

1 ARTICLE 4	2
1.1 Text of Article 4.....	2
1.2 General	3
1.2.1 Accelerated procedure and the deadline for the submission of new evidence, allegations and affirmative defences.....	3
1.3 Article 4.2	4
1.3.1 "include a statement of available evidence".....	4
1.3.2 Relationship with other WTO Agreements	9
1.4 Article 4.3	9
1.4.1 "shall be to clarify the facts of the situation"	9
1.5 Article 4.4	9
1.5.1 Relationship between the matter before a panel as defined by its terms of reference and the matter consulted upon.....	9
1.5.2 Relationship with other WTO Agreements	10
1.6 Article 4.5	10
1.6.1 Relationship with other provisions of the SCM Agreement	10
1.7 Article 4.7	10
1.7.1 "withdraw the subsidy"	10
1.7.2 Time-period for withdrawal of measures	12
1.7.3 Relationship with other provisions of the SCM Agreement	14
1.7.3.1 Article 7.8.....	14
1.7.3.2 Article 19.1	15
1.7.4 Relationship with other WTO Agreements	15
1.7.4.1 DSU	15
1.7.4.2 Agreement on Agriculture	15
1.8 Article 4.9	16
1.9 Article 4.10.....	16
1.9.1 Meaning of "appropriate countermeasures"	16
1.9.1.1 Countermeasures.....	16
1.9.1.2 "appropriate"	18
1.9.1.2.1 General.....	18
1.9.1.2.2 Footnote 9 of the SCM Agreement.....	20
1.9.1.3 Same meaning in Articles 4.10 and 4.11	21
1.9.2 Purpose of countermeasures under Article 4.10	21
1.9.3 Amount of subsidy as the basis for the calculation of countermeasures.....	23
1.9.3.1 General	23
1.9.3.2 Exception to the requirement of equivalence to level of nullification or impairment	24
1.9.3.3 Factors relevant for the calculation of countermeasures.....	27
1.9.4 Relationship with other provisions of the SCM Agreement	28
1.9.5 Relationship with other WTO Agreements	28

1.9.5.1 DSU	28
1.10 Article 4.11	28
1.10.1 Task of the Arbitrator under Article 4.11	28
1.10.2 Article 4.11 provisions as special or additional rules	29
1.10.3 Burden of proof	29
1.10.4 Treatment of data supplied by private entities	30
1.10.5 Relationship with other provisions of the SCM Agreement	31
1.10.5.1 Article 7.9	31
1.10.6 Relationship with other WTO Agreements.....	31
1.10.6.1 Article 22.4 of the DSU	31

1 ARTICLE 4

1.1 Text of Article 4

Article 4

Remedies

4.1 Whenever a Member has reason to believe that a prohibited subsidy is being granted or maintained by another Member, such Member may request consultations with such other Member.

4.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

4.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually agreed solution.

4.4 If no mutually agreed solution has been reached within 30 days⁶ of the request for consultations, any Member party to such consultations may refer the matter to the Dispute Settlement Body ("DSB") for the immediate establishment of a panel, unless the DSB decides by consensus not to establish a panel.

*(footnote original)*⁶ Any time-periods mentioned in this Article may be extended by mutual agreement.

4.5 Upon its establishment, the panel may request the assistance of the Permanent Group of Experts⁷ (referred to in this Agreement as the "PGE") with regard to whether the measure in question is a prohibited subsidy. If so requested, the PGE shall immediately review the evidence with regard to the existence and nature of the measure in question and shall provide an opportunity for the Member applying or maintaining the measure to demonstrate that the measure in question is not a prohibited subsidy. The PGE shall report its conclusions to the panel within a time-limit determined by the panel. The PGE's conclusions on the issue of whether or not the measure in question is a prohibited subsidy shall be accepted by the panel without modification.

*(footnote original)*⁷ As established in Article 24.

4.6 The panel shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 90 days of the date of the composition and the establishment of the panel's terms of reference.

4.7 If the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn.

4.8 Within 30 days of the issuance of the panel's report to all Members, the report shall be adopted by the DSB unless one of the parties to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.

4.9 Where a panel report is appealed, the Appellate Body shall issue its decision within 30 days from the date when the party to the dispute formally notifies its intention to appeal. When the Appellate Body considers that it cannot provide its report within 30 days, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In no case shall the proceedings exceed 60 days. The appellate report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the appellate report within 20 days following its issuance to the Members.⁸

(footnote original)⁸ If a meeting of the DSB is not scheduled during this period, such a meeting shall be held for this purpose.

4.10 In the event the recommendation of the DSB is not followed within the time-period specified by the panel, which shall commence from the date of adoption of the panel's report or the Appellate Body's report, the DSB shall grant authorization to the complaining Member to take appropriate⁹ countermeasures, unless the DSB decides by consensus to reject the request.

(footnote original)⁹ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.11 In the event a party to the dispute requests arbitration under paragraph 6 of Article 22 of the Dispute Settlement Understanding ("DSU"), the arbitrator shall determine whether the countermeasures are appropriate.¹⁰

(footnote original)¹⁰ This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.

4.12 For purposes of disputes conducted pursuant to this Article, except for time-periods specifically prescribed in this Article, time-periods applicable under the DSU for the conduct of such disputes shall be half the time prescribed therein.

1.2 General

1.2.1 Accelerated procedure and the deadline for the submission of new evidence, allegations and affirmative defences

1. The Panel in *Canada – Aircraft* rejected a request for a preliminary ruling that the complaining party may not adduce new evidence or allegations after the end of the first substantive meeting of the Panel with the parties. Canada had argued that given the accelerated procedure under Article 4 of the SCM Agreement, the late submission of allegations or evidence by Brazil, the complaining party, would be prejudicial to Canada's position, as Canada would effectively be denied an adequate opportunity to respond to these allegations or evidence.¹ The Panel referred to the Appellate Body's finding in *Argentina – Textiles and Apparel* that "neither Article 11 of the DSU, nor the Working Procedures in Appendix 3 of the DSU, establish precise deadlines for the presentation of evidence by parties to a dispute"², and concluded that "[t]here is

¹ Panel Report, *Canada – Aircraft*, para. 9.70.

² Panel Report, *Canada – Aircraft*, para. 9.72.

nothing in the DSU, or in the Appendix 3 Working Procedures, to suggest that a different approach should be taken in 'fast-track' cases under Article 4 of the SCM Agreement."³

2. The Panel in *Canada – Aircraft* followed the reasoning set out in the previous paragraph regarding the submission of new allegations and stated that "[w]e can see nothing in the DSU, or in the Appendix 3 Working Procedures, that would require the submission of new allegations to be treated any differently than the submission of new evidence."⁴

3. In the Panel proceedings in *Canada – Aircraft*, Brazil requested the Panel not to accept any affirmative defences by Canada which had not been submitted prior to the end of the first substantive meeting⁵, on the basis that "this is particularly important in this fast-track proceeding"⁶. The Panel stated that "there is nothing in the DSU, or in Appendix 3 Working Procedures, to prevent a party submitting new evidence or allegations after the first substantive meeting. We can see no basis in the DSU to treat the submission of affirmative defences after the first substantive meeting any differently."⁷ However, the Panel added that "Brazil's due process rights would not be respected if Canada were able to submit an affirmative defence ... after the second substantive meeting with the Panel."⁸

1.3 Article 4.2

1.3.1 "include a statement of available evidence"

4. The Panel in *Canada – Aircraft* stated that "although Article 4.2 of the SCM Agreement requires the Member requesting consultations to provide a 'statement of available evidence', there is nothing in either the DSU or the *SCM Agreement* to suggest that requests for establishment of panels for 'fast-track' cases should be any more precise than requests for establishment of panels in 'standard' WTO dispute settlement cases."⁹

5. The Panel in *Australia – Automotive Leather II* rejected the argument that Article 4.2 "imposes an obligation on the complainant to disclose in its request for consultations, not only facts, but also the argumentation why such facts lead the complainant to believe there is a violation of Article 3.1"¹⁰, and stated that "[t]he ordinary meaning of the phrase 'include a statement of available evidence' does not, on its face, require disclosure of arguments in the request for consultations. Nothing in the context or object and purpose of Article 4.2 ... suggests a different conclusion."¹¹ The Panel in *Australia – Automotive Leather II* then addressed the claim that Article 4.2 requires the disclosure of all facts and evidence upon which the complaining Member intends to rely in the course of the dispute settlement proceedings:

"Turning to the question of what is required as a 'statement of available evidence', we note that Australia reads this to require disclosure of all facts and evidence on which the complaining Member will rely in the course of the dispute. Indeed, Australia asserts that any exhibits should have been provided at the time consultations were requested. The ordinary meaning of the phrase 'statement of available evidence' does not support Australia's position. The word 'evidence' is defined as 'available facts, circumstances, etc., supporting or otherwise a belief, proposition, etc.' 'Available' is defined as 'at one's disposal', and 'statement' is defined as 'expression in words'. Thus, based on the ordinary meaning of the terms, Article 4.2 requires a complaining Member to include in the request for consultations an expression in words of the facts at its disposal at the time it requests consultations in support of the conclusion that it has, in the words of Article 4.1, 'reason to believe that a prohibited subsidy is being granted or maintained'. ...

³ Panel Report, *Canada – Aircraft*, para. 9.72.

⁴ Panel Report, *Canada – Aircraft*, para. 9.74.

⁵ Panel Report, *Canada – Aircraft*, para. 9.75.

⁶ Panel Report, *Canada – Aircraft*, para. 9.75.

⁷ Panel Report, *Canada – Aircraft*, para. 9.77.

⁸ Panel Report, *Canada – Aircraft*, para. 9.78.

⁹ Panel Report, *Canada – Aircraft*, para. 9.29.

¹⁰ Panel Report, *Australia – Automotive Leather II*, para. 9.17.

¹¹ Panel Report, *Australia – Automotive Leather II*, para. 9.18.

Moreover, nothing in the context or object and purpose of Article 4.2 suggests to us that the statement of available evidence must be as comprehensive as Australia would require. The mere fact that proceedings under Article 4 of the SCM Agreement are accelerated by comparison to dispute settlement proceedings under the DSU does not, in our view, require us to read into Article 4.2 a requirement that the complainant disclose all facts and arguments in its request for consultations. ... To the extent that the additional requirement of Article 4.2 can be linked to the expedited nature of the proceedings, the additional requirement of a statement of available evidence satisfies the need adequately to apprise the responding Member of the information upon which the complaining Member bases its request for consultations, and serves in addition to inform the resulting consultations."¹²

6. The Panel in *Australia – Automotive Leather II* also rejected the arguments that "the requirement of Article 4.2, that a request for consultations 'include a statement of available evidence', in conjunction with the expedited nature of the proceedings, [requires] a panel to limit the complaining Member to using the evidence and arguments set forth in the request for consultations"¹³, and "that to allow a complainant to come forward with additional facts and arguments in its first submission is inconsistent with Article 4 of the SCM Agreement".¹⁴ In so holding, the Panel referred to its obligation under Article 11 of the DSU to conduct an objective assessment of the matter before it; specifically, the Panel held that "a decision to limit the facts and arguments that the United States may present during the course of this proceeding to those set forth in the request for consultations would make it difficult, if not impossible, for us to fulfill our obligation to conduct an 'objective assessment' of the matter before us."¹⁵

7. In rejecting Australia's claim that in the light of the requirement under Article 4.2 to make a "statement of available evidence", a complainant was disallowed from coming forward with additional facts and arguments in its first submission, the Panel in *Australia – Automotive Leather II* did not rely exclusively on Article 11 of the DSU. The Panel also referred to the right of panels, under Article 13.2 of the DSU, to seek information from any relevant source, a right which, in the opinion of the Panel, is in no way curtailed by Article 4 of the SCM Agreement. Finally, the Panel also considered the requirements with respect to the request for consultations:

"Article 4.2 does contain a requirement, not present in the DSU, that a complainant include a 'statement of available evidence' in its request for consultations. However, we do not consider that the scope of the evidence that a panel may consider is limited in any way by such a statement of available evidence. In this respect, we note Article 4.3 of the SCM Agreement, which explicitly states that one of the purposes of consultations 'shall be to *clarify the facts of the situation...*'. (emphasis added) This provision implies that additional facts or evidence will be developed during consultations. Moreover, the Appellate Body has recognized that consultations play a significant role in developing the facts in a dispute settlement proceeding. For example, in *India – Patents*, the Appellate Body observed that 'the claims that are made *and the facts that are established during consultations* do much to shape the substance and the scope of subsequent panel proceedings'. (emphasis added) This is consistent with the view that a central purpose of consultations in general, and of consultations under Article 4 of the SCM Agreement in particular, is to clarify and develop the facts of the situation.

Moreover, we note that panels have, under Article 13.2 of the DSU, a general right to seek information 'from any relevant source'. Indeed, it is a common feature of panel proceedings for panelists to question parties about the facts and arguments underlying their positions. There is nothing in Article 4 of the SCM Agreement to suggest that this right is somehow limited by the expedited nature of dispute settlement proceedings conducted under that provision. If Australia's position were correct, a panel might be constrained from seeking out replacement information from the party ... that was limited to reliance on the facts set forth in its request for consultations. Similarly, under Australia's view, the defending party might introduce

¹² Panel Report, *Australia – Automotive Leather II*, paras. 9.19-9.20.

¹³ Panel Report, *Australia – Automotive Leather II*, para. 9.24.

¹⁴ Panel Report, *Australia – Automotive Leather II*, para. 9.24.

¹⁵ Panel Report, *Australia – Automotive Leather II*, para. 9.25.

information during the panel proceedings, which the complaining party ... would not be able to rebut, as it would be limited to reliance on the facts set forth in its request for consultations. We do not believe Article 4.2 requires this result."¹⁶

8. The Panel in *US – FSC*, in a finding subsequently confirmed by the Appellate Body¹⁷, considered the ordinary meaning of the terms "statement of available evidence" and indicated that a complainant must identify but need not annex available evidence to its request for consultations. It also considered that there is no need to use explicitly the words "statement of available evidence" provided that the relevant evidence is itself referred to. The Panel stated:

"We note that the word 'evidence' has been defined as 'available facts, circumstances, etc., supporting or otherwise a belief, proposition, etc.', the word 'available' has been defined as 'at one's disposal', and the word 'statement' has been defined as 'expression in words'.¹⁸ Thus, in its ordinary meaning Article 4.2 requires that a Member include in its request for consultations an expression in words of the facts at its disposal at the time it requests consultations in support of its view that it has, in the words of Article 4.1, 'reason to believe that a prohibited subsidy is being granted or maintained'. On the basis of the ordinary meaning of Article 4.2, it is evident that a complainant must identify, but need not annex, available evidence to its request for consultations.

... Although the European Communities did not recite the formulation 'statement of available evidence' when referring to these materials, we do not consider that the explicit use of that descriptive term is necessary provided that the relevant evidence is itself referred to. It is true, of course, that the European Communities in its first submission referred to a variety of additional materials, primarily in the form of secondary sources¹⁹, and that these additional materials were not identified in the request for consultations. Even assuming that these materials represent 'evidence' and that a Member is required to identify *all* available evidence in its request for consultations, we are not in a position to determine whether as a factual matter these materials were at the disposal of the European Communities at the time it made its request for consultations and that the European Communities knew at that time that it would rely on those materials. In short, it may well be that the European Communities' request for consultations does contain a statement of available evidence."²⁰

9. In *US – FSC*, the Appellate Body rejected the United States' argument that a complaint should be dismissed because the complainant failed to "include a statement of available evidence" in its request for consultations. The Appellate Body pointed out a variety of facts, for example, that "[f]ollowing the European Communities' request for consultations, the United States and the European Communities held three separate sets of consultations over a period of nearly five months."²¹ The Appellate Body also invoked Article 3.10 of the DSU and the principle of good faith:

"Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures 'in good faith in an effort to resolve the dispute'. This is another specific manifestation of the principle of good faith which, we have pointed out, is at once a general principle of law and a principle of general international law.²² This pervasive principle requires both complaining and responding

¹⁶ Panel Report, *Australia – Automotive Leather II*, para. 9.29.

¹⁷ Appellate Body Report, *US – FSC*, paras. 155-166.

¹⁸ (footnote original) Concise Oxford Dictionary, Ninth edition, 1995.

¹⁹ (footnote original) The materials in questions were comprised of testimony before the US Congress, reports and other descriptive materials relating to the FSC prepared by US government officials, articles in tax, legal and business publications about the FSC, copies of the requests for consultations and establishment of a panel in this dispute, and excerpts from OECD *Transfer Pricing Guidelines for Multinational Enterprises and Tax Administrations*. All of these materials are explanatory of the FSC except for the OECD *Guidelines*, which were submitted in support of the European Communities' view of the meaning of the concept of the "arm's length" principle referred to in footnote 59 to the SCM Agreement.

²⁰ Panel Report, *US – FSC*, paras. 7.5-7.6.

²¹ Appellate Body Report, *US – FSC*, para. 162.

²² (footnote original) Appellate Body Report on *US – Shrimp*, fn. 99. In that report, we addressed the issue of good faith in the context of the chapeau of Article XX of the GATT 1994.

Members to comply with the requirements of the DSU (and related requirements in other covered agreements) in good faith. By good faith compliance, complaining Members accord to the responding Members the full measure of protection and opportunity to defend, contemplated by the letter and spirit of the procedural rules. The same principle of good faith requires that responding Members seasonably and promptly bring claimed procedural deficiencies to the attention of the complaining Member, and to the DSB or the panel, so that corrections, if needed, can be made to resolve disputes. The procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes."²³

10. The Panel in *US – FSC* had found that the European Communities' request for consultations under Article 4.1 of the SCM Agreement contained a sufficient statement of available evidence within the meaning of Article 4.2, and, consequently, rejected the United States' request that the Panel dismiss the European Communities' claim as not properly before it as a result of the alleged insufficiency of the statement of available evidence. Upon appeal, the Appellate Body rejected the United States' appeal with respect to the second point and, as a result, declined to rule on the United States' appeal on the first point, i.e. whether the European Communities had given a sufficient statement of available evidence within the meaning of Article 4.2. In its analysis, the Appellate Body distinguished between the requirements imposed on the complaining party under Article 4.4 of the DSU and Article 4.2 of the SCM Agreement and held that the Panel had not differentiated between these requirements carefully enough:

"Article 1.2 of the DSU states that 'the rules and procedures of the DSU shall apply subject to the special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding'. Article 4.2 of the *SCM Agreement* is listed as a 'special or additional rule or procedure' in Appendix 2 to the DSU. In our Report in *Guatemala – Cement*, we said that 'the rules and procedures of the DSU apply *together with* the special or additional provisions of the covered agreement' except that, 'in the case of a *conflict* between them', the special or additional provision prevails.²⁴ Article 4.4 of the DSU requires that all requests for consultations, under the covered agreements, 'give reasons for the request, including *identification of the measures at issue* and an *indication of the legal basis for the complaint*.' (emphasis added) It is clear to us that Article 4.4 of the DSU and Article 4.2 of the *SCM Agreement* can and should be read and applied together, so that a request for consultations relating to a prohibited subsidy claim under the *SCM Agreement* must satisfy the requirements of both provisions.

Article 4 of the *SCM Agreement* provides for accelerated dispute settlement procedures for claims involving prohibited subsidies under Article 3 of the *SCM Agreement*. The determination of whether a prohibited subsidy is being granted or maintained under Article 3 of the *SCM Agreement* raises complex factual questions, particularly in the case of subsidies that are claimed to be *de facto* contingent upon export performance. Also, Article 4.5 of the *SCM Agreement* allows a panel to request the assistance of the Permanent Group of Experts on whether the measure is a prohibited subsidy. Given the accelerated timeframes for disputes involving claims of prohibited subsidies, and given that the issue of whether a measure is a prohibited subsidy often requires a detailed examination of facts, it is important to stress the requirement of Article 4.2 that there be 'a statement of available evidence with regard to the existence and nature of the subsidy in question' at the consultation stage in a dispute.

We emphasize that this additional requirement of 'a statement of available evidence' under Article 4.2 of the *SCM Agreement* is distinct from – and not satisfied by compliance with – the requirements of Article 4.4 of the DSU. Thus, as well as giving the reasons for the request for consultations and identifying the measure and the legal basis for the complaint under Article 4.4 of the DSU, a complaining Member must also indicate, in its request for consultations, the evidence that it has available to it, at that

²³ Appellate Body Report, *US – FSC*, para. 166.

²⁴ (footnote original) Appellate Body Report on *Guatemala – Cement*, fn. 55.

time, 'with regard to the existence and nature of the subsidy in question'. In this respect, it is available evidence of the character of the measure as a 'subsidy' that must be indicated, and not merely evidence of the existence of the measure. We would have preferred that the panel give less relaxed treatment to this important distinction."²⁵

11. In *US – Upland Cotton*, the Panel explained the scope of the requirement set out in Article 4.2:

"This additional requirement in Article 4.2 of the *SCM Agreement* serves to provide a responding Member with a better understanding of the matter in dispute and serves as the basis for consultations. The statement of available evidence informs the responding Member of facts at the disposal of the complaining Member at the time it requests consultations about the prohibited subsidy it alleges is being granted or maintained.

However, Article 4.2 does not require disclosure of all facts and evidence upon which the complaining Member will ultimately rely in the course of the dispute settlement proceedings. Article 4.3 explicitly states that one of the purposes of consultations shall be to 'clarify the facts of the situation'. This implies that additional facts and evidence will be developed during the consultations.²⁶ This is consistent with the view that a central purpose of consultation in general, and of consultations under Article 4 of the *SCM Agreement* in particular, is to clarify and develop the facts of the situation.

The statement of available evidence directs attention to the measures concerned. It is the starting point for consultations, and for the emergence of more evidence concerning the measures by reason of the clarification of the 'situation'. If the dispute proceeds to the panel stage, additional evidence may well come to light by reason of the parties' participation in the panel procedures, including in response to the panel's questions and requests for information."²⁷

12. In *US – Upland Cotton*, the Appellate Body upheld the Panel's ruling that Brazil provided a statement of available evidence as required by Article 4.2. In the course of its analysis, the Appellate Body stated that:

"We recognize that the statement of available evidence plays an important role in WTO dispute settlement. The adequacy of the statement of available evidence must be determined on a case by case basis. As the Panel stated, moreover, the 'statement of available evidence ... is the starting point for consultations, and for the emergence of more evidence concerning the measures by reason of the clarification of the 'situation''. It is, therefore, important to bear in mind that the requirement to submit a statement of available evidence applies in the earliest stages of WTO dispute settlement, and that the requirement is to provide a 'statement' of the evidence and not the evidence itself."²⁸

13. The Panel in *India – Export Related Measures* pointed out that in order to provide a sufficient statement of available evidence, there is no requirement to indicate a specific chapter or paragraph of the relevant pieces of evidence which would result in a violation of the SCM Agreement:

"Pursuant to Article 4.2 of the *SCM Agreement*, the complainant must 'state' the 'evidence' it has available as to the existence and nature of the challenged subsidy. This did not require the complainant in this case to indicate the 'specific chapter or

²⁵ Appellate Body Report, *US – FSC*, paras. 159-161.

²⁶ (footnote original) Indeed, consultations may play a significant role in developing the facts in a dispute settlement proceeding. For example, the Appellate Body has observed that "[...] the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of the subsequent panel proceedings." See Appellate Body Report, *India – Patents (US)*, para. 94.

²⁷ Panel Report, *US – Upland Cotton*, paras. 7.98-7.100.

²⁸ Appellate Body Report, *US – Upland Cotton*, para. 308.

paragraph' of the cited items of evidence. The complainant stated the evidence it was relying on, so as to meet the requirements of Article 4.2. Moreover, the body of the text of the request for consultations, which precedes and introduces the text of the statement of available evidence, provided sufficient information to put the respondent on notice as to which aspects of the legal instruments cited as evidence are relevant to this dispute."²⁹

1.3.2 Relationship with other WTO Agreements

14. With respect to the different evidence to be submitted in the course of consultations under Article 4.4 of the DSU and Article 4.2 of the SCM Agreement, respectively, see paragraph 10 above.

1.4 Article 4.3

1.4.1 "shall be to clarify the facts of the situation"

15. With respect to this phrase, see paragraph 7 above.

1.5 Article 4.4

1.5.1 Relationship between the matter before a panel as defined by its terms of reference and the matter consulted upon

16. In *Brazil – Aircraft*, the Panel considered whether and to what extent a panel is limited in its consideration of the matter identified in its terms of reference by the scope of the matter with respect to which consultations were held.³⁰ The Appellate Body agreed with the Panel's finding in this regard and stated as follows:

"In our view, Articles 4 and 6 of the DSU, as well as paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel. Under Article 4.3 of the *SCM Agreement*, moreover, the purpose of consultations is 'to clarify the facts of the situation and to arrive at a mutually agreed solution.'

We do not believe, however, that Articles 4 and 6 of the DSU, or paragraphs 1 to 4 of Article 4 of the *SCM Agreement*, require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel."³¹

17. The Panel in *Canada – Aircraft* adopted a very similar approach to the relationship between a panel's terms of reference and the matter consulted upon:

"In our view, a panel's terms of reference would only fail to be determinative of a panel's jurisdiction if, in light of Article 4.1 – 4.4 of the SCM Agreement applied together with Article 4.2 – 4.7 of the DSU, the complaining party's request for establishment were found to cover a 'dispute' that had not been the subject of a request for consultations. Article 4.4 of the SCM Agreement permits a Member to refer a 'matter' to the DSB if 'no mutually agreed solution' is reached during consultations. In our view, this provision complements Article 4.7 of the DSU, which allows a Member to refer a 'matter' to the DSB if 'consultations fail to settle a dispute'. Read together, these provisions prevent a Member from requesting the establishment of a panel with regard to a 'dispute' on which no consultations were requested. In our view, this approach seeks to preserve due process while also recognising that the 'matter' on which consultations are requested will not necessarily be identical to the

²⁹ Panel Report, *India – Export Related Measures*, paras. 7.112–7.113.

³⁰ Panel Report, *Brazil – Aircraft*, para. 7.6.

³¹ Appellate Body Report, *Brazil – Aircraft*, paras. 131–132. See also Panel Report, *Brazil – Aircraft*, paras. 7.9–7.11.

'matter' identified in the request for establishment of a panel. The two 'matters' may not be identical because, as noted by the Appellate Body in *India – Patents*, 'the claims that are made and the facts that are established during consultations do much to shape the substance and the scope of subsequent panel proceedings.'³²

18. In *India – Export Related Measures*, India claimed, *inter alia*, that the statement of available evidence could not be considered sufficient because it reproduced "verbatim" the list of legal instruments provided to satisfy the requirement to identify the measures under Article 4.4 of the DSU. The Panel concentrated on the question "whether the near-identity between the request for consultations and the statement of available evidence included in it demonstrates, in itself, the insufficiency of the statement of available evidence"³³ and concluded:

"Article 4.2 of the SCM Agreement requires a request for consultations to 'include a statement of available evidence with regard to the existence and nature of the subsidy in question'. As has been repeatedly found, this requirement is different from, and additional to, the requirement to identify the measures at issue and give an indication of the legal basis of the complaint, set out in Article 4.4 of the DSU. This however means that both sets of requirements must be satisfied; it does not necessarily mean that the same item cannot, in any case, serve both to identify the measure at issue and to provide evidence of the existence and nature of a subsidy. In this dispute, as noted above, the listed items appear to satisfy the requirements of Article 4.2 of the SCM Agreement. The fact that the same items also serve to identify the challenged measures, in itself, does not render insufficient the statement of available evidence."³⁴

1.5.2 Relationship with other WTO Agreements

19. With respect to the relationship between Article 4 of the SCM Agreement on the one hand and Articles 4 and 6 of the DSU on the other, see the Sections on those Articles of the DSU.

1.6 Article 4.5

1.6.1 Relationship with other provisions of the SCM Agreement

20. As regards the establishment of the Permanent Group of Experts by Article 24.3, see the Section on Article 24 of the SCM Agreement.

1.7 Article 4.7

1.7.1 "withdraw the subsidy"

21. The Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada)* analysed the meaning of the word "withdraw", and stated that: "we observe first that this word has been defined as 'remove', or 'take away', and as 'to take away what has been enjoyed; to take from.' This definition suggests that 'withdrawal' of a subsidy, under Article 4.7 of the *SCM Agreement*, refers to the 'removal' or 'taking away' of that subsidy."³⁵ Applied to the facts of the dispute, the Appellate Body concluded that "[i]n our view, to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies, in the sense of 'removing' or 'taking away'".³⁶

22. The Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada)* considered the argument by Brazil that Brazil had a contractual obligation under domestic law to issue PROEX bonds pursuant to commitments that had already been made, and that Brazil could be liable for damages for breach of contract under Brazilian law if it failed to respect its contractual obligations. The Appellate Body considered that these issues were not relevant to the "issue of whether the DSB's recommendation to 'withdraw' the prohibited export subsidies permitted the continued issuance of

³² Panel Report, *Canada – Aircraft*, para. 9.12.

³³ Panel Report, *India – Export Related Measures*, paras. 7.108-7.110.

³⁴ Panel Report, *India – Export Related Measures*, para. 7.111.

³⁵ Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.

³⁶ Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45. See also Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.170.

NTN-I bonds under letters of commitment issued before [the date set by the Panel for the withdrawal of the prohibited subsidies]".³⁷

23. In contrast to the findings of the Panel in *Brazil – Aircraft (Article 21.5 – Canada)*, the Panel in *Australia – Automotive Leather II (Article 21.5 – US)* did not limit its findings to a situation in which a Member *continues* to grant a prohibited subsidy. Rather, the Panel addressed the issue whether the term "withdraw the subsidy" is limited to a recommendation with purely prospective effect, or whether it also encompasses repayment:

"Turning first to the ordinary meaning of the term, the word 'withdraw' has been defined as: 'pull aside or back ...; take away, remove ...; retract ... This definition does not suggest that 'withdraw the subsidy' necessarily requires only some prospective action. To the contrary, it suggests that the ordinary meaning of 'withdraw the subsidy' may encompass 'taking away' or 'removing' the financial contribution found to give rise to a prohibited subsidy. Consequently, an interpretation of 'withdraw the subsidy' that encompasses repayment of the prohibited subsidy seems a straightforward reading of the text of the provision.

... In the case of 'actionable' subsidies, Members whose trade interests are adversely affected may, under Part III of the SCM Agreement, pursue multilateral dispute settlement in order to establish whether the subsidy in question has resulted in adverse effects to the interests of the complaining Member. 'If such a finding is made, the subsidizing Member 'shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy'. Alternatively, a Member whose domestic industry is injured by subsidized imports may impose a countervailing measure under Part V of the SCM Agreement, 'unless the subsidy or subsidies are withdrawn'. In both cases, withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member. ... Thus, the use of the term 'withdraw' elsewhere in the SCM Agreement further supports the suggestion that it may encompass repayment. (original emphasis)

...

... An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant."³⁸

24. After rejecting the argument that the phrase "withdraw the subsidy" under Article 4.7 of the SCM Agreement refers to a recommendation with exclusively "prospective effect"³⁹, the Panel in *Australia – Automotive Leather II (Article 21.5 – US)* also rejected the notion that a repayment of portions of a subsidy which are deemed allocated over future periods of time should be considered a "prospective" remedy:

"[W]e do not find meaningful the distinction proposed ... between repayment of 'prospective' and 'retrospective' portions of past subsidies in the context of Article 4.7 of the SCM Agreement. We do not agree that it is possible to conclude that repayment of the 'prospective portion' of prohibited subsidies paid in the past is a remedy having only prospective effect. In our view, where any repayment of any amount of a past subsidy is required or made, this by its very nature is *not* a purely prospective remedy. No theoretical construct allocating the subsidy over time can alter this fact. In our view, if the term 'withdraw the subsidy' can properly be understood to encompass repayment of *any* portion of a prohibited subsidy, 'retroactive effect' exists."⁴⁰

³⁷ Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45.

³⁸ Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, paras. 6.27-6.28 and 6.31.

³⁹ Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.20.

⁴⁰ Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.22.

25. The Panel in *Brazil – Aircraft (Article 21.5 – Canada)* rejected Brazil's contention that requiring Brazil to cease issuing bonds pursuant to commitments made prior to the withdrawal date amounted to a retroactive remedy. Rather, the Panel opined that "the obligation to cease performing illegal acts in the future is a fundamentally prospective remedy".⁴¹

1.7.2 Time-period for withdrawal of measures

26. The Panel in *Brazil – Aircraft* determined that "taking into account the nature of the measures and the procedures which may be required to implement our recommendation, on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other, we conclude that Brazil shall withdraw the subsidies within 90 days."⁴² Agreeing with the Panel's conclusion and recommendation, the Appellate Body in *Brazil – Aircraft* noted that "there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the *SCM Agreement*. Therefore, the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the *SCM Agreement*."⁴³

27. In *Australia – Automotive Leather II*, Australia suggested seven and a half months (half of what Australia considered the "normal" period of time for implementation of panel decisions) as the time-period for withdrawal under Article 4.7. The Panel disagreed:

"Even assuming Australia is correct in its consideration of fifteen months as the 'normal' period of time for implementation of panel decisions, a question we do not reach, we do not agree that one-half of that period is appropriate in a dispute involving export subsidies. In the first place, Article 4.12 specifically provides that 'except for time periods specifically prescribed in this Article' the time periods otherwise provided for in the DSU should be halved in export subsidy disputes. Article 4.7, which provides that the subsidy shall be withdrawn 'without delay', and that the panel shall specify the time-period for withdrawal of the measure in its recommendation, in our view establishes that the time-period for withdrawal is 'specifically prescribed in this Article', that is, in Article 4 of the *SCM Agreement* itself. Moreover, we do not, as a factual matter, believe that a period of seven and one-half months can reasonably be described as corresponding to the requirement that the measure must be withdrawn 'without delay'."⁴⁴

28. In *US – FSC (Article 21.5 – EC)*, the Appellate Body clarified that the text of Article 4.7 requires withdrawal "without delay". The Appellate Body considered there was "no basis" for extending the time-period prescribed for withdrawal: (1) either to protect the contractual interests of private parties, or (2) to ensure an orderly transition to the regime of the new measure. The Appellate Body recalled that it had rejected similar arguments in *Brazil – Aircraft (Article 21.5 – Canada)*, because the obligation to withdraw prohibited subsidies "without delay" is "unaffected by contractual obligations that the Member itself may have assumed under municipal law. The Appellate Body stated:

"Article 4.7 of the *SCM Agreement* requires prohibited subsidies to be withdrawn 'without delay', and provides that a time-period for such withdrawal shall be specified by the panel. We can see no basis in Article 4.7 of the *SCM Agreement* for extending the time-period prescribed for withdrawal of prohibited subsidies for the reasons cited by the United States. In that respect, we recall that, in *Brazil – Aircraft (Article 21.5 – Canada)*, Brazil made a similar argument to the one made by the United States in these proceedings. Brazil argued that, after the expiration of the time period for withdrawal of the prohibited export subsidies, it should be permitted to continue to grant certain of these subsidies because it had assumed contractual obligations, under municipal law, to do so. We rejected this argument, and observed that:

⁴¹ Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.15.

⁴² Panel Report, *Brazil – Aircraft*, para. 8.5. See also Panel Report, *Canada – Aircraft*, para. 10.4.

⁴³ Appellate Body Report, *Brazil – Aircraft*, para. 192.

⁴⁴ Panel Report, *Australia – Automotive Leather II*, para. 10.6.

... to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to 'withdraw' prohibited export subsidies, in the sense of 'removing' or 'taking away'.

[A] Member's obligation under Article 4.7 of the *SCM Agreement* to withdraw prohibited subsidies "without delay" is unaffected by contractual obligations that the Member itself may have assumed under municipal law. Likewise, a Member's obligation to withdraw prohibited export subsidies, under Article 4.7 of the *SCM Agreement*, cannot be affected by contractual obligations which private parties may have assumed *inter se* in reliance on laws conferring prohibited export subsidies. Accordingly, we see no legal basis for extending the time-period for the United States to withdraw fully the prohibited FSC subsidies."⁴⁵

29. In the same vein, with regard to the concept of "without delay" in Article 4.7, the Panel in *Canada – Aircraft Credits and Guarantees* took the view that because it "[is] required to make the recommendation provided for in Article 4.7 of the SCM Agreement, ... [it] recommend[s] that Canada withdraw the subsidies identified above without delay"⁴⁶ and further clarified that Article 4.7:

"[P]rovides that 'the panel shall specify in its recommendation the time-period within which the measure must be withdrawn'. In other words, we are required to specify what period would represent withdrawal 'without delay'. Taking into account the procedures that may be required to implement our recommendation on the one hand, and the requirement that Canada withdraw its subsidies "without delay" on the other, we conclude that Canada shall withdraw the subsidies identified in sub-paragraphs (e), (f), and (g) of paragraph within 90 days."⁴⁷

30. In *Brazil – Taxation*, the Appellate Body further clarified the differences between disputes involving prohibited subsidies and others with regard to the period of implementation:

"Article 4.7 is not used in the sense of requiring *immediate* compliance. Nor does the term 'without delay', combined with the requirement that the panel specify a time period, impose a single standard or time period applicable in all cases. Instead, Article 4.7 requires a panel to specify a time period that constitutes 'without delay' within the realm of possibilities in a given case and considering the domestic legal system of the implementing Member. In determining the time period under Article 4.7 that constitutes 'without delay', a panel should typically take into account the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification. These domestic procedures include any extraordinary procedures that may be available within the legal system of a WTO Member."⁴⁸

Finally, we consider it useful to contrast the text of Article 4.7 of the SCM Agreement with that of Article 21.3(c) of the DSU. Article 21.3 of the DSU specifies that, '[i]f it is impracticable to comply immediately with the recommendations and rulings, the Member concerned shall have a reasonable period of time in which to do so.' Article 21.3(c) of the DSU in turn provides that an arbitrator may be appointed where a reasonable time period cannot be agreed on, and that 'a guideline for the arbitrator should be that the reasonable period of time ... should not exceed 15 months from the date of adoption', although that time period 'may be shorter or longer, depending upon the particular circumstances'. By contrast, Article 4.7 of the SCM Agreement contains no reference to flexibilities depending on 'circumstances'. Article 4.7 simply mandates that 'the panel shall recommend that the subsidizing Member withdraw the

⁴⁵ Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 229-230.

⁴⁶ Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 8.3.

⁴⁷ Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 8.4.

⁴⁸ (footnote original) By contrast, we note that the existence of, and recourse to, extraordinary procedures within the domestic legal system of a WTO Member State is a factor that is generally not taken into account in determining the "reasonable period of time" under Article 21.3(c) of the DSU. See Award of the Arbitrator, *EC – Chicken Cuts (Article 21.3(c))*, para. 49 (referring to Award of the Arbitrator, *Korea – Alcoholic Beverages (Article 21.3(c))*, para. 42; Award of the Arbitrator, *Chile – Price Band System (Article 21.3(c))*, para. 51; Award of the Arbitrator, *US – Offset Act (Byrd Amendment) (Article 21.3(c))*, para. 74).

subsidy without delay' and that 'the panel shall specify in its recommendation the time period within which the measure must be withdrawn.' Therefore, in contrast to Article 21.3(c) of the DSU, the use of the term 'without delay' in Article 4.7 constrains the latitude available to a panel in specifying the time period under that provision."⁴⁹

31. The Panel in *India – Export Related Measures*, in assessing the time frame within which compliance may be achieved, took into account the nature of the measure and the amendment procedures within India necessary in order to reach compliance. The Panel considered that a withdrawal "without delay" by India could be achieved within 90 days if the measure underwent a governmental procedure only, taking into account the necessary time for consultations with stakeholders and amendments to subordinated acts as well as the date of the next scheduled review of the measures. Where a measure needed to also undergo a Parliamentary amendment procedure, the Panel granted a 30-day extension.⁵⁰

32. In *India – Export Related Measures*, India contended that modifications to tax legislation, required in order to withdraw the measures constituting prohibited subsidies, were "*mostly* made through a general budget", and that such modifications "*can* be implemented at the start of the next fiscal year". Consequently, India asked that the time period for withdrawal *additionally* include any amount of time running until the beginning of India's following fiscal year, which, the Panel observed, could result in a time frame for withdrawal ranging from 180 to 544 days, depending on the date of adoption of the Report. The Panel did not grant the additional time requested by India, and noted:

"Given the degree of uncertainty and potential delay that this proposed formula would introduce, and given that India's own comments manifest that it is not strictly necessary to implement withdrawal as part of India's general budget and with effect from the start of a new fiscal year, we consider that acceding to India's request would be incompatible with the requirement of Article 4.7 that we recommend withdrawal 'without delay'. Therefore, we recommend that India withdraw the prohibited subsidies under the SEZ Scheme within 180 days from the date of adoption of the Report."⁵¹

33. In *India – Sugar and Sugarcane*, in assessing the time frame for the withdrawal of the export subsidies in question, the Panel took into account the impact of the COVID-19 pandemic on the respondent's government institutions and their ability to achieve compliance:

"[W]e also note that, throughout these proceedings, India has referred to the impact of the COVID-19 pandemic on the functioning of its various governmental institutions. In our view, the impact of the COVID-19 pandemic has to be taken into account in determining the time frame for the withdrawal of the export subsidies at issue. On balance, in these disputes, we consider it appropriate to grant India 120 days from the date of adoption of the Reports in DS580 and DS581 for the withdrawal of these subsidies."⁵²

1.7.3 Relationship with other provisions of the SCM Agreement

1.7.3.1 Article 7.8

33. The Panel in *Australia – Automotive Leather II (Article 21.5 – US)* referred to Article 7.8 in support of its finding in relation to the phrase "withdraw the subsidy" under Article 4.7. The Panel noted the wording of Article 7.8 that in case of a finding of adverse effects to the interests of another Member within the meaning of Article 5 of the SCM Agreement, the subsidizing Member "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy". The Panel drew the conclusion that "withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate

⁴⁹ Appellate Body Report, *Brazil – Taxation*, paras. 5.446-5.447.

⁵⁰ Panel Report, *India – Export Related Measures*, paras. 9.9-9.16.

⁵¹ Panel Report, *India – Export Related Measures*, paras. 9.17-9.19.

⁵² Panel Report, *India – Sugar and Sugarcane*, para. 7.333.

withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member."⁵³

1.7.3.2 Article 19.1

34. The Panel in *Australia – Automotive Leather II (Article 21.5 – US)*, in the context of considering whether Article 4.7 allowed "retroactive" remedies, rejected the argument that "Article 19.1 of the DSU, even in conjunction with Article 3.7 of the DSU, requires the limitation of the specific remedy provided for in Article 4.7 of the SCM Agreement to purely prospective action. An interpretation of Article 4.7 of the SCM Agreement which would allow exclusively 'prospective' action would make the recommendation to 'withdraw the subsidy' under Article 4.7 indistinguishable from the recommendation to 'bring the measure into conformity' under Article 19.1 of the DSU, thus rendering Article 4.7 redundant."⁵⁴

1.7.4 Relationship with other WTO Agreements

1.7.4.1 DSU

35. In *Brazil – Aircraft*, the Appellate Body noted that "the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the SCM Agreement".

36. The Panel in *US – FSC (Article 21.5 – EC)* found that since the Member failed to comply with the required recommendations under Article 4.7 of the SCM Agreement, it had also "failed to comply with Article 21 of the DSU". The Panel stated:

"Having found that the United States has not fully withdrawn the FSC subsidies as required by the recommendations and rulings of the DSB made pursuant to Article 4.7 *SCM Agreement*, we do not believe that it is necessary to also determine whether the United States 'failed to comply with the DSB recommendations and rulings within the period of time specified by the DSB and has therefore also failed to comply with Article 21 *DSU*'. "⁵⁵

37. In *Canada – Renewable Energy*, in addressing Japan's arguments regarding the differences between the remedies foreseen under the SCM Agreement and the remedy foreseen in Article 19 of the DSU, the Appellate Body pointed out that the "specific remedy provided under Article 4.7 of the SCM Agreement is an important consideration". The Appellate Body stated:

"In *EC – Export Subsidies on Sugar*, the remedy provided under Article 4.7 was the reason why the Appellate Body found that the panel had improperly exercised judicial economy when it failed to make findings under the SCM Agreement once it had found a violation of the Agreement on Agriculture. While the difference in remedy would be relevant to a decision as to whether or not there would be a need to address the claims under the SCM Agreement, having made findings under the GATT 1994 and the TRIMs Agreement, we do not see its relevance in this case for the question of which claim to address first. In any event, this was not a case in which the Panel exercised judicial economy; the Panel made findings under Article III:4 of the GATT 1994 and the TRIMs Agreement. It then examined Japan's claims under the SCM Agreement and found that Japan had failed to establish that the challenged measures confer a benefit within the meaning of Article 1.1(b) of the SCM Agreement."⁵⁶

1.7.4.2 Agreement on Agriculture

38. Regarding the relationship between the Agreement on Agriculture and Article 4.7 of the SCM Agreement, see the Section on Article 21 of the Agreement on Agriculture.

⁵³ Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.28.

⁵⁴ Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.31.

⁵⁵ Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.171.

⁵⁶ Appellate Body Report, *Canada – Renewable Energy*, para. 5.7 (referring to Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 332-335).

1.8 Article 4.9

39. For a table showing the length of time taken in Appellate Body proceedings to date, see the Section covering Article 17.5 of the DSU.

1.9 Article 4.10

1.9.1 Meaning of "appropriate countermeasures"

1.9.1.1 Countermeasures

40. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator looked at the word "countermeasure" as context for finding a meaning for the word "appropriate". The Arbitrator disregarded the dictionary meaning of the word and preferred to refer to its general meaning in international law and to the work of the International Law Commission on state responsibility:

"While the parties have referred to dictionary definitions for the term 'countermeasures', we find it more appropriate to refer to its meaning in general international law and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures.⁵⁷ We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law. When considering the definition of 'countermeasures' in Article 47 of the Draft Articles, we note that countermeasures are meant to 'induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46'. We note in this respect that the Article 22.6 arbitrators in the *EC – Bananas (1999)* arbitration made a similar statement.⁵⁸ We conclude that a countermeasure is 'appropriate' *inter alia* if it effectively induces compliance."⁵⁹

41. In *US – FSC (Article 22.6 – US)*, the Arbitrator looked into the ordinary meaning of the word "countermeasure":

"Dictionary definitions of 'countermeasure' suggest that a countermeasure is essentially defined by reference to the wrongful action to which it is intended to respond. The New Oxford Dictionary defines 'countermeasure' as 'an action taken to counteract a danger, threat, etc'.⁶⁰ The meaning of 'counteract' is to 'hinder or defeat by contrary action; neutralize the action or effect of'⁶¹. Likewise, the term 'counter' used as a prefix is defined *inter alia* as: 'opposing, retaliatory'⁶². The ordinary meaning of the term thus suggests that a countermeasure bears a relationship with the action to be counteracted, or with its effects (cf. 'hinder or defeat by contrary action; neutralize the action or effect of'⁶³).

In the context of Article 4 of the *SCM Agreement*, the term 'countermeasures' is used to define temporary measures which a prevailing Member may be authorized to take in response to a persisting violation of Article 3 of the *SCM Agreement*, pending full compliance with the DSB's recommendations. This use of the term is in line with its

⁵⁷ (footnote original) We also note that, on the basis of the definition of "countermeasures" in the Draft Articles, the notion of "appropriate countermeasures" would be more general than the term "equivalent to the level of nullification or impairment". It would basically include it. Limiting its meaning to that given to the term "equivalent to the level of nullification or impairment" would be contrary to the principle of effectiveness in interpretation of treaties.

⁵⁸ (footnote original) *Op. Cit.*, para. 6.3. In that case, the Arbitrator had to determine the level of nullification or impairment. Since the Article 22.6 Arbitrator in the *EC – Bananas* case considered that measures equivalent to the level of nullification or impairment can induce compliance, it could be argued that in the present case too, countermeasures equivalent to the level of nullification or impairment should be sufficient to induce compliance. However, the Arbitrator in *EC – Bananas* were instructed by Article 22.7 to determine whether the proposed measures were equivalent to the level of nullification or impairment.

⁵⁹ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.44.

⁶⁰ (footnote original) The New Shorter Oxford English Dictionary (1993).

⁶¹ (footnote original) *Ibid.*

⁶² (footnote original) Webster's New Encyclopaedic Dictionary (1994).

⁶³ (footnote original) The New Shorter Oxford English Dictionary (1993).

ordinary dictionary meaning as described above: these measures are authorized to counteract, in this context, a wrongful action in the form of an export subsidy that is prohibited *per se*, or the effects thereof.

It would be consistent with a reading of the plain meaning of the concept of countermeasure to say that it can be directed either at countering the measure at issue (in this case, at effectively neutralizing the export subsidy) or at counteracting its effects on the affected party, or both.

We need, however, to broaden our textual analysis in order to see whether we can find more precision in how countermeasures are to be construed in this context. We thus turn to an examination of the expression '*appropriate*' countermeasures with a view to clarifying what level of countermeasures may be legitimately authorized."⁶⁴

42. In *US – Upland Cotton (Article 22.6 – US I)*, the Arbitrator began its analysis by interpreting the term "countermeasure" in Article 4.10:

"We note at the outset that the term 'countermeasures' is used to designate retaliatory measures in the WTO Agreement only in the *SCM Agreement*. This contrasts with the terms of Article 22 of the DSU, which refers to the 'suspension of concessions or other obligations'. However, it is not argued by either party in these proceedings that the term 'countermeasures' would designate, in the *SCM Agreement*, anything other than a temporary suspension of certain obligations, and this is what we understand the term to refer to.

The prefix 'counter-' can be defined as meaning 'against, in return'.⁶⁵ The Oxford English Dictionary further cites the term 'counter-measure' as an illustration of a situation in which this prefix is used to indicate something that is '[d]one, directed, or acting against, in opposition to, as a rejoinder or reply to another thing of the same kind already made or in existence'. Another dictionary defines the term 'countermeasure' as an 'action or device designed to negate or offset another'.⁶⁶

...

We are not convinced that the use of the term 'countermeasures' necessarily connotes, in and of itself, an intention to refer to retaliatory action that 'goes beyond the mere rebalancing of trade interests', as Brazil suggests. As noted above, the term indicates that the action is taken in response to another, in order to 'counter' it. This does not necessarily connote, in our view, an intention to 'go beyond' a rebalancing of trade interests. Indeed, we are not convinced that the dictionary meanings of the term, in and of themselves, provide any compelling guidance as to the exact *level* of countermeasures that may be permissible under Article 4.10 of the *SCM Agreement*. We note that the term 'countermeasures' is also used in Article 7.9 of the *SCM Agreement*, where the permissible level of countermeasures is defined with reference to the adverse effects of the violating measure.

...

We note that the term 'countermeasures' is the general term used by the ILC in the context of its *Draft Articles on State Responsibility*, to designate temporary measures that injured States may take in response to breaches of obligations under international law.⁶⁷

⁶⁴ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 5.4-5.7.

⁶⁵ (footnote original) Oxford English Dictionary, at www.oed.com.

⁶⁶ (footnote original) Merriam Webster Dictionary, at www.merriamwebster.com.

⁶⁷ (footnote original) http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

We agree that this term, as understood in public international law, may usefully inform our understanding of the same term, as used in the *SCM Agreement*.⁶⁸ Indeed, we find that the term 'countermeasures', in the *SCM Agreement*, describes measures that are in the nature of countermeasures as defined in the ILC's Draft Articles on State Responsibility.

At this stage of our analysis, we therefore find that the term 'countermeasures' essentially characterizes the *nature* of the measures to be authorized, i.e. temporary measures that would otherwise be contrary to obligations under the WTO Agreement and that are taken in response to a breach of an obligation under the *SCM Agreement*. This is also consistent with the meaning of this term in public international law as reflected in the ILC Articles on State Responsibility.

As to the permissible *level* of countermeasures that may be authorized under Article 4.10 of the *SCM Agreement*, this is, in our view, primarily defined through the term 'appropriate' and the wording of footnote 9."⁶⁹

1.9.1.2 "appropriate"

1.9.1.2.1 General

43. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Canada had proposed adopting countermeasures based on the amount of subsidy per aircraft granted by Brazil instead of basing them on the level of nullification or impairment suffered. The Arbitrator examined the meaning of the term appropriate and concluded that "a countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance":

"In accordance with Article 3.2 of the DSU, we proceed with an analysis of the meaning of the term 'appropriate' based on Article 31 of the Vienna Convention.

Examining only the ordinary meaning of the term 'appropriate' does not allow us to reply to the question before us, since dictionary definitions are insufficiently specific. Indeed, the relevant dictionary definitions of the word 'appropriate' are 'specially suitable; proper'.⁷⁰ However, they point in the direction of meeting a particular objective.

The first context of the term 'appropriate' is the word 'countermeasures', of which it is an adjective. While the parties have referred to dictionary definitions for the term 'countermeasures', we find it more appropriate to refer to its meaning in general international law and to the work of the International Law Commission (ILC) on state responsibility, which addresses the notion of countermeasures. We note that the ILC work is based on relevant state practice as well as on judicial decisions and doctrinal writings, which constitute recognized sources of international law. When considering the definition of 'countermeasures' in Article 47 of the Draft Articles, we note that countermeasures are meant to 'induce [the State which has committed an internationally wrongful act] to comply with its obligations under articles 41 to 46'. We note in this respect that the Article 22.6 arbitrators in the *EC – Bananas (1999)*

⁶⁸ (*footnote original*) We also note however that, by their own terms, the Articles of the ILC on State Responsibility do not purport to prevail over any specific provisions relating to the areas it covers that would be contained in specific legal instruments. We note in particular the following Commentary of the ILC:

In common with other chapters of these articles, the provisions on countermeasures are residual and may be excluded or modified by a special rule to the contrary (see article 55). Thus, a treaty provision precluding the suspension of performance of an obligation under any circumstances will exclude countermeasures with respect to the performance of the obligation. Likewise, a regime for dispute resolution to which States must resort in the event of a dispute, especially if (as with the WTO dispute settlement system) it requires an authorization to take measures in the nature of countermeasures in response to a proven breach.

⁶⁹ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, paras. 4.34-4.43.

⁷⁰ (*footnote original*) The New Shorter Oxford English Dictionary (1993), p. 103; Webster's New Encyclopedic Dictionary (1994), p. 48.

arbitration made a similar statement. We conclude that a countermeasure is 'appropriate' *inter alia* if it *effectively* induces compliance."⁷¹

44. Applying their general finding that a countermeasure is appropriate *inter alia* if it effectively induces compliance, the Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* found that in the case of Article 4.7 of the SCM Agreement, "inducing compliance" meant "inducing the withdrawal of the prohibited subsidy":

"In this respect, we recall that the measure in respect of which the right to take countermeasures has been requested is a prohibited export subsidy falling under Article 3.1(a) of the SCM Agreement. Article 4.7 of the SCM Agreement provides in this respect that if a measure is found to be a prohibited subsidy, it shall be withdrawn without delay. In such a case, effectively 'inducing compliance' means inducing the withdrawal of the prohibited subsidy.

In contrast, other illegal measures do not have to be withdrawn without delay. As specified in Article 3.8 of the DSU, if a measure violates a provision of a covered agreement, the measure is considered *prima facie* to cause nullification or impairment. However, if the defendant succeeds in rebutting the charge, no nullification or impairment will be found in spite of the violation. Such a rebuttal may be impossible to make in a number of cases. Yet, this does not change the fact that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement. The Arbitrators are of the view that meaning must be given to the fact that the negotiators did not include the concept of nullification or impairment in those articles, whilst it is expressly mentioned in Article 5 of the SCM Agreement, which deals with the adverse effects of actionable subsidies."⁷²

45. The Arbitrator, in *US – FSC (Article 22.6 – US)*, considered the dictionary meaning of the word "appropriate" and concluded that, as far as the amount or level of countermeasures is concerned, the expression "appropriate" does not in and of itself predefine the precise and exhaustive conditions for the application of countermeasures.⁷³ According to the Arbitrator, Article 4.10 and 4.11 are not designed to lay down a precise formula or otherwise quantified benchmark or amount of countermeasures which might be legitimately authorized in each and every instance.⁷⁴ The Arbitrator indicated:

"Based on the plain meaning of the word, this means that countermeasures should be adapted to the particular case at hand. The term is consistent with an intent not to prejudge what the circumstances might be in the specific context of dispute settlement in a given case. To that extent, there is an element of flexibility, in the sense that there is thereby an eschewal of any rigid *a priori* quantitative formula. But it is also clear that there is, nevertheless, an objective relationship which must be absolutely respected: the countermeasures must be suitable or fitting by way of response to the case at hand."⁷⁵

46. The Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* began by considering the ordinary meaning of "appropriate", before turning to the guidance provided in footnote 9:

"Article 4.10 of the *SCM Agreement* requires the countermeasures that may be authorized in response to the absence of timely withdrawal of a prohibited export subsidy to be 'appropriate'. This term is in turn informed by footnote 9, which clarifies that 'this expression ['appropriate countermeasures'] is not intended to allow countermeasures that would be disproportionate in light of the fact that the subsidies at issue are prohibited'. We will first consider the term 'appropriate', before turning to how it is informed by the terms of footnote 9.

⁷¹ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.42-3.44.

⁷² Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.45-3.46.

⁷³ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.10.

⁷⁴ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.11.

⁷⁵ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.12.

Dictionary definitions of the adjective 'appropriate' include: 'Specially fitted or suitable, proper'⁷⁶ and 'especially suitable or compatible: fitting'.⁷⁷ 'Fitting', in turn, can be defined as 'of a kind appropriate to the situation'. The terms 'fit, suitable, meet, proper, appropriate, fitting, apt, happy, felicitous' are further identified as synonyms that mean 'right with respect to some end, need, use, or circumstance'.⁷⁸

These definitions suggest that the adjective 'appropriate' conveys the notion of something being 'adapted' or 'suited' to the particular situation at hand. This very general indication does not provide explicit guidance as to the exact parameters that legitimately may be taken into account in assessing the 'appropriateness' of countermeasures in the context of Article 4.10 of the *SCM Agreement*. Rather, the term suggests that countermeasures should be 'adapted' to the particular circumstances, and thus that there may be a degree of legitimate variability in what may be 'appropriate', depending on the circumstances of the case. To that extent, we agree with the United States that the term 'appropriate' 'connotes the close relationship between countermeasures and the particular circumstances of a particular case'.

Brazil, for its part, likens the term 'appropriate' to the term 'reasonable', in that it 'similarly involves 'a degree of flexibility'', and that 'the word requires the treaty interpreter to consider all of the circumstances of a particular case in assessing whether the respondent has demonstrated that proposed countermeasures are inappropriate'. Leaving aside for now the question of the burden to be discharged by the responding Member in arbitral proceedings, we agree that the term 'appropriate' suggests that 'all of the circumstances of a particular case' should be taken into account in assessing the "appropriateness" of proposed countermeasures, and that it also suggests a degree of flexibility in what might be considered "appropriate" in a given case."⁷⁹

1.9.1.2.2 Footnote 9 of the SCM Agreement

47. In *US – FSC (Article 22.6 – US)*, the Arbitrator noted that the term "appropriate" countermeasures in Article 4.10 is informed by footnote 9, which provides guidance as to what the expression "appropriate" should be understood to mean. In the Arbitrator's view, "these two elements are part of a single assessment and that the meaning of the expression 'appropriate countermeasures' should result from a combined examination of these terms of the text in light of its footnote".⁸⁰ The Arbitrator thus concluded that "[t]his footnote effectively clarifies further how the term 'appropriate' is to be interpreted. We understand it to mean that countermeasures that would be 'disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited' could not be considered "appropriate" within the meaning of Article 4.10 of the *SCM Agreement*".⁸¹ After analysing the dictionary meaning of the word "disproportionate" in footnote 9, the Arbitrator considered that:

"[F]ootnote 9 further confirms that, while the notion of 'appropriate countermeasures' is intended to ensure sufficient flexibility of response to a particular case, it is a flexibility that is distinctly bounded. Those bounds are set by the relationship of appropriateness. That appropriateness, in turn, entails an avoidance of disproportion between the proposed countermeasures and, as our analysis to this point has brought us, either the actual violating measure itself, the effects thereof on the affected Member, or both."⁸²

48. In *US – FSC (Article 22.6 – US)*, the Arbitrator further looked at the text of the final part of footnote 9 and considered that this text directed them "to consider the 'appropriateness' of

⁷⁶ (footnote original) "appropriate, ppl. a. and n.", *Oxford English Dictionary*, at www.oed.com, definition 5.

⁷⁷ (footnote original) www.merriam-webster.com.

⁷⁸ (footnote original) www.merriam-webster.com.

⁷⁹ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, paras. 4.44-4.47.

⁸⁰ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.8.

⁸¹ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.16.

⁸² Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.19.

countermeasures under Article 4.10 from this perspective of countering a wrongful act and taking into account its essential nature as an upsetting of the rights and obligations as between Members".⁸³ The Arbitrator further noted that that:

"[T]he negative formulation of the requirement under footnote 9 is consistent with a greater degree of latitude than a positive requirement may have entailed: footnote 9 clarifies that Article 4.10 is not intended to allow countermeasures that would be 'disproportionate'. It does not require strict proportionality."⁸⁴

49. The Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* considered footnote 9 in the context of interpreting the concept of "appropriate" countermeasures:

"The very formulation of the footnote, i.e. 'this expression is *not meant to allow* countermeasures that are disproportionate' (emphasis added) indicates, in our view, that it serves to guard against an interpretation of the terms 'appropriate countermeasures' that would allow measures that are 'disproportionate'. We therefore understand this proportionality requirement to be a protection against excessive countermeasures. In other words, while the expression 'appropriate countermeasures' allows a degree of flexibility in assessing what may be 'appropriate' in the circumstances of a given case, this flexibility is not unbounded. As observed by the arbitrator on *US – FSC (Article 22.6 – US)*, 'footnote 9 further confirms that, while the notion of 'appropriate countermeasures' is intended to ensure sufficient flexibility of response to a particular case, it is a flexibility that is distinctly bounded.'⁸⁵

As noted earlier, countermeasures are an exceptional, 'last resort', remedy within the WTO dispute settlement system. Footnote 9, in our view, invites us to exercise caution and to ensure that the response is 'measured' and that the countermeasures to be authorized do not result in a greater disruption in the trade relations among Members and in the application of the WTO agreements than is warranted by the circumstances of the case at hand.

This requirement confirms us in our view that countermeasures, in order to be 'appropriate', should bear some relationship to the extent to which the complaining Member has suffered from the trade-distorting impact of the illegal subsidy. Countermeasures are in essence trade-restrictive measures to be taken in response to a Member's application of a trade-distorting measure that has been determined to nullify or impair the benefits accruing to another Member. Countermeasures that would ensure a relationship of proportionality between the extent to which the trade opportunities of the Member applying the countermeasures has been affected and the extent to which the trade opportunities of the violating Member will in turn be adversely affected would notionally restore the balance of rights and obligations arising from the covered agreements that has been upset between the parties. This would ensure a proper relationship between the level of the countermeasures and the circumstances out of which the dispute arises."⁸⁶

1.9.1.3 Same meaning in Articles 4.10 and 4.11

50. The Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* noted that in their decision, "reference is made to the terms "appropriate countermeasures" as contained in Article 4.10 of the *SCM Agreement*. It is understood that these terms are assumed to have the same meaning also in Article 4.11 of the *SCM Agreement*."⁸⁷

1.9.2 Purpose of countermeasures under Article 4.10

51. The Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* agreed with prior Arbitrator that the objective of countermeasures under Article 4.10 is to "induce compliance":

⁸³ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.23.

⁸⁴ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.27.

⁸⁵ (footnote original) Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.19.

⁸⁶ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, paras. 4.85-4.87.

⁸⁷ Decision by the Arbitrators, *US – Upland Cotton (Article 22.6 – US I)*, fn 118.

"We note that the objective of 'inducing compliance' in relation to retaliatory measures was first recognized in the context of proceedings under Article 22.4 of the DSU. The arbitrator on *EC – Bananas III (US) (Article 22.6 – EC)* thus found that:

'[T]he overall objective of compensation or the suspension of concessions or other obligations as described in Article 22.1:

"Compensation and the suspension of concession or other obligations are temporary measures available in the event that the recommendations or rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements. Compensation is voluntary and, if granted, shall be consistent with the covered agreements."

Accordingly, the authorization to suspend concessions or other obligations is a temporary measure pending full implementation by the Member concerned. We agree with the United States that this *temporary* nature indicates that it is the purpose of countermeasures to *induce compliance*. But this purpose does not mean that the DSB should grant authorization to suspend concessions beyond what is *equivalent* to the level of nullification or impairment. In our view, there is nothing in Article 22.1 of the DSU, let alone in paragraphs 4 and 7 of Article 22, that could be read as a justification for counter-measures of a *punitive* nature."⁸⁸

As the cited passage makes clear, the arbitrator in that dispute did not consider that the objective of 'inducing compliance' implied that this constituted the benchmark by which retaliatory measures may be quantified. Rather, the objective of inducing compliance defined the *purpose* of suspension of concessions or other obligations, while the benchmark (in that case, Article 22.4 of the DSU) required that the *level* of suspension of concessions or other obligations should be in line with the trade effects of the illegal measure on the complainant.

This objective of suspension of concessions or other obligations under Article 22.4 of the DSU has been recently confirmed by the Appellate Body in *US – Continued Suspension*.⁸⁹ Prior arbitrators have also found that the objective of countermeasures under Article 4.10 of the *SCM Agreement* is to 'induce compliance'.⁹⁰

We agree that countermeasures under Article 4.10 of the *SCM Agreement* serve to 'induce compliance'. However, it seems abundantly clear that this purpose does not, in and of itself, distinguish Article 4.10 from the other comparable provisions in the WTO Agreement. 'Inducing compliance' appears rather to be the common purpose of retaliation measures in the WTO dispute settlement system, including in the context of Article 22.4 of the DSU. The fact that countermeasures under Article 4.10 of the *SCM Agreement* serve to induce compliance does not in and of itself provide specific indications as to the *level* of countermeasures that may be permissible under this provision.

This distinction is also found under general rules of international law, as reflected in the ILC's Articles on State Responsibility, which have been referred to by Brazil in these proceedings. Article 49 of these Draft Articles defines 'inducing compliance' as the only legitimate object of countermeasures, while a separate provision, Article 51, addresses the question of the permissible level of countermeasures, which is defined

⁸⁸ (footnote original) Decision by the Arbitrator, *EC – Bananas III (US) (Article 22.6 – EC)*, para. 6.3.

⁸⁹ (footnote original) See Appellate Body Report, *US – Continued Suspension*, para. 309.

⁹⁰ (footnote original) See Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.57; Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras. 3.11 and 3.47.

in relation to proportionality to the injury suffered, taking into account the gravity of the breach.⁹¹

1.9.3 Amount of subsidy as the basis for the calculation of countermeasures

1.9.3.1 General

52. The Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* discussed the approach of having recourse to the "amount of the subsidy" as the basis for the calculation of "appropriate" countermeasures:

"In the three prior cases in which countermeasures under Article 4.10 of the *SCM Agreement* have been considered, the arbitrators had recourse to the 'amount of the subsidy' as the basis for the calculation of 'appropriate countermeasures'.⁹² This is also the principle on which Brazil purports to calculate the level of 'appropriate countermeasures' in these proceedings. The United States, as already noted above, does not disagree, as a matter of principle, with the use of the amount of the subsidy as a starting point for the Arbitrator's analysis in this case.

The use of the 'amount of the subsidy' in prior cases does not imply, however, that the arbitrators in these earlier cases necessarily considered that the 'amount of the subsidy' was the only basis on which 'appropriate countermeasures' might have been calculated. In fact, as we understand it, the arbitrators in these cases took into account the fact that the legal standard embodied in Article 4.10 of the *SCM Agreement* allows greater flexibility than those under Article 22.4 of the DSU or Article 7.9 of the *SCM Agreement* to tailor the countermeasures to the specific circumstances of the case at hand, but did not exclude trade effects as a relevant consideration. In fact, in these decisions, some form of consideration was given to the trade effects of the measure on the complaining Member. As the United States has acknowledged in these proceedings, 'while prior arbitrators considering requests for countermeasures for prohibited subsidies have used an 'amount of the subsidy' approach, they also have acknowledged the 'trade effects' approach'.

Subsidies may operate in a variety of ways, and, depending on the design of the subsidy, as well as its actual operation on the market, the trade effects of the subsidy may be complex to establish. This is well illustrated by the *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)* and the *US – FSC (Article 22.6 – US)* cases. As we have observed above, the terms of Article 4.10 of the *SCM Agreement* allow some flexibility in the manner in which 'appropriate countermeasures' might be calculated.

This Arbitrator is not convinced, however, that an 'amount of subsidy' approach, of itself and without adjustment, will always be consistent with the legal standard embodied in Article 4.10 of the *SCM Agreement*. Actually, we think that in most cases such an approach will not be 'appropriate', notwithstanding its convenience, from a calculation perspective, and its literal attraction, from a 'withdraw the subsidy' perspective. As we have determined above, a consideration of the 'appropriateness' of countermeasures, and in particular the requirement for the countermeasures not to be 'disproportionate', suggests that there should be a degree of relationship between the level of countermeasures and the trade-distorting impact of the measure on the complaining Member.

⁹¹ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, paras. 4.109-4.113.

⁹² (footnote original) In *Brazil – Aircraft (Article 22.6 – Brazil)*, the full payments made under the programme were used as a basis for the calculation. In *US – FSC (Article 22.6 – US)*, the calculation was based on the annual expenditure by the US Government. Finally, in the *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)* case, the amount of the subsidy was calculated on the basis of the benefit conferred by the loan, which was found to correspond to "the difference between the amount Air Wisconsin pays on the loan from EDC and the amount Air Wisconsin would pay on a comparable commercial loan which that company could actually obtain on the market" (Decision by the Arbitrator, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.60).

As noted above, we do not exclude that, in particular circumstances, the complaining Member could perhaps rightly claim that a countermeasure in the amount of the subsidy would be 'appropriate'. However, in most cases, the trade-distorting impact of the subsidy on one or several other Members would not necessarily bear any particular relationship to the amount of the subsidy. As observed by previous arbitrators, the amount of the subsidy may in fact be lower than its trade effects, and apportioning it would ordinarily exacerbate that likelihood. This amount therefore does not seem to us to be *a priori* appropriate, nor is it necessarily proportionate to the extent to which the trade of the Member concerned is adversely affected. In these circumstances, it cannot be assumed that the total amount of the subsidy is an appropriate measure of its trade effects, or even that it is necessarily a relevant 'proxy' for those effects.

Complaining Members do have choices with respect to the amount of countermeasures they seek to impose, and it is the task of an arbitrator to determine whether the choice leads to an appropriate outcome which is consistent with the rights and obligations spelt out in the covered Agreements, the nature of the subsidy concerned and the remedy which is offered, and the balance struck between the rights of all Members. We recall in this context our interpretation of 'appropriateness' in the case of countermeasures against prohibited subsidies, in particular its less precise quantitative constraints. In particular, we note our previous observation that a range of factors can be presented to an arbitrator, together with a number of calculation methods. The arbitrator need not calculate direct equivalence, but instead may accept what the arbitrator feels to be within the bounds of what is appropriate in the circumstances of the case. The legal approach must emanate from the terms of the *SCM Agreement*, the economic principles applied must be logical and unified, and the claims concerning the trade effects must be relevant and reasonable."⁹³

1.9.3.2 Exception to the requirement of equivalence to level of nullification or impairment

53. The Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* rejected Brazil's argument that the countermeasures must be equivalent to the level of nullification or impairment pursuant to Article 22.4 of the DSU, noting that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement. The Arbitrator explained:

"A first approach would be to consider that the concept of nullification or impairment does not apply to Article 4 of the SCM Agreement. We note in this respect that, in relation to actionable subsidies, Article 5 refers to nullification or impairment as only one of the three categories of adverse effects. This could mean that another test than nullification or impairment could also apply in the context of Article 4 of the SCM Agreement.

That said, we note that the Original Panel concluded that, since a violation had been found, a *prima facie* case of nullification or impairment had been made within the meaning of Article 3.8 of the DSU, which Brazil had not rebutted. In that context, we are more inclined to consider that no reference was expressly made to nullification or impairment in Article 4 of the SCM Agreement for the following reasons:

- (a) a violation of Article 3 of the SCM Agreement entails an irrebuttable presumption of nullification or impairment. It is therefore not necessary to refer to it;
- (b) the purpose of Article 4 is to achieve the *withdrawal* of the prohibited subsidy. In this respect, we consider that the requirement to withdraw a prohibited subsidy is of a different nature than removal of the specific nullification or impairment caused to a Member by the measure.⁹⁴ The

⁹³ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, paras. 4.132-4.137.

⁹⁴ (footnote original) We note that Article 3.7 of the DSU refers to the "withdrawal of the measures concerned" as a first objective. However, we also note that, contrary to Article 3.7 of the DSU, Article 4.7 of

former aims at removing a measure which is presumed under the WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent. The latter aims at eliminating the effects of a measure on the trade of a given Member;

- (c) the fact that nullification or impairment is established with respect to a measure does not necessarily mean that, in the presence of an obligation to withdraw that measure, the level of appropriate countermeasures should be based only on the level of nullification or impairment suffered by the Member requesting the authorisation to take countermeasures."⁹⁵

54. In their finding that the concept of nullification or impairment is not found in Articles 3 and 4 of the SCM Agreement, the Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* also noted that a different term than "appropriate countermeasures" was being used in a comparable context in Articles 7.9 and 10 of the SCM Agreement:

"We also note that, when the negotiators have intended to limit countermeasures to the effect caused by the subsidy on a Member's trade, they have used different terms than 'appropriate countermeasures'. Article 7.9 and 10, which is the provision equivalent for actionable subsidies to Article 4.9 and 10 for prohibited subsidies, uses the terms 'commensurate with the degree and nature of the adverse effects determined to exist'. In that context, we do not consider the arguments made by Brazil in its oral presentation and based on the central position of the notion of nullification in the GATT to be compelling. As we have seen above, the term 'appropriate countermeasures' does not impose similar constraints."⁹⁶

55. Further, the Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* addressed the relevance of footnotes 9 and 10 to Article 4.10 and 4.11, respectively:

"We agree that, as those footnotes are drafted, it seems difficult to clearly identify how the second part of the sentence ('in light of the fact that the subsidies dealt with under these provisions are prohibited') relates to the first part of the sentence ('This expression is not meant to allow countermeasures that are disproportionate'). This is probably due to the use of the words 'in light of the fact that'. However, since the text of the treaty is supposed to be the most achieved expression of the intent of the parties, we should refrain from second guessing the negotiators at this point. We can nonetheless note that the reference to the fact that the subsidies dealt with are prohibited can most probably be considered more as an aggravating factor than as a mitigating factor. We also find the use of the word 'disproportionate' to be interesting in light of the term 'out of proportion' used in Article 49 of the Draft Articles. We do not draw any firm conclusions as to the meaning of footnotes 9 and 10. However, we note that footnotes 9 and 10 at least confirm that the term 'appropriate' in Articles 4.10 and 4.11 of the SCM Agreement should not be given the same meaning as the term 'equivalent' in Article 22 of the DSU."⁹⁷⁹⁸

56. The Arbitrator in *US – FSC (Article 22.6 – US)* found that an assessment of the proposed countermeasures in relation to the initial violating measures was sufficient to conclude that the countermeasures were appropriate. In this regard, they compared Articles 7.9 and 9.4 of the SCM Agreement with Article 10 and concluded that the clear reference to trade effects in Article 7.9 "highlights" the lack of any such indication in Article 4.10. The Arbitrator then concluded that Article 4.10 does not "require" that trade effects be the standard by which "appropriateness" is

the SCM Agreement does not provide for any alternative than the withdrawal of the measure once it has been found to be a prohibited subsidy.

⁹⁵ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.47-3.48.

⁹⁶ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.49.

⁹⁷ (footnote original) We are mindful of the fact that, from the point of view of a textual interpretation, "equivalent" and "appropriate" should not be given the same meaning. Interpreters are not permitted to assume such a thing. What we mean is that the term "appropriate", read in the light of footnotes 9 and 10, may allow for more leeway than the word "equivalent" in terms of assessing the appropriate level of countermeasures. A countermeasure remains "appropriate" as long as it is not *disproportionate*, having also regard to the fact that the measure at issue is a prohibited subsidy.

⁹⁸ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.51.

determined. However, they found that Article 4.10 does not "preclude" a Member from adopting countermeasures that are "tailored" to offset adverse "trade effects":

"Recourse to countermeasures is foreseen in three provisions of the *SCM Agreement*: Article 4.10, which we are concerned with here, Article 7.9 and Article 9. As regards actionable subsidies, Article 7.9 provides for authorization of countermeasures 'commensurate with the degree and nature of the adverse effects determined to exist ...'. In a similar vein, Article 9.4 provides, in relation to non-actionable subsidies, for the authorization of countermeasures 'commensurate with the nature and degree of the effects determined to exist'. The explicit precision of these indications clearly highlights the lack of any analogous explicit textual indication in Article 4.10 and contrasts with the broader and more general test of 'appropriateness' found in Articles 4.10 and 4.11.

In short, as far as prohibited subsidies are concerned, there is no reference whatsoever in remedies foreseen under Article 4 to such concepts as 'trade effects', 'adverse effects' or 'trade impact'. Yet, by contrast, such a concept is to be found very clearly in the context of remedies under Article 7, through the notion of 'adverse effects'.

We believe that this difference must be given a meaning and that we should give due consideration to the fact that the drafters – who obviously could have used other terms in order to quantify precisely the permissible amount of countermeasures in the context of Article 4.10 – chose not to do so. It is not our task to read into the treaty text words that are not there. We are also cognizant that the terms that do appear in the text of the treaty must be presumed to have meaning and must be read effectively.⁹⁹ The implications of the use of the term 'appropriate' must therefore be acknowledged and we must give this expression in Article 4.10 its full meaning.¹⁰⁰

...

This reading of the text in its context confirms us in our view that, rather than there being any requirement to confine 'appropriate countermeasures' to offsetting the effects of the measure on the relevant Member, there is a clear rationale exhibited that reinforces our textual interpretation that the Member concerned is entitled to take countermeasures that are tailored to neutralizing the offending measure *qua* measure as a wrongful act. The expression 'appropriate countermeasures', in our view, would entitle the complaining Member to countermeasures which would at least counter the injurious effect of the persisting illegal measure on it. However, it does not *require* trade effects to be the effective standard by which the appropriateness of countermeasures should be ascertained. Nor can the relevant provisions be interpreted to *limit* the assessment to this standard. Members may take countermeasures that are not disproportionate in light of the gravity of the initial wrongful act and the objective of securing the withdrawal of a prohibited export subsidy, so as to restore the balance of rights and obligations upset by that wrongful act."¹⁰¹

57. In *US – FSC (Article 22.6 – US)*, the Arbitrator considered that, since Articles 4.10 and 4.11 of the SCM Agreement may prevail over those of the DSU, there can be no presumption that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4:

"It should be recalled here that Articles 4.10 and 4.11 of the *SCM Agreement* are 'special or additional rules' under Appendix 2 of the *DSU*, and that in accordance with Article 1.2 of the *DSU*, it is possible for such rules or procedures to prevail over those of the *DSU*. There can be no presumption, therefore, that the drafters intended the standard under Article 4.10 to be necessarily coextensive with that under Article 22.4

⁹⁹ (footnote original) See for example the reports of the Appellate Body on *US – Gasoline*, WT/DS2/AB/R, DSR 1996:I, 3, at 21 and *Korea – Dairy*, WT/DS98/AB/R, DSR 2000:I, 3, para. 81.

¹⁰⁰ (footnote original) See paras. 4.24-4.26 above.

¹⁰¹ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras 5.32-5.34 and 5.41.

so that the notion of 'appropriate countermeasures' under Article 4.10 would limit such countermeasures to an amount 'equivalent to the level of nullification or impairment' suffered by the complaining Member. Rather, Articles 4.10 and 4.11 of the *SCM Agreement* use distinct language and that difference must be given meaning.

Indeed, reading the text of Article 4.10 in its context, one might reasonably observe that if the drafters had intended the provision to be construed in this way, they could certainly have made it clear. Indeed, relevant provisions both elsewhere in the *SCM Agreement* and in the *DSU* use distinct terms to convey precisely such a standard as described by the United States, in so many words. Yet the drafters chose terms for this provision in the *SCM Agreement* different from those found in Article 22.4 of the *DSU*. It would not be consistent with effective treaty interpretation to simply read away such differences in terminology.

We therefore find no basis in the language itself or in the context of Article 4.10 of the *SCM Agreement* to conclude that it can or should be read as amounting to a 'trade effect-oriented' provision where explicitly alternative language is to be read away in order to conform it to a different wording to be found in Article 22.4 of the *DSU*.

We would simply add that, while we consider that the precise difference in language must be given proper meaning, this goes no further than that. Our interpretation of Article 4.10 of the *SCM Agreement* as embodying a different rule from Article 22.4 of the *DSU* does not make the *DSU* otherwise inapplicable or redundant."¹⁰²

58. Finally, the Arbitrator in *US – FSC (Article 22.6 – US)* considered that under Article 4.10, a Member is entitled to act with countermeasures that properly take into account the seriousness and nature of the breach. However, they warned that Article 4.10 "does not amount to a blank cheque". The Arbitrator concluded that from the perspective of the measures' trade effects on the part of the complainant did not provide any reason to reach a different conclusion from that already reached:¹⁰³

"Thus, as we interpret Article 4.10 of the *SCM Agreement*, a Member is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question. This cannot be reduced to a requirement that constrains countermeasures to trade effects, for the reasons we have set out above.

At the same time, Article 4.10 of the *SCM Agreement* does not amount to a blank cheque. There is nothing in the text or in its context which suggests an entitlement to manifestly punitive measures. On the contrary, footnote 9 specifically guards us against such an unbounded interpretation by clarifying that the expression 'appropriate' cannot be understood to allow 'disproportionate' countermeasures. However, to read this indication as effectively reintroducing into that provision a quantitative limit equivalent to that found in other provisions of the *SCM Agreement* or Article 22.4 of the *DSU* would effectively read the specific language of Article 4.10 of the *SCM Agreement* out of the text. Countermeasures under Article 4.10 of the *SCM Agreement* are not even, strictly speaking, obliged to be 'proportionate' but not to be 'disproportionate'. Not only is a Member entitled to take countermeasures that are tailored to offset the original wrongful act and the upset of the balancing of rights and obligations which that wrongful act entails, but in assessing the 'appropriateness' of such countermeasures – in light of the gravity of the breach – a margin of appreciation is to be granted, due to the severity of that breach."¹⁰⁴

1.9.3.3 Factors relevant for the calculation of countermeasures

59. The Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* addressed Brazil's argument that certain sales should be excluded because competition was based upon factors other than price, or that there was no competition with the Canadian manufacturer:

¹⁰² Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 5.47-5.50.

¹⁰³ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 6.31 and 6.60.

¹⁰⁴ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, paras. 5.61-5.62.

"Since we selected the amount of the subsidy as the basis for the countermeasures and not the level of nullification or impairment suffered by Canada, it is appropriate and logical to include in our calculation all the sales of subsidised aircraft, whether they compete or not with Bombardier's production. However, consistent with our approach on the burden of proof, we excluded all the sales where Brazil demonstrated that no PROEX interest rate equalization payments had been made and we assumed that future sales of the xxx xxxxxxxx and xxx would not benefit from the PROEX interest rate equalization payments."¹⁰⁵

60. The Arbitrator in *Brazil – Aircraft (Article 22.6 – Brazil)* also rejected Brazil's argument that only sales of aircraft subsequent to the implementation period should be considered although they were delivered after that period:

"We note that, in its report within the framework of the proceedings under Article 21.5 of the DSU, the Appellate Body made the following findings:

'[the Appellate Body] upholds the conclusion of the Article 21.5 Panel that as a result of the continued issuance by Brazil of NTN-I bonds, after 18 November 1999, pursuant to letters of commitment issued before 18 November 1999, Brazil has failed to implement the recommendation of the DSB that it withdraw the prohibited export subsidies under PROEX within 90 days'¹⁰⁶

We, therefore, consider that we have to include in the calculation of the appropriate countermeasures the firm sales for which PROEX letters of commitment were issued before 18 November 1999 and which had not yet been delivered (since the NTN-I bonds are issued at the time of the delivery of the aircraft). We do not consider the arguments based on Brazil's contractual obligations to be compelling. Obligations under internal law are no justification for not performing international obligations."¹⁰⁷

1.9.4 Relationship with other provisions of the SCM Agreement

61. With respect to the relationship with Article 7.9, see the Section on Article 7 of the SCM Agreement.

1.9.5 Relationship with other WTO Agreements

1.9.5.1 DSU

62. As regards the requirement of equivalence of the suspension of concessions to the level of nullification or impairment in Article 22.6 arbitrations, see the Section on Article 22 of the DSU.

1.10 Article 4.11

1.10.1 Task of the Arbitrator under Article 4.11

63. In *Brazil – Aircraft (Article 22.6 – Brazil)*, a case which dealt with Canada's request for authorization to take "appropriate countermeasures" under Article 4.10 of the SCM Agreement, the Arbitrator described their task under Article 4.11 of the SCM Agreement in the following terms:

"As to our task, we follow the approach adopted by previous arbitrators under Article 22.6 of the DSU.¹⁰⁸ We will have not only to determine whether Canada's proposal constitutes 'appropriate countermeasures', but also to determine the level of countermeasures we consider to be appropriate in case we find that Canada's level of

¹⁰⁵ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.62. xxx indicates confidential information.

¹⁰⁶ (footnote original) Appellate Body Report on *Brazil – Aircraft (Article 21.5 – Canada)*, para. 82(a).

¹⁰⁷ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.64-3.65.

¹⁰⁸ (footnote original) See Article 22.6 arbitrations in *EC – Hormones (Article 22.6 – EC)*, para. 12.

countermeasures is not appropriate, if necessary by applying our own methodology."¹⁰⁹

64. In *US – Upland Cotton (Article 22.6 – US I)*, the Arbitrator stated the following in respect of their mandate:

"We agree that, in the event that we find that Brazil's proposed countermeasures are not 'appropriate' within the meaning of Article 4.10 of the *SCM Agreement*, we would be required also to determine what would constitute 'appropriate' countermeasures. This would enable the complaining party to seek an authorization consistent with our decision, as foreseen in Article 22.7 of the DSU. In order to fulfil this part of our mandate, we may be required to adopt an approach or methodology that differs from those proposed by the parties."¹¹⁰

1.10.2 Article 4.11 provisions as special or additional rules

65. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator indicated that they read the provisions of Article 4.11 of the SCM Agreement as special or additional rules:

"We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala – Cement*,¹¹¹ we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference."¹¹²

66. In *US – FSC (Article 22.6 – US)*, the Arbitrator recalled Article 30 of the SCM Agreement and concluded that Article 22.6 of the DSU applies to arbitrations pursuant to Article 4.11 of the SCM Agreement although this latter provision would prevail in case of conflict:

"We also recall the terms of Article 30 of the *SCM Agreement*, which clarifies that the provisions of the *DSU* are applicable to proceedings concerning measures covered by the *SCM Agreement*. Article 22.6 of the *DSU* therefore remains relevant to arbitral proceedings under Article 4.11 of the *SCM Agreement*, as illustrated by the textual reference made to Article 22.6 of the *DSU* in that provision. However, the special or additional rules and procedures of the *SCM Agreement*, including Articles 4.10 and 4.11, would prevail to the extent of any difference between them."¹¹³¹¹⁴

1.10.3 Burden of proof

67. In *Brazil – Aircraft (Article 22.6 – Brazil)*, Canada requested that the DSB authorize it to take appropriate "countermeasures" pursuant to Article 4.10 of the SCM Agreement, and Article 22.2 of the DSU, in the amount of Can\$700 million, in relation to Brazil's subsidy granted to its domestic producer of aircraft. In response to Brazil's request, the DSB referred the matter to an arbitrator in accordance with Article 22.6 of the DSU. With respect to the burden of proof, the Arbitrator held that it was up to Brazil to demonstrate that the countermeasures that Canada was proposing to take were not "appropriate":

"In application of the well-established WTO practice on the burden of proof in dispute resolution, it is for the Member claiming that another has acted inconsistently with the WTO rules to prove that inconsistency. In the present case, the action at issue is the Canadian proposal to suspend concessions and other obligations in the amount of C\$700 million as 'appropriate countermeasures' within the meaning of Article 4.10 of

¹⁰⁹ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.18.

¹¹⁰ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 4.25.

¹¹¹ (footnote original) Op. Cit., para. 65.

¹¹² Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, para. 3.57.

¹¹³ (footnote original) On the notion of "difference", see Report of the Appellate Body on *Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico ("Guatemala – Cement I")*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, paras. 65 and 66.

¹¹⁴ Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 2.6.

the SCM Agreement.¹¹⁵ Brazil challenges the conformity of this proposal with Article 22 of the DSU and Article 4.10 of the SCM Agreement. It is therefore up to Brazil to submit evidence sufficient to establish a *prima facie* case or 'presumption' that the countermeasures that Canada proposes to take are not 'appropriate'. Once Brazil has done so, it is for Canada to submit evidence sufficient to rebut that 'presumption'. Should the evidence remain in equipoise on a particular claim, the Arbitrators would conclude that the claim has not been established. Should all evidence remain in equipoise, Brazil, as the party bearing the original burden of proof, would lose the case.

An issue to be distinguished from the question of who bears the burden of proof is that of the duty that rests on both parties to produce evidence and to collaborate in presenting evidence to the Arbitrators. This is why, even though Brazil bears the original burden of proof, we expected Canada to come forward with evidence explaining why its proposal constitutes appropriate countermeasures and we requested it to submit a 'methodology paper' describing how it arrived at the level of countermeasures it proposes.^{116"117}

68. Along the same lines, the Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* stated that:

"We therefore find that the United States bears the initial burden of establishing the countermeasures are not 'appropriate'. If that initial burden is discharged, Brazil will then have an opportunity of rebutting the conclusion that the countermeasures are not appropriate.

This allocation of burden of proof does not alleviate the burden on each party to establish the facts that it alleges during the proceedings. As observed by the Arbitrator in *US – FSC (Article 22.6 – US)*, 'it is generally for each party asserting a fact, whether complainant or respondent, to provide proof thereof'.¹¹⁸ Accordingly, it is also for Brazil to provide evidence in support of the facts that it advances. The Arbitrator will consider all the evidence and arguments provided by both parties (United States and Brazil) to determine whether the proposed countermeasures are 'appropriate', in line with the principles we have set out concerning burden, and the evidence."¹¹⁹

1.10.4 Treatment of data supplied by private entities

69. In *Brazil – Aircraft (Article 22.6 – Brazil)*, the Arbitrator evaluated the trustworthiness of data supplied by Brazil, and stated that they "could not treat statements from that company as [they] would have if [the statements] had originated from a subject of international law":

"A related problem faced by the Arbitrators in this case was that, in many instances, the original data necessary for the calculations or assessments was solely in the hands of Brazil. When this information originated in the Brazilian government, we assumed good faith and accepted the information and the supporting evidence provided by Brazil to the extent Canada also accepted it or did not provide sufficient evidence to put in doubt the accuracy of Brazil's statements and/or evidence.

However, since this case relates to subsidies granted for the purchase of aircraft produced by the Brazilian aircraft manufacturer, Embraer, a large number of data essential for the resolution of our task is only available to that company. We assumed that Embraer was independent from the Brazilian government and, for that reason, we could not treat statements from that company as we would have if they had originated from a subject of international law. When Brazil only provided statements regarding

¹¹⁵ (footnote original) See WT/DS/46/16.

¹¹⁶ (footnote original) This approach is similar to those followed in the Arbitrator's decisions in *EC – Bananas (1999)* and *EC – Hormones (Article 22.6 – EC)*.

¹¹⁷ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 2.8-2.9.

¹¹⁸ (footnote original) Decision by the Arbitrator, *US – FSC (Article 22.6 – US)*, para. 2.11.

¹¹⁹ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, paras. 4.22-4.23.

information available solely to Embraer, we requested that Brazil support those statements with materials usually regarded as evidence, such as articles or statements reproduced in the specialized press, company annual reports or any other certified information originating in Embraer or other reliable sources. When Brazil was not in a position to provide documentary evidence, we requested a detailed explanation of the reasons why such evidence was not available and expressed our willingness to consider written declarations from authorised Embraer officials, if duly certified. We then weighed this evidence against the evidence submitted by Canada."¹²⁰

1.10.5 Relationship with other provisions of the SCM Agreement

1.10.5.1 Article 7.9

70. The Arbitrator in *US — FSC (Article 22.6 —US)* referred to the wording of Articles 7.9 and 7.10 as context for the interpretation of Article 4.10 and considered that "the explicit precision of these indications [in Articles 7.9 and 7.10] clearly highlights the lack of any analogous explicit textual indication in Article 4.10 and contrasts with the broader and more general test of 'appropriateness' found in Articles 4.10 and 4.11". For the Arbitrator, such a difference in the text "must be given a meaning."¹²¹

71. The Arbitrator in *US — Upland Cotton (Article 22.6 — US I)* contrasted the terms of Article 4.10 with the terms used in Article 7.9:

"[W]ithin the context of the *SCM Agreement*, the terms of Article 4.10 contrast with those of Article 7.9, which foresees, in relation to actionable subsidies, countermeasures 'commensurate with the degree and nature of the adverse effects determined to exist'. Here too, the terms of Article 7.9, through this reference to the 'degree and nature of the adverse effects determined to exist', point to a single specific benchmark as reference, and require the countermeasures to be 'commensurate' with this benchmark, which is carefully defined in relation to the specific adverse effects that form the basis of the underlying findings. These elements distinguish the terms of Article 7.9 from the terms of Article 4.10. This difference can be understood in the broader context of the *SCM Agreement*, where actionable subsidies may only be challenged to the extent that they result in certain enumerated adverse effects for other WTO Members. By contrast, prohibited subsidies are prohibited independently of any demonstration of adverse effects. In such cases, no specific 'adverse effects' will have been 'determined to exist' prior to the request for authorization to apply countermeasures, and therefore there are none that could be referred to."¹²²

1.10.6 Relationship with other WTO Agreements

1.10.6.1 Article 22.4 of the DSU

72. In *Brazil — Aircraft (Article 22.6 — Brazil)*, the Arbitrator addressed Canada's request for authorization to take "appropriate countermeasures" under Article 4.10 of the SCM Agreement. Referring to Article 22.4 of the DSU, Brazil argued that the "countermeasures" must be equivalent to the level of nullification or impairment (this argument was rejected by the Arbitrator as referenced in paragraphs 224-225 above). The Arbitrator explained the relationship between Article 4.11 of the SCM Agreement and Article 22.4 of the DSU by characterizing Article 4.11 of the SCM Agreement as "special or additional rules" and held that the concept of "nullification or impairment" was absent from Articles 3 and 4 of the SCM Agreement and that the principle of effectiveness would be counteracted if the "appropriate countermeasures" had to be necessarily limited to the level of nullification or impairment:

"We read the provisions of Article 4.11 of the SCM Agreement as special or additional rules. In accordance with the reasoning of the Appellate Body in *Guatemala —*

¹²⁰ Decision by the Arbitrator, *Brazil — Aircraft (Article 22.6 — Brazil)*, paras. 2.10-2.11.

¹²¹ Panel Report, *US — FSC (Article 22.6 — US)*, paras. 5.32-5.34.

¹²² Decision by the Arbitrator, *US — Upland Cotton (Article 22.6 — US I)*, para. 4.98.

Cement,¹²³ we must read the provisions of the DSU and the special or additional rules in the SCM Agreement so as to give meaning to all of them, except if there is a conflict or a difference. While we agree that in practice there may be situations where countermeasures equivalent to the level of nullification of impairment will be appropriate, we recall that the concept of nullification or impairment is absent from Articles 3 and 4 of the SCM Agreement. In that framework, there is no legal obligation that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment.

On the contrary, requiring that countermeasures in the form of suspension of concessions or other obligations be equivalent to the level of nullification or impairment would be contrary to the principle of effectiveness by significantly limiting the efficacy of countermeasures in the case of prohibited subsidies. Indeed, as shown in the present case,¹²⁴ other countermeasures than suspension of concessions or obligations may not always be feasible because of their potential effects on other Members. This would be the case of a counter-subsidy granted in a sector where other Members than the parties compete with the products of the parties. In such a case, the Member taking the countermeasure may not be in a position to induce compliance.

We are mindful that our interpretation may, at a first glance, seem to cause some risk of disproportionality in case of multiple complainants. However, in such a case, the arbitrator could allocate the amount of appropriate countermeasures among the complainants in proportion to their trade in the product concerned. The 'inducing' effect would most probably be very similar."¹²⁵

73. The Arbitrator in *US – Upland Cotton (Article 22.6 – US I)* contrasted the standard of "appropriate" countermeasures in Article 4.10 with the "equivalence" standard in Article 22.4 of the DSU:

"We agree that the term 'appropriate', by contrast to the terms 'equivalent to the level of nullification or impairment', does not require us to engage in an exact exercise to work out the correspondence between the level of countermeasures to be authorized and a specific benchmark such as the level of nullification or impairment of benefits suffered by the complainant. We agree that this difference in wording must be given meaning. The term 'appropriate' in Article 4.10 of the *SCM Agreement* suggests a degree of flexibility and adaptation to the circumstances of the case that is not found in Article 22.4 of the DSU."¹²⁶

Current as of: December 2023

¹²³ (footnote original) Appellate Body on *Guatemala – Cement I*, para. 65.

¹²⁴ (footnote original) Canada mentioned that it could have applied a counter-subsidy but refrained from doing so for a number of reasons.

¹²⁵ Decision by the Arbitrator, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras. 3.57-3.59.

¹²⁶ Decision by the Arbitrator, *US – Upland Cotton (Article 22.6 – US I)*, para. 4.97.