

PROHIBITED EXPORT SUBSIDIES

Communication from Australia

The following communication, dated 22 March 2005, is being circulated at the request of the Delegation of Australia.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/40), also be circulated as a formal document.

Australia welcomes the broad discussion at the Negotiating Group on Rules meeting in November 2004 on the Australian proposal to clarify the standard of "in fact" export contingency, as contained in Article 3.1(a) of the WTO Agreement on Subsidies and Countervailing Measures (SCM).¹

We recall that Australia's proposal of 19 October 2004 sought to clarify the following:

- what facts or factors must be considered in determining "in fact" export contingency;
- the fact of export propensity should not be taken in isolation and this fact should not necessarily have greater weight in any case-specific examination; and
- the need for parallel consideration of the application of the subsidy analysis in countervailing duty investigations.

Australia's concerns relate to not only whether or not any particular fact is in itself relevant, but also whether in considering several facts, no one fact on its own is sufficient a basis to determine "in fact" export contingency. Australia considers that export orientation is a relevant fact which may be taken into account but it is one of several facts which are considered.² Under the existing textual formulation of SCM Article 3.1(a), it remains open for undue and unfair emphasis to be placed on the issue of export propensity or export orientation.

Australia considers that SCM Article 3.1(a) can, and should, be clarified without disturbing the important presumption that prohibited subsidies cause serious trade effects.

PROPOSED TEXTUAL AMENDMENTS

The following is intended to outline broadly how Australia sees SCM Article 3.1(a) as being meaningfully clarified. The proposed preliminary text focuses on that aspect of Australia's proposal

¹ Document JOB(04)/151; TN/RL/GEN/22

² *Canada – Measures Affecting the Export of Civilian Aircraft*, (hereafter *Canada – Aircraft*), Appellate Body Report, WT/DS70/AB/R, adopted 8 August 1999, para 173.

relating to ensuring that the fact of export orientation is not given undue emphasis. It also conceptually outlines how an illustrative, non-exhaustive range of factors could be listed.

Australia proposes the following amendment to SCM Article 3.1(a) so that the relevant part of footnote 4 reads:

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

(a) subsidies contingent, in law or in fact⁴, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I ...

⁴ This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export, **or which have a high degree of export orientation**, shall not for those reasons alone be considered to be an export subsidy within the meaning of this provision.

Alternatively, the footnote could read as follows:

Factors that should be considered in determining 'in fact' contingency include the size of the domestic market, ...

Australia reserves the right to submit further proposals on this issue.
