THE PANEL REPORT IN THE U.S.–BRAZIL COTTON DISPUTE: WTO SUBSIDY RULES CONFRONT U.S. AGRICULTURE

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I. INTRODUCTION

In September 2002, the Brazilian government requested consultations with the United States within the context of dispute settlement procedures of the World Trade Organization concerning "certain subsidies provided to United States producers, users and exporters of upland cotton."[1] The United States and Brazil held consultations that proved to be fruitless. Eventually, in February 2003, Brazil requested the establishment of a dispute settlement panel (hereinafter "the Panel"), and the most significant agricultural trade case to this point in the World Trade Organization ("WTO") had officially begun.[2]

Nineteen months later, on September 8, 2004 (almost two years after consultations had begun), the Panel issued its report in the case. The report was called "mixed" by the United States,[3] a significant victory by Brazil, and "not supportable" by U.S. cotton interests.[4] The Panel found against the United States cotton program on a number of major points challenged by Brazil, setting the stage for a tense and important appeal for both countries and for the WTO.[5]

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1. WTO Dispute Settlement Panel, United States – Subsidies on Upland Cotton: Report of the Panel, WT/DS267/R, para 1.1 (Sept. 8, 2004) [hereinafter Panel Report], *available at* http://docsonline.wto.org. All of the United States' filings in the case are also available at the Office of the U.S. Trade Representative website, http://www.ustr.gov/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Index_-_Pending.html.

2. I have represented the U.S. cotton industry for over 12 years in various capacities. While I have attempted to refrain from bias, my unique point of view necessarily ensures I cannot be wholly objective or see the issue from all sides. To state otherwise would be inaccurate. I have attempted to restrict those biases to a minimum and rely on the steady hands of the editors of this Journal to moderate those that remained.

3. Press Release, Office of the U.S. Trade Representative, WTO Panel Issues Mixed Verdict in Cotton Case (Sept. 8, 2004), *available at* http://www.ustr.gov/Document_Library/Press_Releases/2004/September/WTO_Panel_Issues_Mixed_Verdict_in_Cotton_Case.html.

4. *See* Press Release, National Cotton Council of America, NCC Disagrees With Brazil/U.S. Dispute Panel's Decision (Sept. 8, 2004), *available at* http://www.cotton.org/news/releases/2004/brazil-public.cfm.

5. The three-person dispute settlement panel was formed in May 2003 and held oral hearings in July, October and December 2003. Formal submissions by the parties continued through February 2004, and the Panel submitted its final report to the parties June 18, 2004. *See* Panel Report, WT/DS267/R, paras. 1.1-1.8 (Sept. 8, 2004) [hereinafter Panel Report], *available at* http://docsonline.wto.org.

The United States has implemented domestic programs for producers of upland cotton beginning with the enactment of the Agricultural Adjustment Act of 1933.[6] These support programs have taken several different forms and approaches, but all have been designed to protect the income of cotton producers from the vagaries of the agricultural markets. In 1994, with the conclusion of the Uruguay Round Multilateral Trade Negotiations, the newly formed World Trade Organization had a new set of agreements, some of which were designed to discipline the use of agricultural subsidies by Member countries.[7] Brazil's challenge to the U.S. upland cotton program was not the first challenge concerning agricultural subsidies in the WTO, or its predecessor the GATT, but it may well be the most significant.[8]

This article will provide only a brief overview of this dispute and the Panel's decision. The Panel Report itself is 351 pages long, single-spaced, with over 1,500 pages of attachments–a study on overkill.[9] This article will attempt only to outline the battleground over which this dispute was fought, provide a highlight of the issues at stake, and emphasize the most decisive and critical aspects of the Panel Report.

There were procedural wrangles throughout the course of this dispute, starting with critical initial arguments over the scope of Brazil's allegations and an early move by Brazil to institute a kind of controlled discovery process against the United States.[10] The tactical wrangling never fully ceased. As late as January and February 2004, Brazil was urging the Panel to draw adverse inferences[11] against the United States as Brazil claimed the U.S. was withholding important information from the Panel.[12]

6. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (codified as amended at 7 U.S.C. §§ 601-627 (2000)).

7. Agreement on Agriculture, Apr. 15, 1994, WTO Agreement, Annex 1A [hereinafter URAA], *available at* http://www.wto.org/english/docs_e/legal_e/14-ag.pdf.

8. The acronym GATT stands for the General Agreement on Tariffs and Trade, referred to as GATT 1947 with the conclusion of the Uruguay Round trade negotiations. *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, Annex 1A, [hereinafter GATT 1947], *available at* http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

9. Panel Report, *supra* note 1.

10. WTO Secretariat, United States – Subsidies on Upland Cotton: Request for the Establishment of a Panel by Brazil, WT/DS267/7 (Feb. 7, 2003) [hereinafter Request], *available at* http://docsonline.wto.org. (referring to Brazil's move as the "procedures provided in Annex V of the SCM Agreement pursuant to paragraph 2 of that Annex").

11. *See* Panel Report, *supra* note 1, para. 7.610.

12. Ultimately, the Panel denied this request. *See id.* para 7.632.

In the end, aside from its sheer length, the Panel's report appeared to cut its way through most of the side squabbles and reach substantive decisions on their merits. The length of the Panel Report, however, reflects the deluge of arguments and information heaped upon the Panel by the parties. Illustrative of this point, as the Panel prepared to meet for its "resumed session of the first substantive meeting",[13] Brazil's representatives had to roll their documents and submissions in on a cart as there were far too many for them to carry.

The WTO dispute settlement process does not always completely conform to the Dispute Settlement Understanding,[14] and the language of WTO arguments is fairly intricate and stylized. The level of detail provided in the arguments of the parties, the number and degree of economic analyses discussed, created, and submitted, and the emphasis by the Panel on exact words of each particular piece of the applicable agreements belies the diplomatic nature of the WTO Agreements.

As the Panel's analysis is reviewed, one cannot help but contemplate whether the diplomats that negotiated these agreements had any inkling of the extent to which their words would be poured over, parsed and defined by a Dispute Settlement Panel. It is intriguing to wonder if these diplomats expected that such a Panel would go so far as to conclude it could not accept the "view of one Member as representative of an agreed interpretation or understanding of all Members"[15], while the agreement is one that was supposedly reached through consensus. The opinion of the negotiating diplomats apparently holds little sway within the dispute settlement process.

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13. While Panels normally hold only two oral sessions, in this case the Panel held three. However, the Panel considered the second meeting to be simply a resumed session of the first substantive meeting. *Id*., para. 1.7.

14. Understanding on Rules and Procedures Governing the Settlement of Disputes, WTO Agreement, Annex 2, Article 1, § 2, (Apr. 15, 1994) [hereinafter Dispute Settlement Understanding].

15. Panel Report, *supra* note 1, para. 7.942.

II. BACKGROUND—THE APPLICABLE AGREEMENTS

A. *Agriculture Prior to the Uruguay Round*

Prior to the conclusion of the Uruguay Round agreements in 1994,[16] agricultural subsidy policies had not been effectively policed by the General Agreement on Tariffs and Trade.[17] Despite several disputes initiated against agricultural subsidy programs maintained by WTO members, decisions in those disputes did little to control the growing use of subsidy systems in agriculture.

Agricultural export subsidies, in conjunction with a variable import levy, were a centerpiece of European Union agricultural policy and were widely viewed as creating detrimental distortions in international agricultural trade. The United States also maintained an extensive agricultural subsidy regime,[18] albeit one that was based less on export subsidies and more on consumer-based price support mechanisms and limits on how much of the commodity a producer could plant in a crop year.[19] Other countries had different support mechanisms in place for agriculture using different mechanisms and providing often dramatically different levels of support to their farmers.[20]

From the United States' point of view, however, no subsidy program was more egregious at distorting agricultural trade than the European Union's use of export subsidies. The U.S., therefore, effectively led the call for reform of international rules governing agricultural trade and, by extension, agricultural subsidy policies. The Uruguay Round agreement concerning agriculture was the culmination of this reform effort and was widely hailed as bringing agriculture within

16. WTO, WTO LEGAL TEXTS–A SUMMARY OF THE FINAL ACT OF THE URUGUAY ROUND [hereinafter FINAL ACT SUMMARY], *at* http://www.wto.org/english/docs_e/legal_e/ursum_e.htm (last visited Feb. 10, 2005).

17. *See generally* GATT 1947, Art. XVI (treating agricultural subsidies as contractual issues with no real guidance), *available at* http://www.worldtradelaw.net/uragreements/gatt.pdf.

18. The U.S. subsidy structure can be characterized as "extensive", particularly with the so-called 'basic' agricultural commodities: wheat, feed grains, cotton, rice, dairy and, to a lesser extent, tobacco and peanuts.

19. *See, e.g.,* J.W. Looney, *The Changing Focus of Government Regulation of Agriculture in the United States*, 44 MERCER L. REV. 763, 772-75 (1993).

20. *See generally* WTO, AGRICULTURE NEGOTIATIONS: BACKGROUNDER, MARKET ACCESS: TARIFFS AND TARIFF QUOTAS, [hereinafter ACCESS] (noting that any non-tariff barriers were converted to tariffs after the Uruguay round), *at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd10_access_e.htm (last visited Jan. 21, 2005).

the world trading system.[21] The Uruguay Round agreements did not end agricultural subsidies, but they attempted to establish some rules "disciplining" the agricultural subsidy policies of the members of the newly formed World Trade Organization.[22]

B. *The Uruguay Round Agreements*

On April 15, 1994, the Members of the General Agreement on Tariffs and Trade concluded the historic Uruguay Round of Trade Negotiations and officially founded the World Trade Organization.[23] Of the several new trade agreements concluded at that time, there are two of primary significance in the U.S.-Brazil dispute: The Uruguay Round Agricultural Agreement[24] (the "URAA") and the Agreement on Subsidies and Countervailing Measures[25] (the "SCM Agreement").

The URAA was a central focus of the entire Uruguay Round trade negotiation and represented the first complete effort to discipline the use of agricultural subsidies.[26] The URAA contained specific disciplines on domestic agricultural subsidies (domestic support), export subsidies, and market access.[27] On a parallel track, the Members of the GATT were also negotiating a new agreement on subsidies in general; this resulted in the SCM Agreement. The SCM Agreement applies to the use of subsidies in general as well as the corresponding mechanisms used by governments to offset the trade-distorting impact of these subsidies (e.g., countervailing measures).[28] The connection between the URAA and the SCM Agreement is the central legal foundation for the Brazilian dispute.

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21. *See* WTO, FINAL ACT SUMMARY, *supra* note 16 (noting that the results of the Uruguay negotiations provide for a long-term reform and establishment of a trade and domestic policy framework).

22. *See id*. (noting that the Uruguay Round agreements provide for actions that can be taken against disputed subsidies).

23. *Id*.

24. URAA, *supra* note 7, arts. 4-12.

25. *See*, *e.g.,* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, [hereinafter SCM Agreement], *available at* http://www.wto.org/english/docs_e/legal_e/24-scm.pdf.

26. URAA, *supra* note 7, art. 6.

27. SCM Agreement, *supra* note 25, arts. 6-9.

28. *See*, *e.g.*, WTO FINAL ACT SUMMARY, *supra* note 16 (Agreement on Subsidies and Countervailing Measures).

1. *The Uruguay Round Agricultural Agreement*

a. *In General*

The URAA contained disciplines designed to 1) restrict the ability of a Member to use export subsidies[29] on agricultural products; 2) restrict the use of domestic subsidies for agricultural producers that were deemed to distort trade in agriculture; and 3) provide greater market access[30] for agricultural products in international markets. Today, these issues are referred to as the "three pillars" of agricultural trade negotiations.[31] An international trade agreement on agriculture is not likely to be concluded unless all three pillars are dealt with. However, the market access pillar of the URAA is not at issue in the U.S.-Brazil WTO dispute.

b. *The Applicable Sections of the URAA*

Article 6 of the URAA sets out the terms agreed on by WTO Members that govern domestic support commitments.[32] In general, the URAA established a total aggregate measurement of support (referred to paragraph 3 of Article 6 as "Current Total AMS"), and Members were deemed to be in compliance with the domestic support provisions of the URAA if their Current Total AMS did not exceed their "corresponding annual or final bound commitment level."[33] It is important to note that Brazil never claimed that the U.S. exceeded its Current Total AMS under the URAA.[34] Article 6 provides, in part, as follows:

> 1. The domestic support reduction commitments of each Member contained in Part IV of its Schedule shall apply to all of its domestic support measures in favour of agricultural producers with the exception of domestic measures which are not subject to reduction in terms of the criteria set out in this Article and in Annex 2 to

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29. There is a degree of controversy regarding the definition of an export subsidy. In general, however, it is a subsidy that is contingent on the export of the agricultural product and essentially makes the export possible. *See* URAA, *supra* note 7, arts. 8-10; *see also* SCM Agreement, *supra* note 25, art. 3.1.

30. WTO Members agreed to bind and reduce agricultural import tariffs according to schedules they negotiated and also changed most non-tariff import quota systems into a "tariff rate quota" system. *See* ACCESS, *supra* note 20.

31. WTO, AGRICULTURAL NEGOTIATIONS: BACKGROUNDER, INTRODUCTION, *at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd05_intro_e.htm (last visted Dec. 1, 2004).

32. URAA, *supra* note 7, art. 6.

33. *Id.* art. 6, para. 3.

34. Panel Report, *supra* note 1, para. 3.1.

> this Agreement. The commitments are expressed in terms of Total Aggregate Measurement of Support and "Annual and Final Bound Commitment Levels".
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> . . . .
>
> 3. A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.[35]

Paragraph 1, Article 6, of the URAA makes reference to Annex 2 of the URAA, which sets out certain domestic agricultural support programs that are exempt from the "domestic support reduction commitments" and will not be included in the Current Total AMS calculation.[36] The relevant portions of Annex 2 that define the exemption are as follows:

> 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:
>
> (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
>
> (b) the support in question shall not have the effect of providing price support to producers;
>
> plus policy-specific criteria and conditions as set out below.
>
> . . . .
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> 5. Direct payments to producers
>
> Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1 above, plus specific criteria applying to individual types of direct payment as set out in paragraphs 6 through 13 below. Where exemption from reduction is claimed for any existing or new type of direct payment other than those specified in

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35. URAA art. 6, *supra* note 7, paras. 1, 3.
36. *Id*. art. 6, para. 1.

> paragraphs 6 through 13, it shall conform to criteria (b) through (e) in paragraph 6, in addition to the general criteria set out in paragraph 1.
>
> 6. Decoupled income support
>
> (a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.
>
> (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.
>
> (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.
>
> (d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.
>
> (e) No production shall be required in order to receive such payments.[37]

In WTO parlance, domestic agricultural support programs that meet Annex 2 requirements (and are therefore exempt from reduction commitments) are referred to as green box programs.[38]

Article 8 of the URAA states, "each Member undertakes not to provide export subsidies otherwise than in conformity with this Agreement and with the commitments as specified in that Members Schedule."[39] Article 9 of the URAA lists export subsidies to be governed by the URAA and further sets out implementation mechanisms governing these new export subsidy disciplines.[40] In short, Members intending to operate export subsidy programs for agricultural products had to list those programs and agree to expenditure limits and quantity limits for the future use of those subsidies.[41] Those specific agreements are contained in a set of schedules, specific to a particular Member and agreed to by the WTO members. Paragraph 2 of Article 9 provides as follows:

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37. URAA, *supra* note 7, Annex 2.

38. WTO, AGRICULTURE NEGOTIATIONS: BACKGROUND FACT SHEET, DOMESTIC SUPPORT IN AGRICULTURE: THE BOXES, *available at* http://www.wto.org/english/tratop_e/agric_e/agboxes_e.htm (last visited Dec. 1, 2004).

39. URAA, *supra* note 7, art. 8.

40. *Id.* art. 9.

41. *See id.*

> 2. (a) Except as provided in subparagraph (b), the export subsidy commitment levels for each year of the implementation period, as specified in a Members Schedule, represent with respect to the export subsidies listed in paragraph 1 of this Article:
>
> (i) in the case of budgetary outlay reduction commitments, the maximum level of expenditure for such subsidies that may be allocated or incurred in that year in respect of the agricultural product, or group of products, concerned; and
>
> (ii) in the case of export quantity reduction commitments, the maximum quantity of an agricultural product, or group of products, in respect of which such export subsidies may be granted in that year.[42]

Article 10 of the URAA is entitled "Prevention of Circumvention of Export Subsidy Commitments" and contains a catch-all provision in paragraph 1, designed to catch those export subsidies not specifically listed in Article 9: "Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments."[43]

Paragraph 2 of Article 10 of the URAA contains a specific reference to export credit guarantee programs. The interpretation of this Article reference is critical to one aspect of the U.S.-Brazil case: "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."[44]

2. *The Agreement on Subsidies and Countervailing Measures*

a. *In General*

The SCM Agreement was intended to further clarify and expand subsidy provisions included in earlier agreements negotiated within the context of the GATT.[45] The SCM Agreement establishes three types of subsidies: 1) prohib-

42. URAA, *supra* note 7, art. 9, para. 2.
43. *Id.* art. 10, para. 1.
44. *Id.* art. 10.
45. "The Agreement on Subsidies and Countervailing Measures is intended to build on the Agreement on Interpretation and Application of Articles VI, XVI and XXIII which was negotiated in the Tokyo Round." WTO, FINAL ACT SUMMARY, *supra* note 16.

ited subsidies; 2) actionable subsidies; and 3) non-actionable subsidies.[46] Prohibited subsidies involve export subsidies and import substitution subsidies.[47] If a Member is found to be providing a prohibited subsidy, the Member must withdraw it.[48] The complaining Member does not have to prove that the prohibited subsidy caused it any injury.[49]

Actionable subsidies are defined in the SCM Agreement and, while not prohibited by the agreement, these subsidies are not to be applied in a manner which results in serious prejudice to the interests of another Member.[50] In other words, actionable subsidies are not strictly forbidden; the complaining party must prove injury before the subsidy is determined not to be in compliance with the SCM Agreement. Brazil claimed the U.S. cotton program involved both prohibited subsidies and actionable subsidies.[51]

b. *The Applicable Sections of the SCM Agreement*

Articles 1 and 2 of the SCM Agreement define a subsidy generally as a bounty or grant by a government whereby a benefit is conferred on the recipient.[52] The subsidy must be "specific" to the "enterprise or industry or group of enterprises or industries ... within the jurisdiction of the granting authority."[53]

Article 3 of the SCM Agreement discusses prohibited subsidies:

> 3.1. Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I;
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

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46. SCM Agreement, *supra* note 25, pts. II - IV.
47. *Id.* art. 3.1.
48. *Id.* art. 4.7.
49. *See id.* art. 4 (detailing the remedy procedure when there is a complaint of a prohibited subsidy).
50. *Id.* arts. 5-6.
51. Request, *supra* note 10, at 1.
52. SCM Agreement, *supra* note 25, arts. 1-2.
53. *Id.* art. 2.1.

> 3.2. A Member shall neither grant nor maintain subsidies referred to in paragraph 1.[54]

Article 5 of the SCM Agreement discusses actionable subsidies:

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> (a) injury to the domestic industry of another Member;
>
> (b) nullification or impairment of benefits accruing directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994;
>
> (c) serious prejudice to the interests of another Member.
>
> This Article does not apply to subsidies maintained on agricultural products as provided in Article 13 of the Agreement on Agriculture.[55]

Note that both Article 3 and Article 5 contain types of exemptions for agricultural subsidies under the URAA.

Brazil specifically claimed that certain aspects of the U.S. cotton program caused "serious prejudice" to its interests.[56] Article 6 of the SCM Agreement outlines the "definition" of "serious prejudice" for the purposes of the SCM Agreement. The most relevant paragraphs in that Article are as follows:

> 6.2 Notwithstanding the provisions of paragraph 1, serious prejudice shall not be found if the subsidizing Member demonstrates that the subsidy in question has not resulted in any of the effects enumerated in paragraph 3.
>
> 6.3 Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
>
> (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
>
> (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
>
> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the

54. *Id.* art. 3.1 and 3.2.
55. *Id.* art. 5
56. Panel Report, *supra* note 1, para. 7.1252.

> same market or significant price suppression, price depression or lost sales in the same market;
>
> (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity17 as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.[57]

Ultimately, Brazil alleged that the U.S. cotton program had the effect of "significant price suppression . . . in the same market"[58] and that the U.S. cotton program has resulted in "an increase in the world market share of the subsidizing Member."[59]

It is helpful to think of the URAA as providing the code of conduct that Members should adhere to in their agricultural policy, while the SCM Agreement actually provides the cause of action that may be taken against an offending Member. Brazil's claims were not fundamentally based on allegations of violations of the URAA. In fact, Brazil's claims were based on allegations that the United States did not conform to its obligations under the SCM Agreement.

In order to make its case, however, Brazil had to prove that the exemptions contained in Articles 3 and 5 of the SCM Agreement (noted above) and other significant exemptions did not apply in this case.

3. *The Peace Clause*

The specific exemptions in Articles 3 and 5 of the SCM Agreement are primarily cross-referencing Article 13 of the URAA, commonly referred to as the "Peace Clause."[60] The Peace Clause established that for a limited number of years domestic agricultural support measures and agricultural export subsidy measures that conformed to the URAA would be exempt from challenge under

57. SCM Agreement, *supra* note 25, art. 6.
58. Panel Report, *supra* note 1, para. 7.1109.
59. *Id*. para. 7.1417.
60. *See* SCM Agreement, *supra* note 25, arts. 3, 5; *see also* WTO, AGRICULTURE NEGOTIATIONS: BACKGROUNDER, PHASE 1: THE PEACE CLAUSE [hereinafter PEACE CLAUSE], *available at* http://www.wto.org/english/tratop_e/agric_e/negs_bkgrnd13_peace_e.htm (last updated Oct. 10, 2002).

Articles 3 and 5 of the SCM Agreement.[61] The Peace Clause expired on January 1, 2004.[62]

"Green box" measures are unconditionally exempt from a challenge under the SCM Agreement due to the Peace Clause.[63] However, domestic support measures that cannot claim to be green box measures are exempt only if those measures do not "grant support to a specific commodity in excess of that decided during the 1992 marketing year."[64] In other words, if these non-green box domestic support measures provided to cotton by the United States "grant support" to cotton "in excess of that decided during the 1992 marketing year," the exemption would not be applicable and Brazil could move forward with its claim that the U.S. cotton program caused it "serious prejudice."

Article 13 reads as follows:

> 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;
>
> (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:

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61. *See* URAA, *supra* note 7, art. 13; *see also id.* at art. 1(f) (defines the implementation period for the purposes of Article 13 as the nine-year period commencing in 1995). *See also* SCM Agreement, *supra* note 25, arts. 3, 5.

62. *Id. See* William A. Gillon, *The Brazil-U.S. Cotton Dispute*, 2005 ARKANSAS STATE UNIVERSITY AGRIBUSINESS CONFERENCE, *available at* http://agri.astate.edu/Ag%20Bus%20Conference/agbusconf05/gillon.htm.

63. URAA, *supra* note 7, art. 13(a).

64. *Id.* art. 13(b)(ii).

> (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.[65]

Brazil filed the case in September 2002 and formally requested a Panel in March 2003.[66] Even though the Peace Clause expired as of January 2004, because it was in effect when Brazil formally requested a Panel, Brazil had to overcome a Peace Clause defense by the United States.

III. Discussion of the Dispute

A. *Brazil's Claims*

In its request for the establishment of a Panel, Brazil laid out a broad and far-reaching set of claims against the United States cotton program. In general the request stated:

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65. *Id.* art. 13.
66. Panel Report, *supra* note 1, para. 1.1.

> The measures that are the subject of this request are prohibited and actionable subsidies provided to U.S. producers, users and/or exporters of upland cotton[67], as well as legislation, regulations and statutory instruments and amendments thereto providing such subsidies (including export credit guarantees), grants, and any other assistance to the US producers, users and exporters of upland cotton ("U.S. upland cotton industry").[68]

Brazil alleged the U.S. program for upland cotton was inconsistent with U.S. obligations under 13 different sections of the SCM agreement, the URAA and GATT 1994.[69] Brazil also alleged:

- The U.S. had no defense under the Peace Clause (Article 13(b)(ii) of the URAA) because it had provided support to upland cotton in excess of the support decided by the U.S. in the 1992 marketing year;
- The U.S. had no defense under the Peace Clause (Article 13(c)(ii) of the URAA) as its export subsidies did not conform with the URAA;
- The effect of the subsidies is significant price depression and price suppression in the markets for upland cotton in Brazil, the United States, other third country markets, and the world market during marketing years 1999-2002 in violation of SCM Articles 5(c) and 6.3(c).[70]
- The U.S. upland cotton programs had increased the world export market share of the U.S. for upland cotton, displaced or impeded exports of Brazilian upland cotton in third country markets, and provided the United States with an inequitable share of world export trade in upland cotton.[71]
- The "Step 2" program for upland cotton provided prohibited export subsidies and prohibited import substitution subsidies (Bra-

67. The term "upland cotton" means raw upland cotton as well as the primary processed forms of such cotton, including upland cotton lint and cottonseed. The focus of Brazil's claims relate to upland cotton, with the exception of the U.S. export credit guarantee programs as explained below. *See* Panel Report, *supra* note 1, para. 2.2 (giving the definition of "upland cotton" in footnote 8).

68. Request, *supra* note 10.

69. *Id*. (noting the inconsistent amendments: Articles 5(a), 5(c), 6.3(b), (c) and (d), 3.1(a), 3.1(b), and 3.2 of the SCM Agreement; Articles 3.3, 7.1, 8, 9.1 and 10.1 of the Agreement on Agriculture; and Articles III: 4, XVI.1 and XVI.3 of GATT 1994).

70. *Id.*

71. *Id.*

zil also alleged these programs were actionable subsidies under Articles 5 and 6.3 of the SCM Agreement).[72]

- That export credit guarantees relating to all eligible U.S. agricultural commodities were prohibited export subsidies (Brazil also alleged these programs were actionable subsidies under Articles 5 and 6.3 of the SCM Agreement).[73]

B. *Applicable U.S. Statutes and Programs*

The Panel outlined the scope of the U.S. programs challenged by Brazil in its final Report.

> The measures as identified in Brazil's request for the establishment of a panel are alleged prohibited and actionable subsidies provided to United States producers, users and/or exporters of upland cotton, as well as legislation, regulations and statutory instruments and amendments thereto providing such subsidies (including export credit guarantees), grants, and any other assistance to United States producers, users and exporters of upland cotton. They include measures referred to as marketing loan programme payments (including marketing loan gains and loan deficiency payments (LDPs)), user marketing (step 2) payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, cottonseed payments and export credit guarantee programmes, which are described below.[74]

Brazil's challenge covered the provisions of subsidies through these programs during marketing years 1999-2001, as well as subsidies mandated to be provided during marketing years 2002-2007.

The programs listed by the Panel and their primary authorizing legislation are as follows:

72. *Id.*
73. *Id.*
74. Panel Report, *supra* note 1, para.2.2.

Primary Statute	**Programs**	**Years Applicable**
The Agricultural Act of 1949[75] and the Agricultural Adjustment Act of 1938[76]	General price support authority and old land set-aside authorities. Marginally applicable in this case.	Permanent legislation. Many provisions suspended by each farm bill.
The Food, Agriculture, Conservation and Trade Act of 1990[77]	Marketing loan, deficiency payments, conservation payments, revisions to export programs, cotton step 2 program, amendments to crop insurance	1990 -1996 crop years (generally). Marginally applicable in the Brazil case.
Agricultural Market Transition Act[78]	Marketing loan, Production Flexibility Contract payments (PFC), cotton step 2 program	1997-2001 crop years (generally).
The Farm Security and Rural Investment Act of 2002[79] [FSRIA]	Marketing loan, Counter-cyclical payments (CCP), Direct payments (DP), cotton step 2 program	2002-2007 crop years (generally).
The Federal Crop Insurance Act[80]	Federal crop insurance program for upland cotton	The Act as amended was generally applicable for entire time period of Brazil complaint (2001 crop forward)
Agricultural Trade Act of 1978[81]	Revised and authorized the export credit guarantee program	Generally applicable for entire time period of Brazil complaint
ad hoc appropriations and other legislation[82]	Market Loss Assistance payments (MLA); cottonseed payments (only some years considered)	1999, 2000, 2001 for MLA; only for the 2000 crop for cottonseed payments

75. 7 U.S.C. §§ 1441-1445 (2000).

76. 7 U.S.C. §§ 1281-1393 (2000).

77. 7 U.S.C. §§ 1421-1471 (2000).

78. 7 U.S.C. §§ 7201-7334 (2000).

79. The Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, 116 Stat. 134 (codified as amended in scattered sections of 7 U.S.C.).

80. The Federal Crop Insurance Act was enacted as Title V of the Agricultural Adjustment Act of 1938 and is codified as amended in scattered sections of 7 U.S.C. § 1281.

81. 7 U.S.C. §§ 5601-5723 (2000).

82. *E.g.,* Agricultural Assistance Act of 2003, 16 U.S.C.A. §§ 3831-3832 (West 2004); as well as the subsidies provided under the Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriation Act of 2002, Pub. L. 107-44 115 Stat. 253, (2001), the Crop Year 2001 Agricultural Economic Assistance Act (2001), the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2001,

The United States operates a number of programs benefiting agriculture and agricultural producers. The programs challenged by Brazil in this case set forth as follows.

• **Marketing Loan Program (including loan deficiency payments) -** A version of the marketing loan program was in existence under both the FAIR Act of 1996 and the FSRIA of 2002. Under the marketing loan program, an eligible producer of upland cotton may pledge his current cotton production as collateral for a 10-month loan from the federal government at a loan rate established by statute.[83] After pledging the cotton as collateral for the loan, the producer can choose to 1) redeem the loan or 2) forfeit the collateral to the government.[84] In the case of the marketing loan, the loan may be repaid at the lesser of the current loan rate or the adjusted world price.[85] In other words, if world prices for cotton decline after the producer receives the loan, the producer may repay at the lower price and market the cotton. The difference (the loss to the government) is referred to as the "marketing loan gain" and is the primary aspect of this program that Brazil challenged.[86]

• **Production Flexibility Contract Payments -** PFC payments represent direct income support made available to eligible U.S. producers under the FAIR Act of 1996.[87] These payments were made directly to producers based on their historical acreage and yields for seven commodities (including upland cotton). PFC payments did not depend on current prices, production or acreage planted. Producers were permitted to plant any commodity on their farm (or not plant at all) without affecting their eligibility to receive PFC payments. However, the program did provide that a producer could lose eligibility for PFC payments if fruits and vegetables were planted on their historical acreage used to establish eligibility for PFC payments and the producer did not have a history of planting

Pub. L. 106-387 114 Stat. 1549, (2000), and the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act of 2000, Pub. L. 106-78, 113 Stat. 1135 (1999).

83. Agricultural Market Transition Act, 7 U.S.C. § 7201, 7232 (2000) (The marketing loan program is overseen by a wholly owned corporation of the U.S. Department of Agriculture, the Commodity Credit Corporation).

84. *Id.* § 7234.

85. *Id.* §§ 7233-7234.

86. *See* Panel Report, *supra* note 1, para. 7.1291.

87. 7 U.S.C. §§ 7201-7202 (2002).

these crops on that acreage.[88] Eligibility for PFC payments was based on enrollment under a seven-year contract that began with the 1996 crop.[89]

• **Direct Payments** - Direct Payments ("DP") represent direct income support made available to U.S. producers under the FSRIA of 2002 and are available with respect to the 2002-2007 crops.[90] These payments were made directly to producers based on their historical acreage and yields for nine commodities (including upland cotton).[91] Similar to PFC payments, DP did not depend on current prices, production or acreage planted.[92] The direct payment program had planting flexibility provisions similar to those in the PFC program.[93] Unlike the PFC program, eligibility for the DP program was determined through annual enrollment.[94]

• **Market Loss Assistance Payments** - Market loss assistance payments (MLAs) were payments made directly available to producers (including producers of upland cotton[95]) by separate pieces of *ad hoc* U.S. legislation designed to provide "emergency" assistance to U.S. producers.[96] In passing these statutes, it appears that Congress intended to provide this assistance to U.S. producers to offset generally low commodity prices. The MLA payments were not based on current plantings and they were authorized by Congress after each of the specified crops was planted.[97]

• **Counter-cyclical payments** - The FSRIA of 2002 provides for "counter-cyclical" payments for the 2002 through 2007 crops (including upland cotton).[98] A target price is established in the statute and a payment is made equal to the difference between that price minus the fixed direct payment and the

88. *Id.* § 7218.
89. *Id.* § 7212(b)(1)(2).
90. 7 U.S.C.A. § 7913 (West Supp. 2004).
91. *Id.* §7913(b)-(c).
92. *See id*. § 7914 (determination of the amount of DP to be paid).
93. *Id.*
94. *Id.*
95. MLAs were also made available to producers with historical plantings of wheat, feed grains, and rice. *See id*. § 7937.
96. *See* ECONOMIC RESEARCH SERVICE, USDA, FARM AND COMMODITY POLICY: 1996-2001 COMMODITY PROVISIONS, *available at* http://www.ers.usda.gov/Briefing/FarmPolicy/1996emerge.htm.
97. MLAs were made available in 1999, 2000, 2001 and 2002 for each of the previous years crops. *See id*.; RES., CMTY. AND ECON. DEV. DIV., GAO, GAO/RCED-00-177R, FARM PROGRAMS: OBSERVATIONS ON MARKET LOSS ASSISTANCE PAYMENTS (2000), *available at* http://www.gao.gov/new.items/rc00177r.pdf.
98. 7 U.S.C.A. § 7914 (West Supp. 2004).

higher of the base loan rate or the average market price.[99] Eligible payment acreage is equal to 85 percent of the base acres enrolled under the Act, rather than the acreage planted for harvest.[100] This payment is, therefore, linked to price but not to production. Eligibility for a CCP also requires annual enrollment.[101]

• **Step 2 program** - The upland cotton Step 2 program is a program that is specific to upland cotton. It has been authorized (with some variations) since 1990 and provides for the issuance of marketing certificates or cash payments (referred to as Step 2 payments) to eligible domestic users of upland cotton or to exporters of upland cotton when the price of U.S. upland cotton delivered to northern Europe markets is not competitive.[102] The amount of the payment is calculated based on the difference between the U.S. "northern Europe" price and an average of competing growths of upland cotton.[103] As implemented under the FAIR Act of 1996 and the FSRIA Act of 2002, the payment is made to domestic users of upland cotton applying a rate in effect on the day the user "opens" the eligible bale of cotton at the textile mill.[104] The payment is made to exporters of upland cotton applying a rate in effect on the day the cotton is exported.[105]

• **Export credit guarantee program** - The export credit guarantee program is operated by the U.S. Department of Agriculture through the Commodity Credit Corporation (the "CCC").[106] Under the program, the CCC guarantees repayment of up to 98 percent of credit made available to finance a commercial sale of an eligible U.S. agricultural commodity.[107] The most significant such program currently carried out by the United States is referred to as the GSM-102 program. The GSM-102 program guarantees repayment by a foreign purchaser with respect to loans with a term of up to 3 years.[108] The program is available to a large number of U.S. commodities. Exporters wishing to participate in the pro-

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99. *Id.*
100. *Id.* § 7911(f).
101. *See id.* § 7911(b).
102. *See id.* § 7937(a)(1).
103. *Id.*
104. FARM SERV. AGENCY, USDA, UPLAND COTTON FACT SHEET (2003), *available at* http://www.fsa.usda.gov/pas/publications/facts/html/upcot03.htm.
105. *Id.*
106. *See* FARM SERV. AGENCY, USDA, COMMODITY CREDIT CORPORATION FACT SHEET (1999), *available at* http://www.fsa.usda.gov/pas/publications/facts/html/ccc99.htm.
107. *See* FOREIGN AGRIC. SERV., USDA, EXPORT CREDIT GUARANTEE PROGRAMS (GSM-102/103) (2005), *available at* http://www.fas.usda.gov/info/factsheets/gsm102-03.asp.
108. *Id.*

gram must apply for the guarantee and pay a fee ("premium") for the guarantee.[109]

• **Other programs** - Brazil also challenged various other programs, alleging such programs provided subsidies to upland cotton in the United States, including the Federal Crop Insurance Program (a federally subsidized insurance program designed to provide payments to producers when they have crop failures) and the export subsidies under the Extra-Territorial Income Act of 2000, further alleging the Act benefited U.S. producers or exporters of upland cotton.

C. *Panel's Terms of Reference*

The "terms of reference" for a WTO Dispute Settlement Panel serve to describe the specific subject of the Panel's investigation.[110] In this case, the Panel defined its terms of reference as follows:

> To examine, in the light of the relevant provisions of the covered agreements cited by Brazil in document WT/DS267/7, the matter referred to the DSB by Brazil in that document and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[111]

The Panel's terms of reference, therefore, covered the universe of allegations Brazil set forth in document WT/DS267/7 (discussed above). This article will narrow the focus of analysis to the following allegations:

- the U.S. had no defense under the Peace Clause (Article 13(b)(ii) of the URAA) with respect to its domestic support programs for upland cotton, because it had provided support to upland cotton in excess of the support level set by the U.S. in the 1992 marketing year;
- the U.S. upland cotton program caused serious prejudice to Brazil as it 1) increased the U.S. world market share for upland cotton and 2) caused significant price suppression in the same market;
- the "Step 2" program for upland cotton provided prohibited export subsidies and prohibited import substitution subsidies (Bra-

109. *Id.*

110. *See*, *e.g.*, WTO Secretariat, United States – Subsidies on Upland Cotton: Constitution of the Panel Established at the Request of Brazil, WT/DS267/15 (May 23, 2003) (citing WT/DSB/M/145), *available at* http://docsonline.wto.org/.

111. *Id.*

zil also alleged these programs were actionable subsidies under Articles 5 and 6.3 of the SCM Agreement); and

- the export credit guarantee program operated by the United States was a prohibited export subsidy.[112]

D. *Tracking the Panel's Course Through the Maze*

The interconnection of the URAA and the SCM Agreement, along with the potential Peace Clause exemption for the United States, required the Panel to adopt a circuitous, yet unchanging, route to each aspect of Brazil's claims.

First, Brazil had to establish the existence of a subsidy. Second, Brazil had to establish that the Peace Clause defense (or any other asserted exemption) was not available to the United States with respect to the specified subsidy. Third, Brazil had to establish that the subsidy was either prohibited or actionable under the SCM Agreement. If the subsidy was prohibited, no injury finding was required. If the subsidy was actionable, Brazil had to prove that the subsidy had the effect of causing serious prejudice to its interests.

IV. THE PANEL'S MAJOR FINDINGS

The WTO Panel's findings include decisions that side with Brazil on many of its claims, while other findings agree with arguments made by the United States.

- The Panel found the "Peace Clause" in the WTO Agreement on Agriculture did not operate to exempt a number of U.S. measures from a SCM agreement challenge.[113] In so doing, the Panel made a significant finding, namely, that the U.S. PFC program and the DP program were not properly categorized by the U.S. as "green box" programs.[114]
- The Panel determined the aggregate impact of the U.S. marketing loan, counter-cyclical and step 2 programs (program components that are linked to price) had the effect of causing significant price suppression for upland cotton in the world market dur-

112. *See* Panel Report, *supra* note 1, para. 3.1(iii).
113. *Id.* para. 8.1(a).
114. *Id.* para. 8.1(b). The U.S. has consistently notified these two programs to the WTO as exempt green box programs.

ing 1999-2002 and therefore caused serious prejudice within the meaning of Articles 5 and 6 of the SCM Agreement.[115]

- The Panel determined that other U.S. domestic support programs challenged by Brazil (those the Panel determined were not linked to production or price[116]) did not cause serious prejudice to its interests because these programs did not cause significant price suppression.[117]
- The Panel stated Brazil did not establish that any challenged U.S. cotton program had caused an increase in the U.S. world market share for upland cotton.[118]
- The Panel concluded it did not need to reach Brazil's claim that U.S. domestic support programs threatened to cause serious prejudice to Brazil's interests in marketing years 2003-2007; furthermore, the Panel did not find that U.S. domestic support programs *per se* caused serious prejudice in those years, as alleged by Brazil.[119]
- The Panel determined that the cotton Step 2 program was a prohibited subsidy under Article 3 of the SCM Agreement.[120]
- The Panel also determined that export credit guarantees for so-called "unscheduled commodities" (such as cotton and soybeans) are prohibited subsidies.[121]
- The Panel also determined that export credit guarantees had been provided for rice in excess of its schedule and were, therefore, not protected by the Peace Clause or other exemptions claimed by the United States.[122] The panel indicated that Brazil had not met its burden of proof that other "scheduled commodities" had been granted export credit guarantees in excess of the U.S. WTO reduction commitments.[123]

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115. *Id.* para. 8.1(g)(i).
116. *Id.* para. 8.1(g)(ii).
117. *Id.*
118. *Id.*
119. *Id.* paras. 8.1(h)(i) - (ii) (determining that Brazil did not establish that the ETI tax benefits for cotton exporters were prohibited export subsidies.).
120. *Id.* para. 8.1(f).
121. *Id.* para. 7.874.
122. *Id.* para. 7.881.
123. *Id.*

A. *The Peace Clause Was No Defense*

The U.S.-Brazil dispute was the first opportunity for a Panel to interpret the "Peace Clause" in a WTO dispute settlement proceeding. The results of this initial interpretation cannot be said to be spectacular. While Brazil had the burden of proof to show U.S. cotton program support had exceeded the Peace Clause ceiling,[124] the U.S. had a significant problem to overcome as well. U.S. government expenditures under the U.S. cotton program had soared, in 2001 and 2002 in particular, with 2001 reflecting record U.S. government expenditures for the U.S. upland cotton program.[125] The United States, therefore, argued for a Peace Clause interpretation based on rates of support and on support that was specific to upland cotton.[126] Because the loan level and target price level for cotton in 2001 and 2002 were below those rates established in 1992,[127] and also because several components of the 2001 and 2002 cotton program were not coupled to the production decision, the United States hoped the Panel would find that the U.S. level of "support specific" to upland cotton was below the level that existed in 1992–despite the fact that total expenditures were higher.[128] The U.S. would lose under the Peace Clause if the Panel simply compared expenditure levels.

In conducting the Peace Clause analysis, the Panel first focused on whether a particular program met the requirements of Annex 2 of the agreement ("green box") and would therefore be exempt from an SCM Agreement action.[129] If the program was not "green box"[130] then the Panel's analysis focused on whether the support measures[131] granted support to a "specific commodity in excess of that decided during the 1992 marketing year".[132]

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124. *Id.*

125. *Id*.

126. WTO Dispute Settlement Panel, Executive Summary of the First Written Submission of the United States, *in* United States–Subsidies on Upland Cotton: Addendum, WT/DS267/R/Add.1, Annex B-2, para. 15 (Sept. 8, 2004) [hereinafter U.S. Submission], *available at* http://docsonline.wto.org/.

127. *Id.* para. 20.

128. Request, *supra* note 10, at 3.

129. Panel Report, *supra* note 1, paras. 7.350-7.351.

130. See *supra* section IV(B) for a more detailed discussion of the Panel's finding that U.S. PFC payments and direct payments did not meet the requirements of Annex 2, were not properly classified as green box support, and did not escape consideration under clause (ii) of Article 13(b).

131. URAA, *supra* note 7, art. 13 (providing that if a domestic support measure did not fully conform to the provisions of Article 6, then the measure would not qualify for exemption

The Panel determined that the "measures" at issue for purposes of the Peace Clause analysis included all those measures alleged by Brazil as providing support to upland cotton in the U.S. to such an extent that the measures harmed Brazil's interests.[133] In order to determine whether the applicable support measures were exempt, the Panel had to find a way to compare support granted to a specific commodity during the years covered by Brazil's complaint to the level of support decided "during the 1992 marketing year."[134] The Panel stated generally that the "difference between the support that a government decides and the support that its measures grant is that one is expressed in terms of prior determinations of levels of support and the other in terms of subsequent support provided."[135]

The Panel also stated that the period "during the 1992 marketing year" was a "very specific limitation" and required the Panel to "examine what decisions were made by the United States during the 1992 marketing year concerning support for upland cotton, *and at no other time*."[136] The Panel also believed that 1992 support decisions must be considered even if those decisions related to sup-

under Article 13(b)); s*ee also id.* art. 6 (setting out the requirement that each country ensure its domestic support measures do not exceed its "aggregated measurement of support," or "AMS"). *But c.f.* Panel Report, *supra* note 1, para. 7.352 (noting that Brazil did not allege that the U.S. support measures listed in its complaint were not in conformity with Article 6, so the Panel did not address this aspect of Article 13(b)(ii)).

132. Panel Report, *supra* note 1, para. 7.415.

133. *Id.*, para. 7.337. *See id.* para. 7.436. This entire paragraph reads as follows:

> A difference between the support that a government decides and the support that its measures grant is that one is expressed in terms of prior determinations of levels of support and the other in terms of subsequent support provided. (The word "grant" in the English version of the text also has connotations that "provided" does not). Decisions on support are often expressed in terms of appropriations of specific amounts of money, which may exceed the amount subsequently granted. Decisions on support can also be expressed in terms of payments of specific amounts, which are identical to the amount granted. Decisions on support are often expressed in terms of rates or methods to calculate payments, so that the amounts outlaid are not known until later. Decisions on price and income support also include eligibility criteria for production or producers, which are not captured separately in the notion of support granted. In the Panel's view, all of these decisions would delimit "that [support to a specific commodity] decided."

134. *Id.* para. 7.438.

135. *Id.* para. 7.436.

136. *Id.* para. 7.438 (emphasis added).

port granted solely during the 1992 marketing year "or in several marketing years."[137]

The Panel read the requirement of decided "during the 1992 marketing year" so literally that even decisions outside the 1992 marketing year, albeit regarding support in the U.S. for the 1992 marketing year, did not fit within its definition.[138] For instance, decisions made by statute during 1990 that established levels of support for the 1992 crop of upland cotton were not "decisions" made by the United States during the 1992 marketing year.[139] The Panel determined that the only "decisions" regarding support for upland cotton in the U.S. during the 1992 marketing year were "decisions to make particular payments under programmes to support upland cotton."[140] 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.'"[141] The Panel concluded that the sum of those decisions represented an amount of support that could be meaningfully compared with support provided during the period covered by Brazil's complaint.[142]

In doing so, the Panel eliminated the possibility of comparing levels or rates of support between the two time periods. Through the Panel's analysis, the U.S. did not "decide" rates of support during the 1992 marketing year.[143] This analysis also led the Panel to a comparison of support based on measuring expenditures during the two time periods,[144] which is clearly where the Panel wanted to go. Interestingly, this approach appears to contradict the Panel's otherwise unambiguous statement that the difference between "grant" and "decided" is that grant is expressed "in terms of the subsequent support provided" and de-

137. *Id.*

138. *See id.* paras. 7.438-7.439, 7.451-7.452. The Panel essentially ignored the U.S. assertion that the word "decided" was specifically meant to cover the U.S. decisions regarding support during the 1992 marketing year. *Id.* para. 7.436. The Panel stated that even the EU, which submitted two EC regulations, decided its support levels for the 1992 marketing year a day before that marketing year actually began. *Id.* para. 7.442. Thus, the U.S. had no "decision" during the 1992 marketing year. *Id.* paras. 7.439-7.444.

139. *Id.* para. 7.439.

140. *Id.* para. 7.452.

141. *Id.*

142. *Id.*

143. *Id.* para. 7.455.

144. *See id.* paras. 7.470, 7.593-7.595 (evaluating other support measures beyond MY 1992, noting the parties agreed that the Agreement on Agriculture did not limit the length of the reference period for implementation).

cided "is expressed in terms of prior determinations of levels of support."[145] Despite the seemingly clear difference between these two definitions, the Panel's strained and literal reading of "decided during the 1992 marketing year" led it to an analysis that read "grant" and "decided" as equivalents, and it conducted its comparison in "terms of the subsequent support provided."[146]

After deciding how the comparison would be conducted, i.e., in terms of subsequent support provided to a specific commodity, the Panel next had to determine what was meant by "support to a specific commodity." The Panel disagreed with U.S. attempts to interpret "support to a specific commodity" as a comparison involving "product specific support."[147] Rather, the Panel ultimately determined that any measure that identifies and allocates support based on any express linkage to a specific commodity provides support to that commodity within the meaning of Article 13(b)(ii).[148] In so doing, the Panel essentially held that the only way non-product specific support could avoid being considered a "support to a specific commodity" was if that non-product specific support met the requirements of Annex 2 and was considered to be green box support.[149] All non-green box support, whether or not it was linked to the actual production of a specific commodity, would be included in the calculation of "support to a specific commodity" if that support merely had an "express linkage" to the specific commodity.[150] In the case of cotton, for example, because eligibility for decoupled payments was determined based on historical (not current) planting of upland cotton, the express linkage was established, and the support measures were included in the Panel's calculations.[151]

> Measures which grant support in accordance with other parameters, such as volume of historical production, may not be subject to paragraph (b) of Article 13 at all. If they conform fully to the provisions of Annex 2, they are exempt from reduction commitments and are protected by paragraph (a) of Article 13. If they do not so conform, they are covered by paragraph (b) of Article 13. In the Panel's view, where these measures identify and allocate support based on an express linkage to specific

145. *Id.* para. 7.436.

146. *See id.* paras. 7.434-7.438 (analyzing the terms "granted" and "decided" as well as explaining that decisions during MY 1992 "could have related to support granted" at other times).

147. *See id*. para. 7.483 (stating there is no reason to specify just one commodity, because the measures may define various commodities).

148. *Id.* para. 7.484.

149. *See id.* (stating that if the measures conform fully to the provisions of Annex 2, they are exempt from reduction commitments and are protected by paragraph (a) of Article 14).

150. *Id.*

151. *See id.* paras. 7.27, 7.484.

> commodities, they provide support to those commodities within the meaning of subparagraph (b)(ii), read in its context and in the light of its object and purpose. Where, for example, these measures specify commodities in the eligibility criteria and payment rates, they constitute support to the commodities specified in that way.[152]

In summary, the Panel interpreted the Peace Clause comparison as follows:

> The Panel therefore considers that the phrase "grant support to a specific commodity," as used in Article 13(b)(ii):
>
> (i) means all non-green box support measures that clearly or explicitly define a commodity as one to which they bestow or confer support; and
>
> (ii) does not mean "grant product-specific domestic support."[153]

The Panel then went through a fairly exhaustive discussion concerning methodologies used to calculate the support "granted" to upland cotton in the years under investigation. Those methodologies included the use of budgetary outlays, a price gap methodology,[154] and a rate of support methodology that was urged by the United States.[155] The Panel rejected the rate of support methodology.[156]

In its comparison of support in 1992 with the years under investigation, the Panel first used a method involving budgetary outlays and determined the U.S. had exceeded its Peace Clause ceiling.[157] The Panel also stated that the use of a price gap methodology would lead to the same result.[158] The Panel summarized its findings as follows:

> The comparison shows that implementation period support exceeds the [marketing year, ("MY")] MY 1992 benchmark in every year under review. Implementation period support also exceeds the MY 1992 benchmark in every year under review where (1) the marketing loan programme payments and deficiency payments are

152. *Id.* para. 7.484.
153. *Id.* para. 7.494.
154. URAA, *supra* note 7, Annex 3.
155. *See* Panel Report, *supra* note 1, para. 7.426 (showing the United States' argument that, even allowing for the adjustments proposed by Brazil, the product-specific support granted from 1999 to 2002 was lower than the rate of support decided in the 1992 marketing year).
156. *Id.* para. 7.599.
157. *See id.* paras. 7.595-7.598 (showing the Panel's calculation methods involving budgetary outlays).
158. *Id.* para. 7.597.

> both calculated using a price gap; and (2) where the marketing loan programme payments are calculated using a price gap but deficiency payments are calculated using budgetary outlays in order to provide a more appropriate comparison with the measures which succeeded them. This is the case whether marketing loan programme payments: (a) are shown as zero; or (b) are calculated using negative values.[159]

The Panel's seemingly default result, which compared expenditures in 1992 to expenditures in the years covered by Brazil's challenge, ultimately meant the U.S. lost on this part of the case, as actual U.S. expenditures for cotton were clearly higher in more recent years than in 1992.[160] The increasingly decoupled nature of the U.S. cotton program expenditures made little difference to the Panel as it found a "nexus" with cotton in any program that defined eligibility in any manner with reference to cotton.[161]

The Panel's analysis of the Peace Clause was one based solely on the level of expenditures.[162] It bears strength in its simplicity. However, this analysis fails to take into account the impact of variables over which government policy makers have no control–namely price. For example, if the terms of the U.S. cotton program had not changed, yet remained constant since 1992, with the 2001 and 2002 prices dropping to the same extent as they actually did, the identical

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159. *Id.* para. 7.597. The U.S. demonstrated use of a price gap methodology actually resulted in negative numbers reflecting support under the marketing loan program. *Id.* paras. 7.597-7.599.

160. *Id.* para. 7.596 (Table 2). The U.S. had to deal with more programs in this comparison than it ever anticipated, as the Panel decision that PFC and direct payments were not "green box" programs meant that expenditures under those programs were included in the Peace Clause comparison, increasing the total expenditure number for the U.S. cotton program in later years. *See id*. para. 7.413.

161. *See id*. paras. 7.1192-7.1194 (discussing the nexus of the subsidy program and the subsidized product).

162. *Cf. id.* para. 7.596 (Table 2) (comparing expenditures as broken down in accordance with Article 13(b)(ii)). The Panel settled on an approach that compared expenditure levels. The Panel essentially could not determine what the negotiators of the agreement meant by the term "decided" and determined there had been no "decision" by the U.S. government regarding support for cotton in 1992. The statute that provided the terms of the U.S. cotton program for 1992 was enacted in 1990; therefore, Congress did not "decide" in 1992; it had already decided. The regulatory provisions were already in place and the Secretary of Agriculture made virtually no 1992 program decisions in 1992–they were all made in 1991. Further, certain aspects of the U.S. cotton program had changed. There were no longer acreage limitation programs in place that could restrict the number of acres that would be eligible for the marketing loan program; moreover, new programs, such as PFC payments and direct payments, were not in existence under the 1990 Act. *See id*. para. 7.449.

program administered by the United States would have exceeded its Peace Clause ceiling using the Panel's analysis.

Under this approach, one could argue the Panel made the role of agricultural policy makers much more difficult. The Panel's decision expects governments to adjust agricultural policy to keep spending levels in check—even though many of the factors that influence price are out of the control of any government. On further review, however, the long term impact of this analysis is difficult to determine because the Peace Clause has already expired.[163] At the very least, the Panel's grappling with the various provisions of this method of analysis should ensure that any future attempt at a Peace Clause-type exemption will not contain a similar quantity of confusing, uncertain language.

Furthermore, by agreeing to not exceed an overall AMS level, which may be calculated based on budgetary outlays or by a price gap methodology, countries have, to some extent, already placed themselves in the position of having to adjust policies based on factors that are out of their control - like price. The critical difference seems to be that the AMS ceiling, because it aggregates all commodity support, provides countries the flexibility to enhance their ability to comply.[164] Conversely, a product-specific AMS, which only points to commodity-specific expenditures, limits a country's flexibility and narrows the margin of error.[165] The Panel seemed to be aware that it was imposing a product-specific AMS, despite the fact that a product-specific AMS had never been agreed to by WTO members.

B. *Direct Payments and PFC Payments Are Not Green Box*

In one of the more surprising aspects of its determination, the Panel ruled that U.S. DP and PFC payments did not meet the requirements of Annex 2 of the URAA and were, therefore, not properly classified by the United States as "green box" subsidies (subsidies exempt from reduction commitments).[166]

As noted above, green box support measures would be exempt from consideration in the Article 13(b)(ii) comparison of levels of support and would be exempt from challenge under Article 5 of the SCM Agreement.[167] Since their

163. *See* PEACE CLAUSE, *supra* note 60.
164. *See* Panel Report, *supra* note 1, para. 7.501.
165. *See id.*
166. *See id.* para. 7.355.
167. *See id.* para. 7.350.

inception, the United States had classified the PFC payments and DP as "green box" support measures.[168] Brazil challenged this classification and won.[169]

Annex 2 of the URAA sets out the requirements for a support measure to be exempt from the reduction commitments under Article 6 (and, therefore, within the exemptions specified in Article 13).[170] Paragraph 1 of Annex 2 begins the definition of "green box" support measures:

> 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:
>
> (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
>
> (b) the support in question shall not have the effect of providing price support to producers;
>
> plus policy-specific criteria and conditions as set out below.[171]

The policy-specific criteria and conditions referred to in Paragraph 1 include those set out in Paragraph 6 of Annex 2, which deals with decoupled income support like that provided under the PFC payment program and DP. Paragraph 6 provides as follows:

> 6. Decoupled income support
>
> (a) Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.
>
> (b) The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.
>
> (c) The amount of such payments in any given year shall not be related to, or based on, the prices, domestic or international, applying to any production undertaken in any year after the base period.

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168. *See id.* paras. 7.350, 7.352.
169. *See id.* paras. 7.350-7.352.
170. *See id.* para. 7.371.
171. URAA, *supra* note 7, Annex 2, para. 1.

> (d) The amount of such payments in any given year shall not be related to, or based on, the factors of production employed in any year after the base period.
>
> (e) No production shall be required in order to receive such payments.[172]

Brazil's winning argument[173] was aimed at the Article 6 requirement that the "amount of such payments in any given year shall not be related to, or based on, the type or volume of production . . . undertaken by the producer in any year after the base period."[174] The Panel agreed that putting restrictions in place under these U.S. programs regarding the planting of fruits and vegetables[175] meant that

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172. *Id.* para. 6.

173. Brazil made other arguments intended to ensure that PFC payments and direct payments were not determined to meet Annex 2 requirements, such as its argument that base and yield updating, provided for in the Farm Security and Rural Investment Act of 2002, violated the URAA requirement that payments be based on a fixed area and yield); *see also* Panel Report, *supra* note 1, para. 7.393 (determining payments were not in compliance with Annex 2 on other grounds and, therefore, rejected Brazil's argument above); *but see id.* paras. 7.404 – 7.405 (appearing unconvinced by Brazil's arguments, the Panel noted:

> Brazil expresses its argument as a hypothetical; the effect on current production choices depends on 'if' farmers expect future updating. However, since the time when base acres for deficiency payments were established by a rolling average of previous years' plantings under the FACT Act of 1990, there has been only one opportunity to update base acres . . . The Panel notes that updating was not permitted throughout the term of the FAIR Act of 1996, and is not permitted throughout the term of the FSRI Act of 2002. It has been permitted only once since 1996. There is no evidence before the Panel as to what the United States Congress intends to do in future farm bills. There is not evidence, only speculation, as to whether producers will expect to be able to update their base acres under future farm bills.).

174. SCM Agreement, *supra* note 25, art. 6, Annex 2, para. 6(b).

175. *See* 7 U.S.C.A. § 7916 (West Supp. 2004) (setting forth the rules regarding planting flexibility under that Act and the payment program as follows:

> (a) PERMITTED CROPS.—Subject to subsection (b), any commodity or crop may be planted on base acres on a farm.
>
> (b) LIMITATIONS REGARDING CERTAIN COMMODITIES.—
> (1) GENERAL LIMITATION.—The planting of an agricultural commodity specified in paragraph (3) shall be prohibited on base acres unless the commodity, if planted, is destroyed before harvest.
> (2) TREATMENT OF TREES AND OTHER PERENNIALS.—The planting of an agricultural commodity specified in paragraph (3) that is

the payments were "related to ... the type or volume of production ... undertaken by the producer in any year after the base period" and therefore was not in compliance with Paragraph 6(b).[176]

Under the FSRIA of 2002, producers participating in the direct payment program may plant any crop on base acres (or refrain from planting any crop) except for fruits, vegetables (other than lentils, mung beans and dry peas) and wild rice.[177] If a participating producer plants the prohibited crops on base acres, the producer risks being declared ineligible for the direct payment.[178] The Panel held that despite the fact there was no requirement to plant any commodity to qualify for the direct payment, the program itself did not meet the strict require-

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produced on a tree or other perennial plant shall be prohibited on base acres.
(3) COVERED AGRICULTURAL COMMODITIES.—Paragraphs (1) and (2) apply to the following agricultural commodities:
(A) Fruits.
(B) Vegetables (other than lentils, mung beans, and dry peas).
(C) Wild rice.

(c) EXCEPTIONS.—Paragraphs (1) and (2) of subsection (b) shall not limit the planting of an agricultural commodity specified in paragraph (3) of that subsection—
(1) in any region in which there is a history of doublecropping of covered commodities with agricultural commodities specified in subsection (b)(3), as determined by the Secretary, in which case the double-cropping shall be permitted;
(2) on a farm that the Secretary determines has a history of planting agricultural commodities specified in subsection (b)(3) on base acres, except that direct payments and countercyclical payments shall be reduced by an acre for each acre planted to such an agricultural commodity; or
(3) by the producers on a farm that the Secretary determines has an established planting history of a specific agricultural commodity specified in subsection (b)(3), except that—
(A) the quantity planted may not exceed the average annual planting history of such agricultural commodity by the producers on the farm in the 1991 through 1995 or 1998 through 2001 crop years (excluding any crop year in which no plantings were made), as determined by the Secretary; and
(B) direct payments and counter-cyclical payments shall be reduced by an acre for each acre planted to such agricultural commodity)..

176. *See* SCM Agreement, *supra* note 25, Annex 2, para. 6(b).

177. *See* 7 U.S.C.A. § 7916(d) (West Supp. 2004).

178. *See id.* § 7916(c)(1) (containing exceptions for regions with a history of doublecropping covered commodities, or with a history of planting the covered commodities).

ments of Paragraph 6(b) of Annex 2 and, therefore, was not exempt under Article 13(b) of the URAA.[179]

C. *Certain U.S. Measures Have Caused Serious Prejudice to the Interests of Brazil*

Once the Panel determined that Brazil had met its burden of proof opposing the Peace Clause defense raised by the United States, the Panel turned to the core[180] of Brazil's complaint against U.S. domestic support measures in favor of upland cotton: namely, that the effect of U.S. subsidies in favor of upland cotton caused serious prejudice to Brazil's interests within the meaning of Article 5 of the SCM Agreement.[181]

As discussed above, Article 6 of the SCM Agreement outlines the 'definition' of 'serious prejudice' for the purposes of the SCM Agreement.[182] Brazil ultimately focused its arguments on two of these definitions. Brazil sought to prove that the U.S. upland cotton program had the effect of "significant price suppression . . . in the same market"[183] and that the effect of the subsidy was an increase in the "world market share" of the United States with respect to upland cotton.[184]

1. *Significant Price Suppression*

The Panel determined that the aggregate impact of the U.S. marketing loan, counter-cyclical and step 2 programs (program components that are linked to price) had the effect of causing significant price suppression for upland cotton in the world market during 1999-2002 and therefore caused serious prejudice within the meaning of Articles 5 and 6 of the SCM Agreement.[185]

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179. *See* Panel Report, *supra* note 1, para. 7.393.

180. *See id.* para. 3.1. Brazil also alleged other violations of WTO and GATT 1947, including a claim that the U.S. cotton program had resulted in the U.S. obtaining "more than an equitable share" of the world market in upland cotton, as provided in Article XVI of GATT 1947. This article does not discuss these allegations in detail. The Panel's decision either did not reach these allegations or ruled against Brazil on these points.

181. SCM Agreement, *supra* note 25, art. 5.

182. *See id*. art. 6.

183. *Id.* art. 6.3(c).

184. *Id*. art. 6.3(d).

185. Panel Report, *supra* note 1, para. 8.1(g)(i).

The Panel's analysis, however, was somewhat curious, in that it eschewed any responsibility to determine the actual level of subsidization employed by the United States or the actual level of price suppression caused by that subsidization.[186] U.S. program components that were not linked to price were found to not have the effect of causing serious prejudice, creating a price-focused analysis, an analysis that appears to be without clear WTO precedent.[187]

Nevertheless, the Panel methodically stepped through its price suppression analysis. It determined that marketing year 2002 was a relevant year for its serious prejudice inquiry.[188] The Panel further held that subsidies granted by the United States before 2002 were relevant because the effects of such subsidies could last past the year in which they were expensed.[189] Importantly, the Panel stated it did not have to exactly quantify the subsidies at issue and a price suppression analysis could aggregate impacts from several subsidies.[190]

In order to prove serious prejudice, Brazil had to show U.S. cotton subsidies had the effect of significant price suppression "in the same market."[191] The Panel determined that "the same market" could mean the entire world market for upland cotton.[192] The Panel stated that Brazil had alleged significant price suppression in the same market and had defined that market as the world market.[193] It saw no language in the SCM Agreement that precluded it from "reading the term 'market' as including a geographical area which may embrace the entire world."[194] In so doing, the Panel dismissed United States concerns that this definition of "same market" could lead to a finding against the United States, even if U.S. cotton and Brazilian cotton never actually competed for sales in any particu-

186. *See id.* para. 8.1.

187. *See id.* para. 8.1. The Panel cited no prior WTO decision providing support to its price-based, non-price-based distinction.

188. *See id.*

189. *See id.*

190. *See id.* paras. 7.1179, 7.1194.

191. *Id.* paras. 7.1109, 7.1157, 7.1158.

192. *Id.* para. 7.1237 (further stating:

> While we understand there to be a geographic implication to the term, we also see that there is no limitation or restriction on the scope of such a geographic area of economic activity. It could, for example, be a local, regional, national, continental or, even, global, geographical area, provided that the conditions of competition for sales of the product in question provides an appropriate foundation for a finding that a 'market' exists within that area.).

193. *See id.* paras. 7.1194, 7.1221.

194. *Id.* paras. 7.1243.

lar country's market.[195] The Panel outlined the scope of this analysis as an "integrated examination of effects of any subsidies with a sufficient nexus with the subsidized product and the particular effects-related variable under examination."[196] The particular "effects-related" variable focused on by the Panel was price.[197] The subsidized product, of course, was upland cotton.

For the Panel, price suppression could be found if prices are either "prevented or inhibited from rising or they do actually increase, but the increase is less than it otherwise would have been."[198] The Panel then conducted a three-part analysis to determine whether there was price suppression.[199] It looked at 1) the "relative magnitude of U.S. production" and exports of upland cotton; 2) "general price trends;" and 3) whether the "nature of the subsidies is such as to have discernible price suppressive effects."[200]

The Panel stated it would "undertake an analysis focusing on the existence and nature of the subsidies in question by examining their structure, design and operation with a view to discerning their effects."[201] "To the extent a sufficient nexus exists between certain subsidies and any suppression of prices of the subsidized product, we aggregate these subsidies and their effects."[202]

The United States is the second largest producer of upland cotton in the world (China is first), and over the past four to five years, the U.S. has become the largest exporter of cotton fiber in the world.[203] Clearly "the United States

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195. *See id.* para. 7.1252 (further stating:

> In our view, as we have already indicated, the world market is a geographic market. Where price suppression is demonstrated in that market, it may not be necessary to proceed to an examination of each and every other possible market where the products of both the complaining and defending Members are found.).

196. *Id.* para. 7.1192.
197. *Id.*
198. *Id.* para. 7.1279 ("The text of Article 6.3(c) of the SCM Agreement, in its context, indicates that we need to undertake an inquiry into whether upland cotton prices either were pressed down, prevented or inhibited from rising, or while they did actually increase the degree and magnitude of increase was less than it otherwise would have been.").
199. *Id.* para. 7.1280.
200. *Id.*
201. *Id.* para. 7.1194.
202. *Id.*
203. *See* ECON. RESEARCH SERV., USDA, BRIEFING ROOM - COTTON, *at* http://www.ers.usda.gov/Briefing/Cotton/ (last visited Apr. 18, 2005). The use of cotton fiber by U.S. textile mills had dramatically declined over this same time period, with U.S. mill consumption dwindling from 11 million bales per year to under 6 million bales per year. The 5 million bale

exerted a substantial proportionate influence on prices in the world market for upland cotton."[204]

It was also clear that world upland cotton prices had been trending low since 1999.[205] However, the Panel stated that this gradual price drop was not itself conclusive as to a finding of price suppression. Rather, the Panel determined, "[w]e need to examine whether these prices were suppressed, that is, lower than they would have been without the United States subsidies in respect of upland cotton."[206]

The next question, as defined by the Panel, was whether the nature of the U.S. subsidies was such as to have "discernible price suppressive effects."[207] In other words, the Panel asked whether the "structure, design and operation" of U.S. subsidies had a "nexus" to any price suppression.[208]

In working through the various U.S. programs at issue, the Panel separated those programs it deemed to have a "nexus" to price, the so-called price-contingent subsidies, and those that did not have that nexus, namely, non-price-contingent subsidies.[209] The marketing loan program, counter-cyclical program, MLA payments, and step 2 program all had a direct link to price. The movement of world market prices for cotton influenced the level of expenditures under all of these programs, and they shielded U.S. producers, at least to some degree, from declines in world prices. Owing apparently to the sheer size of the subsidies involved with these programs and their direct link to price, the Panel found the "structure, design and operation, particularly of the price-contingent subsidies, constitutes strong evidence supporting a finding of price suppression."[210]

Conversely, DP, PFC payments, and crop insurance subsidies did not have a nexus to price.[211] The Panel determined, therefore, that these subsidy pro-

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difference shifted from domestic consumption to export markets, resulting in total U.S. exports of upland cotton surging just as dramatically as U.S. mill use declined. *See U.S. Cotton Market: Monthly Economic Letter* (COTTON, INC.), Jan. 12, 2005, *at* http://www.cottoninc.com/MarketInformation/MonthlyEconomicLetter/0105mel.pdf.

204. Panel Report, *supra* note 1, para. 7.1285.

205. *See id.* para. 7.1286; *see also* COTTON AND WOOL SITUATION AND OUTLOOK YEARBOOK, Market and Trade Economics Division, Economic Research Service, USDA (Nov. 2003) CWS-2003 at 10, *available at* http://www.ers.usda.gov/publications/so/view.asp?f=field/cws-bby.

206. *Id.* para. 7.1288.

207. *Id.* para. 7.1280.

208. *Id.* para. 7.1289.

209. *Id.* para. 7.1355.

210. *Id.* para. 7.1308.

211. *Id.* para. 7.1307.

grams did not have a sufficient connection to the effects-related variable, namely world prices, and should not be aggregated to determine whether the effects of the U.S. subsidies was significant price suppression.[212]

The Panel determined that suppressed world prices may follow from an increase in supply, there was an increase in supply in the world market for upland cotton, and this increase had been reflected in suppressed prices on the world market.[213] In estimating whether the price suppression it had already found was significant, the Panel determined that with a "basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices could be significant because … profit margins may ordinarily be narrow."[214] Given the overall price trends it found, coupled with the size of the U.S. subsidies in question, the Panel stated it was not "looking at an insignificant or unimportant world price phenomenon."[215]

Thus, upon finding that certain U.S. programs had price suppressing effects and price suppression in the world cotton market was "significant" based on, among other things, the size of the U.S. subsidies in question, the Panel at this point analyzed whether the "effect" of U.S. subsidies was in fact significant price suppression.[216] In other words, the Panel, beginning at paragraph 7.1334 of the report, began its causation analysis with respect to whether U.S. subsidies had had the effect of "significant price suppression . . . in the same market."[217]

Not surprisingly, the Panel's analysis regarding causation tracks very closely to its previous analysis with respect to whether there was significant price suppression and whether U.S. subsidies had price suppressing effects. It retained the price-contingent vs. non-price-contingent dichotomy and reached the same conclusion regarding these two types of subsidies.[218] The Panel also discussed four main points which demonstrated the requisite causal link.[219]

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212. *Id.* para. 7.1308.

213. *Id.* paras. 7.1309-.1312. The Panel also determined, essentially, that if there was price suppression in the world market, there was, necessarily, price suppression in any individual country's market where the product from Brazil and the U.S. might be competing. *Id.* paras. 7.1313-.1315.

214. *Id.* para. 7.1330.

215. *Id.* para. 7.1332.

216. *Id.* para. 7.1333.

217. *Id.* para. 7.1334.

218. *See id.* paras. 7.1345-.1346.

219. *Id.* para. 7.1347.

- The United States exerts a substantial proportionate influence in the world upland cotton market;[220]
- The structure, design and operation of the three price-contingent subsidies constitute evidence supporting a causal link;[221]
- There was a "discernable temporal coincidence of suppressed world market prices and the price-contingent United States subsidies";[222] and
- The evidence on the record indicated that total U.S. production costs[223] exceeded the amount producers received from the market, demonstrating the necessity of subsidies to keep U.S. producers in business.[224]

These four points provided the Panel with the requisite causal link between price-contingent U.S. subsidies and significant price suppression the Panel had already determined to exist.[225] The Panel dismissed U.S. arguments that other market factors had led to low world cotton prices and ultimately concluded these specific cotton program subsidies had caused serious prejudice to Brazil.[226]

2. *Increase in the World Market Share*

Brazil also alleged that the U.S. cotton program had the effect of causing the U.S. to increase its share of the world upland cotton market, in contravention to Article 6.3(d) of the SCM Agreement which indicates that serious prejudice may occur when

> (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.[227]

Brazil based this argument on an increase in U.S. exports of upland cotton during the time period under investigation.[228]

220. *Id.* para. 7.1348.
221. *Id.* para. 7.1349.
222. *Id.* para. 7.1351.
223. This includes fixed and variable costs of production. *Id.* para. 7.1465.
224. *Id.* para. 7.1353.
225. *Id.* para. 7.1355.
226. *Id.* paras. 7.1363, 7.1395.
227. SCM Agreement, *supra* note 25, art. 6.31(d).
228. Panel Report, *supra* note 1, para. 7.1351.

The Panel, however, disagreed with Brazil's interpretation of "world market share," holding that this standard involved a consideration of the entire world market for upland cotton, not just the export market.[229] As Brazil did not establish that any challenged U.S. cotton program had caused an increase in the U.S. world market share for upland cotton as defined by the Panel, the Panel determined Brazil did not establish a *prima facie* case on this point.[230]

D. *Export Credit Guarantee Program Is a Prohibited Subsidy*

The Panel's determination that the U.S. export credit guarantee program is a prohibited subsidy will have impacts beyond the U.S. upland cotton program. Brazil challenged the export credit guarantee program with respect to all commodities that were eligible to receive these guarantees.[231] The Panel's finding, therefore, could impact the viability of this program with respect to all of the so-called "unscheduled commodities" (such as cotton and soybeans) and could limit the availability of the program even to the "scheduled commodities."[232]

In short, the Panel found that the U.S. export credit guarantee program was a prohibited export subsidy under Article 3 of the SCM Agreement as it was not operated at premium rates which are adequate to cover its long-term operating costs and losses.[233] In so doing, the Panel dealt with the United States' ex-

229. *Id.* para. 7.1435.

230. *Id.* para. 7.1465.

231. *Id.* paras. 7.765-.769.

232. Unscheduled commodities are products for which the Unites States is not permitted to provide export subsidies because they are not set out in the export subsidy portion of the final U.S.-WTO schedule the United States filed in 1994. 'Scheduled commodities' are set out in the U.S. schedule, and the United States is permitted to provide export subsidies up to the scheduled level for those commodities. Besides rice, U.S. 'scheduled commodities' are wheat, skim milk powder, coarse grains, butter, bovine meat, other milk products, poultry meat, vegetable oils, live dairy cattle, cheese, eggs, and pig meat. WTO Panel Issues Mixed Verdict in Cotton Case, *supra* note 3.

233. Panel Report, *supra* note 1, paras. 7.867-.869. Annex I to the SCM Agreement sets out an illustrative list of export subsidies. Item (j) in that list deals with export credit guarantee programs and provides the following constitutes an export subsidy:

> (j) 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.

SCM Agreement, *supra* note 25, art. 1, Annex I, item j.

haustive arguments, attempting to show that the export credit guarantee program was not being operated at a loss. The Panel generally disagreed with the argument the U.S. advanced, tending instead to rely on U.S. budget documents that appeared to show a cost to the U.S. government of operating the program.[234] The Panel also refused to concede that the rescheduling of debt, borne by the U.S. government as the result of its obligation under a credit guarantee, moved that debt from the "cost" column to the "debt" column for the purposes of determining long-term operating costs and losses.[235] The Panel also considered it important that premiums charged under the export credit guarantee program had a cap of one percent and did not appear to be determined based upon what it would take to ensure that the program's costs were covered by the premiums.[236]

While it disagreed with these conclusions by the Panel, the United States also argued that the export credit guarantee program was not subject to Article 3 of the SCM Agreement at all.[237] Article 3 applies to export subsidies *except as provided in the URAA*.[238] According to the United States, Article 10.1 of the URAA specifically exempted export credit guarantee programs from the URAA's export subsidy disciplines.[239]

Article 10.2 of the URAA provides as follows:

> 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.[240]

The Panel rejected U.S. arguments that the commitment in Article 10.2 direction, i.e., undertake to work toward the development of disciplines to govern export credit guarantees, meant that the provision of export credit guarantees by Members was exempt from the anti-circumvention provision of Article 10.1, which instructs Members that export subsidies "not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead

234. *See id.* paras. 7.867-.869.
235. *See id.* paras. 7.842-.850.
236. *Id.* paras. 7.859-.860.
237. *Id.* para.. 7.1024.
238. *Id.*
239. *Id.* para. 7.944.
240. URAA, *supra* note 7, art. 10.2.

to, circumvention of export subsidy commitments."[241] According to the Panel, this requirement meant that even though export credit guarantees were not listed in Article 9, the use of such guarantees was still subject to the anti-circumvention requirement included in Article 10.1.[242] The Panel felt that if the drafters of Article 10.2 had meant for that section to exempt export credit guarantees, they would have used the term "exempt." Stating it could not "accept this view of one Member as representative of an agreed interpretation or understanding of all Members",[243] the Panel dismissed the U.S. arguments (maintained by the United States since the conclusion of the URAA) and held that Article 10.2 was merely an agreement to negotiate further on this subject.[244] It was not a blanket exemption for subsidies disguised as export credit guarantees.

The Panel's holding means that export credit guarantees provided by the United States on exports of "unscheduled commodities" are prohibited subsidies. Further, any export credit guarantees provided on exports of "scheduled commodities" that exceed either the dollar amount or quantity specified in the corresponding export subsidy schedule also constitute a prohibited subsidy. Cotton is an unscheduled commodity. The Panel also determined that export credit guarantees had been provided for rice in excess of the export subsidy schedule and were, therefore, not protected by the Peace Clause or other exemptions claimed by the United States.[245] The panel indicated Brazil had not met its burden of proof that other "scheduled commodities" had been granted export credit guarantees in excess of the U.S. WTO reduction commitments.[246]

E. *The Cotton Step 2 Program Is a Prohibited Subsidy*

The Panel also found that a program unique to cotton, the so-called Step 2 program, was a prohibited subsidy under Article 3 of the SCM Agreement.[247] The Panel determined that the Step 2 program provided two types of prohibited subsidies: one contingent on export in contravention of Article 3(a) and one con-

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241. *See* Panel Report, *supra* note 1, para. 7.926; URAA, *supra* note 7, art. 10.1.
242. Panel Report, *supra* note 1, para. 7.927.
243. *Id.* para. 7.942.
244. *Id.* para. 7.926.
245. *Id.* para. 7.881.
246. *Id.* para. 7.896.
247. *Id.* para. 7.760.

tingent on the use of domestic over imported goods,[248] in contravention of Article 3(b) of the SCM Agreement.

As it tackled this issue, the Panel continued to conduct its analysis by looking first to URAA provisions, determining whether any exemptions applied, and only then looking to the subsidy provisions of the SCM Agreement.[249]

Although the Step 2 program is authorized to be paid on all cotton produced in the United States and is authorized by one statutory provision,[250] the Panel nevertheless concluded the Step 2 program contained two different types of subsidies (export and import substitution) and conducted its analysis as if the subsidies were based on two different provisions.[251]

With respect to the export subsidy component of the Step 2 program, the Panel found the United States had no export subsidy schedule under Article 9 of the URAA, with respect to upland cotton.[252] Therefore, any export subsidy determined to exist for upland cotton would not be in compliance with the URAA if it was implemented in a manner that circumvented the export subsidy disciplines established in the URAA.[253] Since the export subsidy component of the program was not in compliance with the URAA, the Panel determined the exemptions in Article 13(c) did not apply and the subsidy was subject to the provisions of Article 3(a) of the SCM Agreement.[254]

Interestingly, the analysis for the import substitution component of the Step 2 program was more complex. This aspect of the Step 2 program was decidedly not an export subsidy and not subject to the provisions of Articles 8, 9 and 10 of the URAA.[255] However, the Panel also found this "domestic support measure" was not exempt from consideration under Article 3(b) of the SCM Agreement via Article 13 of the URAA (the "Peace Clause").[256] Article 13(b), which stated the exemption for domestic support measures, specifically refer-

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248. *Id.* paras. 7.738, 7.747 (noting that Step 2 payments are made to domestic textile mills if the Step 2 program is in effect when the mill opens the bale of cotton for use. The Step 2 payment rate is determined as of the date the bale of cotton is opened at the textile mill.); *see also* 7 C.F.R. § 1427.103 (2005) (providing that only domestically-produced baled upland cotton is eligible for this payment).

249. *Id.* para. 7.657.

250. *Id.* para. 7.738.

251. *Id.* para. 7.741.

252. *Id.* para. 7.666.

253. *See id.* paras. 7.666-.667.

254. *Id.* para. 7.751.

255. *See id.* paras. 7.946-.948.

256. *See id.* paras. 7.1044 - .1045.

enced only Article 5 of the SCM Agreement.[257] It did not authorize an exemption for domestic support measures from Article 3 of the SCM Agreement.[258]

Further, while Article 13(c) of the URAA did exempt export subsidies from Article 3 of the SCM agreement (if they were in compliance with the URAA), it only explicitly referred to export subsidies and did not cover domestic support measures.[259] The Panel reasoned that because the import substitution component of the Step 2 program was not an export subsidy, it was a domestic support measure that did not receive any special exemption from Article 3 of the SCM Agreement.[260] Further, the Panel did not view Article 21 of the URAA, providing that all other WTO agreements "shall apply subject to the provisions" of the URAA, as preventing these domestic support measures from being considered under Article 3(b) of the SCM Agreement–despite the fact the program was otherwise in compliance with the URAA.[261]

Accordingly, the Panel determined that neither component of the Step 2 program was exempted by the URAA from compliance with Article 3 of the SCM Agreement.[262] The Panel determined that since both program components were prohibited subsidies under Article 3, there was no requirement for Brazil to prove injury from these subsidies.[263] They were *per se* violations of Article 3.

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257. *See id.* paras. 7.279, 7.1012 n. 1186.

258. *See id.* paras. 7.1012 n. 1186, 7.1013.

259. *Id.* para. 7.944.

260. *Id.*

261. *See id.* para. 7.1071 (stating further that:

> We do not see an inherent conflict between compliance with the domestic support reduction commitments in Article 6.3 of the Agreement on Agriculture and the prohibition of import substitution subsidies under Article 3.1 (b) of the SCM Agreement so as to render the simultaneous application of the provisions untenable. Article 3.1(b) of the SCM Agreement can be read together with the Agreement on Agriculture provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms. There is, therefore, no necessity to apply the rules in Article 21.1 of the Agreement on Agriculture in order that the provisions of that agreement would prevail over a conflicting provision.).

262. *Id.* paras. 7.1072-.1073.

263. In order to prevail in a GATT dispute, a complainant must show that either benefits accruing to it are being nullified or impaired, or that the attainment of an objective of the General Agreement is being impeded. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 272 (4th ed. 2002); Panel Report, *supra* note 1, para. 8.1.

V. CONCLUSIONS

The Panel's complete findings are set out verbatim below. After finding several aspects of the U.S. cotton program to be prohibited subsidies, the Panel called for the withdrawal of the prohibited subsidies (export credit guarantees and Step 2) without delay.[264] With respect to its finding that other U.S. upland cotton program subsidies caused serious prejudice to the interests of Brazil, the Panel called on the United States to "take appropriate steps to remove the adverse effects or . . . withdraw the subsidy."[265]

Due to time and space constraints, this article has not covered many, many interesting aspects of the dispute. These issues include: 1) the use of econometric modeling studies and other economic data by the Panel; 2) the several conclusions of the Panel regarding Brazil's claims involving provisions of GATT 1947; 3) Panel findings concerning burden of proof; 4) the finding of the Panel concerning threat of serious prejudice; and 5) any discussion about the process of working on a WTO dispute settlement case or the degree to which foreign governments use private law firms to construct their legal arguments in these cases. Also, as this case is currently subject to appeal, it is unclear what aspects of the Panel's rationale will withstand appellate scrutiny.[*]

The U.S.-Brazil cotton dispute stands as the most significant showing to date that the WTO can and will take on agricultural subsidies. It proves that commitments in the URAA have meaning and can be used against countries viewed as the cornerstones of the WTO. The dispute will have a significant impact on the Doha Round of trade negotiations as all the world's agricultural negotiators will have a better understanding of some of the subtleties included in the current URAA and in the drafts of negotiating texts they are reviewing. It may also lead the U.S. Congress, for the first time, to take the URAA provisions into careful consideration as it develops future U.S. agricultural policy.

VI. CONCLUSIONS AND RECOMMENDATIONS OF THE PANEL

8.1 In light of the findings above, we conclude as follows:

(a) Article 13 of the Agreement on Agriculture is not in the nature of an affirmative defense;

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264. Panel Report, *supra* note 1, para. 8.3(b).
265. *Id.* para. 7.1501.
* *See* editor's note.

(b) PFC payments, DP payments, and the legislative and regulatory provisions which establish and maintain the DP programme, do not satisfy the condition in paragraph (a) of Article 13 of the Agreement on Agriculture;

(c) United States domestic support measures considered in Section VII:D of this report grant support to a specific commodity in excess of that decided during the 1992 marketing year and, therefore, do not satisfy the conditions in paragraph (b) of Article 13 of the Agreement on Agriculture and, therefore, are not exempt from actions based on paragraph 1 of Article XVI of the GATT 1994 or Articles 5 and 6 of the SCM Agreement;

(d) concerning United States export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes:

(i) in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice):

- United States export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes are export subsidies applied in a manner which results in circumvention of United States' export subsidy commitments, within the meaning of Article 10.1 of the Agreement on Agriculture and they are therefore inconsistent with Article 8 of the Agreement on Agriculture;

- as they do not conform fully to the provisions of Part V of the Agreement on Agriculture, they do not satisfy the condition in paragraph (c) of Article 13 of the Agreement on Agriculture and, therefore, are not exempt from actions based on Article XVI of the GATT 1994 or Articles 3, 5 and 6 of the SCM Agreement;

- United States export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes are provided by the United States government at premium rates which are inadequate to cover long-term operating costs and losses of the programmes within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement, and therefore constitute *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the SCM Agreement.

(ii) however, in respect of exports of unscheduled agricultural products not supported under the programmes and other scheduled agricultural products:

- the United States has established that export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes have not been applied in manner which either results in, or which threatens to lead to, circumvention of United States export subsidy commitments within the meaning of Article 10.1 and that they therefore are not inconsistent with Article 8 of the Agreement on Agriculture;

- in these circumstances, and as Brazil has also not made a prima facie case before this Panel that the programmes do not conform fully to the provisions of Part V of the Agreement on Agriculture, this Panel must treat them as if they are exempt from actions based on Article XVI of the GATT 1994 and Article 3 of the SCM Agreement in this dispute.

(e) concerning section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton:

(i) section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton is an export subsidy, listed in Article 9.1(a) of the Agreement on Agriculture, provided in respect of upland cotton, an unscheduled product. It is, therefore, inconsistent with the United States' obligations under Articles 3.3 and 8 of the Agreement on Agriculture;

(ii) as it does not conform fully to the provisions of Part V of the Agreement on Agriculture, it does not satisfy the condition in paragraph (c) of Article 13 of the Agreement on Agriculture and, therefore, is not exempt from actions based on Article XVI of the GATT 1994 or Articles 3, 5 and 6 of the SCM Agreement;

(iii) section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton is an export subsidy prohibited by Articles 3.1(a) and 3.2 of the SCM Agreement.

(f) concerning section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users of upland cotton: it is an import substitution subsidy prohibited by Articles 3.1(b) and 3.2 of the SCM Agreement;

(g) concerning serious prejudice to the interests of Brazil:

(i) the effect of the mandatory price-contingent United States subsidy measures – marketing loan programme payments, user marketing (Step 2) payments, MLA payments and CCP payments – is significant price suppression in the same world market within the meaning of Article 6.3(c) of the SCM Agreement constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the SCM Agreement;

(ii) however, Brazil has not established that:

- the effect of PFC payments, DP payments and crop insurance payments is significant price suppression in the same world market within the meaning of Article 6.3(c) of the SCM Agreement constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the SCM Agreement; or

- the effect of the United States subsidy measures listed in paragraph 7.1107 of Section VII:G of this report is an increase in the United States' world market share within the meaning of Article 6.3(d) of the SCM Agreement constituting serious prejudice within the meaning of Article 5(c) of the SCM Agreement.

(h) concerning the ETI Act of 2000:

(i) Brazil has not made a prima facie case before this Panel that the ETI Act of 2000 and alleged export subsidies provided thereunder are inconsistent with Articles 10.1 and 8 of the Agreement on Agriculture in respect of upland cotton;

(ii) with respect to the condition in Article 13(c)(ii) of the Agreement on Agriculture, as Brazil has also not made a prima facie case before this Panel that they do not conform fully to the provisions of Part V of the Agreement on Agriculture in respect of upland cotton, this Panel must treat them as if they are exempt from actions based on Article XVI of the GATT 1994 and Article 3 of the SCM Agreement in this dispute.

8.2 Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered prima facie to constitute a case of nullification or impairment. We conclude that, to the extent that the United States has acted inconsistently with the covered agreements, it has nullified or impaired benefits accruing to Brazil under these agreements.

8.3 In light of these conclusions:

(a) we recommend pursuant to Article 19.1 of the DSU that the United States bring its measures listed in paragraphs 8.1(d)(i) and 8.1(e) above into conformity with the Agreement on Agriculture;

(b) as required by Article 4.7 of the SCM Agreement, we recommend that the United States withdraw the prohibited subsidies in paragraphs 8.1(d)(i) and 8.1(e) above without delay. The time-period we specify must be consistent with the requirement that the subsidy be withdrawn "without delay". In any event, this is at the latest within six months of the date of adoption of the Panel report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier);

(c) pursuant to Article 4.7 of the SCM Agreement, we recommend that the United States withdraw the prohibited subsidy in paragraph 8.1(f) above without delay and, in any event, at the latest within six months of the date of adop-

> tion of the Panel report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier); and
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> (d) we recall that, in respect of the subsidies subject to our conclusion in paragraph 8.1(g)(i) above, pursuant to Article 7.8 of the SCM Agreement:
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> > "7.8. Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy."
> >
> > Accordingly, upon adoption of this report, the United States is under an obligation to "take appropriate steps to remove the adverse effects or . . . withdraw the subsidy".[266]

EDITOR'S NOTE:

Since the time this article was written, the appellate body has issued its report which upheld the panel report in most respects, essentially adopting the Panel's reasoning as well. WTO Appellate Body, United States–Subsidies on Upland Cotton: Report of the Appellate Body, WT/DS267/AB/R (Mar. 3, 2005), *available at* http://docsonline.wto.org/. The Dispute Settlement Body adopted the panel report as modified by the appellate body report on March 24, 2005. WTO Dispute Settlement Body, United States– Subsidies on Upland Cotton: Appellate Body Report and Panel Report–Action by the Dispute Settlement Body, WT/DS267/20 (Mar. 3, 2005), *available at* http://docsonline.wto.org/.

Look for additional analysis of this landmark case in the next issue of the *Drake Journal of Agricultural Law.*

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266. *Id.* paras. 8.1-.3.