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## **1 ARTICLE 2**

### **1.1 Text of Article 2**

#### **Article 2**

##### *Specificity*

2.1 In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:

- (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.
- (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions<sup>2</sup> governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

*(footnote original)*<sup>2</sup> Objective criteria or conditions, as used herein, mean criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.

- (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy programme by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.<sup>3</sup> In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy programme has been in operation.

*(footnote original)*<sup>3</sup> In this regard, in particular, information on the frequency with which applications for a subsidy are refused or approved and the reasons for such decisions shall be considered.

2.2 A subsidy which is limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this Agreement.

2.3 Any subsidy falling under the provisions of Article 3 shall be deemed to be specific.

2.4 Any determination of specificity under the provisions of this Article shall be clearly substantiated on the basis of positive evidence.

### **1.2 General**

1. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body stated that the "purpose of Article 2 of the SCM Agreement is not to identify the elements of the subsidy as set

out in Article 1.1, but to establish whether the availability of the subsidy is limited *inter alia* by reason of the eligible recipients (Article 2.1(a)) or by reason of the geographical location of beneficiaries (Article 2.2)".<sup>1</sup>

### 1.3 Article 2.1

#### 1.3.1 General

2. The Appellate Body in *US – Countervailing Measures (China)* noted that the "purpose of the inquiry under this provision is to determine whether the subsidy that was found to exist pursuant to Article 1.1 is specific".<sup>2</sup> In particular, "the analysis of specificity focuses on the question of whether access to a subsidy is limited to a particular class of recipients".<sup>3</sup>

3. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body provided general guidance on the interpretation of Article 2 in general, its sub-paragraphs, and the relationship between its sub-paragraphs:

"The chapeau of Article 2.1 offers interpretative guidance with regard to the scope and meaning of the subparagraphs that follow. The chapeau frames the central inquiry as a determination as to whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority and provides that, in an examination of whether this is so, the 'principles' set out in subparagraphs (a) through (c) 'shall apply'. We consider that the use of the term 'principles'—instead of, for instance, 'rules'—suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle. Consequently, the application of one of the subparagraphs of Article 2.1 may not by itself be determinative in arriving at a conclusion that a particular subsidy is or is not specific.

Article 2.1(a) establishes that a subsidy is specific if the granting authority, or the legislation pursuant to which the granting authority operates, *explicitly* limits access to that subsidy to eligible enterprises or industries. Article 2.1(b) in turn sets out that specificity 'shall not exist' if the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, the subsidy, provided that eligibility is automatic, that such criteria or conditions are strictly adhered to, and that they are clearly spelled out in an official document so as to be capable of verification. These provisions thus set out indicators as to whether the conduct or instruments of the granting authority discriminate or not: Article 2.1(a) describes limitations on eligibility that favour certain enterprises, whereas Article 2.1(b) describes criteria or conditions that guard against selective eligibility. Finally, Article 2.1(c) sets out that, notwithstanding any appearance of non-specificity resulting from the principles laid down in subparagraphs (a) and (b), other factors may be considered if there are reasons to believe that a subsidy may, in fact, be specific in a particular case.

We observe that Article 2.1(a) and (b) identify certain common elements in the analysis of the specificity of a subsidy. For instance, these principles direct scrutiny to the eligibility requirements imposed by 'the granting authority, or the legislation pursuant to which the granting authority operates'. This is a critical feature of both provisions as it situates the analysis for assessing any limitations on *eligibility* in the particular legal instrument or government conduct effecting such limitations. We also note that both provisions turn on indicators of *eligibility* for a subsidy. Article 2.1(a) thus focuses not on whether a subsidy has been granted to certain enterprises, but on whether access to that subsidy has been explicitly limited. This suggests that the focus of the inquiry is on whether certain enterprises are eligible for the subsidy, not on whether they in fact receive it. Similarly, Article 2.1(b) points the inquiry towards 'objective criteria or conditions governing the eligibility for, and the amount of, a subsidy'. Article 2.1(b) also indicates other legal and practical considerations relevant

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<sup>1</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413.

<sup>2</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.164.

<sup>3</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.169.

to the analysis, all of which centre on the manner in which the criteria or conditions of eligibility are prescribed and adhered to.

Notwithstanding the fact that the principles under subparagraphs (a) and (b) may point to opposite results, there may be situations in which assessing the eligibility for a subsidy will give rise to indications of specificity and non-specificity as a result of the application of Article 2.1(a) *and* (b). This is because Article 2.1(a) identifies circumstances in which a subsidy is specific, whereas Article 2.1(b) establishes circumstances in which a subsidy shall be regarded as non-specific. We can conceive, for example, of situations in which an initial indication of specificity under Article 2.1(a) may need to be considered further if additional evidence demonstrates that the subsidy in question is available on the basis of objective criteria or conditions within the meaning of Article 2.1(b). This therefore suggests that, where the eligibility requirements of a measure present some indications pointing to subparagraph (a) and certain others pointing to subparagraph (b), the specificity analysis must accord appropriate consideration to both principles.

Furthermore, the introductory sentence of Article 2.1(c) establishes that 'notwithstanding any appearance of non-specificity' resulting from the application of Article 2.1(a) and (b), a subsidy may nevertheless be found to be 'in fact' specific. The reference in Article 2.1(c) to 'any appearance of non-specificity' resulting from the application of Article 2.1(a) and (b) supports the view that the conduct or instruments of a granting authority may not clearly satisfy the eligibility requirements of Article 2.1(a) or (b), but may nevertheless give rise to specificity in fact. In such circumstances, application of the factors under Article 2.1(c) to factual features of a challenged subsidy is warranted. Since an 'appearance of non-specificity' under Article 2.1(a) and (b) may still result in specificity in fact under Article 2.1(c) of the *SCM Agreement*, this reinforces our view that the principles in Article 2.1 are to be interpreted together.

Accordingly, we consider that a proper understanding of specificity under Article 2.1 must allow for the concurrent application of these principles to the various legal and factual aspects of a subsidy in any given case. Yet, we recognize that there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that in such circumstances further consideration under the other subparagraphs of Article 2.1 may be unnecessary. For instance, Article 2.1(c) applies only when there is an 'appearance' of non-specificity. Likewise, a granting authority or authorizing legislation may explicitly limit access to a subsidy to certain enterprises within the meaning of Article 2.1(a), but not provide objective criteria or conditions that could be scrutinized under Article 2.1(b). We do, however, caution against examining specificity on the basis of the application of a particular subparagraph of Article 2.1, when the potential for application of other subparagraphs is warranted in the light of the nature and content of measures challenged in a particular case."<sup>4</sup>

4. The Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)* stated that "the specificity inquiry under Article 2 ... involves a consideration of whether there is a *limitation on access to the relevant subsidy*" and that, despite the appearance of non-specificity under Article 2.1(a) and (b), the investigating authority may consider whether the subsidy is *de facto* specific.<sup>5</sup>

#### **1.3.1.1 Order of analysis**

5. The Appellate Body has stated in various disputes that the "starting point" of a specificity analysis is the measure that has been determined to constitute a subsidy under Article 1.1.<sup>6</sup>

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<sup>4</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 366-371.

<sup>5</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.228.

<sup>6</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.140; and Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 747.

6. In *US – Countervailing Measures (China)*, the Appellate Body disagreed with China's argument that Article 2.1 calls for a strict sequential analysis of its three subparagraphs in each and every case.<sup>7</sup> The Appellate Body described the order of the specificity analysis as follows:

"[D]espite the fact that the specificity analysis under subparagraphs (a) through (c) will *ordinarily* proceed in a sequential order, 'there may be instances in which the evidence under consideration unequivocally indicates specificity or non-specificity by reason of law, or by reason of fact, under one of the subparagraphs, and that, *in such circumstances further consideration* under the other subparagraphs of Article 2.1 *may be unnecessary*.' [I]n certain situations, investigating authorities are *not* required to examine specificity with respect to the subsidy at issue under all three subparagraphs. Rather, depending on the type of evidence that is present in a given case, an investigating authority may be able to limit the specificity analysis to *de jure* elements under subparagraphs (a) and (b) or to *de facto* elements under subparagraph (c)."<sup>8</sup>

### 1.3.2 Chapeau of Article 2.1

7. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body pointed out that the chapeau of Article 2.1 "frames the central inquiry as a determination as to whether a subsidy is specific to 'certain enterprises' within the jurisdiction of the granting authority".<sup>9</sup>

#### 1.3.2.1 "certain enterprises"

8. The Panel in *US – Upland Cotton* considered that an "industry" or "group of industries", for the purposes of the chapeau of Article 2, may generally be understood in terms of producers of particular types of product, although the breadth of this concept of "industry" may depend on several factors in a given context. Hence, the specificity of a subsidy can only be assessed on a case-by-case basis:

"According to the text of Article 2 of the *SCM Agreement*, a subsidy is 'specific' if it is specific to an enterprise or industry or group of enterprises or industries (referred to in the *SCM Agreement* as "certain enterprises") within the jurisdiction of the granting authority. This is one way in which the *SCM Agreement* serves to define requirements as to the 'recipients' of the benefit bestowed by a subsidy. Beyond setting out this rather general principle, Article 2 of the *SCM Agreement* does not speak with precision about when 'specificity' may be found.

Looking more closely at the textual terms used in the chapeau of Article 2 of the *SCM Agreement*, the term 'industry' may be defined as 'a particular form or branch of productive labour; a trade; a manufacture'. 'Specificity' extends to a group of industries because the words 'certain enterprise' are defined broadly in the opening terms of Article 2.1, as an enterprise or industry or group of enterprises or industries.

...

We nevertheless believe that an industry, or group of 'industries', may be generally referred to by the type of products they produce. To us, the concept of an 'industry' relates to producers of certain products. The breadth of this concept of 'industry' may depend on several factors in a given case. At some point that is not made precise in the text of the agreement, and which may modulate according to the particular circumstances of a given case, a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products. The plain words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition. Whether a subsidy is specific can only be assessed on a case-by-case basis.

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<sup>7</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.130.

<sup>8</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.123.

<sup>9</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 366; Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.164.

We see merit in the shared view of the parties that the concept of "specificity" in Article 2 of the *SCM Agreement* serves to acknowledge that some subsidies are broadly available and widely used throughout an economy and are therefore not subject to the Agreement's subsidy disciplines. The footnote to Article 2.1 defines the nature of 'objective criteria or conditions' which, if used to determine eligibility, would preclude an affirmative conclusion of specificity. Such criteria are 'neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise.'"<sup>10</sup>

9. The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* considered the meaning of "certain enterprises" in Article 2:

"Furthermore, a subsidy is specific under Article 2.1(a) of the *SCM Agreement* when the explicit limitation reserves access to that subsidy to 'certain enterprises'. The chapeau of Article 2.1 establishes that the term 'certain enterprises' refers to 'an enterprise or industry or group of enterprises or industries'. We first note that the word 'certain' is defined as '[k]nown and particularized but not explicitly identified: (with sing. noun) a particular, (with pl. noun) some particular, some definite'. The word 'group', in turn, is commonly defined as '[a] number of people or things regarded as forming a unity or whole on the grounds of some mutual or common relation or purpose, or classed together because of a degree of similarity'. Turning to the nouns qualified by 'certain' and 'group', we see that 'enterprise' may be defined as '[a] business firm, a company', whereas 'industry' signifies '[a] particular form or branch of productive labour; a trade, a manufacture'. We note that the panel in *US – Upland Cotton* considered that 'an industry, or group of 'industries', may be generally referred to by the type of products they produce'; that 'the concept of an 'industry' relates to producers of certain products'; and that the 'breadth of this concept of 'industry' may depend on several factors in a given case'.<sup>11</sup> The above suggests that the term 'certain enterprises' refers to a single enterprise or industry or a class of enterprises or industries that are known and particularized. We nonetheless agree with China that this concept involves 'a certain amount of indeterminacy at the edges', and with the panel in *US – Upland Cotton* that any determination of whether a number of enterprises or industries constitute 'certain enterprises' can only be made on a case-by-case basis."<sup>12</sup>

10. In *EC and certain member States – Large Civil Aircraft*, the Appellate Body addressed a subsidy programme in which separate groupings of entities had access to separate funding pools:

"[W]e do not consider that explicit limitations on access to a subsidy to entities active in one sector of the economy will produce a different result under Article 2.1(a) by virtue of the fact that separate groupings of entities have access to other pools of funding under that programme. Certainly, if access to the same subsidy is limited to some grouping of enterprises or industries, an investigating authority or panel would be required to assess whether the eligible recipients can be collectively defined as 'certain enterprises'. Where access to certain funding under a subsidy programme is explicitly limited to a grouping of enterprises or industries that qualify as 'certain enterprises', this in our view leads to a provisional indication of specificity within the meaning of Article 2.1(a), irrespective of how other funding under that programme is distributed. The European Union does not challenge the Panel's conclusion that the entities eligible for R&TD grants in the aeronautics sector may be considered to constitute 'certain enterprises'. We also consider that, on the basis of the evidence before it, the Panel could properly have concluded that those eligible to receive funding allocated to research in the aeronautics sector qualified as 'certain enterprises'. For these reasons, we see no grounds to disturb the Panel's conclusion that the evidence before it 'indicate[d] that amounts of subsidization were explicitly

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<sup>10</sup> Panel Report, *US – Upland Cotton*, paras. 7.1139, 7.1140, 7.1142 and 7.1143.

<sup>11</sup> (footnote original) Panel Report, *US – Upland Cotton*, para. 7.1142. We note that understanding "industry" by reference to the producers of a particular product is also consistent with Article 16.1 of the *SCM Agreement*, which defines "domestic industry" as "the domestic producers as a whole of the like products ...".

<sup>12</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373.

set aside under each of the relevant Framework Programmes for the research efforts of 'certain enterprises'."<sup>13</sup>

11. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)* disagreed with the view that an enterprise owned by a public entity cannot be considered an enterprise within the meaning of Article 2.1, and reasoned that the ownership of an enterprise is not pertinent to a specificity analysis under this provision:

"The *chapeau* of Article 2.1 explicitly directs panels to assess whether a subsidy is 'specific to an enterprise or industry or group of enterprises or industries (referred to in {the SCM} Agreement as 'certain enterprises')'. The notion of specificity within the meaning of the SCM Agreement therefore encompasses the universe of entities that constitute 'certain enterprises', as determined in light of the principles in subparagraphs (a) through (c) of Article 2.1. We therefore do not see the pertinence of subsidy recipients that fall outside the definition of an 'enterprise' for a panel's determination of whether a subsidy is specific to 'certain enterprises'.

It follows that, if a subsidy is found to be specific 'to an enterprise or industry or group of enterprises or industries', the fact that this subsidy has also been granted to certain other entities that do not fall within the definition of an 'enterprise' has no bearing on the finding of specificity that has to be made with regard to the group of 'enterprises'. We recall, in this regard, the Appellate Body's statement in the context of Article 2.1(a) that '{w}here access to certain funding under a subsidy programme is explicitly limited to a grouping of enterprises or industries that qualify as 'certain enterprises', this ... leads to a provisional indication of specificity ... irrespective of how other funding under that programme is distributed.' Similarly, if funding under the same subsidy programme is granted to certain enterprises, as well as to other entities that do not constitute 'enterprises' within the meaning of Article 2, the specificity of the subsidy programme should be assessed only by reference to those entities that constitute 'enterprises'."<sup>14</sup>

#### 1.3.2.2 "jurisdiction of the granting authority"

12. In *US – Countervailing Measures (China)*, the Appellate Body pointed out that the identification of the jurisdiction of the granting authority is a "preliminary step providing a framework to conduct the specificity analysis".<sup>15</sup> The Appellate Body also stated that a proper identification of the jurisdiction of the granting authority requires an analysis of both the "granting authority" and its "jurisdiction" in a conjunctive manner. This identification involves a "holistic analysis" of the relevant facts and evidence in each case:

"[P]rovided that an investigating authority adequately substantiates any finding it makes as to whether the jurisdiction covers the entire territory of the relevant WTO Member or is limited to a designated geographical region within that territory, in conducting this holistic assessment it would normally also identify the granting authority."<sup>16</sup>

13. The Appellate Body also stated that an "essential part" of the specificity analysis is a proper determination of "whether the relevant *jurisdiction* is that of the central government or whether it is that of a regional or local government, and whether the granting authority therefore operates at a central, regional, or local level".<sup>17</sup> The importance of this determination lies in the question of specificity:

"'[I]f the granting authority was a regional government, a subsidy available to enterprises throughout the territory over which that regional government had jurisdiction would not be specific.' Conversely, if the granting authority was the

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<sup>13</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 949.

<sup>14</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, paras. 5.257 – 5.258.

<sup>15</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.169.

<sup>16</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.168.

<sup>17</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.166.



central government, a subsidy available to the very same enterprises would be specific."<sup>18</sup>

14. The Appellate Body further indicated that the identification of the jurisdiction of the granting authority will be informed by the investigating authority's determination of a subsidy under Article 1.1:

"We recall that the chapeau of Article 2.1 defines the specificity inquiry as one that seeks 'to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific' to certain enterprises within the jurisdiction of the granting authority. By explicitly linking this provision with Article 1.1 of the SCM Agreement, the chapeau of Article 2.1 indicates that an investigating authority's determination under Article 1.1 as to the existence of a subsidy will *inform* the assessment of whether such subsidy is specific to certain enterprises 'within the jurisdiction of the granting authority'. Indeed, in determining whether a financial contribution exists, investigating authorities must inquire into the nature of the financial contribution at issue and determine whether such contribution was provided by the 'government', by 'any public body within the territory of a Member', or by a 'private body' entrusted or directed by the government."<sup>19</sup>

15. The Appellate Body added that this step in Article 2.1 does not require an investigating authority "to identify the jurisdiction of the granting authority in an explicit manner or in any specific form, as long as it is discernible from the determination".<sup>20</sup>

### **1.3.3 Article 2.1(a)**

#### **1.3.3.1 "legislation pursuant to which the granting authority operates"**

16. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, the Panel interpreted the term "legislation pursuant to which the granting authority operates" in Article 2.1(a) to mean "the legislation that defines the criteria of eligibility for a subsidy" based on the Appellate Body's statement in *US – Carbon Steel (India)* that "'eligibility is key to a consideration of *de jure* specificity under subparagraphs (a) and (b) of Article 2.1 of the SCM Agreement'".<sup>21</sup>

#### **1.3.3.2 *De jure* specificity**

17. In *US – Countervailing Measures (China)*, the Appellate Body summarized its description of the analysis on *de jure* specificity:

"[T]he language in subparagraphs (a) and (b) directs an investigating authority to scrutinize any explicit limitation of access to a subsidy or look for the existence of objective conditions or criteria governing eligibility for a subsidy. In cases where an examination of the nature and content of the challenged measure indicates that access to a subsidy is *explicitly* limited to certain enterprises or, alternatively, if there are 'criteria or conditions' governing the eligibility for a subsidy that are spelled out in *law, regulation, or other official document*, an investigating authority will normally begin by examining this evidence in the light of subparagraphs (a) and (b) in order to determine whether the subsidy is *de jure* specific. This analysis under subparagraphs (a) and (b) may lead an investigating authority to conclude that a subsidy is *de jure* specific within the meaning of Article 2.1(a), or that a subsidy is *not de jure* specific because there are objective criteria or conditions that are clearly spelled out in law, regulation, or other official document."<sup>22</sup>

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<sup>18</sup> Appellate Body Report, *US – Countervailing Measures (China)*, paras. 4.165-4.166.

<sup>19</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.167.

<sup>20</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.169.

<sup>21</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, para. 8.827.

<sup>22</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.120.



### 1.3.3.3 "explicitly limits"

18. The Panel in *EC and certain member States – Large Civil Aircraft* defined the term "explicitly limits" in Article 2.1(a) as follows:

"The specificity principle set out in Article 2.1(a) focuses on whether the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises. It follows from the ordinary meaning of the word 'explicit' that it is not any limitation on access to a subsidy to certain enterprises that will make it specific within the meaning of Article 2.1(a), but only a limitation that '[d]istinctly express[es] all that is meant; leaving nothing merely implied or suggested'; a limitation that is 'unambiguous' and 'clear'. In *US – Upland Cotton*, the panel observed that the concept of specificity under Article 2.1 of the SCM Agreement has to do with whether a subsidy is 'sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products'. While we can broadly agree with this statement (particularly in the context of the facts at issue in *US – Upland Cotton*), we would add that it is not only a limitation to a 'group of producers of certain products' that is the focus of the concept of specificity. In our view, the notion of specificity extends to understanding whether a subsidy is sufficiently broadly available throughout an economy so as not to benefit 'certain enterprises' as defined in Article 2.1 – that is, a particular enterprise or industry or a particular group of enterprises or industries. Thus, a finding of specificity under Article 2.1(a) requires the establishment of the existence of a limitation that expressly and unambiguously restricts the availability of a subsidy to 'certain enterprises', and thereby does not make the subsidy 'sufficiently broadly available throughout an economy'."<sup>23</sup>

19. Along the same lines, the Panel in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)* stated that:

"Article 2.1(a) focuses on whether the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to 'certain enterprises', as defined in the chapeau to Article 2. According to the ordinary meaning of the term 'explicit', not just any limit on access to a subsidy will render it specific within the meaning of Article 2.1(a). Rather, the limitation must 'distinctly express all that is meant; leaving nothing merely implied or suggested'. The limitation must be 'unambiguous' and 'clear'. In other sections of the SCM Agreement, such as Article 3, which refers to 'in law or in fact' export contingency, panels and the Appellate Body have distinguished between *de jure* and *de facto* analyses by stating that a *de jure* analysis should be confined to the text of the relevant legislation or instrument in issue. Although Article 2.1(a) of the SCM Agreement does not specifically refer to 'in law' or '*de jure*' specificity, we note that Article 2.1(c) refers to 'in fact' specificity, perhaps as a means of distinguishing the analysis required under Article 2.1(c) from that required under Article 2.1(a). However, given that Article 2.1(a) provides that 'where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy', it is clear that the express limitation can be found either in the legislation by which the granting authority operates, or in other statements or means by which the granting authority expresses its will."<sup>24</sup>

20. In *US – Ripe Olives from Spain*, the Panel found that Article 2.1(a) does not require that the source of an explicit limitation on access to a subsidy be based solely on the criteria governing eligibility for the subsidy:

"We do not see anything inherent in this meaning, or in the terms of Article 2.1(a) more broadly, to suggest that the existence of an explicit limitation on access to a subsidy must be determined solely based on the eligibility criteria for any subsidy under a particular programme. Article 2.1(a) does not, for example, prescribe that any particular feature of the legislation pursuant to which the granting authority operates must be examined or be the source of an explicit limitation on access to a subsidy. On

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<sup>23</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 949.

<sup>24</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 7.190.

the contrary, the analysis that is called for under Article 2.1(a) simply focuses on the granting authority, or the legislation pursuant to which the granting authority operates, *without further precision or qualification*. In our view, this suggests that in principle any one or more aspects of the legislation pursuant to which the granting authority operates may potentially – and depending upon the facts – serve to demonstrate the existence of an explicit limitation on 'access' to a subsidy. What matters under Article 2.1(a) is that the granting authority, or the *legislation* pursuant to which the granting authority operates, is shown to limit explicitly access to a subsidy. To this extent, we do not understand Article 2.1(a) to preclude the possibility of a finding of *de jure* specificity based on the rules governing the calculation of subsidy amounts available under a programme. However, at the same time, because the rules governing the calculation of the amount of a subsidy may not be the only feature of a subsidy programme bearing upon 'the right or opportunity to benefit from or use' a subsidy, a finding of *de jure* specificity that ignores other relevant features of the subsidy programme would not be well-founded. Thus, although Article 2.1(a) does not exclude the possibility of grounding a finding of *de jure* specificity on the criteria or conditions governing the amount of a subsidy, any such reliance must not be selective in the light of other relevant *de jure* features of the subsidy programme."<sup>25</sup>

21. The Panel also read Article 2.1(a) and (b) as operating simultaneously with one another:

"In our view, the overlapping subject matter and binary nature of the purpose of the principles set out in Articles 2.1(a) and 2.1(b) suggest that they operate simultaneously. Under this reading of the two provisions, an indication of *non-specificity* under Article 2.1(b) would normally imply that the granting authority, or the legislation pursuant to which the granting authority operates, could *not* be found to explicitly limit access to a subsidy to certain enterprises, within the meaning of Article 2.1(a). The fact that the rules governing the eligibility for, and the amount of, a subsidy *do not* favour certain enterprises over others (within the meaning of footnote 2 of the SCM Agreement) would normally suggest that access to that subsidy was not explicitly limited to certain enterprises. Likewise, facts that would normally signal an *absence of non-specificity*, within the meaning of Article 2.1(b), could also drive a conclusion of specificity under Article 2.1(a). This could arise, for example, when the rules governing the *eligibility for a subsidy* are not neutral and favour certain enterprises (within the meaning of footnote 2).

...

[I]n our view, the fact that Article 2.1(b) refers to rules governing the eligibility for, *as well as* the amount of, a subsidy, suggests that evidence of both factors may be important when considering the question of specificity under Article 2.1(a), given that both provisions direct scrutiny towards the same subject-matter, which is *the granting authority or the legislation pursuant to which a granting authority operates*."<sup>26</sup>

22. In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Panel agreed with the complainant's unchallenged claim that each of the subsidies at issue was "specific". Because "each of the challenged financial contributions is negotiated with and provided to the relevant Airbus subsidiary, with the parent company ... in some instances acting as a co-contractee or guarantor", the Panel concluded that the "subsidies granted under each of the contracts are explicitly limited to 'certain enterprises' within the meaning of Article 2.1(a) of the SCM Agreement."<sup>27</sup>

23. In the context of analysing unwritten subsidy measures, the Appellate Body in *US – Countervailing Measures (China)* stated:

"While we do not preclude that there may be circumstances where 'unwritten measures' providing subsidies may be analysed under the principles set forth in subparagraphs (a) and (b), we note that an analysis under these provisions focuses

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<sup>25</sup> Panel Report, *US – Ripe Olives from Spain*, para. 7.25.

<sup>26</sup> Panel Report, *US – Ripe Olives from Spain*, paras. 7.28-7.30.

<sup>27</sup> Panel Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, para. 6.658.

on *explicit* limitation of access to the subsidy to certain enterprises. While the subsidy measure at issue may be unwritten, in order to be *de jure* specific, the granting authority or the legislation pursuant to which the granting authority operates must *explicitly* limit access to the subsidy at issue. Such explicit limitation, in our view, would ordinarily be found in written instruments. This is borne out in subparagraph (b), which establishes that the criteria or conditions governing the eligibility for a subsidy that should be examined pursuant to this provision 'must be *clearly spelled out* in law, regulation, or other official document'. By contrast, a *de facto* specificity analysis under subparagraph (c) would appear to be most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are *not* explicitly provided for in a law or regulation."<sup>28</sup>

24. In *US – Ripe Olives from Spain*, the Panel held that evidence of a past subsidy programme which is no longer in force could still be considered for the purpose of determining *de jure* specificity:

"[W]e do not see in the terms of Article 2.1(a) any *per se* prohibition on the relevance and consideration of facts pertaining to a past subsidy programme no longer in force for the purpose of determining *de jure* specificity. On the contrary, we agree in this respect with the United States that a reading of Article 2.1(a) that would preclude the possibility of taking such information into account might create an exception (which the United States referred to as 'a loophole') for subsidy programmes that favour certain enterprises based on explicit access limitations found in earlier laws or regulations or ones no longer in force. Thus, in our view, it follows from the absence of any limitation in the text of Article 2.1(a) that an investigating authority is entitled to review and rely upon *any fact* it considers relevant to identifying and understanding whether the actions of the 'granting authority' in providing the subsidy under investigation or the 'legislation' pursuant to which it operates, explicitly limit 'access' to a subsidy to certain enterprises."<sup>29</sup>

25. In *US – Softwood Lumber VII*, the Panel rejected Canada's argument that a limitation on access to a small number of excluded activities did not "explicitly" limit the Class 29 programme to certain enterprises or industries<sup>30</sup>:

"[W]e consider that an unbiased and objective authority could consider, as the USDOC did, based on the text of the Income Tax Regulations, that access to the Class 29 programme is limited. Article 2.1 does not specify 'any numerical threshold pointing to a minimum or maximum number of things' required in order to qualify as a 'group of certain enterprises or industries' or 'certain enterprises'. The phrase 'certain enterprises' rather means that the relevant enterprises must be 'known and particularized', but not necessarily 'explicitly identified'. We thus reject Canada's argument that the limitation on access is not 'explicit' because the exclusion is limited to a small number of activities."<sup>31</sup>

#### **1.3.3.4 Individual payments under a generalized programme necessarily specific?**

26. In the context of a dispute regarding an investigating authority's determination of *de jure* specificity, the Panel in *Japan – DRAMs (Korea)* addressed the concern that, if an investigating authority were to focus on individual payments made under a subsidy programme, rather than the subsidy programme *per se*, a finding of specificity would always ensue:

"In reviewing Korea's claim, we have given careful consideration to Korea's argument that the JIA's approach to specificity would mean that investigating authorities would no longer need to show that programmes were specific, but could focus instead on specific transactions under those programmes. As a general matter, though, if an investigating authority were to focus on an individual transaction, and that transaction flowed from a generally available support programme whose normal operation would

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<sup>28</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.129.

<sup>29</sup> Panel Report, *US – Ripe Olives from Spain*, para. 7.37.

<sup>30</sup> Panel Report, *US – Softwood Lumber VII*, para. 7.716.b.

<sup>31</sup> Panel Report, *US – Softwood Lumber VII*, para. 7.724.

generally result in financial contributions on pre-determined terms (that are therefore not tailored to the recipient company), that individual transaction would not, in our view, become 'specific' in the meaning of Article 2.1 simply because it was provided to a specific company. An individual transaction would be 'specific', though, if it resulted from a framework programme whose normal operation (1) does not generally result in financial contributions, and (2) does not pre-determine the terms on which any resultant financial contributions might be provided, but rather requires (a) conscious decisions as to whether or not to provide the financial contribution (to one applicant or another), and (b) conscious decisions as to how the terms of the financial contribution should be tailored to the needs of the recipient company."<sup>32</sup>

27. The Panel in *Japan – DRAMs (Korea)* also observed that the relevant restructuring subsidies were provided pursuant to government entrustment or direction, evidenced in part by the government's intent to save the recipient company. This led the Panel to conclude:

"In general, subsidies which are provided pursuant to government entrustment or direction motivated by an intent to save a single company from insolvency might reasonably be found to be specific to that company."<sup>33</sup>

### **1.3.4 Article 2.1(b)**

#### **1.3.4.1 "objective criteria or conditions"**

28. In *US – Softwood Lumber VII*, the Panel rejected Canada's argument that the Class 29 programme was not specific under Article 2.1(a) of the SCM Agreement because the programme established "objective criteria or conditions" in the sense of Article 2.1(b) of the SCM Agreement.<sup>34</sup> The Panel stated:

"Considering that the Income Tax Regulations explicitly excluded enterprises involved in certain activities from the Class 29 programme, we are of the view that the USDOC properly determined that the Income Tax Regulations favour certain enterprises over others, and thus the eligibility criteria are not objective. Therefore, we reject Canada's allegation that the criteria governing eligibility for the Class 29 programme do not favour certain enterprises over others and are 'objective' within the meaning of Article 2.1(b)."<sup>35</sup>

#### **1.3.4.2 Examination of the broader legislative framework for purposes of non-specificity**

29. The Panel in *US – Softwood Lumber VII* also rejected Canada's argument that, because the activities excluded from the Class 29 programme were eligible for other tax deductions and credits under the Income Tax Act, the USDOC should have examined the potential specificity of the Class 29 programme in the context of other provisions of the Income Tax Act.<sup>36</sup>

30. The Panel agreed with the parties that the consideration of the broader legislative framework in a specificity analysis may be relevant in certain circumstances<sup>37</sup>:

"We agree with the parties that the consideration of the broader legislative framework under a specificity analysis may be relevant in certain circumstances. For instance, as indicated by Canada, in *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, both the panel and the Appellate Body considered that the allocation of patent rights under NASA/USDOD R&D contracts has to be examined in the broader context for the allocation of patent rights to contractors under all R&D contracts with other government departments and agencies. This is because 'the allocation of patent rights or waivers under the NASA/USDOD contracts and Agreements operates within the legislative and regulatory framework that applies to R&D activities performed by all enterprises for US

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<sup>32</sup> Panel Report, *Japan – DRAMs (Korea)*, para. 7.374.

<sup>33</sup> Panel Report, *Japan – DRAMs (Korea)*, para. 7.373.

<sup>34</sup> Panel Report, *US – Softwood Lumber VII*, paras. 7.727-7.729.

<sup>35</sup> Panel Report, *US – Softwood Lumber VII*, para. 7.730.

<sup>36</sup> Panel Report, *US – Softwood Lumber VII*, paras. 7.731-7.732.

<sup>37</sup> Panel Report, *US – Softwood Lumber VII*, para. 7.733.

Government departments and agencies'. The Appellate Body upheld the panel's finding that the allocation of patent rights under the NASA/USDOD contracts is not specific. The Appellate Body explained that both under the general regulations and under a NASA waiver, ownership rights over the invention will belong solely to the contractor, although the mechanism for the initial allocation of patent rights is formally different. Put differently, the result of NASA's patent regulation is the same as under the general regulation, even though the formal procedure is different."<sup>38</sup>

31. The Panel also considered, however, that a subsidy does not become "non-specific" simply because the legislative framework at issue also provides other, different types of subsidies to other enterprises:

"At the same time, the Appellate Body cautioned that the examination of specificity under Article 2.1 should not include subsidies that are different from those challenged by the complaining Member. In particular, per the Appellate Body, a subsidy, access to which is limited to 'certain enterprises', does not become non-specific merely because there are other subsidies that are provided to other enterprises pursuant to the same legislation. In the present case, Canada argues that the USDOC should have examined other tax deductions and credits under the Income Tax Act applicable to the activities excluded from the Class 29 programme. As indicated above, during the investigation, a Canadian interested party referred to certain tax exemptions for individuals engaged in farming and fishing, as well as deductions for the oil and gas and mining industries. Even if these tax exemptions benefit the excluded activities, Canada does not explain how these tax benefits relate to the type of subsidy at issue, i.e. the Class 29 programme, or how these tax benefits lead to the same result as the Class 29 programme. The subsidy at issue, investigated by the USDOC, is the ACCA for Class 29 assets. The evidence before the USDOC showed that the enterprises and industries that are not eligible for the Class 29 programme, are subject to a standard rate of depreciation under Class 43. Based on the above, we consider that Canada has not demonstrated that the examination of other tax benefits was warranted in this case, or how the assessment of the Class 29 programme in the context of other tax benefits would lead to the finding of non-specificity."<sup>39</sup>

### **1.3.5 Article 2.1(c): *de facto* specificity**

#### **1.3.5.1 General**

32. In the context of examining whether a measure is *de facto* specific under subparagraph (c), the Appellate Body in *US – Countervailing Measures (China)* explained:

"[I]n a situation where the evidence suggests that a subsidy is not *de jure* specific because the conditions set out in subparagraph (b) are satisfied, subparagraph (c) of Article 2.1 clarifies that the specificity inquiry does not necessarily end at that point because, 'notwithstanding any appearance of non-specificity' resulting from the application of Article 2.1(a) and (b), a subsidy may nevertheless be found to be 'in fact' specific."<sup>40</sup>

33. In conducting this examination, the Appellate Body noted that an investigating authority should focus on evidence that relates to the factors listed under that provision, namely: (i) the use of a subsidy programme by a limited number of certain enterprises; (ii) the predominant use by certain enterprises; (iii) the granting of disproportionately large amounts of subsidy to certain enterprises; and (iv) the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy.<sup>41</sup>

34. In *US – Softwood Lumber IV*, Canada argued that a subsidy is "specific" only when the government "deliberately limits" access to certain enterprises. This argument was rejected by the

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<sup>38</sup> Panel Report, *US – Softwood Lumber VII*, para. 7.733.

<sup>39</sup> Panel Report, *US – Softwood Lumber VII*, para. 7.734.

<sup>40</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.121.

<sup>41</sup> Appellate Body Report, *US – Countervailing Measures (China)*, fn 635 to para. 4.121. See also Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras. 7.223-7.230.

Panel on the grounds that Article 2 of the SCM Agreement is concerned with the distortion that is created by a subsidy which, either in law or in fact, is not broadly available. Furthermore, in the view of the Panel, there is:

"[N]o basis in the text of Article 2, and 2.1 (c) SCM Agreement in particular, for Canada's argument that if the inherent characteristics of the good provided limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, i.e. to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products."<sup>42</sup>

### **1.3.5.2 "other factors may be considered"**

35. On the argument by Canada that an investigating authority is required to examine all four factors mentioned in Article 2.1(c) in order to determine *de facto* specificity, the Panel in *US – Softwood Lumber IV* stated that Article 2.1(c) provides that if there are reasons to believe that the subsidy may in fact be specific, other factors "may" be considered. In the view of the Panel, the use of the verb "may," rather than "shall" indicates that if there are reasons to believe that the subsidy may in fact be specific, an authority *may* want to look at any of the four factors or indicators of specificity.<sup>43</sup>

#### **1.3.5.2.1 "use of a subsidy programme by a limited number of certain enterprises"**

36. In the context of determining *de facto* specificity, in *US – Countervailing Measures (China)*, the Appellate Body considered that the reference to "use of a subsidy programme" in Article 2.1(c) "suggests that it is relevant to consider whether subsidies have been provided to recipients pursuant to a plan or scheme of some kind".<sup>44</sup>

37. In *US – Countervailing Measures (China)*, the Appellate Body stressed the evidentiary nature of the analysis required to examine this factor:

"[T]he fact that the first factor in Article 2.1(c) refers to a 'subsidy programme' does *not* mean that a *de facto* specificity inquiry requires identification of an explicit subsidy programme implemented through law or regulation, or through other explicit means. Rather, the relevant inquiry with respect to the first of the 'other factors' under Article 2.1(c) seeks to determine whether the subsidy at issue is, in fact, specific by considering whether the relevant subsidy programme is used by a limited number of certain enterprises. By its very nature, such an analysis normally focuses on evidence other than of the kind found in written documents or express acts or pronouncements by a granting authority."<sup>45</sup>

38. With regard to the evidence on the existence of such a programme, the Appellate Body explained that it could be found in various forms:

"Evidence regarding the nature and scope of a subsidy programme may be found in a wide variety of forms, for instance, in the form of a law, regulation, or other official document or act setting out criteria or conditions governing the eligibility for a subsidy. A subsidy scheme or plan may also be evidenced by a systematic series of actions pursuant to which financial contributions that confer a benefit have been provided to certain enterprises. This is so particularly in the context of Article 2.1(c), where the inquiry focuses on whether there are reasons to believe that a subsidy is, in fact, specific, even though there is no explicit limitation of access to the subsidy set out in, for example, a law, regulation, or other official document."<sup>46</sup>

39. In *US – Countervailing Measures (China)*, the Appellate Body added that, in addition to this evidence, the examination of the existence of a plan or scheme regarding the use of the subsidy at

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<sup>42</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.116.

<sup>43</sup> Panel Report, *US – Softwood Lumber IV*, para. 7.123.

<sup>44</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.

<sup>45</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.146.

<sup>46</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.141.



issue may also require assessing the "operation of such plan or scheme over a period of time".<sup>47</sup> The Appellate Body agreed with the Panel that "in the absence of any written instrument or explicit pronouncement, evidence of a 'systematic activity or series of activities' may provide a sufficient basis to establish the existence of an unwritten subsidy programme in the context of assessing *de facto* specificity under the first factor of Article 2.1(c) of the SCM Agreement".<sup>48</sup>

40. Furthermore, the Appellate Body cautioned that the "mere fact that financial contributions have been provided to certain enterprises is not sufficient, however, to demonstrate that such contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c) of the SCM Agreement". Rather, "an investigating authority must have adequate evidence of the existence of a *systematic* series of actions pursuant to which financial contributions that confer a benefit are provided to certain enterprises".<sup>49</sup>

41. Along the same lines, the Panel in *US – Pipes and Tubes (Turkey)* held that a list of transactions "may serve as potential evidence demonstrating that there is a *systematic* series of actions". However, the Panel added that "such a list alone is not sufficient evidence, particularly where the prices of the transactions vary with some prices higher than the benchmark prices and some lower than the benchmark prices".<sup>50</sup> In the Panel's view, "the number or frequency of the subsidies provided under an alleged subsidy programme must be analysed before the *systematic* nature of the subsidy provision can be determined".<sup>51</sup>

42. When considering the use of a subsidy by a limited number of certain enterprises, the Panel in *US – Carbon Steel (India) (Article 21.5 - India)* agreed with India's argument that a "contradiction" in the USDOC's Preliminary and Final Determinations concerning the "limited users" of the subsidy at issue resulted in internal contradictions concerning the reasoning for the determination of *de facto* specificity under Article 2.1(c).<sup>52</sup> The USDOC's Preliminary Determination defined the subsidy programme at issue as the "direct provision of a good" to "Indian [steelmakers] in exchange for a per unit fee". On the other hand, the Final Determination expanded the finding of the "limited users" of the subsidy programme for domestic steel makers alone to domestic steel makers and standalone miners.<sup>53</sup> The Panel was unable to conclude that the USDOC provided a reasoned and adequate explanation for its finding that the mining leases for the iron ore was *de facto* specific under article 2.1(c). The Panel stated:

"The United States has not reconciled these aspects of the USDOC's explanation before us. On one hand, the United States argued that the USDOC's determination was based on 'limited use' by 'two industries, specifically steel producers and mining companies'. On the other hand, the United States' maintained that the 'use of the iron ore from leases is limited to steel companies'. We agree with India that there is no explanation in the USDOC's determination setting out a rationale for the limited nature of the programme at issue *vis-à-vis* 'standalone mining companies', as distinct from steelmakers."<sup>54</sup>

43. With regard to an inquiry into the existence of an unwritten subsidy programme, the Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)* agreed with the Panel's view that "the mere fact that financial contributions have been provided to certain enterprises is not sufficient to demonstrate that such financial contributions have been granted pursuant to a plan or scheme for purposes of Article 2.1(c)".<sup>55</sup> The Appellate Body explained that "in establishing an unwritten subsidy programme, adequate evidence is required of a *systematic* series of actions pursuant to which financial contributions that *confer a benefit* are provided to certain enterprises",<sup>56</sup> and added that:

"Particularly where the existence of an unwritten 'subsidy programme' is established on the basis of a 'series of actions', it is important that the investigating authority

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<sup>47</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.142.

<sup>48</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.149.

<sup>49</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.143.

<sup>50</sup> Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.158.

<sup>51</sup> Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.159.

<sup>52</sup> Panel Report, *US – Carbon Steel (India) (Article 21.5 - India)*, para. 7.199.

<sup>53</sup> Panel Report, *US – Carbon Steel (India) (Article 21.5 - India)*, para. 7.197.

<sup>54</sup> Panel Report, *US – Carbon Steel (India) (Article 21.5 - India)*, para. 7.203.

<sup>55</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.231.

<sup>56</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.233.



properly explain why it considers that series of actions to be 'systematic', so as to evidence the existence of a *de facto* scheme or plan. This avoids that mere repeat action of upstream producers providing inputs to downstream recipients invariably leads to a finding of *de facto* specificity, which would circumvent the legal disciplines of Article 2.1(c)."<sup>57</sup>

44. However, in a separate opinion in *US – Countervailing Measures (China)* (Article 21.5 – China), one Division member considered that the Panel and the majority of the Appellate Division gave the term "subsidy programme" a meaning that is not supported by the text and is contrary to previous Appellate Body decisions.<sup>58</sup> According to this Division member, the term used in Article 2.1(c) has the sole purpose of giving a "conceptual form to the financial contribution and benefit by calling them a 'subsidy programme'"<sup>59</sup> and does not introduce an additional requirement for an investigating authority to "examine the volume and/or the frequency of transactions conferring a 'benefit' to determine whether 'subsidies' have been 'systematically' granted pursuant to a 'subsidy programme'".<sup>60</sup> The Division member stated that "[o]nce a subsidy programme has been identified, then the question is whether there is 'use of [that] subsidy programme by a limited number of certain enterprises'".<sup>61</sup>

#### **1.3.5.2.2 "predominant use by certain enterprises"**

45. In *EC and certain member States – Large Civil Aircraft*, the Panel discussed the meaning of a "predominant use" in the context of Article 2.1(c). Among other things, the Panel considered that:

"The second specificity factor identified in Article 2.1(c) is 'predominant use by certain enterprises'. As we have already noted, when read in the light of the first specificity factor ('use of a subsidy programme by a limited number of certain enterprises'), it is clear that this factor indirectly refers to 'predominant use' of 'a subsidy programme'. The ordinary meaning of the word 'predominant' includes 'constituting the main or strongest element; prevailing'. Thus, 'predominant use {of a subsidy programme} by certain enterprises' may be simply understood to be a situation where a subsidy programme is mainly, or for the most part, used by certain enterprises.

In considering whether there is 'predominant use [of a subsidy programme] by certain enterprises' for the purpose of making a finding of specificity, the last sentence of Article 2.1(c) requires that account be taken of: (i) 'the extent of diversification of economic activities within the jurisdiction of the granting authority'; and (ii) 'the length of time during which the subsidy programme has been in operation'. As with determining whether a subsidy has been granted in 'disproportionately large amounts', the relevance of these two factors to understanding whether there has been 'predominant use {of a subsidy programme} by certain enterprises' will depend upon the particular facts. Thus, for example, where a subsidy programme operates in an economy made up of only a few industries, the fact that those industries may have been the main beneficiaries of a subsidy programme may not necessarily demonstrate 'predominant use'. Rather, use of the subsidy programme by those industries may simply reflect the limited diversification of economic activities within the jurisdiction of the granting authority. On the other hand, the same subsidy programme operating in the context of a highly diversified economy that is used mainly, or for the most part, by only a few industries would tend to indicate 'predominant use'.

Likewise, when taking into account 'the length of time during which the subsidy programme has been in operation', the use of a subsidy programme by certain enterprises may not necessarily indicate 'predominant use' in the context of a relatively new subsidy programme that has not yet operated for enough time to understand its full impact on an economy. Moreover, it may not always make sense to determine whether there has been 'predominant use' over the entire life of a subsidy

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<sup>57</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.233.

<sup>58</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.274.

<sup>59</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.273.

<sup>60</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.274.

<sup>61</sup> Appellate Body Report, *US – Countervailing Measures (China)* (Article 21.5 – China), para. 5.273.

programme, where that programme has operated for decades that have witnessed a material change in the importance of the subsidized activities in the wider economy and/or the granting authority's economic priorities. As with determining whether a subsidy has been granted under a long-standing subsidy programme in 'disproportionately large amounts', a determination of whether there has been 'predominant use' of a long-standing subsidy programme should involve taking into account the extent to which it would be reasonable and appropriate to determine whether the subsidy at issue is in fact sufficiently broadly available throughout an economy so as not to benefit 'certain enterprises' on the basis of the entire duration of the subsidy programme or some shorter period of time."<sup>62</sup>

#### **1.3.5.2.3 "disproportionately large"**

46. In *EC and certain member States – Large Civil Aircraft*, the Panel discussed the meaning of a "disproportionately large" amount of a subsidy in the context of Article 2.1(c). Among other things, the Panel considered that:

"Something may be said to be 'disproportionate' when it is 'lacking proportion'. The ordinary meaning of the word 'proportion' includes 'a portion, a part, a share, esp. in relation to a whole', 'a relative amount or number', 'a comparative relation or ratio between things in size, quantity, number, etc.'. These meanings suggest that the inquiry that must be undertaken when assessing whether the amount of a subsidy is 'disproportionately large' will involve identifying the relationship between the amount of the subsidy at issue and something else that is 'a whole', and determining whether that relationship demonstrates that the amount of subsidy is greater than the amount it would need to be in order to be proportionate – *i.e.*, not lacking proportion. ...

...

In our view, the language of Article 2.1(c), when interpreted in its proper context and in the light of its object and purpose, suggests that where the subsidy at issue has been granted pursuant to a subsidy programme, that programme should normally be used for the purpose of identifying the 'baseline' or 'reference data' needed to perform a disproportionality analysis. However, as the United States points out, the absence of any explicit reference to 'a subsidy programme' in the language of Article 2.1(c) suggests that it does not *require* that a subsidy programme be used for this purpose in each and every factual circumstance."<sup>63</sup>

#### **1.3.5.3 "account be taken of"**

47. In *EC and certain member States – Large Civil Aircraft*, the Panel stated that:

"The last sentence of Article 2.1(c) provides that: 'In applying this subparagraph, *account shall be taken of* ... the length of time during which the subsidy programme has been in operation'. To take something into account means to take something into reckoning or consideration; to take something on notice. Therefore, in the context of the third specificity factor, the last sentence of Article 2.1(c) requires that the length of time during which the relevant subsidy programme has been in operation must form part of the *consideration or reckoning* of whether the amount of a subsidy granted to certain enterprises pursuant to that same subsidy programme is disproportionately large."<sup>64</sup>

#### **1.3.5.4 "length of time during which the subsidy programme has been in operation"**

48. In *US – Countervailing Measures (21.5 - China)*, China argued that the USDOC's had failed to take into account the length of time during which the subsidy programme had been in operation

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<sup>62</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.974-7.976.

<sup>63</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, paras. 7.961 and 7.964.

<sup>64</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.969.

and therefore, that the USDOC's *de facto* specificity determinations were inconsistent with Article 2.1(c) of the SCM Agreement.<sup>65</sup>

49. The Panel first noted that it would "not exclude that an investigating authority may, in some cases, be required to consider more than individual subsidy transactions during the period of investigation in order to properly take account of the length of time during which the relevant subsidy programme has been in operation."<sup>66</sup> However, the Panel pointed out that an investigating authority may be able to demonstrate that the duration of the programme is not the reason for the limited number of recipients of the subsidy, without establishing the total duration of the programme. Mindful of the fact that "a *de facto* specificity analysis under Article 2.1(c) would appear to be most pertinent and useful in the context of subsidies in respect of which eligibility or access limitations are not explicitly provided for in a law or regulation", the Panel noted that there may be inherent limits in an investigating authority's ability to evaluate the total duration of such a subsidy programme.<sup>67</sup> The Panel stated that:

"It is for this reason that Article 2.1(c) 'concedes a certain flexibility for investigating authorities to consider specificity in a number of factual scenarios that may arise' when making a determination of *de facto* specificity, while 'the last sentence of Article 2.1(c) function[s] as a safeguard that keeps in check this flexibility'. Depending on the different factual scenarios that may arise, we do not exclude that an investigating authority may comply with the obligation to take into account 'the length of time during which the subsidy programme has been in operation' without determining the full duration of the programme in question.

Based on the foregoing, we do not consider that Article 2.1(c) imposes in all cases a requirement to establish the total duration of the programme. Rather, to comply with the requirement of the last sentence of Article 2.1(c), it would be sufficient to show that the programme has been in operation for a duration that does not itself account for 'use of a subsidy programme by a limited number of certain enterprises'."<sup>68</sup>

50. The Panel in *US – Pipes and Tubes (Turkey)* confirmed that not only the length of time during which the subsidy programme has operated, but also the extent of the economic diversification are two mandatory factors and must therefore be taken into account whenever an investigating authority makes a *de facto* specificity determination. This does not depend upon whether an interested party in the proceeding raised the relevance of the two factors. Having said that, an investigating authority does not need to consider these two factors explicitly."<sup>69</sup>

51. In considering specificity under Article 2.1(c), the Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)* considered that the length of time during which a subsidy programme has been in operation must also be taken into account. According to the Appellate Body, however, "it does not follow from this that the entire period during which the programme has been in operation has necessarily to be chosen as the relevant time period in determining whether, under the second sentence of this provision, disproportionately large amounts of subsidy have been granted to certain enterprises".<sup>70</sup>

52. The Appellate Body in *US – Countervailing Measures (China) (Article 21.5 – China)* considered whether an investigating authority can be found to have complied with the requirement, found in the third sentence of Article 2.1(c) of the SCM Agreement, to take into account "the length of time during which the subsidy programme has been in operation" if the authority has failed to identify the underlying subsidy programme. According to the Appellate Body and contrary to what is suggested by the United States, "consideration of the duration of a subsidy programme would seem to presuppose that the relevant programme has been properly identified" or, in other words, "the requirement to establish the existence of a subsidy programme is part and

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<sup>65</sup> Panel Report, *US – Countervailing Measures (21.5 – China)* para. 7.261.

<sup>66</sup> Panel Report, *US – Countervailing Measures (21.5 – China)* para. 7.270.

<sup>67</sup> Panel Report, *US – Countervailing Measures (21.5 – China)*, para. 7.271.

<sup>68</sup> Panel Report, *US – Countervailing Measures (21.5 – China)*, paras. 7.272-7.273.

<sup>69</sup> Panel Report, *US – Pipes and Tubes (Turkey)*, para. 7.165.

<sup>70</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, para. 5.222.

parcel" of the obligation to consider the length of time during which the subsidy programme has been in operation.<sup>71</sup>

#### **1.3.5.5 Relationship with subparagraphs 2.1(a) and 2.1(b)**

53. In *US – Countervailing Measures (China)*, China argued that the first sentence of Article 2.1(c) conditions an examination of *de facto* specificity upon an "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b). The Appellate Body disagreed:

"[T]he word 'if' in the first sentence of subparagraph (c) relates to the phrase 'there are reasons to believe that the subsidy may in fact be specific', rather than to the subordinate clause 'notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b)'. Thus, the application of the principles laid down in subparagraphs (a) and (b) does not necessarily constitute a condition that must be fulfilled in order to examine 'other factors' under subparagraph (c)."<sup>72</sup>

#### **1.4 Article 2.2: regional specificity**

54. The Appellate Body in *US – Washing Machines* noted that Article 2.2 is concerned with "limitations on the geographical region(s) where the eligible enterprises are located".<sup>73</sup> The Panel in this dispute stated that the rationale of Article 2.2 is to cover subsidy programmes under which "governments and public bodies encourage particular enterprises to direct their resources to certain geographic regions, thereby interfering with the market's allocation of resources within the territory of [a] Member."<sup>74</sup>

55. In *US – Countervailing Measures (21.5 – China)*, the Panel noted that "the USDOC was [...] required to determine that the conditions for the provision of land within [an economic] zone were different and preferential to the conditions outside the zone in order to make a finding of regional specificity"<sup>75</sup> under Article 2.2.<sup>76</sup> The Panel acknowledged that the USDOC's regional specificity analysis hinged on the geographical limitation of the relevant subsidy, "insofar as it focused on 'whether the prices or terms of sale, including other incentives tied to the purchase of the land, inside the geographic region at issue, are different from those offered outside the geographic region'".<sup>77</sup> Therefore, the Panel concluded that it did "not consider the legal standard applied by the USDOC in the context of the Section 129 proceeding to be inconsistent with Article 2.2 of the SCM Agreement, nor that the questions asked by the USDOC during the investigation were irrelevant to establishing specificity."<sup>78</sup>

56. The Appellate Body in *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)* noted that the "term 'limited' in the text of Article 2.2 is not qualified by the word 'explicitly'. This suggests that, in principle, Article 2.2 covers both explicit and implicit limitations on access to a subsidy". The Appellate Body also observed that "Article 2.2 does not prescribe a particular manner in which a limitation on access to a subsidy must be imposed. Unlike Article 2.1(a), the text of Article 2.2 does not specify that such a limitation must necessarily be found in 'the legislation pursuant to which the granting authority operates', or that it must be imposed by the granting authority itself".<sup>79</sup>

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<sup>71</sup> Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.214.

<sup>72</sup> Appellate Body Report, *US – Countervailing Measures (China)*, para. 4.125.

<sup>73</sup> Appellate Body Report, *US – Washing Machines*, para. 5.213.

<sup>74</sup> Appellate Body Report, *US – Washing Machines*, para. 5.213.

<sup>75</sup> (footnote original) We note that the United States and China agree with this standard. (United States' response to Panel question No. 47(a), para. 219; China's response to Panel question No. 47, paras. 205-206).

<sup>76</sup> Panel Report, *US – Countervailing Measures (21.5 – China)*, para. 7.301.

<sup>77</sup> Panel Report, *US – Countervailing Measures (21.5 – China)*, para. 7.302.

<sup>78</sup> Panel Report, *US – Countervailing Measures (21.5 – China)*, para. 7.303.

<sup>79</sup> Appellate Body Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint) (Article 21.5 – EU)*, para. 5.297.

#### 1.4.1 "certain enterprises"

57. In *US – Washing Machines*, the Appellate Body stated that the term "certain enterprises" is a key component of the first sentence of Article 2.2:

"[A] finding of regional specificity depends on whether a subsidy programme limits availability to 'enterprises' that are located in a designated geographical region within the jurisdiction of the subsidizing Member."<sup>80</sup>

58. In *EC and certain member States – Large Civil Aircraft*, the Panel addressed the question whether a subsidy granted by a regional authority must, to be specific within the meaning of Article 2.2, not only be limited to a designated region within the territory of the granting authority, but must in addition be limited to only a subset of enterprises within that region. The Panel concluded that Article 2.2 is properly understood to provide that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region:

"Article 2.2 is not particularly clearly drafted. It could be understood, based on the text alone, as establishing specificity on the basis of a geographical limitation on the recipients ('within a designated region'), which is the United States' position. It could also be understood to establish specificity on the double basis posited by the European Communities – 'certain', i.e., not all, enterprises, 'within a designated region'. While the text, standing alone, is not unambiguous in this respect, when the text is considered in its context and in light of its object and purpose, it is clear to us that Article 2.2 is properly understood to provide that a subsidy available in a designated region within the territory of the granting authority is specific, even if it is available to all enterprises in that designated region."<sup>81</sup>

59. Likewise, the Panel in *US – Anti-Dumping and Countervailing Duties (China)* also considered the question whether the term "certain enterprises" in Article 2.2 covers all enterprises located within the designated geographical region within the jurisdiction of the granting authority, or is limited to some subset thereof; the Panel reached the same conclusion as the Panel in *EC and certain member States – Large Civil Aircraft*. The Panel stated that the term "certain enterprises" in Article 2.2 "refers to those enterprises located within, as opposed to outside, the designated geographical region in question, with no further limitation within the region being required".<sup>82</sup>

60. The Appellate Body in *US – Washing Machines* found that the term "certain enterprises" is not limited to entities with legal personality:

"Rather, an 'enterprise' may be located in a certain region for purposes of Article 2.2 if it effectively establishes its commercial presence in that region, including by setting up a sub-unit, such as a branch office or manufacturing facility, which may or may not have distinct legal personality."<sup>83</sup>

#### 1.4.2 "designation"

61. The Panel in *US – Anti-Dumping and Countervailing Duties (China)* also addressed the question whether a "designated geographical region" in the sense of Article 2.2 must necessarily have some sort of formal administrative or economic identity, or whether any identified tract of land within the territory of a granting authority can be a "designated geographical region" for the purposes of a specificity finding pursuant to Article 2.2. The Panel concluded that a "designated geographic region" in the sense of Article 2.2 "can encompass any identified tract of land within the jurisdiction of a granting authority".<sup>84</sup>

62. In *US – Washing Machines*, the Appellate Body agreed with the Panel's view that the identification of a region for purposes of Article 2.2 "may be explicit or implicit, provided that the

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<sup>80</sup> Appellate Body Report, *US – Washing Machines*, para. 5.220.

<sup>81</sup> Panel Report, *EC and certain member States – Large Civil Aircraft*, para. 7.1223.

<sup>82</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.135.

<sup>83</sup> Appellate Body Report, *US – Washing Machines*, para. 5.225. See also *ibid.* paras. 5.220-5.224.

<sup>84</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.144.

relevant region is clearly discernible from the text, design, structure, and operation of the subsidy measure at issue".<sup>85</sup> The Panel came to this conclusion after interpreting the term "designate" as follows:

"[T]he verb 'designate' means '[p]oint out, indicate, specify ... [c]all by name or distinctive term; name, identify, describe, characterize'. [C]ertain aspects of this definition – such as 'specify' and '[c]all by name' – point to an act of explicit or affirmative identification, whereas other aspects – such as 'indicate' and 'describe' – suggest that identification may *also* be carried out through indirect means."<sup>86</sup>

63. The Appellate Body added that the inclusion of the term "designate" in Article 2.2 "serves to ensure that the relevant region is sufficiently demarcated and that its borders and territorial coverage are clear".<sup>87</sup>

64. In *US – Washing Machines*, the Appellate Body dealt with a regulation that limited eligibility of investments using negative terms – i.e. it excluded investments made in the Seoul overcrowding area from eligibility for subsidies otherwise available. For Korea, the regulation could not be said to affirmatively designate a geographical region, as it merely disqualified certain investments.<sup>88</sup> The Appellate Body found that the use of negative or exclusionary terms is not relevant:

"[L]imitations on access to a subsidy may be expressed in 'many different ways'. One way in which access to a subsidy may be limited on a geographical basis is by excluding portions of the territory of a Member's jurisdiction from that subsidy's scope of application. To draw the formalistic distinction proposed by Korea could enable Members to circumvent the disciplines of Article 2.2 by framing their regionally focused subsidy schemes in negative or exclusionary terms."<sup>89</sup>

#### **1.4.3 "geographical region"**

65. In *US – Anti-Dumping and Countervailing Duties (China)*, the Panel took the view that "any identified tract of land within the jurisdiction of a granting authority" may qualify as a "geographic region".<sup>90</sup>

66. In *US – Washing Machines*, the Appellate Body addressed the issue of whether the concept of "geographical region" depends on the territorial size of the area covered by the subsidy. The Appellate Body observed that the term "geographical region" in Article 2.2 is not qualified and that, therefore, the territorial size of a region does not constitute a criterion relevant to the applicability of Article 2.2:

"This comports with the function of the provision at hand, which is to address subsidy schemes by which Members direct resources to certain geographical regions within their jurisdictions, thereby interfering with the market's allocation of resources. Indeed, a subsidy programme that excludes from its coverage an area that, albeit territorially small, is nevertheless important from an economic standpoint, could in fact limit eligibility in a significant way."<sup>91</sup>

#### **1.4.4 "subsidy"**

67. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body dealt with a claim of error by China regarding the interpretation of the term "subsidy" in Article 2.2. The Appellate Body stated:

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<sup>85</sup> Appellate Body Report, *US – Washing Machines*, para. 5.229.

<sup>86</sup> Panel Report, *US – Washing Machines*, para. 7.280.

<sup>87</sup> Appellate Body Report, *US – Washing Machines*, para. 5.230.

<sup>88</sup> Appellate Body Report, *US – Washing Machines*, para. 5.228.

<sup>89</sup> Appellate Body Report, *US – Washing Machines*, para. 5.231. See also Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413.

<sup>90</sup> Appellate Body Report, *US – Washing Machines*, para. 5.236 (referring to Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 9.144).

<sup>91</sup> Appellate Body Report, *US – Washing Machines*, para. 5.236.



"We recall that the purpose of Article 2 of the *SCM Agreement* is not to identify the elements of the subsidy as set out in Article 1.1, but to establish whether the availability of the subsidy is limited *inter alia* by reason of the eligible recipients (Article 2.1(a)) or by reason of the geographical location of beneficiaries (Article 2.2). We also consider that a limitation on access to a subsidy may be established in many different ways and that, whatever the approach investigating authorities or panels adopt, they must ensure that the requisite limitation on access is clearly substantiated on the basis of positive evidence. We consider that, under Article 2.2, as under Article 2.1(a), a limitation on access to a financial contribution will also limit access to any resulting benefit, since only those obtaining the financial contribution can be beneficiaries of that subsidy."<sup>92</sup>

### **1.5 Article 2.3: subsidies falling under Article 3 deemed to be specific**

68. The Panel in *Indonesia – Autos* was called upon to decide whether the Indonesian subsidies contingent upon the use of domestic over imported goods were specific:

"As with any analysis under the SCM Agreement, the first issue to be resolved is whether the measures in question are subsidies within the meaning of Article 1 that are specific to an enterprise or industry or group of enterprises or industries within the meaning of Article 2 ... In this case, the European Communities, the United States and Indonesia agree that these measures are specific subsidies within the meaning of those articles ... Further, the European Communities, the United States and Indonesia agree that these subsidies are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b), and that they are therefore deemed to be specific pursuant to Article 2.3 of the Agreement. In light of the views of the parties, and given that nothing in the record would compel a different conclusion, we find that the measures in question are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement"<sup>93</sup>

69. The Panel in *Canada – Autos* quoted Article 2.3 of the SCM Agreement and stated that "[g]iven that the central issue of the claims under the SCM Agreement in this dispute is whether the import duty exemption falls within the provisions of Article 3, we need not, and do not, address the question of specificity separately."<sup>94</sup>

70. In *US – FSC*, the Panel found that the measure at issue was a subsidy within the meaning of Article 1, and then explained that:

"A subsidy is subject to the provisions of the *SCM Agreement* only if it is specific within the meaning of Article 2. Article 2.3 provides, however, that '[a]ny subsidy falling under the provisions of Article 3 shall be deemed to be specific'. Thus, we proceed directly to our analysis of whether the Act is contingent upon export performance and upon the use of domestic over imported goods within the meaning of Article 3 of the *SCM Agreement*."<sup>95</sup>

71. The Panel in *US – Upland Cotton* applied Article 2.3 after finding that certain payments were prohibited subsidies under Articles 3.1(a) and 3.1(b):

"We recall our findings that user marketing (Step 2) payments to domestic users and exporters under section 1207(a) of the FSRI Act of 2002 are prohibited subsidies under Articles 3.1(a) and (b) of the SCM Agreement. As we have found that user marketing (Step 2) payments to domestic users and exporters under section 1207(a) of the FSRI Act of 2002 'fall within the provisions of Article 3', we consequently find that these are 'specific' subsidies within the meaning of Article 2.3 of the SCM Agreement. Furthermore, because of the substantial similarities between user marketing (Step 2) payments to domestic users and exporters under section 1207(a)

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<sup>92</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 413.

<sup>93</sup> Panel Report, *Indonesia – Autos*, para. 14.155.

<sup>94</sup> Panel Report, *Canada – Autos*, para. 10.172.

<sup>95</sup> Panel Report, *US – FSC*, fn 114.



of the FSRI Act of 2002 and under section 136 of the FAIR Act of 1996, we find that the latter are also specific within the meaning of Article 2.3 of the SCM Agreement."<sup>96</sup>

72. The Panel in *Korea – Commercial Vessels* concluded that the effect of Article 2.3 is not restricted to prohibited export subsidy claims, and that Article 2.3 applies in respect of the entirety of the SCM Agreement. Thus "a subsidy that is specific under Article 2.3 (as a result of export contingency) is specific for the purpose of both Part II (prohibited export subsidy) and Part III (actionable subsidy) claims."<sup>97</sup>

73. In *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, the Panel concluded that certain export subsidies were specific by virtue of Article 2.3.<sup>98</sup>

## **1.6 Relationship with other provisions**

### **1.6.1 Article 1.1(b) of the SCM Agreement**

74. In *US – Washing Machines*, the Appellate Body pointed to the differences between the analyses under Article 1.1(b) and Article 2 of the SCM Agreement:

"The text of Articles 1 and 2 of the SCM Agreement does not suggest that the identification of the recipient of a subsidy should prejudice the assessment of whether that subsidy is regionally specific. Indeed, a specificity analysis under Article 2 'presupposes that the subsidy has already been found to exist'. Thus, the notions of financial contribution, benefit, and specificity are distinct and independent concepts, which must be separately assessed in order to ascertain the applicability of the relevant disciplines of the SCM Agreement. An inquiry under Article 1.1(b) focuses, in essence, on whether a financial contribution makes the recipient better off than it otherwise would have been on the marketplace. In this sense, stating that the recipient can be a 'natural or legal person' recognizes that a subsidy may be conferred to a wide variety of economic actors, including individuals, groups of persons, or companies. Conversely, the inquiry under Article 2 hinges on limitations on 'eligibility for a subsidy' in respect of certain recipients. Eligibility may be limited in 'many different ways', e.g. by virtue of the type of activities conducted by the recipients or the region where the recipients run those activities."<sup>99</sup>

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<sup>96</sup> Panel Report, *US – Upland Cotton*, para. 7.1153.

<sup>97</sup> Panel Report, *Korea – Commercial Vessels*, paras. 7.514.

<sup>98</sup> Panel Report, *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, paras. 7.1405 and 7.1461.

<sup>99</sup> Appellate Body Report, *US – Washing Machines*, para. 5.223.