UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA

(DS449)

Third Party Oral Statement of Australia

Geneva, 3 July 2013
Mr Chairman, Members of the Panel

1. Thank you for the opportunity to present Australia’s views in this dispute.

2. Australia has provided a written submission that focuses on some key issues of systemic interest on the application of Article X of the General Agreement on Tariffs and Trade 1994 (GATT 1994).

3. At today’s hearing, I will summarise Australia’s main submissions on Article X of the GATT 1994 before making some observations regarding what a party needs to demonstrate to establish a violation of WTO law. In Australia’s view, this latter issue arises in the context of China’s claims under the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

**Article X of the GATT 1994**

4. In this dispute, the arguments relating to the application of Article X of the GATT 1994 raise important issues about the reach of WTO law into Members’ domestic legal orders.

5. First, Australia considers that the transparency and due process requirements of Article X:1 do not automatically render laws with retroactive effect inconsistent with this provision.

6. Second, Australia considers that the obligation in Article X:2 with respect to prior publication only applies to the enforcement of measures that “effect an advance in a rate of duty” or which impose “a new or more burdensome requirement, restriction, or prohibition on imports”.
7. Third, Article X:3(b) establishes specific obligations, including that the decisions of domestic tribunals in customs matters be implemented and govern the practice of agencies unless an appeal is lodged. However, the relationship between the legislative, executive and judicial branches of government is not otherwise addressed in Article X:3(b) and remains a matter for each WTO Member.

**SCM Agreement**

8. An important issue in this dispute in relation to the claims under the SCM Agreement concerns what a party needs to demonstrate in order to establish a violation of WTO law.

9. It is a well-established principle that to establish a violation of WTO law, a party needs to adduce evidence and make arguments as to how a measure or measures are inconsistent, as such or as applied, with an obligation under relevant provisions of the WTO Agreement.¹

10. Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) states that the WTO dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the [Dispute Settlement Body (DSB)] cannot add to or diminish the rights and obligations provided in the covered agreements.”

11. Taken together with Articles 7 and 11 of the DSU, it is clear that panels are obliged to consider each dispute on its merits under the relevant provisions of the covered agreements.

12. The Appellate Body has clarified that while there is no binding rule of precedent in the WTO, “the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the acquis of the WTO dispute settlement system. Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case.”\(^2\) As such, previous decisions of panels and the Appellate Body may be highly persuasive in how a provision of a covered agreement should be interpreted. However, these interpretations cannot in themselves give rise to substantive obligations. To establish a violation of WTO law it remains necessary to identify the relevant WTO provision and obligation contained therein, and to explain the basis for the claimed inconsistency of the measure with that provision on the basis of evidence.\(^3\)

Conclusion

13. In conclusion, Australia’s written submission and this oral submission have focused on a few specific issues raised in this dispute. This should not be regarded as an indication that Australia considers that the issues it has not addressed are not important. Nor does it indicate agreement, or otherwise, with any particular argument of the parties or third parties in this dispute.

14. Australia thanks the Chairman and Members of the Panel for this opportunity to present its views in this dispute.