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## **1 ARTICLE 21**

### **1.1 Text of Article 21**

#### **Article 21**

##### *Final Provisions*

1. 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.
2. The Annexes to this Agreement are hereby made an integral part of this Agreement.

### **1.2 Relationship between the Agreement on Agriculture and the GATT 1994 or other Multilateral Trade Agreements in Annex 1A to the WTO Agreement**

1. In *Indonesia – Import Licensing Regimes*, the Appellate Body clarified that Article 21.1 of the Agreement on Agriculture has been interpreted to mean that:

"[T]he provisions of the *Agreement on Agriculture* prevail in the event of a conflict between provisions of the *Agreement on Agriculture* and provisions of the GATT 1994 or other Multilateral Trade Agreements in Annex 1A of the WTO Agreement."<sup>1</sup>

### **1.3 Relationship between the Agreement and scheduled concessions and commitments**

2. In *EC – Bananas III*, the Panel rejected the EC argument that the discriminatory TRQ provided for in the Banana Framework Agreement in the EC's Uruguay Round Schedule, as an agricultural market access commitment under Article 4.1, would prevail over the EC's obligations under GATT Article XIII, by operation of Article 21.1.2 The Appellate Body agreed with the Panel, stating:

"The preamble of the *Agreement on Agriculture* states that it establishes 'a basis for initiating a process of reform of trade in agriculture' and that this reform process 'should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines'. The relationship between the provisions of the GATT 1994 and of the *Agreement on Agriculture* is set out in Article 21.1 of the *Agreement on Agriculture*[.]

Therefore, the provisions of the GATT 1994, including Article XIII, apply to market access commitments concerning agricultural products, except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.

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<sup>1</sup> Appellate Body Report, *Indonesia – Import Licensing Regimes*, para. 5.12.

<sup>2</sup> Panel Report, *EC – Bananas III*, para. 7.127.

[W]e do not see anything in Article 4.1 to suggest that market access concessions and commitments made as a result of the Uruguay Round negotiations on agriculture can be inconsistent with the provisions of Article XIII of the GATT 1994. There is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural products. If the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly."<sup>3</sup>

3. In *EC – Export Subsidies on Sugar*, the EC argued that the terms of a footnote to the EC Schedule excluded certain exports from the scope of the EC reduction commitments. The Appellate Body disagreed, and found *arguendo* that the commitment in question was inconsistent with Articles 3.3 and 9.1 of the Agreement on Agriculture. The Appellate Body then examined and rejected a further EC argument that this claimed commitment limiting subsidization could prevail over the provisions of the Agreement on Agriculture:

"[W]e find no provision under the *Agreement on Agriculture* that authorizes Members to depart, in their Schedules, from their obligations under that Agreement. Indeed ... Article 8 requires that, in providing export subsidies, Members must comply with the provisions of both the *Agreement on Agriculture* and the export subsidy commitments specified in their Schedules. This is possible only if the commitments in the Schedules are in conformity with the provisions of the *Agreement on Agriculture*. Thus, we see no basis for the European Communities' assertion that it could depart from the obligations under the *Agreement on Agriculture* through the claimed commitment provided in Footnote 1.

In any event, we note that Article 21 of the *Agreement on Agriculture* provides that: '[t]he provisions of [the] GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.' In other words, Members explicitly recognized that there may be conflicts between the *Agreement on Agriculture* and the GATT 1994, and explicitly provided, through Article 21, that the *Agreement on Agriculture* would prevail to the extent of such conflicts. Similarly, the *General interpretative note to Annex 1A to the WTO Agreement* states that, '[i]n the event of conflict between a provision of the [GATT 1994] and a provision of another agreement in Annex 1A ..., the provision of the other agreement shall prevail to the extent of the conflict.' The *Agreement on Agriculture* is contained in Annex 1A to the *WTO Agreement*.

As we noted above, Footnote 1, being part of the European Communities' Schedule, is an integral part of the GATT 1994 by virtue of Article 3.1 of the *Agreement on Agriculture*. Therefore, pursuant to Article 21 of the *Agreement on Agriculture*, the provisions of the *Agreement on Agriculture* prevail over Footnote 1. We, therefore, do not agree with the European Communities that 'there is no hierarchy between the export subsidy commitments in a Member's schedule and the *Agreement on Agriculture*'.<sup>4</sup>

#### 1.4 Relationship between the Agreement and the SCM Agreement

4. See also the references to the Agreement on Agriculture in various articles of the SCM Agreement: SCM Article 3.1 ("Except as provided in the Agreement on Agriculture"), SCM Article 5 ("This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture"), SCM Article 6.9 ("This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture"). SCM Article 7.1 ("Except as provided in Article 13 of the Agreement on Agriculture") and SCM Article 10 ("Countervailing duties may only be imposed pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement and the Agreement on Agriculture").

5. In *US – Upland Cotton*, the Panel described three situations in which Article 21.1 could apply so that the Agreement on Agriculture would prevail over the prohibition on import substitution

<sup>3</sup> Appellate Body Report, *EC – Bananas III*, paras. 155 and 157.

<sup>4</sup> Appellate Body Report, *EC – Export Subsidies on Sugar*, paras. 220-222.

subsidies in Article 3.1(b) of the SCM Agreement; the Panel found that none of these situations applied in that dispute. The Appellate Body agreed:

"We agree that Article 21.1 could apply in the three situations described by the Panel, namely:

... where, for example, the domestic support provisions of the *Agreement on Agriculture* would prevail in the event that an explicit carve-out or exemption from the disciplines in Article 3.1(b) of the *SCM Agreement* existed in the *text* of the *Agreement on Agriculture*. Another situation would be where it would be impossible for a Member to comply with its domestic support obligations under the *Agreement on Agriculture* and the Article 3.1(b) prohibition simultaneously. Another situation might be where there is an explicit authorization in the text of the *Agreement on Agriculture* that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the *SCM Agreement*."<sup>5</sup>

6. In *US – Upland Cotton*, the Appellate Body, citing its report in *EC – Bananas III*, considered that Article 21.1 could also apply where the Agreement on Agriculture contained "specific provisions dealing specifically with the same matter" as the provision of another multilateral trade agreement in Annex 1A cited by the United States, namely Article 3.1(b) of the SCM Agreement:

"The key issue before us is whether the *Agreement on Agriculture* contains 'specific provisions dealing specifically with the same matter' as Article 3.1(b) of the *SCM Agreement*, that is, subsidies contingent upon the use of domestic over imported goods."<sup>6</sup>

7. However, the Appellate Body found that neither paragraph 7 of Annex 3 nor Article 6.3 of the Agreement on Agriculture dealt specifically with import substitution subsidies and, thus, that Article 21.1 did not apply.<sup>7</sup>

8. The Panel in *India – Sugar and Sugarcane* made the following observation regarding the relationship between the Agreement on Agriculture and the SCM Agreement with respect to the regime that applies to export subsidies:

"An export subsidy for agricultural products can, in principle, be subject to both the Agreement on Agriculture and the SCM Agreement. However, pursuant to Article 21.1, in the event of a conflict between the two Agreements, the disciplines of the Agreement on Agriculture would prevail over those of the SCM Agreement. Accordingly, if an export subsidy were prohibited under the SCM Agreement but permitted under the Agreement on Agriculture, giving rise to a conflict, that measure would be WTO-consistent because the Agreement on Agriculture would prevail over the SCM Agreement. By contrast, if an export subsidy were prohibited under both the Agreement on Agriculture and the SCM Agreement, no conflict would arise, and the measure would be inconsistent with both Agreements.

Consequently, the WTO-consistency of an alleged export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture, followed by the SCM Agreement, if necessary."<sup>8</sup>

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<sup>5</sup> Appellate Body Report, *US – Upland Cotton*, para. 532 (citing the Panel Report, para. 7.1038).

<sup>6</sup> Appellate Body Report, *US – Upland Cotton*, para. 533.

<sup>7</sup> Appellate Body Report, *US – Upland Cotton*, paras. 539-546.

<sup>8</sup> Panel Report, *India – Sugar and Sugarcane*, paras. 7.154-7.155.