

PROHIBITED EXPORT SUBSIDIES

Communication from Australia

The following communication, dated 18 October 2004, 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(04)/151), also be circulated as a formal document.

Article 3.1(a) of the WTO Agreement on Subsidies and Countervailing Measures (SCM) provides that:

- (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 ...

⁴This 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 shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.”

I. ISSUES

Australia previously identified in earlier papers¹ that there is currently a lack of clarity in the rules relating to prohibited subsidies contingent ‘in fact’ upon export performance. Specifically, Australia identified that the standard for meeting the ‘in fact’ contingency under SCM Article 3.1(a) currently lends itself to discriminatory and unpredictable treatment. It is discriminatory, given that WTO case law has appeared to place a greater weight on the export propensity of a product in the range of factors which are examined to determine export contingency. Notwithstanding that the facts and circumstances will clearly vary on a case by case basis, it is unclear as to what facts are to be determinative in any assessment of ‘in fact’ export contingency.

Australia also noted that WTO case law had acknowledged the difficulties associated with an analysis of ‘in fact’ export contingency. In summary, such case law has considered the following matters and found:

- It is not sufficient to demonstrate solely that a government granting a subsidy *anticipated* that exports would result but that the government granted the subsidy *contingent* upon export performance.

¹ Document TN/RL/W/85 and TN/RL/W/139

- In relation to footnote 4, second sentence, of Article 3.1(a), “merely knowing that a recipient’s sales are export-oriented does not demonstrate, **without more**, that the granting of a subsidy is tied to actual or anticipated exports” (emphasis added).²
- Export orientation may be taken into account as a relevant fact provided that it is one of several facts and not the only fact supporting a finding.
- The nearness-to-the-export-market factor of demonstrating export contingency needs to be treated with caution.³

Australia considers that clearer rules and objective and verifiable criteria are needed on the conditions or facts which give grounds for a conclusion that a subsidy is contingent ‘in fact’ upon actual or anticipated export performance. There is no guidance on what facts or what kinds of facts must be taken into account.

Currently the rules relating to subsidies are discriminatory in favour of large markets or economies. A subsidy provided to a product by a WTO Member with a large domestic market for that product may be actionable but carry little if no risk of being found to be export contingent. The same subsidy provided to a product by a WTO Member with a relatively small domestic market may represent a very high risk of being contingent on export performance given a much higher export orientation. Further, a product may be subsidised but, due to fluctuating domestic market conditions, may no longer be solely for the domestic market.

Consideration of the levels of export competitiveness in a product is already reflected in the SCM in the context of special and differential treatment. In that context, export competitiveness is measured by a Member’s share of world trade in that product for a specified time period. Australia considers that it may be feasible to examine whether, as a result of subsidization, a Member’s export competitiveness has increased to certain levels and not been at those levels for sustained periods. The weight given to export orientation in considering ‘in fact’ export contingency could therefore have relevance by virtue of the increase in the export competitiveness of the product.

Clearer rules on prohibited subsidies contingent ‘in fact’ upon export performance also are important in the context of the remedies for prohibited export subsidies. It has also been suggested that it may be appropriate to strengthen the remedies for prohibited subsidies in the context of countervailing duty proceedings⁴. Australia agrees that it is important to maintain the presumption that prohibited subsidies cause serious trade effects. However, it is equally important that it be clearly established whether a subsidy is prohibited for the purposes of countervailing duty investigations.

Australia noted its experience in countervail investigations where investigating authorities establish firstly (and correctly) the existence of a subsidy but determine (incorrectly) that the subsidy is contingent on export performance by virtue of the fact that the company being investigated is exporting. If there are no clear rules or guidelines to be able to determine whether or not a subsidy is contingent ‘in fact’ upon export performance, this clearly will affect the calculation of the level of subsidization to the product in countervailing duty investigations. The incorrect deeming of a subsidy to be prohibited ‘in fact’ upon export performance affects the use of the appropriate denominator in a countervail calculation. In other words, a company’s total export sales will be used rather than total sales.

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

³ *Ibid.*, paragraph 174

⁴ See TN/RL/W78

II. PROPOSED AMENDMENTS

Australia proposes the following amendments to the SCM:

- (i) Australia proposes that in considering a range of factors, it should be made clear that export propensity should not be a factor taken in isolation. Currently footnote 4 to Article 3.1(a) does not adequately address situations where domestic markets of a subsidizing Member are small or where there are fluctuating market conditions, such that products destined for the domestic market have to be sold on the export market.
- (ii) Australia proposes that footnote 4 to Article 3.1(a) be amended. An illustrative, non-exhaustive range of factors that should be taken into account for export contingency, could be listed.

This list could include the conditions or performance requirements attached to the granting of the subsidy; and the export orientation (in the context of export competitiveness of a product).

- (iii) Just as footnote 35 to Article 10 elaborates on establishing whether a measure falls within the parameters of Article 8.1(a) to determine specificity or a measure within Article 8.2 to determine if the measure is non-actionable, Australia also proposes that investigating authorities should ensure that consideration of the facts relating to contingency on export performance is clearly established in a countervail investigation.
