1.1 Text of Article 5

Article 5

Adverse Effects

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

(a) injury to the domestic industry of another Member\(^\text{11}\); (footnote original) \(^{11}\) The term "injury to the domestic industry" is used here in the same sense as it is used in Part V.

(b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994\(^\text{12}\); (footnote original) \(^{12}\) The term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions.

(c) serious prejudice to the interests of another Member.\(^\text{13}\)
(footnote original) 13 The term "serious prejudice to the interests of another Member" is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

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

1.2 General

1.2.1 Elements of a claim under Article 5

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

1.2.2 Temporal scope of Article 5

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

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

1.2.3 No requirement of "continuing" benefit

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

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

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

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2 Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 686.
3 Appellate Body Report, EC and certain member States – Large Civil Aircraft, para. 713.
subsidies provided to the Airbus Industrie consortium "passed through" to the current producer of Airbus LCA, Airbus SAS.4

1.2.5 Reference period for determining whether subsidies cause adverse effects

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

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

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

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

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

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

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4 Appellate Body Report, EC and certain member States – Large Civil Aircraft, paras. 769-777.
5 Panel Report, EC and certain member States – Large Civil Aircraft, paras. 7.1693-7.1694.
Article 1.1(b) of the SCM Agreement and there is consequently no need to re-evaluate under Article 5 the amount of the benefit conferred pursuant to Article 1.1(b). Rather, an adverse effects analysis under Article 5 must consider the trajectory of the subsidy as it was projected to materialize over a certain period at the time of the grant. Separately, where it is so argued, a panel must assess whether there are "intervening events" that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the ex ante analysis. Such events may be relevant to an adverse effects analysis because they may affect the link that a complaining party is seeking to establish between the subsidy and its alleged effects.

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

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

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

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

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

..."

In our view, there is no reason why an 'intervening event' must be defined in terms of circumstances that will only ever decrease the ex ante 'life' of a subsidy. We see nothing in the language used by the Appellate Body to describe an 'intervening event' that would prevent the possibility of finding that an event occurring after the granting of a subsidy might increase the ex ante 'life' of a subsidy. While the extent to which any one or more particular events may be characterized as such will, of course, ultimately depend upon the particular facts, one circumstance that might be
considered to increase the ex ante life of a subsidized loan, for example, could be the unplanned adjustment of its terms in a way that increases the amount of subsidization. We therefore agree with the parties that an 'intervening event' may either increase or decrease the ex ante life of a subsidy.\footnote{9}

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

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

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

\textit{[T]he fact that a subsidy is 'deemed to exist' under Article 1.1 once there is a financial contribution that confers a benefit \textit{does not mean that a subsidy does not continue to exist after the act of granting the financial contribution}.}\footnote{10}\footnote{11}

\textbf{1.3 Article 5(a): injury to the domestic industry}

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

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

\ldots

Since in this case we are essentially fulfulling the role that would be taken by the investigating authority in a countervailing or anti-dumping duty investigation, this means that we must base our examination and determination with respect to injury on positive evidence and an objective examination of the various injury elements as required by the more specific provisions of Article 15."\footnote{12}
1.4 Article 5(b): "nullification or impairment"

1.4.1 General

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

1.4.2 Application of a measure

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

1.4.3 Existence of a benefit

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

1.4.4 Nullification or impairment of a benefit

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

1.5 Article 5 (c)

1.5.1 "serious prejudice"

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

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

\textsuperscript{13} Panel Report, US – Offset Act (Byrd Amendment), paras. 7.118-119.
\textsuperscript{14} Panel Report, US – Offset Act (Byrd Amendment), para. 7.122.
\textsuperscript{15} Panel Report, US – Offset Act (Byrd Amendment), para. 7.123.
\textsuperscript{16} Panel Report, US – Offset Act (Byrd Amendment), para. 7.124.
\textsuperscript{17} Panel Report, US – Offset Act (Byrd Amendment), para. 7.127.
situations identified in the sub-paragraphs of Article 6.3, and the reference in the
chapeau of Article 6.3 to serious prejudice 'in the sense of ' Article 5(c), we believe
that such 'serious prejudice ' may involve the effects of subsidies on the complaining
Member's trade in a given product. That is, it addresses the volumes and prices and
flows of such trade, which may, by logical extension, affect a producing Member's
domestic production of that product. We therefore consider that a detrimental impact
on a complaining Member's production of, and/or trade in, the product concerned may
fall within the concept of 'prejudice ' in Article 5(c) of the SCM Agreement.

Moreover, the prejudice involved must be 'serious '. In one of its ordinary meanings,
'serious ' means 'important ' and 'not slight or negligible '. Thus, the prejudice in
terms of the effect on Brazil's production of, and/or trade in, upland cotton must be
such as to affect Brazil's production of upland cotton, to a degree that is 'important ',
'not slight or negligible ', or meaningful.

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

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

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

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

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

"[A] panel will often be confronted with multiple factors that may have contributed, to
varying degrees, to that effect. Indeed, in some circumstances, it may transpire that
factors other than the subsidy at issue have caused a particular market effect. Yet the
mere presence of other causes that contribute to a particular market effect does not,

20 Appellate Body Report, US – Large Civil Aircraft (2nd complaint), para. 913 (referring to Appellate
Brazil), para. 374; and Appellate Body Report, EC and certain member States – Large Civil Aircraft,
para. 1232).
in itself, preclude the subsidy from being found to be a 'genuine and substantial' cause of that effect. Thus, as part of its assessment of the causal nexus between the subsidy at issue and the effect(s) that it is alleged to have had, a panel must seek to understand the interactions between the subsidy at issue and the various other causal factors, and make an assessment of their connections to, as well as the relative importance of the subsidy and of the other factors in bringing about, the relevant effects. In order to find that the subsidy is a genuine and substantial cause, a panel need not determine it to be the sole cause of that effect, or even that it is the only substantial cause of that effect. A panel must, however, take care to ensure that it does not attribute the effects of those other causal factors to the subsidies at issue, and that the other causal factors do not dilute the causal link between those subsidies and the alleged adverse effects such that it is not possible to characterize that link as a genuine and substantial relationship of cause and effect. The subsidy at issue may be found to exhibit the requisite causal link notwithstanding the existence of other causes that contribute to producing the relevant market phenomena if, having given proper consideration to all other relevant contributing factors and their effects, the panel is satisfied that the contribution of the subsidy has been demonstrated to rise to that of a genuine and substantial cause.22

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

1.5.2 "another Member"

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

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

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

1.5.3 Standing as complainant

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


"In our view, the text of Article XVI [of the GATT 1994] and of Part III of the SCM Agreement make clear that serious prejudice may arise where a Member’s trade interests have been affected by subsidization. We see nothing in Article XVI or in Part III that would suggest that the United States may claim that it has suffered adverse effects merely because it believes that the interests of US companies have been harmed where US products are not involved. The United States has cited no language in Article XVI:1 or Part III suggesting that the nationality of producers is relevant to establishing the existence of serious prejudice. Accordingly, given that serious prejudice may only arise in the case at hand where there is ‘displacement or impedance of imports of a like product from another Member’ or price undercutting ‘as compared with the like product of another Member’, we do not consider that the United States can convert such effects on products from the European Communities into serious prejudice to US interests merely by alleging that the products affected were produced by US companies.”

1.6 Relationship with other Articles of the SCM Agreement

1.6.1 Article 6

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

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

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

Current as of: December 2019