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## **1 ARTICLE 5**

### **1.1 Text of Article 5**

#### **Article 5**

##### *Adverse Effects*

No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:

- (a) injury to the domestic industry of another Member<sup>11</sup>;

*(footnote original)*<sup>11</sup> The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

- (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994<sup>12</sup>;

*(footnote original)*<sup>12</sup> The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

- (c) serious prejudice to the interests of another Member.<sup>13</sup>

(*footnote original*)<sup>13</sup> The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.

## **1.2 General**

### **1.2.1 Elements of a claim under Article 5**

1. In *US – Offset Act (Byrd Amendment)*, the Panel explained that "a measure constitutes an actionable subsidy if it is a subsidy, if it is "specific", and if its use causes "adverse effects."<sup>1</sup>

### **1.2.2 Temporal scope of Article 5**

2. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body rejected the European Communities' request to exclude all alleged prohibited and actionable subsidies granted prior to 1 January 1995 from the temporal scope of the dispute. The Appellate Body concluded that:

"In sum, we agree with the Panel that Article 5 addresses a 'situation ' that consists of causing, through the use of any subsidy, adverse effects to the interests of another Member. It is this 'situation ', which is subject to the requirements of Article 5 of the *SCM Agreement*, that is to be construed consistently with the non-retroactivity principle reflected in Article 28 of the *Vienna Convention*. The relevant question for purposes of determining the temporal scope of Article 5 is whether the causing of adverse effects has 'ceased to exist ' or continues as a 'situation '. We consequently disagree with the European Union that, by virtue of Article 28 of the *Vienna Convention*, no obligation arising out of Article 5 of the *SCM Agreement* is to be imposed on a Member in respect of subsidies granted or brought into existence prior to the entry into force of the *SCM Agreement*. This may mean that a subsidy granted prior to 1 January 1995 falls within the scope of Article 5 of the *SCM Agreement*, but this is only because of its possible nexus to the continuing situation of causing, through the use of this subsidy, adverse effects to which Article 5 applies. In reaching this conclusion, we are *not* saying that the causing of adverse effects, through the use of pre-1995 subsidies, can necessarily be characterized as a 'continuing' situation in this case. Rather, we simply find that a challenge to pre-1995 subsidies is not *precluded* under the terms of the *SCM Agreement*."<sup>2</sup>

### **1.2.3 No requirement of "continuing" benefit**

3. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body upheld the Panel's finding that Articles 5 and 6 of the *SCM Agreement* do not require that a complainant demonstrate that a benefit "continues" or is "present" during the reference period for purposes of an adverse effects analysis. The Appellate Body emphasized, however, that "the effects of a subsidy will ordinarily dissipate over time and will end at some point after the subsidy has expired. Indeed, as with a subsidy that has a finite life and materializes over time, so too do the effects of a subsidy accrue and diminish over time."<sup>3</sup>

### **1.2.4 No requirement of "pass through" in a claim under Article 5 of the SCM Agreement**

4. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body upheld the Panel's finding that the Appellate Body upheld the Panel's finding that the United States was not required to demonstrate, as part of its *prima facie* case under Article 5 of the *SCM Agreement*, that

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<sup>1</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.106.

<sup>2</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 686.

<sup>3</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 713.

subsidies provided to the Airbus Industrie consortium "passed through" to the current producer of Airbus LCA, Airbus SAS.<sup>4</sup>

#### **1.2.5 Reference period for determining whether subsidies cause adverse effects**

5. In *EC and certain member States – Large Civil Aircraft*, the Panel offered the following general observations regarding the use of a "reference period" for the purpose of determining adverse effects:

"Articles 5(a) and (c) and 6.3(a), (b) and (c) do not specify any particular time period for a panel to consider in evaluating whether the subsidies in dispute cause adverse effects to the complaining Member's interests, either in the form of injury to the domestic industry of the complaining Member, or in the form of serious prejudice. Article 6.4 does indicate that, for purposes of analysis of impedance or displacement of exports under Article 6.3(b), a panel should examine changes in relative market shares 'over an appropriately representative period sufficient to demonstrate clear trends in the development of the market for the product concerned, which, in normal circumstances, shall be at least one year.' However, while this establishes a minimum period of data to be considered in normal circumstances, it does not provide any guidance regarding either a starting date, or an end date, of a relevant period. Nor does it provide any guidance as to the appropriate length of a relevant period, so long as a minimum of one year is generally respected in the context of an analysis under Article 6.4.

It is clear that the finding we are required to make is whether there are 'present ' adverse effects caused by the subsidies in dispute, and the parties do not argue otherwise. Of course, it is impossible to assess the 'present ' situation, as immediate data is not available, and thus a review of the past is necessary to draw conclusions about present adverse effects. The issue we must consider here is what evidence we should take into account, what historical period we should refer to, in drawing such conclusions. In our view, in the absence of any specific guidance on this issue, we should avoid making an *a priori* choice of reference period. The legal arguments of the parties do not establish that a panel is either precluded from, or required to, focus on either of the periods proposed by them, in the sense of a limitation on the panel's consideration of information in the abstract. Rather, we consider that it is our responsibility, in making a determination consistent with our obligations under Article 11 of the DSU, to examine the evidence put forward by the United States, and the rebuttal evidence put forward by the European Communities, including recent information where relevant and reliable, in determining whether the United States has demonstrated that subsidies cause present adverse effects within the meaning of Article 5 of the SCM Agreement. While this makes our task of assessment of the evidence more complicated, it serves to ensure that we carry out an objective examination, as required by Article 11 of the DSU, of all the evidence in reaching our conclusions."<sup>5</sup>

6. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* recalled that the Appellate Body in the original proceeding also emphasized the importance of how the "life" of a subsidy "materialize[s] over time" to an adverse effects analysis as follows:

"The Appellate Body ... suggest[ed] that this would involve assessing the extent to which the 'value' of the subsidy 'projected' at the time of its grant may be 'affected' by subsequent 'intervening events'. Thus, the Appellate Body explained that:

At the time of the grant of a subsidy, the subsidy will necessarily be projected to have a finite life and to be utilized over that finite period. In order properly to assess a complaint under Article 5 that a subsidy causes adverse effects, a panel must take into account that a subsidy provided accrues and diminishes over time, and will have a finite life. The adverse effects analysis under Article 5 is distinct from the 'benefit'

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<sup>4</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, paras. 769-777.

<sup>5</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.1693-7.1694.

analysis under Article 1.1(b) of the SCM Agreement and there is consequently no need to re-evaluate under Article 5 the amount of the benefit conferred pursuant to Article 1.1(b). Rather, an adverse effects analysis under Article 5 must consider the trajectory of the subsidy as it was projected to materialize over a certain period at the time of the grant. Separately, where it is so argued, a panel must assess whether there are 'intervening events' that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the ex ante analysis. Such events may be relevant to an adverse effects analysis because they may affect the link that a complaining party is seeking to establish between the subsidy and its alleged effects.

In sum, a panel's analysis of the adverse effects must take into account how the subsidy has materialized over time. As part of this analysis, a panel must assess how the subsidy is affected, both by the depreciation of the subsidy that was projected ex ante and the 'intervening events' referred to by a party that may have occurred following its grant.<sup>6</sup><sup>7</sup>

7. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, drawing on the Appellate Body's findings in the original proceeding, made the following remarks regarding the "life" of a subsidy and underscored that this "life" should not be equated with the subsidy's withdrawal:

"[W]e understand the above Appellate Body findings and observations to have clarified that: (a) a subsidy which no longer exists may be found to cause adverse effects; (b) understanding how the 'life' of a subsidy has 'materialized over time' will help to inform an assessment of its effects; and (c) the 'life' of a subsidy may be determined by examining the extent to which its 'projected value' at the time of grant has been altered by any one or more subsequent 'intervening events'. We note that, in its analysis, the Appellate Body at no point equated the end of the 'life' of a subsidy with the 'withdrawal' of a subsidy for the purpose of Article 7.8 of the SCM Agreement. Indeed, the Appellate Body was not called upon to resolve such a question. Yet, in this compliance proceeding, the European Union has relied upon the Appellate Body's guidance in relation to the 'life' of a subsidy principally for the purpose of demonstrating that it has complied with the obligation to 'withdraw the subsidy'."<sup>8</sup>

8. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* recalled the Appellate Body's description of an "intervening event" in the original proceeding and then noted that an "intervening event" may increase or decrease the ex ante "life" of a subsidy:

"As we understand it, an 'intervening event' will be one that takes place after the grant of a subsidy and alters its ex ante 'life' – that is, an event that changes how a subsidy has 'materialized over time' relative to the expectations held at the time it was granted. It follows, therefore, that an 'intervening event' cannot be an event that was contemplated and used to inform the expectations that shaped the ex ante life of a subsidy when first granted.

...

In our view, there is no reason why an 'intervening event' must be defined in terms of circumstances that will only ever *decrease* the ex ante 'life' of a subsidy. We see nothing in the language used by the Appellate Body to describe an 'intervening event' that would prevent the possibility of finding that an event occurring after the granting of a subsidy might *increase* the ex ante 'life' of a subsidy. While the extent to which any one or more particular events may be characterized as such will, of course, ultimately depend upon the particular facts, one circumstance that might be considered to *increase* the ex ante life of a subsidized loan, for example, could be the

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<sup>7</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.863.

<sup>8</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.866.

unplanned adjustment of its terms in a way that increases the amount of subsidization. We therefore agree with the parties that an 'intervening event' may either *increase* or *decrease* the *ex ante* life of a subsidy."<sup>9</sup>

9. The Panel in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* disagreed with the European Union's argument that full repayment of the financial contribution at issue implies that the contribution has been "returned" and, therefore, no subsidy exists. Rather, the Panel observed:

"[I]t is less than clear to us that the *repayment* of a loan on its *subsidized* terms amounts to the same thing. Rather, it could be argued that the full repayment of a subsidized loan implies that a subsidized financial contribution has been *provided* to the recipient in its entirety, not removed or 'returned', as the European Union argues.

[W]hile it is true that the repayment of a loan on its subsidized terms would bring about the end of the financial contribution, in the sense that there would be no longer any financial contribution in existence, the Appellate Body explicitly recognized in the original proceeding that this, alone, will not necessarily mean that the relevant subsidy has ceased to exist. Specifically, in the paragraph immediately preceding the statement the European Union relies upon, the Appellate Body explained that:

[T]he fact that a subsidy is 'deemed to exist' under Article 1.1 once there is a financial contribution that confers a benefit *does not mean that a subsidy does not continue to exist after the act of granting the financial contribution*.<sup>10"11</sup>

### 1.3 Article 5(a): injury to the domestic industry

10. In *EC and certain member States – Large Civil Aircraft*, the United States claimed that the subsidies at issue caused injury to its domestic industry within the meaning of Article 5(a). The Panel explained that it would interpret "injury to the domestic industry" in Article 5(a) harmoniously with the provisions of Article 15 governing countervailing duty investigations:

"In our view, the term 'injury to the domestic industry', which we are to apply in the same way under Article 5(a) as an investigating authority would in the context of a countervailing duty investigation, includes the question of causation. Thus, we consider that a consistent interpretation of the concept of 'injury to the domestic industry' requires us to examine, in considering causation, the effects of subsidized imports as set forth in Articles 15.2 and 15.4 in our analysis of material injury under Article 5(a). Any other conclusion would, we believe, inappropriately establish a different legal standard and obligations for analysis of injury in the context of Part III from that developed under Part V of the SCM Agreement, which in our view would be contrary to footnote 11.

...

Since in this case we are essentially fulfilling the role that would be taken by the investigating authority in a countervailing or anti-dumping duty investigation, this means that we must base our examination and determination with respect to injury on positive evidence and an objective examination of the various injury elements as required by the more specific provisions of Article 15."<sup>12</sup>

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<sup>9</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.911-6.913.

<sup>11</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 6.1072-6.1073.

<sup>12</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.2068 and 7.2080.

## **1.4 Article 5(b): "nullification or impairment"**

### **1.4.1 General**

11. In *US – Offset Act (Byrd Amendment)*, with respect to "adverse effects," Mexico made arguments of both violation and non-violation nullification or impairment. In relation to claims of violation nullification or impairment, the Panel stated that any presumption arising under Article 3.8 of the DSU stemming from these violations would relate to nullification or impairment caused *by the violation at issue*. The Panel rejected the argument by Mexico on the grounds that, for the purpose of Article 5(b) of the SCM Agreement, Mexico must demonstrate that "*the use of a subsidy*" caused nullification or impairment.<sup>13</sup>

### **1.4.2 Application of a measure**

12. In *US – Offset Act (Byrd Amendment)*, the Panel clarified that the drafters of Article 5 of the SCM Agreement had envisaged the possibility of nullification or impairment resulting from the "use" of a subsidy. Furthermore, the Panel noted that Article 7.1 of the SCM Agreement provides useful context by clarifying that the "use" of a subsidy is to be equated with the grant or maintaining of a subsidy. In this sense, the Panel stated "[e]ven if disbursements have not been granted under the [Offset Act], the maintenance of the [offset programme] constitutes 'application' of a measure for the purpose of a 'non-violation' nullification or impairment claim under SCM Article 5(b)."<sup>14</sup> The Panel went on to find that the existence of a subsidy programme, and the potential use of that subsidy programme, is sufficient for that programme to "apply".<sup>15</sup>

### **1.4.3 Existence of a benefit**

13. The Panel in *US – Offset Act (Byrd Amendment)* explained that there was no reason why the Panel should not find that the requirement of existence of a benefit had been met, since the United States had not disputed that benefits resulting from the negotiated tariff concessions accrued to Mexico under Articles II and VI of the GATT 1994.<sup>16</sup>

### **1.4.4 Nullification or impairment of a benefit**

14. The Panel in *US – Offset Act (Byrd Amendment)* recalled one adopted GATT panel report, namely *EEC – Oilseeds*, where the panel "considered that non-violation nullification or impairment would arise when the effect of a tariff concession is systematically offset or counteracted by a subsidy programme."<sup>17</sup> The Panel found the approach of the Panel in *EEC – Oilseeds* to be reasonable.

## **1.5 Article 5 (c)**

### **1.5.1 "serious prejudice"**

15. In addressing the issue of whether a finding that the "effect of a subsidy" constitutes "significant price suppression" "in the same market" following an analysis pursuant to Article 6.3(c) of the SCM Agreement is conclusive in establishing "serious prejudice" under Article 5 (c), the Panel in *US – Upland Cotton* was of the view that for the purposes of the dispute, the "significant price suppression" that it found had occurred amounted to "serious prejudice" pursuant to Article 5 (c), even though the Panel did not consider it needed to articulate a specific interpretation of the definition of "serious prejudice" in Article 5(c):

"For the purposes of this dispute, we do not believe that it is necessary to develop a fixed interpretation of the outer parameters of what may constitute 'serious prejudice' to the interests of another Member within the meaning of Article 5(c) of the *SCM Agreement*. At the very least, given the subject matter covered by the *SCM Agreement* – government subsidies in respect of goods – the effects-based

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<sup>13</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, paras. 7.118-119.

<sup>14</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7-122.

<sup>15</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7-123.

<sup>16</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7-124.

<sup>17</sup> Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7-127.

situations identified in the sub-paragraphs of Article 6.3, and the reference in the chapeau of Article 6.3 to serious prejudice 'in the sense of ' Article 5(c), we believe that such 'serious prejudice ' may involve the effects of subsidies on the complaining Member's trade in a given product. That is, it addresses the volumes and prices and flows of such trade, which may, by logical extension, affect a producing Member's domestic production of that product. We therefore consider that a detrimental impact on a complaining Member's production of, and/or trade in, the product concerned may fall within the concept of 'prejudice ' in Article 5(c) of the *SCM Agreement*.

...

We recall our conclusion that the price suppression is 'significant'. We note, moreover, Brazil has submitted evidence to substantiate its assertions that there is a close relationship between movements of Brazilian prices and movements in the A-Index and that Brazilian producers have suffered from the suppressed price trends in the Brazilian market and in Brazilian export markets, including in terms of Brazilian producers having reduced production and investment.

In the particular facts and circumstances of this case, whether or not we consider the impact and magnitude of the price suppression or the materiality of effect upon Brazilian producers of upland cotton in terms of the 'significance' of the price suppression or in terms of the question as to whether or not such 'significant ' price suppression amounts to 'serious prejudice ' under the chapeau of Article 6.3, we arrive at the same conclusion: such 'significant price suppression' amounts to 'serious prejudice' within the meaning of Article 5(c) of the *SCM Agreement*.<sup>18</sup>

16. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body elaborated on the causal link requirement under Articles 5(c) and 6.3 of the *SCM Agreement*:

"A plain reading of the language of Article 5 ('No Member should *cause*, through the use of any [specific subsidy] ... (c) serious prejudice to the interests of another Member'); of Article 6.2 ('serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not *resulted in* any of the effects enumerated in [Article 6.3]'); and of Article 6.3 (which provides that serious prejudice may arise when 'the *effect* of the subsidy' is one or more of the market phenomena listed in that provision) makes clear that, in disputes involving claims under Part III of the *SCM Agreement*, a complainant must demonstrate not only the existence of the relevant subsidies and the adverse effects to its interests, but also that the subsidies at issue have *caused* such effects."<sup>19</sup>

17. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body further noted that it has "consistently articulated the causal link required as 'a genuine and substantial relationship of cause and effect'".<sup>20</sup> Determining whether the causal link in question meets the requisite standard of a "genuine and substantial" causal relationship is a "fact-intensive exercise"<sup>21</sup> that should take into account other causal factors:

"[A] panel will often be confronted with multiple factors that may have contributed, to varying degrees, to that effect. Indeed, in some circumstances, it may transpire that factors other than the subsidy at issue have caused a particular market effect. Yet the mere presence of other causes that contribute to a particular market effect does not, in itself, preclude the subsidy from being found to be a 'genuine and substantial' cause of that effect. Thus, as part of its assessment of the causal nexus between the subsidy at issue and the effect(s) that it is alleged to have had, a panel must seek to understand the interactions between the subsidy at issue and the various other causal factors, and make an assessment of their connections to, as well as the relative

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<sup>18</sup> Panel Report, *US – Upland Cotton*, paras. 7.1392 and 7.1394-7.1395.

<sup>19</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 913.

<sup>20</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 913 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 438; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 374; and *EC and certain member States – Large Civil Aircraft*, para. 1232).

<sup>21</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 915.

importance of the subsidy and of the other factors in bringing about, the relevant effects. In order to find that the subsidy is a genuine and substantial cause, a panel need not determine it to be the *sole* cause of that effect, or even that it is the *only* substantial cause of that effect. A panel must, however, take care to ensure that it does not attribute the effects of those other causal factors to the subsidies at issue, and that the other causal factors do not dilute the causal link between those subsidies and the alleged adverse effects such that it is not possible to characterize that link as a genuine and substantial relationship of cause and effect. The subsidy at issue may be found to exhibit the requisite causal link notwithstanding the existence of other causes that contribute to producing the relevant market phenomena if, having given proper consideration to all other relevant contributing factors and their effects, the panel is satisfied that the contribution of the subsidy has been demonstrated to rise to that of a genuine and substantial cause."<sup>22</sup>

18. For further information regarding serious prejudice, see the Section on Article 6.3 of the SCM Agreement.

### 1.5.2 "another Member"

19. In addressing the issue of whether serious prejudice to the interests of "another Member" refers only to the interests of the particular WTO Member bringing forth the claim of serious prejudice or whether the term also includes Members other than the complainant in a particular dispute, the Panel in *US – Upland Cotton* was of the view that the relevant context of the SCM Agreement and the DSU does not preclude it from taking into account the interest of all Members in the dispute, though it emphasized that it did not base its finding on any claims of serious prejudice caused to those other Members:

"For these reasons, in examining Brazil's allegations under Part III of the *SCM Agreement* that it has suffered serious prejudice to its interests within the meaning of Article 5(c), we take full account of the interest of *all* Members – including those of least-developed Members – in these dispute settlement proceedings in accordance with the rights and obligations provided for in Part III of the *SCM Agreement*. Pursuant to Article 3.2 of the *DSU*, we are called upon to clarify the rights and obligations in this covered agreement through application of customary principles of interpretation of public international law.

Therefore, we have taken into account serious prejudice allegations of other Members to the extent these constitute evidentiary support of the effect of the subsidy borne by Brazil as a Member whose producers are involved in the production and trade in upland cotton in the world market. However, we have not based our decision on any alleged serious prejudice caused to them."<sup>23</sup>

### 1.5.3 Standing as complainant

20. The Panel in *Indonesia – Autos* considered whether "the United States may claim that it has suffered serious prejudice as a result of displacement/impedance or of price undercutting with respect to a product which does not originate in the United States solely on the basis that the producer of that product is a 'US company'."<sup>24</sup> The Panel drew a distinction between United States' products and United States' companies/producers and rejected the claim that the nationality of producers is relevant to establishing the existence of serious prejudice:

"In our view, the text of Article XVI [of the GATT 1994] and of Part III of the *SCM Agreement* make clear that serious prejudice may arise where a Member's trade interests have been affected by subsidization. We see nothing in Article XVI or in Part III that would suggest that the United States may claim that it has suffered adverse effects merely because it believes that the interests of US *companies* have been harmed where US *products* are not involved. The United States has cited no language

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<sup>22</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 914.

<sup>23</sup> Panel Report, *US – Upland Cotton*, paras. 7.1414-7.1415. See also Panel Report, *Korea – Commercial Vessels*, para. 7.525.

<sup>24</sup> Panel Report, *Indonesia – Autos*, para. 14.198.

in Article XVI:1 or Part III suggesting that the nationality of producers is relevant to establishing the existence of serious prejudice. Accordingly, given that serious prejudice may only arise in the case at hand where there is 'displacement or impedance of imports of a like product from another Member' or price undercutting 'as compared with the like product of another Member', we do not consider that the United States can convert such effects on products from the European Communities into serious prejudice to US interests merely by alleging that the products affected were produced by US companies."<sup>25</sup>

#### **1.5.4 Relationship between serious prejudice and threat of serious prejudice**

21. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), the Arbitrator addressed the disagreement between the parties as to whether it should value, as part of the compliance panel's threat of impedance findings, counterfactual deliveries of LCA that would have occurred in the reference period. Relatedly, the parties also disagreed on the appropriate annualization period for valuation of the counterfactual deliveries to comprise the threat of impedance findings. The Arbitrator considered that these two disagreements were based on differing perspectives as to the point in time at which the compliance panel situated itself when making the threat of impedance findings, and more generally, as to the nature of a *threat* of impedance as a specific form of economic harm.<sup>26</sup>

22. Given the Arbitrator's mandate under Article 7.10 and the fact that the *threat* of impedance was the relevant form of serious prejudice, the Arbitrator considered the nature of a *threat* of serious prejudice. The Arbitrator did so on the basis of a textual analysis of Article 6.3 of the SCM Agreement and footnote 13 to Article 5(c) thereof, which references Article XVI of the GATT 1994.<sup>27</sup>

23. In the Arbitrator's view, the reference to Article XVI of the GATT 1994 in footnote 13, coupled with the present-tense expression of serious prejudice in Article 6.3, indicates that the scope of serious prejudice under the SCM Agreement includes both present and threatened serious prejudice:

"Article 6.3 of the SCM Agreement is formulated in the present tense ('the effect of the subsidy is') when identifying the specific forms of economic harm that constitute serious prejudice for purposes of Article 5(c), including impedance of imports and exports under Articles 6.3(a) and (b). Footnote 13 to paragraph (c) of Article 5 provides that the term 'serious prejudice to the interests of another Member' is used in the SCM Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994 'and includes threat of serious prejudice'.

Footnote 13 also references Article XVI of the GATT 1994[.]

The reference to Article XVI of the GATT 1994 in footnote 13, coupled with the present-tense expression of serious prejudice in Article 6.3, indicates that the scope of serious prejudice under the SCM Agreement includes both present and threatened serious prejudice, thereby aligning with Article XVI of the GATT 1994.<sup>28</sup>

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<sup>25</sup> Panel Report, *Indonesia – Autos*, para. 14.201.

<sup>26</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), paras. 6.103-6.104.

<sup>27</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), paras. 6.107-6.109.

<sup>28</sup> (*footnote original*) We observe a similar structure as regards the concept of injury in Article 5(a): footnote 11 to paragraph (a) of Article 5 provides that the term "injury to the domestic industry" is used in the same sense as it is used in Part V of the SCM Agreement. Part V (fn 45 to Article 15) provides that, unless otherwise specified, the term "injury" includes both present material injury and a "threat of material injury". The Anti-Dumping Agreement is structured in a similar way, with footnote 9 providing that the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry. Article 10.3 of the Anti-Dumping Agreement (dealing with retroactivity) states that, except as provided in paragraph 2 "where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of the threat of injury or material retardation", suggesting that threat of injury arises where material injury does not yet exist. The Agreement on

The SCM Agreement does not define a threat of serious prejudice, nor does it explain the relationship between serious prejudice as delineated in Article 6.3 and threat of serious prejudice, other than as provided in footnote 13."<sup>29</sup>

24. The Arbitrator then conducted a textual analysis of the term "threat" as it appears in footnote 13. The Arbitrator considered the ordinary meaning of the term, as supported by context provided by Article 4.1(b) of the Agreement on Safeguards, Article 3.7 of the Anti-Dumping Agreement, and Article 15.7 of the SCM Agreement. In the view of the Arbitrator, a threat of impedance is a forward-looking concept, i.e. impedance that has not yet occurred but will soon occur:

"A 'threat' is ordinarily understood as 'an indication of impending evil'. Something is 'impending' when it is 'about to fall or happen; hanging over one's head; imminent; or near at hand'. A threat of impedance, in our view, is therefore a forward-looking concept, i.e. impedance that has not yet occurred but will soon occur.

Instructive guidance by the Appellate Body accords with this understanding. The Appellate Body has discussed the concept of 'threat' in the context of interpreting the phrase 'threat of serious injury' in Article 4.1(b) of the Agreement on Safeguards, explaining that "threat" refers to something that 'has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact be assured with certainty'. This understanding of threat as something that has not occurred at the relevant time, but that will occur at a future time is consistent also with the nature of threat of material injury in Article 3.7 of the Anti-Dumping Agreement and Article 15.7 of the SCM Agreement. We discern no reason to think that the nature of 'threat' in these agreements and the threat of serious prejudice in the SCM Agreement should be interpreted differently."<sup>30</sup>

25. The Arbitrator also noted additional connections between Article 6.3 of the SCM Agreement and footnote 13 thereto, leading to the conclusion that the relationship between present serious prejudice in Article 6.3 and the threat of serious prejudice is temporal:

"More generally, the present tense formulation in Article 6.3 of the types of economic harm that constitute serious prejudice, when read with footnote 13 (indicating that serious prejudice includes threat of serious prejudice), suggest that the relationship between present serious prejudice in Article 6.3 and threat of serious prejudice, is temporal. We note that the way in which the Appellate Body has referred to the relationship between threatened and present serious prejudice is consistent with this understanding:

A claim of present serious prejudice relates to the existence of prejudice in the past, and present, and that may continue in the future. By contrast, a claim of threat of serious prejudice relates to prejudice that *does not yet exist*, but is imminent such that it will materialize in the near future. Therefore, a threat of serious prejudice claim does not necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice."<sup>31</sup><sup>32</sup>

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Safeguards also separately defines "serious injury" and "threat of serious injury", with "serious injury" meaning a significant overall impairment in the position of a domestic industry while "threat of serious injury" means "serious injury that is clearly imminent in accordance with the provisions of paragraph 2."

<sup>29</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), paras. 6.109-6.111.

<sup>30</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), paras. 6.112-6.113.

<sup>31</sup> (*footnote original*) Appellate Body Report, *US – Upland Cotton* (Article 21.5 – Brazil), para. 244 (emphasis added). In saying that a threat of serious prejudice "does not necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice", we understand the Appellate Body to mean that a threat of serious prejudice does not necessarily include present serious prejudice, because a threat, by definition, relates to something that does not yet exist.

<sup>32</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), para. 6.116.

26. Finally, the Arbitrator considered the object and purpose of the inclusion of threat of serious prejudice as part of serious prejudice under Article 5(c) of the SCM Agreement. The Arbitrator noted that, as the assessment of serious prejudice in Article 6.3 is fundamentally backward-looking, and the threat of serious prejudice is included within the scope of serious prejudice, a claim under the latter allows a complainant to address subsidization without waiting for the harm to be manifest:

"Finally, we consider the object and purpose of the inclusion of threat of serious prejudice as part of serious prejudice within the meaning of Article 5(c) of the SCM Agreement. Part III of the SCM Agreement ('Actionable Subsidies') provides that specific subsidies give rise to the remedies in Article 7 *only* where they are demonstrated (*ex post*) to cause adverse effects to the interests of a complaining Member. Serious prejudice is one of these forms of adverse effects, as referred to in Articles 5(c) and 6.3. The present-tense formulation of serious prejudice in Article 6.3 means that the assessment of serious prejudice (and thus the WTO-consistency of a subsidy under Part III) is fundamentally *backward-looking*.

The inclusion of threat of serious prejudice within the scope of serious prejudice, in the context of the effects-based discipline of Part III of the SCM Agreement, enables Members to obtain remedies under Article 7 in respect of serious prejudice that does not presently exist but will exist in the future. A threat of serious prejudice claim is therefore a means to address subsidization that imminently threatens to cause economic harm, without needing to wait until that harm actually manifests. Understood in this context, a threat of serious prejudice is not a form of harm separate from the present form of the particular serious prejudice phenomena in Article 6.3. Rather, it addresses the same harm as the phenomena in Article 6.3, but from a forward-looking perspective because it has not yet occurred but can be expected to do so imminently.<sup>33</sup> This temporal difference between threatened and present serious prejudice also means that the argumentation and evidence in support of a claim of threat of serious prejudice will differ from that required to support a present serious prejudice claim."<sup>34</sup>

27. In the light of the above, the Arbitrator considered a threat of impedance to be a situation in which the threatened impedance has not yet manifested itself as impedance in the time-period considered by the adjudicator:

"The foregoing considerations lead us to expect that, when a threat of impedance is identified by a WTO adjudicator working with the disciplines of Part III of the SCM Agreement, the adjudicator would be referring to a situation whereby the threatened impedance has not yet manifested itself as impedance in the time-period considered by the adjudicator. In other words, we would expect that a panel makes a finding of threat of impedance when it is not yet able to observe the manifestation of the threatened impedance (i.e. impedance). Indeed, if this were not the case, it would appear to us that the line between findings of threat of serious prejudice and present serious prejudice would become, at minimum, significantly blurred."<sup>35</sup>

## **1.6 Relationship with other provisions of the SCM Agreement**

### **1.6.1 Article 6**

28. The Panel in *Indonesia – Autos* determined the existence of serious prejudice within the meaning of Article 5(c) upon finding a significant price undercutting under Article 6.3(c):

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<sup>33</sup> (*footnote original*) If the drafters had intended that a threat of serious prejudice would be a distinct form of harm from the Article 6.3 phenomena, it is reasonable to expect that they would have done so by adding a paragraph (e) to Article 6.3 that says: "the effect of the subsidy is a threat of the effects set forth in paragraphs (a) through (d) of this Article". On the contrary, the reference to threat of serious prejudice in a footnote to Article 5(c), the provision that sets forth the obligation not to cause adverse effects through the use of a subsidy, suggests that serious prejudice in Article 5(c) can be established where the market harm specified in Article 6.3 does not yet exist and not only when it has already occurred.

<sup>34</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), paras. 6.118-6.119.

<sup>35</sup> Decision by the Arbitrator, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* (Article 22.6 – US), para. 6.120.

"We note that under Article 6.3(c) serious prejudice may arise only where the price undercutting is 'significant.' Although the term 'significant' is not defined, the inclusion of this qualifier in Article 6.3(c) presumably was intended to ensure that margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price was being undercut are not considered to give rise to serious prejudice. This clearly is not an issue here. To the contrary, it is our view that, even taking into account the possible effects of these physical differences on price comparability, the price undercutting by the Timor of the Optima and 306 cannot reasonably be deemed to be other than significant.

For the foregoing reasons, we find that the effect of the subsidies to the Timor pursuant to the National Car programme is to cause serious prejudice to the interests of the European Communities in the sense of Article 5(c) of the SCM Agreement through a significant price undercutting as compared with the price of EC-origin like products in the Indonesian market."<sup>36</sup>

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<sup>36</sup> Panel Report, *Indonesia – Autos*, paras. 14.254-14.255.