



Brazil's and Canada's WTO Cases Against U.S. Agricultural Direct Payments

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Summary

In 2007, Brazil and Canada, independently of each other, requested consultations with the United States under the auspices of the World Trade Organization's (WTO's) Dispute Settlement process concerning similar grievances regarding U.S. domestic agricultural support programs and the U.S. export credit guarantee program. After consultations failed to resolve their concerns, both countries (again acting independently) requested the establishment of a WTO panel to rule on their complaints. The WTO's Dispute Settlement Body, on December 17, 2007, established a single panel to consider both cases. In late April 2008, Brazil and Canada informally agreed to postpone proceeding with their joint World Trade Organization (WTO) dispute settlement case challenging certain U.S. agricultural subsidies. At the time of the postponement, the three parties involved in the dispute had been unable to agree on panel membership.

The postponement was thought to be provisional based on success in achieving further disciplines on domestic support in the current Doha Round of WTO trade negotiations. However, the Doha Round negotiations failed to complete an agreement in 2009. As of early 2010 there are no prospects for revival of Doha Round negotiations. Nor have Brazil and Canada given any indication that they will revive their pursuit of their joint case. It is not clear how long the postponement will persist. If resumed, the first order of business will be the formation of a panel.

The joint case combines two separate but similar cases: DS357, brought by Canada, and DS365, brought by Brazil. Both cases make two charges against U.S. farm programs—first, that the United States has exceeded its annual WTO commitment levels for total aggregate measurement of support (AMS) for agriculture in each of the years 1999, 2000, 2001, 2002, 2004, and 2005, and second, that the U.S. export credit guarantee program for agricultural commodities operates as a WTO-illegal export subsidy. Both charges stem, in large part, from a previous negative ruling against U.S. farm programs in a case (DS267) brought by Brazil against the U.S. cotton program. In that case, a WTO panel ruled (the ruling subsequently was upheld by a WTO Appellate Body), first, that direct payments made under U.S. farm programs do not qualify for green box exemption status because of a restriction prohibiting the planting of fruits, vegetables, or wild rice on payment acres; and second, that the U.S. export credit guarantee program operates as a prohibited export subsidy program because the financial benefits returned by these programs failed to cover their long-run operating costs. As a result of the ruling, U.S. export credit guarantees became subject to previously scheduled export subsidy commitments. For more information, see CRS Report RL32571, *Brazil's WTO Case Against the U.S. Cotton Program*, by (name redacted).

Canada and Brazil claim that, since they fail to qualify for inclusion in the green box, U.S. direct payments should be added to its AMS when calculating total domestic support. In addition, they also charge that the United States has improperly notified several of its farm support programs as exempt from the AMS limit, while several other programs were improperly excluded from U.S. notifications. Canada and Brazil claim that when all of the outlays from these allegedly misnotified programs are included, then the U.S. AMS total exceeds its WTO commitment level.

Should a panel be formed and eventually rule on this case, any changes in U.S. farm policy needed to comply with a WTO ruling against the United States would likely involve action by Congress to produce new legislation. This report provides background and details, as well as the current status of the two WTO dispute settlement cases. In addition, it discusses the role of Congress in responding to developments.

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Introduction

In 2007, Canada and Brazil initiated separate but similar WTO cases against certain U.S. farm programs as they relate to U.S. commitments made to the World Trade Organization (WTO). Both Canada's (DS357) and Brazil's (DS365) cases make two broad charges. First, they contend that the United States has exceeded the subsidy spending limit it committed to for domestic agricultural support programs. Second, they charge that the United States operates its agricultural export credit guarantee program in such a manner as to provide prohibited subsidies to those exports made under the programs.

On December 17, 2007, the WTO's Dispute Settlement Body (DSB) announced the establishment of a single panel to hear both cases against U.S. farm programs. Panel membership is based on mutual agreement of the parties involved—Brazil, Canada, and the United States. However, by late February 2008 the case had stalled due to the inability of the three parties to agree on a panel of arbitrators to preside over the case.¹ Under WTO rules, Brazil is legally entitled to ask the WTO director-general to compose the panel if the parties are unable to agree on the members within 20 days after the establishment of a panel. However, Brazil did not pursue this course of action. Then, in late April 2008, Brazil and Canada informally agreed to postpone proceeding with their case pending the U.S. offer to substantially cut domestic agricultural subsidies as part of the Doha Round of WTO trade negotiations.²

Presently, no date has been announced for the resumption of the case. If resumed, the first order of business will be the formation of a panel. Should a panel be formed, it would then have six months to rule on this case. Subsequent appeals of any negative ruling and disagreement over appropriate retaliatory levels, etc., could push resolution of the dispute well into the future. However, the importance of the case is not diminished to the U.S. agricultural community. U.S. agriculture depends heavily on international markets to sell its surpluses. In FY2008, U.S. agricultural exports were a record \$115.5 billion and represented 30% of gross farm income.³

This report begins with background on the evolution of the Canadian and Brazilian WTO cases. This is followed by a section that describes in detail the nature of the two major charges made against U.S. farm programs in the two cases and the U.S. response to those charges. Finally, the report briefly discusses the implications of the case and the potential role of Congress.

Each of these sections may be read independent of the other; thus, readers only interested in the specific charges and their implications may proceed directly to those sections of the report.

Background on the Evolution of the Two Cases

This section provides a historical record of the evolution of both Canada's and Brazil's WTO cases against U.S. farm programs. It includes a timeline (**Table 1**) of the official events as well as a descriptive narrative of the likely motivations and circumstances behind each country's case.

¹ "Brazil, Canada Subsidies Challenge Stalled Over WTO Panel Selection," *Inside U.S. Trade*, February 29, 2008.

² "Brazil, Canada Put WTO Subsidies Challenge on Temporary Hold," *Inside U.S. Trade*, April 25, 2008.

³ *Outlook for U.S. Agricultural Trade*, AES-60, USDA, ERS, December 1, 2008; and *Agricultural Income and Finance Outlook*, AIS-86, USDA, ERS, December 2008.

Table 1. Time Line of the WTO Dispute Settlement Cases DS357 (Canada) and DS365 (Brazil) Against the United States

| Date | Event |
|------------------------------------|--|
| Jan. 8, 2007 | Canada makes a formal “request for consultations” with the United States (WT/DS357/1) to discuss three charges: (1) U.S. export credit guarantee programs operate as prohibited export subsidies; (2) the United States provides total AMS support in excess of its commitment levels; and (3) U.S. support programs provided to U.S. corn producers result in adverse effects in the form of serious prejudice to the interests of Canada during the 1996 to 2006 period in violation of Articles 5(c) and 6.3(c) of the WTO’s Agreement on Subsidies and Countervailing Measures (SCM Agreement). ^a |
| Jan. 22, 2007, to Jan. 24, 2007 | Several additional WTO members—Australia, Argentina, Australia, Brazil, the European Communities, Guatemala, Nicaragua, Thailand, and Uruguay—officially request to join the consultations as interested third parties in accordance with Article 4.11 of the Dispute Settlement Memorandum of Understanding (DSU). ^b |
| Feb. 7, 2007 | Canada and the United States hold consultations to discuss Canada’s allegations. The consultations fail to resolve the dispute. |
| June 7, 2007 | Canada requests (WT/DS357/11) that the establishment of a dispute panel to rule on its complaint in case DS357 be included on the Dispute Settlement Body’s (DSB’s) agenda for its next monthly meeting. Canada drops its “serious prejudice” charge against U.S. corn subsidies, but retains the two other charges identified in its Jan. 8, 2007, consultations request. |
| June 21, 2007 | Canada’s first request for the establishment of a dispute panel to rule on its complaint is vetoed by the United States at the DSB’s monthly meeting. |
| July 11, 2007 | Brazil makes a formal “request for consultations” with the United States (WT/DS365/1) to discuss two charges: (1) U.S. export credit guarantee programs operate as prohibited export subsidies; and (2) the United States provides total AMS support in excess of its commitment levels. |
| July 24, 2007 to Aug. 1, 2007 | Several additional WTO members—Canada, Guatemala, Costa Rica, the European Communities (EC), Mexico, Australia, Argentina, Thailand, India, and Nicaragua—officially request to join the consultations as interested third parties. ^c |
| Aug. 22, 2007 | Brazil and the United States hold consultations to Brazil’s allegations in case DS365. The consultations fail to resolve the dispute. |
| Oct. 8, 2007 | The United States notifies data to the WTO for domestic support for the marketing years 2002, 2003, 2004, and 2005. |
| Nov. 8, 2007 | Brazil (WT/DS365/13) and Canada (WT/DS357/12) request that the establishment of a dispute panel to rule on their complaints against the United States be included on the DSB agenda for its next monthly meeting. |
| Nov. 27, 2007 | At the DSB meeting, both Canada’s and Brazil’s requests for a panel on cases DS357 and DS365 were blocked by the United States. |
| Dec. 17, 2007 | The DSB, at its monthly meeting, announced the establishment of a single panel to examine jointly Brazil’s and Canada’s charges against U.S. farm subsidies and domestic support. |
| Feb. 2008 | The case stalls over the inability to agree on panel members. |
| Apr. 2008 | Brazil and Canada informally agree to postpone proceeding with the case pending Doha negotiations. No resumption date is announced. |

See **Table 2** for a WTO Dispute Settlement process timeline; and **Table 3** for a timeline of a panel’s work stages.

Source: Compiled by CRS from official WTO documents and news sources as cited. All WTO official documents for each of these cases are available at the WTO Documents Online gateway and may be accessed by a simple search on the respective case number, DS357 or DS365, at http://docsonline.wto.org/gen_search.asp?searchmode=simple.

a. For a description and interpretation of Articles 5(c) and 6.3(c) of the SCM Agreement, see CRS Report RL33697, *Potential Challenges to U.S. Farm Subsidies in the WTO*, by (name redacted).

- b. Official WTO documents are Australia, WT/DS357/2; Guatemala, WT/DS357/3; Brazil, WT/DS357/4; Argentina, WT/DS357/5; the EC, WT/DS357/6; Uruguay, WT/DS357/7; Nicaragua, WT/DS357/8; and Thailand, WT/DS357/9.
- c. Official WTO documents are Canada, WT/DS365/2; Guatemala, WT/DS365/3; Costa Rica, WT/DS365/4; the EC, WT/DS365/5; Mexico, WT/DS365/6; Australia, WT/DS365/7; Argentina, WT/DS365/8; Thailand, WT/DS365/9; India, WT/DS365/10; and Nicaragua, WT/DS365/11.

Origins of Canada's WTO Case

Canada and the United States have a history of commodity trade disputes, traditionally focused on various wheat support programs and trade practices.⁴ In 2005, after several years of wrangling over wheat trade issues, Canada extended its disagreement with U.S. farm programs to the corn sector when Canadian corn producers sought legal action for alleged unfair subsidization and dumping of U.S. corn in Canadian markets. Canada's International Trade Tribunal (CITT) ultimately ruled on the 2005 anti-dumping and countervailing (AD/CV) duty case in favor of the United States.⁵ However, Canadian corn producers continued to press their concerns upon the Canadian government about perceived unfair subsidization of U.S. corn.

In January 2007, Canada requested consultations with the United States to discuss three specific charges against U.S. farm programs: (1) U.S. farm support resulted in serious prejudice against Canadian corn producers, (2) U.S. domestic support exceeded its WTO commitments; and (3) U.S. export credit guarantee programs contained implicit WTO-illegal subsidies. Canada's first allegation in its WTO case built upon previous trade complaints against the United States initiated by Canadian corn producers starting in 2005, while the latter two allegations were based on a previous WTO ruling in a case (WTO case DS267) brought by Brazil against the U.S. cotton program.⁶

Another potential factor motivating Canada to bring its case against U.S. farm subsidies was Canadian domestic political concerns emanating from a weak coalition government responding to pressure from corn-producing interests following the unfavorable CITT AD/CV corn duty ruling. In addition, Canada had a general interest in influencing the 2007 U.S. farm bill debate in favor of lower amber-box-type support.⁷ A news report suggested that two additional factors motivating Canada's case included the temporary suspension of Doha Round negotiations (July 24, 2006), which indefinitely postponed the possibility of U.S. farm program reforms under multilateral trade negotiations, and the settlement of a softwood lumber dispute between Canada and the United States, which freed up Canadian government trade attorneys to refocus on the WTO litigation against U.S. farm programs.⁸

The request for consultations represented the first step in instituting a WTO dispute settlement case against the United States—the assigning of an official dispute settlement case number

⁴ For more information see CRS Report RL32426, *U.S.-Canada Wheat Trade Dispute*, by (name redacted).

⁵ CITT, *Dumping and Subsidizing: Finding*, Inquiry No. NQ-2005-001, Unprocessed Grain Corn, April 18, 2006, at http://www.citt-tcce.gc.ca/dumping/inquirie/findings/nq2f001_e.asp.

⁶ For more information, see CRS Report RL32571, *Brazil's WTO Case Against the U.S. Cotton Program*, by (name redacted).

⁷ The amber box includes those policies that result in market-distorting support. For a discussion of proposed reductions in WTO domestic support commitments, see CRS Report RL33144, *WTO Doha Round: The Agricultural Negotiations*, by (name redacted) and (name redacted).

⁸ *Inside U.S. Trade*, "Johanns Says U.S. Will Defend Farm Programs from Canadian Challenge," January 12, 2007.

(DS357)—thus setting in motion the explicit rules and timetables of the WTO DSU process.⁹ Following Canada's request for consultations, several other WTO members—Argentina, Australia, Brazil, the European Communities, Guatemala, Nicaragua, Thailand, and Uruguay—officially requested to join the consultations as interested third parties.

On February 7, 2007, Canada and the United States held consultations concerning the three charges raised by Canada. Under WTO rules, for subsidy complaints alleging adverse effects, a minimum 60-day consultation period is required before a country can ask the WTO to establish a dispute settlement panel.¹⁰ Although the consultations failed to resolve the dispute, the Canadian International Trade Minister, David Emerson, announced on May 2, 2007, that the Canadian government would temporarily hold off on taking any further action in its WTO dispute settlement proceeding (DS357) against U.S. corn subsidies until at least the end of the year, pending the outcome of Doha Round trade negotiations.¹¹

However, in June 2007, Canada requested that the establishment of a WTO dispute settlement panel to hear its case against U.S. farm programs be included on the agenda of the next meeting of the WTO's Dispute Settlement Body (DSB). In its panel request, Canada dropped the serious prejudice charge against U.S. corn subsidies, probably in large part because corn market prices had risen so dramatically since mid-2006 and were projected to remain high for at least the next ten years.¹² The United States blocked Canada's request at the June 21, 2007, DSB meeting. According to WTO rules, a panel can be blocked only once, implying that a second request by Canada, if made at one of the subsequent DSB meetings, would have to be honored. However, Canada refrained from pursuing the establishment of a panel to hear the case at the next several DSB meetings.

Origins of Brazil's WTO Case

Brazil—which has already won a series of WTO dispute settlement rulings against U.S. cotton programs¹³—introduced its new challenge against U.S. farm programs on July 11, 2007, when it requested consultations with the United States to discuss the same two charges against U.S. farm programs as in Canada's case (DS357).

The context for Brazil's new challenge of U.S. farm programs is significant. First, the new challenge builds on panel rulings from Brazil's successful case (DS267) against certain aspects of the U.S. cotton program. Previous findings in the case, although not part of the final recommendations, appear to have set legal precedent and could facilitate Brazil's new claims. Second, the Doha Round of WTO trade negotiations continues to make very little apparent progress after having resumed in September 2007, possibly providing further incentive to seek legal recourse under WTO's dispute settlement process rather than via negotiation.¹⁴ Third, the

⁹ For more information, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by (name redacted).

¹⁰ Article 7.4, SCM Agreement.

¹¹ "Holding Up on the US Corn WTO Case," *Washington Trade Daily*, Vol. 16, No. 88, May 3, 2007.

¹² For long-run commodity price projections, see USDA's Agricultural Baseline Projections; available at <http://www.ers.usda.gov/Briefing/Baseline/>.

¹³ For more information, see CRS Report RL32571, *Brazil's WTO Case Against the U.S. Cotton Program*, by (name redacted).

¹⁴ Doha Round talks were indefinitely suspended on July 24, 2007, but restarted the following September. For more (continued...)

U.S. Congress is presently revisiting omnibus farm legislation. Brazil has a general interest in influencing the U.S. farm bill debate in favor of lower amber-box-type support. Fourth, Canada had already initiated a similar case. Brazil initially joined Canada's case as an "interested third party"; however, Brazil has since chosen to pursue its own separate but similar case. News sources speculate that Brazil did this in order to have a "greater voice" in the WTO dispute settlement process.¹⁵ Furthermore, Brazil's case appears to be more comprehensive than Canada's WTO case in terms of the level of detail of program support activity that is alleged to have been incorrectly notified as exempt or excluded from the AMS spending limit.

Following Brazil's request for consultations, several other WTO members—Canada, Guatemala, Costa Rica, the European Communities (EC), Mexico, Australia, Argentina, Thailand, India, and Nicaragua—officially requested to join the consultations as interested third parties. As with Canada's case, Brazil was assigned an official dispute settlement case number (DS365)—thus setting in motion the explicit rules and timetables of the WTO dispute settlement process.¹⁶ Consultations between Brazil and the United States were held on August 22, 2007, but failed to resolve the dispute.

Status of the Two Cases

By late 2007, Canada and Brazil appear to have coordinated their efforts as both countries submitted official requests on November 8, 2007, for the DSB to add the establishment of a panel to its next meeting agenda. Again, according to the WTO rules, the United States blocked this new panel request at the November 27, 2007, DSB meeting. However, at its next meeting on December 17, the DSB announced the establishment of a single panel to jointly hear both cases brought by Canada (DS357) and Brazil (DS365) against U.S. farm programs. In their requests, Brazil and Canada asked for a single panel to be established to consider both cases jointly. The United States did not object to this proposal.¹⁷ All three countries involved—the United States, Canada, and Brazil—have agreed that the meeting of the panel would be open to the public.

However, by late February 2008 the case had stalled due to the inability of the three parties to agree on a panel of arbitrators to preside over the case.¹⁸ Under WTO rules, Brazil is legally entitled to ask the WTO director-general to compose the panel if the parties are unable to agree on the members within 20 days after the establishment of a panel.¹⁹ However, Brazil did not pursue this course of action. Then, in late April 2008, Brazil and Canada informally agreed to postpone proceeding with their case.²⁰ The postponement was thought to be provisional and based on

(...continued)

information, see CRS Report RL33144, *WTO Doha Round: The Agricultural Negotiations*, by (name redacted) and (name redacted).

¹⁵ "Brazil Changes Course by Filing Separate Case Rather than Joining Canada," Jim Wiesemeyer, AgWeb.com, July 12, 2007.

¹⁶ For more information, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by (name redacted).

¹⁷ WTO Dispute Settlement Body monthly news release, December 17, 2007, available at http://www.wto.org/english/news_e/news07_e/dsb_17dec07_e.htm.

¹⁸ "Brazil, Canada Subsidies Challenge Stalled Over WTO Panel Selection," *Inside U.S. Trade*, February 29, 2008.

¹⁹ Article 8.7, Understanding on Rules and Procedures Governing the Settlement of Disputes, *WTO Legal Texts*, Annex 2—Dispute Settlement Understanding (DSU); available at http://www.wto.org/english/docs_e/legal_e/legal_e.htm.

²⁰ "Brazil, Canada Put WTO Subsidies Challenge on Temporary Hold," *Inside U.S. Trade*, April 25, 2008.

success in achieving further disciplines on domestic support measures in the current Doha Round of WTO trade negotiations. As part of the Doha trade negotiations, U.S. officials had offered to substantially cut domestic agricultural subsidies.²¹

It is not clear how long the postponement will persist. If resumed, the first order of business will be the formation of a panel. In accordance with the DSU, once the establishment of a panel has been announced the DSB has up to 45 days for a panel to be appointed, plus six months for the panel to conclude its work.

Major Charges Against U.S. Farm Programs

Both the Canadian (DS357) and Brazilian (DS365) cases raise two principal charges against U.S. farm programs. Each of these is discussed below.

First Allegation: U.S. Total Domestic Agricultural Support Exceeds Its WTO Limit

In accordance with WTO commitments, all WTO members have agreed to submit annual notifications of their farm program outlays to the WTO, and these outlays are subject to specific limits. For the United States, its total spending limit for “amber box” programs (i.e., programs that are trade- and market-distorting) was \$19.9 billion in 1999 and \$19.1 billion in all subsequent years.²² To date, the United States has notified details of its farm program outlays through 2005.²³ According to U.S. farm program spending notifications to the WTO, U.S. domestic support outlays have remained well within U.S. WTO spending commitments.²⁴ However, Canada and Brazil argue that several U.S. program payments were either omitted from the notification data, or incorrectly notified either as green box or as non-product-specific AMS (where they would more easily qualify for exclusion from amber box limits under the non-product-specific *de minimis* exemption). Canada and Brazil contend that when all of the disputed payments and other subsidies are included in the U.S. AMS calculation, then the total outlays would exceed the spending commitment in each of 1999, 2000, 2001, 2002, 2004, and 2005.

The claim that the United States has exceeded its total spending limits hinges largely on a previous ruling from the U.S.-Brazil cotton case in which a WTO panel found that U.S. payments

²¹ For more information on the Doha Round of WTO trade negotiations and specific offers by major negotiating parties, see CRS Report RL33144, *WTO Doha Round: The Agricultural Negotiations*, by (name redacted) and (name redacted).

²² Amber box outlays are actually a residual category comprised of the total Aggregate Measure of Support (i.e., a total of all market and trade distorting support) less those outlays that are exempt from any limit under four possible exclusion classifications: green box, blue box, and product- or non-product-specific *de minimis* exclusions. For more information on WTO support classifications see CRS Report RS20840, *Agriculture in the WTO: Limits on Domestic Support*, by (name redacted).

²³ At the time that both Canada and Brazil initiated their cases (DS357 and DS365), the United States had only notified its domestic support data through marketing year 2001. The United States notified for the marketing years 2002, 2003, 2004, and 2005 on October 8, 2007.

²⁴ For more information on WTO commitments and actual outlays, see CRS Report RL30612, *Agriculture in the WTO: Member Spending on Domestic Support*, by (name redacted), and CRS Report RL32916, *Agriculture in the WTO: Policy Commitments Made Under the Agreement on Agriculture*, by (name redacted).

made under the Production Flexibility Contract (PFC) and Direct Payment (DP) programs do not qualify for the WTO's green box exemption category because of their prohibition on planting fruits, vegetables, and wild rice on covered program acreage.²⁵ However, the panel did not make the extension that PFC and DP payments should therefore be counted as amber box programs, but instead was mute on this point. In its WTO notifications, the United States has notified its PFC payments as fully decoupled and green box compliant.²⁶ This is an important distinction because the green box contains only non-distorting program payments and is not subject to any limit. Canada and Brazil argue that, because of the previous panel ruling, PFC and DP payments do not conform with WTO green-box rules and should be included with U.S. amber box payments.

Furthermore, Canada and Brazil argue that several other U.S. program payments were incorrectly notified as exempt from the U.S. AMS limit. These include:

- Production Flexibility Contract (PFC) and Direct Payment (DP) programs whose payments were notified as green box under “decoupled income” payments;
- Non-insured Crop Disaster Assistance Program (NAP) payments, Crop Disaster Assistance, Emergency Feed, Livestock Indemnity, and Tree Assistance programs that were notified as green box under “payments for relief from natural disasters;” and
- emergency “crop market loss assistance” payments from the early 2000s that were notified as non-product-specific AMS, but which Brazil and Canada contend would be more correctly notified as product-specific AMS outlays.

In addition, both Canada and Brazil argue that CCP payments (established under the 2002 Farm Act [P.L. 107-171]) should similarly be counted against the U.S. amber box spending limit of \$19.1 billion. In contrast, the United States has notified CCP payments as exempt from AMS limits under the non-product specific de minimis exemption. In addition, as part of its Doha policy reform proposal the United States recommends that CCP payments be eligible for the blue box, where they would be subject to a different limit than the amber box.²⁷

Unlike Canada's case, Brazil cited several additional U.S. farm support programs that it claims were simply not notified (i.e., they were omitted from inclusion in the U.S. AMS total). These include:

- both direct and guaranteed loans, and USDA farm loan programs;
- programs exempting on-farm use of gasoline and diesel fuel from payment of various excise and sales taxes;
- programs exempting U.S. farmers from taxes based on overall farm income—e.g., deductions from taxable income from farming; farm marketing and

²⁵ For more information on these restrictions see USDA, Farm Service Agency, Fact Sheet, *Direct and Counter-Cyclical Payment Program Wild Rice, Fruit, and Vegetable Provisions*, February 2003, at <http://www.fsa.usda.gov/pas/publications/facts/html/fav03.htm>.

²⁶ Decoupled means it has no influence on producer's decision-making process; green box compliant means it adheres to the terms and conditions of Annex 2 of the Agreement on Agriculture.

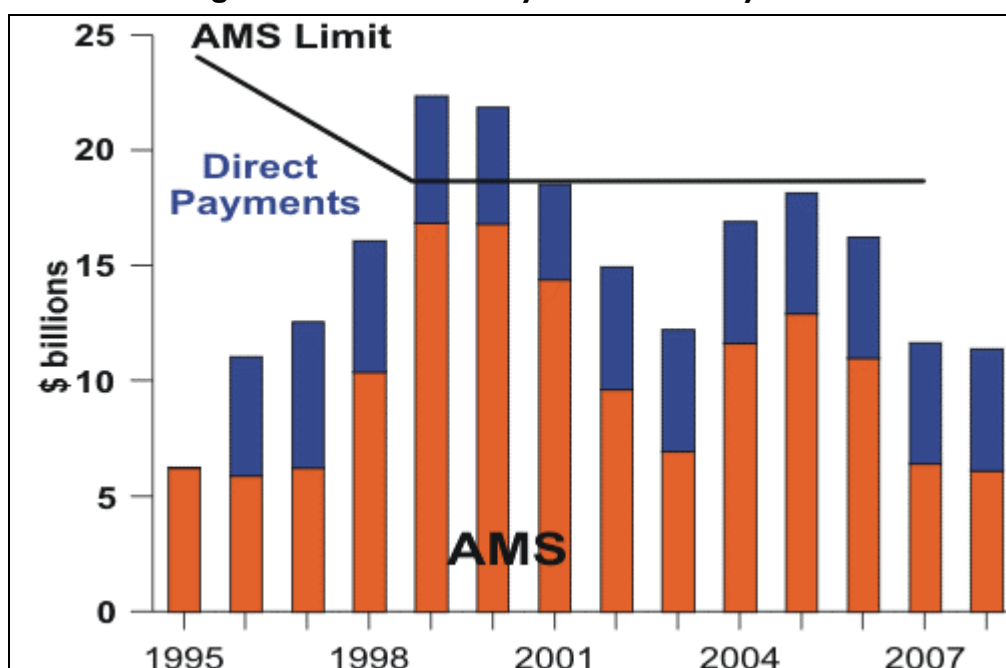
²⁷ Blue box payments are defined as “production-limiting” types of payments. For more information see CRS Report RL33144, *WTO Doha Round: The Agricultural Negotiations*, by (name redacted) and (name redacted).

- purchasing cooperatives; and export transactions of agricultural commodities;
and
- subsidies related to the operation and maintenance of irrigation works by the U.S. Department of the Interior.

Canada and Brazil charge that, when PFC, DP, and CCP payments for all covered crops—wheat, corn, grain sorghum, barley, oats, upland cotton, rice, soybeans, and other oilseeds—as well as the additional program outlays that were excluded from U.S. notifications are included in the U.S.'s amber box, then the total outlays would exceed the spending commitment in each of 1999, 2000, 2001, 2002, 2004, and 2005. However, neither Canada nor Brazil provide the specific details on its year-by-year determinations, so direct comparisons are not possible.

CRS calculations based on U.S. notifications and available USDA data suggest that, with the inclusion of the otherwise excluded PFC and DP payments, the U.S. AMS total would exceed the spending limit in two of the years indicated (**Figure 1**). The further inclusion of both market loss assistance and CCP payments as product specific amber box payments to the U.S. AMS total suggests that the spending limit would be exceeded in five of the years indicated (**Figure 2**).

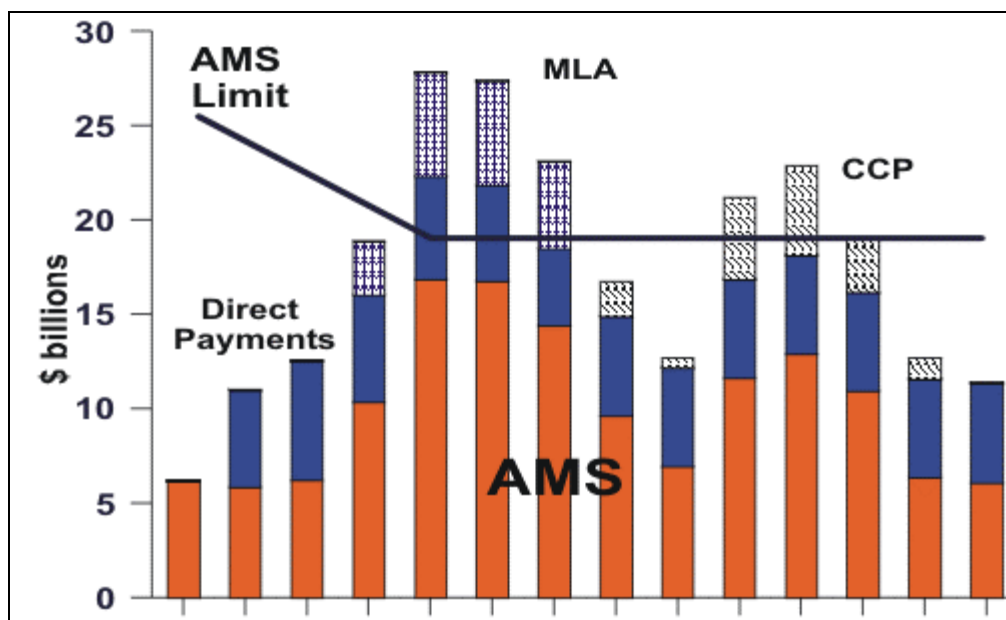
Figure 1. U.S. AMS Outlays and Direct Payments



Source: Data for 1995-2005 are from U.S. WTO notifications, and 2006-2008 are CRS calculations based on USDA data.

Note: Direct payments include PFC and DP payments.

Figure 2. U.S. Outlays for AMS, Direct Payments (DP), Market Loss Assistance (MLA), and Counter-Cyclical Payments (CCP)



Source: Data for 1995-2005 are from U.S. WTO notifications, and 2006-2008 are CRS calculations based on USDA data.

Note: DP includes PFC and DP payments; MLA (1998-2001); CCP (2002-2008).

Second Allegation: U.S. Export Credit Guarantees Are WTO-Illegal Export Subsidies

Canada and Brazil argue that the U.S. export credit guarantee program operates as a WTO-illegal export subsidy. In the U.S.-Brazil cotton case (DS267), a WTO panel found that U.S. export credit guarantees effectively function as export subsidies because the financial benefits returned by these programs failed to cover their long-run operating costs.²⁸ Furthermore, the panel found that this applies not just to cotton, but to all commodities that benefit from U.S. commodity support programs and receive export credit guarantees. As a result, export credit guarantees for any recipient commodity are subject to previously scheduled WTO spending limits. The panel recommended (and was upheld on appeal) that these prohibited subsidies be removed by July 1, 2005. On December 18, 2007, a compliance panel found that the United States had not yet fully complied with the panel ruling.

U.S. Response

In response to Canada's request for consultations on U.S. subsidies, then-U.S. Secretary of Agriculture Mike Johanns declared in early 2007 that the United States would vigorously defend U.S. farm programs against any possible WTO challenge by Canada.²⁹ A spokesman for the U.S.

²⁸ For more detail, see CRS Report RL32571, *Brazil's WTO Case Against the U.S. Cotton Program*, by (name redacted).

²⁹ *Inside U.S. Trade*, "Johanns Says U.S. Will Defend Farm Programs from Canadian Challenge," January 12, 2007.

Trade Representative (USTR) declared that this dispute was an unnecessary diversion of resources and time from the Doha Round negotiations. The official also stated that U.S. farm programs were designed to be in compliance with its WTO obligations and believed that the panel would agree. The official also added that some measures identified by Canada and Brazil had ceased to exist prior to the 2002 farm bill, and that others were not part of the consultations with Canada.

With respect to the ruling that export credit guarantees operate like illegal export subsidies, provisions in the 2008 farm bill (P.L. 110-246; Section 3101(a)), enacted into law on June 18, 2008, would appear to have brought the export credit guarantee program into compliance with WTO rules by eliminating the “subsidy” component of export credit guarantees. This includes repeal of authority for both the GSM-103 program (which guaranteed longer-term—3-10 years—financing) and the Supplier Credit Guarantee Program (which guaranteed very short-term—up to 1 year—financing of exports), as well as repeal of the 1% cap on loan origination fees for the GSM-102 program (which guaranteed intermediate-term—up to 3 years—financing). The 1% fee cap had prevented charging market-based fees and had contributed to the export credit program operating as a WTO-illegal export subsidy. The new farm bill (Sec. 3101(b)) also caps the credit subsidy for the program at \$40 million annually.³⁰

However, the 2008 farm bill did not address the issue surrounding the disqualification of direct payments from the WTO’s green box AMS exclusion due to the planting restriction on fruits, vegetables, and wild rice on program base acres. Instead, direct payments are extended (Sec. 1103) with no change to the current planting restriction, except for 84,000 acres of pilot programs in seven states (Sec. 1107(d)). This retention of the status quo in the face of the cotton panel’s ruling and recommendation has important WTO implications, as it would appear to favor the charge that the United States has exceeded its total AMS limit in at least two years (1999 and 2000) if direct payments are included in the AMS calculation (**Figure 1**).

Potential Implications and Role of Congress

Many market analysts suggest that these two cases brought by Brazil and Canada are harbingers of future challenges to U.S. commodity programs. If either country were to successfully pursue its case, it could affect most U.S. program commodities, since the charges against the U.S. export credit guarantee program and AMS limit extend to all major program crops. Should any eventual changes in U.S. farm policy be needed to comply with a WTO ruling, Congress likely would be called upon to address this issue (including adjustment, if not full removal, of the planting restriction on base acres receiving direct payments).

Ultimately, Congress is responsible for passing farm program legislation that complies with U.S. commitments in international trade agreements. When confronted with a negative WTO dispute settlement ruling, a country has essentially five options to choose from: eliminate the subsidy; reduce the subsidy to diminish its adverse effect; revise the program function to reduce the linkage between the subsidy and the adverse effect (referred to as decoupling); pay a mutually acceptable compensatory payment to offset the adverse effects of the subsidy; or suffer the consequences of trade retaliation.

³⁰ The credit subsidy is the available budget authority for the cost of the program.

While a WTO case can result in punitive sanctions being authorized, the proceedings of a formal case can take many months, and sometimes years, to reach a conclusion.³¹ For example, the U.S.-Brazil cotton case was initiated by Brazil's request for WTO consultations on September 27, 2002. A panel was established nearly six months later on March 18, 2003. The panel's final report was delivered to the DSB on September 8, 2004. The case was appealed and the Appellate Body's final report was adopted by the DSB on March 21, 2005, nearly 30 months after the initial request for consultations.³² Subsequently, Brazil requested a WTO compliance panel to review whether the United States had fully complied with the panel's rulings. The WTO compliance panel issued its final ruling on December 18, 2007, thus extending the length of the U.S.-Brazil cotton case to over five years.

Many market watchers question the relevance of expending legal resources to establish an historical AMS violation in light of the high commodity prices that have persisted since mid-2007. U.S. farm program payments made under the marketing loan provisions and CCP program have to be triggered by low commodity prices before payments are made. Most long-run commodity market projections predict high commodity prices and low government program support to persist well into the future, thus, keeping U.S. domestic support outlays well within current AMS limits without any further changes to the programs. Additional uncertainty arises from the ongoing Doha Round of trade negotiations, where a successful conclusion could potentially mitigate or end Canada's and Brazil's interest in continuing its case against the U.S. farm programs.

Given the importance of agricultural trade in the U.S. agricultural economy, Congress will likely be monitoring developments in the WTO AMS dispute. The House and Senate Agriculture Committees regularly hold hearings on agricultural trade negotiations. If the ongoing Doha Round of WTO trade negotiations were to successfully conclude with a text for further multilateral trade reform, it is likely that Congress would hold hearings and consult with the Administration concerning the possible renewal of fast-track, or Trade Promotion Authority (TPA), legislation, which expired on July 1, 2007.³³ Such hearings and consultations would be a major vehicle for Members to express their views on the U.S.-Brazil/Canada AMS trade dispute, on the negotiating issues that it raises, and on the potential implications for U.S. farm policy.

Table 2. WTO Time Line for Dispute Settlement

| Time Allowed^a | Activity |
|---------------------------------|--|
| 60 days | Consultations, mediation, etc. |
| 45 days | Panel set up and panelists appointed |
| 6 months | Final panel report to parties |
| 3 weeks | Final panel report to WTO members |
| 60 days | Dispute Settlement Body adopts report (if no appeal) |

³¹ For more information, see CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by (name redacted).

³² This timeline is discussed in more detail in CRS Report RL32571, *Brazil's WTO Case Against the U.S. Cotton Program*, by (name redacted).

³³ For more information, see CRS Report RL33743, *Trade Promotion Authority (TPA): Issues, Options, and Prospects for Renewal*, by (name redacted) and (name redacted).

| Time Allowed^a | Activity |
|--------------------------------------|---|
| Total = 1 year | Without Appeal |
| 60 to 90 days | Appeals report |
| 30 days | Dispute Settlement Body adopts appeals report |
| Grand Total = 1 year 3 months | With Appeal |

Source: WTO Dispute Settlement online resources; available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

Note: These approximate periods for each stage of a dispute settlement procedure are target figures—the agreement is flexible. In addition, the countries can settle their dispute themselves at any stage. Totals are also approximate.

- a. Time period begins when the official request for consultations is received by the WTO Dispute Settlement Body (DSB).

Table 3. The Main Stages of a WTO Panel's Work

| Timing | Activity |
|-----------------------------|--|
| Establishment of Panel | The Dispute Settlement Body (DSB) has 45 days to appoint members to the panel. |
| Panel Members Appointed | The panel has 6 months to finish hearings, rebuttals, and expert testimony, to review the evidence, and to produce a final report on the case. |
| Before the first hearing | Each side in the dispute presents its case in writing to the panel. |
| First hearing | The case for the complaining country and the defense. The complaining country or countries, the responding country, and those that have announced they have an interest in the dispute, make their case at the panel's first hearing. |
| Rebuttals | The countries involved submit written rebuttals and present oral arguments at the panel's second meeting. |
| Experts | If one side raises scientific or other technical matters, the panel may consult experts or appoint an expert review group to prepare an advisory report. |
| First draft | The panel submits the descriptive (factual and argument) sections of its report to the two sides, giving them two weeks to comment (this report does not include findings and conclusions). |
| Interim report | The panel then submits an interim report, including its findings and conclusions, to the two sides, giving them one week to ask for a review. |
| Review | The period of review must not exceed two weeks (during that time, the panel may hold additional meetings with the two sides). |
| Final report | A final report is submitted to the two sides and three weeks later, it is circulated to all WTO members. If the panel decides that the disputed trade measure does break a WTO agreement or an obligation, it recommends that the measure be made to conform with WTO rules. The panel may suggest how this could be done. |
| The report becomes a ruling | The report becomes the DSB's ruling or recommendation within 60 days unless a consensus rejects it. Both sides can appeal the report (and in some cases both sides do). |

Source: WTO Dispute Settlement online resources; available at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm.

Author Contact Information

(name redacted)
Specialist in Agricultural Policy
[redacted]@crs.loc.gov, 7-....

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