WORLD TRADE ORGANIZATION

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GENERAL CONTRIBUTION TO THE DISCUSSION OF THE NEGOTIATING GROUP ON RULES ON THE ANTI-DUMPING AGREEMENT

Submission from Australia

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

Introduction

Australia submits this paper as a general contribution to discussion of trade remedy issues for consideration by the Negotiating Group on Rules which are within the mandate agreed by Ministers at the Doha Ministerial. Australia notes that there are already a number of proposals before the Group, some of which are broadly conceptual and others which propose specific amendments to the Agreements.

Australia considers that it is important to recall that the mandate for negotiations is to clarify and improve disciplines under the ADA and SCM Agreements while preserving the basic concepts, principles and effectiveness of these Agreements.

Anti-Dumping

There is a need to distinguish between dumping and the application of anti-dumping measures and also between the so-called misuse or abuse of anti-dumping measures and a WTO Member's legitimate recourse to legal trade remedies.

Equally, however, Australia considers that anti-dumping measures should not be used as disguised barriers to trade. The trade-chilling effect of an application by a domestic industry should not be underestimated.

The process leading to the imposition of anti-dumping measures is necessarily in response to allegations by domestic industry of injurious dumping. Once an application is received, investigating authorities are obliged to consider whether there is a prima facie basis for initiation of an investigation. The claim that an increase in anti-dumping activity connotes an increase in disguised protectionism needs to recognize that domestic industries apply to their governments or investigating authorities for such action.

There is always the need for a balance between the requirements for initiation standards and the subsequent investigation with the trade restrictive effects of these actions.

While the WTO Anti-Dumping Agreement provides rules and disciplines relating to the application of anti-dumping measures, there remain a number of areas where further clarification and improvement could be made to improve predictability, transparency and due process which are vital in a rules-based trading system. At the same time, there is a need to recognize that there may be varying practices which are not necessarily inconsistent with the ADA.

Australia also sees merit in considering the codification of some case law on anti-dumping matters. Recommendations adopted by the Working Group on Implementation may also be a useful starting-point.

Work within the Working Group on Implementation has indicated a range of issues which reflects these varying practices yet it has been possible for consensus to be reached on providing guidance on convergence of these practices. In some areas, it may be preferable to maintain the discretion provided to investigating authorities by the ADA.

Cumulative assessment of injury

Australia considers that the possibility of developing criteria, being discussed within the Working Group on Implementation, would assist in defining conditions of competition. Australia also considers that a flexible approach should be applied when taking into account the factors for assessing the conditions of competition. For example, the conditions of competition need to be considered over the whole of the investigation period and not just a particular point in time.

Facts available

Australia's preliminary comments were sent out in TN/RL/W/22 in response to a paper submitted by a group of countries in document TN/RL/W/6. Australia acknowledged the merit in examining criteria that could be used to determine whether or not to grant an extension of time for information and before facts available can be used. Australia also drew attention to the Appellate Body's findings in the US – Hot-Rolled Steel case and the criteria outlined in that case in determining whether or not to grant an extension. Australia also noted that the Working Group on Implementation's recommendation could form the basis of criteria in the ADA. The ADA is silent on the degree of cooperation required; an exporter is required to act to the best of its abilities; there is an obligation under ADA Article 6.13 for investigating authorities to assist a company supplying the information requested.

Sales in the Ordinary Course of Trade

Australia outlined its views briefly in document TN/RL/W/22. Australia considers that it is unfair to disregard sales below costs in determining normal value when the prices of these sales provide for the recovery of all costs in the period of dumping investigation.

Lesser Duty Rule

Australia considers that a key issue is whether the lesser duty rule should be a mandatory consideration or should be mandatory in application. Australian legislation states that the decision-maker must have regard to the desirability of applying the lesser duty rule. A further issue whether there should be some distinction in the application or consideration of the lesser duty rule depending on the country of export. If that were the case, would this create a two-tier system of anti-dumping measures? Are there situations where the lesser duty rule would be inappropriate? For example, where systematic and persistent dumping in a particular product has disrupted world markets?

Like Goods

Australia considers that there is merit in considering the provisions of ADA Article 2.6, in particular whether separate criteria could be considered to give guidance on like product for the purposes of determining a dumping margin, determining injury and defining domestic industry. This is the subject of a separate paper.

Duty Absorption

"Duty absorption" arises where there appears to have been no or insufficient increase in the export price in response to the imposition of measures. Such non-movement or insufficient movement of selling prices of dumped goods generally results from a decision of exporters to absorb the cost of the duty.

Australia considers that there would be merit in discussions aimed at clarification of the issue of duty absorption.

Other issues

Further areas which Australia considers merit examination by the Rules Group are:

- reviews;
- definition of domestic industry;
- standing;
- initiation standards;
- determination of normal value (affiliated parties);
- constructed export price;
- "all others" rate;
- authorities' discretion on the use of cost data;
- treatment of confidential and non-confidential information;
- transparency in investigatory procedures.