

## PROHIBITED EXPORT SUBSIDIES

### Paper from Australia

The following communication, dated 15 November 2005, is being circulated at the request of the Delegation of Australia.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/283), also be circulated as a formal document.

---

Australia recalls the discussion at the Negotiating Group on Rules meeting in April 2005 on the Australian proposal <sup>1</sup> to clarify the standard of ‘in fact’ export contingency, as contained in Article 3.1(a) of the WTO Agreement on Subsidies and Countervailing Measures (SCM). This discussion was on the basis of an elaborated and amended proposal which took into account earlier and preliminary discussions within the Negotiating Group. <sup>2</sup>

In bringing this issue to Members’ attention, Australia recalls the issues that the proposal seeks to address, namely:

- what facts or factors must be considered in determining “in fact” export contingency;
- the fact of export propensity should not be taken in isolation and this fact should not necessarily have greater weight in any case-specific examination; and
- the need for parallel consideration in the application of the subsidy analysis in countervailing duty investigations.

Australia notes the constructive comments made and the textual suggestions to improve and clarify the intent of this proposal. At the same time, discussion was somewhat divided on the direction the textual guidance should take.

Australia notes in particular that some concerns were raised over an illustrative list of factors that should be examined in determining ‘in fact’ export contingency. Some suggested that this would defeat the very nature of an in fact analysis. Equally, the introduction of language such as “export orientation” itself begged clarification, definition and possible measurement. It may also undermine the presumption of serious trade effects caused by prohibited subsidies. Australia is concerned that any proposed wording not require further definition or reduce the clarity of the text.

---

<sup>1</sup> TN/RL/GEN/34 (JOB(05)/40) dated 23 March 2005

<sup>2</sup> See Documents TN/RL/GEN/22 (JOB(04)/151) dated October 2004;.

Some Members commented at the April session that export propensity, that is, where a Member exports much of its goods, due to the small size of the domestic market, itself is sufficient to meet the export contingency standard. This confirms or underlines our concern about the way panels appear to have given greater weight to this fact, and that one fact alone is given undue weight. Nor do we believe that this is consistent with existing footnote 4 to Article 3.1(a). The Appellate Body in *Canada Aircraft*<sup>3</sup> noted that the high export orientation of a subsidized industry alone was insufficient evidence upon which to find that a subsidy was ‘in fact’ export contingent.

## PROPOSED TEXTUAL AMENDMENTS

To take into account the two aspects that we are seeking to clarify, that is, the type of facts and the weighting of facts, and reflecting on textual suggestions of other WTO Members, Australia proposes in ‘in fact’ export contingency cases that footnote 4 to SCM Article 3.1(a) be amended to read as follows (new text bolded and underscored):

3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

- (a) subsidies contingent, in law or in fact<sup>4</sup>, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I ...

---

4 This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export, **regardless of the level of export**, shall not for that reason alone be considered to be an export subsidy within the meaning of this provision. **Nor shall any fact be taken in isolation or have greater weight when considering whether this standard is met.**

Australia reserves the right to submit further proposals on this issue.

---

---

<sup>3</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, (hereafter *Canada – Aircraft*), Appellate Body Report, WT/DS70/AB/R, Adopted 8 August 1999.