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On Submission to the

Panel of the World Trade Organisation

At the

Centre William Rappard

Geneva, Switzerland

SUBSIDIA – AGRICULTURAL SUBSIDIES ON SWEET BISCUITS, WHEAT AND PORK

ELSA Moot Court Competition Panel

COMPETIA *versus* SUBSIDIA

SUBMISSION OF THE COMPLAINANT - COMPETIA

2006

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List of Abbreviations

AB	Appellate Body
AJIL	American Journal of International Law
AoA	Agreement on Agriculture 1994
ARIBTL	Asper Review of International Business and Trade Law
Doc.	Document
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities

EEC	European Economic Communities
ed./eds.	editor/editors
edn.	Edition
et. al.	*et alia,* and others
GATT	General Agreement on Tariffs and Trade 1994
GJICL	Georgia Journal of International and Comparative Law
HILJ	Harvard International Law Journal
HSH	Harmonised System Heading
ILM	International Legal Materials
ITLR	International Trade Law and Regulation
JIA	Journal of International Arbitration
JIEL	Journal of International Economic Law
JWT	Journal of World Trade
LPIB	Law and Policy in International Business
MJGT	Minnesota Journal of Global Trade
MJIL	Michigan Journal of International Law
p.	Page
NDLR	North Dakota Law Review
para./paras.	paragraph/paragraphs
PSILR	Pennsylvania State International Law Review
SCM Agreement	Agreement on Subsidies and Countervailing Measures 1994
US	United States
USDA	United States Department of Agriculture
VCLT	Vienna Convention on the Law of Treaties, 1969
WTO	World Trade Organisation
WTO Agreement	Marrakesh Agreement Establishing the WTO

Statement of Facts

Subsidia, a developed WTO member, agreed to subject its agricultural subsidies to scheduled reduction commitments under the AoA. Competia, a developing WTO Member, is the world's second-largest producer of sweet biscuits and wheat after Subsidia. The Subsidian Government pays domestic sweet biscuit manufacturers subsidies enabling them to purchase expensive domestically produced ingredients at world market price. Subsidia maintains a system which effectively tracks whether Subsidian sweet biscuits are sold domestically or exported in order to schedule the aforementioned payments correctly. 60% of Subsidian sweet biscuit production is exported; 10% of this volume is manufactured using unsubsidised imported ingredients. Though Subsidia does not violate its budgetary outlay commitments under the AoA, it is able to export sweet biscuits in quantities exceeding its scheduled volume reduction commitment levels below the world market price and the average cost of production in Subsidia. The Subsidian Government also pays price contingent subsidies to domestic wheat farmers to protect them from fluctuations in world market price and demand. Though Subsidia has reduced this subsidy by 36% over 10 years, its share of the world wheat market has increased by 5% annually during this period. Between 2002 and 2004, Competia's share of the world wheat market has fluctuated. It attributes this fluctuation to Subsidia's wheat Scheme. Subsidian Law 345 (§40) mandates the payment of subsidies to domestic pork producers who limit production in accordance with the plan designed by the Subsidian Government. Payments are made on heads of livestock and remain fixed from year to year. If a farmer produces in excess of the stipulated number of swine, he loses 50% of the subsidy payment for that year and 50% of the subsidy payment for the next year. Subsidia has notified this measure as Blue Box under Article 6.5(a)(iii). However, Subsidian pork producers are able to export pork below world market prices and the average cost of production in Subsidia.

Identification of Obligations

CLAIM 1: Article 8 of the AoA obligates Members to provide export subsidies in conformity with the provisions of the AoA and their scheduled reduction commitments. Article 9.1 contains an illustrative list of export subsidies. Article 3.3 and the chapeau to Paragraphs (a) to (f) of Article 9.1 prohibit the provision of these export subsidies to scheduled agricultural products in excess of the reduction commitment levels.

CLAIM 2: Article 8 of the AoA obligates Members to provide export subsidies in conformity with the provisions of the AoA and their scheduled reduction commitments. Article 9.1 contains an illustrative list of export subsidies. Article 3.3 prohibits the provision of these subsidies to unscheduled agricultural products. Article 3.2 obligates Members to provide domestic support within their scheduled reduction commitment levels. Article 6.5 exempts direct payments under production limiting measures from the disciplines of Article 3.2.

CLAIM 3: Article 5 of the SCM Agreement defines actionable subsidies and prohibits their provision. Article 6 defines serious prejudice. Furthermore, the expiry of the 'Peace Clause' on 1 January 2004 enables Complainants to challenge export subsidies under Part III of the SCM Agreement without previously establishing that they violate the AoA.

Summary of Arguments

1. **The Sweet Biscuit Scheme violates Articles 3, 8, and 9 of the AoA.**
    - <u>Payments to Subsidian sweet biscuit manufacturers are export subsidies within the meaning of Paragraphs (a) and (c) of Article 9.1.</u>

      - Payments are export subsidies within the meaning of Article 9.1(a) because they are direct subsidies on the export of an agricultural product financed by the Subsidian Government and contingent upon export performance.

      - Payments are export subsidies within the meaning of Article 9.1(c) because they are payments on the export of an agricultural product financed by virtue of governmental action.

- The Scheme violates Article 3.3 of the AoA because export subsidies paid thereunder are provided in excess of Subsidia' scheduled volume reduction commitment levels.
- The Scheme violates Article 8 because export subsidies paid thereunder are provided in excess of Subsidia's scheduled volume reduction commitment levels and in violation of Article 3.3.

2. The Pork Scheme violates Articles 3, 6, 8, and 9 of the AoA.

- Payments to Subsidian pork producers are export subsidies within the meaning of Paragraphs (a) and (c) of Article 9.1.

  - The payments are export subsidies within the meaning of Article 9.1(a) because they are direct subsidies paid by the government to the producer of an agricultural product contingent upon export performance.

  - The payments are export subsidies within the meaning of Article 9.1(c) because they are payments on the export of an agricultural product financed by virtue of governmental action.
- The Scheme violates Article 3.3 of the AoA because export subsidies paid thereunder are provided in excess of Subsidia' scheduled volume reduction commitment levels.
- The Scheme violates Article 8 because export subsidies paid thereunder are provided in excess of Subsidia's scheduled volume reduction commitment levels and in violation of Article 3.3.
- The Scheme is not a Blue Box Measure because payments thereunder are made and a benefit thus conferred to Subsidian pork producers irrespective of whether they reduce production or not.
- The Scheme violates Article 3.2 because payments made under this programme are not Blue Box Measures and are provided in excess of the scheduled volume reduction commitment levels.

3. The Wheat Scheme violates Part III of the SCM Agreement.

- The expiry of the 'Peace Clause' enables a Complainant to challenge an export subsidy under Part III of the SCM Agreement without previously establishing that it violates the AoA.
- Payments under the Scheme cause serious prejudice and nullification and impairment.
- The Scheme does not conform to the 'Fundamental Requirement' which is applicable in this case.

Arguments

1: SUBSIDIA'S SWEET BISCUIT SCHEME VIOLATES ARTICLES 3, 8 AND 9 OF THE AoA.

Competia's contentions are twofold. *First*, Subsidia is exporting sweet biscuits in quantities exceeding its scheduled volume reduction commitment levels. *Second*, it is subsidising this excess, thereby violating its commitments under Articles 3.3, 8, and 9.1(a) and (c) of the AoA.

1.1: Subsidia bears the burden of proving that it does not subsidise sweet biscuits in excess of its reduction commitment levels.

Article 10.3 of the AoA states:

> Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidised must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.[1]

Once the complainant establishes that the respondent is exporting a product listed in Part IV of its schedule in excess of its scheduled volume reduction commitment levels, the respondent must adduce *prima facie* evidence to prove this excess is not subsidised.[2]

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1 *See* Article 10.3, AoA, WTO Doc. LT/UR/A-1A/2 (1994).

2 *See US – FSC*, Panel Report, para. 7.136; *Canada – Dairy*, Panel Report, para. 7.33.

Subsidian sweet biscuit exports exceed 600 tonnes.[3] Therefore, Subsidia must establish, *prima facie*, that it does not subsidise sweet biscuit exports in excess of 600 tonnes.

Nonetheless, without waiving its right under Article 10.3 of the AoA, Competia shall establish that Subsidia is subsidising sweet biscuit exports in excess of its scheduled volume reduction commitment levels, violating its obligations under Articles 3.3, 8, and 9.1(a) and (c) of the AoA.

1.2: Payments made by the Subsidian Government under the Sweet Biscuit Scheme are export subsidies.

Competia submits that payments made by the Subsidian Government to domestic sweet biscuit manufacturers under the Sweet Biscuit Scheme (hereinafter 'the Scheme') are export subsidies within the meaning of Articles 9.1(a) and (c) of the AoA.

1.2(a): Article 9.1(a)

An Article 9.1(a) measure must be a direct subsidy, provided by governments or their agencies, to, *inter alios*, producers of agricultural products and contingent upon export performance.[4]

(i) Direct Subsidies

Article 3.2 of the DSU mandates the interpretation of WTO Agreements in accordance with customary principles of treaty interpretation.[5] Article 31 of the Vienna Convention on the Law of Treaties, 1969 is a codification of pre-existing customary principles of public international law.[6] It states that the terms of a treaty should be interpreted in their context.[7] Article 1 of the SCM Agreement forms part of the context of Article 9.1.[8] It states, in relevant part: "For the purpose of this Agreement, a subsidy shall be deemed

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3 *See* Statement of Facts, para. 9.

4 *See Canada – Dairy*, Panel Report, para. 7.38.

5 Article 3.2, DSU, WTO Doc. LT/UR/A-2/DS/U/1.

6 *See US – Gasoline*, AB Report, p. 17; *India – Patents (U.S.)*, AB Report, para. 46; *US – DRAMS*, Panel Report, para. 6.13.

7 Article 31(1), Vienna Convention on the Law of Treaties, 1969.

8 *Canada – Dairy*, Panel Report, para. 7.44.

to exist if…a benefit…is conferred." Therefore, a direct subsidy must confer a benefit upon its recipient.[9] A benefit is conferred when something is made available to a natural or legal person or group of persons on better terms than those otherwise prevailing in the market.[10] Subsidia has provided domestic sweet biscuit manufacturers direct payments over 3-5 years to enable them to purchase expensive ingredients manufactured domestically at world market prices.[11] Subsidia submits that these subsidies caused a long-term reduction in the prices of domestically manufactured sweet biscuit ingredients. The continued subsidisation of sweet biscuit production made domestically manufactured ingredients available below world market prices and thereby conferred a benefit on Subsidian sweet biscuit manufacturers.[12]

(ii) Provided by Governments or their Agencies

In *Canada – Dairy*, the AB determined the essence of "government" to be the effective regulation, control, supervision and restraint of individuals through exercise of lawful authority.[13] Subsidian law regulates payments to Subsidian sweet biscuit manufacturers.[14] Therefore, Competia submits that government involvement in the provision of subsidies is evident.

(iii) To Producers of an Agricultural Product

Sweet biscuits, scheduled under HSH 19.05 (HS n. 1905.31)[15] are agricultural products within the meaning of the AoA.[16] Therefore, payments to sweet biscuit manufacturers constitute payments to producers of an agricultural product.

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[9] Id.

[10] *See Canada – Aircraft*, AB Report, para. 149; *US – CVDs*, Panel Report, para. 6.66.

[11] *See* Statement of Facts, para. 5; Clarifications to the Case in response to question 1.

[12] Id.

[13] *Canada – Dairy*, AB Report, para. 97.

[14] *See* Clarifications to the Case (Laws in Subsidia).

[15] *See* Statement of Facts, para. 7.

[16] *See* Article 2, Annex 1, AoA, WTO Doc. LT/UR/A-1A/2 (1994).

(iv) Contingent upon Export Performance

The *US – Cotton* Panel stated that "contingent upon export performance" bears identical meaning in the AoA and SCM Agreement.[17] A subsidy is contingent upon export performance when its provision is conditional upon anticipated or actual export earnings.[18] When the words of the impugned measure demonstrate such conditionality the subsidy is de jure export contingent.[19] Conditionality may be derived by necessary implication from the phraseology of the measure.[20] Subsidian law regulates payments to Subsidian sweet biscuit manufacturers.[21] One of the Scheme's objectives is to enable "sweet biscuits produced in Subsidia to be sold at reasonable prices to consumers."[22] Price of and demand for a commodity are inversely related.[23] A measure designed to lower the price of Subsidian sweet biscuits will increase world demand for them. Furthermore, the subsidy enables Subsidian sweet biscuit manufacturers to sell their produce at 5-10% below world market price. Since sweet biscuit manufactured in Subsidia are cheaper than those manufactured elsewhere a shift in demand from sweet biscuits manufactured elsewhere to those produced in Subsidia is reasonably foreseeable. Therefore, it is reasonably anticipatable that the revenues of Subsidian sweet biscuit manufacturers will increase. Competia submits that the payment is clearly export contingent.

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17 *US – Cotton*, Panel Report, para. 7.700.

18 *See Australia – Automotive Leather II*, Panel Report, para. 9.55.

19 Id.

20 *See Canada – Automobiles*, AB Report, para. 100.

21 *See* Clarifications to the Case (Laws in Subsidia).

22 *See* Statement of Facts, para. 5.

23 *See* Samuelson/Economics (16th edn.).

1.2(b): Article 9.1(c)

An Article 9.1(c) measure must satisfy three criteria.[24] One, it must be a payment. Two, it must be made on the export of an agricultural product. Three, it must be financed by virtue of governmental action.

(i) "Payment"

A payment is a transfer of economic resources, which confers a benefit, though not necessarily upon its recipient.[25] The provision of an input below its average total cost of production (i.e., below its sale price) constitutes a payment.[26] Competia has demonstrated that payments made by the Subsidian Government to domestic sweet biscuit manufacturers enable them to purchase expensive domestically manufactured ingredients below their sale price (i.e., their average total cost of production). Therefore, Competia submits that such subsidies are "payments" within the meaning of Article 9.1(c) of the AoA.

(ii) "On the export of an agricultural product"

Competia has demonstrated that sweet biscuits are an agricultural product within the meaning of the AoA. Furthermore, Competia has demonstrated that sweet biscuit subsidies are export contingent. Therefore, Competia submits that payments made by the Subsidian Government to domestic sweet biscuit manufacturers are made "on the export of an agricultural product."

(iii) "Financed by virtue of governmental action"

Competia has previously demonstrated that the Subsidian Government finances payments to Subsidian sweet biscuit manufacturers.

1.3: Subsidia has violated its obligations under Articles 3.3 and 8.

Competia submits that Subsidia has violated Articles 3.3 and 8 of the AoA.

1.3(a): Article 3.3

> Subject to the provisions of Paragraphs 2(b) and 4 of Article 9, a Member shall not provide export subsidies

[24] *See EC – Sugar*, Panel Report, para. 7.251.
[25] *See Canada – Dairy*, AB Report, para. 107.

[26] *See Canada – Dairy*, AB Report, paras. 119-120.

> listed in Paragraph 1 of Article 9 in respect of the agricultural products or groups of products specified in Section II of Part IV of its Schedule in excess of the budgetary outlay and quantity commitment levels specified therein and shall not provide such subsidies in respect of any agricultural product not specified in that Section of its Schedule.[27]

Payments to Subsidian sweet biscuit manufacturers conform to the definitions in Articles 9.1(a) and (c). Furthermore, Subsidia has violated its scheduled volume reduction commitments with respect to the same.[28] Subsidia cannot avail of the exemptions offered by Paragraphs 2(b) and 4 of Article 9.1 because the former is valid during the third through fifth years of the WTO, and the latter is accorded to developing countries. Therefore, Competia submits that Subsidia has violated its obligations under Article 3.3 of the AoA.

1.3(b): Article 8

Article 8 of the AoA obligates Members to provide export subsidies in conformity with the provisions of the AoA and their scheduled reduction commitments appended thereto.[29] Competia has demonstrated that Subsidia subsidises sweet biscuit exports in excess of its scheduled volume reduction commitment levels thus violating Articles 9.1 and 3.3 of the AoA (*Submissions 1.2 and 1.3(a)*). Therefore, Competia submits that Subsidia has violated Article 8 of the AoA.

2: SUBSIDIA'S PORK SCHEME VIOLATES ARTICLES 3, 6, 8 AND 9 OF THE AOA.

Competia's submissions herein are twofold. *First*, Subsidia's pork scheme (hereinafter 'the Scheme') is an export subsidy. *Second*, it is not a Blue Box measure.

2.1: The Scheme is an export subsidy within the meaning of Articles 9.1(c).

An Article 9.1(c) measure must be a direct payment on the export of an agricultural product financed by virtue of governmental action.

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27 Article 3.3, AoA, WTO Doc. LT/UR/A-1A/2 (1994).

28 *See* Statement of Facts, para. 9.

29 *See* Article 8, AoA, WTO Doc. LT/UR/A-1A/2 (1994).

(i) Payment

Competia has established that a payment is a transfer of funds from the government or a public body (*Submission 1.2(b)(i)*). The Subsidian Government transfers funds to Subsidian pork producers.[30] Therefore, Competia submits that such transfers are payments within the meaning of Article 9.1(c).

(ii) On the Export of an Agricultural Product

Competia has established that a payment made to the producer of an agricultural product contingent upon export performance is a payment on the export of an agricultural product (*Submission 1.2(b)(ii)*). The jurisprudence of *EC –Sugar* indicates that a domestic support measure can have the effect of subsidizing a Member's exports. The Panels and Appellate Body have determined such measures to be 'on the export' to achieve the objectives of the WTO Agreements. Therefore, Competia submits that these payments are payments on the export of an agricultural product within the meaning of Article 9.1(c).

(iii) Financed by Virtue of Governmental Action

The Subsidian Government has made direct subsidy payments to domestic pork producers. Therefore, Competia submits that the aforementioned payments are financed by virtue of governmental action.

2.2: The Scheme violates Articles 3.3 and 8 of the AoA.

Competia's submissions herein are twofold. *First*, Subsidia has violated Article 3.3 of the AoA. *Second*, Subsidia has violated Article 8 of the AoA.

2.2(a): Article 3.3

Article 3.3 obligates Members not to provide export subsidies enumerated in Article 9.1 to products not listed in Section II of Part IV of their schedules. Competia has established that Subsidia's payments to domestic pork producers are export subsidies within the meaning of Article 9.1(c) (*Submission 2.1*). Therefore, the Scheme violates Article 3.3 of the AoA.

2.2(b): Article 8

Article 8 of the AoA obligates Members to provide export subsidies in conformity with the provisions of the AoA and their scheduled reduction commitment levels appended

30 *See* Clarifications to the Case (Laws in Subsidia).

thereto. Competia has established Subsidia violates Articles 9.1 and 3.3 of the AoA (*Submissions 2.1 and 2.2(a)*). Therefore, Competia submits that Subsidia has violated Article 8 of the AoA.

2.3: The Scheme is not a Blue Box measure under Article 6.5(a) (iii).

Subsidia's submissions herein are twofold. *First*, payments made by the Subsidian Government to domestic pork producers are not production limiting. *Second*, the 'Fundamental Requirement' stipulated in Paragraph 1 of Annex 2 to the AoA are applicable in this case but have not been satisfied. Therefore, the Scheme is not a Blue Box measure.

(i) Production Limiting

A Blue Box measure must be a production-limiting programme.[31] Payments under such a programme must be contingent upon production limitation.[32] Under the Scheme, Subsidia withholds only 50% of a pork producer's subsidy payment for a year if he produces more than the fixed number of heads that year.[33] The Subsidian Government thereby incurs part of the production cost of domestic pork producers despite their non-compliance with the Scheme. Therefore, Subsidia submits that the provision of domestic support under the Scheme is not contingent upon production limitation.

(ii) Fundamental Requirement

Competia's submits that the Scheme does not satisfy the 'Fundamental Requirement' stipulated in Paragraph 1 of Annex 2 to the AoA.

(a) Applicability

Brazil's written submissions in *US – Cotton* support the assertion that the 'Fundamental Requirement' stated in Annex 2 is a 'standalone requirement'. Further support for this submission comes from Article 6.1 of the AoA. The rationale behind the application of this requirement is that the obligations under AoA are imposed to minimise distortions in international trade. Therefore, Competia submits that the Fundamental Requirement must be satisfied by a Blue Box Measure.

(b) Violation

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31 *See* Article 6.5, SCM Agreement, WTO Doc. LT/UR/A-1A/2 (1994).

32 *See*

33 *See* Statement of Facts, para. 13.

The standalone requirement states that a domestic support measure must have minimal trade distorting effects. Subsidia's payments to domestic wheat cultivators is designed to shield them against fluctuations in world market prices. Therefore, they will continue to supply wheat to the world market in excess of demand. Stated differently, Subsidian payments result in a misallocation of resources. Therefore, the measure does not satisfy the 'Fundamental Requirement'.

<u>3:</u> SUBSIDIA'S WHEAT SCHEME VIOLATES PART III OF THE SCM AGREEMENT.

Competia's submissions herein are threefold. *<u>First</u>*, Part III of the SCM Agreement is applicable. *<u>Second</u>*, the Subsidian Wheat Scheme (hereinafter 'the Scheme') is a specific subsidy within the meaning of Articles 1.1 and 2 of the SCM Agreement. *<u>Third</u>*, the Scheme adversely affects Competian interests, thereby violating Part III of the SCM Agreement.

<u>3.1</u>: Part III of the SCM Agreement is applicable.

Part III of the SCM Agreement addresses actionable subsidies. A subsidy is actionable if it causes injury to the domestic industry of a Member, nullifies or impairs the benefits accruing to a Member under the SCM Agreement or causes serious prejudice to the interests of a Member.[34] Article 5 prohibits actionable subsidies; Article 6 addresses serious prejudice. However, neither provision was applicable during the implementation period provided a subsidy conformed to the disciplines stipulated in the AoA.[35] The implementation period is a nine-year period which commenced on 1 January 1995 and terminated on 1 January 2004.[36] Therefore, Competia submits that the Scheme may be legitimately challenged under Articles 5 and 6 of the SCM Agreement without previously establishing that it does not violate the provisions of the AoA.[37]

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34 *See* Article 5, SCM Agreement, WTO Doc. LT/UR/A-1A/13 (1994).

35 *See* Common proviso to Articles 5 and 6, SCM Agreement, WTO Doc. LT/UR/A-1A/13 (1994); Article 13, AoA, WTO Doc. LT/UR/A-1A/2 (1994).

36 *See* Article 1(f), AoA, WTO Doc. LT/UR/A-1A/2 (1994).

37 *See US – Cotton*, Panel Report, paras. 7.254-7.264.

Stated differently, Competia submits that the Scheme is subject to the disciplines of Part –III of the SCM Agreement.

3.2: The Scheme is a specific subsidy within the meaning of Articles 1.1 and 2 of the SCM Agreement.

Competia's submission herein is twofold. *One*, payments made by the Subsidian Government are subsidies within the meaning of Article 1.1 of the SCM Agreement. *Two*, these subsidies are specific within the meaning of Article 2 of the SCM Agreement.

3.2(a): Article 1.1

A subsidy within the meaning of Article 1.1 of the SCM Agreement must satisfy two criteria. *One*, it must be a financial contribution by the government or a public body.[38] *Two*, a benefit must be thereby conferred.

(i) "Financial Contribution"

A financial contribution is an actual or potential direct transfer of funds from the government or a public body.[39] The Subsidian Government makes direct payments to domestic wheat cultivators.[40] Therefore, Competia submits that the former has made a financial contribution to the latter.

(ii) "Benefit"

Competia has established that a benefit is conferred when something is made available to a natural or legal person or group of persons on better terms than those otherwise prevailing in the market (*Submission 1.2(a)(i)*). Payments to Subsidian wheat cultivators are designed to protect them against fluctuations in world market price. Therefore, Subsidia submits that the Scheme is designed to provide Subsidian wheat cultivators a better price for their produce than otherwise available in the market, thereby conferring a benefit upon them.

3.2(b): Article 2.2(b)

A subsidy is specific if it is targeted towards an enterprise, group of enterprises, industry, or group of industries.[41] When the authority or legislation granting the

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38 *See US – CVDs*, GATT Panel Report 1984, paras. 390, 393.

39 *See Brazil – Aircraft*, AB Report, para. 157.

40 *See* Clarifications to the Case to the Case (Laws in Subsidia).

subsidy explicitly limits it to an enterprise, group of enterprises, industry, or group of industries, it is *de jure* specific.[42] The Susidian law regulates the subsidy.[43] Furthermore, the Scheme was instituted to protect Subsidian wheat cultivators from fluctuations in world market demand and price. Therefore, these payments are available to only to Subsidian wheat cultivators. Therefore, Competia submits that Subsidia's wheat subsidy is *de jure* specific.

3.3: The Scheme adversely affects Competian interests.

Competia's contentions herein are twofold. *First*, the Scheme nullifies and impairs the benefits accruing to Competia from the SCM Agreement. *Second*, it causes serious prejudice to Competian interests.

Competia has established that Article 3.2 of the DSU mandates interpretation of WTO Agreements in accordance with customary principles of treaty interpretation of public international law, including the Accordingly, GATT 1994 forms part of the context to interpret nullification and impairment and serious prejudice under the SCM Agreement.[44]

3.3(a): Nullification and Impairment

A measure can be challenged if it nullifies or impairs benefits accruing from GATT 1994 or impedes its objectives.[45] Whether such measure complies with provisions of GATT 1994 is immaterial.[46] Furthermore, the *Japan – Film* Panel identified three criteria to be established by the complainant to prove a nullification and impairment complaint.[47]

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41 *See* Marc Benitah, Law of Subsidies under the GATT/WTO System.

42 Article 2.1(a), SCM Agreement, WTO Doc. LT/UR/A-1A/2 (1994).

43 *See* Clarifications to the Case (Laws in Subsidia).

44 *See* Footnotes 12 and 13, Article 5, SCM Agreement, WTO Doc. LT/UR/A-1A/13 (1994); *Japan – Film*, Panel Report, para. 10.41; *US – Offset Act 2000*, Panel Report, paras. 7.118-7.132, *EC – Asbestos*, Panel Report, para. 2.283; Steinberg/Josling, (2003) 6 JIEL. 369.

45 *See* Article XXIII:1(b), GATT, 1994, WTO Doc. LT/UR/A-1A/1/GATT/2.

46 *See Uruguay – Recourse to Article 23*, GATT Panel Report 1962, para. 15.

47 *Japan – Film*, Panel Report, paras. 10.81-10.88; *US – Offset Act 2000*, Panel Report, paras. 7.118-7.132.

One, a benefit accrues to it under this Agreement. Two, the respondent state has adopted a measure. Three, the measure has nullified or impeded the aforementioned benefits.

(i) Benefit accruing

The benefit must accrue from the SCM Agreement.[48] A benefit is said to accrue when the negotiated concessions are not negated by countermeasures. However, if such measures were reasonably expectable during the negotiations, no legitimate expectation of benefits accruing from improved market access can be said to exist.[49] Competia submits that under the AoA, Subsidia is obligated to meet its export subsidy reduction commitments resulting in the benefit of improved market access and increased sales for Competia.

(ii) Application of a measure

A measure means "policies or actions of governments…"[50] The Scheme and laws governing the grant of subsidies to Subsidian wheat cultivators are creations of the Subsidian Government. Therefore, Competia submits that they are measures within the meaning of Article XXIII:1(b).

(iii) Nullification and Impairment

The *Japan – Film* Panel stated that nullification means the upsetting of competitive balance between countries. The objective of the WTO Agreements is to liberalise international trade by, *inter alios*, removing tariff and non-tariff barriers thereto. The domestic support offered by the Subsidian Government to domestic wheat cultivators is an artificial incentive to increase exports. Therefore, the Scheme enables Subsidian wheat cultivators to capture an inequitable share of the world market for wheat.

3.3(b): Serious Prejudice

Competia claims that the Scheme causes serious prejudice to Competian interests.

(i) Significant Price Suppression under Article 6.3(c)

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48 *See* Article 26.1, DSU, WTO Doc. LT/UR/A-2/DS/U/1.

49 *See Japan – Film*, Panel Report, paras. 10.76-10.77; 1961 Report of the Panel on Subsidies, para. 28.

50 *See Japan – Film*, Panel Report, paras. 10.49-10.52.

Serious prejudice comprises three elements. *One*, significant price undercutting or price suppression or depression or lost sales. *Two*, the products in question are like products. *Three*, the products must compete in the same market.

(a) Significant Price Suppression

The term "significant" as employed in Article 6.3 is not defined in the SCM Agreement. The inclusion of the term prevents claims of serious prejudice from succeeding on grounds of negligible margins of suppression.[51] The *US – Cotton* Panel stated that what constitutes significant price suppression is determined in light of the facts and circumstances of each case.[52] The Panel made its determination in light of three considerations.[53] *One*, the quantity of US cotton production relative to the world market; *two*, general price trends in the world cotton market; *three*, the nature of the subsidies at issue.

Subsidia is the leading producer and exporter of wheat to the world market.[54] The payments being made by the government to the wheat producers are counter cyclic and *per se* price suppressive.[55] They insulate production from any kind of losses and thus induce increased production than would prevail in their absence. Subsidies are further made on this reduced price also, thus leading to further reduction in prices.

(b) Like Products

The SCM Agreement defines like products as 'alike in all respects to the product in consideration or in absence of such product, another product, which not alike in all respects, has characteristics closely resembling those of the product under consideration.'[56] The product under consideration in this case is wheat. Competia

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51 *See Indonesia – Autos*, Panel Report, paras. 14.254.

52 *US – Cotton*, Panel Report, para. 7.1316- 7.1329.

53 Id.

54 *See* Statement of Facts, para. 3.

55 *See US – Cotton*, Panel Report, paras. 7.1316-7.1329.

56 *See* Footnote 46, Article 15.1, SCM Agreement, WTO Doc. LT/UR/A-1A/13 (1994).

submits that wheat exported by it is unquestionably a like product with reference to wheat exported by Subsidia.

(c) Competition in the Same Market

The *US - Cotton* Panel observed that goods competing in the world market may be said to be competing in the same market.[57] Therefore, Competia submits that its exports of wheat and Subsidian exports of wheat may be said to be competing in the same market.

Article 6.3(d) of the SCM Agreement legitimises serious prejudice claim based on consistent increase in share of world market of the subsidizing member.[58] The facts demonstrate that over the ten years that the Scheme has been in place, Subsidia's share in the world wheat market has increased consistently.[59] In the previous three-year period given, the increase has been to the tune of 4 per cent.

Therefore, Competia submits that payments under the Scheme are actionable subsidies.

Request for Findings

Competia, therefore, asks that the Panel recommend to the DSB that it request Subsidia to bring its measures, found to be in violation with provisions of the AoA and SCM Agreement, into conformity with them.

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57 *US – Cotton*, Panel Report, paras. 7.1235 – 7.1250.

58 *See US – Cotton*, Panel Report, para. 7.1419.

59 *See* Statement of Facts, para. 11.