WORLD TRADE ORGANIZATION

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COMMENTS ON DOCUMENT TN/RL/W/6 ON ANTI-DUMPING MEASURES

Paper from Australia

The following communication, dated 14 October 2002, has been received from the Permanent Mission of Australia.

Australia thanks the group of countries for the two papers submitted (Documents TN/RL/W/6 and TN/RL/W/10). Australia's comments and questions on Document TN/RL/W/10 were circulated as a room document on 8 July 2002 and have been submitted separately for circulation formally. Following provides some general comments and preliminary reactions to the paper circulated by the group of countries contained in document TN/RL/W/6 of 26 April 2002. These comments and questions are without prejudice to any position Australia may take following the initial phase of the negotiations.

1. Sales in the Ordinary Course of Trade

The proponents suggest strengthening Article 2.2.1 of the WTO Agreement on Anti-Dumping (ADA) to include a definition of "reasonable period of time" and to allow investigating authorities to disregard sales below cost when prices provide for the recovery of all costs in the period for dumping investigation.

"A reasonable period of time" is not defined in the ADA. However, the last sentence in Article 2.2.1 illuminates the meaning of "a reasonable period of time" by treating costs as being recoverable within a reasonable period of time should the criterion set out therein be satisfied. The rationale underlying this is probably to give effect to commercial reality that businesses do make losses from time to time, whether deliberately as a loss leader or merely due to global downturn in demands. Costs should however be regarded as recoverable if they can be recouped through sales over a longer period of time which in this case would be the investigation period.

Even though the meaning of "a reasonable period of time" is not defined in the ADA, that phrase, when read in light of the last sentence, can be taken to mean "period of investigation" as the test provided in Article 2.2.1 is whether the price of the goods is above the weighted average per unit costs for the period of investigation. This allows the exporter to assess the weighted average costs of the goods for the investigation period for the purpose of determining whether such product is profitable in the long run.

Based on the foregoing, Australia considers that the term "a reasonable period of time" is implicitly clear in light of the test set out in Article 2.2.1. Australia agrees that there would be some

merit in examining the definition of "reasonable period of time" provided that definition is consistent with the present understanding of the phrase as set out in Article 2.2.1.

2. Constructed Value

Document TN/RL/W/6 proposes that Article 2.2.2 of the ADA be elaborated to provide clear, comprehensive and representative criteria for calculating a constructed normal value.

- Do the proponents consider that Article 2.2.2 should provide a hierarchy of options?

Article 2.2.2 gives authorities discretion in calculating the selling, general and administrative costs and profit where actual data, pertaining to ordinary course of trade sales of like goods by the producer/exporter, is not available. Currently the discretion is limited to three non-hierarchical options.

Australia considers that while it may be possible to negotiate a hierarchy for the existing options, it is difficult to envisage useful criteria for the basis of the hierarchy. As pointed out in the *EC- Bed Linen* case "[g]iven … that each of the three options is in some sense 'imperfect' in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge which option is less imperfect – or of greater authority - than another …", (*EC-Bed Linen* WT/DS141/R, para 6.61).

The example provided in Document TN/RL/W/6 does illustrate the discretion available in article 2.2.2 but Australia considers that this is desirable, given the myriad of circumstances investigating authorities are faced with and the inherently imperfect nature of constructing a normal value.

3. Cyclical Markets

The proponents suggest that Article 2.4 does not provide for the performance of cyclical markets, especially in the cases of perishable goods, to be taken into consideration when comparing normal value with export price.

- Can the current provisions be made to "fit" cyclical market situations?

4. Prohibition of Zeroing

The proponents suggest that Article 2.4.2 should be clarified to explicitly rule out zeroing. Article 2.4.2 sets out the different methodologies for establishing dumping margin of the product during the investigation period. The methodologies set out therein are as follows:

- A comparison of a weighted average normal value with a weighted average of prices of **all** comparable export transactions; or
- A comparison of normal value and export prices on a transaction-to-transaction basis; or
- A comparison of a normal value established on a weighted average basis to prices of individual export transactions if certain conditions are satisfied.

The methodologies set out in Article 2.4.2 do not allow negative margins to be converted into zero value. Article 2.4.2 in fact requires comparison to be made between weighted average normal value with a weighted average of **all** comparable export prices or on a transaction-to-transaction basis which impliedly requires all transactions to be captured in the comparison exercise. By artificially inflating negative margins to zero value, the investigation authorities are in fact ignoring the negative

margins by neutralising them into zero value. This seems to be at odds with the requirements of Article 2.4.2 which never allow this form of manipulation by the investigating authorities.

As the words used in Article 2.4.2 do not impliedly or expressly admit a construction which permits "zeroing" of negative margins, Australia considers that Article 2.4.2 does not require any clarification to expressly rule out zeroing.

5. Cumulative Assessment of Injury

The proponents propose strengthening Article 3.3 to include the factors that should be taken into account when assessing the conditions of competition between the imported goods and the conditions of competition between the imported goods and the like domestic goods.

The question of developing criteria is currently being considered by the Working Group on Implementation. Australia considers that there would be merit in examining this issue in the light of the Working Group's consideration of proposed criteria.

6. Causal Relationship between Dumping and Injury

The proponents suggest that the provisions of Article 3.5 merit further elaboration by developing procedures and criteria to analyse the causal relationship.

Australia does not consider that there is a lack of clarity in Article 3.5. Article 3.5 requires that adequate regard be given to other factors.

The question of causal link has been the subject of several recent WTO dispute settlement cases relating to anti dumping and safeguards measures. The *Thailand Steel* case emphasised that although Article 3.5 requires that regard must be given by authorities to known factors other than dumped imports which are causing injury, this did not mean that there was an express requirement for an authority to examine these factors on their own initiative. However, they could choose to do so.

7. Threat of Material Injury

The proponents suggest that Article 3.7 should be strengthened to clearly define the factors to be considered when assessing threat of injury.

- What further factors should be considered?

- Could the factors that lead to a determination that threat exists be more clearly set out in Article 3.7?

8. Threshold under Article 5.8

The proponents suggest an increase of the *de minimis* margin of dumping and negligible volume of dumped imports to unspecified levels and the role of *de minimis* in the duty collection process.

- Do the proponents consider that the *de minimis* and negligible volume levels should be increased for both developed and developing countries?
- How do the proponents relate this to cumulatively assessing injury?
- Could the proponents explain when (that is, in what circumstances) would *de minimis* play a role in the duty collection?

9. Facts Available

The proponents raise the issue of more stringent rules to provide more clarity to discipline the excessive use of "facts available".

Australia considers that there may be merit in examining criteria that could be used to determine whether or not to grant an extension of time for information. The Working Group on Implementation has adopted a recommendation on the elements that are relevant in determining whether or not to grant an extension. This recommendation could also form the basis for setting out criteria in the ADA for granting an extension of time.

Australia notes the relevance of the Appellate Body (AB) findings in the *US – Hot Rolled* Steel case. The AB found that there was no failure by the exporter to cooperate and get information from an associated company and that the degree of cooperation was not an absolute standard and unreasonable burdens could not be imposed on exporters.

Reliance was placed on the wording of Article 6.8 that regard should be given to supply information in a "reasonable period" which was determined by having regard to (WT/DS184/AB/R, para 85)

(i) the nature and quality of the information submitted
(ii) the difficulties encountered by an investigating exporter obtaining the information
(iii) the verifiability of the information and ease with which it can be used
(iv) whether other interested parties would be prejudiced if the information is used
(v) whether the acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously and
(vi) the number of days by which the investigated exporter missed the applicable time limit.

10. Lesser Duty Rule

Australia considers that this is an issue which merits examination.

- Do the proponents consider that the lesser duty rule, in some circumstances, should be a mandatory consideration or should be mandatory in application?

- The illustrative example also raises issues of the calculation of the lesser duty. Is this issue of concern to the proponents?

11. Sunset of Anti-Dumping Orders

The proponents suggest that the exception rule in Article 11.3 is over-applied and invariably leads to a continuation of measures.

In the illustrative example provided, the exporter no longer exports to country A, but is still subject to anti-dumping action after the measures have been continued (following a sunset review).

- Do the proponents consider that measures should expire after the 5 year period, without the "likelihood" question being put?

12. Public Interest

The proponents suggest the ADA be strengthened to ensure that relevant information pertaining to public interest be taken into account in a more substantive manner.

The ADA contains no provisions dealing with public interest. Australia does not consider that a public interest test should be included in the Negotiating Group on Rules consideration of issues as it is ultimately a matter for each country to determine under its own law.

The discussion in the Working Group on Implementation on the question of public interest has highlighted various approaches to consideration of the question of public interest. One view is to approach the question of public interest in the context of the application of the lesser duty rule. However, this does not address the question of whether measures should not be imposed at all. For example, regard can be given to whether the industry will benefit from the imposition of measures or if the negative effect of the imposition of measures on interested parties would be disproportionate when compared to its positive effect.