

United States – Subsidies on Upland Cotton

**Questions from the Panel to third parties –
resumed first session of the first substantive Panel meeting**

**Responses by Australia
27 October 2003**

A. QUESTIONS TO INDIVIDUAL THIRD PARTIES

43. ...

44. ...

45. ...

46. ...

47. ...

48. ...

B. QUESTIONS TO ALL THIRD PARTIES

49. *What is the meaning and effect of the introductory phrase of Article 3 of the SCM Agreement (“Except as provided in the Agreement on Agriculture ...”)?*

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

Australia noted previously in its response to the Panel’s earlier question 40 that the legal issue in question concerning the relationship between the *Agreement on Agriculture* and Article 3.1(b) of the *SCM Agreement* derives from the condition attached to the grant of a subsidy, not the grant of a subsidy *per se* or who might benefit from the subsidy. The *Agreement on Agriculture* does not include any provisions concerning the conditionality of domestic support in the sense of SCM Article 3.1(b).

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

It is inconceivable to Australia that any intended exemption from the very significant and unambiguous local content subsidy disciplines of Article 3.1(b) of the *SCM Agreement* would not have been expressly set out in the *Agreement on Agriculture*. The inclusion of express provisions concerning export subsidies in the *Agreement on Agriculture* indicates that the negotiators of that Agreement were well aware of the need to include express provisions if additional or alternative disciplines concerning subsidies for agricultural products were intended vis-à-vis the disciplines established pursuant to the *SCM Agreement*.

The situation is analogous to that examined by the Panel and the Appellate Body in *EC – Bananas* wherein the Appellate Body upheld the Panel's conclusion that the *Agreement on Agriculture* did not permit the EC to act inconsistently with Article XIII of GATT 1994 in the absence of any provisions dealing specifically with the allocation of tariff quotas on agricultural products.¹ In the absence of provisions dealing specifically with local content subsidies in the *Agreement on Agriculture*, that Agreement does not allow a Member to act inconsistently with the *SCM Agreement*. The fact that the phrase “[e]xcept as provided in the Agreement on Agriculture” in the chapeau of SCM Article 3.1 also applies to paragraph (b) of that Article cannot of itself compel the interpretation that there are provision(s) of the *Agreement on Agriculture* which necessarily apply.

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

50. *According to its revised timetable, the Panel will issue its report to the parties after the end of the 2003 calendar year. Does this have any impact on “exempt[ion] from actions” under Article 13(b)(ii) and 13(c)(ii) of the Agreement on Agriculture?*

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

51. *How should the concept of specificity – and, in particular, the concept of specificity to “an enterprise or industry or group of enterprises or industries” – in Article 2 of the SCM Agreement apply to subsidies in respect of agricultural commodities? Please answer the following questions, citing the principles in Article 2 of the SCM Agreement:*

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

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

- (c) *is a subsidy in respect of certain identified agricultural products specific?*
- (d) *is a subsidy in respect of upland cotton, but not other products, specific?*
- (e) *is a subsidy in respect of a certain proportion of the value of total US commodities (or total US agricultural commodities) specific?*

Australia does not wish to comment on this issue.

52. *The Panel notes that different remedies are available in respect of prohibited and actionable subsidies under Article 4.7 and 7.8 of the SCM Agreement. If the Panel were to conclude that a subsidy was prohibited and were to make a recommendation under Article 4.7 of the SCM Agreement to withdraw the subsidy without delay, can the Panel:*

- (a) *also conclude that the same subsidy had resulted in adverse effects to the interests of another Member? If so, what would be the value of such a conclusion in terms of the settlement of the matter before the Panel?*
- (b) *take into account the effects of the interaction of those prohibited subsidies with other, allegedly, actionable subsidies? If so, how is this relevant to the issue of causation under Article 5 of the SCM Agreement?*

If the Panel were to conclude that a subsidy was prohibited and to make a recommendation under Article 4.7 of the *SCM Agreement* to “withdraw the subsidy without delay”, and having regard to the presumption of adverse effects implicit in a finding that a subsidy is prohibited and to the observations of the Appellate Body on the meaning of “withdraw” in SCM Article 4.7²:

- (a) the Panel could conclude that the same subsidy had also resulted in adverse effects to the interests of another Member under SCM Article 5, particularly if that other Member were a third party to the dispute in light of the provisions of Article 10.1 of the DSU;
- (b) the Panel could also consider the interaction of that prohibited subsidy with other, allegedly actionable subsidies. However, the prohibited subsidy would be required to be withdrawn without delay and thus any causative contribution its interaction with other allegedly actionable subsidies may make to the adverse effects of those other actionable subsidies will be removed as a consequence of the withdrawal of the prohibited subsidy.

53. *Would a finding of serious prejudice under Article 5(c) of the SCM Agreement be determinative for a finding under Article XVI:1 of the GATT 1994? Why or why not? What, if any, is the role of footnote 13 of the SCM Agreement in this context?*

Australia does not wish to comment on this issue.

² *Brazil – Export Financing Programme for Aircraft*, Recourse by Canada to Article 21.5 of the DSU, Report of the Appellate Body, WT/DS46/AB/RW, paragraph 45.

54. *Are US cotton producers able to cover the fixed and variable costs without subsidies? Please provide substantiating evidence. Of what relevance is this, if any, to Brazil's actionable subsidy claims?*

Australia does not wish to comment on the facts of US costs of production in relation to upland cotton, but notes the statements of the Appellate Body in relation to the calculation of costs of production in the *Canada – Dairy* dispute.³

55. *In light of the fact that certain third parties have provided submissions about the price effect of claimed US subsidies, which Member or Members is, or are, the “other party” under Article 6.3(c) (“another Member”) for the purposes of these proceedings?*

Australia does not wish to comment on this issue.

56. *Please respond to the following questions concerning the relationship between Article XVI:3 of the GATT 1994, the disciplines on export subsidies and domestic support in the Agreement on Agriculture and the disciplines on prohibited export subsidies and actionable subsidies in Articles 3, 5(c) and 6.3(d) of the SCM Agreement.*

- (a) *Are agricultural domestic support programmes challengeable under Article XVI:3 of the GATT 1994? How, if at all, is the title of Section B of Article XVI (“Additional provisions on export subsidies” (emphasis added)) relevant? How, if at all, are Articles 13 and 21.1, or any other provisions, of the Agreement on Agriculture, relevant?*
- (b) *Are the requirements of Article XVI:3 of the GATT 1994 reflected in, developed by or subsumed by the requirements in Article 6.3(d) of the SCM Agreement, or in any other provisions of the covered agreements? Of what relevance, if any, is the Appellate Body Report in *US – FSC*, para. 117 here?*
- (c) *Of what relevance, if any, is the fact that the definition of “subsidy” in Article 1 of the SCM Agreement and the prohibition on subsidies contingent upon export in Article 3.1(a) were introduced in the Uruguay Round, but did not exist at the time that the GATT 1947 were negotiated?*

In Australia's view, it is unambiguous that agricultural domestic support programs are challengeable under Article XVI:3 of GATT 1994.

It is useful to recall to begin with that GATT 1947 did not provide a definition of a “subsidy” or of an “export subsidy” and that the only disciplines on subsidies of any type were the general subsidy disciplines of paragraph 1 of GATT Article XVI. The provisions of Section B of GATT Article XVI, comprising paragraphs 2-5 and headed “Additional Provisions on Export Subsidies”, were added at the 1954-55 Review Session and constituted the earliest disciplines directed at “the use of subsidies on the export of primary products”. The plurilateral 1979 Tokyo Round Subsidies Code⁴ represented a

³ *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, Recourse to Article 21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW – WT/DS113/AB/RW, paragraphs 94-96, and Second Recourse to Article 21.5 of the DSU by New Zealand and the United States, WT/DS103/AB/RW2 – WT/DS113/AB/RW2, paragraphs 91-120.

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

further stage in the elaboration of disciplines on export subsidies and subsidies generally, in particular, Articles 8-11 and the Annex. This background is helpful in understanding the evolution of the use of terminology originally found in GATT Article XVI and the relationship between provisions of the covered agreements as they exist today.

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

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

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

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

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

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

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

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

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

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

and to the extent that the provisions of the other goods agreements conflict with the provisions of the GATT 1994, the provisions of the other goods agreements prevail. This does not mean, however, that the other goods agreements in Annex 1A, such as the *SCM Agreement*, supersede the GATT 1994. ...⁷ (emphasis added)

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

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

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

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