WORLD TRADE ORGANIZATION

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ARTICLE 9.4 OF THE WTO ANTI-DUMPING AGREEMENT: DUMPING MARGINS FOR EACH SAMPLED EXPORTER BASED ON FACTS AVAILABLE

Submission by Australia

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

Australia notes that there have been previous submissions to the Rules Negotiating Group which have raised the issue of the "all others" rate (for example, TN/RL/W/10 and TN/RL/W/72). Australia considers that this is an issue which merits further examination and discussion and where it is important to create greater certainty in the rules.

WTO Article 9.4 states:

> "When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
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> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
>
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
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> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6."

Article 9.4, concerning exporter sampling, prohibits use of certain margins in calculating the "all others" rate. The Article sets a ceiling ("*… anti dumping duty applied to exporters or producers not included in the examination shall not exceed…")* - and in calculating that ceiling authorities must exclude any *de minimis* or zero margins or facts available.

Article 9.4 applies to known exporters and producers (co-operating parties only) – those that submitted sufficient and appropriate information but which were excluded from the sample. Their individual margins have a ceiling imposed. If any element of the margin was based on the facts available, then this margin would be excluded. The question arises where all sampled margins are based on facts available information.

It is clear why the margins determined using "facts available" are disregarded for establishing the level of the duty for co-operating but non-selected exporters and producers. Article 6.8 allows for determinations to be made on the basis of "facts available" in cases where information has not been provided or is otherwise not available. These are usually non-cooperative, not "all others". (While the ADA does not specify how a margin is determined for these non-cooperative exporters and producers, the terms of Article 6.8 – refer Annex II, paragraph 7, last sentence – infer that a penalty may be applied.)

In the *US Hot-Rolled Steel* case, the US imposed measures after sampling. The measures on the sampled exporters had used, in part, facts available when assessing the dumping margin. The US argued that the scope of the prohibition in Article 9.4 should be narrowed so that it would be linked to excluding only margins established entirely on the basis of facts available. The Appellate Body [1] found that the US had erred in imposing measures on all other exporters in this situation. It found that there is a lacuna in the ADA in relation to the level of anti-dumping duty to be applied to "all others" for exporters and producers not investigated where there are no margins to calculate an "all others" rate. However, Article 9.4 does not prescribe any method to establish the "all others" rate applied to exporters and producers who are not investigated. It simply identifies a maximum limit which authorities "shall not exceed". While recognizing the lacuna the Appellate Body did not proceed to a solution, although in footnote 83 of its report the Appellate Body noted the views of Japan and the USA on how to overcome the lacunae.

The Appellate Body upheld the panel findings and found in summary (paras 119- 130):

- Article 9.4 does not prescribe any method to establish the "all others" rate applied to exporters and producers who are not investigated. It simply identifies a maximum limit which authorities "shall not exceed" in establishing the rate.
- The application of Article 6.8 authorizes the use of "facts available" and is not confined to cases where the entire margin is established using only facts available. Article 6.8 permits recourse to facts available whenever an interested party does not provide some necessary information within a reasonable period, or an interested party impedes the investigation.
- Article 6.8 authorizes investigating authorities to make determinations by remedying gaps in the record which are created as a result of deficiencies in or lack of information supplied by the exporters.
- Article 9.4 seeks to prevent exporters, who were not asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to "all others" was calculated using margins established even in part on the basis of facts available.
- Article 9.4 contains a lacuna because it prohibits the use of certain margins in the calculation of the ceiling for the "all others" rate but does not address the issue of how that ceiling should be calculated in the event that all margins are excluded.

The Agreement recognizes in Article 9.5 that "all other" rates are used as it provides for an accelerated review for exporters who did not export during the investigation and are not associated

[1] *US – Anti-Dumping Measures on Certain Hot-Rolled Steel Products*, Appellate Body Report (WT/DS184/AB/R), 24 July 2001 (hereafter *US Hot-Rolled Steel*).

with known exporters ("new exporters") for the purpose of establishing individual margins and who have been affected by that rate.

In the situation where each of the margins of the sampled exporters is based upon facts available, the Agreement needs to remove the present uncertainty arising from this lacuna. Further, the ceiling imposed by the existing wording of ADA Article 9.4 would not be applicable. This is because the ceiling is established on the basis that *some* of the sampled exporters would cooperate. The ADA does not reflect the possible circumstance that none would have cooperated, or that all of the margins would use facts available.

Removing the present uncertainty may be achieved by adopting a provision like that in ADA Article 2.2.2(iii). In other words, determining dumping margins by "any other reasonable method" in order to clarify the situation for determining 'all other' rate.

Removing the ceiling in this circumstance by adopting an alternative using "any other reasonable method" would not prejudice the rights of new exporters, however, as they retain the right for accelerated review.