China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum
(WT/DS431, WT/DS432, WT/DS433)

Third Party Oral Statement of Australia

27 February 2013
Mr Chairman, Members of the Panel

I. INTRODUCTION

1. Thank you for the opportunity to present Australia’s views on this dispute. We have previously provided a written submission, and our comments today are intended to reinforce the points outlined in our submission.

2. A key issue in this dispute is whether China may justify its 2012 export quotas and system of export restrictions on rare earths, tungsten and molybdenum by invoking Article XX(g) of the General Agreement on Tariffs and Trade 1994 (GATT 1994). Our understanding is that China did not explicitly dispute the complainants’ submission that these export quotas were inconsistent with Article XI:1 of the GATT, although we note from China’s subsequent answers to the Panel’s questions that China has suggested some of the measures concerned were either inaccurately described by the complainants or not supported by the evidence provided.

3. In our statement, Australia will focus on the interpretation of Article XX(g), particularly with regard to:

   (a) the meaning of “relating to the conservation of exhaustible natural resources”;

   (b) the meaning of “made effective in conjunction with restrictions on domestic production or consumption”; and

   (c) the application of the chapeau of Article XX in justifying a measure that is otherwise inconsistent with Article XI.

A. THE MEANING OF “RELATING TO THE CONSERVATION OF EXHAUSTIBLE NATURAL RESOURCES”

4. Central to this dispute is whether China has satisfied the first part of Article XX(g) by demonstrating a close and genuine relationship between its export restrictions and the goal of conservation. Australia agrees with China that the Panel must examine the “general structure and design” of the measure at stake in making this determination.

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1 See Requests for the establishment of a panel, China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum, WT/DS431/6 by the United States; WT/DS432/6 by the European Union; WT/DS433/6 by Japan; and China’s first written submission, para. 4.

2 China’s first written submission, para. 44 (citations omitted).
5. It is in this context that Australia wishes to refer to the panel’s view in China – Raw Materials that “...a policy of extraction would be more in line with a policy to achieve conservation than one confined to restricting exports”\(^3\). Noting that the parties in China – Raw Material did not appeal the panel’s application of the first part of Article XX(g), Australia finds merit in the panel’s view that it would be the limit on production, not the export restriction, which conserves the resource. That is to say, it seems difficult for a Member to justify its export restraints by reference to the goal of conservation in circumstances where only a relatively modest fraction of the capped domestic production is permitted to be exported. In making this statement, Australia is mindful that it does not wish to pre-judge the range of measures that Members might choose to use for the purposes of conservation. Our statement is directed to the parts as we find them in this dispute.

6. Australia agrees with China that the term “conservation” encompasses measures aimed both at “preserving exhaustible natural resources in their current state, as well as regulating their use for economic development today”\(^4\). China submitted that Members may adopt policies to protect a broad range of “exhaustible natural resources”\(^5\) so long as the structure and design of the measure showed a “close and genuine relationship” to the conservation objective\(^6\), and that the measure was aimed both at “preserving exhaustible natural resources in their current state, as well as regulating their use for economic development today”\(^7\).

7. Nevertheless, Australia queries China’s submission that “pursuant to the principle of sovereignty over natural resources, States that possess natural resources may develop policies to husband the use of the resources to promote the production of more sophisticated processed products”\(^8\). Whilst Australia agrees that States have sovereign rights over their natural resources, Members have also exercised their sovereign rights in becoming party to the WTO Agreements. Members have thus agreed to exercise their sovereign rights in a manner that is consistent with their obligations under the WTO Agreements.\(^9\)

\(^3\) Panel Report, China – Raw Materials, para. 7.428.
\(^4\) China’s first written submission, para. 48.
\(^5\) China’s first written submission, para. 43.
\(^6\) China’s first written submission, para. 46.
\(^7\) China’s first written submission, para. 48.
\(^8\) China’s first written submission, para. 58.
B. THE MEANING OF “MADE EFFECTIVE IN CONJUNCTION WITH RESTRICTIONS ON DOMESTIC PRODUCTION OR CONSUMPTION”

8. As indicated by China in its first written submission, the WTO jurisprudence has established that the second part of Article XX(g) contains an “even-handedness” requirement.

9. Interestingly, the WTO jurisprudence informs us of what is not imposed by the even-handedness requirement (as opposed to what is meant by “even-handedness”). That is, the even-handedness requirement does not require domestic and foreign consumers of resources be treated in an identical manner by the resource-endowed Member. It does not require an “empirical effects test”. Nor does it require a “separate showing that the purpose of the challenged measure must be to make effective restrictions on domestic production or consumption”.

10. Australia considers that the Panel has an important opportunity in its consideration of this dispute to further develop Members’ understanding of the “even-handedness” requirement.

11. In this context, Australia submits that Article XX(g)’s even-handedness requirement would require a careful consideration of the design, structure and application of the domestic restrictions, and how those restrictions relate to the export restrictions. Such an approach was taken with respect to import restrictions in US – Shrimp, where the Appellate Body analysed the import restrictions and compared them with the restrictions on domestic producers in determining whether the import restriction was an even-handed measure.

12. In a matter concerning export restrictions, Australia submits that the consideration of the even-handedness requirement would require a comparison between the export restrictions and the restrictions on domestic consumption. That is, a Member’s export restriction in the name of conservation cannot be justified merely because of the existence of restrictions on domestic production.

13. Accordingly, Australia considers pertinent the view expressed by the panel in China – Raw Materials that a Member would need “to show that the impact of the export duty or export quota on foreign users is somehow balanced with some measure imposing restrictions on domestic users and consumers” in order to satisfy the even-handedness requirement in Article XX(g).

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11 Ibid.
12 Ibid.
15 Ibid (emphasis added).
14. Australia, therefore, remains of the view that whilst Article XX(g) does not necessitate equivalence in treatment between foreign consumers and domestic consumers, a Member would need to demonstrate that there is a balance between its restrictions on foreign consumers and its restrictions on domestic consumers. Otherwise, it would be difficult for the Member to assert that it had applied export restrictions in an even-handed manner.  

C. THE APPLICATION OF THE CHAPEAU OF ARTICLE XX

15. Likewise, the Panel has the important opportunity in its consideration of this dispute to facilitate the further development of the Members’ understanding of the chapeau of Article XX of the GATT.

16. Australia notes China’s submission, which suggests that the chapeau only obliges an exporting Member to demonstrate that the export restriction is not applied in a manner that discriminates between the different importing Members concerned.  

17. Australia, however, considers that the reference in the chapeau of Article XX to discrimination extends to measures, which discriminate between the exporting Member and its importing partners. The Appellate Body’s findings in US – Shrimp and United States – Gasoline would support this submission. That is, discrimination could occur not only between different exporting Members, but also between exporting Members and the importing Members concerned.

18. As noted in China’s submission, the chapeau embodies a guarantee against abus de droit by a Member invoking the exception. The chapeau, which addresses arbitrary or unjustifiable discrimination and disguised restrictions on international trade, plays an important role in maintaining the delicate balance between the right of a Member to invoke the general exceptions, and the rights of all other Members under the substantive obligations of the GATT 1994.

19. In considering matters involving export restrictions on natural resources, Australia remains of the view that the chapeau of Article XX requires the Member pursuing conservation goals to restrict foreign consumption in parallel with comparable restrictions on domestic consumption.

16 China’s first written submission, para. 73 (emphasis in the original).
II. CONCLUSION

20. That concludes Australia’s remarks. Australia would be pleased to provide responses to any questions that the Panel may have. Thank you, Mr Chairman, Members of the Panel.