3, 6 and 7;

   (b) the methodology for calculating market price support;

   (c) the meaning of "production eligible" in Annex 3; and

   (d) the reference period for the "fixed external reference price".

3. Australia reserves the right to raise other issues in the third party hearing with the Panel.

II. DOMESTIC SUPPORT UNDER ARTICLES 3, 6 AND 7 OF THE AGREEMENT ON AGRICULTURE

4. Under WTO rules, domestic support for agricultural producers is permitted, provided it does not exceed the Member's corresponding annual or final bound commitment levels. Article 3.2 of the Agreement provides:

   Subject to the provisions of Article 6, a Member shall not provide support in favour of domestic producers in excess of the commitment levels specified in Section I of Part IV of its Schedule.

5. However, as is clear from the text of the provision, Article 3.2 is subject to Article 6.\(^1\) In particular, Article 6.3 provides the terms under which a Member will be in compliance with domestic support commitments:

   A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

\(^1\) In Korea – Various Measures on Beef at para. 803, the Panel specified the relationship between the two articles: "when assessing the WTO compatibility of domestic support, two parameters are indicated: first the provisions of Article 6 which refer to the object of those same 'commitments' on domestic support; and second, Section I of Part IV of a Member's schedule".
6. Therefore, in order to determine a Member's compliance, it is necessary to identify and compare a Member's: (i) final bound commitment level; and (ii) Current Total AMS.

   (i) Final bound commitment level

7. China's final bound commitment level in Part IV of its Schedule is nil. In such cases, Art 7.2(b) clarifies that "the Member shall not provide support to agricultural producers in excess of the relevant de minimis level set out in paragraph 4 of Article 6".

8. Article 6.4 provides that Members shall not be required to include in the calculation of its Current Total AMS product-specific domestic support which is less than a particular percentage of that Member's total value of production of a basic agricultural product during the relevant year. For developed countries the relevant percentage is 5 per cent (Article 6.4(a)(ii)), and for developing countries the relevant percentage is 10 per cent (Article 6.4(b)). Once the level of AMS for a particular product exceeds that threshold (a de minimis amount), the whole monetary figure will count towards a Member's Current Total AMS.


9. In negotiating its accession to the WTO, China also negotiated its own de minimis percentage level for the purposes of Article 6.4 of the Agreement on Agriculture. The level is incorporated into China's Accession Protocol via a direct and detailed reference in paragraph 235 of China's Working Party Report.\(^2\) The relevant extract of paragraph 235 states:

   … the representative of China further confirmed that China would have recourse to a de minimis exemption for product specific support equivalent to 8.5 per cent of the total value of production of a basic agricultural product during the relevant year. Accordingly, these percentages would constitute China's de minimis exception under Article 6.4 of the Agreement on Agriculture.

10. The commitments made by China in these accession documents are enforceable, as an integral part of the WTO Agreement, as was recognised by both the Panel and Appellate Body in China – Measures Affecting Imports of Automobile Parts.\(^3\)

11. As a result of the status of China's accession documents, its de minimis exemption for product specific AMS, for the purposes of Article 6.4 of the Agreement on Agriculture is equivalent to 8.5 per cent of the total value of production of a basic agricultural product during the relevant year. However, if any of China's product

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\(^2\) See para. 2 of the Protocol on the Accession of the People's Republic of China (WT/L/432) ("Accession Protocol"). The paragraphs listed for incorporation are contained in para. 342 of the Report on the Working Party of the Accession of China (WT/ACC/CHN/49) ("Working Party Report"). Para. 235 is listed as one of these paragraphs and is therefore incorporated into China's Accession Protocol.

specific AMS for any product exceeds the \textit{de minimis} level of 8.5 per cent, the full amount of that support will be included in China's Current Total AMS.

12. Further, the Current Total AMS cannot exceed a Member's bound commitment level. As noted above, China's commitment level in Part IV of its Schedule is nil. Therefore any support that exceeds the agreed 8.5 per cent \textit{de minimis} threshold would lead to a breach of China's obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture.

III. THE METHODOLOGY FOR CALCULATING MARKET PRICE SUPPORT

13. AMS and Current Total AMS are defined in Articles 1(a) and (h). In summary, those definitions provide that: AMS is the yearly monetary figure for support that is provided to agricultural producers, where that support is not covered by an exception; Total AMS is the sum of all domestic support provided to agricultural producers; and the Current Total AMS is the Total AMS in a particular year.

14. The definition of AMS in Article 1(a)(ii) notes that it should be "calculated in accordance with the provisions of Annex 3" and "taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". Although two sources for calculating AMS are noted, Annex 3 and Part IV of a Member's Schedule, their status is not equal.

15. Rather, the phrase "in accordance with" indicates that the calculation of domestic support under Articles 6 and 7 must comply with the provisions of Annex 3. By contrast, the phrase "taking into account" merely requires that consideration be given to a Member's Schedule, without specifying precisely the weight that consideration should be accorded. In Australia's view, the relevance of a Member's Schedule is therefore subsidiary to Annex 3. This view has been confirmed by the Appellate Body in Korea – Various Measures on Beef. In that dispute, the Appellate Body found that "in accordance with" required that "Current AMS must be calculated in 'conformity' with the provisions of Annex 3" and "taken into account" meant that "when Current AMS is calculated, the 'constituent data and methodology' in a Member's Schedule must be … 'considered'".\textsuperscript{4}

\textit{i) AMS under Annex 3}

16. Annex 3 provides guidance on the methodology for calculating different types of domestic support. In this dispute, the United States has raised concerns about one of those types of domestic support, namely "market price support". The Panel in Korea – Various Measures on Beef provides the following characterisation of this type of domestic support:

Market price support gauges the effect of a government policy measure on agricultural producers of a basic product rather than the budgetary cost of that measure borne by government. In general, with market price support programmes, all producers of the products which are subject to the market price support mechanism enjoy the benefit of an assurance that their products can be marketed at least at the support price. Therefore, the

\textsuperscript{4} Appellate Body Report, Korea – Various Measures on Beef, para. 111.
minimum price support will be available to all marketable production of the type and quality to which the administered price support programme relates, including where actual market prices are above the administered minimum price level.  

17. The methodology for calculating market price support is set out in paragraph 8 of Annex 3, and has been confirmed by the Appellate Body in *Korea – Various Measures on Beef*. In mathematical terms:

\[
\text{Market Price Support} = \frac{(\text{Applied Administered Price}) - (\text{Fixed External Reference Price})}{x} \times (\text{Production Eligible for the Subsidy})
\]

18. The actual figures to be applied will depend on the facts of the case as determined by the Panel. Australia’s submission does not address the accuracy or relevance of data submitted by either Party on Chinese market price support programs or of the compliance of these programs with China’s WTO obligations. However, Australia submits views on the method of calculation it believes to be consistent with WTO obligations based on the meaning of "production eligible" and "fixed external reference price".

IV. THE MEANING OF "PRODUCTION ELIGIBLE"

(i) Meaning of "production eligible" in Annex 3

19. Market price support is considered distorting under the Agreement on Agriculture when the applied administered price exceeds a fixed historical external reference price. When this is the case, the difference between the two prices is multiplied by the full volume of eligible production and the result is considered to be the level of market price support for that product in the year in question.

20. While the concepts of applied administered price and fixed external reference price are generally well understood, there has been some ambiguity in the past as to the meaning of "production eligible". This issue was clarified by the Appellate Body in *Korea – Various Measures on Beef*, which provided the following guidance:

... *production eligible* refers to production that is "fit or entitled" to be purchased rather than production that was actually purchased. In establishing its program for future market price support, a government is able to define and to limit "eligible" production. Production actually purchased may often be less than eligible production.

21. In that dispute, the Korean government had indicated its intent to purchase a particular amount of a product, and this action was shown to affect the price of all such products in the market. According to the Appellate Body, whether the Korean government actually purchased the products or not was immaterial – the effect on the

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7 Paragraph 8, Annex 3 Agreement on Agriculture.
8 Appellate Body Report, *Korea – Various Measures on Beef*, para. 120
market had already occurred the moment the announcement of an intent to purchase was made.

22. In Australia's view, the Appellate Body's findings in *Korea – Various Measures on Beef* makes clear that, absent exceptional circumstances, "production eligible" is all production "fit or entitled" to be purchased and will generally equate to total production.

(ii) Meaning of "eligible production" with respect to China

23. In the present dispute, the United States submits that under China's market support programs all production in identified provinces is entitled to support.\(^9\) If the Panel accepts the United States' explanation of the programs as an accurate reflection of the facts, Australia submits that the relevant values to be used for "eligible production" in the calculation for market price support should be the value of total production of each given commodity in identified provinces.

24. However, China submits that, in interpreting the definition of "eligible production" under the Agreement on Agriculture, the Panel should use a definition for "eligible production" that China has included in a note to a document referenced in Part IV of its Schedule.\(^10\) China submits that, unlike in the *Korea – Various Measures on Beef* dispute, China's Schedule contains "constituent data and methodology" that can be taken into account in accordance with Article 1(a)(ii) of the Agreement on Agriculture.

25. According to China, the relevant constituent data and methodology to be considered is contained in WT/ACC/CHN/38/Rev.3 (hereafter referred to as 'Rev. 3'), a document included as a reference under the heading "Relevant Support Tables and document" in Part IV of China's Schedule.

26. Rev. 3 includes a note which defines "eligible production".\(^11\) That definition limits eligible production to "the amount purchased by state-owned enterprises from farmers". China contends, relying on Article 1(a)(ii), that this is the definition relevant to the calculation of market price support under Annex 3.

27. As Australia has already outlined, Article 1(a)(ii) requires AMS to be "calculated in accordance with the provisions of Annex 3" and "taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". However any consideration of "constituent data and methodology" under Article 1(a)(ii) cannot be interpreted as nullifying the requirement to calculate Current AMS in accordance with Annex 3.

28. China's contention that the limitation of eligible production to the actual amount purchased is in direct conflict with the terms of Annex 3, as interpreted and applied by the Panel and Appellate Body in *Korea – Various Measures on Beef* – i.e. that it is

\(^9\) United States' first written submission, para. 107.
\(^10\) China's first written submission, paras. 196-203.
\(^11\) China's first written submission, para. 199.
the amount eligible for purchase, not the actual amount purchased, that is relevant. As discussed above, the rationale for this view is based on an economic reality – that the price distorting effect of market price support takes place the moment a product is eligible to be purchased. Any consideration of the product distorting effect of market price support must therefore be taken at this point.

29. Unlike the obligation to look to Annex 3 in calculating market price support, in Australia's view there is no direct obligation on the Panel to accept or apply the constituent data and methodology in China's Schedule. The Panel is merely directed to "consider" it.

30. For the purposes of the Panel's consideration, Australia's observes that Rev. 3 is a supporting document that provides information on domestic support programs in China between 1996-1998. It is descriptive in nature and provides a snapshot or illustration of payments in China during a fixed time period. It does not set out any legal obligations. Rather, Rev. 3 provides evidence of China's views on its domestic support at a particular point in time.

31. Australia also observes that Rev. 3 was unilaterally drafted by one WTO Member, China. While Rev. 3 may have been revised and discussed at meetings by WTO Members during China's accession process it was not drafted by the WTO Membership. Unlike the Agreement on Agriculture, it does not reflect a negotiated outcome between parties. Moreover, while previous WTO cases have acknowledged schedules as integral parts of GATT 1994, Rev. 3 is not in itself a schedule, it is merely a reference in a schedule, and its status should not be elevated to treaty text.

32. Furthermore, even if Rev 3 were considered to have the status of a schedule, it is an established principle in WTO jurisprudence that a Member cannot unilaterally modify its commitments under the WTO Agreements through its Schedule. In the EC-Export Subsidies on Sugar dispute, a note in a schedule that contradicted commitments in the Agreement on Agriculture did not have the legal effect of enlarging or otherwise modifying the European Communities' commitment levels as specified in its Schedule. In this dispute, accepting China's definition of "eligible production", as noted in a document referenced in its Schedule, would usurp the meaning of "eligible production" in the Agreement on Agriculture, as interpreted by the Appellate Body, for only one Member.

33. Finally, accepting China's definition of "eligible production" would have the effect of allowing China greater levels of domestic support. This would undermine the stated long-term objective of the Agreement on Agriculture for Members "to provide for

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12 Appellate Body Report, Korea – Various Measures on Beef, para. 120. The Panel in Korea – Various Measures on Beef had earlier specified that the actual amount purchased by a government is not relevant, nor are the government outlays involved: Panel Report Korea – Various Measures on Beef, para. 827.

13 China's first written submission, paras. 52 (in relation to fixed external reference price) and 59 (in relation to eligible production).

14 Appellate Body Report, EC – Computer Equipment, para. 84.


substantive progressive reductions in agricultural support"; and the commitment by Members under Article 20 to continue reforms to reduce support.

V. THE REFERENCE PERIOD FOR THE "FIXED EXTERNAL REFERENCE PRICE"

34. As noted above at 17, the methodology for calculating market price support is set out in paragraph 8 of Annex 3. In mathematical terms:

\[
\text{Market Price Support} = \frac{\text{(Applied Administered Price)} - \text{(Fixed External Reference Price)}}{\text{X}} \times \text{(Production Eligible for the Subsidy)}
\]

35. Paragraph 9 of Annex 3 provides further guidance on the fixed external reference price:

The fixed external reference price shall be based on the years 1986 to 1988 and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country in the base period. The fixed reference price may be adjusted for quality differences as necessary.

36. In Korea – Various Measures on Beef, the Appellate Body confirmed that the correct reference period to be used for the fixed external reference price is 1986 to 1988, as set out in Annex 3. Australia notes that, in its submission, the United States has used figures based on this reference period.

37. However, China submits that the correct reference period to be used for the fixed external reference price is 1996-1998, the reference period used in Rev. 3. Australia notes that neither China's Accession Protocol nor its Working Party Report indicates that an alternative reference period to 1986-88 should be used.

VI. CONCLUSION

38. In summary, Australia submits that this dispute provides an opportunity for the Panel to clarify the domestic support entitlements of Members and, specifically, to confirm the methodology used to calculate how market price support should be accounted for in the Total AMS. In particular:

- any support that exceeds China's 8.5 per cent de minimis threshold would lead to a breach of its obligations under Articles 3.2 and 6.3 of the Agreement on Agriculture;

- when calculating market price support under the Agreement on Agriculture, absent exceptional circumstances, "production eligible" is all production "fit or entitled" to be purchased and will generally equate to

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17 Preamble, Agreement on Agriculture. (emphasis added)
total production, as found by the Appellate Body in *Korea – Various Measures on Beef*;

- there is no direct obligation on the Panel to accept or apply the constituent data and methodology in China's Schedule, the Panel is merely directed to "consider" it, and, in any event, the requirements of Annex 3 override any methodology in a Schedule;

- while previous WTO cases have acknowledged schedules as integral parts of GATT 1994, Rev 3 is not in itself a schedule, and, in any event, a Member cannot unilaterally modify its commitments under the WTO Agreements through its Schedule; and

- the Agreement on Agriculture specifies that the fixed external reference price should be based on the years 1986 to 1988 and neither China's Accession Protocol nor its Working Party Report indicates that an alternative reference period to 1986-88 should be used.

39. We thank the Panel for the opportunity to submit these views.