WORLD TRADE ORGANIZATION

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Negotiating Group on Rules Original: English

REPLIES TO QUESTIONS FROM INDIA (TN/RL/W/106) AND HONG KONG, CHINA (TN/RL/W/109) ON AUSTRALIA'S GENERAL CONTRIBUTION ON ANTI-DUMPING (TN/RL/W/86) AND "LIKE PRODUCT" (TN/RL/W/91)

The following communication, dated 13 June 2003, has been received from the Permanent Mission of Australia.

Australia thanks India[1] and Hong Kong, China[2] for their questions in relation to Australia's general contribution paper on anti-dumping issues (TN/RL/W/86) and the paper on "like product" (TN/RL/W/91). These questions facilitate both discussion and development of those issues identified as requiring clarification and improvement.

I. LESSER DUTY RULE

Australia's view is that Members should make a distinction between the mandatory application of the lesser duty rule and making mandatory the consideration by or regard to, by investigating authorities, of the desirability of applying the lesser duty rule. As already indicated, Australian legislation mandates the consideration by the investigating authorities of applying the lesser duty rule. Further, the application of the lesser duty rule has been the normal practice. By requiring that developed countries always apply the lesser duty rule in practice, but developing countries, some of whom are the most frequent users of anti-dumping measures, not be similarly required to apply the lesser duty rule in practice would in our view create a two-tier system which clearly would not have the desired benefits for developing countries as some proponents claim. In addition, ADA Article 9.1 notes that "the imposition be permissive in the territory of *all* Members" (emphasis added).

The ADA currently is permissive of not applying the lesser duty rule and leaves it to the discretion or decision by the investigating authorities. It therefore allows for situations where the lesser duty rule would be inappropriate, for example where the duty is not "adequate" to remove the injury to the domestic industry. It therefore allows for the lesser duty to be inappropriate.

Some Members have questioned the existence of persistent and systematic dumping. Although Australia notes the concerns in this regard, it is not an example where investigating authorities would want to go beyond injurious dumping. In other words, such dumping may only be remedied to the point of injury which has been determined to have affected the domestic industry in a particular importing market.

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[1] TN/RL/W/106
[2] TN/RL/W/109

II. DUTY ABSORPTION

The questions which India has raised are entirely pertinent to the issue of duty absorption, reviews and in particular the issue of prospective effect of anti-dumping duties.

In a situation where the anti-dumping duty has been "absorbed" by the exporter, and despite the imposition of anti-dumping duties, the export price has not moved, the question arises as to whether the remedial action has been effective. If the export price has not increased despite the imposition of anti-dumping duties, it cannot be said that the imposition of anti-dumping duties in this situation removes the injurious effect of dumping.

Currently, such situations can be addressed under ADA Article 11. Article 11.1 allows for a duty to be continued only if it remains "necessary" to offset injurious dumping. Article 11.2 allows an investigating authority to examine the continued imposition of a duty "necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed *or varied*, or both" (emphasis added). In other words, Article 11.2 allows an investigating authority to examine whether the duty may be varied and to review an export price.

Australia has experienced at least two cases of which it is aware that the issue of anti-absorption has arisen. In the most recent case the exporter has had interim duty imposed. The investigating authority found dumping in the order of 80 per cent. All contracts won by the exporter were dumped and previously held by the domestic industry. The exporter did not dispute the basic finding of dumping. The behaviour of the exporter in this case could well be argued to be predatory. Following the imposition of interim duty, the company advised in writing that it would not increase the price of its products to cover the duty.

In the other case, the company did not increase its export price following the imposition of final anti-dumping duty. Again, the dumping margin was significant and the industry continued to suffer material injury after the imposition of anti-dumping duty.

The imposition of measures can only effectively remove the injury to a domestic industry if the export price is consequently increased by that same amount, thereby ensuring that the exporter is not selling at injurious prices. Where a company does not increase its export price by the equivalent amount of dumping duty then material injury continues to be experienced by the domestic industry.

It is for this reason that Australia has raised the issue of anti-absorption.

III. LIKE PRODUCT

Australia has raised the issue of different definitions of like product to obtain the views of other WTO Members.

Australia noted in its paper TN/RL/W/91 that the word identical in the context of like product has been taken to mean something less than exactly the same. That is, the word is not given its ordinary meaning and thus consideration should be given to replacing the word and/or developing a list of criteria to define what is meant by like goods.

Australia has suggested that it may aid clarity if the word "identical" were changed to goods having "the same essential physical characteristics". The proposed wording is in Australia's view a more accurate reflection of how the word is interpreted. Australia agrees that the terminology it has proposed raises questions about what the words "goods closely resemble" mean. However, given that what is being proposed simply reflects how the word "identical" is interpreted, then its possible impact on the other words in the definition remains the same.

Australia noted in TN/RL/W/91 that the like goods test is used for different purposes. In Article 2.1, the definition of "like goods" is used for the purpose of assessing dumping. It is used for a different purpose under Article 3.1 and Article 4.1. There, the reference to "like goods" is in the context of determining injury. Australia asks whether the like goods test changes with its purpose for assessing dumping and for determining injury.

As explained in paper TN/RL/W/91, it has been observed that comparing goods exported from the country of export to those produced by the domestic industry to determine like goods for the purpose of material injury does not require that the goods be exactly the same. In some cases, there are minor physical differences in the goods merely because they are produced by different companies. Where the goods are not exactly the same the like goods test may involve criteria such as end uses and consumer tastes and habits – elements that go beyond physical characteristics but appear relevant when the purpose of the test, determining injury, is taken into account.

However, when comparing the exported goods to those sold on the domestic market of the exporter, the goods have at least the possibility of being exactly the same. In some cases where the goods are not exactly the same, the test may in practice be to find goods which are 'most like' on the basis of physical characteristics in order to avoid extensive adjustments for physical characteristics.

To provide examples:

(a) An exporter may produce exactly the same good for export as for sale on its home market. The good produced by the domestic industry may not be exactly the same.

(b) Conversely, an export may produce goods for the home market that are different from those that are exported. The reason may be due to complying with different legislative requirements in different countries or to meet consumer tastes. The goods produced by the domestic industry may be exactly the same as the exported good.

(c) An exporter may produce models A to Z of a good for sale on the home market but only export models A to C. Models A to C may be sufficient for assessing dumping. The domestic industry may produce models A to Z. Models A to Z may be like goods for injury assessment purposes.

(d) Alternatively, the Australian industry may only produce models D to Z. When will these be like to A to C?

Another situation arises when models made by both the exporter and the domestic industry are the same. However, it may be that the lower end models are being dumped and the more expensive models are not dumped. Nevertheless, there may be an argument that all models, that is the dumped and non-dumped, are considered to be like goods. In this way the like goods definition will influence the dumping and injury findings. This is of concern to Australia.

The following questions may assist in assessing whether dumping administrations do in fact use a different definition of like goods based on different criteria to determine like goods for the purposes of dumping and injury.

- How do other countries identify the like goods that they will investigate?
- Do administrations identify the like goods by physical characteristics or have regard to the tariff classification, production processes or other factors?

- In assessing like goods being produced by the domestic industry do administrations consider questions such as quality, market segmentation and end-use and production processes in determining whether the goods produced are like goods to those that are exported? Do they consider these factors when defining like goods on the exporter's home market?

If the answer to the above is that different criteria are used to identify like goods on the exporter's home market and those produced by the domestic industry, the next question is whether it is appropriate to consider whether it is useful to maintain the same definition of like goods.

A concern raised by some Members over the concept of two definitions of like goods based on different criteria is that it is possible that substantially different products would be covered.

Australia does not suggest that substantially different products would be covered. Australia notes that the definition of like goods in the context of the different provisions can operate to identify a different (narrower or broader) set of like goods on the home market of the exporter than the domestic market. Would it give rise to greater clarity to formally acknowledge these type of distinctions?