



EUROPEAN UNION

DELEGATION OF THE EUROPEAN COMMISSION TO AUSTRALIA AND NEW ZEALAND

Ambassador

Canberra, 17 February 2009

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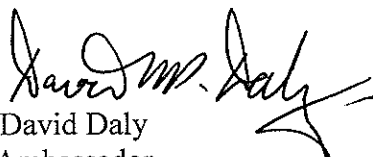
Mr John Potter
National Manager
Trade Measures Branch
Australian Customs Service
Customs House
5 Constitution Ave
Canberra ACT 2601

Dear Mr Potter

Please find attached a submission from the European Commission responding to the discussion paper regarding anti-dumping applications claiming existence of a particular market situation.

I appreciate this submission is after the closing date, but it has been delayed due to the need to have a number of experts comment on the submission.

Yours Sincerely,


David Daly
Ambassador

SUBMISSION BY THE EUROPEAN COMMISSION

Subject: **Discussion paper – Market situation – Existence of subsidies**

The European Commission ('Commission') welcomes the opportunity granted by the Australian Customs to comment on the introduction into the Australian anti-dumping investigation process of a new questionnaire, called 'market situation questionnaire'. This questionnaire is meant to assess claims that in the country of origin of the product subject to an antidumping investigation a 'particular market situation' (Article 2.2 of the WTO Anti-dumping Agreement (ADA)) renders domestic prices unsuitable for use in establishing normal value.

It is understood that this questionnaire mainly results from the decisions of Australia to grant market economy status to China. However, it is clearly stated in the discussion paper released by the Australian Customs that even if they mostly concern China, "*claims of a market situation*" also concern "*any market economy*" (lines 15-17 of the discussion paper). In this respect, in a recent anti-dumping investigation, the Australian Customs Service envisaged to consider EU subsidies as falling under the 'particular market situation' category in which "*market conditions can no longer be said to prevail*". This is also confirmed by the paragraphs 269 to 331 of the discussion paper.

The implication of these statements is that sales in the domestic market will be disregarded in the determination of the normal value if the Australian Customs are satisfied on the basis of undefined criteria and irrespectively of any countervailing investigation that "*the assistance programs have materially affected the domestic prices of the like goods*" (lines 319-322 of the discussion paper). To a certain extent this means in practice putting the EU at the same level as a non-market economy. The Commission finds this quite alarming and believes that the Australian Customs' reasoning is unconvincing and clearly in breach of WTO rules for the following reasons.

The Commission agrees with the Customs when it says (lines 309-311) that in case of practices that can be the subject of a countervailing investigation "*the remedy is more properly found in the imposition of a countervailing duty, not antidumping duty*". As a matter of fact, the Commission is of the view that this is not only the most proper but the *only* remedy that complies with WTO rules. Indeed, the Agreement on Subsidies and Countervailing Measures ('SCM Agreement') states clearly that no specific action against a subsidy of another Member State can be taken except in accordance with the provisions of the Agreement on Subsidies and Countervailing measures (Article 32.1 of the SCM Agreement). It is clear also from their separate existence that anti-dumping and countervailing measures are two instruments that reflect a different rationale and address situations of a different nature: on the one hand, government subsidies, on the other hand, company-driven economic practices. Transposing questions concerning subsidies into an anti-dumping investigation therefore constitutes a breach of WTO rules.

In the discussion paper, Customs refers to the Australian Federal Court decision on the anti-dumping investigation against imports of canned tomatoes from Italy. It is noted that in this case, the investigating authorities disregarded the normal value based on domestic prices in the dumping calculation on the basis of evidence of subsidization acquired through a countervailing investigation performed in parallel. In this respect, Customs recognises in the discussion paper (lines 328-331) that, in anti-dumping investigations, its ability to examine the extent and influence of a government program is limited. The Commission is rather of the view that exercising such ability in an antidumping investigation is inappropriate and that the only solution possible is to have a joint antidumping and a countervailing investigation.

From a procedural point of view, the Commission believes that such a course of action would in practice result in circumventing certain procedural obligations required in a CVD case. This would jeopardize legal certainty and breach the international obligations of Australia since fundamental principles of countervailing investigations would be ignored. For example consultation of governments involved (including at the stage before initiation) would not take place anymore (Article 13 of SCM Agreement) and anti-dumping duties could be imposed and remain in force even when subsidies that existed during the investigation period have been withdrawn (in breach to Article 19.1 of the SCM Agreement).

Furthermore, the statement in lines 243-246 according to which claims lacking of supporting evidence obtained in the course of an investigation may nevertheless be considered as "*relevant information for the purposes of the investigation*" is rather alarming. Indeed, the Commission is of the view that any claim that is not supported by sufficient evidence shall simply be disregarded. Even if Customs did not issue any questionnaire, should parties be allowed to place submissions lacking supporting evidence on the public records (lines 248-252), this would amount to a reversal of the burden of proof to the detriment of exporters and the exporting country, which would be forced to respond to mere unsubstantiated assertions.

Finally, the Commission is worried because of the level of 'sufficiency of evidence' set by the Australian authorities (lines 130 ss. of the discussion paper). Customs considers that it is enough that government influence on the market is "material" (lines 156 and 167 of the discussion paper) and leaves to itself ample discretion in defining this concept. This approach is unsatisfying and unnecessary with regard to subsidies giving the existence of a full set of rules (SCM) providing well reasoned and more certain criteria than simple "material influence".

In conclusion, the Commission is very concerned by this development. It is hardly acceptable to claim that a market economy is effectively a non-market economy when subsidies are granted by governments. The sort of provisions being used to justify this move are intended for use in non-market or transitional economies (China) and should be clearly limited to those cases. The Commission realizes that the concept of particular market situation has not been precisely defined at WTO level but addressing subsidies in anti-dumping proceedings is not only unnecessary but by having important legal as well as procedural implications it would constitute a breach of the WTO agreement on subsidies and countervailing measures.