WORLD TRADE ORGANIZATION

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GENERAL CONTRIBUTION TO THE DISCUSSION OF THE NEGOTIATING GROUP ON RULES ON THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING DUTY MEASURES

Submission from Australia

The following communication, dated 30 April 2003, has been received from the Permanent Mission of Australia.

Australia submits this paper in parallel to its general contribution on anti-dumping as a general contribution to discussion of subsidies and countervailing duty measures issues in particular.

Prohibited subsidies

WTO jurisprudence on prohibited export subsidies, in particular subsidies contingent 'in fact' upon export performance, has clarified many of the concepts contained within Article 1 of the SCM. Analysis by panels however on the export contingency of a measure, including the standard for meeting the 'in fact' contingency, has not clarified or brought predictability to whether certain subsidies may be prohibited or actionable. At the heart of this uncertainty is the export propensity of certain products, industry sectors or markets. A subsidy provided in a large domestic market of a WTO Member, and considered to be an actionable subsidy, may be deemed a prohibited subsidy contingent in fact on export performance if provided in a small domestic market of another WTO Member.

While panels have made it clear that a number of facts are considered when determining export contingency, and no single fact is determinative, the standard appears necessarily subjective and disadvantages smaller economies or markets. Clarification needs to be made of whether more equitable and predictable rules in relation to prohibited export subsidies can be achieved. In this regard, the concept of levels of export competitiveness in a product is a concept used in the SCM in relation to special and differential treatment. Could such a concept help to address any confusion between a product which has been subsidised contingent on export performance, and a product which may be subsidised but, due to fluctuating domestic market conditions, is no longer solely for the domestic market?

Enforcement

Australia sees merit in discussions to clarify the remedy set down in Article 4, namely "withdrawal of the subsidy" where it has been established that a prohibited subsidy has been provided.

Should there be consistency in the application of a remedy and what is meant by "withdraw the subsidy"? If the subsidy agreement is based on the so-called traffic light test according to the effect a subsidy has on trade, would the replacement of a prohibited subsidy with an actionable

subsidy "withdraw the subsidy"? Further, should a remedy involve retrospectivity? If the purpose of the remedy is to bring measures into conformity and balance rights and obligations, how is retrospectivity consistent with this? Where does enforcement go beyond any adverse trade effect?

According to the view of the Article 21.5 panel in the *Australian Leather* case, "terminating a programme found to be a prohibited subsidy or not providing, in the future, a prohibited subsidy, may constitute withdrawal in some cases".[1] It went on to say that "[h]owever, such actions have no impact, and consequently no enforcement effect, in the case of prohibited subsidies granted in the past."

An effective remedy is one where the measure is brought into conformity. Australia suggests that conformity does not mean retrospectivity.

There is also the issue of whether recurring or non-recurring subsidies should be treated differently in terms of a remedy. In Australia's view, SCM Article 4.7 does not distinguish between recurring or non-recurring subsidies in terms of the remedy, i.e. "withdraw the subsidy".

Countervailing duty investigations and procedures

Australia agrees that there should be analogous provisions within the Subsidies Agreement relating to countervailing duty measures to reflect corresponding provisions in the Anti-Dumping Agreement, for example, clarification of facts available under SCM Article 12.7.

Non-actionable subsidies

Australia notes that there have been many assertions in relation to non-actionable or "green box" subsidies. As Australia commented in relation to TN/RL/W/41, the "traffic light" approach is based on the trade distorting effects of certain subsidies. Australia considers that, notwithstanding the lapsing of SCM Article 8, a non-specific subsidy within the meaning of SCM Article 2 is a non-actionable subsidy. Australia notes Venezuela's suggestion[2] that a useful starting point on clarification on non-actionable subsidies could be an examination of the lack of recourse to SCM Article 8.

Subsidy Notifications

Australia considers that there would be merit in further consideration of the SCM Committee's consensus on treatment of notifications at the May 2001 meeting.[3] Australia also considers that the work initiated within the Committee in relation to compliance and streamlining subsidy notifications could also be examined and considered in the context of clarification and improvement of the SCM.

Calculation of subsidization

Notwithstanding the lapsing of Article 6.1, and Australia notes that some Members are seeking the reinstatement of that provision within the SCM, Australia considers that for the purposes of Part V of the SCM, the work undertaken by the Informal Group of Experts on calculation of ad valorem subsidization would be a good basis to examine and set further priorities for potential consensus and acceptable practice/guidelines.

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[1] *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse to Article 21.5, Report of the Panel, WT/DS/126/RW, 21 January 2000, paragraph 6.34.

[2] Venezuela's submission, "Preliminary Replies to the Questions by Australia contained in document TN/RL/W/61" (TN/RL/W/70, 18 March 2003)

[3] See G/SCM/M/30, 14 August 2001