BEFORE THE WORLD TRADE ORGANIZATION

China – Tariff Rate Quotas for Certain Agricultural Products
(WT/DS517)

Third Party Written Submission of Australia

29 May 2018
TABLE OF CONTENTS

I. INTRODUCTION ........................................................................................................... 4

II. PARAGRAPH 116 OF CHINA’S WORKING PARTY REPORT, INCORPORATED INTO CHINA’S ACCESSION PROTOCOL ............................................... 4

III. CONCLUSION .............................................................................................................. 7
### CASES CITED IN THIS SUBMISSION

<table>
<thead>
<tr>
<th>Short Title</th>
<th>Full Case Title and Citation</th>
</tr>
</thead>
</table>
I. INTRODUCTION

1. As a major agricultural exporter, Australia has a significant interest in ensuring a transparent and predictable global trading system – including the transparent and predictable operation of tariff rate quotas (TRQs) for agricultural products. This dispute raises a number of interpretative questions regarding the interaction between the administration of TRQs and: (i) paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol; as well as (ii) a number of provisions of the General Agreement on Tariffs and Trade 1994.

2. In this submission, Australia focuses on the interaction between the administration of TRQs and the disciplines set out in paragraph 116 of China's Working Party Report. Australia reserves the right to raise other issues in the third party hearing with the Panel.

II. PARAGRAPH 116 OF CHINA'S WORKING PARTY REPORT, INCORPORATED INTO CHINA'S ACCESSION PROTOCOL

3. Paragraph 116 of the Working Party Report is incorporated into China's Accession Protocol and therefore contains binding obligations on China. As recognised by both the panel and Appellate Body in China – Measures Affecting Imports of Automobile Parts, the commitments China made in these accession documents are enforceable as an integral part of the WTO Agreement. China is therefore bound to administer TRQs in accordance with the commitments made in that paragraph, namely to:

   … ensure that TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis using clearly specified timeframes, administrative procedures and requirements that would provide effective import opportunities; that would reflect consumer preferences and end-user demand; and that would not inhibit the filling of each TRQ. China would apply TRQs fully in accordance with WTO rules and principles and with the provisions set out in China's Schedule of Concessions and Commitments on Goods.

4. In Australia's view, China's commitments in paragraph 116 address three distinct but interrelated aspects of TRQ administration:

   (i) the basis on which TRQs are administered ("on a transparent, predictable, uniform, fair and non-discriminatory basis");

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1 In particular, Australia is one of the leading global exporters of wheat, and the largest exporter of wheat to China. In 2017, China imported AUD$551 million HS 1001 (Wheat and meslin). Australia has been the top import source in this category since 2014: China Customs Data.

2 See paragraph 1.2 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 paragraph 342 of the Report on the Working Party of the Accession of China (WT/ACC/CHN/49) ("Working Party Report"). Paragraph 116 is listed as one of these paragraphs and is therefore incorporated into China's Accession Protocol. See also United States' first written submission, paras. 57-69.


(ii) the manner in which TRQs should be administered ("using clearly specified timeframes, administrative procedures and requirements"); and

(iii) the outcome of TRQ administration ("[to] provide effective import opportunities … [to] reflect consumer preferences and end-user demand and … [to] not inhibit filling of each TRQ").

5. As treaty text, these commitments must be interpreted using principles of international treaty interpretation\(^5\) in accordance with Article 31(1) of the Vienna Convention on the Law of Treaties 1969 – that is, "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".\(^6\)

(i) "ensure TRQs were administered on a transparent, predictable, uniform, fair and non-discriminatory basis"

6. The first tranche of commitments in paragraph 116 relates to the basis on which TRQs are administered. The ordinary meaning of the verb "to administer" is "manage as a steward; carry on or execute (an office, affairs etc.)".\(^7\) The breadth of this term – and the lack of any textual qualification – indicates that it encompasses the full spectrum of activities associated with the administration of TRQs.

7. With respect to object and purpose, Australia observes that TRQs and the disciplines placed upon them arose from the commitment of Members in the Uruguay Round to phase out non-tariff barriers, such as quantitative restrictions, in favour of "tariffication". In this way, TRQs are permitted under WTO rules because they are recognised as a tool for Members to move towards greater trade liberalisation. However, to function as a tool for liberalisation, Members must administer TRQs consistently with the relevant prescribed disciplines. The commitments in paragraph 116 of China's Working Party Report were included to require China to undertake an express "commitment to administer TRQs in a simple, timely, predictable, uniform, non-discriminatory and non-trade restrictive manner, and in a way that would not cause trade distortions".\(^8\)

8. In Australia's view, the breadth and context of the term "to administer", together with the object and purpose of the disciplines governing the administration of TRQs – and of paragraph 116 in China's Working Party Report – indicates that the commitments in this paragraph apply to all administrative actions and legal instruments associated with the allocation and reallocation of TRQs.\(^9\)

9. A "basis" is "a determining principle; a set of underlying or agreed principles".\(^10\) In Australia's view, this term indicates that all actions and legal instruments within the

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\(^5\) In accordance with Article 3.2 of the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes.


\(^9\) United States' first written submission, paras. 66-69.

broad scope of "administration" (discussed above) must be determined by transparency, predictability, uniformity, fairness and non-discrimination.

10. The object and purpose of the disciplines governing TRQ administration and of paragraph 116 of China's Working Party Report in particular (discussed above) further support this interpretation.

11. Australia considers that any aspects of TRQ administration not based on or determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination, or that contradict these determining principles, would therefore not be consistent with this commitment.

(ii) "using clearly specified timeframes, administrative procedures and requirements"

12. The second tranche of commitments in paragraph 116 relates to the manner in which TRQs must be administered – that is, by having the relevant timeframes, administrative procedures and requirements associated with the allocation and reallocation of TRQs "clearly specified". The ordinary meaning of "clearly" is "distinctly; plainly; manifestly, obviously".11 The verb "to specify" is defined as "mention or name (a thing, that) explicitly; state categorically or explicitly".12 These terms indicate that the timeframes, administrative procedures and requirements associated with TRQ administration must be stated plainly and explicitly.

13. In Australia's view, in light of the object and purpose of the disciplines governing TRQ administration and of paragraph 116, the requirement to "clearly specify" these aspects of TRQ administration is to ensure that the audience that relies on this information can both obtain that information and understand what is required.

14. Australia considers that this commitment therefore requires that information on TRQ timeframes, administrative procedures and requirements must be explicit, accessible and comprehensible for the intended audience.

(iii) "that would provide effective import opportunities; that would reflect consumer preferences and end-user demand and that would not inhibit filling of each TRQ"

15. The third tranche of commitments in paragraph 116 makes clear that the administration of TRQs, in accordance with the prescribed basis and manner, should ensure outcomes that, among other things, do not inhibit the filling of each TRQ.

16. The ordinary meaning of "inhibit" is to "restrain, prevent",13 and "fill" means to "make or become full".14 In Australia's view, this indicates that a Member's administration of TRQs must not prevent the TRQ from being "full" – that is, from being fully exhausted.

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17. In Australia's view, taken together, the individual prescribed commitments in paragraph 116 therefore create a broad and comprehensive obligation for China to administer TRQs on a specific basis, in a specific manner, to ensure specific outcomes.

18. Applying the relevant legal framework to the context of this dispute, Australia considers that the Panel will need to determine whether not complying with any one of the commitments in paragraph 116 amounts to a breach of China's obligation. In particular, Australia observes that the facts before the Panel indicate China's TRQs for wheat, corn and rice have been underfilled over several years. Australia considers that the Panel will therefore need to examine:

- whether the mere underfilling of a TRQ alone determines that China's TRQ administration has inhibited the filling of each TRQ;
- whether inhibiting the filling of each TRQ alone amounts to a breach of paragraph 116; or
- whether a breach of paragraph 116 is only established if the specific basis and/or the specific manner in which China administers its TRQs has inhibited the filling of each TRQ.

III. CONCLUSION

19. In summary, Australia submits that China's distinct but interrelated commitments in paragraph 116 of China's Working Party Report, incorporated into China's Accession Protocol, create a broad and comprehensive obligation for China to ensure all actions and legal instruments associated with the allocation and reallocation of TRQs are administered:

- on a specific basis (determined by the principles of transparency, predictability, uniformity, fairness and non-discrimination);
- in a specific manner (making explicit, accessible and comprehensible the information on TRQ timeframes, administrative procedures and requirements); and
- to ensure specific outcomes (including to ensure the filling of TRQs is not prevented).

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

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15 United States' first written submission, paras. 42-51.