BEFORE A PANEL OF THE WORLD TRADE ORGANIZATION

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

Australia's response to questions from the Panel following the Third Party Session

13 February 2018
## TABLE OF CASES

<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
</table>
1 GENERAL ISSUES

1. Please comment on the following statement by China:

The United States' position is further contradicted by the panel in Korea – Beef, which opined that, "in the calculations of product specific support, the 'constituent data and methodology' has an important role to play". Indeed, the panel and the Appellate Body’s findings in Korea – Beef considered the exclusive application of the methodology set out in Annex 3 as only a fallback option to calculate product-specific AMS in situations where a product was not included in Part IV of a Member's Schedule.¹

1. Australia disagrees with the statement by China. As noted in Australia's oral statement at paragraphs 9-12, the role of “constituent data and methodology” in calculating market price support is made clear through the text of the Agreement on Agriculture, as applied by the Panel and Appellate Body in Korea-Beef. Namely that AMS should be “calculated in accordance with the provisions of Annex 3” and “taking into account the constituent data and methodology” in a Member’s Schedule.

2. Two points are clear – (i) reference to Annex 3 is mandatory; and (ii) while the relevance of a Member's Schedule is of a lesser nature and, at the very least, subsidiary to Annex 3. Annex 3 is not a “fallback option”. Rather, there is no direct obligation to accept or apply the constituent data and methodology in a Member’s Schedule, only to "consider" it, and; in any event, the requirements of Annex 3 override any methodology in a Schedule.

2 QUANTITY OF ELIGIBLE PRODUCTION (QEP)

2. Please comment on paragraph 58 of China's first written submission:

Throughout the 14 working party meetings and numerous informal bilateral or plurilateral consultations, there is no record of any WTO Member disputing this methodology for determining eligible production. In short, the Membership agreed, as one of the terms of its accession to the WTO, that China would determine eligible production on the basis of the amount of production purchased under a market price support measure.²

3. Australia acknowledges that the document WT/ACC/CHN/38/Rev.3 (hereafter referred to as 'Rev. 3'), including earlier versions, was subject to consultation with the WTO Membership at the time and that this document contains a definition of eligible production. However, this document was drafted by China to provide Members with a snapshot of domestic support policies in China at that time. The Working Party Report in fact shows that there was some dissatisfaction among Members with the supporting tables. However, the document is illustrative and descriptive in its nature and Members at the time would have treated it as such. There is no legal basis for importing a definition from a note in a supporting table, of a purely descriptive document, drafted by one Member and applying it in a manner that modifies the obligations set out in relevant WTO Agreements.

3. The EU, in its third party oral statement, noted that paragraphs 237 and 238 of the Working Party report on the Accession of China show that some WTO Members did

¹ China's first written submission, para. 106 (referring to Panel Report, Korea – Beef, para 811).
² China’s first written submission, para. 58.
not agree with all the elements of the methodology and policy classifications used by China in those Supporting Tables. Further, in its oral response to questions, the EU stated that this language could refer to the quantity of eligible production.

a. If paragraph 328 of the Working Party Report has the implications that the EU referred to why does it not state that explicitly? Why did the report instead use "vague language"?\(^3\)

4. In Australia's view the statement in paragraph 238 of the Working Party Report records that some Members did not agree with all the elements of the methodology and policy classifications used by China in Rev. 3. As observed in Australia's response to Question 2, Members would have viewed Rev. 3 as an illustrative document, drafted by China, designed to demonstrate to WTO Members how domestic support policies operated in China at that time. Members would not have viewed this illustrative document as modifying China's obligations under the Agreement on Agriculture. Members would therefore not have thought it necessary to list individual concerns with the methodology, and it would not have been appropriate to state such concerns in a document of this nature.

5. Conversely, the Working Party Report is explicit in situations where commitments have been modified. For example, China's modification of the de minimis exemption under Article 6.4 of the Agreement on Agriculture to 8.5% is clearly recorded in paragraph 235 of the Working Party Report. If the Membership had intended to modify the definition of "production eligible" for China it would, similarly, have been recorded in the Working Party Report.

4. With reference to paragraph 197 of China's first written submission, does the statement that "the absence of a specific definition of the term eligible production in Annex 3 leaves room for a Member-specific, negotiated and agreed approach to the scope of that term" mean that the definition of "eligible production" can be different for every Member? How is this consistent with a harmonious interpretation of the covered agreements?

6. While it is correct that the term eligible production is not defined in the Agreement on Agriculture itself, principles of international treaty interpretation stipulate that terms not defined in the text must be interpreted in accordance with their ordinary meaning in the context of the Agreement and in light of its object and purpose.\(^4\)

7. The context of the Agreement on Agriculture, and its object and purpose in disciplining and reducing domestic support, lends weight to an interpretation of eligible production that takes account of the economic impact of market price support. The economic impact of market price support programs provides producers with the "assurance that their products can be marketed at least at the support price".\(^5\) Given this assurance, the price distorting effect of market price support takes place the moment a product is eligible to be purchased by the government. Therefore, eligible production will generally equate to the total value of production of a particular product. This definition is supported by WTO

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\(^3\) Working Party Report on the Accession of China, para. 238 stated: "Some members of the Working Party noted that although WT/ACC/CHN/38/Rev.3 did provide a basis for supporting the commitments in China's Schedule, this document still contained issues which required further methodological clarification relating to policy classification."


jurisprudence (Korea – Beef). Interpreting eligible production as only the amount actually purchased ignores the economic impact of the effect of price support policies on markets.

8. Since the purpose of the Agreement on Agriculture is to discipline and limit domestic support, with a view to its reduction over time, individually negotiated definitions of eligible production, that have the effect of underreporting the amount of domestic support included in Member’s calculations would undermine the purpose of the Agreement.

5. India's oral statement, at paragraph 7 states: "it should be noted that the term used in the AoA is "production eligible to receive the applied administered price", and not "crops/products eligible to receive the applied administered price". Please present your views on this statement, taking into account the ordinary meaning of the terms, and the absence of a definition for the quantity of eligible production in Annex 3.

9. Australia does not see any difference between the terms "production" and "crops/products" as used in this context or how any such difference would affect the relevant calculation.

6. What is the relevance, if any, of the amount of grain used by farmers for their own consumption, when calculating the quantity of eligible production?

7. The EU stated in its response to question 6 that:

    Whether the product produced is consumed on the farm or not, does not influence whether it is benefitting from the price support for the products in the country concerned, the farmer will benefit from the price support policy whether the production is consumed in house or whether it is trade. Indeed, ultimately the farmers will keep the product for in-house consumption only if that is economically more advantageous than selling the product at the administered price.

    Please explain in detail how production consumed on farm, which arguably would never have entered the market, can benefit from the MPS programme.

10. Australia provides the following combined response to questions 6 and 7.

11. In Australia's view the formula for calculating market price support, and in particular the requirement to multiply by "the quantity of production eligible to receive the applied administered price" in paragraph 8 of Annex 3, clearly includes production consumed on farm. Regardless as to the end use, production consumed on farm is still production.

12. Market price support affects the economic decision making of the farmer – and thus has a distorting impact. This is because it affects how much the farmer produces of that crop, how much a farmer sells to the government, how much to private traders (if the government allows private traders), how much a farmer keeps for seed and how much a farmer consumes on farm. As the EU notes: "ultimately the farmers will keep the product for in-house consumption only if that is economically more advantageous than selling the product at the administered price". Since the price differential (between the price support and market price) will affect all the decision-making of the farmer, all production

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6 India's third party oral statement, para. 7. (emphasis original)
China – Domestic Support for Agricultural Producers

Australia’s response to questions from the Panel

DS511

(whatever its end use may be) should be included in calculations of market price support in order to calculate the total distortion created as a result of the measure.

3 FIXED EXTERNAL REFERENCE PRICE (FERP)

8. Please comment on the following statement by China:

There is no record of any WTO Member insisting or even raising the point that China – and the entire working party itself – erred by not using the 1986-1988 period. Instead, the use of the 1996-1998 period was an agreed terms of China's accession to the WTO.7

13. The use of 1996-1998 reference prices in China's accession process was simply a reference point to establish China's AMS – it does not mean that the same period must be used to calculate China’s AMS thereafter.

14. As noted in Australia's submission at paragraph 37 and Australia's oral statement at paragraphs 24 and 25, there is nothing in China’s Accession Protocol or Working Party Report that provides a legal basis for calculating China’s AMS in accordance with a later reference period (1996-98). Rather, Annex 3 of the Agreement on Agriculture is clear that the fixed external reference price “shall be based on the years 1986 to 1988”.

4 CALCULATIONS AND METHODOLOGY

9. a. What is the legal status of the supporting tables to a Member's Schedule of Concessions (which in China’s case are found in document WT/ACC/CHN/38/Rev.3), as a source of rights and obligations binding on that Member?

15. In Australia’s view, as noted in paragraphs 6-8 of Australia's statement, and paragraphs 30-32 of Australia's submission, Rev. 3 is merely a reference in a Schedule that provides an illustration of domestic support in China at the time of China's accession to the WTO. It is not in itself a Schedule.

b. How, if at all, can these supporting tables modify obligations derived from the binding text of a treaty?

16. Even if Rev. 3 were considered to comprise a Schedule, Members cannot use Schedules to unilaterally modify their obligations under the WTO Agreements.

c. Should they be interpreted as a subsequent agreement or practice (as under Article 31(3) of the VCLT)? Or do they merely provide context for China’s obligations? Or does the reference to constituent data and methodology in Article 1 AoA confer a particular legal status? Please explain.

17. In Australia’s view, the supporting tables/Rev. 3 merely provide context for China’s obligations. They comprise an illustration of the level of domestic support in China at the time of China's accession to the WTO.

10. Please give your views on the appropriate methodology and conversion factors to be used to express all the variables listed in paragraph 8 of Annex 3 to the

7 China's first written submission, paras. 51-52.
AoA (that is, the "fixed external reference price", "applied administered price", and "quantity of production eligible to receive the applied administered price") at the same level of processing.

18. In Australia's view, as noted at paragraphs 17-22 and 34-37 of Australia's submission, paragraph 8 of Annex 3 as applied by panels and the Appellate Body in prior disputes, including Korea-Beef, provide the necessary guidance on these matters.

11. There are practical consequences of using the 1986-1988 period, which go beyond legal questions. For example, as pointed out by some third-parties, data may not exist for the 1986-1988 period for the relevant products, and indeed, some countries were not in existence at that time. How should these practical concerns be resolved when deciding on which period should be used? How would you explain the practice of using a different period during negotiations, while Annex 3 was in existence?

19. In Australia's view, the role of the Panel is limited to determining and applying the relevant law to the facts in this dispute. In this case, the relevant law is found in the Agreement on Agriculture, and there is no legal basis for applying a different period from the 1986-88 period prescribed in the Agreement.

20. Australia acknowledges that the law as it stands in light of the practice of WTO Members raises practical consequences and concerns which need to be resolved. However, in Australia's view, these issues are for the WTO Membership to resolve. If WTO Members determine that a new reference period should apply for acceding Members, this should be provided for explicitly either through amendment of the Agreement or express provision in relevant Accession Protocols.