WORLD TRADE ORGANIZATION

TN/RL/W/37
4 December 2002

(02-6685)

Negotiating Group on Rules Original: English

COMMENTS FROM AUSTRALIA ON BRAZIL'S PAPER ON COUNTERVAILING MEASURES: ILLUSTRATIVE MAJOR ISSUES (DOCUMENT TN/RL/W/19)

Submission by Australia

The following communication, dated 25 November 2002, has been received from the Permanent Mission of Australia.

Australia thanks Brazil for its comprehensive paper on countervailing measures. Australia sees merit in exploring clarification and improvement of provisions in the WTO Agreement on Subsidies and Countervailing Measures (ASCM) relating to countervailing duty investigations analogous to those in the WTO Anti-Dumping Agreement (ADA). Australia considers that there are a number of issues worthy of consideration, for clarification and for purposes of harmony and symmetry with the ADA.

Article 11.4

Australia considers that the standing requirements for both countervailing duty and dumping investigations should be in harmony and that the approach on countervailing duty investigations should reflect what is practice under the ADA.

Brazil suggests that an application should be supported by at least more than 50 per cent of the total domestic production.

- Does Brazil consider that the threshold of total production by that portion of the domestic industry expressing either support for or opposition to the petition should consequently also be adjusted?

Article 11.9 and Article 19

Australia raised the issue during the discussions of "tiret 80" implementation issues of whether Article 11.9 provided for termination where the amount of subsidy is *de minimis* for a specific exporter. Australia recalls that ASCM Article 11.9 reflects or parallels ADA Article 5.8. WTO jurisprudence has found that the *de minimis* test in Article 5.8 does not require a *de minimis* test in Article 9.3 duty assessment procedures and therefore cannot require Members to apply a *de minimis* standard in duty assessment procedures. The DRAMS Panel found that the term "case" used in the first sentence of Article 5.8 encompassed at a minimum the notions of an "application" and "investigation".

- Does Brazil consider that Article 19.4 (which provides that no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist) has any relevance in this context?

Proposal under Article 11

Brazil seeks a provision within the ASCM to define the product under investigation and provides an example relating to products destined to different market segments.

- How does Brazil relate this to ASCM Article 16? Is there any relationship to Article 16 or should there be?

Australia agrees that determining the scope of the "product under investigation" at the initial stage of the investigation is important. We agree that this has a bearing on what determines the "domestic industry" and the data relevant for the injury investigation and analysis.

Article 12.7

Australia agrees that this is an issue that merits harmonization with the ADA. As Australia noted in document TN/RL/W/22 in regard to proposals seeking more stringent and clearer rules on the use of "facts available" in the ADA, Australia considers that any consideration of clarified rules under the ADA on "facts available" should also be reflected in the ASCM.

Australia wishes to highlight some elements of Annex II of the ADA, namely paragraph 5 and paragraph 7. Paragraph 5 provides that "[e]ven though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability". Paragraph 7 provides that if authorities base their findings on secondary sources, they should do so "with special circumspection".

- Does Brazil consider that "facts available" should be used by investigating authorities in situations where a firm has provided data but the investigating authorities may not accept the adequacy of the information?

- Does Brazil consider that recourse to "facts available" enables the investigating authorities to reject all information provided?

- What constitutes "necessary information"? For example, if, by law, information cannot be revealed to third parties, would statements by interested parties constitute "necessary information"?

- Brazil suggests that Members' WTO notifications could be specified as examples of "independent sources". Given that recent WTO case law has reinforced that notifications have no legal effect, does Brazil consider that the use of notifications to the Committee on Subsidies and Countervailing Measures would give legal effect to such a notification?

Article 14

Australia sees merit in further discussions on elaborating and clarifying the provisions of Article 14. A number of the issues raised by Brazil were considered in the report issued by the Informal Group of Experts which would provide a useful point of reference by the Negotiating Group on Rules.

Article 15.3

As noted in document TN/RL/W/22, Australia similarly agrees that there would be merit in developing criteria in evaluating the conditions of competition for the purposes of a cumulative assessment of the effects of imports. Australia notes the work underway in the Committee on Anti-Dumping Practices Working Group on Implementation on the parallel provision in the ADA.

Article 18.1, Article 19.2

Australia also agrees that there is merit in discussion on clarifying these provisions.

Reviews

As Australia indicated in TN/RL/W/23 with regard to the ADA, Australia similarly considers that there is merit in seeking clarification of the provisions in the ASCM relating to reviews, including notification and consultation.

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