

US – UPLAND COTTON¹ (DS267)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Brazil	AA Arts. 3.3, 8. 9.1(a) and 10 ASCM Arts. 3, 5(c) and 6.3(c)	Establishment of Panel	18 March 2003
			Circulation of Panel Report	8 September 2004
Respondent	United States		Circulation of AB Report	3 March 2005
			Adoption	21 March 2005

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** US agricultural “domestic support” measures, export credit guarantees and other measures alleged to be export and domestic content subsidies.
- **Product at issue:** Upland cotton and other products covered by export credit guarantees.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **AA Art. 13 (due restraint (peace clause)):** The Appellate Body upheld the Panel's finding that the “Peace Clause” in the AA did not apply to a number of US measures, including domestic support measures for upland cotton.
- **ASCM Art. 6.3(c) (serious prejudice):** The Appellate Body upheld the Panel's finding that the effect of subsidy programme at issue – i.e. marketing loan programme payments, Step 2 (*user marketing*) payments, market loss assistance payments, and counter-cyclical payments – is significant price suppression within the meaning of Art. 6.3(c), causing serious prejudice to Brazil's interests within the meaning of Art. 5(c).

The Panel found that other US domestic support programmes (i.e. production flexibility contract payments, direct payments, and crop insurance payments) did not cause serious prejudice to Brazil's interests because Brazil failed to prove a necessary causal link between these programmes and significant price suppression.

- **ASCM Art. 3.1(a) and (b), AA, Art. 9.1(a) (export substitution subsidies and import subsidies – step 2 Payments):** The Appellate Body upheld the Panel's finding that Step 2 payments to *domestic* users of US upland cotton were subsidies contingent on the use of domestic over imported goods that are prohibited under ASCM Arts. 3.1(b) and 3.2. The Appellate Body also upheld the Panel's findings that Step 2 payments to *exporters* of US upland cotton constitute subsidies contingent upon export performance within the meaning of AA Art. 9.1(a) and, consequently, the United States had acted inconsistently with AA Arts. 3.3 and 8. In addition, the Appellate Body found that the Step 2 payments to exporters were prohibited export subsidies that were inconsistent with ASCM Arts. 3.1(a) and 3.2.
- **AA Art. 10.1 and ASCM Arts. 3.1(a) and 3.2 (export subsidies – export credit guarantees):** The Appellate Body upheld the Panel's finding that US export credit guarantee programmes at issue were “export subsidies” within the terms of the ASCM, and thus, circumvented the US export subsidy commitments in violation of AA Art. 10.1 and violated ASCM Arts. 3.1(a) and 3.2 of the ASCM. The Appellate Body, in a majority opinion, also upheld the Panel's finding that AA Art. 10.2 does not exempt export credit guarantees from the export subsidy disciplines in Art. 10.1. One member of the Appellate Body, however, in a separate opinion, expressed the contrary view that Art. 10.2 exempts export credit guarantees from the disciplines of Art. 10.1 until international disciplines are agreed upon.
- **ASCM Arts. 4.7 and 7.8 (panel recommendations):** The Panel recommended that (i) as for prohibited subsidies (export credit guarantees and step 2 payments), the United States withdraw them without delay (i.e. in this case, within six months of the date of adoption of the Panel/AB Report or 1 July 2005 (whichever was earlier))³; and (ii) as for subsidies found to cause serious prejudice, the United States should take appropriate steps to remove their adverse effects or withdraw the subsidy.

¹ *United States – Subsidies on Upland Cotton*

² Other issues addressed: DSU Arts. 11, 12.7, 17.5; terms of reference (expired measures, consultations); burden of proof; judicial economy; Appellate Body's scope of review (fact vs law); sufficiency of notice of appeal (Working Procedures for Appellate Review, Rule 20(2)); statement of available evidence (ASCM Art. 4.2); GATT Art. XVI; Item (j) of the illustrative list of the ASCM.

³ On 3 February 2006, the United States Congress approved a bill that repealed the Step 2 subsidy programme for upland cotton. The bill was signed into law on 8 February 2006, and took effect on 1 August 2006.

US – UPLAND COTTON (ARTICLE 21.5 – BRAZIL)¹ (DS267)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	Brazil	ASCM Arts.3, 5(c), 6.3(c), and item (j) of the Illustrative List, AA Arts. 8 and 10.1, DSU Arts. 11 and 21.5	Referred to the Original Panel	28 September 2006
			Circulation of Panel Report	18 December 2007
Respondent	United States		Circulation of AB Report	2 June 2008
			Adoption	20 June 2008

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- US export credit guarantees and agricultural domestic support measures relating to cotton, pig meat, poultry meat and other agricultural products.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- AA Arts. 10.1 and 8, and ASCM Arts 3.1(a), 3.2 and the Illustrative List of Export Subsidies, item (j):** The Appellate Body upheld the Panel's finding that export credit guarantees provided under the revised GSM 102 programme were "export subsidies" because the premiums charged were inadequate to cover the long-term operating costs and losses of the programme, within the meaning of item (j) of the Illustrative List. The Appellate Body upheld the Panel's finding under item (j) despite having found that the Panel's analysis of certain quantitative evidence concerning the financial performance of the revised GSM 102 programme did not meet the requirements of DSU Art. 11. Upon finding that the Panel acted inconsistently with DSU Art. 11, the Appellate Body completed the analysis and found that the Panel's finding on the structure, design, and operation of the revised GSM 102 programme, in the light of the quantitative evidence, provided a sufficient evidentiary basis for the conclusion that the revised GSM 102 programme operates at a loss within the meaning of item (j). The Appellate Body also upheld the Panel's consequential finding that the United States acted inconsistently with AA Arts. 10.1 and 8, and ASCM Art. 3.1(a) and 3.2, and therefore that the United States had failed to comply with the DSB's recommendations and rulings.
- ASCM Arts. 5(c) and 6.3(c) (serious prejudice):** The Appellate Body upheld the Panel's conclusion that the United States failed to comply with the DSB's recommendations and rulings in that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers was significant price suppression in the world market for upland cotton within the meaning of ASCM Art. 6.3(c), constituting "present" serious prejudice to the interests of Brazil within the meaning of ASCM Art. 5(c).

3. OTHER ISSUES²

- Terms of reference (DSU Art. 21.5 panels):** The Appellate Body upheld the Panel's findings that Brazil's claims concerning export credit guarantees for pig meat and poultry meat were properly within the scope of the Art. 21.5 proceedings. The Appellate Body upheld the Panel's finding that Brazil's claims concerning marketing loan and counter-cyclical payments provided after 21 September 2005 were properly within the scope of the Art. 21.5 proceedings.

¹ United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil

² Other issues addressed: Appellate Body's scope of review (fact vs law); panels' discretion to seek information (DSU Art. 13); request for open hearing; the propriety of the panel's composition; designation of a Member as a "least developing country"; terms of reference (DSU Art. 6.2).