United States – Subsidies on Upland Cotton

WT/DS 267

Responses to the Panel’s questions and the questions of certain third parties submitted by the European Communities

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I. ARTICLE 13 OF THE AGREEMENT ON AGRICULTURE

Question

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

Answer

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. 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

1 Australia’s Oral Statement, para. 18.
on Agriculture and the other Annex I Agreements and cannot be seen as a
derogation therefrom. Despite the extent to which Article 3.3 could be thought of
as a derogation from the SPS Agreement, the Appellate Body ruled in EC
Hormones that it could not be considered an affirmative defence, and that the
burden of proof did not, therefore lie with the defendant.\(^2\) In particular, the
Appellate Body noted that the situation in Article 3.3 of the SPS Agreement is
“qualitatively different” from the relationship between for instance, Article 1 and
XX GATT.\(^3\)

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**

**Question**

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

**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” 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” 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. 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

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6 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.
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.

**Question**

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

**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.
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? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

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.

Question

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

Answer

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

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

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? 3rd parties, in particular Australia, Argentina, Canada, EC, NZ

Answer

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

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7 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.
sentence and the operative language in the second sentence. Australia offers the Panel another definition: “harmoniously” or “agreeably”, but fails to note that that the Oxford English Dictionary considers this usage of the word “accordingly” obsolete.8

16. The European Communities would point out that both the French and Spanish text support the view that the use of the word “accordingly” links the general statement in the first sentence with the specific obligations of the second sentence. The French text uses the term “en conséquence” and the Spanish the term “por consiguiente”. Both of these terms show that the criteria in the second sentence 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.9 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.

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8 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).

9 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.
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.10 (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).11 Such provisions do not, however, impose additional obligations supplemental to the specific obligations, unless expressly stated.12


12 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.
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.

**Question**

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

**Answer**

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.

**Question**

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*

**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.

**Question**

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

**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.13

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

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

**Question**

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? 3rd 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. Paragraph 5 acts as a “catch-all” for all direct payments. 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. 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.

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

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.

14 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 [...].”

15 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.”

16 First Third party Submission, paras. 19 & 20. Obviously, some other exempted support measures are defined in Article 6 of the Agreement on Agriculture.
Nevertheless, while the first paragraph informs the interpretation of paragraph 6 it cannot detract from the words actually used in paragraph 6. 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.

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

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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.

**Question**

12. Where does Article 13(b) require a year-on-year comparison? **3rd 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.

**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)? 3rd 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.
Question

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

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.

Question

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

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.

Question

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

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.
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? 3rd parties, in particular Australia, Argentina, Canada, China, EC, NZ

Answer

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

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

Question

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

Answer

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

Question

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

Answer

42. See the answer to question 12 above.

Question

20. 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.

**Question**

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

**Answer**

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

45. Granted is the past tense of the verb “grant” which means “to give or confer, (a possession, a right etc) formally; transfer (property) legally”.19 “Decided” is the past tense of the verb “decide” which means “come to a determination or resolution that, to do, whether”.20 Thus, in this context, “granted” refers to support which has been provided, to which a farmer (or all eligible farmers in a Member) has obtained a right. “Decided” implies that a political authority (be it a legislature or a government department or agency) has determined that a particular crop is to be entitled to a particular type of assistance.

46. The European Communities believes that the use of the term “decided”, as opposed to “granted” and “provided” (which are used elsewhere in the Agreement on Agriculture) is very deliberate. Article 13(b) is designed to protect support

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which was “decided” during 1992. It was negotiated in November 1992 as part of the first Blair House Agreement and later multilateralised.\textsuperscript{21} In November 1992, the negotiators could not have known the support granted for the marketing year 1992, which was of course running during that period. They did not, therefore, intend to refer to the support granted when using the term “decided”. Rather, they were referring to decisions taken during 1992 in respect of support which WTO Members intended to grant – not that actually granted.

\textbf{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? 3\textsuperscript{rd} parties, in particular, Australia, Argentina, Canada, China, EC, NZ

\textbf{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”

\textsuperscript{21} 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).
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 makers. It may be that only a certain amount of production would be eligible, 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 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.

22 For instance, because of quotas on eligible production or definitive budgetary ceilings.

23 See para. 9 & 11 of Annex 3.
Question

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

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.

Question

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**

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**24**, together with the relevant sections of the “Dunkel Draft”, which were replaced by Article 13(b)(ii).**25**

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.**26**

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24  Exhibit EC-1.

25  Exhibit EC-2.

26  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).
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". 

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 “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”.

Question

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? 

Answer

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

Question

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)?
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.

Question

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
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

Question

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? 3rd 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? 3rd 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.
Question

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). 3rd 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, 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”.28

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

27  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.

28  Panel report, Brazil –Aircraft (21.5) – II, footnote 214.
losses of the programme – represents the appropriate benchmark for determining that an export subsidy does not exist.

**Question**

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? 3rd parties, in particular, Argentina, Canada, EC, NZ

**Answer**

66. Both.

**Question**

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

**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.
Question

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

Answer

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

Question

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

Answer

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

Question

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

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

29 Panel report, Canada – Export Credits and Loan Guarantees for Regional Aircraft, WT/DS222/R, para. 7.341.
subsidies negotiated by the drafters of the Agreement on Agriculture. All other export subsidies are regulated by Article 10.1.

Question

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) 3rd parties, in particular, Argentina, Canada, EC, NZ

(a) "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)

(b) "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)

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

Answer

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

Question

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
3rd 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)? 3rd 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**

**Question**

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

**Answer**

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

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30 [Original footnote to question] "We recall that the ETI measure grants a tax exemption in two different sets of circumstances: (a) where property is produced within the United States and held for use outside the United States; and (b) where property is produced outside the United States and held for use outside the United States. Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances might not be export contingent does not dissolve the export contingency arising in the first set of circumstances. 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."

31 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".

31
Question

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

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.

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. 3rd parties, in particular, Australia, Argentina, EC, NZ, Paraguay

Answer

76. The Panel’s question involves two elements. First, is a Member entitled to provide domestic content subsidies under the Agreement on Agriculture? Second, if such subsidies are permitted, what is the relevance of such a rule to Brazil’s claims under Article 3 of the SCM Agreement and Article III.4 GATT. The European Communities has already provided elements of a response in its oral statement. 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

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32 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.
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”.

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)

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”. 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 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.34

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 subordi- nate 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 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.

34 Oral Statement, para. 38.
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.35

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.

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V. ETI Act

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? 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. 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.

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. Consequently, the US could not have legitimately maintained that it was entitled to peace clause protection.

36 The Appellate Body confirmed the panel’s finding of a violation of Article 3.1(a) of the SCM Agreement see Article 21.5 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.

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. Argentina, China, EC, NZ

Answer

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

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

88. The Panel may find some assistance in the Appellate Body’s findings in United States – Shrimp (21.5). In that recourse to Article 21.5, Malaysia attempted to challenge certain aspects of the revised US measure at issue which were identical in the measure which was subject to the original challenge.39 These aspects had been found by the panel and the Appellate Body to be consistent with the United States’ WTO obligations. The Appellate Body found that there was no need for the


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.

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.

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40 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.
VI. QUESTIONS FROM OTHER THIRD PARTIES ADDRESSED TO THE EUROPEAN COMMUNITIES

Questions from Australia to the European Communities

Question

43. 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.41

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.

41 [Original footnote to question] First Third Party Submission by the European Communities, paragraph 17.
Question

44. 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. 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.

Answer

92. The 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:

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: …
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.44 (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.5.45 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.46 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).

Question

45. 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.47

47 [Original footnote to question] First Third Party Submission by the European Communities, paragraph 21.
United States – Subsidies on Upland Cotton  
Responses to the Panel’s questions  
submitted by the European Communities  
11 August 2003.

Would the European Communities please explain the legal authorities for its argument, having regard to its arguments and the Appellate Body’s findings in Argentina – Footwear Safeguards.\(^{48}\)

**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.\(^{49}\) 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**

**Question**

46. 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?

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\(^{48}\) [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.\(^{[1-1]}\) 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’.\(^{[1-1]}\) 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.

Answer

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