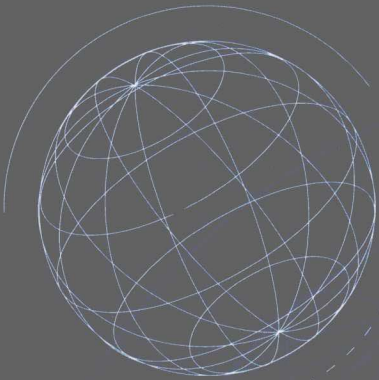




WORLD TRADE  
ORGANIZATION

**Dispute Settlement Reports 2008**  
**Volume VI: Pages 2011 to 2382**

2008



CAMBRIDGE

WORLD TRADE ORGANIZATION

Dispute Settlement Reports

2008  
Volume VI

Pages 2011-2382



 **CAMBRIDGE**  
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo,  
Delhi, Dubai, Tokyo

Cambridge University Press

The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

[www.cambridge.org](http://www.cambridge.org)

Information on this title: [www.cambridge.org/9780521195201](http://www.cambridge.org/9780521195201)

© World Trade Organization 2003, 2005, 2007, 2008, 2009 and 2010

This publication is in copyright. Subject to statutory exception and  
to the provisions of relevant collective licensing agreements,  
no reproduction of any part may take place without  
the written permission of Cambridge University Press.

First published 2010

Printed in the United Kingdom at the University Press, Cambridge

*A catalogue record for this publication is available from the British Library*

*Library of Congress Cataloguing in Publication data*

ISBN 978-0-521-19520-1 hardback

Cambridge University Press has no responsibility for the persistence or accuracy  
of URLs for external or third-party internet websites referred to in this publication,  
and does not guarantee that any content on such websites is, or will remain,  
accurate or appropriate.

## THE WTO DISPUTE SETTLEMENT REPORTS

The *Dispute Settlement Reports* of the World Trade Organization (the "WTO") include panel and Appellate Body reports, as well as arbitration awards, in disputes concerning the rights and obligations of WTO Members under the provisions of the *Marrakesh Agreement Establishing the World Trade Organization*. The *Dispute Settlement Reports* are available in English. Volumes comprising one or more complete cases contain a cumulative list of published disputes. The cumulative list for cases that cover more than one volume is to be found in the first volume for that case.

*This volume may be cited as DSR 2008:VI*

**TABLE OF CONTENTS**

*Page*

**United States - Subsidies on Upland Cotton  
- Recourse by Brazil to Article 21.5 of the  
Understanding on Rules and Procedures  
Governing the Settlement of Disputes  
(WT/DS267)**

Report of the Panel - Table of Annexes D-13 to H ..... 2013



## **UNITED STATES – SUBSIDIES ON UPLAND COTTON**

### **Recourse by Brazil to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes**

#### **Report of the Panel WT/DS267/RW**

*Adopted by the Dispute Settlement Body  
on 20 June 2008  
as Modified by Appellate Body Report*

#### **LIST OF ANNEXES\***

#### **ANNEX D**

#### **RESPONSES OF PARTIES TO THE PANEL'S QUESTIONS AND OTHER COMMENTS AND DOCUMENTS RECEIVED FROM PARTIES**

<b>Contents</b>	<b>Page</b>
Annex D-13 Responses of the United States to the Panel's Second Set of Questions	2017
Annex D-14 Brazil's Comments on the Responses of the United States to the Panel's Second Set of Questions	2136
Annex D-15 United States' Comments on the Responses of Brazil to the Panel's Second Set of Questions	2243

---

\* Annexes A to D-6 to be found in Volume IV and Annexes D-7 to D-12 in Volume V.

## ANNEX E

### COMMUNICATIONS FROM PARTIES

	<b>Contents</b>	<b>Page</b>
Annex E-1	Letter of the United States dated 7 November 2006	2326
Annex E-2	Letter of the United States dated 20 November 2006	2330
Annex E-3	Letter of the United States dated 21 November 2006	2334
Annex E-4	Letter of Brazil dated 22 November 2006	2337
Annex E-5	Letter of Brazil dated 24 November 2006	2341
Annex E-6	Letter of Brazil dated 18 December 2006	2343
Annex E-7	Letter of the United States dated 19 December 2006	2345
Annex E-8	Letter of Brazil dated 22 January 2007	2348
Annex E-9	Letter of Brazil dated 7 February 2007	2351
Annex E-10	Letter of the United States dated 12 February 2007	2353

## ANNEX F

### COMMUNICATIONS FROM THE PANEL TO PARTIES

	<b>Contents</b>	<b>Page</b>
Annex F-1	Communication of 8 November 2006	2356
Annex F-2	Communication of 27 November 2006	2358
Annex F-3	Communication of 28 November 2006	2359
Annex F-4	Communication of 20 December 2006 <sup>1</sup>	2360
Annex F-5	Communication of 17 January 2007	2361
Annex F-6	Communication of 22 January 2007	2363
Annex F-7	Communication of 16 February 2007	2364
Annex F-8	Communication of 21 March 2007	2365

---

<sup>1</sup> This communication was sent to the Parties as well as to the Third Parties.



## **ANNEX G**

### **WORKING PROCEDURES AND TIMETABLE OF THE PANEL**

<b>Contents</b>	<b>Page</b>
Annex G-1 Working Procedures	2368
Annex G-2 Timetable (Final)	2372

## **ANNEX H**

### **REQUEST FOR THE ESTABLISHMENT OF A PANEL**

<b>Contents</b>	<b>Page</b>
Annex H-1 Request for the Establishment of a Panel by Brazil	2374



**ANNEX D-13**

**RESPONSES OF THE UNITED STATES TO THE  
PANEL'S SECOND SET OF QUESTIONS  
(2 April 2007)**

**TABLE OF CONTENTS**

	Page
TABLE OF EXHIBITS .....	2018
A. SCOPE OF THIS PROCEEDING.....	2021
B. CLAIMS OF BRAZIL REGARDING PRESENT SERIOUS PREJUDICE .....	2047
1. Significant price suppression - Article 6.3(c) of the SCM Agreement .....	2047

## TABLE OF EXHIBITS

Exhibit US-	Title
140	NASS Prospective Plantings Report (March 30, 2007)
141	7 U.S.C. 5622
142	7 C.F.R. 1493 (Subparts A and B)
143	<i>The New Shorter Oxford English Dictionary</i> at 793, Volume 1, (2005 Edition)
144	Economic Research Service, Commodity Costs and Returns available at <a href="http://www.ers.usda.gov/data/CostsandReturns/">http://www.ers.usda.gov/data/CostsandReturns/</a>
145	Comparisons of USDA February Projections to Final Estimates
146	Comparison of NCC Planting Intentions Report Data to Final NASS Acreage Data
147	Updated Cotton, Corn, and Soybean Futures Data for 2007 (Year To Date)
148	<i>The New Shorter Oxford English Dictionary</i> at 1350, Volume 1, (2002 Edition)
149	<i>The Handbook of Fixed Income Securities</i> , 6 <sup>th</sup> ed. (2001), Fabozzi, Frank J. (McGraw-Hill Professional), pp. 588-592
150	Marshall, John F. "Futures Versus Swaps: Some Considerations for the Thrift Industry," <i>Review of Business</i> ; Winter 1990/1991; 12, 3, pp. 15-23
151	BSC Bond Street Capital; Credit Tenant Lease Loans - Minimum \$10,000,000. <a href="http://www.bisonfinancial.com/loans/bsc_ctl.html">http://www.bisonfinancial.com/loans/bsc_ctl.html</a>
152	Glennon, Dennis and Nigro, Peter; "Measuring the Default Risk of Small Business Loans: A Survival Analysis Approach," <i>Journal of Money, Credit, and Banking</i> , Vol. 37, No. 5 (October 2005), pp. 923-947
153	Notice to GSM-102 Program Participants: USDA Clarifies Method for Computing Interest Coverage Under GSM-102 Program (15 July 2005) <a href="http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?PrNum=0105-05">http://www.fas.usda.gov/scriptsw/PressRelease/pressrel_dout.asp?PrNum=0105-05</a>

<b>Exhibit US-</b>	<b>Title</b>
154	Wall St. Journal prime rates from February, 2000 to the present, available at <a href="http://www.hsh.com/indices/prime00s.html">http://www.hsh.com/indices/prime00s.html</a> (accessed 20 March 2007)
155	Comparison of interest rate coverage of CCC GSM-102 export credit guarantees and Ex-Im Bank Letter of Credit Insurance for Banks (1 July 2005 - 1 March 2007)
156	26-week T-bill rates as provided by the U.S. Department of Treasury for the period 1 July 2005 - 20 March 2007, available at <a href="http://treasurydirect.gov/RI/OFAuctions">http://treasurydirect.gov/RI/OFAuctions</a>
157	Remarks by Ben S. Bernanke, Chairman of the United States Federal Reserve Board, "Modern Risk Management and Banking Supervision" (12 June 2006) available at <a href="http://www.federalreserve.gov/boardDocs/speeches/2006/200606123/default.htm">http://www.federalreserve.gov/boardDocs/speeches/2006/200606123/default.htm</a>
158	Overview: US Standard General Ledger available at <a href="http://www.fms.treas.gov/ussgl/about.html">http://www.fms.treas.gov/ussgl/about.html</a>
159	Standard General Ledger cover; Treasury Financial Manual Transmittal Letter No. S2 06-02 (14 July 2006), which immediately follows the cover, and pages III-146 and III-151 of the Ledger. <a href="http://fms.treas.gov/ussgl/tfm_releases/06-02/ussgl_06-02.pdf">http://fms.treas.gov/ussgl/tfm_releases/06-02/ussgl_06-02.pdf</a> (Pages 972, 977)
160	Office of Management and Budget Circular A-136 available at <a href="https://max.omb.gov/maxportal/pdf/circular_a136_section_6.1.pdf">https://max.omb.gov/maxportal/pdf/circular_a136_section_6.1.pdf</a>
161	2008 U.S. Government Budget Appendix: CCC Export Loans Program Account, pp. 104-106
162	Federal Reserve Board Supervisory Letter SR 94-12 available at <a href="http://www.federalreserve.gov/BOARDDOCS/SRLETTERS/1994/SR9412.HTM">http://www.federalreserve.gov/BOARDDOCS/SRLETTERS/1994/SR9412.HTM</a>
163	"Applying the CAMEL Framework", Asian Development Bank available at <a href="http://www.adb.org/Documents/Guidelines/Financialpart060302.asp">http://www.adb.org/Documents/Guidelines/Financialpart060302.asp</a>
164	Government Accountability Office Report No. GAO-04-531

1. The United States submits below responses to the Panel's questions directed at either both parties or the United States alone. Before turning to those questions, the United States notes that important new data has become available since the meeting with the Panel providing even further support for the U.S. arguments that marketing loan and counter-cyclical payments do not "numb" the planting decisions of the U.S. farmers. As the Panel may recall, in the meeting with the Panel, the United States submitted the recently-issued survey of MY 2007 upland cotton planting intentions, showing that U.S. producers intended to pull back on their upland cotton plantings in MY 2007 by approximately 14 percent in response to such factors as the relatively more attractive prices for corn and the poor performance of U.S. exports since August 2006 (at which time the Step 2 program was eliminated). This evidence clearly contradicted Brazil's claims that U.S. farmers do not respond to market signals and continue to plant upland cotton in situations where – without marketing loan and counter-cyclical payments – they would not do so.

2. Brazil has attempted to dismiss this evidence asserting that "[i]f marketing loan and CCP subsidies did not exist, and if U.S. cotton farmers would have to react to market price signals, far more than 14 percent of cotton acreage predicted by the NCC would switch to substitute crops."<sup>1</sup> Brazil has not substantiated that assertion, nor explained how a projected 14 percent year-over-year decline in planted acreage is consistent with the proposition that U.S. cotton farmers' planting decisions are numbed and do not react to market signals. Moreover, recent data published by USDA show that, in fact, "far more than 14 percent of cotton acreage" is projected to switch to other crops in the upcoming crop year. According to the "Prospective Plantings" report published by the National Agricultural Statistics Service ("NASS") based on surveys conducted by USDA in the first two weeks of March from a sample of more than 86,000 farm operators across the United States, "upland cotton acreage is expected to total 11.9 million, **down 21 percent from last year and the lowest since 1989.**"<sup>2</sup> The magnitude of the acreage shift is even more remarkable when one considers regional responses. According to the NASS report, "due to the increased demand and higher prices of crops used for bio-fuels," acreage is expected to decline dramatically **in every single area in which upland cotton is grown.** These shifts are so substantial that, in many cases, planted acreage is at historically low levels; levels lower than they were in years well before either the marketing loan or counter-cyclical payments came into effect<sup>3</sup>:

- Upland growers in the Delta States (Arkansas, Louisiana, Mississippi, Missouri, and Tennessee) are expecting the largest decrease in acreage. Producers intend to plant 2.91 million acres, **a 31 percent decrease from the previous year.**

<sup>1</sup> Oral Statement of Brazil, para. 73.

<sup>2</sup> NASS Prospective Plantings Report, p. 1 (March 30, 2007) (Exhibit US-140).

<sup>3</sup> See NASS Prospective Plantings Report, pp. 28-29 (March 30, 2007) (Exhibit US-140).

- Farmers in Mississippi expect to plant 740,000 acres, 40 percent less than last year and the lowest acreage since 1983.
- In Louisiana producers intend to plant 380,000 acres, the lowest since 1975.
- In the Southeastern States (Alabama, Florida, Georgia, North Carolina, South Carolina, and Virginia) growers intend to plant 2.55 million acres, a decrease of 24 percent from last year.
- The planted area in North Carolina is expected to decline 570,000 acres, 34 percent less than 2006.
- Producers in Texas, Oklahoma, Kansas, and New Mexico intend to plant 6.01 million acres, a 13 percent decrease from last year.
- Texas producers expect to plant 5.70 million acres, down 700,000 acres from last year.
- Upland planted acreage in California and Arizona is expected to total 390,000 acres, down 18 percent from last year.
- California producers intend to plant 210,000 acres, the lowest since USDA began tracking upland cotton acreage intentions in 1941.

3. In other words, there is no longer any question of "*if* U.S. cotton farmers would have to react to market price signals." The evidence proves definitively that, even under Brazil's arguments, U.S. cotton farmers *do* react to market price signals and other planting and production signals (such as considerations of weather, pests, and good agronomic practices). This is a matter of fact. And no amount of econometric gymnastics performed by Brazil for purposes of this proceeding – which appears, increasingly, to be the main evidentiary basis for its claims – detracts from it.

4. As a large number of the Panel's questions deal with the question of the effect of marketing loan and counter-cyclical payments on plantings, production and exports, the above data are particularly important in reviewing the U.S. and Brazilian responses.

#### A. SCOPE OF THIS PROCEEDING

##### *Questions to both parties*

44. ***The European Communities argues in respect of the preliminary objection raised by the United States regarding the claims of Brazil relating to export credit guarantees for pig meat and poultry meat under the GSM 102 programme that "the important issue is the nexus or the degree of interrelatedness or interdependence between different elements of the measure." (Oral State-***

*ment of the European Communities, para. 6) The European Communities submits in this regard that:*

*"the Panel should examine the original measure at issue and the 'measures taken to comply,' and, with particular reference to the 'elements of the measure' that the United States argues are outside the Panel's terms of reference, enquire into the extent to which these are interrelated or interdependent with measures or 'elements of measures' that the United States accepts are within the Panel's terms of reference." (Oral Statement of the European Communities, para. 11)*

*Do the parties agree with the approach suggested by the European Communities and with the considerations in paragraph 13 of the Oral Statement of the European Communities?*

1. The United States does not agree with the approach suggested by the European Communities. Nor does the United States agree that the "factors" listed in paragraphs 13 of the EC Oral Statement support expanding the scope of this proceeding to include GSM 102 export credit guarantees provided for exports of pig meat and poultry meat.
2. The scope of matters that are properly reviewed in an Article 21.5 proceeding are established by Article 21.5 of the DSU. That Article provides that:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures. . . .

3. Two things about this language indicate the proper approach to determining the measures that are properly within the scope of an Article 21.5 proceeding:
  - First, the text provides for dispute settlement procedures for the resolution of disagreements regarding "measures taken to comply with the recommendations and rulings [of the DSB]."
  - And, second, the text does *not* provide for "measures taken to comply with the recommendations and rulings" of the DSB *and any other "interrelated" or "interdependent" measures*.
4. By the terms of Article 21.5, the touchstone for determining what is a "measure taken to comply" is *the recommendations and rulings* of the DSB. It is these recommendations and rulings that – necessarily and logically – drive what measures are taken to comply and, thus, what measures are properly the subject of a "compliance" proceeding under Article 21.5 of the DSU. Considerations of "interrelatedness" or "interdependence" may be implicated in resolving as a fac-



tual matter *what the measure taken to comply is* in a particular dispute. However, the "interrelatedness" or "interdependence" that is relevant in that context is between elements of the *new* measure taken to comply (e.g., *EC – Bed Linen* (21.5))<sup>4</sup> or multiple *new* measures that may not all be declared by a responding Member as being taken to comply with the DSB's recommendations and rulings but nonetheless are properly deemed measures taken to comply given the particular recommendations and rulings in the original proceeding and the facts of the dispute (e.g., *Softwood Lumber* (21.5), *Australia Leather II* (21.5), and *Australia – Salmon* (21.5)).<sup>5</sup>

5. Moreover, it is not "interrelatedness" or "interdependence" in the abstract that is important but, rather, such a connection *vis-a-vis the DSB's recommendations and rulings*. Thus, if the DSB's recommendations and rulings distinguish between different elements of a measure or different measures then that distinction is determinative for purposes of the compliance proceeding as well. There is no fresh test of "interrelatedness" or "interdependence" applied under Article 21.5 of the DSU such as the one the European Communities now espouses that would allow *any measure* deemed to be "interrelated" or "interdependent" with a measure taken to comply to be swept into the scope of a compliance proceeding.

6. In the present dispute, the DSB's recommendations and rulings clearly distinguish "export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes . . . in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)"<sup>6</sup> from other export credit guarantees under those programs. This is because the original panel found that Brazil

<sup>4</sup> In *EC – Bed Linen* (21.5) a question raised was whether all elements of the new dumping redetermination on imports from India should be considered part of one indivisible measure such that even those elements that had not changed since the original proceeding and had not been subject to any recommendations and rulings therein should be subject to renewed challenge in the Article 21.5 proceeding. The Appellate Body explained that:

we are of the view that the investigating authorities of the European Communities were not required to change the determination as it related to the "effects of other factors" in this particular dispute. Moreover, we do not see why that part of the redetermination that merely incorporates elements of the original determination on "other factors" would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute. Indeed, the investigating authorities of the European Communities were able to treat this element separately. Therefore, we do not agree with India that the redetermination can only be considered "as a whole new measure."

*EC – Bed Linen* (AB), para. 86.

<sup>5</sup> The *Australia – Salmon* (21.5), *Australia – Leather* (21.5), and *U.S. – Softwood Lumber IV* (21.5) disputes all dealt with situations in which two new measures were taken close in time – one that was declared to achieve compliance – and another that the complaining party alleged "undid" the compliance achieved by the first. In those disputes, the panels assessed the connectedness of the new measures to determine whether they should both be considered "measures taken to comply" such that compliance is examined by reference to both.

<sup>6</sup> *Upland Cotton* (Panel), para. 8.1(d) (emphasis added).