

**SUBSIDIES: WITHDRAWAL OF A SUBSIDY**

Communication from Australia

The following communication, dated 19 January 2006, is being circulated at the request of the Delegation Australia.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiation Group as an informal document (JOB(06)/9), also be circulated as a formal document.

Australia proposes that the meaning and scope of what constitutes “withdrawal” of the subsidy as provided under Article 4.7 of the WTO Agreement on Subsidies and Countervailing Measures (SCM) be clarified.<sup>1</sup>

While this issue, of course, arose for Australia in the *Australian Automotive Leather* case, it is one which we believe is crucial for finding a remedy for prohibitive subsidies, whatever form they may take. We do not seek to undermine the dispute settlement process nor do we seek to open up matters of implementation of subsidy dispute outcomes.

As the *Australian Automotive Leather* implementation panel stated, “withdrawal” of a subsidy is “to enforce the absolute prohibition on the grant or maintenance” of prohibited subsidies.<sup>2</sup> It presumes and reinforces that prohibited subsidies cause serious trade effects. Australia strongly endorses this view.

Presumption of serious trade effects

Adverse effects are presumed for prohibited subsidies. Therefore, “withdrawal” of the subsidy could mean at least the removal of these adverse effects (or something more).

Australia considers that the phrase “withdrawal of the subsidy” means the same in both SCM Article 4.7 and SCM Article 7.8. The language in SCM Article 7.8 provides the context of what “withdrawal” of the subsidy means. And, in the context of Article 7.8, “withdrawal of the subsidy” must be different or something more than “removal of adverse effects” in relation to the remedy for actionable subsidies.

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<sup>1</sup> Previous submissions by Australia on this issue are contained in documents TN/RL/W/139, dated 18 July 2003, and TN/RL/GEN/35 (JOB(05)/41), dated 23 March 2005

<sup>2</sup> *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (hereafter *Australian Automotive Leather*), Recourse to Article 21.5, Panel Report, WT/DS126/RW, 21 January 2000, paragraph 6.34.

We do not want to undermine the presumption of adverse effects and indeed, if we do not deal with “withdrawal of the subsidy” adequately to give this phrase meaning, then there is a risk that the presumption is undermined. If the remedy for prohibited subsidies, namely “withdrawal” of the subsidy, is not adequately clarified, then the absolute prohibition on granting or maintaining prohibited subsidies is also undermined.

#### Possible remedies or approaches

Depending on the facts and circumstances, the very nature or type of prohibited subsidy may have an impact or implications for what may constitute “withdrawal” of the subsidy. In order to provide increased predictability and certainty to the current rules and to reinforce the absolute prohibition on prohibited subsidies, SCM Article 4.7 should be clarified to include the parameters of the remedy.

Some Members have suggested that a distinction be drawn between one-off and recurring subsidies in order to define what constitutes “withdrawal” of the subsidy. In other words, “withdrawal” would be examined on the basis of the frequency of payment of subsidies determined by a panel to be prohibited. Australia sees merit in this.<sup>3</sup>

“Withdrawal” of a subsidy would appear to be relatively straightforward where it means the complete cessation or termination of benefits.

But there remains a lack of clarity on what would constitute “withdrawal” under various circumstances or scenarios. For example, where payments have already been fully disbursed but future production has or is benefiting from that fully disbursed subsidy (for example, either a one-off payment or an expired recurring subsidy program that has an ongoing effect), “withdrawal” of the subsidy would need to address ongoing benefits.

Whether a subsidy is a one-time payment or recurring, it is possible that a subsidy programme, and presumably payments under that programme, found to be prohibited could be revised in order to achieve withdrawal of the subsidy. This could be through, for example, the removal of the export contingency aspect of the program although subsidies would be continued to be paid. The outcome of this is that the prohibited subsidy could be considered to be withdrawn.

Australia therefore considers that there is merit in clarifying whether “withdrawal” of the subsidy may allow for the replacement of the prohibited subsidy with an actionable subsidy and the extent to which such replacement would still amount to “withdrawal”. Replacement of the prohibited subsidy with an actionable subsidy may undermine the effectiveness of the remedy provided under SCM Article 4.7 where the expectation of withdrawal is the termination of the program.

Further, an examination of the rationale for finding the subsidy program prohibited may be necessary in order to ensure that the obligation is not circumvented. If the subsidy programme was intended to target an industry which relied on exports and was designed on the basis of the export orientation of that industry, any subsidy paid consequently could potentially be based on export contingency and therefore still amount to a prohibited subsidy. In other words, “withdrawal” may only be satisfied through termination of the subsidy in this scenario.

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<sup>3</sup> There are also currently proposals in relation to Part V of the SCM in relation to whether subsidies are allocated or expensed. These discussions are, we believe, relevant to consideration of “withdrawal” of the subsidy.

### Repayment/ retrospective remedy

In Australia's view, a remedy should not be punitive but ensure that a subsidy is brought into conformity. Nor does Australia consider that "withdrawal" should encompass a retrospective remedy and the possibility of repayment, including repayment in full.

However, we consider that portions of a subsidy which are deemed allocated over future periods of time may not be considered to be "repayment" as such. For example, in the circumstance of a non-recurring subsidy, say for plant and equipment which has an ongoing benefit and involving more than one payment, the remedy of "withdrawal" would be to require an end to payments.

Australia has previously outlined the considerable difficulties posed in relation to repayment or retrospective remedy for some jurisdictions. By clarifying the SCM Agreement to strengthen the rules, especially their deterrent effect, would in our view present a better outcome than focussing on areas which would simply pose too great a difficulty for governments with different domestic legal systems.

### How would the text be clarified?

Australia previously indicated suggestions for clarifying the "withdrawal" provision under Article 4 of the SCM Agreement.

- (i) The text of SCM Article 4 should be elaborated to clarify the parameters of what is required in order to "withdraw" the subsidy, depending on the facts and circumstances surrounding the granting of the subsidy;
- (ii) specifically, clarify the text of SCM Article 4 to ensure that a subsidy claim should require the panel to make a finding to elaborate on what in broad terms would constitute "withdrawal" of the subsidy.
  - o For example, a claim brought before a panel would also be required to outline what would constitute "withdrawal" of the subsidy. A panel could then, as part of its findings, provide the parameters of what could constitute "withdrawal".
- (iii) Clarification of analogous provisions within Article 7.8 in relation to "withdraw the subsidy" may also be helpful.

### **PROPOSED TEXTUAL AMENDMENTS**

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy [footnote \*] without delay. In this regard, the panel shall specify in its recommendation **what would constitute withdrawal of the subsidy and** the time period within which the measure must be withdrawn.

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**Footnote \* What constitutes withdrawal of the subsidy necessarily depends upon the facts and circumstances surrounding the granting of the subsidy, including, but not limited to, whether the subsidy granted confers an ongoing benefit.**

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy **[footnote \*\*]**.

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**Footnote \*\* As defined in Article 4.7 of this Agreement.**

Australia reserves the right to submit further proposals on this issue.

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