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## 1 GENERAL

### 1.1 Object and purpose of the SCM Agreement

1. In *Brazil – Aircraft*, the Panel considered that the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies that distort international trade:

"In our view, the object and purpose of the SCM Agreement is to impose multilateral disciplines on subsidies which distort international trade. It is for this reason that the SCM Agreement prohibits two categories of subsidies -- subsidies contingent upon exportation and upon the use of domestic over imported goods -- that are specifically designed to affect trade."<sup>1</sup>

2. In *Canada – Aircraft*, the Panel noted that the SCM Agreement "does not contain any express statement of its object and purpose", and stated that "[w]e therefore consider it unwise to attach undue importance to arguments concerning the object and purpose of the SCM Agreement". However, the Panel considered that the object and purpose of the SCM Agreement could appropriately be summarized "as the establishment of multilateral disciplines 'on the premise that some forms of government intervention distort international trade, [or] have the potential to distort [international trade]'"<sup>2</sup>

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<sup>1</sup> Panel Report, *Brazil – Aircraft*, para. 7.26.

<sup>2</sup> Panel Report, *Canada – Aircraft*, para. 9.119.

3. In *US – Export Restraints*, the Panel indicated its agreement with the Panels in *Brazil – Aircraft* and *Canada – Aircraft* with regard to their statements on the object and purpose of the SCM Agreement.<sup>3</sup> The Panel concluded, however, that not every government action or intervention is to be considered as a subsidy that may distort trade and that, accordingly, the object and purpose of the SCM Agreement can only be in respect of 'subsidies' as defined in the Agreement:

"It does not follow from those statements, however, that every government intervention that might in economic theory be deemed a subsidy with the potential to distort trade is a subsidy within the meaning of the SCM Agreement. Such an approach would mean that the 'financial contribution' requirement would effectively be replaced by a requirement that the government action in question be commonly understood to be a subsidy that distorts trade. ...

... [W]hile the object and purpose of the Agreement clearly is to discipline subsidies that distort trade, this object and purpose can only be in respect of 'subsidies' as defined in the Agreement. This definition, which incorporates the notions of 'financial contribution', 'benefit', and 'specificity', was drafted with the express purpose of ensuring that not every government intervention in the market would fall within the coverage of the Agreement."<sup>4</sup>

4. In *US – Carbon Steel*, the Appellate Body offered the following observations on the object and purpose of the SCM Agreement:

"[W]e turn to the object and purpose of the *SCM Agreement*. We note, first, that the Agreement contains no preamble to guide us in the task of ascertaining its object and purpose. In *Brazil – Desiccated Coconut*, we observed that the '*SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947.'<sup>5</sup> The *SCM Agreement* defines the concept of 'subsidy', as well as the conditions under which Members may not employ subsidies. It establishes remedies when Members employ prohibited subsidies, and sets out additional remedies available to Members whose trading interests are harmed by another Member's subsidization practices. Part V of the *SCM Agreement* deals with one such remedy, permitting Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods. However, Part V also conditions the right to apply such duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link between the two) and on compliance with its procedural and substantive rules, notably the requirement that the countervailing duty cannot exceed the amount of the subsidy. Taken as a whole, the main object and purpose of the *SCM Agreement* is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.

We thus believe that the Panel properly identified, as among the objectives of the *SCM Agreement*, the establishment of a framework of rights and obligations relating to countervailing duties<sup>6</sup>, and the creation of a set of rules which WTO Members must respect in the use of such duties.<sup>7</sup> Part V of the Agreement is aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so."<sup>8</sup>

5. The Panel in *US – FSC (Article 21.5 – EC)* rejected an interpretation of Article 1.1(a)(1)(ii) on the grounds that this interpretation would lead to a result that was "inherently contradictory to what may be viewed as the object and purpose of the *SCM Agreement* in terms of disciplining

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<sup>3</sup> Panel Report, *US – Exports Restraints*, para. 8.62.

<sup>4</sup> Panel Report, *US – Exports Restraints*, para. 8.63.

<sup>5</sup> (footnote original) Appellate Body Report on *Brazil – Desiccated Coconut*, at 181.

<sup>6</sup> (footnote original) Panel Report, para. 8.32.

<sup>7</sup> (footnote original) *Ibid.*, para. 8.68.

<sup>8</sup> Appellate Body Report, *US – Carbon Steel*, paras. 73-74.

trade-distorting subsidies in a way that provides legally binding security of expectations to Members".<sup>9</sup> The Panel stated that:

"In this regard, it is evident that the interpretation advanced by the United States would be irreconcilable with that object and purpose, given that it would offer governments '*carte-blanche*' to evade any effective disciplines, thereby creating fundamental uncertainty and unpredictability. In short, such an approach would eviscerate the subsidies disciplines in the *SCM Agreement*."<sup>10</sup>

6. In *US – Softwood Lumber IV* the Appellate Body upheld the Panel's finding and rejected a narrow interpretation of the term "goods" in Article 1.1(a)(1)(iii). In the course of its analysis, the Appellate Body stated that:

"[T]o accept Canada's interpretation of the term 'goods' would, in our view, undermine the object and purpose of the *SCM Agreement*, which is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions. It is in furtherance of this object and purpose that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of standing timber for the sole purpose of severing it from land and processing it."<sup>11</sup>

7. The Panel in *Japan – DRAMs (Korea)* observed that "one of the purposes of the SCM Agreement is to interpret and clarify concepts in Article VI of the GATT 1994", and noted that:

"We note that the full title of the Tokyo Round Subsidies Code was the '*Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*'. The preamble to the Code clarified that the parties to the Code had agreed to its terms desiring, *inter alia*, 'to apply fully and to interpret the provisions of Articles VI, XVI and XXIII' of the GATT, and to 'elaborate rules for their application in order to provide greater uniformity and certainty in their implementation'. The full title of the *SCM Agreement* was shortened from the '*Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*' to the '*Agreement on Subsidies and Countervailing Measures*'. As the Appellate Body explained in *Brazil – Desiccated Coconut*, the reason for the change was that the *SCM Agreement* 'contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947' (Appellate Body Report, *Brazil – Desiccated Coconut*, page 17). We note that Article 11.2 of the *SCM Agreement* refers to injury 'within the meaning of Article VI of GATT 1994 as interpreted by this Agreement', (emphasis supplied) and that Article 32.1 of the *SCM Agreement* refers to the provisions of GATT 1994 'as interpreted by this Agreement'. (emphasis supplied)"<sup>12</sup>

8. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body discussed the object and purpose of the SCM Agreement in the context of interpreting the scope of the term "public body" in Article 1.1(a)(1):

"We note, first, that the *SCM Agreement* does not contain a preamble or an explicit indication of its object and purpose. However, the Appellate Body has stated that the object and purpose of the *SCM Agreement* is 'to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures'.<sup>13</sup> Furthermore, in *US*

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<sup>9</sup> Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.39.

<sup>10</sup> Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.39.

<sup>11</sup> Appellate Body Report, *US – Softwood Lumber IV*, para. 64.

<sup>12</sup> Panel Report, *Japan – DRAMs (Korea)*, fn 605.

<sup>13</sup> (footnote original) In making this observation, the Appellate Body based itself on the 1986 Punta del Este Ministerial Declaration, which initiated the Uruguay Round, and charted the course of the negotiations.

– *Softwood Lumber IV*, the Appellate Body noted that the object and purpose of the *SCM Agreement* is to 'strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions'.<sup>14</sup> Finally, we note that, with respect to the object and purpose of the *SCM Agreement*, the Appellate Body stated in *US – Countervailing Duty Investigation on DRAMS* that the *SCM Agreement* 'reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the application of countervailing measures'.<sup>15</sup>

As we see it, considerations of object and purpose are of limited use in delimiting the scope of the term 'public body' in Article 1.1(a)(1). This is so because the question of whether an entity constitutes a public body is *not* tantamount to the question of whether measures taken by that entity fall within the ambit of the *SCM Agreement*. A finding that a particular entity does not constitute a public body does not, without more, exclude that entity's conduct from the scope of the *SCM Agreement*. Such measures may still be attributed to a government and thus fall within the ambit of the *SCM Agreement* pursuant to Article 1.1(a)(1)(iv) if the entity is a private entity entrusted or directed by a government or by a public body.<sup>16</sup>

We consider that the Panel's object and purpose analysis did not take full account of the *SCM Agreement's* disciplines. It is important to keep in mind that entities that are considered not to be public bodies are not, thereby, immediately excluded from the *SCM Agreement's* disciplines or from the reach of investigating authorities in a countervailing duty investigation. The Panel was concerned with what it saw as the implications of too narrow an interpretation. As we see it, however, too broad an interpretation of the term 'public body' could equally risk upsetting the delicate balance embodied in the *SCM Agreement* because it could serve as a license for investigating authorities to dispense with an analysis of entrustment and direction and instead find entities with any connection to government to be public bodies. Thus, in our view, considerations of the object and purpose of the *SCM Agreement* do not favour either a broad or a narrow interpretation of the term 'public body'. We therefore disagree with the Panel's finding that interpreting 'any public body' to mean any entity that is controlled by the government best serves the object and purpose of the *SCM Agreement*.<sup>17</sup>

## **1.2 Relationship with other WTO Agreements**

### **1.2.1 GATT 1994**

#### **1.2.1.1 Article III**

##### **1.2.1.1.1 Absence of conflict between the SCM Agreement and Article III of the GATT 1994**

9. Considering whether there is a general conflict between the *SCM Agreement* and Article III of the GATT 1994, the Panel in *Indonesia – Autos* stated:

"As was the case under GATT 1947, we think that Article III of GATT 1994 and the WTO rules on subsidies remain focused on different problems. Article III continues to prohibit discrimination between domestic and imported products in respect of internal taxes and other domestic regulations, including local content requirements. It does

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(See Appellate Body Report, *US – Carbon Steel*, footnote 65 to para. 73 (quoting Ministerial Declaration on the Uruguay Round, GATT Doc. No. MIN.DEC (20 September 1986), p. 7))

<sup>14</sup>(*footnote original*) Appellate Body Report, *US – Softwood Lumber IV*, para. 64. (footnote omitted)

<sup>15</sup> (*footnote original*) Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

<sup>16</sup> (*footnote original*) Moreover, a finding that an entity is a public body does not, in itself, result in the application of the "disciplines" of the *SCM Agreement*, as the financial contribution by the public body must confer a benefit and the subsidy granted must be specific for such disciplines to apply.

<sup>17</sup> Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 301-303.

not 'proscribe' nor does it 'prohibit' the provision of any subsidy *per se*. By contrast, the SCM Agreement prohibits subsidies which are conditional on export performance and on meeting local content requirements, provides remedies with respect to certain subsidies where they cause adverse effects to the interests of another Member and exempts certain subsidies from actionability under the SCM Agreement. In short, Article III prohibits discrimination between domestic and imported products while the SCM Agreement regulates the provision of subsidies to enterprises.

...

Accordingly, we consider that Article III and the SCM Agreement have, generally, different coverage and do not impose the same type of obligations. Thus there is no general conflict between these two sets of provisions."<sup>18</sup>

10. The Panel in *Indonesia – Autos* further acknowledged that while Article III of the GATT 1994 and the SCM Agreement may overlap to a certain extent, the two sets of provisions serve different purposes:

"[T]he only subsidies that would be affected by the provisions of Article III are those that would involve discrimination between domestic and imported products. While Article III of GATT and the SCM Agreement may appear to overlap in respect of certain measures, the two sets of provisions have different purposes and different coverage. Indeed, they also offer different remedies, different dispute settlement time limits and different implementation requirements. Thus, we reject ... [the] argument that the application of Article III to subsidies would reduce the SCM Agreement to 'inutility'.

...

[T]he obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and ... different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement."<sup>19</sup>

#### **1.2.1.1.2 Absence of conflict between the SCM Agreement and Article III:2 of the GATT 1994**

11. The Panel in *Indonesia – Autos* rejected the argument that "the obligations contained in Article III:2 of GATT and the SCM Agreement are mutually exclusive"<sup>20</sup> because "the SCM Agreement 'explicitly authorizes' Members to provide subsidies that are prohibited by Article III:2 of GATT."<sup>21</sup> The Panel stated:

"We also recall that the obligations of the SCM Agreement and Article III:2 are not mutually exclusive. It is possible ... to respect ... obligations under the SCM Agreement without violating Article III:2 since Article III:2 is concerned with discriminatory product taxation, rather than the provision of subsidies as such. Similarly, it is possible ... to respect the obligations of Article III:2 without violating ... obligations under the SCM Agreement since the SCM Agreement does not deal with taxes on products as such but rather with subsidies to enterprises. At most, the SCM Agreement and Article III:2 are each concerned with different aspects of the same piece of legislation. "<sup>22</sup>

12. As regards the relationship with Article 27.3 on a transition period for developing countries and least developing countries and Article III:2 of the GATT 1994, see the Sections on Article III of the GATT 1994 and Article 27 of the SCM Agreement.

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<sup>18</sup> Panel Report, *Indonesia – Autos*, paras. 14.33 and 14.36.

<sup>19</sup> Panel Report, *Indonesia – Autos*, paras. 14.39 and 14.56.

<sup>20</sup> Panel Report, *Indonesia – Autos*, para. 14.97.

<sup>21</sup> Panel Report, *Indonesia – Autos*, para. 14.98.

<sup>22</sup> Panel Report, *Indonesia – Autos*, paras. 14.98-14.99.

### 1.2.1.2 Article VI

13. In the *Brazil – Desiccated Coconut* dispute, the Panel was faced with the question "whether Article VI creates rules which are separate and distinct from those of the SCM Agreement, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the SCM Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction."<sup>23</sup> In phrasing this issue, the Panel in *Brazil – Desiccated Coconut* made clear that the SCM Agreement did not supersede Article VI of the GATT 1994 as the basis for the regulation by the WTO Agreement of countervailing measures. In making this finding, the Panel relied on the existence of the general interpretive note to Annex 1A of the WTO Agreement and on the fact that certain provisions of Article VI are not "replicated or elaborated" in the SCM Agreement.<sup>24</sup> The Appellate Body in *Brazil – Desiccated Coconut* confirmed the statement by the Panel that the SCM Agreement did not supersede Article VI of the GATT 1994.<sup>25</sup> In making this finding, the Appellate Body emphasized the integrated nature of the WTO Agreement and the annexed agreements. More specifically, the Appellate Body found that although the provisions of the GATT 1947 were now incorporated into the GATT 1994, they did not represent the totality of rights and obligations of WTO Members in a given subject area:

"The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of the GATT 1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994."<sup>26</sup>

14. The Appellate Body in *Brazil – Desiccated Coconut* noted that "[t]he relationship between the *SCM Agreement* and Article VI of GATT 1994 is set out in Articles 10 and 32.1 of the *SCM Agreement*."<sup>27</sup> Apart from the integrated structure of the WTO Agreement and the annexed agreements, the Appellate Body therefore focused on these two provisions of the SCM Agreement. The Appellate Body then explicitly agreed with the Panel's statement that:

"Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures."<sup>28</sup>

15. The Appellate Body in *Brazil – Desiccated Coconut* then proceeded to find that:

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<sup>23</sup> Panel Report, *Brazil – Desiccated Coconut*, para. 227.

<sup>24</sup> Panel Report, *Brazil – Desiccated Coconut*, para. 227.

<sup>25</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 14.

<sup>26</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 15.

<sup>27</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, p. 16.

<sup>28</sup> Panel Report, *Brazil – Desiccated Coconut*, para. 246; Appellate Body Report, *Brazil – Desiccated Coconut*, p. 17.

"[C]ountervailing duties may only be imposed in accordance with Article VI of the GATT 1994 and the *SCM Agreement*. A countervailing duty being a specific action against a subsidy of another WTO Member, pursuant to Article 32.1, it can only be imposed "in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The ordinary meaning of these provisions taken in their context leads us to the conclusion that the negotiators of the *SCM Agreement* clearly intended that, under the integrated *WTO Agreement*, countervailing duties may only be imposed in accordance with the provisions of Part V of the *SCM Agreement* and Article VI of the GATT 1994, taken together. If there is a conflict between the provisions of the *SCM Agreement* and Article VI of the GATT 1994, furthermore, the provisions of the *SCM Agreement* would prevail as a result of the general interpretative note to Annex 1A.

...

The fact that Article VI of the GATT 1947 could be invoked independently of the *Tokyo Round SCM Code* under the previous GATT system does not mean that Article VI of GATT 1994 can be applied independently of the *SCM Agreement* in the context of the WTO. The authors of the new WTO regime intended to put an end to the fragmentation that had characterized the previous system."<sup>29</sup>

### 1.2.1.3 Article XVI

16. With respect to the relationship with Article XVI:4 of the GATT 1994, see the Section on that Article of the GATT 1994.

### 1.2.2 TRIMs Agreement

17. The Panel in *Indonesia – Autos* considered the issue of whether a measure covered by the SCM Agreement can also be subject to the obligations contained in the TRIMs Agreement. The Panel first noted that the general interpretive note to Annex 1A of the WTO Agreement did not apply in this context and opined that it had to resort to the relevant principle of general international law. In so doing, the Panel emphasized the general international law presumption against conflicts:

"We note first that the interpretive note to Annex IA of the WTO Agreement is not applicable to the relationship between the SCM Agreement and the TRIMs Agreement. The issue of whether there might be a general conflict between the SCM Agreement and the TRIMs Agreement would therefore need to be examined in the light of the general international law presumption against conflicts and the fact that under public international law a conflict exists in the narrow situation of mutually exclusive obligations for provisions that cover the same type of subject matter.

In this context the fact that the drafters included an express provision governing conflicts between GATT and the other Annex 1A Agreements, but did not include any such provision regarding the relationship between the other Annex 1A Agreements, at a minimum reinforces the presumption in public international law against conflicts. With respect to the nature of obligations, we consider that, with regard to local content requirements, the SCM Agreement and the TRIMs Agreement are concerned with different types of obligations and cover different subject matters. In the case of the SCM Agreement, what is prohibited is the grant of a subsidy contingent on use of domestic goods, not the requirement to use domestic goods as such. In the case of the TRIMs Agreement, what is prohibited are TRIMs in the form of local content requirements, not the grant of an advantage, such as a subsidy."<sup>30</sup>

18. The Panel in *Indonesia – Autos* proceeded to emphasize the different types of obligations and the different subject matters covered by the SCM Agreement on the one hand and the TRIMs Agreement on the other. It explored how bringing a national measure into consistency with one of

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<sup>29</sup> Appellate Body Report, *Brazil – Desiccated Coconut*, pp. 16 and 18.

<sup>30</sup> Panel Report, *Indonesia – Autos*, para. 14.50.

the agreements could nevertheless fail to remove the incompatibility with the other agreement. The Panel ultimately concluded that both the TRIMs Agreement and the SCM Agreement were applicable to the dispute before it:

"A finding of inconsistency with Article 3.1(b) of the SCM Agreement can be remedied by removal of the subsidy, even if the local content requirement remains applicable. By contrast, a finding of inconsistency with the TRIMs Agreement can be remedied by a removal of the TRIM that is a local content requirement even if the subsidy continues to be granted. Conversely, for instance, if a Member were to apply a TRIM (in the form of local content requirement), as a condition for the receipt of a subsidy, the measure would continue to be a violation of the TRIMs Agreement if the subsidy element were replaced with some other form of incentive. By contrast, if the local content requirements were dropped, the subsidy would continue to be subject to the SCM Agreement, although the nature of the relevant discipline under the SCM Agreement might be affected. Clearly, the two agreements prohibit different measures. We note also that under the TRIMs Agreement, the advantage made conditional on meeting a local content requirement may include a wide variety of incentives and advantages, other than subsidies. There is no provision contained in the SCM Agreement that obliges a Member to violate the TRIMs Agreement, or vice versa.

We consider that the SCM and TRIMs Agreements cannot be in conflict, as they cover different subject matters and do not impose mutually exclusive obligations. The TRIMs Agreement and the SCM Agreement may have overlapping coverage in that they may both apply to a single legislative act, but they have different foci, and they impose different types of obligations.

...

We find that there is no general conflict between the SCM Agreement and the TRIMs Agreement. Therefore, to the extent that the ... programmes are TRIMs and subsidies, both the TRIMs Agreement and the SCM Agreement are applicable to this dispute.

We consider ... that the obligations contained in the WTO Agreement are generally cumulative, can be complied with simultaneously and that different aspects and sometimes the same aspects of a legislative act can be subject to various provisions of the WTO Agreement."<sup>31</sup>

### **1.2.3 DSU**

#### **1.2.3.1 Article 4**

19. With respect to the relationship between Article 4.4 of the SCM Agreement and Article 4 of the DSU, see the Section on that Article of the DSU.

#### **1.2.3.2 Article 11**

20. With respect to the relationship between Article 4.2 of the SCM Agreement and Article 11 of the DSU, see the Section on that Article of the DSU.

#### **1.2.3.3 Article 13.2**

21. With respect to the relationship between Article 4.2 of the SCM Agreement and Article 13.2 of the DSU, see the Section on that Article of the DSU.

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<sup>31</sup> Panel Report, *Indonesia – Autos*, paras. 14.51-14.52 and 14.55-14.56.

#### 1.2.3.4 Article 23.1

22. In *Canada – Aircraft Credits and Guarantees*, the Panel recalled the prospective nature of WTO dispute settlement remedies and that such an approach was also applicable to the SCM Agreement:

"In any event, even if the WTO dispute settlement mechanism does only provide for prospective remedies, we note that it does so in respect of all cases, and not only those involving prohibited export subsidies. Article 23.1 of the DSU provides that Members shall resolve all disputes through the multilateral dispute system, to the exclusion of unilateral self-help. Thus, to the extent that the WTO dispute settlement system only provides for prospective remedies, that is clearly the result of a policy choice by the WTO Membership. Given this policy choice, and given the fact that Article 23.1 of the DSU applies to all disputes, including those involving (alleged) prohibited export subsidies, we see no reason why the (allegedly) prospective nature of WTO dispute settlement remedies should impact on our interpretation of the second paragraph of item (k)."<sup>32</sup>

#### 1.2.4 Agreement on Agriculture

23. The Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)* noted that the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture. In this case, the Appellate Body considered that it was unable to determine whether the measures at issue "conform[] fully" to Articles 9.1(c) or 10.1 of the Agreement on Agriculture and therefore declined to examine the claim under Article 3.1(a) of the SCM Agreement.<sup>33</sup>

#### 1.2.5 GATT Subsidies Code

24. The Panel in *Canada – Aircraft Credits and Guarantees* held that it did not consider that the object and purpose of the SCM Agreement was necessarily the same as the object and purpose of the GATT Subsidies Code. For the Panel, the SCM Agreement provides for more extensive special and differential treatment for developing countries than the GATT Subsidies Code did. In addition, the preamble to the Marrakesh Agreement Establishing the World Trade Organization, of which agreement the SCM Agreement is an integral part, recognizes "that there is need for positive efforts designed to ensure that developing countries, and especially the least developed among them, secure a share in the growth in international trade commensurate with the needs of their economic development". No such "need" was identified in the GATT Subsidies Code. In addition, all WTO Members are bound by the SCM Agreement, whereas only a number of GATT Contracting Parties were signatories of the GATT Subsidies Code. Furthermore, the provisions of the SCM Agreement – unlike those of the GATT Subsidies Code – are subject to binding dispute settlement under the DSU.<sup>34</sup>

### 1.3 Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade or Part V of the Agreement on Subsidies and Countervailing Measures

#### 1.3.1 Text of the Declaration

**Declaration on Dispute Settlement Pursuant to the  
Agreement on Implementation of Article VI of the General Agreement  
on Tariffs and Trade or Part V of the Agreement on  
Subsidies and Countervailing Measures**

*Ministers,*

*Recognize,* with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and

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<sup>32</sup> Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.170.

<sup>33</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 125.

<sup>34</sup> Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.171.

Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

### 1.3.2 Interpretation and application

25. In *US – Lead and Bismuth II*, the United States argued that, by virtue of the Declaration, the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement is also applicable to reviews of countervailing duty investigations under the SCM Agreement. The Appellate Body disagreed:

"We consider this argument to be without merit. By its own terms, the *Declaration* does not impose an obligation to apply the standard of review contained in Article 17.6 of the *Anti-Dumping Agreement* to disputes involving countervailing duty measures under Part V of the *SCM Agreement*. The *Declaration* is couched in hortatory language; it uses the words 'Ministers recognize'. Furthermore, the *Declaration* merely acknowledges 'the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.' It does not specify any specific action to be taken. In particular, it does not prescribe a standard of review to be applied."<sup>35</sup>

26. The Panel in *US – Corrosion-Resistant Steel Sunset Review* considered the issue of "whether prior panel and Appellate Body decisions on countervailing measures can be taken into account by, and provide guidance for, panels dealing with disputes under the *Anti-dumping Agreement* (and *vice versa*)", and stated that it found support in the Declaration "for the application of a similar interpretative analysis by this Panel in addressing analogous issues under the *Anti-dumping Agreement*".<sup>36</sup> Subsequent panels have made similar statements.<sup>37</sup>

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<sup>35</sup> Appellate Body Report, *US – Lead and Bismuth II*, para. 49.

<sup>36</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, fn 39.

<sup>37</sup> Panel Reports, *US – Softwood Lumber VI*, para. 7.18; *US – Countervailing Duty Investigation on DRAMS*, para. 7.351; *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.81; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, footnote 45; *Japan – DRAMs (Korea)*, para. 7.354.