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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 Member¹¹;

(footnote original) ¹¹ The term "injury to the domestic industr

(c) serious prejudice to the interests of another Member. 13

(footnote original) ¹³ 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." ¹

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 the interests of another Member." ¹³

considered to increase the ex ante life of a subsidized loan, for example, could be the 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."⁹

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 once7.7 (n)-3 a0l3 (a)7 /Pw 0.342nots.7373 0 Td3 (

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.¹³

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 purposes of Article 5(b)."¹⁴

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 become 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 2.4 (a)7 4(c)5 (e 4 (t)-7 ()0.6 (t)i)-2 ([(n)-174w 0.36)6.4 (io.4 (m)16.9 (u)-3 (l)-1Tp0.36)7.16 0 4f04Tw 0.36eTd (i)Tj 0.0

1.6 Relationship with other provisions of the SCM Agreement

1.6.1 Article 6

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