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SUBSIDIES: WITHDRAWAL OF A SUBSIDY

Communication from Australia

The following communication, dated 22 March 2005, is being circulated at the request of the Delegation of Australia.

The submitting delegation has requested that this paper, which was submitted to the Rules Negotiating Group as an informal document (JOB(05)/41), also be circulated as a formal document.

In the interest of exchanging views with other WTO Members on this important issue, Australia provides the following elaboration of some aspects of the questions previously posed[1] to provide better guidance to Members on the meaning and scope of the term "withdraw the subsidy".

I. ISSUES

Australia would like to focus initially on select aspects of the range of issues suggested by the questions posed previously, namely:

(i) What constitutes "withdrawal" of the subsidy;

(ii) If "withdrawal" of the subsidy can be defined as compliance with the rules; and

(iii) If "withdrawal" of the subsidy is, or should be, more than compliance with the rules.

(i) What constitutes "withdrawal" of the subsidy

Clarification is needed on whether SCM Article 4.7 relating to "withdrawal" of the subsidy is intended to ensure compliance with the rules, that is, whether a subsidy found to be prohibited is to be brought into conformity with the rules. The requirement in SCM Article 4.7 to "withdraw" the subsidy is a special or additional rule that is different from the requirement under Article 19.1 of the Dispute Settlement Understanding (DSU).[2] A remedy for prohibited subsidies must be meaningful and effective regardless of the form in which a prohibited subsidy is found to exist.[3]

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[1] TN/RL/W/139 of 18 July 2003

[2] See Appendix 2 to the DSU and G*uatemala – Cement AB Report*, para 65; *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, para 6.41.

[3] *Australian Automotive Leather, 21.5 Report*, para 6.36.

There is a presumption in the SCM of the serious trade effects of prohibited subsidies. "Withdrawal" of a subsidy is "to enforce the absolute prohibition on the grant or maintenance" of prohibited subsidies.[4]

"Withdrawal" of the subsidy of itself could be taken to have removed the adverse effects if withdrawal of the subsidy meant the complete cessation or termination of benefits. However, if the subsidy has been fully disbursed or if a fully disbursed subsidy has ongoing benefits (for example, the useful life of assets), the question arises as to whether the prohibited subsidy has been "withdrawn" in the sense of the adverse effects removed.

It could be argued that while a subsidy or programme exists or continues, it is susceptible to a claim that it causes adverse effects in future. Further, the very nature or type of prohibited subsidy may also have an impact or implication for what may constitute "withdrawal" of the subsidy.[5] For example, should a different or separate remedy be applied for recurring subsidies which are expensed annually? Should the design of a subsidy influence what constitutes "withdrawal" of the subsidy? For example, a prohibited subsidy contingent 'in fact' upon export performance may be differently designed to a prohibited subsidy contingent 'in law' upon export performance. The former may have been designed to target companies with export potential. Cessation of the programme may or may not remove the serious trade effects caused by the subsidy in world markets. Similarly, a prohibited subsidy contingent 'in law' upon export performance and containing explicit export performance targets may arguably be made compliant by the removal of the targets. A replacement subsidy may still constitute an actionable subsidy and potentially still be prohibited as it may 'in fact' be contingent on export performance if the government had targeted sectors which are export-based.

Australia does not suggest that "withdrawal" of the subsidy is the equivalent of "removing the adverse effects". But we consider that clarification is necessary within SCM Article 4 on the extent of the remedy to be applied.

Such clarification is particularly desirable when it is recalled that a prohibited subsidy is also an actionable subsidy. In a prohibited subsidy case where the adverse effects are assumed, the text of SCM Article 4.7 provides that the remedy is "withdrawal" of the subsidy. "Withdrawal" of the subsidy could therefore arguably be intended to include removal of the adverse effects.

Further, Australia notes that the issue of the meaning of "withdrawal" of the subsidy has in any case been raised in the context of serious prejudice. Another WTO Member[6] proposes that it be made explicit that in removing the adverse effects of the subsidy, the benefit of subsidies fully disbursed prior to the end of the compliance period be allocated over the total production of the products. That Member notes that the "withdrawal" of the subsidy "would not, in and of itself, be a sufficient remedy in those cases where subsidies fully disbursed under a withdrawn programme clearly benefited future production, allocation becomes necessary in order to ensure that the adverse effects of the measure are removed."

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[4] *Australian Automotive Leather, 21.5 Report*, para 6.34.

[5] *Australian Automotive Leather, 21.5 Report*, footnote 24: the panel expressed the view that the "specific details of the factual evidence underlying the conclusion that the subsidies were … prohibited do not, in our view determine what is required in order to "withdraw the subsidy" within the meaning of Article 4.7 of the SCM Agreement".

[6] See TN/RL/GEN/14; JOB(04)/120 (Serious prejudice).

(ii) If "withdrawal" of the subsidy is compliance

Australia 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. If "withdrawal" of a subsidy is to bring a prohibited subsidy into conformity with the SCM without requiring "removal of adverse effects", then the issue arises as to whether a prohibited subsidy could be replaced by an actionable subsidy. This in Australia's view could undermine the effectiveness of the remedy provided under SCM Article 4.7 and would necessarily depend on the facts and circumstances relating to a particular case or situation.[7]

(iii) If "withdrawal" of the subsidy is more than compliance

In the context of examining whether repayment is required, including partial or full repayment, the remedy under SCM Article 4.7 is not "intended to fully restore the *status quo ante* by depriving the recipient of the prohibited subsidy of the benefits it may have enjoyed in the past".[8]

Australia considers that there needs to be clarification on whether "withdrawal" of a subsidy requires more than compliance, that is, that there needs to be a deterrent effect or punitive remedy, and if so, clarification also on what the extent of that penalty should be.

In addition to issues concerning removal of adverse effects, does it also encompass a retrospective remedy and the possibility of repayment, including repayment in full.[9] Repayment of course may encompass a situation where there are portions of a subsidy which are deemed allocated over future periods of time.

A retrospective application should only be applied if the withdrawal of the subsidy at the time of the panel decision would not remove the adverse trade effects. [10] However, putting aside whether or not a retrospective and punitive remedy were appropriate, removal of the adverse trade effects may have implications for the presumption of such effects in prohibited subsidy cases.

II. PROPOSED AMENDMENTS

Australia proposes the following amendments to 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.

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[7] *Australian Automotive Leather, 21.5 Report,* para 6.47: the panel did not consider that "it is possible to change, *ex post facto*, the export contingency associated with the prohibited subsidy", noting that "it was a logical impossibility to change the facts and circumstances surrounding the decision to provide the subsidy which led to the conclusion that the subsidy was prohibited".

[8] *Australian Automotive Leather, 21.5 Report,* para 6.49.

[9] *Australian Automotive Leather, 21.5 Report,* para 6.39: The panel concluded that "withdrawal" of the subsidy is not limited to prospective action only where export subsidies are fully disbursed and the export contingency is entirely in the past.

[10] *Australian Automotive Leather, 21.5 Report,* para 6.34.

- For example, if findings related to a one-off subsidy, then a panel could provide the parameters of what could constitute "withdrawal" on the basis of a claim made on what must be withdrawn (as outlined under proposed amendment (i) above).