

## ANNEX J

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

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## 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?** <sup>3rd</sup> 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".*<sup>1</sup>

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.<sup>2</sup>

According to the standards established by the Appellate Body,<sup>3</sup> 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:<sup>4</sup>

*"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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<sup>1</sup> Appellate Body Report, *US – Shirts and Blouses*, WT/DS33/AB/R, p. 14, text at note 16.

<sup>2</sup> *Id.*, p. 16, text preceding note 23.

<sup>3</sup> See paragraphs 113 to 116 of Brazil's First Written Submission.

<sup>4</sup> 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.** 3<sup>rd</sup> 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.** 3<sup>rd</sup> 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 by the Member concerned and must remain constant. Otherwise, the choice of the word "a" in this provision would be difficult to explain. If the negotiators of the AoA had not wanted the period to maintain an identity over time, they would have so indicated by using a different preposition, for example, "some" period, indicating that the period could be subject to a certain mobility.

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?** 3<sup>rd</sup> 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?** 3<sup>rd</sup> 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.** 3<sup>rd</sup> 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)?** 3<sup>rd</sup> 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 paragraph 1(a) and (b) of Annex 2 plus the policy-specific criteria and conditions set out in the subsequent paragraphs of Annex 2 while at the same time violating the general principle of meeting "the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production."

It might then be possible to evade conformity with the provisions of Article 6 of the AoA or with the level of support to a specific commodity decided during the 1992 marketing year.

The result could be to undermine the purpose of Article 13(b) of exempting from countervailing duties or actions based on Article XVI.I or Articles 5 and 6 of the SCM Agreement only those measures which comply with the conditions set forth therein.

**10. If the first sentence of paragraph 1 of Annex 2 is not a stand-alone obligation, then must new, non- or minimally trade-distorting measures that do not conform to the criteria listed in Annex 2 be classified as non-Green Box?** 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ

Yes. Argentina considers that non- or minimally trade-distorting measures that do not conform to the criteria listed in Annex 2 must be excluded from the Green Box. In other words, the measures which satisfy the fundamental requirement of having no, or at most minimal, trade-distorting effects or effects on production, but which do not meet the criteria established in paragraph 1(a) and (b) of Annex 2 and the policy-specific criteria and conditions set out in the subsequent paragraphs of Annex 2, cannot be exempted from reduction commitments.

**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.** 3<sup>rd</sup> 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?** 3<sup>rd</sup> 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)?** 3<sup>rd</sup> 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 subparagraph (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 ...". Consequently, domestic support of the kind referred to in Article 13(b) that does not conform to Article 6 does not

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)?** 3<sup>rd</sup> 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?** 3<sup>rd</sup> 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.<sup>5</sup> 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?** 3<sup>rd</sup> 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?** 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ

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<sup>5</sup> 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 characteristic of the commodity and not of the subsidy granted. The phrase "support to a specific commodity" cannot be identified with "specific support to a commodity".

The concept of "specificity" in Article 2 of the SCM Agreement is what indicates whether a subsidy is subject to the provisions of Part II or to the provisions of Parts III or V of that Agreement.

**18. 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

**19. Where does Article 13(b)(ii) require a year-on-year comparison?** 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ

Argentina submits that the domestic support measures granted in any of the marketing years of the period covered between 1995 and 2003 are relevant for the purposes of determining conformity with Article 13(b)(ii), which does not explicitly require a year-on-year comparison.

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

In Argentina's view Article 13(b)(ii) requires a comparison of support granted with support decided. Such a comparison is possible by making a calculation in terms of budgetary outlays in each one of the periods in question (support granted in the implementation period as compared to support decided during the 1992 marketing year).

**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?** 3<sup>rd</sup> parties, in particular, Australia, Argentina, Canada, China, EC, NZ

According to the text of Article 13(b)(ii) the word "*decided*" signifies the decision to provide payments for a specific commodity (including the revenue foregone under Article 1(c) of the AoA), whether those payments are classified as product-specific or non-specific, as well as other forms of domestic support in monetary terms as set forth in Annex 3 of the AoA.

The phrase "*support decided during the 1992 marketing year*" is necessarily linked to the phrase "grant support" - indeed, there would be no basis for comparison if in one case the support was granted, while in the other case, the support was only planned. In other words, as indicated in the reply to the preceding question, the Article 13(b)(ii) requirement necessarily involves a comparison of domestic support measured in the same manner in each one of the periods in question, i.e. a "comparison of the comparable".

In principle, the comparison must be made between the support granted in any year of the implementation period and the support "decided" during 1992. The support "decided during the 1992 marketing year" refers to a legislative or administrative decision by a Member during the 1992 marketing year on the domestic support to be granted during the implementation period in terms of budgetary outlays.

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 Annex 3, where it refers to total outlays?** 3<sup>rd</sup> 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 years.

The term "support" used in Article 13(b)(ii) of the AoA refers to budgetary outlays for any kind of support that is not Green Box. For example, the term "support" could include assistance granted by the State by foregoing tax revenue or writing off producers' debts.

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

Support should be compared under Article 13(b)(ii) in total monetary terms. In paragraph 16 of its oral submission, Argentina submits that the term "decided" in Article 13(b)(ii) should not be interpreted as meaning that the rate per unit of production is the factor to be considered in determining the amount of support granted. If the argument put forward by the United States were accepted, this would enable an unlimited amount of domestic support to be granted for each product provided the total AMS is not exceeded, since it would be covered by Article 13. Thus, the amount of the AMS could be granted to one or several products, provided its maximum bound level is not exceeded.

The comparison must be made in terms of total value of support for a specific product, comparing the levels for each marketing year subsequent to 1992 and up to 31 December 2003 with the levels of support decided during the 1992 marketing year.

**24. Please provide any written drafting history which could shed light on why the proviso was added to what is now Article 13(b)(ii) of the *Agreement on Agriculture* and, in particular, why the words "grant" and "decided" were used.** EC

**25. 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".** 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ

The term "decided during" in Article 13(b)(ii) refers to a decision made by the Member granting the support during the 1992 marketing year with respect to the budgetary outlays that would be made for domestic support, excluding Green Box.

If there was no decision during the 1992 marketing year, the budgetary outlays effectively made during that marketing year must be considered to constitute the support "decided during" the 1992 marketing year (i.e. if there is no express decision in this respect, we must fall back on what was effectively disbursed which also, implicitly, represents a "decision").

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

While it is true that in the English version of the Agreement on Agriculture, the verb tense used in Article 13(b)(ii) is the present tense, as stated by the United States in paragraph 90 of its first written submission ( ... the proviso is written in the present tense ...), it should be stressed that in the Spanish text, the present tense is clearly used in the subjunctive mode ("*a condición de que no otorguen ayuda ...*")

The expression "*a condición de que*" uses the subjunctive mode to indicate the conditional or possible nature and expresses syntactic subordination.

The use of the subjunctive mode in Article 13(b)(ii) is important, because in Spanish it is used to express and form sentences in which the action remains in doubt, as opposed to the indicative mode where the tenses always indicate that the action, concretely, is taking place, has taken place, or will be taking place.

The Spanish text coincides with the verbal tense used in the French version ("*à condition que ces mesures n'accordent pas*"), in which the present subjunctive is also used.

Consequently, Argentina does not agree with the United States' contention that the present tense criterion in Article 13(b)(ii) implies that the only support the Panel may consider is current support.

**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 that the Member has a zero base for the purposes of the comparison required under Article 13(b)(ii)?** EC

**28. In paragraph 13 of Australia's oral statement, you state that a "question" is: "could conditions of price competition for the purposes of a non-violation or impairment claim be 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

### **Export Credit Guarantee Programme**

**29 (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? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

An export credit guarantee is a "financial contribution" in the form of a "potential direct transfer of funds or liabilities" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement when it involves the granting of a financial credit in conditions more favourable than those that can normally be found on the market. Those conditions may contain all or some of the following

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?** 3<sup>rd</sup> 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. 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).** 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ

As stated by the Appellate Body in *US - FSC* and in *Canada - Dairy Products*, the AoA does not contain its own definition of a subsidy, and hence we must turn to the SCM Agreement for the context. The Appellate Body has also established (FSC case) that export subsidies under Article 3.1(a) of the SCM Agreement constitute export subsidies under the AoA.

The relevance of Articles 1 and 3 of the SCM Agreement is therefore unquestionable when it comes to evaluating the consistency of the export credit guarantees with WTO rules.

Moreover, Annex I of the *SCM Agreement* identifies export subsidies by providing an illustrative list thereof. In other words, a measure which constitutes an export subsidy classified in the Illustrative List is *per se* a prohibited subsidy under Article 3.1(a) of the *SCM Agreement*. Obviously, the "Illustrative" List in no way covers all measures that could qualify as an export subsidy under Article 3.1(a) of the SCM Agreement. As its name indicates, it is only an "illustrative" list and not an exhaustive one.

Now, footnote 5 in Article 3.1(a) of the SCM Agreement states that "measures referred to" in Annex I as not constituting export subsidies shall not be prohibited.

There are two paragraphs in this Annex that refer to credit, guarantee or insurance programmes: (j) and (k). There is a fundamental difference between the two. Item (k) explicitly recognises that a measure, in the circumstances set forth in its second paragraph, shall not be considered an export subsidy (see the last sentence of the second paragraph), fulfilling the requirement set forth in footnote 5 to the SCM Agreement:

(k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and other credit terms and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement. (Emphasis added)

Argentina does not agree with the *a contrario* interpretation provided by the United States in paragraphs 180 to 183 of its submission, either with respect to the first paragraph of item (k) or with respect to item (j) of Annex I to the *SCM Agreement*, because unlike the final sentence of the second paragraph of item (k), the text does not explicitly recognize that the measure will not be an export subsidy, and an *a contrario* interpretation that circumvents the test of Article of 3.1(a) of the *SCM Agreement* is not possible.

That is to say, even if a given credit, guarantee or insurance programme includes:

- either, in relation to item (j), premium rates which are adequate to cover the long-term operating costs and losses of the programmes;
- or, in relation to the first paragraph of item (k), interest rates below the cost of funds that are not used to secure a material advantage in the field of export credit terms,\$

none of this in any way enables us to infer that because they display either or both of these characteristics, they should not be considered to be export subsidies if they meet the conditions set forth in Articles 1 and 3.1(a) of the *SCM Agreement*.

For the situation put forward by the United States to be possible, there would have to be a text similar to the final sentence of the second paragraph of item (k) which explicitly states that a given measure is not considered to be an export subsidy. Only then would footnote 5 of the *SCM Agreement* become operational.

Now, even if the appropriate language had been included in item (j) and the first paragraph of the item (k) of Annex I of the *SCM Agreement* and footnote 5 were operational, an *a contrario* interpretation would still be unacceptable because, in addition to the test of Article 3.1(a) of the *SCM Agreement*, Members using such programmes must also comply with the AoA obligations, in particular Articles 8, 10.1 and 10.3, without prejudice to the application of Article 3 of the *SCM Agreement* to agricultural subsidies after the expiry of the Peace Clause in Article 13 of the AoA. In other words, the absence in Article 1(e) of the AoA of a footnote such as footnote 5 of the *SCM Agreement* precludes any *a contrario* interpretation in favour of users of export credits for agricultural products. Furthermore, Article 10.3 of the *SCM Agreement* itself places on the user Member the entire burden of proof that such programmes are not export subsidies.

**31. 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?** 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ

If the Panel decides to refer to provisions of the *SCM Agreement* for contextual guidance, as established by the Appellate Body, in the interpretation of the terms of Article 10 of the *Agreement on Agriculture* (Prevention of Circumvention of Export Subsidy Commitments), the Panel should refer to both: first of all to item (j) of Annex I (*Illustrative List of Export Subsidies*) of the *SCM Agreement*, and subsidiarily to Articles 1 and 3 of the *SCM Agreement*. Naturally, if the Panel should conclude

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.** 3<sup>rd</sup> 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".** 3<sup>rd</sup> 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"?** 3<sup>rd</sup> 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?** 3<sup>rd</sup> 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. 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). 3<sup>rd</sup> 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 U.S. financial institutions would be unwilling to provide financing without CCC's guarantee. (7 CFR 1493.10(a)(2) Exhibit BRA-38)**

The fact that the programmes operate in cases where credit is necessary to increase or maintain exports and where US private financial institutions would be unwilling to provide financing without the CCC's guarantee is relevant to Brazil's claims about the GSM 102 and GSM 103 programmes in that it implies a recognition of the impact and trade-distorting effect of the export credit guarantees.

**(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)**

This is another recognition of the fact that without such measures, there would be no exports, or there would be fewer exports from the United States.

**(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)**

The fact that in providing this credit guarantee facility, the CCC seeks to expand market opportunities for US agricultural exporters and assist long-term market development for US agricultural commodities once again reinforces the negative impact and distortion caused by the export credit guarantees to world trade.

**37. 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. 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

It is wrong to state that there are no disciplines on export credits and export credit guarantees. Article 10.2 must be analysed together with Article 10.1, in that when the export guarantee and credit programmes contain a subsidy component and are therefore genuine export subsidies, they must automatically comply with the requirement of not circumventing export subsidy commitments.

The export credits and export credit guarantees granted by the United States constitute export subsidies for the reasons set forth in the replies to questions 29 and 36 above. They do not comply with Articles 3, 8 and 10.1 of the AoA.

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 words, we are speaking of a subsidy.

**(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)?** 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ

In Argentina's view, the United States' interpretation of Article 10.2 is entirely at odds with the context of the provision and the object and purpose of Article 10 of the AoA, since it would contribute to the circumvention of export subsidy commitments by excluding an entire category of export subsidies from the general disciplines in that area.

Article 1(e) of the AoA clearly defines export subsidies without excluding those that are not listed in Article 9.1 of the Agreement.

At the same time, Article 13(c) of the AoA stipulates that in order to be exempted, export subsidies must conform fully to the provisions of Part V of the AoA, and not to a particular article. Article 10, which forms part of Part V of the AoA, stipulates in paragraph 1 that: " ... *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 ...* ".

Thus, the lack of disciplines specifically developed for export credit guarantees does not necessarily imply the absence or shortage of criteria that would make it possible to establish objectively whether these instruments "*conform fully to the provisions of Part V of this Agreement*" as stipulated in the chapeau of Article 13(c).

## STEP 2 PAYMENTS

**38. 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, 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)<sup>6</sup>, do any other dispute settlement reports offer guidance on this issue? For example, how,**

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<sup>6</sup> "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. Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances. Where a 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."

**if at all is the Appellate Body's report in Canada-Aircraft relevant here?**<sup>7</sup> 3<sup>rd</sup> 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."** 3<sup>rd</sup> 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.** 3<sup>rd</sup> 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

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<sup>7</sup> 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".<sup>7</sup>

SCM Agreement? Indeed, Article 3 of the SCM Agreement reads "except as provided in the Agreement on Agriculture ... ". The AoA does not contain any provision which explicitly permits such subsidies.

"Except as provided in the Agreement on Agriculture ..." also means that Article 3 of the SCM Agreement applies to agricultural subsidies to the extent that they are not in conflict with the AoA. In this connection, no provision can be found in the AoA that is in conflict with Article 3.1(b) of the SCM Agreement, permitting the granting of "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods." Consequently, Argentina considers that subsidies contingent upon the use of domestic over imported goods are prohibited under the AoA.

Regarding the EC's argument in which it tries to distinguish between the terms "to" and "in favour" with respect to support for agricultural producers, this difference does not tally with the Spanish text, and "in favour", "to" and "benefit" are synonyms.

Article from the Agreement on Agriculture	Spanish	English
1.a	a	in favour
1.d	a	to
1.h	a	in favour
3.2.	a	in favour
6.1.	en favor	in favour
6.2.	a	to
6.3.	a	in favour
7.1.	en favor	in favour
7.2.a	en favor	in favour
7.2.b	a	to
9.1.a	a	to
Annex 2	a	to (in different paragraphs throughout the annex)
Annex 3.7	beneficio a	benefit
Annex 4.4	beneficio a	benefit

In other words, the text does not contain the difference that the EC is attempting to expose, nor can a phrase such as "in favour" be interpreted as the waiver of a prohibition under Article 3.1(b) of the SCM Agreement, since such a waiver does not appear in the text.

Regarding the second sentence of paragraph 7 of Annex 3 of the AoA concerning "measures directed at agricultural processors", it makes no reference whatsoever to the "subsidies contingent ... upon the use of domestic over imported goods" mentioned in Article 3.1(b) of the SCM Agreement. Obviously, these are two different matters. Moreover, paragraph 7 of Annex 3 contains no mention of the SCM Agreement. If the intention had been to exempt these measures from the prohibition contained in Article 3.1(b) of the SCM Agreement, this would have been expressly stated, specifically mentioning the provision of the SCM Agreement, i.e. Article 3.1(b).

As regards the second question, for the reasons provided above, the phrase "provide support in favour of domestic producers" neither refers to the subsidies in Article 3.1(b) of the SCM Agreement, nor permits them.

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.

#### **ETI Act**

**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?** Argentina, China, EC, NZ

**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.** Argentina, China, EC, NZ

## 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? 3<sup>rd</sup> 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: 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. 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

#### Reply

In Australia's view, having regard to their ordinary meanings in their context of the object and purpose of the *Agreement on Agriculture*, the words "defined" and "fixed" have distinct meanings.<sup>1</sup> The word "defined" refers to the period of time stipulated for the purposes of determining initial eligibility for a particular decoupled income support payment. The word "fixed" establishes that once it has been "defined", that period of time is unchangeable for that payment.

**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. 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

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<sup>1</sup> *The New Shorter Oxford English Dictionary*, Ed. Lesley Brown, Clarendon Press, Oxford, Volume 1 provides the following potentially relevant definitions of the words:

"defined": "having a definite or specified outline or form; clearly marked, definite" (page 618);

"fixed": "1 Definitely and permanently placed or assigned; stationary or unchanging in relative position; definite, permanent, lasting. 2a Directed steadily or intently towards an object. b ... 3 Placed or attached firmly; made firm or stable in position. ...

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"<sup>2</sup>. 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"<sup>3</sup>. 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 Annex 3, nor was there intended to be. Annex 3 relates to the calculation of a Member's AMS for the purposes of implementing its reduction commitments in relation to production and trade-distorting domestic support measures, consistent with the object and purpose of the *Agreement on Agriculture*. By definition in the first sentence of paragraph 1, Annex 2 domestic support measures may not, or may only minimally, distort production and trade. Thus, there is no logical or other basis for there to be any relationship.

Australia notes too that Article 7.2(a) of the *Agreement on Agriculture* specifically envisages the introduction of domestic support measures after entry into force of the *WTO Agreement* by providing for "any [domestic support] measure that is subsequently introduced that cannot be shown to satisfy the criteria in Annex 2 to this Agreement". Australia considers that, had the negotiators intended that the 1986-88 period be required to be used as the base period for the purposes of making decoupled income support payments – or indeed for any other purpose envisaged in Annex 2 – paragraph 6(a) would have expressly provided for this rather than for "a defined and fixed base period".

**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? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Reply

In Australia's view, and consistent with the use of the word "a" in the phrase "a defined and fixed base period", a Member may only define and fix a base period once for the purposes of a particular decoupled income support payment. Once that base period is defined and fixed, it is unchangeable.

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

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<sup>2</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 1.

<sup>3</sup> *The New Shorter Oxford English Dictionary*, Volume 2, page 3269.

**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? 3<sup>rd</sup> 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”<sup>4</sup>. 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, 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,<sup>5</sup> 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”<sup>6</sup>. A further definition is “in conformity with a given set of circumstances”<sup>7</sup>.

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”<sup>8</sup>, 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”.

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

Reply

The word “fundamental” has a number of meanings<sup>9</sup> which can be summarised as “primary” or “essential”. The word “requirement” too has a number of meanings<sup>10</sup> which can be summarised as a “condition”. Thus, a “fundamental requirement” is a primary or essential condition.<sup>11</sup> It is an

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<sup>4</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 551.

<sup>5</sup> Oral Statement by Australia, paragraphs 35-36.

<sup>6</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 15.

<sup>7</sup> *Webster’s Third New International Dictionary*, Ed. Philip Babcock Gove, Merriam-Webster Inc, Springfield, Massachusetts, 1993, page 12.

<sup>8</sup> Third preambular paragraph of the *Agreement on Agriculture*.

<sup>9</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 1042, provides relevant definitions of “fundamental” as “1 Of or pertaining to the basis or groundwork; going to the root of the matter. 2 Serving as the base or foundation; essential or indispensable. Also, primary, original; from which others are derived.”

<sup>10</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 2557, provides definitions of “requirement” as “1 The action of requiring something; a request. 2 A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3 Something called for or demanded; a condition which must be complied with.”

<sup>11</sup> Third Party Submission of Australia, paragraph 31, and Oral Statement by Australia, paragraph 33.

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)? 3<sup>rd</sup> 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. If the first sentence of paragraph 1 of Annex 2 is not a stand-alone obligation, then must new, non- or minimally trade-distorting measures that do not conform to the criteria listed in Annex 2 be classified as non-Green Box? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

Reply

Yes.

**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. 3<sup>rd</sup> parties, in particular, Australia, Argentina, Canada, EC, NZ**

Reply

Australia assumes that the “direct payments programme” referred to in this question is the Direct Payments programme of the United States at issue in this dispute.

Even if the first sentence of paragraph 1 of Annex 2 were to express only a general principle which informs the interpretation of the other criteria in Annex 2, the US Direct Payments programme would still be non-compliant with paragraph 6(b) of Annex 2 because it:

- penalises producers based on the type of production undertaken after the base period, and
- because it allowed producers to update their base acreage and base yield(s) after the base period,

contrary to the express requirement of paragraph 6(b) that the amount of decoupled income support payments not be related to, or based on the type and/or volume of production undertaken by the producer in any year after the base period.

**12. Where does Article 13(b) require a year-on-year comparison? 3<sup>RD</sup> 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"<sup>12</sup> and "to an amount or degree beyond"<sup>13</sup>.

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)? 3<sup>RD</sup> 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)? 3<sup>RD</sup> 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 "such measures" in the proviso refers to "domestic support measures that conform fully to the provisions of Article 6 ...". Thus, the proviso states "provided that [*domestic support measures that conform fully to the provisions of Article 6*] do not grant support to a specific commodity in excess of that decided during the 1992 marketing year".

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<sup>12</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 873.

<sup>13</sup> *Webster's Third New International Dictionary*, page 792.

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”<sup>14</sup>. 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 production, it would enjoy, as a right, protection for actions that would otherwise be WTO-inconsistent. On the other hand, if a Member did not observe the obligations that form part of the negotiated outcome, it would lose its generic right to the protection that constituted an essential element of that outcome. See also question 28 below.

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

Reply

In this question, Australia understands that the panel uses the term “product-specific” in the sense of “product-specific” support as argued by the United States in its First Written Submission.<sup>15</sup>

Australia notes that counter-cyclical payments (CCPs) are expressly differentiated by product.<sup>16</sup> Even though the CCP programme applies to more than one commodity and there is no requirement for a producer to grow any of those commodities, actual payments are made by product. Further, notwithstanding that there is no requirement for a producer to grow upland cotton to receive the CCP for upland cotton, it is not possible for a producer to receive the CCP for upland cotton if that producer has never actually produced upland cotton. Similarly, a producer could not receive the CCP for another eligible commodity under the program, e.g., corn, if that producer has never grown corn. Thus, CCPs for eligible commodities, in this case upland cotton, are effectively product-specific.

Australia notes too that CCPs for upland cotton are product-specific if there is a correlation between enrolled acreage for the purposes of the CCP (and Direct Payments) programme and the acreage actually used to grow upland cotton. However, there is insufficient current information available to Australia to assess whether CCPs can be considered to be product-specific on this basis.

That said, Australia re-iterates its strong view that “support to a specific commodity” within the meaning of subparagraph (ii) (and (iii)) of Article 13(b) does not equate to product-specific support and that “support to a specific commodity” includes that portion of non-product specific support that benefits the commodity at issue, in this case upland cotton.<sup>17</sup> Had the authors of Article 13 intended that “support to a specific commodity” not include non-product specific support, Australia believes that they would have said so, consistent with the usage of such terminology elsewhere in the *Agreement on Agriculture*, for example, in Articles 1(a), 4(a) and paragraph 1 of Annex 3.

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<sup>14</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 1.

<sup>15</sup> First Written Submission of the United States, paragraphs 77-81.

<sup>16</sup> Section 1104, 2002 Farm Security and Rural Investment Act, Exhibit Bra -29.

<sup>17</sup> Oral Statement by Australia, paragraphs 20-25.

Further, “such measures” in the proviso of Article 13(b)(ii) and (iii) refers to “domestic support measures that conform fully to the provisions of Article 6” in the chapeau of Article 13(b), which include non-product specific support measures other than “green box” support measures. In Australia’s view, to exclude non-product specific domestic support measures from the assessment of “support [granted by such measures] to a specific commodity” would be contrary to the express meaning of the text.

See also question 28 below.

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

Reply

No. See also questions 14 and 28.

**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*? 3<sup>RD</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Reply

Australia does not consider that the concept of “specificity” in SCM Article 2, or references to “a product” or “subsidized product” in certain provisions of the *SCM Agreement*, have any express textual relationship to the meaning of “support to a specific commodity” in Article 13(b)(ii).

However, Australia notes that a subsidy does not need to be enterprise or industry-specific to be “specific” within the meaning of SCM Article 2. SCM Article 2.1(c) expressly provides that a subsidy can be specific notwithstanding an appearance of non-specificity if a subsidy programme is in fact directed at certain enterprises or industries. SCM Article 2 could therefore be considered to provide broad contextual support for Australia’s view that CCPs for upland cotton are product-specific .

**18. 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**

**19. Where does Article 13(b)(ii) require a year-on-year comparison? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

Reply

See questions 12 above and 28 below.

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

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? 3<sup>rd</sup> 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 be used differently from Annex 3, where it refers to total outlays? 3<sup>rd</sup> parties, in particular, Australia, Argentina, Canada, China, EC, NZ**

Reply

Australia believes it is significant that the proviso of Article 13(b)(ii) and (iii) uses "support" rather than "AMS", "support as calculated in Annex 3", or a similar term and that it bears out Australia's view that the use of the term "support" in the proviso was not intended to have the same meaning.

See question 28 below.

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

Reply

See question 28 below.

**24. Please provide any written drafting history which could shed light on why the proviso was added to what is now Article 13(b)(ii) of the Agreement on Agriculture and, in particular, why the words "grant" and "decided" were used. EC**

**25. 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". 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Reply

Australia is concerned that use of the phrase "authorised during" may be considered to imply a relationship with budgetary approval and expenditure processes and that this would not necessarily be a correct interpretation. As an alternative, Australia suggests "committed to during" could be an appropriate interpretation of the phrase "decided during". See question 28 below.

**26. 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-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 that the Member has a zero base for the purposes of the comparison required under Article 13(b)(ii)? EC

28. In paragraph 13 of Australia's oral statement, you state that a "question" is: "could conditions of price competition for the purposes of a non-violation or impairment claim be 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

#### Reply

The proviso "provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year" appears in both subparagraphs (ii) and (iii) of Article 13(b). In both cases, the basic textual provision is the same:

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.

Yet Article 13(b)(ii) deals with situations of violation nullification or impairment complaints in relation to actionable subsidies, and Article 13(b)(iii) deals with situations of non-violation nullification or impairment complaints in relation to tariff concessions. It does not seem to Australia to be feasible that the authors of the text of Article 13 of the *Agreement on Agriculture* would have intended exactly the same language within the same Article to have distinct meanings. Indeed, Australia believes it must be assumed that, had the authors intended that the proviso be interpreted and applied differently in the context of violation and non-violation complaints, they would have used different texts, consistent with the normal rules of treaty interpretation. In Australia's view, therefore, it must be assumed that the authors of Article 13 intended that the proviso have the same meaning in the context of both violation and non-violation complaints, and the proviso must be interpreted in such a way as to be capable of being applied in relation to both situations. To this end, it would be a proper exercise of the Panel's discretionary powers to consider also the nature of a non-violation complaint to determine the proviso's meaning.

Australia recalls that the text of the proviso, as well as the draft text of what became Article 13 of the *Agreement on Agriculture* first appeared in the "Blair House Accord" and that the

Accord also included provisions concerning the *EEC – Oilseeds* dispute.<sup>18</sup> In Australia's view, that dispute is crucially relevant to the proper interpretation of Article 13(b)(ii) and (iii).<sup>19</sup>

The panel in *EEC – Oilseeds* described the purpose of GATT Article XXIII:1(b) in the following terms:

... The Panel noted that these provisions, as conceived by the drafters and applied by the contracting parties, serve mainly to protect the value of tariff concessions.<sup>[...]</sup> The idea underlying them is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. ...<sup>20</sup>

The *EEC – Oilseeds* panel went on to say:

The Panel carefully analysed the price mechanism established in the framework of the Community's market organization for oilseeds and found that the production subsidy schemes of the Community protect Community producers completely from the movement of prices for imports and hence prevent the lowering of import duties from having any impact on the competitive relationship between domestic and imported oilseeds. ...<sup>21</sup>

The *EEC – Oilseeds* panel also said:

... The Panel considered that the main value of a tariff concession is that it provides an assurance of better market access through improved price competition. Contracting parties negotiate tariff concessions primarily to obtain that advantage. They must therefore be assumed to base their tariff negotiations on the expectation that the price effect of the tariff concessions will not be systematically offset. ... The Panel does not share the view of the Community that the recognition of the legitimacy of such expectations would amount to a re-writing of the rules of the General Agreement. ... The recognition of the legitimacy of an expectation relating to the use of production subsidies therefore in no way prevents a contracting party from using production subsidies consistently with the General Agreement; it merely delineates the scope of the protection of a negotiated balance of concessions. For these reasons the Panel found that the United States may be assumed not to have anticipated the introduction of subsidies which protect Community producers completely from the movement of prices for imports and thereby prevent tariff concessions from having any impact on the competitive relationship between domestic and imported oilseeds, and which have as one consequence that all domestically-produced oilseeds are disposed of in the internal market notwithstanding the availability of imports.<sup>22</sup>

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<sup>18</sup> *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* (“*EEC – Oilseeds*”), Report of the Panel, adopted 25 January 1990, BISD 37S/86.

<sup>19</sup> Australia notes that the report of the *EEC – Oilseeds* panel has been cited with approval in subsequent WTO jurisprudence, for example, *Japan – Measures Affecting Consumer Photographic Film and Paper*, Report of the Panel, WT/DS44/R, paragraph 10.35, and *EC – Measures Affecting Asbestos and Asbestos-Containing Products*, Report of the Appellate Body, WT/DS135/AB/R, paragraph 185.

<sup>20</sup> *EEC – Oilseeds*, paragraph 144.

<sup>21</sup> *EEC – Oilseeds*, paragraph 147.

<sup>22</sup> *EEC – Oilseeds*, paragraph 148.

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 conditions, matters to be considered included market prices and the applicable tariff concession(s) as well as any other relevant measures, including measures that were not inconsistent with GATT 1947. Further, that assessment involved a temporal comparison between the “conditions of price competition” that could legitimately have been expected at the time a tariff concession was negotiated and the conditions that actually prevailed at a later point of time.

Accordingly, to enable its application in a situation of non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member, the proviso of Article 13(b)(iii) must be interpreted in a manner capable of:

- establishing other Members’ legitimate expectations of the “conditions of price competition”;
- taking account of factors such as the applicable tariff concession(s), market prices and domestic support measures that conform fully to the provisions of Article 6 of the *Agreement on Agriculture*; and
- allowing a comparison between two different points in time.

In Australia’s view, interpreting the phrase “grant support” in a manner that limits the factors to be considered to domestic support measures that conform fully to the provisions of Article 6 as measured by budgetary outlays, as argued by Brazil, or the rate of payment, as argued by the United States, could not lead to a proper application of the proviso of Article 13(b)(iii) in the context of a non-violation dispute. Such an interpretation cannot establish other Members’ legitimate expectations of “conditions of price competition” as these have been understood in GATT and WTO jurisprudence, as it cannot capture issues relating to tariff concessions and market prices that are integral to a non-violation complaint of nullification or impairment of the benefits of tariff concessions accruing to another Member. The only essential element that such an interpretation is capable of capturing is the basic point in time for the purposes of comparison: instead of being the time at which a tariff concession was negotiated, it is the 1992 marketing year.

It would not be possible for the interpretations of the proviso offered by Brazil and the United States to apply in the context of a non-violation dispute. Thus, Australia believes it is incumbent upon the Panel to consider whether it is possible to apply in the context of an actionable subsidy complaint the proviso in the sense of legitimate expectations of the “conditions of price competition” as this applies to a non-violation nullification or impairment complaint. That application would need to take account as appropriate of tariff concessions, market prices and domestic support measures that conform fully to the provisions of Article 6.

Australia considers that such a “conditions of price competition” test is capable of being applied in the context of a violation complaint covered by Article 13(b)(ii) and was in fact intended by the authors of the text of Article 13. In Australia’s view, a “conditions of price competition” test as this was interpreted and applied in *EEC – Oilseeds*, allowing as appropriate tariff concessions, market prices and domestic support measures that conform fully to the provisions of Article 6, forms “the whole”.

Further, such an interpretation overcomes the many interpretive questions raised by the arguments put forward by the parties to the dispute. Notwithstanding that legitimate expectations of “conditions of price competition” are not normally applicable in the context of a violation complaint, Australia cannot identify any provision of the *Agreement on Agriculture*, or indeed any other of the covered agreements, that would preclude the application of such a test in the context of Article 13(b)(ii).

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]<sup>23</sup> support [assistance or backing]<sup>24</sup> to a specific commodity in excess of [more than]<sup>25</sup> that decided [determined or resolved,<sup>26</sup> 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.

<sup>23</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 1131.

<sup>24</sup> *The New Shorter Oxford English Dictionary*, Volume 2, pages 3152-3153.

<sup>25</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 873.

<sup>26</sup> *The New Shorter Oxford English Dictionary*, Volume 1, 607.

However, should the Panel consider that another interpretation of the proviso of Article 13(b)(ii) was intended by the authors of the text of Article 13, Australia believes it incumbent upon the Panel to test its interpretation in the context of a non-violation complaint covered by Article 13(b)(iii).

EXPORT CREDIT GUARANTEE PROGRAMMES

29. (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? 3<sup>d</sup> parties, in particular, Argentina, Canada, EC, NZ

(b) How, if at all, would this be relevant to the claims of Brazil? 3<sup>d</sup> parties, in particular, Argentina, Canada, EC, NZ

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). 3<sup>d</sup> parties, in particular, Argentina, Canada, EC, NZ

31. 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? 3<sup>d</sup> parties, in particular, Argentina, Canada, EC, NZ

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. 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ

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". 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ

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"? 3<sup>rd</sup> 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? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ

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) 3<sup>rd</sup> 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)

37. 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. 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ
- (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)? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ

#### STEP 2 PAYMENTS

38. 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, 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)<sup>27</sup>, do any other dispute settlement reports offer guidance on this issue? For example, how,

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<sup>27</sup> "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.<sup>27</sup> Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances. Where a

**if at all is the Appellate Body's report in Canada-Aircraft relevant here?<sup>28</sup> 3<sup>rd</sup> 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". 3<sup>rd</sup> 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*<sup>29</sup> 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. 3<sup>rd</sup> parties, in particular, Australia, Argentina, EC, NZ, Paraguay**

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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. <sup>28</sup> 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".<sup>28</sup>

<sup>29</sup> *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, paragraph 179.

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<sup>30</sup> 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.

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<sup>30</sup> Oral Statement by Australia, paragraphs 29-30.

ETI ACT

**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? Argentina, China, EC, NZ**

**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. Argentina, China, EC, NZ**

## ANNEX J-3

### ANSWERS OF BENIN TO THE PANEL'S QUESTIONS OF 25 JULY 2003

11 August 2003

Benin offers the following responses to the 25 July questions of the Panel, as they pertain to the scope of Benin's Third Party Submission or Oral Statement:

**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 of 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? 3<sup>rd</sup> parties, in particular Argentina, Benin, China, Chinese Taipei**

Reply

Benin agrees with the basic assertion of Australia that Article 13 of the *Agreement on Agriculture* is an affirmative defence.

In Benin's view, the notion of Article 13 as an affirmative defence is easily reconciled with the view that the conditions set out in Article 13 are a prerequisite to its availability. As Benin argued in its Third Party submission, the language used in Article 13 shows the clear intent of its drafters that the Member seeking to invoke the peace clause defence must bear the burden of demonstrating full compliance with all of the preconditions set out in this provision. As noted by Benin, this intent is demonstrated, *inter alia*, by the use of the proviso "provided that." In the *Quantitative Restrictions* case, also referred to in Benin's Third Party submission, the Appellate Body considered similar language in GATT Article XVIII:11, and found that the burden lay on the Member seeking to invoke the proviso.

While Benin and Australia thus share the same view on the nature of Article 13, Benin would not find it necessary to refer to the invocation of Article 13 as a "privilege." In Benin's view, a Member that has met the burden of demonstrating full compliance with all of the preconditions set out in Article 13 could invoke this defence as a right. However, the United States has clearly not met this burden in the present case.

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

Reply

Please see Benin's answer to Question 18, which also addresses the issue raised in Question 16.

**18. 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 you believe appropriate. Benin**

## Reply

In Benin's view, the phrase "support to a specific commodity" in Article 13(b)(ii) means any support, other than green box support, provided to a particular, identifiable agricultural commodity. Such support can be provided through either a product-specific or non product-specific programme.

The United States argues that "the phrase 'support to a specific commodity' should be understood to mean 'product-specific support'". This position is supported by the European Communities, which suggests that the word "specific" was inserted in Article 13 as "a qualifier to the word 'support'".

As noted by Benin in its oral statement of July 24, if the drafters of the Agreement on Agriculture had wanted to use the term "product-specific support" in Article 13(b)(ii), they obviously could have done so, as they did elsewhere in Agreement, such as in Article 6(4), or in Annex 3.

The interpretation proposed by the United States and the European Communities is contrary to the language actually used in Article 13(b)(ii), which refers to support to a "specific commodity" and not "specific support" to a commodity, or "product-specific support." The treaty interpreter must give meaning to the words actually used by the drafters of this provision.

As noted by New Zealand in its Third Party submission, the use of the term "specific commodity" in Article 13(b)(ii) was used to distinguish the "peace clause" from general domestic support commitments, which are determined on the basis of total "Aggregate Measure of Support". As stated by New Zealand, without such wording, "peace clause" protection could be lost for any agricultural product if total AMS increased, even if support to a specific product had not increased.

Moreover, to re-iterate another point raised by Benin in its oral statement, acceptance of the US interpretation would clearly elevate form over substance. Benin agrees with Brazil that the US interpretation "would carve out a category of non-'green box' subsidies simply because the measures distort trade in *multiple* commodities...This interpretation would permit Members to insulate their trade-distorting non-'green box' measures from challenge by manipulating the *form* of the support so that it does not mandate the production of a specific commodity in order to receive the subsidy, or by providing such support through a non-'product-specific' measure."

Benin also notes that the Appellate Body has made clear that the WTO-consistency of subsidies must be determined by their substance, and not by their form.<sup>1</sup>

Therefore, support provided to any specific or identifiable commodity, regardless of the nature of that support, must be included in the analysis required by Article 13(b)(ii). In Benin's view, this interpretation would remain the same if the word "specific" were deleted from Article 13(b)(ii),

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<sup>1</sup> In Benin's view, it is useful to recall how the Appellate Body interpreted the export subsidy commitments of the *Agreement on Agriculture* in the *Canada Dairy* dispute, where the tribunal emphatically rejected an interpretation that would have elevated form over substance. The Appellate Body refused to read the word "payments" in Article 9.1(c) narrowly, i.e. to mean monetary payments only, but not payments-in-kind:

"...if a restrictive reading of the words "payments" were adopted, such that "payments" under Article 9.1(c) had to be monetary, no account could be taken, under Article 9.1(c), of "revenue foregone". This would, we believe, prevent a proper assessment of the commitments made by WTO Members under Article 9.2, as envisaged by Article 1(c) of the *Agreement on Agriculture*. We, therefore, prefer a reading of Article 9.1(c) that allows full account to be taken of "revenue foregone". The contrary view would, in our opinion, elevate form over substance and permit Members to circumvent the subsidy disciplines set forth in Article 9 of the *Agreement on Agriculture*." [emphasis added]

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", the result would be the same. The most important point is that the drafters of the Agreement could have used "product-specific support", a term of art found elsewhere in the Agreement, but did not.

In addition, Benin would offer the following views on the ETI Act:

**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? Argentina, China, EC, NZ**

#### Reply

Brazil has asked the Panel to find that "the ETI Act constitutes an export subsidy violating AoA Articles 10.1 and 8 and ASCM Article 3.1(a)." [Paragraph 330 of Brazil's First Submission.] As is well-known, the Appellate Body has found that the ETI measure is inconsistent, *inter alia*, with the same provisions cited by Brazil: Articles 10.1 and 8 of the *Agreement on Agriculture*, and Article 3.1(a) of the SCM Agreement.<sup>2</sup> The Appellate Body report was adopted by the DSB on January 29, 2002, and the ETI has remained unamended since that time.

Before responding directly to Question 41, Benin would offer some preliminary observations on the relevance of earlier Panel and Appellate Body reports.

In Benin's view, prior adopted Panel or Appellate Body reports are not technically binding on subsequent Panels. As the Appellate Body stated in *Japan Alcohol*, adopted panel reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute."<sup>3</sup> Thus, the adopted Appellate Body decision in the FSC/ETI dispute is binding only on the parties to that dispute, the United States and the EC.

However, the Appellate Body in *Japan Alcohol* also made clear that prior panel decisions "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."<sup>4</sup>

A similar approach was taken by the Panel in the *India – Patent Protection* case. The Panel, established at the request of the EC, had to determine what weight to give to the adopted Panel and Appellate Body reports on the same subject matter in an earlier case brought by the United States. The Panel stated that:

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<sup>2</sup> Appellate Body report, *United States – Tax Treatment for 'Foreign Sales Corporations': Recourse to Article 21.5 of the DSU by the European Communities*. WT/DS108/AB/RW.

<sup>3</sup> Appellate Body report, *Japan - Taxes on Alcoholic Beverages*. WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R. Page 14.

<sup>4</sup> Appellate Body report, *Japan - Taxes on Alcoholic Beverages*. *Ibid*, page 14. In the *Shrimp-Turtle* compliance panel appeal, the Appellate Body added that: "This reasoning applies to adopted Appellate Body Reports as well." Appellate Body report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia*. WT/DS58/AB/RW, paragraph 109.

“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 system in providing security and predictability to the multilateral trading system, and to the need to avoid inconsistent rulings (which concern has been referred to by both parties). In our view, these considerations form the basis of the requirement of the referral to the "original panel" wherever possible under Article 10.4 of the DSU.”<sup>5</sup> [original emphasis]

It is also highly instructive to recall the position taken by the United States as a third party to the EC complaint, since there are direct parallels to the current situation in *Cotton*. The US position, as summarized by the Panel, included the following:

“The United States argued in its third party submission that the precise measures and provisions of the WTO Agreement at issue in this dispute had been the subject of a previous WTO dispute settlement proceeding....The Appellate Body had thoroughly analyzed the legal issues in the case and it was neither necessary nor appropriate for the Panel to repeat that work. The Panel should consider the arguments of the parties, but be guided by the Appellate Body’s recent interpretation of the obligations at issue....

The United States supported the view of the EC that it was not necessary or appropriate to repeat all of the legal arguments made in the earlier dispute (WT/DS50) in the context of the present proceedings....India appeared to seek an entirely redundant proceeding. Despite India's obligation under Article 17.14 of the DSU to accept the Appellate Body's report in the earlier case unconditionally, India's submission gratuitously disparaged the work of the Appellate Body....

The United States added that, moreover, India did not argue that it had modified its patent regime since the Appellate Body's ruling and that, in that situation, the Panel should be guided by the Appellate Body's decision, not by allegedly new arguments about the same patent regime.

India should not be permitted to reopen legal issues that had been conclusively determined by a panel and the Appellate Body. Such a result would invite repetitive litigation....The drafters had wanted to avoid giving complainants or defendants an incentive to re-litigate disputes to see if different panels would produce different results. If such "panel shopping" did produce different results, the effect on the dispute settlement system would be profoundly destabilizing.

The WTO dispute settlement system could not function effectively without consistent panel judgments....Without consistent judgments, WTO Members would find little guidance in the legal interpretations developed by dispute settlement panels and the Appellate Body. The role of the dispute settlement system [would be] greatly

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<sup>5</sup> Panel report, India - Patent Protection for Pharmaceutical and Agricultural Chemical Products, WT/DS79/R, paragraph 7.30.

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]

The parallels between *India – Patent Protection* and *Cotton* are striking, and the US submission in the former case provide clear guidance as to how the *Cotton* panel should examine Brazil's current ETI claims.

As was the case in *Patent Protection*, the Appellate Body has "thoroughly analyzed the legal issues in the [FSC/ETI] case" and it is "neither necessary nor appropriate" for the *Cotton* Panel to "repeat that work." The *Cotton* Panel should consider the arguments of the parties, but "be guided by the Appellate Body's recent interpretation of the obligations at issue." The United States should not be permitted to "reopen legal issues [related to the ETI] that had been conclusively determined by a panel and the Appellate Body." Benin shares the US concern that "such a result would invite repetitive litigation", would promote "panel shopping", and that different results could be "profoundly destabilizing."

Thus, in Benin's view, the *Cotton* panel should be guided by the Appellate Body's interpretation of the US ETI measure.

Turning to the specific question raised by the Panel: as noted above, Benin agrees with the position advanced by the United States in *Patent Protection* that a responding party in a subsequent case dealing with the same measure should not be permitted to reopen issues "that had been conclusively determined by a panel and the Appellate Body." However, in *Cotton*, the United States would have the right to advance specific new defences that were not considered by the Panel or the Appellate Body in the FSC/ETI dispute (e.g. that the United States is entitled to the protection of Article 13 because its export subsidies for cotton "conform fully" to the provisions of Part V of the *Agreement on Agriculture*).

Thus, as a procedural matter, the *Cotton* Panel could consider such US arguments. However, as a substantive matter, Benin would note that the relevant obligations in Part V of the *Agreement on Agriculture* are Articles 8 and 10.1. As stated above, the Appellate Body has already determined that the ETI involves export subsidies inconsistent with US obligations under both these provisions. Therefore, in Benin's view, US export subsidies for cotton do not "conform fully to the provisions of Part V." Accordingly, the ETI is not exempt from action by virtue of the Peace Clause.

**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. Argentina, China, EC, NZ**

#### Reply

As noted in the footnote to paragraph 43 of the EC statement, the reference to adopted Appellate Body reports providing "a final resolution to the dispute" was taken from the decision of the Appellate Body in the *Shrimp-Turtle* compliance panel appeal.<sup>6</sup> However, the context of that case was slightly different from the present dispute. The Appellate Body decision in the Article 21.5 proceeding in *Shrimp Turtle* involved the same dispute as had been litigated earlier between Malaysia

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<sup>6</sup> Appellate Body report, United States – Import Prohibition of Certain Shrimp and Shrimp Products: Recourse to Article 21.5 of the DSU by Malaysia. Op. Cit.

and the United States, although it had by then moved to the compliance panel stage.<sup>7</sup> 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-US dispute in *FSC/ETI*, since that is the “dispute” which has resulted in an adopted Appellate Body report. The “dispute” referred to in Article 12 and Appendix 3 would be the *Cotton* dispute, as these proceedings are now underway. Article 9.3 provides that if more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons shall serve as panelists on each of the separate panels, and the timetables shall be harmonized. While this provision might have had some potential relevance if the *Cotton* and *FSC* cases had been running concurrently, given the partial overlap of claims, it seems of little relevance now to the Panel as it assesses the weight to ascribe to prior rulings on the *FSC/ETI*.

In any event, Benin would strongly re-iterate its position, as set out above, that the *Cotton* panel should be guided by the Appellate Body’s interpretation of the *ETI*, particularly since the measure has not been amended since the DSB adopted the Appellate Body’s report.

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<sup>7</sup> Similar kinds of issues are raised in European Communities – Antidumping Duties on Imports of Cotton-Type Bed Linen from India: Recourse to Article 21.5 of the DSU by India. Report of the Appellate Body. WT/DS141/AB/RW.

## 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

1. The meaning of the term "defined" is "having a definite or specified outline or form; clearly marked, definite".<sup>1</sup> The term "fixed" is defined as "definitely and permanently placed or assigned; stationary or unchanging in relative position; definite, permanent, lasting".<sup>2</sup> Based on the ordinary meaning of these terms, the base period for US direct payments must be clearly set out and remain unchanged. Because the structure of direct payment programme and the parameters for direct payments are essentially the same as those regarding PFC payments, the Panel should find that the applicable base period for direct payments is the base period for PFC payments. By allowing base acreage for direct payments to be updated, the United States acts inconsistently with paragraph 6(a) of Annex 2 because the base period is not "fixed". Canada refers the Panel to paragraphs 4-6 of its third party oral statement.

**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.**

#### Reply

2. Paragraph 6(a) of Annex 2 of the *Agriculture Agreement* requires eligibility for decoupled income support payments to be determined by "clearly-defined criteria such as... production level in a defined and fixed based period". Use of the indefinite article "a" in this provision means that no base period is specified. To the contrary, paragraph 11 of Annex 3 specifies a base period.

3. Use of the definite article "the" in paragraphs 6(b), (c) and (d) of Annex 2 creates a reference to the base period established pursuant to paragraph 6(a).

**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*?**

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<sup>1</sup> *New Shorter Oxford English Dictionary*, p. 618 ("defined") [Exhibit CDA-4].

<sup>2</sup> *New Shorter Oxford English Dictionary*, p. 962 ("fixed") [Exhibit CDA-5].

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”.<sup>3</sup> The term “specific commodity” means a commodity that is clearly and explicitly defined.<sup>4</sup> 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 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?**

Reply

6. Article 2 of the *SCM Agreement* sets out principles that apply to determine whether a subsidy “is specific to [certain enterprises]”. In the context of Article 2, the phrase “is specific to” means that a government restricts the availability of a subsidy to certain enterprises.<sup>5</sup> In the context of Article 13(b)(ii) of the *Agriculture Agreement*, the term “specific commodity” means a commodity that is clearly and explicitly defined.<sup>6</sup> Article 13(b)(ii) requires an examination of all support that is not exempt under Annex 2 and that benefits a “precise”, “exact”, or “defined” commodity. Such support may be provided either through product-specific or non-product-specific support programmes.

**29. (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?**

Reply

7. Yes, an export credit guarantee is a potential direct transfer of funds under Article 1.1(a)(1)(i) of the *SCM Agreement*. The GSM programmes “underwrite credit extended by the private banking sector in the United States (or, less commonly, by the US exporter) to approved foreign banks using dollar-denominated, irrevocable letters of credit to pay for food and agricultural products sold to foreign buyers.”<sup>7</sup> Under the SCGP, “CCC guarantees a portion of payments due from importers under short-term financing (up to 180 days) that exporters have extended directly to the importers for the

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<sup>3</sup> *United States – Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WT/DS2/AB/R, adopted 20 May 1996, p. 23.

<sup>4</sup> US First Written Submission, para. 77, fn 66. (“Clearly or explicitly defined; precise, exact, definite.”)

<sup>5</sup> US First Written Submission, para. 77. (“‘Specific’ means ‘[s]pecially or peculiarly pertaining to a particular thing or person, or a class of these; peculiar (to)’.”)

<sup>6</sup> US First Written Submission, para. 77, fn 66. (“Clearly or explicitly defined; precise, exact, definite.”)

<sup>7</sup> See Exhibit BRA-71 (“Fact Sheet: CCC Export Credit Guarantee Programmes (GSM-102/103)”).

purchase of US agricultural products.”<sup>8</sup> 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 export subsidies within the meaning of Article 1(e) of the *Agriculture Agreement*. Item (j) of the Illustrative List may not be interpreted *a contrario* to deem US export credit guarantee practices as not providing export subsidies under Article 10.1 of the *Agriculture Agreement*. Where US programmes may not be deemed to provide export subsidies because they do not meet the requirements of item (j), Articles 10.1 and 10.3 of the *Agriculture Agreement* nevertheless require the United States to demonstrate that it has not granted export subsidies within the meaning of Articles 1 and 3 of the *SCM Agreement* in respect of the relevant quantity of exports. Canada refers the Panel to paragraphs 49-50 of its written third party submission and paragraphs 12-14 of its third party oral statement.

**31. 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?**

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<sup>8</sup> See Exhibit BRA-72 (“Fact Sheet: CCC Supplier Credit Guarantee Programme”).

Reply

11. The Panel should refer to both. Item (j) of the Illustrative List in Annex I of the *SCM Agreement* allows the Panel to determine whether the United States provides “export credit guarantee... programmes” such that guaranteed export credit transactions guaranteed under those programmes are subsidized *per se*. Articles 1 and 3 of the *SCM Agreement* allow the Panel to determine, on a transaction-by-transaction basis, whether given quantities of US exports are subsidized.

**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.**

Reply

12. Canada refers the Panel to paragraphs 41-48 of its written third party submission with respect to how and to what extent Article 14(c) of the *SCM Agreement* and the cited panel report are relevant.

13. Whether a benefit is conferred under Article 1.1(b) of the *SCM Agreement* is a question of fact, to be assessed in the light of all the relevant financial considerations of a given export credit transaction. The Panel's findings in this respect will depend on an examination of: 1) the terms of credit transactions that are guaranteed by the CCC, including the length of the repayment period and any fees charged for the guarantee, and 2) credit transactions with similar terms that are occurring in the market without a CCC guarantee.

**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."**

Reply

14. Were the Panel to find that support for exports of agricultural products such as export credit guarantees are not available on the marketplace from commercial lenders, this would suggest that a benefit under Article 1.1(b) of the *SCM Agreement* exists because the provision of such support in the market would otherwise require uneconomical terms and conditions (based on factors such as a lack of security provided by the product and a lack of lender confidence in sales of the product).

**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"?**

Reply

15. The term “costs” must be distinct in meaning from the term “losses”, otherwise the coordinating conjunction “and” is rendered meaningless. This is confirmed by the French version of the phrase (“*les frais et les pertes*”). In Canada's view, any “claims paid” may yield “losses” when they are added to any other “operating costs” incurred under the programme. Such losses would be required to be covered over the long term by the premiums charged to avoid a finding that transactions guaranteed under the programme are subsidized *per se*.

**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 long-term market development for US agricultural commodities." (7 CFR 1493.10(a)(2) Exhibit BRA-38)**

Reply

19. This statement confirms that the US programmes are contingent upon export performance within the meaning of Article 1(e) of the *Agriculture Agreement*.

**37. 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.**

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*.<sup>9</sup>

- (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 Article 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.

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<sup>9</sup> *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 questions posed to third parties on July 28, 2003. While it was specifically asked to address Questions 1, 4, 12, 13, 14, 15, 16, 17, 21, 22, 23, 25, 41 and 42, China notes the Panel in the fax cover page granted freedom to third parties "to respond to or comment on questions posed to the other third parties". Given the short period within which third parties are required to submit their views, China therefore responds to and comments on the following underlined questions.

#### ARTICLE 13 OF THE *AGREEMENT ON AGRICULTURE*

2. **Question 1. Australia has argued that Article 13 of the *Agreement on Agriculture* is an affirmative defence. How do you [Australia] reconcile this with your [Australian] view that the conditions in Article 13 are a "pre-requisite" to the availability of a right or privilege? Would other third parties have any comments on Australia's assertion?**

#### Reply

3. China agrees with the interpretation of Article 13 of the *Agreement on Agriculture* (the "Peace Clause") put forward by Australia. As explained in its written submission, China believes that the Peace Clause does not impose positive obligations; it only stands to provide limited exemptions from actions to measures that may otherwise be subject to actions based on GATT 1994 and the Agreement on Subsidies and Countervailing Measures (the "*Subsidies Agreement*"). As wording of the Peace Clause indicates, such exemptions are not automatically available or granted upon a simple allegation by a Member that it is protected; certain conditions built into the Peace Clause must be met before such a Member can enjoy entitlement to Peace Clause exemption.

4. The United States alleged that if conditions do have to be met for availability of Peace Clause protection, it is upon the complaining party to prove that the US measures do not meet such conditions, and hence do not enjoy Peace Clause protection. In support of its reasoning, it asserts that the Peace Clause imposes positive obligations by its built-in reference to Annex 2 to and Article 6 of the *Agreement on Agriculture*<sup>1</sup>. China disagrees on that point. In its written submission, China stated that when Annex 2 and Article 6 are brought under the Peace Clause as conditions, they lose any positive obligation nature, if any, in their original places; they have come to form conditions precedent for entitlement to Peace Clause exemption. Since the Peace Clause contains limited exemptions from actions based on GATT and the *Subsidies Agreement*, it is affirmative defence in nature, and the party claiming its entitlement bears the burden of proving that it is so entitled.

5. China sees no need to "reconcile" the affirmative defence nature with the conditions that must be met to enjoy that defence. The latter is simply required to happen prior to availability of affirmative defence. The two elements, i.e. conditions to be met and availability of exemptions, form an organic whole of the Peace Clause. To China's understanding, parties to this dispute share greater

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<sup>1</sup> Para. 43, US First Written Submission, United States – Subsidies on Upland Cotton, WT/DS267, 11 July 2003.

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"<sup>2</sup>. 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?**

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

Reply

12. Main elements of Article 13(b)(ii) and (iii) read: “domestic support measures that fully conform to ... shall be exempt from actions ... , provided that such measures do not grant support to a specific commodity *in excess of that decided during the 1992 marketing year*” (emphasis added). The full conformity chapeau and the proviso are two conditions to the availability of exemption granted by this Article.

13. The Panel’s question relates to interpretation of the proviso. Key to the interpretation are the words “that”, “during the 1992 marketing year” and “in excess of”. The word “that” is inserted in the second portion of the proviso to refer back to what was described in the previous portion, i.e. “support to a specific commodity”. The phrase “in excess of” requires a comparison. The phrase “during the 1992 marketing year” indicates a requisite element of comparison, a common denominator in time frame without which a comparison is impossible. The combination of these three elements requires a comparison of support levels between a given year at issue and 1992 marketing year, i.e. a year-on-year comparison.

14. Obviously, the proviso does not contemplate the comparison of the sum of support levels for more than one year with that of 1992 marketing year. Such a comparison would be one between two grossly unequal numbers, resulting in no statistical significance and would destroy the purpose of the proviso being a condition precedent to the availability of a protection.

15. In addition, the proviso, properly interpreted, cannot be limited to a comparison only of measures currently in effect against those during the 1992 marketing year, as the US argues. The US based its argument on the present tense of the proviso, arguing that such a tense only calls for determination of the support that challenged measures currently grant. With respect, China disagrees. While it is indeed written in the present tense, the sentence is led by the key word “provided” in a strong limitation and demand style. As such, the present tense serves the purpose. The intention of such tense is to ensure that support levels beyond those in 1992 are not to be protected by the Peace Clause. Further, the US argument fails to recognize that the present tense is “present” only in respect of 1995, when the *Agreement on Agriculture* came into effect. It seeks to govern then “future” measures. Using the time of panel dispute resolution as the vantage point, as the United States argues, seriously limits the proviso’s scope to examining only measures current as of the time of dispute. Thirdly, the US interpretation that a comparison is only limited to the measures currently in effect drives a significant loophole into the treaty language, and seeks to remove the proviso requirement for measures that are not current during the year of dispute resolution. Such an interpretation would also be tantamount to placing a period of limitation within which a complaining member must seek dispute settlement against dispute-current measures only. Neither the loophole nor the period of limitation can be intended by the drafters. It follows therefore, while Article 13(b) requires a year-on-year comparison, that comparison is not limited to measure currently in effect. The issue of what measures are before this Panel are set out in the terms reference for this Panel.

**16. Question 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)?**

Reply

17. China proposes to address this question in two parts: one, does a failure by a Member to comply in a given year with the chapeau 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)? Two, does a failure by a Member to comply in a given year with 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)? In this respect, it is again useful to turn back to the elements in Article 13(b)(ii) and (iii), which read: "domestic support measures that fully conform to ... shall be exempt from actions ... , provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year". As discussed in China's answers to Question 12, both the chapeau and the proviso are two co-existing conditions, and breach of either will lead to loss of the exemption granted by these Articles.

18. For the first part, a failure by a Member to comply in a given year with the chapeau of Article 13(b) will not impact its entitlement to benefit in an earlier or a later year from the exemption from action. The chapeau requires that domestic support measures conform fully to provisions of Article 6. Articles 6.1 and 6.3 in turn provide that all non-green box domestic support measures of a Member are considered to be in compliance with Article 6 if the Member's "Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule" (emphasis added). The word "exceed" requires a comparison. The words "current", "corresponding" and "annual" indicate that the comparison is to be made on an annual basis between the level of support actually provided in a given year and annual bound commitment level in the same year as indicated in the Member's Schedule. A Member's actual level of support varies from year to year, so does a Member's annual bound commitment level. Therefore a factual comparison between the two in a given year shall not have any bearing on a comparison of different support levels in an earlier or later year.

19. In respect of the second part of the question, China would like to reiterate its answer to Question 12 that Article 13 (b) requires a year-on-year comparison between the annual level of support at issue and the level of support in 1992 marketing year. Whether domestic support measures in a given marketing year exceeds same in 1992 marketing year is a matter of fact. The level of support in each given year challenged shall be compared separately to same in the 1992 marketing year. A factual conclusion on the "excess" issue for measures in one year certainly shall not preclude an examination of a different set of facts in another year.

**20. 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)?**

Reply

21. The chapeau of Article 13(b) requires compliance with Article 6 for the purpose of determining whether Peace Clause protection is available. As discussed in China's answers to Question 13, Article 6 provides that a Member's Current Total AMS in any year shall not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule. In other words, in considering the "exceed" issue, Current Total AMS, being the monetary sum value of all measures provided by a Member in a given year shall be compared against the corresponding annual bound commitment committed by the Member in its Schedule. Such a comparison disregards the issue of support to a specific commodity. Furthermore, the phrase "support to a specific commodity" only appears in the proviso of Article 13(b), but not in the chapeau. Therefore support to a specific commodity is not an issue under consideration by the chapeau of Article 13(b).

22. In respect of the proviso of Article 13(b), China believes a failure of a Member to comply thereof in respect of a specific commodity does not impact its entitlement to benefit in respect of other agriculture products from the exemption from action provided by Article 13(b).

23. For the purpose of this discussion, support measures can be classified into two categories: support measures provided exclusively to one specified product or those generally available to a number of specified products.

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, the term "specific commodity" requires break up and attribution of the general budgetary outlay to each specific product for comparison under the proviso. For the purpose of this case, only the portion of outlay that was used for upland cotton is relevant for that comparison. Outlays broken up for other products covered by the same programme is not at issue before this Panel. In addition, terms of reference governing this Panel procedure does not require the Panel to review measures involving other products.

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

Reply

27. China believes that a hypothetical deletion suggested would not change the fundamental meaning of Article 13(b)(ii).

28. China understands that the word "specific" is inserted to avoid a lump-sum treatment of measures generally applicable to a number of commodities. It is to emphasize that when calculating the amount of support granted to one commodity, the portion that is delivered to that specific commodity at issue shall be singled out and counted as part of the amount of all support granted to that specific commodity. Doing the comparison otherwise would render the requisite comparison as part of the proviso meaningless.

29. If the word "specific" were to be deleted, the proviso would read:

..., provided that such measures do not grant support to *a* commodity in excess of that decided during the 1992 marketing year. (emphasis added)

With "specific" deleted, while the emphasis effect may be diminished, the word "a" remains and the fundamental meaning of this proviso will not change. A comparison is still required for the support levels that are directly applicable and those attributable to upland cotton.

30. The above interpretation accords with the views of New Zealand and Australia that the term "support to a specific commodity" is not synonymous with the term "product-specific support"<sup>3</sup>. The term "product-specific support" focuses on "product-specific", pointing to a support programme designed for and provided exclusively to a specified product. On the other hand, the term "support to a specific commodity" is used to incorporate a level of support delivered to a *specific commodity*, combining both product specific support and the attributed portion of a much larger programme generally available to a number of products including upland cotton.

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<sup>3</sup> Paras. 23 – 24, Oral Statement by Australia, *United States – Subsidies on Upland Cotton*, WT/DS267, 24 July 2003; Para. 9, New Zealand's Oral Statement, *United States – Subsidies on Upland Cotton*, WT/DS267, 24 July 2003.

**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 used in a sense and for purposes different from that used in the proviso of Article 13(b)(ii) of the *Agreement on Agriculture*. References to “a product” or “subsidized product” in certain provisions of the *Subsidies Agreement* is not relevant at all to the meaning of “support to a specific commodity”.

33. Pursuant to Article 1.2 of the *Subsidies Agreement*, a subsidy shall be subject to WTO disciplines only if its availability is restricted to specified recipients, i.e. to a *specific enterprise or industry or a group of enterprises or industries*. (emphasis added) The word defines what falls under WTO discipline over subsidies. In contrast, the word “specific” used in the phrase “support to a specific commodity” of the Peace Clause proviso, as China explains in its answers to Question 16, is an emphasis for calculating year on year support levels on a product basis. The latter is only an indicator for a method of calculation and comparison. The same word in the two different places carry with them separate meanings and purposes.

**34. Question 21. Please comment on Brazil’s assertion that “grant” and “decided” in Article 13(b)(ii) have broadly the same meaning. If so, why did the drafters not use the same term?**

35. Debate among the parties revolves around the word “decided” in the proviso of Article 13(b)(ii). The United States argued that its domestic support measures “did not decide on an outlay or expenditure amount in favor of upland cotton”; rather, it argued that “US measures ‘determined’” a per pound rate of support during 1992 marketing year while actual outlays or expenditures were known or completed after the marketing year’s end. As the actual outlay would come to its knowledge upon final accounting of the world prices, no amount of outlay was “decided” during the 1992 marketing year<sup>4</sup>.

36. In China’s opinion, the above US interpretation does not lend any utility to interpreting the proviso in Article 13(b)(ii). The proviso, of which “decided” is an element, serves, together with the chapeau, as a qualifier to the entitlement to exemption from actions. Were the US interpretation to prevail, no measure involving year end accounting for the calculation of expenditure would exceed “that decided during the 1992 marketing year”, as the former is not capable of measuring up to the 1992 level.

37. In support of the US reading, EC argued that Brazil’s the use of “decided” as opposed to “granted” is indication that use of budgetary outlays shall be ruled out; that “decided” implies one-off determination, not involving “deciding” countless applications for support under a particular programme; and that use of the word “during” in the same sentence means that “decided” may also cover future periods.<sup>5</sup> However, the EC in its arguments fails to point out expressly what should constitute the 1992 benchmark<sup>6</sup>.

38. Interpretation of the word “decided” shall be carried out “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”<sup>7</sup>. Drafters of this Article must be understood to have used the word to carry out the Article’s object and purpose, being a 1992 benchmark against which to measure whether certain supports are

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<sup>4</sup> Para. 94, *First Written Submission of the US*, 11 July 2003.

<sup>5</sup> Paras. 14 - 17, *Oral Statement by the European Communities*, 24 July 2003.

<sup>6</sup> Para. 19, *Ibid*.

<sup>7</sup> Article 31.1, *Vienna Convention on the Law of Treaties*.

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 generally available to a number of products including the product at issue, or product specific, do not overstep the 1992 marketing year level if it is to be protected by the Peace Clause exemption.

44. The United States argued that the comparison required should be between the “per pound rates” of product specific supports<sup>8</sup>. With respect, such an approach fails to recognize the thrust of the Blair House accord. In addition, while domestic support programmes may have specific designs, e.g. paid on per unit basis, such designs shall not guide how Article 13(b)(ii) should be interpreted. The Article has no reference at all to per unit calculation for the purpose of comparison.

45. If unit of production is to be accepted as an method for comparison in addition to absolute support level comparison, under Article 13(b)(ii), four possibilities exist. A decision as to whether a Member asserting affirmative defence is entitled to Peace Clause protection is possible only when both the absolute support level and the per unit support level are higher or lower than those during the

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<sup>8</sup> Paras. 82 – 87, US First Written Submission, *United States – Subsidies on Upland Cotton*, WT/DS267, 11 July 2003.

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,

[I]t must also be kept in mind that Article 17.14 of the *DSU* provides not only that Reports of the Appellate Body ‘shall be’ adopted by the DSB, by consensus, but also that such Reports ‘shall be unconditionally accepted by the parties to the dispute.’ Thus, Appellate Body Reports that are adopted by the DSB are, as Article 17.14 provides, ‘unconditionally accepted by the parties to the dispute’, and, therefore, *must be treated by the parties to a particular dispute as a final resolution to that dispute*. In this regard, we recall, too, that Article 3.3 of the *DSU* states that the ‘prompt settlement’ of disputes ‘is essential to the effective functioning of the WTO’.  
(emphasis added)

51. The word “that” appears to limit the binding force of Appellate Body report only to the parties in the case on which the Appellate Body’s report is made. Panels in other cases are not bound by any precedential effect of an earlier Appellate Body report, because the facts, parties and other circumstances of claim may be entirely different. Generally speaking, such an interpretation is widely accepted by commentators<sup>9</sup>.

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<sup>9</sup> John H. Jackson, “The Legal Meaning of a GATT Dispute Settlement Report: Some Reflections”, Towards More Effective Supervision by International Organization: Essays in Honour of Henry G. Schermers (Martinus Nijhoff Publishers, Dordrecht, Boston and London, 1994).

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<sup>10</sup> and the Appellate Body<sup>11</sup> 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)* and *this* case, *US – Subsidies to Upland Cotton*. Under the circumstances, there is no reason why “final resolution to that dispute” as reflected in *US – FSC (21.5)* should not be considered and taken by this Panel.

53. In respect of the term “disputes” under Article 12 and Appendix 3 of the *DSU*, it is simply used in the general context of limiting participation to only parties to a dispute for the purpose of assisting panels in organizing their respective working procedures. Meaning and interpretation of the term “dispute” lends no support to interpretation of the Appellate Body’s exclamation in *US-Shrimp (21.5)* that its report in a specific case “must be treated by the parties to a particular dispute as a final resolution to that dispute”. Therefore, China believes that the term “dispute(s)” used in Article 12 and Appendix 3 of the *DSU* is not helpful for interpretation of the Appellate Body’s statement.

54. Article 9.3 of the *DSU*, on the other hand, is part of *DSU* Article 9 which deals with procedures for multiple complainants. It is an attempt to consolidate panel proceedings while the matter at issue has been challenged by more than one Member. Specifically, Article 9.3 reads:

If more than one panel is established to examine the complaints related to the same matter, to the greatest extent possible the same persons shall serve as panelists on each of the separate panels and the timetable for the panel process in such disputes shall be harmonized.

The Article seeks, to the extent possible, uniformity and consistency in panel reasoning and conclusions, in the event that more than one panel is established, by having the same jurists sitting on separate panels. The requirement for having the same panelists and harmonization of panel processes, on the other hand, is only capable of being carried out if the first panel’s proceedings were on-going.

55. For the current case, direct application of Article 9.3 is practically impossible. While complaints raised by Brazil in this case do cover the same ETI Act of the United States which was the subject matter of *US – FSC (21.5)*, the panel in the latter case completed its proceedings as early as 29 January 2002. In addition, the complaint by Brazil involves a whole plethora of US measures, of which the US ETI Act was only one. The majority of the measures challenged by Brazil were not dealt with by the panel in *US – FSC (21.5)*.

56. Having said that, China believes that the spirit of Article 9.3 is still of guidance value. Since the ETI Act challenged by Brazil in this case is exactly the same challenged by the EU in *US – FSC*

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<sup>10</sup> Panel Report, *US - FSC (21.5)*, WT/DS108/RW, adopted on 29 January, 2002.

<sup>11</sup> Appellate Body Report in *US - FSC (21.5)*, AB-2002-1, WT/DS108/AB/RW, adopted on 29 January 2002.

(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 find 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

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## 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? 3<sup>RD</sup> 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*.<sup>1</sup> 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.

2. 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.<sup>2</sup> 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.<sup>3</sup>

3. 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.

## II. 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*. 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

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<sup>1</sup> Australia's Oral Statement, para. 18.

<sup>2</sup> 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.

<sup>3</sup> 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.

Answer

4. The two words have slightly different meanings, as is suggested by the use of the conjunctive “and”. “Defined” means “having a definite or specified outline, or form; clearly marked, definite”<sup>4</sup> and thus implies, in terms of interpretation of paragraph 6, that the base period for any measure which is claimed to be green box must be set down in the measure itself. “Fixed” is defined as “definitely and permanently placed or assigned, stationary or unchanged in relative position, definite, permanent lasting”<sup>5</sup> and suggests that the base period for a particular measure cannot be changed at a later date. In other words, a Member may define a base period by means of a formula whereas a fixed base period implies that the years chosen for the base period do not change.

5. Decoupled support within a WTO Member need not take the form of a single measure, but may involve several measures. The first sentence of Paragraph 1 of Annex 2 refers to “domestic support measures”. Different measures may have different base periods, and a single measure may have several different base periods.<sup>6</sup> Each measure will, of course, have to be judged against the basic and policy specific criteria set down in Annex 2. However, it would defeat the objective of Annex 2 paragraph 6 if a Member could adopt repeated, practically identical measures, in respect of which farmers are aware that they may update the base period. If a farmer knows that a base period is going to be updated, and knows the type of production that will qualify for payments, a WTO Member inevitably encourages the growth of a particular crop, cannot be considered to have decoupled support from production and inevitably creates trade or production distorting effects.

6. The European Communities also refers the Panel to its response to question 11.

**Q3. 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. 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

Answer

7. In the view of the European Communities, the word “a” indicates that it is for the Member concerned to choose a base period, rather than the base period be fixed for all WTO Members.

8. “The” in paragraphs 6(b),(c) and (d) refers to the base period or periods established for eligibility for payments in paragraph 6(a).

9. There are notable differences between these phrases and the phrase “based on the years 1986 to 1988” in Annex 3. First, Annex 3 refers to an already defined and fixed period. Second, the reference period 1986-1988 refers to all measures taken by all Members, and not to specific measures which are intended to conform to Annex 2 taken by specific Members.

**Q4. How often can a Member define and fix a base period in accordance with paragraph 6 of Annex 2 of the *Agreement on Agriculture*? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

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<sup>4</sup> The New Shorter Oxford English Dictionary, 1993.

<sup>5</sup> The New Shorter Oxford English Dictionary, 1993.

<sup>6</sup> For instance, in the experience of the European Communities, where decoupled payments are based on past payments of production aids, and not all production aids are brought under a decoupled scheme, it must be envisioned that new products could be brought into the decoupled payment scheme, with the possibility that such payments are based on a different base period.

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, if 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? 3<sup>rd</sup> 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 are two sets of "criteria". The first is the "basic criteria" set out in subparagraphs (a) and (b) of paragraph 1, and the second is the "policy-specific criteria" set out in paragraphs 2 to 13. This understanding is confirmed by the text of paragraph 5 of Annex 2, which refers to the "basic criteria" and the "specific criteria". Thus, Articles 6.1 and 7.1 of the *Agreement on Agriculture* refer to the basic and policy specific criteria set out in Annex 2.

15. The European Communities has already set out its understanding of the term "accordingly" in its Third Party Written Submission.<sup>7</sup> In the European Communities view, the term "accordingly" is

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<sup>7</sup> First Third Party Submission of the European Communities, 15 July 2003, para. 20. The European Communities recall, in this context, the opinion of Professor Desta set out in footnote 19 to para. 20.

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.<sup>8</sup>

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 are intended to express the principle set out in the first sentence. Moreover, had the negotiators intended that the first sentence be a self-standing obligation, rather than use the term “accordingly” they would have used the term “additionally” or “in addition”, or a synonymous term.

17. Further support for this view can be found in the frequent use of the term “accordingly” in the WTO Agreement. A survey of the term’s use suggests that it links a general statement, often recognising that a particular situation causes specific effects, with a right or obligation to take some type of action set out in an ancillary sentence.<sup>9</sup> These general statements are not such as to impose specific obligations. The Appellate Body had occasion to consider the relationship between such provisions in the *Turkey-Textiles* dispute (Articles XXIV.4 and XXIV.5 GATT). It concluded:

The chapeau of paragraph 5 of Article XXIV begins with the word "accordingly", which can only be read to refer to paragraph 4 of Article XXIV, which immediately precedes the chapeau.

[..]

57. According to paragraph 4, the purpose of a customs union is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries. [...] Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5. For this reason, the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of customs unions set forth in

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<sup>8</sup> Australia’s Oral Statement, para 35. Oxford English Dictionary, p. 15. Australia refers to the first sense of the word “accordingly” which is preceded by the symbol “=” which indicates that a particular usage is obsolete (see Abbreviations and Symbols, page xxvi).

<sup>9</sup> See Articles II.6(a), III.9, XII.3(d), XVI.3, XVIII.5, XXIV.5 GATT 1994, together with Ad Article III and Ad Article XXVIII.4 to GATT 1994, Articles 2.1 and 11 of the Dispute Settlement Understanding, Article A(i) of the Trade Policy Review Mechanism, Article 12.8 of the Agreement on Technical Barriers to Trade, Article 1 of the GATS Annex on Telecommunications and Article 5.1 of the Agreement on Textiles and Clothes.

paragraph 4. The chapeau cannot be interpreted correctly without constant reference to this purpose.<sup>10</sup> (emphasis added)

18. The Appellate Body has, consequently, recognised the linking function of the word “accordingly”, and the fact that provisions which may be linked to later provisions through the use of the word “accordingly” may not impose separate obligations.

19. The European Communities would also point out that the Appellate Body has found that other provisions (e.g. Article III.1 GATT) which contain general principles are set up as “a guide to understanding and interpreting the specific obligations contained” in other provisions (e.g. Article III.2 and the other paragraphs of Article III).<sup>11</sup> Such provisions do not, however, impose additional obligations supplemental to the specific obligations, unless expressly stated.<sup>12</sup>

20. 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.

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

Answer

21. 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.

**Q8. 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**

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<sup>10</sup> Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (“*Turkey – Textiles*”), WT/DS34/AB/R, adopted 19 November 1999, paras. 56 and 57 (emphasis added). Note that the Panel also found that Article XXIV.4 was “not expressed as an obligation” (Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (“*Turkey – Textiles*”), WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, para. 9.126).

<sup>11</sup> 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.

<sup>12</sup> 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.

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)? 3<sup>rd</sup> 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. Second, WTO Members, when designing measures intended to conform to Annex 2, will be required to attempt to identify the effects of such measures. Such a task is often only feasible on an *ex post facto* basis. The correct classification of measures is a vital element for a Member to ensure that it respects its domestic support ceilings. Requiring a Member to measure effects diminishes the ability of a Member to ensure correct classification. Such an interpretation should, therefore, be avoided.<sup>13</sup>

24. It is rather remarkable, had the drafters intended that the first sentence of paragraph 1 be a self-standing obligation, that no indication of how such effects are to be measured was included in the *Agreement on Agriculture*. It is far from obvious how the effects of a measure on production and/or trade is to be measured. Nor is it clear how it can be decided that a particular effect can be considered as going beyond “minimal”. This can be contrasted with Article 6.3 of the *SCM Agreement* where the negotiators set out with some precision certain criteria deemed to cause serious prejudice to the interests of another Member. This leads to the inevitable conclusion that the criteria by which a Member or a panel is required to determine whether a measure has more than minimal trade or production distorting effects are the basic and policy specific criteria set out in Annex 2.

25. Article 13(b) is one element of a complex series of arrangements intended to provide legal security and certainty to Members who have embarked on a process of agricultural reform. It is designed to ensure that a Member may design its domestic support measures in such a way as to ensure that they do not provide support in excess of that decided in 1992 in order that it be exempted from the actions listed in Article 13(b). This requires a Member to be able to classify its measures as green box, other exempt policies, or as amber box. Only by being sure of its classification can a Member ensure that it maintains the protection provided by Article 13(b). This is one reason why the criteria for treatment as green box, or as another exempt measure, are so precisely defined. (Other exempt measures are precisely defined in Articles 6.4 and 6.4 of the *Agreement on Agriculture*). Consequently, bringing an effects test into an analysis of green box compatibility would make it very difficult for a Member to be sure that it remains within the level of support decided in 1992 and would therefore render nugatory the security and predictability necessary to permit the process of agricultural reform initiated by the Agreement on Agriculture.

**Q10. If the first sentence of paragraph 1 of Annex 2 is not a stand-alone obligation, then must new, non- or minimally trade-distorting measures that do not conform to the criteria listed in**

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<sup>13</sup> See, in this sense, First Third Party Submission of the European Communities, para. 24.

**Annex 2 be classified as non-Green Box? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

Answer

26. The European Communities is not convinced that “non- or minimally trade-distorting measures” might exist which would not be covered by Annex 2. Annex 2 has at least two paragraphs which are designed as “catch-all” provisions. Paragraph 2 of Annex 2 acts as a “catch-all” for general service programmes not involving direct payments to producers or processors.<sup>14</sup> Paragraph 5 acts as a “catch-all” for all direct payments.<sup>15</sup> Moreover, Annex 2 is designed to cover all domestic support measures which are deemed to have no or at least minimal trade-distorting effects. Consequently, it would seem surprising if a non- or minimally trade-distortive measure would not meet the criteria of Annex 2.

27. In the hypothesis that a measure which had no or minimal trade-distorting effects did not conform to the criteria in Annex 2 the European Communities would conclude that it could not be considered as Green Box support. As the European Communities explained in its Third Party Submission, rather than defining those domestic support measures which were to be subject to reduction commitments, the negotiators of the *Agreement on Agriculture* chose to define all those measures which were not to be subject to reduction commitments – hence Annex 2.<sup>16</sup> Such a result does not run counter to the objectives of the *Agreement on Agriculture* since it ensures the security and predictability of the reform process.

**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. 3<sup>rd</sup> parties, in particular, Australia, Argentina, Canada, EC, NZ**

Answer

28. The European Communities considers that the first sentence of paragraph 1 of Annex 2 sets out the general purpose of Annex 2 and therefore informs the interpretation of the criteria in Annex 2. It is relevant to the interpretation of paragraph 6 in that it should be considered to be part of the context of paragraph 6. Nevertheless, while the first paragraph informs the interpretation of paragraph 6 it cannot detract from the words actually used in paragraph 6.<sup>17</sup> As the Panel considers its interpretation of the words used in paragraph 6, it can take account of the purposive language of the first sentence of paragraph 1.

29. There are two issues which the Panel must resolve with respect to direct payments – the reduction of payments where certain crops are grown and the updating of base periods.

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<sup>14</sup> The third sentence of paragraph 2 reads “[S]uch programmes, which include but are not restricted to the following list, shall meet the general criteria in paragraph 1 above and policy-specific conditions where set out below [...]”.

<sup>15</sup> The second sentence of paragraph 5 reads “[w]here exemption from reduction is claimed for any existing or new type of direct payment other than those specified in paragraphs 6 through 13, it shall conform to criteria (b) through (e) in paragraph 6, in addition to the general criteria set out in paragraph 1.”

<sup>16</sup> First Third party Submission, paras. 19 & 20. Obviously, some other exempted support measures are defined in Article 6 of the *Agreement on Agriculture*.

<sup>17</sup> 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.

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 payment prevents subsidised farmers from potentially upsetting the market equilibrium, and thus serves to prevent effects on trade or production in the market for crops for which payment is reduced. Seen the other way, not ensuring such a reduction would allow subsidised farmers to grow the relevant crops and thus upset the historical market equilibrium with potential effects on trade and production. In the light of the first sentence of paragraph 1, the only possible application of Article 6(b) to payment reductions imposed where certain crops are grown is to find that such reductions are not such as to make the payment based on a type of production.

31. The situation is rather different with respect to the updating of base periods. The European Communities considers that where farmers know that base periods will be updated, and that the production of certain crops will give them a greater entitlement to support in a later period, there will be a production distorting effect. Such updating is clearly inconsistent with notions set out in the first sentence of paragraph 1 since knowledge of such updating will incite farmers to produce more of certain crops which qualify for support and thus will have effects on production.

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

Answer

32. The European Communities does not consider that Article 13(b) requires a year-on-year comparison. It permits such a year-on-year comparison and given that support is generally expressed in annual amounts, appears a reasonable basis for making such a comparison. In considering this issue, the Panel must compare two elements. The first is the domestic support measure challenged. The second is, at least for Article 13(b)(ii), support “decided” in an earlier period.

33. We examine first the domestic support measure challenged. In order to benefit from the protection of Article 13 a measure must conform to the provisions of Article 6 and must “not grant support” in excess of that decided in during the 1992 marketing year. The European Communities interprets the present tense of “not grant support” as requiring the Panel to determine the support at the time the measure is challenged when Panel is asked to determine whether Article 13 is applicable. Inevitably, such a determination requires that the Panel consider a specific period, which is comparable with an earlier period. The European Communities considers that the Panel has some discretion in choosing a specific period, although it is clear it must be as close as possible to the time of the dispute. However, since the Panel must consider the support granted it must choose a period for which data is complete. Given Article 1(i) of the *Agreement on Agriculture*, the period chosen may well be based on the calendar, financial or marketing year of the Member complained against.

34. In respect of support “decided”, the Panel must consider the nature of the support decided during the 1992 marketing year. As the European Communities has explained at length elsewhere, the relevant element for comparison is not the support actually granted for the 1992 marketing year – rather it is the support decided. Consequently, in each case, the element for comparison must depend on the decision made during the 1992 marketing year. As a function of that decision, the Panel will

have to choose a period which is comparable with the most recent period. This may well be a marketing year, but need not be so.

**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)? 3<sup>RD</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Answer

35. Failure to comply with Article 6 of the *Agreement on Agriculture* or granting support in excess of that decided in 1992 in a given year does not impact a Member's entitlement to benefit from the protection of Article 13(b) in a later (or earlier) year, provided that the Member concerned complies with Article 6 of the *Agreement on Agriculture* and does not grant support at present in excess of that decided during marketing year 1992. This is clear from the present tense of "do not grant support" which makes it clear that the comparison must be with the support granted in the most recent period.

**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)? 3<sup>RD</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Answer

36. No. A failure to maintain support granted within the level decided during marketing year 1992 in respect of a specific commodity would not affect the availability of Article 13(b) in respect of other commodities, provided that support granted to that specific commodity was not in excess of that decided during 1992.

**Q15. Is there any basis on which counter-cyclical payments could be considered product-specific? 3<sup>RD</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Answer

37. The European Communities considers that, since counter-cyclical payments are paid as a function of fluctuations in the price of different commodities with respect to target prices also specified by commodity, they should be considered product specific.

**Q16. If the word "specific" were deleted from Article 13(b)(ii), would this change the meaning of the subparagraph? 3<sup>RD</sup> parties, in particular Australia, Argentina, Benin Canada, China, EC, NZ**

Answer

38. Yes. Article 13(b)(ii) refers to product specific support. It does not refer to all support which may be attributed to a product. The use of the word "specific" has meaning, because it makes it clear that the support in question is that granted or decided in respect of a specific product, rather than that granted or decided in respect of all products and which could arguably be attributed to a product.

**Q17. 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? 3<sup>RD</sup> 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.<sup>18</sup>

**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? 3<sup>rd</sup> 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? 3<sup>rd</sup> 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”.<sup>19</sup> “Decided” is the past tense of the verb “decide”

<sup>18</sup> EC Oral Statement, 24 July 2003, para. 23.

<sup>19</sup> The New Shorter Oxford English Dictionary, 1993, p. 1131.

which means “come to a determination or resolution *that, to do, whether*”.<sup>20</sup> 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.<sup>21</sup> 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? 3<sup>rd</sup> 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 the support granted should not be calculated on the basis of the AMS methodology set out in Annex 3. Indeed, Article 1(a) of the *Agreement on Agriculture* refers to AMS as “the annual level of support” (emphasis added).

49. For the support decided AMS-like criteria should be used. This would take into account the reference to AMS as the annual level of support, but would also recognise that Article 13(b)(ii) refers to the support “decided” rather than granted. Crucially, the support decided must be considered as that which it was decided to provide during the 1992 marketing year. This must be determined on a case-by-case basis. It should be determined on the basis of the information available to the decision

<sup>20</sup> The New Shorter Oxford English Dictionary, 1993, p. 607. Italics in the original.

<sup>21</sup> The main change made in the second Blair House Agreement, in respect of Article 13(b) was the extension of the implementation period for the purposes of the Article 13(b).

makers. It may be that only a certain amount of production would be eligible,<sup>22</sup> or that the decision makers had production estimates at their disposal, and thus knew the extent of the support that was being decided. Alternatively, the amount of support decided could also be determined from budgetary acts, preparing expenditure for future years, in which the decision making authorities would have knowledge of the support they wished to grant, and the quantity of production which would likely enjoy such support. Using such a basis, it would be possible to use AMS-like criteria. AMS-like criteria can be used because it will often be possible to establish, for certain measures, a gap between the applied administered price and the internal or external fixed reference price<sup>23</sup> and establish, on the basis of information available to the decision makers, the amount of production which was eligible, or which was estimated. For other measures, it may also be possible to use appropriation or budgetary decisions.

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

Answer

50. The European Communities considers that the Panel should use AMS for the most recent period, and an AMS - like calculation for calculating the support decided during the 1992 marketing year, as explained in our response to question 22.

**Q24. Please provide any written drafting history which could shed light on why the proviso was added to what is now Article 13(b)(ii) of the *Agreement on Agriculture* and, in particular, why the words "grant" and "decided" were used EC**

Answer

51. As the European Communities has noted above, the current text of Article 13(b)(ii) formed part of the first Blair House Agreement of November 1992. We have annexed the text which resulted from these negotiations<sup>24</sup>, together with the relevant sections of the "Dunkel Draft", which were replaced by Article 13(b)(ii).<sup>25</sup>

52. The European Communities also considers that it may assist the Panel to have a copy of some of the key decisions reforming the EC's Common Agricultural Policy adopted during 1992. Thus, we have annexed Council Regulation (EC) No. 1766/92 on the common organisation of the market in cereals and Council Regulation (EC) No. 1765/92 establishing a system of compensatory payments.<sup>26</sup>

**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". 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Answer

53. The European Communities finds some merit in such an interpretation. It would be consistent with the careful choice of the negotiators to use the word "decided" rather than the term "granted" or

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<sup>22</sup> For instance, because of quotas on eligible production or definitive budgetary ceilings.

<sup>23</sup> See para. 9 & 11 of Annex 3.

<sup>24</sup> Exhibit EC-1.

<sup>25</sup> Exhibit EC-2.

<sup>26</sup> Council Regulation (EC) No. 1766/92 on the common organisation of the market in cereals (Exhibit EC-3) and Council Regulation (EC) No. 1765/92 (Exhibit EC-4).

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

Answer

54. The European Communities notes that both the French and Spanish text also use the present tense.

**Q27. 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 that the Member has a zero base for the purposes of the comparison required under Article 13(b)(ii)? EC**

Answer

55. The European Communities does not consider that it is the full amount of support decided in 1992 for later years that should be taken into account. Such an approach might not be feasible where the decision taken in 1992 was an open-ended one. This approach also sits uneasily with the practice in the *Agreement on Agriculture* of expressing support on an annual basis. Since the regulation of agricultural production takes place on a yearly basis, it seems unlikely that a decision would be taken setting a maximum amount for a number of years without regulating how such support would be allocated between specific years.

56. The European Communities considers that the Panel should use a level of support readily comparable with the support currently granted. This may well be the support decided for a particular marketing year. If a decision was made in 1992 for future years, it would be to ignore the drafters intent to rule out the possibility that the support decided for later years is the relevant support.

57. The European Communities does not consider that it will ever be the case that a Member which provides subsidies can be said never to have made a decision in 1992 which would qualify under Article 13(b). At the very least, a Member would have decided, on the basis of its subsidy programmes, and the amount of eligible production and/or estimated production, to set aside a specific amount of budgetary appropriations for future years. If, however, a Member decided not to provide support to a specific commodity, the level of support for purposes of the comparison would be zero.

**Q28. In paragraph 13 of Australia's oral statement, you state that a "question" is: "could conditions of price competition for the purposes of a non-violation or impairment claim be**

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

58. 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.

### III. 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? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Answer

59. Export credits may involve the provision of "loans". Export credit guarantees, like other types of guarantees, normally involve an obligation to cover losses resulting from defaults on guaranteed loans. If provided by a government, they may involve a "financial contribution" within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*.

**(b) How, if at all, would this be relevant to the claims of Brazil? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Answer

60. Whether or not export credit guarantees are "financial contributions" is directly relevant to Brazil's claim that GSM 102, GSM 103 and SCGP constitute "export subsidies" within the meaning of Article 3.1 (a) of the *SCM Agreement*.

61. It is also relevant, by way of context, for Brazil's claim that those programmes are "export subsidies" for the purposes of Article 10.1 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). 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Answer

62. The relationship between the Illustrative List and Article 3.1(a) is addressed specifically by footnote 5, which provides that

Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of the Agreement.

63. In this regard, the European Communities recalls the reasoning followed by the panels in *Brazil – Aircraft (21.5) I and II*<sup>27</sup>, which concluded that the first paragraph of item (k) of the Illustrative List does not provide *a contrario* an “affirmative defence”.

64. As noted by the panel in *Brazil – Aircraft (21.5) – II*, the Appellate Body’s statement relied upon by the United States “does not form part of the legal basis for its disposition of the appeal, nor did the Appellate Body explain its statement”<sup>28</sup>.

65. Item (j) of the illustrative list describes circumstances in which, *inter alia*, export credit guarantee programmes may constitute export subsidies. In certain circumstances (e.g. where the Government is the only provider), it may be that the requirement set out in item (j) – that export credit guarantees must not be provided at premium rates which are inadequate to cover the long-term operating costs and losses of the programme – represents the appropriate benchmark for determining that an export subsidy does not exist.

**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? . 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Answer

66. Both.

**Q32. 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. . 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Answer

67. The European Communities agrees that Article 14(c) may be relevant context for the interpretation of Article 1.1(b) of the *SCM Agreement*, where the subsidy consists of a loan guarantee. However, Article 14(c) may not be applicable if the government is the only supplier of a certain type of service and no comparable type is provided by other suppliers. In that case it may be necessary to resort to alternative benchmarks, such as the one set out in item (j) of the Illustrative List. This would depend on the particular circumstances of the case.

**Q33 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." . 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

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<sup>27</sup> Panel report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS64/RW, (“Brazil – Aircraft (21.5) – I”), paras. 6.24-6.67; Panel report, *Brazil – Export Financing Programme for Aircraft – Second Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW/2, (Brazil – Aircraft (21.5) - II, paras. 5.269-5.275.

<sup>28</sup> Panel report, *Brazil – Aircraft (21.5) – II*, footnote 214.

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.<sup>29</sup>

**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"? 3<sup>rd</sup> 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? 3<sup>rd</sup> 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 subsidies 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) 3<sup>rd</sup> 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)

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<sup>29</sup> 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*, 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. 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Answer

72. The European Communities considers that it is only the operation of export credit guarantees as export subsidies which is regulated by the *Agreement on Agriculture*. Other elements of the provision of export credit guarantees are not regulated by the *Agreement on Agriculture*. To the extent that the scenario developed by the Panel would lead to the provision of export subsidies which circumvent, or which threaten to circumvent, a Member's export subsidy commitments the European Communities considers that it cannot be reconciled with Article 10.1 of the *Agreement on Agriculture*.

- (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)? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Answer

73. The European Communities disagrees with the US argument that there are no disciplines on export credit guarantees. The discipline applying to export credit guarantees, where they operate as export subsidies, is that they should not be provided in a manner inconsistent with Article 10.1. If they are provided inconsistently with Article 10.1 then they are not protected by Article 13

#### IV. 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, 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)<sup>30</sup>, 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?<sup>31</sup> . 3<sup>rd</sup> 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." . 3<sup>rd</sup> 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.. 3<sup>rd</sup> 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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<sup>30</sup> [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.<sup>30</sup> Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances. Where a 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."

<sup>31</sup> 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".<sup>31</sup>

Article III.4 GATT. The European Communities has already provided elements of a response in its oral statement.<sup>32</sup> 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 *Agreement on Agriculture* does not define "domestic support".

78. AMS is the measurement of domestic support. AMS is defined as "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than [that exempted etc]." This is very general – it covers all support in favour of agricultural producers. This broad scope of domestic support measures which can be maintained consistently with the *Agreement on Agriculture* is confirmed by Article 6.1 which states that the domestic support reduction commitments "shall apply to all of its [i.e. the Member's] domestic support measures in favour of agricultural producers [...]". Paragraph 1 of Annex 3 on the calculation of the AMS refers to AMS being calculated "on a product specific-basis for each basic agricultural product receiving market prices support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment". (emphasis added)

79. Consequently, the range of domestic support measures which a Member may maintain (consistent with reduction commitments) is very broad and is only limited by the condition that such support must be in favour of agricultural producers. As the European Communities has noted, paragraph 7 of Annex 3 explicitly states that "measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products".<sup>33</sup> The European Communities considers that the term "benefit" used here must be regarded as being synonymous with "favour" in the sense of "in favour of agricultural producers". Moreover, it is clear that by "measures directed at agricultural processors" the negotiators intended subsidies which were paid to processors, where the benefit went to the agricultural producer. Consequently, in light of the broad definition of "domestic support" and the specific reference to domestic content subsidies in paragraph 7 of Annex 3, the European Communities considers that a Member is entitled to maintain domestic content subsidies consistently with the *Agreement on Agriculture*.

80. Second, in response to the Panel's question, the effect of finding that domestic content subsidies are provided consistently with the *Agreement on Agriculture* would be that they cannot be found inconsistent with either Article 3.1(b) of the *SCM Agreement* or Article III.4 GATT 1994. Article 21.1 of the *Agreement on Agriculture* states that "the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the

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<sup>32</sup> Paras. 34 to 38 of the EC's Oral Statement (as delivered). The Panel's reference to para. 32 corresponds to the text provided at the third party session.

<sup>33</sup> In terms of negotiating background, it may be useful to the Panel to note that paragraph 7 of Annex 3 was subject to negotiation during the period in which a Panel had ruled that the EC's payments to oilseed processors was not covered by Article III.8(b) GATT 1947 and were consequently inconsistent with Article III.4 GATT 1947 (*European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* Report of the Panel (L/6627 BISD 37S/86) adopted on 25 January 1990. That the negotiators retained this text must therefore be considered as a clear sign that they intended to permit Members to maintain such subsidies, subject to reduction commitments, in the *Agreement on Agriculture*.

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*.<sup>34</sup>

81. 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* to the *SCM Agreement* or GATT 1994. Such an interpretation directly contradicts Article 21.1 of the *Agreement on Agriculture*.

82. Indeed, it can be pointed out that applying Article 3.1(b) of the *SCM Agreement* and Article III.4 GATT to domestic content subsidies provided consistently with the *Agreement on Agriculture* would lead to stricter disciplines being applied to domestic subsidies for agriculture than are applicable to domestic subsidies for industrial goods. If Article 3.1(b) and Article III.4 were to apply, domestic subsidies for agricultural products would be subject to reduction commitments and Article 3.1(b) *SCM Agreement* and Article III.4 GATT. However, domestic subsidies for industrial products are not subject to reduction commitments. Since the *Agreement on Agriculture* establishes “a basis for initiating a process of reform of trade in agriculture”, it would seem contradictory to find that domestic support for agriculture is in fact subject to stricter obligations than domestic support for other industries. This explains the “subject to” language of Article 21.1 of the *Agreement on Agriculture*. Article 21.1 and the *Agreement on Agriculture* more generally can also be compared with the other sectoral agreement included in Annex 1A of the WTO Agreement. The *Agreement on Textiles and Clothing* explicitly provides, in its Article 9, that the textiles and clothing sector is to be fully integrated into the GATT 1994. The *Agreement on Agriculture* has no such language, and Article 21.1 runs directly counter to this notion. It cannot be lightly assumed that the negotiators, while providing for the possibility to maintain domestic content subsidies, intended that such subsidies also be subject to rules which effectively makes it impossible to maintain such subsidies.<sup>35</sup>

83. The Panel should therefore reject Brazil’s arguments that domestic content subsidies granted in favour of agricultural producers can be found to be inconsistent with Article 3.1(b) of the *SCM Agreement* and Article III.4 GATT 1994.

## V. ETI ACT

**Q41. 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? Argentina, China, EC, NZ**

### Answer

84. The European Communities does not consider that either the Peace Clause or Article 6 of the *Agreement on Agriculture* is relevant. The ETI Act provides export subsidies.<sup>36</sup> Article 6 of the *Agreement on Agriculture* does not apply to export subsidies, and therefore the US would not have been in a position to invoke it.

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<sup>34</sup> Oral Statement, para. 38.

<sup>35</sup> See, in a similar sense, 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. 165.

<sup>36</sup> The Appellate Body confirmed the panel’s findings of a violation of Article 3.1(a) of the *SCM Agreement* see Article 231.5 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. 120.

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*.<sup>37</sup> 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)*.<sup>38</sup>

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.<sup>39</sup> 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.<sup>40</sup>

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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<sup>37</sup> 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.

<sup>38</sup> Para. 97, Article 21.5 Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia* ("United States – Shrimp (21.5)"), WT/DS58/AB/RW, adopted 21 November 2001.

<sup>39</sup> *United States – Shrimp (21.5)*, para. 96.

<sup>40</sup> The Appellate Body made a similar finding with respect to a claim not pursued before a panel. See, Report of the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted on 24 April 2003.

90. The European Communities does not consider it material that the present case concerns a party (Brazil) which was not party to the FSC dispute. Article 17.14 states that a “party to the dispute” must unconditionally accept the findings of the Appellate Body adopted by the DSB. Of the parties before the Panel, the United States is a party to the FSC dispute, and must, therefore, unconditionally accept the Appellate Body’s findings in that dispute. This is further reinforced by Articles 3.2 and 3.3 DSU which state that the dispute settlement system must provide security and predictability and promote prompt settlement of disputes. Consequently, given the United States is required to unconditionally accept the findings in the Article 21.5 procedure, the European Communities believes that Brazil, by adopting the EC’ claims and the Appellate Body’s findings in the FSC dispute, would make a sufficient case to compel the Panel to find that the ETI Act is inconsistent with the US’ WTO obligations in this dispute.

## VI. QUESTIONS FROM OTHER THIRD PARTIES ADDRESSED TO THE EUROPEAN COMMUNITIES

### Questions from Australia to the European Communities

**Q43. Would the European Communities please explain why, in its view, the ordinary meaning of the phrase “shall meet the fundamental requirement” as it appears in the first sentence of paragraph 1 of Annex 2 to the *Agreement on Agriculture* does not give meaning and effect to all provisions of that agreement.<sup>41</sup>**

#### Answer

91. The European Communities did not state that the phrase “shall meet the fundamental requirement” does not give meaning and effect to all provisions of that agreement. The question appears to be based on an erroneous characterisation of the EC’s position. In paragraph 17 of its First Written Submission the European Communities stated that the first sentence of Annex 2 did not create a free-standing obligation. This view is compelling when an interpreter considers the ordinary meaning of the terms, in their context, and in light of the object and purpose of the provision. The European Communities has explained this in some detail in its answers to the Panel’s questions 6-11 and in its previous submissions to the Panel.

**Q44. The European Communities argues that, under the “accepted canons of interpretation of international law”, “context and objective” require that the first sentence of paragraph 1 of Annex 2 to the *Agreement on Agriculture* be considered to set out an objective.<sup>42</sup> Would the European Communities please explain the legal authorities for its argument, having regard to relevant statements by the Appellate Body, particularly those in *Japan – Alcohol Taxes*.<sup>43</sup>**

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<sup>41</sup> [Original footnote to question] First Third Party Submission by the European Communities, paragraph 17.

<sup>42</sup> [Original footnote to question] Oral Statement by the European Communities, paragraph 25.

<sup>43</sup> [Original footnote to question] In *Japan – Taxes on Alcoholic Beverages*, Report of the Appellate Body, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pages 11-12, the Appellate Body said:

Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: “interpretation must be based above all upon the text of the treaty”.<sup>[...]</sup> The provisions of the treaty are to be given their ordinary meaning in their context.<sup>[...]</sup> The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions.<sup>20</sup> A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness ..<sup>[...]</sup> In *[US – Gasoline]*, we noted 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 the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility”.<sup>[...]</sup>

Answer

92. European Communities understands from Australia's question that Australia considers that the European Communities' interpretation of the first sentence of Paragraph 1 of Annex 2 would deprive the first sentence of effect.

93. Australia's implication is quite erroneous, and built upon an incomplete, examination of the Appellate Body's rulings. The European Communities interpretation does not deprive the first sentence of effect. Stating that the first sentence does not impose a self-standing obligation is not the same as stating that it is deprived of effect. Indeed, the Appellate Body has arrived at exactly the same conclusion with respect to other provisions containing purposive language, similar to that contained in the first sentence of paragraph 1. In *Japan – Alcoholic Beverages* the Appellate Body found:

Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways.<sup>44</sup> (emphasis added)

94. Moreover, the Appellate Body has also found that Article XXIV.4 GATT, which the Appellate Body qualified as "purposive language", was relevant for the interpretation of Article XXIV.5.<sup>45</sup> Clearly this gave a provision which had no operational effects, an effect, within the meaning of the Appellate Body's statements in *United States – Gasoline*.<sup>46</sup> Similarly, the European Communities has argued that while the first sentence of paragraph 1 does not impose a self standing obligation, it does set out the purpose of Annex 2 which informs the interpretation of other elements of Annex 2. (See the European Communities response to question 11 from the Panel).

**Q45. The European Communities argues that the omission of a reference to the "fundamental requirement" as set out in the first sentence of paragraph 1 of Annex 2 to the *Agreement on Agriculture* in paragraphs 5, 6 and 7 of that Annex provides "contextual support" to its argument that the first sentence sets out an objective.<sup>47</sup> Would the European Communities**

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*Footnote 20:* That is, the treaty's "object and purpose" is to be referred to in determining the meaning of the "terms of the treaty" and not as an independent basis for interpretation: ...

<sup>44</sup> 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, page 18.

<sup>45</sup> Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* ("*Turkey – Textiles*"), WT/DS34/AB/R, adopted 19 November 1999, para. 57.

<sup>46</sup> Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline* ("*United States – Gasoline*"), WT/DS2/AB/R, adopted 20 May 1996, page 23.

<sup>47</sup> [Original footnote to question] First Third Party Submission by the European Communities, paragraph 21.

please explain the legal authorities for its argument, having regard to its arguments and the Appellate Body's findings in *Argentina – Footwear Safeguard*.<sup>48</sup>

Answer

95. We refer Australia in part to the European Communities' answer to the previous question where the European Communities has explained that its interpretation of the first sentence of Paragraph 1 does not deprive the provision of effect. Second, the issue in *Argentina – Footwear Safeguards* was whether the panel had given any effect to Article XIX GATT.<sup>49</sup> The panel in that case erroneously concluded that because of the omission of a reference to unforeseen developments in the *Agreement on Safeguards* it need not give effect to this requirement set out in Article XIX GATT. As the European Communities has explained, by interpreting the first sentence of paragraph 1 as setting an objective informing the rest of Annex 2, the Panel would be giving effect to the first sentence.

**Questions from Argentina to the European Communities**

**Q46. In paragraph 18 of its Oral Statement, the European Communities state that Article 13 (b)(ii) and (iii) of the Agreement on Agriculture are clearly "not intended to set up a comparison between domestic support granted in 1992 and domestic support granted in a more recent period" and request the Panel to reject the equation of the term "decided" with the term "granted".**

**What would be, in the opinion of the EC, the appropriate benchmark in a hypothetical case in which a subsidizing Member has taken no decision on internal support during 1992 ?**

Answer

96. We refer Argentina to the European Communities' response to question 27.

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<sup>48</sup> [Original footnote to question] In *Argentina – Safeguard Measures on Imports of Footwear*, Report of the Appellate Body, WT/DS121/AB/R, the European Communities argued (paragraphs 38-44) on appeal, and the Appellate Body found (paragraph 88), that the Panel erred by:

fail[ing] to give meaning and legal effect to *all* the relevant terms of the *WTO Agreement*, contrary to the principle of effectiveness ... in the interpretations of treaties. [...] The Panel states that the 'express omission of the criterion of unforeseen developments' in Article XIX:1(a) from the *Agreement on Safeguards* 'must, in our view, have meaning'. [...] On the contrary, in our view, if they had intended to *expressly omit* this clause, the Uruguay Round negotiations would and could have said so in the *Agreement on Safeguards*. They did not.

<sup>49</sup> Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear* ("Argentina – Footwear Safeguards"), WT/DS121/AB/R, adopted 12 January 2000.

## ANNEX J-7

### NEW ZEALAND ANSWERS TO QUESTIONS FROM THE PANEL TO THIRD PARTIES

11 August 2003<sup>1</sup>

#### 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. 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

#### Reply

"Defined" and "fixed" mean two different things and impose two distinct and different requirements for a base period under paragraph 6(a) of Annex 2. "Defined" means "having a definite or specified outline or form".<sup>2</sup> "Fixed" means "definitely and permanently placed or assigned; stationary or unchanging in relative position; definite, permanent, lasting".<sup>3</sup> Accordingly a base period must have a definite and specified form that is permanent.

**Q3. 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. 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

#### Reply

"A" in the context of paragraph 6(a) refers to one single defined and fixed base period. "The" in "the base period" in the context of subsequent sub-paragraphs refers to the single base period required under paragraph 6(a). Paragraph 6(a), however, does not specify a particular base period – only that once it is determined it is fixed. On the other hand, Annex 3 specifies that the "fixed" base period in that instance must be the 1986-88 period.

**Q4. How often can a Member define and fix a base period in accordance with paragraph 6 of Annex 2 of the Agreement on Agriculture? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

#### Reply

Once, when a programme is first established. Thereafter, so long as the programme retains fundamentally the same elements, it should be considered to be the same programme and apply the same base periods.

**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**

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<sup>1</sup> New Zealand has not responded to questions not directed specifically to New Zealand.

<sup>2</sup> *The New Shorter Oxford English Dictionary*, Vol 1, Clarendon Press, Oxford (1993), page 618.

<sup>3</sup> *Ibid*, page 962.

**Agriculture have on the meaning of the preceding sentence? 3<sup>rd</sup> 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. 3<sup>rd</sup> 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 purpose of Article 13(b)? 3<sup>rd</sup> parties in particular Australia, Argentina, Canada, EC, NZ**

Reply

If the first sentence of paragraph 1 of Annex 2 is a stand-alone obligation it would allow effects-based claims of non-compliance with Annex 2. This is consistent with Article 13(b) because it means that the measures excluded from Annex 2 have a more than minimal distorting effect on trade or production, and as such they could potentially give rise to the kind of adverse effects to the interests of other Members that the *GATT 1994* and the *SCM Agreement* establish a right to address. As such those measures should not be exempt from reduction commitments and should be required to meet the requirements of Article 13(b) in order to be exempt from actions under the *Agreement on Subsidies and Countervailing Measures* (the “*SCM Agreement*”) and *General Agreement on Tariffs and Trade 1994* (the “*GATT 1994*”).

**Q10. If the first sentence of paragraph 1 of Annex 2 is not a stand-alone obligation, then must new, non- or minimally trade-distorting measures that do not conform to the criteria listed in Annex 2 be classified as non-Green Box? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, EC, NZ**

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. 3<sup>rd</sup> 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.<sup>4</sup>

**Q12. Where does Article 13(b) require a year-on-year comparison? 3<sup>rd</sup> 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)? 3<sup>rd</sup> 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)? 3<sup>rd</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

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<sup>4</sup> Third Party Submission of New Zealand, 15 July 2003.

Reply

No. The language of Article 13(b) makes it clear that the exemption from action applies to a “specific commodity”, which means that the eligibility for such exemption must be assessed on a product-by-product basis.

**Q15. Is there any basis on which counter-cyclical payments could be considered product-specific? 3<sup>RD</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Reply

Yes. The basis upon which counter-cyclical payments should be considered product-specific have been outlined in the First Written Submission of Brazil,<sup>5</sup> and highlighted in New Zealand’s Third Party Submission.<sup>6</sup>

**Q16. If the word "specific" were deleted from Article 13(b)(ii), would this change the meaning of the subparagraph? 3<sup>RD</sup> parties, in particular Australia, Argentina, Benin Canada, China, EC, NZ**

Reply

Not necessarily. The application of the rules of treaty interpretation to the provision, taking into account its object and purpose, would still support a conclusion that the relevant support was that granted to an individual commodity. The use of the word “specific” simply reinforces that interpretation.

**Q17. 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? 3<sup>RD</sup> parties, in particular Australia, Argentina, Canada, China, EC, NZ**

Reply

The *SCM Agreement* provisions cited would seem to shed little light on the meaning of “support to a specific commodity” in Article 13(b)(ii). Article 2 of the *SCM Agreement* sets out principles for determining whether a subsidy is specific to an enterprise or industry or group of enterprises or industries. Article 13(b)(ii) of the *Agreement on Agriculture* is concerned with the support granted to a specific commodity. The two assessments are unrelated. In relation to the second part of the question, the references to “a product” or “subsidised product” seem fully consistent with interpreting “support to a specific commodity” referred to in Article 13(b)(ii) as meaning support to a particular product.

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

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<sup>5</sup> Brazil’s First Submission to the Panel Regarding the “Peace Clause” and Non-“Peace Clause” Related Claims, 24 June 2003 (“First Written Submission of Brazil”), paragraphs 199-202 and 207-213.

<sup>6</sup> Paragraphs 2.17-2.13.

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? 3<sup>rd</sup> 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? 3<sup>rd</sup> 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? 3<sup>rd</sup> 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". 3<sup>rd</sup> 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? 3<sup>d</sup> 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? 3<sup>d</sup> 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). 3<sup>d</sup> 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).”<sup>7</sup>

**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? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Reply

The Panel should refer to both. The *SCM Agreement* provides both a general definition of an “export subsidy” (specifically the definition of a “subsidy” in the terms of Article 1 and the requirement of contingency upon export in the terms of Article 3) and an Illustrative List containing specific examples of export subsidies. Therefore Articles 1 and 3 and item (j) of the Illustrative List provide contextual guidance for the interpretation of the terms in Article 10.

**Q32. 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. . 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Reply

The Panel in Canada – Export Credits and Loan Guarantees<sup>8</sup> considered that Article 14(c) of the *SCM Agreement* provided contextual guidance for interpreting ‘benefit’ in relation to loan guarantees. In that case it was determined that the relevant benchmark for determining whether a loan guarantee conferred a “benefit” was whether there was “a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed ... and the amount that the firm would pay on a comparable commercial loan absent the ... guarantee.” This confirms that the appropriate point of reference for determining whether a “benefit” has been conferred is the marketplace, in this case the extent to which the premium rates charged on current export credit guarantees are lower than the corresponding financing rates that a commercial bank would normally require given a similar level of risk.

**Q33. 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." . 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Reply

Brazil’s statement goes toward a conclusion that a “benefit” is conferred in the terms of Article 1.1(b) of the *SCM Agreement*. It is significant because it indicates that either commercial lenders are not prepared to accept the risks associated with such guarantees or that the United States export credit programme is so big that it has forced any competition from commercial programmes out of the marketplace. For whatever reason, the United States export credit guarantee programmes

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<sup>7</sup> Report of the Panel, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS/222, paragraph 7.395.

<sup>8</sup> *Ibid*, paragraph 7.397.

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"? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Reply

“Claims paid” is one element of the calculation of the costs and losses of an export credit guarantee programme. Other elements to be taken into account would include, for example, costs and losses associated with reinsurance costs, administration costs and the costs of refinancing (i.e. the rescheduling (not the full amount, but the net present value of the losses)).

**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? 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

Reply

The drafters of the *Agreement on Agriculture* did not include export credit guarantees in Article 9.1 of the *Agreement* because export credit guarantees are not, *per se*, export subsidies. They may involve export subsidies, but this depends on whether they provide a benefit in relation to the marketplace.

**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) 3<sup>rd</sup> parties, in particular, Argentina, Canada, EC, NZ**

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

Reply

See New Zealand's answer to Question 33 above.

**"The programs are operated in a manner intended not to interfere with markets for cash sales. The programs 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

This statement simply supports Brazil's analysis in relation to the “benefit” and “export contingency” elements of the export credit guarantee programme.

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

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. 3<sup>rd</sup> 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<sup>9</sup>, affirmed by the Appellate Body,<sup>10</sup> 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)? 3<sup>rd</sup> 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,**

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<sup>9</sup> 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.

<sup>10</sup> 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? 3<sup>rd</sup> 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<sup>11</sup> 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." . 3<sup>rd</sup> 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.. 3<sup>rd</sup> 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

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<sup>11</sup> 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

**Q41. 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? Argentina, China, EC, NZ**

#### Reply

While it is open to the United States to claim exemption from action for such measures under the peace clause, the United States has no reduction commitments in respect of upland cotton and it cannot therefore provide export subsidies to upland cotton in a WTO-consistent manner.

**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**

#### Reply

References to "disputes" in the Dispute Settlement Understanding must be interpreted in context. Article 17.14 requires that parties to a dispute unconditionally accept the report of the Appellate Body once adopted by the Dispute Settlement Body ("DSB"). That acceptance is in the context of that particular dispute between those particular parties. However that does not preclude a Panel from finding that a *prima facie* case of WTO-inconsistency has been made out where a Member makes a complaint in relation to a measure that has previously been ruled to be WTO-inconsistent where that ruling has been adopted by the DSB and where the measure remains unchanged.

## ANNEX J-8

### PARAGUAY'S REPLY AS THIRD PARTY TO THE FOLLOWING QUESTION

11 August 2003

#### ARTICLE 13 OF THE AGREEMENT ON AGRICULTURE

26. 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-language text, or any other difference which might aid the Panel in interpreting these words?

#### Reply

In its analysis of the question raised by the Panel as to the period to be considered and the verb tense used, Paraguay is expressing a view based on both versions:

"(ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, **provided** that such measures **do not grant support** to a specific commodity in excess of that decided during the 1992 marketing year; and ...."

"ii) estarán exentas de medidas basadas en el párrafo 1 del artículo XVI del GATT de 1994 o en los artículos 5 y 6 del Acuerdo sobre Subvenciones, **a condición de que no otorguen** ayuda a un producto básico específico por encima de la decidida durante la campaña de comercialización de 1992; y ..."

As regards the verb tense used, the English version clearly calls for a present tense interpretation, as the Panel rightly points out.

It clearly reads "**provided** that such measures do not grant support". If we take the word "provided" as indicating the occurrence of an event ("**in the event**"), we must bear in mind that this would introduce conditionality.

The Spanish text expresses the conditionality in even clearer terms through the words "**a condición de que no otorguen**", a conditionality which introduces a notion of facts.

In Spanish, the verb is used in the present **subjunctive mode**, which according to the *Larousse Dictionary*, is the mode used to express possibility, as opposed to the indicative mode, which is the reality mode.

Although we consider that both versions indicate the present, it appears to us that the Spanish version of the sentence stresses conditionality, which must be given considerable weight in order to arrive at a correct interpretation.

In the case at issue, *the condition under which the measures shall be exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement* is that support should not be granted to a specific commodity in excess of that decided during the 1992 marketing year.

The 1992 marketing year provides the standard needed to carry out a proper comparison between support at different times, so that in our view, we should be considering the entire spectrum and taking a comprehensive view of the background information.

Paraguay concludes that it is the Panel's task to consider the period it deems suitable for determining the effects of this type of measure on world trade.

## 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<sup>1</sup>. 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*<sup>2</sup>, 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

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<sup>1</sup> The New Oxford Dictionary of English: "subject to: ... 2 dependent or conditionally upon".

<sup>2</sup> WT/DS60/AB/R, paragraph 65.

the AoA or that the AMS is broadly defined, as indicated by the EC<sup>3</sup>, 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.

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<sup>3</sup> Replies by the EC to question 40, paragraph 77.

## 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”.<sup>1</sup> “Meet” has a number of meanings, including “come into conformity with (a person, a person's wishes or opinion)” and “satisfy (a demand or need); satisfy the requirements of (a particular case); be able or sufficient to discharge (a financial obligation)”. The words “shall meet” in context mean that Annex 2 measures must conform to or satisfy an express stipulation. Australia has previously explained that a “fundamental requirement” is a primary or essential condition.<sup>2</sup> When used as a definite article as in the clause “shall meet the fundamental requirement”, the word “the” establishes the “fundamental requirement” as the express stipulation that Annex 2 measures must conform to or satisfy.<sup>3</sup>

In Australia's view, the normal rules of treaty interpretation do not permit the word “accordingly” to be interpreted so as to obviate a clear and unambiguous obligation. Australia agrees that the Appellate Body found in the *Turkey – Textiles* dispute, in the particular circumstances of GATT Article XXIV, that the word “accordingly” linked the purposive language of Article XXIV:4 to operative language in the specific obligations found elsewhere in Article XXIV. However, the first

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<sup>1</sup> *The New Shorter Oxford English Dictionary*, Volume 2, page 2808.

<sup>2</sup> Australian response to Question no. 7 from the Panel.

<sup>3</sup> Australia addressed the meaning of “the” in more detail in its response to question 3 from the Panel.

sentence of paragraph 1 of Annex 2 to the *Agreement on Agriculture* cannot be characterised as purposive. The Appellate Body's finding in the *Turkey – Textiles* dispute is not, and cannot be, a valid interpretative basis to say that because the word “accordingly” has a particular meaning in the context of GATT Article XXIV, that same meaning must apply wherever else the word “accordingly” appears.<sup>4</sup>

Panel question no. 9

It remains unclear to Australia what is meant by “effects-based claims” in the context of the Panel's question.

However, Australia notes that under the EC's interpretation there would be no limits to the amounts that a WTO Member could provide as Annex 2 support, even if such support had profound trade-distorting effects or effects on production. For example, the EC's interpretation would allow a Member to pay “decoupled income support” of such a magnitude that the support would provide the means for that Member's domestic producers to switch from dryland to irrigation production with resulting substantial increases in production and trade-distorting effects. Thus, even if the first sentence of paragraph 1 of Annex 2 of the *Agreement on Agriculture* were considered to express an objective, such an outcome would nevertheless be directly contrary to that objective. At the very least, the magnitude of Annex 2 payments must be able to be a factor in assessing whether Annex 2 domestic support measures “meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production”.

Further, the EC's argument that identifying the effects of such measures is often only feasible on an *ex post facto* basis is not convincing. First, even the EC argument concedes that in many, if not most, cases, it is feasible to identify the effects of such measures in advance. Secondly, even if the precise effects of such measures cannot be identified in advance, policy makers could draw on past experience and econometric analyses to determine whether certain types of payments would likely be distorting.

Finally, Australia considers that the “problems” pointed to by the EC that would be engendered by interpreting the first sentence of paragraph 1 as a freestanding obligation are no different to other situations, including under the *Agreement on Agriculture*. If another Member were to argue successfully in a dispute that a measure at issue was indeed an export subsidy, the responding Member could well be required to show “after the fact” that it is in compliance with its export subsidy reduction commitments under the *Agreement on Agriculture*.<sup>5</sup>

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<sup>4</sup> Australia considers that the Appellate Body's discussion of the meaning of “like products” in *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WTO DS135/AB/R, paragraphs 87-100, confirms this view.

<sup>5</sup> See, for example, *United States – Tax Treatment of “Foreign Sales Corporations”*, WT/DS108.

## ANNEX J-11

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

22 August 2003

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#### 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? 3<sup>rd</sup> 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*.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> Australia's Oral Statement, para. 18.

<sup>2</sup> 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.

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

#### Answer

9. Both Article 6.1 and 7.1 refer to the "criteria set out in [...] Annex 2". When one considers Annex 2, there are two sets of "criteria". The first is the "basic criteria" set out in subparagraphs (a) and (b) of paragraph 1, and the second is the "policy-specific criteria" set out in paragraphs 2 to 13. This understanding is confirmed by the text of paragraph 5 of Annex 2, which refers to the "basic criteria" and the "specific criteria". Thus, Articles 6.1 and 7.1 of the *Agreement on Agriculture* refer to the basic and policy specific criteria set out in Annex 2.

10. The European Communities has already set out its understanding of the term "accordingly" in its Third Party Written Submission.<sup>4</sup> In the European Communities view, the term "accordingly" is 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.<sup>5</sup>

11. 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

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<sup>4</sup> First Third Party Submission of the European Communities, 15 July 2003, para. 20. The European Communities recall, in this context, the opinion of Professor Desta set out in footnote 19 to para. 20.

<sup>5</sup> Australia's Oral Statement, para 35. Oxford English Dictionary, p. 15. Australia refers to the first sense of the word "accordingly" which is preceded by the symbol "≡" which indicates that a particular usage is obsolete (see Abbreviations and Symbols, page xxvi).

are intended to express the principle set out in the first sentence. Moreover, had the negotiators intended that the first sentence be a self-standing obligation, rather than use the term “accordingly” they would have used the term “additionally” or “in addition”, or a synonymous term.

12. Further support for this view can be found in the frequent use of the term “accordingly” in the WTO Agreement. A survey of the term’s use suggests that it links a general statement, often recognising that a particular situation causes specific effects, with a right or obligation to take some type of action set out in an ancillary sentence.<sup>6</sup> These general statements are not such as to impose specific obligations. The Appellate Body had occasion to consider the relationship between such provisions in the *Turkey-Textiles* dispute (Articles XXIV.4 and XXIV.5 GATT). It concluded:

The chapeau of paragraph 5 of Article XXIV begins with the word "accordingly", which can only be read to refer to paragraph 4 of Article XXIV, which immediately precedes the chapeau.

[..]

57. According to paragraph 4, the purpose of a customs union is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. This objective demands that a balance be struck by the constituent members of a customs union. A customs union should facilitate trade within the customs union, but it should *not* do so in a way that raises barriers to trade with third countries. [...] Paragraph 4 contains purposive, and not operative, language. It does not set forth a separate obligation itself but, rather, sets forth the overriding and pervasive purpose for Article XXIV which is manifested in operative language in the specific obligations that are found elsewhere in Article XXIV. Thus, the purpose set forth in paragraph 4 informs the other relevant paragraphs of Article XXIV, including the chapeau of paragraph 5. For this reason, the chapeau of paragraph 5, and the conditions set forth therein for establishing the availability of a defence under Article XXIV, must be interpreted in the light of the purpose of customs unions set forth in paragraph 4. The chapeau cannot be interpreted correctly without constant reference to this purpose.<sup>7</sup> (emphasis added)

13. The Appellate Body has, consequently, recognised the linking function of the word “accordingly”, and the fact that provisions which may be linked to later provisions through the use of the word “accordingly” may not impose separate obligations.

14. The European Communities would also point out that the Appellate Body has found that other provisions (e.g. Article III.1 GATT) which contain general principles are set up as “a guide to understanding and interpreting the specific obligations contained” in other provisions (e.g.

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<sup>6</sup> See Articles II.6(a), III.9, XII.3(d), XVI.3, XVIII.5, XXIV.5 GATT 1994, together with Ad Article III and Ad Article XXVIII.4 to GATT 1994, Articles 2.1 and 11 of the Dispute Settlement Understanding, Article A(i) of the Trade Policy Review Mechanism, Article 12.8 of the Agreement on Technical Barriers to Trade, Article 1 of the GATS Annex on Telecommunications and Article 5.1 of the Agreement on Textiles and Clothes.

<sup>7</sup> Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (“*Turkey – Textiles*”), WT/DS34/AB/R, adopted 19 November 1999, paras. 56 and 57 (emphasis added). Note that the Panel also found that Article XXIV.4 was “not expressed as an obligation” (Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products* (“*Turkey – Textiles*”), WT/DS34/R, adopted 19 November 1999, as modified by the Appellate Body Report, WT/DS34/AB/R, para. 9.126).

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

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"<sup>10</sup>. 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, 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<sup>11</sup>, 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".<sup>12</sup> A further definition is "in conformity with a given set of circumstances".<sup>13</sup>

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",<sup>14</sup> 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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<sup>8</sup> 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.

<sup>9</sup> 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.

<sup>10</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 551.

<sup>11</sup> Oral Statement by Australia, paragraphs 35-36.

<sup>12</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 15.

<sup>13</sup> *Webster's Third New International Dictionary*, Ed. Philip Babcock Gove, Merriam-Webster Inc, Springfield, Massachusetts, 1993, page 12.

<sup>14</sup> Third preambular paragraph of the *Agreement on Agriculture*.

*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.

## EC Comment

16. Neither Australia nor New Zealand examine the use of the word “criteria” in Annex 2 where it means something different from the fundamental requirement. The second sentence of the first paragraph of Annex 2 clearly distinguishes the “fundamental requirement” from the general and policy-specific “criteria”. Paragraph 5 of Annex 2 is even more explicit in this regard. It would seem odd that Article 6.1 and 7.1 would use criteria to mean both the basic and policy specific criteria and the requirement, while Annex 2 itself operates a distinction between the criteria and the requirement. Thus, while it is the case that the dictionary definition of “criteria” could arguably, in the abstract, cover a “fundamental requirement” in this particular case there are compelling arguments that the use of the word “criteria” in Articles 6.1 and 7.1 does not.

17. The European Communities has already explained why Australia’s interpretation of “accordingly” is incorrect. It is quite clear that “accordingly” establishes a relationship between the purposive language of the first sentence of para. 1 of Annex 2 and the operational language of the other parts of Annex 2. Synonyms of “accordingly” include “as a result, consequently, ergo, thus, therefore”.<sup>15</sup> To read the term as meaning that the first sentence and the rest of the paragraph applied as cumulative and separate conditions (as suggested by Australia) would deprive the word “accordingly” of effect. Reading the first sentence of paragraph 1 as relevant to the interpretation of the rest of Annex 2, but not as a separate condition would, contrary to Australia’s assertion, give the first sentence meaning.

18. New Zealand points out that:

“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” [...]measures would at the very least have to meet the subsequent basic and policy-specific criteria”

19. New Zealand does not explain how the first sentence can set a self-standing criterion if respecting that so-called criterion depends on satisfying other criteria. What then is the content of the separate “criterion” in the first sentence, if it is already defined in the second sentence of the first paragraph and the rest of Annex 2 ? Moreover, how, given the alleged existence of two sets of self-standing criteria, can it be sufficient to satisfy only one set of criteria and at the same time satisfy the other set (or “at the very least” satisfy the other set) as the final sentence of New Zealand’s response implies. Even on its own terms, New Zealand’s position that the first sentence of paragraph 1 is a self standing obligation, but that it can be satisfied by meeting the criteria set out in the rest of Annex 2, is internally inconsistent. This illustrates very well the European Communities’ point that the proposition that the first sentence imposes a self-standing obligation cannot be squared with any reasonable interpretation of “accordingly”.

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<sup>15</sup> Chamber’s Thesaurus, 1986.

## 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*. 3<sup>rd</sup> 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<sup>16</sup> which can be summarised as "primary" or "essential". The word "requirement" too has a number of meanings<sup>17</sup> which can be summarised as a "condition". Thus, a "fundamental requirement" is a primary or essential condition.<sup>18</sup> It is an 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*.

## EC Response

21. Australia executes a logical leap in the fourth sentence of its response. It arrives at the conclusion that the "fundamental requirement" is a "freestanding obligation" that applies "cumulatively" with the other criteria. However, this assertion is without foundation, and is directly contradicted by the use of the word "accordingly" at the beginning of the next sentence.

## Question

**2. In paragraph 13 of Australia's oral statement, you state that a "question" is: "could conditions of price competition for the purposes of a non-violation or impairment claim be 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**

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<sup>16</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 1042, provides relevant definitions of "fundamental" as "1 Of or pertaining to the basis or groundwork; going to the root of the matter. 2 Serving as the base or foundation; essential or indispensable. Also, primary, original; from which others are derived."

<sup>17</sup> *The New Shorter Oxford English Dictionary*, Volume 1, page 2557, provides definitions of "requirement" as "1 The action of requiring something; a request. 2 A thing required or needed, a want, a need. Also the action or an instance of needing or wanting something. 3 Something called for or demanded; a condition which must be complied with."

<sup>18</sup> Third Party Submission of Australia, paragraph 31, and Oral Statement by Australia, paragraph 33.

**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 from the assessment of non-violation complaints, but not notions from Articles 5 and 6 *SCM Agreement* into an assessment of support for the purposes of Article 13 *Agreement on Agriculture*.

24. In short, the European Communities sees no foundation for Australia's assertions.

**IV. STEP 2 PAYMENTS**

**Question**

**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.. 3<sup>rd</sup> parties, in particular, Australia, Argentina, EC, NZ, Paraguay**

Answer

25. 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

Article III.4 GATT. The European Communities has already provided elements of a response in its oral statement.<sup>19</sup> These are expanded upon below.

26. 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 *Agreement on Agriculture* does not define "domestic support".

27. AMS is the measurement of domestic support. AMS is defined as "the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than [that exempted etc]." This is very general – it covers all support in favour of agricultural producers. This broad scope of domestic support measures which can be maintained consistently with the *Agreement on Agriculture* is confirmed by Article 6.1 which states that the domestic support reduction commitments "shall apply to all of its [i.e. the Member's] domestic support measures in favour of agricultural producers [...]". Paragraph 1 of Annex 3 on the calculation of the AMS refers to AMS being calculated "on a product specific-basis for each basic agricultural product receiving market prices support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment". (emphasis added)

28. Consequently, the range of domestic support measures which a Member may maintain (consistent with reduction commitments) is very broad and is only limited by the condition that such support must be in favour of agricultural producers. As the European Communities has noted, paragraph 7 of Annex 3 explicitly states that "measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products".<sup>20</sup> The European Communities considers that the term "benefit" used here must be regarded as being synonymous with "favour" in the sense of "in favour of agricultural producers". Moreover, it is clear that by "measures directed at agricultural processors" the negotiators intended subsidies which were paid to processors, where the benefit went to the agricultural producer. Consequently, in light of the broad definition of "domestic support" and the specific reference to domestic content subsidies in paragraph 7 of Annex 3, the European Communities considers that a Member is entitled to maintain domestic content subsidies consistently with the *Agreement on Agriculture*.

29. Second, in response to the Panel's question, the effect of finding that domestic content subsidies are provided consistently with the *Agreement on Agriculture* would be that they cannot be found inconsistent with either Article 3.1(b) of the *SCM Agreement* or Article III.4 GATT 1994. Article 21.1 of the *Agreement on Agriculture* states that "the provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the

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<sup>19</sup> Paras. 34 to 38 of the EC's Oral Statement (as delivered). The Panel's reference to para. 32 corresponds to the text provided at the third party session.

<sup>20</sup> In terms of negotiating background, it may be useful to the Panel to note that paragraph 7 of Annex 3 was subject to negotiation during the period in which a Panel had ruled that the EC's payments to oilseed processors was not covered by Article III.8(b) GATT 1947 and were consequently inconsistent with Article III.4 GATT 1947 (*European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* Report of the Panel (L/6627 BISD 37S/86) adopted on 25 January 1990. That the negotiators retained this text must therefore be considered as a clear sign that they intended to permit Members to maintain such subsidies, subject to reduction commitments, in the *Agreement on Agriculture*.

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*.<sup>21</sup>

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* to the *SCM Agreement* or GATT 1994. Such an interpretation directly contradicts Article 21.1 of the *Agreement on Agriculture*.

31. Indeed, it can be pointed out that applying Article 3.1(b) of the *SCM Agreement* and Article III.4 GATT to domestic content subsidies provided consistently with the *Agreement on Agriculture* would lead to stricter disciplines being applied to domestic subsidies for agriculture than are applicable to domestic subsidies for industrial goods. If Article 3.1(b) and Article III.4 were to apply, domestic subsidies for agricultural products would be subject to reduction commitments and Article 3.1(b) *SCM Agreement* and Article III.4 GATT. However, domestic subsidies for industrial products are not subject to reduction commitments. Since the *Agreement on Agriculture* establishes “a basis for initiating a process of reform of trade in agriculture”, it would seem contradictory to find that domestic support for agriculture is in fact subject to stricter obligations than domestic support for other industries. This explains the “subject to” language of Article 21.1 of the *Agreement on Agriculture*. Article 21.1 and the *Agreement on Agriculture* more generally can also be compared with the other sectoral agreement included in Annex 1A of the WTO Agreement. The *Agreement on Textiles and Clothing* explicitly provides, in its Article 9, that the textiles and clothing sector is to be fully integrated into the GATT 1994. The *Agreement on Agriculture* has no such language, and Article 21.1 runs directly counter to this notion. It cannot be lightly assumed that the negotiators, while providing for the possibility to maintain domestic content subsidies, intended that such subsidies also be subject to rules which effectively makes it impossible to maintain such subsidies.<sup>22</sup>

32. The Panel should therefore reject Brazil’s arguments that domestic content subsidies granted in favour of agricultural producers can be found to be inconsistent with Article 3.1(b) of the *SCM Agreement* and Article III.4 GATT 1994.

### **Australia’s response**

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

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<sup>21</sup> Oral Statement, para. 38.

<sup>22</sup> See, in a similar sense, 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. 165.

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<sup>23</sup> 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 program 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.

### **New Zealand’s Response**

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 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.

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<sup>23</sup> Oral Statement by Australia, paragraphs 29-30.

### 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.<sup>1</sup>

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)<sup>2</sup> and with the price of oil per barrel (West Texas)<sup>3</sup>, 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

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<sup>1</sup> Second oral third party submission by Argentina, 8 October 2003, paragraphs 15-17.

<sup>2</sup> Source: Further submission of the United States, "Fibre Prices" table, paragraph 23.

<sup>3</sup> 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.<sup>4</sup>

**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 "exempt[ion] from actions" under Article 13(b)(ii) and 13(c)(ii) of the *Agreement on Agriculture*?**

10. The impact will depend on the Panel's finding on the preliminary issue raised with respect to the Peace Clause. If the Panel finds, as Argentina maintains, that the United States does not qualify for protection under Article 13 of the AoA, the expiry date of the Peace Clause will be entirely irrelevant.

11. If after 31 December 2003 the Panel should decide not to rule on the substantive claims, this would affect Brazil's right to due process by depriving it, on the basis of rules which are no longer in force, of the right to a finding that would settle of the dispute as to whether or not the subsidies were consistent. Thus, Brazil would be deprived of a positive settlement of the dispute.

**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*:**

**(a) Is a subsidy in respect of all agricultural, but not other, products specific?**

12. Yes.

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

13. Yes.

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

14. Yes.

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<sup>4</sup> As already stated, "[t]he conditions for the existence for a conflict between two rules was clarified by the Appellate Body in the *Guatemala – Cement case* (WT/DS60/AB/R, paragraph 65), 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." (Comments by Argentina on the reply by the European Communities to question 40 from the Panel to the third parties).

(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 2.1 for determining whether a subsidy is specific, indent (c) stipulates that in case of doubt as to the specificity of a subsidy, a number of other factors should be considered. In Argentina's view, this implies that the intention of the drafters of the Agreement was that the concept of "specificity" should be as comprehensive as possible.

**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?**

22. In Argentina's view, 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, it could nevertheless also conclude that the same subsidy had resulted in adverse effects to the interests of another Member and make the same recommendation to withdraw the subsidy under Article 7.8 of the SCM Agreement.

23. Indeed, bearing in mind that we are speaking of two different claims, the value of such a conclusion would be to have made *"an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and ... such other findings as will assist the DSB in making recommendations or in giving the rulings provided for in the covered agreements"*, in conformity with Article 11 of the DSU.

24. For the reasons set forth above and as stated throughout these proceedings, Argentina requests the Panel to issue the findings and recommendations requested by Brazil, including those related to the Step 2 and GSM 102 programmes which, under Article 4.7 of the SCM Agreement, must be withdrawn without delay. Likewise, the Panel should also make a recommendation that the United States take appropriate steps to remove the adverse effect of those programmes under Article 7.8 of the SCM Agreement.

- (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?**

25. In Argentina's view, if the Panel concludes that there were prohibited subsidies, it should recommend – under Article 4.7 of the SCM Agreement – that they be withdrawn without delay, without prejudice to taking into account the effects of the interaction of those prohibited subsidies with other actionable subsidies.

26. Taking into account the effects of the said interaction is extremely important to determining causation under Article 5 of the SCM Agreement. Indeed, as already stated<sup>5</sup>, Argentina considers that it is the collective impact of all the US subsidies that has effects on the cultivated area, production, exports and prices, notwithstanding the fact that the mere elimination of a prohibited subsidy would not necessarily put an end to the adverse effects of the other actionable subsidies.

**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?**

27. A finding of serious prejudice under Article 5(c) of the SCM Agreement is determinative for a finding under Article XVI:1 of the GATT 1994, since that Article orders the contracting party granting the subsidy to consider the possibility of limiting it *"[i]n any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by such subsidization ..."*. In other words, if it is determined that a subsidy causes or threatens to cause serious prejudice under Article 5(c) of the SCM Agreement, it necessarily calls for a finding of violation of Article XVI:1 of the GATT 1994.

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<sup>5</sup> Second oral third party submission by Argentina, 8 October 2003, paragraph 33.

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.<sup>6</sup> According to an ICAC study<sup>7</sup>, the cost of production in the United States was US\$0.81 per pound of cotton in the marketing year 1999<sup>8</sup>, 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.<sup>9</sup> 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.<sup>10</sup>

**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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<sup>6</sup> Third party submission by Argentina, 15 July 2003, paragraphs 17 and 18.

<sup>7</sup> Cotton: World Statistics, Bulletin of the International Cotton Advisory Committee, September 2002 (Annex BRA-9).

<sup>8</sup> 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).

<sup>9</sup> Second written third party submission by Argentina, 3 October 2003, paragraph 49.

<sup>10</sup> 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).

35. The concept of "another Member" within the meaning of Article 6.3(c) covers Argentina, which indeed submitted claims relating to the price effect of US subsidies.

36. Notwithstanding, Argentina is aware that in these proceedings, it is Brazil that brought the case and requested consultations and the establishment of this Panel. At the same time, Argentina – which has also suffered serious prejudice – felt that it was appropriate to ask to be joined in the consultations, participated actively in them and raised a number of issues, as well as asking to join as a third party and presenting, in its submissions, arguments relating to price effect.

37. As stated throughout these proceedings, it is in Argentina's interest that the Panel should issue the findings and recommendations requested by Brazil, since this would mean that, in conformity with Article 7.8 of the SCM Agreement, the United States would have to *"take appropriate steps to remove the adverse effects or ... withdraw the subsidy"*.

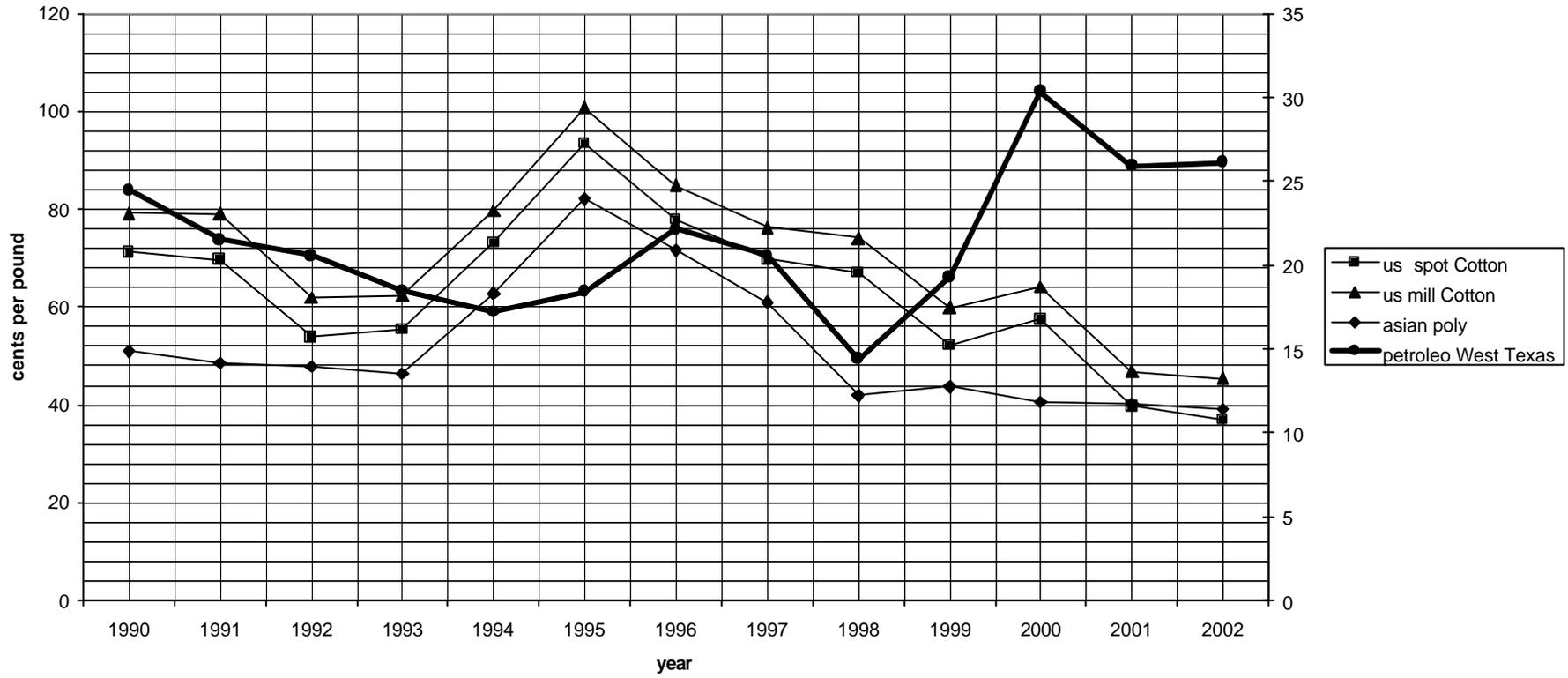
38. This interest on the part of Argentina is based on the conviction that if the Panel were to issue such findings and recommendations, the elimination of the adverse effects or the withdrawal of the subsidies would have a favourable impact on the international price of cotton – indeed, without the US subsidies which generate a world market surplus, international cotton prices could be higher or could fall less. Similarly, if its share in the world market were not increased as a result of the subsidies, the international price of cotton would be higher or would not be so low, and as a result, third party producers, including Argentina, would not suffer as much prejudice as a result of artificially depressed prices.<sup>11</sup>

39. As already stated, an increase in the world cotton price would be significant – even if as a result of the subsidies the suppression or depression of international prices amounted to only 1 cent per pound – since it would enable countries like Argentina to recover their competitive position in the world cotton market.<sup>12</sup>

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<sup>11</sup> Second oral third party submission by Argentina, 8 October 2003, paragraph 10.

<sup>12</sup> Second written third party submission by Argentina, 3 October 2003, paragraphs 34 to 36, and second oral third party submission by Argentina, 8 October 2003, paragraph 38.



## ANNEX J-13

### RESPONSES BY AUSTRALIA

27 October 2003

A. QUESTIONS TO INDIVIDUAL THIRD PARTIES

43. ...

44. ...

45. ...

46. ...

47. ...

48. ...

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 ...”)?**

Reply

In Australia’s view, with regard to subsidies for agricultural products, unless the *Agreement on Agriculture* makes express provision to the contrary, Article 3 of the *SCM Agreement* continues to apply to such subsidies. The simultaneous application of both Agreements to agricultural products is confirmed by Article 21.1 of the *Agreement on Agriculture*.

Australia noted previously in its response to the Panel’s earlier question 40 that the legal issue in question concerning the relationship between the *Agreement on Agriculture* and Article 3.1(b) of the *SCM Agreement* derives from 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 *Agreement on Agriculture* does not include any provisions concerning the conditionality of domestic support in the sense of SCM Article 3.1(b).

Moreover, the *Agreement on Agriculture* does not confer a right to grant subsidies. Rather, that Agreement establishes disciplines for the use of certain subsidies in relation to agricultural products should a Member choose to provide subsidies for such products. Arguments that the *Agreement on Agriculture* allows local content subsidies based on the phrase “support in favour of domestic producers” and similar phrasing and the provisions of paragraph 7 of Annex 3 of that Agreement are not sustainable. The word “support” is used throughout the *Agreement on Agriculture* in the sense of generic measures providing a calculable financial advantage to agricultural producers, whether price support, direct subsidy payments or any other means not exempted from a Member’s commitment to reduce domestic support. Indeed, Annex 3 is headed “Domestic Support: Calculation of Aggregate Measurement of Support”.

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.<sup>1</sup> 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 SCM Article 3.1 also applies to paragraph (b) of that Article cannot of itself compel the interpretation that there are provision(s) of the *Agreement on Agriculture* which necessarily apply.

The Panel may not interpret the provisions of the *SCM Agreement* and the *Agreement on Agriculture* so as to diminish or override fundamental WTO obligations in the absence of express provisions to that effect. To do so would constitute, in Australia's view, a misapplication of the customary rules of interpretation of public international law.

**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 “exempt[ion] from actions” under Article 13(b)(ii) and 13(c)(ii) of the Agreement on Agriculture?**

Reply

In Australia's view, whether the date the Panel's report will be issued to the parties to the dispute will have any impact on any “exempt[ion] from actions” under Article 13(b)(ii) of the *Agreement on Agriculture* will depend on whether the Panel finds that the United States is granting, through domestic support measures that conform fully to the provisions of Article 6 of that Agreement, support to a specific commodity in excess of that decided during the 1992 marketing year. If the Panel finds that the United States is granting support to a specific commodity in excess of that decided during the 1992 marketing year, the United States will have no “exempt[ion] from actions” pursuant to Article 13(b)(ii), irrespective of when the Panel's report is issued. If the Panel finds that the United States is not granting such support to a specific commodity in excess of that decided during the 1992 marketing year, the United States may be “exempt from actions” pursuant to Article 13(b)(ii) until Article 13 expires.

**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:**

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

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<sup>1</sup> *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, paragraphs 153-158.

- (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<sup>2</sup>:

- (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.

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<sup>2</sup> *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.<sup>3</sup>

**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

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<sup>3</sup> *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 – WT/DS113/AB/RW, paragraphs 94-96, and Second Recourse to Article 21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW2 – WT/DS113/AB/RW2, paragraphs 91-120.

of subsidies on the export of primary products”. The plurilateral 1979 Tokyo Round Subsidies Code<sup>4</sup> represented a further stage in the elaboration of disciplines on export subsidies and subsidies generally, in particular, Articles 8-11 and the Annex. This background is helpful in understanding the evolution of the use of terminology originally found in GATT Article XVI and the relationship between provisions of the covered agreements as they exist today.

In relation to the use of subsidies on the export of primary products, the substantive discipline established by Article XVI:3 of GATT 1994 was that:

“[i]f a contracting party grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product”.

Thus, the key discipline established by Article XVI:3 of GATT 1994 is that a subsidy that has the effect of increasing a Member’s exports of a primary product must not be applied so as to result in that Member having more than an equitable, that is, a “just” or “fair”,<sup>5</sup> share of world export trade in that primary product. GATT Article XVI:3 was elaborated by Article 10.1 and 10.2 of the later plurilateral Tokyo Round Subsidies Code, but these provisions were not carried forward to, and incorporated as such, in the *SCM Agreement*.

Notwithstanding the heading of Section B of GATT Article XVI, that discipline is distinct from the export subsidy disciplines later incorporated in Article 3.1(a) of the *SCM Agreement*. In particular, GATT Article XVI:3 is concerned with the effects rather than the conditions of a subsidy’s grant.

Moreover, the discipline established by Article XVI:3 of GATT 1994 is distinct from the discipline established by Article 6.3(d) of the *SCM Agreement*, which relates to whether the effect of a subsidy is to increase a Member’s world market share compared to the previous three-year average share. At the same time, there may be substantial commonality of facts in demonstrating non-compliance with either provision. Further, both GATT Article XVI:3 and SCM Article 6.3(d) must be applied within the same contextual framework of “serious prejudice” established by GATT Article XVI:1, and SCM Article 5(c) and its footnote.

The GATT Article XVI:3 discipline is also distinct from the disciplines established by other provisions of the covered agreements.

The Appellate Body has previously noted that the *WTO Agreement* was accepted by WTO Members as a “single undertaking”.<sup>6</sup> The Appellate Body has also said:

The relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis. Although the provisions of the GATT 1947 were incorporated into, and became a part of the GATT

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<sup>4</sup> *Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade*, BISD 26S/56.

<sup>5</sup> *The New Shorter Oxford English Dictionary*, Ed. Lesley Brown, Clarendon Press, Oxford, 1993, Volume 1, 843.

<sup>6</sup> For example, *Brazil – Measures Affecting Desiccated Coconut*, Report of the Appellate Body, WT/DS22/AB/R, page 13.

1994, they are not the sum total of the rights and obligations of WTO Members concerning a particular matter. For example, with respect to subsidies on agricultural products, Articles II, VI and XVI of the GATT 1994 alone do not represent the total rights and obligations of WTO Members. The *Agreement on Agriculture* and the *SCM Agreement* reflect the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies. The general interpretative note to Annex 1A was added to reflect that the other goods agreements in Annex 1A, in many ways, represent a substantial elaboration of the provisions of the GATT 1994, and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994. ...<sup>7</sup> (emphasis added)

In the absence of a conflict between the provisions of Article XVI:3 of GATT 1994 and Article 6.3(d) of the *SCM Agreement* or any other provisions of the covered agreements such that the General Interpretative Note to Annex 1A of the *WTO Agreement* becomes operative, GATT Article XVI:3 continues to apply. In Australia's view, the Appellate Body report in *US – FSC*, paragraph 117, does not affect the interpretation of the relationship between these provisions other than in the sense of confirming that the relationship must be determined on the basis of the texts of the relevant provisions as a whole.

The continued applicability of Article XVI:3 of GATT 1994 is confirmed by Article 13 of the *Agreement on Agriculture*. The exemption from action pursuant to AA Article 13(b)(ii) is only applicable in respect of paragraph 1 of GATT Article XVI, whereas the exemption from action pursuant to AA Article 13(c)(ii) is applicable to the whole of GATT Article XVI. Had the negotiators of the *WTO Agreement* believed that GATT Article XVI:3 had become redundant, they would not have expressly distinguished between the paragraphs of GATT Article XVI in AA Article 13 as they did. Moreover, Australia believes its view is fully consistent with the provisions of Article 21.1 of the *Agreement on Agriculture* and with the nature of the *WTO Agreement* as a whole as a “single undertaking”.

Further, the distinction between the provisions of Article XVI of GATT 1994 in Article 13(b)(ii) and 13(c)(ii) of the *Agreement on Agriculture* is entirely consistent with the object and purpose of the *Agreement on Agriculture*, including as expressed in the third preambular paragraph that the “long-term objective is 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”. It would be directly contrary to that objective if WTO Members were able, albeit otherwise consistently with the domestic support provisions of the *Agreement on Agriculture*, nonetheless to arrange their domestic support payments so as to achieve an inequitable share of the world export market in a particular primary product.

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<sup>7</sup> *Brazil – Desiccated Coconut*, Report of the Appellate Body, pages 14-15.

## 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.<sup>1</sup>

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

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<sup>1</sup> 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 subsidies 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-developed countries. The “particular consideration” that must be extended to them goes beyond simply ensuring that their views are heard – as noted above, such procedural protections are provided for elsewhere in the DSU. Instead, Panels must give “particular consideration” to their “special situation”. In the context of the present case, the “special situation” of Benin and Chad has been presented in some detail to the panel. Massive US cotton subsidies have had, and continue to have, a devastating impact on the fragile economies of West Africa, pushing hundreds of thousands of people from subsistence farming into absolute poverty. If DSU Article 24.1 has any meaning, this “special situation” of Benin and Chad must be given full, substantive consideration by the Panel.

Finally, Benin and Chad note that the serious prejudice caused to their economies has also been specifically raised before the Panel by one of the disputing parties, Brazil. As the Panel will recall, Part 7 of Brazil’s Further Submission of 9 September 2003 is on “Serious Prejudice to the Interests of African Countries by Reason of the US Subsidies on Upland Cotton”. This provides additional support for the position that the serious prejudice to Benin and Chad needs to be examined by the Panel in assessing the WTO-consistency of the US subsidies.

**“55. 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.”**

As noted, the drafters of the SCM Agreement used the term “complaining Member” in other provisions of the Agreement. In Article 6.3(c), they chose the term “other Member” rather than “complaining Member.” For the reasons set out above, Benin and Chad are of the view that Article 6.3(c) encompasses both the complainant, Brazil, as well as other WTO Members.

The Panel has before it substantial evidence about the effects of the US subsidies, including the significant price undercutting by US cotton compared with the price of the like products of Brazil,

Benin and Chad in world markets, as well as significant price suppression and price depression in world cotton markets. In assessing the WTO-consistency of the US subsidies, the Panel is required by the SCM Agreement to take this evidence into account.

## 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

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

**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*...")?**

Reply

The meaning and effect of this phrase is that Article 3 of the *SCM Agreement* applies *subject to* the export subsidy disciplines of the *Agreement on Agriculture*, which permit, in some instances and within certain limits, the granting or maintaining of subsidies that would otherwise be prohibited under the *SCM Agreement*.

**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 Agreement* apply to subsidies in respect of agricultural commodities? Please answer the following questions, citing the principles in Article 2 of the *SCM Agreement*:**

Reply

Canada's answers assume that the phrase "in respect of" has the same meaning as the standard "is specific to" in Article 2.1 of the *SCM Agreement*. Based on the ordinary meaning of the phrase "is specific to", read in context and in light of the object and purpose of Article 2 and of the *SCM Agreement*, the specificity test is concerned with the actual availability of a programme. Analysis on availability may include an assessment of the manner in which a programme is used in the circumstances of a given case. The panel in *US – Softwood Lumber III* recently confirmed: "In our view, Article 2 *SCM Agreement* is concerned with the distortion created by a subsidy which either in law or in fact is not broadly available."<sup>1</sup> Moreover, a programme may be found either *de jure* or *de facto* specific, and either determination depends on the nature of the evidence relied upon.<sup>2</sup>

**(a) is a subsidy in respect of all agricultural, but not other, products specific?**

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<sup>1</sup> *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, Report of the Panel, WT/DS257/R, circulated 29 August 2003, para. 7.116.

<sup>2</sup> In this respect, a determination under Article 2 is similar to a determination under Article 3. The legal standard expressed by the phrase "is specific to" is the same for both *de jure* or *de facto* determinations; the only difference is the nature of the evidence relied upon. See *Canada – Measures Affecting the Export of Civilian Aircraft*, Report of the Appellate Body, WT/DS70/AB/R, adopted 20 August 1999, para. 167 ("In our view, the legal standard expressed by the word 'contingent' is the same for both *de jure* or *de facto* contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent.")

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.<sup>3</sup>

- (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 both crops and livestock.

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

Reply

The answer will depend on the facts of a given case, including whether the eligible products involve only “an enterprise or industry or group of enterprises or industries” (based on standard industrial classification) under Article 2.1.

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

Reply

Yes.

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

Reply

Where a programme appears *de jure* non-specific under Articles 2.1(a) and (b), predominant use of a programme by “certain enterprises” (a defined term in Article 2.1) would indicate, in the absence of any other reasonable explanation, that the availability of the subsidy is limited in fact to such enterprises or industries under Article 2.1(c) and 2.4. Likewise, where a programme appears *de jure* non-specific under Articles 2.1(a) and (b), the granting of disproportionately large amounts of subsidy to certain enterprises would indicate, in the absence of any other reasonable explanation, that the availability of the subsidy is limited in fact to such enterprises or industries under Article 2.1(c) and 2.4. In both cases, any predominance or disproportionality should be measured over an

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<sup>3</sup> *United States – Continued Dumping and Subsidy Offset Act of 2000*, Report of the Panel, WT/DS217/R, WT/DS234/R, adopted 27 January 2003, at para 4.1146.

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”.<sup>1</sup>

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 *Agreement on Agriculture* prevails over the *SCM Agreement* to the extent that it has more specific provisions over the same matter covered by the *SCM Agreement*.

5. The introductory phrase of Art. 3 of the *SCM Agreement* again, in the matter of prohibited subsidies, grants deference to the *Agreement on Agriculture*. It reads:

[E]xcept as provided in the *Agreement on Agriculture*, the following subsidies, within the meaning of Article 1, shall be prohibited.

Given that the *SCM Agreement* contains disciplines over all types of subsidies, including agricultural, and the *Agreement on Agriculture* imposes more specific disciplines over subsidies granted to agricultural commodities only, where such specificity of discipline can be established, the *Agreement on Agriculture* shall prevail pursuant to Article 3.1 of the *SCM Agreement*.

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<sup>1</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, DSR 1997:II, Para. 155.

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 an extension proposal; such Members, aided with the Panel’s interpretation of the key components of this clause, will have a better basis to form their negotiating policy and stance, not only in terms of the Peace Clause, but also with regard to WTO discipline on agriculture.

**12. 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 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**

- (a) is a subsidy in respect of all agricultural, but not other, products specific?
- (b) is a subsidy in respect of all agricultural crops (i.e. but not to other agricultural commodities, such as livestock) specific?
- (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?**
- (f) **is a subsidy in respect of a certain proportion of total US farmland specific?**

13. “Commodity” includes agricultural crops such as upland cotton.<sup>2</sup> While the *Agreement on Agriculture* identifies agricultural products by reference to their respective HS codes<sup>3</sup>, in certain places it uses the terms “commodity” and “agricultural product” interchangeably.<sup>4</sup> Hence, in China’s opinion, “agricultural commodity” can be understood as equivalent to “agricultural product” under the *Agreement on Agriculture*. Such equivalence is particularly relevant with regard to upland cotton, which being an agricultural product and crop, unquestionably meets the definition of a commodity.

14. On the other hand, “industry” used in the context of Art. 2 of the *SCM Agreement* normally refers to “a particular form or branch of productive labour; a trade, a manufacture”<sup>5</sup>, while in the context of trade and commercial policy, “agriculture” means “the science and practice of cultivating the soil and rearing animals; farming”.<sup>6</sup> Cultivate, in turn, means “prepare and use soil for crops”<sup>7</sup>, i.e. the use of productive labour for soil preparation and use. Hence, agriculture, being the science and practice of using productive labour, meets the definition of “industry”. Further, the *Agreement on Agriculture* also treats “agriculture” as an “industry” by extensively using “agricultural producers” and “agricultural production” to refer to the targets of domestic support measures.<sup>8</sup>

15. Art. 2 of the *SCM Agreement* provides that a subsidy is specific if it is provided to an enterprise or industry or group of enterprises or industries. Based on the analysis in Paras. 12 and 13 above, China believes that any subsidy to agricultural commodities shall be considered as specific for the purpose of Art. 2 of the *SCM Agreement*. By the same token, China believes that:

- (a) a subsidy in respect of all agricultural, but not other, product is specific, since agriculture producing all agricultural products is an industry and consists of “group of enterprises” by definition.
- (b) Similarly, subsidies in respect of “all agricultural crops (i.e. but not to other agricultural commodities, such as livestock)”, “certain identified agricultural products” and “upland cotton, but not other products” should all be deemed as specific since “group of enterprises” producing crops (certain products, upland cotton) are targeted in all the cases.
- (c) The use of “a certain proportion of the value of total US commodities” or “a certain proportion of US farmland” will necessarily be equivalent to “an enterprise or industry or group of enterprises or industries” because the “proportion” has to be generated by adding up those data from specific “enterprise or industry or group of enterprises or industries”.

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<sup>2</sup> Commodity means “a thing of use or value; specially a thing that is an object of trade, especially a raw material or agriculture crop”, Lesley Brown (ed.), *The Shorter Oxford English Dictionary*, 5<sup>th</sup> ed. (Oxford University Press, 2002), p.461.

<sup>3</sup> Art. 2, *Agreement on Agriculture*.

<sup>4</sup> e.g. under Art. 6, the terms “product-specific domestic support” and “basic agricultural product” are used in the context of quantifying domestic support commitments, while under Art. 13(b), domestic support measures under Art. 6 that do not grant support to a specific commodity in excess of that decided during the 1992 marketing year are required to be exempt from actions as specified therein.

<sup>5</sup> *The Shorter Oxford English Dictionary*, p.1363.

<sup>6</sup> *Ibid*, p. 44.

<sup>7</sup> *Ibid*, p. 575.

<sup>8</sup> e.g. Art. 6, *Agreement on Agriculture*.

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.<sup>9</sup>

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**”.<sup>10</sup> 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**”.<sup>11</sup> 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.<sup>12</sup>

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<sup>9</sup> 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.

<sup>10</sup> Original note, “*SCM Agreement Article 7.8* (emphasis added)”.

<sup>11</sup> Original note, “*SCM Agreement Article 19.1* (emphasis added)”.

<sup>12</sup> 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.<sup>13</sup> 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 prohibition on certain types of subsidies: Members are obligated, under Article 3.2 of the SCM Agreement, to "neither grant nor maintain" such subsidies. **While the trade effects of prohibited subsidies may be countered under Parts III and V of the SCM Agreement, Part II of the SCM Agreement establishes special and additional rules for rapid dispute settlement in cases involving such subsidies. Article 4.7 of the SCM Agreement establishes a specific remedy to be recommended in the case of a violation - withdrawal of the subsidy.** (Original emphasis added)

21. Indeed, the panel considered the Art. 4.7 prescription of withdrawal for subsidies found to be prohibited under to be so "special" that it is "specific remedy" designed to "not merely counteract *adverse* trade effects, but is intended to enforce the absolute prohibition on the grant or maintenance of such subsidies".<sup>14</sup>

22. In other words, such a specific remedy under Art. 4.7 grants the subsidizing Member far less options than Art. 7.8, which allows the subsidizing Member the options of either to "remove the adverse effects" or "withdraw the subsidy".

23. The above interpretation is further supported by the difference in terminology for countermeasures allowed to be taken by a complaining Member in the event that recommendations adopted by the DSB are not followed. The Arbitrators in their Decision on *Brazil – Aircraft (Article 22.6 – Brazil)*<sup>15</sup>, stated:

We also note that, when the negotiators have intended to limit countermeasures to the effect caused by the subsidy on a Member's trade, they have used different terms than 'appropriate countermeasures'. Article 7.9 and 10, which is the provision equivalent for actionable subsidies to Article 4.9 and 10 for prohibited subsidies, uses the terms 'commensurate with the degree and nature of the adverse effects determined to exist'.<sup>16</sup>

while Art. 4.10 only used the term "appropriate countermeasures", without the qualification of commensuration with the degree and nature of adverse effects as required under Arts. 7.9 and 7.10 for actionable subsidies. In deed, the Arbitrators ruled in the arbitration that

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<sup>13</sup> Original note, "[w]e note *that*, pursuant to Article 31 of the SCM Agreement, the provisions of Articles 6.1 (presumption of serious prejudice), and 8 and 9 (non-actionable subsidies) shall apply for five years from the date of entry into force of the WTO Agreement unless extended for a further period."

<sup>14</sup> 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. 6.34.

<sup>15</sup> Decision by the Arbitrators, *Brazil – Export Financing Programme for Aircraft – Recourse to Arbitration by Brazil under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement*, WT/DS46/ARB, 28 August 2000.

<sup>16</sup> *Ibid*, Para. 3.49.

when dealing with a prohibited export subsidy, an amount of countermeasures which corresponds to the total amount of the subsidy is “appropriate”<sup>17</sup> against the Brazilian argument that such an interpretation would be punitive.<sup>18</sup>

24. Hence, past panels and arbitrators have determined that Art. 4.7 remedies are special, specific, and additional to those under Art. 7.8, that when recommended by a panel, they more than counteract adverse trade effects. In light of such reasoning, the need for this Panel, after it having established prohibited subsidies, to go an extra step to find adverse effects is superfluous.

25. With respect to this Panel’s question as to whether the Panel can “take into account the effects of interaction of those prohibited subsidies with other, allegedly, actionable subsidies” if it were to find prohibited subsidy, China believes the answer is not straight forward.

26. Art. 5 of the *SCM Agreement* makes no express distinction between prohibited and actionable subsidies when discussing adverse effects to the interests of other Members. It simply requires that no Member shall cause adverse effects through the use of any subsidy referred to in Paras. 1 and 2 of Article 1 of the *SCM Agreement*, which covers all types of subsidies that meets the specificity test, i.e. prohibited and actionable.

27. Having said that, the structure of the *SCM Agreement* is such that it sets out highly compartmentalized sections on prohibited, actionable and non-actionable subsidies. Analyses of adverse effects are specifically placed under Part III that deals with actionable subsidies only. As discussed above, establishment of a prohibited subsidy does not require any finding of adverse effect, but is contingent upon a finding of a mere existence. In that sense, when this Panel accounts and analyzes adverse effects caused by actionable subsidies, inclusion of adverse effects generated by prohibited subsidies would tend to enlarge adverse effects caused by actionable subsidies, if the former only adds to the latter. In other words, the highly compartmentalized nature of the *SCM Agreement* requires this Panel to form a precise opinion, where partition is possible, on the degree and nature of adverse effects caused by actionable subsidies alone, and such precision is vital for the subsidizing Member to “remove the adverse effects” under Art. 7.8 and for the complaining Member to take commensurate countermeasures under Arts. 7.9 and 7.10. Such a partitioning method is very much relevant to the issue of causation, as in cases where partition is possible, there should be no causal link between prohibited subsidies and adverse effects caused by actionable subsidies.

28. If, however, this Panel finds that a simple partition is not possible to exclude adverse effects generated by prohibited subsidies, due to the fact that such adverse effects compounds or amplifies adverse effects caused by actionable subsidies, the issue is more difficult. Prohibited subsidies may indeed have played a role in causing a compounding or amplification of adverse effects, caused by actionable subsidies in the first place. Such circumstances would necessitate a consideration of the totality of evidence before this Panel and a finding that best reflects a possible attribution of adverse effects to those only caused by actionable subsidies found. Such a finding, China submits, may have to be weighed against the crucial need to discourage the use of multiple types of subsidies that are not WTO compliant to create compounded adverse effects.

**29. Question 53. 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**

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<sup>17</sup> *Ibid*, Para. 3.60.

<sup>18</sup> *Ibid*, Para. 3.55.

30. China believes that a finding of serious prejudice under Article 5(c) of the *SCM Agreement* would be determinative for a finding under Article XVI:1 of the GATT 1994.

31. Art. 5(c) of the *SCM Agreement* prohibits any Member against using any subsidy to cause serious prejudice to the interests of another Member. Instances of deemed existence and possible occurrence of serious prejudice are further enumerated under Art. 6 of the same agreement. Art. XVI:1 of GATT 1994, on the other hand, requires a subsidizing Member, to discuss, upon request, with the other contracting party or parties concerned, or with the Contracting Parties, the possibility of limiting the subsidization, in the event that its granting of subsidies causes or threatens to cause serious prejudice to the interests of any other contracting party while stopping short of listing those under Art. 6 of the *SCM Agreement*.

32. China believes possible difference, if any, between serious prejudice found under Art. 5(c) of the *SCM Agreement* and serious prejudice found under GATT Art. XVI:1, is effectively removed by footnote 13 of the *SCM Agreement*, which specifically provides:

The term “serious prejudice to the interests of another Member” is used in this [SCM] Agreement in the same sense as it is used in paragraph 1 of Article XVI of GATT 1994, and includes threat of serious prejudice.

To interpret otherwise would clearly be contrary to the intent of the drafters of this footnote.

**33. Question 55. 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**

34. China believes that any Member, the prices of whose like product (upland cotton for these proceedings), as supplied in the same market, at the same level of trade and at comparable times, are capable of being compared to the prices of the subsidized product for the purpose of determining whether significant price undercutting exists under Art. 6.3(c), is *another Member* for the purpose of Art. 6.3(c) of the *SCM Agreement*.

35. First, 6.3(c) of the *SCM Agreement* reads,

Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply: ...

(c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market.

36. Article 6.5 subsequently explains that

For the purpose of paragraph 3(c), price undercutting shall include any case in which such price undercutting has been demonstrated through a comparison of prices of the subsidized product with prices of a non-subsidized like product supplied to the same market. The comparison shall be made at the same level of trade and at comparable times, due account being taken of any other factor affecting price comparability. However, if such a direct comparison is not possible, the existence of price undercutting may be demonstrated on the basis of export unit values.

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 meaningfulness of such a comparison, Art. 6.5 requires it to be made at the same level of trade and at comparable times, as well as any other factor affecting price comparability. No where does Art. 6.5 limit non-subsidized like product to only those from one country, e.g. the complaining party.

38. Second, specific references to the “complaining Member” is made in other paragraphs of this very Article 6. For instance, Article 6.7, reads

Displacement or impediment resulting in serious prejudice shall not arise under paragraph 3 where any of the following circumstances exist during the relevant period:

- (a) prohibition or restriction on exports of the like product from *the complaining Member* (emphasis added) or on imports from the *complaining Member* (emphasis added) into the third country market concerned;...”.

39. The same word “complaining Member” is specifically used from Para. (a) through to Para. (e) under Article 6.7. The above reference clearly suggests that for the purpose of these paragraphs, the drafters explicitly distinguished the like product from “the complaining Member” from the like product from other Members. Should the drafters have the same intent to make such a distinction under Article 6.3, they would have done so.

40. Based on the above interpretations, China believes that *another Member* under Art. 6.3 of the *SCM Agreement* shall include any Member, the prices of whose like product, upland cotton for these proceedings, as supplied in the same market, at the same level of trade and at comparable times, is capable of being compared to the prices of the subsidized product for the purpose of determining whether significant price undercutting exists under Art. 6.3(c).

**41. Question 56. 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*. 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 *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?**

42. In China’s opinion, agricultural domestic support programmes are not challengeable under Article XVI:3 of GATT 1994.

43. Negotiating history of the current WTO agreements, being codification of the GATT Uruguay Round, as reported by scholars, indicates that the original Art. XVI of GATT 1947 contained only the first paragraph. Section B of Art. XVI and the interpretive note thereto were added by the *1955 Protocol Amending the Preamble and Part I and II of the Agreement* with an intent to outlaw export subsidies that results in subsidizing Member “having more than equitable share of the world export trade in that product”<sup>19</sup> only.<sup>20</sup> While the added article adopted such vague wordings as “any form of

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<sup>19</sup> Article XVI:3, GATT 1994.

<sup>20</sup> Terence P. Stewart (ed.), *the GATT Uruguay Round: a Negotiating History* (Kluwer Law and Taxation Publishers, 1993), p. 134.

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*”)<sup>21</sup> is further proof that Art. XVI did not contemplate any discipline on domestic support. While not all Contracting Parties of GATT signed the *Subsidies Code*, it does represent the efforts of some GATT Contracting Parties

[t]o apply fully and to interpret the provisions of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade only with respect to subsidies and countervailing measures and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation.<sup>22</sup>

45. On the issue of subsidies, the *Subsidies Code* is structured to distinguish between export subsidies on certain primary (Art. 10, for the purpose of Art. XVI:3, GATT) and non-primary subsidies (Art. 9 and illustrative Annex) on the one hand, and “[s]ubsidies other than export subsidies” (Art. 11) on the other. Such a distinction represents consensus, at least amongst some GATT Contracting Parties, that GATT Art. XVI:3 only disciplines export subsidies *per se*.

46. In addition, in attempting to develop the “unlawfulness” of these “non-export subsidies”, Art. 11(2) of the *Subsidies Code* only specified possible “injury to a domestic industry of another signatory”, “serious prejudice to the interests of another signatory”, nullification and impairment of “benefits accruing to another signatory under the General Agreement [of Tariffs and Trade] as well as adverse effect on ‘the conditions of normal competition’”, to the express exclusion of a GATT Art. XVI:3 action for “more than equitable share of world export trade”. The ostensible omission of a GATT XVI:3 challenge against non-export subsidies is again indication that GATT XVI:3 did not contemplate a challenge against non-export subsidies, which should include domestic support measures.

47. The *Agreement on Agriculture* of the WTO, while setting out object and quantitative disciplines on agricultural domestic supports, does not engage in a comprehensive and express definition of the term domestic support, except that it is granted in favour of domestic agricultural producers. Yet the agreement does treat domestic support and export subsidies in different sections. Art. 13, in addition, makes a symmetrical reference to the two concepts on equal footing. The polarized treatment lends support to a conclusion that the multilateral trade regime at the Uruguay Round sees a need to discipline agricultural domestic support measures. Given the progression of discipline development for agricultural domestic support and the loss of inequitable world export trade challenge in the *Agreement on Agriculture*, it appears to be a stretching of terms to interpret that Art. XVI:3 of GATT 1947 should contemplate a challenge against agricultural domestic support measures.

48. Language of Article 21.1 of the *Agreement on Agriculture* again supports the above opinion of China. The article governs the relationship of the provisions of GATT 1994 and the Agreement on Agriculture.<sup>23</sup> The Appellate Body, in its *EC – Bananas III* report, stated to the effect that the provisions of GATT 1994 apply to a matter except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter.<sup>24</sup>

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<sup>21</sup> 26S/56.

<sup>22</sup> Preamble, the *Subsidies Code*.

<sup>23</sup> Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Appellate Body Report, WT/DS27/AB/R, DSR 1997:II, Paras. 155-156.

<sup>24</sup> See *Supra*, Para. 3.

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<sup>25</sup> 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 and developed by requirements in Article 6.3(d) of the *SCM Agreement*.

51. GATT Art. XVI:3 is the first attempt by the multilateral trade system to seek avoidance of the clinching of "more than equitable share of world export trade in a primary product" by a Member granting "directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory". The article, led by the word "[a]ccordingly", grants Members the inequitable world export trade challenge to address concerns over possible "harmful effects", "undue

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<sup>25</sup> Original quote from the Appellate Body Report, WT/DS108/AB/R, Para. 117:

"... the provisions of the *SCM Agreement* do not provide explicit assistance as to the relationship between the export subsidy provisions of the *SCM Agreement* and Article XVI:4 of the GATT 1994. In the absence of any such specific textual guidance, we must determine the relationship between Articles 1.1(a)(1) and 3.1(a) of the *SCM Agreement* and Article XVI:4 of the GATT 1994 on the basis of the texts of the relevant provisions as a whole. It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*. First of all, the *SCM Agreement* contains an express definition of the term "subsidy" which is not contained in Article XVI:4. In fact, as we have observed previously, the *SCM Agreement* contains a broad package of new export subsidy disciplines that "go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947". Next, Article XVI:4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the "comparable price charged for the like product to buyers in the domestic market". In contrast, the *SCM Agreement* establishes a much broader prohibition against *any* subsidy which is "contingent upon export performance". To say the least, the rule contained in Article 3.1(a) of the *SCM Agreement* that all subsidies which are "contingent upon export performance" are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Thus, whether or not a measure is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to "primary products", which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI.4 of the GATT 1994."

disturbance” and hindrance to “the achievement of the objectives” of GATT cause by subsidies to primary products, as enumerated under the preceding article of XVI:2.

52. The *Subsidies Code* further defined “more than an equitable share of world export trade” as including

any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets.<sup>26</sup>

In addition to attempting to discipline subsidies to primary products, signatories to the *Subsidies Code* also agreed to a number of general provisions on subsidies, not necessarily limited to primary products. Adverse effects caused by subsidies, exemplified by injury to the domestic industry of another signatory, nullification or impairments to the benefits of another Member and serious prejudice to the interests of another Members, were first introduced under Art. 8 of the *Subsidies Code* as indication of the “unlawfulness” of such subsidies. The very same standards were to be later adopted by Art. 5 of the *SCM Agreement* on actionable subsidies.

53. The concept of inequitable world export share caused by subsidies to primary products, on the other hand, was retained under Art. 6.3(d) of the *SCM Agreement*, with such changes as “world market share” to replace “share of world export trade” and the addition of a three year period to constitute “representative period” benchmark.

54. While China agrees that the requirements of GATT Art. XVI:3 are reflected in and developed by requirements in Article 6.3(d) of the *SCM Agreement*, prior Appellate Body reports have indicated that to the extent a specific WTO agreement conflict with the provisions of GATT 1994, the former shall prevail. In that respect, it is important to quote the Appellate Body in *Brazil – Desiccated Coconut*:

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

... the question for consideration is not whether the *SCM Agreement* supersedes Article VI of GATT 1994. Rather, it is whether Article VI creates rules which are separate and distinct from those of the *SCM Agreement*, and which can be applied without reference to that Agreement, or whether Article VI of GATT 1994 and the *SCM*

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<sup>26</sup> Para. 10:2(a), the *Subsidies Code*.

Agreement represent an inseparable package of rights and disciplines that must be considered in conjunction.<sup>27</sup>

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*.”<sup>28</sup> Apart from the integrated structure of the *WTO Agreement* and the annexed agreements, the Appellate Body therefore focused on these two provisions of the *SCM Agreement*. The Appellate Body then explicitly agreed with the Panel’s statement that:

Article VI of GATT 1994 and the SCM Agreement represent a new and different package of rights and obligations, as among WTO Members, regarding the use of countervailing duties. Thus, Article VI and the respective SCM Agreements impose obligations on a potential user of countervailing duties, in the form of conditions that have to be fulfilled in order to impose a duty, but they also confer the right to impose a countervailing duty when those conditions are satisfied. The SCM Agreements do not merely impose additional substantive and procedural obligations on a potential user of countervailing measures. Rather, the SCM Agreements and Article VI together define, clarify and in some cases modify the whole package of rights and obligations of a potential user of countervailing measures.<sup>29</sup>

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.<sup>30</sup>

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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<sup>27</sup> Original Appellate Body quote, Panel Report on *Brazil – Desiccated Coconut*, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, Para. 227; Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/AB/R, DSR 1997:I, p. 15.

<sup>28</sup> Appellate Body Report on *Brazil – Desiccated Coconut*, p. 16.

<sup>29</sup> Panel Report, *Brazil – Desiccated Coconut*, *Brazil – Measures Affecting Desiccated Coconut*, WT/DS22/R, adopted 20 March 1997, Para. 246, as upheld by the Appellate Body Report; Appellate Body Report on *Brazil – Desiccated Coconut*, p. 17.

<sup>30</sup> Appellate Body Report on *Brazil – Desiccated Coconut*, pages 16 and 18.

in connection with the inequitable share of world market challenge, requires that the Art. 6.3(d) prevail over GATT Art. XVI:3. In other words, if this Panel were to find that the GATT provision in conflict with the Art. 6.3(d), a claim against agricultural export subsidies cannot be brought under GATT XVI:3, but should be brought as actionable subsidies under Art. 6.3(d) of the *SCM Agreement*; however, if this Panel does not find any conflict, agricultural export subsidies actionable under Art. 6.3(d) of the *SCM Agreement* shall not be precluded from being actionable under GATT XVI:3, which can only be logical interpretation of note 56 to the *SCM Agreement* as it applies to the relationship.

58. Conflicts or differences were obviously found by the Appellate Body in *US-FSC*. It found that Article XVI:4 of GATT 1994

differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*.

Hence, “[u]nquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the Agreement on Agriculture must clearly take precedence over ... the GATT 1994”.

59. Such an interpretation is further supported the general interpretative note to Annex 1A, which provides to the effect that in the event of a conflict between a provision of the GATT 1994 and a provision of another agreement in Annex 1A, the latter shall prevail to the extent of the conflict.

60. This Panel’s Question 56(c) is in fact answered by the quoted passage from the Appellate Body in *US-FSC*. When GATT 1947 was negotiated and codified, there was nothing in it that expressly defines the term “subsidy”, or the term “export subsidy”. Such definitions only came into WTO wording in the Uruguay Round in addition to the new and more comprehensive discipline on “prohibited subsidies” under the *SCM Agreement* and “domestic [agricultural] support” under the *Agreement on Agriculture*. The more explicit disciplines under the *SCM Agreement* and the *Agreement on Agriculture*, as noted by the Appellate Body in the quoted passage, being “the latest statement of WTO Members as to their rights and obligations concerning agricultural subsidies”, clearly take precedence over any GATT 1994 provisions to the extent of direct conflict.

61. 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-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.

4. The EC is not expressing any views on the largely factual question of whether the subsidies at issue should be “allocated” or “expensed”. The point made by the EC was simply that Brazil cannot have it both ways. If the subsidies are fully expensed to the marketing year where they are granted, as Brazil appears to have done, it is contradictory to claim at the same time that they continue to provide benefits beyond that marketing year.

Question 47

**In the EC further submission, it is said that significantly different conditions of competition in regional markets may prevent the Panel from arriving at the conclusion that there is a world market. Is the payment of a subsidy a “condition of competition” and, if so, how should that impact upon the Panel’s analysis?**

Reply

5. To be precise, the EC’s position is that there is no world market for the purposes of Article 6.3 (c) where the existence of trade barriers has the consequence that the conditions of competition, and in particular the price levels prevailing in one geographical area are significantly different from those prevailing in another geographical area.

6. Unlike, for example, import duties, quotas or transport costs, subsidies do not, of themselves, insulate the prices in one geographical area from those in other areas and, therefore, do not lead to existence of separate geographical markets.

**QUESTIONS TO ALL THIRD PARTIES**

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...”)?**

Reply

7. The introductory phrase of Article 3 makes it clear that subsidies which would be inconsistent with Article 3.1, but which are provided consistently with the export competition provisions of the *Agreement on Agriculture* are not prohibited.

Question 50

**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 “exempt[ion] from actions” under Article 13(b)(ii) and 13(c)(ii) of the Agreement on Agriculture?**

Reply

8. No.

9. In the first place, and contrary to the Panel’s implicit suggestion, it is still an open question, in view of the definition of the terms “implementation period” and “year” in Article 1 (f) and (i), respectively, of the *Agreement on Agriculture*, whether the provisions cited in the question will cease to apply by the end of the 2003 calendar year or at a subsequent date during 2004.

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.<sup>1</sup> 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 Agreement apply to subsidies in respect of agricultural commodities? Please answer the following questions, citing the principles in Article 2 of the SCM Agreement:**

- (a) **is a subsidy in respect of all agricultural, but not other, products specific?**
- (b) **is a subsidy in respect of all agricultural crops (i.e. but not to other agricultural commodities, such as livestock) specific?**
- (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?**
- (f) **is a subsidy in respect of a certain proportion of total US farmland specific?**

#### Reply

A subsidy granted to an economic operator which does not require any production of agricultural products, and in which the subsidy may be used for any purpose, does not appear, to the EC, to be specific in the sense of Article 2.1(a)

#### 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:**

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<sup>1</sup> See e.g. Panel report on *India – Measures Affecting the Automotive Sector*, WT/DS1465/R, WT/DS175/R, at para. 7.26.

- (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 claiming that a subsidy is prohibited under Part II and, in addition, causes “adverse effects” under Part III.

13. A finding that a prohibited subsidy causes “serious prejudice” may still be relevant in so far as it may be possible for the subsidising Member to withdraw the export or local content condition attached to the subsidy, which causes its prohibition, while maintaining the subsidy and its adverse effects.

- (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?**

14. In a situation where the complaining party has made no claim that a prohibited subsidy causes adverse effects under Part III, it would be necessary to establish the causal link between the actionable subsidies and the adverse effects. However, the EC understands that this situation does not arise in the present dispute, because Brazil claims that all the allegedly prohibited subsidies cause adverse effects.

Question 53

**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

15. Footnote 13 states that the term “serious prejudice” is used in the *SCM Agreement* in the same sense as in Article XVI:1 of the GATT. Therefore, it seems that a finding that a subsidy causes “serious prejudice” under Article 5(c) of the *SCM Agreement* would have the necessary implication that the same subsidy causes also “serious prejudice” in the sense of Article XVI:1 of the GATT, in so far as that provision can be applied on its own.

Question 54

**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

16. The EC has not taken any position on the factual issue raised in the question.

17. In principle, whether or not a producer is able to cover all its costs without subsidies is not, as such, directly relevant, let alone determinative of whether the subsidies cause adverse effects.

Question 55

**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

18. The EC agrees with the United States that, for the purposes of Article 6.3(c), only the price effects on the “products” of Brazil are relevant. (See US Further Submission, para. 86 and the case law cited therein)

Question 56

**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<sup>2</sup> here?**

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<sup>2</sup> WT/DS108/AB/R, para 117:

“... the provisions of the *SCM Agreement* do not provide explicit assistance as to the relationship between the export subsidy provisions of the *SCM Agreement* and Article XVI:4 of the GATT 1994. In the absence of any such specific textual guidance, we must determine the relationship between Articles 1.1(a)(1) and 3.1(a) of the *SCM Agreement* and Article XVI:4 of the GATT 1994 on the basis of the texts of the relevant provisions as a whole. It is clear from even a cursory examination of Article XVI:4 of the GATT 1994 that it differs very substantially from the subsidy provisions of the *SCM Agreement*, and, in particular, from the export subsidy provisions of both the *SCM Agreement* and the *Agreement on Agriculture*. First of all, the *SCM Agreement* contains an express definition of the term “subsidy” which is not contained in Article XVI:4. In fact, as we have observed previously, the *SCM Agreement* contains a broad package of new export subsidy disciplines that “go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947”. Next, Article XVI:4 prohibits export subsidies only when they result in the export sale of a product at a price lower than the “comparable price charged for the like product to buyers in the domestic market.” In contrast, the *SCM Agreement* establishes a much broader prohibition against *any* subsidy which is “contingent upon export performance”. To say the least, the rule contained in Article 3.1(a) of the *SCM Agreement* that all subsidies which are “contingent upon export performance” are prohibited is significantly different from a rule that prohibits only those subsidies which result in a lower price for the exported product than the comparable price for that product when sold in the domestic market. Thus, whether or not a measure

- (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*.<sup>3</sup> 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 the *SCM Agreement*.)

21. This interpretation is confirmed by Article 13 of the *Agreement on Agriculture*. It would be odd if the peace clause exempted export subsidies from action under Article XVI:3, but not domestic support, which is assumed to have less pernicious trade effects. Clearly, if the drafters of the peace clause did not deem necessary to exempt domestic support from action under Article XVI:3 it is because they considered that this provision did not apply to domestic support pursuant to Article 21.1 of the *Agreement on Agriculture*.

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is an export subsidy under Article XVI:4 of the GATT 1947 provides no guidance in determining whether that measure is a prohibited export subsidy under Article 3.1(a) of the *SCM Agreement*. Also, and significantly, Article XVI:4 of the GATT 1994 does not apply to "primary products", which include agricultural products. Unquestionably, the explicit export subsidy disciplines, relating to agricultural products, contained in Articles 3, 8, 9 and 10 of the *Agreement on Agriculture* must clearly take precedence over the *exemption* of primary products from export subsidy disciplines in Article XVI:4 of the GATT 1994."

<sup>3</sup> Cf. Panel and Appellate Body reports, *Brazil – Measures Affecting Desiccated Coconuts*, WT/DS22/R and WT/DS22/AB/R.

## 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 *SCM Agreement* to demonstrate serious prejudice separately after establishing that one of the effects of a subsidy listed under Article 6.3 applies, as the effects listed in Article 6.3 themselves equate to serious prejudice”. How does this view relate to Article 6.3(d), which appears to contain no element of degree? India**

#### Reply

India presumes that by ‘element of degree’ the Panel means the ‘intensity or amount’ of the effects of the subsidy as enumerated in Article 6.3 of the *SCM Agreement*. India notes that for serious prejudice to arise, in respect of only one out of the four effects of the subsidy in Article 6.3, has the intensity of the effect been specified. This is in respect of the effect of the subsidy in Article 6.3 (c) wherein the ‘intensity or amount’ of price undercutting, price suppression or price depression has been qualified by ‘significant’. Thus, for serious prejudice to arise in case of price undercutting, price suppression or price depression, such effects should be significant. What can constitute ‘significant’ would vary from case to case. India is of the view that the other cases of effect of the subsidy specified in paragraphs 3 (a), 3(b) and 3 (d) of Article 6 contain no element of degree.

India fails to see how the absence of any element of degree in paragraphs 3 (a), 3(b) and 3 (d) of Article 6 results in the complaining Member being separately required to prove that the prejudice is indeed serious even after having established that one of these effects exists. If the drafters had intended that the complaining Member should separately establish that the prejudice caused by the effects of the subsidy was serious they would have defined the requirements for this purpose. The *SCM Agreement* contains no such requirement. India is, therefore, of the view that there is no obligation under the *SCM Agreement* to demonstrate serious prejudice separately after establishing that one of the effects of a subsidy listed under Article 6.3 applies.

## 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.<sup>1</sup> 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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<sup>1</sup> *United States – Subsidies on Upland Cotton*, Further Submission of the United States, 30 September 2003, para 167.

**(a) is a subsidy in respect of all agricultural, but not other, products specific?**

New Zealand does not consider that this question is relevant to this dispute as none of the subsidies at issue are provided on the same terms to all agricultural products.

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

Yes such a subsidy would be specific, because access to the subsidy is explicitly limited to certain enterprises within the meaning of Article 2.1(a), specifically to producers of agricultural crops.

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

Yes, because it is specific to producers of certain agricultural products and is thus explicitly limited to certain enterprises within the meaning of Article 2.1(a).

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

Yes, because it is specific to producers of one product and is thus explicitly limited to certain enterprises within the meaning of Article 2.1(a).

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

It is not clear from the question what kind of subsidy is being referred to, and, as noted in New Zealand's general comments on this question, whether or not a subsidy is specific within the terms of Article 2 of the *SCM Agreement* requires examination of the particular features of the subsidy at issue. To the extent that the subsidy referred to in the question is limited to certain enterprises (as suggested by the fact that the subsidy is provided only in respect of a certain proportion of the total value of United States commodities or agricultural commodities) it would be specific within the meaning of Article 2.1(a).

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

See New Zealand's answer to (e) above.

**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? All third parties**

A Panel may conclude that a prohibited subsidy had resulted in adverse effects to the interests of another Member. The chapeau of Article 5 of the *SCM Agreement* refers to "any subsidy referred to in paragraphs 1 and 2 of Article 1". Reference is made in paragraph 2 of Article 1 to subsidies being subject to the provisions of Part III only if they are specific in accordance with Article 2. Article 2.3 deems any subsidy falling under the provisions of Article 3, ie prohibited subsidies, to be "specific". Thus a prohibited subsidy may also be subject to the provisions of Part III of the *SCM Agreement*. It is therefore open to a Panel to conclude that a prohibited subsidy resulted in adverse effects to the interests of another Member.

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* would be determinative for a finding under Article XVI:1 of the GATT 1994 because serious prejudice is used in the same sense in Article 5(c) as it is in Article XVI:1. Footnote 13 explicitly clarifies this.

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

Without subsidies United States cotton producers would not be covering their full costs of production and so would be making losses over the longer term. Evidence for this has been provided by Brazil in Exhibits Bra-7 and Bra-205. For example in 1999, 2000 and 2001 the USDA estimated that United States cotton producers total costs exceed the value of production by 173, 142 and 259 dollars per planted acre respectively, as shown in "US cotton production costs and returns 1997-2001".<sup>2</sup>

Accordingly the subsidies mean that United States production is higher than it otherwise would be. As Professor Sumner's econometric work shows, without subsidies US production over 1999-2002 would have been an average of 28.7 per cent lower than actual US production<sup>3</sup> and as a consequence United States exports would have declined on average by 41.2 per cent between MY

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<sup>2</sup> Exhibit BRA 7.

<sup>3</sup> *United States – Subsidies on Upland Cotton*, Brazil's Further Submission to the Panel, 9 September 2003, para 105.

1999-2002<sup>4</sup> 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<sup>5</sup> 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 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?**

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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<sup>4</sup> *Ibid.*

<sup>5</sup> Oral Statement of Benin, 8 October 2003.

- (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?**

Article 6.3(d) of the *SCM Agreement* elaborates on one specific aspect of the disciplines on subsidies in GATT Article XVI:3, and that is in relation to the situation where a subsidy, as defined in the *SCM Agreement*, results in an increase in the world market share of the subsidising Member in the particular subsidised product. However GATT Article XVI:3 addresses a broader situation – where the result of the application of the subsidies is that the subsidising Member has a “more than equitable share” of the world export trade in the product.

A Member challenging a subsidy need not demonstrate that the subsidising Member’s share of the world market has necessarily increased. For example, a Member may apply a subsidy that increases its exports of a product in order to simply maintain its market share. “But for” that subsidy, relevant economic factors might have meant that a Member’s exports should in fact have declined. Therefore Article 6.3(d) of the *SCM Agreement* covers one specific aspect of how a “more than equitable share” of the world market might manifest itself but not all such situations.

As such the situation is distinguishable from *US-FSC*<sup>6</sup> in relation to GATT Article XVI:4 where the Appellate Body found that the narrow prohibition in Article XVI:4 had been entirely subsumed by Article 3.1(a) of the *SCM Agreement*.

- (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?**

See New Zealand’s answer to Questions (a) and (b) above.

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<sup>6</sup> Appellate Body Report, *United States – Tax Treatment for “Foreign Sales Corporation”*, WT/DS108/AB/R, adopted 20 March 2000

## 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 contingent upon export performance or a subsidy contingent 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 2.1 of the SCM Agreement provides that “In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as ‘certain enterprises’) within the jurisdiction of the granting authority, the following principles shall apply:...” Thus, when considering the answers below, the principles set forth in Article 2.1 must also be borne in mind.

Also, the basic reason for excluding “non-specific subsidies” from being prohibited should be that the subsidies are generally available and no competitive advantage is provided to a particular sector or some specific sectors. If there is competitive advantage provided to one or more sectors

with the effect of excluding other sectors from receiving the advantages, it should be considered as specific.

Our view is that the concept of 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 *de facto* determinative for a finding under Article XVI:1 of the GATT 1994.

**Q54. About the evidence of US cotton producers to cover or not to cover the fixed and variable costs without subsidies.**

A: We do not have information available on this.

**Q55. About “another Member” of Article 6.3(c).**

A: We do not claim that we are “another Member” in the sense of Article 6.3(c) of the SCM Agreement.

**Q56. About the relationship between Article XVI:3 of the GATT 1994, the disciplines on export subsidies and domestic support in the AoA and the disciplines on prohibited export subsidies and actionable subsidies in Article 3, 5(c) and 6.3(d) of the SCM Agreement.**

- A(a) Agricultural domestic support should not be challengeable under Article XVI:3 of the GATT 1994. Although the second sentence “grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory” seems to be broad enough to include domestic subsidies, this second sentence still comes after the introductory sentence, which requires Members to avoid the use of subsidies on the export of primary products. Also paragraph 3 of Article XVI of the GATT 1994 is under the title “Section B - Additional Provisions on Export Subsidies”. There is no reason why the provisions in paragraph 3 should not be limited to export subsidies. Otherwise, the title would become meaningless and redundant.
- (b) Paragraph 117 of the Appellate Body Report in *US-FSC* is an appropriate interpretation of the relationship between the definition of subsidies and export subsidies in Articles 1.1(a)(1) and 3.1(a) of the SCM Agreement on the one hand and export subsidies in Article XVI:4 of the GATT 1994 on the other. However, it does not have relevancy in deciding the relationship between domestic subsidies and export subsidies. The requirements of Article XVI:3 of the GATT 1994 are imposed on export subsidies, as explained above, while Article 6.3(d) of the SCM Agreement is about non-export subsidies. Thus, the requirements of Article XVI:3 of the GATT 1994 are neither reflected in, nor developed by or subsumed by the requirements in Article 6.3(d) of the SCM Agreement.
- (c) Under the principle set forth by the above-mentioned Paragraph 117 of the Appellate Body Report in *US-FSC*, if there is conflict between Article XVI of the GATT 1994 and the AoA, the AoA must take precedence over the GATT 1994. Based on the same principle, the SCM Agreement should take precedence over the GATT 1994 to the extent that there is conflict. However, with regard to the definition of subsidy in Article 1 of the SCM Agreement and the prohibition on subsidies contingent upon export in Article 3.1(a), there is no conflict provision in Article XVI of the GATT 1994. Thus, there is no issue here of whether one agreement would take preference over the other. Nevertheless, Article XVI of the GATT 1994 and the SCM Agreement are still the rules under the WTO dealing with the same set of matters. The definition of certain terms in one agreement could serve as a very important source in helping to define the same terms in another agreement. Therefore, unless there is a sound basis for having a different interpretation, we do not see any reason for different meanings of subsidies and export subsidies in Article XVI of the GATT 1994 from those in the SCM Agreement.