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## **1 ANNEX V**

### **1.1 Text of Annex V**

#### **ANNEX V**

##### **PROCEDURES FOR DEVELOPING INFORMATION CONCERNING SERIOUS PREJUDICE**

1. Every Member shall cooperate in the development of evidence to be examined by a Panel in procedures under paragraphs 4 through 6 of Article 7. The parties to the dispute and any third-country Member concerned shall notify to the DSB, as soon as the provisions of paragraph 4 of Article 7 have been invoked, the organization responsible for administration of this provision within its territory and the procedures to be used to comply with requests for information.

2. In cases where matters are referred to the DSB under paragraph 4 of Article 7, the DSB shall, upon request, initiate the procedure to obtain such information from the government of the subsidizing Member as necessary to establish the existence and amount of subsidization, the value of total sales of the subsidized firms, as well as information necessary to analyse the adverse effects caused by the subsidized product.<sup>66</sup> This process may include, where appropriate, presentation of questions to the government of the subsidizing Member and of the complaining Member to collect information, as well as to clarify and obtain elaboration of information available to the parties to a dispute through the notification procedures set forth in Part VII.<sup>67</sup>

*(footnote original)*<sup>66</sup> In cases where the existence of serious prejudice has to be demonstrated.

*(footnote original)*<sup>67</sup> The information-gathering process by the DSB shall take into account the need to protect information which is by nature confidential or which is provided on a confidential basis by any Member involved in this process.

3. In the case of effects in third-country markets, a party to a dispute may collect information, including through the use of questions to the government of the third-country Member, necessary to analyse adverse effects, which is not otherwise reasonably available from the complaining Member or the subsidizing Member. This requirement should be administered in such a way as not to impose an unreasonable burden on the third-country Member. In particular, such a Member is not expected to make a market or price analysis specially for that purpose. The information to be supplied is that which is already available or can be readily obtained by this Member (e.g. most recent statistics which have already been gathered by relevant statistical services but which have not yet been published,

customs data concerning imports and declared values of the products concerned, etc.). However, if a party to a dispute undertakes a detailed market analysis at its own expense, the task of the person or firm conducting such an analysis shall be facilitated by the authorities of the third-country Member and such a person or firm shall be given access to all information which is not normally maintained confidential by the government.

4. The DSB shall designate a representative to serve the function of facilitating the information-gathering process. The sole purpose of the representative shall be to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties.

5. The information-gathering process outlined in paragraphs 2 through 4 shall be completed within 60 days of the date on which the matter has been referred to the DSB under paragraph 4 of Article 7. The information obtained during this process shall be submitted to the panel established by the DSB in accordance with the provisions of Part X. This information should include, *inter alia*, data concerning the amount of the subsidy in question (and, where appropriate, the value of total sales of the subsidized firms), prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares. It should also include rebuttal evidence, as well as such supplemental information as the panel deems relevant in the course of reaching its conclusions.

6. If the subsidizing and/or third-country Member fail to cooperate in the information-gathering process, the complaining Member will present its case of serious prejudice, based on evidence available to it, together with facts and circumstances of the non-cooperation of the subsidizing and/or third-country Member. Where information is unavailable due to non-cooperation by the subsidizing and/or third-country Member, the panel may complete the record as necessary relying on best information otherwise available.

7. In making its determination, the panel should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.

8. In making a determination to use either best information available or adverse inferences, the panel shall consider the advice of the DSB representative nominated under paragraph 4 as to the reasonableness of any requests for information and the efforts made by parties to comply with these requests in a cooperative and timely manner.

9. Nothing in the information-gathering process shall limit the ability of the panel to seek such additional information it deems essential to a proper resolution to the dispute, and which was not adequately sought or developed during that process. However, ordinarily the panel should not request additional information to complete the record where the information would support a particular party's position and the absence of that information in the record is the result of unreasonable non-cooperation by that party in the information-gathering process.

## **1.2 General**

1. Annex V procedures have been requested in several panel proceedings to date, and are referenced in the panel reports in *Indonesia – Autos*<sup>1</sup>, *US – Upland Cotton*<sup>2</sup>, *Korea – Commercial Vessels*<sup>3</sup>, *EC and certain member States – Large Civil Aircraft*<sup>4</sup>, and *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*.<sup>5</sup>

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<sup>1</sup> Panel Report, *Indonesia – Autos*, paras. 1.17-1.19.

<sup>2</sup> Panel Report, *US – Upland Cotton*, para. 1.3.

<sup>3</sup> Panel Report, *Korea – Commercial Vessels*, paras. 1.11-1.14.

<sup>4</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 1.7-1.8.

<sup>5</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 1.7-1.12, 7.19, 7.22.

2. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body noted that "Annex V procedures are key to affording parties early access to critical information" and that "the conduct of an Annex V information-gathering procedure bears a direct relationship to a panel's discharge of its adjudicative function in a dispute involving allegations of serious prejudice".<sup>6</sup>

### 1.3 Paragraph 2: initiation of the procedure by the DSB

3. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body found that the initiation of an Annex V procedure occurs automatically when there is a request for initiation of such a procedure and the DSB establishes a panel, even in the absence of DSB consensus.<sup>7</sup> The Appellate Body observed that:

"All of Annex V, together with, *inter alia*, Articles 6.6, 7.4, 7.5, and 7.6 of the *SCM Agreement*, are listed as special or additional rules and procedures under Appendix 2 to the DSU. We recall in this connection that, pursuant to Article 1.2 of the DSU, the provisions of both the *SCM Agreement* and the DSU apply in the context of a dispute involving allegations of actionable subsidies causing serious prejudice, except that, to the extent that there is a conflict, those provisions of the *SCM Agreement* identified in Appendix 2 to the DSU prevail, including over Article 2.4 of the DSU."<sup>8</sup>

4. The Appellate Body found support for its interpretation in the fact that Annex V procedures are among the special or additional rules and procedures identified in Appendix 2:

"Additional relevant context, in our view, is found in Article 1.2 of the DSU, which deals with the special or additional dispute settlement rules found in other agreements (including Annex V and Article 7.4 of the *SCM Agreement*). The last sentence of Article 1.2 stipulates that, in the event of a conflict between the DSU and the special or additional rules and procedures listed in Appendix 2 to the DSU:

{t}he Chairman shall be guided by the principle that special or additional rules and procedures *should be used where possible*, and the rules and procedures set out in this Understanding should be used to the extent necessary to avoid conflict. (emphasis added)

This provision expresses Members' preference for the use of the special or additional rules and procedures. Such preference is logical given that the special or additional rules listed in Appendix 2 were crafted by the negotiators of each individual agreement with a view to the particular characteristics of disputes that might arise under such agreement and, in the case of the *SCM Agreement*, under each Part of that Agreement.

In contrast, if a positive consensus rule were to apply to the initiation of an Annex V procedure, as the United States contends, this would mean that an Annex V procedure cannot be initiated whenever there is a formal objection by a single WTO Member. This would enable individual Members to prevent the use of this detailed, carefully tailored mechanism for gathering necessary information, even though the DSB's initiation of such information-gathering procedures and Members' duty to cooperate in them are both expressed as mandatory. Furthermore, if initiation required positive consensus, two consequences could flow for which there may be no remedy in the panel proceedings. First, the parties to the dispute could be denied access to critical information from third-country Members if those Members choose not to become third parties in the dispute. Second, if the objection to the initiation of the Annex V procedure comes from a WTO Member other than the responding party or a concerned third-country Member, there may be no basis upon which the Panel could, pursuant to

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<sup>6</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 502 and 533.

<sup>7</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 480-549.

<sup>8</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 509.

paragraphs 6 and 7 of Annex V, allow the complainant to rely upon best available evidence and/or draw adverse inferences based on the conduct of the respondent."<sup>9</sup>

#### **1.4 Use of information gathered under Annex V for prohibited subsidy claims**

5. In *Korea – Commercial Vessels*, the Panel declined to rule that the complainant was precluded from using information that was gathered under Annex V (regarding serious prejudice) in respect of its prohibited subsidy claims:

"We must now consider whether or not the EC was entitled to use that information for the additional purpose of supporting its Part II claims. In particular, the question is whether information properly gathered under the Annex V mechanism regarding the existence of alleged subsidization, which was properly relied on by the EC in support of its Part III serious prejudice claims against certain alleged subsidies, could also be used in the context of Part II claims concerning the same alleged subsidies

In the context of the EC's Part III claims, we must determine whether or not the relevant APRG and PSL transactions constitute subsidies. In doing so, we are bound by the provisions of Article 1 of the *SCM Agreement*. At paragraphs 170 and 172 of the EC's first written submission, the EC is requesting us to perform the same analysis of subsidization<sup>20</sup> in respect of the same measures in the context of its Part II claims. We see nothing in Annex V that would require us to ignore our Part III analysis of subsidization when reviewing the EC's Part II claims which concern allegations of the same subsidization in respect of the same measures. Nor indeed do we see any requirement in the *SCM Agreement* to perform this analysis more than once for any given measure alleged to be a subsidy.

In any event, even if we were precluded from relying on the relevant Annex V information when determining the existence of subsidization in the context of the EC's Part II claims, at the very least any finding of the existence of subsidization in respect of the EC's Part III claims would compel us to 'seek' that very same information (i.e., regarding the same alleged subsidies) from Korea under Article 13.1 of the *DSU*. In other words, the very same information would in any event be brought before the Panel, but only much later in the proceedings, after the Panel had made findings regarding the existence of subsidization in respect of the EC's Part III claims. We recall that there is no textual basis for requiring us to rule that the relevant Annex V information is not directly admissible in respect of the EC's Part II claims. We therefore see no basis for ruling that the relevant information should only enter the record indirectly, and much later in the proceedings, via Article 13.1 of the *DSU*.

For the above reasons, we decline to rule that the EC was precluded from using information that was properly gathered under the Annex V mechanism regarding the existence of alleged subsidization, and properly relied on by the EC in respect of its Part III serious prejudice claims against certain alleged subsidies, in support of additional Part II claims concerning the same alleged subsidies."<sup>10</sup>

#### **1.5 Adverse inferences from non-cooperation**

6. In *Korea – Commercial Vessels*, the Panel found that the European Communities had failed to demonstrate "non-cooperation" on Korea's part that would warrant an adverse inference:

"As the December 1998 Agreement is not relevant to our examination of the Daewoo workout, we fail to see how an earlier version of that agreement could be of greater probative value, especially as it was concluded over two years before the Daewoo workout. Furthermore, we note that the EC asserts that the January 1998 Agreement 'shows the degree of intervention of the [GOK] in the corporate sector'. However, government intervention in the corporate sector does not necessarily amount to government entrustment or direction in respect of a particular restructuring. For these

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<sup>9</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 522-523.

<sup>10</sup> Panel Report, *Korea – Commercial Vessels*, para. 7.5, sub-paras. 4-7.

reasons, we decline to treat Korea's failure to provide the January 1998 Agreement in the context of the Annex V procedure as 'non-cooperation' in the meaning of Annex V.7 of the *SCM Agreement*. We therefore reject the EC's request for an adverse inference under that provision.

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We consider that the EC's request for adverse inferences regarding the 'KDB report' is unfounded, since there is nothing on the record to suggest that any such report ever existed. In particular, Korea has never referred to any such report. Korea has merely referred to a workout plan proposed by the KDB (on 26 November 1999) on the basis of a workout report prepared by Anjin (submitted in final form on 24 November 1999).

Regarding the EC's request for adverse inferences concerning the 30 October 1999 summary workout earlier in these proceedings, we see no reason why, having submitted an English version of the full Anjin workout report under the Annex V procedure, Korea should also have submitted an English version of the summary report. We note that Annex V question 3.1.3(17) merely requested a copy of the 'full report with all annexes', so we do not consider that Korea was required to provide a copy of the summary report under the Annex V procedure. As for whether or not Korea should in any event have submitted an English version of Anjin's summary report earlier in the Panel proceedings, we consider it appropriate that Korea only submitted the summary report when it sought to rely on it in response to a question from the Panel (which in turn was prompted by arguments from the EC). Since the report had not already been translated into English, we consider it reasonable that Korea would not be able to make an English version of that report available to the Panel until some time after the deadline for the reply to the Panel's question. For these reasons, we reject the EC's request for adverse inferences."<sup>11</sup>

7. In *EC and certain member States - Large Civil Aircraft*, the United States requested that the Panel draw adverse inferences on a number of issues due to the European Communities' failure to provide information. In one instance, the Panel did so:

"We recall that paragraph 7 of Annex V provides that a panel 'should draw adverse inferences from instances of non-cooperation by any party involved in the information-gathering process.' In the light of the foregoing, and consistent with our previous finding on the amount of the loan payments made to Airbus under the challenged PROFIT programmes, we conclude pursuant to paragraph 7 of Annex V, that the challenged subsidies under the PROFIT I and II are specific within the meaning of Article 2.1(c) of the SCM Agreement."<sup>12</sup>

8. In *US - Large Civil Aircraft (2<sup>nd</sup> complaint)*, the European Communities requested the Panel to draw adverse inferences on a number of issues (relating to the amounts of the alleged subsidies) in the light of alleged non-cooperation by the United States in disclosing certain information regarding the amounts of some alleged subsidies. The Panel suggested that effectively the same result would be reached through the operation of the normal rules on burden of proof:

"For each of the challenged measures, the European Communities has presented the Panel with evidence and arguments in support of its estimate of the amount of the subsidy allegedly provided to Boeing. Where the United States disputes the European Communities' estimate of the amount of an alleged subsidy, it has provided the Panel with its own evidence and/or arguments to support its own, generally lower, estimate. If the Panel were to consider the evidence and/or arguments advanced by the United States to be insufficient to rebut the evidence and arguments presented by the European Communities, then the Panel would accept the European Communities' estimate. In such a situation, the Panel would accept the European Communities' estimate not by virtue of United States 'non-cooperation', and not as a matter of drawing 'adverse inferences', but simply by virtue of the operation of the normal

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<sup>11</sup> Panel Report, *Korea - Commercial Vessels*, paras. 7.401, 7.450-7.451.

<sup>12</sup> Panel Report, *EC and certain member States - Large Civil Aircraft*, para. 7.1580.

principles regarding the burden of proof in WTO dispute settlement proceedings. Likewise, if the Panel were to consider the evidence and/or arguments advanced by the United States to be sufficient to rebut the evidence and arguments presented by the European Communities, then the Panel would accept the United States' estimate not by virtue of United States 'cooperation', but simply by virtue of the operation of the normal principles regarding the burden of proof in WTO dispute settlement proceedings."<sup>13</sup>

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

### **1.6.1 Article 6**

9. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body noted that Article 6 of the SCM Agreement defines "serious prejudice" and refers, on two occasions, to Annex V.<sup>14</sup>

### **1.6.2 Article 7.4**

10. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body noted that the provisions of Annex V refer three times to Article 7.4 of the SCM Agreement.<sup>15</sup>

## **1.7 Relationship with other Agreements**

### **1.7.1 DSU**

11. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Appellate Body noted the relationship between Annex V and the DSU:

"All of Annex V, together with, *inter alia*, Articles 6.6, 7.4, 7.5, and 7.6 of the *SCM Agreement*, are listed as special or additional rules and procedures under Appendix 2 to the DSU. We recall in this connection that, pursuant to Article 1.2 of the DSU, the provisions of both the *SCM Agreement* and the DSU apply in the context of a dispute involving allegations of actionable subsidies causing serious prejudice, except that, to the extent that there is a conflict, those provisions of the *SCM Agreement* identified in Appendix 2 to the DSU prevail, including over Article 2.4 of the DSU."<sup>16</sup>

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<sup>13</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 7.38.

<sup>14</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 508.

<sup>15</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 508.

<sup>16</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 508.