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United States – Subsidies on Upland Cotton Recourse to Article 21.5 by Brazil, WT/DS267/AB/RW (2 June 2008)

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Abstract: Two of the four issues in this Appellate Body Report concerned the proper scope of Article 21.5 DSU compliance panel proceedings; the other two issues concerned the Appellate Body's review of the Panel's use of evidence. On the Article 21.5 issues, the Appellate Body essentially ruled that an Article 21.5 compliance proceeding could evaluate the WTO consistency of: (i) the entirety of an implementation measure (including parts of the measure that did not specifically implement DSB recommendations and rulings) and (ii) new subsidy grants made under a program in respect of which prior subsidy grants had been found to cause serious prejudice so as to determine whether the new grants also resulted in serious prejudice. On the evidentiary issues, the Appellate Body upheld the Panel's conclusions, although it modified certain of the Panel's reasoning. Probably the most interesting aspect of the case was the substantial deference showed by the Appellate Body to the Panel's consideration of causation and non-attribution issues. This deference was striking compared to the lack of deference that the Appellate Body has given to national authorities on those issues. We detect, however, a welcome interest on the part of the Appellate Body to require the use of analytical tools on the part of panels evaluating serious-prejudice cases.

1. Background

This paper examines certain issues presented by the Appellate Body Report in a compliance proceeding brought by Brazil in respect of US subsidies benefitting upland cotton.[1] The case initially arose in 2002, when Brazil challenged certain US

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1 *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/AB/RW (2 June 2008) (hereinafter 'Appellate Body 21.5 Report'). The Panel and Appellate Body reports in the original proceedings were analyzed in André Sapir and Joel Trachtman, 'Subsidization, Price Suppression, and Expertise: Causation and Precision in Upland Cotton', The WTO Case Law of 2004–2005 (ALI, 23 February 2007), also published in 7 *World Trade Review* 183–209 (2008).

measures as subsidies prohibited by or actionable under WTO rules.[2] The original Panel Report, issued in 2004, concluded *inter alia*:[3]

> – US government export credit guarantees provided to unscheduled products (including upland cotton) and one scheduled product (rice) under three US programs – known as GSM 102, GSM 103, and SCGP – were export subsidies applied so as to result in circumvention of US export subsidy commitments in the WTO Agreement on Agriculture;
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> – such subsidies to the extent subject to the SCM Agreement were prohibited export subsidies because the premiums charged for the guarantees did not cover their long-term costs;
>
> – export credit guarantees provided in respect of other scheduled products (including in particular pig meat and poultry meat) did not violate any WTO rules;
>
> – certain US domestic subsidy measures – namely marketing loan program payments, Step 2 payments,[4] market loss assistance payments and countercyclical payments – were actionable subsidies in that they caused significant price suppression resulting in serious prejudice to Brazil in terms of Article 5(c) SCM; and
>
> – the United States should withdraw the export subsidies within six months of the adoption of the report (or, if earlier, by 1 July 2005) and take appropriate steps to remove the adverse affects of or withdraw the subsidies found to cause serious prejudice to Brazil. Article 7.9 DSU effectively requires the latter to be accomplished within six months of the adoption of the report in question (i.e., by 21 September 2005 in this case).

On appeal, the Appellate Body upheld the results reached in the Panel Report to the extent appealed, except for the findings on pig meat and poultry meat.[5] As to them, the Appellate Body found itself unable to complete the analysis of the issues. Thus, there was no finding of WTO inconsistency with regard to those two products, but also no finding of WTO consistency (which was the case of the other scheduled products besides rice). The reports were adopted on 21 March 2005.[6]

The United States stated that it would implement the DSB recommendations.[7] As to the export credit programs, the US eliminated the GSM 103 program and

2 *United States – Subsidies on Upland Cotton*, WT/DS267/1 (3 October 2002).

3 *United States – Subsidies on Upland Cotton*, WT/DS267/R (8 September 2004) (hereinafter 'Panel Report').

4 The Step 2 payments were also found to constitute export and import substitution subsidies under Article 3 SCM.

5 *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (3 March 2005) (hereinafter Appellate Body Report').

6 WT/DS267/20 (24 March 2005).

7 WT/DSB/M/188, at 7 (18 May 2005) (minutes of meeting held on 20 April 2005).

announced a new fee structure for the GSM 102 and SCGP programs in June 2005. In October 2005, it stopped issuing guarantees under the SCGP program. Then, in February 2006, it eliminated the Step 2 program.[8]

Brazil claimed that these actions failed to bring the United States into compliance with its WTO obligations, and the Article 21.5 DSU compliance proceeding that is the subject of this paper ensued.[9] In its report,[10] the compliance Panel concluded that the revised GSM 102 program continued to provide guarantees for fees that did not cover its total costs and thus was still an export subsidy in violation of the Agriculture Agreement and a prohibited export subsidy under the SCM Agreement. These findings applied to unscheduled products (such as upland cotton) and to three scheduled products (rice, pig meat, and poultry meat). The Panel also concluded that the marketing loan and countercyclical payments that were unchanged continued to cause serious prejudice to Brazil. The Panel also made two procedural rulings regarding the scope of the Article 21.5 proceeding. First, the Panel concluded that Brazil could renew its claim that the US was providing export subsidies in excess of the applicable scheduled amounts with regard to pig meat and poultry meat. Second, the Panel determined that, in examining the serious-prejudice issue, it could consider marketing loan and countercyclical payments made subsequent to the date by which the United States should have implemented the original Panel Report.

On appeal, the Appellate Body upheld the results of the Panel Report,[11] although it modified the Panel's analysis. The reports were adopted on 20 June 2008.[12] As noted, Brazil had previously requested authority to take retaliatory measures against the United States for its failure to comply, and following adoption of the Article 21.5 reports, the arbitrations to determine the level of permitted retaliation measures were reactivated[13] and were pending as of 1 August 2009.

For the most part, the Appellate Body's rulings in this case focused on rather narrow issues: two of the four contested issues concerned the permissible scope of Article 21.5 proceedings; the other two issues essentially involved a review of the conclusions that the Panel had drawn from the evidence it examined. Regarding

8 Appellate Body 21.5 Report, para. 8.

9 Brazil initially requested authorization to take countermeasures for non-implementation on 4 July 2005. WT/DS267/21 (5 July 2005). That action led to an agreement on sequencing between the United States and Brazil, pursuant to which the United States requested arbitration of the level of countermeasures; the arbitrations (technically there are two arbitrations – one under Article 4 SCM and one under Article 7 SCM) were suspended until completion of the Article 21.5 DSU proceedings, and Brazil was allowed to have a 21.5 panel established without further consultations or a second DSB meeting. The agreement is found at WT/DS267/22 (8 July 2005). Brazil requested the establishment of a 21.5 panel on 18 August 2006, WT/DS267/30 (21 August 2006), and it was established on 28 September 2006. WT/DSB/M/220, item 4 (2 November 2006).

10 *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*, WT/DS267/RW (18 December 2007) (hereinafter 'Panel 21.5 Report').

11 Appellate Body 21.5 Report, para. 448.

12 WT/DS267/37 (26 June 2008).

13 WT/DS267/38 & 39 (15 October 2008).

the issues arising under the Agriculture and SCM Agreements, the Panel largely followed the same basic approach that it had in the original proceeding. Thus, the case does not present new issues under those agreements. As noted below, however, it is interesting to contrast the rather 'light touch' review the Appellate Body applied to the Panel's findings on serious prejudice with the intensive review that it has instructed panels to undertake when they are reviewing decisions of national authorities on injury in dumping, subsidy, and safeguard cases.

We turn first to the Article 21.5 scope issues and then to the evidentiary issues.

2. Article 21.5: Scope of 'Measures Taken to Comply'

Article 21.5 DSU provides an expedited panel procedure in the event that 'there is disagreement as to the … consistency with a [WTO] agreement of measures taken to comply with the [DSB's] recommendations and rulings'. Under Article 21.5, the matter is to be referred to the original panel (wherever possible) and the report is to be circulated within 90 days. In practice, so-called compliance panels have usually taken much longer than 90 days to circulate their reports and the reports have often been appealed. Nonetheless, compliance panel proceedings are typically a bit quicker than regular panel proceedings.[14]

A responding party may well prefer to limit the scope of issues referred to compliance panels under Article 21.5. After all, the matter will be heard by the original panel, which has already found the respondent to be in violation of WTO rules in the initial proceeding.[15] Moreover, if the respondent loses in an Article 21.5 proceeding, it will not benefit from any reasonable period of time in which to implement, but rather will be immediately subject to retaliatory measures (subject to a relatively short delay while the level of retaliation is arbitrated). Thus, there are clear strategic reasons why respondents urge a narrow view of the scope of the phrase 'measures taken to implement'.

Complaining parties, of course, have precisely the opposite interests. For the WTO dispute-settlement system itself, it would seem that allowing more scope to Article 21.5 DSU proceedings is probably desirable. As discussed in more detail below, such a result promotes efficiency and avoids splitting closely related issues between two separate proceedings.

2.1 Raising previously litigated but unresolved issues in Article 21.5 DSU proceedings

The first scope issue in this case concerned certain US export credit guarantee programs. As noted above, the United States was found to have violated WTO rules because the fees charged for these programs did not cover their costs. As a

14 William J. Davey (2008), 'Expediting the Panel Process in WTO Dispute Settlement', in Merit E. Janow, Victoria Donaldson, and Alan Yanovich (eds.), *The WTO: Governance, Dispute Settlement and Developing Countries*, New York: Juris Publishing, pp. 409, 415–421.

15 More often than not, the original panelists are available and do serve. See ibid., at 464–470.

consequence, it was found to have provided WTO-illegal export subsidies with regard to products not subject to WTO export subsidy commitments (i.e., so-called unscheduled products, including upland cotton) and with regard to one product – rice – where it had scheduled export subsidy commitments. In respect of two other scheduled products – pig meat and poultry meat – the Appellate Body reversed the Panel's conclusion that it had not exceeded its export subsidy commitments, but the Appellate Body did not complete the analysis of the issue, which meant that there were no findings regarding these two products. The Panel's conclusion that there was no violation of export subsidy commitments in other scheduled products was not challenged.

The United States claimed that it had corrected the export credit violations by eliminating two of the three export credit guarantee programs at issue and generally restructuring the remaining program. In challenging the restructured program – GSM 102 – Brazil argued that GSM 102 continued to constitute an export subsidy and requested findings in respect of unscheduled products and three scheduled products – rice, as to which a violation had been found in the original proceeding, and pig meat and poultry meat, as to which no findings were made, as described above. The United States asked the Panel to exclude pig meat and poultry meat from the scope of the proceedings. The Panel declined to do so. In its view, the fact that no violation had been found and that therefore no implementing measure needed to be taken did not mean that Brazil's claims were not related to 'measures taken to comply', as used in Article 21.5 DSU.[16] In reaching this conclusion, the Panel viewed the export guarantee arrangements for pig and poultry meat as measures separate from the implementing measure – the revised GSM 102 program – but it relied on *US–Softwood Lumber IV*[17] as supporting the notion that measures 'with a particularly close relationship' to an implementation measure could be considered to be within the scope of an Article 21.5 proceeding.[18] The Panel also noted that this situation was analogous to a case where the Appellate Body had ruled that a claim in respect of which a panel had exercised judicial economy in the original proceeding could be properly heard in an Article 21.5 proceeding.[19]

On appeal, the Appellate Body rejected the Panel's analysis – in particular, its view that multiple measures were at issue – as inapplicable. In its view, the first step was to identify the 'measure taken to comply'.[20] In that regard, it took the

16 Panel 21.5 Report, para. 9.23.

17 *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS257/AB/RW (adopted 20 December 2005).

18 Panel 21.5 Report, paras. 9.24–9.25.

19 Panel 21.5 Report, para. 9.26, citing *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW (adopted 24 April 2003).

20 Appellate Body 21.5 Report, para. 201.

view that the measure taken to comply was the revised GSM 102 program as a whole, and it noted various examples of where the United States had so described it.[21] The Appellate Body stressed that WTO Members have discretion to adopt either narrowly focused measures or broader measures when they implement DSB recommendations and rulings. It saw no reason why the definition of 'measures taken to comply' should be limited to what a Member was required to implement. Thus, since it viewed the new GSM 102 program as a single measure, it naturally encompassed the contested provisions on pig and poultry meat.[22]

In reaching its conclusion, the Appellate Body rejected the US arguments that its interpretation would lead to Members making the least possible changes to measures and would result in tangles of separate regimes, all done to avoid possible expansive challenges in Article 21.5 proceedings. The Appellate Body's position was simple: the choice of how to implement is up to the WTO Member concerned, and the DSU is neutral as to that choice.[23] It also rejected the US argument that it was unfair to include pig and poultry meat because they would be subject to an expedited challenge and benefit from no reasonable period of time for implementation, even though they had never been subject to a finding of WTO inconsistency. Again, the Appellate Body saw these consequences as flowing from the US choice as to the scope of its implementation measure.[24] Moreover, as the Appellate Body later noted, there are strong efficiency reasons for treating such related claims in one proceeding.

The Appellate Body did, however, place certain limits on the claims that could be raised. For example, it indicated that a complainant could not raise (i) claims that were raised in the original proceeding but were rejected or not pursued[25] and (ii) claims that could have been, but were not, raised in the original proceeding.[26] It would be possible, however, to raise claims that had been pursued in the original proceeding but not decided for reasons of judicial economy or, as in this case, the Appellate Body's inability to complete the analysis of an issue. And, of course, to the extent that the new measure taken to comply implicates new WTO issues, those could be raised.

21 Appellate Body 21.5 Report, paras. 203–204.

22 As to the Panel's reliance on the *US–Softwood Lumber IV* case, the Appellate Body noted that the case applied where there was a measure taken to comply and another closely related measure that could not be so characterized. That issue was explored in much more detail in *United States – Laws, Regulations and Methodology for Calculating Dumping Margins* (*Zeroing*), WT/DS294/AB/RW (adopted 11 June 2009).

23 Appellate Body 21.5 Report, para. 206.

24 Appellate Body 21.5 Report, para. 207. The Appellate Body could have noted, but did not, that Article 21.5 proceedings are typically not all that expedited. See note 14 supra.

25 Appellate Body 21.5 Report, para. 210. An example would be a claim in respect of which a prima facie case had not been established. See *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW (adopted 24 April 2003).

26 Appellate Body 21.5 Report, para. 211. An example would be a new claim against an unchanged part of the contested measure.

To us, the Appellate Body's position seems textually based and eminently reasonable, particularly for reasons of efficiency. An attempt to limit the scope of 'measures taken to comply' in the way suggested by the United States would likely lead to many instances of cases that belonged together being split between regular and compliance proceedings. That would obviously be inefficient, especially if different panelists were involved.[27] While determination of whether a measure qualifies as a 'measure taken to comply' for purposes of Article 21.5 DSU may at times be difficult, that was not true in this case. The revision of the GSM 102 program was clearly a 'measure taken to comply'.

2.2 *Subsequent subsidy payments and Article 21.5 proceedings*

The second Article 21.5 scope issue concerned the challengeability of subsidy payments made subsequent to 21 September 2005 (the date by which the United States was required to remove the adverse affects of or withdraw the subsidies found to be causing serious prejudice in the initial panel proceeding). As described above, in the original proceeding, payments under several US programs – the so-called Step 2 program, as well as the programs providing marketing loan, market loss assistance, and counter-cyclical payments – were found to have caused serious prejudice to Brazil. The United States terminated the Step 2 program, but continued payments under the marketing loan and counter-cyclical programs on the same terms as before. In the Article 21.5 proceeding, the United States argued that the findings in the original proceeding had been made in respect of payments made in the 1999–2002 marketing years and that it was required only to remove the adverse effects of those payments. According to the United States, later payments had to be challenged in a new proceeding.[28] In this regard, it noted that Brazil had chosen to challenge the payments and not the programs 'as such'. The Panel rejected this reasoning and took the position that the obligation in Article 5 SCM not to cause adverse effects through subsidies would not be met if a Member continued to provide payments under the same conditions as the original subsidy found to have caused adverse effects.[29] The Panel also cited the 'particularly close relationship' language discussed in the prior section.[30]

On appeal, the Appellate Body reached the same result, but based it on somewhat different reasoning. It focused on the requirement in Article 7.8 SCM that 'the Member granting *or maintaining* such subsidy [i.e., one found to cause adverse effects] shall take appropriate steps to remove the adverse effects or shall

27 It is likely that there would be different panelists, since the respondent could object to the same panelists and the Director-General might hesitate to appoint the same panelists, as different issues would be at stake.

28 The Panel determined that the DSB recommendations and rulings addressed only payments made under the subsidy programs and not the programs themselves. Brazil conditionally appealed this finding, but the Appellate Body found it unnecessary to decide the issue. Appellate Body 21.5 Report, paras. 250–254.

29 Panel 21.5 Report, paras. 9.79.

30 Panel 21.5 Report, para. 9.80.

withdraw the subsidy'. The Appellate Body was of the view that the implementation obligation was not limited to the subsidies granted in the past that had given rise to the Panel's rulings. In its view, the word 'maintain' suggests that the Article 7.8 obligation is of a 'continuous nature', which means that it would apply to recurring annual payments subsequent to those that had been evaluated by the Panel.[31] Otherwise, it thought that the commitment to take appropriate steps to remove the effects would be virtually meaningless. The respondent could do nothing, and the effects of the previously granted subsidies would dissipate. while the same effects would continue as a result of the newly granted subsidies.[32]

The United States disputed this. In its view, Brazil could have obtained broader relief of the sort that it was seeking in the Article 21.5 proceeding if it had challenged the US subsidy program 'as such' or claimed that the program created a threat of serious prejudice in the future. The Appellate Body responded that there was little difference between an 'as such' challenge and that made by Brazil, because in both cases the past actual payments would have to be examined to determine if the program was causing serious prejudice.[33] As to the possibility of alleging the threat of serious prejudice, the Appellate Body noted that that claim differed in substance from a claim of current serious prejudice. It also noted that in countervailing duty cases, a finding of serious injury entitled one to a remedy against future imports.[34] Overall, the Appellate Body was concerned that accepting the US argument would make it difficult to obtain relief even after serious prejudice had been established and that the US position would undermine the DSU goal of prompt compliance.

On reflection, the Appellate Body seems to have come to the best result, although one can criticize its reasoning in some respects. For example, the use of the term 'maintain' in Article 7.8 SCM would seem to cover the situation where a subsidy has been granted in the past, but is still being paid out (e.g., a ten-year grant of $1 million per year), rather than the Appellate Body's interpretation, which seems to suggest that it covers future independent grants. Moreover, the relevance of its citation to CVD practice as context supporting its position is difficult to understand, as such different anti-subsidy provisions are concerned.[35]

31 Appellate Body Report, para. 237.

32 Ibid. The Appellate Body found support for its view of Article 7 in the operation of Article 4 SCM (prohibited subsidies). It noted that where a Member replaced condemned prohibited subsidies with new subsidies, those new subsidies could be challenged in an Article 21.5 proceeding. *United States – Tax Treatment of 'Foreign Sales Corporations' – Second Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW2 (adopted 14 March 2006).

33 Appellate Body 21.5 Report, para. 237.

34 Appellate Body 21.5 Report, para. 238.

35 The rules at issue in *US–Cotton* effectively limit the right of a WTO Member to provide subsidies, while the rules on CVDs concern a Member's right to impose compensatory duties to offset subsidized exports from other members. It is true, of course, that an investigation of past conduct in a CVD case serves as the basis for a prospective remedy.

Nonetheless, the US argument would unduly narrow the scope of Article 21.5 proceedings. In essence, it resembles the argument that if a measure is found to violate WTO rules, compliance is achieved by the simple act of withdrawing the contested measure and that Article 21.5 cannot be used to challenge a replacement measure. That position was long ago rejected.[36] To us, it seems that if a WTO Member is found to have violated WTO rules, then it is appropriate to allow an Article 21.5 challenge to the 'new' regime that the Member puts in its place – whether that regime is a truly new regime, a somewhat revised regime, or essentially a continuation of the old regime.

Interestingly, the issue in this case is not so dissimilar from the issues that arise under antidumping cases involving the United States since the US system of retrospective assessment of antidumping duties on an annual basis means that by the time that a WTO proceeding – original or compliance – has been completed there will technically be a new US measure in place. The United States has to date also been unsuccessful in arguing that such 'new' measures are not challengeable in Article 21.5 proceedings.[37]

The US defense that Brazil should have challenged the US programs on an 'as such' basis is somewhat disingenuous. Such a challenge is a particularly difficult one to make when subsidies are involved. For example, the subsidies Brazil challenged under Article 5 SCM are not prohibited. They are a WTO problem only if they result in certain adverse effects, such as the serious prejudice to its interests that Brazil claimed in this case. Thus, an 'as such' challenge under Article 5 would have to show that the program at issue inherently led to serious prejudice, which would involve, as noted by the Appellate Body, looking at exactly the same material as was considered in this case. The difference would be that a stronger finding would have to be made – the program inherently causes serious prejudice, as opposed to a finding that the program has caused serious prejudice in the specific years examined. Since the existence of serious prejudice will depend on so many other market factors that will change over time, it will not be easy to conclude that a subsidy program inherently results in serious prejudice.

Basically the issue comes down to two questions: What is the nature of the obligation found in Article 5 SCM? If violated, what sort of remedial action is required? The obligation is not to cause 'adverse effects' such as 'serious prejudice'. That obligation is a continuing one. Once such adverse effects are found, the respondent is required by Article 7.8 SCM to remove the adverse effects or withdraw the subsidy. Since WTO remedial obligations are commonly viewed as prospective in nature, this obligation would seem to require the subsidy program to be withdrawn or the adverse effects of the program to be removed. If the subsidy

36 *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 by Ecuador*, WT/DS27/RW/ECU, paras. 6.3–6.12, especially para. 6.09 (adopted 6 May 1999).

37 See, e.g., *United States – Measures Relating to Zeroing and Sunset Reviews – Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/RW (24 April 2009) (on appeal, report expected 18 August 2009).

program is only modified, as here, the implementation issue will be whether the revised program will still cause serious prejudice. As such, that issue is an appropriate one for Article 21.5 DSU proceedings. And that is the result achieved here. Indeed, it would make little sense to say that the nature of the finding and the obligation to remove the adverse effects had no future implications for the programs found to have caused the problems.

2.3 Summary

In our view, the Appellate Body's resolution of the DSU Article 21.5 scope issues seems eminently reasonable.

3. Evidentiary issues

There were two evidentiary issues on the appeal – one relating to whether the US export credit guarantee program covered its costs and the other related to the Panel's finding of significant price suppression.

3.1 GSM 102 export credit guarantees

The third issue on appeal was the US claim that the evidence did not support a conclusion that its continuing export credit guarantee program – GSM 102 – still operated at a loss. The Panel examined four items of what the Appellate Body characterized as quantitative evidence in its assessment of whether or not the GSM 102 program was operated at a loss.

(i) US estimates showing losses for the 2006–2008 GSM 102 guarantees in the 2007 and 2008 US budgets;
(ii) US re-estimates for the 1992–2006 period that showed no losses overall;
(iii) consolidated financial statements of the granting agency (CCC), which showed an overall liability for the guarantee programs; and
(iv) cash accounting data compiled by Brazil for the 1992–2005 period, which showed a loss for the programs.[38]

In its evaluation of this evidence, the Panel relied in particular on item (i), which it found was confirmed by items (iii) and (iv).[39] It discounted item (ii), offered by the United States, because even though that data had shown some older cohorts (the guarantees granted in a given year) did not incur losses, the data did not demonstrate that more recent years would not result in losses. Moreover, the Panel noted that the re-estimates were only estimates.[40] Although the Panel did not comment on it, the re-estimates seemed to continue to show recent cohorts operating at a

38 Appellate Body 21.5 Report, para. 279.
39 Panel 21.5 Report, para. 14.89.
40 Ibid., para. 14.81.

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loss (i.e., the overall profitability of the program as re-estimated by the United States fell significantly by including the 2003–2006 cohorts).[41]

For the Appellate Body, the Panel's evaluation was seriously flawed. With the exception of two cohorts that had closed out profitably (1994 and 1995), all the evidence consisted of estimates and projections. Yet the Panel seemed to dismiss the US re-estimates because they were merely estimates and yet gave credence to the other estimates. Moreover, it did not attempt to reconcile the various estimates or explain why such a reconciliation was not possible. In the Appellate Body's words: 'The Panel's internally incoherent treatment of the same class of quantitative evidence thus vitiates the conclusion it drew based on the financial data submitted by the parties.'[42] Thus, the Appellate Body concluded that the Panel had not made an 'objective assessment' of the matter and facts as required by Article 11 DSU.[43]

Having reversed the Panel's conclusion based on the quantitative evidence, the Appellate Body turned to whether it could complete the analysis of the issue. In this regard, it essentially concluded that the evidence offered by the United States and Brazil was of similar reliability, but supported irreconcilable results.[44] It noted that its attempt to reconcile some of the conflicting estimates at the appellate hearing was unsuccessful.[45] Thus, the Appellate Body concluded that the quantitative evidence did not resolve the issue of whether the GSM 102 program operated at a loss.

This conclusion did not end the matter, because the Panel had also based its finding that the US program did not cover its overall costs on the structure, design, and operation of the GSM 102 program.[46] In that regard, the Panel had noted (i) that there was a statutory cap of 1 % on GSM 102 fees; (ii) that the fees did not increase in respect of risk as fast as they did under certain other US export credit programs (probably because of the cap); and (iii) that foreign obligor risk was not reflected in the fees. The Appellate Body rejected the US criticisms of the Panel's analysis of these factors[47] and concluded that it was 'not persuaded that the Panel

41 See figures in Appellate Body 21.5 Report, para. 262.

42 Appellate Body 21.5 Report, para. 294.

43 Ibid., para. 295.

44 Ibid., para. 301.

45 Ibid., para. 300.

46 The Panel also compared the GSM 102 program fees with the OECD's minimum premium rates (MPRs), established under the OECD's 'Arrangement on Officially Supported Export Credits – 2008 Revision', OECD Doc. TAD/PG(2007)28/Final (see paras. 23–25 thereof) and noted that there was a significant difference. While the OECD MPRs are set to ensure that certain, non-agricultural credit guarantee programs charge appropriate premia to reflect non-payment risks, their scope of application is sufficiently different that the Panel did not place much reliance on the OECD MPRs, except to note that the difference in fees was of considerable magnitude. The Appellate Body also did not place much emphasis on the differences. Appellate Body 21.5 Report, paras. 302–307.

47 The US criticisms were largely an attempt to suggest that these other comparators were different than the GSM 102 program, which the Panel and Appellate Body accepted. The US arguments that they were therefore irrelevant was not so persuasive and was rejected.

erred in finding that "the GSM 102 program is not designed to cover its long term operating costs and losses"'.[48]

Given its foregoing analysis, the Appellate Body concluded that 'The Panel's finding on the structure, design and operation, in light of the two plausible outcomes with similar probabilities that emerge from the quantitative evidence, provides a sufficient evidentiary basis for the conclusion that it is more likely than not that the revised GSM 102 program operates at a loss.'[49]

This conclusion is defensible – but only barely. The key evidence was the so-called quantitative evidence. The Appellate Body characterized that evidence as supporting two plausible outcomes, but since the outcomes were polar opposites, it would have been more appropriate to characterize the quantitative evidence as inconclusive. In that situation, one can legitimately ask whether indirect evidence regarding the design of the program should be sufficient to conclude that a violation had occurred. After all, evidence on design, structure, and operation is only indicative of a potential problem with meeting costs; the key evidence is the quantitative evidence, which was inconclusive. One can argue that Brazil or the Panel needed to do much more to explain the inconsistencies in that key evidence. The changes made by the United States should have reduced its losses (if any). The fact that the only cohorts that had closed in the past were profitable certainly could be taken to suggest that those changes would make it likely that the more recent cohorts would also be profitable. At a minimum, some more detailed analysis of the differences between the terms under which the profitable cohorts and the current cohorts operated should have been undertaken. These unexplored areas certainly raise some serious questions about the Panel and the Appellate Body's conclusions. Ultimately, of course, it is not the role of the Appellate Body to revisit a Panel's factual findings, but where it has reversed part of the findings supporting a specific factual conclusion, this raises questions about the conclusion itself. Thus, while the conclusion may have been correct,[50] the issue presented a very close call and a more thorough analysis of the evidence should have been undertaken. This case is one where a remand would have been useful.

48 Appellate Body 21.5 Report, para. 320.

49 Ibid., para. 321.

50 As panelists, we would have analyzed the evidence in its totality and concluded that it all supported Brazil – including the re-estimates of recent cohorts – except for the re-estimates of cohorts from the past. Absent more evidence on why the experience of those cohorts should outweigh the current US government view of whether the program would lose money, that counter-evidence would not outweigh what Brazil had presented. By dividing the evidence into two groups – quantitative and other – and essentially determining that the more important group was inconclusive, the Appellate Body arguably made the issue a closer one than it really was. After all, the US government issued the guarantees on the assumption that they would lose money and, to the extent that the cost of the guarantees at issue here was re-estimated, they still showed losses.

3.2 Serious prejudice

The United States also appealed the Panel's finding that its domestic subsidies to cotton producers caused serious prejudice to Brazil through the suppression of cotton prices internationally. In that respect, the United States raised two particular points.[51]

First, the United States objected that the Panel did not indicate the degree of price suppression that it found to be significant. In the original proceeding, the Panel had used a 'binary' approach in that it first determined whether price suppression had occurred and then considered whether it was significant. In this Article 21.5 proceeding, the Panel followed a unitary approach in which it considered three issues together: the existence of price suppression, its significance, and its causation.[52]

The Appellate Body considered that a unitary approach was acceptable given the conceptual nature of the inquiry – which essentially involved an evaluation of a comparison of what did happen and what would have happened if there had been no US subsidization.[53] In that regard, the Appellate Body noted that the Panel had used an economic model proposed by Brazil in order to undertake the counterfactual assessment. Using that model, but substituting US parameters for the Brazilian ones, the Panel found that US production was 12–18 % higher with the subsidies and that elimination of the subsidies would have increased prices by 1.4–2.3 % (compared to an increase of 8.2–8.9 % using Brazil's parameters).[54] The Panel did not choose between the US and Brazilian parameters, but suggested that even with the US numbers, there was significant price suppression because of the commodity status of the product involved:

> [F]or a basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices *could be significant* because, for example, profit margins *may* ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes trade on markets experiencing price suppression.[55]

Noting that the United States had not challenged the accuracy of this statement, the Appellate Body concluded: 'Thus, the range of price effects resulting from the simulations would fall within the Panel's view of what constitutes "significant" price suppression in the specific context of the world price of upland cotton.'[56]

51 The United States raised several other evidentiary issues that the Appellate Body grouped together in one section and rejected – in part because they involved questions of fact and in part because the Appellate Body thought the Panel's decision to follow the approach of the original panel on a number of issues was appropriate. Appellate Body 21.5 Report, paras. 382–446.

52 Appellate Body 21.5 Report, paras. 352–353.

53 Ibid., paras. 354 *et seq*.

54 Ibid., paras. 363–365.

55 Panel 21.5 Report, para. 10.50, quoting Panel Report (emphasis added).

56 Appellate Body 21.5 Report, para. 365.

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One would have wished for more analysis by the Panel than speculation that a small suppression of prices *could* be significant. Indeed, one could argue that the Panel never found that price suppression was significant in fact, but only speculated that it could be. Nonetheless, given the role of the Appellate Body, which is not to review factual questions, its decision not to disturb the Panel finding may be defensible.

Second, the United States objected to the Panel's conclusion because it had failed to consider the influence of China on cotton prices. China has become the major cotton importer. For us, as well as the Appellate Body, the US evidence that the lack of transparency about Chinese demand had a price-suppressing effect was not all that persuasive.[57] However, the US argument was theoretically sound; it was a matter of whether there was evidence to support it. Nonetheless, the Panel's analysis of this issue was rather terse. In its entirety, it read:

> [B]ased on the evidence before it, that while China may play a significant role in the market for upland cotton, this does not diminish the significance of the impact of [US] subsidies on the world price for upland cotton as a result of their effect on [US] supply to the world market.[58]

Given the weakness of the US evidence, the Appellate Body essentially concluded that the Panel had done enough.[59]

In respect of both of these evidentiary issues, the difference in the level of deference accorded by the Appellate Body to panel factfinding and analysis as opposed to national authority factfinding and analysis is striking. In particular, one is struck by the stark difference between the Appellate Body's approach to non-attribution analysis here and its approach to non-attribution analysis by national authorities in trade-remedy cases. In apparent recognition of this gulf, the Appellate Body stressed that the 'serious-prejudice' provisions of the SCM Agreement do not contain the detailed language on causation and non-attribution applicable to CVD investigations under the same agreement.[60] Nonetheless, there is an explicit causation requirement in Article 5(c) SCM (not mentioned by the Appellate Body) and, according to the Appellate Body, there is a causation requirement inherent in Article 6.3 SCM. Also inherent in these causation requirements is a requirement not to attribute price-suppression effects attributable to other causes than the subsidy to the subsidy. While the lack in Articles 5 and 6 SCM of the more specific language found in the trade-remedy provisions may argue for a bit more flexibility for a panel's consideration of the issue, no reasonable degree of flexibility can justify the difference. The Panel's analysis here

57 Appellate Body 21.5 Report, para. 378.
58 Panel 21.5 Report, para. 10.243.
59 Appellate Body 21.5 Report, para. 381.
60 Ibid., para. 368.

does not at all measure up to the Appellate Body's language, for example, in *Japan–Hot-Rolled Steel*:[61]

> In order that investigating authorities … are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. If the injurious effects of the dumped imports are not appropriately separated and distinguished from the injurious effects of the other factors, the authorities will be unable to conclude that the injury they ascribe to dumped imports is actually caused by those imports, rather than by the other factors. Thus, in the absence of such separation and distinction of the different injurious effects, the investigating authorities would have no rational basis to conclude that the dumped imports are indeed causing the injury.

While one could argue that the apparent difference in approach can be justified on the ground that national investigating authorities may tend to be biased, whereas WTO panels are more objective, the Appellate Body expressly rejected the idea of a different standard, as noted below. Nonetheless, in this case the difference in approach is real (and significant under any evaluative standard).

It is noteworthy, however, that the Appellate Body's position with respect to the role of economic analysis, and in particular of economic models, has evolved significantly since the original proceeding.

In the original proceeding, Brazil submitted a quantitative simulation of an economic model in support of its 'serious-prejudice' arguments, which showed that, but for the US subsidies to the US upland cotton industry, world cotton prices would have been higher by an average of 12.6% during the period 1999–2002. The United States objected to the accuracy and adequacy of the simulation and to the fact that Brazil provided the model itself.

The Panel decided to 'take note' of the outcomes of the simulation, but refused to rely 'upon the quantitative results of the modeling exercise – in terms of estimating any numerical value of the effects of the United States subsidies'.[62] It further indicated that 'Without prejudice to the relevance or utility of such simulations generally to a serious-prejudice analysis under Part III of the SCM Agreement, we would point out our particular concern here, in ensuring procedural fairness between the parties and the reliability of the evidence, that the model was not equally accessible to the parties and, as relevant, to the Panel in these proceedings.'[63]

On appeal, neither party contested the Panel's decision to take the modeling results 'into account where relevant to our analysis … and [to attribute] to them

61 *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, para. 223 (adopted 23 August 2001).

62 Panel Report, para. 7.1205.

63 Ibid., para. 7.1206.

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the evidentiary weight we deemed appropriate'.[64] The United States, however, contended that the Panel failed to include in its analysis the supply response of third countries that would have resulted in the absence of US subsidies. For its part, Brazil argued that the Panel did take this factor into account, since the models it used incorporate such supply response. Both parties agreed on the features of the models, but disagreed on 'whether the Panel *took into account* supply responses of third countries, as reflected in these models or otherwise.'[65]

The Appellate Body was unable to decide on what is ultimately an empirical issue. It simply indicated:

> We note that the Panel indicated expressly that it had taken the models in question into account. It would have been helpful had the Panel revealed how it used the models in examining the question of third country responses. Nevertheless, we are not prepared to second-guess the Panel's appreciation and weighting of the evidence before it, and we do not see any error on the part of the Panel in the application of the law to the facts in addressing this question.[66]

This amounted to accepting the Panel's decision, while at the same time faulting it for insufficient economic analysis. In the ALI project's examination of those reports, the authors (including one of the present coauthors) concluded:

> The *Upland Cotton* case illustrates the challenges that panels face when they are required to evaluate complex economic matters. The serious-prejudice provisions of the SCM Agreement call for an initial determination by the Panel … In these cases, requirements to determine issues such as 'causation', 'price suppression', and 'significant' must be understood as requirements that panels use the best analytical tools reasonably available to make such determinations.[67]

In this Article 21.5 proceeding, the Panel seems to have heeded the criticism by the Appellate Body and the advice of the ALI project. Here Brazil again submitted an economic model to simulate the effects of US subsidies on the world market for upland cotton, a fact welcomed by the Panel. In its entirety, the relevant paragraph read:

> In this case, we have taken the analysis of the model one step further by considering is some details the arguments made by the parties about the model, its assumptions and results. To the extent possible, we have provided our assessment of these arguments, and based on that arrived at an overall conclusion about the simulation results.[68]

64 Ibid., para. 7.1209.

65 Appellate Report, para. 447.

66 Ibid., para. 448 (footnote omitted).

67 André Sapir and Joel Trachtman, *World Trade Review*, see note 1 supra, p. 208.

68 Panel 21.5 Report, para. 10.198. The omitted footnote 491 at the end of the first sentence noted the transparency of the model, with Brazil providing to the United States and to the Panel 'full access to the model, its assumptions and the results'. We recall that in the original proceeding the Panel had deplored that the model used by Brazil was not equally available to the parties and to the Panel itself.

In its evaluation, the Panel noted the advantage of the modeling approach used by Brazil, but was 'also mindful of the criticism by the United States that Brazil's model "has no foundation within economic circles"'.[69] Furthermore, it noted that the magnitude of the impact of US subsidies on the world cotton price depends on the parameter values assigned to the model, and that the two parties presented arguments in favor of different parameter values. The Panel decided not to take a position on which parameter values were better, but nonetheless took 'note of the fact that price suppression has been the outcome of all the simulation results whether one uses the parameter values proposed by Brazil or [those] proposed by the United States'.[70]

Hence, contrary to the original proceeding, where the Panel simply took the model into account, here the model simulation results were central to the Panel's finding of price suppression due to the US subsidies. However, by refusing to take a position on the parameter values, the Panel was still unable to reach a judgment, simply based on the model, about the magnitude of the impact of US subsidies and, therefore, about whether price suppression was 'significant'. For this, as noted above, it needed to invoke the fact referred to previously that upland cotton is a 'basic and widely traded commodity'.

On appeal, the United States claimed that the Panel had failed to determine the degree of price suppression that it found to be 'significant'. In its evaluation of the US claim, the Appellate Body started by focusing on price suppression. It credited the Panel for its extensive discussion of the model simulations presented by both parties, insisting that such simulations are essential in serious-prejudice cases: 'Because the examination of price suppression necessarily involves an analysis of what would have been the case in the absence of an intervening event, modeling exercises are likely to be an important analytical tool that a panel should scrutinize.'[71]

However, the Appellate Body faulted the Panel for refusing to take a stand on which parameters were more appropriate to measure the effect of the subsidies at issue on prices, or on the appropriateness of the model itself. In support of its view that 'the Panel could have gone further in its evaluation and comparative analysis of the economic simulations and the particular parameters used',[72] the Appellate Body noted:

> The relative complexity of a model and its parameters is not a reason for a panel to remain agnostic about them. Like other categories of evidence, a panel should reach conclusions with respect to the probative value it accords to economic

69 Ibid., para. 10.220.
70 Ibid. Para. 10.222.
71 Appellate Body 21.5 Report, para. 357.
72 Ibid., para. 358.

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> simulations or models presented to it. This kind of assessment falls within the panel's authority as the initial trier of facts in a serious-prejudice case.[73]

The Appellate Body had already noted in an earlier footnote that 'where a panel operates as an initial trier of facts, such as this one, it would … be expected to provide reasoned and adequate explanations and coherent reasoning'.[74] The Appellate Body explicitly stated that this requirement was similar to what a panel is expected to do when examining determinations of domestic investigating authorities in trade-remedy cases. Perhaps this statement indicates that the Appellate Body in the future will hold panel determinations in these circumstances to the higher standard it expects of national authorities. It did not do so in this case.

Nor did the Appellate Body suggest how panel determinations in future 'serious-prejudice' cases could achieve a higher standard of economic expertise than in the past. Perhaps the earlier advice by the ALI project could usefully be repeated here, namely that:

> The determination of significant price suppression and its causation would seem amenable to a report from an expert review group comprised of economic experts in relevant disciplines…Engaging expert review groups to work through issues of appropriate assumptions and modeling techniques would relieve panels of a burden that they generally cannot bear. Article 13 of the DSU has been found to provide panels with broad flexibility to utilize experts. So it is curious that economic experts have not been used.[75]

4. Conclusion

US–Upland Cotton is one of only three serious-prejudice WTO disputes, one of only two with a positive decision, and the only one with a decision that has been appealed to the Appellate Body. It is also the only serious-prejudice case to have been adjudicated under Article 21.5 DSU.

Regarding the scope of compliance proceedings under Article 21.5 DSU, the Appellate Body upheld the Panel's findings that the two Brazilian claims contested by the United States were properly within the scope of the Article 21.5 proceedings. We concur with the Appellate Body's reasoning on these matters.

As far as substantive, evidentiary issues are concerned, the Appellate Body first upheld the Panel's finding that the United States had failed to comply with the DSB's recommendations and rulings concerning export subsidies. It did so despite having faulted the Panel for failing to make an 'objective assessment' of the matter and facts as required by Article 11 DSU, which necessitated that the Appellate Body complete the analysis. Our view, however, is that the Appellate Body's

73 Ibid., para. 357.
74 Ibid., para. 293, n.618.
75 André Sapir and Joel Trachtman, see note 1 supra, p. 206.

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analysis was too rudimentary to uphold the Panel's finding with sufficient confidence. A remand would therefore have been useful.

Finally, the Appellate Body upheld the Panel's finding that the United States failed to comply with the DSB's recommendations and rulings, in that certain payments to US cotton producers resulted in serious prejudice for Brazil. In doing so, the Appellate Body did not subject the Panel's analysis to the type of searching examination that it has required panels to undertake in respect of injury analyses of national authorities. Of particular interest, the Appellate Body credited the Panel for its discussion of the modeling exercises presented by the parties, although it faulted the Panel for not going far enough in its own evaluation of these exercises. Here we clearly detect a will on the part of the Appellate Body to insist on the necessity for future panels to make full use of analytical tools, such as simulation models, in serious-prejudice cases. We suggest that in order to fulfill this requirement, panels may well have to engage experts under Article 13 DSU.