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1 ARTICLE 1

1.1 Text of Article 1

Article 1

Definition of Terms

In this Agreement, unless the context otherwise requires:

- (a) "Aggregate Measurement of Support" and "AMS" mean the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, which is:
 - (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
 - (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 3 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;
- (b) "basic agricultural product" in relation to domestic support commitments is defined as the product as close as practicable to the point of first sale as specified in a Member's Schedule and in the related supporting material;
- (c) "budgetary outlays" or "outlays" includes revenue foregone;
- (d) "Equivalent Measurement of Support" means the annual level of support, expressed in monetary terms, provided to producers of a basic agricultural product through the application of one or more measures, the calculation of which in accordance with the AMS methodology is impracticable, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement, and which is:

- (i) with respect to support provided during the base period, specified in the relevant tables of supporting material incorporated by reference in Part IV of a Member's Schedule; and
 - (ii) with respect to support provided during any year of the implementation period and thereafter, calculated in accordance with the provisions of Annex 4 of this Agreement and taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;
- (e) "export subsidies" refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement;
- (f) "implementation period" means the six-year period commencing in the year 1995, except that, for the purposes of Article 13, it means the nine-year period commencing in 1995;
- (g) "market access concessions" includes all market access commitments undertaken pursuant to this Agreement;
- (h) "Total Aggregate Measurement of Support" and "Total AMS" mean the sum of all domestic support provided in favour of agricultural producers, calculated as the sum of all aggregate measurements of support for basic agricultural products, all non-product-specific aggregate measurements of support and all equivalent measurements of support for agricultural products, and which is:
- (i) with respect to support provided during the base period (i.e. the "Base Total AMS") and the maximum support permitted to be provided during any year of the implementation period or thereafter (i.e. the "Annual and Final Bound Commitment Levels"), as specified in Part IV of a Member's Schedule; and
 - (ii) with respect to the level of support actually provided during any year of the implementation period and thereafter (i.e. the "Current Total AMS"), calculated in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule;
- (i) "year" in paragraph (f) above and in relation to the specific commitments of a Member refers to the calendar, financial or marketing year specified in the Schedule relating to that Member.

1.2 Article 1(a)(ii)

1.2.1 Aggregate Measurement of Support (AMS)

1. The Panel in *Korea – Various Measures on Beef*, in a finding later reversed by the Appellate Body¹, agreed with the complainants that Korea had provided domestic support to its beef industry in excess of its commitment levels for 1997 and 1998. In its notifications, Korea had determined that its Current AMS for beef was below the *de minimis* threshold as set out in Article 6.4; as a result, Korea argued, this domestic support item did not have to be included in the calculation of its Current Total AMS. The Panel found that Korea's calculations in this respect were in error. Korea argued that its calculation was correct, because it was based on the "constituent data and methodology" used in its Schedule, in accordance with Articles 1(a)(ii) and 1(h)(ii) of the Agreement on Agriculture. The Appellate Body, with respect to the calculation of the Current AMS, first recalled the wording of Article 1(a)(ii) of the Agreement on Agriculture which contains the definition of the term "Current AMS" stating:

¹ See Appellate Body Report, *Korea – Various Measures on Beef*, paras. 126-127 and 129.

"To determine whether Korea's Current AMS for beef exceeds 10 per cent of total value of beef production, we refer again to Article 1(a)(ii) of the *Agreement on Agriculture*, which defines Current AMS. Under this provision, Current AMS is to be

calculated *in accordance with* the provisions of Annex 3 of this Agreement and *taking into account* the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule; ... (emphasis added)

Article 1(a)(ii) contains two express requirements for calculating Current AMS. First, Current AMS is to be 'calculated *in accordance with* the provisions of Annex 3 of this Agreement'. The ordinary meaning of 'accordance' is 'agreement, conformity, harmony'. Thus, Current AMS must be calculated in 'conformity' with the provisions of Annex 3. Second, Article 1(a)(ii) provides that the calculation of Current AMS is to be made while 'taking into account the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule.' 'Take into account' is defined as 'take into consideration, notice'. Thus, when Current AMS is calculated, the 'constituent data and methodology' in a Member's Schedule must be 'taken into account', that is, it must be 'considered'.²³

2. The Appellate Body then held that Article 1(a)(ii) accorded "higher priority" to the provisions of Annex 3 than to "constituent data and methodology" contained in a Member's Schedule, but as Korea had no specific "constituent data and methodology" for beef, its Current AMS for beef was to be calculated in accordance with the provisions of Annex 3:

"Looking at the wording of Article 1(a)(ii) itself, it seems to us that this provision attributes higher priority to 'the provisions of Annex 3' than to the 'constituent data and methodology'. From the viewpoint of ordinary meaning, the term 'in accordance with' reflects a more rigorous standard than the term 'taking into account'.

We note, however, that the Panel did not base its reasoning on this apparent hierarchy as between 'the provisions of Annex 3' and the 'constituent data and methodology'. Instead, the Panel considered that where no support was included in the base period calculation for a given product, there is no 'constituent data or methodology' to refer to, so that the only means available for calculating domestic support is that provided in Annex 3. As beef had not been included in Supporting Table 6 of Korea's Schedule LX, Part IV, Section I, the Panel concluded that Annex 3 alone is applicable for the purposes of calculating current non-exempt support in respect of Korean beef.

In the circumstances of the present case, it is not necessary to decide how a conflict between 'the provisions of Annex 3' and the 'constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule' would have to be resolved in principle. As the Panel has found, in this case, there simply are no constituent data and methodology for beef. Assuming *arguendo* that one would be justified – in spite of the wording of Article 1(a)(ii) – to give priority to constituent data and methodology used in the tables of supporting material over the guidance of Annex 3, for products entering into the calculation of the Base Total AMS, such a step would seem to us to be unwarranted in calculating Current AMS for a product which did *not* enter into the Base Total AMS calculation. We do not believe that the *Agreement on Agriculture* would sustain such an extrapolation. We, therefore, agree with the Panel that, in this case, Current AMS for

² (footnote original) We note that this difference is not reflected in the wording of the definition of Current Total AMS in Article 1(h). Article 1(h)(ii) provides that Current Total AMS is to be calculated "in accordance with the provisions of this Agreement, including Article 6, and with the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule". (emphasis added)

³ Appellate Body Report, *Korea – Various Measures on Beef*, para. 111.

beef has to be calculated in accordance with the provisions of Annex 3, and with these provisions alone."⁴

3. In *Korea – Various Measures on Beef*, the Panel also held that Korea had miscalculated its Current AMS for beef on the basis of a fixed external reference price for the period 1989-1991, rather than the period 1986-88, as set forth in paragraph 9 of Annex 3. Korea argued that its use of the period 1989-1991 was justified, because this period was referred to in the constituent data and methodology (used with respect to products other than beef) contained in a table of supporting material incorporated in its Schedule. The Appellate Body agreed with the Panel and recalled its findings referenced in paragraph 2 above:

"The Panel found that in both 1997 and 1998 Korea miscalculated its fixed external reference price, contrary to Article 6 and paragraph 9 of Annex 3, by using a fixed external reference price based on data for 1989-1991. Korea justifies this choice by invoking the 'constituent data and methodology' used in its Supporting Table 6 for all products other than rice, i.e., for barley, soybean, maize (corn) and rape seeds. In Supporting Table 6, all these products use the period 1989-1991 for the fixed external reference price.

We have already explained above that we share the Panel's view with respect to Korea's argument on 'constituent data and methodology' used in the table of supporting material. We agree with the Panel that, in this case, Current AMS for beef has to be calculated in accordance with Annex 3. According to Annex 3, '[t]he fixed external reference price shall be based on the years 1986 to 1988'. We, therefore, also agree with the Panel that in calculating the product specific AMS for beef for the years 1997 and 1998, Korea should have used an external reference price based on data for 1986-1988, instead of data for 1989-1991."⁵

1.2.2 "support"

4. The Panel on *US – Upland Cotton* commented regarding "support":

"Disciplines on 'support' are one of the three pillars of the Agreement on Agriculture, which uses the word 'support' interchangeably with 'domestic support'. Neither are defined terms, although Articles 3.2, 6.1, 6.3, 7.1 and 7.2(a) clarify their meaning somewhat by referring to 'support in favour of domestic producers' or 'domestic support in favour of agricultural producers'. ...

Annex 3 sets out at great length a methodology for measuring the support granted by those measures which are calculated or can be calculated in an Aggregate Measurement of Support ('AMS'). Paragraph 1 of Annex 3 lists the following types of support:

'market price support, non-exempt direct payments, or any other subsidy not exempted from the reduction commitment ('other non-exempt policies')

The residual type of support in this list refers to any 'other' subsidy and paragraph 2 refers to 'subsidies' under paragraph 1. We can also note that the first two types of support in the list are price and income support, which are terms used in paragraph 1 of Article XVI of the *GATT 1994* to illustrate the word 'subsidy'. It is clear from all these references that all relevant types of support for the purposes of the *Agreement on Agriculture* are subsidies.

An important feature of the *Agreement on Agriculture* is that it defines in detail the domestic support measures *exempt* from reduction commitments, rather than those which are *subject* to reduction commitments. It is therefore inappropriate to attempt

⁴ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 112-114.

⁵ Appellate Body Report, *Korea – Various Measures on Beef*, paras. 117-118.

to give an exhaustive definition of 'support'. It is also unnecessary to do so due to the detailed methodology for measuring support contained in the text."⁶

1.3 Article 1(c)

5. In *Canada – Dairy*, the Appellate Body interpreted "revenue foregone" in relation to scheduled commitments under Article 9.1:

"In terms of [Article 1(c)], 'revenue foregone' is to be taken into account in determining whether 'budgetary outlay' commitments, made with respect to export subsidies as listed in Article 9.1, have been exceeded. In our view, the foregoing of revenue usually does not involve a monetary payment."⁷

1.4 Article 1(e)

1.4.1 "subsidies"

6. In *Canada – Dairy*, the Appellate Body recalled its finding in *Canada – Aircraft* where it had stated that a subsidy "arises where the grantor makes a 'financial contribution' which confers a 'benefit' on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace".⁸

7. In *US – FSC*, the Appellate Body, noting "that the *Agreement on Agriculture* does not contain a definition of the terms 'subsidy' or 'subsidies'"⁹, reiterated the approach it followed in *Canada – Dairy* as follows:

"Therefore, in this case, we will consider, first, whether the FSC measure involves a transfer of economic resources by the grantor, which in this dispute is the government of the United States, and, second, whether any transfer of economic resources involves a benefit to the recipient."¹⁰

8. As regards the definition of a subsidy under the SCM Agreement, see the Section on Article 1 of the SCM Agreement.

1.4.2 "contingent upon export performance"

9. In *US – FSC*, the Appellate Body interpreted the requirement of export contingency also with reference to the SCM Agreement, stating that:

"We see no reason, and none has been pointed out to us, to read the requirement of 'contingent upon export performance' in the *Agreement on Agriculture* differently from the same requirement imposed by the *SCM Agreement*. The two Agreements use precisely the same words to define 'export subsidies'. Although there are differences between the export subsidy disciplines established under the two Agreements, those differences do not, in our view, affect the common substantive requirement relating to export contingency. Therefore, we think it appropriate to apply the interpretation of export contingency that we have adopted under the *SCM Agreement* to the interpretation of export contingency under the *Agreement on Agriculture*."¹¹

10. The Appellate Body further noted that "provision of subsidies under the FSC measure is *dependent* or *conditional* upon either the *exportation* of 'export property', or, in the case of services provided before exportation, at the very least, the *anticipation of that exportation*. For

⁶ Panel Report, *US – Upland Cotton*, paras. 7.420-7.423.

⁷ Appellate Body Report, *Canada – Dairy*, para. 110.

⁸ Appellate Body Report, *Canada – Dairy*, para. 87.

⁹ Appellate Body Report, *US – FSC*, para. 136.

¹⁰ Appellate Body Report, *US – FSC*, para. 137.

¹¹ Appellate Body Report, *US – FSC*, para. 141.

these reasons, we find that the FSC measure involves 'subsidies contingent upon export performance' under the *Agreement on Agriculture*.¹²

11. The compliance Panel in *US – FSC* found that the statutory provision at issue, "by virtue of the requirement of 'use outside the United States', involved export subsidies as defined in Article 1(e) of the *Agreement on Agriculture* for the purposes of Article 10.1 of the *Agreement on Agriculture*".¹³

12. With respect to the issue of whether the US export credit guarantee programmes at issue constitute "export subsidies" within the meaning of Article 10.1 of the *Agreement on Agriculture*, the Panel in *US – Upland Cotton* looked to Article 1(e) of the *Agreement on Agriculture* for guidance before ultimately concluding that it did not see why the concept of "export subsidy" in Article 10.1 of the *Agreement on Agriculture* should differ from that of the *SCM Agreement*:

"Article 1(e) of the *Agreement on Agriculture* states that the term 'export subsidies' 'refers to subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement'. According to its own terms, and read in conjunction with Article 1(e) of the *Agreement on Agriculture*, Article 10.1 covers any subsidy contingent on export performance that is not listed in Article 9.1."¹⁴

13. The compliance Panel in the same dispute also looked into the *SCM Agreement*:

"The *Agreement on Agriculture* does not generally define the meaning of the term export subsidies'. Article 1(e) of the *Agreement* provides that export subsidies are 'subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement'. Panels and the Appellate Body have, in interpreting the meaning of 'export subsidies' in Article 10.1, relied, *inter alia*, on the relevant provisions of the *SCM Agreement* (including Articles 1 and 3 and items of the Illustrative List) as 'context'.¹⁵ These provisions define what measures constitute, respectively, 'subsidies', and 'export subsidies', for the purposes of the *SCM Agreement*.¹⁶

14. As regards the concept of export contingency under the *SCM Agreement*, see the Section on Article 3.1(a) of the *SCM Agreement*.

1.5 Article 1(h)

15. In *Korea – Various Measures on Beef*, the Panel and the Appellate Body addressed Korea's argument that its method for calculation of domestic support was justifiable because it was based upon "the constituent data and methodology used in the tables of supporting material incorporated by reference in Part IV of the Member's Schedule", although it was not consistent with the methodology set out in Annex 3 to the *Agreement on Agriculture*. See paragraphs 1-3 above.

16. The Panel in *China – Agricultural Producers*, based on the definitions in Article 1(a) and (h), defined the concepts of AMS, total AMS and Current Total AMS, as follows:

"[W]e note that both **AMS** and **Total AMS** relate to a monetary value of the support granted to producers of basic agricultural products. **AMS** generally may be product- or non-product specific and in this case refers to the amount of support provided to a number of specified products, i.e. wheat and rice. **Total AMS** is the sum of all of the

¹² Appellate Body Report, *US – FSC*, para. 142.

¹³ Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.122; upheld by Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 194-196.

¹⁴ Panel Report, *US – Upland Cotton*, para. 7.796.

¹⁵ (footnote original) See Appellate Body Report, *US – FSC*, paras. 136-141; Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.116; Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 187-196; Panel Report, *US – Upland Cotton*, paras. 7.797-7.803; Panel Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras. 5.152-5.162, Panel Report, *Canada – Dairy*, paras. 7.125 ff. This last panel considered that Article 9.1 of the *Agreement on Agriculture* can also serve as "context" to interpret the meaning of "export subsidy" under Article 10.1 of the *Agreement*.

¹⁶ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 14.45.

separate product-specific AMS, as well as any non-product specific AMS and equivalent measurements of support, using the exclusionary rules contained in Article 6.4 regarding AMS levels below the *de minimis* level and in Article 6.5 regarding direct payments under production-limiting programmes. When calculated for a specific year, it becomes the **Current Total AMS**.¹⁷

17. The Panel in *China – Agricultural Producers* noted that both Article 1(a)(ii) and Article 1(h)(ii) of the Agreement on Agriculture have to be used when calculating AMS and Current Total AMS, and that both parties agreed with this view.¹⁸ The Panel added that "Article 1(a) and (h) direct [the Panel] to use both the provisions of the Agreement on Agriculture, including Annex 3, and China's CDM, when calculating AMS and Current Total AMS, and that AMS has to be calculated first."¹⁹ Then, the Panel highlighted the provisions of Annex 3 to the Agreement on Agriculture that are relevant to the calculation of AMS.²⁰

18. The Panel in *China – Agricultural Producers* underlined the similarities in the calculation processes of Base Total AMS and Current Total AMS and stated that such similarities should be taken into account in making calculations:

"In conclusion, we find that while Article 1 does not contain guidance on how to calculate the Base Total AMS, Paragraph 5 of Annex 3 does set out important rules in this regard. Importantly, Paragraphs 6-13 of Annex 3 are also applicable to the calculation of the Current Total AMS. This implies that as per the Agreement on Agriculture, the calculation processes of both the Base Total and current AMS are similar. This similarity gives strong support to the notion that there must be consistency in the way these measurements of domestic support are calculated. Importantly, we are of the view that failing to recognize that the Agreement on Agriculture provides for a similar calculation process for both types of measurements might end up in a comparison between apples and oranges, as China suggests."²¹

1.5.1 "constituent data and methodology" (CDM)

19. The Panel in *China – Agricultural Producers* defined the concept of constituent data and methodology (CDM) as follows:

"As a whole, taken in the context of Articles 1(a) and 1(h) of the Agreement on Agriculture, the Panel understands the phrase 'constituent data and methodology' to mean those pieces of (chiefly numerical) information and/or modes of procedure which are characteristic of and essential for the understanding and calculation of a Member's AMS, as found in that Member's tables of supporting material."²²

20. The Panel in *China – Agricultural Producers* stated that the calculation of Current Total AMS has to be done in two steps, and, pointed, in this context, to the textual difference between Article 1(a)(ii) and Article 1(h)(ii):

"We recall that ... the calculation of Current Total AMS follows a two-step process where product-specific AMS, as defined in Article 1(a)(ii), has to be calculated first. The resulting AMS for different products would then need to be subjected to Article 6.4 of the Agreement on Agriculture and the support exceeding the *de minimis* level aggregated in order to obtain the Current Total AMS, as defined in Article 1(h)(ii). This Current Total AMS would then be compared to a Member's domestic support commitments. Therefore, although Articles 1(a)(ii) and 1(h)(ii) can be said to be organically and inextricably linked, they each relate to a different stage of the overall calculation of AMS. These conceptual differences, in turn, are reflected in the language of the two provisions. For these reasons, we consider that the calculations must be

¹⁷ Panel Report, *China – Agricultural Producers*, para. 7.127.

¹⁸ Panel Report, *China – Agricultural Producers*, para. 7.130.

¹⁹ Panel Report, *China – Agricultural Producers*, para. 7.132.

²⁰ Panel Report, *China – Agricultural Producers*, paras. 7.133-7.137.

²¹ Panel Report, *China – Agricultural Producers*, para. 7.233. See also *ibid.* paras. 7.243-7.244 and 7.251.

²² Panel Report, *China – Agricultural Producers*, para. 7.144.

undertaken sequentially. Furthermore, the concrete application of the CDM may vary depending on whether AMS or Current Total AMS is being calculated.

We generally agree with China that the calculation of Current Total AMS should be done on the basis of an approach that gives meaning to both Annex 3 and the CDM, by using a holistic approach and a harmonious interpretation of the different provisions of the Agreement on Agriculture. However, such an interpretation should not lead to a result where the textual differences in either provision are read out, without more, especially in a situation where there appear to be important differences in the manner in which AMS and Current Total AMS are to be calculated."²³

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²³ Panel Report, *China – Agricultural Producers*, paras. 7.157-7.158.