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SUBMISSION ON REGIONAL TRADE AGREEMENTS BY AUSTRALIA

Paper by Australia

The following submission, dated 12 May 2005, is being circulated at the request of the Delegation of Australia.

FURTHER SUBMISSION ON REGIONAL TRADE AGREEMENTS
BY AUSTRALIA

1. This communication responds to the comments and requests for clarification by Members in relation to Australia's second submission on the definition of 'substantially all trade' (TN/RL/W/173/Rev.1).*

Introduction

2. The principle of non-discrimination, or most-favoured-nation (MFN) is at the heart of the multilateral system. There are few WTO-sanctioned exceptions, and Article XXIV is amongst the most important.

3. MFN has today become almost the exceptional level of trade preference between trading partners. The need to clarify the rules applied to the examination of RTAs in the WTO is urgent. RTAs that are not comprehensive and not subject to meaningful review and effective disciplines damage the multilateral trading system by providing comfort to protectionist elements while satisfying to some extent the elements in support of liberalisation. Such RTAs reward anti-liberalisation elements and undermine the constituency for multilateral liberalisation.

Eliminating all duties on a minimum of at least 95 percent of tariff lines

4. It is in this context that Australia proposed a definition of 'substantially all trade' as eliminating all duties on a minimum of 95 percent of tariff lines at the six digit level of the Harmonised System (HS). While the figure has been described as 'ambitious', we firmly believe it is necessary to ensure the integrity of the multilateral trading system.

5. In these negotiations we have the opportunity to establish benchmarks of real importance to the multilateral trading system. Weak international obligations are readily exploited by interests opposed to trade liberalisation. A test for 'substantially all trade' that allowed significant omissions from RTAs would encourage poor quality RTAs. Conversely, a rigorous definition of 'substantially all trade' would strengthen the position of governments in committing to trade liberalisation, and assist them to undertake often overdue domestic reforms.

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* In English only.

6. Combined with the flexibility of a ten year implementation or transition period, the ability to exclude from liberalisation commitments a full five per cent of tariff lines represents a pragmatic solution to the need for a discipline that both supports the multilateral trading system while providing adequate flexibility to accommodate reservations related to the most sensitive products.

At least 70 percent of tariff lines at entry into force

7. By October 2004 there were 300 RTAs that had been notified to the GATT or WTO. Of these, 150 were operational. By the end of 2007 there are likely to be 300 operational RTAs. Such prodigious growth in RTAs, if not subject to prudent disciplines, could dramatically erode the impetus for trade liberalisation at the multilateral level.

8. It is therefore necessary to establish a discipline that establishes a rigorous standard that would apply at the time of entry into force of the agreement. This standard needs to be sufficiently high to ensure that RTAs are comprehensive and do not 'backload' an unreasonable amount of liberalisation commitments to the end of the implementation period.

9. Accordingly, Australia has proposed a standard of at least 70 percent tariff coverage at the six digit level on entry into force. Again, we believe this to be a pragmatic proposal that balances the need for a rigorous discipline to ensure RTAs are supportive of the multilateral trading system, while retaining adequate flexibility for Members to accommodate the treatment of sensitive products.

Calculation of Tariff Coverage

10. Australia's tariff line proposal has two important dates:

(i) on entry into force: duties must be eliminated on at least 70 percent of all tariff lines at the six digit level; and

(ii) precisely 10 years after entry into force of the agreement: binding commitments in the agreement must indicate that duties will be eliminated on at least 95 percent of all tariff lines at the six digit level.

These conditions apply to all parties to the agreement. Where a Customs Union is a party to a plurilateral agreement, the Customs Union as a whole can be treated as a single Party.

11. In the calculation of these tests, Australia has proposed using the six digit level of the Harmonised System, as it is important to apply internationally recognised and adopted standards. The Harmonised System is the only internationally recognised standard in this regard, and WTO Members are harmonised at the six-digit level. To satisfy the proposed definition of 'substantially all trade', all duties and tariff rate quotas (TRQs) on tariff lines at a higher level of disaggregation (i.e. 8 and 10 digit levels) that are constituent parts of a six digit line must be eliminated if that six digit line is to be considered part of the 70 percent on entry into force or 95 percent after 10 years.

'Highly traded' products

12. We have been cautious about including a trade based test as trade flows are subject to fluctuation. This is especially so with the implementation of RTAs, where trade flow quantities and patterns can be expected to be significantly influenced.

13. However, we recognise that a tariff line test alone may not capture 'substantially all trade' in all cases. Accordingly, we also proposed a "highly traded" product test. This test attempts to overcome the difficulties associated with a trade flow analysis (i.e. fluctuations in trade from year to year) by using as its base period the three years before entry into force of the agreement.

14. Using this three year base period, we propose two options to define a "highly traded" product:

(i) where the value of a Member's imports in any single HS six digit line as a proportion of their total imports from the RTA partner exceeds 0.2 percent (this figure would be the average over the three year base period); or

(ii) a requirement that the top, say 50, imports of each RTA party at the 6-digit level that are traded between the RTA partners must be included in the Agreement. Any product that is considered a "highly traded" product must be included in the agreement, i.e. duties must be eliminated on these products by the ten year transition period.

15. The "highly traded" product test would be applied on entry into force. This means the base period for measuring the trade would be the three years immediately preceding entry into force. Any product that meets the "highly traded" product test would have to be included in the lines that are presently or prospectively scheduled for duty elimination by the end of the ten year period.

Products that Members currently do not, but could trade, if it were not for the protectionist measures of one or more of the parties

16. In TN/RL/W/173/Rev.1[*] Australia proposed this could involve an analysis of the overall export trade of each Member. Our objective in this proposal is to enable Members to be aware, in the context of an RTA examination, of the products that are not traded as a result of protectionism by one of the parties.

17. Our proposed methodology for identifying such trade is to examine the global exports of the parties to the agreement and examine whether the significant exports of each party is subject to the elimination of duties by the other parties, even if the other parties are historically not markets for those products. We would define 'significant exports' as products which represent at least two percent of a party's total exports in value at the six digit level. The period for this calculation would again be a base period of three years prior to the entry into force of the agreement. The required information could be obtained from the United Nations Commodity Trade Statistics Database (Comtrade).

Ten year phase in

18. Several Members expressed support for this position, while a few Members expressed concern that 10 years may be inadequate to accommodate the treatment of some products in their RTAs. However, the current practice of Members notifying RTAs with substantial amounts of trade subject to implementation or transition periods has no legal basis. Only those agreements notified as interim agreements can take advantage of the ten year implementation period, and those agreements are required by Article XXIV.5(c) to 'include a plan and schedule' for the formation of the RTA within a 'reasonable length of time' (i.e. within 10 years - paragraph 3 of the Understanding on the Interpretation of Article XXIV of the GATT). Therefore, an RTA notified under Article XXIV, but not notified as an interim agreement, should be assessed on its trade coverage and compliance with the requirement of eliminating duties on substantially all trade at the time of entry into force.

[*] In English only.

19. As it is only those RTAs notified as interim agreements that have legal cover in Article XXIV for an implementation or transition period, Australia's proposal of using that period as a precedent or guide for establishing a legal accommodation of an existing practice by Members is in itself an important improvement in the WTO disciplines for the assessment of RTAs.

20. There is an important logic to the relationship between RTAs that are merely notified and RTAs that are notified as interim agreements. The provision for interim agreements clearly envisaged the need for the flexibility mentioned above, and in providing it, imposed the additional requirement of plans and schedules to demonstrate that the agreement would satisfy the requirement of 'substantially all trade' within ten years. It would therefore seem illogical if agreements not notified as interim agreements were to be afforded greater flexibility than interim agreements, such as phased in periods longer than ten years, without having the added disciplines in Article XXIV.5(c) of providing a plan and schedule. This would make interim agreements irrelevant, and undermine the prudent balance of flexibility with commensurate disciplines.

21. Therefore, for RTAs not notified as interim agreements it is important to establish a discipline that accommodates existing practice, while not affording greater flexibility than Article XXIV.5(c), which is the provision of Article XXIV that was expressly designed to afford that flexibility through interim agreements. We are not persuaded by the view that ten years is an inadequate implementation or transition period for RTAs not notified as interim agreements. Where Members insist there is a need for an implementation or transition period greater than 10 years our view is that in the first instance they should support this proposal in order to provide a legal basis for the existing practice by Members of an implementation or transition period. Under our proposal it is possible to have a commitment phased in beyond ten years, provided 95 percent of tariff lines at the six digit level is liberalised by the end of 10 years. If a Member finds they need longer than 10 years to phase in commitments in order to meet the 95 percent requirement, our view is that such Members should notify their agreement as an interim agreement and avail themselves of Article XXIV.5(c), where according to paragraph 3 of the Understanding on the Interpretation of Article XXIV of the GATT, they could, in exceptional circumstances, exceed 10 years provided they also comply with the associated disciplines of providing plans and schedules to support their claims.

Special and Differential treatment

22. Australia reaffirms its willingness to consider S&D-specific provisions in enhanced disciplines for RTAs. Such provisions would be negotiated and applied to all developing countries whose RTAs are notified under Article XXIV of the GATT.

Application of Clarified Rules

23. Any clarification or improvement of GATT Article XXIV must apply to all agreements in force at that time. Older RTAs not in force at that time would not be subject to new disciplines.

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