

**Team: 016 R**

**ELSA MOOT COURT COMPETITION ON WTO LAW**

***THE CASE***

***SUBSIDIA - AGRICULTURAL SUBSIDIES ON SWEET BISCUITS,  
WHEAT & PORK***

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**2006**

**COMPETIA**

**Complainant**

**Vs.**

**SUBSIDIA**

**Respondent**

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**SUBMISSION FOR RESPONDENT**

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### *List of Abbreviations*

AB	Appellate Body
AMS	Aggregate Measurement of Support
AoA	Agreement on Agriculture
ATC	Agreement on Textiles and Clothing
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATT 1994	General Agreement on Tariffs and Trade 1994
ICJ	International Court of Justice
ICTFY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
SCM	Agreement on Subsidies and Countervailing Measures
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

## ***B. Substantive***

### *Summary*

#### ***Sweet biscuits***

- Subsidia's domestic support and export subsidies programme on sweet biscuits is in conformity with WTO law. The exported quantities beyond quantity commitment levels of sweet biscuits do not receive an Art. 9.1 AoA type export subsidy.
- Art. 9.1 (a) AoA is not met in what regards the exceeding amount of sweet biscuits, since all direct subsidies are granted within the scheduled commitment levels.
- Art. 9.1 (c) AoA is not met in what regards the exceeding amount, since internal allocation of the received direct subsidies by sweet biscuit producers is not a payment. Even if the Panel does find a payment, this payment is not made "on the export" because it is not export contingent. If the panel does not concur, the payment is not "financed by virtue of governmental action" because Subsidia does not control the internal allocation of the received direct subsidies.

#### ***Wheat***

- Subsidia's price-contingent export subsidies programme on wheat is in conformity with WTO law. The programme is a measure covered by Art. 13 AoA, since the challenged subsidies took place during the implementation period and are in full conformity with Part V of this Agreement. By virtue of the Peace Clause, the wheat scheme is exempt from actions based on Arts. 5 and 6 of the SCM.
- If the Panel does not find the wheat scheme exempt under Art. 13 AoA, Subsidia submits that the SCM is not applicable to the present case. The specific provisions of the AoA should prevail over the general framework provided for in the SCM, according to Art. 21.1 AoA. The subsidies in question are in full consistency with the AoA discipline.
- Even if the wheat scheme is analyzed in light of the SCM rules, Subsidia does not pay subsidies in violation of Art. 5(c) of this Agreement. The requirements of Art. 6.3 (c) and (d) SCM are not met.

#### ***Pork***

- The pork scheme does not violate the AoA. It is a legal "blue box" domestic support, in the terms set forth in Art. 6.5 (a) (iii) AoA. In addition, the pork scheme meets the non-trade concerns requirement foreseen in the Preamble of the AoA.
- The pork scheme is also consistent with export subsidy reduction commitments, since it confers no export subsidy under Art. 9.1 (c) and Art. 9.1 (f) AoA.

*Statement of Facts*

Competia has initiated a complaint over the subsidies on sweet biscuits, wheat and pork currently paid by Subsidia before the DSB of the WTO. Subsidian sweet biscuit manufacturers are granted direct subsidies on 600.000t of sweet biscuits for purchasing domestic sugar, butter and wheat flour. The subsidies are designed to bring the price of these ingredients down to the prices at which imported ingredients are sold in Subsidia. Subsidia has developed a tracking system in order to comply with its AoA commitments and has fully met its budgetary values.

Subsidia also provides price-contingent export subsidies on wheat. These are not paid in excess of its scheduled commitments under the AoA. Subsidia's export subsidy programme has been in place for ten years and now Competia alleges that it suffers fluctuations in its world market share as a result of the price-contingent subsidies.

For the producers of pork, Subsidia provides "blue box" domestic support. This subsidy is contingent on production limitation, due to trade and environmental concerns. In 2000, 9 million swine were produced in Subsidia and by 2015 the number must be reduced to 7 million. Subsidia Law No. 345, Section 40 sets forth a system which requires farmers to cut production according to the plan made out for each farm.

Since both countries failed to resolve the said disputes during the consultations, Competia formally requested the formation of a panel under Art. 6 DSU, regarding the three schemes explained above.

*Identification of the WTO Measures at Issue***I. Arts. 3.3, 8 and 9 AoA**

Subsidia shall not provide export subsidies listed in Art. 9.1 AoA 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. It also shall not provide Art. 9.1 export subsidies in respect of an unscheduled agricultural product.

**II. Art. 13 AoA**

AoA consistent export subsidies applied during the implementation period are exempt from actions under Arts. 3, 5 and 6 of the SCM.

**III. Art. 5 SCM combined with Art. 6.3 (c) and (d) SCM**

Subsidia shall not use a subsidy in a manner that causes adverse effects to the interests of other Members. No Subsidian subsidy should cause serious prejudice, by having as an effect either (i) the increase in its world market share in wheat as compared to the average share it had during the previous period of three years, in a consistent trend of increase over the pe-

riod when subsidies have been granted; or (ii) lost sales in the same market.

#### **IV. Arts. 3.2 and 6 AoA**

Subsidia shall only provide domestic support, which is not included in the Current Total AMS, on scheduled products under production-limiting programmes.

##### *Identification of the WTO legal Claims*

Competia has filed a dispute settlement complaint in the WTO against Subsidian subsidies on sweet biscuits, wheat and pork. Competia claims, first, that the sweet biscuit scheme is in violation of the AoA Arts. 3, 9 and 8; second, that the wheat scheme violates Part III of the SCM; and third, that the pork scheme violates Arts. 3, 6, 8 and 9 of the AoA.

##### *Legal Pleadings*

#### **I. The Sweet Biscuit Scheme is consistent with Arts. 3.3, 8 and 9 of the AoA**

Subsidia grants export subsidies that are in full conformity with the AoA and with the commitments specified in Subsidia's Schedule, in accordance with Art. 8 AoA. Subsidia submits that pursuant to Art. 3.3 AoA, the exported quantity of sweet biscuits beyond its commitment levels of 600.000 t does not receive an Art. 9.1 AoA type export subsidy.

##### **1. No Export Subsidy under Art. 9.1 (a) on Quantities beyond Commitment Levels**

No "direct subsidies" are paid by "governments or their agencies" on quantities beyond 600.000t. Subsidia grants direct export subsidies on 600.000t of sweet biscuits in accordance with its Schedule. Direct domestic support is not paid on exported sweet biscuits.

##### **2. No Export Subsidy under Art. 9.1 (c) on Quantities beyond Commitment Levels**

The requirements of Art. 9.1 (c) AoA are not met. First, no "payment" on excess sweet biscuits is conferred. Second, even if a "payment" exists, this "payment" is not made "on the export. Third, this payment is not "financed by virtue of governmental action".

##### *a. Quantities beyond Commitment Levels receive no "Payments"*

Excess sweet biscuits receive no "payments", because there is no additional transfer of economic resources in respect of these quantities. Even if the received direct subsidies are internally allocated on excess sweet biscuits by a producer, this cannot be a payment under Art. 9.1 (c). Pursuant to Art. 3.2 DSU, the DSB relies on customary rules of international law, as codified in Art. 31 VCLT, for interpreting WTO law.<sup>1</sup> According to Art. 31 VCLT, interpretation requires the wording, context, object and purpose of a regulation to be taken into con-

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<sup>1</sup> U.S. – Gasoline, AB Report, paras. 16-17; Japan – Alcoholic Beverages, AB Report, paras. 10-12, 15; EC – Computer Equipment, AB Report, para. 85; Canada – Dairy, AB Report, para. 138; India – Patent Protection, AB Report, paras. 45-46; US – Shrimp, AB Report, para. 34. See also *McRae*, JIEL 3 (2000), 27 (37).

sideration.

*i. Ordinary Meaning of "Payments"*

The verb "to pay" is defined as "to give (someone) money due for work, goods".<sup>2</sup> Thus, it envisages two parties. The AB confirmed this by interpreting "payments" as a "transfer of economic resources".<sup>3</sup> One single entity cannot transfer resources within itself; it can only allocate them. However, allocation is a word that is distinctly absent from Art. 9.1 (c) AoA. Under the principle of *expressio unius est exclusio alterius*<sup>4</sup>, allocation shall not be included in the ambit of Art. 9.1 (c) AoA. The AB in *EC – Sugar*, although opining that "payments" do not always require the presence of distinct entities, dealt with a highly regulated market and compared internal allocation to a transfer between single legal entities.<sup>5</sup> Thus, the AB recognized that the notion of payments involves distinct entities. Unlike under the EC sugar regime, the market of sweet biscuits is not regulated by government. If producers in Subsidia were divided into subsidized and non-subsidized under market conditions, the former would never transfer money to the latter without consideration. On an unregulated market, internal allocation cannot be compared to a transfer of resources between two entities, and thus must be treated differently.

*ii. Context of "Payments"*

The AB's interpretation of "payments-in-kind" in Art. 9.1 (a) AoA requires distinct entities. The AB stated that "payments" denotes "a transfer of economic resources in a form other than money, from the grantor of the payment to the recipient"<sup>6</sup>. It also noted that the same interpretation applies in Art. 9.1 (c) AoA.<sup>7</sup> An interpretation of "payments" encompassing internal allocation would also deprive the schedules and Art. 10.3 AoA of legal significance. Since the government cannot prevent subsidies from being allocated within the receiving entity,<sup>8</sup> a subsidy would automatically count as a subsidy on the whole production, al-

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<sup>2</sup> *Soanes / Hawker*, Compact Oxford English Dictionary.

<sup>3</sup> *Canada – Dairy*, AB Report, para. 107. See also *Canada- Dairy (21.5 II)*, AB Report, para. 85.

<sup>4</sup> *Waincymer*, WTO litigation, para. 7.18.6.

<sup>5</sup> *EC – Sugar*, AB Report, para. 265.

<sup>6</sup> *Canada – Dairy*, AB Report, para. 87.

<sup>7</sup> *Ibid*, para. 107.

<sup>8</sup> *Hancher/Buendia Sierra*, Cross-Subsidization and EC Law, para. 3.2.5.

though the schedules set forth specific quantities. Members would be prohibited from exporting beyond their commitment levels. Art. 10.3 AoA shows *a contrario* that members are entitled to export beyond these levels subject to proof that these quantities do not receive subsidies. Such proof could never be provided, because export subsidies would always be on the whole production. This contradicts the principle *ut res magis valeat quam pereat*<sup>9</sup>.

*b. Even if a "Payment" is found, this is not made "on the Export"*

The payment is not made "on the export". First, "on the export" must be interpreted as "contingent upon export performance". Second, payments through the internal allocation of resources are not export contingent.

*i. The Interpretation of "on the Export"*

The phrase "on the export" in the context of Art. 9.1 (c) AoA must be interpreted as "contingent upon export performance": first, in accordance with the ordinary meaning, second, the specific context of that term, and third, this interpretation is also confirmed by the AB.

*1) Ordinary Meaning of "on the Export"*

The term "on" is defined *inter alia* as "indicating the reason of action; having as a motive"<sup>10</sup>. A payment, which has exportation as a motive is dependent, thus contingent<sup>11</sup> on that motive. This interpretation is imperative in the context of Art. 9.1 (c) AoA.

*2) Context of Art. 9.1 (c) AoA*

*a) Art. 9.1 AoA provides no self-standing Definition of "Export Subsidies"*

The *chapeau* of Art. 9.1 AoA refers to the listed practices as "export subsidies". It declares them to be "subject to reduction commitments". The prerequisites for this legal consequence are stated in the phrase "the following *export subsidies*". Since a prerequisite can not be its own legal consequence, Art. 9.1 AoA does not define export subsidies in isolation from the context of Art. 1 (e) AoA. Instead, the *chapeau* understands that the practices listed in Art. 9.1 AoA are export subsidies according to Art. 1 (e) in part I AoA, which is titled "*Definition of Terms*". Art. 1 (e) AoA supports the above approach. "Export subsidies" are defined by the phrase "subsidies contingent upon export performance including the export subsidies listed in Art. 9.1". A complete *definiendum* is constituted by its *definiens* as a whole. One part of the *definiens* cannot be autonomously referred to by the *definiendum*. In referring to the practices

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<sup>9</sup> *Brownlie, Principles of Public International Law*, 606-607; *Carreau, Droit International*, 155; *Oppenheim, Oppenheim's International Law*, 1280; *Waincymer, WTO Litigation*, para. 7.18.7.

<sup>10</sup> *Brown, Shorter Oxford English Dictionary*.

<sup>11</sup> *US – FSC (21.5)*, AB Report, para. 111.

listed in Art. 9.1 AoA, Art. 1 (e) AoA uses the word “including”. Since “including” is used in the *definiens*, it can only be interpreted within the scope of the *definiens* itself. This means that practices listed in Art. 9.1 AoA are included by the phrase “subsidies contingent upon exportation”. The latter phrase cannot intend to exclude the listed practices from the first phrase’s ambit. It is logically impossible that export subsidies contingent on export performance *include* export subsidies that are not export contingent. A similar issue arose with the phrase “direct subsidies *including* payments-in-kind” (emphasis added) in Art. 9.1 (a) AoA. The AB reversed the Panel’s finding that payments-in-kind were *per se* direct subsidies. Rather, the AB held that these are a form of “direct subsidies”, and must still meet the requirements of “direct subsidies”.<sup>12</sup> Words shall be construed consistently,<sup>13</sup> thus Art. 1 (e) AoA requires that “export subsidies listed in Art. 9.1” be “subsidies contingent upon export performance”.

b) The French and Spanish Versions require Export Contingency in the Context of Art. 1 (e) AoA

Pursuant to Art. 33.3 VCLT, all linguistic versions are presumed to have the same meaning. The term “on the export” corresponds to “à la exportation” and “a la exportación” in Art. 9.1 (c) AoA. Art. 1 (e) AoA uses the same expression: “subventions à l’exportation”, “subvenciones a la exportación” respectively. If “à l’ exportation / a la exportación” means “contingent” in connection with “subsidy”, it must mean the same in connection with “payment”,<sup>14</sup> especially since Art. 9.1 (c) AoA is but one form of subsidies.<sup>15</sup>

c) Export Contingency is required by the Disciplines in the AoA

The AoA established distinct disciplines for domestic support and export subsidies. Pursuant to Art. 1 (a) AoA, domestic support commitments apply to support paid on an agricultural product. If measures that are not export contingent but export neutral were deemed export subsidies, these measures would have to be included into both kinds of disciplines. In consequence, the distinction between export subsidies and domestic support would be eroded. This erosion of the distinction is one that the AB has strongly cautioned against.<sup>16</sup>

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<sup>12</sup> *Canada – Dairy*, AB Report, para. 87.

<sup>13</sup> *US – FSC*, AB Report, para. 136-7; *India – Quantitative Restrictions*, AB Report, para. 92; *Waincymer*, WTO Litigation, para. 7.18.4.

<sup>14</sup> *EC – Sugar*, EC Appellant Submission, para. 231.

<sup>15</sup> *Canada – Dairy*, AB Report, paras. 87 and 107.

<sup>16</sup> *Canada – Dairy 21.5*, AB Report, para. 90.

### 3) *The AB Inference of an Export Contingency Standard*

According to the AB's reasoning in *EC – Sugar*, mere coincidence with export would not render a payment “on the export”. The AB found that payments on surplus sugar were “on the export” because this sugar had to be exported pursuant to EC law.<sup>17</sup> Payments on surplus sugar only existed under subsequent exportation of the sugar, thus were export contingent. Concerning the Panel's interpretation of “on the export”, the AB did not acknowledge that “on the export” may cover measures that are not contingent on export. Although the Panel's interpretation of “on the export” was “in connection with” exports, the AB effectively modified it into that of export contingency.<sup>18</sup> It is necessary to note that these findings are not based on the observance that a payment to a product that must be exported is *a fortiori* “on the export” if this phrase described a mere coincidence. Rather, the AB based its reasoning on the compulsion for surplus sugar to be exported and for this reason also deemed its interpretation of “on the export” not to erode the distinction of disciplines between domestic support and export subsidies.<sup>19</sup> The reasoning of the AB requires export contingency. This is also consistent with the *Canada – Dairy* Panels, which as a matter of course found payments to be “on the export” because they were export contingent.<sup>20</sup> The AB in *US – FSC* referred to the “common substantive requirement” of export subsidies to be export contingent.<sup>21</sup> The internal allocation of received direct subsidies is not export contingent, hence, not “on the export”.

#### ii. The “Payment” is not Export Contingent

The alleged payment is not export contingent since exportation is not a condition for the payment. As observed by the AB, the requirement of export contingency in the AoA is the same as in the SCM.<sup>22</sup> In *US – FSC (Article 21.5)*, the AB explained that “contingent” means

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<sup>17</sup> *EC – Sugar*, AB Report, para. 277.

<sup>18</sup> *EC – Sugar*, AB Report, para. 274 *et seq.*

<sup>19</sup> *EC – Sugar*, AB Report, para. 281-283.

<sup>20</sup> *Canada – Dairy*, Panel Report, para. 7.90; *Canada – Dairy (21.5)*, Panel Report, para. 6.78. The Panel's finding was left unmodified by the AB.

<sup>21</sup> *US – FSC*, AB Report, para. 141.

<sup>22</sup> *US – Cotton*, AB Report, para. 571.



“conditional or dependent upon export performance”<sup>23</sup>. Anticipation of exports, *e.g.* because the recipient is export-oriented, is not enough to establish export contingency.<sup>24</sup> Sweet biscuit producers are not required to produce and export sweet biscuits beyond 600.000t. Furthermore, excess sweet biscuits are not required to be exported. Unlike sugar producers in *EC – Sugar*, Subsidian sweet biscuit producers are free to sell their products on both the domestic and export market. The fact that exports are made at low prices is irrelevant. Instead, what is decisive is whether the alleged payments are contingent upon the exports, not whether the exports are contingent upon the alleged payments. The payment would also occur if the amount beyond 600.000t is not exported. Thus, the payment on this amount is export neutral and not export contingent.

*c. Even if “Payments on the Export” exist, they are not “financed by Virtue of governmental Action”* Art. 9.1 (c) AoA stipulates that whether or not a charge on the public account is involved, the payment must be financed “by virtue of governmental action”. It is not sufficient that a charge on the public account is involved somewhere. In *Subsidia*, the internal allocation is conducted by private parties. Their actions cannot be attributed to *Subsidia* because it does not control them. First, according to customary rules of state responsibility, the minimum requirement of the phrase “by virtue of” is governmental control over the financing. Second, the Subsidian government does not control producers’ internal allocation of resources.

*i. Interpretation of “by Virtue of” as effective Control by the Government*

*1) Ordinary Meaning*

The dictionary meaning of “by virtue of” encompasses “by authority of”<sup>25</sup>. Since it includes “by authority of”, it envisages the requirement of governmental control. This meaning is imperative due to the context and object and purpose of Art. 9.1 (c) AoA.

*2) Context*

The meaning “by authority of” requires a normative operation beyond the recognition of a mere causal link. All citizen actions are, to some extent, caused by the State, at least by it providing infrastructure. Thus, a normative operation is required by Art. 9.1 (c) AoA. Customary rules regarding this normative operation have evolved in public international law. These rules have been codified in the ILC’s Draft Articles on State Responsibility, from

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<sup>23</sup> *US – FSC (21.5)*, AB Report, para. 111. See also *Cottier / Oesch*, *International Trade Regulation*, 995.

<sup>24</sup> *Canada – Aircraft*, AB Report, paras. 171-173.

<sup>25</sup> *Garner*, *Black's Law Dictionary*.

which the Uruguay Round negotiators could not have intended to derogate. According to Art. 3.2 DSU and 31.3 (c) VCLT, the DSB shall take these rules into consideration when interpreting WTO law.<sup>26</sup> This has consistently been the case in WTO jurisprudence.<sup>27</sup> According to Art. 8 of the Draft Articles, the conduct of private parties shall only be attributable if the state at least controlled the conduct. Generally, the conduct of private parties shall not be attributable.<sup>28</sup> The ICJ applied this interpretation holding that actions of the Nicaraguan *Contras* were not attributable to the US, for the US did not exercise “effective control” over these actions, although it did provide “heavy subsidies and other support”.<sup>29</sup> A similar issue arose before the Appeals Chamber of the ICTFY. It held that attribution could be retained only if the State had issued specific instructions<sup>30</sup> or had exercised “overall control going beyond the mere financing and equipping” of forces carrying out certain operations.<sup>31</sup> Both judgements inferred that governmental action may enable private parties to carry out actions by providing substantial means being causal for the actions. However, for attribution it is necessary that the state not only control the provision of means but also the actions conducted because of this provision. The private conduct must be an “integral part” of a governmental operation, and not “only incidentally or peripherally associated with an operation” thereby escaping the state’s control.<sup>32</sup>

### 3) Object and Purpose

As implied in its Preamble, the AoA works towards less governmental trade restrictions. If private action not controlled by government would be attributed to the state as a wrongful act that has to be restricted under international law, WTO law would be subject to an interpretation that contributes to an increase of governmental intervention in the market, *i.e.*

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<sup>26</sup> See also *Marceau*, JWT 33 (1999), 87 (127).

<sup>27</sup> *US – Cotton Yarn*, AB Report, para. 120; *US – Line Pipe Safeguards*, AB Report, para. 259; *Canada – Dairy*, Panel Report, para. 7.77 fn. 427; *Brazil – Aircraft (22.6)*, Arbitration, para. 3.44; *US – FSC (22.6)*, Arbitration, para. 5.58.

<sup>28</sup> *Crawford*, The International Law Commission’s Articles on State Responsibility, 113.

<sup>29</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, I.C.J. Reports 1986, p. 14.

<sup>30</sup> *The Prosecutor v. Tadić*, Case IT-94-1, (1999) I.L.M., vol. 38, paras. 118 – 119.

<sup>31</sup> *The Prosecutor v. Tadić*, Case IT-94-1, (1999) I.L.M., vol. 38, para. 145.

<sup>32</sup> *Crawford*, The International Law Commission’s Articles on State Responsibility, 110.

trade restriction. This would invert the object and purpose of the AoA.

Although the AB opined that “by virtue of governmental action” did not require governmental “mandate or direction”,<sup>33</sup> it recognized that Art. 9.1 (c) AoA encompasses “control” of individuals.<sup>34</sup> In *EC – Sugar and Canada – Dairy* the AB found “payments financed by virtue of governmental action”. This was because governmental action “contro[ed] virtually every aspect” (emphasis added) of the domestic milk or sugar market.<sup>35</sup> In both cases, incentives were provided to produce in excess,<sup>36</sup> and financial disincentives for the diversion of surplus products onto the domestic market were instated.<sup>37</sup> The financing of payments was integrally linked to governmental action in either case. Thus, the state controlled beyond the provision of means, the actions deriving from that provision, namely the financing of “payments on the export”. Subsidia has no control over this process of financing.

*ii. Subsidia does not “control” the Financing of Payments*

At issue are not the government payments provided on 600.000t, but the payments allegedly provided on excess sweet biscuits through the internal allocation of resources. These are autonomously provided by the producers. Unlike in *EC – Sugar and Canada – Dairy*, Subsidia does not provide incentives to produce excess sweet biscuits, because quantities beyond 600.000t are not eligible for direct subsidies. Thus, excess production is an autonomous private act. Subsidia also does not impose financial disincentives for diverting sweet biscuits on the domestic market. The internal allocation therefore cannot be deemed “integral” to the government measure. In clear distinction from the Canada and EC cases, Subsidia only controls the provision of means not the actions conducted with those means by private parties. Thus, the minimum requirement for state attribution is not fulfilled.

**II. Wheat: Full Conformity with the SCM and the AoA**

Subsidia’s price-contingent export subsidies programme on wheat complies with WTO law. First, the programme is covered by Art. 13 AoA, the “Peace Clause”, and is exempt from legal claims before the DSB. Second, even if the measure is not considered exempt, Subsidia submits that the AoA is *lex specialis* in relation to the SCM and must take precedence. Third,

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<sup>33</sup> *Canada – Dairy (Article 21.5 II)*, AB Report, paras. 127-128.

<sup>34</sup> *Canada – Dairy (Article 21.5)*, AB Report, para. 112; *EC – Sugar*, AB Report, para. 235.

<sup>35</sup> *Canada – Dairy (Article 21.5 II)*, AB Report, para. 144; *EC – Sugar*, AB Report, para. 238.

<sup>36</sup> *Canada – Dairy (Article 21.5 II)*, AB Report, para. 151; *EC – Sugar*, AB Report, paras. 238-239.

<sup>37</sup> *Canada – Dairy (Article 21.5 II)*, AB Report, para. 144; *EC – Sugar*, AB Report, paras. 238-239.

if the Panel decides that the SCM applies, there is no violation to be found, because Competia has not suffered adverse effects.

### **1. Exemption under the Peace Clause**

Wheat is a product under the heading 10.01 of the Harmonized System and thus an “agricultural product”, pursuant to Art. 2 and Annex 1 of the AoA. Therefore, the AoA is applicable to the present case.

Art. 13 AoA exempts the wheat scheme from actions based on Arts. 5 and 6 SCM.

#### *a. Burden of Proof lies with the Complainant*

In order to be exempt from action under Art. 13 (c) (ii) AoA, an agricultural export subsidy must: (i) take place during the implementation period, and (ii) fully conform to the provisions of Part V of that Agreement. Since the Peace Clause is not an affirmative defence,<sup>38</sup> Competia bears the burden of proving that the conditions of Art. 13 (c) (ii) are not satisfied.

#### *b. Measures took place during the Implementation Period*

The export subsidies that supposedly caused serious prejudice to Competia were in action during the implementation period, since they took place in 2001-2003.

##### *i. End of the Implementation Period for Wheat*

Art. 1 (f) AoA states that the “implementation period” is a nine-year term commencing in 1995. The word “year” means the marketing year as specified in Subsidia’s Schedule, according to Art. 1 (i) AoA. Thus, the end of the implementation period will not necessarily be on December 31<sup>st</sup>, 2003.<sup>39</sup> Pursuant to Art. 3.2 DSU, international customary law can be applied to the interpretation of the term “year”. This includes the Grains Trade Convention, which defines that the wheat fiscal year starts every July 1<sup>st</sup> and ends on the following June 30<sup>th</sup>. Therefore, the implementation period for wheat subsidies ends in June 2004.

##### *ii. Measures at Issue: Export Subsidies*

Art. 13 (c) (ii) AoA clearly states that “during the implementation period *export subsidies* [...] shall be exempt from actions”. Therefore, the crucial analysis is whether the challenged export subsidies on wheat happened during the implementation period.

It is self-evident that a decrease in market share in a given year can only be measured in comparison to the market share in the preceding year. Consequently, the cause for a decrease in a given year must have taken place in the year immediately foregone. Competia contends to have suffered fluctuations in its world market share in 2002-2004. Thus, the ex-

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<sup>38</sup> *US – Cotton*, Panel Report, para. 7.283.

<sup>39</sup> See *Tollini*, *Revista de Política Agrícola* 13 (2004), 18 (22).

port subsidies alleged by Competia to be the cause of such fluctuations happened in 2001-2003.

*c. Full Conformity with Part V AoA*

Subsidia has scheduled the wheat scheme according to Art. 9.1 (a) AoA. As per the *chapeau* of Art. 9.1, the wheat subsidies are subject to reduction commitments, which Subsidia has duly complied with during the ten years of the programme's existence. Considering that all criteria of Art. 13 (c) (ii) are fulfilled in this case, Subsidia requests that the Panel find the wheat scheme exempt from the present action. The expression *exempt from action* means, as maintained by the Panel in *US – Cotton*, “not exposed or subject to a legal process or suit”<sup>40</sup>.

*d. Continuation of the Peace Clause*

The Peace Clause is one of the logical corollaries of the AoA and must still be deemed to be in force. It must, pursuant to Art. 3.2 DSU, be analyzed in light of Art. 31 VCLT.

Firstly, the *text* of the AoA refers to the continuity of the reform process in world agricultural regulation in various provisions. The Preamble of the AoA encompasses the concepts of “process of reform”, “long-term objective”, and “progressive reductions”. This leads to the understanding of the AoA as an initiating step in an ongoing evolution towards a fair agricultural trading system. The same idea is expressed in its Art. 20.

Secondly, as observed in the Doha Declaration<sup>41</sup>, agricultural negotiations encompass trade issues and also a series of non-trade concerns. Given this complex *context*, the expression “implementation period” in Art. 13 should not be seen as a detached timeline, completely independent from the reform process. If this were the case, the foremost objectives of the AoA would be rendered redundant. As stated by the Panel in *Canada – Auto Measures*, “in many cases, however, it is impossible to give meaning, even ‘ordinary meaning’, without looking also at the context and/or object and purpose.”<sup>42</sup>

Thirdly, the *object and purpose* of a regulation should be sought in the AoA as a whole, as well as in the provision itself.<sup>43</sup> The AB has recognized the reform process as a fundamental

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<sup>40</sup> *US – Cotton*, Panel Report, para. 7.306 *et seq.*

<sup>41</sup> WT/MIN(01)/DEC/1, 20 November 2001, paras. 13 and 14. See also *Desta*, *The Law of International Trade in Agricultural Products*, 440.

<sup>42</sup> *Canada – Auto Measures*, Panel Report, para. 10.12.

<sup>43</sup> *EC – Chicken*, AB Report, paras. 738-9.

objective of the AoA.<sup>44</sup> Besides that, the Peace Clause's purpose is to represent an end-date for the negotiating process, as an instrument to encourage Members to reach consensus.<sup>45</sup> Members expected to have a new agreement by the end of the implementation period, as they did not include any provisions in the AoA clearly stating what should be the Members' obligations after its expiry under Art. 13.<sup>46</sup> Therefore, in order to achieve maximum effectiveness in the agricultural reform, Art. 13 must still be considered to be in force<sup>47</sup>.

## **2. Inapplicability of the SCM**

Even if the Panel concludes that the wheat scheme is not exempt from action, Subsidia contends that the SCM is not applicable to this case. First, Art. 21.1 AoA requires that the AoA prevail over other Annex 1A Agreements, in the event of a conflict. Second, Art. 5 (c) SCM cannot take precedence over Art. 9.1 AoA because such a decision would result in the predominance of obligations over rights of Members and this is contrary to Art. 3.3. DSU.

### *a. Concrete Conflict between SCM and AoA*

The relationship between the norms of the AoA and of other Annex 1A Agreements is set out in Art. 21.1 AoA, which establishes that, in the event of a conflict, the rules of other Annex 1A Agreements must apply *subject to* the AoA.<sup>48</sup>

Given that the drafting of the specific Agreements occurred separately until a very late stage of the negotiating process,<sup>49</sup> a number of potential inconsistencies are found among them.<sup>50</sup> As stated by the AB, the relationship between WTO Agreements is very complex and must be examined on a case-by-case basis.<sup>51</sup> In what concerns the wheat scheme, the adherence to the AoA, *i.e.* the exercise of Subsidia's right to provide export subsidies, allegedly leads to a

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<sup>44</sup> *EC – Bananas III*, AB Report, para. 156.

<sup>45</sup> *Gonzalez*, *Columbia Journal of Environmental Law* 27 (2002), 433 (459).

<sup>46</sup> As they did with Art. 9 ATC, which has a very similar function to Peace Clause. See also *Prief/Pitschas*, *Das Übereinkommen*, 200, and *Benitah*, *The law of subsidies*, 18.

<sup>47</sup> See *Goh/Morgan*, *JWT* 35 (2003), 977 (992).

<sup>48</sup> *US – Cotton*, Panel Report, para. 7.657.

<sup>49</sup> *Lugard/Montaguti*, *JIEL* 3 (2000), 473 (474).

<sup>50</sup> For instance, the AB observed the possible conflict between GATT 1994 and GATS in *EC – Bananas*, para. 45; SCM and GATT 1994, in *US – Lumber*, para. 134; and GATT 1994 and ATC, in *Turkey – Textiles*, para. 7.

<sup>51</sup> *Brazil – Desiccated Coconut*, AB Report, page 13.

breach of the SCM. Hence, what is present in this instant is a conflict within the definition of the AB in *Guatemala – Antidumping Investigation*, i.e. “a situation where adherence to the one provision will lead to a violation of the other”.<sup>52</sup>

*b. Prevalence of the AoA*

Considering that a “conflict” is characterized in the present case, the SCM provisions must be applied “subject to”, meaning “under the control or authority of”, the AoA rules.<sup>53</sup> Thus, Art. 21.1 mandates that other Annex 1A Agreements, such as the SCM, apply under the authority of the AoA, which takes precedence and is predominant over all the other Annex 1A Agreements. Moreover, the principle of *lex specialis derogat legi generali* applies in the event of conflict of norms. Therefore, the AoA prevails over the SCM, for it is the most specific set of rules governing export subsidies in agricultural products.<sup>54</sup>

Subsidia contends that a complaint against agricultural export subsidies can only be brought if the said subsidies are not consistent with the AoA.<sup>55</sup> This can also be inferred from the AB decision in *Canada – Dairy*: “the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture”<sup>56</sup>.

Furthermore, the AB held that if the AoA contains specific provisions dealing specifically with the same matter, it should prevail over other agreements.<sup>57</sup> Given that the SCM and the AoA overlap in what regards agricultural export subsidies, the AoA must take precedence and Competia cannot allege a violation of Part III of the SCM.

*c. Balance of Rights and Obligations – Art. 3.3 DSU*

Subsidia also argues that the accumulation of SCM and AoA rules would subject agricultural subsidies to disciplines much stricter than those of industrial subsidies. This interpretation leads to a prevalence of obligations over rights of Members and contradicts the principle of treaty interpretation *in dubio mitius*. This principle favours the less onerous interpreta-

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<sup>52</sup> *Guatemala – Antidumping Investigation*, AB Report, para. 65. See also *Pauwelyn, Conflict of Norms in Public International Law*, 161.

<sup>53</sup> *Soanes / Hawker, Compact Oxford English Dictionary*.

<sup>54</sup> *US – Cotton*, Panel Report, para. 7.257. See also *Weiß / Herrmann, Welthandelsrecht*, 152, and *Van den Bossche, The Law and Policy of the World Trade Organization*, 584.

<sup>55</sup> *Siuves, Legal Issues of Economic Integration* 31 (2004), 25 (32).

<sup>56</sup> Para 123. This understanding was affirmed in *US – Cotton*, AB Report, para. 532.

<sup>57</sup> *EC – Bananas III*, AB Report, paras. 155-158.

tion of provisions that create obligations. As the AB stated, it is not possible to “lightly assume that sovereign states intended to impose upon themselves the more onerous, rather than the less burdensome” obligations.<sup>58</sup> Pursuant to Art. 3.3 DSU, the SCM obligations should be balanced in relation to Subsidia’s rights under the AoA and its Schedule.

### **3. No violation of Art. 5 SCM**

If the Panel nevertheless deems the SCM applicable and decides to analyze the wheat scheme in light of its rules, Subsidia defends that there is no breach of Art. 5 (c) SCM. The wheat scheme is not used in a manner that causes serious prejudice to Competia, since Art. 6.3 SCM is not fulfilled<sup>59</sup>.

The factual material available does not enable Competia to demonstrate that the wheat scheme features coincide with the situations in subparagraphs (c) and (d). According to the general rule of procedure, “it is for the complaining party to establish the violation it alleges”<sup>60</sup>. The burden of proving a breach of the SCM based on Art. 6.3 SCM, therefore, lies with the complainant.<sup>61</sup>

#### *a. Art. 6.3 (c) SCM is not characterized*

Competia cannot successfully prove serious prejudice under subparagraph (c). First, Competia has gained sales in the past few years. Second, the loss of sales occurred in 2004 is not “significant”, as required by Art. 6.3 (c). Third, the loss of sales occurred in 2004 is not an effect of the Subsidian wheat scheme.

#### *i. Gained Sales*

Competia’s world market share grew 9% in 2003 and fell 4% in 2004. It has consequently gained 5% of the total world wheat market. The practical outcome is that Competian wheat producers now sell approximately 33% more wheat than they did three years ago.

#### *ii. No significant lost Sales*

The loss of sales in 2004 is not “significant”, within the meaning of Art. 6.3 (c) SCM. The con-

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<sup>58</sup> *EC - Hormones*, AB Report, para. 70; reiterated in *Argentina - Footwear*, Panel Report, para. 7.8; *US - Lamb*, Panel Report, footnote 59; *U.S. - 1916 Act (EC)*, Panel Report, footnote 354.

<sup>59</sup> See reasoning in *Indonesia - Automobile*, Panel Report, para. 14.238, also *Vermulst / Graaflma*, WTO Disputes, 358.

<sup>60</sup> *Turkey - Textiles*, Panel Report, para. 9.57; *Argentina - Textiles*, Panel Report, para. 6.35.

<sup>61</sup> *US - Shirts and Blouses*, AB Report, page 16. Also *Lunn*, Practising Law Institute, 668.



cept of significance “may not solely depend upon a given level of numeric significance”<sup>62</sup>. It implies that an isolated statistic of one year cannot serve as a basis for the characterisation of serious prejudice in the SCM. Moreover, the term “significant” should be understood as important and consequential.<sup>63</sup> The loss of sales in 2004 is neither important nor consequential, since it happened in one single year and was directly preceded by a very considerable growth.

*iii. No “Effect of the Subsidy”*

The expression “effect of subsidy” in Art. 6.3 SCM denotes that there must be a causal link between the subsidy and the alleged serious prejudice.<sup>64</sup> Competia only provides information of market fluctuations but fails to present any proof of relationship between the wheat scheme and the alleged lost sales. Since the mere correlation between two facts is not sufficient for establishing causal nexus under Art. 6.3 (c) SCM,<sup>65</sup> there is no causal link between the wheat scheme and the lost sales of Competia in 2004.

*b. Art. 6.3 (d) SCM is not characterized*

There is no serious prejudice under Art. 6.3 (d) SCM in this case. First, this provision is not applicable to subsidies on wheat. Second, even if it is deemed applicable, the information at hand does not meet the prerequisites of this subparagraph. Third, Competia fails to establish a reasonable causal link between the wheat scheme and the alleged serious prejudice.

*i. Art. 6.3 (d) SCM is not applicable*

According to footnote 17 SCM, Art. 6.3 (d) SCM does not apply when there is a specific agreement dealing with the primary product or commodity in question. The AoA is the WTO Agreement that applies to wheat products and, therefore, Art. 6.3 (d) SCM must be disregarded.

*1) Definition of “Primary Product”*

Considering that the wording in Art. 6.3 (d) SCM clearly mirrors the one in Art. XVI:3 GATT 1994 and that the SCM does not define “primary product”, it is necessary to import the definition of “primary product” from the GATT 1994.<sup>66</sup> Wheat is a product of farm and, thus,

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<sup>62</sup> *US - Cotton*, Panel Report, para. 7.1329.

<sup>63</sup> *Korea - Commercial Vessels*, Panel Report, para. 7.570.

<sup>64</sup> *US - Cotton*, AB Report, para. 435.

<sup>65</sup> *US - Cotton*, AB Report, para. 451.

<sup>66</sup> Ad Article XVI, Section B, para. 2. See *Josling/Steinberg*, JIEL 6 (2003), 369 (387).

qualifies as a primary product under this description and must also be considered as such for the purposes of Art. 6.3 (d) SCM. Furthermore, two GATT Panels have previously found that wheat flour is a primary agricultural product.<sup>67</sup> If wheat flour is a primary agricultural product, wheat must also be considered as such.

2) *“Other multilaterally agreed specific Rules”*

WTO Agreements are categorized as multilateral or plurilateral. The ratification of the multilateral agreements is mandatory to all Members, but the ratification of plurilateral agreements is optional. In the present case, there is a specific set of multilaterally agreed rules on the trade of agricultural products, within the meaning of footnote 17 SCM, and this is the AoA.

3) *“Product or Commodity in Question”*

The interpretation of the term “product” in footnote 17 SCM should encompass a group of products, such as “agricultural products”. It is largely accepted that, regarding the number of words in international treaties, words in singular presumably include the plural meaning and vice-versa, as supported by the Panel in *E.C. – Bed Linen*.<sup>68</sup> In conclusion, Art. 6.3 (d) SCM does not apply to the wheat scheme.

ii. Conditions are not met

Even if Art. 6.3 (d) SCM is found applicable, regardless of the exclusion in footnote 17, the evidence provided by Competia is not sufficient for the establishment of serious prejudice.

1) *No Increase as compared to the Average Share it had during the previous Period of three Years*

Art. 6.3 (d) SCM requires an increase in the subsidizing country’s world market share in a given year, *as compared to* the average share it had during the previous period of three years.<sup>69</sup> Competia has neither provided the current statistics (2005) to which the average share in the previous period of three years (2002-2004) should be compared; nor presented the average of the previous three years (2001-2003) to compare with the 2004 world market share.

Art. 6.6 SCM obliges the complaining party to provide “all relevant information that can be obtained as to changes in market shares of the parties to the dispute”. As a general matter of

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<sup>67</sup> *France – Wheat Exports*, Panel Report, para. 14; *EC – Wheat Flour*, Panel Report, para. 2.3.

<sup>68</sup> *EC – Bed Linen*, Panel Report, para. 6.70.

<sup>69</sup> This was the interpretation adopted by Brazil in *US – Cotton*: “The three-year average U.S. world market share in MY 1998-2000 was 22.3 percent. In MY 2001, the subsidy-enhanced U.S. world market share increased to 38.3 percent.” Brazil’s Further Submission, para. 21.

procedure, if a party is supposed to bring relevant evidence to the case and it abstains from doing so, it should bear the unfavourable consequences of this non-production.<sup>70</sup>

For the purposes of conferring legal stability to the WTO system, there must be a cautious investigation of the material facts in matters concerning serious prejudice.<sup>71</sup> The finding of serious prejudice based on a complainant's evidentiary material that is not satisfactorily solid and persuasive contradicts Art. 3.2 DSU. This is because it brings Members into a very high degree of uncertainty concerning their rights and obligations.

Given the erroneous argumentation and evidence of Competia, Subsidia requests that the Panel find that no *prima facie* case under Art. 6.3 (d) SCM has been established and, hence, disregard the claims based on it. This corresponds with the Panel in *US – Cotton*, when it considered Brazil's equivoques in the interpretation of the expression "world market share" in the same provision.<sup>72</sup>

## 2) No "Effect of the Subsidy"

The causal nexus required under Art. 6.3 (d) SCM is not present in this case. The complex calculations presented by Competia supposedly draw a causal link between (i) the wheat subsidies and (ii) the fluctuations in its world market share. However, for the purposes of Art. 6.3 (d) SCM, such calculations must evidence that the wheat subsidies caused the (iii) increase in Subsidia's world market share. By no means can one deduce a link between (i) and (iii), simply by acknowledging a link between (i) and (ii).

Given that the DSB has not interpreted the causal nexus in Art. 6.3 (d) SCM yet and that this provision mirrors the language of Art. XVI:3 of GATT 1994, previous decisions on the causal link in Art. XVI:3 must be used to enlighten the present case. The GATT Panel in *EC – Sugar* adopted the view that causation between a subsidy and the increase in the world market share of the subsidizing country should not be presumed, since there are countless factors influencing the world market flows.<sup>73</sup> If causation cannot be unmistakably concluded out of a transparent, rather than complex, analysis of facts, it should be deemed inexistent.

### III. Pork: Full Conformity with the AoA

The pork scheme does not violate the AoA. First, it is a "blue box" consistent with Art. 6.5

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<sup>70</sup> See *Cheng*, General Principles of Law, 320.

<sup>71</sup> *Chambovey*, JWT 36 (2002), 305 (324).

<sup>72</sup> *US – Cotton*, Panel Report, para. 7.1465.

<sup>73</sup> *EC – Refunds on Exports of Sugar*, Panel Report, para. V(f).

(a) (iii) AoA and also with the Preamble of the AoA, in what regards non-trade concerns. Second, the pork scheme does not violate the export reduction commitments set forth in Arts. 3.3 and 8 AoA.

### **1. The Pork Scheme is consistent with Art. 3.2 AoA**

Subsidia cannot grant “blue box” subsidies in excess of the commitment levels, since the AoA does not set forth any budgetary limit for this kind of expenditure. Hence, there is no violation of Art. 3.2 AoA. Moreover, the pork scheme fully conforms to Art. 6.5 (a) (iii) AoA. Subsidia submits that Art. 6.5 (a) (iii) AoA must be interpreted in light of Art. 31 VCLT, as presented below.

#### *a. Ordinary Meaning*

According to the ordinary meaning of Art. 6.5 (a) (iii) AoA, all its requirements are fulfilled. The subsidies paid to pork producers in Subsidia consist on direct payments under a production-limiting programme, which are made on a fixed number of head.

#### *i. Production-limiting Programme - Art. 6.5 (a) AoA*

In principle, any usual domestic support under Art. 6.1-4 AoA (*i.e.* “amber box”) must be considered “blue box” if it requires farmers to obey production-limiting programmes.<sup>74</sup>

In order to qualify as a production-limiting programme, the pork scheme sets a *limit* – a restriction on the size or amount<sup>75</sup> – on swine produced. Under the pork scheme, each farmer has a rigid reduction schedule that contains a restriction on the number of head for which production is authorized.

Moreover, Subsidian legislation establishes a penalty against deviation from such schedules. If a farmer produces beyond the set limit, he will suffer a 50% discount on his payments. This mechanism guarantees that no breach on the part of the farmers has a prejudicial effect on world market price. It thus ensures that the pork scheme is *de jure* and *de facto* consistent with WTO law.

#### *ii. Made on a fixed Number of Head - Art. 6.5 (a) (iii) AoA*

The number of swine to be produced every year is fixed by the plan set up for each farm, in compliance with the prerequisite of subparagraph (iii) of Art. 6.5 (a) AoA. The payments to pork producers are made on *fixed* number of head, since the ordinary meaning of the word

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<sup>74</sup> *Filippi/ Stevenson*, *International Trade Law & Regulation* 10 (2004), 50 (50).

<sup>75</sup> *Soanes/ Hawker*, *Compact Oxford English Dictionary*.

*fixed* is “predetermined”<sup>76</sup>. In addition, the sum that is paid per head of pork is also predetermined.

*b. Context*

Subsidia contends that the word *fixed* in subparagraph (iii) of Art. 6.5 AoA does not mean *unchanging*<sup>77</sup>. The inclusion of further criteria to “blue box” subsidies is still under negotiation. As observed in the Hong Kong Ministerial Declaration,<sup>78</sup> Members have not reached consensus on this matter yet. Therefore, *unchanging* clearly does not correspond to the current meaning of the word *fixed* in Art. 6.5 (a) (iii) AoA.

*c. Object and Purpose*

The “blue box” subsidies paid by Subsidia are not only lawful pursuant to the text of Art. 6.5 (a) (iii) AoA, but also with the overall objectives of this Agreement. They respect the non-trade concerns set forth in the Preamble of the AoA. Non-trade concerns were always an essential issue to WTO Members.<sup>79</sup> This is because of the very prejudicial impact that agricultural trade liberalization has on farmers. Agriculture is multifunctional<sup>80</sup> and therefore requires special rules that facilitate ecological equilibrium. The “blue box” rules found in the AoA were created with this purpose.<sup>81</sup> The pork scheme takes non-trade concerns into account, since it aims at eliminating the side-effects of swine production on the environment.

**2. The Pork Scheme is consistent with Arts. 3.3, 8 and 9 of the AoA**

In accordance with Art. 3.3 AoA, swine equivalents do not receive an Art. 9.1 AoA type export subsidy. Pursuant to Art. 10.3 AoA, the burden of proof rests on the complainant, because pork products are not “subject to reduction commitments”. The Panel in *US – FSC* held that only “scheduled” products are “subject to reduction commitments”, since “unscheduled” products are subject to other AoA commitments.<sup>82</sup> Pork products are “unsched-

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<sup>76</sup> *Ibid.*

<sup>77</sup> WT/L/579, 2 August 2004, paras. 13-14.

<sup>78</sup> WT/MIN(05)/W/3/Rev.2, 18 December 2005, Annex A, para. 9.

<sup>79</sup> WTO Members also stressed the relevance of the “blue box” to non-trade concerns. See TN/AG/R/4, 15. *Howse/Trebilcock*, *The Regulation of International Trade*, 246 *et seq.*

<sup>80</sup> As defined by *Boisvert / de Gorter / Peterson*, *Multifunctionality*, 458.

<sup>81</sup> By the United States and the European Communities in the Blair House Accord, as cited in *Dixon*, *Golden Gate University Law Review* 29 (1999), 429 (415).

<sup>82</sup> *US – FSC*, Panel Report, para. 7.143; the Panel was not modified by the AB.

uled”, thus the burden of proof does not shift to the respondent under Art. 10.3 AoA.

*a. The Pork Scheme confers no Export Subsidy under Art. 9.1 (c) AoA*

Art. 9.1 (c) AoA is not met. First, the “blue box” measure does not confer a “payment” to pork processors. Second, even if a payment is found, this is not made “on the export” of pork products. Third, this payment is not “financed by virtue of governmental action”.

*i. The “Blue Box” Measure confers no “Payment”*

There is no transfer of economic resources to pork processors, because the price charged for swine is not less than the “proper value” of swine to producers.<sup>83</sup> The “proper value” is established by an objective standard<sup>84</sup>, which the Panel in *Canada – Dairy 21.5* deemed to be the market price. The AB deemed this benchmark viable<sup>85</sup> but did not apply it, because the domestic market price was favourable to producers due to market price support.<sup>86</sup> The AB observed that appliance of the domestic market price benchmark would allow WTO consistent domestic support to be considered “payments” under Art. 9.1 (c) AoA, because of the high domestic prices. This would result in an erosion of the distinction between the domestic support and export subsidies disciplines.<sup>87</sup> The Panel in *EC – Sugar* also dealt with market price support and thus did not apply the domestic market price benchmark.<sup>88</sup> Unlike these cases, the present case does not involve market price support. Instead, it is the different factual situation of direct payments in the form of “blue box” support which result in low domestic prices. In order to preserve the distinction of disciplines with special emphasis on “blue box” support, the domestic market price benchmark has to be applied, since pork processors purchase only domestic swine. “Blue box” support per definition affects the whole production of an agricultural product, because it is “production-limiting”. “Blue box” support is not subject to a prohibition of export. Art. 6.5 AoA recognizes that possible effects on trade are outweighed by the positive effects of production limitation and therefore exempts the listed measures from reduction commitments. If a “blue box” supported product

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<sup>83</sup> *Canada – Dairy*, AB Report, para. 113.

<sup>84</sup> *Canada – Dairy 21.5*, AB Report, para. 86.

<sup>85</sup> *Canada – Dairy 21.5*, AB Report, para. 87.

<sup>86</sup> *Canada – Dairy 21.5*, AB Report, para. 81; see also *McMahon*, *The Agreement on Agriculture*, 212.

<sup>87</sup> *Canada – Dairy (21.5)*, AB Report, para. 90.

<sup>88</sup> *EC – Sugar*, AB Report, para. 2; *EC – Sugar*, Panel Report, paras. 3.1 - 3.15.

could be considered a payment under Art. 9.1 (c) AoA, this product would be prohibited from being processed into an exported product. This would deprive the Art. 6.5 AoA exemption of “blue box” support from reduction commitments of its legal significance. Determining the proper value of a good to a producer thus has to take into account the specific circumstances of the case<sup>89</sup> and must not render regulations inane. The domestic market price benchmark recognizes the specific character of “blue box” support and thus is imperative in the present case. The price for swine is freely negotiated between swine producers and pork processors. No swine are sold below the domestic market price.

*ii. Even if a Payment is found, it is not made “on the Export” of Pork Products*

As argued above, “on the export” requires export contingency. Sales of swine to pork processors are not made “on the export” because these sales are not contingent upon exportation. Sales of swine to pork processors are also made if the producer does not export. Thus, payments are not contingent on exports. Exportation of high quantities is not decisive, because export orientation of the recipient does not establish export contingency.<sup>90</sup>

*iii. Even if a Payment is found, it is not “financed by Virtue of governmental Action”*

As argued above, “financed by virtue of governmental action” requires the government to control the process of financing. It is not sufficient that government provides the means for a private action. It must also control the actions arising from the provision. Subsidia does not control the actions of swine producers and pork processors. Swine producers decide freely at which prices to sell swine, as pork processors freely decide at which prices to sell pork products and whether or not to export. Thus, “payments on the export” are not an “integral part” of a governmental measure. The “Blue box” subsidies are at best merely causal to the payments.

*b. The Pork Scheme confers no Export Subsidy under Art. 9.1 (f) AoA*

Art. 9.1 (f) AoA is not fulfilled because swine do not receive “direct subsidies” “contingent on their incorporation in exported products”. “Blue box” support is paid to pork producers regardless whether the swine processed in pork products are exported or not.

*Request for Findings*

Subsidia therefore asks the Panel to endorse its sweet biscuits, wheat and pork schemes as being in full conformity with WTO law.

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<sup>89</sup> *EC – Sugar*, AB Report, para. 259.

<sup>90</sup> *Canada – Aircraft*, AB Report, paras. 171-173.