

United States – Subsidies on Upland Cotton

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

**Responses by Australia
11 August 2003**

ARTICLE 13 OF THE AGREEMENT ON AGRICULTURE

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

Australia does not see any inconsistency in its views. In Australia's view, the potential availability of an affirmative defence in the general sense is in the nature of a right or privilege. Australia wishes to clarify, however, that it considers Article 13 in the specific sense to be a right available when the conditions prescribed therein are met, rather than a privilege.

ARTICLE 13(B) OF THE AGREEMENT ON AGRICULTURE: DOMESTIC SUPPORT MEASURES

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

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

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

In Australia's view, "a" is used in the phrase "a defined and fixed base period" in paragraph 6(a) of Annex 2 to the *Agreement on Agriculture* as an indefinite article, and is defined as meaning "one, some, any"². Thus, having regard to the ordinary meaning of the words in their context and in the light of the object and purpose of the *Agreement on Agriculture*, "a defined and fixed base period" is the base period selected by an individual WTO Member for the purposes of determining initial

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

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

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

² *The New Shorter Oxford English Dictionary*, Volume 1, page 1.

eligibility for a particular decoupled income support payment. Once that base period is selected, it is fixed, that is, it is unchangeable.

“The” is defined as “designating one or more ... things already mentioned or known, particularized by context or circumstances, inherently unique, familiar, or otherwise sufficiently identified”.³ Thus, the use of “the” as a definite article in the phrase “after the base period” in paragraphs 6(b), (c) and (d) of Annex 2 establishes a relationship to the base period already identified, that is, to the base period selected by an individual WTO Member for the purposes of determining initial eligibility for a particular decoupled income support payment in accordance with paragraph 6(a) and which, once fixed, is unchangeable.

Australia does not consider that there is any relationship between any base period defined and fixed for a support program for the purposes of paragraph 6 of Annex 2 and the use of the years 1986-88 as a base period under Annex 3, nor was there intended to be. Annex 3 relates to the calculation of a Member’s AMS for the purposes of implementing its reduction commitments in relation to production and trade-distorting domestic support measures, consistent with the object and purpose of the *Agreement on Agriculture*. By definition in the first sentence of paragraph 1, Annex 2 domestic support measures may not, or may only minimally, distort production and trade. Thus, there is no logical or other basis for there to be any relationship.

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

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

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

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

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*

The ordinary meaning of “criteria”, as the plural of “criterion”, is “principle[s], standard[s], or test[s] by which a thing is judged, assessed, or identified”⁴. Thus, the “criteria” in Articles 6.1 and 7.1 as these relate to Annex 2 of the *Agreement on Agriculture* encompasses all of the relevant principles, standards or tests established in Annex 2 against which domestic support measures for which exemption from reduction commitments is claimed are to be judged, assessed and/or identified.

³ *The New Shorter Oxford English Dictionary*, Volume 2, page 3269.

⁴ *The New Shorter Oxford English Dictionary*, Volume 1, page 551.

As Australia said in its Oral Statement,⁵ the word “accordingly” has several, equally valid meanings that are potentially applicable in the context: “harmoniously”, “agreeably”, “in accordance with the logical premises” and “correspondingly”⁶. A further definition is “in conformity with a given set of circumstances”⁷.

In Australia’s view, having regard to its ordinary meanings in its context and in light of the object and purpose of the *Agreement on Agriculture*, including to “[correct] and [prevent] ... distortions in world agricultural markets”,⁸ the word “accordingly” can and should properly be interpreted in the sense of “consistent with” or “in conformity with” the fundamental requirement established in the first sentence. Consistent with that interpretation, the obligation that “green box” measures “meet the fundamental requirement ...” is cumulative with the additional basic criteria established in paragraph 1 and the policy specific criteria established in paragraphs 2-13 of Annex 2. To interpret the word “accordingly” otherwise would be to negate the plain and unambiguous obligation established in the first sentence of paragraph 1 of Annex 2 that “[d]omestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production”.

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

The word “fundamental” has a number of meanings⁹ which can be summarised as “primary” or “essential”. The word “requirement” too has a number of meanings¹⁰ which can be summarised as a “condition”. Thus, a “fundamental requirement” is a primary or essential condition.¹¹ It is an overarching, freestanding obligation that applies to all “green box” measures cumulatively with the additional basic criteria established in paragraph 1 and the policy specific criteria established in paragraphs 2-13 of Annex 2. To interpret a “fundamental requirement” otherwise than as a primary or essential condition would not give the words their ordinary meaning in their context and in light of the object and purpose of the *Agreement on Agriculture*.

8. *In your oral statement, you emphasize the use of the word "criteria" in other parts of the Agreement on Agriculture, as distinct from the reference to "fundamental requirement" in the first sentence of paragraph 1 of Annex 2. Is it the case that sub-paragraphs (a) and (b) of paragraph 1 of Annex 2 are also "criteria"? EC*

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

It is not clear to Australia what is meant by “effects-based claims” in the context of this question. In Australia’s view, a claim of non-compliance with the first sentence of paragraph 1 of Annex 2 would require an assessment of whether a domestic support measure meets the primary or essential condition

⁵ Oral Statement by Australia, paragraphs 35-36.

⁶ *The New Shorter Oxford English Dictionary*, Volume 1, page 15.

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

⁸ Third preambular paragraph of the *Agreement on Agriculture*.

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

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

¹¹ Third Party Submission of Australia, paragraph 31, and Oral Statement by Australia, paragraph 33.

that such measures have no, or at most minimal, trade-distorting effects or effects on production, that is, that such measures not, or only negligibly, bias or unnaturally alter trade or production.

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

Yes.

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

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

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

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

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

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

In Australia’s view, a requirement for a temporal comparison of measures granting support to a specific commodity is an implicit and integral component of the requirement in Article 13(b)(ii) that such measures not be “in excess of” that decided during the 1992 marketing year. “In excess of” is defined as “more than”¹² and “to an amount or degree beyond”¹³.

See question 28 below.

13. *Does a failure by a Member to comply in a given year with either the chapeau of Article 13(b) or the proviso in subparagraph (ii) of Article 13(b) impact its entitlement to benefit in an earlier or a later year from the exemption from action provided by Article 13(b)? 3RD parties, in particular **Australia**, Argentina, Canada, China, EC, NZ*

It is Australia’s view that there is no obligation with which a Member is required to comply in either the chapeau of Article 13(b), or the proviso of Article 13(b)(ii).

See question 28 below.

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

¹² *The New Shorter Oxford English Dictionary*, Volume 1, page 873.

¹³ *Webster’s Third New International Dictionary*, page 792.

Yes. In Australia's view, there is no requirement that the application of the proviso be considered only in relation to a specific commodity at issue in a dispute. The failure of a Member to comply with Article 13(b)(ii) and (iii) in respect of one specific commodity affects its right to exemption from actions under Article 13(b)(ii) and (iii) in respect of all commodities.

Australia notes that the basic text of both Article 13(b)(ii) and (iii) reads as follows:

During the implementation period, ... domestic support measures that conform fully to the provisions of Article 6 ... shall be ... exempt from actions based on [*the specified provisions*], provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

The phrase "such measures" in the proviso refers to "domestic support measures that conform fully to the provisions of Article 6 ...". Thus, the proviso states "provided that [*domestic support measures that conform fully to the provisions of Article 6*] do not grant support to a specific commodity in excess of that decided during the 1992 marketing year".

Similarly to its use in the context of question 3 above, "a" is used in the phrase "support to a specific commodity" as an indefinite article, and is defined as meaning "one, some, any"¹⁴. Having regard to the ordinary meaning of the word in its context and in light of the object and purpose of the *Agreement on Agriculture*, "support to a specific commodity" means support to any one commodity.

Further, Australia considers that this interpretation is consistent with the object and purpose of the *Agreement on Agriculture*, including as expressed in the preambular clauses to that Agreement, for example, "to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets". The *Agreement on Agriculture* resulted from lengthy and complex negotiations and provided a finely balanced set of rights and obligations aimed at reducing the unnatural distortions of global agricultural production and trade. During an agreed transition period, so long as a Member adheres to its obligations intended to achieve that objective and does not introduce domestic support measures which result in new or additional distortions in trade and production, it would enjoy, as a right, protection for actions that would otherwise be WTO-inconsistent. On the other hand, if a Member did not observe the obligations that form part of the negotiated outcome, it would lose its generic right to the protection that constituted an essential element of that outcome. See also question 28 below.

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

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

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

¹⁴ *The New Shorter Oxford English Dictionary*, Volume 1, page 1.

¹⁵ First Written Submission of the United States, paragraphs 77-81.

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

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

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

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

See also question 28 below.

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

No. See also questions 14 and 28.

17. *What is the relevance, if any, of the concept of "specificity" in Article 2 of the SCM Agreement and references to "a product" or "subsidized product" in certain provisions of the SCM Agreement to the meaning of "support to a specific commodity" in Article 13(b)(ii) Agreement on Agriculture? 3RD parties, in particular **Australia**, Argentina, Canada, China, EC, NZ*

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

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

18. *Benin's oral statement considers the phrase "support to a specific commodity" in Article 13(b)(ii) of the Agreement on Agriculture. How does Benin believe that phrase is best interpreted. Please substantiate your response, commenting on other submissions by parties and third parties as you believe appropriate. Benin*

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

See questions 12 above and 28 below.

¹⁷ Oral Statement by Australia, paragraphs 20-25.

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

See question 28 below.

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

See question 28 below.

22. *What is the meaning of "support" in Agreement on Agriculture 13(b)(ii) ? Why would it be used differently from Annex 3, where it refers to total outlays? 3rd parties, in particular, **Australia**, Argentina, Canada, China, EC, NZ*

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

See question 28 below.

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

See question 28 below.

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

25. *Please comment on an interpretation of the words "decided during" in Article 13(b)(ii) that would read them as synonymous with the words "authorized during". 3rd parties, in particular **Australia**, Argentina, Canada, China, EC, NZ*

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

26. *Under Article 13(b)(ii), a comparison is required between support at different times. One of the issues which is contested between the parties is whether the only later period that the Panel can consider is the present one (i.e. the period underway at the time of the request for establishment of the Panel). This argument is based on the present tense of the words "do not grant" in the English text. The Panel asks whether there is any difference in the verb tense as used in the Spanish-language text, or any other difference which might aid the Panel in interpreting these words? Argentina, EC, Paraguay, Venezuela*

27. *If the 1992 "decision" led to or was the funding source for the money provided in 1992 and later years, is it the full amount of all that funding that constitutes the "support" decided in 1992? If the answer to this question is that it is the full amount of all the support provided pursuant to the "decision" that must be taken into account, must this be compared with the total amount of support that will or might flow from the decision made in the more recent period for the purposes of the comparison required under Article 13(b)(ii)? If a Member did not make a "decision" (however that may be interpreted) in 1992 about "support", is it the case that the Member has a zero base for the purposes of the comparison required under Article 13(b)(ii)? EC*

28. In paragraph 13 of Australia's oral statement, you state that a "question" is: "could conditions of price competition for the purposes of a non-violation or impairment claim be assessed solely on the basis of budgetary outlay figures, as argued by Brazil, or on the basis of a rate of payment, as argued by the United States? In Australia's view, both factors put forward by Brazil and the United States would properly form a part of that assessment, but not the whole." Could you please clarify this statement (indicating other elements which would complete the "whole" and explain its relevance for the purposes of our consideration of Article 13 of the Agreement on Agriculture? *Australia, EC*

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

During the implementation period ... domestic support measures that conform fully to the provisions of Article 6 ... shall be ... exempt from actions based on [*the specified provisions*], provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

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

Australia recalls that the text of the proviso, as well as the draft text of what became Article 13 of the *Agreement on Agriculture* first appeared in the "Blair House Accord" and that the Accord also included provisions concerning the *EEC – Oilseeds* dispute.¹⁸ In Australia's view, that dispute is crucially relevant to the proper interpretation of Article 13(b)(ii) and (iii).¹⁹

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. ...²⁰

¹⁸ *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.

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

²⁰ *EEC – Oilseeds*, paragraph 144.

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

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

The *EEC – Oilseeds* panel also said:

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

In summary, the *EEC – Oilseeds* panel considered that the basis for assessing whether the benefits of tariff concessions are being nullified or impaired in a non-violation complaint is the legitimate expectations of the “conditions of price competition” for a product. In assessing those conditions, matters to be considered included market prices and the applicable tariff concession(s) as well as any other relevant measures, including measures that were not inconsistent with GATT 1947. Further, that assessment involved a temporal comparison between the “conditions of price competition” that could legitimately have been expected at the time a tariff concession was negotiated and the conditions that actually prevailed at a later point of time.

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

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

In Australia's view, interpreting the phrase “grant support” in a manner that limits the factors to be considered to domestic support measures that conform fully to the provisions of Article 6 as measured by budgetary outlays, as argued by Brazil, or the rate of payment, as argued by the United States, could not lead to a proper application of the proviso of Article 13(b)(iii) in the context of a non-violation dispute. Such an interpretation cannot establish other Members' legitimate expectations of “conditions of price competition” as these have been understood in GATT and WTO jurisprudence, as

²¹ *EEC – Oilseeds*, paragraph 147.

²² *EEC – Oilseeds*, paragraph 148.

it cannot capture issues relating to tariff concessions and market prices that are integral to a non-violation complaint of nullification or impairment of the benefits of tariff concessions accruing to another Member. The only essential element that such an interpretation is capable of capturing is the basic point in time for the purposes of comparison: instead of being the time at which a tariff concession was negotiated, it is the 1992 marketing year.

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

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

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

The use of such a test would explain why the phrase “grant support” was used without further elaboration, such as “support as measured by AMS”, “support as calculated in Annex 3” or similar wording. “Support” in the context of subparagraphs (ii) and (iii) of Article 13(b) was purposefully intended to mean all non-“green box” domestic support measures, whether specific or not, which benefit a specific commodity in the sense of a “conditions of price competition” test. In this context, Australia notes that paragraph 8 of Annex 3 expressly excludes from the calculation of AMS some forms of “support” within the meaning of subparagraphs (ii) and (iii) of Article 13(b).

The proviso establishes “support ... decided during the 1992 marketing year” as the basis for comparison. In other words, the basis for comparison is the legitimate expectations of other Members of the “conditions of price competition” having regard to the applicable tariff measures and non-“green box” domestic support measures as these were committed to by a Member during the 1992 marketing year, *vis-à-vis* market prices. It requires a comparison of the legitimate expectations of other Members of the “conditions of price competition” to apply in future on the basis of decisions made by a Member during the 1992 marketing year with the actual “conditions of price competition” at a future point in time. Thus, question concerning whether a year-on-year comparison is required or whether a failure by a Member to comply in a given year affects that Member’s entitlement to invoke Article 13(b) in other years become moot. So long as a Member’s non-“green box” domestic support measures that conform fully to the provisions of Article 6 “grant support to a specific commodity” in the sense of a “conditions of price competition” test “in excess of that decided during the 1992 marketing year”, Article 13(b)(ii) and (iii) does not provide an exemption from actions based on the specified provisions. Conversely, once a Member’s non-“green box” domestic support measures no longer grant support in excess of that decided during the 1992 marketing year, the Member re-acquires the right to invoke Article 13(b)(ii) and (iii).

In Australia’s view, interpreting the proviso of Article 13(b)(ii) as requiring the application of a “conditions of price competition” test is consistent with the ordinary meaning of the words in their context:

provided that [*domestic support measures that conform fully to the provisions of Article 6*] do not grant [*agree to, bestow or confer*]²³ support [*assistance or backing*]²⁴ to a specific commodity in excess of [*more than*]²⁵ that decided [*determined or resolved*,²⁶ i.e., committed to] during the 1992 marketing year.

Moreover, interpreted in the sense of legitimate expectations of “conditions of price competition” in respect of both Article 13(b)(ii) and (iii), the proviso is consistent with the object and purpose of the *Agreement on Agriculture*, including as expressed in the preamble of the Agreement “to establish a fair and market-oriented agricultural trading system and that a reform process should be initiated through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective ... rules and disciplines” and “to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets”. The provisos of Article 13(b)(ii) and (iii) establish the outer limits within which the market distorting support that continues to be permitted under the *Agreement on Agriculture* must remain during the implementation period if a Member is to benefit from the protection against actionable subsidy claims offered by Article 13(b) during that time. In other words, a Member’s domestic support measures may not create a more market distorting situation in respect of any one commodity than could reasonably have been anticipated on the basis of that Member’s decisions made known during the 1992 marketing year for that product.

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

EXPORT CREDIT GUARANTEE PROGRAMMES

29. a) *Is an export credit guarantee a financial contribution in the form of a "potential direct transfer of funds or liabilities (e.g. loan guarantee)" within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement? Why or why not? 3rd parties, in particular, Argentina, Canada, EC, NZ*
- b) *How, if at all, would this be relevant to the claims of Brazil? 3rd parties, in particular, Argentina, Canada, EC, NZ*
30. *The Panel could arguably take the view that Articles 1 and 3 of the SCM Agreement were relevant in assessing the WTO-consistency of United States export credit guarantees. The Panel would therefore appreciate third party views on this situation, including with respect to the viability of an a contrario interpretation of item (j) of the Illustrative List (as addressed in paragraphs 180-183 of the United States' first written submission). 3rd parties, in particular, Argentina, Canada, EC, NZ*
31. *If the Panel decides to refer to provisions of the SCM Agreement for contextual guidance in the interpretation of the terms in Article 10 Agreement on Agriculture, should the Panel refer to item (j) or Articles 1 and 3 of the SCM Agreement or both? 3rd parties, in particular, Argentina, Canada, EC, NZ*
32. *The Panel's attention has been drawn to Article 14(c) of the SCM Agreement (see third party submission of Canada) and to the panel report in DS 222 Canada- Export Credits and Loan*

²³ *The New Shorter Oxford English Dictionary*, Volume 1, page 1131.

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

²⁵ *The New Shorter Oxford English Dictionary*, Volume 1, page 873.

²⁶ *The New Shorter Oxford English Dictionary*, Volume 1, 607.

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

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*

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*

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*

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)*

37. *The United States seems to argue that, at present, by virtue of Article 10.2 of the Agreement on Agriculture, there are **no** disciplines on agricultural export credit guarantees under the Agreement on Agriculture (or the SCM Agreement).*

(a) *Comment on the following proposition: a WTO Member may therefore extend agricultural export credit guarantees without charging a premium, and for an indefinite period, in addition to any other terms and conditions it may wish? How would this reconcile with the title of Article 10 of the Agreement on Agriculture ("Prevention of Circumvention on Export Subsidy Commitments"), and with other commitments contained in the Agreement on Agriculture? Please cite any relevant material, including any past WTO dispute settlement cases. 3rd parties, in particular, Argentina, Canada, EC, NZ*

(b) *If, as the United States argues, there are no disciplines on export credit guarantees in the Agreement on Agriculture, how could export credit guarantees "conform fully to the provisions of Part V" of the Agreement on Agriculture within the meaning of*

Article 13 (how can you assess "conformity" or non-conformity with non-existent disciplines)? 3rd parties, in particular, Argentina, Canada, EC, NZ

STEP 2 PAYMENTS

38. *Please comment on the statement in note 119 of the United States' first written submission that "...to the extent a consumer that had intended to export instead opens the bale, then that consumer could still obtain the Step 2 payment upon submission of the requisite documentation". The Panel notes that Step 2 payments all involve upland cotton produced in the United States. What are the two distinct factual situations that Step 2 payments involve? Other than the panel report in Canada-Dairy and the findings of the Appellate Body in US-FSC (21.5)²⁷, 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?²⁸ 3rd parties, in particular, **Australia**, Argentina, NZ, Paraguay*

39. *Please comment on the United States assertions at paragraph 129 of its first written submission, that "[t]he 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*

This comment responds to both questions 38 and 39.

Australia provided detailed comment on the "Step 2" payment program having regard to the Appellate Body's findings in *US – FSC (21.5)* at paragraphs 49-69 of its Third Party Submission. Australia does not dispute that "Step 2" payments may be made on either export or domestic use of a bale of cotton, or that the "intent" with which a buyer purchased a bale of cotton has no effect on an entitlement to a "Step 2" payment in respect of that particular bale. However, these arguments by the United States are not determinative of the issue.

To qualify for a "Step 2" payment, a bale of cotton must be either exported or consumed by a domestic user. These are the two distinct factual situations covered by the "Step 2" payment program: by definition, a particular bale of cotton cannot be both exported and consumed by a domestic user.

²⁷ "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.²⁷ 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."

²⁸ 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".²⁸

The Appellate Body's findings in *Canada – Aircraft*²⁹ provide further support for the view that “Step 2” payments are export or local content subsidies. In each of the distinct factual situations of export or domestic use, “Step 2” payments are contingent upon export performance or contingent upon the use of domestic over imported goods respectively.

40. *With respect to paragraph 32 of the oral statement of the EC, are subsidies contingent on the use of domestic goods consistent with the AoA? Does the phrase "provide support in favour of domestic producers" refer to, and/or permit such subsidies? What is the meaning and relevance of this (if any) to Brazil's claims under Article 3 of the SCM Agreement and Article III:4 of the GATT 1994. 3rd parties, in particular, Australia, Argentina, EC, NZ, Paraguay*

Australia does not consider that the phrase “provide support in favour of domestic producers” in Article 3.2 of the *Agreement on Agriculture* permits subsidies contingent upon the use of domestic goods.

In Australia's view, the legal issue in question relates to the condition attached to the grant of a subsidy, not the grant of a subsidy *per se* or who might benefit from the subsidy. The fact that a measure may benefit an agricultural producer (“support in favour of domestic producers”) does not serve to override measures otherwise prohibited.

Article 21.1 of the *Agreement on Agriculture* provides that “[t]he provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement”. Article 3.1 of the *SCM Agreement* applies “[e]xcept as provided in the Agreement on Agriculture”. The General Interpretive Note to Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* also provides contextual guidance. Pursuant to that Note, the *Agreement on Agriculture* would prevail to the extent of any conflict with GATT 1994.

However, in the case of subsidies contingent upon the use of domestic goods, there is no conflict between either the *Agreement on Agriculture*, which *inter alia* disciplines the amounts of domestic support in favour of domestic producers which distorts trade and production, and the *SCM Agreement* or GATT 1994, which discipline or prohibit certain conditions attached to subsidies, including subsidies in favour of agricultural producers (subject only to the provisions of Article III:8(b) of GATT 1994). There is no provision in the *Agreement on Agriculture* which provides for an exception to, or cover for, local content conditions attached to the grant of a subsidy.

Australia has already noted³⁰ that Article 13(b)(ii) does not exempt non-“green box” domestic support measures from actions based on Article 3 of the *SCM Agreement*. Neither does Article 13 anywhere refer to GATT Article III:4. Nor with regard to these Articles is there any provision comparable to Articles 5 and 12 of the *Agreement on Agriculture*. As stated in the preambular clauses of the *Agreement on Agriculture*, the “long-term objective is to provide for substantial progressive reductions in agricultural support and protection”: it is not intended to provide for a weakening of disciplines, particularly when such disciplines are not specifically mentioned.

Australia also notes that the domestic support provisions of the *Agreement on Agriculture* provide for a strengthening and elaboration of the provisions of Article XVI of GATT 1994. They are not directed towards a diminution of basic GATT obligations. National treatment is central to the multilateral trading system. It is inconceivable to Australia that the negotiators of the *Agreement on Agriculture* would, as part of a reform program designed to strengthen disciplines, agree to weaken national treatment disciplines.

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

³⁰ Oral Statement by Australia, paragraphs 29-30.

However, in the event the Panel were to consider that the phrase “provide support in favour of domestic producers” refers to and/or permits subsidies contingent upon the use of domestic goods, Australia notes that such support could be permitted only to the extent that the support was actually passed through to the producers of the basic agricultural product.

ETI ACT

41. *Concerning its claims on the ETI Act, Brazil relies on the US – FSC case. However, it appears that the United States did not raise the issue of the Peace Clause in that case, nor did the US appear to invoke Article 6 of the Agreement on Agriculture. If the Panel’s understanding is correct, how, if at all, are these differences relevant here? Argentina, China, EC, NZ*

42. *How do you view the reference in paragraph 43 of the EC’s third party oral statement with respect to the relevance of Article 17.14 of the DSU, and, in particular, the phrase “a final resolution to that dispute” (emphasis added)? Please explain the use, and relevance (if any) of the term “disputes” in Articles 9.3 and 12 and Appendix 3 of the DSU, and please cite any other provisions you consider relevant. Argentina, China, EC, NZ*
