ANNEX J

ANSWERS OF THIRD PARTIES TO THE QUESTIONS FROM THE PANEL AND FROM OTHER THIRD PARTIES', AND COMMENTS THERETO

ANNEX J-1

REPLIES BY ARGENTINA TO QUESTIONS POSED BY THE PANEL TO THE THIRD PARTIES FIRST SESSION OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

11 August 2003

Article 13 of the *Agreement on Agriculture*

1. Australia has argued that Article 13 of the *Agreement on Agriculture* is an affirmative defence. How do you reconcile this with your view that the conditions in Article 13 are a "prerequisite" to the availability of a right or privilege? Australia Would other third parties have any comments on Australia's assertion? 3rd parties, in particular Argentina, Benin, China, Chinese Taipei

Argentina agrees with Australia that Article 13 of the Agreement on Agriculture is an affirmative defence and that in these proceedings the United States therefore carries the burden of proof on the question of whether its subsidies conform with the terms of Article 13.

According to the Appellate Body in *US-Shirts and Blouses*:

> *"… the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption".*[1]

As stated by Brazil in Paragraph 112 of its first written submission, in the case of claims of violation of the positive obligations of the WTO Agreement, it is the complaining party that has the burden of providing a prima facie case of violation. However, in the case of affirmative defences, such as Articles XX and XI:2(c)(i), the Appellate Body itself established that it is only reasonable that the burden of establishing such a defence should rest upon the party asserting it.[2]

According to the standards established by the Appellate Body,[3] Article 13 of the Agreement on Agriculture is a provision in the nature of an affirmative defence. As such, it does not create new obligations for Members, but limits the scope of certain provisions of the SCM Agreement and the GATT 1994 subject to certain conditions. Nor does it alter the legal nature of Members' measures, but simply permits Members to maintain those measures exempt from actions, if the measures meet the conditions specified in Article 13(a), (b) or (c). As Argentina stated in its Third Party Initial Brief:[4]

> *"Argentina considers that the provisions contained in Article 13 of the AoA have an exceptional nature. This would imply that the Member who alleges to be protected by the Peace Clause has the burden of proving the fulfilment of its legal requirements. As long as*

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[1] Appellate Body Report, *US – Shirts and Blouses*, WT/DS33/AB/R, p. 14, text at note 16.
[2] *Id.*, p. 16, text preceding note 23.
[3] See paragraphs 113 to 116 of Brazil's First Written Submission.
[4] Argentina's Third Party Initial Brief, paragraph 14.

the US does not demonstrate prima facie that it fulfils all the conditions that would allow a protection against a claim by virtue of Article 13 of the AoA, the Panel should consider as appropriate the claims under Article XVI of GATT 1994 or Articles 3, 5 and 6 of the SCM Agreement".

The exceptional nature of Article 13 of the Agreement on Agriculture (AoA) cannot change merely because the conditions justifying it include conformity with rules that create positive obligations for Members (e.g. Article 6 of the AoA). This legal nature comes out clearly in the chapeau of Article 13 of the AoA which begins with the words "*Notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures …*", providing guidance to the effect that the purpose of the entire Article 13 is to create exceptions, subject to certain conditions, to the provisions of the GATT 1994 and the SCM Agreement.

For example the party claiming defence under Article 13 of the AoA clearly must prove, inter alia, that the domestic support measures which it claims should be exempt from actions based on Articles 5 and 6 of the SCM Agreement and Article XVI of the GATT 1994 do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

If Article 13 of the AoA did not exist, any domestic support measure would unquestionably be subject to actions based on Articles 5 and 6 of the SCM Agreement and Article XVI of the GATT 1994. The temporary defence accorded by Article 13 is an exception to that situation, and it is therefore up to the claimant to demonstrate that the conditions permitting such defence have been fulfilled.

Mere reference, as one of the conditions justifying the measure, to conformity with a positive obligation of the AoA, cannot alter the exceptional nature that informs all of Article 13.

Article 13(b) of the *Agreement on Agriculture*: Domestic Support Measures

2. Please explain the difference, if any, between the meaning of "defined" and the meaning of "fixed" in the phrase "a defined and fixed base period" in paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Argentina considers that while the term "defined" refers to the need for the base period to be clearly determined in the order authorising the payments, the term "fixed" refers to the need for the base period to be identified in terms which prevent it from being shifted or modified *a posteriori*. The term "fixed" indicates that the payments made in accordance with the criteria stipulated in paragraph 6(a) must always rely on the same base period, and no change is possible.

3. Please explain the meaning of "a" in "a defined and fixed base period" in paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*, the meaning of "the" in "the base period" in paragraphs 6(b), (c) and (d), and the difference between these and the phrase "based on the years 1986-88" in Annex 3. 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

The purpose of the term "a" in paragraph 6(a) of Annex 2 of the Agreement on Agriculture is to establish the obligation for Members to identify a single period, which may cover two, three or more years depending on the Member. For example the base periods established by the EU, the United States and Argentina are different with respect to the payments referred to in paragraph 6(a) of Annex 2. However, although different for each Member – the identification of the period is up to the Members in that it is not specified in the text of the Agreement *per se* – the period must be identified

In the case at issue, the United States identified, for the purposes of paragraph 6(a) of Annex 2, the period running from 1986 to 1988, as shown in document G/AG/AGST/USA on pages 1-7, referred to in Part IV of the United States' Schedule of Commitments – Schedule XX.

In paragraph 6(b), (c) and (d), Argentina understands the term "the base period" to refer to the base period 1986-1988, the only base period identified in the AoA for domestic support (Annex 3).

"The" base period refers to the base period 1986-1988, since there is no other period for domestic support. Indeed, Article 1(a)(i) also refers to "the" base period, which is none other than the period specified in Annex 3 of the AoA. Article 1(d)(i) and Article 1(h)(i) also mention "the" base period.

In other words, "a" base period is different from "the" base period. Moreover, the second sentence of paragraph 5 of Annex 2 of the AoA requires the adoption of "the" base period established in paragraphs 6(b), (c) and (d), clearly reflecting this difference with paragraph 6(a).

In the case of payments by the United States under paragraph 6 of Annex 2 of the AoA, this distinction is irrelevant since "a" base period in the context of paragraph 6(a) and "the" base period of paragraphs 6(b), (c) and (e) are the same - 1986-1988 - having been so defined by the United States in its Schedule of Commitments.

4. How often can a Member define and fix a base period in accordance with paragraph 6 of Annex 2 of the *Agreement on Agriculture*? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

It is Argentina's understanding that under paragraph 6 of Annex 2 of the Agreement on Agriculture, for each programme a Member may only define and establish a base period once. Otherwise, the term "fixed" would lose all of its relevance.

5. Do you agree that a payment penalty based on crops produced is "related to type of production"? EC

6. Please explain the meaning of the word "criteria" in Article 6.1 and 7.1. What effect, if any, does the use of the word "Accordingly" in paragraph 1 of Annex 2 of the *Agreement on Agriculture* have on the meaning of the preceding sentence? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

The word "criteria" in Article 6.1 and 7.1 signifies the parameters, rules or precepts which serve to distinguish the domestic support measures that are not subject to reduction.

In relation to the preceding sentence, the use of the word "accordingly" in paragraph 1 of Annex 2 of the Agreement on Agriculture indicates that the basic criteria listed thereafter are a corollary to the "fundamental principle" set forth in the preceding sentence. However, this does not imply that the preceding sentence does not contain "stand-alone" obligations.

On the contrary, the domestic support measures for which exemption from the reduction commitments is sought must conform to the two basic criteria (set forth in paragraph 1(a) and (b)), plus the policy-specific criteria and conditions set out in the subsequent paragraphs of Annex 2, in addition to which they must meet "the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production". A measure which meets the two criteria set forth in paragraph 1(a) and (b) plus the policy-specific criteria and conditions set out in the subsequent paragraphs of Annex 2 may also violate the general principle. Any other interpretation would deprive

of any meaning the first sentence of paragraph 1 of Annex 2, which the text itself qualifies as a "fundamental requirement".

7. Please explain the meaning of the words "the fundamental requirement" as used in paragraph 1 of Annex 2 of the *Agreement on Agriculture*. 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

In Argentina's view, the words "the fundamental requirement" as used in paragraph 1 of Annex 2 signify the establishment of a general mandatory condition governing the establishment and application of any measure whose inclusion in the "Green Box" is claimed.

8. In your oral statement, you emphasize the use of the word "criteria" in other parts of the *Agreement on Agriculture*, as distinct from the reference to "fundamental requirement" in the first sentence of paragraph 1 of Annex 2. Is it the case that sub-paragraphs (a) and (b) of paragraph 1 of Annex 2 are also "criteria"? EC

9. If the first sentence of paragraph 1 of Annex 2 is a stand-alone obligation, does this allow effects-based claims of non-compliance with Annex 2? If so, how does this affect the purpose of Article 13(b)? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

The first sentence of paragraph 1 of Annex 2 of the AoA contains a stand-alone obligation.

Since the first sentence of paragraph 1 of Annex 2 imposes an obligation by requiring that the measures for which exemption from a reduction commitment is claimed must, as a primary or essential condition, be such that they do not artificially alter trade or production, it permits claims of non-compliance with Annex 2 based on the effects of the domestic support measures, regardless of whether they meet the basic criteria set out in the second sentence of paragraph 1 and with the policy-specific criteria and conditions set out in the rest of Annex 2.

Otherwise, we would be exempting from the reduction commitments measures that might be complying with the two basic criteria set forth in p -
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11. If the first sentence of paragraph 1 of Annex 2 expresses a general principle which informs the interpretation of the criteria in Annex 2, please explain how this affects the assessment of the direct payments programme's compliance with paragraph 6 of Annex 2. 3rd parties, in particular, Australia, Argentina, Canada, EC, NZ

Argentina considers that there is a clear hierarchy between the two provisions, in which the principal obligation for Members is to ensure that their support programmes, even if they could qualify as decoupled support programmes under paragraph 6 of Annex 2, do not have trade-distorting effects or effects on production, as stipulated in paragraph 1 of the same Annex.

Consequently, even if the Direct Payments programme complies with the requirements of the second sentence of paragraph 1 of Annex 2, if it does not comply with the fundamental requirement laid down in the first sentence, it cannot be considered a Green Box programme.

Argentina agrees with Brazil's statement in paragraphs 183-191 of its first written submission with respect to the strong production and trade-distorting effects of the Direct Payments programme.

12. Where does Article 13(b) require a year-on-year comparison? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

As stated in paragraph 21 of its oral submission, Argentina maintains that the domestic support measures granted during any one of the marketing years of the period covered between the entry into force of the AoA in 1995 and the expiry of Article 13 on 31 December 2003 are relevant for the purpose of determining conformity with Article 13(b), the text of which does not explicitly establish the requirement of a year-on-year comparison.

Thus, the excess support granted during any one of the years of the period of implementation suffices to cancel the protection provided by the Peace Clause.

Nor can a year-on-year comparison be inferred from Article 13 or from its context. Otherwise, at the beginning of each marketing year the Member that had exceeded the level of support in the previous year would be covered by the Peace Clause once again and exempt from any claims.

In practical terms, this interpretation would turn Article 13 protection into an absolute defence, given the difficulty of challenging the level of support granted during the current marketing year at the time of the complaint. If it were only possible to challenge the support granted during a past marketing year independently of the support granted during the current year, what would be the use of any successful claim under Articles 5 and 6 of the SCM Agreement? How would it be possible, in that case, to eliminate the adverse effects of a subsidy already granted?

13. Does a failure by a Member to comply in a given year with either the chapeau of Article 13(b) or the proviso in subparagraph (ii) of Article 13(b) impact its entitlement to benefit in an earlier or a later year from the exemption from action provided by Article 13(b)? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

In Argentina's view, the failure by a Member to comply in a given year with either the *chapeau* of Article 13(b) or the proviso in sub paragraph (ii) of Article 13(b) results in the loss of the protection granted by the Peace Clause.

Regarding the "*chapeau*" of Article 13(b): domestic support that does not conform to the provisions of Article 6.1, for example distorting support in excess of the reduction commitment in violation of Article 3.2 of the AoA, is outside the scope of Article 13(b). Indeed, that Article refers to "domestic support measures that conform fully to the provisions of Article 6 … ". Consequ75 Ts

bear any relation to Article 13(b)(ii). Such support is prohibited and does not enjoy the protection of the Peace Clause.

Regarding failure to comply with the proviso in Article 13(b)(ii): any failure to comply in whatever year implies exclusion from the scope of Article 13(b) for all of the distorting domestic support measures concerning the specific commodity in question.

14. Does a failure of a Member to comply with Article 13(b) in respect of a *specific commodity* impact its entitlement to benefit in respect of other agricultural products from the exemption from action provided by Article 13(b)? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

In Argentina's view, failure by a Member to comply with Article 13(b)(i) and (ii) in respect of a specific commodity does not impact its entitlement to benefit in respect of other agricultural products from the exemption action provided by Article 13(b).

However, failure to comply with the conditions laid down in the *chapeau* of Article 13(b) i.e. failure of the domestic support to conform with the provisions of Article 6 of the AoA, could result in exclusion from the protection offered by Article 13(b) in respect of domestic support granted to all products, for example, if the domestic support measure exceeds the level of the commitment in the schedule of the Member concerned.

15. Is there any basis on which counter-cyclical payments could be considered product-specific? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

As stated in paragraph 8 of its Oral Submission, Argentina considers that "*support to a specific commodity*" in Article 13(b)(ii) includes any domestic support measure that is not a Green Box measure and that provides any identifiable support to a commodity in particular, regardless of whether the measure may provide support to a greater number of commodities.[5] In this respect, counter-cyclical payments explicitly provide support to cotton (upland) as can be seen in the text of the United States Farm Act of 2002 (2002 Farm Security and Rural Investment Act, Title I, Subtitle A, Exhibit US-1).

16. If the word "specific" were deleted from Article 13(b)(ii), would this change the meaning of the subparagraph? 3rd parties, in particular Australia, Argentina, Benin, Canada, China, EC, NZ

The word "specific" is an adjective qualifying the noun "commodity". The adjective "specific" does not qualify the support (the calculation of which may or may not be product-specific, as stated in paragraph 1 of Annex 3 of the AoA).

If the word "specific" qualifying the noun "commodity" were not there, the text would no longer have the precision that it currently has, although this does not mean that even then it could not be interpreted as referring to any type of domestic support (regardless of whether it is categorized as product-specific or non-specific under Annex 3 of the AoA).

17. What is the relevance, if any, of the concept of "specificity" in Article 2 of the *SCM Agreement* and references to a "product" or "subsidized product" in certain provisions of the SCM Agreement to the meaning of "support to a specific commodity" in Article 13(b)(ii) *Agreement on Agriculture*? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

[5] In this respect, Argentina agrees with New Zealand: *" … New Zealand sees no basis on which to suggest that support to a specific commodity should be excluded simply because other commodities may receive similar support".* Third Party Submission of New Zealand, 15 July 2003, paragraph 2.23.

In Argentina's view the concept of specificity in Article 2 of the SCM Agreement is not linked to the term "specific commodity" in Article 13(b)(ii) of the AoA. In Article 2 of the SCM Agreement, the specificity is a characteristic of the subsidies (prohibited or actionable) covered by the current SCM Agreement, while the specificity referred to in the phrase "specific commodity" is

Where no "decision" has been taken in terms of budgetary outlays during 1992, Argentina understands that the only support that can be considered as "decided" during that marketing year is the support granted during that year.

22. What is the meaning of "support" in *Agreement on Agriculture* 13(b)(ii)? Why would it be used differently from Annexe 3, where it refers to total outlays? 3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ

The "support granted" in each marketing year of the implementation period must necessarily be linked to the budgetary outlays for those

elements: lower interest rates, longer repayment terms for loans, lower down-payment requirement, reduced frequency of payments per year and/or total or partial exemption from any fee or premium to provide the US Government with adequate protection against potential flaws in its export credit guarantee portfolio. This is confirmed in practice by the fact that no company on the market is prepared to provide coverage equivalent to the coverage accorded with the credit guarantees of the Commodity Credit Corporation of the United States.

Moreover, items (j) and (k) of the Illustrative List in (Annex 1) of the SCM Agreement set out the circumstances in which this type of operation should be considered an export subsidy.

29. (b) How, if at all, would this be relevant to the claims of Brazil? 3rd parties, in particular, Argentina, Canada, EC, NZ

It is relevant to the claims of Brazil in that the fact of being a "financial contribution" is the first element of a prohibited export subsidy claim.

30.

that the challenged credit guarantees come under indent (j) of Annex I, it would have to conclude that they violate Articles 1 and 3.1(a) of the *SCM Agreement per se*.

32. The Panel's attention has been drawn to Article 14(c) of the *SCM Agreement* (see third party submission of Canada) and to the panel report in DS 222 *Canada - Export Credits and Loan Guarantees.* How and to what extent are Article 14(c) of the *SCM Agreement,* and the cited panel report, relevant to the issue of whether or not the United States export credit guarantee programmes confer a "benefit"? What would the appropriate market benchmark be to use for any comparison? Please cite any other relevant material. 3rd parties, in particular, Argentina, Canada, EC, NZ

Argentina agrees with Canada's interpretation in paragraphs 41 to 48 of its written submission to the effect that Article 14(c) of the SCM Agreement and the Panel and Appellate Body reports in WT/DS70, as well as the Panel report in WT/DS222, are relevant to the issue of whether the export credit guarantee programmes of the United States confer a "benefit". The standard established therein for the determination of the existence of a "benefit" constitutes the appropriate legal framework for the interpretation of the facts in the present case.

According to the last part of paragraph 157 of the report of the Appellate Body in WT/DS70, *" … the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."*

33. What is the relevance (if any) of Brazil's statement that: " … export credit guarantees for exports of agricultural exports [sic] are not available on the marketplace by commercial lenders". 3rd parties, in particular, Argentina, Canada, EC, NZ

The relevance of Brazil's statement lies in the fact that if the marketplace is unable to provide export credit guarantees for agricultural products, the mere granting of such guarantees by the Government of the United States would constitute an export subsidy. It would demonstrate that the market was unable to equal the conditions offered by the challenged programmes.

34. Comment on the United States' view of the meaning of "long term operating costs and losses" in item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* as meaning "claims paid" under the export credit guarantee programmes. Does the United States' interpretation give meaning to both "costs" and "losses"? Do claims paid represent "losses"? 3rd parties, in particular, Argentina, Canada, EC, NZ

35. Did the drafters of the *Agreement on Agriculture* include export credit guarantees in Article 9.1 of the *Agreement on Agriculture*? Why or why not? 3rd parties, in particular, Argentina, Canada, EC, NZ

Article 9.1 of the Agreement on Agriculture is a list of export subsidies that are subject to reduction commitments. As such, it does not include export credit guarantees. However, there are other export subsidies, as emerges the actual text of Article 10.1, which are also subject to disciplines.

In this respect, Argentina agrees with Canada's statement in paragraph 32 of its Written Submission that:

> *"Article 9 of the Agriculture Agreement lists and describes certain export subsidies that are subject to reduction commitments. All other export subsidies fall within the scope of Article 10.1 … "*

36.

Regarding the first question of the Panel in (a) above, the answer is no. The granting of export credit guarantees under conditions in which no consideration is required, in this case a premium charged by the granting institution, is tantamount to the transfer of funds to the beneficiary. The beneficiary, in the absence of an adequate premium, transfers all of the credit and commercial risk of the operation to the institution granting the guarantee without any cost to itself. In other

if at all is the Appellate Body's report in Canada-Aircraft relevant here?[7] 3rd parties, in particular, Australia, Argentina, NZ, Paraguay

As stated by Argentina in paragraphs 80-85 of its written submission, both the corresponding section of the 2002 SFRI Act and the provisions of the Section 1427.100ff. of the Code of Federal Regulations clearly establish that the Commodity Credit Corporation (CCC) must issue marketing certificates or cash payments to exporters and/or users of US (upland) cotton.

Given that the purpose of the programme is to provide a direct incentive for US cotton exports and consists of a direct payment to exporters based on the difference between the US domestic cotton price and the world market price, there can be no doubt that whenever the former is higher than the latter, an export subsidy is present inasmuch as the existence of these payments enables the US product to compete artificially with the lower-cost products of more efficient producers.

It should be noted that the programme known as *Step 2* establishes the right of exporters to receive a subsidy for shipments made in connection with foreign sale operations, while establishing an obligation upon the CCC to grant that subsidy once the particular requirements are satisfied.

We stress that the payment is the difference between the domestic market and the international market because that would be the most relevant evidence that the subsidy seeks to ensure that the product can be exported at prices lower than the domestic price.

39. Please comment on the United States assertions at paragraph 129 of its first written submission, that "[t]he program is indifferent to whether recipients of the benefit of this programme are exporters or parties that open bales for the processing of manufacturing raw cotton into cotton products in the United States." 3rd parties, in particular, Australia, Argentina, NZ, Paraguay

The fact that the Step 2 programme is indifferent to whether the recipients are exporters or users of cotton in the United States does not alter its inconsistency, since the United States has not specified upland cotton in its schedule of commitments and this type of subsidy under the Step 2 programme is granted for cotton. Consequently, any provision in the legal texts with respect to the granting of such a subsidy makes it inconsistent per se with Articles 3.3 and 8 of the AoA, while for the same reason any sum distributed, budgeted or provided for under the programme constitutes a prohibited subsidy within the meaning of Article 3 of the SCM Agreement.

40. With respect to paragraph 32 of the oral statement of the EC, are subsidies contingent on the use of domestic goods consistent with the AoA? Does the phrase "provide support in favour of domestic producers" refer to, and/or permit such subsidies? What is the meaning and relevance of this (if any) to Brazil's claims under Article 3 of the *SCM Agreement* and Article III:4 of the GATT 1994. 3rd parties, in particular, Australia, Argentina, EC, NZ, Paraguay

Are subsidies contingent on the use of domestic goods, because they are prohibited under Article 3.1(b) of the SCM Agreement, also prohibited under the AoA given that there is no specific provision in the AoA that is explicitly mentioned in the introductory sentence of Article 3 of the

[7] There, the Appellate Body stated that,

> "the fact that some of TPC's contributions, in some industry sectors, are *not* contingent upon export performance, does not necessarily mean that the same is true for all of TPC's contributions. It is enough to show that one or some of TPC's contributions do constitute subsidies "contingent ... in fact … upon export performance".[7]

SCM Agreement? Indeed, Article 3 of the SCM Agreement reads "except as provided in the Agreement on Agric

With respect to the third question, Article III:4 of the GATT 1994 prohibits discrimination against imported products, so that this article is also applicable, as well as Article 2.1 of the Agreement on Trade-Related Investment Measures. Moreover, the TRIMs Agreement does not make the slightest reference to the Agreement on Agriculture.

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ANNEX J-2

ANSWERS BY AUSTRALIA TO THE QUESTIONS FROM THE PANEL

11 August 2003

ARTICLE 13 OF THE *AGREEMENT ON AGRICULTURE*

1. Australia has argued that Article 13 of the *Agreement on Agriculture* is an affirmative defence. How do you reconcile this with your view that the conditions in Article 13 are a "prerequisite" to the availability of a right or privilege? Australia Would other third parties have any comments on Australia's assertion? 3RD parties, in particular Argentina, Benin, China, Chinese Taipei

Reply

Australia does not see any inconsistency in its views. In Australia's view, the potential availability of an affirmative defence in the general sense is in the nature of a right or privilege. Australia wishes to clarify, however, that it considers Article 13 in the specific sense to be a right available when the conditions prescribed therein are met, rather than a privilege.

ARTICLE 13(B) OF THE *AGREEMENT ON AGRICULTURE*: DOMESTI

Reply

In Australia's view, "a" is used in the phrase "a defined and fixed base period" in paragraph 6(a) of Annex 2 to the *Agreement on Agriculture* as an indefinite article, and is defined as meaning "one, some, any"[2]. Thus, having regard to the ordinary meaning of the words in their context and in the light of the object and purpose of the Agreement on Agriculture, "a defined and fixed base period" is the base period selected by an individual WTO Member for the purposes of determining initial eligibility for a particular decoupled income support payment. Once that base period is selected, it is fixed, that is, it is unchangeable.

"The" is defined as "designating one or more … things already mentioned or known, particularized by context or circumstances, inherently unique, familiar, or otherwise sufficiently identified".[3] Thus, the use of "the" as a definite article in the phrase "after the base period" in paragraphs 6(b), (c) and (d) of Annex 2 establishes a relationship to the base period already identified, that is, to the base period selected by an individual WTO Member for the purposes of determining initial eligibility for a particular decoupled income support payment in accordance with paragraph 6(a) and which, once fixed, is unchangeable.

Australia does not consider that there is any relationship between any base period defined and fixed for a support programme for the purposes of paragraph 6 of Annex 2 and the use of the years 1986-88 as a base period under e of tfw8notr wasthere istexeg2Cc 0.3543upportt relates to the

6. Please explain the meaning of the word "criteria" in Article 6.1 and 7.1. What effect, if any, does the use of the word "Accordingly" in paragraph 1 of Annex 2 of the Agreement on Agriculture have on the meaning of the preceding sentence? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Reply

The ordinary meaning of "criteria", as the plural of "criterion", is "principle[s], standard[s], or test[s] by which a thing is judged, assessed, or identified"[4]. Thus, the "criteria" in Articles 6.1 and 7.1 as these relate to Annex 2 of the *Agreement on Agriculture* encompasses all of the relevant principles,

overarching, freestanding obligation that applies to all "green box" measures cumulatively with the additional basic criteria established in paragraph 1 and the policy specific criteria established in paragraphs 2-13 of Annex 2. To interpret a "fundamental requirement" otherwise than as a primary or essential condition would not give the words their ordinary meaning in their context and in light of the object and purpose of the *Agreement on Agriculture*.

8. In your oral statement, you emphasize the use of the word "criteria" in other parts of the Agreement on Agriculture, as distinct from the reference to "fundamental requirement" in the first sentence of paragraph 1 of Annex 2. Is it the case that sub-paragraphs (a) and (b) of paragraph 1 of Annex 2 are also "criteria"? EC

9. If the first sentence of paragraph 1 of Annex 2 is a stand-alone obligation, does this allow effects-based claims of non-compliance with Annex 2? If so, how does this affect the purpose of Article 13(b)? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Reply

It is not clear to Australia what is meant by "effects-based claims" in the context of this question. In Australia's view, a claim of non-compliance with the first sentence of paragraph 1 of Annex 2 would require an assessment of whether a domestic support measure meets the primary or essential condition that such measures have no, or at most minimal, trade-distorting effects or effects on production, that is, that such measures not, or only negligibly, bias or unnaturally alter trade or production.

10. [illegible]

12. Where does Article 13(b) require a year-on-year comparison? 3RD parties, in particular Australia, Argentina, Canada, China, EC, NZ

Reply

In Australia's view, a requirement for a temporal comparison of measures granting support to a specific commodity is an implicit and integral component of the requirement in Article 13(b)(ii) that such measures not be "in excess of" that decided during the 1992 marketing year. "In excess of" is defined as "more than"[12] and "to an amount or degree beyond"[13].

See question 28 below.

13. Does a failure by a Member to comply in a given year with either the chapeau of Article 13(b) or the proviso in subparagraph (ii) of Article 13(b) impact its entitlement to benefit in an earlier or a later year from the exemption from action provided by Article 13(b)? 3RD parties, in particular Australia, Argentina, Canada, China, EC, NZ

Reply

It is Australia's view that there is no obligation with which a Member is required to comply in either the chapeau of Article 13(b), or the proviso of Article 13(b)(ii).

See question 28 below.

14. Does a failure of a Member to comply with Article 13(b) in respect of a specific commodity impact its entitlement to benefit in respect of other agricultural products from the exemption from action provided by Article 13(b)? 3RD parties, in particular Australia, Argentina, Canada, China, EC, NZ

Reply

Yes. In Australia's view, there is no requirement that the application of the proviso be considered only in relation to a specific commodity at issue in a dispute. The failure of a Member to comply with Article 13(b)(ii) and (iii) in respect of one specific commodity affects its right to exemption from actions under Article 13(b)(ii) and (iii) in respect of all commodities.

Australia notes that the basic text of both Article 13(b)(ii) and (iii) reads as follows:

> During the implementation period, … domestic support measures that conform fully to the provisions of Article 6 … shall be … exempt from actions based on [*the specified provisions*], provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

The phrase 'all of the conditions set forth in' [

Similarly to its use in the context of question 3 above, "a" is used in the phrase "support to a specific commodity" as an indefinite article, and is defined as meaning "one, some, any"[14]. Having regard to the ordinary meaning of the word in its context and in light of the object and purpose of the *Agreement on Agriculture*, "support to a specific commodity" means support to any one commodity.

Further, Australia considers that this interpretation is consistent with the object and purpose of the *Agreement on Agriculture*, including as expressed in the preambular clauses to that Agreement, for example, "to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets". The *Agreement on Agriculture* resulted from lengthy and complex negotiations and provided a finely balanced set of rights and obligations aimed at reducing the unnatural distortions of global agricultural production and trade. During an agreed transition period, so long as a Member adheres to its obligations intended to achieve that objective and does not introduce domestic support measures which result in new or additional distortions in trade and

Reply

See question 28 below.

21. Please comment on Brazil's assertion that the terms "grant" and "decided" in Article 13(b)(ii) have broadly the same meaning. If so, why did the drafters not use the same term? 3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ

Reply

See question 28 below.

22. What is the meaning of "support" in Agreement on Agriculture 13(b)(ii) ? Why would it

used in the Spanish-language text, or any other difference which might aid the Panel in interpreting these words? Argentina, EC, Paraguay, Venezuela

27. If the 1992 "decision" led to or was the funding source for the money provided in 1992 and later years, is it the full amount of all that funding that constitutes the "support" decided in 1992? If the answer to this question is that it is the full amount of all the support provided pursuant to the "decision" that must be taken into account, must this be compared with the total amount of support that will or might flow from the decision made in the more recent period for the purposes of the comparison required under Article 13(b)(ii)? If a Member did not make a "decision" (however that may be interpreted) in 1992 about "support", is it the case

Accord also included provisions concerning the *EEC – Oilseeds* dispute.[18]

In summary, the *EEC – Oilseeds* panel considered that the basis for assessing whether the benefits of tariff concessions are being nullified or impaired in a non-violation complaint is the legitimate expectations of the "conditions of price competition" for a product. In assessing those conditi

The use of such a test would explain why the phrase "grant support" was used without further elaboration, such as "support as measured by AMS", "support as calculated in Annex 3" or similar wording. "Support" in the context of subparagraphs (ii) and (iii) of Article 13(b) was purposefully intended to mean all non-"green box" domestic support measures, whether specific or not, which benefit a specific commodity in the sense of a "conditions of price competition" test. In this context, Australia notes that paragraph 8 of Annex 3 expressly excludes from the calculation of AMS some forms of "support" within the meaning of subparagraphs (ii) and (iii) of Article 13(b).

The proviso establishes "support … decided during the 1992 marketing year" as the basis for comparison. In other words, the basis for comparison is the legitimate expectations of other Members of the "conditions of price competition" having regard to the applicable tariff measures and non-"green box" domestic support measures as these were committed to by a Member during the 1992 marketing year, vis-à-vis market prices. It requires a comparison of the legitimate expectations of other Members of the "conditions of price competition" to apply in future on the basis of decisions made by a Member during the 1992 marketing year with the actual "conditions of price competition" at a future point in time. Thus, question concerning whether a year-on-year comparison is required or whether a failure by a Member to comply in a given year affects that Member's entitlement to invoke Article 13(b) in other years become moot. So long as a Member's non-"green box" domestic support measures that conform fully to the provisions of Article 6 "grant support to a specific commodity" in the sense of a "conditions of price competition" test "in excess of that decided during the 1992 marketing year", Article 13(b)(ii) and (iii) does not provide an exemption from actions based on the specified provisions. Conversely, once a Member's non-"green box" domestic support measures no longer grant support in excess of that decided during the 1992 marketing year, the Member re-acquires the right to invoke Article 13(b)(ii) and (iii).

In Australia's view, interpreting the proviso of Article 13(b)(ii) as requiring the application of a "conditions of price competition" test is consistent with the ordinary meaning of the words in their context:

> provided that [*domestic support measures that conform fully to the provisions of Article 6*] do not grant [agree to, bestow or confer][23] support [*assistance or backing*][24] to a specific commodity in excess of [*more than*][25] that decided [*determined or resolved,*[26]*, i.e., committed to*] during the 1992 marketing year.

Moreover, interpreted in the sense of legitimate expectations of "conditions of price competition" in respect of both Article 13(b)(ii) and (iii), the proviso is consistent with the object and purpose of the *Agreement on Agriculture*, including as expressed in the preamble of the Agreement "to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective … rules and disciplines" and "to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets". The provisos of Article 13(b)(ii) and (iii) establish the outer limits within which the market distorting support that continues to be permitted under the *Agreement on Agriculture* must remain during the implementation period if a Member is to benefit from the protection against actionable subsidy claims offered by Article 13(b) during that time. In other words, a Member's domestic support measures may not create a more market distorting situation in respect of any one commodity than could reasonably have been anticipated on the basis of that Member's decisions made known during the 1992 marketing year for that product.

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[23] *The New Shorter Oxford English Dictionary*, Volume 1, page 1131.
[24] *The New Shorter Oxford English Dictionary*, Volume 2, pages 3152-3153.
[25] *The New Shorter Oxford English Dictionary*, Volume 1, page 873.
[26] *The New Shorter Oxford English Dictionary*, Volume 1, 607.

(a) **"The programmes operate in cases where credit is necessary to increase or maintain US exports to a foreign market and where US financial institutions would be unwilling to provide financing without CCC's guarantee. (7 CFR 1493.10(a)(2) Exhibit BRA-38)**

(b) **"The programmes are operated in a manner intended not to interfere with markets for cash sales. The programmes are targeted toward those countries where the guarantee is necessary to secure financing of the exports but which have sufficient financial strength so that foreign exchange will be available for**

if at all is the Appellate Body's report in Canada-Aircraft relevant here?[28] 3rd parties, in particular, Australia, Argentina, NZ, Paraguay

39. Please comment on the United States assertions at paragraph 129 of its first written submission, that "[t]he programme is indifferent to whether recipients of the benefit of this programme are exporters or parties that open bales for the processing of manufacturing raw cotton into cotton products in the United States". 3rd parties, in particular, Australia, Argentina, NZ, Paraguay

Reply

This comment responds to both questions 38 and 39.

Australia provided detailed comment on the "Step 2" payment programme having regard to the Appellate Body's findings in *US – FSC (21.5)* at paragraphs 49-69 of its Third Party Submission. Australia does not dispute that "Step 2" payments may be made on either export or domestic use of a bale of cotton, or that the "intent" with which a buyer purchased a bale of cotton has no effect on an entitlement to a "Step 2" payment in respect of that particular bale. However, these arguments by the United States are not determinative of the issue.

To qualify for a "Step 2" payment, a bale of cotton must be either exported or consumed by a domestic user. These are the two distinct factual situations covered by the "Step 2" payment programme: by definition, a particular bale of cotton cannot be both exported and consumed by a domestic user.

The Appellate Body's findings in *Canada – Aircraft*[29] provide further support for the view that "Step 2" payments are export or local content subsidies. In each of the distinct factual situations of export or domestic use, "Step 2" payments are contingent upon export performance or contingent upon the use of domestic over imported goods respectively.

40. With respect to paragraph 32 of the oral statement of the EC, are subsidies contingent on the use of domestic goods consistent with the AoA? Does the phrase "provide support in favour of domestic producers" refer to, and/or permit such subsidies? What is the meaning and relevance of this (if any) to Brazil's claims under Article 3 of the SCM Agreement and Article III:4 of the GATT 1994. 3rd parties, in particular, Australia, Argentina, EC, NZ, Paraguay

---

United States taxpayer is simultaneously producing property within and outside the United States, for direct use outside the United States, subsidies may be granted under the ETI measure in respect of both sets of property. The subsidy granted with respect to the property produced within the United States, and exported from there, is export contingent within the meaning of Article 3.1(a) of the *SCM Agreement*, irrespective of whether the subsidy given in respect of property produced outside the United States is also export contingent."

1. [28] There, the Appellate Body stated that,

> "the fact that some of TPC's contributions, in some industry sectors, are *not* contingent upon export performance, does not necessarily

Reply

Australia does not consider that the phrase "provide support in favour of domestic producers" in Article 3.2 of the *Agreement on Agriculture* permits subsidies contingent upon the use of domestic goods.

In Australia's view, the legal issue in question relates to the condition attached to the grant of a subsidy, not the grant of a subsidy *per se* or who might benefit from the subsidy. The fact that a measure may benefit an agricultural producer ("support in favour of domestic producers") does not serve to override measures otherwise prohibited.

Article 21.1 of the *Agreement on Agriculture* provides that "[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement". Article 3.1 of the *SCM Agreement* applies "[e]xcept as provided in the Agreement on Agriculture". The General Interpretive Note to Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* also provides contextual guidance. Pursuant to that Note, the *Agreement on Agriculture* would prevail to the extent of any conflict with GATT 1994.

However, in the case of subsidies contingent upon the use of domestic goods, there is no conflict between either the *Agreement on Agriculture*, which inter alia disciplines the amounts of domestic support in favour of domestic producers which distorts trade and production, and the *SCM Agreement* or GATT 1994, which discipline or prohibit certain conditions attached to subsidies, including subsidies in favour of agricultural producers (subject only to the provisions of Article III:8(b) of GATT 1994). There is no provision in the *Agreement on Agriculture* which provides for an exception to, or cover for, local content conditions attached to the grant of a subsidy.

Australia has already noted[30] that Article 13(b)(ii) does not exempt non-"green box" domestic support measures from actions based on Article 3 of the *SCM Agreement*. Neither does Article 13 anywhere refer to GATT Article III:4. Nor with regard to these Articles is there any provision comparable to Articles 5 and 12 of the *Agreement on Agriculture*. As stated in the preambular clauses of the *Agreement on Agriculture*, the "long-term objective is to provide for substantial progressive reductions in agricultural support and protection": it is not intended to provide for a weakening of disciplines, particularly when such disciplines are not specifically mentioned.

Australia also notes that the domestic support provisions of the *Agreement on Agriculture* provide for a strengthening and elaboration of the provisions of Article XVI of GATT 1994. They are not directed towards a diminution of basic GATT obligations. National treatment is central to the multilateral trading system. It is inconceivable to Australia that the negotiators of the Agreement on Agriculture would, as part of a reform programme designed to strengthen disciplines, agree to weaken national treatment disciplines.

However, in the event the Panel were to consider that the phrase "provide support in favour of domestic producers" refers to and/or permits subsidies contingent upon the use of domestic goods, Australia notes that such support could be permitted only to the extent that the support was actually passed through to the producers of the basic agricultural product.

[30] Oral Statement by Australia, paragraphs 29-30.

an issue raised in Question 16. Such a deletion, in Benin's view, would reinforce the view that support provided to "a commodity", regardless of the form of that support, would come under this provision.

In any event, whether the drafters chose the term "support to a specific commodity" or "support to a commodity", th

> "It can thus be concluded that panels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same. In examining dispute WT/DS79 [the EC complaint] we are not legally bound by the conclusions of the Panel in dispute WT/DS50 [the prior US complaint] as modified by the Appellate Body report. However, in the course of "normal dispute settlement procedures" required under Article 10.4 of the DSU, we will take into account the conclusions and reasoning in the Panel and Appellate Body reports in WT/DS50. Moreover, in our examination, we believe that we should give significant weight to both Article 3.2 of the DSU, which stresses the role of the WTO dispute settlement

diminished and the system could not fulfill its purpose: to serve as a "central element in providing security and *predictability* to the multilateral trading system." [emphasis added]

and the United States, although it had by then moved to the compliance panel stage.[7] By contrast, *Cotton* is a new dispute, albeit one that includes the same measure that had been found to be WTO-inconsistent in the earlier EC-US *FSC* dispute.

Thus, in the present context, the reference to "the dispute" in DSU Article 17.14 would refer to the EC-

ANNEX J-4

CANADA'S RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES (FIRST SESSION)

11 August 2003

Canada sets out responses to the questions of the Panel in which Canada has a systemic interest:

2. Please explain the difference, if any, between the meaning of "defined" and the meaning of "fixed" in the phrase "a defined and fixed base period" in paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*.

Reply

Reply

4. A Member may define and fix a base period only once for any given type of decoupled income support payment.

16. If the word "specific" were deleted from Article 13(b)(ii), would this change the meaning of the subparagraph?

Reply

5. The Appellate Body explained in *United States – Reformulated Gasoline* that "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of a treaty".[3] The term "specific commodity" means a commodity that is clearly and explicitly defined.[4] Deletion of the word "specific" would imply an examination of support benefiting a potentially broader product class, a result that is not supported by the text of Article 13(b)(ii) of the *Agriculture Agreement.*

17. What is the releva3ftdl.

purchase of US agricultural products."[8] Where a foreign bank or foreign importer defaults under the terms of the credit/financing that has been extended, the CCC will transfer funds to the US bank or US exporter directly.

(b) How, if at all, would this be relevant to the claims of Brazil?

Reply

8. Where the guarantees provided under the US programmes confer a "benefit", a "subsidy" exists within the meaning of Article 1.1 of the *SCM Agreement*. Whether a "subsidy" exists under Article 1.1 of the *SCM Agreement* is relevant to determining whether the US programmes grant export subsidies within the meaning of Article 1(e) of the *Agriculture Agreement*. Panels and the Appellate Body have relied upon the definition of a "subsidy" in Article 1.1 of the *SCM Agreement* as context to determining whether an "export subsidy" exists under Article 1(e) of the *Agriculture Agreement*. This Panel should do the same.

9. Were the Panel to find that these programmes provide export subsidies within the meaning of Article 1(e) of the *Agriculture Agreement* (a likely result in this case), then it would also find that the United States has violated Articles 8 and 10.1 at the very least in respect of exports of upland cotton because it is an unscheduled product and the US quantitative export subsidy reduction commitment level for that commodity is therefore zero.

30. The Panel could arguably take the view that Articles 1 and 3 of the *SCM Agreement* were relevant in assessing the WTO-consistency of United States export credit guarantees. The Panel would therefore appreciate third party views on this situation, including with respect to the viability of an *a contrario* interpretation of item (j) of the Illustrative List (as addressed in paragraphs 180-183 of the United States' first written submission).

Reply

10. Whether an export subsidy exists under Articles 1 and 3 of the *SCM Agreement* is relevant to determining whether the US programmes grant/ontra6 0 TD58 respect t5 Tf 0.0638 Tc120 Tj cvnp11.25 T.3569 A

35. Did the drafters of the *Agreement on Agriculture* include export credit guarantees in Article 9.1 of the *Agreement on Agriculture*? Why or why not?

Reply

16. Export credit guarantees were not included in Article 9.1 of the *Agreement on Agriculture* because Members could not agree on specific language. Article 10.1 therefore covers any export subsidies granted by such guarantees.

36. Please explain any possible significance the following statements may have in respect of Brazil's claims about GSM102 and 103 (7 CFR 1493.10(a)(2), Exhibit BRA-38)

(a) "The programmes operate in cases where credit is necessary to increase or maintain US exports to a foreign market and where US financial institutions would be unwilling to provide financing without CCC's guarantee. (7 CFR 1493.10(a)(2) Exhibit BRA-38)

Reply

17. This statement suggests that similar credit transactions that are not guaranteed by the CCC would involve uneconomical terms and conditions. Therefore, it suggests that a "benefit" exists within the meaning of Article 1 of the *SCM Agreement.* The statement also confirms that the US programmes are contingent upon export performance within the meaning of Article 1(e) of the *Agriculture Agreement.*

(b) "The programmes are operated in a manner intended not to interfere with markets for cash sales. The programmes are targeted toward those countries where the guarantee is necessary to secure financing of the exports but which have sufficient financial strength so that foreign exchange will be available for scheduled payments." (7 CFR 1493.10(a)(2) Exhibit BRA-38)

Reply

18. This statement also suggests that a "benefit" exists within the meaning of Article 1 of the *SCM Agreement,* and confirms that the US programmes are contingent upon export performance within the meaning of Article 1(e) of the *Agriculture Agreement.*

(c) "In providing this credit guarantee facility, CCC seeks to expand market opportunities for US agricultural exporters and assist lone . The stateme58 targe

within the meaning of Article 1(e) of the *Agriculture Agreement.* Agricus-The pr5065e Agreeme5 0 T an

indefinite period, in addition to any other terms and conditions it may wish? How would this reconcile with the title of Article 10 of the *Agreement on Agriculture* ("Prevention of Circumvention on Export Subsidy Commitments"), and with other commitments contained in the *Agreement on Agriculture*? Please cite any relevant material, including any past WTO dispute settlement cases.

Reply

20. Were the Panel to find that US export credit guarantee programmes provide export subsidies within the meaning of Article 1(e) of the *Agriculture Agreement*, then it would also find that the United States has violated its export subsidy commitments under the *Agriculture Agreement* at the very least in respect of exports of upland cotton. In this respect, Canada refers the Panel to paragraphs 51-54 of its written third party submission, paragraphs 15-16 of its third party oral statement, and paragraphs 133-153 of the Appellate Body's original report in *US – FSC*.[9]

(b) If, as the United States argues, there are no disciplines on export credit guarantees in the *Agreement on Agriculture*, how could export credit guarantees "conform fully to the provisions of Part V" of the *Agreement on Agriculture* within the meaning of Article 13 (how can you assess "conformity" or non-conformity with non- existent disciplines)?

Reply

21. For export credit guarantees to be exempt from the obligations set out in the *Agriculture Agreement*, the Agreement would have to expressly provide for the exemption. No provision of the *Agriculture Agreement* exempts export credit guarantees from any obligation under the Agreement. The US guarantees will therefore "conform fully to the provision of Part V" only if they do not confer export subsidies within the meaning of Articles 1(e) of the *Agriculture Agreement* "in a manner which results in, or which threatens to lead to, circumvention of [US] export subsidy commitments" under Article 10.1.

[9] *United States – Tax Treatment for "Foreign Sales Corporations"*, Report of the Appellate Body, WT/DS108/AB/R, adopted March 20, 2000.

ANNEX J-5

RESPONSE BY CHINA TO THE PANEL'S QUESTIONS TO THIRD PARTIES

11 August 2003

1. China appreciates this opportunity to present its views to the Panel in relation to the Panel's

disagreement on who should bear the burden of proof under the Peace Clause than whether conditions under the Peace Clause are pre-requisites to availability of Peace Clause exemption.

ARTICLE 13(B) OF THE AGREEMENT ON AGRICULTURE: DOMESTIC SUPPORT MEASURES

6. Question 4, How often can a Member define and fix a base period in accordance with paragraph 6 of Annex 2 of the *Agreement on Agriculture*?

Reply

7. In relation to US direct payments under the 2002 FRSI Act, the European Communities ("EC") in its oral statement took a unique stance different from those of all other parties. Noting the United States argument that updating of base periods was necessary in order to bring support for oilseeds production under the direct payment scheme, the EC argued that "it must be possible to have different reference periods while eligibility is based on previous eligibility for production distorting subsidies" "to ensure the progressive movement of production distorting subsidies to decoupled subsidies"; on the other hand, the EC also expressed concern that "continued updating of reference periods in respect of the same already decoupled support, creating an expectation that production of certain crops will be rewarded with a greater entitlement to supposedly decoupled payments, tends to undermine the decoupled nature of such payments"[2]. Such a line of reasoning may have given rise to the question raised by the Panel.

8. While sharing the same concern with the EC, China does not see eye to eye with the EC on the proposed allowance for an initial jump of the reference period over the transition from production distorting subsidies to "decoupled subsidies", even if the latter are found to be decoupled. In China's opinion, the issue is not about frequency of reference period updating; the issue is whether Para. 6 of Annex 2 to the *Agreement on Agriculture* allows updating of the reference period at all.

9. Specifically, the Panel in this case is faced with a direct payment programme that was initiated by a Member several years prior to the coming into effect of the *Agreement on Agriculture*, but was over the years, maintained in the Member country by successor legislations with slight variations. While Para. 6 of Annex 2 to the *Agreement on Agriculture* does not specify when "a fixed and defined base period" falls, it certainly does not provide a window of opportunity for an existing production distorting support measure to transform into a kind of payment with an increased production factor (acreage) in a new up-to-date period. Such an interpretation would grant a bonus not intended by the drafters. The requirement by Para. 6 for a "base" period reflects the drafters' intention to freeze any "Green Box" programme at its initial support level, as opposed to a period selected by a Member. If a Member wishes to carry out a transformation, it should certainly follow the spirit of Para. 6 and use the base period that is already fixed and defined by the predecessor legislation.

10. Therefore, with respect to the interpretation Para. 6 of Annex 2 to the *Agreement on Agriculture* as applied to a direct payment programme that is a direct descendent of predecessor programmes, China is of the view that no updating shall be allowed at all.

11. Question 12. Where does Article 13(b) require a year-on-year comparison?

[2] Para. 30, Oral Statement by the European Communities, United States – Subsidies on Upland Cotton, WT/DS267, 24 July 2003.

Reply

24. Where a programme is designed to provide support exclusively to one product, e.g. upland cotton for the purpose of this case, other products are not brought under its coverage. Failure by the Member's upland cotton-specific programme (if there is any in this case) to comply with Article 13(b)'s proviso would only take the exclusively cotton support programme at issue out of the protection of exemption by Article 13(b). Whether that Member's other support programmes are protected under Article 13(b)'s protection against actions is a matter not related to the cotton support measures at issue.

25. Where support measures are generally available to a number of products including upland cotton

31. Question 17. What is the relevance, if any, of the concept of "specificity" in Article 2 of the *SCM Agreement* and references to "a product" or "subsidized product" in certain provisions of the *SCM Agreement* to the meaning of "support to a specific commodity" in Article 13(b)(ii) *Agreement on Agriculture*?

32. China believes that the concept of "specificity" in Article 2 of the *Subsidies Agreement* is

entitled to exemption. Measures involving agricultural support above that benchmark must risk challenges on the basis of Article XVI:1 of the GATT and Articles 5 and 6 of the *Subsidies Agreement*. As such, the 1992 benchmark must be established for the purpose of comparison.

39. Preference of the word "decided" over "granted" by drafters of the Article may be a result of numerous possibilities. Choosing "decided" to imply a "fixed determination" can be reflective of an intention to exclude expenditures that cannot be precisely allocated to a specific marketing year; certain support payments may be granted by an administration, but may not have reached its beneficiaries in 1992; it may well be an indication of the drafters' intention to cover the exact scenario described by the US, i.e. granted in 1992 but decided in 1993. However, such choice of the word shall not push aside the core intention, which is to choose the year 1992 for establishing that benchmark support level.

40. Again, the issue of burden of proof comes up. If a subsidizing Member wishes to avail itself of the protection of Article 13(b)(ii), it is obligated to prove that the measures being challenged do not exceed the 1992 benchmark. Subsequent to the coming effect of GATT 1994, there exists a reasonable expectation that all subsidizing Members should have notified the WTO Committee on Agriculture their respective level of support in 1992 to allow a workable comparison. In the absence of such notice, evidence of a 1992 benchmark level can only be established by the complaining party, in the form of actual budgetary outlays by the subsidizing Member. Such is the best information available for a proper comparison.

41. Question 22, What is the meaning of "support" in *Agreement on Agriculture* 13(b)(ii)? Why would it be used differently from Annex 3, where it refers to total outlays? Question 23, Should support be compared under Article 13(b)(ii) in terms of unit of production or total volume of support or both?

42. Annex 3 of the *Agreement on Agriculture* is an aid to calculating AMS, which is required not to exceed the corresponding annual or final bound commitment level specified in a Member's domestic support reduction commitments in the Member's schedule under Article 6 of the *Agreement on Agriculture*. In other words, the support calculated on the basis of outlays is part of the concept of replacing commitments to reduce domestic support on a product by product basis with a commitment to reduce overall support to the agricultural sector, a breakthrough in the Agreement's negotiations effected by the Blair House accord.

43. Insertion of the Peace Clause into the *Agreement on Agriculture* is again a part of the Blair House accord. Budgetary outlay, as exemplified by the calculation method in Annex 3, is the approach adopted to ensure that levels of support to upland cotton, whether ge0.75 0 roach6y e for a pr a w-12.75

1992 marketing year. A decision on whether Peace Clause shields the measures at issue may have to be made taking into account extraneous factors if one method yields a plus and another minus. Those factors are, however, nowhere to be found under Article 13(b)(ii) and thus the inclusion of product unit comparison is certainly not contemplated by the drafters.

ETI ACT

46. Question 41. Concerning its claims on the ETI Act, Brazil relies on the *US – FSC* case. However, it appears that the United States did not raise the issue of the Peace Clause in that case, nor did the US appear to invoke Article 6 of the *Agreement on Agriculture*. If the Panel's understanding is correct, how, if at all, are these differences relevant here?

47. China believes that it is not necessary for the Panel to consider the issue of the Peace Clause or Article 6 of the *Agreement on Agriculture* regarding Brazil's claims on the ETI Act.

48. The issue is dealt with by Article 7.2 of the *DSU*, which provides:

> Panels shall address the relevant provisions in any covered agreement or agreements *cited by the parties* to the dispute." (emphasis added)

In effect, under this article, a Panel is required to consider and address relevant provisions *cited by the parties* only. Since the US in this case has not claimed defence for its ETI Act, there is no need for this Panel to consider same.

49. Question 42. How do you view the reference in paragraph 43 of the EC's third party oral statement with respect to the relevance of Article 17.14 of the *DSU*, and, in particular, the phrase "a final resolution to *that* dispute" (emphasis added)? Please explain the use, and relevance (if any) of the term "disputes" in Articles 9.3 and 12 and Appendix 3 of the *DSU*, and please cite any other provisions you consider relevant.

50. The phrase "a final resolution to that dispute" cited by the EC in its third party oral statement comes from the Appellate Body Report in *US-Shrimp (21.5)* case, in which the Appellate Body stated,

52. Be that as it may, the ETI Act in this current case is the very same one challenged by the EC, and found to violate the *Agreement on Agriculture* and the *Subsidies Agreement* by both the panel[10] and the Appellate Body[11] in *US – FSC (21.5)*, whose reports were adopted on 29 January 2002 by the DSB. While in *that* case, the complaint was the EC, and in *this* case, the complaint was Brazil, the measures being challenged were the same, and the Member whose measures were challenged were the same. Countermeasures against the same measures were authorized by the DSB. While both the panel and the Appellate Body reports must be treated by EC and the US as final resolution to that dispute, the US is the party whose measures were found to be non-WTO compliant, and the same measures, since not having been withdrawn, is brought to this dispute. Brazil, as a Member of the WTO system, indeed with other Members of the WTO, has reasonable expectations for the US to withdraw the measures after the DSB authorization. In respect of ETI Act, there is no difference between *that* case, being *US – FSC (21.5)* iwm1e278at

(21.5), and that the panel proceedings have long progressed beyond the panelist selection stage, the only way to ensure uniformity and consistency in panel reasoning and conclusions is to have this Panel consider and adopt the reasoning and conclusion of the panel and the Appellate Body *US – FSC (21.5)* in respect of the US ETI Act.

57. China thanks this Panel for granting this opportunity to present its views on issues related to this proceeding, and hopes that this Panel will finds the above points helpful.

ANNEX J-6

RESPONSES TO THE PANEL'S QUESTIONS AND THE QUESTIONS OF CERTAIN THIRD PARTIES SUBMITTED BY THE EUROPEAN COMMUNITIES

11 August 2003

TABLE OF CONTENTS

I. ARTICLE 13 OF THE AGREEMENT ON AGRICULTURE

Q1. Australia has argued that Article 13 of the *Agreement on Agriculture* is an affirmative defence. How do you reconcile this with your view that the conditions in Article 13 are a "prerequisite" to the availability of a right or privilege? Australia Would other third parties have any comments on Australia's assertion? 3RD parties, in particular Argentina, Benin, China, Chinese Taipei

Answer

1. Australia's views cannot be reconciled. Australia is correct in noting that the conditions in Article 13 can be considered a prerequisite for taking action under the *SCM Agreement.*

Answer

10. As explained in question 2 above, a Member may provide decoupled support through several measures which may have different base periods. However, a Member may not renew a measure, with essentially the same characteristics as previous measures, where, as a matter of fact, farmers are aware that they will have the possibility to update their base periods and thus have an interest in producing certain crops.

11. We also refer the Panel to our response to question 11.

Q5. Do you agree that a payment penalty based on crops produced is "related to type of production"? EC

Answer

12. The European Communities believes that an examination of the conformity of a decoupled scheme with the criteria set out in Annex 2 must involve an examination of the scheme as a whole. In that light, the European Communities is not convinced that where, as part of a scheme where no production is required to receive payments, and that the production of any type of crop is permitted, reducing payments where certain crops are produced can be such as to make the scheme, when taken as a whole, related to a type of production. Consequently, the reduction of payment linked to the production of fruit and vegetables must be seen as part of a scheme which permits a farmer to grow any type of crop, or even not to produce at all. Such a scheme, it is submitted, taken as a whole, meets the criteria that payments are not related to a type of production. To find otherwise would not permit a WTO Member wishing to introduce decoupled payments to take account of important elements of internal competition, in an historical perspective, and avoid those farmers receiving decoupled payments from enjoying both the decoupled payments and a privileged position vis-à-vis farmers who are not entitled to such payments. Moreover, as the European Communities has explained, such a finding would require a Member to increase its subsidy programmes in order to prevent internal distortions of competition, running directly contrary to the process of reform instituted by the *Agreement on Agriculture*.

13. We also refer the Panel to our response to question 11.

Q6. Please explain the meaning of the word "criteria" in Article 6.1 and 7.1. What effect, if any, does the use of the word "Accordingly" in paragraph 1 of Annex 2 of the *Agreement on Agriculture* have on the meaning of the preceding sentence? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Answer

14. Both Article 6.1 and 7.1 refer to the “criteria set out in [..] Annex 2”. When one considers Annex 2, there ar.

intended to link the purposive language of the first sentence, with the "basic criteria" set out in the second sentence. In its Third Party Submission the EC offered a dictionary definition, "in accordance with the logical premises" which showed that the word "accordingly" operates as a linkage between the premise or understanding set out in the first sentence and the operative language in the second sentence. Australia offers the Panel another definition: "harmoniously" or "agreeably", but fails to note that that the Oxford English Dictionary considers this usage of the word "accordingly" obsolete.[8]

16. The European Communities would point out that both the French and Spanish text support the view that the use of the word "accordingly" links the general statement in the first sentence with the specific obligations of the second sentence. The French text uses the term "en conséquence" and the Spanish the term "por consiguiente". Both of these terms show that the criteria in the second sentence angly" links the gerisentence7 ithese 6TD -0.1388AleTj 287.25 0 TD -0.0945 Tc 1.ritMoreover, ha Tc 0.negotiatogl 681- Tc 0 Tw (16.) Tj 13.Tc 0.1875 Tw (Tw ( )7j -451.5 -12.75 Tj 0 -1( )Tj 22.3 TD -0.052 Tc 0.2395 Tw (The

10 (emphasis added)

The Appellate Body has, consequently, recognised the linking function of the word , and the fact that provisions which m ay be linked to later provisions through the use of ordingly" may not impose separate obligations.

The European Communities would also point out that the Appellate Body has found that other .g. Article III.1 GATT) which cont ain general principles are set up as "a guide to ng and interpreting the specific obligations contained" in other provisions (e.g. III.2 and the other paragraphs of Article III).11 Such provisions do not, however, impose ated.12

Answer

22. Yes. The second sentence of paragraph 1 refers to sub-paragraphs (a) and (b) as "basic criteria". Paragraph 5 refers to the same "basic criteria". The European Communities considers that the "criteria" referred to in Articles 6.1 and 7.1 of the *Agreement on Agriculture* (mentioned in question 6 above) refer to both the basic criteria set out in the second sentence of paragraph 1 and the policy-specific criteria set out in paragraphs 2 to 13 of Annex 2.

Q9. If the first sentence of paragraph 1 of Annex 2 is a stand-alone obligation, does this allow effects-based claims of non-compliance with Annex 2? If so, how does this affect the purpose of Article 13(b)? 3rd parties' in particular Australia, Argentina, Canada, EC, NZ

Answer

23. The implication of finding that the first sentence of paragraph 1 is a stand-alone obligation is that an effects test would become applicable to assessing compliance with Annex 2. The result of such an interpretation is two fold. First, as the Panel implies, another WTO Member could bring a WTO dispute alleging that because of its effects a measure does not comply with Annex 2. S1077 y,

30. With respect to the former, the European Communities has already explained why it considers that reducing payments upon growing certain crops cannot be considered to base payments on a type of production (see also the EC's response to Panel question 5 above). The European Communities position is supported not only by the text of paragraph 6(b) but also by an interpretation informed by the first sentence of paragraph 1. Permitting such a reduction of payments does not distort trade – it minimises any distortion which may be caused by any decoupled payments in markets which were historically undistorted by subsidies. It ensures that the equilibrium established by the market in the relevant product is maintained. To the extent decoupled support can be seen as having an effect on trade or production by providing support to farmers who produce some crops, the reduction in

***Agreement on Agriculture*? 3RD parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Answer

39. The European Communities is not convinced that the drafters of the *Agreement on Agriculture* had Article 2 of the *SCM Agreement* in mind when drafting Article 13(b) of the *Agreement on Agriculture*. It may comment further depending on the views of the other third parties on this issue.

40. The European Communities has already referred to the relevance of the references to " a product" and a "subsidised product" in its Oral Statement.[18]

Q18. Benin's oral statement considers the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture.* How does Benin believe that phrase is best interpreted. Please substantiate your response, commenting on other submissions by parties and third parties as you believe appropriate. Benin

Answer

41. The European Communities may comment, as necessary, on Benin's response.

Q19. Where does Article 13(b)(ii) require a year-on-year comparison? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Answer

42. See the answer to question 12 above.

Q20. Does Article 13(b)(ii) require a comparison of support granted with support decided? How could such a comparison be made?

Answer

43. Yes. See the answer to question 22 below.

Q21. Please comment on Brazil's assertion that the terms "grant" and "decided" in Article 13(b)(ii) have broadly the same meaning. If so, why did the drafters not use the same term? 3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ

Answer

44. As the European Communities has explained elsewhere, the use of the term "decided" is crucial to an understanding of Article 13(b). It is now established that a panel is obliged to use the normal rules of interpretation of international law as codified in the Vienna Convention on the Law of Treaties. This requires it to look, in the first place, to the ordinary meaning of the words. "Granted" does not mean the same as "decided".

45. Granted is the past tense of the verb "grant" which means "to give or confer, (a possession, a right etc) formally; transfer (property) legally".[19] "Decided" is the past tense of the verb "decide"

[18] EC Oral Statement, 24 July 2003, para. 23.
[19] The New Shorter Oxford English Dictionary, 1993, p. 1131.

which means "come to a determination or resolution *that, to do, whether*".[20] Thus, in this context, "granted" refers to support which has been provided, to which a farmer (or all eligible farmers in a Member) has obtained a right. "Decided" implies that a political authority (be it a legislature or a government department or agency) has determined that a particular crop is to be entitled to a particular type of assistance.

46. The European Communities believes that the use of the term "decided", as opposed to "granted" and "provided" (which are used elsewhere in the *Agreement on Agriculture*) is very deliberate. Article 13(b) is designed to protect support which was "decided" during 1992. It was negotiated in November 1992 as part of the first Blair House Agreement and later multilateralised.[21] In November 1992, the negotiators could not have known the support granted for the marketing year 1992, which was of course running during that period. They did not, therefore, intend to refer to the support granted when using the term "decided". Rather, they were referring to decisions taken during 1992 in respect of support which WTO Members intended to grant – not that actually granted.

Q22. What is the meaning of "support" in *Agreement on Agriculture* 13(b)(ii) ? Why would it be used differently from Annex 3, where it refers to total outlays? 3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ

Answer

47. With respect, the European Communities does not consider that support is equated in Annex 3 to total outlays. Annex 3 provides methodologies for calculating the Aggregate Measure of Support (AMS). Article 1(a) defines the AMS as "the annual level of support, expressed in monetary terms […]". However, AMS is not necessarily calculated in terms of budgetary outlays. For instance, market price support is calculated "using the gap between a fixed external reference price and the applied administered price multiplied by the quantity of production eligible to receive the applied administered price. Budgetary payments made to maintain this gap […] shall not be included in the AMS." (Annex 3, para. 8) Similarly, non-exempt payments dependent on a price gap are to be calculated "either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays" (Annex 3, para. 10). This makes it clear that AMS need not be calculated in terms of total outlays.

48. The European Communities considers the term "support" in Article 13(b)(ii) must be considered from several perspectives. First, it is clear that the word "support" refers to the support granted in a recent period. Second, and at the same time, the word "that" used in the phrase "that decided" is also a reference to the word "support". However, as already noted, there is crucial distinction in this comparison between the "support decided" and the "support granted". The support decided does not equal the support actually granted during marketing year 1992. For the later period, there is no reason that

makers. It may be that only a certain amount of production would be eligible,

"provided". The European Communities is concerned, however, that the term "authorised" is more restrictive than the term "decided". For that reason, while the European Communities sees support for the interpretation that "decided during" is synonymous with "authorised during", it is not clear to the European Communities that "authorised" has exactly the same meaning as "decided".

Q26. Under Article 13(b)(ii), a comparison is required between support at different times. One of the issues which is contested between the parties is whether the only later period that the Panel can consider is the present one (i.e. the period underway at the time of the request for establishment of the Panel). This argument is based on the present tense of the words "do not grant" in the English text. The Panel asks whether there is any difference in the verb tense as used in the Spanish-

assessed solely on the basis of budgetary outlay figures, as argued by Brazil, or on the basis of a rate of payment, as argued by the United States? In Australia's view, both factors put forward by Brazil and the United States would properly form a part of that assessment, but not the whole." Could you please clarify this statement (indicating other elements which would complete the "whole" and explain its relevance for the purposes of our consideration of Article 13 of the *Agreement on Agriculture*? Australia, EC

Answer

Answer

68. The European Communities does not agree with the proposition that the provision by a government of finance not available from other suppliers confers *per se* a benefit. The European Communities recalls that the Panel in *Canada – Export Credits and Loan Guarantees* left open this issue.[29]

Q34. Comment on the United States' view of the meaning of "long term operating costs and losses" in item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* as meaning "claims paid" under the export credit guarantee programmes. Does the United States' interpretation give meaning to both "costs" and "losses"? Do claims paid represent "losses"? 3rd parties, in particular, Argentina, Canada, EC, NZ

Answer

69. The European Communities does not express an opinion on this question at this time.

Q35. Did the drafters of the *Agreement on Agriculture* include export credit guarantees in Article 9.1 of the *Agreement on Agriculture*? Why or why not? 3rd parties, in particular, Argentina, Canada, EC, NZ

Answer

70. Export credit guarantees are not included in Article 9.1. Article 9.1 represents a list of export subsidies which were permitted to be maintained, but which were made subject to reduction commitments. Article 9.1 is a list of permitted export subsidies negotiated by the drafters of the *Agreement on Agriculture*. All other export subsides are regulated by Article 10.1.

Q36. Please explain any possible significance the following statements may have in respect of Brazil's claims about GSM102 and 103 (7 CFR 1493.10(a)(2), Exhibit BRA-38) 3rd parties, in particular, Argentina, Canada, EC, NZ

(a) "The programmes operate in cases where credit is necessary to increase or maintain US exports to a foreign market and where US financial institutions would be unwilling to provide financing without CCC's guarantee. (7 CFR 1493.10(a)(2) Exhibit BRA-38)

(b) "The programmes are operated in a manner intended not to interfere with markets for cash sales. The programmes are targeted toward those countries where the guarantee is necessary to secure financing of the exports but which have sufficient financial strength so that foreign exchange will be available for scheduled payments." (7 CFR 1493.10(a)(2) Exhibit BRA-38)

(c) "In providing this credit guarantee facility, CCC seeks to expand market opportunities for US agricultural exporters and assist long-term market development for US agricultural commodities." (7 CFR 1493.10(a)(2) Exhibit BRA-38)

[29] Panel report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R, para. 7.341.

Answer

71. At this stage, the European Communities does not comment on the factual aspects of this claim.

Q37. The United States seems to argue that, at present, by virtue of Article 10.2 of the *Agreement on Agriculture*

***(21.5)*[30], do any other dispute settlement reports offer guidance on this issue? For example, how, if at all is the Appellate Body's report in *Canada-Aircraft* relevant here?[31] . 3rd parties, in particular, Australia, Argentina, NZ, Paraguay**

Answer

74. This is a question of fact on which the European Communities takes no position. It will comment, as necessary, on the replies of the other third parties.

Q39. Please comment on the United States assertions at paragraph 129 of its first written submission, that "[t]he programme is indifferent to whether recipients of the benefit of this programme are exporters or parties that open bales for the processing of manufacturing raw cotton into cotton products in the United States." . 3rd parties, in particular, Australia, Argentina, NZ, Paraguay

Answer

75. This is a statement of fact on which the European Communities offers no comment at present. The European Communities will comment further depending on the replies of other third parties.

Q40. With respect to paragraph 32 of the oral statement of the EC, are subsidies contingent on the use of domestic goods consistent with the *AoA*? Does the phrase "provide support in favour of domestic producers" refer to, and/or permit such subsidies? What is the meaning and relevance of this (if any) to Brazil's claims under Article 3 of the *SCM Agreement* and Article III:4 of the GATT 1994.. 3rd parties, in particular, Australia, Argentina, EC, NZ, Paraguay

Answer

76. The Panel's question involves two elements. First, is a Member entitled to provide domestic content subsidies under the *Agreement on Agriculture*? Second, if such subsidies are permitted, what is the relevance of such a rule to Brazil's claims under Article 3 of the *SCM Agreement* and

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[30] [Original footnote to question] "We recall that the ETI measure grants a tax exemption in two different sets of circumstances: (a) where property is produced *within* the United States and held for use *outside* the United States; and (b) where property is produced *outside* the United States and held for use outside the United States. Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances.[30] Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent

Article III.4 GATT. The European Communities has already provided elements of a response in its oral statement.[32] These are expanded upon below.

77. First, a Member is entitled to provide domestic content subsidies under the *Agreement on Agriculture* provided such subsidies are provided consistently with the Member's domestic support commitment levels. This conclusion flows from a number of factors. First, the *Agreement on Agriculture* disciplines domestic support. Article 6.1 refers to "domestic support reduction commitments". Article 3.1 refers to "domestic support [..] commitments […] constitut[ing] commitments limiting subsidization" and Article 3.2 obliges Members "not [to] provide support in favour of domestic producers in excess of the [domestic] support commitment levels". Despite these clear rules on domestic support, the

85. The Peace Clause will only apply in respect of export subsidies which "conform fully to the provisions of Part V" of the *Agreement on Agriculture* (Article 13(c)). The Appellate Body upheld the panel's findings that the ETI Act provided export subsidies in violation of Article 10.1 of the *Agreement on Agriculture*.[37] Consequently, the US could not have legitimately maintained that it was entitled to peace clause protection.

Q42. How do you view the reference in paragraph 43 of the EC's third party oral statement with respect to the relevance of Article 17.14 of the *DSU*, and, in particular, the phrase "a final resolution to *that* dispute" (emphasis added)? Please explain the use, and relevance (if any) of the term "disputes" in Articles 9.3 and 12 and Appendix 3 of the *DSU*, and please cite any other provisions you consider relevant. Argentina, China, EC, NZ

Answer

86. Article 17.14 DSU states that an Appellate Body Report shall be "adopted by the DSB and unconditionally accepted by the parties to the dispute". The reference in the EC's oral statement to the phrase "a final resolution to *that* dispute" (emphasis from the Panel) is from the Appellate Body in *United States – Shrimp (21.5)*.[38]

87. In the present case the Panel must decide a preliminary question. It must determine whether the claims brought by Brazil against the ETI Act are in any way different from those which the panel and Appellate Body upheld against the ETI Act in the EC's Recourse to Article 21.5. If Brazil's claims are identical to those upheld against the ETI Act, the European Communities considers that the United States must be considered to have unconditionally accepted the Appellate Body's findings as adopted by the DSB.

88. The Panel may find some assistance in the Appellate Body's findings in *United States – Shrimp (21.5)*. In that recourse to Article 21.5, Malaysia attempted to challenge certain aspects of the revised US measure at issue which were identical in the measure which was subject to the original challenge.[39] These aspects had been found by the panel and the Appellate Body to be consistent with the United States' WTO obligations. The Appellate Body found that there was no need for the panel, having determined that this aspect of the measure had not changed, to re-examine the consistency of the measure with the US' WTO obligations.[40]

89. The situation before the Panel is the inverse. Here, the US measure was found to be inconsistent with US' WTO obligations. The European Communities understands that the measure before the Panel in this case and before the panel and the Appellate Body in *United States – FSC (21.5)* is identical. On the assumption that the claims are identical, applying Article 17.14 DSU and the Appellate Body's findings in *United States – Shrimp (21.5)* the United States must be assumed to have unconditionally accepted the findings against the ETI Act.

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[37] Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"* ("United States – FSC (21.5)"), WT/DS108/AB/RW, adopted 29 January 2002, para. 196.

[38] Para. 97, Article 21.5 Appellate Body Report, *United States*

please explain the legal authorities for its argument, having regard to its arguments and the Appellate Body's findings in *Argentina – Footwear Safeguard*

ANNEX J-7

NEW ZEALAND ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

11 August 2003[1]

Article 13(b) of the *Agreement on Agriculture*: Domestic support measures

Q2. Please explain the difference, if any, between the meaning of "defined" and the meaning of "fixed" in the phrase "a defined and fixed base period" in paragraph 6(a) of Annex 2 of the Agreement on Agriculture. 3rd

Agriculture have on the meaning of the preceding sentence? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Reply

"Criteria" are the standards by which a thing is assessed. In this case they are the standards by which domestic support measures must be assessed in order to qualify for exemption from reduction commitments. These criteria are set out in Article 6 and Annex 2 of the *Agreement on Agriculture*, and include: the "fundamental requirement" in Annex 2 paragraph 1 that measures have at most minimal trade-distorting effects; the "basic criteria" in paragraph 1(a) and (b); and the "policy-specific criteria and conditions" set out elsewhere in Annex 2. The use of the word "accordingly" signifies that the intention of the drafters was to indicate that in order to meet the first criterion – the "fundamental requirement" that they be at most minimally trade-distorting – measures would at the very least have to meet the subsequent basic and policy-specific criteria.

Q7. Please explain the meaning of the words "the fundamental requirement" as used in paragraph 1 of Annex 2 of the Agreement on Agriculture. 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Reply

"The fundamental requirement" as used in paragraph 1 of Annex 2 refers to a characteristic which, if not present, excludes a measure from a claim of exemption from reduction commitments. In this case that characteristic is that the measure has "no, or at most minimal, trade-distorting effects or effects on production." Paragraph 1 specifies that measures for which exemption is claimed "shall meet" this fundamental requirement. Had the drafters intended to make only a general statement of principle they would not have referred to a "requirement" that "shall be met". The use of the term "fundamental" only serves to underline the importance placed on all measures meeting this requirement in order to be exempt.

Q9. If the first sentence of paragraph 1 of Annex 2 is a stand-alone obligation, does this allow effects-based claims of non-compliance with Annex 2? If so, how does this affect the b)?t on Ag39ure. 3rdrd not. parties, in part7 ba93l

Reply

Yes.

Q11. If the first sentence of paragraph 1 of Annex 2 expresses a general principle which informs the interpretation of the criteria in Annex 2, please explain how this affects the assessment of the direct payments programme's compliance with paragraph 6 of Annex 2. 3rd parties, in particular, Australia, Argentina, Canada, EC, NZ

Reply

If the first sentence of paragraph 1 of Annex 2 expresses a general principle then the criteria in paragraph 6 of Annex 2 must be strictly applied to ensure that only genuinely decoupled income support that had at most minimal impacts on trade and/or production qualified for exemption from reduction commitments.

Irrespective of whether the first sentence of paragraph 1 of Annex 2 is to be considered a general principle or a stand-alone obligation, the requirement that there be only one defined and fixed base period in paragraph 6 is unambiguous. In New Zealand's view the updating of base acreage under the Direct Payments programme alone is sufficient to exclude it from the scope of permitted green box measures set out in paragraph 6 of Annex 2, as outlined in paragraph 2.29 of New Zealand's Third Party Submission.[4]

Q12. Where does Article 13(b) require a year-on-year comparison? 3RD parties, in particular Australia, Argentina, Canada, China, EC, NZ

Reply

Article 13(b)(ii) and 13(b)(iii) require a comparison with 1992 of any year in which injury, nullification or impairment or serious prejudice is alleged to have occurred.

Q13. Does a failure by a Member to comply in a given year with either the chapeau of Article 13(b) or the proviso in subparagraph (ii) of Article 13(b) impact its entitlement to benefit in an earlier or a later year from the exemption from action provided by Article 13(b)? 3RD parties, in particular Australia, Argentina, Canada, China, EC, NZ

Reply

The nature of the non-compliance at issue may be such that it does impact on a Member's entitlement to benefit in an earlier or later year from the exemption from action provided by Article 13(b). Whether or not that is so must be assessed on a case-by-case basis.

Q14. Does a failure of a Member to comply with Article 13(b) in respect of a specific commodity impact its entitlement to benefit in respect of other agricultural products from the exemption from action provided by Article 13(b)? 3RD parties, in particular Australia, Argentina, Canada, China, EC, NZ

[4] Third Party Submission of New Zealand, 15 July 2003.

Reply

See New Zealand's answer to question 12 above.

Q20. Does Article 13(b)(ii) require a comparison of support granted with support decided? How could such a comparison be made?

Reply

Such a comparison could be made by interpreting these terms logically as requiring a comparison between the total volume of support to a specific commodity in 1992 and in any other year in respect of which claims under the *SCM Agreement* and *GATT 1994* are made.

Q21. Please comment on Brazil's assertion that the terms "grant" and "decided" in Article 13(b)(ii) have broadly the same meaning. If so, why did the drafters not use the same term? 3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ

Reply

Article 13(b)(ii) would be devoid of meaning if it were to be interpreted as requiring a comparison between two things that were not like ie if "support granted" was somehow different from "support decided". Therefore the issue is not the difference in wording used, but substantively, what comparison meets the object and purpose of the provision. In New Zealand's view that is a comparison between the total volume of support to a specific commodity in 1992 and in any other year in respect of which claims under the *SCM Agreement* and *GATT 1994* are made.

Q22. What is the meaning of "support" in Agreement on Agriculture 13(b)(ii) ? Why would it be used differently from Annex 3, where it refers to total outlays? 3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ

Reply

Annex 3 refers to budgetary outlays as a component of the Aggregate Measurement of Support ("AMS") calculation. There is nothing to suggest that budgetary outlays should not also be a component of the calculation of "support" in the context of Article 13(b)(ii).

Q23. Should support be compared under Article 13(b)(ii) in terms of unit of production or total volume of support or both? 3rd parties, in particular, Australia, Argentina, Canada, China, EC, NZ

Reply

The rationale behind the comparison required by Article 13(b)(ii) is to create an upper limit to the level of trade and production distortion resulting from Members' domestic support programmes. Therefore the appropriate comparison is with the total volume of support because that provides the truest indication of the real effects of the support programmes on trade and production. Support in terms of unit of production may well be a relevant factor in that calculation but it will not be the only one.

Q25. Please comment on an interpretation of the words "decided during" in Article 13(b)(ii) that would read them as synonymous with the words "authorized during". 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

Reply

New Zealand is not sure what "authorised" in such a context would mean. Presumably it requires evidence of some kind of formal "authorisation". What support was formally authorised, by legislation or regulation, might provide some insight into what level of support was received for specific commodities, but it cannot provide the full picture. It therefore makes no sense to interpret "decided" in such a limited way.

Export credit guarantee programmes

Q29. (a) Is an export credit guarantee a financial contribution in the form of a "potential direct transfer of funds or liabilities (e.g. loan guarantee)" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement? Why or why not? 3rd parties, in particular, Argentina, Canada, EC, NZ

Reply

An export credit guarantee is a "financial contribution" under Article 1.1(a)(1) because it is a "loan guarantee".

Q29. (b) How, if at all, would this be relevant to the claims of Brazil? 3rd parties, in particular, Argentina, Canada, EC, NZ

Reply

It is relevant because a financial contribution is a necessary element of a "subsidy" under Article 1.1(a)(1)(i) of the *SCM Agreement*. Brazil has presented arguments to support a finding that the US export credit guarantee programmes are subsidies as defined in Article 1.1(a)(1)(i), that are contingent upon export according to the terms of Article 3.1(a). The *SCM Agreement* has been found to provide useful context for determining what constitutes an export subsidy for the purposes of Article 10.1 of the *Agreement on Agriculture*. Brazil has demonstrated that, in the terms of Article 10.1, the United States export credit guarantee programmes are applied so as to result in, or threaten to lead to, circumvention of the United States export subsidy commitments.

Brazil has therefore demonstrated that the United States export credit guarantee programmes do not conform fully to the provisions of Part V of the *Agreement on Agriculture* and therefore cannot be exempt from actions based on Article XVI of *GATT 1994* or Articles 3, 5 and 6 of the *SCM Agreement* by the terms of Article 13(c)(ii) of the *Agreement on Agriculture*.

Q30. The Panel could arguably take the view that Articles 1 and 3 of the SCM Agreement were relevant in assessing the WTO-consistency of United States export credit guarantees. The Panel would therefore appreciate third party views on this situation, including with respect to the viability of an a contrario interpretation of item (j) of the Illustrative List (as addressed in paragraphs 180-183 of the United States' first written submission). 3rd parties, in particular, Argentina, Canada, EC, NZ

Reply

New Zealand notes that the Illustrative List simply lists measures that constitute export subsidies under Article 3.1(a) of the *SCM Agreement*. As stated by the Panel in Canada – Export Credits, "item (j) sets out the circumstances in which the grant of loan guarantees is *per se* deemed to

be an export subsidy (i.e. when the "premium rates … are inadequate to cover the long-term operating costs and losses" of the loan guarantee)."[7]

Q31. If the Panel decides to refer to provisions of the SCM Agreement for contextual guidance in the interpretation of the terms in Article 10 Agreement on Agriculture, should the Panel refer to item (j) or Articles 1 and 3 of the SCM Agreement or both? 3rd

provide the recipient with export credit guarantees not available in, and therefore on terms more favourable than, the marketplace, and thus confers a "benefit" in the terms of Article 1.1(b).

Q34. Comment on the United States' view of the meaning of "long term operating costs and losses" in item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement as meaning "claims paid" under the export credit guarantee programmes. Does the United States' interpretation give meaning to both "costs" and "losses"? Do claims paid represent "losses"? 3rd parties, in particular, Argentina, Canada, EC, NZ

Reply

"Claims paid" is one element of the calculation of the costs and losses"lo7 Tc 0 Tw (Q34/F0 11.25 Tf

Reply

This statement reinforces the obvious export contingency of the export credit guarantee programme and through the reference to expand[ing] opportunities and assist[ing] long-term market development makes it clear that the intention of the programme is to provide a benefit to US exporters.

Reply

Q37. The United States seems to argue that, at present, by virtue of Article 10.2 of the Agreement on Agriculture, there are no disciplines on agricultural export credit guarantees under the Agreement on Agriculture (or the SCM Agreement).

(a) Comment on the following proposition: a WTO Member may therefore extend agricultural export credit guarantees without charging a premium, and for an indefinite period, in addition to any other terms and conditions it may wish? How would this reconcile with the title of Article 10 of the Agreement on Agriculture ("Prevention of Circumvention on Export Subsidy Commitments"), and with other commitments contained in the Agreement on Agriculture? Please cite any relevant material, including any past WTO dispute settlement cases. 3rd parties, in particular, Argentina, Canada, EC, NZ

Reply

The proposition is not reconcilable with the title of Article 10 of the *Agreement on Agriculture* as such an export credit guarantee would clearly provide an export subsidy and thus potentially circumvent export subsidy commitments. It also ignores the findings of the Panel in US-FSC Article 21.5[9], affirmed by the Appellate Body,[10] that the threat of circumvention of export subsidy reduction commitments in the terms of Article 10.1 exists in relation to both unscheduled and scheduled agricultural products when the amount of a subsidy is unqualified or unlimited, as implied in the proposition above.

(b) If, as the United States argues, there are no disciplines on export credit guarantees in the Agreement on Agriculture, how could export credit guarantees "conform fully to the provisions of Part V" of the Agreement on Agriculture within the meaning of Article 13 (how can you assess "conformity" or non-conformity with non- existent disciplines)? 3rd parties, in particular, Argentina, Canada, EC, NZ

Reply

The United States interpretation would render the phrase "conforming fully to the provisions of Part V" meaningless in respect of export credit guarantees and it therefore cannot be sustained.

Step 2 payments

Q38. Please comment on the statement in note 119 of the United States' first written submission that "...to the extent a consumer that had intended to export instead opens the bale,

[9] Report of the Panel, *United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108/RW), paragraphs 8.118 and 8.119.

[10] Report of the Appellate Body, *United States – Tax Treatment for "Foreign Sales Corporations", Recourse to Article 21.5 of the DSU by the European Communities* (WT/DS108AB/RW).

then that consumer could still obtain the Step 2 payment upon submission of the requisite documentation". The Panel notes that Step 2 payments all involve upland cotton produced in the United States. What are the two distinct factual situations that Step 2 payments involve? Other than the panel report in Canada-Dairy and the findings of the Appellate Body in US-FSC (21.5), do any other dispute settlement reports offer guidance on this issue? For example, how, if at all is the Appellate Body's report in Canada-Aircraft relevant here? 3rd parties, in particular, Australia, Argentina, NZ, Paraguay

Reply

The two distinct factual situations involved are 1) where cotton is exported, and 2) where cotton is used domestically. The notional consumer referred to by the United States cannot be both an exporter and domestic user of the same bale of cotton.

Even if the Panel were to find that there are not two distinct factual situations involved, ie that there was only one 'Step 2 payment' programme as alleged by the United States, the findings of the Appellate Body in Canada-Aircraft[11] referred to in the question above make it clear that the fact that some of the payments made under that programme are *not* contingent upon export performance, does not necessarily mean that the same is true for all of the payments under the programme. To paraphrase the Appellate Body, it is enough to show that one or some of the Step 2 payments do constitute subsidies "contingent … in fact … upon export performance." Those payments made upon production of proof of export clearly meet the export contingency requirement.

Q39. Please comment on the United States assertions at paragraph 129 of its first written submission, that "[t]he program is indifferent to whether recipients of the benefit of this programme are exporters or parties that open bales for the processing of manufacturing raw cotton into cotton products in the United States." . 3rd parties, in particular, Australia, Argentina, NZ, Paraguay

Reply

The fact that an applicant is required to identify themselves as either an exporter or domestic user and an exporter is required to provide proof of export in order to receive the payment would seem to suggest that the programme is not, in fact, so 'indifferent'.

Q40. With respect to paragraph 32 of the oral statement of the EC, are subsidies contingent on the use of domestic goods consistent with the AoA? Does the phrase "provide support in favour of domestic producers" refer to, and/or permit such subsidies? What is the meaning and relevance of this (if any) to Brazil's claims under Article 3 of the SCM Agreement and Article III:4 of the GATT 1994.. 3rd parties, in particular, Australia, Argentina, EC, NZ, Paraguay

Reply

New Zealand does not agree that a right to provide subsidies contingent upon the use of domestic products contrary to Article 3 of the *SCM Agreement* can be found in the requirement that subsidies "directed at agricultural producers … to the extent that they benefit producers of the basic agricultural product" be included in the calculation of AMS. There is no basis for reading such a right into the *Agreement on Agriculture*. To do so would allow the possibility for exemption from action under the *SCM Agreement* to exist other than by virtue of the peace clause. The peace clause explicitly does not provide such exemption from action under Article 3 of the *SCM Agreement* when

[11] Report of the Appellate Body, *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R , paragraph 179.

it quite clearly could have done so. In New Zealand's view that indicates that there was no intention on the part of the drafters that domestic support measures, whether they conform with Article 6 of the *Agreement on Agriculture* or not, should be so exempt. The same is true in respect of *GATT 1994* Article III:4 claims.

ETI Act

Although we consider that both versions indicate the present, it appears to us that the Spanish

ANNEX J-9

COMMENTS BY ARGENTINA ON THE REPLY BY THE EUROPEAN COMMUNITIES TO QUESTION 40 FROM THE PANEL

22 August 2003

Argentina would like to make the following comments on the reply by the European Communities to question 40 from the Panel.

Argentina does not share the EC's assertion that Members are entitled to provide domestic content subsidies under the Agreement on Agriculture (AoA) provided such subsidies are provided consistently with the Member's domestic support commitment levels.

It is our view that the rules of the AoA, on the one hand, and of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures (ASCM), on the other, contain disciplines that apply independently unless there is a "conflict" between the provisions, in which case the rules of the AoA apply as a result of Article 21.1 of this Agreement.

Article 21.1 of the AoA states that *"The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to* ("a reserva de" in the Spanish text) *the provisions of this Agreement."*

The words "subject to" or "a reserva de" indicate dependency or a condition[1]. Such dependency or condition does not, however, mean that all the disciplines in the GATT 1994 and the Agreements in Annex 1A automatically cease to apply in the case of the AoA. On the contrary, these disciplines "shall apply" unless there is a discrepancy or conflict between a rule in the AoA and the rules in the GATT 1994 or the Agreements in Annex 1A. This conclusion also receives contextual support in the General interpretative note to Annex 1A.

The conditions for the existence for a conflict between two rules was clarified by the Appellate Body in the *Guatemala – Cement case*[2], where it is determined that there is a conflict between two provisions if adherence to one provision leads to a violation of the other. In the case before us, in order to determine whether a rule in the GATT 1994 or in an Agreement in Annex 1A (Article 3.1(b) of the ASCM in this particular case) does not apply, it must first be determined whether there is an inconsistency or discrepancy with a provision of the AoA. In other words, these rules must be applied together.

In this connection, Argentina considers that compliance with the obligations laid down in Articles 6.1 and 3.2 of the AoA, and with paragraph 7 of Annex 3, does not allow any inconsistency with Article 3.1(b) of the ASCM to be detected.

Regarding Articles 6.1 and 3.2 of the AoA, nothing in these provisions indicates that it is not possible to apply them together with the prohibition on granting subsidies contingent on the use of domestic rather than imported products. The fact that the term "domestic support" is not defined in

[1] The New Oxford Dictionary of English: "subject to: … 2 dependent or conditionally upon".
[2] WT/DS60/AB/R, paragraph 65.

the AoA or that the AMS is broadly defined, as indicated by the EC[3], does not imply that the prohibition laid down in Article 3.1(b) of the ASCM is not valid in relation to the AoA. In this connection, the AoA does not contain any reference to possible exclusion.

Regarding paragraph 7 of Annex 3, the statement that "Measures directed at agricultural processors shall be excluded to the extent that such measures benefit the producers of the basic agricultural products" does not mean that such benefits cover measures made subject to the use of national rather than imported products. Producers of the basic agricultural products are allowed the benefits without making the measure contingent on the use of domestic products.

Lastly, with regard to the EC's reference to the preamble to the AoA ("*Having decided* to establish a basis for initiating a process of reform of trade in agriculture …"), it should be noted that this process could very well envisage stricter obligations concerning certain types of measure that particularly distort international agricultural trade. On the contrary, it appears contradictory to assume that an agricultural trade reform process envisages the weakening of disciplines that could be applied in another way.

For the foregoing reasons, Argentina considers that subsidies that are granted to agricultural producers contingent on the use of domestic rather than imported products, either as a sole requirement or as one of several requirements, are inconsistent with Article 3.1(b) of the ASCM and Article III.4 of the GATT 1994.

3

ANNEX J-10

COMMENTS BY AUSTRALIA ON THE RESPONSES OF THE EUROPEAN COMMUNITIES TO QUESTIONS FROM THE PANEL AFTER THE FIRST SESSION OF THE FIRST SUBSTANTIVE PANEL MEETING

22 August 2003

These comments by Australia are offered in response to some of the answers submitted by the EC to the questions from the Panel after the first session of the first substantive Panel meeting. It is not Australia's intention to comment on all of the answers submitted by the EC, as most issues have already been addressed in Australia's written Third Party Submission, Australia's Oral Statement and Australia's responses to questions from the Panel after the first session of the first substantive Panel meeting.

Panel question no. 6 and Australian question no. 2

The EC refers to the findings of the Appellate Body in the *Turkey – Textiles* dispute concerning the interpretation of the word "accordingly" at the beginning of Article XXIV:5 of GATT 1994 to support its view that the first sentence of paragraph 1 of Annex 2 to the *Agreement on Agriculture* does not establish a freestanding obligation. However, as EC recognises, the Appellate Body expressly found in that dispute that the text of GATT Article XXIV:4 does not contain any operative language, that is, that GATT Article XXIV:4 "does not set forth a separate obligation itself". Nor do any of the other provisions cited by the EC in its footnote 9 contain operative language in the sense of setting forth a separate obligation.

The words "shall meet the fundamental requirement" establish a clear and unambiguous obligation that Annex 2 measures must conform to or satisfy the primary or essential condition that such measures have no, or at most minimal, trade-distorting effects or effects on production. "Shall", when used in the present tense as an auxiliary verb followed by an infinitive as in the first sentence of paragraph 1 of Annex 2, is defined as: "must according to a command or instruction".[1] "Meet" has a number of meanings, including "come into conformity with (a person, a person's wishes or opinion)"

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ANNEX J-11

COMMENTS BY THE EUROPEAN COMMUNITIES ON RESPONSES TO THE QUESTIONS OF THE PANEL SUBMITTED BY OTHER THIRD PARTIES

22 August 2003

TABLE OF CONTENTS

I. INTRODUCTION

1. The European Communities has sought to comment on some of the responses to the Panel's questions submitted by other third parties. It has not been possible to do this in an exhaustive manner. Rather, the European Communities has made comments on certain responses which in its view merited further discussion. Evidently, where the European Communities has not commented on a particular argument, this does not imply that we support it.

2. For the Panel's ease of reference, we have retained in this document the Panel's original questions and the responses of the European Communities. Where the European Communities has decided to comment on a particular argument of another third party, we have inserted *verbatim* the text of the other party's arguments. We have deleted all questions which we have decided not to make comments on.

II. ARTICLE 13 OF THE AGREEMENT ON AGRICULTURE

Question

1. Australia has argued that Article 13 of the *Agreement on Agriculture* is an affirmative defence. How do you reconcile this with your view that the conditions in Article 13 are a "prerequisite" to the availability of a right or privilege? Australia Would other third parties have any comments on Australia's assertion? 3rd parties, in particular Argentina, Benin, China, Chinese Taipei

Answer

3. Australia's views cannot be reconciled. Australia is correct in noting that the conditions in Article 13 can be considered a prerequisite for taking action under the *SCM Agreement*.[1] In using the term "prerequisite", Australia essentially recognises that, in respect of measures covered by Article 13, a complainant can only invoke the relevant provisions of the *SCM Agreement* if it proves that the threshold requirements or prerequisites referred to in Article 13 have been satisfied. As the European Communities has pointed out, such a situation is very different from the situation where, in the event of a violation of a WTO Agreement, a WTO Member pleads a defence which potentially exculpates it from this violation (e.g. Article XX GATT) in respect of which it bears the burden of proof.

4. Comparing Article 13 with Article 3.3 of the *SPS Agreement* shows that Australia's views are irreconcilable. This provision permits WTO Members not to base SPS measures on international standards but to impose higher standards where there is a scientific justification or an appropriate risk assessment has been carried out. This provision has some similarities with Article 13 of the *Agreement on Agriculture* since it sets a threshold which must be met before a Member can act. However, Article 3.3 may be seen as going further than Article 13 since it provides a derogation from the central discipline of the *SPS Agreement* ; the obligation to base SPS measures on international standards. On the other hand, Article 13 is simply one element regulating the interface between the *Agreement on Agriculture* and the other Annex I Agreements and cannot be seen as a derogation therefrom. Despite the extent to which Article 3.3 could be thought of as a derogation from the *SPS Agreement*, the Appellate Body ruled in *EC Hormones* that it could not be considered an affirmative defence, and that the burden of proof did not, therefore lie with the defendant.[2] In particular, the Appellate Body noted that the situation in Article 3.3 of the SPS Agreement is "qualitatively different" from the relationship between for instance, Article 1 and XX GATT.[3]

5. Consequently, Australia is correct to consider that Article 13 is a prerequisite or a threshold condition before the other Annex I Agreements may become applicable but is incorrect to consider that Article 13 can be considered an affirmative defence.

Response of Australia

> Australia does not see any inconsistency in its views. In Australia's view, the potential availability of an affirmative defence in the general sense is in the nature of a right or privilege. Australia wishes to clarify, however, that it considers Article 13 in the specific sense to be a right available when the conditions prescribed therein are met, rather than a privilege.

EC Comment

6. The European Communities fails to see how Australia can reasonably assert that there is no "inconsistency in its views". If Article 13 *Agreement on Agriculture* is a "prerequisite" for a complainant to bring an action under the *SCM Agreement* it cannot be at the same time a defence. A defence applies when a breach of a WTO Agreement arises, and the defending Member relies on another provision of a WTO Agreement in order to exculpate itself. Article XX GATT is the best example. In such a case, the burden of proof shifts to the Member invoking a defence. A prerequisite

[1] Australia's Oral Statement, para. 18.

[2] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones) ("European Communities – Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 109.

[3] Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones) ("European Communities – Hormones")*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 105.

is entirely different. It implies that before a Member can undertake a particular action, it must take another action. In this context, a complaining Member must prove that Article 13 *Agreement on Agriculture* does not apply, before proving that the relevant provisions of the *SCM Agreement* apply.

7. Australia's bald assertion, glossing over its previous use of the word "prerequisite", does not adequately explain how its views can be reconciled.

III. ARTICLE 13(B) OF THE *AGREEMENT ON AGRICULTURE*: DOMESTIC SUPPORT MEASURES

Questions 2 - 5

8. The European Communities would only note that the changes presented by Australia to questions 2 and 3 on 15 August 2003 as "corrigenda" altered substantively the meaning of Australia's original response. The change from "program" to "payment" is a substantial change, and not a mere typographical error.

Question

6. Please explain the meaning of the word "criteria" in Article 6.1 and 7.1. What effect, if any, does the use of the word "Accordingly" in paragraph 1 of Annex 2 of the *Agreement on at Article 13*

Article III.2 and the other paragraphs of Article III).[8] Such provisions do not, however, impose additional obligations supplemental to the specific obligations, unless expressly stated.[9]

15. The Panel may find it useful to refer to the European Communities' response to a question posed by Australia (see question no. 44 in this document). In its response, the European Communities deals with Australia's unfounded assertion that the European Communities' reading of the first sentence of paragraph 1 would render that provision ineffective.

Response of Australia

> The ordinary meaning of "criteria", as the plural of "criterion", is "principle[s], standard[s], or test[s] by which a thing is judged, assessed, or identified"[10]. Thus, the "criteria" in Articles 6.1 and 7.1 as these relate to Annex 2 of the *Agreement on Agriculture* encompasses <u>all</u> of the relevant principles, standards or tests established in Annex 2 against which domestic support measures for which exemption from reduction commitments is claimed are to be judged, assessed and/or identified.
>
> As Australia said in its Oral Statement[11], the word "accordingly" has several, equally valid meanings that are potentially applicable in the context: "harmoniously", "agreeably", "in accordance with the logical premises" and "correspondingly".[12] A further definition is "in conformity with a given set of circumstances".[13]
>
> In Australia's view, having regard to its ordinary meanings in its context and in light of the object and purpose of the *Agreement on Agriculture*, including to "[correct] and [prevent] … distortions in world agricultural markets",[14] the word "accordingly" can and should properly be interpreted in the sense of "consistent with" or "in conformity with" the fundamental requirement established in the first sentence. Consistent with that interpretation, the obligation that "green box" measures "meet the fundamental requirement …" is cumulative with the additional basic criteria established in paragraph 1 and the policy specific criteria established in paragraphs 2-13 of Annex 2. To interpret the word "accordingly" otherwise would be to negate the plain and unambiguous obligation established in the first sentence of paragraph 1 of Annex 2 that "[d]omestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production".

Response of New Zealand

> "Criteria" are the standards by which a thing is assessed. In this case they are the standards by which domestic support measures must be assessed in order to qualify for exemption from reduction commitments. These criteria are set out in Article 6 and Annex 2 of the *Agreement*

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[8] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages ("Japan – Alcoholic Beverages")*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 17.

[9] See Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas ("European Communities – Bananas")*, WT/DS27/AB/R, adopted 25 September 1997, paras. 214-216 holding that the absence of a specific reference to Article III.1 GATT in Article III.4 GATT meant that an examination of the consistency of a measure with Article III.4 GATT did not require, in addition, an examination of the consistency of the measure with Article III.1 GATT.

[10] *The New Shorter Oxford English Dictionary*, Volume 1, page 551.

[11] Oral Statement by Australia, paragraphs 35-36.

[12] *The New Shorter Oxford English Dictionary*, Volume 1, page 15.

[13] *Webster's Third New International Dictionary*, Ed. Philip Babcock Gove, Merriam-Webster Inc, Springfield, Massachusetts, 1993, page 12.

[14] Third preambular paragraph of the *Agreement on Agriculture*.

Question

7. Please explain the meaning of the words "the fundamental requirement" as used in paragraph 1 of Annex 2 of the *Agreement on Agriculture.* 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Answer

20. The phrase "the fundamental requirement" signals the negotiators intent to treat differently measures which are less or not at all distortive to trade or production and sets forth the general purpose of Annex 2; a purpose which permeates the rest of Annex 2. Considering the term in the abstract does not answer the question whether a panel must examine the effects of measures for which green box status is claimed in addition to examining whether such measures respect the basic and policy-specific criteria set out in Annex 2, or whether respecting the basic and policy-specific criteria is such that a measure is deemed not to have the effects mentioned in the first sentence. As the European Communities has explained, there are compelling textual and purpose based arguments which support the latter interpretation.

Response of Australia

The word "fundamental" has a number of meanings[16] which can be summarised as "primary" or "essential". The word "requirement" too has a number of meanings[17] which can be summarised as a "condition". Thus, a "fundamental6srehas a number of meanings

whole." Could you please clarify this statement (indicating other elements which would complete the "whole" and explain its relevance for the purposes of our consideration of Article 13 of the *Agreement on Agriculture*? Australia, EC

Answer

22. The European Communities would prefer to let Australia clarify its statement. The European Communities will comment upon Australia's clarification in its comments on the responses of the other third parties.

Australia's Response

> Given the length of Australia's response, the European Communities has not reproduced it here.

EC Comment

23. The European Communities is unconvinced of Australia's argument. There is nothing in the text of Article 13 to suggest that in order to determine "support" under Article 13 it is necessary to consider all the factors which are relevant to examining a non-violation case. Moreover, the European Communities notes that Article 13(b)(ii) provides that Articles 5 and 6 of the *SCM Agreement* may be applicable under certain conditions. However, an assessment of whether a measure is inconsistent with Articles 5 and 6 of the *SCM Agreement* is not based on the same criteria as would be applicable in assessing a non-violation complaint. Indeed, such criteria may have nothing to do with the domestic market of the Member which is providing a subsidy. Australia does not explain why the type of criteria relevant to non-violation complaints would also be relevant in assessing a complaint under Articles 5 and 6 of the *SCM Agreement.* Nor does it explain why it is necessary to import notions -ii) provides that A m29 the European C

provisions of this Agreement." As the European Communities pointed out in its oral statement, this means that provisions of the other Annex 1A Agreements are "subordinated" to the *Agreement on Agriculture*.[21]

30. To find that such subsidies were inconsistent with either Article 3.1(b) of the *SCM Agreement* or Article III.4 GATT would be to subordinate the right to provide such domestic content subsidies under the *Agreement on Agriculture* Tj 51 0 TD re

provides contextual guidance. Pursuant to that Note, the *Agreement on Agriculture* would prevail to the extent of any conflict with GATT 1994.

However, in the case of subsidies contingent upon the use of domestic goods, there is no conflict between either the *Agreement on Agriculture*, which *inter alia* disciplines the amounts of domestic support in favour of domestic producers which distorts trade and production, and the *SCM Agreement* or GATT 1994, which discipline or prohibit certain conditions attached to subsidies, including subsidies in favour of agricultural producers (subject only to the provisions of Article III:8(b) of GATT 1994). There is no provision in the *Agreement on Agriculture* which provides for an exception to, or cover for, local content conditions attached to the grant of a subsidy.

Australia has already noted[23] that Article 13(b)(ii) does not exempt non-"green box" domestic

EC Comments

33. Australia confuses legal issues. Article 3.1(b) of the *SCM Agreement* and Article III.4 GATT concern *inter alia* the conditions under which subsidies may be granted. The *Agreement on Agriculture* provides a right, up to a specified limit, to provide support to domestic producers, irrespective of the manner in which such support is provided. That is, a Member is entitled to provide support up to the limits and to do so in any form. Paragraph 3.7 of Annex 3 makes it clear that a Member is entitled to include in its support subsidies granted to processors which benefit agricultural producers. A Member thus has a right to provide support in the form of payments to its agricultural producers. This right conflicts with the prohibition in Article 3.1(b) of the *SCM Agreement* and Article III.4 GATT.

34. The European Communities fails to see the relevance of Article XVI GATT to this issue. Moreover, it is inaccurate of Australia to suggest that interpreting the *Agreement on Agriculture* in this manner would result in a weakening of obligations. Australia conveniently ignores that, in placing absolute limits on the amount of domestic support which a Member may provide, WTO Members agreed to impose stricter disciplines on domestic support for agriculture than that applicable to domestic subsidies for industrial products.

35. New Zealand's argument rests on the conception that it is only Article 13 (the peace clause) which regulates the interface between the *Agreement on Agriculture* and the other Annex 1A Agreements. As Australia points out, Article 21.1 *Agreement on Agriculture* is clearly relevant, as is the General Interpretative Note to Annex 1A. New Zealand's unsubstantiated argument does not stand.

ANNEX J-12

REPLIES FROM ARGENTINA TO PANEL'S QUESTIONS

27 October 2003

A. QUESTIONS TO INDIVIDUAL THIRD PARTIES

Q43. Please elaborate, citing figures, on your statement that polyester fibre prices actually follow cotton prices. Argentina

1. Argentina submits that the explosion in the production of synthetic fibres played no part in the fall in international cotton prices; in fact, the contrary appears to have occurred.[1]

2. The "Fibre Prices" table in paragraph 23 of the Further Submission of the United States shows that polyester prices have always been lower than cotton prices (see the columns "US mill" and "US spot" as compared to "Asia poly") and, moreover, they appear to follow cotton prices. Thus, for example, in 1995, when cotton prices reached their record level for the series, polyester prices happened to follow the same trend, precisely at a time when the price of oil was practically at its lowest for the period under consideration.

3. Another example is the period from 2000 to 2002: while the price of oil was at its highest, the price of polyester reached its low point for the period under consideration, having "accompanied" the very low cotton prices.

4. Attached hereto as Annex ARG-1 is a graph comparing the evolution of cotton prices (US mill and US spot) with that of polyester fibre prices (Asian poly)[2] and with the price of oil per barrel (West Texas)[3], clearly reflecting a very close correlation between cotton and polyester prices.

5. On the other hand, the last few years do not show any correlation between the price per barrel of oil and the price of polyester fibres, which shows that polyester has had to adapt to cotton prices in order to remain competitive, and not the reverse as the United States claims.

B. QUESTIONS TO ALL THIRD PARTIES

Q49. What is the meaning and effect of the introductory phrase of Article 3 of the SCM Agreement ("Except as provided in the *Agreement on Agriculture* ...")?

6. The introductory phrase of Article 3 of the SCM Agreement ("*Except as provided in the Agreement on Agriculture* ...") means that the provisions of that Article apply to agricultural subsidies to the extent that they do not conflict with the Agreement on Agriculture (AoA). The phrase "*except as provided* ..." does not necessarily imply that there is a conflict between the two Agreements.

7. In this connection, Argentina replied to question 40 of the Panel to the third parties, stating that no provision could be found in the AoA that conflicted with Article 3.1(b) of the SCM Agreement. Indeed, the AoA does not contain any provision which explicitly permits the granting of

[1] Second oral third party submission by Argentina, 8 October 2003, paragraphs 15-17.
[2] Source: Further submission of the United States, "Fibre Prices" table, paragraph 23.
[3] Source: Argentine Oil and Gas Institute (IAPG).

"subsidies contingent, whether solely or as one of several other conditions, on the use of domestic over imported products."

8. It is therefore Argentina's understanding that since they are prohibited under Article 3.1(b) of the SCM Agreement, and since there is no specific provision in the AoA that is explicitly mentioned in the introductory phrase of Article 3 of the SCM Agreement, subsidies contingent on the use of domestic over imported goods are also prohibited under the AoA.

9. Likewise, Argentina pointed out in its comments on the reply by the European Communities to question 40 from the Panel that the rules of the AoA, on the one hand, and of the GATT 1994 and the SCM Agreement, on the other, contained disciplines that were applied together, unless there was a discrepancy or "conflict" between the different provisions.[4]

Q50. According t

(d) Is a subsidy in respect of upland cotton, but not other products, specific?

15. Yes.

(e) Is a subsidy in respect of certain proportion of the value of total US commodities (or total US agricultural commodities) specific?

16. Yes.

(f) Is a subsidy in respect of certain proportion of total US farmland specific?

17. Yes.

18. Argentina stresses that the concept of "specificity" in Article 2 of the SCM Agreement is very broad, since it refers to the subsidies for an enterprise or an industry or group of enterprises or industries.

19. From the standpoint of the SCM Agreement, agricultural subsidies are specific within the meaning of Article 2, since they are not available for all products. The mere fact that they are "agricultural" precludes any interpretation that they are not specific.

20. As regards the principle of Article 2.1, agricultural subsidies comply with the requirements of each one of its indents:

- Indent (a), because not all of the enterprises of a Member have access to subsidies under the AoA;
- indent (b), because there is no automatic eligibility for the subsidies under the AoA, nor are they based on objective criteria such as those listed in footnote 2 to Article 2, since they benefit the producers of certain products – in the case in point, those included in Annex I of the AoA;
- indent (c), because a subsidy for an agricultural product complies with all of the requirements of the first sentence thereof. As regards the second sentence of indent (c), there is no evidence for including an agricultural subsidy under any of these factors.

As to the specific case of export subsidies, Article 2.3 reaffirms their specificity. Having already pointed out that specificity is established under Article 2.1 and 2.3, there is no need to address the principle in Article 2.2.

21. Generally speaking, it should be borne in mind that in addition to the principles laid down in indents (a) and (b) of Article

(a) Also conclude that the same subsidy had resulted in adverse effects to the interests of another Member? If so, what would be the value of such a conclusion in terms of the settlement of the matter before the Panel?

22. In Argentina's view, if the Panel were to conclude that a subsidy was prohibited and to make a recommendation –

28. In this connection, footnote 13 of the SCM Agreement, which states that *"the term 'serious prejudice to the interests of another Member' is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice"*, clearly establishes the link between the two provisions.

Q54. Are US cotton producers able to cover the fixed and variable costs without subsidies? Please provide substantiating evidence. Of what relevance is this, if any, to Brazil's actionable subsidy claims?

29. Argentina has no evidence that US cotton producers are unable to cover their fixed and variable costs without subsidies.

30. What Argentina has repeatedly stated – referring to the evidence submitted by Brazil during these proceedings – is that the US cotton producers cannot bridge the gap between total production costs (i.e. the sum of fixed and variable costs) and market prices for cotton without subsidies.

31. Argentina has pointed out that cotton production costs in the United States are among the highest in the world.[6] According to an ICAC study[7], the cost of production in the United States was US$0.81 per pound of cotton in the marketing year 1999[8], while US producers' market prices fell from US$0.60 to US$0.30 per pound.

32. Argentina also stated that the only possible explanation how the United States bridged this widening gap between production costs and market prices is subsidies, since without them many US producers would have been compelled to cease production (in spite of the fact that they would eventually have been able to cover their fixed and variable costs).

33. This fact, that without subsidies US cotton producers could not have bridged the gap between their total production costs and market prices, is entirely relevant to Brazil's claims, since it shows that as a result of the subsidies, less efficient US producers are immune to changes in market prices. In other words, without the US subsidies which generate a world market surplus, international cotton prices would have been higher or would not have fallen as much.

34. This confirms both the actual serious prejudice and the threat of serious prejudice caused by the subsidies, in that future subsidies will be as necessary as the current ones for US producers to bridge the gap between market prices and their total production costs.[9] This will enable them to continue competing with more efficient third-country producers, especially considering that the USDA itself forecasts an increase in total production costs.[10]

Q55. In light of the fact that certain third parties have provided submissions about the price effect of claimed US subsidies, which Member or Members is, or are, the "other party" under Article 6.3(c) (*"another Member"*) for the purposes of these proceedings?

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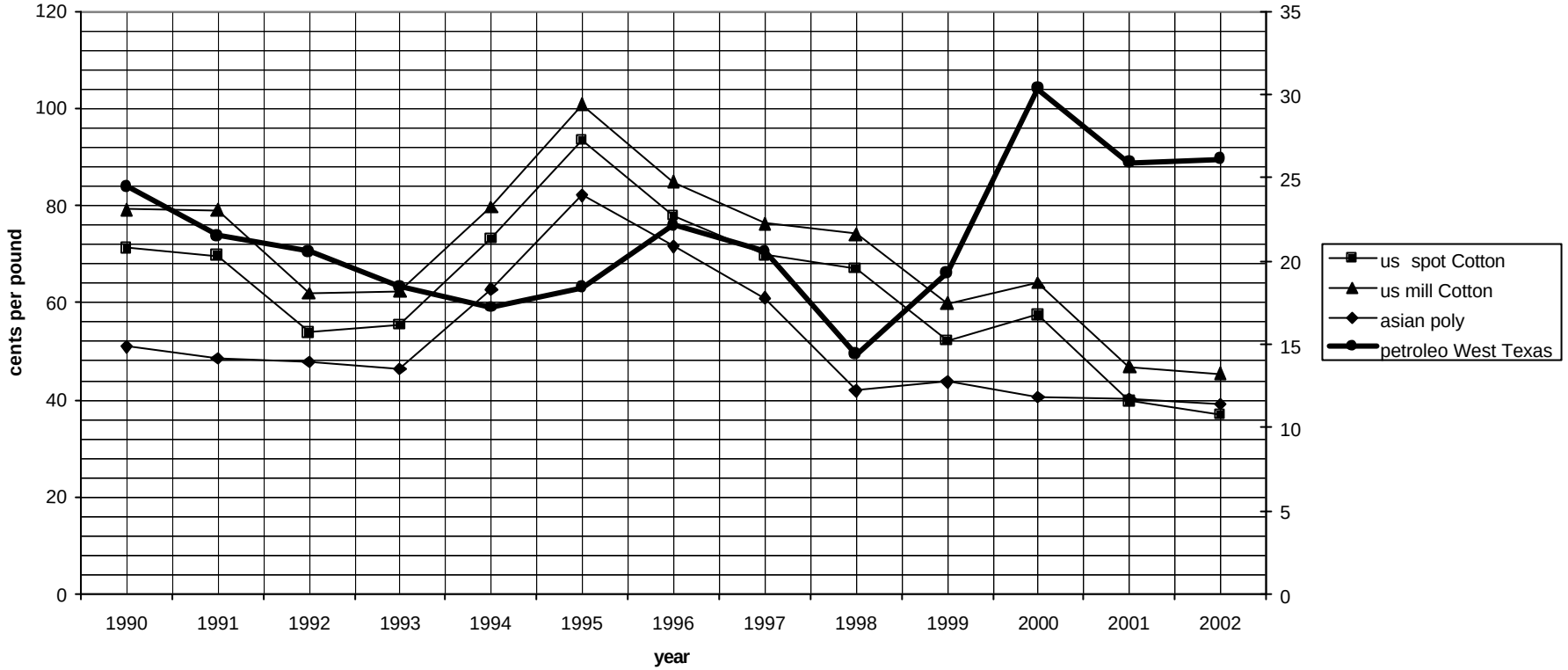
[6] Third party submission by Argentina, 15 July 2003, paragraphs 17 and 18.

[7] Cotton: World Statistics, Bulletin of the International Cotton Advisory Committee, September 2002 (Annex BRA-9).

[8] As stated by Brazil in its first submission to the Panel of 24 June 2003, paragraph 32, according to the ICAC study the cost of production in Argentina averaged 59 cents per pound of cotton (See Annex BRA-9).

[9] Second written third party submission by Argentina, 3 October 2003, paragraph 49.

[10] See Annexes BRA-7 (ERS Data: Commodity Costs and Returns); BRA-257 ("Cost of Farm Production Up in 2003", USDA, 6 May 2003) and BRA-82 ("USDA Agricultural Baseline Projections until 2012", USDA, February 2003, p.48).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It is inconceivable to Australia that any intended exemption from the very significant and unambiguous local content subsidy disciplines of Article 3.1(b) of the *SCM Agreement* would not have been expressly set out in the *Agreement on Agriculture*. The inclusion of express provisions concerning export subsidies in the *Agreement on Agriculture* indicates that the negotiators of that Agreement were well aware of the need to include express provisions if additional or alternative disciplines concerning subsidies for agricultural products were intended vis-à-vis the disciplines established pursuant to the *SCM Agreement.*

The situation is analogous to that examined by the Panel and the Appellate Body in *EC – Bananas* wherein the Appellate Body upheld the Panel's conclusion that the *Agreement on Agriculture* did not permit the EC to act inconsistently with Article XIII of GATT 1994 in the absence of any provisions dealing specifically with the allocation of tariff quotas on agricultural products.[1] In the absence of provisions dealing specifically with local content subsidies in the *Agreement on Agriculture*, that Agreement does not allow a Member to act inconsistently with the *SCM Agreement.* The fact that the phrase "[e]xcept as provided in the Agreement on Agriculture" in the chapeau of

(c) is a subsidy in respect of certain identified agricultural products specific?

(d) is a subsidy in respect of upland cotton, but not other products, specific?

(e) is a subsidy in respect of a certain proportion of the value of total US commodities (or total US agricultural commodities) specific?

Reply

Australia does not wish to comment on this issue.

Q52. The Panel notes that different remedies are available in respect of prohibited and actionable subsidies under Article 4.7 and 7.8 of the SCM Agreement. If the Panel were to conclude that a subsidy was prohibited and were to make a recommendation under Article 4.7 of the SCM Agreement to withdraw the subsidy without delay, can the Panel:

(a) also conclude that the same subsidy had resulted in adverse effects to the interests of another Member? If so, what would be the value of such a conclusion in terms of the settlement of the matter before the Panel?

(b) take into account the effects of the interaction of those prohibited subsidies with other, allegedly, actionable subsidies? If so, how is this relevant to the issue of causation under Article 5 of the SCM Agreement?

Reply

If the Panel were to conclude that a subsidy was prohibited and to make a recommendation under Article 4.7 of the *SCM Agreement* to "withdraw the subsidy without delay", and having regard to the presumption of adverse effects implicit in a finding that a subsidy is prohibited and to the observations of the Appellate Body on the meaning of "withdraw" in SCM Article 4.7[2]:

(a) the Panel could conclude that the same subsidy had also resulted in adverse effects to the interests of another Member under SCM Article 5, particularly if that other Member were a third party to the dispute in light of the provisions of Article 10.1 of the DSU;

(b) the Panel could also consider the interaction of that prohibited subsidy with other, allegedly actionable subsidies. However, the prohibited subsidy would be required to be withdrawn without delay and thus any causative contribution its interaction with other allegedly actionable subsidies may make to the adverse effects of those other actionable subsidies will be removed as a consequence of the withdrawal of the prohibited subsidy.

Q53. Would a finding of serious prejudice under Article 5(c) of the SCM Agreement be determinative for a finding under Article XVI:1 of the GATT 1994? Why or why not? What, if any, is the role of footnote 13 of the SCM Agreement in this context?

Reply

Australia does not wish to comment on this issue.

[2] *Brazil – Export Financing Programme for Aircraft*, Recourse by Canada to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS46/AB/RW, paragraph 45.

Q54. Are US cotton producers able to cover the fixed and variable costs without subsidies? Please provide substantiating evidence. Of what relevance is this, if any, to Brazil's actionable subsidy claims?

Reply

Australia does not wish to comment on the facts of US costs of production in relation to upland cotton, but notes the statements of the Appellate Body in relation to the calculation of costs of production in the *Canada – Dairy* dispute.[3]

Q55. In light of the fact that certain third parties have provided submissions about the price effect of claimed US subsidies, which Member or Members is, or are, the "other party" under Article 6.3(c) ("another Member") for the purposes of these proceedings?

Reply

Australia does not wish to comment on this issue.

Q56. Please respond to the following questions concerning the relationship between Article XVI:3 of the GATT 1994, the disciplines on export subsidies and domestic support in the Agreement on Agriculture and the disciplines on prohibited export subsidies and actionable subsidies in Articles 3, 5(c) and 6.3(d) of the SCM Agreement.

(a) Are agricultural domestic support programmes challengeable under Article XVI:3 of the GATT 1994? How, if at all, is the title of Section B of Article XVI ("Additional provisions on export subsidies" (emphasis added)) relevant? How, if at all, are Articles 13 and 21.1, or any other provisions, of the Agreement on Agriculture, relevant?

(b) Are the requirements of Article XVI:3 of the GATT 1994 reflected in, developed by or subsumed by the requirements in Article 6.3(d) of the SCM Agreement, or in any other provisions of the covered agreements? Of what relevance, if any, is the Appellate Body Report in US – FSC, para. 117 here?

(c) Of what relevance, if any, is the fact that the definition of "subsidy" in Article 1 of the SCM Agreement and the prohibition on subsidies contingent upon export in Article 3.1(a) were introduced in the Uruguay Round, but did not exist at the time that the GATT 1947 were negotiated?

Reply

In Australia's view, it is unambiguous that agricultural domestic support programmes are challengeable under Article XVI:3 of GATT 1994.

It is useful to recall to begin with that GATT 1947 did not provide a definition of a "subsidy" or of an "export subsidy" and that the only disciplines on subsidies of any type were the general subsidy disciplines of paragraph 1 of GATT Article XVI. The provisions of Section B of GATT Article XVI, comprising paragraphs 2-5 and headed "Additional Provisions on Export Subsidies", were added at the 1954-55 Review Session and constituted the earliest disciplines directed at "the use

[3] *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse to Article 21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW –

of subsidies on the export of primary products". The plurilateral 1979 Tokyo Round Subsidies Code[4] represented a further stage in the elaboration of disciplines on export subsidies and subsidies generally, in particular, Articles 8-

ANNEX J-14

RESPONSES OF BENIN AND CHAD TO THE PANEL'S QUESTIONS

27 October 2003

Benin and Chad would offer the following responses to those Panel questions that pertain to the scope of their Third Party Submissions:

"44. Please explain how Articles 5 and 6 of the *SCM Agreement* and Article XVI of the GATT 1994 would permit or require the Panel to take account of any effects of the subsidies in question on the interests of Members other than the complaining party. Benin and Chad."

Brazil is the sole complaining party in this dispute, and ultimately only Brazil would have the right to any remedy provided by the SCM Agreement. However, Benin and Chad submit that the Panel is nevertheless required to take account of the effects of the US subsidies on the interest of Members other than the complaining Member, for the following reasons.

First, the chapeau of Article 5 states that "[n]o Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members". The drafters of Article 5 referred to "Members" in the plural, connoting an obligation on behalf of the subsidizing Member not to cause adverse effects to the interests of all WTO Members – not just the complaining Member.

Second, when the drafters of the SCM Agreement intended to refer only to the "complaining Member", they used this term specifically, such as in Article 6.7, or in paragraph 2 of Annex V. They could similarly have used the term "complaining Member" elsewhere in Articles 5 and 6, but they did not. Therefore, the term "other Members" cannot be interpreted as synonymous with "complaining Members", just as the term "another Member" cannot be read as limited only to the "complaining Member". The treaty interpreter must give meaning to the terms actually used in the text.[1]

Third, this interpretation is consistent with Article 3.8 of the DSU, which provides as follows:

> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge. [emphasis added]

Article 3.8 refers to the "adverse impact" on "other Members" in the plural, referring to all WTO Members. Although the SCM Agreement provides special and additional rules for dispute settlement, these special rules have not ousted the application of DSU Article 3.8. Benin and Chad are "parties to [the] covered agreement", the SCM Agreement, and it can therefore be presumed that

[1] The textual analysis set out above applies equally to Article XVI:1 of the GATT 1994, which refers to the "other contracting party." (By virtue of paragraph 2(a) of the *Explanatory Notes to GATT 1994*, the references to "contracting party" are deemed to read "Member.") Article XVI:1 thus refers to the "other Member" and not the "complaining Member."

the breach of the SCM Agreement by the United States has an adverse impact on these two African countries.

In any event, the Panel need not rely exclusively on the presumption set out DSU Article 3.8, since Benin and Chad have already provided to the Panel detailed evidence about the adverse effects of US subsides on West and Central Africa. Benin and Chad also note the similarities in language between the SCM Agreement ("adverse effects") and DSU Article 3.8 ("adverse impact"). This reinforces the relevance and applicability of the latter provision.

Fourth, DSU Article 10.1, which deals with Third Parties, provides additional support for the position that the Panel should take into account the adverse effects on parties other than just the complaining party:

> The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process.

DSU Article 10.1 is not limited simply to allowing Third Parties to present their views. That is dealt with elsewhere, including in DSU Article 10.2, which grants to Third Parties the right "to be heard by the Panel". By contrast, DSU Article 10.1 is not limited to providing Third Parties with the right to present views. Instead, it mandates that the "interests" of the third parties shall be "fully taken into account".

Fifth, DSU Article 24.1 provides that "[a]t all stages… of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members". Benin and Chad are both least-The "particular consideration" t
views are heard –

ANNEX J-15

CANADA'S RESPONSES TO PANEL QUESTIONS TO THIRD PARTIES FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES (RESUMED FIRST SESSION)

27 October 2003

Reply

No. Canada shares the view of the United States in *United States – Continued Dumping and Subsidy Offset Act of 2000*, that, as a general matter, "all agriculture" is too broad to qualify as a "group of enterprises or industries" for specificity purposes.[3]

(b) is a subsidy in respect of all agricultural crops (i.e. but not to other agricultural commodities, such as livestock) specific?

Reply

The answer will depend on the facts of a given case. A panel would have to consider, among other things, the number of enterprises or industries (based on standard industrial classification) within the jurisdiction of the granting authority that are actually eligible to receive the subsidy, and the level of diversification of the "all agricultural crops" universe. Furthermore, the answer would also depend on the nature of the measure in question and whether it excludes enterprises or industries that might otherwise be reasonably or practically included. For example, weather that may cause extensive damage to crops (e.g. hail, frost, excessive moisture, drought) may not cause any damage to livestock. Therefore, it may not be reasonable or practical to include livestock under a crop insurance programme. On the other hand, an income stabilization programme could reasonably or practically include 75 ises or industries bl and.75 0 TD -0.0962 9hongs, the number.w.1104 Tc 1.De moisture,4consider,0.082

appropriate period of time and in relation to the value of production in question as compared to the total value of all agricultural production.

(f) is a subsidy in respect of a certain proportion of total US farmland specific?

Reply

The answer will depend on the facts of a given case, including the proportion of total US farmland involved, whether that proportion involves "an enterprise or industry or group of enterprises or industries", and whether the programme "is specific to" (i.e., available only to) those enterprises or industries.

ANNEX J-16

RESPONSE BY CHINA TO THE PANEL'S QUESTIONS TO THIRD PARTIES

27 October 2003

1. China appreciates this opportunity to present its views again to the Panel in relation to the Panel's questions posed to third parties on October 13, 2003. Given the short period within which third parties are required to submit their views, China responds to and comments on the following underlined questions.

2. Question 49. What is the meaning and effect of the introductory phrase of Article 3 of the *SCM Agreement* ("Except as provided in the *Agreement on Agriculture*…")? All third parties

3. To answer this Panel's question, it is helpful to first look to the relationship between the *Agreement on Agriculture* and the *SCM Agreement.* Art. 21.1 of the *Agreement on Agriculture* provides:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement [on Agriculture].

4. The Appellate Body, in *EC – Bananas III,* further clarified this article by stating that

> the provisions of GATT 1994, [and indeed 'other Multilateral Trade Agreements including the *SCM Agreement*, note added pursuant to Art. 21 of the *Agreement on Agriculture*], …, apply …, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter".[1]

In other words, Art. 21.1 of the *Agreement on Agriculture*, as interpreted by the Appellate Body, requires that in connection with a specific matter, the A

6. Therefore, in line with Art. 21.1 of the *Agreement on Agriculture* past Appellate Body interpretation above and Art. 3.1 of the *SCM Agreement*, the *Agreement on Agriculture*, where it is more specific, shall *prevail* over provisions of the *SCM Agreement.*

7. Question 50. According to its revised timetable, the Panel will issue its report to the parties after the end of 2003 calendar year. Does this have any impact on "exempt[ion] from actions" under Article 13(b)(ii) and 13(c)(ii) of the *Agreement on Agriculture*? All third parties

8. China believes Article 13 continues to be applicable to the current case even after it ceases to be in effect.

9. Art. 13 of the *Agreement on Agriculture* protects subsidy measures otherwise prohibited or actionable under the *SCM Agreement* during the nine-year implementation period commencing in 1995. Unless agreed otherwise amongst Members, Article 13 will expire in 2004.

10. Art. 70 of the *Vienna Convention on the Law of Treaties*, in dealing with the consequences of the termination of a treaty, provides to the effect that the termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination. Applied to Art. 13 of the *Agreement on Agriculture*, if a Member's subsidy measures were granted and implemented prior to expiry of the Peace Clause, such Member's possible right to be protected thereunder is not removed by the expiry; neither are obligations on other Members to exercise due restraint. Such rights, obligations and legal situations created through implementation of the Peace Clause for the purpose of these proceedings are allowed by the *Vienna Convention on the Law of Treaties* to be live issues as between parties to a dispute. Even if the Panel were to make its report after the expiry, the rights and obligations and their past interaction are heavily controversial issues the interpretation and resolution of which by this Panel will have bearings on the merits of the case not only between the parties to this dispute, but also to the general WTO membership. Therefore, this Panel, even if it chooses to issue its report after the expiry date of the Peace Clause, is obligated to rule on such rights and obligations during implementation of the Peace Clause.

11. In addition, considering the likelihood of the Peace Clause being extended as reportedly suggested by some Members, however remote, an interpretation of the "exempt from action" requirement and its practical application is of extraordinary value to Members having interests in such

(e) is a subsidy in respect of a certain proportion of the value of total US commodities (or total US agricultural commodities) specific?

(f) is a subsidy in respect of a certain proportion of total US farmland specific?

13. "Commodity" includes agricultural crops such as upland cotton.[2] While the *Agreement on Agriculture* identifies agricultural products by reference to their respective HS codes[3], in certain

16. Question 52, The Panel notes that different remedies are available in respect of prohibited and actionable subsidies under Article 4.7 and 7.8 of the *SCM Agreement.* If the Panel were to conclude that a subsidy was prohibited and were to make a recommendation under Article 4.7 of the *SCM Agreement* to withdraw the subsidy without delay, can the Panel:

(a) also conclude that the same subsidy had resulted in adverse effects to the interests of another Member? If so, what would be the value of such a conclusion in terms of the settlement of the matter before the Panel? All third parties

(b) take into account the effects of the interaction of those prohibited subsidies with other, allegedly, actionable subsidies? If so, how is this relevant to the issue of causation under Article 5 of the *SCM Agreement*? All third parties

17. China believes that if this Panel were to find that a subsidy was prohibited and were to recommend under Article 4.7 of the *SCM Agreement* an immediate withdraw the subsidy, there would be no need for this Panel to dwell on the issue of whether adverse effects have been generated by the same subsidy.

18. The *SCM Agreement* has a primary distinction between prohibited subsidies under Article 3 where effects are presumed and actionable subsidies under Article 5 where the complaining party must demonstrate adverse effects. Amongst differences between prohibited and actionable subsidies, such as degree of proof, dispute settlement procedures, are different remedies under Arts. 4.7 and 7.8.

19. While no panel has dealt squarely with the issued raised by this Panel, the panel on *Australia – Automotive Leather II (Article 21.5 – US)* did touch upon the relationship between Arts. 4.7 and 7.8 briefly.[9]

> As regards the context of Article 4.7, we note that the term "withdraw the subsidy" appears elsewhere in the SCM Agreement. We consider these references to "withdrawal" of subsidies to be relevant for our understanding of the term. In the case of "actionable" subsidies, Members whose trade interests are adversely affected may, under Part III of the SCM Agreement, pursue multilateral dispute settlement in order to establish whether the subsidy in question has resulted in adverse effects to the interests of the complaining Member. If such a finding is made, the subsidizing Member "shall take appropriate steps to remove the adverse effects **or shall withdraw the subsidy**".[10] Alternatively, a Member whose domestic industry is injured by subsidized imports may impose a countervailing measure under Part V of the SCM Agreement, "**unless the subsidy or subsidies are withdrawn**".[11] In both cases, withdrawal of the subsidy is an alternative, available to the subsidizing Member, to some other action. Repayment of the subsidy would certainly effectuate withdrawal of the subsidy by a subsidizing Member so as to allow it to avoid action by the complaining Member.[12]

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[9] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 1 February 2000.

[10] Original note, "*SCM Agreement Article 7.8* (emphasis added)".

[11] Original note, "*SCM Agreement Article 19.1* (emphasis added)".

[12] Panel Report, *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather – Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW and Corr.1, adopted 1 February 2000, Para. 6.28.

20. The panel in that case went *on* to elaborate in light of Art. 4.7's object and purpose:

> Turning to the object and purpose of Article 4.7 of the SCM Agreement, we observe that the SCM Agreement as a whole establishes disciplines on subsidies. The SCM Agreement categorizes subsidies as non-actionable, actionable, or prohibited.[13] In the case of non-actionable and actionable subsidies, Members are only allowed to take certain prescribed steps in the event that their trade interests are harmed by another Member's subsidies. Part II of the SCM Agreement, however, establishes an absolute

30.

37. Essentially, Art. 6.5 requires a comparison between prices of the subsidized product and prices of a *non-subsidized like product supplied to the same market* for the purpose of determining whether significant price undercutting exists under Art. 6.3(c). To ensure fairness and statistical

subsidy which operates to increase the export of any product", no where can any express effort to discipline domestic support be found.

44. The addition of Art. 11, entitled "Subsidies other than export subsidies" by the *1979 Agreement on Interpretation and Application of Article VI, XVI and XXIII of the General Agreement* (the "*Subsidies Code*")[21] is further proof that Art. XVI did not contemplate any discipline on domes

49. Coming back to the text of GATT Art. XVI:3, as well as the general progression of multilateral trade regime on agricultural domestic support measures, specificity on domestic support discipline as provided under the *Agreement on Agriculture* clearly stands out and pales any possible equation of GATT Article XVI:3 to a discipline on agricultural domestic support.

(b) Are the requirements of Article XVI:3 of the GATT 1994 reflected in, developed by or subsumed by the requirements in Article 6.3(d) of the *SCM Agreement*, or in any other provisions of the covered agreements? Of what relevance, if any, is the Appellate Body Report in *US-FSC*, para. 117[25] here?

(c) Of what relevance, if any, is the fact that the definition of "subsidy" in Article 1 of the *SCM Agreement* and the prohibition on subsidies contingent upon export in Article 3.1(a) were introduced in the Uruguay Round, but did not exist at the time that the GATT 1947 was negotiated?

50. Art. 6(3)(d), on the other hand, is a natural prolongation of the inequitable world export trade challenge made available by GATT Art. XVI:3 and further developed by the *Subsidies Code*. China believes that requirements of Art. XVI:3 of the GATT 1994 are reflected in

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> Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction.[27]

55. The Appellate Body noted further 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*."[28] 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.[29]

56. The Appellate Body then proceeded to find that:

> [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.[30]

57. China takes the above Appellate body statement to mean that Art. 32.1 of the *SCM Agreement*, being the linkage between Art. XVI:3 of GATT 1994 and Art. 6.3(d) of *SCM Agreement*

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[27] Original Appellate Body quote, Panel Report on

ANNEX J-17

REPLIES OF THE EUROPEAN COMMUNITIES TO THE QUESTIONS FROM THE PANEL

27 October 2003

QUESTIONS TO THE EC

Question 45

In relation to the term "same market" in Article 6.3 (c)of the SCM Agreement states in paragraph 10 of its oral statement that a "world market" cannot exist if there are significant trade barriers between Members. On the other hand, the Panel notes that in relation to cotton, the EC takes the position in paragraph 14 of its further submission that the term "same market" in Article 6.3(c) should be read to include the domestic market of the subsidising Member. In light of the fact that many domestic cotton markets, possibly including that of China, have significant trade barriers, how can the EC reconcile these two positions?

Reply

1. The question does not state correctly the views expressed by the EC. Contrary to what is said in the question, the EC did not state at paragraph 14 of its further submission that "the term '**same market**' in Article 6.3 **(c)** should be read to include the domestic market of the subsidising Member". Rather, the EC said in paragraphs 14-16 of its further submission that the term "**world market share"** in Article 6.3 **(d)** includes also the share of the domestic market of the subsidising Member. This reading of Article 6.3(d) is compatible with the view that the term "same market" in Article 6.3(c) may include the world market, where there is such a world market. On the other hand, there is no reason why Article 6.3(d) should apply only in those cases where it can be established that there is a world market. Rather the term "world market share" should be understood to mean, in that context, the aggregate of the shares in each of the relevant geographical markets.

2. Contrary also to what is stated in the question, the EC has taken no position on the issue of whether, "in relation to cotton", there is a world market for the purposes of Article 6.3 (c). It might well be that, as suggested in the question, there is no world market for cotton, with the consequence that the price effects mentioned in Article 6.3(c) would have to be observed separately within each distinct national or regional market and/or in the residual "rest-of-the world" market. This is a factual matter on which the EC does not wish to express any views.

Question 46

Should the Panel prefer a concept of allocation of the benefit of subsidies to later years, to a concept of fully expensing subsidies to the year in which the benefit was provided?

Reply

3. Whether a subsidy should be "allocated" or "expensed" depends on the nature of the subsidy concerned, having regard to relevant criteria, such as those outlined at paragraph 11 of the EC's further submission.

10. In any event, the Panel would be precluded by its terms of reference from taking into account the consequences of the expiry of those provisions. The "matter" before the Panel was defined at the time where the DSB agreed to the establishment of the panel and cannot be modified in the course of the proceedings.[1] In accordance with its terms of reference, the Panel must consider the measures in dispute as they existed when the matter was referred to the DSB, on the basis of the facts existing at that moment and in the light of the WTO provisions that were relevant at that time.

11. Brazil's claim is that the measures at issue were WTO inconsistent at the time when the matter was referred to the DSB. The Panel would go beyond its terms of reference if it were to decide that the measures are WTO inconsistent at a subsequent moment, as a result of the expiry of the peace clause. If, on the other hand, the Panel were to apply WTO provisions that will become relevant only after the expiry of the peace clause to measures and facts as they existed at the time when the matter was referred to the DSB, it would be making an impermissible retroactive application of such provisions.

Question 51

How should the concept of specificity – and, in particular, the concept of specificity to "an enterprise or industry or group of enterprises or industries" -- in Article 2 of the SCM

(a) also conclude that the same subsidy had resulted in adverse effects to the interests of another Member? If so, what would be the value of such a conclusion in terms of the settlement of the matter before the Panel?

Reply

12. Yes. There is nothing in the *SCM Agreement* which prevents a complaining party from

(c) Of what relevance, if any, is the fact that the definition of "subsidy" in Article 1 of the SCM Agreement and the prohibition on subsidies contingent upon export in Article 3.1(a) were introduced in the Uruguay Round, but did not exist at the time that the GATT 1947 was negotiated?

Reply

19. Article XVI:3 of the GATT has been elaborated in Article 6.3(d) of the *SCM Agreement*, with the consequence that it cannot be applied independently from Part III of the SCM Agreement, just like Article VI of the GATT cannot be applied independently from Part V of the *SCM Agreement*.[3] Indeed, if Article XVI:3 could be applied on its own, the additional requirements provided for in Article 6.3(d) and related provisions, such as Article 6.7, would be rendered largely redundant.

20. By its own terms, Article XVI:3 is concerned exclusively with "export subsidies". However, as noted by the Appellate Body in the passage of the *FSC* report mentioned in the question, the scope of the notion of export subsidy in Article XVI differs from the scope of the same term in the *SCM Agreement* and in the *Agreement on Agriculture*. It is conceivable, therefore, that one and the same measure may be at the same time an "export subsidy" in the sense of Article XVI:3 and "domestic support" within the meaning of the *Agreement on Agriculture*. This is not saying that the *Agreement on Agriculture* and Article XVI:3 can apply simultaneously to the same measure. Where a measure is subject to the rules on domestic support of the *Agreement on Agriculture*, those rules excludes the application of Article XVI:3 to the same measure, in accordance with Article 21.1 of the *Agreement on Agriculture* (irrespective of whether Article XVI:3 can be applied independently from Tw (Indeed, if T9 wh

ANNEX J-18

ANSWER TO PANEL QUESTION TO INDIA

27 October 2003

Question 48

In the further submission of India, it is stated that "there is "no obligation under the

ANNEX J-19

RESUMED FIRST SESSION OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

NEW ZEALAND ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

14 October 2003

Q49. What is the meaning and effect of the introductory phrase of Article 3 of the SCM Agreement ("Except as provided in the Agreement on Agriculture …")? All third parties

This phrase refers to provisions in the *Agreement on Agriculture* that provide specific exception from Article 3 of the *SCM Agreement.* New Zealand does not agree that any such exception exists in the *Agreement on Agriculture* that would authorise use of local content subsidies contrary to Article 3.1(b) of the *SCM Agreement,* as argued by the United States.[1] There is no basis upon which to claim that the *Agreement on Agriculture* gives Members a right to use whatever domestic support they wish with complete impunity from action under other WTO Agreements.

Q50. According to its revised timetable, the Panel will issue its report to the parties after the end of the 2003 calendar year. Does this have any impact on "exemp[tion] from actions" under Article 13(b)(ii) and 13(c)(ii) of the Agreement on Agriculture? All third parties

No. Brazil has not claimed that the implementation period in Article 13 has expired. It has claimed that the provision of Articles 13(b) and (c) have not been respected.

Q51. How should the concept of specificity – and, in particular, the concept of specificity to "an enterprise or industry or group of enterprises or industries" – in Article 2 of the SCM Agreement apply to subsidies in respect of agricultural commodities ? Please answer the following questions, citing the principles in Article 2 of the SCM Agreement. All third parties

New Zealand agrees with Brazil that the ordinary meaning, context and object and purpose of Article 2.1(a) of the *SCM Agreement* confirm that subsidies that are available to discrete segments of an economy or to only particular industries are specific. New Zealand considers that Brazil has demonstrated that each of the subsidies provided by the United States to upland cotton are specific within the meaning of Article 2.

Whether or not a subsidy is specific within the terms of Article 2, with the exception of prohibited subsidies which are deemed specific by Article 2.3, requires examination of the particular features of the subsidy at issue, including factual information about the actual usage of the subsidy and not simply its availability. Thus in relation to the general scenarios outlined below only general responses are possible.

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[1] *United States – Subsidies on Upland Cotton*, Further Submission of the United States, 30 September 2003, para 167.

The value of such conclusion in terms of the settlement of the matter before the Panel is to clarify the adverse effects that must be removed by the subsidising Member, albeit that a subsidising Member does not have the option of removing the adverse effects attributable to prohibited subsidies other than by withdrawing the subsidy without delay.

(b) take into account the effects of the interaction of those prohibited subsidies with other, allegedly, actionable subsidies? If so, how is this relevant to the issue of causation under Article 5 of the SCM Agreement? All third parties

A Panel may take into account the effects of the interaction of those prohibited subsidies with other actionable subsidies. For example, actionable subsidies could operate to neutralise the effect of removal of the prohibited subsidy, as would likely be the case in respect of removal of the Step 2 export payments. Removal of this prohibited export subsidy would be likely to lead to a decline in United States exports and thus lower the United States domestic price for upland cotton. However lower prices for upland cotton producers would trigger increased marketing loan deficiency payments that could in turn boost exports and thus maintain the adverse effect of the United States subsidies.

It is therefore important to consider the interaction of the various types of subsidies at issue and look at their collective effect. However no attribution of the effects to either prohibited or actionable subsidies is needed, because there is no conflict between the remedies for prohibited subsidies and actionable subsidies. To the extent that the subsidies causing serious prejudice to the interests of other Members include prohibited subsidies, the subsidising Member must withdraw them without delay, as they do not have the option available in respect of actionable subsidies of maintaining the subsidy so long as the adverse effect is removed.

Q53. Would a finding of serious prejudice under Article 5(c) of the SCM Agreement be determinative for a finding under Article XVI:1 of the GATT 1994? Why or why not? What, if any, is the role of footnote 13 of the SCM Agreement in this context? All third parties

A finding of serious prejudice under Article 5(c) of the *SCM Agreement* any, i153ce under 2ot

1999-2002[4] and world prices would have been an average of 12.6 per cent higher. This evidence thus supports Brazil's claim that the United States subsidies have caused serious prejudice to Brazil's interests and threaten to cause serious prejudice to Brazil's interests in the future.

Q55. In light of the fact that certain third parties have provided submissions about the price effect of claimed US subsidies, which Member or Members is, or are, the "other party" under Article 6.3(c) ("another Member") for the purposes of these proceedings? All third parties

Brazil is the "other party" in the context of Article 5(c). But that does not mean that other Members too cannot be suffering the serious prejudice through the use of the subsidies at issue by the United States. Indeed the Oral Statement of Benin to the Panel[5] makes it clear that this is the case.

Q56. Please respond to the following questions concerning the relationship between Article XVI:3 of the GATT 1994, the disciplines on export subsidies and domestic support in the Agreement on Agriculture and the disciplines on prohibited export subsidies and actionable subsidies in Articles 3, 5 and 6.3 (d) of the SCM Agreement. All third parties.

(a) Are agricultural domestic support programmes challengeable under Article XVI:3 of the GATT 1994? How, if at all, is the title of Section B of Article XVI ("Additional provisions on <u>export subsidies</u>" (emphasis added) relevant? How, if at all, are Articles 13 and 21.1, or any other provisions, of the Agreement on Agriculture relevant?

Agricultural domestic support programmes are challengeable under GATT 1994 Article XVI:3 to the extent that they meet the requirements of that Article, including, for example, that they must provide a subsidy that "operates to increase the export of any primary product from its territory".

The title of Section B is relevant in that it reflects the narrower scope of Section B vis-à-vis Section A. Section B addresses "Additional Provisions on Export Subsidies", whereas Section A is broader and addresses "Subsidies in General" – it includes subsidies that operate to reduce imports of any product into the territory of the subsidising Member. The term "export subsidies" in the particular context of GATT Article XVI is not defined, but can be given meaning by the scope of paragraph 3 which applies to "any form of subsidy which operates to increase the export of any primary product" and is thus a broader definition than "contingent … upon export" found in the *SCM Agreement.*

Article 21.1 of the *Agreement on Agriculture*, which provides that GATT 1994 must be applied subject to the *Agreement*, is relevant in so far as it clarifies that in the event of legal conflict the provisions of the *Agreement on Agriculture* apply. During the implementation period Article 13 of the *Agreement on Agriculture* provides exemption from actions based on specific GATT 1994 provisions, subject to certain criteria being met. Article 13 exempts domestic support measures from action based on Article XVI:1 only if such measures do not grant support in excess of that decided during the 1992 marketing year.

Brazil has brought forward evidence to demonstrate that the subsidies at issue operate to increase United States exports of upland cotton and that they have been applied by the US in a manner that has resulted in the United States having a "more than equitable share of the world export trade" within the meaning of Article XVI:3 and therefore cause serious prejudice within the meaning of Article XVI:1.

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[4] *Ibid*.
[5] Oral Statement of Benin, 8 October 2003.

ANNEX J-20

RESPONSES TO QUESTIONS FROM THE PANEL FOR THIRD PARTIES

THE SEPARATE CUSTOMS TERRITORY OF TAIWAN, PENGHU, KINMEN AND MATSU

27 October 2003

Q49. About the meaning and effect of the introductory phrase of Article 3 of the SCM Agreement.

A: The introductory phrase of Article 3 of the SCM Agreement "Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited" has the meaning that if there is different provision in the Agreement on Agriculture (AoA) with regard to the subsidies listed in Article 3 of the SCM Agreement, the AoA provision shall prevail. In other words, even if a subsidy is specific within the meaning of Article 1 of the SCM Agreement, and even if it is a subsidy contigent upon export performance or a subsidy contigent upon the use of domestic over imported goods, it is still not within the scope of prohibition under Article 3 of the SCM Agreement. The effect of such agricultural subsidy shall be decided by the AoA.

The critical point here is whether it is "provided in the Agreement on Agriculture". In this regard, Article 8 of the AoA is relevant. Article 8 provides that: "Each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule." The AoA, at this current stage, only requires reduction of such subsidy, not the elimination of such subsidy. In other words, suppose the subsidy is in conformity with the AoA and with the commitments as specified in the Members' Schedule, it should be allowed by the AoA and thus would not be prohibited under the SCM Agreement according to the introductory phrase of Article 3 of the SCM Agreement.

Q50. About the impact of the revised timetable to issue the Panel report after the end of the 2003 calendar year on the "exempt[ion] from actions" under Articles 13(b)(ii) and 13(c)(ii) of the AoA.

A: We have no comments on this question.

Q51. About the concept of specificity in Article 2 of the SCM Agreement applying to subsidies in respect of agricultural commodities.

A: Article 2.3h-sidies
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with the effect of excluding other sectors from receiving the advantages, it should be considered as specific.

Our view is that the concept if specificity applies to the agriculture sector as follows:

(a) All agricultural products: not specific. The competitive advantage is provided to all agricultural products. No agricultural products are excluded.

(b) All agricultural crops: specific. Although the coverage is broad, some agricultural products are excluded.

(c) Certain identified agricultural products: specific. Apparently it excludes a large portion of products.

(d) Upland cotton: specific. It excludes all other products and only gives advantage to one product.

(e) Certain proportion of the value of total US commodities or total US agricultural commodities: not specific. No commodities or agricultural commodities are excluded.

(f) Certain proportion of total US farmland: not specific, as long as farmland is not restricted to that producing certain commodities.

Q52. About different remedies available in respect of prohibited and actionable subsidies.

A(a) The SCM Agreement explicitly divides subsidies into three categories, and Part II and Part III are designed to deal with different categories of subsidies. If a subsidy falls within "Part II Prohibited Subsidies", it would not be falling within "Part III Actionable Subsidies". Thus, it is unthinkable that if the Panel were to conclude, for example, that a subsidy was prohibited and were to make a recommendation under Article 4.7 of the SCM Agreement, it would also have to decide whether the same subsidy had resulted in adverse effects to the interest of another Member.

(b) For the same reason, the Panel should not take into account the interactive effects of those prohibited subsidies with other subsidies.

Q53. About the determinativeness of a finding under the SCM Agreement for a finding under GATT 1994

A: Footnote 13 of the SCM Agreement explains that "The term 'serious prejudice to the interests of another Member' is used in this Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice." Although there is no same provision in Article XVI of the GATT 1994, the real intent of the WTO Members should be to harmonize the meaning and concept of the same phrase where it appears in different agreements. It would also be reasonable to interpret the same phrase in the same manner, unless there is strong reason for not doing so. Our view, therefore, would be that if there is a finding of serious prejudice under Article 5(c) of the SCM Agreement, it should be

Q55. About "another Member" of Article 6.3(c).84 TcD /F1 11.25 Tf -13.5 TD /F1e0 TD 0 Tc r0r3.53-