

United States – Subsidies on Upland Cotton
(WT/DS267)

**Initial Brief of the United States of America
on the Question Posed by the Panel**

A. Introduction

1. The United States thanks the Panel for this opportunity to comment on the question concerning Article 13 of the *Agreement on Agriculture* (“Agriculture Agreement”) posed by the Panel in its fax of May 28, 2003. The Panel asked the parties to address:

[W]hether Article 13 of the *Agreement on Agriculture* precludes the Panel from considering Brazil’s claims under the *Agreement on Subsidies and Countervailing Measures* in these proceedings in the absence of a prior conclusion by the Panel that certain conditions in Article 13 remain unfulfilled. In particular, the Panel invites the parties to explain their interpretation of the words “exempt from actions” as used in Article 13 of the *Agreement on Agriculture*, as well as bringing to the Panel’s attention any other relevant provisions of the covered agreements and any other relevant considerations which the parties consider should guide the Panel’s consideration of this issue.

2. Article 13 (the “Peace Clause”) precludes the Panel from considering Brazil’s claims under Article XVI of the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”) and the *Agreement on Subsidies and Countervailing Measures* (“Subsidies Agreement”) since the U.S. support measures at issue conform with the Peace Clause. The Peace Clause “exempt[s]” conforming support measures “from actions based on” the corresponding provisions of the Subsidies Agreement and the GATT 1994.¹ Read in accordance with the customary rules of interpretation of public international law, the phrase “exempt from actions” means “not exposed or subject to” a “legal process or suit” or the “taking of legal steps to establish a claim.” Therefore, Brazil cannot maintain any action – and the United States cannot be required to defend any such action – based on provisions specified in the Peace Clause² since the U.S. support measures for upland cotton conform to the Peace Clause. In light of the correct interpretation of the Peace Clause, the United States respectfully requests the Panel to organize its procedures to first determine whether Brazil may maintain any action based on provisions exempted by the Peace Clause.

¹ For example, Article XVI of the GATT 1994 and Part III of the Subsidies Agreement correspond to Article 13(a)(ii) of the Agriculture Agreement, GATT 1994 Article XVI:1 and Articles 5 and 6 of the Subsidies Agreement correspond to Article 13(b)(ii) of the Agriculture Agreement, and GATT 1994 Article XVI and Articles 3, 5, and 6 of the Subsidies Agreement correspond to Article 13(c)(ii) of the Agriculture Agreement.

² See WT/DS267/7, at 3 (asserting claims based on Subsidies Agreement Articles 3.1(a), 3.1(b), 3.2, 5(a), 5(c), 6.3(b), 6.3(c), and 6.3(d) and GATT 1994 Articles XVI:1 and Article XVI:3).

3. Consider the alternative approach proposed by Brazil in its May 23 letter – that is, requiring the United States to defend the substantive claims at the same time as arguing the Peace Clause issues. If the Panel were to allow Brazil to proceed with its substantive claims under the Subsidies Agreement and GATT 1994 now, and only conclude later (for example, at the time of the issuance of its report) that the U.S. measures at issue conform to the Peace Clause based on the facts of this dispute, U.S. measures would already have been subject to Brazil’s action based on those claims. As the United States will explain, this would contradict the ordinary meaning of the phrase “exempt from actions” in Article 13, read in its context, and in light of the object and purpose of the Agriculture Agreement. Consequently, to allow Brazil to proceed with any action against these U.S. measures that are exempt from actions based on such claims would contravene the Peace Clause and upset the balance of rights and obligations of WTO Members.

B. Legal Interpretation of the Peace Clause

4. The Peace Clause, Article 13 of the Agriculture Agreement,³ governs the treatment during

³ The Peace Clause reads:

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:
 - (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

the implementation period of the Agreement of certain domestic support measures and export subsidies “notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures.”⁴ For purposes of the Panel’s question, there would appear to be two interpretive issues. The first is straightforward and apparently not in dispute: whether the Peace Clause is in effect for the measures at issue. The second is what is the nature of the treatment under the Peace Clause of conforming measures – i.e., what does it mean to say that conforming measures are “exempt from actions.”

1. Duration of the Peace Clause: The “Implementation Period”

5. The Peace Clause is in force at present. The first words of the Peace Clause (“During the implementation period”) establish the duration of the treatment afforded by this provision. Article 1(f) of the Agriculture Agreement defines “implementation period” as “the six-year period commencing in the year 1995” but goes on to specify that “for purposes of Article 13, it means the nine-year period commencing in 1995.” That is, Members determined that exempting certain measures from certain actions based on otherwise applicable WTO provisions was desirable for a time period *longer* than the period for the phase-in of all other commitments under the Agriculture Agreement. Thus, the Peace Clause currently continues to exempt conforming measures – whether U.S., Brazilian, or of any other Member – from actions under the corresponding provisions of the GATT 1994 and the Subsidies Agreement.

2. Effect of the Peace Clause: “Exempt from Actions”

6. For purposes of this dispute, all of the relevant provisions of the Peace Clause utilize the same language and construction: conforming measures “shall be . . . exempt from actions based on” specified provisions of the WTO agreements. The critical phrase “exempt from actions” is not defined in the Agriculture Agreement. According to the customary rules of interpretation of

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- 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.

Agriculture Agreement, Article 13 (footnote omitted).

⁴ Agriculture Agreement, Article 13 (chapeau). Article 21.1 of the Agriculture Agreement also makes it clear that the Subsidies Agreement and GATT 1994 only apply “subject to” the provisions of the Agriculture Agreement, including Article 13 (the Peace Clause).

public international law,⁵ these terms should be interpreted according to their ordinary meaning in their context, in light of the object and purpose of the Agreement.⁶

7. The ordinary meaning of the word “exempt” is “[n]ot exposed or subject to something unpleasant or inconvenient; not liable to a charge, tax, etc. (Foll. by *from, of*).”⁷ The ordinary meaning of the word “action” is “[t]he taking of legal steps to establish a claim or obtain remedy; the right to institute a legal process” and “[a] legal process or suit.”⁸ A legal dictionary provides further explanation of the term “action”:

Term in its *usual legal sense* means a *lawsuit* brought in a court; a *formal complaint* within the jurisdiction of a court of law. . . . The *legal or formal demand of one's right* from another person or party made and insisted on in a court of justice. An *ordinary proceeding in a court* of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. It includes *all the formal proceedings* in a court of justice attendant upon the demand of a right made by one person of another in such court, *including an adjudication* upon the right and its enforcement or denial by the court.⁹

Thus, according to the ordinary meaning of the terms, “exempt from action” means “not exposed or subject to” the “taking of legal steps to establish a claim,” such as a “formal complaint” or any “formal proceedings,” including an “adjudication” of the claim. An even simpler formulation would be “not liable to” a “legal process or suit.”

8. Relevant context for the phrase “exempt from actions” includes the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), which applies to “disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the ‘covered agreements’).” The covered agreements, of course, include the Agriculture Agreement and the Subsidies Agreement. Article 3.7 of the DSU states: “*Before bringing a case*, a Member shall

⁵ See *Understanding on Rules and Procedures Governing the Settlement of Disputes*, Article 3.2 (The dispute settlement system “serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.”).

⁶ The customary rules of interpretation of public international law are reflected in part in Article 31(1) of the Vienna Convention, which reads: “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

⁷ *The New Shorter Oxford English Dictionary*, vol. 1, at 878 (first definition as adjective & noun) (italics in original).

⁸ *The New Shorter Oxford English Dictionary*, vol. 1, at 22 (first and second definitions).

⁹ *Black's Law Dictionary* at 28 (6th ed. 1990) (emphasis added).

exercise its judgement as to whether *action* under these procedures would be fruitful” (emphasis added). Similarly, Article 4.5 of the DSU states: “*In the course of consultations* in accordance with the provisions of a covered agreement, before resorting to *further action* under this Understanding, Members should attempt to obtain satisfactory adjustment of the matter” (emphasis added). Thus, these provisions suggest that “action” based on the relevant provisions would include all stages of a dispute, including the “bringing [of] a case,” consultations, and panel proceedings.¹⁰

9. In addition, Article 7, which forms part of Part III of the Subsidies Agreement (entitled “Actionable Subsidies”), serves as context for the term “exempt from actions.” Article 7 provides procedures (including consultations, panel proceedings, and remedies) to enforce the legal rights contained in Article 5 (on “adverse effects”) and Article 6 (on “serious prejudice”). Article 7 states in its introductory phrase that its procedures apply “[e]xcept as provided in Article 13 of the Agreement on Agriculture.”¹¹ Thus, these provisions also support reading “exempt from actions” in Article 13 to mean “not subject to” the “taking of legal steps to establish a claim.” Footnote 35 of the Subsidies Agreement provides additional context that may help explain that “exempt from action” includes not resorting to dispute settlement. Footnote 35, which deals with “non-actionable”¹² subsidies, states that “[t]he provisions of Parts III [on actionable subsidies] and V [on countervailing measures] *shall not be invoked* regarding measures considered non-actionable in accordance with the provisions of Part IV.”¹³ As otherwise relevant provisions cannot be “invoked” for non-actionable subsidies, footnote 35 supports reading “exempt from action” as not resorting to dispute settlement by asserting legal claims.

10. This interpretation of “exempt from actions” meshes with the object and purpose of the Agriculture Agreement. The Agreement represents the outcome of long and difficult negotiations to move towards the “long-term objective . . . to provide for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time, resulting in correcting and preventing restrictions and distortions in world agricultural markets.”¹⁴ Members therefore agreed to the Peace Clause, recognizing that agricultural subsidies could not be eliminated immediately and needed, under certain conditions, to be exempted from the Subsidies Agreement and GATT 1994 subsidies disciplines.

¹⁰ As further support for the fact that “action” includes dispute settlement, DSU Article 3.10 provides that: “It is understood that requests for conciliation and the use of the dispute settlement procedures should not be intended or considered as contentious *acts* . . .” (emphasis added).

¹¹ Subsidies Agreement, Article 7.1.

¹² The ordinary meaning of the term “actionable” is “[a]ffording ground for an action at law.” *The New Shorter Oxford English Dictionary*, vol. 1, at 22.

¹³ Subsidies Agreement, Article 10 fn. 35 (emphasis added).

¹⁴ Agriculture Agreement, preamble (third paragraph).

C. Conclusion: Brazil May Not Bring, and the Panel May Not Adjudicate, a Subsidies Agreement or GATT 1994 Article XVI Action Against U.S. Measures Conforming to the Peace Clause

11. Brazil’s approach – that both the applicability of the Peace Clause and Brazil’s Subsidies Agreement and GATT 1994 Article XVI claims be considered at the same time – would contravene the plain meaning of the Peace Clause by subjecting U.S. measures to the “taking of legal steps to establish a claim.” Under Brazil’s approach, the U.S. measures would be subject to an action based on the corresponding provisions of the Subsidies Agreement and GATT 1994 at the same time that the Panel would be reviewing the applicability of the Peace Clause. Brazil’s approach would ignore the plain meaning of the provisions of the Peace Clause exempting these measures from actions.

12. Accordingly, the United States respectfully requests the Panel to find that measures that conform to the Peace Clause are exempt from any action, including action under the DSU, based on the corresponding provisions of the Subsidies Agreement and the GATT 1994. As a result, the United States is not required to defend those measures in any action based on Brazilian claims exempted by the Peace Clause.