1 ARTICLE 13

1.1 Text of Article 13

Article 13

Due restraint

During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):

(a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be:

(i) non-actionable subsidies for purposes of countervailing duties[4];

(*footnote original*)[4] "Countervailing duties" where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures.

(ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; and

(iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994;

(b) domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each

Member's Schedule, as well as domestic support within de minimis levels and in conformity with paragraph 2 of Article 6, shall be:

(i) exempt from the imposition of countervailing duties unless a determination of injury or threat thereof is made in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations;

(ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year; and

(iii) exempt from actions based on non-violation nullification or impairment of the benefits of tariff concessions accruing to another Member under Article II of GATT 1994, in the sense of paragraph 1(b) of Article XXIII of GATT 1994, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year;

(c) export subsidies that conform fully to the provisions of Part V of this Agreement, as reflected in each Member's Schedule, shall be:

(i) subject to countervailing duties only upon a determination of injury or threat thereof based on volume, effect on prices, or consequent impact in accordance with Article VI of GATT 1994 and Part V of the Subsidies Agreement, and due restraint shall be shown in initiating any countervailing duty investigations; and

(ii) exempt from actions based on Article XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement.

1.2 General

1. In *US – Upland Cotton*, in which the Panel was established during the "implementation period", the Panel explained the structure of Article 13 (the "Peace Clause") as follows:

> "Article 13 sets out certain conditions in the chapeaux of paragraphs (a) and (b) and an additional condition in the proviso in subparagraphs (ii) and (iii) of paragraph (b).
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> Paragraph (a) covers domestic support measures that conform fully to the provisions of Annex 2 of the *Agreement on Agriculture*, that is, so-called 'green box' measures, which are not subject to reduction commitments. Paragraph (b) covers domestic support measures that conform fully to the provisions of Article 6, which covers domestic support subject to reduction commitments, and domestic support not subject to reduction commitments in terms of the criteria set out in that article. The chapeau of paragraph (b) confirms that these are so-called 'amber box', 'blue box', '*de minimis*' and 'S&D box' domestic support measures.
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> Paragraph (b) does not cover domestic support measures not subject to reduction in terms of the criteria in Annex 2 and maintained in conformity therewith in accordance with Article 7.1. These are measures that satisfy paragraph (a). The parties agree that these measures are excluded from paragraph (b). We will therefore refer to measures covered by paragraph (b) as 'non-green box measures'.
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> Measures that do not conform fully to the provisions of Annex 2 of the *Agreement on Agriculture* do not satisfy paragraph (a). Therefore, they are subject to reduction commitments, unless they are exempt on the basis of other criteria set forth in

> Article 6. In either case, they must conform fully to the provisions of Article 6 and, hence, are subject to paragraph (b).
>
> The conditions that apply to green box measures are set out in the chapeau of paragraph (a). The conditions that apply to non-green box measures are set out in the chapeau of paragraph (b), subject to an additional condition in the proviso in subparagraphs (ii) and (iii) that 'such measures do not grant support to a specific commodity in excess of that decided in the 1992 marketing year'. Each of these two groups of conditions provides exemptions from actions based on certain provisions, including paragraph 1 of Article XVI of the *GATT 1994* and Articles 5 and 6 of the *SCM Agreement*[1]… Domestic support measures that satisfy *either* of the groups of conditions fall outside the scope of the obligations in these provisions of Article XVI of the *GATT 1994* and Part III of the *SCM Agreement*."[2]

1.2.1 "exempt from actions"

2. In a ruling not challenged on appeal, the Panel in *US – Upland Cotton* interpreted the phrase "exempt from actions" in Article 13 as meaning, on the one hand, that serious prejudice actions could not be invoked against measures that complied with the relevant conditions set out in the Agreement on Agriculture but, on the other hand, that a Member could still institute WTO dispute settlement proceedings where it considered that those measures did not satisfy all the relevant conditions:

> "[T]he Panel considers that the ordinary meaning of the terms read in their context and in light of the object and purpose of the treaty, indicates that 'exempt from actions' means that dispute settlement actions based on the listed provisions shall not be invoked with respect to measures that satisfy the conditions in Article 13. However, that does not preclude multilateral dispute settlement based on the listed provisions where a Member considers that benefits accruing under covered agreements are being impaired by a measure taken by another Member that does *not* satisfy the relevant conditions set forth in Article 13. The issue of whether a measure satisfies the relevant conditions is an issue of substance in a dispute."[3]

1.3 Paragraph (a)

3. In *US – Upland Cotton*, the Appellate Body, like the Panel, began its analysis under Article 13 under paragraph (a) first, noting that:

> "[D]omestic support that conforms fully to the provisions of Annex 2—that is 'green box' support, which is exempt from the domestic support reduction obligations of the *Agreement on Agriculture*—is also exempt, during the implementation period, from actions based on Article XVI of GATT 1994 and the actionable subsidies provisions of Part III of the *SCM Agreement*."[4]

1.3.1 Footnote 4

4. The dispute in *Brazil – Coconut* concerned Brazil's imposition of a countervailing duty on desiccated coconut from the Philippines. The Philippines claimed *inter alia* that even if its programmes constituted subsidies, these programmes fully complied with the developing country and *de minimis* exemptions under Article 6, and were thus exempt from countervailing duties unless there were an injury determination consistent with GATT Article VI and the SCM Agreement. The Panel referred to footnote 4 to Article 13, which provides that "'Countervailing duties' where referred to in this Article are those covered by Article VI of GATT 1994 and Part V of the Agreement on Subsidies and Countervailing Measures". The Panel, having concluded that the

[1] *(footnote original)* Those which satisfy the conditions in paragraph (a) fall outside the whole of Article XVI of the *GATT 1994* and Part III of the SCM Agreement.
[2] Panel Report, *US – Upland Cotton*, paras. 7.346-7.350.
[3] Panel Report, *US – Upland Cotton*, para. 7.320.
[4] Appellate Body Report, *US – Upland Cotton*, para. 319.

measures at issue were outside the scope of Article VI of GATT 1994 and of the SCM Agreement, concluded that "Article 13 of the Agreement on Agriculture does not apply to this dispute".[5]

1.4 Paragraph (b)

1.4.1 Subparagraph (i)

1.4.1.1 Order of analysis

5. The dispute on *Mexico – Olive Oil* concerned, *inter alia*, an EC claim that by initiating a countervailing duty investigation on imports of an agricultural product (olive oil) on the basis of an allegation that subsidized imports were materially retarding establishment of a domestic industry in Mexico, Mexico had breached Articles 13(b)(i) and 21 of the Agreement on Agriculture. The Panel set out the order of analysis for such claims:

> "There are three legal elements in Article 13(b)(i). First, the chapeau of paragraph (b) provides that the obligations and exemptions set forth in the succeeding subparagraphs only apply to 'domestic support measures' which conform fully to the provisions of Article 6 of the *Agreement on Agriculture*. Second, subparagraph (i) exempts such products from the imposition of countervailing duties, unless a determination of injury or threat thereof is made in accordance with Part V of the *SCM Agreement*. Third, subparagraph (i) also requires that 'due restraint shall be shown in initiating any countervailing duty investigations' in relation to those measures."[6]

1.4.1.2 "injury or threat thereof"

6. In *Mexico – Olive Oil*, the Panel interpreted the reference in Article 13(b)(i) to "injury or threat thereof", in relation to the EC's claim that "injury or threat" did not include "material retardation of establishment":

> "We note that the first clause of Article 13(b)(i) refers *inter alia* to 'injury or threat thereof … in accordance with … Part V of the *Subsidies Agreement*.' The paragraph does not refer to 'material injury', but rather to 'injury'. 'Injury', in turn, is defined in footnote 45 of the *SCM Agreement* as 'material injury to a domestic industry, threat of material injury to a domestic industry or *material retardation* of the establishment of such an industry' (emphasis added.) In other words, the definition of the term 'injury' for purposes of the *SCM Agreement* encompasses the concept of material retardation. We therefore do not find that the first clause of subparagraph (i) prohibits the imposition of duties on the basis of a determination of material retardation as opposed to determinations of material injury or threat of material injury."[7]

1.4.1.3 "due restraint"

7. In *Mexico – Olive Oil*, the Panel also examined and rejected, as a factual matter, an EC claim that Mexico acted inconsistently with Article 13(b)(i) by failing to show "due restraint" and initiating the countervailing duty investigation at issue:

> "The term 'due restraint' has not been interpreted by panels or the Appellate Body to date. To assist in determining the ordinary meaning of the terms 'due' and 'restraint', we look first to dictionary definitions. Black's Law Dictionary defines 'due' as 'just, proper, regular, and reasonable.' The definition in Webster's New Encyclopedic Dictionary is similar, referring to 'appropriate', 'adequate' and 'regular'. The New Shorter Oxford English Dictionary defines 'restraint' as '(self-) control; the ability to restrain oneself; reserve; absence of excess or extravagance.' The review of the French and Spanish texts, which are equally authentic,[8] suggests similar interpretations. In the French version the relevant term to be interpreted is the word

[5] Panel Report, *Brazil – Coconut*, para. 284.
[6] Panel Report, *Mexico – Olive Oil*, para. 7.55.
[7] Panel Report, *Mexico – Olive Oil*, para. 7.61.
[8] (*footnote original*) See the final clause of the WTO Agreement. See also the Panel Report on EC – Trademarks and Geographical Indications (US), para. 7.607.

> 'modération'. The dictionary *Le Grand Robert de la langue française* defines 'modération' as 'circonspection, pondération, reserve' and 'retenue', which shows that all of these words express reserve, caution and balancing. Regarding the Spanish terms 'debida moderación', the *Diccionario de la lengua española* provides for the word 'debida' the definition 'como corresponde o es lícito' and 'a causa de, en virtud de'. 'Moderación' is defined as 'cordura, sensatez, templanza en las palabras o acciones'. Therefore, considered on the basis of all three authentic texts of Article 13(b)(i) the ordinary meaning of 'due restraint' is 'a proper, regular, and reasonable demonstration of self-control, caution, prudence and reserve'.
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> We consider this definition to be consistent with the context of Article 13 as a whole, as well as with the object and purpose of the provision, which is to provide a 'peace clause', during the implementation period, for Members taking actions permitted under the *SCM Agreement* against subsidies that are provided consistent with the provisions of the *Agreement on Agriculture.*"[9]

1.4.2 Subparagraph (ii)

1.4.2.1 "grant" and "decided"

8. In *US – Upland Cotton*, the Appellate Body rejected arguments that the conditions set out in Article 13(b)(ii) could not be based on factors such as producers' decisions that are beyond the control of a government, because the terms "grant" and "decided" must be given distinct meanings:

> "We note that the verbs 'grant' and 'decided' have distinct meanings. We agree with the observation of the Panel that ''[d]ecided' refers to what the government determines, but 'grant' refers to what its measures provide.' In Article 13(b)(ii), each of these words has been chosen to govern one side of the comparison required by that proviso. In the light of the distinct meanings of these words, and the distinct roles they play in the context of Article 13(b)(ii), we reject the idea that the word 'grant', which is applicable to implementation period support, must be read to mean the same thing as 'decided', which is applicable to the 1992 benchmark level of support.
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> Moreover, we do not accept that unpredictability of producer decisions under planting flexibility rules, *per se*, could modify the specific requirements set out in the proviso to Article 13(b)(ii). What is relevant for the comparison is the support that the measure actually grants during the implementation period. Indeed, we agree with Brazil that a certain degree of unpredictability in the volume of the payments flowing to particular commodities is inherent in many of the support measures disciplined by the *Agreement on Agriculture*, including measures granting support to a specific commodity. The existence of such unpredictability cannot be a ground to alter the basis of comparison under the proviso to Article 13(b)(ii) from what is actually 'grant[ed]' in the implementation period to what is only 'decided'."[10]

1.4.2.2 "provided that such measures do not grant support to a specific commodity"

9. In *US – Upland Cotton* the Appellate Body examined this condition in Article 13(b)(ii) in relation to US measures that the parties agreed granted support to a commodity, upland cotton. The question was whether cotton was a "specific commodity" and what linkage was required between the support and the commodity. The Appellate Body upheld the Panel's approach that found that "such measures … grant[ing] support to a specific commodity" include but are not limited to "non-green box measures that clearly or explicitly define a commodity as one to which they bestow or offer support"[11]:

> "The key element, however, is the significance of the qualifying word 'specific' in this phrase. The Panel described the ordinary meaning of the term 'specific' as 'clearly or explicitly defined; precise; exact; definite' and as 'specially or peculiarly pertaining to

[9] Panel Report, *Mexico – Olive Oil*, paras. 7.67–7.68.
[10] Appellate Body Report, *US – Upland Cotton*, paras. 382-383.
[11] Appellate Body Report, *US – Upland Cotton*, para. 363.

> a particular thing or person, or a class of these; peculiar (*to*)'. In our view, the term 'specific' in the phrase 'support to a specific commodity' means the 'commodity' must be clearly identifiable. The use of term [*sic*] 'to' connecting 'support' with 'a specific commodity' means that support must 'specially pertain' to a particular commodity in the sense of being conferred on that commodity. In addition, the terms 'such measures … grant' indicates that a discernible link must exist between 'such measures' and the particular commodity to which support is granted. Thus, it is not sufficient that a commodity happens to benefit from support, or that support ends up flowing to that commodity by mere coincidence. Rather, the phrase 'such measures' granting 'support to a specific commodity' implies a discernible link between the support-conferring measure and the particular commodity to which support is granted."[12]

10. In *US – Upland Cotton* the Appellate Body rejected the argument that the phrase "support to a specific commodity" should be limited only to "product-specific support". First, it noted that the drafters chose a different phrase from those used elsewhere in the Agreement on Agriculture. Second, the Appellate Body noted that the scope of domestic support measures that may grant "support to a specific commodity" includes all non-green box domestic support measures identified in the chapeau of Article 13(b), which are the following:

> "Measures covered by Article 6 include both product-specific and non-product-specific amber box support subject to reduction commitments. In addition, measures covered by the chapeau *also* include product-specific and non-product-specific support within *de minimis* levels. They further include blue box support provided in accordance with Article 6.5, as well as development box support, provided according to the provisions of Article 6.2, for both of which the distinction between product-specific and non-product specific support for purposes of the AMS calculation has little practical relevance. Like the Panel, we believe that the use of the term 'such measures' in the proviso to Article 13(b)(ii) indicates that all such measures identified in the chapeau of Article 13(b) may qualify as granting 'support to a specific commodity' and are eligible to be included in the analysis. By contrast, under the United States' argument, domestic support measures listed in the chapeau (with the exception of product-specific amber box support) could not be 'support to a specific commodity' even if they confer support on a specific commodity and there is a discernible link between the measure and that commodity."[13]

11. In *US – Upland Cotton* the Appellate Body found a discernible link between certain domestic support programmes and the "specific commodity" of upland cotton due to the factual relationship between production of that commodity and payment recipients, as well as references to upland cotton in the legislative provisions establishing and governing the operation of the programmes:

> "We observe, however, that the Panel acknowledged that a producer with upland cotton base acres may plant any crop other than the excluded fruits, vegetables, and wild rice, but it found that there was 'a strongly positive relationship between those recipients who hold upland cotton base acres and those who continue to plant upland cotton, despite their entitlement to plant other crops'. The Panel further observed that data provided by the United States showed that 'a very large proportion of farms with upland cotton base acres continue to plant upland cotton in the year of payment', and that 'the overwhelming majority of farms enrolled in the programmes which plant upland cotton also hold upland cotton base'.
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> …
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> [T]he Panel highlighted several factors revealing a close nexus between payments with respect to historic upland cotton base acres under the production flexibility contract, market loss assistance, direct payment and counter-cyclical payment measures, and the continued production of upland cotton on an equivalent number of physical acres at present. The Panel noted that payments under each program were

[12] Appellate Body Report, *US – Upland Cotton*, para. 362.
[13] Appellate Body Report, *US – Upland Cotton*, para. 368.

> based on 'very specific eligibility criteria', primarily the production of upland cotton in a historical base period. The Panel also observed that, in the case of each of the measures, a particular payment rate was specified for upland cotton. Yield calculations were also specific to upland cotton and related to historical upland cotton yields per acre. In the case of market loss assistance payments, payments were specifically designed to compensate for low prices for upland cotton. In the case of counter-cyclical payments, the payment rate for upland cotton is directly linked to the market price of upland cotton in the year of payment. In our view, these characteristics and operational factors of the measures in question demonstrate a link between payments made with respect to historic upland cotton base acres and the continued production of upland cotton."[14]

12. In a finding not challenged on appeal, the Panel in *US – Upland Cotton* sought guidance in the guidelines for calculating Aggregate Measure of Support (AMS) set out in Annex 3 to calculate the support granted or decided under Article 13(b)(ii). Ultimately, in the circumstances of the dispute, it was not necessary for the Panel to choose between price gap or budgetary outlay methodologies to calculate direct payments dependent on a price gap:

> "Nevertheless, the drafters of the *Agreement on Agriculture* evidently considered that the AMS reflected basic principles of the measurement of support. In the Panel's view, AMS methodology can be used to measure both the MY 1992 benchmark and implementation period support under Article 13(b)(ii), subject to two modifications dictated by the treaty text: (1) the AMS methodology should be applied to the corpus of implementation period support measures subject to Article 13(b), to the extent relevant, and not just to support subject to reduction commitments; and (2) it is not appropriate to calculate an AMS on a product-specific basis for a basic agricultural product and total non-product-specific support separately. Therefore, the Panel will apply the principles of AMS methodology to measure the MY 1992 benchmark and implementation period support, subject to these two modifications, for the purposes of Article 13(b)(ii).
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> …
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> The AMS expresses support in monetary terms. It measures subsidies, including both budgetary outlays and revenue foregone by governments or their agents. Non-exempt direct payments dependent on a price gap can be measured in terms of a 'price gap methodology', which filters out the effect of fluctuations in market prices, or in terms of budgetary outlays. Non-exempt direct payments based on factors other than price must be measured in terms of budgetary outlays. Where calculation of the market price support and other components of AMS is not practicable, an EMS shall be calculated, which also involves multiplying prices by quantities of eligible production or budgetary outlays. There is no reason why these basic principles of measurement of support under the *Agreement on Agriculture* would be inappropriate to measure implementation period support under Article 13(b)(ii)."[15]

1.4.2.3 "that decided during the 1992 marketing year"

13. The Panel in *US – Upland Cotton* was called upon to construe the meaning of the phrase "that decided during the 1992 marketing year" to establish the benchmark for the comparison of support requirement set forth in Article 13(b)(ii) of the Agreement on Agriculture. The Panel noted that the word "decided" stood in contrast to the word "grant" used in the same sentence and considered that, in context, this required the Panel to examine what decisions had been taken by the United States during the course of the 1992 marketing year concerning support for upland cotton, irrespective of when the support was actually granted as a result of those decisions:

> "The period 'during the 1992 marketing year' is a very specific limitation on the establishment of the benchmark which the Panel is obliged to apply. The Panel must examine what decisions were made by the United States during the 1992 marketing year concerning support for upland cotton, and at no other time. The time at which

[14] Appellate Body Report, *US – Upland Cotton*, paras. 376 and 379.
[15] Panel Report, *US – Upland Cotton*, paras. 7.552 and 7.554.

> support was granted as a result of those decisions is not addressed in the text. Decisions taken during the 1992 marketing year could have related to support granted in the same marketing year or in a later marketing year or in several marketing years. The text does not preclude any of these possibilities."[16]

14. The Panel on *US – Upland Cotton* did not find any particular policy decisions taken by the United States during the 1992 marketing year that added up to a measure of support. Instead, the only decisions on support for upland cotton taken by the United States during the 1992 marketing year were those to effectuate payments pursuant to programmes that provided support to upland cotton[17]:

> "The only other decisions on support for upland cotton in the United States during the 1992 marketing year were decisions to make particular payments under programmes to support upland cotton. Each of those was a 'determination' of a recipient's entitlement to a payment, in a particular amount, according to the programme and payment conditions, and hence a 'decision on 'support' taken 'during the 1992 marketing year'. Those determinations involved consideration by the United States government of its obligations or authority to make payments, and matters such as eligibility criteria, compliance with acreage conditions, relevant rates and prices, and volume of upland cotton harvested and used, as set out in the applicable laws and regulations. There is no evidence that payments determined by these decisions involved substantial delays from the time these decisions were taken such that they were made in a different marketing year from that in which the payments were made. The sum of these decisions represents an amount of support that can be compared meaningfully with implementation period support and which can be measured according to the same methodology. In the Panel's view, this is the correct measure of the MY 1992 benchmark in this dispute."[18]

15. The Panel on *US – Upland Cotton* also found that two 1992 EC regulations reforming the Common Agricultural Policy, which the condition in Article 13(b)(ii) may have been designed to protect, provided no assistance in interpreting the phrase "support decided in the 1992 marketing year" because they were "done" on the day before the beginning of the 1992 marketing year:

> "The two EC regulations submitted to the Panel show that they were both 'done' on 30 June 1992. This appears to mean that the decisions to adopt those regulations were taken on that day, although they entered into force the following day. Both define the marketing year for the relevant products as beginning on 1 July and ending on 30 June of the following year so that, for those products and the European Communities, the 1992 marketing year did not begin until 1 July 1992. Therefore, on their own terms, neither regulation appears to have been decided 'during the 1992 marketing year' and, as such, they do not assist the Panel in its interpretation in this particular dispute."[19]

1.4.3 Relationship with Annex 3 to the Agreement on Agriculture

16. Regarding the criteria for calculation of Aggregate Measurement of Support, see the Section on Annex 3 of the Agreement on Agriculture.

1.5 Paragraph (c)

17. The Panel in *US – Upland Cotton* examined various export subsidies for agricultural products for compliance with the substantive provisions of Part V of the Agreement on Agriculture. It observed that this examination was also determinative of compliance with paragraph (c) of Article 13:

> "The conditions set out in the chapeau of Article 13(c) of the *Agreement on Agriculture* refer to compliance with particular substantive provisions in Part V of the

[16] Panel Report, *US – Upland Cotton*, para. 7.438.
[17] Panel Report, *US – Upland Cotton*, paras. 7.446-7.451.
[18] Panel Report, *US – Upland Cotton*, para. 7.452.
[19] Panel Report, *US – Upland Cotton*, para. 7.442.

Agreement on Agriculture (which includes Articles 8 through 11, as well as, by reference, Article 3.3, of that Agreement) and export subsidy reduction commitments in each Member's Schedule.

…

Our examination of the export subsidy claims of Brazil under the *Agreement on Agriculture* will, in the first instance, determine the merits of Brazil's claims under the export subsidy provisions of the *Agreement on Agriculture*. Where substantive compliance with the provisions of Part V and fulfilment of Article 13(c) of the *Agreement on Agriculture* are both squarely before us, these findings will also be determinative for the purposes of the examination of consistency with Part V of the *Agreement on Agriculture* called for under Article 13(c)(ii) of the *Agreement on Agriculture*. Should we find a violation of the export subsidy provisions in Part V of the *Agreement on Agriculture,* we may then conduct an examination, as necessary and appropriate for the resolution of this dispute, under Articles 3.1(a) and 3.2 of the *SCM Agreement* and/or Article XVI of the *GATT 1994*."[20]

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Current as of: December 2020

[20] Panel Report, *US – Upland Cotton*, paras. 7.675 and 7.677.