

**EUROPEAN COMMUNITIES – SELECTED CUSTOMS
MATTERS**

(AB-2006-4)

Appeals by the United States and European Communities

Oral Statement by Australia

**Geneva
28 SEPTEMBER 2006**

Introduction

Members of the Division,

1. In this statement Australia will address three issues.
2. First, Australia considers that the Panel made a number of legal errors with regard to its interpretation of the United States' **panel request** resulting in an incorrect determination of the "measure at issue" for the purposes of Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).
3. Secondly, Australia takes the position that the Panel took an incorrect approach to determining the **meaning of 'administer' in Article X:3(a)** of the GATT 1994, resulting in an overly limited application of the obligations contained in Article X:3(a).
4. Thirdly, Australia considers that the Panel was correct in concluding that **Article XXIV:12 of the GATT 1994** does not have application to the facts of this dispute.

Panel Request

5. In Australia's view the Panel made a number of legal errors in its approach to interpreting the panel request.
6. Australia recalls that the first step in the Panel's analysis was identifying the "measure at issue"¹. The Panel found that for the purposes of Article X:3(a) of GATT 1994, the "measure at issue" which had to be identified in the Panel request was the "manner of administration that is allegedly non-uniform, partial and/or unreasonable"². The Panel's reasoning was based, in part, on identification of an "inter-linkage" between the term "measure at issue" in Article 6.2 of the *Dispute Settlement Understanding* (DSU) with the term "measure" in Article 19.1 of the DSU³. The Panel further limited its terms of reference by concluding that, to meet the requirements of Article 6.2, such a claim had to detail relevant customs areas.⁴
7. The Panel should have considered the scope of the US panel request against the requirements in Article 6.2 of the DSU. The Panel is not free to determine its own terms of reference, but must address the measures at issue and legal claims that are put to it in the panel request.
8. Australia recognises that the EC is entitled to be made aware of the case against it, and that Article 6.2 plainly requires that the legal claim and measure at issue must be stated with sufficient specificity. However, in identifying the specific measures at issue, nothing in the text of the US's panel request

¹ *Panel Report*, paragraph 7.18

² *Panel Report*, paragraph 7.20

³ *Panel Report*, paragraphs 7.14 and 7.17.

⁴ *Panel Report*, paragraph 7.30

required the Panel to limit the measures at issue according to the illustrative list in paragraph 3 of the US panel request as it did.

9. In this regard, Australia agrees with the US that the Panel's reliance on an Appellate Body consideration of a similar phrase in *India-Patents (US)*⁵ is misplaced. In that case, the phrase "including but not limited to" referred to a number of Articles of the TRIPS Agreement. This is distinguished from the present case where the legal claim under Article X:3(a) was clearly identified. It is also not clear why the Panel concluded that there was a requirement for specification of "customs areas" on the basis of the Appellate Body's findings in *EC-Computer Equipment*⁶.

Interpretation of Article X:3(a)

10. A separate but related issue for the Appellate Body to consider is whether the term "administer" in Article X:3(a) means only specific instances of applied administration, or whether the term includes laws, regulations and decisions that are intended to, and have the practical effect of administering the substantive laws and regulations of the kind specified in Article X:1.
11. In Australia's view, the Panel did not take a consistent approach to the meaning of "administer"⁷. With differing objectives, both the US and EC demonstrate the Panel's inconsistency in their appeals. This inconsistency, if not clarified by the Appellate Body, will make it difficult for other WTO Members to understand the practical content of their obligations under Article X:3(a).
12. A previous panel dispute, *Argentina Hides*⁸, attempted to clarify the issue of obligations under Article X:3(a) in respect of measures of an 'administrative nature'. That case dealt with measures similar to those which are the subject of this dispute. Importantly, for present purposes, the Panel found that measures of an "administrative nature" were reviewable for substance under Article X:3(a).
13. This case was referred to at length in the oral submissions at the Panel stage.⁹ Despite this, no attempt was made by the Panel to distinguish that dispute from the present case. In Australia's view, while it was not incumbent on the Panel to take an identical approach to the panel in that case, it should have given the *Argentina-Hides* Panel Report due consideration.

⁵ *India - Patent Protection For Pharmaceutical And Agricultural Chemical Products* WT/DS50/AB/R, 19 December 1997, paragraph 89, US submission 21 August 2006 paragraph 72.

⁶ Third Participant's Submission of Japan, 11 September 2006, paragraph 3, Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, WT/DS62/AB/R – WT/DS67/AB/R, adopted 22 June 1998, noted at *Panel Report*, paragraph 7.31

⁷ See paras 7.113 (where the Panel interpreted "administer to include administrative processes and their results, but not laws and regulations) and 7.198 of the Panel report where the Panel concludes that tariff classification of a product constitutes an act of administration within the meaning of Article X:3(a) of the GATT 1994. We note that certain tariff classification decisions can be made by regulation.

⁸ *Argentina – Measures Affecting the Export of Bovine Hides and the Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001

⁹ Para 132, US appeal submissions.

14. In Australia's view, to limit the meaning of "administer" as the Panel has done, would unduly restrict the scope of Article X:3(a). Article X:3(a) goes beyond mere transparency. It is an obligation to conduct the administration of the day-to-day operations of customs authorities in a uniform manner. As such, it is an important safeguard of the predictability and security of the multilateral trading system.

3. Article XXIV:12 of GATT

15. Australia agrees with the Panel that Article XXIV:12 of GATT 1994 is not relevant to this dispute. This dispute does not concern the observance of Article X:3(a) of the GATT 1994 by regional and local governments. This is because individual EC Member States cannot be regarded as regional or local governments.

16. As correctly reasoned by the Panel, Article XXIV:12 of the GATT cannot be used to read down substantive obligations of a covered agreement. It defines the territorial scope of an obligation in terms of the responsibility of a treaty signatory. It does not serve to modify that Member's obligation under a covered agreement.

17. In this case, Article XXIV:12 does not have the effect of limiting the EC's obligations under Article X:3(a) of the GATT 1994 "so that it is only required to take 'reasonable measures' to ensure uniform administration by the customs authorities of the member States."¹⁰ The EC is a WTO Member in its own right. Accordingly, it is bound, independently of its Member States, to ensure the uniform administration of its customs laws across the entire membership.

Conclusion

18. Australia thanks the Appellate Body for its consideration of the points we have raised.

¹⁰ Panel Report, para. 7.142