United States – Countervailing and Anti-dumping Measures on Certain Products from China
(WT/DS449)

Third Party Written Submission of Australia

24 June 2013
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I. INTRODUCTION

1. Australia considers that these proceedings initiated by China under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) raise significant questions with respect to the General Agreement on Tariffs and Trade 1994 (GATT 1994) and the Agreement on Subsidies and Countervailing Measures (SCM Agreement).

2. In this submission, Australia will not address the different factual accounts by China and the United States with respect to the enactment of relevant legislation, and the sequencing of events as they relate to domestic case law. Instead, Australia will address issues relating to the interpretation of Article X of the GATT 1994.

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

I. INTERPRETATION OF ARTICLE X OF GATT 1994

A. “PUBLISHED PROMPTLY IN SUCH A MANNER AS TO ENABLE GOVERNMENTS AND TRADERS TO BECOME ACQUAINTED WITH THEM” UNDER ARTICLE X:1

4. Article X:1 of the GATT 1994 requires Members to “promptly publish in such a manner as to enable governments and traders to become familiar with them”, laws, regulations, judicial decisions and administrative rulings of general application pertaining to the range of subject matters listed in this paragraph. Article X:1 outlines a World Trade Organization (WTO) Member’s obligations in relation to the publication of trade regulations and is fundamentally a provision about transparency.

5. In this dispute, a key issue in the interpretation of this provision is the meaning of the term “in such a manner as” in the first sentence of Article X:1. Interpreted in its immediate context, “in such a manner” has the effect of qualifying the term “publish promptly” by reference to the purpose of publication, which is “to enable governments and traders to become familiar with them.”

6. The issue is whether the term “in such a manner” gives rise to an obligation only as to “form” – how the measure is published so as to enable governments and traders to become familiar with them – or whether it gives rise to a substantive obligation in a temporal sense, that is, that laws must always be published before their “effective date.”

7. China appears to argue that a law that has retroactive effect is, ipso facto, inconsistent with Article X:1 because “in no event can publication be considered “prompt” if it takes place after the measure has taken effect.”

1 China’s First Written Submission, para. 64.
8. The United States, on the other hand, argues that Article X:1 is confined to a procedural obligation to publish and does not give rise to any substantive obligation in relation to the content of those laws, including their “effective date”.  

9. Article X:1 is silent on whether “laws, regulations, judicial decisions and administrative rulings” can be applied retrospectively from the date of publication. This is not notwithstanding the term “made effective”, in the first sentence of Article X:1 which, in Australia’s view, could, in the context of domestic legislation, mean “enacted” or “in force”. This is consistent with the Appellate Body’s interpretation of the term “made effective” in the context of Article XX(g) of the GATT 1994 in US – Gasoline.  

10. We note that the Panel in EC – IT Products found in relation to “made effective” that Article X:1 “covers measures that were brought into effect, or made operative, in practice and is not limited to measures formally promulgated or that have formally “entered into force”” (emphasis added). However, this was in the context of an inquiry into whether Article X:1 extended to measures that were applied in practice, despite not being formally binding under European Union law.  

11. The factual situation at issue in this case is different. In our view, the Panel’s statement in EC – IT Products cannot be read as meaning that publishing a law upon its enactment would be a violation of Article X:1 if the law has effects in the past. Article X:1 does not render laws which have retroactive effects inconsistent with this provision.  

12. Finally, in Australia’s opinion, it is important that Article X:1, which concerns a procedural obligation to publish, and X:2, which deals with the enforcement or operation of measures, not be conflated.  

B. THE SCOPE OF ARTICLE X:2  

13. In their respective submissions, the Parties have canvassed issues relating to whether countervailing duties are: “of general application”; a “rate of duty or other charge”; causing “an advance in a rate of duty”; or imposing “a new or more burdensome requirement, restriction or prohibition on imports”.  

14. Australia considers that the Panel may wish to examine the scope of Article X:2 with respect to no measure being able to be “enforced before such measure has been officially published” (emphasis added).  

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2 United States’ First Written Submission, paras. 76, 81 and 90.  
5 “This being so, in circumstances where the relevant measure has been "made effective", the requirement to publish promptly will arise regardless of its formal adoption or whether it remains a "draft" measure under the Member's municipal legal order.” Panel Report, EC – IT Products, para. 7.1048.  
6 Article X:2.
15. The Appellate Body in *US – Underwear* stated that the “essential implication” of Article X:2 is that “Members and other persons affected, or likely to be affected, by governmental measures imposing restraints, requirements and other burdens, should have a reasonable opportunity to acquire authentic information about such measures and accordingly to protect and adjust their activities or alternatively to seek modification of such measures”. The Appellate Body also noted that “prior publication is required for all measures falling within the scope of Article X:2, not just ATC [Agreement on Textiles and Clothing] safeguard restraint measures sought to be applied retrospectively”.

16. The Panel in *EC – IT Products* stated that the scope of Article X:2 “covers measures of general application that ‘cause’ an ‘increase’ in a rate of duty”. The Panel further noted that, unlike Article X:1, “enforced” in Article X:2 would be fulfilled by proof that a measure has been applied. Australia notes, however, that the Panel in *EC – IT Products* did not have to deal with the situation where the legal basis for a duty changed, whether or not the actual rate of duty changed.

17. In Australia’s view, where a measure does not effect an “advance” in a rate of duty or other charge on imports, or create a new or more burdensome requirement, restriction or prohibition on imports, failure to publish that measure would not fall foul of Article X:2. This is consistent with the purpose of Article X:2 to protect due process by providing notice to parties whose interests are affected by a particular measure.

18. The Panel in *US – Anti-Dumping Measures on Oil Country Tubular Goods* noted that Article X:2 can preclude retroactive application of a measure. It also noted, however, that compliance with this obligation depends on “the timing of the publication of a measure, and its enforcement in particular circumstances affecting the rights of WTO Members” (emphasis added).

19. In Australia’s view, where only the legal basis for the application of a rate of duty changes, but not the rate of the duty itself, the measure would not necessarily be caught by Article X:2. This is consistent with the due process purpose of Article X:2 by ensuring traders are informed in advance of the rate of duty they will pay, but not preventing Members from enacting retroactive legislation where such retroactivity has no effect on the actual duties paid. In other words, the legal basis for a rate of duty under a WTO Member’s domestic law may have no commercial effect. Australia underscores that whether or not this would give rise to a cause of action under domestic law is a separate matter.

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8 Ibid.
9 Panel Report, *EC – IT Products*, para. 7.1106
10 Ibid, para. 7.1129.
C. ARTICLE X:3(b) AND THE STATUS OF A LAW UNDER APPEAL

20. Article X:3 of the GATT 1994 establishes certain minimum standards for transparency and procedural fairness.\(^\text{13}\) It requires a balance between a trader’s fundamental right to procedural fairness and the sovereign right of WTO Members to manage the manner in which they administer their own laws and regulations.\(^\text{14}\)

21. Article X:3(b) contains a number of specific obligations. This includes that WTO Members are required to maintain independent tribunals in respect of the review of customs actions which “shall be implemented by and shall govern the practice of” the agencies concerned “unless an appeal is lodged …”.

22. However, the relationship between the legislative, executive and judicial branches of government is not otherwise addressed in this provision and remains a matter for each WTO Member in accordance with its own constitution and system of government.

23. Australia notes the Appellate Body’s observation in *Thailand – Cigarettes (Philippines)* that:

   Article X:3(b) does not prescribe one particular type of review or correction of administration action relating to customs matters. Instead, it refers to “judicial, arbitral or administrative tribunals or procedures”. This suggests that there are a variety of ways in which a WTO Member may comply with the obligation of maintaining tribunals or procedures for prompt review and correction of administrative action relating to customs matters, provided that, inter alia, such tribunals or procedures are independent of the agencies entrusted with administrative enforcement as required by the second sentence of Article X:3(b).\(^\text{15}\)

24. Similarly, Article X:3(b) requires WTO Members to maintain systems of independent review and for decisions to be implemented if not appealed. It does not prevent WTO Members from legislating and having such legislation applied by their courts so long as they comply with the specific obligations of the provision.

25. In *US – Stainless Steel Plate*, the Panel stated that the WTO dispute settlement system “was not in our view intended to function as a mechanism to test the consistency of a Member’s particular decisions or rulings with the Member’s own domestic law and practice; that is a function reserved for each member’s domestic judicial system and a function WTO panels would be particularly ill-suited to perform”.\(^\text{16}\)

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\(^{13}\) Appellate Body Report, *US – Shrimp*, para. 183.

\(^{14}\) Panel Report, *Thailand – Cigarettes*, para. 7.874.

\(^{15}\) Appellate Body Report, *Thailand – Cigarettes (Philippines)*, para. 205.

\(^{16}\) Panel Report, *US – Stainless Steel Plate*, para. 6.50.
26. We agree with the Panel’s characterisation of the application of Article X and see useful analogies in the context of this dispute. Specifically, a WTO Member’s ability to legislate retroactively on a matter that is being considered by a court is a matter for each Member’s domestic legal system.

II. CONCLUSION

27. Central to this dispute are important issues concerning aspects of Article X of the GATT 1994 and its reach into Members’ domestic legal orders. In Australia’s view:

   (a) Article X:1 constitutes a procedural requirement to “publish … promptly in such a manner as to enable governments and traders to become acquainted with them”, and is silent as to any substantive effect of the measure in question. Article X:1 does not render laws which have retroactive effects inconsistent with the provision;

   (b) Article X:2 only establishes prior publication obligations with respect to measures that effect “an advance in a rate of duty” or create a “new or more burdensome requirement, restriction, or prohibition on imports”; and

   (c) Article X:3(b) requires WTO Members to maintain independent tribunals to review customs actions and that the decisions of these tribunals must be implemented unless an appeal is lodged. However, the relationship between the legislative, executive and judicial branches of government is not otherwise addressed in this provision and remains a matter for each WTO Member in accordance with its own constitution and system of government.