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GENERAL AGREEMENT ON TARIFFS AND TRADE

Committee on Anti-Dumping Practices

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Committee on Subsidies and
Countervailing Measures

QUESTIONS CONCERNING THE IMPLEMENTING LEGISLATION OF AUSTRALIA

Responses by Australia

Reproduced herewith are responses by the Australian authorities to the questions raised by the European Community in documents ADP/W/84 and SCM/W/75 concerning Australia's Anti-Dumping and Countervailing Legislation.

QUESTIONS CONCERNING THE IMPLEMENTING LEGISLATION OF AUSTRALIA -
EUROPEAN COMMUNITY ADP/W/84 AND SCM W/75 OF 24 JULY 1984

Australia responds as follows to the points of particular concern to the European Community.

1. Administrative Procedures

(a) Legal Status

Australia's anti-dumping and countervailing legislation, the Customs Tariff (Anti-Dumping) Act 1975, is a taxing Act and under Australian constitutional law cannot specify administrative procedures such as those followed by the administering authority in the conduct of investigations.

The legislation does, however, prescribe the facts on which the Minister for Industry and Commerce must be satisfied before imposing a dumping or countervailing duty.

Australia considers that its administrative procedures are in complete conformity with Codes principles and requirements. A public notice is issued at each stage of investigation, namely initiation of investigation, preliminary finding and final finding and all parties are given the opportunity up until the time of final finding to present their views and defend their interests.

Immediately on initiation of an investigation, all known interested parties are invited in writing to make submissions to assist the administering authority to reach a preliminary finding. Later in the course of investigations following notification of an affirmative preliminary finding, the opportunity is given for parties to meet those with opposing views, make submissions and present rebuttals. Opportunity is also given for parties to see all evidence presented which is not confidential.

The opportunity provided for parties to meet is standard practice under Australian procedures and goes beyond the Code requirement that such meetings be convened on request of a party.

Australia's representative at the May 1984 meeting of the Committee on Anti-Dumping Practices advised that a comprehensive manual setting out Australia's administrative procedures for public information was in course of preparation. A draft version of this manual has been completed and it will be forwarded to the GATT secretariat by end September 1984.

The repeal of section 14 of the Customs Tariff (Anti-Dumping) Act 1975 in no way lessened Australia's responsibilities under the Codes. Although the avenue of appeal against the imposition of securities as provisional measures to the Federal Court of Australia has been removed there is still an avenue of appeal in certain circumstances to the High Court of Australia. Final anti-dumping and countervailing findings remain appealable to Australian Courts.

(b) Delays

Australia's procedures provide for preliminary findings, affirmative or negative, to be reached within 45 days of initiation of a dumping investigation and within 60 days of initiation of an investigation into a subsidisation complaint. The additional time allowed in the latter case recognises the requirements of the Subsidies and Countervailing Duties Codes for consultations.

It is stressed that these time periods are allowed in normal circumstances and that additional time may be needed in complex cases to reach a preliminary finding.

Australia does not seek to carry out inquiries with exporters in the time leading up to a preliminary finding although exporters and other interested parties are given ample opportunity to make submissions, if they so desire, during this period.

It has been Australia's experience that considered preliminary findings can be reached in most cases within these time scales.

(c) Import Source Switching

It has been found on a number of occasions that the imposition of anti-dumping measures against goods from a particular country or the initiation of a dumping investigation results in significant imports of the like goods from other sources.

Australia does not automatically extend the scope of an investigation to cover such situations nor has invoked the "initiation in special circumstances" of the Anti-Dumping Code.

Provisional measures against the goods being imported from new sources are only imposed once an affirmative preliminary finding is reached and only if it is judged if such measures are necessary to prevent further injury to a domestic industry during the period of investigations.

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

(a) "Hidden Dumping"

Australia does not consider that the revised sub-section 4(3) of the Act which enables the export price to be constructed in circumstances where there is a sale at a loss between non-associated parties is contrary to paragraph 1 of Article VI of the GATT.

The purpose of the provision is to enable investigation and construction of export price where it is found that a compensatory arrangement exists between exporter and importer. It is recognised that there could be other reasons for an importer to sell goods at a loss on the Australian domestic market without any compensatory arrangement with an exporter. In such cases, export price is determined according to the normal criterion of actual price paid less any charges accruing after exportation of the goods.

Australia considers that the provisions of paragraph 1 of Article VI of the GATT relating to hidden dumping are not exhaustive. The paragraph only refers to one form of price dumping.

(b) Discretion of the Minister

Ministerial discretion is appropriate in anti-dumping and countervailing legislation providing it is exercised in accordance with the provisions of the Codes. Decisions by the Minister are fully appealable in Australian Courts.

Normal values and export prices are compared having regard to any differing circumstances that are present in the determination of costs by the Minister. Allowances are needed to take account of differences so that equitable comparisons are possible at all times. For example: sub-section 5(6) enables the Minister to exclude from a constructed normal value, those elements of expense which would usually be excluded from a normal value based on domestic prices in the exporting country, namely "due allowance provisions".

3. Miscellaneous Amendments Act

The provisions of sub-section 214(B) of Australia's Customs Act, inserted in March 1984, apply only to parties located in and investigations conducted within Australia. They have no application outside Australia.

4. Sections of the Customs Tariff (Anti-Dumping) Act 1975
Which Have Remained Unchanged

(a) Profit Rate to be Added to Cost of Production

Paragraph 5(2)(c) of the Act allows for construction of normal value when it is inappropriate to determine same under other prescribed criteria. Although the Minister may determine a rate of profit on the sale any amount so determined must, because of the very nature of paragraph 5(2)(c), be a rate of profit as if the goods were destined for domestic consumption in the country of export rather than for export.

Accordingly, no conflict is seen between paragraph 5(2)(c) of the Act and Article 2(4) of the Anti-Dumping Code.

(b) Definition of Subsidies, Including so Called
"Freight Dumping"

Australia's policy is to apply the concept of subsidy consistent with the GATT and the material injury test as outlined in the Code. However, amendments to section 10 of the Act in 1982 followed the Australian Government's decision that, as a matter of trade policy and notwithstanding the injury test requirement of the Code, Australia should be free to take reciprocal countervailing action without requiring proof that subsidised exports to Australia are causing or threatening injury to a domestic industry in cases where other countries do not accord Australian exports the same test in their countervailing actions. Additionally, Australia will adopt a similar approach to the definition of subsidy to that applied by other countries in countervailing actions against Australian exports.

Specifically, the provisions allow Australia to take reciprocal countervailing action in any case where another country applies countervailing duty against Australian exports without applying an injury test or by using a concept of a countervailing subsidy broader than the concept currently embodied in paragraph 10(4)(A) of the Customs Tariff (Anti-Dumping) Act 1975.

Section 12 of the Customs Tariff (Anti-Dumping) Act 1975 outlines the circumstances in which the Minister shall be deemed to be satisfied, for the purposes of section 10 or 11 of the Act, that reduction of freight has been granted on carriage of goods. A reduction or remission of freight occurs when goods exported to Australia have been carried from the country of export freight free, or the amount of freight paid is less than the normal freight.

The administering authority, in examining a complaint of reduction or remission of freight in terms of section 10 or 11 of the Act, investigates the rate of freight which is applicable to the particular shipment under inquiry and determines whether, at the time of exportation, such rate was freely available under the same terms and conditions to any and every shipper.

Complaints of "freight dumping" are investigated in accordance with the requirements for investigation into a complaint of injurious subsidisation.

(c) Retroactive Application of Anti-Dumping or Countervailing Duties

Sub-sections 13(2), 13(3) and 13(4) of the Customs Tariff (Anti-Dumping) Act 1975 were drafted to reflect the provisions of Articles 11.1(i) and (ii) of the Anti-Dumping Code and Articles 5.5 and 5.9 of the Subsidies and Countervailing Duties Code. The words "had the right to require and take such security" quoted from sub-section 13(2) of the Act are considered compatible with the words "date of application of provisional measures" used in the nominated Code articles.

(d) Imposition of Countervailing Duties Without Injury Test

See answer to Question 4(b).

(e) Protective Measures in Favour of Third Countries

Article VI.6 of the GATT provides for Contracting Parties to implement, in prescribed circumstances, countervailing measures on behalf of another Contracting Party. Article VI.6(B) of the General Agreement refers to "an" industry, not "domestic industry" as defined in the Codes. Australia considers, within the context of the General Agreement, that "an industry" in a third country can refer to individual producers or manufacturers of the product in question. With respect to section 11 of the Customs Tariff (Anti-Dumping) Act 1975, Australia considers this section does not conflict with Article VI.6 of the General Agreement: Firstly, the CONTRACTING PARTIES' prior approval is not precluded by the provisions of the section, and secondly, where paragraph (c) of Article VI.6 applies, the prior approval of the CONTRACTING PARTIES is not required before publication of a notice.