

**UNITED STATES – SUBSIDIES ON UPLAND COTTON
(WT/DS267)**

Oral Statement by Australia

24 July 2003

Mr Chairman, Members of the Panel

1. I appreciate this further opportunity to present Australia's views on matters at issue in this dispute.
2. In this statement, I will provide some elaboration of Australia's views on the meaning of Article 13(b)(ii) of the *Agreement on Agriculture*. I will also address some of the matters raised in the First Written Submission of the United States and in the First Third Party Submission of the European Communities.

Mr Chairman, Members of the Panel

3. I will begin with matters relating to the meaning of Article 13(b)(ii) of the *Agreement on Agriculture*.
4. As Australia noted in its Written Submission,¹ the word “decided” appears twice in the operative provisions of the *Agreement on Agriculture* – in subparagraphs (ii) and (iii) of Article 13(b). Further, the immediate context for the word “decided” is exactly the same in each case: “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)(iii) deals with a completely different type of action: one based on non-violation or impairment under GATT Article XXIII:1(b).

¹ Third Party Submission of Australia, paragraph 26.

5. Thus, Australia believes that it will be necessary for the Panel to consider two key threshold questions.

6. Firstly, is the meaning of the phrase “provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year” the same in each of Article 13(b)(ii) and (iii)?

7. Australia recalls that the phrase, as well as draft text for what became Article 13, first appeared in the “Blair House Accord”. Also included in the Accord were provisions concerning the *EEC – Oilseeds* dispute².

8. In Australia’s view, that dispute is crucially relevant to the interpretation of Article 13(b)(ii) and (iii).

9. Australia recalls that it clearly understood in the resumed Uruguay Round agriculture negotiations in 1993 that the words “decided during the 1992 marketing year” had been chosen to incorporate into the text of Article 13(b)(ii) and (iii) the sense of expectations of “conditions of price competition” as this had been interpreted and applied in the *EEC – Oilseeds* dispute.

10. 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.^[...] 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. ...³

² *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, and *Follow-Up on the Panel Report “European Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, DS28/R, BISD 39S/91.

³ *EEC – Oilseeds*, paragraph 144.

11. That Panel went on to say:

... 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. ...⁴

12. In any case, having regard to the customary principles of interpretation, Australia considers that the phrase “provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year” must have the same meaning in both Article 13(b)(ii) and (iii).

13. Thus, there is a second threshold question that the Panel needs to consider. That question is: could conditions of price competition for the purposes of a non-violation nullification 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.

Mr Chairman, Members of the Panel

14. I would now like to comment on some matters raised in the First Written Submission of the United States.

15. Firstly, Australia disagrees with the United States’ approach to interpreting the “peace clause” and the meaning of “exempt from action based on”.⁵

⁴ *EEC – Oilseeds*, paragraph 148.

⁵ First Written Submission of the United States, paragraph 33.

16. If the United States' interpretation is correct and the WTO Agreement negotiators intended the interpretation offered by the United States, surely the negotiators would have included provisions clarifying how such situations should be resolved? At the very least, surely Article 13 of the *Agreement on Agriculture* would have been listed in the Special or Additional Rules and Procedures Contained in the Covered Agreements at Appendix 2 to the *Dispute Settlement Understanding*? Yet the negotiators did neither of these things.

17. The United States argues as well that its interpretation is supported by the fact that the peace clause applies “[n]otwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures”.⁶ However, the United States ignores that, for its argument to be valid, the peace clause would also have to apply “notwithstanding the provisions of the *Dispute Settlement Understanding*”.

18. The United States argues too that Brazil is in error by asserting that the peace clause itself “provides no positive obligations”.⁷ In Australia's view, however, this argument confuses obligations and conditions: the United States is equating a binding requirement to act in a certain way with a prerequisite for the availability of a right or privilege. Article 13 of the *Agreement on Agriculture* does not of itself establish any binding requirements with which WTO Members are required to comply.

19. That confusion between rights and obligations continues when the United States argues that “Brazil's approach would produce bizarre results”.⁸ Indeed, the United States' arguments could be considered to confirm the nature of Article 13 as an affirmative defence. Had Brazil alleged a breach of the United States' obligations under Article 6, Brazil would have had the initial burden of

⁶ First Written Submission of the United States, paragraph 39.

⁷ First Written Submission of the United States, Paragraph 43.

⁸ First Written Submission of the United States, paragraph 44.

making a *prima facie* case of inconsistency. Article 13, however, is a right or privilege available to the United States, provided that its measures fully conform to the relevant conditions. Thus, it is for the United States to demonstrate that it is entitled to invoke that right or privilege.

20. Secondly, the United States argues that “support to a specific commodity” is equivalent to “product-specific support”.⁹

21. The United States asserts that the definition of Aggregate Measurement of Support – or AMS – at Article 1(a), and Article 6 concerning Domestic Support Commitments, provide relevant context. The United States asserts that because the calculation of AMS, and exemptions from Current Total AMS, differentiate between product specific and non-product specific domestic support, “support” in the context of Article 13(b)(ii) and (iii) means product-specific AMS.

22. Australia does not agree. AMS is defined by Article 1(a) to mean “the annual level of support ... provided for an agricultural product in favour of the producers of the basic agricultural product”. However, Article 13(b)(ii) and (iii) refer to “support to a specific commodity”.

23. Had the negotiators intended that “support to a specific commodity” in the context of Article 13(b)(ii) and (iii) mean product-specific AMS only, they would have said so in the text. They did not. Further, the United States’ argument ignores that a Member’s reduction commitments include both product specific and non-product specific domestic support measures unless they are exempt from inclusion.

24. Thus, in Australia’s view, “support to a specific commodity” means: all non-“green box” support that benefits a specific commodity, whether that support be through product specific, or non-product specific, programs. Indeed,

⁹ First Written Submission of the United States, paragraph 78.

Australia believes that “support to a specific commodity” in the context of Article 13(b)(ii) and (iii) can include forms of support additional to those captured in an AMS calculation.

25. It follows, of course, that Australia considers – in the context of this dispute – that the portions of the direct payment and counter-cyclical payment programs that benefit upland cotton should be included in the calculation of “support to a specific commodity” within the meaning of Article 13(b)(ii). Moreover, Australia notes that the counter-cyclical payment program provides a target price of 72.4 cents per pound for upland cotton,¹⁰ and that entitlements to “Step 2” payments and some other domestic support programs are additional to the target price, as they were to the 1992 target price of 72.9 cents per pound.

26. Thirdly, the United States argues that direct payments under the 2002 Farm Act meet the criteria of Annex 2 Decoupled Income Support payments. Australia has already addressed the issue of planting restrictions on fruit and vegetables and wild rice in its Written Submission.

27. The United States argues that “eligibility for direct payments is defined by clearly defined criteria ... in a defined and fixed base period” and that “payment yields and base acres are defined in the 2002 Act and fixed for the duration of the legislation”.¹¹ The United States’ interpretation means that a WTO Member could re-define and re-fix a base period every time it introduced new domestic support legislation. This cannot be a correct interpretation of the provisions of paragraph 6 of Annex 2 to the *Agreement on Agriculture*.

¹⁰ Section 1104, 2002 FSRI Act, Exhibit Bra-29.

¹¹ First Written Submission of the United States, paragraph 67.

28. Fourthly, the United States argues that “a Member may choose to provide ‘amber box’ support in any ... manner so long as that Member’s Current Total AMS does not exceed ... [its] commitment level”.¹²

29. Australia disagrees. The United States’ argument ignores that Article 13(b)(ii) does not exempt non-“green box” domestic support measures from actions based on Article 3 of the *SCM Agreement*. It also ignores the provisions of Article 21.1 of the *Agreement on Agriculture*. In an analogous situation in the *EC – Bananas* dispute, the Appellate Body said: “... the provisions of the GATT 1994 ... apply ... except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter”.¹³ The Appellate Body went on to say in that dispute:

... [T]he negotiators of the *Agreement on Agriculture* did not hesitate to specify ... limitations elsewhere in that agreement; had they intended to do so with respect to Article XIII of the GATT 1994, they could, and presumably would, have done so. ...¹⁴

30. The Appellate Body’s statement is equally applicable in the context of this dispute. Had the negotiators of the *Agreement on Agriculture* intended that non-“green box” domestic support measures be “exempt from actions based on” Article 3 of the *SCM Agreement*, they would have said so. The negotiators did expressly exempt export subsidies from actions based on SCM Article 3 to the extent that such export subsidies conformed fully to the provisions of Part V of the *Agreement on Agriculture*. In Australia’s view, therefore, the omission from Article 13(b)(ii) of the *Agreement on Agriculture* of an express exemption from actions based on SCM Article 3 for local content subsidies has meaning.

¹² First Written Submission of the United States, paragraph 144.

¹³ *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, Report of the Appellate Body, WT/DS27/AB/R, paragraph 155.

¹⁴ *EC – Bananas*, paragraph 157.

31. Fifthly, the United States has requested that the Panel issue a preliminary ruling that Production Flexibility Contract and Market Loss Assistance payments are not within the Panel's terms of reference because these programs have expired. The fact that a measure has expired cannot be sufficient to remove it from the Panel's purview. If the Panel were to grant the United States' request solely on that basis, it would mean that any Member could authorise WTO-inconsistent domestic support programs through short-lived measures and avoid the consequences of such actions.

Mr Chairman, Members of the Panel

32. The final matter on which I will comment today concerns the Third Party Submission of the European Communities and its arguments in relation to the interpretation of the first sentence of paragraph 1 of Annex 2 to the *Agreement on Agriculture*. The European Communities argues that the first sentence "simply signals the objective of Annex 2" and does not set out an independent obligation.¹⁵

33. That argument ignores the plain meaning of the text and renders the first sentence of paragraph 1 inutile, which of course a treaty interpreter may not do. If an exemption from reduction commitments is being claimed for any domestic support measures, the first sentence says they "shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production". As explained in Australia's written submission,¹⁶ a fundamental requirement is a primary or essential condition. To interpret a "fundamental requirement" other than as a separate and independent obligation would be contrary to the plain meaning of the words and thus to the normal rules of treaty interpretation. The use of the words "shall meet" establishes an express

¹⁵ First Third Party Submission by the European Communities, paragraph 15.

¹⁶ Australia's Third Party Submission to the Panel, paragraph 31.

obligation to comply with the specified condition that such measures not, or only minimally, bias or unnaturally alter trade or production.¹⁷

34. The European Communities argues that the word “accordingly” at the beginning of the second sentence of paragraph 1 links the ‘fundamental requirement’ in the first sentence with the ‘basic criteria’ in the second sentence” and thus makes clear that the fundamental requirement is complied with if the basic criteria in the second sentence and the policy-specific criteria set out in paragraphs 2 to 13 are met.¹⁸

35. However, the meanings for “accordingly” cited by the European Communities – “in accordance with the logical premises” and “correspondingly” – do not compel the interpretation it has offered. Moreover, there are other, equally valid meanings of the word “accordingly”, provided by the same dictionary, such as “harmoniously” and “agreeably”.¹⁹

36. It is possible to interpret the whole of paragraph 1 to Annex 2 so as to give effect to all of its provisions:

- domestic support measures for which exemption from the reduction commitments is claimed shall not, or shall only minimally, distort trade or production; and
- to the extent that measures of the type described in paragraphs 2 to 13 of the Annex are consistent and harmonious with that fundamental requirement and conform to the basic and policy-specific criteria as set out in the second sentence, they are exempt from reduction commitments.

¹⁷ Australia’s Third Party Submission to the Panel, paragraphs 31-32.

¹⁸ First Third Party Submission by the European Communities, paragraph 20.

¹⁹ *The New Shorter Oxford English Dictionary*, Volume I, Ed. Lesley Brown, Clarendon Press, Oxford, 1993, page 15.

37. Thus, notwithstanding that they may meet the basic and policy-specific criteria set out in paragraphs 1 and 6 of the Annex, a Member may not claim Decoupled Income Support payments as “green box” where those payments do not meet the fundamental requirement that they shall not, or shall only minimally, distort trade or production. Such could be the case, for example, where the level of Decoupled Income Support payments are sufficient to affect directly producer decisions concerning the allocation of economic resources to production of a particular commodity.

Mr Chairman, Members of the panel

38. Should you have questions on any matters concerning Australia’s Written Submission and Oral Statement, I would be pleased to take these on notice and arrange for written answers to be provided.

Thank you, Mr Chairman, Members of the Panel.