# WORLD TRADE ORGANIZATION

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## FURTHER CONTRIBUTION TO THE DISCUSSION OF THE NEGOTIATING GROUP ON RULES ON THE AGREEMENT ON SUBSIDIES AND COUNTERVAILING DUTY MEASURES

Submission from Australia

The following communication, dated 17 July 2003, has been received from the Permanent Mission of Australia.

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Australia recalls its earlier paper relating to its general contribution to discussion of subsidies and countervailing duty measures. The following raises some additional issues as well as proposing areas where current disparities and ambiguities need to be addressed in order to provide greater clarity and predictability in the rules relating to prohibited and actionable subsidies.

**Prohibited export subsidies**

Australia considers that it is important that the rules relating to export subsidies are upheld and are not circumvented through lack of clarity or imprecision. Australia noted in its general contribution to the discussion of the Negotiating Group on Rules on the Agreement on Subsidies and Countervailing Measures [1] that the rules need to be clarified and improved in relation to prohibited subsidies contingent 'in fact' upon export performance. In particular, Australia identified that the standard for meeting the 'in fact' contingency under SCM Article 3.1(a) currently lends itself to discriminatory and unpredictable treatment.

The Appellate Body in *Canada – Aircraft* acknowledged that analysis of 'in fact' export contingency is difficult. It indicated that it is not sufficient to demonstrate solely that a government granting a subsidy *anticipated* that exports would result but that the government granted the subsidy *contingent* upon export performance.[2] In examining footnote 4, second sentence, it noted that "merely knowing that a recipient's sales are export-oriented does not demonstrate, **without more**, that the granting of a subsidy is tied to actual or anticipated exports" (emphasis added).[3] It noted that export orientation may be taken into account as a relevant fact provided that it is one of several facts and not the only fact supporting a finding. Further, the Appellate Body considered that the nearness-to-the-export-market factor of demonstrating export contingency needed to be treated with caution.[4]

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[1] Document TN/RL/W/85

[2] *Canada – Measures Affecting the Export of Civilian Aircraft*, (hereafter *Canada – Aircraft*), Appellate Body Report, WT/DS70/AB/R, Adopted 8 August 1999, paragraph 171

[3] *Ibid*., paragraph 173

[4] *Ibid*., paragraph 174

In Australia's view, there need to be clearer rules on the conditions or facts which give grounds for a conclusion that a subsidy is contingent 'in fact' upon actual or anticipated export performance. There is no guidance on what facts or what kinds of facts must be taken into account. Whilst export propensity is one fact (and cannot solely be based on the fact that a company exports) which would be considered to determine whether a subsidy is contingent on export and thereby prohibited, case law suggests that export propensity has taken on greater weight in the range of factors which are examined to determine export contingency.

Further, it has been Australia's experience in countervail investigations that investigating authorities will establish firstly (and correctly) the existence of a subsidy and will determine (incorrectly) that the subsidy is contingent on export performance by virtue of the company exporting, and thereby apply the corresponding denominator in a countervail calculation.

- Australia proposes that in considering a range of factors, it should be made clear that export propensity should not be a factor taken in isolation. Currently footnote 4 does not adequately address situations where domestic markets of a subsidizing Member are small or where there are fluctuating market conditions, such that products destined for the domestic market have to be sold on the export market.

- Australia proposes that a range of factors that should be taken into account for export contingency, be listed.

- Australia also proposes that investigating authorities should ensure that consideration of the facts relating to contingency on export performance is clearly established in a countervail investigation.

Australia is of the view that it is important to maintain the presumption in the SCM of serious trade effects caused by prohibited subsidies. Australia noted in its earlier concepts paper that consideration of the levels of export competitiveness in a product is already reflected in the SCM in the context of special and differential treatment. Notwithstanding the relevance of GATT Article XVI:3 in relation to the export of primary products, consideration of export competitiveness of a subsidized product may address current discriminatory treatment of a product which may be subsidised but, due to fluctuating domestic market conditions, is no longer solely for the domestic market. For example, would it be feasible to examine whether, as a result of subsidization, a Member's export competitiveness has increased to certain levels and not been at those levels for sustained periods?

- Should export propensity be considered a factor but only once a certain level or threshold of export competitiveness has been reached? In the same way that market share is examined in the context of subsidies which cause serious prejudice, is it relevant to consider export competitiveness in order to establish export contingency?

**Enforcement**

Australia believes that there needs to be clarification of the meaning of "withdraw the subsidy" both in the context of Part III and Part V of the SCM to ensure consistency in its application. Australia does not consider that there has been consistency in the analysis by panels of these provisions and believes that this is an area which requires clarification. As noted in TN/RL/W/85, Australia considers that 'withdrawal of the subsidy' is a prospective remedy regardless of whether the subsidy is recurring or non-recurring. Further, Australia considers that "withdraw the subsidy", whether in the context of Part III (Article 4.7) or Part V (Article 7.8) of the SCM, does not necessitate repayment by the recipients of the subsidy as a norm.

Australia sees merit in examining the following issues to clarify these provisions:

- Whether the context of Part III and V alters the meaning of "withdraw the subsidy", as has been suggested by some panels;
- Whether replacement of a prohibited subsidy with an actionable subsidy constitutes an effective or suitable remedy;
- Whether "withdrawal of the subsidy" means removal of adverse trade effects;
- Whether retrospectivity or repayment should normally only be countenanced to the extent that there are portions of a subsidy which are deemed allocated over future periods of time;
- Given that there is a presumption of serious trade effects where it is established that there is a prohibited subsidy, whether there is nonetheless a need to quantify or establish the level of serious trade effects in 'withdrawal of the subsidy';
- Whether 'withdrawal of the subsidy' should not go beyond the adverse trade effects;
- Whether SCM Articles 4.10 and 7.9 in relation to "appropriate countermeasures" provide context to the meaning of "withdraw the subsidy";
- Whether there should be a distinction between recurring and non-recurring subsidies;
- Whether termination of a prohibited subsidy constitutes "withdrawal";
- Whether "withdrawal" must encompass a punitive remedy and have an "impact"[5] and enforcement effect on the subsidizing Member.

**Actionable Subsidies: Serious Prejudice**

Australia notes that the chapeau of SCM Article 6.3 states that serious prejudice "may arise in any case where **one or several** of the following apply" (emphasis added). Australia proposes that the evidentiary requirements under SCM Article 6.3 to demonstrate that "the effect of a subsidy" has caused displacement or impeding of exports in a subsidizing Member's market should be clarified, including whether there are distinctions in evidentiary requirements which need to be made between the sub-paragraphs of Article 6.3, for example, between sub-paragraphs a), b) and d).

In *Indonesia – Autos*[6], the Panel found that the analysis required under SCM Article 6.4 is not relevant or appropriate to claims pursuant to Article 6.3(a). However, the Panel noted that this did not mean that the market share data are irrelevant to an analysis of displacement or impeding of exports or that it may be highly relevant evidence. The Panel said there could be some overlap in terms of relevance of the analysis required under SCM Article 6.4, particularly where the evidence must demonstrate the effect of the subsidy.

Within SCM Article 6.3, what would be the representative period and does this need to be specified more clearly? If subsidization has been present in the market for some time, does this affect an assessment of displacement and impediments to exports?

SCM Article 6.5 provides that a comparison of prices of the subsidized product with the non-subsidized like product be made with "due account being taken of any other factor affecting price comparability". Australia sees merit in exploring clarification of what factors should be taken into account.

[5] *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Recourse to Article 21.5, Report of the Panel, WT/DS126/RW, 21 January 2000, paragraph 6.34.

[6] *Indonesia – Certain Measures Affecting the Automobile* Industry, (hereafter *Indonesia – Autos*), Report of the Panel, WT/DS54/55/59/64/R, 2 July 1998, paragraph 14.211.

Clarification of the circumstances listed under SCM Article 6.7, in particular sub-paragraph (f) would be useful. What standards or other regulatory requirements would be captured by this sub-paragraph?

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