

**AUSTRALIA – SUBSIDIES PROVIDED TO  
PRODUCERS AND EXPORTERS OF  
AUTOMOTIVE LEATHER -**

**RECOURSE TO ARTICLE 21.5 OF THE DSU BY THE  
UNITED STATES**

**REPORT OF THE PANEL**

The report of the Panel on Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 21 January 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

Note by the Secretariat: This Panel Report shall be adopted by the Dispute Settlement Body (DSB) within 30 days after the date of its circulation unless a party to the dispute decides to appeal or the DSB decides by consensus not to adopt the report. If the Panel Report is appealed to the Appellate Body, it shall not be considered for adoption by the DSB until after the completion of the appeal. Information on the current status of the Panel Report is available from the WTO Secretariat.

## I. INTRODUCTION AND FACTUAL BACKGROUND

1.1 On 16 June 1999, the Dispute Settlement Body (“the DSB”) adopted the report and recommendations of the Panel in the dispute *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather* (WT/DS126/R) (“*Australia – Automotive Leather*”). In that report, the Panel found that payments under a grant contract between the Government of Australia, and Howe and Company Proprietary Ltd. (“Howe”) and Howe’s parent company Australia Leather Holdings, Ltd. (“ALH”) were subsidies within the meaning of Article 1 of the Agreement on Subsidies and Countervailing Measures (“the SCM Agreement”) contingent upon export performance within the meaning of Article 3.1(a) of that Agreement.<sup>3</sup> The Panel accordingly recommended, pursuant to Article 4.7 of the SCM Agreement, that Australia withdraw those subsidies without delay, which the Panel specified to be within 90 days.<sup>4</sup>

1.2 On 6 July 1999 Australia submitted a communication to the Chairman of the DSB pursuant to Article 21.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”), regarding “surveillance of implementation of recommendations and rulings – time-period for implementation” (WT/DS126/6). In that communication, Australia stated that the United States had been informed at a bilateral meeting in Canberra on 25 June 1999 that Australia intended to implement the DSB recommendations, and that Australia intended to implement the DSB recommendations within the time-frame provided for in the panel report.

1.3 On 17 September 1999, Australia submitted to the Chairman of the DSB a “status report by Australia” to inform the DSB of Australia’s progress in implementing the recommendations and rulings in the dispute (WT/DS126/7). In that communication, Australia stated that on 14 September 1999, Howe had repaid the Australian Government \$A8.065 million, an amount which covered any remaining inconsistent portion of the grants made under the grant contract. Australia further stated that the Australian Government had also terminated all subsisting obligations under the grant contract. Australia concluded that this implemented the recommendations and rulings in the dispute to withdraw the measures within 90 days.

1.4 On 4 October 1999, the United States submitted a communication seeking recourse to Article 21.5 of the DSU (WT/DS126/8). In that communication, the United States indicated its view that the measures taken by Australia to comply with the recommendations and rulings of the DSB were not consistent with the SCM Agreement and the DSU. In particular, in the view of the United States, Australia’s withdrawal of only \$A8.065 million of the \$A30 million grant, and Australia’s provision of a new \$A13.65 million loan on non-commercial terms to Howe’s parent company, ALH, were inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement. The United States further stated that because there was “a disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB” between the United States and Australia, within the terms of Article 21.5 of the DSU, the United States sought recourse to Article 21.5 in the matter and requested that the DSB refer the disagreement to the original panel, if possible, pursuant to Article 21.5.

1.5 At its meeting on 14 October 1999, the DSB decided, in accordance with Article 21.5 of the DSU, to refer to the original panel the matter raised by the United States in document WT/DS126/8. The DSB further decided that the Panel should have standard terms of reference as follows:

“To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS126/8, the matter referred to the DSB by the

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<sup>3</sup> *Australia – Automotive Leather* at para. 10.1(b).

<sup>4</sup> *Australia – Automotive Leather* at paras. 10.3, 10.7

United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.6 The Panel was composed as follows:

Chairperson: H.E. Carmen Luz Guarda

Members: Mr. Jean-François Bellis  
Mr. Wieslaw Karsz

1.7 The European Communities ("the EC") and Mexico reserved their rights to participate in the Panel proceedings as third parties.

1.8 The Panel met with the parties on 23-24 November 1999, and with the third parties on 23 November 1999.

1.9 The parties having agreed to dispense with the interim review stage, the Panel submitted its report to the parties on 14 January 2000.

## II. FINDINGS AND RECOMMENDATIONS REQUESTED BY THE PARTIES

2.1 The **United States** requests the Panel to "determine that Australia has not withdrawn its illegal subsidy without delay, and thus has not complied with Article 4.7 of the SCM [Agreement] and the Panel's recommendations".

2.2 The United States also requests the Panel to make a preliminary ruling that Australia produce by 29 October 1999 authentic copies of certain documents, as well as certain information, for review by the Panel and the United States.

2.3 **Australia** requests the Panel to "find that in withdrawing \$8.065 m. from Howe by 14 September 1999: Australia has fully implemented the recommendation of the DSB of 16 June 1999 (WT/DS126/5)".

## III. PROCEDURAL MATTERS

### A. WORKING PROCEDURES CONCERNING THE DESCRIPTIVE PART OF THE PANEL REPORT

3.1 The Panel adopted its working procedures for this dispute after consulting with the parties. With the agreement of the parties, these procedures provide that, in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel's report. Accordingly, the submissions of the United States are set forth in Annex 1, and the submissions of Australia are set forth in Annex 2. The third party oral statement and the written submission of the EC containing answers to questions posed by the Panel are set forth in Annex 3. Mexico, the other third party, did not make a written submission nor did it present a written version of its oral remarks made at the third party session.<sup>5</sup>

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<sup>5</sup> See para. 4.2 for a summary of Mexico's oral remarks.

B. PROCEDURES GOVERNING BUSINESS CONFIDENTIAL INFORMATION

3.2 As part of its working procedures, the Panel established, in consultation with the parties, additional procedures governing business confidential information “(BCI)”. The BCI procedures are set forth in Annex 4. In the original dispute, the Panel had adopted similar procedures.

3.3 Under the BCI procedures, either party may designate as “business confidential” information that it submits. Only “approved persons” may have access to such information. “Approved persons” are those who have provided a signed “Declaration of Non-Disclosure” to the Chair of the Panel, and have thereby agreed to abide by the established BCI procedures. A party submitting business confidential information also must submit a non-confidential version or summary thereof, which can be disclosed to the public.

3.4 In a letter to the Panel dated 8 November 1999, the EC objected to the BCI procedures established by the Panel. In particular, the EC noted that the procedures provide that certain portions of the parties’ written submissions can be withheld if they are considered to contain business confidential information, and if the relevant officials of the third party have not signed a Declaration of Non-Disclosure. In the view of the EC, this requirement is not in conformity with the DSU. The EC argued that EC officials are not allowed to enter into personal commitments to third country governments concerning the conduct of dispute settlement proceedings, and that such obligations may only be undertaken by the EC. The EC further argued that EC officials are bound by the EC Treaty and their terms of employment not to disclose confidential information, including business confidential information, and that the EC is bound to protect the confidentiality of such information under the DSU. The EC therefore requested that the Panel ensure that the EC received complete copies of the parties’ written submissions, as requested by the DSU.

3.5 In a response to the EC dated 11 November 1999, the Panel noted that Australia had already submitted business confidential information, expressly on the basis of the procedures established by the Panel concerning such information (*see* para. 5.9, *infra.*), and that Australia also had submitted, and the EC had been provided with a copy of, a non-business confidential letter describing that information. The Panel recalled that the BCI procedures had been adopted by the Panel in consultation with the parties, in recognition of the parties’ concerns over the protection of business confidential information, and that similar procedures had been adopted in the original dispute. The Panel indicated that, while respecting the obligations undertaken by EC officials with respect to confidentiality, it continued to conclude that in this case special procedures for the submission and handling of business confidential information were appropriate. The Panel concluded therefore that to obtain access to any business confidential information in this dispute, the EC would need to provide signed Declarations of Non-Disclosure, in accordance with the relevant procedures established by the Panel.

3.6 At the third party session, the EC reiterated its objection to this aspect of the Panel’s working procedures.<sup>6</sup>

C. WORKING PROCEDURES AS REGARDS THIRD PARTIES

3.7 The working procedures adopted by the Panel provide, *inter alia*, for only one meeting with the parties, in conjunction with which the third party session was held. The procedures also provide for third parties to receive only the first submissions, and not the rebuttal submissions, of the parties.

3.8 In its 8 November 1999 letter to the Panel, the EC objected to this aspect of the Panel’s working procedures. The EC recalled that Article 10.3 of the DSU provides that:

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<sup>6</sup> Annex 3-1 at paras. 9-10.

“Third parties shall receive the submissions of the parties to the dispute to the first meeting of the panel”.

The EC stated that since in this case there was to be only one meeting of the Panel, at which the Panel would be considering both submissions of each party, the EC should, in accordance with Article 10.3 of the DSU, receive all of the parties' submissions. The EC claimed that it is only in this way that it would be able to make known its views on the issues that the Panel was actually considering at its meeting, rather than having to express views on the incomplete positions of the parties that would have been developed and might have changed in the further submissions that the Panel would have before it at the meeting. The EC therefore asked the Panel to clarify the working procedures so as to ensure that the EC received all written submissions made before the meeting of the Panel.

3.9 In its 11 November 1999 response to the EC, the Panel indicated that it had decided not to change the existing working procedures which provide for third parties to receive the first written submissions of the parties, but not the rebuttals. The Panel stated that if it had decided to hold two meetings with the parties, as is the normal situation envisioned in Appendix 3 of the DSU, third parties would have received only the written submissions made prior to the first meeting, but not rebuttals or other submissions made subsequently. Thus, in the more usual case, third parties would be in the same position as they were in this case with respect to their ability to present views to the panel. In the view of the Panel, the procedure it had established conformed more closely with the usual practice than would be the case if third parties received the rebuttals, and was in keeping with Article 10.3 of the DSU in a case where the Panel holds only one meeting.

3.10 At the third party session, the EC reiterated its objection to this aspect of the Panel's working procedures.<sup>7</sup>

#### **IV. THIRD PARTY STATEMENTS**

4.1 As indicated, the full text of the EC's oral statement is attached at Annex 3. In addition, the Panel had invited third parties to answer several questions, should they choose to do so. The EC's written answers to those questions are also attached at Annex 3.

4.2 In its oral remarks at the third party session, **Mexico** regretted that there had been no translation of the submissions and stated that the lack of translation made it impossible for Mexico to react in a prompt manner to the parties' arguments, and that Mexico was therefore not in a position to make a submission. Mexico noted that under the Panel's working procedures, Mexico had no further opportunity to present its views. Mexico had a systemic interest in how Article 21.5 panels are carried out in practice. Mexico stated that it had sent the Panel's written questions to its capital, but noted that the Chair had recalled that third parties are not obliged to answer such questions.

#### **V. REQUEST BY THE UNITED STATES FOR PRELIMINARY RULING CONCERNING INFORMATION FROM AUSTRALIA**

5.1 In its first written submission,<sup>8</sup> the United States asked the Panel to request that Australia produce, by 29 October 1999, authentic copies of the following documents, as well as the following information, for review by the Panel and the United States:

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<sup>7</sup> Annex 3-1 at paras. 2-8.

<sup>8</sup> Annex 1-1 at para. 54.

- "1. Any agreement, whether by formal agreement or by correspondence with Howe or its related entities, under which Howe agreed to repay, or repaid, \$A8.065 million of the \$A30 million provided in 1997 and/or 1998.
2. Any correspondence between the Government of Australia and Howe or its related entities that refers to the agreement to repay, or to the repayment of, the \$A8.065 million referred to in request 1 above.
3.
  - (a) Any written calculation of the \$A8.065 million communicated to or by Howe or its related entities to or by the Australian Government.
  - (b) An explanation of how the \$A8.065 million was calculated.
4. Any document by which the Grant Contract was terminated and any document terminating any performance requirements by Howe pursuant to that Grant Contract.
5. The loan contract between the Australian Government and Australia Leather Holdings providing for the "additional loan of \$13.65 million" to Australia Leather Holdings referred to in Australia's Joint Media Release 99/291, dated September 15, 1999.
6. Any documents referring to or related to the loan contract or the loan referenced in request 5 above, including but not limited to any correspondence between Howe or its related entities and the Australian Government.
7.
  - (a) Any written calculation of the amount of the \$A13.65 million loan communicated to or by Howe or its related entities to or by the Australian Government.
  - (b) An explanation of how the \$A13.65 million was calculated or determined.
8. Any documents created by the Australian Government related to the authorization of the Australian Government to (a) issue a new \$A13.65 million loan referenced in request 5 above, and/or (b) terminate the Grant Contract and request repayment of \$A8.065 million of the subsidy".

5.2 The United States argued that this information and documentation were crucial to the Panel's determination under Article 21.5 of the DSU. The United States had relied in its first submission on published statements and submissions of the Australian Government to establish that (a) Australia's method of determining the prospective portion of the grant was arbitrary and resulted in inappropriately putting most of the grant beyond the reach of the SCM Agreement remedies; and (b) the loan was simply a reimbursement on non-commercial terms of the purported withdrawal of the \$A8.065 million repaid by Howe.

5.3 According to the United States, the information and documents requested contained facts and information with a direct bearing on the issues in this proceeding; they should reveal in detail the circumstances under which the repayment by Howe was made, how that amount was agreed to or calculated, and whether there was any reimbursement or *quid pro quo* for the repayment. Similarly, given that the loan was obviously linked to the partial repayment of the grant, documentation and information pertaining to the loan were critical to a clear understanding of its relationship to the grant and grant repayment at issue. In addition, the exact terms of the loan, and the conditions for its issuance, were

highly relevant to whether, and the extent to which, Australia was simply funding Howe's reimbursement out of its own pocket.

5.4 The United States recalled that it had requested these documents and information of Australia at the first organizational meeting of the Panel, on 18 October 1999, but had received nothing as of the filing deadline for the United States' first submission. In the view of the United States, therefore, the request should have come as no surprise to Australia, and Australia should have no trouble meeting the deadline proposed by the United States. It was important that these documents and information be provided on this schedule to permit the United States to review them prior to Australia's first submission, so that relevant information could be incorporated into the United States' second submission.

5.5 The **Panel** sought the views of Australia with regard to the United States' request for preliminary ruling concerning its information request. The Panel stated that if Australia did not object to providing some or all of that information, it should so indicate, and that in that case, the Panel would request that any such documents be submitted no later than the deadline for Australia's first written submission. If Australia objected to the United States' request or any part thereof, its response should set forth the basis for any such objection.

5.6 **Australia** replied that, as a general point, the United States had laid no foundation for most of the putative material, in particular about the 1999 loan, sought in its request for a preliminary ruling. However, according to Australia, most of the material did not exist. Australia noted that it had informed the United States orally about the details of both the withdrawal and the loan prior to 14 September 1999 and had told the United States that a media release was being issued on the matter. Nonetheless, during the six weeks between 14 September and the 18 October organizational meeting of the Panel, the United States had not requested any documents or any further explanation or details. While, at the behest of the United States, Australia had waived the normal requirement for consultations prior to establishment of the Panel, the United States had had plenty of time and opportunity to approach Australia about the matter, but had chosen not to. As a normal procedure, Australia considered that the United States should have to lay some foundation for requiring specific information, rather than launching such a request through seeking an immediate ruling by the Panel.

5.7 Regarding the withdrawal of subsidies required by the DSB, Australia indicated, in response to the United States' requests 1 and 4, that it would include the Deed of Release and confirmation of payment of the \$A8.065 million in the context of Australia's first submission. In response to request 2, Australia indicated that the letter from the Government to ALH could be provided, although no foundation had been laid about its relevance to the dispute. In response to request 3 (a), Australia stated that there was no written calculation of the \$A8.065 million communicated to or by Howe or its related entities to or by the Australian Government, and that the issue had been resolved at meetings. In response to request 3 (b), Australia indicated that the explanation of how the \$A8.065 million had been calculated would be provided in its first submission.

5.8 Regarding the 1999 loan generally, Australia indicated that the Australian Government was entitled to provide new subsidies, including in the form of an unconditional concessional loan to ALH, and was not constrained in this by the DSB recommendation on automotive leather. Australia therefore considered that the matter was not before the Panel and that the United States had not laid the necessary foundation for using this Panel process for seeking such information. Australia stated that, based on the argument at paragraph 50 of the US first submission,<sup>9</sup> the United States was not arguing that the loan was WTO inconsistent, which it could hardly do given the Panel's finding on the 1997 loan, which was for automotive leather purposes, while the 1999 loan was unconditional to ALH. According to Australia,

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<sup>9</sup> Annex 1-1 at para. 50.

there was nothing covert about the 1999 loan except that it dealt with the business of a single, small company. Rather than going on a fishing expedition, the United States should first have to establish the need for such additional information to argue its case, which appeared on the basis of its first submission to be one of trade effect rather than WTO rules.

5.9 Regarding the United States' request 5, Australia indicated that, if the Panel considered that it needed to see the Loan Agreement, Australia was willing to provide it, so long as there was an assurance from other parties that the BCI procedures set out by the Panel would be adhered to. In this regard, Australia requested the Panel to inform the United States and the third parties that, as a condition for receiving business confidential information, consistent with paragraph XII:1(i) of the BCI procedures, Australia required that all business confidential information, including notes taken under paragraph VII:2 of the BCI procedures, be returned promptly to Australia.

5.10 Regarding the United States' request 6, Australia indicated that the letter from the Government to ALH could be provided. Regarding request 7, Australia indicated that there was no written calculation of the amount of the \$A13.65 million loan communicated to or by Howe or its related entities to or by the Australian Government, and that there were lengthy consultations with ALH about the size of a new concessional loan. A wide range of options in respect of ALH and its shareholders had been considered. The decision in favour of a loan had been based solely on the Panel's finding in favour of the 1997 loan to ALH and Howe for automotive leather purposes. The terms of the loan had been derived from those in the 1997 loan, but without any connection to automotive leather. The final amount had been accepted by ALH in the context of its assessment of all factors, including resolving the case, the effect on ALH's balance sheet, tax implications for ALH, and ALH's judgement of future interest rates. Regarding request 8, Australia indicated that these documents were referred to in its response concerning requests 1 and 6.

5.11 The **Panel** concluded that, based on Australia's comments on the United States' request, Australia was willing to submit all of the information either on its own, or in the event that the Panel considered it necessary, to the extent that documents existed and subject to proper handling in accordance with the BCI procedures. The Panel observed that it had every expectation that parties and third parties would abide by the relevant procedures established by the Panel, if they wished to have access to such information. In this regard, the Panel had requested the United States and the third parties to sign and return to the Panel Secretary the non-disclosure forms, so that a list of approved persons could be established to enable the parties and third parties to provide only approved persons with copies of business confidential information. The Panel informed Australia that it did consider necessary the submission of all of the information requested by the United States, and therefore expected Australia to submit all relevant information in conjunction with Australia's first written submission.

5.12 In conjunction with its first submission, Australia submitted certain documents and information requested by the United States.

## **VI. FINDINGS**

### **A. IS THE 1999 LOAN WITHIN THE PANEL'S TERMS OF REFERENCE ?**

6.1 Australia argues that the 1999 loan is not within the scope of the Panel's terms of reference. In this regard, Australia argues that the 1999 loan is not part of the implementation of the DSB's ruling and recommendation, noting that it was not notified to the DSB in the document submitted in this regard by

Australia (WT/DS126/7). In Australia's view, the Panel's terms of reference "relate to the implementation of the recommendation of the Report, i.e. to withdraw the grant payments from Howe".<sup>10</sup>

6.2 The United States argues that, under Article 21.5 of the DSU, the Panel's task is to determine the existence or consistency of measures taken to comply with the DSB's ruling. In the United States' view, it is clear that if the Panel can determine the "existence" of measures taken to comply with the ruling, it can consider whether the measures purportedly taken to comply were effectively rendered non-existent.<sup>11</sup>

6.3 We note that this Panel is operating under standard terms of reference, which authorize the Panel

"To examine, in the light of the relevant provisions of the covered agreements cited by the United States in document WT/DS126/8, the matter referred to the DSB by the United States in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".<sup>12</sup>

Consequently, as in the original dispute, the Panel's terms of reference are defined by the "request for establishment", that is, document WT/DS126/8. That document provides, in pertinent part:

"On 15 September 1999, the Australian government announced in a media release that it had implemented the Panel report's recommendation by terminating the grant contract with Howe and that Howe had repaid \$A8.065 million of the \$A30 million grant. Australia stated that this repayment constituted the "prospective element" of the grant because it was "the proportion of grant monies found to be applied to the sales performance targets contained in the Grant Contract for the period from 14 September 1999 until the end of the Grant Contract on 30 June 2000".

Australia further stated in the same media release that it was providing a new loan of \$A13.65 million to Howe's parent company, Australian Leather Holdings Ltd. The United States understands that this loan was granted on non-commercial terms.

The United States believes that **these measures** taken by Australia to comply with the recommendations and rulings of the DSB are not consistent with the SCM Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In particular, **Australia's withdrawal of only \$A8.065 million** of the \$A30 million grant, and **Australia's provision of a new \$A13.65 million loan** on non-commercial terms to Howe's parent company, are inconsistent with the recommendations and rulings of the DSB and Article 3 of the SCM Agreement". (emphasis added).

6.4 In general, it is the complaining Member in WTO dispute settlement which establishes the scope of the measures before a panel. A "matter" before a panel consists of the "measure(s)" at issue, and the claims relating to those measures, as set out in the request for establishment.<sup>13</sup> In this case, the United States' request for establishment clearly identifies both the repayment by Howe and the 1999 loan as the measures at issue. For us to rule, as suggested by Australia, that we are precluded from considering the 1999 loan, would allow Australia to establish the scope of our terms of reference by choosing what

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<sup>10</sup> Annex 2-1 at para. 51.

<sup>11</sup> Annex 1-2 at para. 30

<sup>12</sup> WT/DS126/9 (1 November 1999).

<sup>13</sup> See, *Guatemala - Anti-Dumping Investigation regarding Portland Cement from Mexico (Guatemala-Cement)*, WT/DS60/AB/R (*Guatemala-Cement AB Report*), adopted 25 November 1998, para. 76.

measure or measures it will notify, or not notify, to the DSB in connection with its implementation of the DSB's ruling. Australia has not made any argument or advanced any reasoning to support its position beyond stating its own view that the 1999 loan is not relevant to this dispute.

6.5 Even assuming that a panel may conclude that a measure specifically identified in the request for establishment is not properly before it in a proceeding under Article 21.5, a question we do not here decide, in this case we see no basis for such a conclusion. The 1999 loan is inextricably linked to the steps taken by Australia in response to the DSB's ruling in this dispute, in view of both its timing and its nature. In our view, the 1999 loan cannot be excluded from our consideration without severely limiting our ability to judge, on the basis of the United States' request, whether Australia has taken measures to comply with the DSB's ruling. In the absence of any compelling reason to do so, we decline to conclude that a measure specifically identified in the request for establishment is not within our terms of reference.

6.6 We note that this view is consistent with the conclusion of the Panel in *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*.<sup>14</sup> In that case, the Panel observed that its terms of reference comprised the measures and claims specified by Ecuador in requesting the Panel's establishment.<sup>15</sup>

6.7 Therefore, we find that the 1999 loan is within our terms of reference, and we may consider it in determining the existence or consistency of measures taken by Australia to comply with the DSB's ruling in this dispute.

B. EXISTENCE OR CONSISTENCY OF MEASURES TAKEN TO COMPLY WITH THE RECOMMENDATION OF THE DISPUTE SETTLEMENT BODY

### 1. Arguments of the United States

6.8 The United States asserts that Australia has failed to take measures to comply with the recommendation and ruling in this dispute, that is, that Australia has failed to withdraw the subsidies determined to be inconsistent with Article 3.1(a) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement). In addition, the United States asserts that the measures taken by Australia are not consistent with the SCM Agreement and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).

6.9 In the United States' view, in order to comply with the recommendation to "withdraw the subsidy" in this dispute, Australia was required to withdraw the "prospective portion" of the prohibited subsidies found to have been provided to Howe. The United States notes that in our original determination, we found that the payments under the grant contract constituted prohibited subsidies, recommended that Australia withdraw the subsidies, and that the measures be withdrawn within 90 days. The United States observes that Article 1.1 of the SCM Agreement provides that a subsidy exists if there is a direct transfer of funds from the government and a benefit is thereby conferred. Therefore, the United States asserts that what must be withdrawn, in order to comply with the recommendation, is that portion of the funds provided by the Government of Australia that continues to confer a benefit to Howe after the adoption of the Report in this dispute, that is, after 16 June 1999.

6.10 The United States calculates what it refers to as the "prospective portion" of the subsidy to be withdrawn by allocating the amount of the grant payments over the useful life of Howe's production

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<sup>14</sup> WT/DS27/RW/ECU (12 April 1999).

<sup>15</sup> *Id.* para. 6.7. See also paras. 6.8-6.10, where the Panel concluded that Article 21.5 did not establish any limitations on the measures that might be brought before a panel under that provision.

assets, and calculating the amount allocable to the period following adoption of the report on 16 June 1999. To the amount thus calculated as the "prospective portion" of the subsidy, the United States adds interest accruing after the date of adoption of the report.<sup>16</sup> The United States finds support for its approach to this calculation in the practice of Members, in particular its own practice and that of the EC, in calculating subsidy amounts under Part V of the SCM Agreement, which provides for countervailing measures as a unilateral remedy in cases of injurious subsidies, and also points to the Report of the Informal Group of Experts.<sup>17</sup> That report, which concerned recommendations for calculating the *ad valorem* rate of subsidization in the context of certain serious prejudice cases under Part III of the SCM Agreement, recommends that large non-recurring subsidies should normally be allocated over the useful life of the recipient's assets.

6.11 The United States argues that large non-recurring grants can be used to purchase productive assets, or free up other funds to purchase assets, and thus provide benefits which last a long time – generally, over the life of those assets. In the absence of an allocation, the United States argues that a subsidy would have to be attributed to some shorter period of time, which would ignore economic reality, and would, in many cases, place subsidies in the form of large, non-recurring grants beyond the reach of panel recommendations under Article 4.7 of the SCM Agreement.

6.12 A fundamental principle underlying the United States' approach is that the recommendation required under Article 4.7 of the SCM Agreement "that the subsidizing Member withdraw the subsidy without delay," calls only for prospective corrective action, and therefore requires the withdrawal only of the "prospective portion" of a prohibited subsidy. In this regard, the United States refers to Article 19.1 of the DSU which provides that "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement". In the United States' view, this recommendation requires only prospective corrective action by Members, not retrospective action. The United States also notes the decision of the Appellate Body in *Guatemala-Cement*, which states that "It is, therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to *prevail* over the provision of the DSU".<sup>18</sup> In the United States' view, there is no inconsistency between withdrawal without delay of the prospective portion of a subsidy under Article 4.7 of the SCM Agreement and bringing the subsidy into conformity with a Member's obligations under Article 19 of the DSU.

6.13 Moreover, the United States argues that, to the extent Australia may be considered to have withdrawn part of the subsidy, any such withdrawal is vitiated by the simultaneous provision of the 1999 loan, conditioned upon the repayment by Howe of \$A8.065 million. The United States argues that the 1999 loan amount was sufficient to enable Howe to repay \$A8.065 million, invest the remainder, and have sufficient funds at the end of the loan period to repay the outstanding amount. The United States also argues that the 1999 loan "steps into the shoes" of the prohibited subsidy Australia was required to withdraw, and is therefore itself inconsistent with Article 3.1(a) of the SCM Agreement.

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<sup>16</sup> The result of this calculation, that is, the amount that the United States argues should be withdrawn in order to withdraw the "prospective portion" of the prohibited subsidy, is \$A26,346,154.

<sup>17</sup> Informal Group of Experts on Calculation Issues Related to Annex IV of the Agreement on Subsidies and Countervailing Measures, Report to the Committee on Subsidies and Countervailing Measures, G/SCM/W/415/Rev.2, 15 May 1998.

<sup>18</sup> *Guatemala –Cement AB Report*, para. 66 (emphasis in original).

## 2. Arguments of Australia

6.14 Australia, like the United States, contends that only a "prospective" remedy is envisioned under Article 4.7 of the SCM Agreement. In this regard, Australia considers that terminating all subsisting obligations under the grant contract, thus terminating the sales performance requirements on Howe under that contract, would be sufficient to implement the recommendation to withdraw the subsidy in this dispute. Australia maintains that it is not the provision of money that was found to be prohibited, but the combination of the provision of the money and the export contingency. Therefore, Australia argues that, by terminating the grant contract and all obligations on Howe under that contract, in particular with respect to the sales performance targets, it has brought the subsidy into conformity with Article 3.1(a) of the SCM Agreement by eliminating the prohibited export contingency.

6.15 Australia argues that elimination of the tie to the sales performance targets transforms the payments under the grant contract from prohibited subsidies to subsidies consistent with the requirements of Article 3.1(a) of the SCM Agreement. In Australia's view, a prohibited subsidy that is "brought into conformity" with Article 3.1(a) has been withdrawn in the sense of Article 4.7 of the SCM Agreement. Australia acknowledges that in some circumstances, "it is difficult to see how the subsidy could be withdrawn...without withdrawing money",<sup>19</sup> but contends that this case does not present such circumstances.

6.16 While Australia maintains, in the first instance, that no repayment is necessary in order to comply with the recommendation in this dispute, it decided, in order to "ensure an end to this dispute",<sup>20</sup> to require Howe to pay \$A8.065 million. Australia calculated this amount as the portion of the subsidy allocable to the period after the end of implementation period (*i.e.*, 14 September 1999), until the end of the sales performance targets under the grant contract (*i.e.*, 30 June 2000). Australia's argument in the alternative appears to be based on the same principle as that underlying the United States' position, namely that any repayment need only be of the "prospective portion" of the subsidy. However, Australia differs from the United States with respect to the calculation of the amount to be repaid in order to effectuate repayment of the "prospective portion" of the subsidy. Australia's view is that, in this case, the payments under the grant contract must be allocated over the period for which the sales performance targets set forth in the grant contract were to be in effect, that is, to the period 1 April 1997 to 30 June 2000, less any amounts allocable to sales other than exports of automotive leather. Australia bases this view on its understanding that the grant payments were found to be prohibited subsidies because they were tied to the sales performance targets, which the Panel considered to be, effectively, export performance targets. The amount to be repaid under Australia's calculation is the amount allocable to export sales of automotive leather during the period from 14 September 1999, the end of the implementation period, to 30 June 2000, the end of the performance targets under the grant contract.<sup>21</sup>

6.17 With respect to the 1999 loan, Australia argues that it is not part of the implementation of the recommendation in this dispute. Moreover, Australia asserts that the 1999 loan is not inconsistent with Article 3.1(a) of the SCM Agreement.

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<sup>19</sup> Annex 2-5, answer to question 13(b) from the Panel.

<sup>20</sup> Annex 2-1 at para. 20.

<sup>21</sup> Australia presents two alternative calculations, depending on whether the allocation is based on the aggregate sales performance target, or the interim targets set forth in the grant contract. The first basis yields an amount of \$A6.602 million to be withdrawn, and the second yields an amount of \$A8.065 million. (Annex 2-1 at paras. 46-49, footnotes 22-24, and Attachment A.) Australia considers the lower amount to be based on the appropriate approach (*id.* at para. 47), but required the repayment of the higher amount.

### 3. The meaning of “withdraw the subsidy” in Article 4.7 of the SCM Agreement

6.18 We are required to determine whether Australia has taken measures to comply with the recommendation and ruling of the DSB in this dispute. Our recommendation and ruling, adopted by the DSB, was made pursuant to Article 4.7 of the SCM Agreement, and called upon Australia to "withdraw the subsidies identified in paragraph 10.1(b)" of the Report within 90 days. The "subsidies identified in paragraph 10.1(b)" of the Report are "the payments under the grant contract [which we had determined] are subsidies within the meaning of Article 1 of the SCM Agreement which are contingent upon export performance within the meaning of Article 3.1(a) of that Agreement". The question before us is the existence or consistency with a covered agreement of measures taken to comply with that recommendation. In order to resolve this question, it is in our view imperative to know what that recommendation means, which in turn requires interpretation of the phrase "withdraw the subsidy" in Article 4.7.

6.19 Both parties, and the EC as third party, appear to be of the view that our task in this dispute is to choose between the parties' respective positions and either conclude, as Australia argues, that Australia has fully complied with the DSB's ruling, or conclude, as the United States argues, that **because** Australia did not withdraw from Howe the sum that the United States calculates should have been withdrawn, it has failed to take measures to comply with the DSB's ruling. In response to a question from the Panel, both parties argue that the possibility that "withdraw the subsidy" under Article 4.7 of the SCM Agreement should be interpreted to mean "repay in full" the financial contribution to the recipient was not an issue in dispute between the parties, and therefore is not an issue which we need to address.<sup>22</sup> Our view differs. That neither party has argued a particular interpretation before us, and indeed, that both have argued that we should not reach issues of interpretation that they have not raised, cannot, in our view, preclude us from considering such issues if we find this to be necessary to resolve the dispute that is before us. A panel's interpretation of the text of a relevant WTO Agreement cannot be limited by the particular arguments of the parties to a dispute.

#### (a) Recommendation of a remedy having exclusively "prospective" effect

6.20 The parties have gone to some lengths to argue that "withdraw the subsidy" is a recommendation with exclusively “prospective” effect. The United States argues that "withdraw the subsidy" requires some repayment in this case, but that the repayment can only be "prospective".<sup>23</sup> The United States argues that the "prospective portion" of a one-time subsidy paid in the past can be identified by allocating the subsidy over the useful life of the recipient's productive assets and then drawing a line at the date of adoption of the panel report finding the subsidy to be prohibited. According to the United States, repayment is a prospective remedy with no retrospective effect if it is limited to that portion of the subsidy benefit allocated to the period following adoption of the panel report, plus interest accruing between the date of adoption of the panel report and the end of the implementation period.

6.21 Australia also argues, in the alternative to its primary argument (*see* para. 6.46 *infra.*), that repayment of the "prospective portion" of the subsidy is a prospective remedy. Australia calculates the prospective portion as that portion of the subsidy allocated to the period from the end of the implementation period to the end of the period covered by the sales performance targets under the grant contract. Australia argues that in this case, the subsidies must be allocated in full to the sales performance targets set forth in the grant contract, that is, to the period 1 April 1997 to 30 June 2000, less any amounts allocable to sales other than exports of automotive leather. Australia bases this position on its understanding that the Panel itself so allocated the grant payments by ruling that those payments were

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<sup>22</sup> Annex 1-5 (United States) and Annex 2-5 (Australia), answer to question no. 2 for both parties.

<sup>23</sup> It is supported in this view by the EC. (Annex 3-2, answer to Panel questions 1 and 2.)

prohibited subsidies because they were tied to the sales performance targets, which the Panel considered to be, effectively, export performance targets.<sup>24</sup>

6.22 While we understand the conceptual framework advanced by the United States,<sup>25</sup> as well as that underlying Australia's alternative position, we do not find meaningful the distinction proposed by the parties between repayment of "prospective" and "retrospective" portions of past subsidies in the context of Article 4.7 of the SCM Agreement. We do not agree that it is possible to conclude that repayment of the "prospective portion" of prohibited subsidies paid in the past is a remedy having only prospective effect. In our view, where any repayment of any amount of a past subsidy is required or made, this by its very nature is **not** a purely prospective remedy. No theoretical construct allocating the subsidy over time can alter this fact. In our view, if the term "withdraw the subsidy" can properly be understood to encompass repayment of **any** portion of a prohibited subsidy, "retroactive effect" exists.

6.23 The EC, as third party, argues that there can be no obligation on a Member to remedy violations with retroactive effect. In the EC's view, any such obligation would be ineffective, since it would result in interference with private rights, giving rise to domestic legal claims. However, this concern would equally arise if repayment of a putative "prospective portion" of a subsidy is required, as the United States proposes, with the support of the EC. Indeed, even the cessation of subsidy payments in the future, a remedy more clearly "prospective" in effect, may interfere with private rights and give rise to domestic legal claims. Many situations can be envisioned, and not only in the subsidies area, in which a Member's actions to implement a ruling of the DSB might result in some interference with private rights, and result in domestic legal claims. This possibility does not, in our view, limit our interpretation of the text of the SCM Agreement.

(b) May "withdraw the subsidy" be understood to encompass repayment?

6.24 In this case, we must consider whether the recommendation to "withdraw the subsidy" in Article 4.7 of the SCM Agreement can properly be understood to encompass repayment. In order to answer that question, we must first determine what is meant by the term "withdraw the subsidy" as used in Article 4.7 of the SCM Agreement. In particular, we must consider whether that term is limited to a recommendation with purely prospective effect, or whether it also encompasses repayment.

6.25 The Appellate Body has repeatedly observed that, in interpreting the provisions of the WTO Agreement, including the SCM Agreement, panels are to apply the general rules of treaty interpretation

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<sup>24</sup> Australia's calculation methodology is based on a fundamental misunderstanding of our original determination finding the payments under the grant contract to be prohibited subsidies. Contrary to Australia's understanding, we did not conclude that the subsidies in question were "tied to" particular export sales during a particular period, specifically, the sales performance targets in the grant contract. Rather, we concluded that the subsidy payments under the grant contract "are in fact tied to Howe's actual or anticipated exportation or export earnings. These payments are conditioned on Howe's agreement to satisfy, on the basis of best endeavours, the aggregate performance targets". *Australia – Automotive Leather*, para 9.71. The sales performance targets were an important factual element in our finding, but as we stated, it was our consideration of **all** of the facts that led us to the conclusion that the payments under the grant contract were prohibited subsidies. The specific details of the factual evidence underlying the conclusion that the subsidies were in fact contingent upon export performance within the meaning of Article 3.1(a) of the SCM Agreement and therefore 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.

<sup>25</sup> We note that the concept of allocation of certain subsidies over time has been used and/or recommended in the context of countervailing measures and serious prejudice, because in those contexts, particular subsidy amounts must be attributed to particular sales of particular goods at particular moments in time for calculation of per unit or *ad valorem* subsidization of specific products to be possible. In our view, these issues simply do not arise where the question is what is meant by "withdrawal" of prohibited subsidies.

set out in the Vienna Convention on the Law of Treaties. These rules call, in the first place, for the treaty interpreter to attempt to ascertain the ordinary meaning of the terms of the treaty in their context and in the light of the object and purpose of the treaty, in accordance with Article 31(1) of the Vienna Convention. The Appellate Body has also recalled that the task of the treaty interpreter is to ascertain and give effect to a legally operative meaning for the terms of the treaty. The applicable fundamental principle of *effet utile* is that a treaty interpreter is not free to adopt a meaning that would reduce parts of a treaty to redundancy or inutility.<sup>26</sup>

6.26 Article 4.7 of the SCM Agreement sets forth the recommendation that a panel is to make in a dispute involving a prohibited subsidy:

"If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay".

In order to ascertain the meaning of "withdraw the subsidy" in Article 4.7, we will consider first the ordinary meaning of the term. We will then consider the meaning of the term in its context, and in the light of the object and purpose of the SCM Agreement. Finally, we will consider whether an interpretation of "withdraw the subsidy" as providing exclusively a prospective remedy would render the recommendation and remedy in prohibited subsidy cases ineffective.

(i) *Textual analysis*

6.27 Turning first to the ordinary meaning of the term, the word "withdraw" has been defined as: "pull aside or back (withdraw curtain, one's hand); take away, remove (child from school, coins from circulation, money from bank, horse from race, troops from position, favour etc. from person); retract (offer, statement, promise)".<sup>27</sup> This definition does not suggest that "withdraw the subsidy" necessarily requires only some prospective action. To the contrary, it suggests that the ordinary meaning of "withdraw the subsidy" may encompass "taking away" or "removing" the financial contribution found to give rise to a prohibited subsidy. Consequently, an interpretation of "withdraw the subsidy" that encompasses repayment of the prohibited subsidy seems a straightforward reading of the text of the provision.

(ii) *Context*

6.28 As regards the context of Article 4.7, we note that the term "withdraw the subsidy" appears elsewhere in the SCM Agreement. We consider these references to "withdrawal" of subsidies to be relevant for our understanding of the term. In the case of "actionable" subsidies, Members whose trade interests are adversely affected may, under Part III of the SCM Agreement, pursue multilateral dispute settlement in order to establish whether the subsidy in question has resulted in adverse effects to the interests of the complaining Member. If such a finding is made, the subsidizing Member "shall take appropriate steps to remove the adverse effects **or shall withdraw the subsidy**".<sup>28</sup> Alternatively, a Member whose domestic industry is injured by subsidized imports may impose a countervailing measure under Part V of the SCM Agreement, "**unless the subsidy or subsidies are withdrawn**".<sup>29</sup> In both cases, withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action.

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<sup>26</sup> *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 23; *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 12.

<sup>27</sup> Concise Oxford Dictionary, sixth edition, (1976).

<sup>28</sup> SCM Agreement Article 7.8 (emphasis added).

<sup>29</sup> SCM Agreement Article 19.1 (emphasis added).

Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member. In the practice of at least one Member, the United States, "withdraw the subsidy" as used in Article 19.1 of the SCM Agreement encompasses repayment.<sup>30</sup> Thus, the use of the term "withdraw" elsewhere in the SCM Agreement further supports the suggestion that it may encompass repayment.

6.29 The United States, Australia, and the EC as third party all argue that an interpretation of Article 4.7 of the SCM Agreement which would allow a retroactive remedy is inconsistent with Article 19 of the DSU and customary practice under the GATT 1947 and the WTO. We note also Article 3.7 of the DSU, which provides in pertinent part:

"The aim of the dispute settlement mechanism is to secure a positive solution to a dispute. A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. **In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements**". (emphasis added).<sup>31</sup>

6.30 It might be argued that because Article 3.7 of the DSU appears to equate "bring the measure into conformity", the recommendation provided for in Article 19.1 of the DSU, with withdrawal of the inconsistent measure, "withdraw the subsidy", the recommendation provided for in Article 4.7 of the SCM Agreement, should also be equated with "bring the subsidy into conformity".<sup>32</sup> As the parties have argued, the recommendation to "bring the measure into conformity" under Article 19.1 is generally understood to require a Member found to have violated a provision of the WTO Agreements to "withdraw the measure" in a prospective sense. Thus, it might be argued that "withdraw the subsidy" should also require a Member to do so only in a prospective sense.

6.31 However, we do not believe that Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action. An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively "prospective" action would make the recommendation to "withdraw the subsidy" under Article 4.7 indistinguishable from the recommendation to "bring the measure into conformity" under Article 19.1 of the DSU, thus rendering Article 4.7 redundant.

6.32 Finally, to argue, as the United States and Australia do, that the customary practice under the GATT/WTO has been to recommend prospective remedies, does not address, much less resolve, the question of what is meant by the term "withdraw the subsidy", a special or additional rule of dispute

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<sup>30</sup> *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/R, circulated 23 December 1999, pp. 248-249 (Second Submission of the United States, 30 June 1999, paras. 40-49). We recognize that the United States' position in that case is consistent with its position concerning repayment of the "prospective portion" of a subsidy, being based on allocation of the subsidy over time, and repayment of the "net present value of the outstanding benefit stream" *Id.* at p. 249, para. 49. However, this does not alter the fact that US practice acknowledges that "withdraw the subsidy" in Article 19.1 of the SCM Agreement encompasses repayment.

<sup>31</sup> In contrast, Article 26.1 of the DSU provides that after a finding of non-violation nullification or impairment, "there is no obligation to withdraw the measure. However, in such cases, the panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment".

<sup>32</sup> This appears to be Australia's position, as it repeatedly referred to "bringing the subsidy into conformity with Article 3.1(a)" in its arguments before us.

settlement which is new to the SCM Agreement and has not before been interpreted by a panel. Indeed, Article XVI.1 of the Marrakesh Agreement provides that the WTO, including dispute settlement panels interpreting the terms of WTO Agreements, "shall be guided" by the customary practice of the GATT 1947 "**Except as otherwise provided under this Agreement or the Multilateral Trade Agreements**" (emphasis added). We are of the view that "withdraw the subsidy" in Article 4.7 of the SCM Agreement is a provision that "otherwise provides", and therefore customary practice under GATT 1947 and the WTO Agreement does not require us to conclude that "withdraw the subsidy" must be read to allow prospective action only.

(iii) *Object and purpose*

6.33 Turning to the object and purpose of Article 4.7 of the SCM Agreement, we observe that the SCM Agreement as a whole establishes disciplines on subsidies. The SCM Agreement categorises subsidies as non-actionable, actionable, or prohibited.<sup>33</sup> In the case of non-actionable and actionable subsidies, Members are only allowed to take certain prescribed steps in the event that their trade interests are harmed by another Member's subsidies. Part II of the SCM Agreement, however, establishes an absolute prohibition on certain types of subsidies: Members are obligated, under Article 3.2 of the SCM Agreement, to "neither grant nor maintain" such subsidies. While the trade effects of prohibited subsidies may be countered under Parts III and V of the SCM Agreement, Part II of the SCM Agreement establishes special and additional rules for rapid dispute settlement in cases involving such subsidies. Article 4.7 of the SCM Agreement establishes a specific remedy to be recommended in the case of a violation - withdrawal of the subsidy.

6.34 In our view, the architecture of the SCM Agreement discussed above provides further support for the conclusion that the remedy provided for prohibited subsidies, withdrawal, encompasses repayment. This specific remedy, withdrawal of the prohibited subsidy, does not merely counteract adverse trade effects, but is intended to enforce the absolute prohibition on the grant or maintenance of such subsidies. In our view, terminating a programme found to be a prohibited subsidy, or not providing, in the future, a prohibited subsidy, may constitute withdrawal in some cases. However, such actions have no impact, and consequently no enforcement effect, in the case of prohibited subsidies granted in the past. Thus, an interpretation of "withdraw the subsidy" which encompasses repayment is consistent with the overall structure of the SCM Agreement, as well as with the explicit prohibition of certain subsidies and special dispute settlement procedures provided for in such cases. In this regard, we recall that repayment is a means of "withdrawing" a subsidy by which the possibility of an importing Member imposing countervailing measure on imported subsidized goods can be avoided.

(iv) *Effectiveness of the remedy*

6.35 We believe it is incumbent upon us to interpret "withdraw the subsidy" so as to give it effective meaning. A finding that the term "withdraw the subsidy" may not encompass repayment would give rise to serious questions regarding the efficacy of the remedy in prohibited subsidy cases involving one-time subsidies paid in the past whose retention is not contingent upon future export performance. For instance, Australia argues in this case that no repayment is required, and that elimination of the export contingency in the grant contract would have been sufficient to withdraw the subsidy. Under Australia's approach, the only effect of a panel recommendation to "withdraw the subsidy" would be a prospective change in the terms of the subsidy. As a result, prohibited export subsidies paid in the past, and for which there is no

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<sup>33</sup> We note that, pursuant to Article 31 of the SCM Agreement, the provisions of Articles 6.1 (presumption of serious prejudice), and 8 and 9 (non-actionable subsidies) shall apply for five years from the date of entry into force of the WTO Agreement unless extended for a further period.

continuing export contingency, would be beyond the effective reach of a recommendation to "withdraw the subsidy", no matter how clear the violation of Article 3.1(a) of the SCM Agreement might be..

6.36 Under Article 1.1 of the SCM Agreement, a subsidy is deemed to exist if there is a financial contribution by a government, and a benefit is thereby conferred. A subsidy may take the form of a one-time financial contribution conferring a benefit, or it may take the form of a programme or practice pursuant to which financial contributions conferring a benefit are provided on a recurrent basis.<sup>34</sup> For "withdraw the subsidy" to be a meaningful remedy, that is, for it to effectuate the prohibition on the grant or maintenance of certain types of subsidies, it must be effective regardless of the form in which a prohibited subsidy is found to exist. An interpretation of Article 4.7 which would provide an effective remedy only in some cases would not, in our view, be appropriate.

6.37 We note that the EC, as third party, has argued that the absence of a remedy for past and consummated violations is and has always been a well-known feature of the GATT/WTO system, under which in some cases there is no remedy at all for a complaining party. The EC cites the Panel decision in the *Trondheim Toll Equipment* dispute, in which a government contract was awarded in violation of provisions of the Government Procurement Agreement.<sup>35</sup> The panel in that dispute realized that the "usual" GATT remedy of "bring the measure into conformity" was less than satisfactory, but declined to recommend an alternative remedy.<sup>36</sup> However, unlike the Panel in *Trondheim*, in this case we are considering a specific recommendation to "withdraw the subsidy", which is a special provision unique to the SCM Agreement. We decline to read "withdraw the subsidy" in a manner that does not give it an effective meaning merely because in some cases under other WTO Agreements, the general remedy under Article 19.1 of the DSU of bringing the measure into conformity may not be effective.

6.38 If we were to accept the conclusion that "withdraw the subsidy" does not encompass repayment, then that recommendation, far from providing a remedy for violations of Article 3.1(a) of the SCM Agreement, would grant full absolution to Members who grant export subsidies that are fully disbursed to the recipient before a recommendation to withdraw the subsidy is issued in dispute settlement, and for which the export contingency is entirely in the past. We do not believe that the drafters of the SCM Agreement would have established in Article 3.1(a) the strict prohibition against subsidies contingent on export performance, including one-time subsidies contingent in fact on export performance, only to undermine that prohibition by providing a remedy which is ineffective in the case of such subsidies.

(v) *Conclusion*

6.39 Based on the ordinary meaning of the term "withdraw the subsidy", read in context, and in light of its object and purpose, and in order to give it effective meaning, we conclude that the recommendation to "withdraw the subsidy" provided for in Article 4.7 of the SCM Agreement is **not** limited to prospective action only but may encompass repayment of the prohibited subsidy.

6.40 The United States and Australia both look to Article 19.1 of the DSU as a principal element to be considered in interpreting Article 4.7 of the SCM Agreement, arguing that Article 4.7 of the SCM Agreement should be read consistently with Article 19.1 of the DSU.

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<sup>34</sup> See *Brazil – Export Financing Programme for Aircraft*, WT/DS46/R, adopted as modified by WT/DS46/AB/R, 20 August 1999, paras. 7.1-7.3.

<sup>35</sup> *Norway - Procurement of Toll Collection Equipment for the City of Trondheim*, GPR/DS.2/R, adopted 13 May 1992.

<sup>36</sup> *Id.* at paras. 4.21-4.25.

6.41 However, Article 19.1 of the DSU is not the basis of the recommendation in a case involving prohibited subsidies, such as this one. Rather, the recommendation to "withdraw the subsidy" is required by Article 4.7 of the SCM Agreement, which is a special or additional rule or procedure on dispute settlement, identified in Appendix 2 to the DSU. It is Article 4.7 which we must interpret and apply in this dispute. In this respect, we note Article 1.2 of the DSU, which provides:

"The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding. **To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail...**" (emphasis added).

Thus, to the extent that "withdraw the subsidy" requires some action that is different from "bring the measure into conformity", it is that different action which prevails.<sup>37</sup>

6.42 "Withdraw the subsidy" is, as discussed above, different from "bring the measure into conformity", the recommendation required under Article 19.1 of the DSU. This conclusion is consistent with the observation of the Appellate Body in *Brazil – Aircraft*:

"Article 4.7 [of the SCM Agreement] contains several elements which are different from the provisions of Articles 19 and 21 of the DSU with respect to recommendations by a panel and implementation of rulings and recommendations of the DSB. For example, Article 19 of the DSU requires a panel to recommend that the Member concerned bring its measure "into conformity" with the covered agreements. In contrast, Article 4.7 of the *SCM Agreement* requires a panel to recommend that the subsidizing Member *withdraw* the subsidy".<sup>38</sup>

That a "retrospective" remedy might not be permissible under Article 19.1 of the DSU (a question which we do not here decide) does not preclude us from concluding, on the basis of the text of Article 4.7 of the SCM Agreement, that "withdraw the subsidy" is **not** limited to purely prospective action, but may encompass repayment of prohibited subsidies.

(c) If repayment is necessary to "withdraw the subsidy", can partial repayment be sufficient?

6.43 Having concluded that the recommendation to "withdraw the subsidy" in Article 4.7 of the SCM Agreement encompasses repayment, we must further consider whether such repayment must be of the full amount of the prohibited subsidy, or whether a lesser amount, a partial repayment, may suffice.

6.44 As discussed above, we do not view the distinction drawn by the parties between the "prospective" and past portions of a subsidy to be meaningful. Thus, this distinction provides no basis for a conclusion that repayment of less than the full amount of the prohibited subsidy would suffice to satisfy a recommendation to withdraw the subsidy. In this regard, we note that the United States' line of reasoning in calculating the "prospective" benefit of past subsidies raises a number of questions. In the first place, taking back the full amount of the prohibited subsidy necessarily eliminates the benefit conferred. Moreover, as is evident in this dispute, the valuation of the benefit of a subsidy, its allocation over time, and the calculation of the "prospective portion" thereof, are complicated questions, for which

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<sup>37</sup> See *Guatemala-Cement AB Report*, para. 65.

<sup>38</sup> *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, para. 191 (emphasis in original).

there are no guidelines in the SCM Agreement.<sup>39</sup> It seems to us unlikely that the negotiators of the SCM Agreement intended "withdraw the subsidy" to involve these complex questions of allocation over time without some indication in the text of the Agreement to that effect. The parties have made no other arguments which would support a conclusion that anything less than full repayment would satisfy the requirements of Article 4.7.

6.45 Having concluded that Article 4.7 of the SCM Agreement encompasses repayment, we can find no basis for concluding that anything less than full repayment would suffice to satisfy the requirement to "withdraw the subsidy" in a case where repayment is necessary.

(d) Is repayment in full of the prohibited subsidy necessary in this case?

6.46 Australia argues in the first instance that no repayment is required in this case, and that it could have fully complied with the recommendation to withdraw the subsidy in this case by releasing Howe from the remaining obligations under the grant contract. In Australia's view, this action would have eliminated the export contingency on which was based the determination that the subsidies granted to Howe were prohibited, and would bring the prohibited subsidies into conformity with Article 3.1(a) of the SCM Agreement, thus "withdrawing" the prohibited subsidies.

6.47 We are not persuaded by Australia's argument that it is possible to change, *ex post facto*, the export contingency associated with the prohibited subsidy in this case. Our determination of the existence of in fact export contingency was based on the "facts that existed at the time the contract establishing the conditions for the grant payments was entered into".<sup>40</sup> Where, as here, the prohibited subsidy is a one-time, past event, and its retention is not contingent upon export performance yet to be achieved, it is 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. While in this case, the period covered by the sales performance targets has not yet ended, releasing Howe from any obligations with respect to those targets cannot change the fact that there was a close tie between anticipated exportation and the grant of the subsidies **at the time the subsidies were provided**. We noted in our original determination that the fact that anticipated exports did not come to pass in the volumes anticipated did not affect the conclusion that the subsidies were contingent upon export performance. Similarly, the removal of the sales performance targets today cannot change the fact that, at the time the subsidies were provided, they were contingent upon anticipated export performance. The purely prospective remedy proposed by Australia of changing after the fact the conditions on which the subsidy was provided, essentially by erasing the sales performance targets from the grant contract, in our view would be completely ineffective in this case.

6.48 Thus, we conclude that, in the circumstances of this case, repayment is necessary in order to "withdraw" the prohibited subsidies found to exist. As discussed above, we do not find any basis for repayment of anything less than the full subsidy. We therefore conclude that repayment in full of the prohibited subsidy is necessary in order to "withdraw the subsidy" in this case.

6.49 In our view, the required repayment does not include any interest component. We believe that withdrawal of the subsidy was intended by the drafters of the SCM Agreement to be a specific and effective remedy for violations of the prohibition in Article 3.1(a). However, we do not understand it to be a remedy intended to fully restore the *status quo ante* by depriving the recipient of the prohibited

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<sup>39</sup> While some Members have developed methodologies for the valuation of subsidy benefits in the context of countervailing duty procedures, these are not universally accepted or consistent. Moreover, their relevance and applicability in the context of the Article 4.7 recommendation is not apparent.

<sup>40</sup> *Australia - Leather*, para. 9.68.

subsidy of the benefits it may have enjoyed in the past. Nor do we consider it to be a remedy intended to provide reparation or compensation in any sense. A requirement of interest would go beyond the requirement of repayment encompassed by the term "withdraw the subsidy", and is therefore, we believe, beyond any reasonable understanding of that term.

#### **4. Has Australia withdrawn the prohibited subsidies in this case?**

6.50 Australia withdrew A\$8.065 million from Howe on 14 September 1999. On the same date, Australia provided a loan of A\$13.65 million on non-commercial terms (the 1999 loan) to Howe's parent company, ALH.<sup>41</sup> In light of the facts and circumstances surrounding the provision of the 1999 loan and the repayment by Howe, we find that they are inextricably linked elements of a single transaction. The documents concerning the loan make clear that the repayment and the provision of funds pursuant to the loan occurred at the same time, and that the provision of the loan funds was **specifically conditioned** on the repayment.<sup>42</sup> Moreover, the total loan amount was sufficient to fund the repayment, with enough left over to invest, at an unexceptional rate of return, so as to yield a sufficient sum to allow repayment in full of the loan on the due date.<sup>43</sup> In our view, in the particular circumstances of this case, the provision of the 1999 loan nullifies the repayment by Howe of \$A8.065 million.

6.51 We emphasise that we do **not** determine that the 1999 loan is inconsistent with Article 3.1(a) of the SCM Agreement. Nor do we consider that Australia is precluded from providing subsidies to Howe simply because it has been determined that the payments under the grant contract are prohibited subsidies. We simply find that because of the loan, in the circumstances of this case, no repayment, and consequently, no withdrawal of the prohibited subsidies, has effectively taken place.

## **VII. CONCLUSION**

7.1 Based on the foregoing, we determine that Australia has failed to withdraw the prohibited subsidies within 90 days, and thus has not taken measures to comply with the DSB's recommendation in this dispute.

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<sup>41</sup> While the specific terms of the 1999 loan are business confidential information, Australia has acknowledged that it is a subsidy. Annex 2-2, para. 8.

<sup>42</sup> We note Australia's argument that the 1999 loan was provided to ALH, Howe's parent company, while the repayment was made by Howe. However, the provision of the 1999 loan by Australia was expressly conditioned on repayment. In these circumstances, we do not believe the distinction between the two corporate entities insisted upon by Australia undermines our conclusion that the provision of the 1999 loan vitiates the repayment. Moreover, the entire history of transactions between the Government of Australia, ALH, and Howe in connection with this matter indicates that the legal distinctions between the two corporate entities do not preclude the conclusion that cooperative behaviour between the two with respect to the repayment and the use of the 1999 loan is likely and expected.

<sup>43</sup> This conclusion is based on the United States' calculations concerning the loan amount and the repayment amount in this regard. Australia did not dispute either the calculation or the interest rate relied on by the United States in those calculations. We therefore conclude that the interest rate derived by the United States was one which would be obtainable on the investment of the funds remaining after repayment of the \$8.065 million.