Before the World Trade Organization

Panel Proceedings

EUROPEAN UNION – ANTI-DUMPING DUTIES ON FATTY ACID FROM INDONESIA

(DS622)

THIRD PARTY WRITTEN SUBMISSION OF AUSTRALIA

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LIST OF ACRONYMS, ABBREVIATIONS AND SHORT FORMS

Abbreviation	Full Form or Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of GATT 1994
Member	Member of the World Trade Organization
WTO	World Trade Organization

I. INTRODUCTION

1. Australia welcomes the opportunity to present its views to the Panel. Australia considers the dispute raises some important questions in relation to 1) "as such" challenges of unwritten measures, and 2) the standing provisions in the Anti-Dumping Agreement.

2. Australia reserves the right to raise other issues at the third party hearing before the Panel.

II. "AS SUCH" CHALLENGES OF UNWRITTEN MEASURES

3. Australia agrees with the European Union that "as such" challenges against an unwritten measure are serious.[1]

4. Australia notes that, in *US - Oil Country Tubular Goods Sunset Reviews,* the Appellate Body stated that: "By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application".[2]

5. For a complainant to satisfy a Panel of the existence of an unwritten measure which can be subject to an "as such" challenge, "a complaining party must clearly establish, through arguments and supporting evidence, at least that the alleged "rule or norm" is attributable to the responding Member; its precise content; and indeed, that it does have general and prospective application."[3] This is a "high threshold"[4] in that each element must be sufficiently demonstrated by the evidence. A panel cannot lightly assume the existence of a rule or norm.

6. Unwritten measures by their nature entail complex evidentiary considerations. Where a measure is not expressed in a written document, "a panel must carefully examine the concrete instrumentalities that evidence the existence of the purported measure".[5]

[1] European Union's first written submission, para. 36; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172.
[2] Appellate Body Report, *US – Oil Country Tubular Sunset Reviews,* para. 172.
[3] Appellate Body Report, *US – Zeroing (EC),* para. 198.
[4] Appellate Body Report, *US – Zeroing (EC),* para. 198.
[5] Panel Report, *EU – Cost Adjustment Methodologies II (Russia),* para. 7.26, citing Appellate Body Report, *US – Zeroing (EC),* para. 198.

7. Previous WTO panel reports have found that an unwritten measure can be determined from secondary sources of evidence including policy documents, administrative guidelines and statements of government officials.[6] Australia considers that it is open to the Panel to consider the collective weight of a complainant's evidence in establishing the existence and content of the unwritten measure.

8. Turning to whether the alleged unwritten measure has "general and prospective application", this may be found if the measure reflects a deliberate policy, going beyond the mere repetition of the application of the measure in specific instances.[7] In this regard, the Appellate Body has explained that relevant evidence may include proof of the measure's "systematic application".[8] Furthermore, as the Appellate Body has identified, "the extent to which a particular rule or norm provides administrative guidance for future conduct and the expectations it creates among economic operators that it will be applied in the future, are also relevant in establishing the prospective nature of that rule or norm."[9]

9. Australia does not take a position on the specific evidence in this dispute. However, Indonesia appears to rely on three categories of evidence to demonstrate that there exists an unwritten measure of "general and prospective application":

- First, previous findings of the Commission, including the underlying investigation into duties on fatty acids;
- Second, the language used by the Commission in the instances identified by Indonesia; and
- Finally, disclosures made by the Commission in those instances, specifically the calculation file.[10]

[6] Panel Report, *Argentina – Import Measures*, para. 6.43; See also Appellate Body Report, *Argentina – Import Measures,* paras. 5.51-5.52; Appellate Body Report, *US – Zeroing (EC),* para. 202; Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.309-7.311; Panel Report, *EC – Approval and Marketing of Biotech Products,* para. 7.515 and 7.532.
[7] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.34.
[8] Appellate Body Report, *US – Anti-Dumping Methodologies (China),* para. 5.132 citing Appellate Body Report, US – Zeroing (EC), para. 198.
[9] Appellate Body Report, *US – Anti-Dumping Methodologies (China),* para. 5.132 citing Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.
[10] Indonesia's first written submission, paras. 320-323.

10. The Panel could consider whether the instances identified by Indonesia have the required frequency, consistency and extended repetition to constitute a measure of "general and prospective application".[11] While Indonesia references the "systematic application" of the methodology,[12] it appears to Australia that Indonesia places significant reliance on repetition to prove the existence of an "intentional policy".[13]

11. In the context of permissive legislation and in the absence of any other evidence, Australia considers that a limited number of specific applications may not have sufficient probative value to demonstrate either the precise content of a measure, or that it has general and prospective application.[14]

III. STANDING

12. The Appellate Body has said that standing, or *locus standi*, is generally understood to mean the right to bring an action in a dispute.[15] In the context of the Anti-Dumping Agreement, the standing requirements in Article 5.4 are an important step to provide interested parties potentially subject to the investigation a meaningful test of whether the application has the required support of the industry.[16]

13. Indonesia argues that the investigation should have been terminated at the time the complaint was withdrawn, because the standing requirement under Article 5.4 of the Anti-Dumping Agreement was likely no longer met.[17]

14. Australia does not take a position on the specific evidence in this dispute. However, in Australia's view, once an investigating authority is satisfied of the adequacy and accuracy[18] of the information forming the basis for the standing determination, the investigation should proceed without reconsideration of its determination – even if the support justifying the initiation subsequently falls below the requisite numerical benchmark.

[11] See Appellate Body Report, *US – Anti-Dumping Methodologies (China),* para. 5.132.
[12] Indonesia's first written submission, para 3.45; See Appellate Body Report, *US – Anti-Dumping Methodologies (China),* para. 5.132.
[13] Indonesia's first written submission, para. 345.
[14] See Award of the Arbitrators, *China – IPRs Enforcement (EU),* para. 4.41
[15] Appellate Body report, *EC Bananas III,* para. 132, footnote 65; See B. Garner, A Dictionary of Modern Legal Usage (Oxford University Press, 1987), p. 347; L.B. Curzon, *A Dictionary of Law*, 4th ed. (Pitman Publishing, 1993), p. 232.
[16] Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.63.
[17] Indonesia's first written submission, para. 183.
[18] See Article 5.3 of the Anti-Dumping Agreement.

15. Australia notes that the Panel in *Mexico – Steel Pipes and Tubes* stated that "Article 5.4 pertains exclusively to initiation, and there is no on-going obligation to monitor domestic industry support once an investigation has been initiated under the Anti-Dumping Agreement".[19] Indeed, in Australia's view, to impose an obligation on the investigating authority to revisit standing after initiation of the investigation would undermine an investigating authority's ability to focus on completing a proper investigation without unnecessary delay.

16. Australia agrees with the European Union that no obligation to revisit the standing assessment exists or could, let alone should, be supported by Article 5.4. of the Anti-Dumping Agreement.[20] It is appropriate for an investigating authority to carry out its investigation in a proper manner, without undue delay, even in circumstances where a complaint has been withdrawn.

IV. CONCLUSION

17. Australia thanks the Panel for the opportunity to submit its views on the issues raised in this dispute.

[19] Panel Report, *Mexico – Anti Dumping Duties on Steel Pipes and Tubes*, para. 7.347.
[20] European Union's first written submission, para. 163.