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"LIKE PRODUCT" WITHIN THE MEANING OF THE WTO ANTI-DUMPING AGREEMENT

Submission by Australia

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

Introduction

Australia notes that there have been a number of contributions to the Rules Negotiating Group on the issue of "like product" and "product under investigation", for example document TN/RL/W/10.

Australia considers that it is appropriate to consider the provisions of Article 2.6 of the WTO Anti-Dumping Agreement (ADA) having regard to recent WTO jurisprudence to reflect more fully the approach being taken by anti-dumping administrations and to give greater clarity to ADA Article 2.6 than exists at present.

While the *Japan Alcoholic Beverages* case[1] noted that the term "like product" appears in various GATT provisions and that it did not necessarily follow that the term had to be interpreted in a uniform way, ADA Article 2.6 notes that the term "like product" applies "throughout this Agreement". Accordingly, would there be merit in giving consideration to interpreting the term differently according to the provision, for example, a test of the actual physical characteristics for the purpose of Article 2.2, a market focus test for the purpose of Articles 3 and 4 of the ADA?

Background

Article 2.6 of the WTO Anti-Dumping Agreement states

> "Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

For the purpose of this paper Australia is only concerned with the first half of the definition i.e. what is meant by the term identical and will examine that term in the light of recent panel decisions.

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[1] *Japan – Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS8/R, WT/DS10/R and WTDS11/R, 11 July 1996, hereinafter *Japan Alcoholic Beverages*.

The crucial question is what constitutes identical and how is it to be measured. The answer is straightforward where the goods being imported and the goods being produced are exactly the same. As a fundamental proposition, it has been accepted that the definition of likeness is based on the physical characteristics of goods. It has never been based on a pure market test. However there has been an acceptance that the goods produced on the home market may be at the very least presented differently when sold on an export market, but that these differences did not mean that the goods were not identical. This approach of regarding identical to mean something less than goods being exactly the same has been supported by the reference to 'produit similaire' in the definition of like products as requiring similarity between goods, not that they be exactly the same.

The *Japan Alcoholic Beverages* case, although not based on the definition of like product contained in the WTO Anti-Dumping Agreement, made some general observations on like product and in reviewing previous panels found that criteria had been developed. That analysis provides useful guidance on interpretation of like product for the purpose of the WTO Anti-Dumping Agreement. Furthermore, the criteria used in the *Japan Alcoholic Beverages* case is gaining acceptance in anti-dumping administrations as useful and non-exclusive criteria to determine what constitutes a like product. However, there will inevitably be a need for an exercise of judgement in coming to a decision on "like products".

The *Japan Alcoholic Beverages* panel noted that previous panel and working party reports had unanimously agreed that the term "like product" should be interpreted on a case-by-case basis.[2] It further noted that panels had used different criteria to establish likeness. The *Japan Alcoholic Beverages* panel recalled that previous panels had used different criteria to establish likeness such as the product's properties, nature and quality, and its end-uses; consumers' tastes and habits, which change from country to country; and the product's classification in tariff nomenclatures (para 6.21 refers).

The *Japan Alcoholic Beverages* panel examined, in the context of GATT Article III and the Interpretative Note ad Article III, the distinction between "like" and "directly competitive or substitutable products". It noted that the latter should be interpreted more broadly than "like product" and that like products should be viewed as a subset of directly competitive or substitutable products. The appropriate test to define whether two products are "like" or "directly competitive or substitutable" is the marketplace. The decisive criterion, according to the panel, to determine whether two products are directly competitive or substitutable is whether they have common end-uses. In terms of "like products", however, such a criterion is necessary but insufficient to define likeness. For two products to be "like", they must share essentially the same characteristics, apart from commonality of end-uses.

Issues to consider

It may be said that the WTO jurisprudence has reached a point where there is now clear guidance on how the term "like" should be understood. To include in the definition of like product non-exclusive, non-hierarchical criteria would be helpful in giving guidance on how to interpret the term in the context of the WTO Anti-Dumping Agreement and in light of clarifications provided through relevant WTO jurisprudence.

Notwithstanding that ADA Article 2.6 provides that the term "like product" be applied consistently throughout the Anti-Dumping Agreement, Australia would welcome views on the merits of whether consideration should be given to developing separate criteria for consideration of like

[2] *Japan –Taxes on Alcoholic Beverages*, Report of the Panel, WT/DS8/R, WT/DS10/R and WTDS11/R, paragraph 6.21.

product under ADA Article 2 for the purpose of determining a dumping margin, ADA Article 3 for the purpose of determining injury and ADA Article 4 for the purpose of defining domestic industry.

One view is that a market focus test, as reflected in the *Japan Alcoholic Beverages* case, is appropriate to be used in assessing the like goods produced by a domestic industry. The ultimate reason for considering the effect of dumped goods causing material injury is whether they compete in the same market. However, for the purpose of making a determination under ADA Article 2, a test which concentrates more on the actual physical characteristics, e.g. physical characteristics and Customs classification, may be sufficient.

Questions for consideration

(a) Should non-hierarchical non-exhaustive criteria, based on the criteria set out in the *Japan Alcoholic Beverages* case, be incorporated in the definition of what constitutes "like goods"?

(b) Should consideration be given to replacing the word "identical" with "goods, which have essentially the same physical characteristics" as part of the process of specifying criteria for the purpose of determination of dumping and determination of injury, as well as for the definition of domestic industry?

(c) Should separate criteria be developed which make a distinction for the purpose of ADA Article 2 relating to determination of dumping and ADA Article 3 relating to determination of injury?