1  **ARTICLE 7**

1.1 **Text of Article 7**

**Article 7**

*Remedies*

7.1 Except as provided in Article 13 of the Agreement on Agriculture, whenever a Member has reason to believe that any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice, such Member may request consultations with such other Member.

7.2 A request for consultations under paragraph 1 shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question, and (b) the injury caused to the domestic industry, or the nullification or impairment, or serious prejudice caused to the interests of the Member requesting consultations.
In the event that the request relates to a subsidy deemed to result in serious prejudice in terms of paragraph 1 of Article 6, the available evidence of serious prejudice may be limited to the available evidence as to whether the conditions of paragraph 1 of Article 6 have been met or not.

7.3 Upon request for consultations under paragraph 1, the Member believed to be granting or maintaining the subsidy practice 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.

7.4 If consultations do not result in a mutually agreed solution within 60 days, any Member party to such consultations may refer the matter to the DSB for the establishment of a panel, unless the DSB decides by consensus not to establish a panel. The composition of the panel and its terms of reference shall be established within 15 days from the date when it is established.

Any time-periods mentioned in this Article may be extended by mutual agreement.

7.5 The panel shall review the matter and shall submit its final report to the parties to the dispute. The report shall be circulated to all Members within 120 days of the date of the composition and establishment of the panel’s terms of reference.

7.6 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.

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

7.7 Where a panel report is appealed, the Appellate Body shall issue its decision within 60 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 60 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 90 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.

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

7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

7.9 In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

7.10 In the event that a party to the dispute requests arbitration under paragraph 6 of Article 22 of the DSU, the arbitrator shall determine whether the countermeasures are commensurate with the degree and nature of the adverse effects determined to exist.
1.2 Article 7.8

1.2.1 General

1. The Panel in Indonesia – Autos referred in its conclusions and recommendations to the remedy in Article 7.8 as follows:

   "With respect to the conclusion of serious prejudice to the interests of the European Communities, Article 7.8 of the SCM Agreement provides that, '[w]here a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining the subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.'"

2. In the context of a claim regarding the scope of Article 21.5 of the DSU, the Panel in US – Upland Cotton (Article 21.5 – Brazil) addressed the issue of whether it is only the adverse effects resulting from the subsidies at issue in the original proceeding that need to be removed, or whether the Article 7.8 obligation also requires the removal of (additional) adverse effects resulting from the continued provision of the same subsidies:

   "Under Article 7.8 of the SCM Agreement the United States was obligated, with respect to the subsidies subject to the 'present' serious prejudice finding of the original panel, to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'.

   It is clear from the context that the adverse effects that must be removed are the adverse effects of the subsidy that has been determined to have resulted in adverse effects. Since the original panel made a finding of present serious prejudice in respect of subsidies provided during MY 1999-2002, the question arises whether the obligation to take appropriate steps to remove the adverse effects only applies to payments of subsidies made in those years.

   It is not in dispute that the United States presently provides marketing loan and counter-cyclical payments on the same legal basis and subject to the same conditions and criteria as the marketing loan payments and counter-cyclical payments that were subject to the panel's finding of 'present' serious prejudice. In a situation where the subsidy in question has been found to be a prohibited one, the continued use of the subsidy under the same conditions and criteria is inconsistent with a Member's obligation to 'withdraw' the subsidy under Article 4.7 of the SCM Agreement. Thus, the concept of 'withdrawal' must in any event be interpreted to mean that a Member must cease to act in a WTO-inconsistent manner with respect to that subsidy. If a failure to cease conduct inconsistent with a Member's obligations under Article 3 of the SCM Agreement is inconsistent with the obligation to withdraw the subsidy in Article 4.7 of the SCM Agreement, we see no logical reason why the same concept should not also apply to the obligation that arises under Article 7.8 of the SCM Agreement to withdraw the subsidy or to take appropriate steps to remove the adverse effects of a subsidy that has been determined to result in adverse effects. In our view, the remedy under Article 7.8 must be viewed in its relationship to the obligation in Article 5 not to cause through the use of any subsidy referred to in Articles 1.1 and 1.2 of the SCM Agreement adverse effects to the interests of other Members. It must serve to restore conformity with the Member's obligation to avoid causing adverse effects through the use of any subsidy. As a consequence, a Member does not take appropriate steps to remove adverse effects of a subsidy if it continues to provide payments under the same conditions and criteria as the original subsidy in a manner that causes adverse effects. The interpretation advocated by the United States, whereby the obligation under Article 7.8 of the SCM Agreement is limited to the removal of the adverse effects caused by subsidies granted in a particular period of time, implies that it would not be possible to review in an Article 21.5 proceeding whether a Member causes adverse effects by continuing to grant subsidies under the same conditions and criteria as the subsidies found to have caused adverse effects.

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1 Panel Report, Indonesia – Autos, para. 15.3.
Such an interpretation fails to take into account the relationship between Article 7.8 and Article 5 of the SCM Agreement and thus fails to interpret Article 7.8 in its proper context.2

3. The Appellate Body was in broad agreement with the Panel's approach to Article 7.8 of the SCM Agreement:

"Pursuant to Article 7.8, the implementing Member has two options to come into compliance. The implementing Member: (i) shall take appropriate steps to remove the adverse effects; or (ii) shall withdraw the subsidy. The use of the terms 'shall take' and 'shall withdraw' indicate that compliance with Article 7.8 of the SCM Agreement will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of its adverse effects. A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own.

The question then becomes: With respect to which subsidies must the implementing Member take such action? Such action would certainly be expected with respect to subsidies granted in the past and which may have formed the basis of a panel's determination of present serious prejudice and adverse effects. However, we do not see the obligation in Article 7.8 as being limited to subsidies granted in the past. Article 7.8 expressly refers to a Member 'granting or maintaining such subsidy'. The verb 'maintain' suggests, to us, that the obligation set forth in Article 7.8 is of a continuous nature, extending beyond subsidies granted in the past. This means that, in the case of recurring annual payments, the obligation in Article 7.8 would extend to payments 'maintained' by the respondent Member beyond the time period examined by the panel for purposes of determining the existence of serious prejudice, as long as those payments continue to have adverse effects. Otherwise, the adverse effects of subsequent payments would simply replace the adverse effects that the implementing Member was under an obligation to remove. Such a reading of Article 7.8 would not give meaning and effect to the term 'maintain', which is distinct from the term 'grant', and has also been included in that Article. Indeed, it would render the term 'maintain' redundant. In addition, it would fail to give meaning and effect to the obligation to 'take appropriate steps to remove the adverse effects' in Article 7.8, and to the requirement under Article 21.5 to 'comply' with the DSB's recommendations and rulings, including the requirement to take the remedial action foreseen in Article 7.8 as a consequence of a finding of adverse effects.

Our interpretation of Article 7.8 is consistent with the context provided by Article 4.7 of the SCM Agreement, which applies in cases involving prohibited subsidies. In US – FSC (Article 21.5 – EC II), the Appellate Body stated that, 'if, in an Article 21.5 proceeding, a panel finds that the measure taken to comply with the Article 4.7 recommendation made in the original proceedings does not achieve full withdrawal of the prohibited subsidy—either because it leaves the entirety or part of the original prohibited subsidy in place, or because it replaces that subsidy with another subsidy prohibited under the SCM Agreement—the implementing Member continues to be under the obligation to achieve full withdrawal of the subsidy'. Similarly, a Member would not comply with the obligation in Article 7.8 to withdraw the subsidy if it leaves an actionable subsidy in place, either entirely or partially, or replaces that subsidy with another actionable subsidy. We recognize that, unlike Article 4.7, Article 7.8 gives Members the option of removing the adverse effects as an alternative to withdrawing the subsidy. The availability of this option is arguably a consequence of the fact that actionable subsidies are not prohibited per se; rather, they are actionable to the extent they cause adverse effects. Nevertheless, the option of removing the adverse effects cannot be read as allowing a Member to continue to cause adverse effects by maintaining the subsidies that were found to have resulted in adverse effects. As observed earlier, if the contrary proposition were accepted, the adverse effects of subsequent subsidies, especially in the case of recurrent subsidies, would simply replace the adverse effects that the implementing Member was required to

remove, making the obligation in Article 7.8 to 'take appropriate steps to remove the adverse effects' meaningless."

4. In US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU), the Panel disagreed with the European Union’s interpretation of the phrase "to take appropriate steps to remove the adverse effects" which was that this phrase entails an obligation to ensure adverse effects are removed from the specific transaction that formed the basis of the adverse effects findings in the original proceeding. The Panel explained:

"First, the European Union's argument involves an assumption that the phrase 'take appropriate steps to remove the adverse effects' in Article 7.8 must be interpreted to mean that a Member found to be granting or maintaining an actionable subsidy is obligated to ensure that the particular adverse effects found to exist in respect of the specific transactions during the original reference period cease to exist in respect of those same transactions. We doubt whether such an interpretation of 'remove the adverse effects' is meaningful in a practical sense. It is not clear, for example, how it is possible in practice for a Member to take steps to ensure that significant price suppression found in relation to specific transactions during the original reference period does not continue in respect of those same transactions in the post-implementation period or that a significant lost sale found in the original reference period in respect of a specific transaction does not continue to constitute a lost sale in respect of that transaction in the post-implementation period.

Second, the idea that 'to take appropriate steps to remove the adverse effects' entails an obligation to ensure that adverse effects must be 'removed' from the specific transactions that formed the basis for the adverse effects findings in the original proceeding is also difficult to reconcile with the prospective interpretation of Article 7.8. ... In our view, to interpret 'to take appropriate steps to remove the adverse effects' to mean 'ensuring that no adverse effects arise in the new reference period', is very different from interpreting this phrase to mean that a Member is obligated 'to remove the adverse effects associated with each of {the} sales' that were found to be lost sales in the original proceeding."

5. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) considered the scope of Article 7.8 by stressing the effects-based nature of disciplines under Article 5 of the SCM Agreement and noting the role of Article 7.8 in bringing an implementing Member into conformity with its rights and obligations. The Panel concluded that "a subsidy found to have caused adverse effects in an original proceeding need not always continue to exist during the implementation period in order for an implementing Member to have a compliance obligation with respect to that subsidy under the terms of Article 7.8 of the SCM Agreement." The Panel explained:

"It follows from the effects-based nature of the disciplines in Article 5 and the role that Article 7.8 is intended to play in bringing an implementing Member into conformity with its obligations under the SCM Agreement, that there may well be particular factual circumstances when the obligation to 'take appropriate steps to remove the adverse effects' or 'withdraw the subsidy' will apply to subsidies found to have caused adverse effects in an original proceeding, irrespective of whether those subsidies continue to exist in the implementation period. In other words, because the remedies provided for under Article 7.8 are intended to bring an implementing Member into conformity with its obligations under Article 5, the fact that it is possible under these disciplines to find that a subsidy no longer being granted or maintained causes adverse effects, necessarily implies that the mere fact that a subsidy granted in the past no longer exists cannot alone exclude it from the scope of an implementing Member's Article 7.8 compliance obligations."
6. In EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), the Panel provided guidance on the appropriate counterfactual to assess whether a Member has complied under Article 7.8 of the SCM Agreement by taking appropriate steps to remove the adverse effects after it has been determined that the Member failed to achieve compliance under Article 7.8 of the SCM Agreement by withdrawing the subsidy. The Panel rejected the counterfactual suggested by the European Union, which "entails comparing the actual market situation ... with the market situation that would have existed if the challenged subsidies had been withdrawn at the end of the implementation period."\(^7\)

7. The Panel noted that "the European Union's proposed counterfactual ignores all prior effects of the non-withdrawn subsidy, which may well be important to understanding its present-day effects" and "fails to identify whether the provision of a non-withdrawn subsidy that continues to exist in the post-implementation period has present day effects."\(^8\) Moreover, the Panel pointed out that the respondent's different hypothetical withdrawal options may involve "different, possibly competing, scenarios" and "a complainant might well conceive of other possible withdrawal options that would have a different counterfactual market effect."\(^9\)

8. Therefore, the Panel found that the appropriate counterfactual to apply is one under which the subsidies in question were never granted to Airbus, referred to as "the absence of" these subsidies.\(^10\)

1.2.2 Implication under Article 7.8 of the "expiry" of subsidy for determination of "withdrawal"

9. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) found that the "expiry" of a subsidy does not necessarily amount to withdrawing that subsidy within the meaning of Article 7.8 of the SCM Agreement:

"[I]t cannot be concluded on the sole basis of the 'expiry' of the relevant ... subsidies that the European Union and certain member States have ipso facto complied with the obligation to 'withdraw the subsidy' with respect to those measures. Rather, in the light of the effects-based nature of the subsidy disciplines of Article 5, the extent to which these passive 'expiry' events may be found to amount to the 'withdrawal' of subsidies for the purpose of Article 7.8 will depend upon the extent to which they bring the European Union and certain member States into conformity with Article 5 of the SCM Agreement."\(^11\)

10. The European Union in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) contended that the "expiry", "extinction" and/or "extraction" events always amount to "withdrawal" of subsidies.\(^12\) In support of this interpretation, the European Union presented three arguments. First, the European Union argued that "the obligation to 'withdraw the subsidy' in both Articles 4.7 and 7.8 of the SCM Agreement must be given the same meaning and that, therefore, the former possibility for achieving compliance with Article 4.7 must also be available to an implementing Member faced with a compliance obligation under Article 7.8."\(^13\) The Panel disagreed:

"[T]he fact that the 'removal' or 'taking away' of a subsidy, in the sense of bringing the 'life' of a subsidy to an end, may suffice to bring an implementing Member into compliance with Article 4.7 does not undermine our interpretation of what is needed to 'withdraw the subsidy' for the purpose of Article 7.8. This is because the availability of this particular compliance option under Article 4.7 results from the fact that the prohibition in Articles 3.1(a) and 3.2 is based on the mere existence of a particular type of subsidy, irrespective of its trade effects. ... [I]n the light of the purpose of Article 7.8 and the effects-based disciplines of Article 5, it is only logical, in our view,

\(^7\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.263.
\(^8\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.265.
\(^9\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.267.
\(^10\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.268.
\(^12\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 6.1079.
\(^13\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 6.1086.
to find that the 'removal' or 'taking away' of a subsidy, in the sense of bringing the 'life' of a subsidy to an end, may not always *ipso facto* suffice to bring an implementing Member into compliance with its obligation to 'withdraw the subsidy' for the purpose of Article 7.8 of the SCM Agreement.

...  

[W]e understand Article 3.7 of the DSU to be a more general expression of the compliance objective that is articulated in Articles 4.7 and 7.8 for the purpose of Parts II and III of the SCM Agreement. It follows, therefore, that as is the case with the obligation to 'withdraw the subsidy' under Articles 4.7 and 7.8, the 'withdrawal' of measures that is referred to in Article 3.7 of the DSU should be understood in the light of the nature of the particular obligation(s) with respect to which an implementing Member must achieve conformity in any given dispute. Where pursuant to any such obligation a continued infringement of a covered agreement can only be established on the basis of the *existence* of a particular type of measure, the mere 'removal' or 'taking away' of that measure, in the sense of its termination, will be sufficient to conclude that the measure has been 'withdrawn', thereby bringing the relevant Member into conformity with the covered agreements. On the other hand, where the relevant obligation imposes a prohibition or discipline that is based on the existence of certain *trade effects*, as opposed to the existence of a measure, the mere 'removal' or 'taking away' of the relevant measure, in the sense of its termination, may not bring an end to the undesired trade effects. In this latter situation, the mere 'removal' or 'taking away' of a measure would be insufficient to establish that the 'withdrawal' of measures envisaged in Article 3.7 has been achieved.

Thus, the reason why the 'removal' or 'taking away' of a subsidy, in the sense of bringing the 'life' of a subsidy to an end, may have a different impact on the extent to which an implementing Member has complied with Article 4.7 compared with Article 7.8 is not because of any fundamental difference in the intellectual framework used to interpret the respective obligations to 'withdraw the subsidy'. Rather, the difference is due to the diverse nature of the obligations that give rise to the respective compliance obligation – the former being based on the mere *existence* of a prohibited subsidy, whereas the latter being focused on the *trade effects* of a subsidy, irrespective of its continued existence.*

11. Second, the European Union in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* argued that the Appellate Body’s statements in *US – Upland Cotton (Article 21.5 – Brazil)* must be understood "within the specific temporal context of the lives of the subsidies at issue in a particular dispute." The European Union emphasized that the LA/MSF measures in this proceeding were provided over 42 years ago and the subsidies had "'accrued and diminished'" over time, which affect the way by which compliance is assessed with the requirements of Article 7.8.

The Panel also rejected this argument:

"Contrary to what appears to be the European Union’s position, we do not understand the ... Appellate Body statements to support the proposition that the mere expiry of a subsidy at the end of its expected life before the end of an implementation period will *always* suffice to establish that an implementing Member has 'withdrawn' the subsidy for the purpose of Article 7.8. Rather, as already noted, the logical implication of the Appellate Body's statement is that it will only be in circumstances that are not 'usual' or 'normal' that allowing a subsidy to expire passively over the ordinary course of its expected life will be sufficient to establish compliance.

While it is true that the Appellate Body has declared that a subsidy has a 'finite life', which 'accumulates and diminishes over time', and which 'comes to an end', the Appellate Body has never equated the end of the life of a subsidy with the cessation of its effects. On the contrary, the Appellate Body has explicitly found that the effects of a

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subsidy may well persist beyond its expected life, and that ultimately, the extent to which this may be the case will be a fact-specific matter. Although the age of a subsidy will be an important factor to consider when making this assessment, it will not alone be determinative. Thus, the simple fact that the anticipated life of a subsidy may have expired before the end of the implementation period does not preclude that the subsidy may be continuing to cause adverse effects in the post-implementation period. Ultimately, therefore, we cannot accept the European Union's reliance on the Appellate Body's statements to support its contention that the passive 'expiry' events it relies upon mean that it has complied with the obligation to 'withdraw the subsidy' because, as already noted, equating these events with the 'withdrawal' of subsidies for the purpose of Article 7.8 would render any findings of adverse effects made against such expired subsidies in original proceedings purely declaratory, and to this extent render the effects-based disciplines of Article 5 of the SCM Agreement inutile."

12. Finally, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) rejected the European Union's third argument that an interpretation of Article 7.8 in which an implementing Member must achieve conformity with Article 5 of the SCM Agreement would read out the compliance option in Article 7.8 to "take appropriate steps to remove the adverse effects", contrary to the principle of effective treaty interpretation. In the Panel's view, Article 7.8, by its express terms, provides an implementing Member with "potentially two different pathways to achieve the same compliance objective". The Panel explained, that the first option to "withdraw the subsidy"—which may be achieved by bringing the "life" of the subsidy to an end or by modifying the terms of the subsidy in a way that eliminates the prohibited export performance condition—focuses on the implementing Member's efforts on the subsidy found to have caused adverse effects. Thereby, the Member found to have caused such adverse effects has the option to come into conformity with Article 5 of the SCM Agreement by 'withdrawing' that subsidy. By contrast, because the second option in Article 7.8 to "take appropriate steps to remove the adverse effects" does not explicitly refer to the "subsidy", an implementing Member under this approach would come into conformity with its compliance obligations under Article 5 "without taking any specific action in relation to the subsidy found to cause adverse effects, but rather through other more effects-based or market-focused solutions". In the Panel's view, "the very existence of this possibility suggests that the drafters of the SCM Agreement had in mind that the option to 'withdraw the subsidy' might not always be a desirable course of action for an implementing Member". Under either approach, the range of compliance options will vary and depend on the facts of the particular case. In sum, the Panel stated:

"It follows from the above analysis that finding that the two compliance options provided for in Article 7.8 must be interpreted in a way that brings an implementing Member into conformity with its obligations under Article 5 of the SCM Agreement does not render the option to 'withdraw the subsidy' inutile. While the efforts of an implementing Member taking up the option to 'withdraw', 'remove' or 'take away' the subsidy, will be focused on the subsidy itself; an implementing Member wanting to 'take appropriate steps to remove the adverse effects' may pursue a different course action that is unrelated to the subsidy measure itself. An implementing Member will, of course, be free to choose between any possible alternative means of pursuing these two compliance options. However, as the Appellate Body has emphasized, whatever approach an implementing Member finally decides upon must be 'sufficient to bring that Member into compliance with its WTO obligations'."

13. The Appellate Body in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) considered whether the Panel erred in its interpretation of Article 7.8. The Appellate Body noted that the use of the word "or" in the text of this provision suggests that a Member may implement DSB recommendations and rulings under Part III of the SCM Agreement by choosing either of the alternative pathways to achieving compliance. It also considered that the use of the words "granting or maintaining" of a subsidy found to have caused adverse effects reflects an

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obligation to cease any such conduct. Therefore, the Appellate Body found it difficult to see how a Member could be said to be granting or maintaining a subsidy giving rise to a compliance obligation if that subsidy has expired and therefore no longer exists. The Appellate Body pointed out:

"Article 7.8 consists of two clauses. The introductory clause refers to circumstances where a subsidy is found, in an adopted panel or Appellate Body report, to have 'resulted in adverse effects to the interests of another Member'. The second clause then specifies that, in such a situation, 'the Member granting or maintaining such subsidy' may come into compliance with its obligations under the SCM Agreement in one of two alternative ways: (i) it may either 'take appropriate steps to remove the adverse effects'; or (ii) it may 'withdraw the subsidy'. The use of the word 'or' in the context of the second clause of Article 7.8 suggests that the Member concerned may implement the recommendations and rulings of the DSB under Part III of the SCM Agreement by choosing either of these alternative pathways to achieving compliance.

... Article 7.8 of the SCM Agreement expressly refers to the 'granting or maintaining' of a subsidy found to have caused adverse effects to the interests of another Member. As we see it, these terms indicate that Article 7.8 reflects an obligation to cease any conduct amounting to the 'granting or maintaining' of subsidies that cause adverse effects. This is true regardless of whether the words 'granting or maintaining' in Article 7.8 are understood in the present continuous tense, or as present participles qualifying the term 'Member'. Indeed, Article 7.8 sets out an obligation 'of a continuous nature, extending beyond subsidies granted in the past. Moreover, the object of the action of 'granting or maintaining' is the 'subsidy' that causes adverse effects. In the light of this language in Article 7.8, we find it difficult to see how a Member could be said to be 'granting or maintaining' a subsidy giving rise to a compliance obligation if that subsidy has expired and therefore no longer exists."23

11. In EC and certain member States – Large Civil Aircraft (Article 21.5 – US), the Appellate Body expressed concern with the Panel's understanding that 'withdrawal' requires, in each case, that the implementing Member remove the adverse effects of any past subsidies, regardless of whether such subsidies had expired. The Appellate Body looked at the ordinary meaning of the word "withdraw" and found that it concerns the taking away of that subsidy, and thus means that a Member "granting or maintaining" a subsidy should cease such conduct. The Appellate Body noted that the Panel's reasoning in this regard was that it should be possible to find that an implementing Member has withdrawn – i.e. "taken away" – a subsidy found to cause adverse effects when "the terms or conditions of that subsidy have been modified in a way that ensures it no longer causes adverse effects."24 However, the Appellate Body noted that it was not clear how an implementing Member could modify the terms and conditions of subsidies that no longer exist.25 Moreover, while the pathway identified by the Panel – i.e. modification of the terms or conditions of a subsidy in a way that ensures it no longer causes adverse effects – may provide one way for an implementing Member to come into compliance with its obligations under Article 7.8, the Appellate Body noted that it did "not see how it would effectively differ from the other compliance option provided for under this provision: the option of taking appropriate steps to remove the adverse effects."26

12. The Appellate Body in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) noted the Panel's reliance on the context and object and purpose of Article 7.8. It also underlined that Article 7.8 is situated within a broader range of provisions applicable to disputes regarding actionable subsidies that have been found to be inconsistent with Articles 5 and 6 of the SCM Agreement. According to the Appellate Body, however, while Article 5 and Article 7.8 of the SCM Agreement concern two related but distinct inquiries, the Panel's analysis of Article 5 appears

23 Appellate Body Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), paras. 5.362 and 5.364.
24 (footnote original) Panel Report, para. 6.1098. (italics original; underlining added).
25 Appellate Body Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 5.364.
26 Appellate Body Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 5.365.
to have blurred the distinction between these two provisions. The Appellate Body clarified that
while a past subsidy that no longer exists may be found to cause or have caused adverse effects
that continue to be present during the reference period, the source of the inconsistency under
Article 5 is nonetheless the subsidy that causes adverse effects. In turn, the option to withdraw
the subsidy under Article 7.8 contemplates action in relation to the subsidy found to have caused
adverse effects and to the extent that the underlying subsidy has ceased to exist, there is no
additional requirement to remove any lingering effects that may flow from the subsidy. The
Appellate Body disagreed with the Panel that it follows from the so-called ‘effects based nature’ of
Article 5 that an implementing Member would have a compliance obligation under Article 7.8
regardless of whether the subsidy continues to exist:

“As we see it, Article 5 and Article 7.8 of the SCM Agreement concern two related but
distinct inquiries: while the former seeks to establish the existence of adverse effects
and the causal link between any subsidy and the adverse effects found to exist, the
latter specifies the compliance actions to be taken by a Member granting or
maintaining a subsidy found to have caused or to cause adverse effects. The Panel’s
analysis of Article 5 appears to blur the distinction between these two provisions and,
as the European Union suggests, to ‘collapse {} the substantive obligations under
Article 5 and the implementation obligations under Article 7.8’. We note in particular
that, in its analysis of the compliance obligations that an implementing Member has
under Article 7.8, the Panel relied heavily on what it characterized as the ‘effects-
based nature’ of Article 5 of the SCM Agreement. The Panel referred in particular
to the following passage of the Appellate Body report in EC and certain member States –
Large Civil Aircraft:

Article 5 of the SCM Agreement imposes an obligation on Members not to
cause adverse effects to the interests of other Members through the use
of any subsidy as defined in Article 1. We disagree with the proposition
that this obligation does not arise in respect of subsidies that have come
to an end by the time of the reference period. In fact, we do not exclude
that, under certain circumstances, a past subsidy that no longer exists
may be found to cause or have caused adverse effects that continue to be
present during the reference period.

This passage recognizes that a subsidy and its effects need not be contemporaneous.
Contrary to what the Panel appears to have assumed, it does not follow from this that
the effect of a subsidy can be detached from the subsidy itself such that these effects
could be subject to a separate compliance obligation under Article 7.8. When a
subsidy has expired such that it is no longer in existence, we cannot see how a
compliance obligation could still apply to lingering effect of such a past subsidy.
Rather, what is relevant for Article 5, as well as for Article 7.8, is the causing of
adverse effects through the use of the subsidy. While a past subsidy that no longer
exists may be found to cause or have caused adverse effects that continue to be
present during the reference period, the source of the inconsistency under Article 5 is
nonetheless the subsidy that causes adverse effects. The option to ‘withdraw the
subsidy’ under Article 7.8 contemplates action in relation to the subsidy found to have
causadverse effects. To the extent that the underlying subsidy has ceased to exist,
there is no additional requirement, under Article 7.8, to remove any lingering effects
that may flow from that subsidy. We therefore disagree with the Panel that it follows
from the so-called ‘effects-based nature’ of the discipline of Article 5 that an
implementing Member would have a compliance obligation under Article 7.8
regardless of whether the subsidy continues to exist.”

13. The Appellate Body in EC and certain member States – Large Civil Aircraft (Article 21.5 –
US) found support for its interpretation of Article 7.8 in Part II of the SCM Agreement covering
prohibited subsidies, as well as the rules that apply to the imposition of countervailing duties in
Part V. The Appellate Body also looked at context provided by other covered agreements and
noted that Article 7.8 is one of the special or additional rules and procedures on dispute settlement
contained in the covered agreements that are identified in Article 1.2 and Appendix 2 of the DSU,

27 Appellate Body Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), paras.
5.370 - 5.371.
and it was concerned with the Panel's decision to resort to context provided by the DSU without properly considering the contextual relevance of those provisions in other parts of the SCM Agreement:

"Our reading of Article 7.8 also finds support in the relevant provisions under Part II of the SCM Agreement, entitled 'Prohibited Subsidies', comprising Articles 3 and 4. Article 3.1 provides that subsidies contingent upon export performance (Article 3.1(a)) or upon the use of domestic over imported goods (Article 3.1(b)) 'shall be prohibited'. Article 3.2 further provides that '(a) Member shall neither grant nor maintain subsidies referred to' in Article 3.1. Article 4, like Article 7 of the SCM Agreement, is entitled 'Remedies', and sets out the rules for dispute settlement involving prohibited subsidies referred to in Article 3. Article 4.7 provides that, '(i) 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'. Article 4.7 does not require removal of the effects of such subsidies. Rather, withdrawal under Article 4.7 seeks to eliminate the source of the inconsistency, namely, the condition that is prohibited under Article 3.1(a) or 3.1(b). Similarly, Article 7.8 addresses the source of the infringement found to exist, and requires cessation of conduct consisting of the granting or maintaining of subsidies that cause adverse effects. It would be incongruous, in our view, if elimination of the source of the inconsistency were sufficient to comply with an implementing Member's obligations in the context of Article 4.7, but not in the context of Article 7.8.

It is also useful in this regard to consider the rules that apply to the imposition of countervailing duties under Part V of the SCM Agreement. While serious prejudice can only be addressed through countermeasures imposed under Part III, subsidies that cause injury to the domestic industry can be addressed *either* through countermeasures imposed under Part III or through countervailing duties under Part V.

With regard to the imposition of countervailing duties, Article 19.1 of the SCM Agreement stipulates that countervailing duties may be imposed on subsidized imports 'unless the subsidy or subsidies are withdrawn.' Hence, under Part V of the SCM Agreement, remedial action is contemplated with respect to subsidies that cause injury to the domestic industry. As we see it, the same is true in the context of Part III of the SCM Agreement, where the inconsistency to be remedied relates to subsidies that constitute a genuine and substantial cause of adverse effects during the implementation period. Thus, the inconsistency does not relate to only the effects, as the Panel seems to have suggested, but rather to the *action of using subsidies* in a way that causes adverse effects.

Looking beyond the SCM Agreement to context provided by other covered agreements, we note that Article 7.8 of the SCM Agreement is one of the 'special or additional rules and procedures on dispute settlement contained in the covered agreements' that are identified in Article 1.2 and Appendix 2 of the DSU, which prevail over the general DSU rules and procedures to the extent that they *cannot* be read as *complementing* each other. In this regard, we are concerned with the Panel's decision to resort to context provided by various provisions of the DSU without considering properly the contextual relevance of provisions in other parts of the SCM Agreement. This is especially so because, as a 'special or additional rule' on dispute settlement in the SCM Agreement, Article 7.8 must be properly understood in the particular context of disputes involving subsidies."28

14. The Appellate Body concluded that while expired subsidies can give rise to adverse effects, there is no requirement under Article 7.8 to remove these effects. The obligation to take appropriate steps to remove the adverse effects or withdraw the subsidy concerns the subsidies that continue to be granted or maintained by the implementing Member at the end of the implementation period. An implementing Member cannot be required to withdraw a subsidy that has ceased to exist. The Appellate Body also noted that it saw no basis, under Article 7.8 of the

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28 Appellate Body Report, *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, paras. 5.376 - 5.379.
SCM Agreement, "to require that an implementing Member 'take appropriate steps to remove the adverse effects' of subsidies that no longer exist."\textsuperscript{29}

1.2.3 Implication under Article 7.8 of the modification of the terms of a subsidy

15. In EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), the European Union argued that a "substantial modification" of the terms of a subsidized loan gives rise to a new financial contribution, which requires a new benefit assessment against a contemporaneous market benchmark.\textsuperscript{30} The Panel recalled the Appellate Body's observations in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) and stated that "the question ... to be resolved, in the light of the European Union's submissions, is whether the [***] amendment has aligned the terms of the A350XWB LA/MSF loan agreement with a market benchmark."\textsuperscript{31} The Panel added:

"In the light of the prospective nature of WTO remedies, we understand that the alignment of an existing subsidized loan with a market benchmark need not result in the repayment of past subsidies provided under that loan, but rather, it must achieve non-subsidization with respect to the future operation of the loan."\textsuperscript{32}

16. The Panel rejected the European Union's reliance on Japan – DRAMS (Korea) because that dispute addressed different legal and factual matters. The Panel explained that, in contrast to the German A350XWB agreement, the loans at issue in Japan – DRAMS (Korea) had not been characterized as a subsidy within the meaning of Article 1.1 of the SCM Agreement.\textsuperscript{33} The Panel pointed out that the legal question in EC and certain member States – Large Civil Aircraft (Article 21.5 – EU) was the following:

"[W]hether the [***] amendment should be understood to have created a new German A350XWB loan contract that must be considered separately and independently from the pre-existing subsidized A350XWB loan, when it comes to determining whether the subsidy provided under the pre-existing A350XWB loan contract has been withdrawn for the purpose of Article 7.8 of the SCM Agreement."\textsuperscript{34}

17. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – EU) further considered that "the [***] amendment to the German A350XWB LA/MSF agreement altered the rights of the German government and Airbus, but it did not bring into existence a new loan agreement."\textsuperscript{35} The Panel therefore found that:

"[T]he original German A350XWB LA/MSF agreement continues to exist in a modified form, reflecting the revised repayment terms agreed through the [***] amendment. In our view, this implies that, contrary to the European Union's contention, the appropriate benchmark against which to measure whether the [***] amendment aligned the terms of the German A350XWB LA/MSF agreement with the market, is not a loan on the same or similar terms issued by a market lender for the first time at the same moment as the amendment."\textsuperscript{36}

18. In this regard, the Panel stated that:

"[W]here funding under a subsidized loan agreement has already been disbursed and remains outstanding, an amendment to that loan to bring it into alignment with a market benchmark on a prospective basis would need to ensure that, all other things being equal, the revised repayment terms capture the overall cash-flow the market

\textsuperscript{29} Appellate Body Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 5.383.

\textsuperscript{30} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.129.

\textsuperscript{31} panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.140.

\textsuperscript{32} panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.140.

\textsuperscript{33} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.145.

\textsuperscript{34} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.143.

\textsuperscript{35} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.147.

\textsuperscript{36} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.147.
lender would have expected to achieve, at the time the recipient originally entered into the government loan contract, for the remaining duration of the particular loan."\textsuperscript{37}

19. According to the Panel, such an approach "would ensure that the 'withdrawal' of a subsidy will depend upon a Member's own actions and decisions, as opposed to exogenous factors such as the general cost of finance in an economy."\textsuperscript{38}

20. The Panel found that the same reasoning applies "mutatis mutandis in relation to the European Union's reliance on Japan – DRAMS (Korea) to support its submissions concerning the [***] amendments to the A380 LA/MSF agreements."\textsuperscript{39}

1.2.4 Implication under Article 7.8 of the full repayment of a loan on its subsidized terms

21. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – EU) disagreed with the European Union's contention that the repayment of the LA/MSF agreements removed the financial contribution provided to Airbus and thus brought the life of the subsidy to an end. The Panel pointed out that, contrary to the European Union's assertion, the first compliance panel in the same dispute did not discuss whether the removal of one of the constituent elements of a subsidy means that the subsidy no longer exists, but stated that "the repayment of a loan on its own subsidized terms might not amount to the 'removal' of a financial contribution."\textsuperscript{40} The Panel considered that:

"[T]he full repayment of the principal disbursed under a subsidized loan can be best equated with the provision of a financial contribution in the form of a one-off cash grant (equivalent to the total savings resulting from below-market interest rates), not the 'removal' of a subsidy. In our view, to argue otherwise would mean that Members would have different compliance obligations under Article 7.8 of the SCM Agreement in relation to the withdrawal of subsidies affording recipients the same amount of benefit, simply because of the form of the financial contribution chosen to confer that benefit."\textsuperscript{41}

22. The Panel concluded that "the repayment of a loan on subsidized terms should not be understood to bring the life of a subsidy to an end".\textsuperscript{42} The Panel pointed out that the repayment of principal and interest under a subsidized loan is an inherent feature of this type of financial contribution, and that the performance of this essential requirement cannot define "both the provision and the withdrawal of a subsidy" for the purpose of Article 7.8 of the SCM Agreement.\textsuperscript{43}

23. Referring to the Appellate Body statement in EC and certain member States – Large Civil Aircraft concerning the terms of Article 1 of the SCM Agreement, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – EU) found that "the life of a subsidized loan may come to an end in either of two situations: when the financial contribution and the benefit have been removed; or when only the benefit is removed."\textsuperscript{44}

24. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – EU) further clarified that although "a Member has no compliance obligation under Article 7.8 with respect to expired subsidies", the repayment of a loan on subsidized terms does not necessarily mean that the subsidy has expired and it does not "remove", "return" or "withdraw" the subsidized loan.\textsuperscript{45} For both a grant and a subsidized loan, "the life of the subsidy will depend upon the extent to which the recipient is continuing to use the subsidy for its originally intended purposes (in the European Union's example, the useful life of the purchased assets) without having repaid at least the

\textsuperscript{37} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.149.
\textsuperscript{38} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.151.
\textsuperscript{39} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.217.
\textsuperscript{40} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.188.
\textsuperscript{41} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.196.
\textsuperscript{42} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.197.
\textsuperscript{43} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.198.
\textsuperscript{44} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.202.
\textsuperscript{45} Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.203.
remaining value of the benefit associated with the original financial contribution on a prospective basis."\(^{46}\)

### 1.2.5 Implication under Article 7.8 of the amortization of the benefit through the passage of time

25. In EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), in discussing the withdrawal of a subsidy through the amortization of benefit, the Panel rejected the European Union's argument that the life of a subsidized loan may be determined on the basis of the expected repayment period. To the contrary, the Panel stated that "the life of the subsidy will depend upon the extent to which the recipient is continuing to use the financial contribution for its originally intended purpose without having repaid at least the remaining value of the benefit on a prospective basis."\(^{47}\)

26. Furthermore, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – EU) noted that the Spanish A380 LA/MSF agreement had been amended twice, which constituted "intervening events", modifying the ex ante expectations.\(^{48}\) The Panel thus found that "even by the European Union's own 'loan life' standard, the life of the Spanish A380 LA/MSF subsidy has not come to an end because the [***] amendment extended the repayment terms beyond the contracting parties' ex ante expectations."\(^{49}\)

### 1.2.6 Article 7.8 as a special or additional rule and procedure

27. The Appellate Body in US – Upland Cotton (Article 21.5 – Brazil) noted that Article 7.8 of the SCM Agreement is one of the "special or additional rules and procedures on dispute settlement contained in the covered agreements" within Annex II of the DSU, which prevail over the general DSU rules and procedures to the extent of a conflict between them.\(^{50}\)

28. In addition, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) elaborated on Article 7.8 of the SCM Agreement as a "special or additional rule and procedure" on dispute settlement:

"Article 7.8 specifies what an implementing Member must do following the adoption of a panel and/or Appellate Body report in which it is determined that any subsidy has caused adverse effects within the meaning of Article 5 of the SCM Agreement. In particular, Article 7.8 prescribes that any 'Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy'. It follows that in order to determine whether an implementing Member has complied with the recommendations and rulings adopted by the DSB in cases involving actionable subsidies, one of the questions that an Article 21.5 panel will have to evaluate is whether the Member concerned has acted in conformity with the requirement to 'take appropriate steps to remove the adverse effects' or 'withdraw the subsidy'."\(^{51}\)

29. However, the Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) cautioned that the fact Article 7.8 of the SCM Agreement is a "special or additional rule and procedure" within the meaning of DSU Annex II does not mean that Article 7.8 "must be applied in isolation to the rules of the DSU". Rather, "a first important part of the context of Article 7.8 are the rules of the DSU governing when and how WTO compliance obligations are incurred and discharged."\(^{52}\)

30. The Panel in EC and certain member States – Large Civil Aircraft (Article 21.5 – US) highlighted various provisions of the DSU – such as Articles 19.1 (obligation to bring WTO-

\(^{46}\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.203.

\(^{47}\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.239.

\(^{48}\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.243.

\(^{49}\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – EU), para. 7.244.

\(^{50}\) Appellate Body Report, US – Upland Cotton, para. 235; see also Appellate Body Reports, Guatemala – Cement I, fn 55; US – FSC, para. 159.

\(^{51}\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 6.2.

\(^{52}\) Panel Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 6.804.
inconsistent measure into conformity), 21.1 (prompt compliance with the recommendations and rulings of the Dispute Settlement Body), 21.5 (process by which disputing parties resolve disagreement with the existence or consistency of measures taken to comply), 3.2 (preservation of Members’ rights and obligations under the covered agreements), 3.4 (satisfactory settlement of the matter), and 3.7 (mutually acceptable solutions) – as relevant context to the interpretation of Article 7.8. On that basis, the Panel concluded that "one of the fundamental objectives of Article 7.8 of the SCM Agreement must be to bring an implementing Member found to have caused adverse effects to the interests of another Member back into conformity with its obligations under Article 5 of the SCM Agreement."

The Panel found additional support for this approach in WTO case law.

1.2.7 Relationship with other Articles of the SCM Agreement

1.2.7.1 Article 4.7

31. In the context of its finding that the phrase "withdraw the subsidy" under Article 4.7 referred to retrospective remedies (repayment), the Panel in Australia – Automotive Leather II (Article 21.5 – US) considered Article 7.8 and the phrase "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy" therein.

1.3 Article 7.9 and 7.10

1.3.1 Meaning of "countermeasures ... commensurate with the degree and nature of the adverse effects determined to exist"

1.3.1.1 "countermeasures"

32. The Arbitrator in US – Upland Cotton (Article 22.6 – US II) developed a detailed interpretation of the expression "countermeasures ... commensurate with the degree and nature of the adverse effects determined to exist". With respect to the term "countermeasures", the Arbitrator stated that:

"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 this term to refer to.

The prefix 'counter-' can be defined as meaning 'against, in return'. 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'.

..."

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


Panels Report, EC and certain member States – Large Civil Aircraft (Article 21.5 – US), para. 6.813.

countermeasures that may be permissible under Article 7.9 of the SCM Agreement. We also note that the term 'countermeasures' is similarly used in Article 4.10 of the SCM Agreement, where the permissible level of countermeasures is defined differently, in terms of 'appropriateness'.

... We note that the term 'countermeasures' is the general term used by the ILC in the context of its Articles on State Responsibility to designate temporary measures that injured States may take in response to breaches of obligations under international law. This has been noted by arbitrators in the context of interpreting Article 4.10 of the SCM Agreement.

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. 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 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 relevant WTO Agreement(s) 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.  

1.3.1.2 "commensurate with the degree and nature"

33. In the context of providing a detailed interpretation of the expression "countermeasures ... commensurate with the degree and nature of the adverse effects determined to exist", the Arbitrator in US – Upland Cotton (Article 22.6 – US II) considered the term "commensurate":

"Dictionary definitions of this term include: 'equal in measure or extent: coextensive' and 'corresponding in size, extent, amount, or degree: proportionate', 'of equal extent, coextensive'.

In light of these elements, we agree that the term 'commensurate' essentially connotes a 'correspondence' between two elements. In the context of Article 7.9, the 'correspondence' is between the countermeasures and the 'degree and nature of the adverse effects determined to exist'.

...

We agree that the term 'commensurate' does not suggest that exact or precise equality is required, between the two elements to be compared, i.e. in this case, the proposed countermeasures and the 'degree and nature of the adverse effects determined to exist'. To that extent, we agree that the term 'commensurate' connotes a less precise degree of equivalence than exact numerical correspondence. Nonetheless, the term 'commensurate' does indicate, in our view, a relationship of correspondence and proportionality between the two elements, and not merely a relationship of 'adequacy' or 'harmony' as suggested by Brazil. We do not exclude that this correspondence may be qualitative as well as quantitative. The exact nature of the correspondence at issue will further be informed by the identification of what exactly the proposed countermeasures are required to be 'commensurate' with. This is defined through the terms 'the degree and nature of the adverse effects determined to exist'.  

56 Decision by the Arbitrator, US – Upland Cotton (Article 22.6 – US II), paras. 4.24-4.32.  
57 Decision by the Arbitrator, US – Upland Cotton (Article 22.6 – US II), paras. 4.36-4.39.
34. The Arbitrator in EC and certain member States – Large Civil Aircraft (Article 22.6 – EU) further clarified that the "commensurateness" standard may not require exact equivalence between the level of the proposed countermeasures and the adverse effects found to exist.58

35. Regarding the terms "degree and nature", the Arbitrator in US – Upland Cotton (Article 22.6 – US II) stated that:

"We agree that the reference to both the 'degree' and the 'nature' of the adverse effects determined to exist suggests that the correspondence that is required to exist, between the proposed countermeasures and the 'degree and nature of the adverse effects', may encompass both quantitative and qualitative elements. The 'degree' of the effects could be understood as a quantitative element, whereas the reference to the 'nature' of the adverse effects seems to point to something more qualitative.

... We agree that the reference to the 'nature' of the adverse effects may be understood to refer to the different 'types' of adverse effects that are foreseen in Articles 5 and 6, and that this therefore invites a consideration of the specific type of 'adverse effects' that have been determined to exist as a result of the specific measure in relation to which countermeasures are being requested. These effects could manifest themselves in a variety of ways, each reflecting a specific type of trade distortion.

... In assessing the 'commensurateness' of the proposed countermeasures to the 'degree and nature' of the adverse effects determined to exist, we are entitled to take into account fully the 'degree and nature' of these adverse effects as they present themselves in the case at hand, but we are not permitted to do more than that. In other words, the 'degree and nature' of the adverse effects determined to exist in the case at hand constitute the entirety of what we may and must consider in assessing the 'commensurateness' of the proposed countermeasures in that case."59

1.3.1.3 "the adverse effects determined to exist"

36. The Arbitrator in US – Upland Cotton (Article 22.6 – US II) considered that "the adverse effects determined to exist" refers to the findings on adverse effects made by the Panel/Appellate Body in the underlying proceedings:

"Brazil observes that the term 'adverse effects determined to exist' sends the treaty interpreter back to the precise findings on adverse effects made by the panels and the Appellate Body as these constitute the 'adverse effects determined to exist'. We agree.

The expression 'adverse effects determined to exist' refers us to the specific 'adverse effects' within the meaning of Articles 5 and 6 of the SCM Agreement that form the basis of the underlying findings in the case at hand.

We note in this respect that Article 5 of the SCM Agreement identifies three categories of 'adverse effects to the interests of other Members', that 'no Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1'. These are:

(a) injury to the domestic industry of another Member;

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58 Decision by the Arbitrator, EC and certain member States – Large Civil Aircraft (Article 22.6 – EU), para. 6.508.
59 Decision by the Arbitrator, US – Upland Cotton (Article 22.6 – US II), paras. 4.41-4.47. See also Decision by the Arbitrator, EC and certain member States – Large Civil Aircraft (Article 22.6 – EU), para. 6.45.
(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;

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

Article 7.1 further provides the possibility for any WTO Member to request consultations with another Member, whenever it has reason to believe that 'any subsidy referred to in Article 1, granted or maintained by another Member, results in injury to its domestic industry, nullification or impairment or serious prejudice'.

In principle, therefore, the 'adverse effects determined to exist' in the underlying proceedings ultimately leading to a request for countermeasures under Article 7.9 of the SCM Agreement may be in the form of injury to the domestic industry of a Member, nullification or impairment, or serious prejudice to the interests of another Member." 60

1.3.2 Purpose of countermeasures under Article 7.9

37. The Arbitrator in US – Upland Cotton (Article 22.6 – US II) considered the purpose of countermeasures under Article 7.9 to be essentially the same as countermeasures under Article 4.10 of the SCM Agreement and retaliatory measures under Article 22.4 of the DSU:

"The question of the objective of retaliatory measures in the WTO has been addressed 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.'

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. 61 Arbitrators have also found that the objective of countermeasures under Article 4.10 of the SCM Agreement is to 'induce compliance'. 62

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60 Decision by the Arbitrator, US – Upland Cotton (Article 22.6 – US II), paras. 4.49-4.53.
62 (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. 3.47-3.48; Decision by the Arbitrator, Brazil – Aircraft (Article 22.6 – Brazil), paras. 3.44, 3.54, 3.57 and 3.58.
We see no reason to assume that countermeasures under Article 7.9 of the SCM Agreement would serve a different purpose. The authorization of countermeasures in relation to actionable subsidies arises in circumstances comparable to those relating to countermeasures under Article 4.10 of the SCM Agreement or Article 22.4 of the DSU, i.e. in a situation where the responding Member has failed to comply with the recommendations and rulings of the DSB in the prescribed time period. As under Article 22.4 of the DSU and Article 4.10 of the SCM Agreement, countermeasures under Article 7.9 of the SCM Agreement constitute temporary measures taken in response to a continued breach of the obligations of the Member concerned, and pending full compliance with the recommendations and rulings of the DSB. We consider, therefore, that countermeasures under Article 7.9 of the SCM Agreement also serve to 'induce compliance'.

1.3.3 Task of the Arbitrator

38. In US – Upland Cotton (Article 22.6 – US II), the Arbitrator referred to Article 7.10 and described their mandate as follows:

"In these proceedings, we are therefore called upon to determine whether the countermeasures proposed by Brazil in relation to the marketing loans and countercyclical payments are "commensurate with the degree and nature of the adverse effects determined to exist" within the meaning of Article 7.9 of the SCM Agreement. ... ...

We agree that, in the event that we find that Brazil's proposed countermeasures are not commensurate with the degree and nature of the adverse effects determined to exist, we would be required also to determine what would constitute such 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."

1.3.4 Burden of proof

39. In US – Upland Cotton (Article 22.6 – US II), the Arbitrator considered that the approach taken to the burden of proof under Article 4.11 was equally applicable in the context of Article 7.10:

"In the context of proceedings under Article 4.11 of the SCM Agreement and Article 22.6 of the DSU, arbitrators have consistently determined that the party objecting to the proposed countermeasure bears the burden to establish a prima facie case or presumption that the countermeasures are not 'appropriate' within the meaning of Article 4.11 and that it is then up to the party proposing the countermeasures to rebut such presumption.

The same approach applies, in our view, to proceedings under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement. We therefore find that the United States bears the initial burden of establishing the countermeasures are not 'commensurate with the degree and nature of the adverse effects determined to exist' and that Brazil bears the burden of rebutting such conclusions.

The Arbitrator is also of the view that 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 on US – FSC (Article 22.6 – EC), 'it is generally for each party asserting a fact, whether complainant or respondent, to

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64 Decision by the Arbitrator, US – Upland Cotton (Article 22.6 – US II), paras. 4.8, 4.16.
65 (footnote original) See Decision of the Arbitrator, Brazil – Aircraft (Article 22.6 – Brazil), paras. 2.8-2.9.
provide proof thereof’. 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 ‘commensurate with the degree and nature of the adverse effects determined to exist’.

1.3.5 Article 7.9 as a special or additional rule and procedure

40. In US – Upland Cotton (Article 22.6 – US II), the Arbitrator were mindful that Article 7.9 establishes a special or additional rule and procedure under Appendix 2 of the DSU:

“The terms of Article 7.9 of the SCM Agreement, as a ‘special or additional rule and procedure’, should be interpreted on their own terms. It is clear that they may embody different rules, which would prevail in case of conflict. Nonetheless, Article 22.6 of the DSU remains relevant, as the general legal basis under which the proceedings are conducted. Indeed, Article 7.9 of the SCM Agreement refers expressly to Article 22.6 of the DSU as the legal basis for arbitral proceedings relating to countermeasures in relation to actionable subsidies.”

1.3.6 Article 7.10 arbitrations

41. The Arbitrator in EC and certain member States – Large Civil Aircraft (Article 22.6 – EU) considered that the arbitration in that case was covered by both Article 7.10 of the SCM agreement and Article 22.6 of the DSU. In contrast to Article 22.7, which defines the mandate of an arbitrator under an Article 22.6 arbitration, the mandate under Article 7.10 of the SCM Agreement "is to determine whether the countermeasures proposed by the United States are 'commensurate with the degree and nature of the adverse effects determined to exist'. The Arbitrator further noted that Article 7.10 makes explicit reference to Article 22.6, "thereby confirming that arbitrations governed by Article 7.10 are, at the same time, governed by Article 22.6".

1.3.6.1 Events occurring outside the Reference Period

42. In considering events occurring outside the Reference Period, the Arbitrator in EC and certain member States – Large Civil Aircraft (Article 22.6 – EU) stated the following:

"[W]e emphasize that, insofar as we take into account in our assessment any particular evidence that was not available during the 2011-2013 Reference Period, we do so in order to place as accurate a value as reasonably possible on the orders that represent the lost sales that occurred in the 2011-2013 Reference Period, and not to alter adverse effects already established in the compliance proceedings or to establish any additional adverse effects. Instead, in our assessment we take into account evidence, including post-Reference Period evidence, only insofar as it sheds light on how we should quantify the adverse effects determined to exist in the 2011-2013 Reference Period."

43. The Arbitrator in EC and certain member States – Large Civil Aircraft (Article 22.6 – EU) pointed out that Articles 5 and 6 of the SCM Agreement describe multiple types of adverse effects and that therefore Article 7.10 "clearly envisions that an arbitrator may assess multiple kinds of different adverse effects, the 'degree and nature' of which may differ."
44. The Arbitrator in *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)* rejected the argument that it should calculate a countermeasures or suspension of concessions for individual product markets. In the view of the Arbitrator, "providing a single maximum level of Annual Suspension based on the 'degree and nature of the adverse effects determined to exist' is consistent with [the Arbitrator's] mandate."72

1.3.7 Relationship with other Articles of the SCM Agreement

1.3.7.1 Article 4.10 of the SCM Agreement

45. 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."73

46. 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."74

Current as of: December 2019

72 Decision by the Arbitrator, *EC and certain member States – Large Civil Aircraft (Article 22.6 – EU)*, para. 6.190.

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

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