1 ARTICLE 10

1.1 Text of Article 10

Article 10

Prevention of Circumvention of Export Subsidy Commitments

1. Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

2. Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.

3. Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

4. Members donors of international food aid shall ensure:

(a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;

(b) that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations", including, where appropriate, the system of Usual Marketing Requirements (UMRs); and

> (c) that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.

1.2 Article 10.1

1.2.1 "Export subsidies not listed in paragraph 1 of Article 9"

1. The Appellate Body in *US – FSC* and the Panel in *US – Upland Cotton* both applied the interpretation of export contingency under the SCM Agreement to the interpretation of export contingency under the Agreement on Agriculture; see the Section on Article 1(e) of the Agreement on Agriculture.

1.2.2 "export subsidy commitments"

2. In *US – FSC*, the Appellate Body interpreted the term "export subsidy commitments" to have "a wider reach [than reduction commitments] that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products":

> "The word 'commitments' generally connotes 'engagements' or 'obligations'. Thus, the term 'export subsidy *commitments*' refers to commitments or obligations relating to export subsidies assumed by Members under provisions of the *Agreement on Agriculture*, in particular, under Articles 3, 8 and 9 of that Agreement.
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> …
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> We also find support for this interpretation of the term 'export subsidy commitments' in Article 10 itself, which draws a distinction, in sub-paragraphs 1 and 3, between 'export subsidy commitments' and '*reduction commitment levels*'. In our view, the terms 'export subsidy commitments' and 'reduction commitments' have different meanings. '*Reduction* commitments' is a narrower term than 'export subsidy commitments' and refers only to commitments made, under the first clause of Article 3.3, with respect to *scheduled* agricultural products. It is only with respect to *scheduled* products that Members have undertaken, under Article 9.2(b)(iv) of the *Agreement on Agriculture*, to *reduce* the level of export subsidies, as listed in Article 9.1, during the implementation period of the *Agreement on Agriculture*. The term 'export subsidy commitments' has a wider reach that covers commitments and obligations relating to *both* scheduled and unscheduled agricultural products."[1]

1.2.3 "applied in a manner which results in, or which threatens to lead to circumvention"

3. In *US – FSC*, the Appellate Body examined the measures at issue in relation to Article 10.1:

> "We turn next to whether the subsidies under the FSC measure are 'applied in a manner which *results in*, or which *threatens to lead to*, *circumvention* of export subsidy commitments'. (emphasis added) The verb 'circumvent' means, *inter alia*, 'find a way round, evade…'. Article 10.1 is designed to prevent Members from circumventing or 'evading' their 'export subsidy commitments'. This may arise in many different ways. We note, moreover, that, under Article 10.1, it is not necessary to demonstrate *actual* 'circumvention' of 'export subsidy commitments'. It suffices that 'export subsidies' are 'applied in a manner which … *threatens to lead to circumvention* of export subsidy commitments'."[2]

4. In *US – Upland Cotton*, the Appellate Body rejected an argument that the concept of "threat" in Article 10.1 of the Agreement of Agriculture obliges Members to take affirmative, precautionary steps to prevent circumvention:

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[1] Appellate Body Report, *US – FSC*, paras. 144 and 147.
[2] Appellate Body Report, *US – FSC*, para. 148.

> "Nor are we prepared to accept Brazil's suggestion that the concept of 'threat' in Article 10.1 should be read in a manner that requires WTO Members to take 'anticipatory or precautionary action'. The obligation not to apply export subsidies in a manner that 'threatens to lead to' circumvention of their export subsidy commitments does not extend that far. There is no basis in Article 10.1 for requiring WTO Members to take affirmative, precautionary steps to ensure that circumvention of their export subsidy reduction commitments does not occur."[3]

5. In *US – FSC*, the Appellate Body pointed out the relevance of the structure and characteristics of the tax measure at issue, in relation to Article 10.1:

> "In determining whether the FSC measure in this case is 'applied in a manner which … threatens to lead to circumvention of export subsidy commitments', it is important to consider the structure and other characteristics of that measure. The FSC measure creates, in itself, a *legal entitlement* for recipients to receive export subsidies, not listed in Article 9.1, with respect to agricultural products, both scheduled and unscheduled. As we understand it, that legal entitlement arises in the recipient when it complies with the statutory requirements and, at that point, the government of the United States must grant the FSC tax exemptions. There is, therefore, no discretionary element in the provision by the government of the FSC export subsidies. If the statutory eligibility requirements are met, then an FSC is entitled by law to the statutorily established tax exemption. Furthermore, there is no limitation on the amount of exempt foreign trade income that may be earned by an FSC. Therefore, the legal entitlement that the FSC measure establishes is unqualified as to the *amount* of export subsidies that may be claimed by FSCs. There is, in other words, no mechanism in the measure for stemming, or otherwise controlling, the flow of FSC subsidies that may be claimed with respect to any agricultural products. In this respect, the FSC measure is unlimited."[4]

6. In *US – Upland Cotton*, the Appellate Body explained that its findings in *US – FSC* were not intended to imply that a "threat" of circumvention requires an unconditional legal entitlement to receive an export subsidy:

> "A proper reading of the Appellate Body's statement in *US – FSC*, however, reveals that it did not intend to provide an exhaustive interpretation of threat of circumvention under Article 10.1 of the *Agreement on Agriculture*. In noting that the measure at issue in that dispute created a 'legal entitlement' and had no 'discretionary element', the Appellate Body was merely describing characteristics of the measure at issue in that case that it found relevant for its analysis of 'threat'. In other words, the Appellate Body did not foreclose, in *US – FSC*, the possibility that a measure that does not create a 'legal entitlement' or that has a 'discretionary element' could be found to 'threaten[] to lead to circumvention' under Article 10.1 of the *Agreement on Agriculture*."[5]

1.2.3.1 Difference in nature of "circumvention" in respect of scheduled and unscheduled products

7. In *US – FSC*, the Appellate Body pointed out that the nature of "circumvention" of export subsidy commitments may differ depending on whether the measure at issue applies to scheduled or unscheduled products:

> "Given that the nature of the 'export subsidy commitment' differs as between scheduled and unscheduled products, we believe that what constitutes 'circumvention' of those commitments, under Article 10.1, may also differ.
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> As regards *scheduled* products, when the specific reduction commitment levels have been reached, the *limited authorization* to provide export subsidies as listed in Article 9.1 is transformed, effectively, into a *prohibition* against the provision of those

[3] Appellate Body Report, *US – Upland Cotton*, para. 707.
[4] Appellate Body Report, *US – FSC*, para. 149.
[5] Appellate Body Report, *US – Upland Cotton*, para. 709.

> subsidies. However, as we have seen, the FSC measure allows for the provision of an unlimited amount of FSC subsidies, and scheduled agricultural products may, therefore, benefit from those subsidies when the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached. In our view, Members would have found 'a way round', a way to 'evade', their commitments under Articles 3.3 and 9.1, if they could transfer, through tax exemptions, the very same economic resources that they were, *at that time*, prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1."[6]

8. The Panel in *US – FSC (Article 21.5 – EC)* found that the legislation at issue contained subsidies contingent on export performance both with regard to scheduled and unscheduled agricultural products, which threatened to circumvent to the respondent's export subsidy commitments under Article 3.3 of the Agreement on Agriculture:

> "We note that the Act creates a legal entitlement for recipients to receive export subsidies, not listed in Article 9.1, with respect to both scheduled and unscheduled agricultural products. Upon fulfilment by the taxpayer of the conditions stipulated in the Act, the United States government must provide the tax exclusion. As there is no limitation on the amount of extraterritorial income, and thus on the amount of qualifying foreign trade income, that may be claimed in respect of eligible transactions, the amount of export subsidies is unqualified.
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> Thus, with respect to *unscheduled* agricultural products, we believe that the Act involves the application of export subsidies, *not* listed in Article 9.1, in a manner that, at the very least, 'threatens to lead to circumvention' of that 'export subsidy commitment' in Article 3.3.
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> With respect to *scheduled* agricultural products, we observe that the measure allows for the provision of an unlimited amount of subsidies, and scheduled agricultural products may, therefore, benefit from those subsidies even after the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached. Thus, we find that the Act is applied in a manner that, at the very least, threatens to lead to circumvention of the export subsidy commitments made by the United States, under the first clause of Article 3.3, with respect to scheduled agricultural products."[7]

9. On this basis, the in *US – FSC (Article 21.5 – EC)* found a violation of Article 10.1, and consequently Article 8, of the Agreement on Agriculture:

> "We note that, in these proceedings, the United States does not contest that, if the measure gives rise to subsidies contingent upon export performance under the *Agreement on Agriculture*, then these subsidies would violate its obligations under Articles 10.1 and 8 of the *Agreement on Agriculture*.
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> We therefore conclude that the United States has acted inconsistently with its obligations under Article 10.1 … Furthermore, by acting inconsistently with Article 10.1, the United States has acted inconsistently with its obligation under Article 8 of the *Agreement on Agriculture* 'not to provide export subsidies otherwise than in conformity with this Agreement …'."[8]

[6] Appellate Body Report, *US – FSC*, paras. 151-152; confirmed by the Panel Report, *US – FSC (Article 21.5 – EC)*, paras. 8.117-8.122.
[7] Panel Report, *US – FSC (Article 21.5 – EC)*, paras. 8.118-8.120.
[8] Panel Report, *US – FSC (Article 21.5 – EC)*, paras. 8.121-8.122.

1.3 Article 10.2

1.3.1 Application of Article 10.1 to export credits, export credit guarantees or insurance programmes

10. In *US – Upland Cotton* the Appellate Body upheld the Panel's finding that Article 10.2 of the Agreement on Agriculture does not exempt or "carve out" export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement:

> "As the Panel observes, were such an exemption intended, it could have been easily achieved by, for example, inserting the words '[n]otwithstanding the provisions of Article 10.1', or other similar language at the beginning of Article 10.2. Article 10.2 does not include express language suggesting that it is intended as an exception, nor does it expressly state that the application of any export subsidy disciplines to export credits or export credit guarantees is 'deferred', as the United States suggests. Given that the drafters were aware that subsidized export credit guarantees, export credits and insurance programs could fall within the export subsidy disciplines in the *Agreement on Agriculture* and the *SCM Agreement*, it would be expected that an exception would have been clearly provided had this been the drafters' intention.
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> Moreover, as the Panel explained, Article 10.2 'contrasts starkly with the text of other provisions in the covered agreements, which clearly carve out or exempt certain products or measures from certain obligations that would otherwise apply pending the development of further multilateral disciplines'. The Panel referred to Article 6.1(a) and the footnote 24 to Article 8.2(a) of the *SCM Agreement* and Article XIII of the *General Agreement on Trade in Services*, which expressly indicate that existing disciplines do not apply pending the negotiation of future disciplines. However, Article 10.2 does not expressly exclude the application of the existing disciplines in the *Agreement on Agriculture* until such time as the specific disciplines on export credits, export credit guarantees and insurance programs are internationally agreed upon."[9]

11. In coming to this conclusion, the Appellate Body in *US – Upland Cotton* interpreted Article 10.2 as indicating that the disciplines to be agreed on by WTO members were those export subsidy disciplines that were already applicable:

> "The Panel rejected the United States' submission that Brazil's approach would render Article 10.2 irrelevant. In the Panel's view, 'the purpose of any eventual disciplines could be further to facilitate the determination of when export credit guarantee programmes in respect of agricultural products constitute export subsidies *per se* by developing and refining existing disciplines'. Put another way, 'the work envisaged in Article 10.2 would presumably elaborate further and more specific disciplines that could facilitate identification of the extent to which such export credit guarantee programmes constitute export subsidies, or to what extent export credit guarantee programmes are not permitted'. The use of the term 'development' in Article 10.2 is consistent with this view. The definitions of the term 'development' include: '[t]he action or process of developing; evolution, growth, maturation; … a gradual unfolding, a fuller working-out' and '[a] developed form or product … an addition, an elaboration'. This suggests that the disciplines to be internationally agreed will be an elaboration of the export subsidy disciplines that are currently applicable.
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> This interpretation is consistent with the reference in Article 10.2 to internationally agreed disciplines 'to govern the provision of' export credits, export credit guarantees or insurance programs; alternatively, Article 10.2 could have referred to internationally agreed disciplines 'to govern' export credits, export credit guarantees or insurance programs. The latter formulation ('to govern') would have been broader in scope, whereas the formulation used in Article 10.2 ('to govern the provision') is narrower. If the drafters had intended that currently no disciplines at all would apply to export credit guarantees, export credits and insurance programs, it would have made more sense for them to have chosen the broader formulation 'to govern'. The drafter's choice of the narrower formulation 'to govern the provision of'

[9] Appellate Body Report, *US – Upland Cotton*, paras. 609-610.

> suggests that export credit guarantees, export credits and insurance programs are not 'undisciplined' in all respects, and that the disciplines to be developed have to do *only* with their *provision*. In other words, export credit guarantees, export credits and insurance programs are governed by Article 10.1 of the *Agreement on Agriculture*, but WTO Members will develop specific disciplines on the provision of these instruments."[10]

12. In *US – Upland Cotton*, the Appellate Body found further support for this reading of Article 10.2 in its context in light of the object and purpose of the Agreement on Agriculture:

> "Although Article 10.2 commits WTO Members to work toward the development of internationally agreed disciplines on export credit guarantees, export credits and insurance programs, it is in Article 10.1 that we find the disciplines that currently apply to export subsidies not listed in Article 9.1. A plain reading of Article 10.1 indicates that the only export subsidies that are excluded from its scope are those 'listed in paragraph 1 of Article 9'. The United States and Brazil agreed that export credit guarantees are not listed in Article 9.1. Thus, to the extent that an export credit guarantee meets the definition of an 'export subsidy' under the *Agreement on Agriculture*, it would be covered by Article 10.1. Article 1(e) of the *Agreement on Agriculture* defines 'export subsidies' as 'subsidies contingent upon export performance, *including* the export subsidies listed in Article 9 of this Agreement'. (emphasis added) The use of the word 'including' suggests that the term 'export subsidies' should be interpreted broadly and that the list of export subsidies in Article 9 is not exhaustive. Even though an export credit guarantee may not necessarily include a subsidy component, there is nothing inherent about export credit guarantees that precludes such measures from falling within the definition of a subsidy. An export credit guarantee that meets the definition of an export subsidy would be covered by Article 10.1 of the *Agreement on Agriculture* because it is not an export subsidy listed in Article 9.1 of that Agreement."[11]

1.4 Article 10.3

1.4.1 Partial reversal of burden of proof

13. In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body explained that Article 10.3 provides a special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9 and 10. The Appellate Body started its explanations by identifying the two elements of a claim that may be brought under Article 3.3 of the Agreement on Agriculture:

> "Pursuant to Article 3 of the *Agreement on Agriculture*, a Member is *entitled* to grant export subsidies within the limits of the reduction commitment specified in its Schedule. Where a Member claims that another Member has acted inconsistently with Article 3.3 by granting export subsidies in excess of a quantity commitment level, there are *two* separate parts to the claim. First, the responding Member must have exported an agricultural product in quantities exceeding its quantity commitment level. If the quantities exported do not reach the quantity commitment level, there can be no violation of that commitment, under Article 3.3. However, merely exporting a product in quantities that exceed the quantity commitment level is not inconsistent with the commitment. The commitment is an undertaking to limit the quantity of exports that may be *subsidized* and not a commitment to restrict the volume or quantity of exports *as such*. The second part of the claim is, therefore, that the responding Member must have granted export subsidies with respect to quantities exceeding the quantity commitment level. There is, in other words, a *quantitative* aspect and an *export subsidization* aspect to the claim."[12]

14. In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body explained that Article 10.3 partially alters the rules on burden of proof in WTO dispute settlement in that it

[10] Appellate Body Report, *US – Upland Cotton*, paras. 611-612.
[11] Appellate Body Report, *US – Upland Cotton*, para. 615.
[12] Appellate Body Report, *Canada – Dairy (Article 21.5 - New Zealand and US II)*, para. 70.

separates the claim the two parts described in paragraph 13 above.[13] The Appellate Body then explained the operation of this altered burden of proof as follows:

> "Consistent with the usual rules on burden of proof, it is for the complaining Member to prove the first part of the claim, namely that the responding Member has exported an agricultural product in quantities that exceed the responding Member's quantity commitment level.
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> If the complaining Member succeeds in proving the quantitative part of the claim, and the responding Member contests the export subsidization aspect of the claim, then, under Article 10.3, the responding Member '*must establish* that no export subsidy … has been granted' in respect of the excess quantity exported.' (emphasis added)
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> …
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> With respect to the export subsidization part of the claim, the complaining Member, therefore, is relieved of its burden, under the usual rules, to establish a *prima facie* case of export subsidization of the excess quantity, provided that this Member has established the quantitative part of the claim."[14]

1.4.2 Limitation in scope to scheduled products

15. In *US – Upland Cotton*, the Appellate Body reasoned that Article 10.3 only applies to scheduled products, not unscheduled products:

> "We disagree with the Panel's view that Article 10.3 applies to *unscheduled* products. Under the Panel's approach, the only thing a complainant would have to do to meet its burden of proof when bringing a claim against an *unscheduled* product is to demonstrate that the respondent has exported that product. Once that has been established, the respondent would have to demonstrate that it has not provided an export subsidy. This seems to us an extreme result. In effect, it would mean that any export of an unscheduled product is *presumed* to be subsidized. In our view, the presumption of subsidization when exported quantities exceed the reduction commitments makes sense in respect of a *scheduled* product because, by including it in its schedule, a WTO Member is reserving for itself the right to apply export subsidies to that product, within the limits in its schedule. In the case of *unscheduled* products, however, such a presumption appears inappropriate. Export subsidies for both unscheduled agricultural products and industrial products are completely prohibited under the *Agreement on Agriculture* and under the *SCM Agreement*, respectively. The Panel's interpretation implies that the burden of proof with regard to the same issue would apply differently, however, under each Agreement: it would be on the respondent under the *Agreement on Agriculture*, while it would be on the complainant under the *SCM Agreement*."[15]

1.5 Article 10.4

1.5.1 Relationship between Articles 10.4 and 10.1

16. In *US – Upland Cotton*, the Appellate Body remarked that "each paragraph in Article 10 pursues [the] aim" of "Prevention of Circumvention of Export Subsidy Commitments" and that "Article 10.4 provides disciplines to prevent WTO Members from circumventing their export subsidy commitments through food aid transactions".[16] The Appellate Body commented further:

> "[W]e do not see Article 10.4 as excluding international food aid from the scope of Article 10.1. International food aid is covered by the second clause of Article 10.1 to

[13] Appellate Body Report, *Canada – Dairy (Article 21.5 - New Zealand and US II)*, para. 71.
[14] Appellate Body Report, *Canada – Dairy (Article 21.5 - New Zealand and US II)*, paras. 72-73, and 75.
[15] Appellate Body Report, *US – Upland Cotton*, para. 652. See also Panel Report, *US – FSC*, paras. 7.136-7.143.
[16] Appellate Body Report, *US – Upland Cotton*, para. 616.

> the extent that it is a 'non-commercial transaction'. Article 10.4 provides specific disciplines that may be relied on to determine whether international food aid is being 'used to circumvent' a WTO Member's export subsidy commitments. …The measures in Article 10.2 and the transactions in Article 10.4 are both covered within the scope of Article 10.1. As Brazil submits, 'Article 10.4 provides an example of specific disciplines that have been agreed upon for a particular type of measure and that complement the general export subsidy rules' but, like Article 10.2, it does not 'establish any exceptions for the measures that [it] covers'. WTO Members are free to grant as much food aid as they wish, provided that they do so consistently with Articles 10.1 and 10.4."[17]

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[17] Appellate Body Report, *US – Upland Cotton*, para. 619.