WORLD TRADE ORGANIZATION

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COMMENTS FROM AUSTRALIA ON THE EUROPEAN COMMUNITIES' PAPER: REFLECTION PAPER ON A SWIFT CONTROL MECHANISM FOR INITIATIONS (DOCUMENT TN/RL/W/67)

Submission from Australia

Australia thanks the European Communities for its most interesting elaboration of its proposals for a swift control mechanism for initiations in anti-dumping and countervailing duty investigations. The following poses questions and provides Australia's preliminary views which are without prejudice to any final position that Australia may subsequently take in the later negotiations phase.

Australia agrees that current anti-dumping initiations are not measures which can be subject to dispute settlement procedures under ADA Article 17.4. Australia also agrees that a flawed initiation cannot subsequently be cured notwithstanding that in a dispute settlement proceeding relating to provisional or definitive anti-dumping or countervailing duty measures, the initiation of an investigation could also be examined.

Australia considers that this issue raises the importance of initiation standards both from an evidentiary viewpoint and definitional grounds (like product, product under investigation, domestic industry, standing).

Australia is mindful of the commercial effect ('trade-chilling' effect) that the very initiation of an anti-dumping investigation can have on exporters/producers. However, Australia would be interested in views on whether the 'clock' could be stopped where matters are referred to fast tract initiation panels in order to ensure that this is balanced with procedural fairness.

Having an open, transparent system of consultations sometimes remedies perceptions that initiation of an investigation is groundless. Therefore, Australia considers that any swift control mechanism should not undermine open consultations. Otherwise, such a mechanism may encourage immediate recourse to dispute settlement proceedings which may ultimately be without foundation.

Given there is not a corresponding provision as ADA Article 17.4 reflected in the SCM, does the absence of the inclusion of initiation of anti-dumping investigations in ADA Article 17.4 represent lacuna in the ADA? Australia notes in this context the Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation on Article VI of the GATT 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, namely "the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures". Does the EC consider there to be imbalance between the ADA and the SCM in relation to dispute settlement actions?

Fast track initiation panels

The European Communities correctly identifies the grounds or elements on which initiations could be challenged. The European Communities also suggests that there be an obligation on a panel

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to issue suggestions on how to implement recommendations. If there is no prima facie evidence or one of the elements to initiate are absent, then the only recommendation could be for the investigation to be terminated. What does implementation and "reasonable period of time" mean in the context where, for example, one of the elements has not been established by the investigating authorities? Surely in such cases, the investigation should be terminated without recourse to dispute settlement proceedings. Further, in a situation where a fast track panel has determined that one element or the grounds for initiation are deficient, and the recommendation is to terminate, could the domestic industry simply submit a new application?

What are the implications of footnote 7 (relating to the suspensive effect)? How would this relate to, for example, 'stopping the clock'?

Arbitration

The timeframes outlined under this scenario may be less disruptive to the investigation timeline overall. However, as Australia commented above, 'stopping the clock' while a matter is subject to the fast track panel could prevent any disadvantage to either the affected domestic industry or the exporters/producers subject to investigation.

Would an arbitration clause based on Article 25 of the DSU result in an expedited outcome? Article 25 of the DSU is based on the "mutual agreement" of the parties. While it is not subject to the prescriptive time frames of other dispute settlement provisions, it does not provide any certainty should the parties fail to reach an agreement.

The European Communities notes that the arbitration could be conducted on the basis of a "checklist" of basic elements required for the initiation of an investigation. Does the European Communities consider that this would be sufficient, particularly as initiation raises issues of qualitative evidence notwithstanding that it is prima facie evidence? For example, in a countervailing duty investigation, would a website address for a government programme be sufficient prima facie evidence for initiation of an investigation?

Standing advisory body

The merits of having a non-binding advisory opinion under this option are not clear. It is also not clear how this would improve predictability in proceedings. While such an opinion could give a 'warning' to the investigating authority that the initiation was deficient, the consistency of the initiation would still be subject to the binding findings of a dispute settlement panel if it were subsequently challenged. How would this option provide legal certainty?