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Article 8

Identification of Non-Actionable Subsidies

8.1 The following subsidies shall be considered as non-actionable²³:

*(footnote original)*²³ It is recognized that government assistance for various purposes is widely provided by Members and that the mere fact that such assistance may not qualify for non-actionable treatment under the provisions of this Article does not in itself restrict the ability of Members to provide such assistance.

- (a) subsidies which are not specific within the meaning of Article 2;
- (b) subsidies which are specific within the meaning of Article 2 but which meet all of the conditions provided for in paragraphs 2(a), 2(b) or 2(c) below.

8.2 Notwithstanding the provisions of Parts III and V, the following subsidies shall be non-actionable:

- (a) assistance for research activities conducted by firms or by higher education or research establishments on a contract basis with firms if:^{24, 25, 26}

*(footnote original)*²⁴ Since it is anticipated that civil aircraft will be subject to specific multilateral rules, the provisions of this subparagraph do not apply to that product.

*(footnote original)*²⁵ Not later than 18 months after the date of entry into force of the WTO Agreement, the Committee on Subsidies and Countervailing Measures provided for in Article 24 (referred to in this Agreement as "the Committee") shall review the operation of the provisions of subparagraph 2(a) with a view to making all necessary modifications to improve the operation of these provisions. In its consideration of possible modifications, the Committee shall carefully review the definitions of the categories set forth in this subparagraph in the light of the experience of Members in the operation of research programmes and the work in other relevant international institutions.

*(footnote original)*²⁶ The provisions of this Agreement do not apply to fundamental research activities independently conducted by higher education or research establishments. The term "fundamental research" means an enlargement of general scientific and technical knowledge not linked to industrial or commercial objectives.

the assistance covers²⁷ not more than 75 per cent of the costs of industrial research²⁸ or 50 per cent of the costs of pre-competitive development activity^{29, 30};

*(footnote original)*²⁷ The allowable levels of non-actionable assistance referred to in this subparagraph shall be established by reference to the total eligible costs incurred over the duration of an individual project.

*(footnote original)*²⁸ The term "industrial research" means planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services.

*(footnote original)*²⁹ The term "pre-competitive development activity" means the translation of industrial research findings into a plan, blueprint or design for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype which would not be capable of commercial use. It may further include the conceptual formulation and design of products, processes or services alternatives and initial demonstration or pilot projects, provided that these same projects cannot be converted or used for industrial application or commercial exploitation. It does not include routine or periodic alterations to existing products, production lines, manufacturing processes, services, and other on-going operations even though those alterations may represent improvements.

*(footnote original)*³⁰ In the case of programmes which span industrial research and pre-competitive development activity, the allowable level of non-actionable assistance shall not exceed the simple average of the allowable levels of non-actionable assistance applicable to the above two categories, calculated on the basis of all eligible costs as set forth in items (i) to (v) of this subparagraph.

and provided that such assistance is limited exclusively to:

- (i) costs of personnel (researchers, technicians and other supporting staff employed exclusively in the research activity);
 - (ii) costs of instruments, equipment, land and buildings used exclusively and permanently (except when disposed of on a commercial basis) for the research activity;
 - (iii) costs of consultancy and equivalent services used exclusively for the research activity, including bought-in research, technical knowledge, patents, etc.;
 - (iv) additional overhead costs incurred directly as a result of the research activity;
 - (v) other running costs (such as those of materials, supplies and the like), incurred directly as a result of the research activity.
- (b) assistance to disadvantaged regions within the territory of a Member given pursuant to a general framework of regional development³¹ and non-specific (within the meaning of Article 2) within eligible regions provided that:

*(footnote original)*³¹ A "general framework of regional development" means that regional subsidy programmes are part of an internally consistent and generally applicable regional development policy and that regional development subsidies are not granted in isolated geographical points having no, or virtually no, influence on the development of a region.

- (i) each disadvantaged region must be a clearly designated contiguous geographical area with a definable economic and administrative identity;
- (ii) the region is considered as disadvantaged on the basis of neutral and objective criteria³², indicating that the region's difficulties arise out of more than temporary circumstances; such criteria must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification;

*(footnote original)*³² "Neutral and objective criteria" means criteria which do not favour certain regions beyond what is appropriate for the elimination or reduction of regional disparities within the framework of the regional development policy. In this regard, regional subsidy programmes shall include ceilings on the amount of assistance which can be granted to each subsidized project. Such ceilings must be differentiated according to

the different levels of development of assisted regions and must be expressed in terms of investment costs or cost of job creation. Within such ceilings, the distribution of assistance shall be sufficiently broad and even to avoid the predominant use of a subsidy by, or the granting of disproportionately large amounts of subsidy to, certain enterprises as provided for in Article 2.

(iii) the criteria shall include a measurement of economic development which shall be based on at least one of the following factors:

- one of either income per capita or household income per capita, or GDP per capita, which must not be above 85 per cent of the average for the territory concerned;
- unemployment rate, which must be at least 110 per cent of the average for the territory concerned;

as measured over a three-year period; such measurement, however, may be a composite one and may include other factors.

(c) assistance to promote adaptation of existing facilities³³ to new environmental requirements imposed by law and/or regulations which result in greater constraints and financial burden on firms, provided that the assistance:

*(footnote original)*³³ The term "existing facilities" means facilities which have been in operation for at least two years at the time when new environmental requirements are imposed.

- (i) is a one-time non-recurring measure; and
- (ii) is limited to 20 per cent of the cost of adaptation; and
- (iii) does not cover the cost of replacing and operating the assisted investment, which must be fully borne by firms; and
- (iv) is directly linked to and proportionate to a firm's planned reduction of nuisances and pollution, and does not cover any manufacturing cost savings which may be achieved; and
- (v) is available to all firms which can adopt the new equipment and/or production processes.

8.3 A subsidy programme for which the provisions of paragraph 2 are invoked shall be notified in advance of its implementation to the Committee in accordance with the provisions of Part VII. Any such notification shall be sufficiently precise to enable other Members to evaluate the consistency of the programme with the conditions and criteria provided for in the relevant provisions of paragraph 2. Members shall also provide the Committee with yearly updates of such notifications, in particular by supplying information on global expenditure for each programme, and on any modification of the programme. Other Members shall have the right to request information about individual cases of subsidization under a notified programme.³⁴

*(footnote original)*³⁴ It is recognized that nothing in this notification provision requires the provision of confidential information, including confidential business information.

8.4 Upon request of a Member, the Secretariat shall review a notification made pursuant to paragraph 3 and, where necessary, may require additional information from the subsidizing Member concerning the notified programme under review. The Secretariat shall report its findings to the Committee. The Committee shall, upon request, promptly review the findings of the Secretariat (or, if a review by the Secretariat has not been requested, the notification itself), with a view to determining whether the conditions and criteria laid down in paragraph 2 have not been met. The procedure provided for in this

paragraph shall be completed at the latest at the first regular meeting of the Committee following the notification of a subsidy programme, provided that at least two months have elapsed between such notification and the regular meeting of the Committee. The review procedure described in this paragraph shall also apply, upon request, to substantial modifications of a programme notified in the yearly updates referred to in paragraph 3.

8.5 Upon the request of a Member, the determination by the Committee referred to in paragraph 4, or a failure by the Committee to make such a determination, as well as the violation, in individual cases, of the conditions set out in a notified programme, shall be submitted to binding arbitration. The arbitration body shall present its conclusions to the Members within 120 days from the date when the matter was referred to the arbitration body. Except as otherwise provided in this paragraph, the DSU shall apply to arbitrations conducted under this paragraph.

1.2 Article 8.2(a)

1. In *US – Large Civil Aircraft (2nd complaint)*, the Panel rejected an argument that Article 8.2(a) gives rise to a necessary implication that governmental purchases of R&D services are covered by the SCM Agreement:

"We do not find this reasoning persuasive, and believe that the European Communities' argument is to some extent based on a misreading of the text of Article 8.2(a), which concerns 'assistance' for research activities conducted by firms, including 'assistance' for higher education or research establishments that conduct research for firms on a contract basis. In addition, Article 8.2(a) does not state that 'government support of R&D on a contract basis' is a subsidy. Rather, Article 8.2(a) refers to government assistance for research activities conducted by firms 'or by higher education or research establishments on a contract basis with firms'. If the terms of Article 8.2(a) gave rise to the necessary implication that certain types of transactions necessarily constitute subsidies within the meaning of the SCM Agreement, we would of course agree that those types of transactions must logically involve a financial contribution within the meaning of Article 1.1(a)(1). The problem with the European Communities' argument is that there does not appear to be anything in Article 8.2(a) to suggest that governmental purchases of R&D services from firms fall within the scope of the SCM Agreement. By its own terms, Article 8.2(a) concerns 'assistance' for research conducted by firms. If the only manner in which a government could provide 'assistance' for research conducted by firms was by purchasing R&D services from firms, then the European Communities argument would rest on solid ground. However, this strikes us as a false premise."¹

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¹ Panel Report, *US – Large Civil Aircraft (2nd complaint)*, para. 958.