

SUBMISSION ON REGIONAL TRADE AGREEMENTS BY AUSTRALIA

Paper by Australia

Revision

The following submission, dated 28 February 2005, is being circulated at the request of the Delegation of Australia.

This communication builds on Australia's first submission on the definition of 'substantially all trade' (TN/RL/W/15) and provides a possible basis to progress the important issue of defining with greater precision the term 'substantially all the trade' as it pertains to Article XXIV of the General Agreement on Tariffs and Trade (GATT). Agreement on the meaning of 'substantially all trade' is important in assessing whether regional trade agreements to which WTO Members are a party are consistent with the WTO commitments of those Members. This submission by Australia responds to the Doha Declaration mandate for negotiations to clarify and improve the WTO disciplines and procedures related to regional trade agreements, and provides a substantive contribution to the development of effective disciplines related to regional trade agreements in the WTO as called for by the report "The Future of the WTO: Addressing Institutional Challenges in the New Millennium".

Background

1. Paragraph 29 of the Doha Declaration states:

We also agree to negotiations aimed at clarifying and improving disciplines and procedures under the existing WTO provisions applying to regional trade agreements. The negotiations will take into account the developmental aspects of regional trade agreements.

This mandate to improve and give certainty of definition and form to the disciplines and procedures of the WTO provisions related to regional trade agreements reflects widely held concerns; specifically, that the current ambiguities have hindered the Committee for Regional Trade Agreements (CRTA) from completing even one assessment of whether an individual trade agreement conforms to WTO provisions.

2. These concerns have most recently been underlined by the report "The Future of the WTO: Addressing Institutional Challenges in the New Millennium" (the Sutherland report). The Sutherland report articulates the importance of ensuring that regional trade agreements improve the "trading and development prospects of beneficiaries." Furthermore, the report makes a strong call for regional trade agreements to "be subject to meaningful review and effective disciplines in the WTO."

* In English only

3. As highlighted in the Sutherland report, the existing systemic inability to objectively discern whether regional trade agreements involving WTO Members are consistent with the WTO commitments of those Members presents the danger of a proliferation of regional trade agreements with poor trade-liberalising outcomes and trade distorting effects. Deficient regional trade agreements of this nature, particularly those that deliberately exclude entire sectors, such as agriculture, from liberalising commitments, undermine the multilateral trading system by entrenching protectionism, and give comfort to interest groups that benefit from such protectionism at the expense of the multilateral rules-based international trading system. Conversely, full coverage, high quality RTAs would through their liberalising effect promote further trade liberalisation at the multilateral level.

4. An important element in the development of effective disciplines that apply to regional trade agreements is the definition of 'substantially all trade'. Article XXIV, paragraph 8, GATT requires that, in relation to customs unions and free trade agreements, "duties and other restrictive regulations of commerce ... are eliminated with respect to substantially all the trade ...". On any reading of this provision, the term 'substantially all trade' is pivotal to assessing the WTO-consistency of regional trade agreements.

Substantially All Trade: A Proposed Definition

5. The objective of defining 'substantially all trade' in the context of Article XXIV and the examination of regional trade agreements must be to ensure that neither entire sectors nor 'highly traded' products are excluded from regional trade agreements. It is therefore necessary that the definition incorporate quantitative benchmarks in relation to the "duties" aspect of the agreement that preclude such exclusions.

6. In relation to preventing the exclusion of entire sectors, the appropriate quantitative measure needs to be sufficiently ambitious, and yet reflect the reality that some products may be excluded from regional trade agreements, and furthermore, that in some cases, liberalisation commitments may be phased-in over time. An appropriate accommodation of these competing factors could be achieved by prescribing a benchmark of **eliminating all duties on a minimum of at least 95 percent of tariff lines at the six digit level in the harmonised system of tariff classification lines**. We regard a minimum 95 percent as satisfying the requirements of an effective discipline under Article XXIV, and yet retains sufficient flexibility to accommodate the exclusion of certain product lines.

7. While the benchmark of at least 95 percent of the harmonised system of tariff lines at the six digit level would prevent the exclusion from a regional trade agreement of a particular sector (ie. at the Chapter or Heading level), it may not be effective in deterring the exclusion of 'highly traded' products. In addressing this issue it is important to first identify clearly what **'highly traded' products are, and in this regard we propose that these products be defined as those that constitute at least, say, 2 percent of trade between the parties**. We are open to other views as to an appropriate percentage of trade between the parties that would give appropriate specificity to the term 'highly traded' product. The important point is to come to an agreement on a clear definition that accurately describes the term 'highly traded'.

8. Another aspect of preventing the exclusion of 'highly traded' products is to identify those products in the context of trade governed by the regional trade agreements. This would require statistical information on the trade between the parties on a product specific basis, with a historical reach of at least three years prior to the notification and each subsequent review of the regional trade agreements. Inclusion of this information could be an added requirement in the standard format for notification, and/or a required feature under the 'Trade Analysis' section in the factual presentation produced by the Secretariat.

9. There is also a need to expose to the examination process those **products that Members currently do not, but could trade, if it were not for the protectionist measures of one or more the parties**. This could involve analysis of the overall export trade of each Member. We would welcome proposals on how this might most appropriately be achieved.

10. Phased-in commitments: A plain reading of Article XXIV.8.(a) and Article XXIV.8.(b) suggests a requirement for regional trade agreements to achieve the elimination of duties and other restrictive regulations of commerce on substantially all trade on entry into force. However, many regional trade agreements to which WTO Members are a party clearly contain significant trade liberalizing commitments that are phased in over time rather than being operative on entry into force. Some WTO Members have sought comfort from the term ‘reasonable length of time’ in Article XXIV.5(c), but this provision relates specifically to “interim agreements” within the meaning of Article XXIV.5(a) and Article XXIV.5(b). Accordingly, it does not have any direct bearing on commitments related to ‘substantially all trade’ in Customs Unions or Free Trade Agreements not notified as interim agreements. However, while Article XXIV.5(c) does not directly concern itself with regional trade agreements other than those notified as interim agreements, we believe it nonetheless provides useful guidance when trying to accommodate the common practice of phased-in liberalisation commitments in regional trade agreements by WTO Members.

11. Therefore a pragmatic approach to the development and consistent application of WTO disciplines to regional trade agreements requires the determination of an appropriate period of time after entry into force of the regional trade agreements at which to assess whether the elimination of duties and other restrictive regulations of commerce on substantially all trade has been achieved. As indicated above, we are firmly of the view that the precedent of defining **‘a reasonable length of time’ in Article XXIV.5.(c) as ten years** (articulated in the Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, paragraph 3) provides an appropriate model for application to the assessment of the elimination of duties in respect of substantially all trade.

12. The proposed ten year period for the assessment of regional trade agreements has several benefits: it builds on an existing implicit understanding by WTO Members that ten years is a suitable period; is consistent with the period described in Article XXIV.5.(c); accommodates the majority of existing regional trade agreements that contain phased-in commitments; and is rigorous enough to prevent the erosion of this requirement as an effective discipline.

13. Complementary to this flexibility in accommodating phased-in commitments, it is appropriate to require an ambitious yet pragmatic percentage for the elimination of duties on ‘substantially all trade’ upon entry into force of regional trade agreements. It is therefore proposed that a **minimum level of, say, 70 percent of tariff lines at the HS six-digit level is an appropriate benchmark for the elimination of duties on ‘substantially all trade’ at the time of entry into force** of the regional trade agreement, as it ensures the majority of the trade between the parties is liberalised immediately.

14. The term “Substantially all Trade” calls for comprehensive liberalisation in RTAs. This proposal merely provides a benchmark for this obligation. Accordingly, **these obligations should apply to all regional trade agreements currently in force to which WTO Members are a party.**

15. The approach outlined in this document has as its key objectives the conscientious implementation of the Doha mandate, the promotion of comprehensive regional trade agreements that deliver genuinely trade-liberalizing and less trade distorting outcomes, and the development of a mutually supportive multilateral, regional and bilateral trade architecture by ensuring that regional trade agreements to which WTO Members are a party accurately reflect their WTO commitments. We are open to discussing S&D treatment for Developing Countries.
