

**BEFORE THE APPELLATE BODY
OF THE WORLD TRADE ORGANIZATION**

PHILIPPINES – TAXES ON DISTILLED SPIRITS
(AB-2011-6/DS396, DS403)

Third Participant Oral Statement of Australia

25 October 2011

A. INTRODUCTION

Members of the Division.

1. Thank you for the opportunity to present Australia's views on this appeal. Australia has provided a written submission identifying some key issues of systemic and legal interest raised by the Philippines' appeal on the panel's findings in this dispute and the European Union's other appeal on the panel's approach to the European Union's claim under the second sentence of Article III:2 of *General Agreement on Tariffs and Trade* (GATT 1994). Australia would like to briefly address some of those key issues.

A. THE ISSUES UNDER APPEAL

(i) *Article III:2 and Ad Article III of GATT 1994 – “like products” and “directly competitive or substitutable products”*

2. In its written submission Australia briefly outlined the different criteria based on existing WTO jurisprudence which might be used by a panel to determine whether products are “like” for the purposes of the first sentence of GATT 1994 Article III:2, and whether products are “directly competitive or substitutable” for the purposes of the second sentence of that article.
3. In Australia's view the evaluation of these factors will differ in relation to the first and second sentence of the Article III:2. Australia further notes that the Appellate Body has described “like” products as a narrower subset of the broader category of “directly competitive or substitutable products”.¹ Therefore, while the panel's finding in relation to the categorisation of products as “like” under the first sentence of Article II:2 might reasonably inform its conclusion as to whether the products are also “directly competitive or substitutable”, Australia submits that the panel was correct to also give full consideration to the remaining elements of a claim under the second sentence of Article III:2 of GATT 1994.²
4. Australia submits that panel has the responsibility to determine the weight to be placed on particular factors and criteria in the interpretation of GATT 1994 Article III:2. In the current dispute, Australia considers that the comparison of the physical characteristics of the products under consideration is a key factor. However, Australia agrees with the reasoning of the panel, which is consistent with previous panels and the Appellate Body, that no one criterion, such as a difference in physical characteristics, should be considered determinative and the evidence as a whole must be examined to determine the characterisation of the products at issue.³ By way of example, Australia notes the panel finding in *Japan-Alcoholic Beverages II* that shochu and vodka were “like” products even though they contained similar but not identical raw materials.⁴ Further, in considering whether the shochu and imported spirits were “directly competitive or substitutable” under the second sentence of

¹ Appellate Body Report, *Korea-Alcoholic Beverages*, para. 118.

² Appellate Body Report, *Japan-Alcoholic Beverages II*, p. 24. See also *Ad Article III of GATT 1994*.

³ Appellate Body Report, *EC-Asbestos*, para. 109.

⁴ Panel Report, *Japan-Alcoholic Beverages II*, para. 6.23.

GATT 1994 Article III:2 the panel in the same dispute found that the term “directly competitive or substitutable” does not suggest at all that physical resemblance is required...the decisive criterion... is whether they have common end uses’.⁵

5. In considering that panel’s findings in relation to the second sentence of Article III:2 and the proximity of the relationship between the products in this dispute, Australia observed in its submission that previous panels have found that products with different net retail prices can be “directly competitive” even if the products are not purchased with the same frequency.⁶

(ii) *Article 11 of the DSU*

6. In relation to the Philippines’ claim under Article 11 of the DSU the Appellate Body is called upon to determine whether the panel has made an “objective assessment” of the evidence adduced by the parties. Australia considers that claims under Article 11 go to the heart of the WTO dispute panel’s primary responsibility in the resolution of disputes and therefore such claims must be supported by strong evidence.
7. In considering the Philippines appeal, Australia notes the repetition of allegations applied both to claims in relation to Article III:2 of GATT 1994 and under Article 11 of the DSU.⁷ Australia therefore submits that the Appellate Body may wish to draw a distinction between allegations related to errors in the panel’s appreciation of the facts and evidence, and those related to errors of law, in order to determine how such claims should appropriately be dealt with.

B. CONCLUSION

8. Members of the Division, Australia would be pleased to provide answers to any questions on these or any other matters related to the appeal.

⁵ Panel Report, *Japan Alcoholic Beverages II*, para. 6.22.

⁶ Panel Report, *Korea – Alcoholic Beverages*, para. 10.74; Panel Report, *Chile-Alcoholic Beverages*, para. 7.37.

⁷ See for example: European Union Appellee Submission, paras. 163, 185. and 191; and United States Appellee Submission para. 99.