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Committee on Anti-Dumping Practices

Committee on Subsidies and
Countervailing Measures

QUESTIONS CONCERNING THE IMPLEMENTING LEGISLATION OF AUSTRALIA

European Community

The European Community has examined the Customs Tariff (Anti-Dumping) Act 1975 as amended by the Customs Tariff (Anti-Dumping) Amendment Act 1984 and the Act to amend the Customs Act 1901 and the Industries Assistance Commission Act 1973 in relation to duties of customs under the Customs Tariff (Anti-Dumping) Act 1975. It has also taken note of the second reading speeches offered by the Minister assisting the Minister for Industry and Commerce with regard to Australia's administrative procedures in anti-dumping and countervailing matters and wishes to raise the following points of particular concern:

1. Administrative procedures

a) Legal status

Important elements of Australia's anti-dumping and countervailing procedures are laid down in procedural rules outside the anti-dumping legislation proper. It appears that these rules are not legally binding for the administering authority and could not be evoked before Australia's courts of law. Indeed, none of these rules has been notified to GATT under the terms of Article 16 (6) of the Anti-Dumping Code and Article 19 (5) of the Code on Subsidies and Countervailing Duties ("Subsidies Code"). The Community considers this situation as being unsatisfactory. Since in Australia the Codes themselves are not enforceable as domestic law, there are no legal safeguards that the criteria set out in the Codes with regard to, e.g. the admissibility of anti-dumping and countervailing complaints, the initiation of proceedings, the protection of confidential information, the supply of non-confidential summaries, the rights of the parties involved to defend their interests and to be kept informed and

the transparency of proceedings and decisions taken, will be respected by the administering authority. The situation has become even more serious since section 14 of the Customs Tariff (Anti-Dumping) Act 1975 has been repealed. This section stipulated that the Minister should not take any action inconsistent with the obligations of Australia under any international agreement relating to tariffs or trade. The deletion of this section has deprived the parties concerned of the possibility to evoke these obligations before Australia's courts of law to the extent that essential elements of the Codes have not been implemented by the Commonwealth Parliament. The Community does not share the view put forward by the government of Australia in its reply to written questions submitted by the European Communities that issues concerning Australia's international obligations are more appropriately considered within the context of the Codes' dispute settlement procedures. While these provisions can be extremely useful in settling disputes between Code signatories they certainly do not provide expeditious relief to individual parties whose immediate trade interests are affected by anti-dumping or countervailing actions.

b) Delays

Under the terms of the administrative procedures it is envisaged that preliminary anti-dumping or anti-subsidy determinations should be made not later than 45 days after the initiation of the investigation. This delay is inadequately short and, in most cases, the administering authority will not be able to reach proper preliminary findings in respect of dumping or subsidisation, material injury and the causal link between the imports under consideration and the alleged injury within this period.

The inadequacy of this delay becomes obvious if it is compared with international practice. Although those of Australia's trading partners which are carrying out anti-dumping and countervailing proceedings are under an obligation, as is the government of Australia, to provide expeditious relief for their domestic industry against unfairly priced imports, they have recognised that a fair and equitable administration of their unfair trade laws requires substantially more time than the delay envisaged in Australia's administrative procedures.

A preliminary dumping finding can only reasonably be made after the exporters involved have had an opportunity to supply the relevant information which usually is done by way of replying to a questionnaire dispatched by the administering authority. In addition, in many cases, overseas verification visits will be necessary. In this context the Commission wishes to remind the Australian government of the Recommendation of the GATT Committee on Anti-Dumping Practices of 15 November 1983 that respondents to an anti-dumping questionnaire should normally be given at least thirty days for the reply and that this time-limit should be counted from the date of the receipt of the questionnaire which, for this purpose, shall be deemed to have been received one week from the day on which it was sent to the respondents. If Australia follows this recommendation, the adoption of which it has supported, there would remain not more than 8 days for the examination and verification of the exporters' replies.

c) Import source switching

It is provided for preliminary anti-dumping action being taken on the basis of tentative normal values where significant quantities of goods are imported from countries not yet subject to an investigation and where there is cause to believe that these goods are imported at dumped prices. This is considered necessary in order to counter import source switching which may occur as a consequence of anti-dumping proceedings.

Such a rule disregards essential provisions of the Code which stipulate that only in special circumstances shall the authorities of the importing country decide to initiate proceedings without a request made by or on behalf of the industry concerned, and that they shall proceed only if they have sufficient evidence of dumping and material injury caused thereby. Under the terms of this rule the Australian authorities would immediately investigate any imports from new suppliers and thereby attempt to establish

the evidence which should have been the precondition for any action. Moreover, it allows action to be taken on the basis of a tentative assessment of normal value using available and probably erroneous information without providing a reasonable opportunity to the exporters concerned to defend themselves.

2. Amendments to the Customs Tariff (Anti-Dumping) Act 1975

a) "Hidden dumping"

The revised section 4 (3) enables the Minister to consider the sale at a loss of imported goods in Australia as indicating that the purchase of these goods has not been made at arm's length, and to determine the export price on the basis of the price at which these goods were sold by the importer less the prescribed deductions.

While Article 2 (5) of the Anti-Dumping Code authorizes construction of the export price where it appears to the investigating authorities that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer, the fact that the importer sells the goods at a loss does not, by itself, provide sufficient evidence of a compensatory arrangement. In addition, there is the first note to paragraph 1 of Article VI GATT which indicates that there must be "sales at a loss" and an association between the importer and his supplier before the export price can be constructed. It follows that the revised section 4 (3) is contrary to GATT and to the Anti-Dumping Code.

b) Discretion of the Minister

The Act includes a considerable number of provisions under the terms of which the administering authority enjoys practically unlimited discretion which not only reduces the certainty of the law to the detriment of international trade, but also enables the Minister to act in a manner not in conformity with the Codes. There is, for example, subsection 6 of section 5 which entitles the Minister to make

"such adjustments as are necessary" to ensure that the normal value is properly comparable with the export price of the goods, or the new subsection (3A) (d) of section 4 which reads that the Minister shall have regard to "such other matters as (he) considers relevant" when he determines whether an importer is selling at a loss.

3. Miscellaneous Amendments Act

The Community has noted with concern that parties involved in anti-dumping and countervailing investigations shall not be excused from answering questions or from producing documents on the grounds that the answer or production might tend to incriminate them or make them liable to penalty. It is considered that such a provision could operate against fundamental principles of equity and cannot be justified by the need to ensure expeditious relief for the industry. The possibility to make any findings on the basis of the facts available where necessary information is not provided within a reasonable period appears to be sufficient to achieve the objectives sought by the anti-dumping and countervailing statute.

4. Sections of the Customs Tariff (Anti-Dumping) Act 1975 which have remained unchanged

There are a number of points where, in the Community's view, Australia's anti-dumping and countervailing legislation was not in conformity with Australia's international obligations under Article VI GATT or the Anti-Dumping and Subsidies Codes. All of these points were raised already in the GATT document ADP/W/60 and SCM/W/50 concerning questions relating to the then Australian Anti-Dumping Act. Unfortunately the Australian Government has not availed itself of the opportunity to revise these sections in the context of the general review of its anti-dumping and countervail legislation so as to bring them in line with the internationally agreed rules. The Community considers it necessary, therefore, briefly to reiterate its concerns with regard to these issues:

a) Profit rate to be added to cost of production

According to section 5 (2) (c) (ii) (B) the amount for profit which is to be added to the production costs for the purpose of establishing normal value shall be calculated in accordance with such a rate "as the Minister determines would be the rate of profit of that sale".

It is doubtful whether this section is in conformity with Article 2 (4) of the Anti-Dumping Code which clearly stipulates that the addition for profit shall not exceed the profit normally realised on sales of products of the same general category on the domestic market of the country of origin. If it is intended to operate this section in conformity with the Code, there is no reason to avoid the Code language.

b) Definition of subsidies, including so-called "freight-dumping"

Under the terms of Section 10, countervailing duties can be imposed on imports benefiting from so-called "prescribed assistance". This is defined as "any assistance, incentive, exemption, privilege or benefit (whether financial or otherwise) in relation to goods other than payment or grant of a subsidy, bounty, reduction or remission of freight or other financial assistance on the production, manufacture, carriage or export of the goods".

This definition extends the scope of Australian countervailing duty law far beyond what has been envisaged by Article VI (3) GATT which declares countervailable only bounties or subsidies determined to have been granted on the manufacture, production or export of a product in the country of origin or exportation, including subsidies on transportation.

Section 12 considers it "by definition", to be a subsidy when the freight charged for transport of the goods concerned to Australia has been less than "normal freight" as defined in the Act. It is not in conformity with the Subsidies Code to determine without prior countervailing enquiry that freight at a rate below the said "normal rate" implies a subsidy.

c) Retroactive application of anti-dumping or countervailing duties

Under the terms of section 13 (2) duties may be imposed on goods which have been entered for home consumption already and in relation to which Customs had the right to require and take securities but did not do so. This provision is contrary to Article 11 of the Anti-Dumping Code and Art. 5 of the Subsidies Code which permit retroactive application of duties only under very limited conditions.

d) Imposition of countervailing duties without injury test

According to section 10 (2B) and (2D) the Minister can impose countervailing duties on imported goods without prior enquiry into whether these imports have caused injury, where these goods are exported from a country which, in the opinion of the Minister, has applied countervailing duties on exports from Australia without proper injury test.

This provision is clearly not in conformity with Australia's obligations under GATT and the Subsidies Code. These obligations are not contingent upon the fulfilment by other countries of their own obligations. Where Australia has reason to believe that another signatory has not acted in accordance with its Code obligations she should have recourse to the dispute settlement procedures established by the Subsidies Code and there should be no unilateral retaliation on the basis of a necessarily subjective evaluation of other countries' practices.

e) Protective measures in favour of third countries

Sections 9 and 11 contain extensive rules on the application of anti-dumping and countervailing duties on imports which are injurious to a producer or manufacturer of a third country exporting to Australia. While, in fact, Article 12 of the Anti-Dumping Code provides for protective action in favour of third countries, such action can only be taken where injury is being caused to a "domestic industry" in the third country (Article 12 (2) of the Code). It is not sufficient, therefore, that injury is caused to "a producer or manufacturer" who does not account for a major part of the total domestic production of like products in the third country.

Moreover, the Subsidies Code does not provide for application of countervailing duties in favour of third countries at all. It is true that under the terms of Article VI (6)(b) GATT such action may be taken, subject to authorisation by the Contracting Parties. Such authorisation has not been given however. Section 11 cannot be based on Article VI (6) (c) GATT either, since Section 11 is not limited to actions taken under the exceptional circumstances referred to in this paragraph.

The European Community is aware that the Government of Australia has replied to points 4a) to 4e) above already in GATT documents ADP/W/71 and SCM/W/63, but it considers that these replies have not been fully satisfactory and requests the Australian authorities, therefore, to reconsider these issues in the light of Australia's international obligations under GATT and the Codes.