WORLD TRADE ORGANIZATION

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COMMENTS BY AUSTRALIA ON THE PROPOSAL BY VARIOUS MEMBERS ON SUNSET REVIEWS (DOCUMENT TN/RL/W/76)

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

The following is based on the preliminary comments made at the May session of the Rules Negotiating Group on the proposal presented by various Members on sunset reviews. Australia would like to express its appreciation for the paper (document TN/RL/W/76) on sunset reviews, which is an important and complex issue that requires careful consideration.

The problem which was identified in paper TN/RL/W/6, and expanded upon in TN/RL/W/76, is that in practice "an expansive use of the exception (sunset reviews to continue the order) turns the continuation of the order into a de facto practice". The paper proposes the following solution, consisting of two elements:

- The first element is for anti-dumping measures to remain in force for as long as is necessary to counteract injurious dumping and to have the five-year sunset absolutely imposed.

- The second element of the proposal is to prevent a new initiation no sooner than one year (or 6 months in exceptional circumstances) following the termination of an anti-dumping measure (that is, it proposes the establishment of a "grace period").

The illustrative example provided in the paper describes a situation where duties continue even though the company had no plans of exporting to the country imposing measures because the domestic industry has asserted the company would restart injurious dumping if the dumping duty was terminated.

Australia acknowledges that the continuation of measures, in circumstances where the exporter has no intention of exporting again, seems superfluous and that it makes the concept of a sunset review meaningless where measures continue forever as a matter of routine. However, in the above example, it would not be the exporter who was affected by the measures continuing, as they have no plans to export to the country where measures apply.

Australia also acknowledges that the acceptance of mere assertions, as set out in the example, is an undesirable practice. This would apply equally to the assertions of all interested parties.

The automatic and absolute termination of measures after five years would address the issue of concern identified in the example. However, Australia would like to express concern that new problems could arise from this proposed solution.

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What if the exporting company did export at dumped and injurious levels after the measures were removed? The domestic industry would be unprotected for the minimum 6 months required to elapse before they could reapply for measures and in addition would be unable to be protected until a minimum of 60 days into the investigation when preliminary measures can be applied. Small- or medium-sized domestic industries, which the measures were protecting, could well be seriously injured in this time.

Australia would also be interested in the scope of "exceptional circumstances" and if it could be used in the above circumstances.

Australia does not necessarily consider that it is abuse of the sunset review system where measures have existed for long periods. Such a situation may not indicate abuses but may merely show, amongst other possibilities, that there may have been little change in circumstances and that dumping could still cause or be causing material injury.

Australia also doubts that exporters are often disadvantaged in the market during the period of an anti-dumping measure as suggested by the proponents in their paper TN/RL/W/76. Rather, the anti-dumping measures mean that the exporter can continue to compete but only at a level non-injurious to the domestic industry.

In Australia's view, the second element of the proposal introduces or distorts the balance of rights and obligations under the WTO Anti-Dumping Agreement (the right to remedy injurious dumping).

Australia agrees that the "likelihood" test is inherently predictive and cannot be conducted on the basis of facts only. Australia also notes that it is possible for this test to be abused. However, Australia doubts that the only way to manage the difficulty of the likelihood test is to terminate all measures after five years without exception. Paper TN/RL/W83 (Proposal on Reviews) contemplates a 'harmonised indicative list' that may also be useful to consider for sunset reviews.

Australia considers that the likelihood test must also apply to the recurrence of dumping.

Australia suggests that the likelihood test may not be the only factor influencing the rate of continuations. Procedural issues, such as whether authorities can initiate reviews and the timeframe for reviews, may also be an influence.

As other Members have noted, it would be worthwhile to clarify the extent to which the provisions of the Agreement which apply to initial investigations also apply to reviews, and, if those provisions were found not to apply to any extent, to consider providing rules.

In particular, Australia notes the problems encountered as a result of a lack of clarity provided by ADA Article 11.3. Australia considers that the DRAMS case [1] has provided some useful analysis in this regard which could provide guidance on this issue.

Improvements outlining the investigation process in more detail, including criteria to be used in determining "likelihood" may address the lack of clarity and predictability in Article 11.3 without undermining the fundamental principles of the Agreement while ensuring that the test of injurious dumping is honoured and preserved.

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[1] *United States – Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one Megabit or above from Korea*, Report of the Panel, WT/DS99/R, adopted 19 March 1999. See in particular footnote 494.