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**WTO DISCIPLINES ON EXPORT CREDIT SUPPORT FOR
AGRICULTURAL PRODUCTS IN THE WAKE OF THE US -
COTTON CASE AND THE DOHA ROUND NEGOTIATIONS**

Dominic Coppens



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ABSTRACT

This contribution offers an overview of the current as well as potential future obligations on export credit support for agricultural products under the Agreement on Agriculture and the SCM Agreement. The US – Upland Cotton rulings have not only shown that such disciplines are actually in place, yet they are also in line with – and even go beyond - the obligations imposed on direct export subsidies for agricultural products. Even negotiators seemed surprised by this jurisprudence as they were unintentionally drafting more flexible rules instead of more rigid ones on export credit support for agricultural products in the Doha Round. This contribution explains that the latest draft on the table would, however, impose additional disciplines that are clearly stricter than those imposed on direct export subsidies but, at the same time, fails to equalize the level playing field among WTO Members and is hard to read in a coherent way.

KEY WORDS

World Trade Organization, Export Credit Support, US-Cotton Dispute, Agreement on Agriculture, SCM Agreement

AUTHOR

Dominic Coppens is Research Fellow at the Institute for International Law and Leuven Centre for Global Governance Studies, KU Leuven

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ADDRESS FOR CORRESPONDENCE

dominic.coppens@law.kuleuven.be

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1. INTRODUCTION

In response to the current financial crisis, governments together with international institutions such as the World Bank, IMF and WTO have recently welcomed the pledge of the G-20 'to ensure availability of at least \$250 billion over the next two years to support trade finance through export credit and investment agencies and through the Multilateral Development Banks'.¹ At the same time, they emphasize 'that any measures be in place until market conditions recover and should be consistent with their respective international obligations.' This contribution will demonstrate that with regard to export credit support for *agricultural* products reconciling both aspects is far from evident in light of existing WTO obligations.²

After introducing agricultural export credit support, the first part will systematically spell out the relevant existing disciplines under the Agreement on Agriculture and the SCM Agreement as interpreted by the panels and Appellate Body in the *US – Upland Cotton* case. In the second part, the focus will turn to the negotiations in the Doha Round on potential future disciplines on export credit support for agricultural products and scrutinizes the latest draft text on the negotiating table. From a systemic point of view, this discussion will illustrate the important but often thorny interplay between dispute settlement and negotiations in the WTO.

2. EXPORT CREDIT SUPPORT FOR AGRICULTURAL PRODUCTS

The concept of 'export credit' is not defined in any of the WTO agreements. The Panel in *Korea – Commercial Vessels* defined it in general terms as credits provided to foreign buyers.³ The exporter can allow a foreign buyer to defer payment (supplier credit) or the foreign buyer may obtain a loan from the exporter's bank or another financial institution (ECA) enabling payment for the purchase (buyer credit). Essentially, export credits thus allow foreign buyers to defer payment over a period of time to the exporter or financial institution. Based on their maturity, they are generally categorized in short-term (≤ 1 year), medium-term (1-5 years) and long-term export credits (>5 years). Export Credit Agencies (ECAs) can 'officially support' such export credits in two ways. First, under 'pure cover' support, ECAs offer insurance or guarantees for export credits extended by the exporter or a financial institution to a foreign buyer (or its bank). Second, some ECAs also offer 'official financing support' in the form of export credits (direct credit) by extending loans directly to foreign buyers to purchase specific products/services originating from the ECAs' country.⁴ Export credit support for agricultural goods usually takes the form of pure cover support for short-term export credits.⁵

Such support can result in export credit offered by potential importers on terms not available on the commercial market, thus affecting their choice among potential exporters or their initial decision whether or not to buy the product. By affecting the choice among exporters, 'officially supported' export credits at subsidized rates have

¹ OECD, Working Party on Export Credits and Credit Guarantees, *Statement: the Global Financial Crisis and Export Credits* (TAD/ECG(2009)3, 23 April 2009).

² A parallel analysis for export credit support to non-agricultural products can be found in Dominic Coppens, 'How much credit for export credit support under the SCM Agreement?', 12(1) *Journal of International Economic Law* (March 2009), 63 – 113.

³ WTO Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels (Korea – Commercial Vessels)*, WT/DS273/R, adopted 11 April 2005, para 7.323.

⁴ Other types of 'official financing support' consist of interest rate support for export credits and refinancing of export credits extended by exporters or financial institutions.

⁵ The focus is of this paper is therefore on pure cover support. OECD, *An analysis of officially supported export credits in agriculture* (COM/AGR/TD/WP(2000)91/FINAL, 2001), at 9.

the potential to distort trade flows.⁶ Nonetheless, official support for agricultural products may be legitimate, according to an OECD study, in the presence of liquidity constraints in the importers' market. If a country faces systemic liquidity constraints and agricultural imports are a high priority, export credit support could create *additional* demand, which would otherwise not have existed. The resulting higher exports would therefore not come at the expense of other exporters or local production in terms of their existing sales.⁷ This argument could in principle justify agricultural export credit support to importers from the least-developed countries (LDCs) or net-food importing countries as it allows them to import vital amounts of food.⁸ Rude and Gervais also formally demonstrate that rules disciplining interest rate subsidies may not be appropriate in case of liquidity constraints because of this potential for additionality and benefits for all exporting countries.⁹

The same OECD study also gives insights into the amount of agricultural export support offered in the second half of the 1990s by countries participating in the OECD Arrangement. Even though the EC is by far the largest provider of export subsidies for agriculture, most agricultural export credit support was extended by the United States (46 per cent of the total), followed by Australia, the EC and Canada.¹⁰ On the other hand, few emerging developing countries offered export credit support for agricultural products.¹¹ Agricultural export support is not only primarily extended by OECD countries but these countries were also the main recipients thereof.¹² The very limited share of support channelled to net-food importing countries and LDCs reveals that the above-mentioned justification for export credit support might not hold in practice.¹³ Overall, the subsidy rate as well as the importance of export credit support in the total trade of agricultural products was reported to be not very large. Even so, the OECD study called for strengthening disciplines on agricultural export credit support as such support could be trade distortive in individual cases and could also increase in the future. A more recent follow-up empirical study is unfortunately

⁶ See also, in the context of export credit support for aircrafts, WTO Panel Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU (Canada – Aircraft (Article 21.5 – Brazil))*, WT/DS70/RW, adopted 4 August 2000, para 5.137.

⁷ Even in that case the results are considered ambiguous because the development of future domestic production/imports or private trade financing might be hampered. OECD, above n 5, at 22.

⁸ OECD, above n 5, at 22.

⁹ An export credit at subsidized rates can relax the liquidity constraints of importers and thus increase their demand. If this demand-inducing effect (putting upward pressure on the price) outweighs exporters' supply-inducing effect (putting downward pressure on the price), the price increases even if more of the good is traded. On the other hand, in their model, rules on minimum premium rates are always appropriate as insurance subsidies unambiguously have the potential to distort markets. Apparently, differential treatment in case LDCs and net-importing countries are recipients with respect to minimum premium rules cannot be justified on the basis of liquidity constraints. But the different outcome with regard to interest rate rules and premium rate rules emerges from the assumption in their model that premiums at subsidized rates only affect the exporter's cost and is not passed through in any way in a discounted interest rate. As a result, minimum premium rates only affect the supply side and not import demand in their model. But, as they also acknowledge, 'a credit guarantee allows the home country exporters to charge a lower interest rate because the risk associated with the transaction is lower.' This indirect effect on the interest rate is, however, not reflected in their model. James Rude and Jean-Philippe Gervais, 'An analysis of a Rules-based Approach to Disciplining Export Credits in Agriculture', 21(3) *International Economic Journal* 441 (2007), 441- 463.

¹⁰ These four countries accounted for almost all export credit support. The amount of the subsidy element of the support offered by the United States, Canada and Australia exceeded their level of export subsidy notifications in the WTO. Support offered by the United States was also most trade distortive. OECD, above n 5, at 31.

¹¹ For reasons of food security and fiscal policies, agricultural exports are more often taxed than subsidized in developing countries. OECD, *Agricultural Policies in Emerging Economies – 2000* (COM/AGR/APM/TD/WP(2000)43/FINAL, June 2000), at 44.

¹² OECD, above n 5, at 23-24.

¹³ OECD, above n 5, at 25.

lacking, however some insights within WTO Members' export credit support for agricultural products might be drawn from the operation of the WTO's dispute settlement system and Trade Policy Review Mechanism. First, the United States fundamentally and substantially altered its export credit support programs for agricultural products in response to the *US – Upland Cotton* rulings discussed below. Under the 2008 farm bill, only one export credit guarantee programme for agricultural products is operative, namely, the General Sales Manager 102 (GSM 102), which guarantees the repayment of credit made available to finance commercial export sales of agricultural commodities on credit terms that do not exceed three years.¹⁴ In order to comply with the *US – Upland Cotton* compliance rulings, the 1% statutory cap¹⁵ on the premium charged to the exporter under this programme has also been removed.¹⁶ Second, in the Trade Policy Review of Canada, questions were raised about its export credit programmes for agricultural products, which are operated through Canada's official ECA (Export Development Canada (EDC)) and through a state-owned enterprise 'Canadian Wheat Board' (CWB). According to Canada, the relevant EDC programs operate on commercial principles and in answering questions on CWB's operation¹⁷, Canada also emphasized that 'to date, there has been no WTO agreement on rules governing the extension of export credit or export credit guarantees' but this seems not fully accurate in light of the *US – Upland Cotton* case.¹⁸ Third and finally, some large, emerging nations such as China and India have also started to set up export credit support facilities for agricultural products in line with the general trend of reducing their agricultural policy's anti-export bias.¹⁹

3. DISCIPLINES ON EXPORT CREDIT SUPPORT FOR AGRICULTURAL PRODUCTS

3.1. HISTORICAL CONTEXT

At the time the Uruguay Round was launched in 1986, export credit support for non-primary products was already substantively disciplined by the Illustrative List of Export Subsidies, of which had been previously annexed to the plurilateral Tokyo Round Subsidies Code (1979). Generally speaking, pure cover support (item (j)) and direct financing support (item (k)) of export subsidies were prohibited when

¹⁴ The 2008 farm bill gives funding authority for credit guarantees through FY2012. Charles E. Hanrahan, 'Agricultural Export Provisions of the 2008 Farm Bill', CRS Report for Congress (June 2008), at 2.

¹⁵ Of the value of the guaranteed transaction.

¹⁶ WTO, Trade Policy Review Body, *Trade Policy Review United States – Minutes of Meeting – Addendum* (WT/TPR/M/200/Add.1, 9 September 2008), at 276.

¹⁷ The Agri-Food Credit Facility (ACF) guarantees credits offered by CWB to foreign private buyers, which in practice have terms up to one year and for which no premium at all is charged. Canada indicates that most CWB sales are made on a cash basis but in some cases, the government offers export credit guarantees to the CWB, allowing it to make credit sales to creditworthy buyers. Canada's TPR of 2007 reveals that credit sales under the ACF amounted to between 3% and 4% of total sales during 2002/3 and 2003/4. In the CWB's view, this 'small amounts of export credit' is offered 'to compete with other exporting countries providing such support.' See Canadian Wheat Board, 'Position on Trade' (available at <http://www.cwb.ca/public/en/hot/trade/position/>, visited on 20 May 2009); WTO, Trade Policy Review Body, *Trade Policy Review – Report by the Secretariat – Canada* (WT/TPR/S/179/Rev.1, 4 June 2007), at 98; WTO, Trade Policy Review Body, *Trade Policy Review – Canada – Minutes of Meeting - Addendum* (WT/TPR/M/179/Add.1, 22 June 2007), at 255.

¹⁸ WTO, Trade Policy Review Body, *Trade Policy Review – Canada – Minutes of Meeting - Addendum* (WT/TPR/M/179/Add.1, 22 June 2007), at 209.

¹⁹ India created in 2001 a specific agriculture division in its Exim Bank Agro and China's Export & Credit Insurance Corporation (SINOSURE), set up in 2001 after its WTO accession, has introduced special export insurance for agricultural products.

offered at a cost to government.²⁰ Yet, an exception to this standard was inscribed in item (k) for export credit support in accordance with the more flexible interest rate provisions of the 'Arrangement on Guidelines for Officially Supported Export Credits' (OECD Arrangement). In this non-binding gentlemen's agreement, certain OECD Members (OECD Participants) elaborated (for the first time in 1978) specific disciplines on non-agricultural export credit support with a repayment period of at minimum two years. On the other hand, export subsidies for primary products were subject to a more flexible standard and no specific rules were elaborated for export credit support for agricultural products in the Tokyo Round Subsidies Code.

The multilateral Agreement on Subsidies and Countervailing Measures (SCM Agreement) resulting from the Uruguay Round largely copied the Tokyo Round Code's disciplines on export credit support for non-agricultural products in the Illustrative List of Export Subsidies (Annex I).²¹ A sector-specific Agreement on Agriculture was also agreed upon after years of demanding negotiations. The Cairns group was formed as a coalition of developed and developing agricultural exporting countries that collectively pushed for further liberalization in this field.²² The United States, in a somewhat surprising move given its own protected and subsidized agricultural market, observed 'a subsidy treadmill', while firmly defending the same interests to break the 'vicious circle' of agricultural subsidization mainly because of the severe budgetary implications of its support and the conviction that its agricultural sector would be competitive in an undistorted market.²³ The United States also had extensive export credit support and food aid programmes in place under which exports were indirectly subsidized.²⁴ On the defending side of the negotiation table were the European Communities (EC), Japan, Korea and those developing countries which benefited from preferential access to the EC market or were net-food importing.²⁵ Targeting primarily EC agricultural export subsidies, the United States proposed phasing out all agricultural export subsidies over a period of five years.²⁶ Most other countries did not go that far but nonetheless agreed that export subsidies had to be phased out gradually, leaving the EC largely isolated in its more defensive position.²⁷ Targeting in turn the United States' practice, the EC proposed that the OECD Arrangement would be extended to agricultural products and brought under the GATT.²⁸ Its call for stricter disciplines on export credit support was

²⁰ Pure cover support was only prohibited if offered at premium rates *manifestly* inadequate to cover the cost to the government but this qualification was deleted during the Uruguay Round. The non-exhaustive list of export subsidies was based on the 1960 Declaration.

²¹ The SCM Agreement also inscribed a subsidy definition, which is also relevant for the applicable disciplines on export credit support (see below).

²² Today, the group consists of 19 agricultural exporting countries.

²³ See Clayton Yeutter, 'U.S. Negotiating Proposal on Agriculture in the Uruguay Round', in Ernst-Ulrich Petersmann and Meinhard Hilf (Eds), *The New GATT Round of Multilateral Trade Negotiations – legal and economic problems* (Deventer: Kluwer, 1988), 265-270, at 267; See Terence P. Stewart, *The GATT Uruguay Round: a negotiating history (1986-1992). Introduction and overview* (Deventer: Kluwer, Volume I, 1993), 1382, at 142-145 and 172; John Croome, *Reshaping the world trading system - A history of the Uruguay Round* (Geneva, World Trade Organization, 1995), 392, at 112.

²⁴ Stewart, above n 23, at 145.

²⁵ Croome, above n 23, at 112-113.

²⁶ It is debated whether this ambitious proposal, which even went further than the Cairns group position, genuinely reflected the United States' position or was inspired by strategic considerations. See Stewart, above n 23, at 172; Croome, above n 23, at 114 and 234; and Melaku Geboy Desta, *The Law of International Trade in Agricultural Products – From GATT 1994 to the WTO Agreement on Agriculture* (The Hague: Kluwer Law International, 2002), 468, at 207 (footnote 16).

²⁷ Stewart, above n 23, at 170 and 186-190; Croome, above n 23, at 234.

²⁸ Negotiating Group on Agriculture, Submission by the European Communities, *Improving the GATT Rules and Disciplines* (MTN.GNG/NG5/W/106, 26 September 1989); Note by the Secretariat, *Clarification and elaboration of elements of detailed proposals submitted pursuant to the mid-term review decision* (MTN.GNG/NG5/W/161, 4 April 1990) at 77.

supported by the Cairns group and also - at least formally - by the United States.²⁹ Part V of the Agreement on Agriculture reflects the final bargain on export subsidies and identifies six types of export subsidies that are made subject to reduction commitments (Article 9 Agreement on Agriculture). Export credit support is, however, not included in this list. Only Article 10.2 Agreement on Agriculture expressly refers to export credit practices and instructs WTO Members to work toward the development of internationally agreed disciplines. In 1997, this negotiating mandate was picked up by Participants of the OECD Arrangement (and Argentina)³⁰ but these negotiations broke down in 2000 and were passed on to the WTO. Before taking a closer look at the latest draft text, the current rules for agricultural export credit support are scrutinized. Note that both the OECD study mentioned above as well as several scholars assumed that, pursuant to Article 10.2 Agreement on Agriculture, no such international disciplines were in place thus far³¹ but, although this interpretation was fiercely advocated by the United States, the Panel and Appellate Body disagreed in *US – Upland Cotton*. Their interpretation of the existing disciplines on agricultural export credit support clearly has had an important impact on the negotiations.

3.2 CURRENT DISCIPLINES ON AGRICULTURAL EXPORT CREDIT SUPPORT

A preliminary question is under which multilateral WTO agreement agricultural export credit support has to be scrutinized and, if more than one agreement is applicable, under which it has to be analyzed first. The Agreement on Agriculture applies to agricultural products as defined in Annex 1³² and, pursuant to Article 21.1, provisions of other agreements 'shall apply subject to the provisions of this Agreement.' This provision thus expressly provides for the application of the SCM Agreement and the GATT 1994 to agricultural products³³. However, at the same time, this implies that, according to the Appellate Body, these other agreements apply 'except to the extent that the Agreement on Agriculture contains specific provisions dealing specifically with the same matter.'³⁴ Furthermore, Article 3.1 SCM Agreement prohibits export subsidies and import substitution subsidies 'except as provided in the Agreement on Agriculture', which indicates according to the Appellate Body that 'the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the Agreement on Agriculture.'³⁵ Referring to both provisions, panels have analyzed agricultural export subsidy claims first under the Agreement

²⁹ The United States proposed that such support would be subject to the same disciplines as for non-agricultural support (Illustrative List). Note by the Secretariat, above n 28, at 66 and 71.

³⁰ Technical discussions started in 1995. Export Credits Secretariat, *The Export Credits Arrangement 1978-2008, Achievements and Challenges Continued!* (Paris: OECD, April 2008).

³¹ OECD, above n 5, at 8; OECD, above n 11, at 49; Thomas C. Beierle, 'Agricultural Trade Liberalization – Uruguay, Doha, and Beyond', 36(6) *Journal of World Trade* 1089 (2002), at 1097; Søren F. Olsen, 'The Negotiation of the Agreement on Agriculture', in B. O'Conner (Ed), *Agriculture in WTO Law* (London: Cameron May, 2005), 43 - 82, at 78. On the other hand, the WTO Secretariat considered that agricultural export credit support was subject to disciplines in case offered at subsidized terms. WTO, Background Paper by the Secretariat, *Export Credits and Related Facilities* (G/AG/NG/S/13, 26 June 2000), para 44.

³² Article 2 Agreement on Agriculture.

³³ WTO Panel Report, *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WT/DS267/R, adopted 21 March 2005, para 7.257.

³⁴ WTO Appellate Body Report, *United States – Subsidies on Upland Cotton (US – Upland Cotton)*, WT/DS267/AB/R, adopted 21 March 2005, para 532.

³⁵ WTO Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States (Canada – Dairy (Article 21.5 – New Zealand and US))*: WT/DS103,113/AB/RW, adopted 18 December 2001, para 123.

on Agriculture.³⁶ Once the analysis under the Agreement on Agriculture is finished, the question on the applicability of the SCM Agreement emerges.

3.2.1 Agreement on Agriculture

'The fundamental general provision of the Agreement on Agriculture concerning export subsidies'³⁷ is Article 8, which stipulates that '(e)ach Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Member's Schedule'.³⁸ Contrary to the SCM Agreement (Article 3.1(a)), agricultural export subsidies are thus not principally prohibited under the Agreement on Agriculture.³⁹ In disciplining agricultural export subsidies, the Agreement on Agriculture draws a distinction between listed types of export subsidies and other types of export subsidies. In order to grasp the obligations imposed on non listed types of export subsidies such as export credit support, an overview of the obligations imposed on listed types of export subsidies is useful.

(a) Listed types of export subsidies

Article 9.1 lists six types of agricultural export subsidies which, according to the Appellate Body, are *deemed* 'export subsidies' within the meaning of Article 1(e) Agreement on Agriculture.⁴⁰ In disciplining such listed types of export subsidies, an important distinction is made between scheduled and unscheduled agricultural products.⁴¹ WTO Members were entitled in the Uruguay Round⁴² to specify in their Schedule agricultural products that were benefiting from listed types of export subsidies during the 1986-1990 base period and these were made subject to reduction commitments. Considering such scheduled agricultural products, the listed types of export subsidies are prohibited only to the extent that they are in excess of the reduction commitment level of the Member in question. These reduction commitments were disaggregated at the product level and expressed in terms of both a budgetary outlay commitment⁴³ and export quantity commitment.⁴⁴ Obviously, such reduction commitments were only meaningful with respect to a Member that had effectively scheduled an agricultural product in the first place. Indeed, with regard to unscheduled agricultural products, listed types of export subsidies are prohibited as *such*. Hence, those countries that did not have any of the listed types

³⁶ See, for example, Panel Report, *US – Upland Cotton*, above n 33, paras 7.251-7.262.

³⁷ WTO Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada – Dairy)*, WT/DS103,113/R, adopted 27 October 1999, para 7.27.

³⁸ WTO Appellate Body Report, *European Communities – Export Subsidies on Sugar (EC – Export Subsidies on Sugar)*, WT/DS265,266,283/AB/R, adopted 19 May 2005, paras 216 and 220.

³⁹ Observe, however, that export credit support in conformity with the interest rate provisions of the OECD Arrangement is not prohibited under the SCM Agreement (item (k), para 2 of the Illustrative List).

⁴⁰ Hence, complainants can jump directly to one of these items, without the need for a separate demonstration of an 'export subsidy' in the meaning of Article 1(e) of the Agreement on Agriculture. Appellate Body Report, *EC – Export Subsidies on Sugar*, above n 38, para 269.

⁴¹ Article 3.3 Agreement on Agriculture.

⁴² Or at the moment of accession.

⁴³ This prescribes the annual maximum level of expenditure for such export subsidies to the product in question.

⁴⁴ This prescribes the annual maximum level of the product in question that could benefit from such export subsidies. Developed WTO Members committed themselves in the Uruguay Round to reducing their level of export subsidies by the year 2000 by 36 percent in value terms and by 21 percent in volume terms from a 1986–1990 base period. Developing countries had to reduce their level of support by 24 percent in value terms and 14 percent in volume terms over ten years, and LDCs did not have to make any reduction commitment.

of export subsidies in place during the Uruguay Round – like all LDCs or countries like India and Korea – and have thus not listed any agricultural product are in principle not allowed to introduce them afterwards.⁴⁵ Overall, only 25 WTO Members have specified one or more agricultural products in their Schedule⁴⁶ and have thus a ‘limited authorization’⁴⁷ to provide the listed types of export subsidies insofar as the product (or product grouping) in question is included in its Schedule and up to the budgetary outlay and export volume level committed. Importantly, S&D treatment is, however, offered to developing countries with respect to two types of listed subsidies, namely marketing and transport export subsidies.⁴⁸ Developing countries are not required to make commitments on these two types of export subsidies, provided ‘these are not applied in a manner that would circumvent reduction commitments.’⁴⁹

(b) Non-listed types of export subsidies

In order to find a violation of Article 10.1, two elements have to be established: (a) the presence of ‘export subsidies not listed in paragraph 1 of Article 9’; (b) which are ‘applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments’. Alternatively, Article 10.1 also stipulates that (a) ‘non-commercial transactions’ shall (b) not ‘be used to circumvent such commitments’.

(i) SCOPE

Is subsidized export credit support covered by Article 10.1?

Export credit support for agricultural support is only covered insofar as it constitutes an ‘export subsidy’ in the meaning of Article 10.1. The determination whether export credit support is subsidized or not is discussed under the next section. Assuming though for a moment that export credit support is indeed subsidized, such support seems, at face value, within the scope of Article 10.1 as it is an export subsidy ‘not listed in paragraph 1 of Article 9’. Nonetheless, the United States argued before the original Panel and Appellate Body in *US – Upland Cotton* that export credit support is exempted from the scope of paragraph 1 by virtue of paragraph 2 of Article 10, which reads:

⁴⁵ Unless Article 9.4 Agreement on Agriculture applies (see below n 49).

⁴⁶ Counting the EC as one, which refers to the EC-15.

⁴⁷ WTO Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" (US – FSC)*, WT/DS108/AB/R, adopted 20 March 2000, para 151.

⁴⁸ See paragraphs (d) and (e) of Article 9.

⁴⁹ Article 9.4 Agreement on Agriculture. This provision is extended under the Hong Kong Ministerial Declaration until five years after the end-date for the elimination of all forms of export subsidies. The exact scope of this S&D provision is however not entirely clear. On the one hand, ‘commitments’ referred to in Article 9.4 could mean reduction commitments upon scheduled agricultural products. Under such a narrow reading, this S&D provision would only be meaningful with respect to a developing country Member that has effectively scheduled an agricultural product in the first place. On the other hand, most (developing) Members seem to give meaning to the fact that the wording ‘commitments’ is not qualified by the prefix ‘reduction’ and therefore has to refer to commitments on scheduled agricultural products (i.e. subject to *reduction* commitment) as well as unscheduled agricultural products (i.e. subject to the commitment not to offer subsidies). This reading, which also finds support in the notification requirement procedure, would entitle all developing countries to offer marketing and transport export subsidies on scheduled products above the final commitment level and on unscheduled products. But operationalizing the anti-circumvention condition cited in the full text under this broad reading is even more difficult than under the narrow reading as this condition is by its terms only meaningful for agricultural products subject to *reduction* commitments; i.e. scheduled products.

'Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.'

As disentangled by the Appellate Body, two types of obligations are imposed upon WTO Members with respect to export credit support under paragraph 2: (i) working towards the development of internationally agreed disciplines to govern their provision; and (ii) after agreement on such disciplines, to provide them only in conformity therewith.⁵⁰ To date, no such disciplines have been agreed upon and no substantive obligations are thus currently imposed by virtue of Article 10.2. Applying customary norms of treaty interpretation, the Appellate Body agreed with the Panel that paragraph 2 does, however, not carve out export credit support from the scope of paragraph 1. Yet, in a rare separate opinion, one Appellate Body Member adhered to the United States' view mainly because the fact that WTO Members 'chose to deal with these three types of measures in Article 10.2 shows that this special treatment of the three types of measures must be given meaning and weight'.⁵¹

First, starting with the ordinary meaning of paragraph 2, the Appellate Body stressed that it does not explicitly exclude export credit support from the disciplines in Article 10.1 whereas 'it would be expected that an exception would have been clearly provided had this been the drafters' intention.'⁵² The wording 'development' also suggests that future disciplines will be 'an elaboration of the export subsidy disciplines that are *currently* applicable' and that, as a result, the mandate of Article 10.2 will not, as argued by the United States, be irrelevant if export credit support is already disciplined under paragraph 1.⁵³ On the other hand, as the dissenting Appellate Body Member argued, the wording 'working *toward* the development' of disciplines might likewise suggest that no disciplines yet exist.⁵⁴

Second, the Appellate Body found contextual support in Article 10.1 *juncto* Article 1(e) Agreement on Agriculture. A plain reading of Article 10.1 would only exclude export subsidies listed in Article 9.1. Moreover, the term 'export subsidies' is defined in Article 1(e) as 'subsidies contingent upon export performance, *including* the export subsidies listed in Article 9 of this Agreement' and the use of the word 'including' suggests that the term 'export subsidies' should be interpreted broadly" according to the Appellate Body. One could object that the ordinary meaning of 'including' merely indicates that Article 9.1 is not an exhaustive list but not necessarily that the group of non-listed subsidies should be interpreted broadly. Furthermore, the Appellate Body rejected the United States' claim that the Panel's analysis would undermine genuine international food aid transactions (Article 10.4) because they are not expressly excluded from the scope of Article 10.1 either. In fact, the Appellate Body agreed with the Panel and held that food aid transactions are indeed covered by Article 10.1 under the concept of 'non-commercial transactions' but disagreed with the United States that this would curtail Members' ability to provide

⁵⁰ Appellate Body Report, *US – Upland Cotton*, above n 34, para 607.

⁵¹ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 631-641. Observe that several authors as well as the OECD Secretariat also shared the United States' view but that the WTO Secretariat seemed to have taken another position (see above n 31). See also, Panel Report, *US – Upland Cotton*, above n 33, WT/DS267/R/Add.1, Part 3, at D-29.

⁵² Because drafters were well aware that export credit support could fall within the export subsidy disciplines of the Agreement on Agriculture and the SCM Agreement. Appellate Body Report, *US – Upland Cotton*, above n 34, paras 609-610; Panel Report, *US – Upland Cotton*, above n 33, para 7.906.

⁵³ Emphasis added. Appellate Body Report, *US – Upland Cotton*, above n 34, para 611.

⁵⁴ Emphasis added. He/she also found confirmation in the fact that only 'after agreement on such disciplines' export credit support shall be provided in conformity therewith. Appellate Body Report, *US – Upland Cotton*, above n 34, para 633.

such support as they 'are free to grant as much food aid as they wish, provided that they do so consistently with Articles 10.1 and 10.4.'⁵⁵

Third, the Appellate Body referred to the object and purpose of Article 10 which is – as its title suggests – 'the prevention of circumvention of export subsidy commitments.'⁵⁶ The United States' view would undermine this objective as it would imply that export credit support is currently 'not subject to any discipline *at all*.'⁵⁷ Furthermore, along these lines the dissenting Member disagreed because Article 10.2 recognizes the trade distorting potential of export credit support and is thus consistent with the objective of prevention of circumvention.

Fourth, the panel and the Appellate Body also found support in the negotiating history of Article 10.2, even though both considered it in fact redundant to resort to this supplementary mean of interpretation.⁵⁸ The fact that this was seen as redundant is surprising not only in light of the ambiguity left by the general rules of interpretation, but also given the fact that the Appellate Body seemed to rely on the general rules on interpretation to find out the drafters' intention.⁵⁹ If revealing their intention is considered central in the interpretative analysis, the preparatory work seems relevant *par excellence*.⁶⁰ In which direction does this preparatory work on Article 10.2 point?

The drafting history clearly shows that export credit support was explicitly on the negotiating table.⁶¹ Three relevant phases in the drafting process could be distinguished, whereby each time a separate paragraph was devoted to export credit support under the general anti-circumvention article.⁶² In first instance, a draft text for discussion was circulated by the Chairman whereby '[f]or the purposes of this Article, whether [export credit support] constitute[s] export subsidies shall be

⁵⁵ The Appellate Body agreed with Brazil that "Article 10.4 provides an example of specific disciplines that have been agreed upon for a particular type of measure and that *complement* the general export subsidy rules" but, like Article 10.2, it does *not* "establish any exceptions for the measures that [it] covers" (para 619; emphasis added). Hence, the Appellate Body does not formally consider Article 10.4 as a specific rule for food aid transactions exempted from the general rule of Article 10.1. To be sure, the disciplines imposed under Article 10.1 and 10.4 are not treated as separate and complementary by the Appellate Body given that the obligation of non-circumvention with respect to food aid seems to be *determined* on the basis of the disciplines spelled out in Article 10.4.

⁵⁶ Appellate Body Report, *US – Upland Cotton*, above n 34, para 617.

⁵⁷ At the time of the original *US – Cotton* case, the peace clause was still applicable. Today, the argument might be advanced that subsidized export credit support could also be actionable under the SCM Agreement (see below) and would therefore not be 'not disciplined *at all*' even if Article 10.1 would have been considered inapplicable. Arguably, this should have been anticipated by the Appellate Body (and claimed by the United States).

⁵⁸ Appellate Body Report, *US – Upland Cotton*, above n 34, para 623.

⁵⁹ Indeed, the Appellate Body observed several times how the general rules of interpretation revealed drafters' intent. See, for example, Appellate Body Report, *US – Upland Cotton*, above n 34, paras 608, 609, 612, 617.

⁶⁰ From a systemic point, one might argue that sorting out the intention of the drafters should not be the purpose of the general rules of interpretation.

⁶¹ In July 1990, the *Framework Agreement on Agriculture Reform Programme* (known as the *DeZeeuw Text*) envisaged 'concurrent negotiations to govern the use of export assistance, including "disciplines on export credits"'. Next, the Chairman of the negotiations requested in a *Note on Options in the Agriculture Negotiations of June 1991*, 'decisions by the principals on whether subsidized export credits and related practices ... would be subject to reduction commitments unless they meet appropriate criteria to be established in terms of the rules that would govern export competition'. In August 1991, an *addendum* circulated by the new Chairman Dunkel set out an Illustrative List of Export Subsidy Practices, which was suggested as basis for further consideration and included (h) export credits provided by governments or their agencies on less than fully commercial terms; and (i) subsidized export credit guarantees or insurance programmes. Note by the Chairman, *Options in the Agriculture Negotiations, Addendum 10* (MTN.GNG/AG/W/1/Add.10, 2 August 1991).

⁶² None of these drafting texts explicitly listed export credit support under the export subsidies subject to reduction commitments. They were always dealt with under the anti-circumvention provision.

determined on the basis of paragraphs (j) and (k) of Annex 1 to the [SCM Agreement]' (phase 1).⁶³ Subsequently, this paragraph was omitted in *Dunkel Draft*, which inserted a new paragraph on export credit support: 'Participants undertake not to provide export credits, export credit guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines' (phase 2).⁶⁴ Finally, this proposal was in turn replaced by the current text of Article 10.2 whereby Members agreed to work toward the development of internationally agreed disciplines and, after agreement, to comply therewith (phase 3). In the reading advocated by the United States and the dissenting Appellate Body Member, a shift emerged from an initial proposal of disciplining export credit support by reference to the Illustrative List (phase 1) to a final agreement making such support only subject to future negotiations (phase 3).⁶⁵ However, the Panel read the omission of the provision referring to the Illustrative List (shift from phase 1 to phase 2) as reflecting a decision that this paragraph was considered 'mere surplusage' given that export credit support was within the disciplines on export subsidies according to the terms of the Agreement.⁶⁶ Although the negotiating history does not offer a clear-cut answer, at least two arguments cast doubt on the accuracy of the Panel's reading. First, contrary to what the Panel seems to suggest, the negotiating history reveals that it was not evident that the standard for export credit support established under the Illustrative List (paras (j) and (k)) could be transposed to the context of the Agreement on Agriculture.⁶⁷ Second, the provision referring to the Illustrative List was not merely omitted but was, in the *same* draft, also *replaced* by another provision dealing explicitly with export credit support (which referred to internationally agreed disciplines).⁶⁸ This is given no meaning at all in the Panel's interpretation but would just be the result of coincidence. Without much underpinning or specification, the Appellate Body read the drafting history as revealing that

⁶³ *Draft Text on Agriculture*. Unfortunately, this draft text is not available in the GATT archive and could therefore not be consulted. Panel Report, *US – Upland Cotton*, above n 33, para 7.937.

⁶⁴ *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Dunkel Draft)* (MTN.TNC/W/FA, 20 December 1991).

⁶⁵ Yet, it should be noted that the United States' arguments on the reading of these drafts was no example of clarity. The position of the United States before the Panel seemed to be that the reference to the Illustrative List was transposed in indirect terms in phase 2 (e.g. under the concept of 'internationally agreed disciplines') but dropped in the final phase. However, it seems unlikely that 'internationally agreed disciplines' include those elaborated in the Illustrative List and this for at least two reasons. First, as Brazil also argued, drafters would arguably have been more specific if they aimed at referring to the Illustrative List. Second, the Illustrative List is simply not 'an internationally agreed discipline' on export credit support for *agricultural* products but, at most, would be relied upon to reveal whether or not such support is subsidized. Hence, the United States' argument that the reference to the Illustrative List was expressly dropped and replaced during the drafting process would be more plausible if this is situated between phase 1 and phase 2 (instead of between phase 2 and 3). Indeed, the change from phase 2 to phase 3 seemed to reflect the recognition among drafters that no internationally agreed disciplines were in place at that time. Apparently, the United States seems to have altered its position along these lines on appeal. See also Joseph A. McMahon, *The WTO Agreement on Agriculture – A Commentary* (Oxford: Oxford University Press, 2006), 333, at 95; Olsen, above n 31, at 78; See, Panel Report, *US – Upland Cotton*, above n 33, WT/DS267/R/Add.1, Part 3, at D-17 (para 32) and D-31 (footnote 56); United States, *United States - Subsidies on Upland Cotton, Appellant's Submission of the United States of America (Appellant's Submission)* (28 October 2004), paras 374-377.

⁶⁶ Panel Report, *US – Upland Cotton*, above n 33, para 7.940.

⁶⁷ For example, in previous texts other standards than those of item (j) and (k) of the Illustrative List were elaborated in the context of the Agreement on Agriculture. See for example, the addendum circulated by chairman Dunkel in December 1991 (above n 61).

⁶⁸ The Panel's reasoning would be more plausible if the references to both the Illustrative List as well as to internationally agreed disciplines would have been stated in the same draft. But the negotiating history shows that the former was deleted in the draft in which the latter showed up, which arguably should be given meaning. The dissenting Appellate Body Member seemed to argue to some extent along these lines (Appellate Body Report, *US – Upland Cotton*, above n 34, para 636).

negotiators struggled with this issue and suggesting 'that the disagreement between the negotiators related to which kinds of specific disciplines were to apply to such measures' and not whether such disciplines had to be put in place. The United States also advocated that it should be given meaning that Members explicitly chose not include export credit support under the listed items of export subsidies that are subject to reduction commitments (Article 9.1).⁶⁹ But, the Appellate Body explained that '(o)ne reason, for instance, may be that they considered that their (export credit support) programs did not include a subsidy component, so that there was no need to subject them to export subsidy reduction commitments.' Yet, this explanation lacks convincing since, as the Appellate Body itself has observed, Members were well aware of the potential trade distorting impact of subsidized export credit support offered by their trading partners (in particular by the United States).⁷⁰ Interestingly, the United States also argued that, if it would have known that export credit support for agricultural products was indirectly made subject to reduction commitments (through Article 10.1), its base period export subsidy quantity (from which export subsidy commitments were calculated) would have been much larger given the 'very significant' amount of quantities involved in its export credit guarantee programmes during that period.⁷¹ This indeed convincingly shows that the United States, by far the largest provider of such support, was not aware that such support was already disciplined. Whereas the Appellate Body seems to have neglected this argument, the Panel found that it could not accept the opinion of 'one Member' as representing a shared interpretation among Members.⁷² In this respect, the United States also pointed to the fact that export credit support was not subject to the notification requirements⁷³ but the Appellate Body simply observed that 'whether WTO Members with export credit guarantee programs have reported them in their export subsidy notifications is not determinative for purposes of our inquiry into the meaning of Article 10.2.'⁷⁴ Although low legal value should indeed be attached to the notification requirements, they might nonetheless be useful to reveal the drafters' intention.

To summarise, the Panel and Appellate Body have found that export credit support was not by virtue of Article 10.2 exempted from the scope of Article 10.1. The Appellate Body's main concern seemed to be that deciding otherwise would mean

⁶⁹ Brazil objected that the Chairman Dunkel's draft (see above n 61) also included other items in its list, such as tax concessions on exports, which were also not carried over in the listed types of subsidies under Article 9.1 but which are nonetheless subject to the disciplines under Article 10.1. See, Panel Report, *US – Upland Cotton*, above n 33, WT/DS267/R/Add.1, Part 3, at D-30.

⁷⁰ This recognition precisely underpins the Appellate Body's reading that it was no option for drafters to not make export credit support subject to any discipline at all. Appellate Body Report, *US – Upland Cotton*, above n 34, para 623.

⁷¹ Panel Report, *US – Upland Cotton*, above n 33, para 7.941; United States, *Appellant's Submission*, above n 65, para 385.

⁷² Panel Report, *US – Upland Cotton*, above n 33, para 7.942.

⁷³ United States, *Appellant's Submission*, above n 65, para 348.

⁷⁴ The Appellate Body also observed that the United States and Brazil disagreed on whether export credit support was subject to the notification requirements but failed to mention which view was the correct one. It seems that the United States' position was correct. The table on notifications (Table ES:1) refers to (1) 'subsidies exports' and (2) food aid, and a second table (supporting table ES:1) specifies the six listed types of exports. So, while food aid is explicitly referred to, no reference is made to (subsidized) export credit support. Brazil's argument that subsidized export credit support should, nonetheless, have been notified as 'subsidized exports' seems not very plausible, all the more, because no Member (including the United States with its extensive export credit support programme) included these in their notifications, and the lack thereof was also not contested by other Members. Above, Canada, as third party, agreed that export credit support was not subject to the notification requirements. Appellate Body Report, *US – Upland Cotton*, above n 34, para 220. This also seemed to be the position of the WTO Secretariat. See, Background Paper by the Secretariat, above n 31, para 41.

that export credit support was currently not subject to any discipline *at all*, which could not have been the intention of the drafters. An element in favour of this interpretation, though not articulated in the argumentation, was that all major Members, including the United States, at least formally agreed during the Uruguay Round that export credit support should be disciplined. Furthermore, the current negotiations mandated by Article 10.2 Agreement on Agriculture seem, as indeed suggested by the Appellate Body, to elaborate additional disciplines.⁷⁵ Nonetheless, several arguments also cast doubt on whether the Panel and Appellate Body correctly revealed the drafters' intention. First, the negotiating record shows that the option to discipline export credit support by reference to the Illustrative List was on the table but replaced by another explicit provision, which only mandates future negotiations. Moreover, the United States, which was by large the prime provider of such support, was certainly not aware that its export credit support was subject to the anti-circumvention provision as interpreted by the Appellate Body. The absence of a reference in the notification requirements to export credit support and at the same specifying all listed types of export subsidies as well as food aid, indicates that other Members seemed to share this interpretation. Last but not least, as explained in more detail below, the Appellate Body's interpretation has the result that export credit support for agricultural products is even subject to stricter disciplines than listed types of export subsidies. It seems not very plausible that drafters had such an outcome in mind.

Obviously, the rejection of the claim that Article 10.2 exempts export credit support from the scope of Article 10.1 does not mean that export credit support 'will necessarily constitute export subsidies for purposes of the *Agreement on Agriculture*. [Such support is] subject to the export subsidy disciplines in the *Agreement on Agriculture* only to the extent that [it includes] an export subsidy component.'⁷⁶ Before tackling the substantive question on what should exactly be demonstrated, we first turn to the procedural question at issue, namely which party bears the burden of proof in demonstrating this subsidy component.

Burden of proof

As a general rule, 'the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence'.⁷⁷ Nonetheless, Article 10.3 Agreement on Agriculture provides a special rule for proof of certain export subsidies.⁷⁸ It reads:

'Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized 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.'

This provision 'pursues the aim of preventing circumvention of export subsidy commitments by providing special rules on the reversal of burden of proof where a Member exports an agricultural product in quantities that exceed its reduction commitment level.'⁷⁹ Elaborating upon its content, the Appellate Body continued that

⁷⁵ Yet, this might also precisely be the result of the outcome of this case.

⁷⁶ Appellate Body Report, *US – Upland Cotton*, above n 34, para 626.

⁷⁷ WTO Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India (US – Wool Shirts and Blouses)*, WT/DS33/AB/R, adopted 23 May 1997, at 335; Appellate Body Report, *US – Upland Cotton*, above n 34, para 644.

⁷⁸ WTO Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products (Canada – Dairy)*, WT/DS103,113/AB/R, adopted 27 October 1999, para 69.

⁷⁹ Appellate Body Report, *US – Upland Cotton*, above n 34, para 616; WTO Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second*

'in such a situation a WTO Member is treated as if it has granted WTO *inconsistent* export subsidies for the excess quantities, unless the Member presents adequate evidence to "establish" the contrary.'⁸⁰

As a consequence, the reversal of the burden of proof, applicable both in the original as well as compliance procedures⁸¹, is triggered merely by exceeding the quantity reduction commitments.⁸² Article 10.3 thus 'cleaves the complaining Member's claim in two.'⁸³ In line with the general rule on the burden of proof, the complaining party has to prove first that a quantity of an agricultural product exported by the respondent is in excess of its reduction commitment. If demonstrated, the burden immediately then shifts to the complainant who then is compelled to establish that no export subsidy has been granted to this excess quantity. So, the complaint is not required to make a *prima facie* case of export subsidization regarding this excess quantity.⁸⁴

Four specifications should be made regarding the exact scope of Article 10.3. First, the text of this provision explicitly stipulates that it applies with respect to claims regarding listed as well as non-listed types of export subsidies. As a consequence, the specific burden of proof is also applicable with regard to claims formulated under Article 10.1. Second, the text also indicates that such a claim should relate to *export quantity* reduction commitments that are alleged to be exceeded and not to budgetary outlay commitments.⁸⁵ Third, disagreeing with the Panel in *US – Upland Cotton*, the Appellate Body concluded that its scope is confined to those agricultural products that are effectively scheduled and for which, as stipulated in Article 10.3, *reduction* commitments are thus made.⁸⁶ Bringing nonscheduled export subsidies within its scope would lead to 'an extreme result' as it would mean that 'any export of an unscheduled product is *presumed* to be subsidized.'⁸⁷ But what if an export subsidy programme similarly operates with respect to both scheduled and unscheduled agricultural products and both are challenged at the same time, as happened in the *US – Upland Cotton* case. Concerning unscheduled products, the burden of proof for demonstrating that the export credit guarantees constituted export subsidies rested upon Brazil pursuant to the general rule, whereas, for scheduled products, the non-existence of export subsidization of the same type of guarantees had to be demonstrated by the United States pursuant to the specific rule of Article 10.3.⁸⁸ Acknowledging this difference, the compliance Panel in *US –*

Recourse to Article 21.5 of the DSU by New Zealand and the United States (Canada – Dairy (Article 21.5 – New Zealand and US II)), WT/DS103,113/AB/RW2, adopted 17 January 2003, para 74.

⁸⁰ Appellate Body Report, *US – Upland Cotton*, above n 34, para 616.

⁸¹ WTO Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States (Canada – Dairy (Article 21.5 – New Zealand and US))*, WT/DS103,113/RW, adopted 18 December 2001, para 6.4.

⁸² Panel Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, above n 81, para 6.5; WTO Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" (US – FSC)*, WT/DS108/R, adopted 20 March 2000, paras 7.136 and 7.161.

⁸³ Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, above n 79, para 71.

⁸⁴ Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, above n 79, paras 72-76.

⁸⁵ WTO Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil (US – Upland Cotton (Article 21.5 – Brazil))*, WT/DS267/RW, adopted 20 June 2008, footnote 635.

⁸⁶ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 652, 681, footnote 1035.

⁸⁷ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 650-652. The Panel's interpretation would imply that the burden of proof with regard to the same issue would apply differently, under each Agreement: 'it would be on the respondent under the *Agreement on Agriculture*, while it would be on the complainant under the *SCM Agreement*.' Appellate Body Report, *US – Upland Cotton*, above n 34, para 652.

⁸⁸ See, Appellate Body Report, *US – Upland Cotton*, above n 34, footnote 1035.

Upland Cotton decided that it would first proceed as if Brazil bore the burden of proof with respect to the subsidization element, *i.e.* as if Article 10.3 did not exist. Only if Brazil had failed to demonstrate this element, which did not happen⁸⁹, the Panel would have applied Article 10.3 to the claims regarding scheduled products and thus required the United States to establish that no export subsidies were given with respect to the excess quantities of these scheduled products.⁹⁰ Fourth and finally, Article 10.3 is solely applicable with regard to claims of export subsidization brought under the Agreement on Agriculture and not under alternative claims formulated under the SCM Agreement.⁹¹ Given that the claim on export subsidization is first addressed under the Agreement on Agriculture and taken into consideration that the SCM Agreement's subsidy standards are hereby often relied upon (e.g. item (j)), the shift back to the general rule on the burden of proof for the alternative claim under the SCM Agreement might not always be relevant.⁹² Applied to the *US – Upland Cotton* case, once the United States failed to demonstrate that the standard of item (j) was met with respect to scheduled products for the purpose of the claim under Article 10.1 Agreement on Agriculture, it was not very difficult for Brazil to subsequently demonstrate a direct violation of item (j) with regard to its claim under the SCM Agreement.⁹³

When is export credit support considered an ‘export subsidy’ in the meaning of Article 10.1 Agreement on Agriculture?

Contrary to the SCM Agreement, the Agreement on Agriculture does not include a definition of a ‘subsidy’ but simply stipulates in Article 1(e) that ‘export subsidies’ under the Agreement on Agriculture refer to subsidies contingent upon export performance.⁹⁴ As accurately summarized and approved by the Appellate Body in *US – Upland Cotton*, because ‘the Agreement on Agriculture does not contain a comprehensive definition of the term “export subsidy”, the Panel would refer to the SCM Agreement for *contextual guidance*. In particular, the Panel said it would *determine* whether GSM 102 guarantees are “export subsidies” by applying the standard set out in item (j) of the Illustrative List.’⁹⁵ Indeed, the Panel in the compliance procedure, in line with the original panel, formally relied on item (j) only as contextual support for interpreting ‘export subsidies’ under Article 10.1 Agreement

⁸⁹ See, Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, footnote 765.

⁹⁰ Insofar Brazil had demonstrated the existence of such quantity in excess of the United States’ reduction commitments. Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, para 14.47. This order of analysis seems to have been implicitly approved by the Appellate Body. See WTO Appellate Body Report, *United States – Subsidies on Upland Cotton (US – Upland Cotton (Article 21.5 – Brazil))*, WT/DS267/AB/RW, adopted 20 June 2008, para 321.

⁹¹ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 647-649.

⁹² This shift of the burden of proof might in certain cases still be relevant given that the subsidy definition is not always similar under both agreements (e.g. list of Article 9.1 might deviate from subsidy definition under SCM Agreement).

⁹³ This result is mitigated if claims are formulated with respect to export subsidization of scheduled as well as unscheduled agricultural products. The order of analysis as specified by the compliance Panel in *US – Cotton* would imply that the burden of proof is, also for the analysis under the Agreement on Agriculture, first placed upon the complaining party. Hence, no shift in the burden of proof should take place for the analysis under the SCM Agreement. See, Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, para 14.154.

⁹⁴ Because the concept of ‘export contingency’ is defined similar under Article 1(e) of the Agreement on Agriculture as under Article 3.1(a) of the SCM Agreement, the case law developed on this concept under the SCM Agreement is also applied in the context of the Agreement on Agriculture. Appellate Body Report, *US – FSC*, above n 47, para 7.150, Appellate Body Report, *US – Upland Cotton*, above n 34, paras 571-584.

⁹⁵ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 90, para 260 (emphasis added).

on Agriculture but *de facto* applied item (j) to agricultural export credit support.⁹⁶ Observing that there was no disagreement among parties that an export credit guarantee programme meeting the elements of item (j) is a *per se* export subsidy, the Panel first applied this standard as contextual guidance for interpreting export subsidies under Article 10.1.⁹⁷ Only if the item (j) test would not be met, the Panel would be willing to proceed ‘to a further contextual examination of the definitional elements contained in Articles 1 and 3 SCM Agreement’ as demanded by Brazil.⁹⁸

Export subsidies as defined by item (j) of the Illustrative List⁹⁹

Item (j) reads:

‘The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.’

Item (j) thus considers pure cover support as an export subsidy if it is offered at premium rates which are inadequate to cover the long-term operating costs and losses of the programme. The evaluation is made at an aggregate level and thus calls for a ‘programme-wide analysis’¹⁰⁰, which compares the level of premiums¹⁰¹ with the overall long-term costs of the programme to the government. Passing this cost-to-the-government test requires ‘a finding on whether the premiums are insufficient (...) and not a finding of the precise difference between premiums and long-term operating costs and losses’.¹⁰² This should be primarily demonstrated on the basis of quantitative evidence but could be supplemented with non-quantitative evidence.

First, to the extent that relevant data is available, a *quantitative evaluation* of the financial performance of a programme should be undertaken revealing ‘the difference, if any, between the revenues derived from the premiums charged under the programme and its long-term operating costs and losses.’¹⁰³ To this end, ‘both retrospective data relating to a programme’s historical performance and projections of its future performance’ could be advanced.¹⁰⁴ Whereas the compliance panel

⁹⁶ This seems to be criticized by Benitah. Marc Benitah, ‘U.S. Agricultural export credits after the WTO cotton ruling: the law of unintended consequences’, 6(2) The Estey Centre Journal of International Law and Trade Policy 107 (2005), at 111-112.

⁹⁷ Panel Report, *US – Upland Cotton*, above n 33, para 7.763; Appellate Body Report, *US – Upland Cotton*, above n 34, para 647.

⁹⁸ Panel Report, *US – Upland Cotton*, above n 33, para 7.803.

⁹⁹ In order to determine whether official *financing* support for agricultural products is an ‘export subsidy’ under Article 10.1, contextual support could be found in item (k), paragraph 1. The standard set out in this provision is, however, not elaborated in this contribution because such financing support is not widespread for agricultural products (see above) and complainants might more easily opt for demonstrating the existence of an ‘export subsidy’ on the basis of Article 1 *juncto* 3 SCM Agreement than on the basis of item (k) para 1 as the latter mandates an additional cost to the government demonstration. For an analysis of item (k), para 1, see Coppens, above n 2, at 88-91.

¹⁰⁰ Panel Report, *US – Upland Cotton*, above n 33, para 7.763.

¹⁰¹ A premium is ‘an amount to be paid for a contract of insurance’. Panel Report, *US – Upland Cotton*, above n 33, para 7.817.

¹⁰² Appellate Body Report, *US – Upland Cotton*, above n 34, paras 666-667.

¹⁰³ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 90, para 278.

¹⁰⁴ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 90, para 278. The original Panel decided, with agreement from the parties, that the 1992-2002 period was an adequately ‘long-term’ period but also indicated that older data could be relevant as well as projections for the future and on the compliance level, historical data from the 1992 – 2006 period was taken into consideration together with projections for 2006 and 2008. Generally speaking, the reference to ‘long-

found support in the quantitative data that the revised programme still operated at a loss, the Appellate Body observed conflicting data on whether the programme was making a loss or not.¹⁰⁵ Apparently left unnoticed by the panel as well as the Appellate Body in the compliance procedure, the focus under item (j) should be on the adequacy of *actual* premiums charged under the challenged programme and data on past performance should therefore be interpreted with caution as the fee structure under the challenged programme might have changed over time.¹⁰⁶ Indeed, the relevant question in the compliance procedure was whether the *revised* fee structure under the - only left over - GSM 102 programme was adequate to cover long-term operating costs and losses.¹⁰⁷

Supplementary to this quantitative analysis or when there is an absence of financial data, *non-quantitative evidence* may be relevant. First, the Appellate Body agreed with the Panel that this evidence could include a comparison between the premiums under the programme and the minimum premium rates (MPRs) as set out in the OECD Arrangement even in the case of agricultural export credit support, which is not covered by the OECD Arrangement.¹⁰⁸ In particular, the magnitude (not any difference) of the difference between the premiums charged under the GSM-102 programme and MPRs provided an indication that premiums were set on a level inadequate to cover long-term costs.¹⁰⁹ Second, elements of the 'structure, operation and design' of the revised GSM-102 programme suggested that it

term' refers according to the Panel to 'a period of sufficient duration as to ensure an objective examination which allows a thorough appraisal of the programme and which avoids attributing overdue significance to any unique or atypical experiences on a given day, month, trimester, half-year, year or other specific time period.' Panel Report, *US – Upland Cotton*, above n 33, para 7.832.

¹⁰⁵ The Panel had found support in the *initial subsidy estimates* for 2006 and 2007 which projected a net cost to the government. However, the Appellate Body firmly criticized the Panel for dismissing the import of the United States' argument that *re-estimates* data over the 1992 – 2006 period projected an aggregate anticipated profit. As these re-estimates take into account information about the historical performance (and estimated changes in future cash flows) of export credit guarantees issued in a given year, they might in the view of the Appellate Body be even more reliable than the initial estimates. At the same time, the Appellate Body also observed that the CCC's consolidated Financial Statements estimated credit guarantee liabilities (i.e. estimated net cash outflows of the guarantees on a net present value basis) of \$220 million with respect to post-1991 guarantees that were outstanding as of 30 September 2006. Hence, the Appellate Body was confronted with conflicting data on the export performance of the CCC up to 2006, for which none of parties could give a convincing explanation: the CCC Financial Statements indicated that the programme was a making a loss, while the re-estimates presented the opposite conclusion.

¹⁰⁶ On the one hand, historical data showing an overall profit is relevant insofar the new fee structure is more stringent than before. Indeed, this *a fortiori* – reasoning seems to be made by the Appellate Body: 'It is not unreasonable to assume that *the increase of fees* resulting from the revision of the GSM 102 programme would accentuate the downward trend shown in the re-estimates data for the 15-year period. Thus, we consider that the re-estimates data, which show better-than-expected historical performance, are an important indicator of the *revised* GSM 102 programme's likely future performance' (Appellate Body Report, *US – Upland Cotton*, above n 34, para 299, emphasis added). On the other, historical data showing an overall loss is not *per se* an indication of the inadequacy of *actual* premiums if the fee structure has been strengthened over time. Although not explicitly recognized by the Appellate Body, this data *an sich* (e.g. CCC's audited Financial Statements) should have been considered relevant only because it questioned the accuracy of re-estimates data. Of course, projections for the future incorporating the new fee structure (i.e. estimates for 2006 and 2007) are clearly relevant.

¹⁰⁷ The panel and Appellate Body focused on this particular question (see Panel Report, *US – Upland Cotton*, above n 33, para 4.18 and Appellate Body Report, *US – Upland Cotton*, above n 34, para 321) but did not explicitly relate their discussion on quantitative data to this element (except for the Appellate Body Report, *US – Upland Cotton*, above n 34, para 299; see above n 106).

¹⁰⁸ Yet, MPRs do not provide a legally binding benchmark under item (j) as this item, contrary to paragraph 2 of item (k), does not refer to the OECD Arrangement.

¹⁰⁹ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 90, paras 302-306; Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, paras 14.94 – 14.103.

operated at a loss. For example, the Panel found that the structure and design of the revised GSM 102 did not adequately ensure that GSM 102 fees were risk-based because foreign obligor risk was not reflected in the fees¹¹⁰ and the operation of the one percent fee cap prevented adjustment of fees to increased level of risks (scaling).¹¹¹ Although the Appellate Body had found that the quantitative date has given rise to opposing conclusions, this non quantitative evidence provided a 'sufficient evidentiary basis for the conclusion that it is more likely than not that the revised GSM programme operates at a loss.' As a result, the Appellate Body agreed with the compliance Panel's conclusion that the revised GSM programme was still an 'export subsidy' in the meaning of item (j) and therefore also within the meaning of Article 10.1 Agreement on Agriculture.

Export subsidies as defined by Article 1 *juncto* 3 of the SCM Agreement

A subsidy in the meaning of Article 1 SCM Agreement exists in case (i) a financial contribution by a government¹¹² (ii) confers a benefit¹¹³. Such a subsidy is considered an 'export subsidy' under Article 3.1 SCM Agreement if it is contingent upon exportation.¹¹⁴ The first element of the definition is fulfilled in case export credit support is offered directly by the government or indirectly through direction of entrustment of private finance institutions.¹¹⁵ Turning to the second element, such export credit support confers a benefit according to the case law if offered at below commercial market rates.¹¹⁶ With respect to the pure cover support, the fee charged for receiving an export credit guarantee is compared with a comparable guarantee available at the commercial market. If the fee charged by the government is lower than the market fee, a benefit would be conferred. Alternatively, the benefit analysis looks at the impact of the export credit guarantee on the export credit. It confers a benefit if the difference between the amount paid on a loan guaranteed by the government and the amount that would have to be paid on a commercial loan without government guarantee is not offset by the fee which has to be paid for the government guarantee.¹¹⁷ Such subsidized export credit support is, by definition, contingent upon exportation in the meaning of Article 3 SCM Agreement as it supports loans (or is a loan in itself) extended to foreign buyers.

Brazil claimed that the United States export credit programme was not only an 'export subsidy' under Article 10.1 in light of the standard set in item (j) but also within the meaning of Article 1 *juncto* 3 SCM Agreement.¹¹⁸ Brazil had a good

¹¹⁰ The Panel agreed with Brazil that foreign obligor risk should not only be reflected via exposure limits (as was the case under the revised GSM 102) but also through fees. Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, paras 14.113 – 14.115. It might be relevant to observe that the MPRs under the OECD Arrangement also do not take into consideration foreign buyer/borrower risks but only country risks. See, Coppens, above n 2, footnote 83.

¹¹¹ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 90, para 312.

¹¹² Article 1.1(a)(1) of the SCM Agreement. Article 1.1(a)(2) is not relevant for our discussion.

¹¹³ Article 1.1(b) of the SCM Agreement.

¹¹⁴ Or if covered under the Illustrative List (see above discussion on item (j)). Recall that the concept of 'export contingency' is applied similar as under SCM Agreement (see above n 94).

¹¹⁵ For an elaboration of this aspect, see Coppens, above n 2, at 78-80.

¹¹⁶ In case the foreign importer receives an export at better terms than on the private market, the exporter *ipso facto* benefits as its chances of securing the contract will rise.

¹¹⁷ Contextual support is found in Article 14(c) SCM Agreement. See WTO Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea (EC – Countervailing Measures on DRAM Chips)*, WT/DS299/R, adopted 3 August 2005, paras 7.189-7.190; WTO Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft (Canada – Aircraft Credits and Guarantees)*, WT/DS222/R and Corr.1, adopted 19 February 2002, paras 7.397-7.398.

¹¹⁸ To be sure, challenging an export credit guarantee *programme* under Article 1 *juncto* Article 3 SCM Agreement might be more difficult in light of the mandatory/discretionary distinction traditionally adopted by most panels when analyzing export credit support as they examined whether the

reason for pursuing this supplementary claim as it would put beyond doubt, if successfully demonstrated, that the United States should not only ensure that the programme runs at no cost to the government but also that it confers no benefit. Put otherwise, the programme should not only have to run break-even (item (j)) but also not offer guarantees on terms that are not available on the commercial market (Article 1). Yet, the Panel, justified in the view of the Appellate Body, exercised judicial economy on the Brazil's 'argument' under Article 1 *juncto* 3 since it already found a violation of item (j).¹¹⁹ As Brazil had rightly feared, the US held before the compliance Panel that it implemented the DSB's recommendations because it brought its pure cover programme into accordance with the cost-to-the-government standard in item (j).¹²⁰ Again, the compliance Panel exercised judicial economy on Brazil's claim under Articles 1 and 3 of the SCM Agreement because the revised pure cover programme was still found to be inconsistent with item (j). However, this exercise of judicial economy fails to acknowledge that the subsidy determination under both options (benefit-to-the-recipient versus cost-to-the-government) could give rise to differing implementation standards or, at least, would give different guidance as to implementing the DSB's recommendations. Indeed, the question is left open as to a correct understanding of the obligation to 'withdraw the *subsidy* without delay' if the subsidy element is only demonstrated on the basis of the cost-to-government standard under item (j).¹²¹ Ought the United States implement the DSB's recommendations if it ensures that its revised export credit programme no longer runs at a cost to the government, even though it might still be beneficial 'as such' or 'as applied' under Article 1 SCM Agreement? The Arbitrator in the pending Article 22.6 procedure will have to solve this thorny legal question resulting from the panels' and Appellate Body's exercise of judicial economy in order to decide on whether countermeasures should be based on the cost-to-the-government standard, as advocated by the United States, or on the benefit-to-the recipient standard, as claimed by Brazil.¹²² At first sight, the United States' argument might seem defensible given that the panels' analyses focused on item (j) and thus lack a finding that the more demanding benefit-to-the-recipient standard is also met.¹²³ Yet, this line of reasoning would have to acknowledge that the panels' judicial economy exercise was a false one as it deprived Brazil from the right to demonstrate its

programme 'as such' mandated WTO inconsistent behaviour (see, for example, Panel Report, *Canada – Aircraft Credits and Guarantees*, above n 117, para 7.131 and footnote 93). Yet, it should be emphasized that the panels' approach on this distinction (even in the field of export credit support) is far from uniform. Moreover, the Appellate Body has stressed that the import of this distinction may vary from case to case and therefore cautioned against the application of this distinction 'in a mechanistic fashion'. WTO Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para 93; WTO Appellate Body Report, *United States – Law, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WT/DS294/AB/R, adopted 9 May 2006, paras 213-214; For a summary on the 'controversial "mandatory/discretionary" distinction', see WTO Panel Report, *United States – Customs Bond Directive for Merchandise Subject to Anti-Dumping/Countervailing Duties*, WT/DS345/R, adopted 1 August 2008; See also Panel Report, *US – Upland Cotton*, above n 33, para 7.763.

¹¹⁹ Panel Report, *US – Upland Cotton*, above n 33, para 6.31. The Appellate Body qualified it as a correct application of the principle of judicial economy. Appellate Body Report, *US – Upland Cotton*, above n 34, paras 731-733.

¹²⁰ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, Part 2, at A-9 (para 3).

¹²¹ The compliance Panel did not clarify whether the US would have implemented the original DSB's recommendations [based on the item (j) analysis] if the standard of item (j) would have been met under the revised programme even though the programme or some individual transactions would still confer a benefit.

¹²² Written Submission by Brazil (13 January 2009), at 34 – 40; Written Submission by the United States (9 December 2008), at 4-7.

¹²³ Recall that the United States objected that the benefit-to-the-recipient would be met.

primary claim,¹²⁴ which was based on Article 1 SCM Agreement, and thus to obtain a more stringent implementation obligation.¹²⁵

It should be highlighted that the Panel would arguably have looked at Article 1 *juncto* Article 3 SCM Agreement for contextual support in case the United States' export credit programme would *not* have been an 'export subsidy' in the meaning of item (j). This seems to be implied in the Panel's statement that if the item (j) test would not be met, it would be willing to proceed 'to a further contextual examination of the definitional elements contained in Articles 1 and 3 SCM Agreement'.¹²⁶ More fundamentally, panels have systematically (and correctly) rejected that item (j) could be used *a contrario*, namely to demonstrate that export credit support is not a prohibited export subsidy under the SCM Agreement.¹²⁷ Such support is still prohibited under the SCM Agreement if offered at subsidized terms in the meaning of Article 1 *juncto* Article 3 SCM Agreement. Accordingly, the United States' call for such an *a contrario* reading of item (j) articulated before the Panel in *US – Upland Cotton* would probably not have been accepted.¹²⁸ To be sure, the Appellate Body in *US – Upland Cotton* underlined that, until present, it has not revealed whether it would agree that an *a contrario* reading of item (j) should be dismissed.¹²⁹

(II) DISCIPLINES: CIRCUMVENTION OR THREAT OF CIRCUMVENTION

According to the Appellate Body, Article 10.1 Agreement on Agriculture is 'designed to prevent Members from circumventing or "evading" their "export subsidy commitments"'.¹³⁰ But the provision does not illuminate how the standard of 'anti-circumvention' should exactly be understood. Recall that listed types of export subsidies could be offered up to the level of reduction commitments for scheduled products but are flatly prohibited for non-scheduled products.¹³¹ When are these export subsidy commitments *circumvented* by the provision of non-listed types of export subsidies to such scheduled or non-scheduled agricultural products?

The literature was divided on how this question had to be answered. On the one hand, some authors, such as Desta, considered that the standard of anti-circumvention imposed on non-listed export subsidies should certainly be *lower* than the standard imposed on listed types of subsidies as its purpose is 'only to protect the commitments on those exhaustively listed export subsidies from being evaded by the use of non-listed subsidies'.¹³² On the other hand, some former United States negotiators considered Article 10.1 as a 'catch-all'-provision, which would cover

¹²⁴ Indeed, Brazil explicitly articulated in the first place a claim referring to Article 1 *juncto* 3 of the SCM Agreement in the compliance procedure. Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, at A-7. The exercise of judicial economy thus only seems to give 'a partial resolution of the matter at issue' and did not 'enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance'. WTO Appellate Body Report, *Australia – Measures Affecting Importation of Salmon (Australia – Salmon)*, WT/DS18/AB/R, adopted 6 November 1998, para 223.

¹²⁵ So, the fact that the Appellate Body considered the exercise of judicial economy as legitimate pleads for Brazil's argument.

¹²⁶ Panel Report, *US – Upland Cotton*, above n 33, para 7.803.

¹²⁷ See, Coppens, above n 2, at 91-93.

¹²⁸ Panel Report, *US – Upland Cotton*, above n 33, para 7.772. Footnote 5 to the SCM Agreement stipulates that 'Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.'

¹²⁹ Appellate Body Report, *US – Upland Cotton*, above n 34, para 731; WTO Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU (Brazil – Aircraft (Article 21.5 – Canada))*, WT/DS46/AB/RW, adopted 4 August 2000, para 80

¹³⁰ Appellate Body Report, *US – FSC*, above n 47, para 148.

¹³¹ Except for the S&D treatment under Article 9.4.

¹³² Desta, above n 26, at 260-267.

export subsidy schemes not anticipated by the negotiators during the Uruguay Round, and would impose 'a virtual prohibition' on non-listed export subsidies. In their view, non-listed export subsidies are thus subject to a *higher* standard than listed ones.¹³³

Somewhat in line with the latter interpretation, the Panel in *Canada – Milk* followed the latter interpretation as it considered 'one example' of such (threat of) circumvention a situation where non-listed types of export subsidies are given to scheduled products in excess of the reduction commitment level.¹³⁴ The Panel observed that all parties agreed with this interpretation and also found contextual support in Article 10.3 which, as elaborated above, shifts the burden of proof to the respondent to demonstrate that no 'export subsidy, whether listed in Article 9 or not'¹³⁵ is given in respect of the quantity it has exported in excess of its reduction commitment level.¹³⁶ The Appellate Body in *US - FSC* seemed to agree with this example in its reasoning with regard to scheduled products that 'Members would have found "a way round", a way to "evade", their commitments under Articles 3.3 and 9.1, if they could transfer, through (non-listed types of export subsidies), the very same economic resources that they were, (...), prohibited from providing through other methods under the first clause of Article 3.3 and under 9.1' when the specific reduction commitment levels have been reached.¹³⁷ Hence, the Appellate Body seemed to hold that circumvention is present, and not merely assumed, when non-listed types of export subsidies are offered to scheduled products above their reduction commitment levels or to unscheduled products *tout court*. At the same time, the Appellate Body seemed to be of the view that *no* circumvention would be present when Members do not offer non-listed export subsidies to scheduled products above their reduction commitment levels. This interpretation was applied and confirmed by the panels in the *US – Upland Cotton* procedures. Indeed, the compliance Panel considered the following elements *necessary* to establish circumvention:

"For unscheduled products, "circumvention" of the United States' export subsidy commitments will occur if *any* export subsidies (in the form of GSM 102 export credit guarantees) are provided in respect of *any* quantity of exports of the product in question. For scheduled products, "circumvention" will occur if the United

¹³³ See Dale E. McNiel, 'Furthering the Reforms of Agricultural Policies in the Millennium Round', 9(41) *Minnesota Journal of Global Trade* 41 (2000), at 71.

¹³⁴ Panel Report, *Canada – Dairy*, above n 37, paras 7.122 and 7.20. The reference to 'one example' indicates that the Panel left open the possibility that even when the reduction commitment level is not surpassed, (threat of) circumvention by non-listed types of export subsidies could occur. See also Panel Report, *Canada – Dairy*, above n 37, para 7.29.

¹³⁵ Emphasis added.

¹³⁶ Taking a somewhat more flexible stance advocated also by *Destia*, the Panel in the second compliance of *Canada – Milk* seemed to hold that the provision of non-listed export subsidies in excess of the reduction commitment level only makes a *prima facie* case of (threat of) circumvention which can still be rebutted by the respondent. The Panel's interpretation seems to result from an erroneous reading of Article 10.3 as the latter only shifts the burden of proof on the respondent with respect to the export subsidy element and not with respect to the anti-circumvention standard. Yet, at the time of this second compliance panel, the Appellate Body in *US – FSC* had already dealt with this legal question in a way more in line with the original panel. WTO Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States (Canada – Dairy (Article 21.5 – New Zealand and US II))*, WT/DS103/RW2, WT/DS113/RW2, adopted 17 January 2003, paras 5.166-5.173.

¹³⁷ Similarly, the Appellate Body reasoned as regards to non-scheduled products, that 'Members would certainly have "found a way round", a way to "evade"' the prohibition on providing listed types of export subsidies to non-scheduled products 'if they could transfer, through (non-listed types of export subsidies), the very same economic resources that they are prohibited from providing in other forms under Articles 3.3 and 9.1.' Appellate Body Report, *US - FSC*, above n 47, paras 150- 152.

States provides export subsidies to volumes of exports of the product at issue *in excess of its "quantity" reduction commitments or of its "budgetary outlay"*.¹³⁸

As a result, subsidized export credit support for unscheduled products (such as cotton) as well as for three scheduled products in excess of the United States' quantity commitments (i.e. rice, pig meat, poultry meat) were deemed inconsistent with the anti-circumvention obligation in the compliance procedure.¹³⁹ Non-listed export subsidies are thus disciplined similarly under the 'anti-circumvention' standard of Article 10.1 as listed ones under Articles 3.3 *juncto* 9.1 Agreement on Agriculture. Non-listed types of export subsidies are prohibited for unscheduled products and added to listed types of export subsidies for the determination of whether scheduled products are subsidized above their reduction commitments.

Actual circumvention of export subsidy commitments is, as stressed by the Appellate Body, not even necessary to find a violation of Article 10.1 given that a *threat* of circumvention is sufficient.¹⁴⁰ If 'actual' circumvention is found with respect to an agricultural product, panels are allowed to exercise judicial economy on the additional claim of threat of circumvention.¹⁴¹ As a result, the claim that non-listed types of subsidies *threaten* to lead to circumvention of export subsidy commitments is only examined for those agricultural products of which actual circumvention could not be demonstrated. Such a threat of circumvention was, in the interpretation of the Panel in *US – Upland Cotton*, only present if the subsidy programme created the unconditional legal entitlement to receive them.¹⁴² However, the Appellate Body rejected the Panel's narrow interpretation which seems, as the Appellate Body also hinted at, to be inspired by the mandatory/discretionary distinction.¹⁴³ According to the Appellate Body, "the ordinary meaning of the term "threaten" refers to a *likelihood* of something happening" and 'does not connote a sense of certainty'.¹⁴⁴ Thus, threatening to lead to circumvention is present in case 'the export subsidies are applied in a manner that is "likely to" lead to circumvention of a WTO Member's export subsidy commitments'.¹⁴⁵ So, contrary to the Panel, the Appellate Body 'did not foreclose (...) the possibility that a measure that does not create a "legal entitlement" or that has a "discretionary element" could be found to "threaten[]" to lead to circumvention'.¹⁴⁶ On the other hand, a threat of circumvention is not

¹³⁸ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, para 14.137. See also Panel Report, *US – Upland Cotton*, above n 33, para 7.664. The Appellate Body in the original procedure also confirmed its previous interpretation as regards unscheduled products in stipulating that '(e)xpport subsidies for both unscheduled agricultural products and industrial products are *completely prohibited* under the Agreement on Agriculture and under the SCM Agreement, respectively' (above n 34, para 652, emphasis added).

¹³⁹ Panel Report, *US – Upland Cotton*, above n 33, paras 14.139-14.150. This anti-circumvention analysis was not appealed. See, Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 90, paras 269 and 323.

¹⁴⁰ Appellate Body Report, *US – FSC*, above n 47, paras 148-154.

¹⁴¹ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 715-719; Panel Report, *US – Upland Cotton*, above n 33, para 7.882 (footnote 1061). According to the Panel, subsidies that result in actual circumvention *ipso facto* also threaten to result in circumvention.

¹⁴² Panel Report, *US – Upland Cotton*, above n 33, para 7.883.

¹⁴³ The Panel also erroneously generalized the Appellate Body's reference to 'legal entitlement' in *US – FSC*. Appellate Body Report, *US – Upland Cotton*, above n 34, paras 706-710. The Appellate Body's view seems to fit into its general approach to deconstruct the mandatory/discretionary distinction.

¹⁴⁴ Appellate Body Report, *US – Upland Cotton*, above n 34, para 704 (emphasis in the original). The AB interpreted 'threat' under Article 10.1 similarly as in the context of the Anti-Dumping Agreement and Safeguard Agreement. See, however, below n 154.

¹⁴⁵ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 704-705.

¹⁴⁶ Appellate Body Report, *US – Upland Cotton*, above n 34, para 709.

interpreted as broadly as to require 'precautionary steps to ensure that circumvention of (...) export subsidy reduction commitments never happens.'¹⁴⁷ Hence, the standard of 'likelihood' is situated somewhere in between both extremes and should – unsurprisingly – be analysed on a case-by-case basis.¹⁴⁸ In this respect, the Appellate Body clarified that this standard is certainly not met in case it is only demonstrated that exports of the products in question are *eligible* for export credit guarantees and the subsidizing Member has *provided* export credit guarantees to exports of *other* unscheduled products.¹⁴⁹ The presence of both elements under the US export credit programme was indeed insufficient to demonstrate a 'threat of circumvention' particularly because of the lack of evidence of previous subsidization of the agricultural product in question under the export credit programme.¹⁵⁰ Consequently, a pivotal element for revealing the likelihood of circumvention in the future seems to be whether the product in question has previously benefited from the challenged non-listed type of subsidy.

In conclusion, the case law has largely neutralized the distinction often stressed in the literature between two sets of substantive obligations depending on whether or not the export subsidy is listed. The standard of actual anti-circumvention imposed on non-listed export subsidies under Article 10.1 is exactly the same as the (reduction) commitment standard imposed on listed export subsidies under Articles 3.3 *juncto* 9.1. Although Article 10.1 might have been drafted differently if this interpretation was indeed in the mind of the drafters¹⁵¹, such interpretation spells out a clear-cut standard of which Article 10.3 offers contextual support and of which none of the WTO Members involved in the above-mentioned cases contested (including the main export subsidizers the EC and the US).¹⁵² Hence, WTO Members are not allowed to grant '*any subsidy whatsoever to exports* of unscheduled products'¹⁵³ and of scheduled products above their reduction commitment level. What is more, non-listed export subsidies are even disciplined more stringently as listed ones given that a *likelihood* of such circumvention ('threat of circumvention') caused by such non-listed subsidy suffices to find an inconsistency with Article 10.1 of the Agreement. Hence, under the AB's broad reading, a Member could be found *actually* violating WTO disciplines only because there is a likelihood that in the *future* certain WTO inconsistent subsidies would be offered.¹⁵⁴

Nonetheless, should not this general conclusion be nuanced with respect to developing countries? Recalling that under the broad interpretation of Article 9.4 these countries are free to offer marketing and transport export subsidies. How then does their right to offer these two listed types of subsidies to (un)scheduled products influences the determination of (threat of) circumvention of export subsidy commitments? Put otherwise, how can such developing countries circumvent export

¹⁴⁷ Appellate Body Report, *US – Upland Cotton*, above n 34, para 713.

¹⁴⁸ Appellate Body Report, *US – Upland Cotton*, above n 34, para 704 (footnote 1082).

¹⁴⁹ Or to exports of scheduled products in excess of its export subsidy reduction commitments.

¹⁵⁰ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 713-714.

¹⁵¹ This was argued by Desta, above n 26, at 262.

¹⁵² See, for example, Panel Report, *US – Upland Cotton*, above n 33, para 7.921.

¹⁵³ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, footnote 782.

¹⁵⁴ Even if the current legal system does not mandate that Member to offer such WTO inconsistent subsidies in the future (panel's more narrow approach). The Appellate Body seems to overlook (see above n 144) that *threat* of circumvention elaborated in Article 10.1 has another quality than the *threat* of injury that could be countervailed (or which could be responded by imposing anti-dumping duties or safeguard duties). Contrary to the threat referred to in Article 10.1, in the latter case subsidization (dumping/increased imports) *actually* takes place and there is only uncertainty on whether it will cause the required level of *injury*. On the other hand, one might argue that the Appellate Body's interpretation acknowledges that a threat of future subsidization might affect actual behaviour of foreign producers.

subsidy commitments by using non-listed types of export subsidies if they are indeed allowed and without clear limitation,¹⁵⁵ by offering two types of listed export subsidies? Two opposite readings can be articulated. If one reads article 10.1 as implicitly imposing a lower standard on non-listed export subsidies, the argument follows that next to two listed types of export subsidies (marketing and transport export subsidies), developing countries are *a fortiori* free to offer non-listed types of export subsidies to scheduled and unscheduled products. However, the opposite reading seems more plausible in light of the case law's reading of Article 10.1, which disciplines non-listed export subsidies even more strictly than listed ones.¹⁵⁶ This interpretation, which would also give substance to Article 10.1 regarding developing countries, would treat non-listed export subsidies similarly as listed ones that are not benefiting from Article 9.4.¹⁵⁷ Yet, this interpretation implies that countries having no scheduled agricultural products, such as India and China, could not offer any subsidized export credit support for agricultural products and that a threat thereof would even suffice to find a WTO inconsistency. In contrast, countries such as the EC, the US and Canada are allowed to offer subsidized export credit to agricultural products up to their reduction commitment level. The panels in the original as well as compliance procedure found that the United States offered subsidized export credit support to scheduled products in excess of its reduction commitments and to unscheduled products and therefore violated Article 10.1 of the Agreement on Agriculture. Next to an inconsistency with the Agreement on Agriculture, Brazil also claimed that the export credit support offered to agricultural products violated the SCM Agreement. This situation will be analysed under the following section.

3.2.2. SCM Agreement

Article 3.1 SCM Agreement spells out a general prohibition on export subsidies (3.1(a)) and import substitution subsidies (3.1(b)). In the *US – Upland Cotton* case, the question on the applicability of this provision to *agricultural* subsidies is raised in a double way. Firstly, the question that needed to be tackled was whether subsidies contingent upon the use of domestic agricultural goods which are consistent with the domestic support provisions of the Agreement on Agriculture are nonetheless prohibited under 3.1(b) SCM Agreement. Obviously, this issue is highly relevant as a positive answer would imply that a measure compatible with the Agreement on Agriculture would be prohibited under the SCM Agreement. Secondly, Brazil also claimed that export credit support already found inconsistent with the Agreement on Agriculture was, in addition, also inconsistent with the prohibition on export subsidies (3.1(a)) SCM Agreement. The relevance of such an additional claim lies in the stricter implementation obligations which result from a violation SCM Agreement's prohibited subsidies provisions. In particular, as the Appellate Body in *US – Sugar* explained, Article 4.7 SCM Agreement mandates the panel to make an additional recommendation to 'withdraw the subsidy without delay' if a prohibited subsidy is found to exist under the SCM Agreement.¹⁵⁸ Important to keep in mind, Brazil's claim under Article 3.1(a) was confined to export credit support found *inconsistent*

¹⁵⁵ Recall that Article 9.4 is also subject to an 'anti-circumvention' obligation but its interpretation is far from clear (see above n 49).

¹⁵⁶ Otherwise, developing countries would also be free to provide all other types of non-listed export subsidies (e.g. tax exemptions contingent upon exportation).

¹⁵⁷ Hence, listed as well as non-listed subsidies for unscheduled products are prohibited except for marketing and transport export subsidies.

¹⁵⁸ Article 4.7 of the SCM Agreement is a special rule superseding the general rule established in Article 19.1 of the DSU. See, Appellate Body Report, *EC – Export Subsidies on Sugar*, above n 38, paras 329-335. This explains why panels are not allowed to exercise judicial economy on claims under Article 3 SCM Agreement in case the measure in question is already found inconsistent with another WTO Agreement. See, Appellate Body Report, *EC – Export Subsidies on Sugar*, above n 38, para 335.

with the Agreement on Agriculture. Hence, Brazil did not claim that the level of export credit support in *conformity* with the Agreement on Agriculture (i.e. to scheduled products below Member's commitment level) was also inconsistent with Article 3.1(a) SCM Agreement.

The relationship between the Agreement on Agriculture and Article 3.1 SCM Agreement is governed by the introductory phrase of Article 3.1 SCM Agreement and Article 21.1 Agreement on Agriculture. First, the reference in Article 3.1 SCM Agreement stipulating that it applies '(e)xcept as provided in the Agreement on Agriculture' implies, according to the Appellate Body that the Agreement on Agriculture prevails over Article 3 SCM Agreement 'but only to the extent that the former contains an *exception*'.¹⁵⁹ Second, Article 21.1 Agreement on Agriculture, which 'deals more broadly',¹⁶⁰ with the interaction with the other agreements on trade in goods, stipulates that these other agreements 'shall apply subject to the provisions' of the Agreement on Agriculture. According to the panel in *US – Upland Cotton*, this means that the Agreement on Agriculture takes precedence 'in the event, and to the extent, of any *conflict*'.¹⁶¹ In particular, the Panel distinguished three situations of such a conflict: (i) *an explicit carve-out or exemption* from the disciplines in the SCM Agreement existed in the text of the Agreement on Agriculture; (ii) it would be *impossible* for a Member to *comply* with its obligations under the Agreement on Agriculture and the SCM Agreement *simultaneously*; (iii) there is *an explicit authorization* in the text of the Agreement on Agriculture that would authorize a measure that, in the absence of such an express authorization, would be prohibited by the SCM Agreement.¹⁶² Although explicitly agreeing with these examples, the Appellate Body concluded that also other situations could be covered by Article 21.1 Agreement on Agriculture given that this provision should be interpreted more broadly as excluding other agreements in case the Agreement on Agriculture 'contains specific provisions dealing *specifically with the same matter*'.¹⁶³

Applying first these provisions to the question on the applicability of the prohibition of import substitution subsidies, the Appellate Body agreed with the Panel's conclusion that this prohibition is applicable to agricultural subsidies because there is no provision in the Agreement on Agriculture that 'deal(s) specifically with the same matter as Article 3.1(b) SCM Agreement, that is, subsidies contingent upon the use of domestic over imported goods'.¹⁶⁴ Second, concerning the claim of the applicability of the prohibition on export subsidies (3.1(a)) to agricultural export credit support, the panel in *US – Upland Cotton* found that agricultural export subsidies *inconsistent* with the Agreement on Agriculture are not exempted from the applicability of Article 3.1(a) SCM Agreement by virtue of its opening clause.¹⁶⁵ Even though the Appellate Body agreed with this conclusion, a consistent application of its own broad reading of Article 21.1 Agreement on Agriculture would have foreclosed the applicability Article 3.1(a) SCM Agreement.¹⁶⁶ Indeed, the Agreement

¹⁵⁹ Appellate Body Report, *US – Upland Cotton*, above n 34, para 530.

¹⁶⁰ Appellate Body Report, *US – Upland Cotton*, above n 34, para 531.

¹⁶¹ Panel Report, *US – Upland Cotton*, above n 33, para 7.1036 (emphasis added).

¹⁶² The Panel formulated these as examples (para 7.1038) but nevertheless seemed to consider it as an exhaustive list (para 7.1039).

¹⁶³ Appellate Body Report, *US – Upland Cotton*, above n 34, para 532.

¹⁶⁴ Appellate Body Report, *US – Upland Cotton*, above n 34, para 546.

¹⁶⁵ Panel Report, *US – Upland Cotton*, above n 33, para 7.947.

¹⁶⁶ According to the Appellate Body in *US – Sugar*, one of the 'complex issues' of an additional analysis of agricultural export subsidies under Article 3 of the SCM Agreement is 'whether the Agreement on Agriculture contains "specific provisions dealing specifically with the same matter"'. Appellate Body Report, *EC – Export Subsidies on Sugar*, above n 38, para 339 and footnote 537.

on Agriculture does have provisions 'dealing specifically with the same matter', namely those elaborated above dealing with export subsidies (and even export credit support in particular). Hence, the Panel's more limited reading of Article 21.1, which would exempt only conflicting provisions, seems more in line with the Appellate Body's agreement in the same case that agricultural export subsidies inconsistent with the Agreement on Agriculture could indeed subsequently be scrutinized under Article 3 SCM Agreement.¹⁶⁷

Applying directly the same 'export subsidy' standard upon which it had indirectly relied under the Agreement on Agriculture (i.e. item (j))¹⁶⁸, the Panel thus concluded – and the Appellate Body agreed – that *to the extent* that the United States' export credit guarantees were inconsistent with the Agreement on Agriculture, they were also inconsistent with Article 3.1(a) SCM Agreement. Nonetheless, its conclusions and recommendations seemed to be formulated more broadly because the Panel in respect of unscheduled products supported under the programme and 'in respect of one scheduled product (rice)' concluded that the export credit guarantees 'constitute per se export subsidies prohibited by Articles 3.1(a) and 3.2 SCM Agreement' which the United States has to withdraw without delay.¹⁶⁹ Hence, was the United States also required, by virtue of the application of the SCM Agreement, to withdraw export credit guarantees to the scheduled product (rice) below the level of reduction commitments and thus in conformity with the Agreement on Agriculture? The Appellate Body in *US – Sugar* seemed to have revealed this ambiguity when raising the questions 'whether the SCM Agreement applies to the subsidy as a whole, or whether it applies to the subsidy only to the extent that the subsidy exceeds the responding Members' commitment levels as specified in its Schedule' and 'whether, in the event the SCM Agreement applies, a panel could make a recommendation to withdraw the subsidy in whole, or whether that recommendation would apply to the subsidy only to the extent that it exceeds the responding Member's commitment levels'. Parallel to the original panel, the Panel in the *US – Upland Cotton* compliance procedure decided that 'there is no question' that, to the extent export credit guarantees were still inconsistent with the Agreement on Agriculture, they were subject to (and inconsistent with) the export subsidy prohibition of Article 3.1 SCM Agreement.¹⁷⁰ Apparently taking into consideration the issues raised by the Appellate Body in *US – Sugar*, the Panel specified in its conclusion that 'the United States also acts inconsistently with Articles 3.1(a) and 3.2 SCM Agreement by providing export subsidies to unscheduled products and by providing export subsidies to scheduled products *in excess of the commitments of the United States under the Agreement on Agriculture*.'¹⁷¹ Hence, the panel applied the SCM Agreement to the subsidy merely to the extent that it exceeded the United States' commitment levels and, by logical consequence, also explicitly confined its conclusions under the SCM Agreement to the part of the subsidy inconsistent with the Agreement on Agriculture. The United States therefore had to withdraw the subsidy only to the extent that it was inconsistent with the Agreement on Agriculture (i.e. exceeds its commitment levels).

¹⁶⁷ Appellate Body Report, *US – Upland Cotton*, above n 34, paras 583-584 (footnote 858), 629-630, 674, 732.

¹⁶⁸ Recall that the 'export subsidy' definition might be different under both agreements. So, not all export subsidies under the Agreement on Agriculture are *ipso facto* 'export subsidies' under the SCM Agreement.

¹⁶⁹ Panel Report, *US – Upland Cotton*, above n 33, para 8.2(d)(i) and 8.3(b).

¹⁷⁰ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, para 14.154.

¹⁷¹ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, para 15.1(c) (emphasis added).

Nonetheless, the compliance Panel explicitly left open the question whether, now that the peace clause has lapsed, ‘there may be a violation of Articles 3.1(a) and 3.2 SCM Agreement in respect of *all* exports (i.e. even those that conform to the disciplines of the Agreement on Agriculture)’.¹⁷² Answering this question affirmatively, as the Cairns group suggested¹⁷³, would mean that agricultural export subsidies not exceeding a Member’s commitments under the Agreement on Agriculture¹⁷⁴ and thus in conformity with the Agreement on Agriculture would nonetheless be prohibited by virtue Article 3.1 SCM Agreement.¹⁷⁵ The pivotal issue is whether the introductory phrase of Article 3.1 SCM Agreement and/or Article 21.1 Agreement on Agriculture shields such agricultural export subsidies from the applicability of Article 3.1 SCM Agreement even after the *explicit exception* stipulated in the peace clause has lapsed.¹⁷⁶ Although the case law did not offer a decisive answer as of yet, there are indications that they would still exempt such agricultural export subsidies from the prohibition of Article 3 SCM Agreement. First, even though dating from before the expiration of the peace clause, the Appellate Body in *Canada – Milk/Dairy Article 21.5* concluded that the WTO consistency of an export subsidy should be examined, in the first place, under the Agreement on Agriculture and, importantly, it based this conclusion on the introductory phrase of Article 3.1 SCM Agreement, which was merely ‘*borne out*’, in other words, confirmed/supported by – and not dependent on – the peace clause.¹⁷⁷ Second, the Panel in *US – Upland Cotton* observed that the quantitative limits imposed by the export subsidy disciplines of the Agreement on Agriculture ‘may be considered less stringent than the outright prohibition on export subsidies found in Article 3.1(a) of the SCM Agreement. However, these less stringent obligations are *explicitly spelled out in the text of the Agreement*, with further *guidance* provided in Articles 13 and 21 of the Agreement.’¹⁷⁸ The indication that the text of the Agreement on Agriculture ‘explicitly spells out’ more flexible rules seems to fit surprisingly well with the same Panel’s interpretation that, by virtue of Article 21.1, the Agreement on Agriculture would prevail in a situation where ‘there is *an explicit authorization* in the text of the Agreement on Agriculture that would authorize a measure that, in the absence of such an express authorization, would be prohibited by the SCM Agreement.’^{179 180}

Yet, exempting agricultural export subsidies in conformity with the Agreement on Agriculture from the export subsidy prohibition under Article 3.1 should not imply that they are also exempted from the applicability of the actionable subsidy provisions of the SCM Agreement (Part III of the SCM Agreement). Indeed, several arguments can be advanced that such agricultural export subsidies should be challengeable if

¹⁷² Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, footnote 785.

¹⁷³ See *Cairns Group Negotiating Proposal - Export Competition* (G/AG/NG/W/11, 16 June 2000). See also, McNiel, above n 133, at 72.

¹⁷⁴ This could relate to listed or non-listed export subsidies within Members’ reduction commitments or, in case of developing countries, to marketing and transport export subsidies.

¹⁷⁵ Of course, only insofar these are also export subsidies within the meaning of the SCM Agreement.

¹⁷⁶ Article 13(c)(ii) Agreement on Agriculture.

¹⁷⁷ Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, above n 35, paras 123–124.

¹⁷⁸ Panel Report, *US – Upland Cotton*, above n 33, para 7.1073 and footnote 1216 (emphasis added). Again, Article 13 Agreement on Agriculture is only considered further ‘guidance’.

¹⁷⁹ Panel Report, *US – Upland Cotton*, above n 33, para 7.1038. Although the Panel did not indicate which provision(s) it exactly had in mind, a prime candidate may be Article 8 Agreement on Agriculture, which stipulates that Members undertake ‘not to provide export subsidies *otherwise than in conformity with*’ the Agreement on Agriculture. This provision indeed seems to serve as such an ‘explicit authorization’ for agricultural export subsidies under Article 21.1 Agreement on Agriculture and an (implicit) ‘exception’ under the introductory clause of Article 3.1 SCM Agreement

¹⁸⁰ The argument that the broad formulation in the introductory phrase of Article 3.1 does not exclusively refer to the peace clause also finds contextual support in Article 5 of the SCM Agreement as this provision’s reference is explicitly confined to the peace clause (see below n 181).

causing adverse affects to other WTO Members. First, agricultural domestic subsidies are challengeable under Part III of the SCM Agreement.¹⁸¹ Exempting, at the same time, agricultural export subsidies from such potential scrutiny contradicts the central approach taken in the GATT/WTO in disciplining export subsidies more stringently than domestic subsidies because of their greater direct trade distorting effect. Second, while considering agricultural export subsidies under certain circumstances consistent with the Agreement on Agriculture (e.g. if fulfilling export subsidy commitments) while, at the same, scrutinizing their trade effects under the 'actionable' subsidy category, is parallel to the treatment of certain non-agricultural export subsidies that are not prohibited by virtue of the Illustrative List.¹⁸² Third, Article 21.1 Agreement on Agriculture could even in its broad reading offered by the Appellate Body not shield agricultural export subsidies from an actionable subsidy claim as no provision in the Agreement on Agriculture 'deals specifically with the same matter', namely with the (demonstration of) adverse effects of subsidies to other Members. In fact, there is *no conflict* between considering certain (non-)agricultural members as not prohibited on its face though mandating, at the same time, that their adverse effects, if demonstrated, should be taken away. The export subsidy commitment provisions under the Agreement on Agriculture can thus perfectly be applied alongside the actionable subsidy provisions of the SCM Agreement.¹⁸³

To summarise, case law has clarified that *subsidized export credit support for unscheduled products and for scheduled products above reduction commitments* are inconsistent with the Agreement on Agriculture and are also prohibited under Article 3.1 SCM Agreement.¹⁸⁴ As a result, they should, to the extent they are inconsistent with the Agreement on Agriculture, be withdrawn without delay pursuant to Article 4.7 SCM Agreement. Only those developing countries benefiting from S&D on the prohibition of Article 3.1(a) are exempted from the additional application of Article 3

¹⁸¹ Contrary to Article 3, Part III of the SCM Agreement explicitly exempts from its scope 'subsidies on agricultural products as provided in Article 13 (peace clause) of the Agreement on Agriculture' and is therefore clearly dependent on the existence of the peace clause. The different type of reference to the Agreement on Agriculture in both clauses should be given meaning. Implicitly, panels and Appellate Body in *US – Upland Cotton* have confirmed that agricultural domestic subsidies are challengeable under Part III of the SCM Agreement. Because the domestic support challenged by Brazil did not meet the conditions of the peace clause (which was still applicable at that time), it was already actionable under Articles 5 and 6 of the SCM Agreement. Moreover, in the compliance procedure (at which time the peace clause had lapsed), the domestic support challenged by Brazil was directly scrutinized under Articles 5 and 6 of the SCM Agreement. See Panel Report, *US – Upland Cotton*, above n 33, para 7.608; Appellate Body Report, *US – Upland Cotton*, above n 34, paras 319 and 394; Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, above n 85, para 10.4.

¹⁸² Indeed, some export subsidies are not prohibited on the basis of an exception spelled out in the Illustrative List (e.g. item(k), para 2) but are still actionable under Article 5 of the SCM Agreement. Even more, the Panel in *Korea – Commercial Vessels* concluded that also prohibited export subsidies could still be challenged under Article 5 SCM Agreement as an actionable subsidy. See, Panel Report, *Korea – Commercial Vessels*, above n 3, para 7.334.

¹⁸³ For the same reasons are agricultural export subsidies also countervailable if the substantive and procedural requirements are met. See also, Richard H. Steinberg and Timothy E. Josling, 'When the Peace Ends: the Vulnerability of EC and US Agricultural Subsidies to WTO Legal Challenge', 6 *Journal of International Economic Law* (2003), 369, at 377–378; Humberto N. Siuves, 'The Expiry of the Peace Clause on Agricultural Export Subsidies – the Outlook Post-Cancun', 31(1) *Legal Issues of Economic Integration* (2004), 25, at 32–34.

¹⁸⁴ An exception should arguably be made for agricultural export credit support that merely is a 'threat of circumvention'. Without textual reference to such a 'threat' in the applicable SCM Agreement provisions and the traditional stricter application of the mandatory/discretionary principle, it is far from evident that such a threat of circumvention would also be inconsistent with the SCM Agreement.

SCM Agreement to such agricultural export subsidies.¹⁸⁵ On the other hand, *subsidized export credit support for scheduled products within reduction commitments* seems not prohibited but nonetheless actionable and countervailable under the SCM Agreement.

3.2.3 *In conclusion: disciplines on agricultural export credit support from the perspective of a level playing field*

The analysis of the current disciplines on agricultural export credit support has shown that WTO Members do not compete on a level playing field, of which two reasons are given. First, only those 25 WTO Members having scheduled agricultural products are allowed to provide export credit support at *subsidized* terms and such is the case only insofar as their total level of export subsidies (listed and non-listed types) does not surpass their reduction commitment levels. In contrast, countries like China or India are not allowed to offer subsidized export credit support as they have not scheduled products.

Second, the operation of the benchmarks for determining whether export credit support is 'subsidized' might have an unequal impact among countries. As the Panel has accurately explained in *Brazil – Aircraft (Article 21.5)*, in case of pure cover support, the financial terms of the export credit are based on the risk of the guarantor government and not of the borrower. Because developing countries have a higher perceived risk than developed countries, a guarantee at similar cost-recovering premium rates would have less impact on the financial terms of the export credit if extended by developing countries. Consequently, item (j) allows developed countries to support export credits at interest rates that would be consistently lower than those supported by developing countries.¹⁸⁶ In contrast, under the benefit-to-the recipient standard (Article 1 SCM Agreement), the fee charged for receiving pure cover should not simply be cost-recovering but must neutralize the advantage of the guarantee/insurance on the financial terms of the export credit extended to foreign importers (or their banks).¹⁸⁷ Contrary to the cost-to-the-government standard, countries thus 'compete on a level playing field' in the respect to the benefit-to-the-recipient standard, 'i.e., a measure which constitutes an export subsidy when provided by [a developing country] *ipso facto* will also constitute a subsidy when provided by [a developed country], and vice versa.'¹⁸⁸ Export credit support at cost-recovering premium rates would still be an 'export subsidy' in the meaning of 10.1 if offered at non-market terms because the definitional elements of an export subsidy under Article 1 *juncto* Article 3 are principally applicable.¹⁸⁹ Hence, in theory, developing as well as developed countries thus compete on equal footing in this respect. In practice, however, the mandatory/discretionary distinction – to the extent

¹⁸⁵ After all, LDCs and low-income countries listed in para (b) of Annex VII of the SCM Agreement are exempted from the prohibition on export subsidies (Article 27.2 SCM Agreement). As these countries do not have scheduled agricultural products, any subsidized agricultural export support is inconsistent with the Agreement on Agriculture but not subject to the stricter implementation standard of the SCM Agreement. As such support is already inconsistent with the Agreement on Agriculture without having to prove its adverse trade effects, the potential additional claim that they are actionable pursuant to Article 27.8 and 27.9 of the SCM Agreement seems not relevant in practice.

¹⁸⁶ WTO Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU (Brazil – Aircraft (Article 21.5 – Canada))*, WT/DS46/RW, adopted 4 August 2000, para 6.59.

¹⁸⁷ Alternatively, it is assessed whether the fee charged is lower than the market fee for a similar guarantee/insurance.

¹⁸⁸ Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, above n 186, para 6.60.

¹⁸⁹ This disadvantage imposed on developing countries was one of the reasons why panels have systematically rejected that item (j) could be used *a contrario* (see above n 127).

it is still relevant¹⁹⁰ -might make it more difficult to challenge an export credit support programme on the basis of the benefit-to-the-recipient standard (Article 1 *juncto* Article 3) than a similar challenge on the basis of item (j). Above, the Appellate Body agreed that panels could exercise judicial economy on a claim under Article 1 *juncto* 3 SCM Agreement if a violation of item (j) has been found.¹⁹¹ The disadvantage for developing countries inherent in the cost-to-the-government standard is thus not entirely neutralized.

3.3. FUTURE DISCIPLINES ON EXPORT CREDIT SUPPORT FOR AGRICULTURAL PRODUCTS

3.3.1. *Negotiations on agricultural export credit support in the Doha Round*

When negotiations on the reform process mandated under Article 20 Agreement on Agriculture were picked up in early 2000, negotiations on disciplining export credit support were underway among OECD Participants within the OECD, with mainly the United States on the defensive side. But non-OECD Participants such as Argentina, Brazil and India claimed that the WTO was the appropriate forum to negotiate and conclude such disciplines as this would enable participation of all stakeholders.¹⁹² Other Cairns group members such as Canada and Australia also called to shift negotiations to the WTO. The EC, for its part, was rather neutral on the exact forum of negotiations but stressed the need for a more 'level playing field in export competition' in the WTO as 'direct' subsidies (listed in Article 9) were subject to reduction commitment, whereas export credit support was, in the EC's view, not subject to any specific discipline as the Article 10.2 mandate had not yet materialised.¹⁹³ Although the United States first emphasized that the OECD was the appropriate forum to tackle this issue, it finally realized that it could use any concession in this field to obtain reciprocal concessions of trading partners if the subject was transferred to the WTO negotiations.¹⁹⁴ As a result, negotiations in the OECD broke down¹⁹⁵ and were taken up in the WTO negotiations under the reform

¹⁹⁰ See above n 118.

¹⁹¹ This would not be a disadvantage in case implementation not only mandates that item (j) is respected but also that Article 1 *juncto* 3 of the SCM Agreement would be met. As explained above, this question is not yet settled.

¹⁹² Proposal by Mercosur (Argentina, Brazil, Paraguay and Uruguay), Bolivia, Chile, Costa Rica, Guatemala, India and Malaysia, *Export Credits for Agricultural Products* (G/AG/NG/W/139, G/AG/W/50, 21 March 2001).

¹⁹³ See, European Communities Proposal, *Export Competition* (15 September 2000), paras 5-6; Note by the European Communities, *Export Credits* (Brussels, 20 July 2001), paras 1-2; ICTSD, 'Agriculture Negotiations at the WTO: Context Setting and Intelligence Report - February-April 2001' (Geneva, May 2001), at 5 and 16.

¹⁹⁴ Submission from the United States, *Proposal for Comprehensive Long-Term Agricultural Trade Reform* (G/AG/NG/W/15, 23 June 2000), at 4.

¹⁹⁵ The latest draft text circulated in the OECD: *Chairman's Revised Proposal for a Sector Understanding on Export Credits for Agricultural Products, 14-15 November 2000* (TD/CONSENSUS(2000)25/REV4, 9 July 2002). This draft text articulated a general repayment of 180 days but inscribed an exception for cereals, oilseeds and cotton with repayment up to 18 months (Section D.2). However, Canada and the United States failed to overcome their disagreement on this text before a mid-May 2001 ministerial OECD meeting, marking the end of the OECD negotiations. While the United States signaled that it would have accepted these repayment terms, Canada was only willing to offer 12 months as maximum repayment term for the three products mentioned. On the other hand, Canada was unwilling to accept the United States' request to make export credit support offered by state-trading enterprises subject to these disciplines (Section C.iii). Before these talks with Canada, the Bush administration also came under pressure from Democratic members of Congress not to agree with new disciplines in the OECD as the likelihood of reciprocity would be greater if the topic was integrated in the WTO negotiations. ICTSD, above n 193, at 5 and 24-25; 'U.S. - Canada Fight Prevents Agriculture Export Credit Deal', 19(16) *Inside US Trade* (20 April 2001).

process and subsequently became part of the Doha Round negotiations, which aimed at ‘the reductions of, with a view to phasing out, all forms of export subsidies.’¹⁹⁶

From the outset, the strengthening of disciplines on export credit support was a ‘widely shared objective’ among WTO Members.¹⁹⁷ The United States also accepted that this topic was ‘on the table’ but advocated flexibility¹⁹⁸ and would use any concession in this field to push for stricter reduction commitments on direct subsidies.¹⁹⁹ The United States also emphasized that all forms of export credit support, including those offered by state trading enterprises (e.g. Canadian Wheat Board), should be covered and therefore called for increased transparency on all different forms of export credit support.²⁰⁰ Conversely, the EC endorsed the principle of ‘full parallelism’, indicating that it would only agree on further reductions of direct subsidies (listed in Article 9) if export credit support (and other indirect subsidies such as food aid and state trading enterprises) would be similarly tackled.²⁰¹ The Cairns group also pushed for stringent rules on export credit support but their proposals leave out export credit support offered by state trading enterprises (STEs).²⁰² Furthermore, several developing countries also claimed that new disciplines on export credit support (and STEs) should give adequate special and differential treatment to their support.²⁰³ Mindful of the Asian financial crisis, some Asian countries²⁰⁴, together with the United States and Cuba, also advocated that subsidized export credit support could be legitimate in case of currency reserve crises.²⁰⁵ Lastly, African countries endorsed the need for stricter disciplines but also emphasized that the needs of net-food importing countries and LDCs should be recognized in this process as would-be recipients hurt by increasingly stringent disciplines imposed on users of such support.²⁰⁶ Crafting appropriate S&D for these

¹⁹⁶ *Doha Ministerial Declaration*, adopted on 14 November 2001 (WT/MIN(01)/DEC/1, 20 November 2001), para 13.

¹⁹⁷ *Negotiations on Agriculture – Overview (Chairperson’s overview paper)* (TN/AG/6, 18 December 2002), para 33.

¹⁹⁸ It is reported that the United States considered the WTO negotiations as a ‘totally new ballgame’ and thus rejected that the latest OECD draft would be used as a starting point for the discussion in the WTO. ‘U.S. Proposal on Export Credits Likely to Mirror Industry Position’, *Inside US Trade* (31 May 2002).

¹⁹⁹ ‘US Says Farm Export Credits “on the table” at the WTO’, *Wall Street Journal* (12 November 2001).

²⁰⁰ This call by U.S. negotiators was inspired by a paper from its agro-industry, which referred to various forms of export credit support offered by Australia, Canada, France, China and India and also emphasized that, in light of Article 10.2 Agreement on Agriculture, export credit support should not be disciplined similarly as direct export subsidies. Both arguments were picked up by U.S. negotiators. ‘WTO Members Split over Approach for Export Credit Disciplines’, *Inside US Trade* (7 June 2002).

²⁰¹ The G-10, a group of countries with high levels of subsidies, was in favour of phasing out all export subsidies but also made it conditional on the principle of full parallelism. ICTSD, ‘UNCTAD XI: Key Members Report Growing Consensus on Main Farm Trade Issues’, 8(21) *Bridges Weekly Trade News Digest* (16 June 2004), at 1-2.

²⁰² Of course, this is not an accident as some its main Members have STEs in place (e.g. Canada, Australia and New Zealand). See, for example, *Cairns group proposal on export credits, export credit guarantees or insurance programmes* (JOB(07)/69, 22 May 2007), at 2-3 (compare with the scope of the latest draft discussed below).

²⁰³ See, for example, *Special and differential treatment for developing countries in world agriculture trade, submission by ASEAN* (G/AG/NG/W/55, 10 November 2000), at 2; See also ICTSD, ‘Tariff Conversion Main Sticking Point of Agriculture Week’, 9(5) *Bridges Weekly Trade News Digest* (16 February 2005).

²⁰⁴ Korea, Japan and Malaysia.

²⁰⁵ ICTSD, ‘Agriculture Negotiations at the WTO – ‘Modalities’ Phase Update Report’ (Geneva, September 2002), at 14-15.

²⁰⁶ *WTO African Group: Joint Proposal on the Negotiations on Agriculture* (G/AG/NG/W/142, 23 March 2001), para 16.

countries in future disciplines on export credit support was even explicitly mandated by a Ministerial decision adopted at the end of the Uruguay Round (NFIDC Decision).²⁰⁷ Although all WTO Members thus endorsed this concern, several developed countries (e.g. EC, Australia and New Zealand) as well as some large developing countries (e.g. Brazil, Argentina) warned that this should not open a large loophole. The EC in particular argued that such a loophole would have the perverse effect of increasing the debt burden of these countries.²⁰⁸ Broadly speaking, these negotiation positions and arguments explain the dynamism of the drafting process until present.

Two different approaches were suggested on how such export credit support had to be disciplined during the first substantive discussions in mid 2002.²⁰⁹ On the one hand, the Cairns group (sided by the United States and several developing countries such as India) proposed a 'rules-based' approach by which commercial terms of all different aspects of such support (i.e. duration, minimum interest rates and premium rates) would be specified. Export credit support not fulfilling these conditions would be considered 'export subsidies' and made subject to specific reduction commitments or, alternatively, simply be prohibited.²¹⁰ On the other hand, the EC (sided by Norway and Japan) proposed a 'reduction commitment' approach by which the subsidy component of export credit support would be calculated and be brought under the reduction commitments for direct export subsidies.²¹¹ But the United States objected that calculating the subsidy component was very difficult in practice and that this approach was already unsuccessfully explored in the OECD negotiations.²¹²

Already in the first draft modalities paper of 2003 (Harbinson Text), the choice for the rules-based approach was reflected by spelling out detailed conditions for export credit support and making non-conforming support subject to 'specific financing reduction commitments'.²¹³ In the July Framework Agreement of 2004, the EC finally

²⁰⁷ *Ministerial Decision on Measures Concerning the Possible Negative Effects of the Reform Programme for Least-Developing and Net Food-Importing Developing Countries (NFIDC Decision)*, para 4. See also Article 16 Agreement on Agriculture.

²⁰⁸ See, for example, ICTSD, 'WTO Agriculture Negotiations Progress on Technical Issues', 8(40) Bridges Weekly Trade News Digest (24 November 2004).

²⁰⁹ See ICTSD, above n 205, at 14-15.

²¹⁰ ICTSD, 'Agriculture: Little Progress in Export Competition Debate', 6(24) Bridges Weekly Trade News Digest (26 June 2002), at 3.

²¹¹ The EC thus seemed to have changed minds as it previously pleaded for a rules-based approach in the OECD negotiations but exact reasons for this shift are unclear. Aggarwal reveals that the EC considered a rules-based approach less transparent than the reduction commitment approach in place for direct subsidies, as the former could only be monitored and challenged through a costly and time-consuming dispute settlement system in which the export subsidy element had to be demonstrated. But it is highly questionable whether this transparency argument effectively makes sense given that the rules based approach seems at least as transparent. It was also reported that the EC aimed at diverting the attention away from eliminating towards reducing direct subsidies. Indeed, the 'reduction commitment' approach reflected more the EC's plea for 'full parallelism' as it implied that direct subsidies and subsidized export credits were disciplined identically. Another suggested argument was that the EC defended this approach because some of its countries had extensive export credit support programs in place. Rajesh Aggarwal, 'Dynamics of Agriculture Negotiations in the World Trade Organization', 39(4) *Journal of World Trade* (2005), 741, at 754; 'WTO Members Split over Approach for Export Credit Disciplines', *Inside US Trade* (June 7, 2002).

²¹² 'WTO Members Split over Approach for Export Credit Disciplines', *Inside US Trade* (June 7, 2002).

²¹³ Negotiations on Agriculture, *First Draft of Modalities for Further Commitments – Revision* (18 March 2003, TN/AG/W/1/Rev.1), para 36 and attachment 5. See also *Chairperson's overview paper*, above n 197, paras 33-34 and at 48-57.

agreed upon the elimination of all export subsidies by a certain end date.²¹⁴ Incorporating the principle of 'parallelism', the agreement included the elimination of (i) scheduled export subsidies as well as (ii) export credit support with repayment terms of beyond 180 days and (iii) export credit support below 180 days not fulfilling specific disciplines on, *inter alia*, minimum interest and premium rates.²¹⁵ These commitments were in December 2004 incorporated in a new text on export credit support which closely resembled the Harbinson Text.²¹⁶ Although WTO Members failed to finalize the Doha Round, the EC finally agreed in Hong Kong to fix a date for the elimination of export subsidies and all other export measures with equivalent effect.²¹⁷ The 2013 end date would, however, only be confirmed once the modalities on export credit support, STEs and food aid would be completed.

For the negotiations of these modalities in April 2006, Chairman Falconer suggested to work further along the same lines.²¹⁸ Falconer's Reference Paper therefore implemented the rules-based approach, whereby specific disciplines were elaborated which had to ensure that there was no inherent export subsidy element in export credit support programmes. Indeed, the idea was that conforming export credit support would not be considered as 'export subsidies' either for the purpose of the Agreement on Agriculture or any other WTO Agreement. Non-conforming export credit support, on the other hand, would be subject to specific export financing phasing-out commitments. Although no specific S&D language was already inscribed, Falconer also noted that negotiators needed to remain mindful of the entitlement of developing countries to benefit from longer implementation periods for phasing out all forms of export subsidies and emphasized that this entitlement of developing countries, 'as actual or potential users of export credits', had to be kept in mind.²¹⁹ While some general specific questions still had to be solved, the general rules-based approach of Falconer's Reference Paper was no longer considered under dispute. It came thus as a surprise that the EC in reaction to this Reference Paper proposed a 'very different approach', which would only focus on core disciplines (e.g. repayments terms, premiums and self-financing) and return to a reduction commitment approach.²²⁰ Whereas the subsequent Draft Possible

²¹⁴ Previously, the EC was only willing to eliminate export subsidies on a series of products. See ICTSD, 'Agriculture Negotiations at the WTO 'Framework Phase' Update Report', Quarterly Intelligence Report No. 11 (March 2004), at 5.

²¹⁵ *The Doha Work Programme - Decision Adopted by the General Council on 1 August 2004* (WT/L/579, 2 August 2004), paras 18-21, 24 and 26. Putting pressure on the EC, the United States, contrary to its position in the beginning of the Round (see above n 200), had repeatedly confirmed that, in case the EC agreed to eliminate direct subsidies and if state trading enterprises would effectively be disciplined, it would agree with the elimination of the subsidy element of export credit support and stricter disciplines on food aid. The United States' acceptance of the principle of parallelism was already reflected in the *US – EC Joint Text* of August 2003 and spelled out in the *Preparations for the Fifth Session of the Ministerial Conference Draft Cancún Ministerial Text - Second Revision* (JOB(03)/150/Rev.2, 13 September 2003), para 3.

²¹⁶ See ICTSD, 'WTO Agriculture Negotiations Progress on Technical Issues', 8(40) Bridges Weekly Trade News Digest (24 November 2004).

²¹⁷ WTO Members further agreed that export credit support up to 180 days 'should be self-financing, reflecting market consistency, and that the period should be of a sufficiently short duration so as not to effectively circumvent real commercially-oriented discipline.' *Hong Kong Ministerial Declaration*, adopted on 18 December 2005 (WT/MIN(05)/DEC, 22 December 2005), para 6.

²¹⁸ Chair's Reference Paper, *Export Credits, Export Credit Guarantees or Insurance Programmes* (13 April 2006).

²¹⁹ This entitlement in paragraph 22 of the *July Framework Agreement* makes clear that developing countries will benefit from longer implementation periods for 'phasing out all forms of export subsidies.'

²²⁰ This is documented in the *Chair's Reference Paper, Rev.1, Export Credits, Export Credit Guarantees or Insurance Programmes* (10 May 2006). The EC considered that the rules-based approach would not ensure full parallelism and involve technical complicity which would be difficult to monitor.

Modalities on Agriculture (July 2006)²²¹ still adhered to the rules-based approach, negotiations ultimately changed track along the lines suggested by the EC. This approach is reflected in the latest negotiation text, which is more extensively discussed below.²²²

Seemingly not the EC's main motivation behind its proposal, a plausible explanation why the change of track was accepted might be found in the Appellate Body's *US – Upland Cotton* ruling dating from mid 2005. Apparently, Falconer's Reference Text, incorporating years of negotiations along the lines of the rules-based approach, did not grasp the wider implications of the panel's and Appellate Body's *US – Upland Cotton* ruling. Under Falconer's Reference Text, export credit support conforming to the specific disciplines (e.g. being self-financing) would not be considered an 'export subsidy' for the purpose of any WTO Agreement and thus not be prohibited. On the other hand, non-conforming export credit support would, until the date of elimination, also not be prohibited as long as it fulfilled specific reduction commitments. All WTO Members would thus be allowed to schedule such specific reduction commitments at the end of the Doha Round. However, the Appellate Body had already confirmed that under the existing rules non self-financing export credit support programmes (in the meaning of item (j)) for non-scheduled products are prohibited as *such* and for scheduled products are only allowed within existing reduction commitments. Members having no scheduled products simply cannot offer subsidized export credit support. Moreover, even if export credit support programmes would be self-financing under the current rules, they could still be considered 'export subsidies' if conferring a benefit to the exporter (Article 1 *juncto* 3 of the SCM Agreement). Inadvertently, WTO Members targeting mainly US export credit support were thus drafting more flexible instead of more stringent rules on export credit support. Somewhat ironically, the principle of parallelism, fiercely defended by the EC during the negotiations as the 'name of the game'²²³, seems to be already largely read into the current rules by the panels and Appellate Body.²²⁴ The shift in approach thus might reflect the awareness among negotiators that subsidized export credit support is, in fact, already indirectly subject to the reduction commitments.²²⁵ At the same time, the fact that countries were unintentionally drafting more flexibility puts further doubt in whether the panel and Appellate Body indeed interpreted the current rules in line with the intention of WTO Members. In the following section, a closer look is taken on how the latest proposal would complement the existing disciplines on agricultural export credit support.

²²¹ *Draft Possible Modalities on Agriculture* (TN/AG/W/3, 12 July 2006), Annex I.

²²² With the important difference that non-conforming export subsidy support is simply prohibited in the latest draft. The proposal on the table in 2007 for the first time reflected the EC's suggested approach. See *Working Document No. 1, Annex D, Possible New Article to Replace the Current Article 10.2 of the Agreement on Agriculture* (6 November 2007). In line with the EC's proposal, it stated that non-conforming export credit support is 'to be eliminated within the binding levels of Members' export subsidies elimination Schedules.'

²²³ These are the words of Pascal Lamy anno 2004 when he was still EC trade commissioner. ICTSD, 'UNCTAD XI: Key Members Report Growing Consensus on Main Farm Trade Issues', 8(21) *Bridges Weekly Trade News Digest* (16 June 2004), at 1-2.

²²⁴ Indeed, the disciplines on direct subsidies and subsidized export credit support are similar. The only difficulty is defining when export credit support is exactly at subsidized terms. The EC seems to hold that the principle of full parallelism is not fulfilled as long as there are no straightforward rules established on when export credit support is considered an 'export subsidy'.

²²⁵ This was already reflected in the *Draft Possible Modalities on Agriculture* (TN/AG/W/3, 12 July 2006), paras 98 and 104 and para 5 of Annex I.

3.3.2. Latest draft on disciplines for agricultural export credit support

The most recent Draft Modalities for Agriculture dates from December 2008 and spells out new disciplines in Annex J, which would replace the current Article 10.2 Agreement on Agriculture.²²⁶

As correctly anticipated by the Appellate Body in *US – Upland Cotton*, the disciplines set out in Annex J further elaborate the export subsidy disciplines that are currently applicable.²²⁷ Indeed, '(i)n addition to complying with all other export subsidy obligations under this Agreement and the other covered Agreements'²²⁸, export credit support should be offered in conformity with Annex J.²²⁹ Annex J therefore cannot be 'construed to imply any change to the obligations and rights under Article 10.1 or to diminish in any way existing obligations under other provisions of the Uruguay Round Agreement on Agriculture or other WTO Agreements.'²³⁰

Export financing support, which is defined broadly²³¹, is disciplined by Annex J if offered by one of the 'export financing entities' established at the national or sub-national level. Parallel to the scope of the SCM Agreement as developed in the case law, it comprises support offered directly by public bodies²³² as well as indirectly through entrustment or direction of a private body.²³³ Above, export credit support is even captured if offered by private financial institutions in which there is some form of government participation even if the government exercises neither control nor direction/entrustment over the private body.²³⁴ This seems to be looser than the government nexus mandated under Article 1.1(a)(1) SCM Agreement and might substantially open the scope of Annex J in light of the various participations taken by governments in response to the current financial crisis. Furthermore, export credit support offered by agricultural STEs is explicitly included on demand mainly by the United States and EC.²³⁵

²²⁶ See *Revised Draft Modalities for Agriculture* (TN/AG/W/4/Rev.4, 6 December 2008), para 165 and Annex J. Previous modalities drafted in 2008 disciplined export credit support similarly.

²²⁷ Appellate Body Report, *US – Upland Cotton*, above n 34, para 611.

²²⁸ Emphasis added. But footnote 1 clarifies that 'the second paragraph of item (k) of Annex I to the Agreement on Subsidies and Countervailing Measures (hereafter the "Illustrative List") shall not be applicable in the case of agricultural products.' This clarification is, certainly at the moment, redundant given that the latest version of the OECD Arrangement to which item (k), para 2 refers does not apply to agricultural products. Indeed, a precondition for export credit support to be in conformity with the OECD Arrangement is that it is subject to its provisions (Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, above n 186, para 6.61). Footnote 1 would explicitly eliminate any (future) aspirations among OECD Participants to modify the disciplines on agricultural export credit support through item (k) paragraph 2.

²²⁹ This is again reiterated with respect to the condition of self-financing.

²³⁰ *Revised Draft Modalities for Agriculture*, above n 226, para 160.

²³¹ Next to direct financing support and pure cover support, two other types are explicitly mentioned: government-to-government credit agreements covering the imports of agricultural products from the creditor country under which some or all of the risk is undertaken by the government of the exporting country; and any other form of governmental export credit support, direct or indirect, including deferred invoicing and foreign exchange risk hedging.

²³² These are controlled by the government. Panel Report, *Korea – Commercial Vessels*, above n 3, 7.50-7.56 and 7.352-7.56.

²³³ Article 2(a),(d) Annex J. Article 1.1(a)(1)(iv) of the SCM Agreement. See also, WTO Appellate Body Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities (US – Countervailing Measures on Certain EC Products)*, WT/DS212/AB/R, adopted 8 January 2003, para 116.

²³⁴ Article 2(b) Annex J.

²³⁵ Article 2(c) Annex J.

Reflecting the new 'core disciplines' approach suggested by the EC, only two types of disciplines are imposed on such export financing support.²³⁶

First, *the maximum repayment term* of such support is uniformly set on 180 days, regardless of the agricultural product supported.²³⁷ Accordingly, the exceptions for cereals, oilseeds and cotton inscribed on the demand of the United States in the latest draft OECD are not upheld.²³⁸ More fundamentally, no exception is also made for breeding livestock and agricultural vegetable reproduction material for which a different repayment term was generally considered more acceptable given the longer lifetime of such non-consumable agricultural products.²³⁹ Only two types of exceptions on the 180 day rule are inscribed, which both relate to developing countries. Firstly, all developing countries are given a four years phase-in period within which to implement the 180 day rule when they *provide* export financing support: during the first two years, maximum repayment terms of 360 days could be offered and during the next two years, the maximum repayment term is lowered to 270 days.²⁴⁰ Secondly, as mandated by the NFIDC Decision and consistent with economic theory²⁴¹, LDCs and net food-importing countries are given longer repayment terms when they make *use* of export credit support but only for the importation of 'basic foodstuffs'.²⁴² A repayment term *shall* be given of between 360 and 540 days and an unspecified 'further extension of such a time frame shall be provided' in case of exceptional circumstances.²⁴³ The 180 days rule is thus even not allowed as repayment term for such export credit support to those countries.

Second, all export financing support programmes except for direct financing support have to be *self-financing*. In particular, such a programme will be considered as not self-financing if premiums rates charged inadequately cover the operating costs and losses of that programme over a previous 4-year rolling period.²⁴⁴ With respect to export credit support offered by developing countries, this rolling period is specified at 6 years. Alternatively, a programme will also be considered not self-financing under Annex J if it fails the unspecified 'long-term operating costs and losses' standard of item (j) of the Illustrative List.

If export credit support does not conform to the maximum repayment terms and/or the self-financing obligation, it is considered inconsistent with Annex J. In contrast to previous drafts, such non-conforming export credit support is not made subject to the reduction commitments for direct export subsidies or made subject to specific reduction commitments, but instead is simply prohibited. By consequence, such

²³⁶ For example, no specific rules on minimum interest rates are inscribed and absent are also provisions relating to transparency requirements.

²³⁷ Already from the beginning of the WTO negotiations, this 180 day rule, which was transposed from the latest draft circulating in the OECD, was widely accepted as an appropriate rule for export credit support offered by developed countries for consumable agricultural goods. The July Framework Agreement already incorporated the 180 days rule.

²³⁸ As mentioned above (n 195), this was one of the stumbling blocks for reaching an agreement within the OECD. The fact that the United States did not really attach to these exceptions in the WTO talks supports the theory that its refusal in the OECD was a tactical move.

²³⁹ Here again, the latest OECD draft offered longer maximum repayment terms for breeding cattle (2 years for contracts up to \$150 000 and 3 years for contracts exceeding \$150 000) and agricultural vegetable reproduction material (1 year).

²⁴⁰ After four years, the normal 180 days rule shall thus apply.

²⁴¹ Although export credit support at subsidized terms could be legitimated from an economic perspective, other options would be superior such as food aid in cash form (i.e. untied) or export credit support offered by international organizations as the importing country would not be bound to import the foodstuff from a particular country.

²⁴² Net-food importing countries are listed in G/AG/5/Rev.8 (22 March 2005).

²⁴³ It should be exceptional circumstances 'which still preclude financing normal levels of commercial imports of basic foodstuffs and/or in accessing loans granted by multilateral and/or regional financial institutions within these timeframes.'

²⁴⁴ This rolling period under the first alternative was much debated with the United States and EC respectively suggesting 15 years and 1 year.

export credit support inconsistent with the Agreement on Agriculture will also be challengeable under Article 3 SCM Agreement.²⁴⁵

How should these substantive conditions imposed under Annex J be appreciated in light of the 'subsidy'-standards (benefit-to-the-recipient and cost-to-the-government) spelled out in the SCM Agreement and in light of the disciplines imposed on other agricultural export subsidies?

First, to what extent does the maximum repayment terms correspond to commercial practice and hence, ensure that these repayment terms are not beneficial to the recipient (and exporter)? Although not necessarily reflecting commercial conditions, the Berne Union General Understanding could offer an initial useful touchstone as it elaborates an understanding among Berne Union Members, which comprises of public as well as private sector providers of export credit and investment insurance, regarding *inter alia* terms of payment.²⁴⁶ The Berne Union General Understanding stipulates that 'it is normally sound underwriting practice for credit terms to be related to the nature of the goods and to be in line with sound conditions normally accepted in the market.'²⁴⁷ Agricultural products are not treated as a separate category but consumable agricultural products would be covered by the category of 'consumable goods'²⁴⁸ for which a maximum term of six months is inscribed. This corresponds with the 180 days rule inscribed in Annex J for export credit support offered by developed countries and would, for example, imply that the United States would have to substantially shorten its maximum repayment terms (up to three years) under its GSM-102 programme. Under 'Sector Agreements', specific repayments are specified for non-consumable agricultural products. For breeding animals, 180 days is the general rule but 2 or even 3 years repayment terms depending on the contract value are allowed for cattle²⁴⁹ and for agricultural vegetable reproduction material, maximum terms are permitted up to 360 days. This flexibility on the 180 days rule for non-consumable agricultural products foreseen in the Berne Union Understanding would, however, not be allowed under Annex J.²⁵⁰ Hence, regardless whether terms beyond the 180 days rule would be offered in commercial practice, export financing entities, including private institutions in which governments have a participation, are mandated to limit export financing support for non-consumable agricultural products up to the 180 days repayment terms. Compared to the six months repayment term, the term developing countries are allowed to offer during a transitional period (360 days and 270 days) as well as the term mandated for such support for the importation of basic foodstuff in LDCs and net food-importing countries (between 360 and 540 days) clearly do not correspond to commercial practice and are thus at 'subsidized terms'.

Second, Annex J specifies a specific previous 4-year rolling period. This is substantially shorter than the long-term period in the meaning of item (j) that was effectively taken into account in the *US – Upland Cotton* case (i.e. 1992-2002 and

²⁴⁵ In order to find a violation of this provision, the existence of an export subsidy in the meaning of Article 1 *juncto* 3 or the Illustrative List (item (j) or (k)) will have to be demonstrated.

²⁴⁶ Berne Union Agreements, Understandings and Obligations in the Export Credit Insurance Field - General Understanding (Berne Union General Understanding) (January 2001). One of the guiding principles of the Berne Union is to 'promote export credit and investment insurance terms that reflect sound business practices.' See also Background Paper by the Secretariat, above 31, paras 19-21, 27,38.

²⁴⁷ Article III of the Berne Union General Understanding. So, it is understandable that for agricultural goods a short maximum term of half a year is spelled out in Annex J, whereas the OECD Arrangement referred to under item k, para 2 of the Illustrative List allows for maximum repayment terms up to 10 years and even only disciplines official support for export credits with repayment terms of minimum two years. After all, agricultural goods are mostly consumable, whereas the OECD Arrangement mainly targets export credit support for capital goods.

²⁴⁸ Article V(b) of the Berne Union General Understanding.

²⁴⁹ See above n 239.

²⁵⁰ Except for developing countries during the implementation phase.

1992-2006)²⁵¹ on which basis the United States also defined a long-term period as a 'period of ten years or more' in its 2008 Farm Bill. Yet, under Annex J, the programme should be self-financing over a strict previous 4-years period even if atypical experiences have occurred. Obviously, the shorter the self-financing term, the more difficult it is to compensate losses during one period of time with profits during another period of time. Furthermore, a well-defined short self-financing term also facilitates monitoring and challenging an export credit programme and seems sensible as the focus should be on the *actual* operation of the export credit programme.²⁵² To be sure, Members are still allowed to rely on the unspecified 'long-term' period of item (j) to demonstrate that a programme is not self-financing under Annex J. In this way, quantitative evidence related to future projections and non-quantitative evidence are still relevant. By inscribing self-financing as one of its core obligations, Annex J however incorporates a cost-to-the-government standard, which is inherently disadvantageous for developing countries.²⁵³ This disadvantage seems only partly counterbalanced by a longer self-financing period for developing countries.²⁵⁴

Third, non-conforming support is inconsistent with Annex J and thus not made subject to the reduction commitments for direct subsidies or to specific reduction commitments, whereas direct export subsidies are allowed insofar reduction commitments are respected until the final elimination date. Hence, the current draft goes beyond the principle of 'full parallelism'.

Generally speaking, Annex J disciplines are more stringent than those actually imposed under Article 10.1 Agreement on Agriculture. But export credit support fulfilling those aspects of Annex J that are less demanding could still be challenged on the basis of Article 10.1 because Annex J disciplines are formulated as additional. For example, Annex J conforming export credit support could still be challenged as conferring a benefit-to-the recipient in the meaning of Article 1 SCM Agreement. Such export credit support violates the Agreement on Agriculture and the SCM Agreement if offered to unscheduled products and to scheduled products above reduction commitment levels. This raises the question as to the value of the flexibility explicitly offered under Annex J. Developing countries are allowed to offer repayment terms at non-commercial - and thus subsidized - terms during a transitional period. As these countries often do not have scheduled products, such 'export subsidies' in the meaning of Article 1 *juncto* 3 SCM Agreement would nonetheless be inconsistent with Article 10.1 of the Agreement on Agriculture and Article 3 SCM Agreement. Of parallel note, all countries are *required* to offer longer repayment terms to net-food importing countries and LDCs for their importation of basic foodstuffs. Hence, an export credit programme tailored to these countries

²⁵¹ Generally speaking, the long term period referred to in item (j) should, according to the Panel in *US – Upland Cotton*, be of 'sufficient long duration (...) which avoids attributing overdue significance to any unique or atypical experiences on a (...) specific time period.' Panel Report, *US – Upland Cotton*, above n 33, para 7.832.

²⁵² Because repayment terms are maximum 180 days, the adequacy of the charged premiums could also be meaningfully assessed over a relatively short period of time.

²⁵³ Theoretically, this disadvantage would be neutralized in case disciplines on minimum *interest* rates would be established with respect to export credits benefiting from pure cover. Disciplines on minimum interest rates were inscribed in previous drafts but only for official *financing* support and not for export credits benefiting from *pure cover*. Noteworthy, under the OECD Arrangement no minimum interest rates are inscribed for pure cover support either, which explains why the safe haven of item (k), para 2 is not available for pure cover support at the moment.

²⁵⁴ As under the current regime, the disadvantage is also partly tempered by the benefit-to-the-recipient standard, which is still available for an assessment under Article 10.1. Recall that Article 10.1 only outlaws such subsidized pure cover support above reduction commitment levels, while Annex J outlaws non self-financing pure cover support *as such*. Above, the long-term period spelled out in item (j) is also inscribed in Annex J and makes no distinction between developed and developing countries.

would even mandate export credit support at subsidized terms and thus be vulnerable to an 'as such' claim. Again, such export credit support is thus at subsidized terms and violates Article 10.1 Agreement on Agriculture if offered above commitment levels.

4. CONCLUDING REMARKS

One of the arguments articulated by the United States before the Panel in *US – Upland Cotton* was that Brazil's interpretation would imply that export credit guarantees would be subject to more disciplines than any other practice in the Agreement on Agriculture as it would not only be subject to the disciplines on export subsidy disciplines but also to additional disciplines developed under Article 10.2.²⁵⁵ However, Brazil firmly rejected this statement because subsidized export credits are only subject to export subsidy disciplines if they lead to circumvention and it was far from clear that future disciplines would be 'additional', as they could equally well 'replace' current disciplines.²⁵⁶

The United States' argument turned out, however, to be accurate. The case law read subsidized export credit support into the scope of Article 10.1 and interpreted the anti-circumvention requirement in a way that made such support indirectly subject to commitments for listed types of subsidies. Even more, subsidized export credit support is scrutinized more severely than listed types of export subsidies as a 'threat' of circumvention suffices. This means that subsidized export credit support could simply not be offered by those Members having no listed types of export subsidies (e.g. India, China), while other Members, mostly developed countries, could offer it up to their reduction commitment levels. This 'inverse' S&D-treatment is further reinforced by the cost-to-government standard, which might not be fully neutralized by the potential application of the benefit-to-recipient standard.

Apparently, negotiators were also somewhat surprised by the interpretation offered in *US – Upland Cotton* as they were unintentionally drafting greater flexible rules instead of more rigid ones during the course of several years. But the latest negotiation text shows that they are now on track for drafting additional rules. Export credit support not fulfilling the core disciplines on maximum repayment terms and self-financing would be outlawed *as such*. The different treatment of WTO Members depending on whether they have scheduled products or not is thus largely deleted in respect of export credit support.²⁵⁷ Although offered limited flexibility in terms of a longer self-financing period, developing countries are still under a disadvantage by the cost to the government standard reflected in the self-financing obligation. Furthermore, the temporal flexibility under Annex J on repayment terms regarding their export credit support seems of limited legal value as such subsidized support would be outlawed under the 'additional' Article 10.1 obligation.²⁵⁸

In sum, future disciplines would go further than the principle of 'full-parallelism' and this principle is to a large extent already read into the current rules by panels and the Appellate Body with regard to export credit support. Contrary to certain forms of export credit support for non-agricultural products, there is no – and will not be – any explicit 'safe haven' for subsidized export credit support for agricultural products.²⁵⁹

²⁵⁵ See, Panel Report, *US – Upland Cotton*, above n 33, WT/DS267/R/Add.1, Part 3, at D-17, D-32; Part 4, at E-14.

²⁵⁶ Panel Report, *US – Upland Cotton*, above n 33, WT/DS267/R/Add.1, Part 3, at D-33.

²⁵⁷ It could still play a role under the additional claim on the basis of Article 10.1.

²⁵⁸ Unless the developing country in question has scheduled agricultural products.

²⁵⁹ Export credit support entailing no cost to the government could very well be at better terms than on the commercial market. Such support would be captured by the benefit-to-the-recipient subsidy definition which will still be applicable for a claim under Article 10.1 but challenging an export credit

Policy space allowing Members to play a complementary role to the private market seems less mandatory in the field of agricultural export credits as these mostly take the form of short-term credits for which private trade financing instruments are well developed.²⁶⁰ Yet, the experience of today shows that these private short-term export credits could quickly run dry in times of financial crisis.²⁶¹ However, the existing rules only allow those countries having scheduled products (and up to reduction commitments) to offer export credit support for agricultural products filling in this gap left by the private trade financing market and no flexibility to tackle such situations is inscribed in the draft negotiating text currently on the table.²⁶² In normal circumstances, policy space for subsidized export credit support is only considered legitimate to spur urgently needed food imports in LDCs and net-food importing countries. Arguably, in both situations, the optimal strategy would not exist of subsidized export credit support by Members but of unbound food aid in cash form or export credit support offered by international organizations as both strategies would de-link support from exportation of a particular country.²⁶³ Whereas the current disciplines do not distinguish between recipient countries, the latest negotiating draft would mandate longer repayment terms for export credit support to importers of basic foodstuff in LDCs and net-food importing countries. But again, the legal value of such flexibility is doubtful as Article 10.1 does not allow WTO Members to offer subsidized export credits above their reduction commitment levels.

Although questionable from a *legal* perspective, reading substantive disciplines on agricultural export credit support in the current provisions - as the adjudicating bodies have done - as well as drafting even more stringent disciplines in the way Members are doing should thus generally be welcomed from a *policy* perspective. But this objective is only legitimate insofar S&D treatment is not put upside down and insofar as rules are articulated coherently.

program on the basis of the benefit-to-the recipient seems more difficult in light of the mandatory/discretionary distinction. Above, subsidized export credit support for scheduled products will only be inconsistent with Article 10.1 if offered above reduction commitment levels.

²⁶⁰ This might have to be nuanced for developing countries where a developed private financing market would be lacking.

²⁶¹ The safe haven is also inapplicable for short-term export credit support to non-agricultural products.

²⁶² Given that the safe haven of item (k), para 2 is also not available for short term export credit support (and pure cover support in general), ECAs are also prohibited to offer export credit support for non-agricultural products which aims at filling in the gap in private short-term trade financing, even though the WTO Secretariat has repeatedly called upon ECAs and international financial institutions to spur trade financing. For example, the Director-General's Report on the financial and economic crisis of March 2009 univocally welcomed ECAs' efforts in this domain without any acknowledgement of the trade distortive potential of such support or of the fact that such support might very well be prohibited under the SCM Agreement and/or Agreement on Agriculture. In the *US – Upland Cotton* arbitration procedure, the United States even cited the WTO Secretariat's call on ECAs to fill the private trade finance gap to underpin its claim that Brazil's request for countermeasures against GSM 102 must be considered in the context of the financial crisis and the need for credit availability. Yet, Brazil correctly responded that the disciplines do "not change in times of crisis" and subtly highlighted that the United States had agreed with this position in *Korea – Commercial Vessels* when it rejected that Korea's actions should be exempted from the disciplines of the SCM Agreement where they had been undertaken in response to a financial crisis. See, Coppens, above n 2, at 111-113; *Report to the TPRB from the Director-General on the financial and economic crisis and trade-related developments* (JOB(09)/30, March 2009), paras 56-57; Written Submission by the United States (9 December 2008), at 3-4; Written Submission by Brazil (13 January 2009), at 25 – 27.

²⁶³ Both strategies are also allowed. On food aid, see Article 10.4 Agreement on Agriculture (above n 55) and on export credit support offered by international organizations, see Coppens, above n 2, at 79-80 and footnote 271.



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Leuven Centre for Global Governance Studies
Europahuis, Blijde Inkomststraat 5, 3000 Leuven, Belgium
Tel. ++32 16 32 87 25 Fax ++32 16 32 87 26
info@ggs.kuleuven.be

