The Proposed Involvement of South Africa in the US - Canada WTO Corn Dispute

An Opinion Prepared by

Hilton E. Zunckel

Floor Inc Attorneys

As Commissioned by

The Maize Trust

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1. Introduction

The Government of Canada requested consultations with the United States of America (US) on 8 January 2007 under the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the Settlement of Disputes (the DSU or Dispute Settlement Understanding) with respect to corn (maize) exports from the US under a host of agricultural subsidy programmes. As a producer and exporter of maize it strongly suspected by the private sector participants in the South African maize value chain that the South African maize sector has a vested interest in the success of such an action. Furthermore, the South African Government has indicated via the Minister of Agriculture's Agricultural Trade Forum (ATF) that it is prepared to consider joining such dispute if such initiation is forthcoming from the maize industry.

To this end the Maize Trust, being a judicial person acting in an impartial manner for the benefit of the maize value chain as a whole, found it prudent to determine whether there is a *'prima facie'* case for the South African Government, together with the industry, to jointly involve themselves in the WTO corn dispute. The substance of this opinion addresses this determination and is intended to serve as a basis for evaluating the potential action, with the further intention of making the document available to the South African Government to expedite the decision as regards official participation in the dispute by South Africa.

Should this eventuality arise the industry, together with the South African Government, would foresee the further compilation of a detailed legal analysis as would be expected for written submissions to the WTO dispute settlement panel which may be established to adjudicate this matter.

2. Executive Summary

- The Government of Canada initiated a trade dispute in the WTO against United States maize subsidies on 8 January 2007. The Canadian complaint contends that US$9 billion provided to US maize farmers each year is depressing the global maize price to the detriment of other maize producing and exporting countries.

- The US Trade Representative (USTR) has indicated that the US fully expects Canada will file a formal challenge in the World Trade Organization against US maize subsidies. In view of this and the presently available evidence we are of the view that the WTO dispute 'US – Corn' is likely to be initiated imminently.

- As a producer and exporter of maize South African has a definite vested interest in the success of such this Canadian action, and should thus join the dispute settlement proceedings officially.

- In doing so the South African government has a unique opportunity in signalling its solidarity with the agricultural sector in a meaningful way in joining the WTO maize dispute.

- The current policy approach that focuses purely on contingent trade remedies ignores the inherent problem of subsidization at a global level, in that domestic countervailing duties against the US cannot be used as an effective remedy when those subsidies have an influence on the world price, like maize.

- In considering the maize dispute South African authorities should bear in mind that the result, identified by the Canadians will also have a similar influence on wheat, sorghum, barley, oats, cotton, rice, soybeans, and other oilseeds. These sectors, as they are active in South Africa, should thus be natural allies to any initiative taken by the maize industry.

- Unlike a tariff which could be construed as protectionist, a WTO dispute clearly addresses injustice in that the offending party is not adhering to obligations undertaken under international law for which other countries potentially pay twice, firstly through the concessions given in return for the undertakings by the defaulter and secondly through the negation of such concessions through non compliance. It is precisely such a double payment trap in which the maize industry finds itself.

- It therefore follows that if the government is going to match the standard that it sets for its agricultural citizens - premised on global competitiveness - then it follows that the government should be equally competitive in

applying the global trade policy tools at its disposal, especially when an unprotected industry faces unfair competition from a foreign government.

- South Africa is still procedurally able to join the dispute as a co-complainant or as a third party. This is despite not having been part of the initial consultations.

- South Africa and Canada have a natural affinity for collaboration on this matter by virtue of their joint Membership of the Cairns Group of 17 countries, the WTO coalition that essentially has a common interest in subsidy free agricultural trade. Within the Cairns Group, Canada has brought the complaint and Argentina, Australia, Brazil, Guatemala, Thailand and Uruguay have joined the case so far. It is thus evident that South Africa would not be out of place in this company either as a country opposing agricultural subsidies or as a country with a development agenda. The action is well aligned with South Africa's agricultural trade policy agenda.

- On balance our analysis has indicated that in the wake of the WTO US – Upland Cotton dispute there is a very solid legal basis for further attacks on the US agricultural subsidy regime, due in large measure to the fact that these subsidies are programmatic and not only applicable to cotton but also wheat, maize, grain sorghum, barley, oats, rice, soybeans, and other oilseeds. To this end this opinion finds that Canada has made an accurate evaluation as to the merits of the WTO action with a high probability of success. This is supported by the fact that eight other countries have joined the consultations to date.

- South Africa is a dispute settlement virgin. It is thus recommended that third party participation would be the suggested vehicle for South African participation. Third party participation is a good way to ease into the dispute settlement system and learn the ropes. Third party participation relieves South Africa of the substantive burden of building a case and taking the resource responsibility of leading a dispute. The primary parties will cover all the legal bases and argue their intricacies in detail. As a third party South Africa can choose how deeply to engage in this legal process and select in what depth to follow the principal and other third party submissions.

- South Africa should use this participation as a capacity building exercise with a view to establishing local skills to deal with WTO disputes into the future. The fact that South Africa has been flirtatiously prodded as being guilty of acting outside of its WTO obligations on three occasions, strengthens the argument that South Africa needs to 'get fit' in the ways of WTO dispute settlement.

- South Africa would need to apply a range of skills in order to make an effective intervention in the maize dispute. This intervention will likely involve 1-2 written submissions to the panel with written responses to questions put by the panel to South Africa, and 1-2 appearances and oral statements to the panel. In the likely event that the matter is appealed, a further written statement and oral submission would be made to the Appellate Body. Depending on the depth of intervention sought, South Africa would need to monitor and evaluate the submissions of the primary parties and other third parties in compiling a credible contribution.

- In order to make these inputs it is recommend that a 'Maize Dispute Task Team' is formed. This task team would comprise a government contingent representing the 3 functional ministries affected by the case (DTI, Agriculture and Foreign Affairs) together with a private sector contingent constituted under the auspices of the Maize Forum.

- It is noted that the maize industry is already well positioned to act as the driver for South African participation in the maize dispute. The maize value chain is already well organized through the consultative structure known as the Maize Forum. It is suggested that a 'Maize Dispute Committee' be established under the auspices of the Maize Forum. It is evident that there is a wealth of trade expertise present within the maize sector and it is suggested that the Maize Forum constitute such a working committee to represent inputs from the value chain as a whole selected from functional competencies.

- It is further suggested that the Maize Forum augment its expertise with legal assistance with regard to WTO agricultural dispute settlement and economic modelling expertise which is required to measure the market effects to justify South Africa's trade interest in the case.

- Adopting this 'team South Africa' approach to participation under the overarching aim of building local capacity into the future will enable costs to be relatively modest.

- In view of the WTO timelines that apply it would imply that South Africa needs to have its principal participation decision approved in advance of the WTO dispute settlement body meeting set for 24 April 2007 (procedurally this may be extended to 22 May 2007) followed with the preparation of a formal legal submission by approximately August 2007 and an oral submission to the panel in September 2007.

- In our considered opinion South Africa is legally justified, morally obliged and infinitely technically capable of defending its agricultural interests in a WTO dispute. As such South Africa should only avoid joining the dispute in the most exceptional of circumstances. We find no such circumstances present in our analysis.

3. Dispute Settlement in the WTO

In order to provide non-legal readers with a background reference as to the milieu in which this opinion is couched, the following brief explanation is provided so as to explain what WTO dispute settlement is and how it functions and what its relevance is in this matter[1]. Elements of this initial explanation are expanded upon in the body of the opinion.

WTO dispute settlement is essentially an international judicial process for trade matters – a trade court. Officially, the WTO legal text that governs the settlement of disputes is the 'Understanding of the Rules and Procedures Governing the Settlement of Disputes'[2], colloquially referred to as the dispute settlement understanding, or DSU for short.

Dispute settlement is a central feature in the multilateral trading system. Over the past 12 years, that is since its inception, WTO Dispute Settlement has proven to be one of the most effective instruments available in any multilateral forum to defuse disagreements between countries as to their respective rights and obligations under the WTO's rather unique aquis of international law. The WTO's 10 year anniversary strategic review under the auspices of former Director General Peter Sutherland found the dispute settlement system to be a 'unique contribution' to the stability of the global economy, a construct 'to be admired' and 'a significant step forward' in the rules based system of international trade diplomacy[3]. Matters before the WTO are between Member countries and private parties do not have standing in the WTO generally, or under the dispute settlement system. Industries thus rely on the government to initiate WTO action.

Without a means of settling disputes, the international trading system would be less effective because the legal rules could not be enforced when contravened. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly defined procedures, with time lines for conducting disputes. It is notable that the underlying aim of the procedure is not intended to obtain judgments, but rather to

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[1] The following explanation is intended to serve as an introduction. Readers who wish to make a more detailed reading as to the functioning of WTO dispute settlement may wish to consult the following reference: UNCTAD: 'Course on Dispute Settlement 3.2 Panels / 3.3 Appellate Review' United Nations, New York & Geneva 2003.

[2] Annex 2 to the Marrakesh Agreement Establishing World Trade Organization: Understanding of the Rules and Procedures Governing the Settlement of Disputes. (Referred to hereafter as: 'the DSU' for ease of reference).

[3] Report by the Consultative Board to the Director General Supachai Panitchpakdi: 'The Future of the WTO Addressing Institutional Challenges in the New Millennium' WTO, Geneva 2004, at page 49.

settle disputes amicably through bilateral consultations between the involved parties where this is at all possible. So far, this aim has been rather successfully met with less than half the complaints initiated proceeding to the substantive litigating panel phase. Most of the matters have thus been settled ‘out of court’ as it where, or remained within a protracted consultation phase between the parties.

The court phase is initiated by a complaining party if the consultations do not prove successful. The initial ruling is made by a so called ‘panel’, similar to a court of first instance in South Africa. The WTO Members then accept or reject the panel’s ruling through the Dispute Settlement Body (DSB) which is effectively the WTO’s plenary body, the General Council sitting in an alternative role. After the initial DSB decision a review is possible with a secondary process available to appeal points of law, similar to the function of the supreme or appellate division in South Africa.

A dispute arises when one country adopts a trade policy measure or takes some action that one or several WTO members considers to be ‘breaking the law’ i.e. under any of the WTO Agreements, or alternatively is considered to be not respecting obligations that it has assumed. These are the primary parties to the dispute, a defendant and one or several complainants. Another subsidiary group of Members can also form. These are third countries to the dispute called ‘third parties’. Third Parties can declare that they have an interest in the case and enjoy some not insubstantial rights without having to assume the full burden of participation as a primary party as a complainant or defendant. They may join neutrally or indicate their partiality to either of the primary parties.

Historically there was a procedure for settling disputes under the WTO’s forerunner, the General Agreement on Tariffs and Trade (GATT). This early dispute mechanism had an essential flaw in that rulings could be blocked by the loosing party. The procedure also had no fixed timetables, and thus could be inconclusively prolonged. The Uruguay Round agreement ‘The Dispute Settlement Understanding’ introduced more structure in the process in obtaining a definitive ruling, and additionally added clearly defined stages in the procedures. Most notably it has become impossible for the country losing the matter to prevent the adoption of the ruling by the DSB. Under the GATT system, decisions of the panels could only be adopted by consensus. The implication was that any single objection, notably by the loser, could block the majority decision. Under the WTO system the rulings are automatically adopted unless there is a consensus to reject them. In other words a Member wishing to block a ruling has to convince all 149 other WTO members (including its opposing adversary) that they are incorrect and should share its view.

In comparison with the GATT, the WTO DSU also introduced greater discipline for the length of time a case should take to be settled, with flexible deadlines set in various stages of the procedure. The agreement emphasizes that prompt settlement is essential if the WTO is to function effectively. It sets out in considerable detail the procedures and the timetable to be followed in resolving

disputes. If a case runs its full course to a first ruling, it should ordinarily not take more than one year, extended to fifteen months if the case is appealed. The agreed time limits are flexible, and if the case is considered urgent (for example perishable products may be at issue), the process could be accelerated to accommodate these special circumstances to the extent possible. It is notable, but not seen in practice, that at any stage of the proceedings the parties can step away from the judicial process, resembling a court or tribunal in nature, and settle the dispute by themselves. In other words consultation and mediation remain theoretically available options throughout.

In the event that the losing party does not comply with the ruling of the DSB, which will have been a standard requirement to bring the iterant behaviour into line with WTO obligations, the aggrieved party can request the original panel to be revived to examine the extent to which the loser has complied with the ruling. If the loser fails or refuses to bring its national policies into conformity with the ruling then the aggrieved party may be entitled to compensation and could be authorized to retaliate against the iterant party by denying them trade concessions of a like quantum to that determined to be attributable to the continued maintenance of the illegal measure. In the US - Foreign Sales Corporation (FSC) case[4], which involved tax credits on US wheat exports, the quantum of retaliation awarded to the EU was US$ 4 billion annually. Progression to this stage is certainly not the norm in the system with merely a handful of cases having reached this stage. It is however notable in the present instance that at present Brazil is pursuing a compliance panel with the US in the landmark agricultural dispute on cotton.

African countries generally have not taken to using the DSU to enforce their rights in the WTO. It is speculated that African countries have difficulties participating in the institutional structures of the WTO generally, and in the dispute settlement mechanism specifically. The constraints faced by African countries include human resource constraints, financial constraints, which often lead to inability to defend interests, and a fear of backlash from the world's larger trading powers. These constraints are particularly notable in the multilateral trading system which is becoming more complex. It is not only the complexity of the substantive international trade law, but also the complexity of the litigation process that makes WTO dispute settlement proceedings a daunting task for many African countries. In view of this, no African country has ever requested consultations against another WTO Member. This includes South Africa. Somewhat alarmingly, South Africa has however had two requests for

[4] WTO Document series: WT/DS108.

consultations made against it. These were by India on pharmaceuticals and by Turkey on blankets. Neither of these matters proceeded to the establishment of a panel. The present consideration of participation by South Africa would thus be a proactive landmark step into a policy space not previously occupied by South Africans.

4. Origins & Grounds for the WTO 'Corn' Dispute

4.1 The Grounds

The corn (maize) dispute was initiated by Canada on 8 January 2007 when they tabled a request for consultations with the WTO Secretariat[5]. This action flows from existing efforts on the domestic front in Canada to address US maize subsidies through their domestic trade remedies legislation against what they saw as injurious subsidization and dumping of US maize into Canada. This action led to the imposition of a combined duty to cover subsidization and dumping which was implemented in December 2005. This lasted until April 2006 when it was withdrawn, in part due to pressure from the US[6]. Ironically this pressure included a request for WTO consultations with Canada. Canadian maize farmers are currently appealing the Canadian decision to remove the duties in their domestic courts.

The Canadian WTO action is thus an extension of the domestic process and is strategically timed for two inter-related reasons. Firstly we are aware that the WTO's Doha Round of trade talks remain stalled following the impasse that arose in July 2006. Granted that there have been some encouraging bilateral discussions between the US and the European Union over the past two months, but a breakthrough is not imminent, not least because the WTO now consists of 150 Members, and their consensus would be required in alignment with these smaller group initiatives. It has been speculated to what extent WTO Members would hold off on agricultural disputes, in the hope that the subsidies matter would be addressed and resolved through the negotiation process. The negotiating impasse thus provides an impetus to re-look at dispute options[7]. In

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[5] WTO Document WT/DS357/1 dated 11 January 2007.

[6] Canadian International Trade Tribunal: Findings of Inquiry No. NQ-2005-001. April 2006 at page 27. The official reasoning was that 'The Tribunal finds that the injury suffered during the period of inquiry is attributable to other factors, primarily exchange rate fluctuation and unknown factors that could explain the widening gap between the delivered price of the subject goods and the price of domestic grain corn in 2004-2005'.

7 'Doha Round - Really a credibility Test for WTO?' commentary on http://www.tradepolicy.ch posted 13 March 2007.

addition, turning to dispute settlement has some impetus in prompting negotiators to resume the negotiations in order to settle subsidy rules that suit them as opposed to being placed in a position of having to tailor domestic policy to suit the outcome of adjudication. The second related element involves domestic policy considerations. The US legislation that enables the subsidy regime is the Farm Bill which is periodically updated. The next update is due to be before Congress later this year. The Canadian move is thus also tactically placed to influence the look of the 2007 Farm Bill[8].

The Canadian action is also premised upon the successful challenge to the US agricultural subsidy regimes in the notable agriculture case US – Upland Cotton[9]. The US subsidy regimes are programmatic. In other words this means that the subsidy schemes are not only applicable to 1 crop but rather can be applied to a host of products declared eligible under the subsidy programmes. It is for this reason that the US – Upland Cotton dispute provides such a good source of precedent for other agricultural disputes, and the present maize dispute in particular.

The legal basis on which Canada premised the consultation request is grounded in four different Agreements, namely:

- The Understanding on Rules and Procedures Governing the Settlement of Disputes - DSU (Articles 1 and 4). Article 1 is the entrée to the DSU and makes reference to the various agreements to which the DSU applies. In the present instance this would include the agriculture and subsidies agreements. Article 4 sets out the basis, procedures and time frames for the consultation process.
- The General Agreement on Tariffs and Trade 1994 - GATT 1994 (Article XXII). This article provides a general facility for consultation generally on any matter.
- The Agreement on Subsidies and Countervailing Measures - SCM Agreement (Articles 4, 7 and 30). Article 4 sets out the consultation and dispute procedures for prohibited subsidies. It requires that the consultation request is accompanied by a statement of evidence. Such a list was provided by Canada. Article 7 does the same thing for actionable subsidies.

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[8] 'WTO Maize Dispute Looms' commentary on http://www.tradelaw.co.za/news/article.asp?newsID=123 posted 17 January 2007.

[9] See WTO documents - 'Upland Cotton': Report of the Panel United States Upland Cotton WT/DS 267/R 8 September 2004; & 'Upland Cotton': Report of the Appellate Body United States Upland Cotton WT/DS 267/AB/R 3 March 2005. This case is herein after referred to as 'Upland Cotton' or 'the cotton dispute' for ease of reference.

- The Agreement on Agriculture (Article 19). This article indicates that GATT Article XXII and the DSU (referred to above) will apply to consultations and dispute settlement for agricultural products.

The United States measures that formed the basis of the complaint are found in the US Agricultural Act of 1949 and the Agricultural Adjustment Act of 1938 which make up what is known as the 'permanent law' that provides for income and commodity price support. Congress enacts recurring farm bills that expire after four to six years. These farm bills amend provisions of the permanent law to make changes to agricultural support programmes. The last farm bill was the Farm Security and Rural Investment Act of 2002 (FSRI Act). This Act follows on from the Federal Agricultural Improvement and Reform Act (FAIR Act of 1996). The FSRI Act authorizes payments for the 2002 to 2007 crop years for agricultural crops which include corn (maize). Congress can also provide supplementary assistance under separate legislation.

In terms of this legislation the Canadian request is set out on 3 broad fronts. Firstly, Canada contends that US subsidies have caused serious prejudice to Canadian producers through corn price suppression in the Canadian market. Secondly, Canada claims that US export credit guarantees are illegal export subsidies. Thirdly Canada claims that US direct payments are not green box compliant and should thus count towards US amber box payments. These three fronts are each addressed in turn hereafter[10] in sections 4.2 to 4.4.

The first precursory task under each of the 3 fronts is to identify that the conditions of definition and specificity of the subsidy taken to task exist[11]. More specifically the subsidies must take the form of a financial contribution by the US government or alternatively an income or price support. Through either of these mechanisms a benefit must be conferred upon the subsidy recipients. These subsidies should then be targeted (made specific) to an industry. In the present instance this is defined as 'US producers of primary agricultural products and/or to the US corn industry'. This step is perhaps one taken for granted in that it essentially checks if the measure is a subsidy and if so, does it have potential market effects through being narrowly targeted (specific).

This precursory task is unlikely to be contentious as it is fairly self evident that the measures are subsidies. In US – Upland Cotton the US did not attempt to argue that the subsidy regimes were not subsidies i.e. they conceded that there was a financial contribution by a government where the government practice involves a

[10] WTO Document: G/AG/GEN/74 11 January 2007 at pages 2-4.
[11] SCM Agreement: Articles 1 and 2 respectively.

direct or potential transfer of funds, and this conferred a benefit upon the recipients[12]. It is not difficult to construe a direct payment of government money to a farmer within the definition of a subsidy as required in the SCM Agreement Article 1. The second condition is that the subsidy measure must be specific to an enterprise or industry. In Upland Cotton the panel provided guidance to measuring specificity. The panel reasoned that SCM Article 2 does not 'speak with precision' about when specificity may be found. The panel thus develops a rule that firstly an industry or group of industries may be generally referred to by the type of products they produce i.e. the concept of an industry relates to producers of certain products (like cotton or maize). Secondly the SCM Agreement is an agreement on trade in goods and it applies in respect of all goods. It thus follows that the concept of specificity must be considered within the legal framework of the WTO Agreement as a whole. The effect is that it is now very easy to find a subsidy specific if it is granted to anything less than all goods (i.e. all HS headings whether industrial or agricultural) because the measurement taken is very wide. Thus in order to be non specific (safe and not trade distorting) the benchmark is the universe of the trade in goods in totality, making it virtually impossible to escape the definition of specificity.

It is thus safe to conclude that the US maize support measures are subsidies that are specific to the agricultural sector in line with the definitional criteria of the SCM Agreement. This then paves the way to examine the 3 functional grounds upon which Canada has sought to oppose the maize subsidies.

4.2 Actionable Subsidies

4.2.1 Actionable: Amber Box/Light

The measures addressed in the first part of the complaint are mainly domestic subsidies and concomitant enabling legislation (domestic support commonly referred to as 'amber box' subsidies under the WTO Agreement on Agriculture (AoA)) provided to US maize farmers[13]. The Canadians have chosen a rather long period to address these payments, that being the 1996 to the 2006 marketing years[14]. Canada considers that the measures at issue are inconsistent

[12] See: WTO Document WT/DS 267 Upland Cotton panel report at paragraph 7.1113. The US did however try and argue that the quantum of the subsidy was incorrectly calculated.

[13] Note that export subsidies were also included in this 1st section although these export subsidies really form the subject of the 2nd part of the allegation. These are discussed separately.

[14] The South African maize season runs from 1 May to 30 April while the 'marketing' year for US corn runs from 1 September to 31 August. The choice of a long period is possibly intended to counter the type of short term market vagaries, like exchange movements, which proved difficult in the Canadian domestic action.

with the United States' obligations under Articles 5(c) and 6.3 (c) of the SCM Agreement.

Amber subsidies are actionable. Essentially this means that they can be used by Members, unless they cause what are called 'adverse effects' to the interests of another Member. Adverse effects include three possible categorizations. These are injury to the domestic industry, nullification of benefits (notably circumvention of tariff concessions) and what is called serious prejudice. Canada has selected to use this third element, serious prejudice (SCM Article 5(c)) as their course of action. Specifically Canada has alleged that the serious prejudice is the type listed under the SCM Agreement in paragraph Article 6.3(c). This states that serious prejudice exists or poses a threat when an actionable subsidy has caused serious price undercutting by the subsidized product, price suppression (the price remains stagnant when it may have risen), price depression (the price has decreased when it may have been maintained or may have risen)[15] of a like product in the same market.

In examining the existence of serious prejudice and threat of serious prejudice to Canada, reference is made to specific US subsidy programmes under the 2002 US Farm Bill, earlier and related legislation. There are 3 specific subsidy programmes addressed by Canada. These are marketing loans (loan deficiency payments), counter-cyclical payments and direct payments (previously called production flexibility contract payments and market loss assistance (MLA) payments) to the US corn industry. These programmes either make direct funding grants linked to production levels to the corn producers or artificially support price levels above world market levels. These constructs are classic agricultural domestic support programmes (so called amber box)[16]. For an expanded explanation of the operation of these US subsidies see Annex 2.

If we examine the precedent to hand in Upland Cotton, we note that in the present instance Canada is following the previous Brazilian example of contending that the adverse effect brought about by the US subsidies involved serious prejudice bringing about significant price suppression by the subsidized product in the same market under Article 6.3(c) of the Agreement on Subsidies and Countervailing Measures.

In examining the term 'the same market' we find the term widely interpreted by the panel, favouring the case of Brazil at the time. The panel contrasts the term

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[15] The provision also refers to or lost sales for a like product in the same market (in this instance this would be lost Canadian corn sales in their home market). Canada has not used this third alternative in the present case.

[16] See the Agreement on Agriculture Articles 6 & 7, and definitions in Articles 1(a) & (d).

on the multilateral track (WTO remedy sought) with the requirement under the countervailing route (domestic remedy sought). The panel notes that in the countervail case the market must be a compartmentalization of a Member's domestic market in certain situations where there may be a localized or targeted impact in a certain geographic area within the importing Member's market. On the multilateral route however, the panel sees the absence of an analogous requirement in Article 6.3(c) to constrain the meaning of 'market' to any particular geographic area, or to focus particularly upon a particular trade flow (i.e. imports into, or exports from, particular areas) as support for the view that the term 'market' includes a geographical area which may embrace the world. This follows from the understanding that the very purpose of the Agreement on Subsidies and Countervailing Measures is to reduce trade distortion through the grant of subsidies by Member governments and an understanding that trade distortion may occur in multiple geographical areas.[17] The market is thus taken to be the entire world market. This concept would likely apply in the maize case also i.e. the relevant market would be global.

The price that is suppressed is judged against a generally accepted international standard. Brazil makes a case and the panel concurs that the so called 'A-Index' is a composite of an average of the five lowest price quotes from a selection of the principal upland cottons traded in the world market[18]. There is little doubt that a global market exists for maize trade and a suitable international price source will be selected. This might conceivably be the Chicago Board of Trade (CBT) or the International Grains Council (IGC).

In considering the price suppression effect, the cotton panel drew a distinction between the subsidies that have a direct price effect and those that support income. The price dependent support (marketing loans/loan deficiency payments) was found to be structured in such a way that the panel was convinced that they produced 'enhanced production and trade-distorting effects'[19]. The payments stimulate production and exports and result in lower world market prices than would prevail in their absence. The counter-cyclical nature of the programme gives rise to an iterative chain of distortion in that the lower the United States drives the world price, the greater the magnitude of the subsidy received by United States cotton producers to make up the difference between the loan rate and the world price over a given time period. Brazil in fact cited US Department of Agriculture (USDA) economists in support of this dynamic in price support measures like the marketing loan programme.

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[17] Upland Cotton paragraph 7.1238.
[18] The index is compiled by 'Cotlook' - which is a private UK based organization.
[19] Upland Cotton paragraph 7.1295.

In deciding whether the suppression was ‘significant’ the panel relied on a textual interpretation of the term and concluded that the suppression would be significant if it was shown to be ‘important, notable or consequential’. This is indeed the case when considering the relative magnitude of the United States production and exports in the world market, then in cotton and now in maize and other products.

Finally the panel proceeds to make a cause-and-effect linkage between the United States measures and the significant price suppression impact observed on the world market. Four factors are cited as establishing causation:

1. The United States exerts a substantial proportionate influence in the world cotton market.
2. United States subsidies are directly linked to world prices for cotton insulating producers from low prices. This design and operation supports a causal link with the significant price suppression.
3. The United States measures and the significant suppression happen concurrently. The panel describes this rather eloquently as a ‘discernable temporal coincidence’.
4. The divergence between producers' total costs of production and revenue from sales of cotton. United States cotton producers would not have been able to sustain their operations in the absence of subsidies, as the effect of the subsidies was to allow cotton production at a price lower than that necessary to cover their production costs.

These steps would likewise be applicable in an examination of the world market for maize.

4.2.2 Actionable: Export Subsidies

Note that export subsidies were also included in this 1st section of the Canadian complaint although these export subsidies really form the subject of the 2nd part of the allegation. The reason for this is probably to have a second bite at the apple and ‘reserve’ the use of the adverse effect remedies in part 1 in case of their being unsuccessful on grounds for export subsidy remedies in part 2 of the complaint. The distinction being that under the SCM Agreement export subsidies are prohibited (Article 2) and must be ceased, while amber subsidies are allowable but only to the extent that they do not cause adverse effects. Canada makes particular reference to export credit guarantees to facilitate the export of

corn, the General Sales Manager (GSM 102) program and the Supplier Credit Guarantee Program (SCGP). These measures are explained in Annex 2.

In the case of agricultural subsidies, there is a difference in the way export subsidies are treated *vis-à-vis* the SCM Agreement. Agricultural export subsidies are not in fact prohibited but are specifically condoned as long as they are scheduled[20]. This would effectively mean that for purposes of the remedies that can be applied to the scheduled agricultural export subsidies they assume an amber light sheen when considered under the SCM Agreement. In other words they are permitted (basis the AoA) but actionable (basis SCM) to the extent that they cause adverse effects. To the extent that they are not scheduled under the AoA they would be prohibited under both the AoA and SCM Agreement. This latter instance forms the basis of the second part of the Canadian complaint (discussed in the following section).

4.3 Export Subsidies (Prohibited)

The subsidies addressed in the second part of the Canadian request refer to export subsidies that are not scheduled in the US schedule of agricultural commitments (part 4). Again the specific measures identified are export credit guarantee programs and other similar measures such as the GSM-102 program and the SCGP.

The US uses these mechanisms to provide exporters with financing for exports at rates which are more favourable than those which these exporters could obtain on the open market. In addition the premiums recovered under the programs at issue are inadequate to cover the long term operating costs of the programs, meaning that they are run as loss making schemes.

The legal ground for attacking these subsidies is the notion that the SCM Agreement prohibits subsidies contingent on export performance (SCM Article 3.1). The Agreement is explicit that these subsidies not be granted or maintained (SCM Article 3.2). In addition Annex 1 to the SCM Agreement provides an indicative (i.e. non-exhaustive) list of prohibited export subsidies. Item (j) of the list specifically refers to export guarantee programmes which are run at a loss[21].

[20] See the Agreement on Agriculture Article 8 which refers to part 4 section 2 of the agricultural schedule of commitments for the US. It is noted that export credits are not scheduled by the US, hence the greater likelihood that they are best suited to placement in part 2 of the Canadian complaint. Again this inclusion at this point is probably to cover unforeseen eventualities and not be caught without grounds for action due to not having raised the issue initially should these be sought later.

[21] SCM Agreement Annex I (j) prohibition: "The provision by governments (or special institutions

The violation here is thus rather textually explicit and virtually impossible for the US to defend. In adding additional support to the SCM the AoA also prohibits export subsidies which are not specifically scheduled[22]. The AoA does this VIA Article 3.3 (the prohibition on export subsidy provision beyond scheduled allowances), Article 8 (the undertaking to use export subsidies only as scheduled), Article 9.1 (the non-exhaustive list of export subsidies that needed to be scheduled in order be able to maintain their use, and Article 10.1 (the prohibition of employing mechanisms to circumvent export subsidy commitments).

In Upland Cotton the panel found US export credit programmes to be illegal under the SCM Agreement's indicative list (paragraph j), but more interestingly that this finding was valid not only for cotton, but for all commodities that benefit from commodity support programs and receive export credit guarantees. As a result, export credit guarantees for any recipient commodity are allowed only as scheduled under the AoA. The US schedules make no such provision for export credits on any product; or for these or any other export subsidies for maize. On this reasoning any spending on export credits is beyond allowable US spending limits.

Looking in greater detail at the parallels that can be drawn from Upland Cotton we see that the same export credits were examined for cotton. These are referred to as the general sales manager (GSM) or supplier credit guarantee (SCGP) programmes. These subsidies have been a matter of contention throughout the implementation period of the Uruguay Round as evidenced by their inclusion as a specific subject to be addressed as part of the Doha Negotiations.

What these payments involve is the provision of US$ based loans to importing buyers of United States cotton at interest rates comparable to those in the United States as opposed to those in the importer's home market. The loans are underwritten by an agency of the United States Department of Agriculture, the Credit Guarantee Corporation (CCC). The benefit to buyers is that ordinarily they may not be credit worthy to obtain US$ based loans due to currency shortages in their home countries and usually these buyers will be in countries where the interest rate is higher than that of United States interest rate levels.

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controlled by governments) of export credit guarantee or insurance programs, of insurance or guarantee programs against increases in the cost of exported products or of exchange risk programs, at premium rates which are inadequate to cover the long-term operating costs and losses of the programs."

[22] An examination of the US schedule of export subsidy reduction commitments indicates that no reservation of any kind (value or volumetric) was made by the US on corn (maize). The grains that are scheduled to receive export subsidies are wheat, barley, sorghum, malt & rice.

Other countries are unable to match these marketing assistance measures and are then less competitive in the world market. It is notable that Brazil requested that cotton and 'other' products eligible for this support are addressed. This was accepted by the panel and the ruling on these export measures is thus more widely applicable than just cotton.

Part V of the Agreement on Agriculture provides for the disciplines on export subsidies. Essentially export subsidies are listed in a definitive list in Article 9, and these subsidies have to be scheduled and then reduced according to the modalities applied in the Uruguay Round and indicated on the Member's schedule. There are 6 listed Article 9 export subsidies, which do not include export credits.

In the current instance export credits are not part of this list, a fact that the parties and the panel were in agreement with. In other words the United States had not included export credit payments to upland cotton (inter alia) in its list of export subsidy commitments. The examination thus proceeded to AoA Article 10.1 which deals with circumvention of export subsidy commitments by using subsidies not part of the export subsidy list. It is notable from previous WTO *juris prudence* in the United States –Foreign Sales Corporation[23] (FSC) case that any export subsidy granted that has the effect of transferring the same financial resources that could have been obtained via a listed export subsidy, is considered to be circumventing an export subsidy. As its barometer for measuring effect, FSC uses as a measure the transfer of the same quantum of economic resources to the subsidy recipient. By this it is understood that any unscheduled (non Article 9) subsidy which is able to convey export subsidy value to any (listed or unlisted) product to the same extent that an Article 9 export subsidy could, is guilty of circumvention or even more readily, the threat thereof. The implication of this strict interpretation of circumvention effectively bans the use of any export subsidy (listed or unlisted) except as within volume and value allowances in listed in each Member's schedule of export subsidies. The nature of the Agreement on Agriculture 9.1 subsidies becomes of little relevance as long as one is able to make the 'transfer of the same economic resources' connection. As the transfer of resources is exactly what a subsidy is; this should not be difficult to do. Put differently, if one fails to prove that a given subsidy is a listed subsidy then it is automatically an unlisted subsidy and unlisted subsidies are likely (to the point of presumption) to circumvent a listed subsidy when resources are provided to the recipient. It is perhaps based, at least in part, on this ruling that the United States did not contest the status of unscheduled subsidies. The

[23] WTO documents: series WT/DS108.

panel notes that 'The United States submits that it is not permitted to provide any export subsidies in respect of unscheduled products, but that it is in compliance with its scheduled quantitative reduction commitments'.[24]

The reason that the United States did not schedule these export subsidies is that they were of the view that Agreement on Agriculture Article 10.2 provided a specific exemption from the general requirements of the Agreement on Agriculture for export credits. Article 10.2 states that Members would seek to develop disciplines on export credits. This has not happened during the entire implementation period of the Uruguay Round to date and it could well be said that several Members have like wise held the suspicion that export credits have been exempt from export subsidy disciplines.

The Upland Cotton panel follows in the steps of the FSC case and takes a strict interpretation of circumvention. The panel sees that the general prohibition on circumvention in Article 10.1 applies to export credits and that the intention to develop disciplines on export credits in Article 10.2 does just that, expresses an intention to pursue additional discipline without creating an exception that permits the use of export credits[25]. The panel states in paragraphs 7.904 and 7.926 that 'We find no textual support for the United States assertion that Article 10.2 serves to "defer disciplines" or to "except" export credit guarantee programmes from export subsidy disciplines' and 'While Article 10.1 currently provides the discipline in the Agreement on Agriculture on the use of export credit guarantee programmes, the work envisaged in Article 10.2 would presumably elaborate further and more specific disciplines that could facilitate identification of the extent to which such export credit guarantee programmes constitute export subsidies, or to what extent export credit guarantee programmes are not permitted.'

This finding provided new clarity on the status of export credits in a manner that is perhaps contrary to expectation, but certainly welcomed by proponents of the demise of export subsidies, and would apply equally in the way these measures are used in maize[26].

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[24] Upland Cotton panel paragraph 7.873.

[25] This panel view was upheld by the Appellate Body, but notably 1 of the 3 AB members held a dissenting view. Our view is in concurrence with the majority view on this point of law.

[26] As a technical point we note that the Upland Cotton analysis did actually discuss maize, but fell short of definitively ruling against export credits on maize due to a lack of proof of circumvention. See Upland Cotton at paragraph 7.881. In our opinion this matter is not completely settled as the scheduling of 'course grains' does not actually refer to 'corn'.

4.4 Green Box (Domestic Support)

Under the AoA, trade distorting domestic subsidies (the so called Amber Box) have to be scheduled and reduced over time. Members are not allowed to spend more than their scheduled reservations on these subsidies. Not all domestic subsidies are considered as trade distorting. Those considered to be non trade distorting or at most minimally trade distorting are exempted from being scheduled and reduced under the amber box, and can countries can spend freely on these programmes[27], colloquially referred to as the green box.

The third element of the Canadian claim relates to the distinct disciplines for the amber and green Boxes. Canada makes the case that certain US subsidy programmes that the US has declared and treated as non trade distorting (green box) have been incorrectly declared and should be listed as amber box subsidies, thus counting towards the total spending limits undertaken by the US on domestic support[28] (see Annex 1).

The measures that Canada identifies in the third category of the complaint relate to the following types of US subsidy payments: Production Flexibility Contract (PFC) payments, Direct Payments, MLA payments and Counter Cyclical Payments. Essentially these payments should be counted towards the total US amber box limit, instead of being free of spending limitations under the green box. Canada contends that when these notional green box items are added to existing amber box payments then the US exceeds of the commitment levels specified in its schedule of amber box commitments.

These subsidies represent so called 'decoupled income support' provided as direct payments to US farmers[29]. As a condition for green box colouration, decoupled payments must be exactly that – de-linked from any commodity volume or price movements. If they were linked to price/volume movements then they would be coupled and clearly constitute amber box domestic support.

In Upland Cotton it was seen that the base periods upon which these payments are calculated (fixed in the Uruguay Round) was updated by the US, thus linking (coupling) the payments to more recent production periods. The underlying reasoning as to why this is a problem is premised on the notion that if a farmer knows that the amount he produces today is going to form the basis of the size of

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[27] See AoA Article 6.1 which provides the specific carve out from reduction commitments for subsidies listed in 'Annex 2'. This Annex essentially describes the so called Green Box.

[28] An examination of part 1 to schedule 4 of the US agriculture commitments indicates that the total bound AMS (amber box) spend available to the US has been US$ 19,103 billion per annum since 2000. (The initial level at which the Uruguay Round reductions commenced was US$ 23,083 billion).

[29] See: AoA Annex II paragraphs 5 and 6(b).

subsidy payments he receives tomorrow, then the present incentive is to boost production, clearly not in line with green box reasoning of de-linking payments from production.

As the identified subsidies thus contravene paragraph 6(b) of Annex 2 to the Agreement on Agriculture, they loose their green status and become amber. Canada finds that because the payments are programmatic and the payments are thus made to all programme crops, not just maize is at issue here. In other words these payments to wheat, maize, grain sorghum, barley, oats, cotton, oilseed and rice should be included in the Aggregate Measurement of Support (AMS) of the US. The inclusion of spending across this product range would then logically further limit the spending space available to support any one product under the total AMS cap.

The US has strategically withheld its subsidy payment notifications to the WTO since the implementation of the Farm Act 2002. The US thus last notified in 2001. This means that no indication is yet to hand as regards direct payment and countercyclical payment programmes. The Canadian contention is however that when the PFC (notified), DP, and CCP payments are included in the US amber box, then the total outlays exceeds the spending commitment in each of 1999, 2000, 2001, 2004, and 2005. It is notable that the US's own Doha negotiation stance indicates that they themselves find that countercyclical payments are not and will not be green box compatible as their Doha proposal seeks an extension of the present blue box to include their countercyclical payments as being eligible for notification as blue box, where they would escape the current amber box constraints. This specific example serves to indicate the direct relationship existing between the pressures that can be brought to bear in the trade negotiations arena through the use of dispute settlement as a trade policy tool.

None the less in Upland Cotton, with regard to these payments that the US had initially considered as 'direct payments' under the Green Box, and were found by the panel to be Amber Box, the panel contended that they were not able to find that these measures suppressed the world price and consequently these measures cannot be found to cause serious prejudice. The reasoning of the panel was heavily influenced by the fact that none of the measures (PFC and DP payments and crop insurance subsidies) are price contingent, but are rather directed at income support.

The panel expressed the view that the price versus income support differentiation is sufficient to divorce the subsidies from having an impact on world market prices, stating that the 'combination attenuates the nexus between these

subsidies with the subsidized product and the single effects-related variable - world price - that we are called upon to examine in our price suppression analysis under Article 6.3(c). These subsidies are of a different nature, and thus effect, than the other (price-contingent) subsidies we have examined'[30].

This finding is notable in that by undergoing the actionable scrutiny of Part III of the SCM Agreement, these subsidies in effect almost regain their green colouration as they will not need to be amended or withdrawn, i.e. the same end result as if they had been Green Box compliant from the start. The author has previously observed that the amber status of previously green measures means that they are not automatically safe and not automatically prohibited. WTO Members can use them as long as they do not upset others by causing adverse effects to the interests of others. If the measure does cause adverse effects, then the affected Member can take action to remedy this effect. In essence this is the acid test of whether a subsidy is, as required for the agriculture Green Box, non-, or at most minimally, trade distorting. If a subsidy is used in such a way that it does not adversely affect others, proved by the fact that no action is brought against the user, it is an indication that it is not meaningfully distorting trade.

This being said it is likely that Canada will attempt to refute this price vs. income support logic using subsequent case law. In 2005 the Korea – Commercial Vessels[31] panel stated that it was not required to separate the subsidy programmes present in examining the serious prejudice through price suppression. This would indicate that in nimble argument in the maize case, it could be possible to re-argue the matter and find that income support programmes do play a role in suppressing the world price. This view is supported by Professor Daniel Sumner, the imminent US agricultural economist who represented Brazil in the Upland Cotton dispute[32].

5. Basis of a Case

In the wake of the Upland Cotton dispute the trade community at large began to speculate as to the possible future claims that may arise against the US and the EU based on the precedent established for cotton. In particular the non governmental group, Oxfam, commissioned several commodity studies to

[30] Upland Cotton panel report: at paragraph 7.1307.
[31] WTO document: WT/DS/273/R at paragraph 7.616.
[32] See: 'Boxed in: Conflicts between US farm policies and WTO obligations'; DA. Sumner, The CATO Institute, December 2005 at pages 17 and 22. We further note that in private communication this view is also expressed by the trade practice of Sidley Austen Brown LLP in Geneva.

examine which products would be the subject of further cases[33]. Their analysis was based upon inputs from the trade lawyers and economic specialist used by Brazil in the cotton case. In respect of maize the analysis indicated that the following countries would have a substantive trade interest in a maize dispute against the US: Argentina, Ecuador, El Salvador, Colombia, Honduras, Guatemala, Mexico, Paraguay, Peru, South Africa and Venezuela. To date Argentina and Guatemala have joined the corn case and Mexico has expressed an intention to do so at the panel stage.

From the discussion to date recall that the cotton panel set out a 4 point test to judge causation in respect of price suppression under the SCM Agreement. These were:

1. A substantial proportionate influence in the world market.
2. A direct link of subsidies to world prices so as to insulate producers from low prices.
3. The concurrent existence of price suppression and the subsidies.
4. Production costs in excess of the net realisable value upon sale.

The following briefly summarised data sets indicate that these conditionalities are clearly present in respect of the US maize industry.

For the first condition:
The US dominates the world maize market by its own admission. According to the USDA's Economic Research Service (ERS)[34]:

> 'The United States dominates world corn trade, …… and the rest of the world must adjust to prevailing U.S. prices. This makes world corn trade and prices very dependent on weather in the U.S. corn belt. ……Argentina, the second-largest corn exporter in most years, is in the Southern Hemisphere. Farmers there plant their corn after the size of the U.S. crop is known, providing a quick, market-oriented supply response to short U.S. crops….. Several countries including Brazil, Ukraine, Romania, and **South Africa**—have had significant corn exports when crops were large or international prices attractive.'

The following graphical representation visually drives home the notion that US activity in the maize market is dominant at a world market level:

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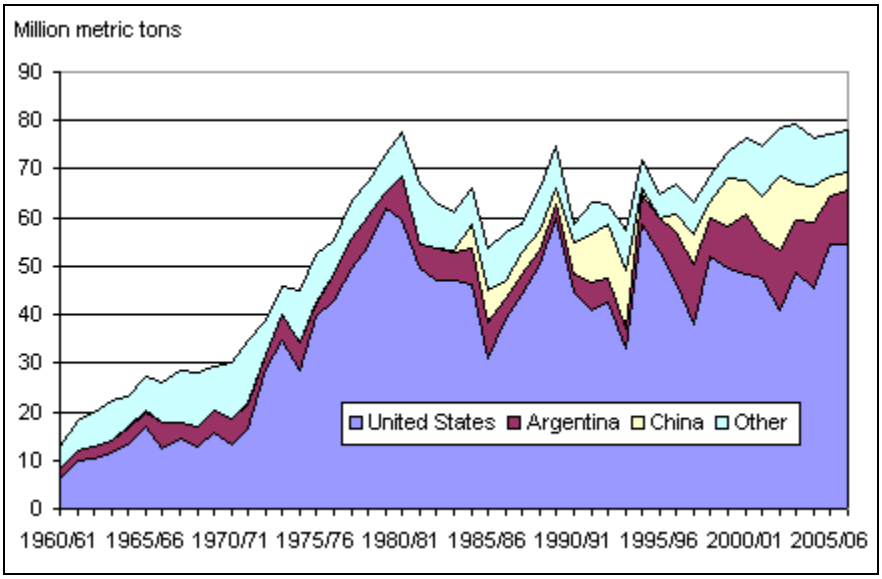
[33] 'Truth or Consequences: Why the EU and the USA Must Reform Their Subsidies, Or Pay the Price' Oxfam Briefing Paper 81. Oxfam International, November 2005.
[34] See: http://www.ers.usda.gov/Briefing/Corn/trade.htm .

World Exporters of Maize



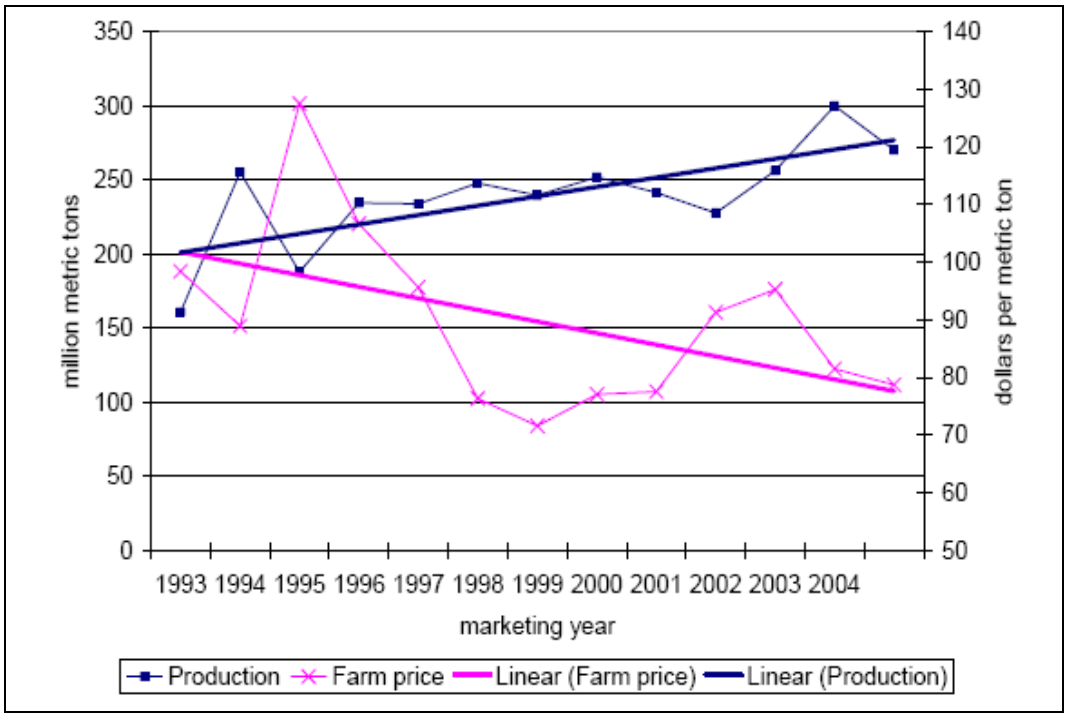
(Source: USDA – ERS)

For the second and third conditions:

The examination of the US subsidy programmes indicated that they are linked to various floor prices (loan rates and target prices) which adjust US maize producer incomes to certain predetermined returns independent of market returns. The Oxfam study makes compelling visual statement in this regard, showing that US maize production trends behave exactly opposite to what maize price trends would suggest. The US increases production as prices fall. The rational response to declining prices is declining production. This is a self sustaining suppression mechanism, for the lower the market is suppressed by the subsidies, the greater the subsidy that is needed to meet the predetermined floor price. The legislative mechanisms and budgetary outlays from the US Treasury are in place at the same time (the cotton panel's 'temporal coincidence') as these market effects are observed.

The graphical representation is as follows:

US Corn Immune to Market Signals



(Source: Oxfam based on USDA figures)

For the fourth condition:
In maize, like cotton, the most damning evidence against US subsidies lies in the fact that in the absence of subsidies US maize farmers would produce maize at a loss i.e. in the face of unencumbered market conditions they would cease production. The US would move from the world's largest maize exporter to being a net importer of maize. Professor Sumner makes the following observations based on recent US maize crop years[35]:

> 'The fact remains that: price contingent subsidies alone for corn, wheat, and rice are still sizable relative to the total value of production. To put matters in perspective price-contingent subsidies for cotton during 2004–06 ranged from about 12 percent to 64 percent of production. By way of comparison, in 2006 price-contingent subsidies for corn will amount to about 33 percent of production, similar subsidies for wheat will amount to about 29 percent of production, and those for rice will amount to about 42 percent of production. In other words, the

[35] Sumner DA, 'Boxed in: Conflicts between U.S. farm policies and WTO obligations' The CATO Institute December 2005 at page 19.

magnitude of price-contingent subsidies for these crops is comparable to that of the subsidies found to cause significant price suppression in the cotton case.'

The following cost, revenue subsidy figures illustrate the point. Note that in the absence of subsidies the US maize farmer makes a loss in each season examined. This loss is then compensated for by subsidy payments:

US Cost & Returns of Harvested Acre of Corn (US$ per acre)			
	2003	**2004**	**2005**
Cost of Production	349.8	349.8	349.8
Value of Production	317.4	312.8	279.1
Net return (value – cost)	-32.4	-37.0	-70.6
Corn subsidy	23.3	37.9	105.3
Net return + subsidy	-9.1	0.9	34.7
(Source: Cato Institute based on USDA figures)			

Modeling

While legal interpretation is obviously important, the cotton panel relied on economic evidence in assessing the market impacts linked to the legal terminologies in their case. Evidence was presented in the form of an economic model to measure global cotton market conditions prepared by the Food and Agricultural Policy Research Institute (FAPRI). FAPRI also models the maize market[36]. Evidence was submitted by expert opinions by the parties and a wealth of published research from credible sources was considered. The panel expressly indicates that the expert evidence had 'contributed constructively' to their work. With regard to the modeling and published research, we surmise from the reasoning of the panel that this evidence has played a decisive role in molding the panel's thought process. The precise extent of this reliance is unknown, but the panel did indicate that they had considered these sources and had 'attributed to them the evidentiary weight we deemed appropriate'. In the cotton dispute the argument surrounding the modeling analysis was rather

[36] See: http://www.fapri.org/models/grains.aspx .

acrimonious with heated argument[37]. The USDA dissected the FAPRI model relied upon by Brazil and questioned the minute details of its construction, assumptions and reliability. We note that the FAPRI cotton model has since been discontinued. Modeling will be a definite resource for South Africa to examine in preparing a submission in the maize dispute. This is further addressed in section 8.1.

6. Type of Participation and Timelines

In terms of the dispute settlement understanding (DSU) [38], the complaining and the responding Members are the 'parties' to the dispute. There may be more than 1 complaining Member, but only 1 responding Member. In the present instance these 'parties' are Canada as the complainant and the US as the respondent. Other countries may thus become involved either as additional complaining parties (DSU Article 9) or in a less rigorous manner as so-called third parties (DSU Article 10). South Africa could still join the proceedings in either of these capacities[39].

6.1 Co-complainants

In order to become a co-complainant in a dispute a country requests a panel in its own right on exactly the same grounds or on grounds that resemble or are related to the same matter. In practical terms this would mean that South Africa would follow exactly the same route that Canada has followed to date i.e. submit its own request for consultations to the US. When this happens, the DSU provides that a single panel may be established to jointly examine the 2 (or more if others also join) complaints. This is done with due regard for the rights of both Members so that the rights which the parties to the dispute would have enjoyed had separate panels been set up are in no way impaired, i.e. providing them with no lesser right than they would have had in individually litigating. In these circumstances a single panel is established to examine the combined complaints provided that this is feasible and agreeable to all concerned. The co-complainant is part of the selection of the panellists.

The written submission by each of the separate complainants is made available to the other complainants. In addition each complainant can be present when any of the other complainants appears before the panel. These parties are entitled to

[37] See Upland Cotton panel at paragraphs

[38] Annex 2 to the Marrakesh Agreement Establishing World Trade Organization: Understanding of the Rules and Procedures Governing the Settlement of Disputes (referred to as 'the DSU' for ease of reference).

[39] Statement valid at the time of opinion submission: 30 March 2007.

receive any and all the submissions made by any third parties that join the dispute and to be present when the third parties appear before the panel or the Appellate Body. In short, they can be everywhere and see everything.

If for some reason the panels are not combined and they run separately, then the system aims to arrange that the same persons serve as panellists on each of the separate panels and that the timetable for the panel process in the disputes is harmonized.

We observe that South Africa could still initiate the process of becoming a co-complainant with Canada by making a request for consultations with the US on the same or similar grounds as the Canadian request. As an alternative third party participation could be considered. This third party method of participation would be our recommended course for South Africa in the maize dispute. Third party participation is thus discussed in greater detail hereafter.

6.2 Third Parties

The most important right that a third party enjoys is that its 'interest' as raised is fully accounted for to the same extent as that of the primary parties by the panel[40]. Although their interests are fully considered, third parties do not enjoy the same rights of participation as the primary parties. This should not be seen negatively, but rather as a positive in that this is part of assuming a lighter participatory burden for a third party. The third party receives the primary parties' first written submissions to the panel and is able to present its own views in written form and orally to the panel during the first substantive panel meeting[41]. This oral presentation is not in the same session as the primary parties, and the first substantive meeting is actually divided into separate party and third party sub-sessions. Third parties are however able to be present for the submissions of all the other third parties i.e. they are entitled to be present for the entirety of the third party session[42]. These submissions are given to the primary parties to the dispute as well as the other third parties and are reflected as part of the panel report[43]. The third parties are not involved in approving panellists nor are they privy to the written inputs of other third parties beyond those made for the third party hearing at the first substantive meeting. Beyond this, third parties have no other rights. This being said, a panel can, and sometimes does, extend the rights

[40] See DSU Article 10.1.
[41] See DSU Article 10.3.
[42] See DSU Appendix 3 paragraph 6.
[43] The third party is responsible for circulating its written submission to the parties and other third parties and will be required to make a set available to the panel. This number is determined by the panel and is usually 10 copies.

of participation of third parties in individual cases. In practice however these third party limitations are less onerous than they appear as parties and third parties are free to make their own submissions available as they please. They often do, especially to third parties that have declared an allegiance to their cause. This was for instance the experience of Benin and Chad who obtained the documentation to which they did not have automatic entitlement from their official alignment with the cause of Brazil, the primary complainant who do have the right to share their own information as they so desire.

In the event of the matter being appealed, third parties also have rights[44]. Note that a WTO appeal is held purely to re-examine questions of law covered in the panel report and legal interpretations developed by the panel. The appeal process does not consider additional arguments or new evidence. Only parties to the dispute, not third parties, may make an appeal to the panel's report. None the less, third parties who notified the DSB of their substantial interest in the matter,[45] i.e. who were part of the initial panel process, are entitled to make written submissions to, and be given an opportunity to be heard by the Appellate Body.

6.3 Joining Procedures

Members have the opportunity to join the case as third parties at two stages; firstly, at the consultation phase, and secondly at the panel stage of the proceedings. South Africa can no longer join at the first juncture (as this would have had to have been done in January 2007), but the opportunity is open to do so at the second sage. For the sake of clarity in determining the timelines both phases are addressed hereafter.

In the consultation stage other Members can request to join the consultations within 10 days of the circulation of the primary request to join consultations under Article 4.11 of the DSU. Technically, the requestor must have a 'substantial interest' which is 'well founded'. Practically not much attention is paid the founding requirement and requestors usually just refer to the request for consultations of the primary complainant and state that they have a substantial interest. By way of example the request by Uruguay[46] to join the current maize consultations merely reads as follows:

'With regard to the consultations requested and pursuant to Article 4.11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU),

[44] DSU Article 17 paragraph 4.
[45] This would have happened as per DSU paragraph 2 of Article 10.
[46] WTO document: WT/DS357/7 dated 24 January 2007.

in view of its substantial trade interest and systemic interest in the matter at issue Uruguay wishes to be joined in the consultations sought by Canada.'

The responding party (in this case the US) then decides whether to approve the additional request or requests. In the maize consultations the following 8 additional countries applied to join the consultations using this mechanism: Argentina, Australia, Brazil, the European Communities, Guatemala, Nicaragua, Thailand and Uruguay. The US accepted all 8 of these requests to join the consultations[47].

The consultation phase of the proceedings officially runs for 60 days[48] after which the complaining Member can request the establishment of a panel. This is not an absolute requirement. In other words the complainant does not have to act immediately, they merely have the option to do so if they wish, but the consultations could carry on indefinitely. This is premised on the principle that the preferred solution under the DSU is that the parties come to a positive, mutually acceptable solution[49]. It is to this end that the consultations may be rather protracted. We note for instance that in the Upland Cotton case the initial request for consultations with the US by Brazil was made on 27 September 2002 with their request for the establishment of a panel only following on 6 February 2003, an intervening period of just over 120 days as compared to the mandated 60 days after which request could have been forthcoming. The process is thus flexible to the judgement of the complainant as to how well it deems the consultations to be proceeding.

In the present maize matter the Canadian request for consultations was made on 8 January 2007[50]. The 60 day mandatory consultation period expired on 9 March 2007. Canada can thus request the establishment of a panel at any meeting of the DSB from now onward. The DSB meets every month. The first such opportunity was thus at the DSB meeting held on 20 March 2007, but Canada did not place such a request on the agenda of the meeting. The next DSB meeting is scheduled for 24 April 2007. The officially set dates for the monthly DSB meetings for the remainder of 2007 are as follows[51]:

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[47] WTO documents: For the requests to join WT/DS/357/1-9, & for the US acceptance WT/DS/357/10.
[48] See DSU Article 4.7.
[49] See DSU Article 3.7.
[50] WTO documents: WT/DS357/1, G/L/812, G/SCM/D73/1 & G/AG/GEN/74 circulated by the Secretariat on 11 January 2007. These all refer to the same document simply circulated to all the concerned WTO bodies being the DSB, General Council, SCM Committee & the Agriculture Committee.
[51] See: http://www.wto.org/meets_public/meets_e.pdf visited 22 March 2007.

24 April,
22 May,
20 June,
24 July,
31 August,
25 September,
22 October,
20 November, &
18 December.

In the present instance South Africa has not joined the consultation phase of the maize dispute. However, Members other than the primary parties do have an opportunity to be heard by panels and to make written submissions as third parties, even if they have not participated in the initial consultations. South Africa's second opportunity to participate will thus be at the panel request stage. What is required is South Africa would indicate that it has a substantial interest in the maize matter and it would accordingly notify this interest to the DSB in terms of Article 10.2 of the DSU.

6.4 Timing Matters

Typically what is going to happen is that Canada will make a request to the DSB for the panel to be established. This will likely be on 24 April 2007. They could however have a meeting scheduled before this date. This would happen when there is no scheduled meeting within 15 days of the request to establishing the panel being submitted. In this case Canada can request a special DSB meeting that will be held between 10 and 15 days after the request. Technically this could thus be the case if Canada makes the request before 9 April 2007. As the DSB meets every month, this would seem unlikely and 24 April is the most probable first date that Canada could be expected to act.

The US has one opportunity at frustrating the establishment of the panel i.e. blocking its establishment. This option is usually exercised by a respondent in order to buy time and delay the inevitable. The US is thus likely to block the establishment at the first DSB meeting held to establish the panel. Canada will then make a second request, and the panel will then be established at the next DSB meeting, currently set for 22 May 2007. Again Canada might request an emergency meeting that could be scheduled between 25 April and 8 May 2007.

In practice, the DSB applies a ten day deadline from the establishment of the panel for Members to reserve their rights as third parties. At the DSB meeting at which the panel is established, it is sufficient to reserve this right orally at the meeting. It is however more likely to do so in a prior written form. In any event, during the ten days following the DSB meeting, the substantial interest and the desire of Members to participate as third parties must be notified to the DSB in writing through the WTO Secretariat.

There is a difference between the 'substantial trade interest' which is required for third parties in joining the consultations and the 'substantial interest' before the panel. Most significant is the fact that it is possible to join consultations only with the respondent's acceptance. In the case of non-acceptance, there is no recourse to enforce participation immediately; however the excluded party can none the less request its own consultations[52]. As opposed to this in the panel stage, any Member who invokes a systemic interest, for all practical purposes, is admitted to the panel procedure as a third party without any scrutiny whether the interest expressed is really substantial. As such, admission cannot be blocked by the respondent and this effectively means that 'you are in if you want in'.

Once the panel is established, parties have to agree on the panelists within 20 days. If there is no agreement one of the parties can request the WTO Director General (DG) to appoint the panelists. The DG then has 10 days to do this and compose the panel. Disagreeing on the panelists is also a delaying tactic so the extra 10 days will likely elapse[53].

After the composition of the panel an organizational meeting will be held within a week to two weeks depending on the availability of the parties and the panelists. This meeting then agrees on the timetable for the case within the general guidelines of the DSU. The next steps are thus open to determination. Typically the first written submission of the complainants will have to be submitted within 3 to 6 weeks of the organizational meeting. The respondent's first submission will then be submitted within 2 - 3 weeks. After that the third parties normally have about 2 weeks to submit their written submissions. The first substantive meeting of the panel with parties and third parties will be held a week to 2 weeks thereafter.

In total the consultation and panel process should take one year, with an additional three months if there is an appeal. By way of example the 'standard' course of a dispute is set forth in Annex 3. As a practical example the actual timeframe from Upland Cotton is compiled in Annex 4 (longer than usual due to the complexity of the issues and the number of third parties involved).

It must be noted that in certain WTO Agreements have specialized, expedited time frames that can be followed. The SCM Agreement is one of these[54]. Expedited timetables are especially relevant with regard to prohibited (export) subsidies. However, based on the precedent in the cotton case, the standard

[52] This would be done via the DSU Article 4.11 on the basis of paragraph 1 of Article XXII or paragraph 1 of Article XXIII of the GATT 1994.
[53] See DSU Article 8.7.
[54] See SCM Agreement Articles 4 & 7.

timeframes were used. The panel reasoned that the although there were shortened time frames in the SCM Agreement, the primary point of departure on agricultural subsidies is the AoA, which does not contain special time frames. The SCM Agreement makes cross reference to the AoA in these instances. The panel thus found that these expedited times did not apply[55]. It is thus likely that the present maize case will also follow the standard time lines.

Based on the aye foregoing discussion the potential immediate time frame for South Africa might be as follows:

April 24: Canada requests the establishment of a panel (blocked by the US).
May 22: Panel is established at the second request.
May 22-31: South Africa (and others) notifies a substantial interest a third party.
June 22: The panel is appointed by the WTO director general.
July 5: Meeting to organize the time line and procedures.
August 10: Canada makes its written submission.
August 31: The US makes its written submission.
Sept. 14: South Africa makes its written submission.
October 1: Panel holds first substantive meeting with Canada & the US.
October 2: Panel holds the third party substantive meeting.

[Third parties 'rest' unless further hearings are specially convened]

October 19: Written responses (rebuttals) from parties.
November 1: Panel holds second substantive meeting (parties only).
November 22: Descriptive report issued.
December 3: Parties comment on descriptive report.
December 17: Interim report issued.
January 21: Final report issued to parties.
February 11: Final report issued openly.

[Process moves to appeal]

While the timetable set out above is speculative, it indicates that if Canada proceeds without further delay, South Africa should:

- Indicate its intention to join the dispute at the 22 May 2007 DSB meeting.
- Use the available 3 months to 'network' with Canada and other sympathizers and coordinate the content of written submissions.

[55] WTO document: WT/DS267/R at paragraph 7.5. As a technical point one might raise the expiry of the so-called Peace Clause (AoA Article 13) as ground to revisit this finding in Upland Cotton. This examination is feasible but is considered beyond the scope of this initial opinion.

- Submit a written submission by mid September.
- Present oral evidence based on a summary of the written submission in early October.
- Possibly provide written responses to questions posed by the panel during November.

6.5 Preferred Participation Method

Given that South Africa decides to participate in the case, South Africa would need to decide whether to participate as a co-complainant or whether it should elect to be a third party.

As to taking a leading role as a complainant, it is our view that South Africa would already have initiated a dispute of its own on maize in the event that it had felt so strongly inclined. As this was not the case, it seems to us to be incongruous to want to take up this option now. We note that none of the 8 parties that have joined the US-Canada consultations to date have indicated that the will seek participation as co-complainants. It is our view that South Africa would more likely be suited to take up the substantive yet lesser role available, being that of a third party, in the same vein as the other 6 developing countries that have committed to the process thus far[56].

We note that South Africa is a dispute settlement virgin, having never participated in a WTO dispute beyond the consultation phase as a complainant, respondent or as a third party. We recall that South Africa has been called to consultations on two occasions, by India in April 1999 and by Turkey in April 2003. In both instances we note that these Members challenged aspects of South Africa's antidumping regime[57]. We further recall that South Africa has been threatened with WTO action in the last 2 years by both the EU and Australia on aspects of the motor industry development programme (the MIDP)[58]. These flirtations indicate firstly that South Africa is likely to become involved in WTO dispute at some stage, and secondly that South African participation will likely be on the 'back foot' as a respondent. From a strategic view it would seem anomalous that South Africa is attacked on products where it is defensive (less competitive) as opposed to being proactive in defending its agricultural products where it is an exporter and has some advantage. In either instance, South Africa would do well to start becoming 'WTO fit' and engaging in the dispute settlement process.

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[56] These countries are: Argentina, Brazil, Guatemala, Nicaragua, Thailand and Uruguay.
[57] WTO documents: WT/DS168/1(India) & WT/DS288/1 (Turkey).
[58] See: http://www.tradelaw.co.za/news/article.asp?newsID=135.

6.5.1 Underlying Logic

Third party participation is a good way to ease into the dispute settlement system and learn the ropes. Third party participation relieves South Africa of the substantive burden of building a case and taking the resource responsibility of leading a dispute. The primary parties are going to cover all the legal bases and argue their intricacies in detail. As a third party South Africa can choose how deeply to engage in this legal process and select in what depth to follow the principal and other third party submissions. Technically the option exists to draw up a fairly modest statement highlighting elements of specific interest to South Africa without engaging the process in any great technical detail. This type of statement could for instance focus on South Africa's development paradigms and the ongoing contribution of agricultural growth to continued nation building. In this regard South Africa could link into the flavour of the Doha Development Agenda and emphasise the importance of reflecting international prices at their true, unsuppressed levels in order to facilitate the economic progression of the country's 3 million subsistence farmers into the realm of being emergent commercial farmers with a tradable surplus and the ongoing contribution that this makes to engendering a food secure environment at a basic household level. This flavouring would perhaps represent the unique contribution that South Africa could bring to the dispute. Some additional thought on this angle is provided in Annex 5. This should be backed with at least some modicum of legal argument to provide the submission with the credibility necessary to sell it, as this is after all a legal process.

We note for instance that this is the role played by the African least developed countries Benin and Chad in the Upland Cotton dispute. These countries firstly made the case that international cotton prices were inextricably linked to their national social and economic structure, providing an economic expert to appear before the panel and present this research. As a secondary step these countries supported the notion that the primary complainant, Brazil, would have its case strengthened by having third parties supporting its legal arguments. Officially sanctioned, the legal team of Benin and Chad thus consulted narrowly with that of Brazil; in order make certain Brazil received supporting inputs to the panel on some of the key legal issues in the case. To this end the legal teams were in direct contact and sharing information. It is notable that Brazil (via their private sector cotton association) also made some funding available to the West African team[59]. The synergies were clear and the collaboration effective to both groups in view of the fact that they were pursuing a common result in the case. However, throughout, the weight of the responsibility was with Brazil and the West Africans

[59] Notably Brazil funded the expenses of the US based economic expert witness who appeared on behalf of Benin & Chad before the panel, Dr. Nicolas Minot of IFPRI.

played a supplementary role, which while being extremely useful was far less onerous than that assumed by Brazil[60]. Africa has also participated less spectacularly in some other WTO disputes.

6.5.2 African Participation

In examining African participation in the DSU, we find that the African continent has been traditionally shy, but somewhat less so than South Africa. In WTO dispute settlement as third parties, sub-Saharan African countries[61] have been involved in the following disputes:

US – Shrimp and Shrimp Products[62] (Nigeria);
EC – Asbestos[63] (Zimbabwe);
EC – Bananas[64] (ACP);
EC – Sugar[65] (ACP);
US – Upland Cotton;[66] (Benin and Chad).

In the shrimp, asbestos, and cotton cases African countries participated in support of the complainants challenging the disputed measures. It is noted that in the two cases in which African countries participated as ACP countries, they participated not only as third parties, but also as co-defendants (as opposed to co-complainants), that is, to defend perceived rights under a measure challenged as being WTO-inconsistent. In Bananas, banana producing African countries participated to defend the EC banana regime, against developing countries in Central America. Similarly, Mauritius led a group of sugar producing ACP countries to defend the EC sugar regime, this group included Swaziland. In these cases, African countries participated to defend interests arising out of ACP preference agreements that were perceived as being threatened. A notable feature of participation in these cases is that funding for participation was provided by the EC. It addition in these cases the countries applied for and received enhanced third party rights. Enhanced third party rights are unusual and can be granted by the panel. In obtaining these additional rights it seems that

[60] For a detailed analysis of how the West Africans made of success of their participation see: Zunckel HE, 'The African Awakening in United States-Upland Cotton.' (2005) Journal of World Trade, issue 39 pages 1071-1093, (Kluwer Law International).
[61] In North Africa Egypt has been a respondent in 4 matters (Tuna with Thailand, Steel with Turkey, Textile with the US, & matches with Pakistan).
[62] WTO document WT/DS58: United States – Import Prohibition of Certain Shrimp and Shrimp Products.
[63] WTO document WT/DS135: European Communities – Measures Affecting Asbestos and Asbestos-Containing Products.
[64] WTO document WT/DS27: European Communities – Regime for the Importation, Sale and Distribution of Bananas.
[65] WTO document WT/DS265: European Communities – Export Subsidies on Sugar.
[66] WTO document WT/DS267: United States – Subsidies on Upland Cotton.

these countries really saw themselves as co-complainants (as opposed to co-defendants), and in our view perhaps they should have assumed this role directly in the process. From a South African trade policy perspective, these countries aligned themselves with the 'wrong team' as it where as they were in defence of agricultural subsidies. This would be akin to South Africa declaring an alliance in support of the US maize subsidy regime in the present maize case.

As noted in the previous section most recently, Benin and Chad (both least developed countries) participated as third parties in Upland Cotton. Their funding was made possible through the *pro bono* services of a US law firm and more interestingly through cooperation with the complainant Brazil. Without this assistance, and considering the complexity of the issues raised in the dispute, it is clear by their own admission that Benin and Chad would have faced severe difficulties in participating in the proceedings[67]. Their experience was however overwhelmingly positive and dovetailed well with their activities on the negotiations front in agriculture generally and especially under the WTO 'Cotton Initiative' which is seeking an end to cotton subsidies at a political level. In view of this the West Africa opposition to the US is more closely aligned to South Africa's own aversion to agricultural subsidies, than to that of the ACP who have supported the EU subsidy regimes in order to support the value of their own preferences. It is suggested that South Africa could benefit from the same positive experience in taking up third party participation in the maize dispute with the added advantage of being better resourced with legal, economic and financial wherewithal to support such participation. In our opinion South Africa is well placed to put together a 'rainbow' team to run its case, and this is acceptable in the dispute settlement process.

In fact, parties and third parties may comprise their representation to the panel and the Appellate Body (AB) as they please. Governments are thus free to accredit legal practitioners, private sector experts and academics to their delegations and these representatives may appear and speak fully before the panel or AB[68]. It is common practice for private legal counsel to appear in panel and Appellate Body proceedings as part of a Member's delegation and to present arguments on their behalf. These experts also assist in the preparation of parties' written submissions, which are then submitted under the title / letterhead of the respective government. This practice has certainly assisted developing country Members to participate in dispute proceedings in the face of HAVING limited human resources with WTO dispute settlement skills. The government remains

[67] Comment to the author by Geneva delegation of Benin, March 2005.

[68] This practice was adopted in the case EC – Bananas III in September 1997. See WTO document: WT/DS27/AB/R at paragraphs 4 – 12. The AB ruled in favour of one of the smallest WTO Members, St. Lucia, who wanted to use 2 private lawyers in its appearance before the AB.

responsible for the outside representatives on its delegation and has a responsibility to ensure that these experts maintain a sense of diplomatic decorum and respect the confidentiality of the dispute settlement proceedings. Naturally there is also the option of only employing such expertise in the preparation of the case, with the government's Geneva based officials taking care of the WTO submissions and appearances. The West Africans comprised their dispute team with government officials from the Geneva mission, augmented at stages with government officials from the capital; a cotton industry representative from Benin, private sector lawyers based in Geneva and an economics expert from the US. The lawyers essentially did the coordination work as the Benin mission was very small, being an LDC, and at the time Chad did not have a Geneva mission.

7. Canadian Cooperation

South Africa and Canada have a natural affinity for collaboration on this matter by virtue of their joint Membership of the Cairns Group of countries, a WTO lobbying coalition that essentially has a common interest in subsidy free agricultural trade[69]. The Cairns Group comprises Argentina, Australia, Bolivia, Brazil, Canada, Chile, Colombia, Costa Rica, Guatemala, Indonesia, Malaysia, New Zealand, Paraguay, Philippines, South Africa, Thailand and Uruguay. Within the Cairns Group, Canada has brought the complaint and 6 of the other countries have already joined the consultations (Argentina, Australia, Brazil, Guatemala, Thailand and Uruguay)[70]. It is thus evident that South Africa would not be out of place in this company either as a country opposing agricultural subsidies or as a country with a development agenda[71]. It is our opinion that the substance of the maize dispute is well aligned to South Africa's agricultural and trade policies.

As was seen from the cooperation between Brazil and others in the cotton case, it would logically follow that Canada would find benefit in garnering the support of like minded Cairns Group countries. The benefit of sharing resources and legal arguments is obvious to the analyst. Canada has however been less than openly

[69] The Cairns Group (CG) was set up during the Uruguay Round in 1986 to argue for agricultural trade liberalization. The CG became an important pivot in the farm talks and remains in operation. Its countries are developed and developing and they share the common objective that agriculture has to be liberalized as these countries lack the resources to compete with larger countries in domestic and export subsidies.

[70] The full list of countries that have joined the consultations are: Argentina, Australia, Brazil, the European Communities, Guatemala, Nicaragua, Thailand and Uruguay.

[71] Note however that South Africa is classified as a 'developed' country in the WTO. It is interesting to note that in the request for consultations brought by India against South Africa on pharmaceuticals (WTO document DS 168), India indicated that as a developed country SA would have to accord India special developing country privileges under the DSU!

forthcoming in garnering this support. Perhaps this is not completely unexpected in this phase of the proceedings when they have not yet fully committed to the initiation of a panel. If South Africa were to join the dispute should it arise, it is recommended that Geneva based diplomats arrange an exploratory Cairns coordination meeting in order to explore official resource sharing cooperation.

In pursuing these initial thoughts the authors made contact with the Canadian authorities via the Canadian commercial office in Rosebank, Johannesburg[72]. The contact was established with the following official:
Mr. Neil Clegg [Counsellor Commercial]
Canadian Trade Office
Cradock Place
Rosebank, 2196
neil.clegg@international.gc.ca
Tel: (011) 442 3130.

On an unofficial level we were advised that the Canadian authorities had contacted the DTI (Chief Negotiator X. Carim) at the time of initiating their WTO consultations in January 2007. The DTI had apparently indicated that South Africa would not be joining Canada in the dispute. We are uncertain as to whether this refers only to the consultation phase or to the entire dispute process. The Canadian Trade Office made an enquiry on our behalf and advised that the official view from Ottawa was that:

- In the event that Canada initiated the maize panel it would officially advise the South African authorities.
- All contact would be via official government channels and no communication would be made directly with the South African maize industry.
- Canada would not be making any financial resources available to South Africa to assist in preparing a third party submission.
- Consideration of any other assistance would be based upon South Africa's ultimate participation decision and such official approach by South Africa.

Our reading is that the local Canadian representatives are encouraged by the present initiative by the Maize Trust, but understandably have some reticence to engage with legal counsel representing the Maize Trust or maize industry players, outside of official diplomatic channels. Our sense was that they would 'come to the party' more enthusiastically when official channels were opened at

[72] Personal e-mail and telephonic contact conducted between 8 & 26 March 2007.

the appropriate time. It would seem that their perception of such channel is firmly with the DTI as opposed to the Department of Agriculture. They were for example unaware of the existence or role of the Agricultural Trade Forum (ATF).

It may be of value to establish direct contact with the Canadians at a private sector industry level. We note the Canadian equivalent of Gain SA, the Ontario Corn Producers' Association, has been at the forefront of steering Canadian government thinking and public opinion regarding this case[73].

8. South African Participation Issues

8.1 Structure

On balance the analysis has indicated that in the wake of the US – Upland Cotton dispute there is a sound legal basis for further attacks on the US agricultural subsidy regime, due in large measure to the fact that these subsidies are programmatic and not only applicable to cotton but also wheat, maize, grain sorghum, barley, oats, rice, soybeans, and other oilseeds. To this end Canada has made an accurate evaluation as to the merits of the WTO action. This is supported by the fact that eight other countries have joined the consultations to date. It has been recommended that third party participation would be the suggested vehicle for South African participation.

In taking some lessons from African participation in the cotton case and an analysis of the structure of the panel and Appellate Body reports it is clear that South Africa would need to apply a range of skills in order to make an effective intervention. This intervention will likely involve 1-2 written submissions to the panel with written responses to questions put by the panel to South Africa, and 1-2 appearances and oral statements to the panel. In the likely event that the matter is appealed, a further written statement and oral submission would be made to the Appellate Body. Depending on the depth of intervention sought, South Africa would need to monitor and evaluate the submissions of the primary parties and other third parties in compiling a credible contribution.

The West African countries were weakly resourced both in capacity and financial resources, yet managed to make a highly effective contribution in the cotton dispute. South Africa is far better resourced on both counts. In addition the South African maize sector has indicated a willingness to participate in the process both financially and at a technical level. This technical input is crucial in obtaining an

[73] See www.ontariocorn.org and http://www.ontariocorn.org/newsrel/CCP%20Press%20Release%20-%20January%209,%202007.pdf .

accurate submission. South Africa is also fortunate in that there is an existing channel of interface between the agricultural sector and the government through the ATF. To this end it is recommended that the South African case be prepared as a joint public sector private sector partnership. The overarching principle should be to firstly treat the maize dispute on its merits but to do so with the added strategic objective of using the participation as a training platform with the view to creating an enduring capacity base that can be used in other WTO disputes. The suggestion is thus to use the opportunity to create an enduring capacity to engage in WTO dispute settlement, noting that South Africa should not be caught unprepared in the event that it is taken on and needs to put up a defence at short notice. This capacity building opportunity should be broadly extended. In short we would recommend the formation of a 'Maize Dispute Task Team'. This task team would comprise a government contingent representing the 3 functional ministries affected by the case and a private sector contingent constituted under the auspices of the Maize Forum.

The WTO process is an intergovernmental forum so government participation is a *sine qua non*. The DTI is the line ministry dealing with the WTO and is likely to lead *ex officio* in presenting a South African case. The line expertise in maize is however at the Department of Agriculture (directorate international trade) and it is recommended that this unit take the functional lead from the government. It is further noted that this directorate is represented by a staff member based at the South African mission in Geneva. The official linkage to the maize industry then flows comfortably from the pre-existing platform provided by the ATF. In considering the role of the DTI, it is observed that the existing investigative capacity on dealing with subsidy issues and related grain tariff issues is actually housed with the International Trade Administration Commission (ITAC) and not with the ITED division within DTI responsible for trade negotiations. This point is raised so as to ensure that the capacity built to date as to agricultural issues within the DTI, and related family at ITAC, are most efficiently employed. We also note that while the DTI is the line ministry responsible for trade matters, it should be recognized that there are potentially wider political considerations in South Africa's international relations that may justify some involvement by the Department of Foreign Affairs. In overview, as this would be the first time that South Africa engages in an international trade dispute at the WTO it is suggested that there is a joint green light provided at a Ministerial level from Agriculture, DTI and Foreign Affairs.

From an industry perspective it is noted that the maize value chain is already well organized through the consultative structure known as the Maize Forum. It is suggested that a 'Maize Dispute Committee' be established under the auspices of the Maize Forum. It is evident that there is a wealth of trade expertise present within the maize sector and it is suggested that the Forum constitute such a working committee to represent inputs from the value chain as a whole selected from functional competencies rather than political representivity, which will always remain, for structural balance, at the executive level of the Maize Forum. In addition to the producer and processor views it is likely to be necessary to

have a grain trader and/or a representative from SAFEX in order to provide the expertise as regards the linkage of the South African maize market to the international maize market. It is further suggested that the Maize Forum augment its expertise with legal assistance with regard to WTO agricultural dispute settlement and economic modelling expertise which is required to measure the market effects to justify South Africa's trade interest in the case.

In enlisting the legal expertise the Maize Forum has 3 options. It could approach overseas trade lawyers or in the same vein, convince the government to join the Advisory Centre on WTO Law (ACWL) which could provide discounted fee rates[74]. Both these options would however dilute the aim of building dispute settlement capacity locally. Our suggestion would thus be to engage local trade law expertise, which in our opinion is available and certainly sufficiently versed to handle a third party intervention. As a 'reserve' option the local legal expert could always use a Geneva based correspondent lawyer thereby keeping the legal initiative within the South African camp. In our view this reserve option would prove unnecessary. As regards using the Advisory Centre: while membership of the centre should be examined as separate option, this is unlikely to prove a workable option in this instance as South Africa is currently not a subscriber to the ACWL and other countries who have already joined the case are ACWL subscribers. Our understanding is that the ACWL will be involved in representing another developing country in the dispute.

As regards the economic modelling capacity we recommend that the Maize Forum use a local university. Again, this is with the aim of entrenching local trade capacity. In addition this modelling work is equally applicable to trade negotiations and thus encouraging the capacity provides for wider trade benefits to the industry not just in the realm of dispute settlement. In particular we note that the Maize Trust already supports the Bureau for Food and Agricultural Policy (BFAP) at the University of Pretoria[75]. Again the option can be created for BFAP to collaborate with US experts, such as Professor Daniel Sumner, who conducted the modelling for Brazil in the cotton dispute[76]. Our recommendation would thus be to co-opt the BFAP onto the Forum's Maize Dispute Committee.

We do not feel ourselves at liberty to recommend who would chair the 'Maize Dispute Task' team once the Forum's 'Maize Dispute Committee' is augmented with the government team addressed earlier. We can see that there may be merit in the Maize Forum taking on this role, especially if the industry sees fit to provide

[74] See: www.acwl.ch .
[75] See: www.bfap.co.za.
[76] University of California Davis, Agricultural Issues Centre, see: http://www.ucdavis.edu/search/directory_results.shtml?filter=Daniel%20Sumner.

the funding for this exercise. We recognise that this will likely be a strategic decision taken with political sensitivities considered at the highest level within the maize industry. We are of the opinion that the group should have a 'secretary' who would be responsible for monitoring the WTO process and convening the Task Team as required, liaising with individual team members to obtain expert inputs and generally looking to the overall management of the task team.

8.2 Costs

The costs of bringing a dispute to the WTO as a complainant or having to defend an action can be substantial. This is especially so in a case such as the present maize dispute where the case involves both questions of law and economic argument in support of the legal principles. This being said there is some mitigation in that there is now a firm set of agricultural precedent in the WTO (notably cotton, sugar, FSC and dairy) as regards agricultural subsidies which will limit the amount of new 'creative' argument that needs to be generated. The sceptics' response would be that the US will apply a new, and to date unsurpassed, level of creative argument to justify why the maize matter differs from the previous cases. This is where the advantage of third party participation comes into its own as third participants can rely to a greater or lesser degree on the arguments of the primary parties and to some extent can determine the depth of argument in which they would want to engage.

If we look at the African experience in the ACP cases, then we recall that the EU footed the bill in its entirety as the ACP countries were supporting the EU in retaining their distorting regimes. In this instance we would certainly not see South Africa approaching the US for funding to support the retention of trade distorting maize subsidies. The option does exist to approach the Canadian government in this regard. Based on our preliminary contact with Canadian officials it would seem that they do not intend directly funding third parties who support them. It would however make sense to further explore the possibility of having Canada share its legal arguments and modelling results, which they seemed open to in cursory discussion.

If we look to the other African experience in the cotton case, we note that the West Africans were essentially sponsored by Brazil and the given free legal services by a leading international law firm because they saw the advantage of being involved in a landmark case. South Africa is not a LDC and as such our circumstances are somewhat different. Furthermore it is a matter of 'national pride' and in our estimation South Africa has the wherewithal within its ranks to successfully bring sufficient technical expertise to bear without having outside expertise provided for free. What we can learn from the West African experience

is that previous research conducted indicated that if the West Africans had in fact paid for their case as a complainant the cost would have been in the order of US$ 1 million[77]. While this seemed to be a large cost, it was noted from the Benin submission to the panel that they were losing US$304 million annually just in lost export earnings due to the US subsidies at issue. The hypothetical spending decision would thus be a foregone affirmative when the return is considered. It is our understanding that another South African agricultural sector is itself considering a WTO dispute as a primary complainant against the EU, and based on the US$1 million research has accordingly budgeted R7 million for such an action. Costs depend entirely on the depth of input that South Africa selects.

On the assumption that South Africa elects to participate as a third party making a solid submission, in our estimation the expedient application of available resources within the maize industry, cooperative teaming with the Government, like cooperation with the Canadian authorities and judicious use of local trade law and agricultural economics expertise, could be effectively performed for approximately R2 million (ZAR). This is based on the assumption that the inputs of the South African government are carried under the general staff cost budget of the relevant ministries. Whether or not the government made an additional contribution toward to costs estimate would be a matter for further exploration by the 'Maize Dispute Task Team'.

8.3 Influencing Factors

The following factors may have an additional bearing on the decision to participate in the maize dispute:

8.3.1 Trade Policy

The South African government has a unique opportunity in signalling its solidarity with the agricultural sector in a meaningful way in joining the maize dispute. The government has had a rather frugal approach in lending support to the grain sector on the trade policy front. In recent times the treatment of the wheat and maize industries as regards the maintenance of tariffs is particularly pertinent. The policy approach that focuses purely on contingent trade remedies ignores the inherent problem of subsidization at a global level, in that domestic countervailing duties against the US cannot be used as an effective remedy when those subsidies have an influence on the world price. In these cases the theoretical policy response options would be either to retain a tariff or to address the distortion via the WTO, through negotiations or via a dispute. It follows then that if the former has been rejected then the latter is the only remaining option. It

[77] See footnote 60 with reference to page 1090 of the said paper.

is well understood that South Africa has vital little influence on the WTO negotiation agenda in reducing first world subsidies, and in addition that such negotiating agenda is currently stalled. It therefore remains that if the government is going to match the standard that it sets for its agricultural citizens premised on global competitiveness then it follows that the government should be equally competitive in applying the global trade policy tools at its disposal. In addition we contend that unlike a tariff which could be construed as protectionist, a WTO dispute clearly addresses injustice in that the offending party is not adhering to obligations undertaken under international law for which other countries potentially pay twice, firstly through the concessions given in return for the undertakings by the defaulter and secondly through the negation of such concessions through non compliance. It is precisely such a double payment trap in which the maize industry finds itself. In our view it would be morally extremely difficult for the government to avoid joining the dispute when requested to do so by the industry.

In so far as considerations pertaining to the free trade agreement (FTA) negotiations between South Africa and the US, we note that these deliberations are indefinitely set aside for all practical purposes. One of the underlying points of contention within the negotiating impasse was the claim by SACU negotiators that subsidized US products would not be considered as candidates for preferential tariff treatment. This stance would merely be confirmed by participation in the WTO maize dispute. Based on these factors there would seem little diplomatic capital to be lost on the fate of the FTA should South Africa join the maize dispute[78].

8.3.2 Product Coverage

The analysis has indicated that although the dispute is based on a maize action, the action takes its lead from a previous cotton dispute. The point is that the US subsidy programmes at issue are programmatic and hence apply to other agricultural products also. In considering the maize dispute South African authorities should bear in mind that the result, identified by the Canadians will also have a similar influence on wheat, sorghum, barley, oats, cotton, rice, soybeans, and other oilseeds. These sectors, as they are active in South Africa, should thus be natural allies to any initiative taken by the maize industry. In this regard we note that in addition to maize, the Oxfam study[79] also identifies South Africa as a potential complainant in sorghum against the US. It is also notable that Nicaragua joined the maize dispute in the consultations phase and explicitly

[78] This view is expressed subject to the knowledge that both Ministers Mpahlwa and Xingwana have recently visited the US and we are unaware of any developments having arisen on those visits to countermand this view.
[79] See footnote 33.

stated that their interest in joining was related to their peanut industry and not to maize[80].

This having being said the maize industry should consider that South African exporters to the US, especially those benefiting from concessions under the Africa Growth and Opportunity Act (AGOA) will potentially object to South Africa taking any adversarial stance against the US in fear of losing their export markets, particularly through a loss of preferences which the US can unilaterally with draw at their sole discretion. Apart from industrial products we note that certain fruit and beverage products may be particularly sensitive[81]. It may be worth considering engaging in discussions with these industries to ensure that their objections do not obfuscate the overall national interest.

8.3.3 Product at issue

It is our understanding that the product at issue in the 'corn' dispute refers to the South African coarse grain referred to as 'maize'. This product is classified under the harmonized tariff system under chapter 10, specifically under heading 1005.10[82]. The South African maize industry has 2 distinct subcategories of maize although both fall under the same tariff heading, white and yellow maize. These grains are used in the food and feed sectors respectively. Due to consumer preferences it is likely that given the correct pricing conditions white maize is substitutable into the feed market, while there is consumer resistance to the substitution of yellow maize into the food market. It is usual for the South African maize price to track the international maize price with a differentiation within this track for a white maize premium.

This distinction might be relevant in the maize dispute due to the WTO using the legal construct of a 'like product'. There is a huge technical body of work as to the definition of 'likeness' emanating primarily from GATT Article I, the general most favoured nation treatment provision. Essentially it means that a foreign product will be exactly the same as, closely resembling or functionally directly substitutable for a domestic product. The concept is directly relevant under the SCM Agreement provision that will be applicable to the serious prejudice

[80] WTO document: WT/DS357/8 dated 24 January 2007. 'Because the U.S. marketing loan payments, direct payments, and counter-cyclical payments raised in Canada's request, as applied to peanuts, are undermining Nicaragua's peanut exports, and are contributing to the amount by which the United States is exceeding its Aggregate Measure of Support, Nicaragua respectfully asks that its "substantial trade interest" in these consultations be recognized.'

[81] For trade statistics on these products refer to the US International Trade Commission: http://dataweb.usitc.gov/scripts/cy_m3_run.asp?Fl=m&Phase=HTS2&cc=7910&cn=South+Africa.

[82] SA tariff descriptor as per: http://www.customstariff.co.za/index.htm.

determination in Article 6.3 (a-c). The question is thus: is South African maize the same i.e. a like product with that subject to litigation in the corn dispute. It would seem from a reading of the Canadian documentation that their concern is with feed corn (yellow maize). In our opinion this would be the same as South African yellow maize, and we would contend that due to the fact that US subsidies are not provided differently to yellow and white corn, white maize would also meet the 'like product' requirement. The matter is however not that straight forward[83]. Our opinion is however that South African maize does and will make the grade.

The matter is tabled as it will certainly need to be addressed for the sake of a solid legal submission, and also it is likely that the US could argue against its likeness as part of its defence. The distinction will also be relevant in any modelling work that is undertaken. We note that Mexico has indicated that it will join the case[84]. This is notable in that Mexico also has a substantial white maize consumption in the food market. It would thus make sense to liaise with the Mexicans on the like product issue at the appropriate juncture.

8.3.4 The Peace Clause

During the implementation period of the Agreement on Agriculture provision was made for Members to exercise 'due restraint' in brining actions against agricultural subsidies under the SCM Agreement. The Upland Cotton case proved that this protection is not absolute and that subsidies that caused adverse effects could be litigated despite the due restraint provision. Furthermore, since the cotton case the Peace Clause has now expired[85]. Due to these two factors our view this that the Peace Clause will not be a decisive point in the maize case.

This being said we note that the period selected for the case by Canada runs from the 1996 to 2006 marketing years. This would cover a period between 1996 and 2003 when the peace clause was still active. While it seems almost criminal to spend case resources on this expired provision, again it is likely to form part of the US defence, at least in part. Our suggestion would be to support a reading of the chapeau of AoA Article 13 in respect of the words 'during the implementation

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[83] One of the tasks ahead would be to map the correlation between the SA and global maize prices over the period 1996 – 2006. As a preliminary observation, the type of divergence that is evident in the 3 year picture compiled by Grain SA is not the type of trend that one would like to observe. This will need further attention. See: http://www.grainsa.co.za/documents/28%20Mar%20Grane%20en%20pariteitpryse.xls.

[84] 'Mexico will join Canada's complaint against U.S. corn subsidies if WTO investigates' International Herald & Tribune, 6 March 2007.

[85] This was effective 1 January 2004 in terms of AoA Article 1(h). We note that the cotton precedent finally dispels the former Board on Tariffs & Trade view that the Peace Clause precluded any WTO actions on agricultural products.

period' as meaning that the expiry is absolute and that the limited protection provided is fully disabled after the implementation period i.e. that subsidies provided during this time become fully actionable in the post implementation period. We believe that this argument could be effectively made. In any event the latter period of the Canadian complaint covers 2004, 2005 and 2006 when the Peace Clause will definitely be a non-issue.

9. Ready, Steady - Go?

The first part of the 'US – Corn' dispute in the form of consultations has passed, with the initiation drawing wide interest with eight countries joining the consultations as third parties and some others like South Africa considering further options. The question thus arises as to whether the matter will be taken further and if so at what stage.

The analysis provided in this opinion clearly indicates that on legal grounds, (textually and with ancillary precedent and current economic indicators) Canada has very good grounds for pursuing the matter to the panel stage and beyond. It is a trend in WTO dispute settlement that the complainant usually wins the case, the reason being that Members usually make very sure that the odds are in their favour before initiating disputes. South Africa certainly has a substantial interest in the matter as a producer and exporter of maize and would easily qualify as a participant in the case as a co-complainant but more likely as a third party.

The next step lies with Canada and it is at liberty to between now and 9 April and thereafter again at the DSB meeting on 24 April 2007, or thereafter. To date Canada has been tight lipped as to its plans, and initial inquiries with locally based Canadian officials have proved likewise. This is the first disadvantage for South Africa of not having joined the proceedings at the first opportunity in the consultations. The consultations are confidential and it is thus understandable that the parties present are not openly discussing the matter[86]. Conceptually it would however be safe to say that given that the Doha negotiations commenced in November 2001 and are still inconclusive in reigning in US subsidies, it is extremely unlikely that Canada will have solved the matter through sporadic discussions with the US over a recent 60 day period.

The indications that we have to date are emanating from the US. We consulted the agricultural doyen of trade Professor Timothy Josling from Stanford University on some preliminary matters surrounding the dispute[87]. Professor Josling

[86] DSU Article 4 paragraph 6.
[87] Personal communication with the authors: 17 January 2007.

indicated that in his opinion there is 'a favourable confluence of events' that make for a good opportunity for Canada to go ahead with the matter. These are the Doha impasse, the drafting of the US Farm Bill 2007 and, in the wake of the Canadian remedies action, a need for the Canadian government to show that 'it can be tough on trade issues with the US'. He surmises that without a negotiating breakthrough Canada will go ahead with the dispute. He opines that 'with nothing going on in Geneva, I would not count on the Canadians backing off. That would be the worst of both worlds for them'.

Subsequent to the WTO consultations on 7 February 2007 with Canada and the 'interested 8' the US Trade Representative (USTR), Susan Schwab, was questioned about the consultations while appearing before the US Congress. The USTR indicted that she 'fully expects Canada will file a formal challenge in the World Trade Organization against U.S. corn subsidies', adding that it was not unlikely that litigation on products with similar subsidy payments to corn would likely 'pick up in the absence of a successful Doha round'. Allied to this the congressional research service (CRS) indicated that it was likely that Canada would act at the April 2007 meeting of the DSB. It was considered as unlikely that Canada would request another round of consultations[88].

In view of the presently available evidence we would be of the view that the WTO dispute 'US – Corn' is likely to be initiated. In view of this the WTO timelines that apply would mean that South Africa needs to have its participation decision approved in advance of the WTO DSB meeting set for 24 April 2007, followed with the preparation of a formal legal submission by approximately August 2007.

[88] News report: 'Schwab Predicts Canada Will Seek WTO Panel on U.S. Corn Subsidies' Inside US Trade, 23 February 2007.

Annex 1 – US AMS Commitments

Schedule XX - UNITED STATES OF AMERICA

PART IV - AGRICULTURAL PRODUCTS: COMMITMENTS LIMITING SUBSIDIZATION
(Article 3 of the Agreement on Agriculture)
SECTION I - Domestic Support: Total AMS Commitments

BASE TOTAL AMS (Million dollars)	Years of implementation 1995 - 2000	Annual and final bound commitment levels (Million dollars)	Supporting Tables & document reference
1		2	3
23,879.112	1995	23,083.142	AGST/USA
	1996	22,287.173	
	1997	21,491.203	
	1998	20,695.243	
	1999	19,899.264	
	2000	19,103.294	

Annex 2 – US Subsidy Programmes

Under present US legislation maize producers can receive three types of government payments to augment income earned from the market. These payments are marketing loans (loan deficiency payments), countercyclical payments and direct payments. These domestic support measures are successively applied to provide US maize farmers with better returns than the market by topping up market based returns to two successively higher supported prices. The fist floor price being the 'loan rate', and the second being the 'target price'. These floor prices are reached by using the 3 subsidy programmes singularly or in combination depending on how much lower the market price is below the desired floor price[89].

Marketing Loans (Loan deficiency payments)

Farmers receive market prices for farm program crops only when prices are above the US government's administratively set minimum producer prices called loan rates (a floor price). However, when market prices at the farm gate level fall below the loan rate, returns to producers are supplemented to raise them to the loan rate by subsidies termed loan deficiency payments or marketing loans. Support is provided on actual sales of program crops, and so the size of payment depends on both the quantity sold and the market price, thus compensating for a total return for the farmer.

Countercyclical Payments

This provision is based on target prices established for each commodity. This program is similar to the 'deficiency payments' that operated until the 1996 Farm Bill. The countercyclical payments are made when the effective price reached after applying a marketing loan is less than the target price. The countercyclical payment is equal to the difference between the target price and the 'effective' price, multiplied by the yield base and 85 per cent of the area base. If producers elected to update their area base, they could also choose to partially update their yield base for the purpose of calculating the countercyclical payment. The 2002 legislation provides for this yield update to be on a once only basis. The countercyclical payment provision provides for increased support when market prices decline. Production decisions, at least up to 85 per cent of the base area, are influenced by the prospect of always having returns that are at least equal to the target price. Whenever market prices are below the target price these returns

[89] Readers wishing to interrogate the nature of these programmes and their legislative bases in greater detail are recommended to consult the lucid explanation of these measures found in the US – Upland Cotton panel report commencing at paragraph 7.200 through 7.230 & 7.250. The explanations in this section are also drawn from the Australian Bureau of Research and Agricultural Economics (ABARE) Research Report 06.10 (September 2006).

would be made up of a combination of market returns, loan deficiency payments (based on current prices, the loan rate and current production levels), fixed payments (based on a potentially updated area base, a fixed yield base and the crop payment rate) and countercyclical payments (based on a potentially updated area base, a potentially updated yield base and current prices).

Direct Payments

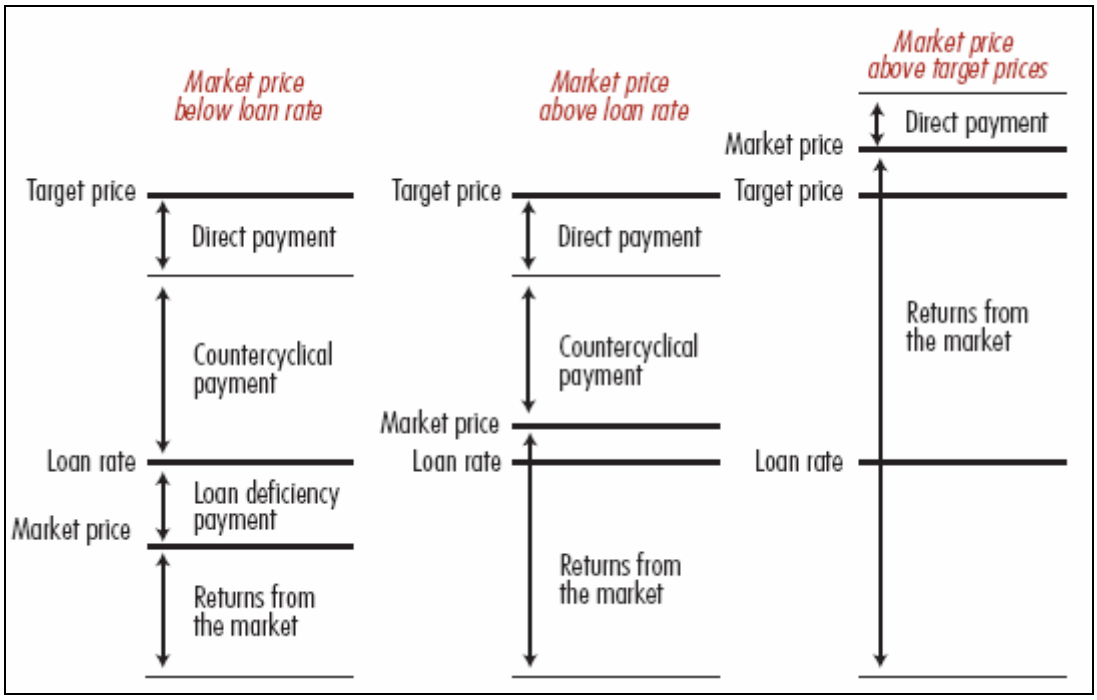
Direct payments are made to eligible producers for each of the 2002 to 2007 crop years. The size of the direct payment is based on historical yield bases and 85 per cent of area bases that are established for each farmer from previous actual plantings and yields, and unit payment rates that are pre-set for each program crop in the Farm Bill. Consequently, the size of the direct payment does not change with changes in actual yields, areas planted or prices. Under the flexible planting arrangements that have applied since 1996, farmers with program crop bases receive direct payments determined on those historical bases. The payments are made for the crops that they have base areas for, even if they currently produce other crops. For example, a farmer could have a wheat base and would receive program payments derived from the wheat payment rates, but could currently plant soybeans. In the 2002 farm bill, farmers were given the option to update area bases from pre-1996 levels to 1998–2001. In earlier legislation these payments were referred to as production flexibility contract payments (PFC's). Also under earlier legislation, recipients of PFC's could also receive market loss assistance (MLA) payments which were ad hoc emergency assistance provided to producers in order to make up for losses sustained as a result of low commodity prices. Under MLA's appropriated subsidy assistance was divided among PFC payment recipients proportionately to their respective previous PFC payment. The two measures are thus considered similar due to their linkage in this manner, noting that MLA payments were only made to recipients enrolled in the PFC programmes.

The following diagram depicts how floor prices are reached by using the 3 subsidy programmes listed above, singularly or in combination, depending on how much lower the market price is below the desired floor price. The domestic support measures in the diagram are applied to provide US maize farmers with better returns than the market by topping up market based returns to two successively higher supported prices.

The fist floor price is the 'loan rate'.

The second floor price is the 'target price'.

These floor prices are reached by using the 3 subsidy programmes singularly or in combination depending on how much lower the market price is below the desired floor price.



(Source: ABARE 2006)

Export credit guarantee measures

The USDA administers export credit guarantee programmes for commercial financing of United States agricultural commodities through the Commodity Credit Corporation (CCC). There were originally 3 three export credit guarantee programmes, but one has been withdrawn. The General Sales Manager 102 (GSM 102) and the Supplier Credit Guarantee Programme (SCGP) remain. The US uses export credit guarantees to increase exports of agricultural commodities, to compete against foreign agricultural exports, to assist countries in meeting their food and fibre needs and for other purposes it deems appropriate. The CCC has US$ 5.5 billion available annually under this programme. Notably a country's risk premium has no impact on the premiums payable under the programmes.

General Sales Manager 102 (GSM 102)

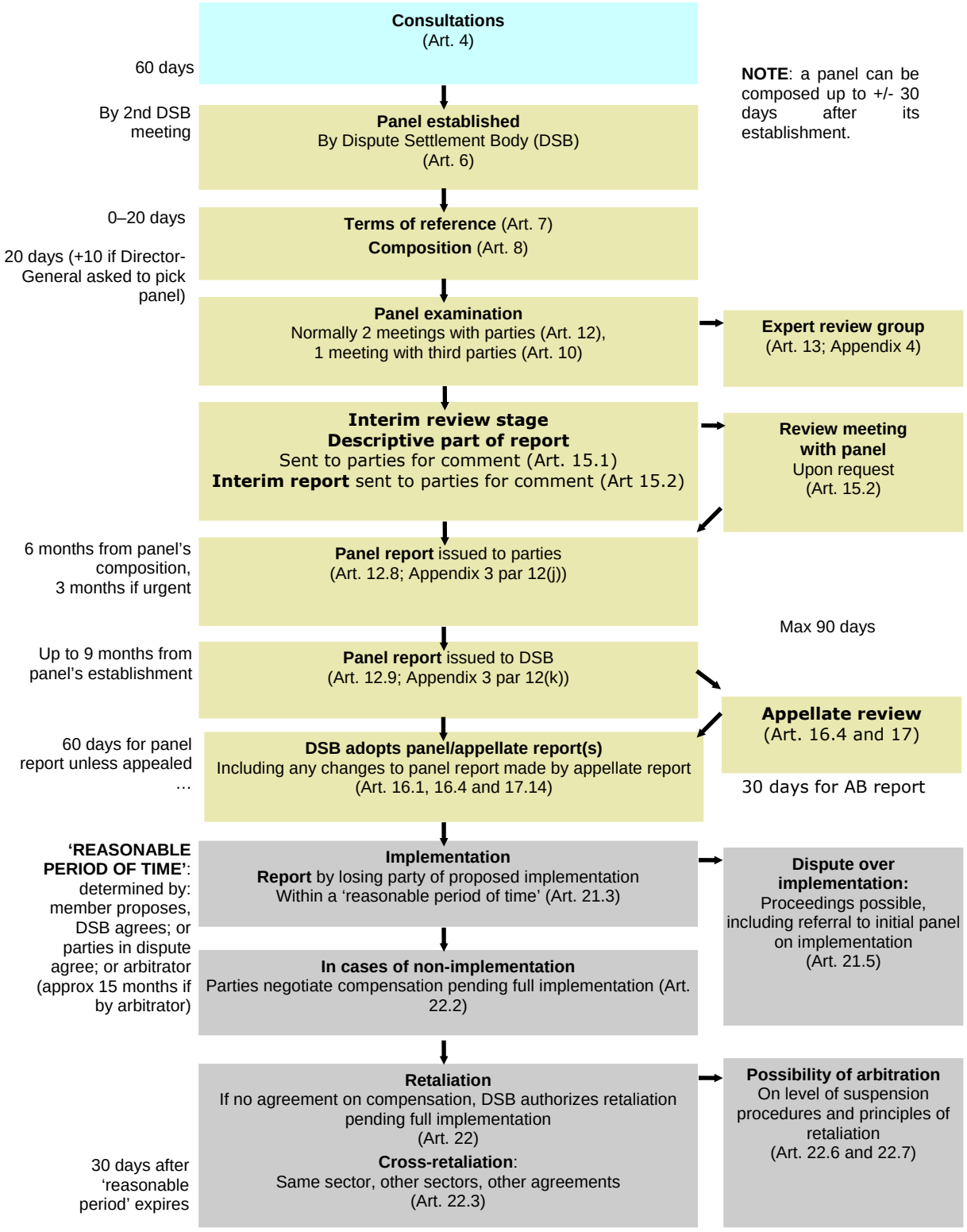
Under the GSM 102 the CCC is authorized to guarantee the repayment of credit made available to finance commercial export sales of agricultural commodities from privately owned stocks on credit terms between 90 days and three years. The CCC generally covers 98 per cent of the principal and a portion of the interest. The CCC selects agricultural commodities and products according to market potential. The CCC does not provide financing, but rather guarantees payments due from foreign banks. If the foreign bank fails to make any payment as agreed, the exporter is required to submit a notice of default to the CCC. To secure such a payment guarantee, once a firm export sale exists, the US exporter must apply prior to the date of exportation. The exporter pays a fee calculated on the dollar amount guaranteed, based on a schedule of rates

applicable to different credit periods. There is a statutory cap on the fee charged of 1 per cent of the guaranteed dollar value of the transaction.

Supplier Credit Guarantee Programme (SCGP)

Under the SCGP, the CCC is authorized to issue guarantees for the repayment of credit made available for a period not exceeding 180 days by a US exporter to a purchaser of US agricultural commodities in a foreign country. These direct credits must be secured by promissory notes signed by the importers. The CCC does not provide financing, but rather guarantees payment due from the importer. Typically, the CCC guarantees a portion (65 per cent) of the value of the exports (principal only; the guarantee does not cover interest). The exporter negotiates terms of export credit sales with the importer. Once a firm export sale exists, the United States exporter must apply for a payment guarantee prior to the date of exportation. The exporter pays a fee for the guarantee calculated on the guaranteed portion of the value of the export sales. There is a statutory cap on the fee charged of 1 per cent of the guaranteed dollar value of the transaction. If the foreign bank fails to make any payment, the exporter or assignee is required to submit a notice of default to the CCC. The CCC pays a valid claim for loss.

Annex 3 – Stylized WTO Dispute Structure



[Source: DSU Text (Appendix 3) & 'Understanding the WTO' 3RD Edition (Geneva 2003)]

Annex 4 – Cotton Case Timeline

Timetable in the US - Upland Cotton Proceedings	
27 September 2002	Brazil requests consultations.
3,4,19 December 2002	Consultations held.
17 January 2003	Further consultations held.
6 February 2003	Brazil requests the establishment of a panel.
18 March 2003	DSB establishes the panel.
18 – 28 March 2003	Third parties reserve claim participation (13).
9 May 2003	DG requested to compose the panel.
19 May 2003	The Director General composes the panel.
22 - 24 July 2003	Panel meets parties 1st substantive time.
24 July 2003	Panel meets with third parties.
7 – 9 October 2003	Panel extended parties 1st meeting.
8 October 2003	Panel meets with third parties.
2 -3 December 2003	Panel meets 2nd substantive time.
26 April 2004	The panel issues draft report to the parties.
18 June 2004	The panel issues the final report to the parties.
8 September 2004	The final panel report is issued publicly.
18 October 2004	The US Files notice to appeal with the DSB.
28 October 2004	US files appellant's submission.
2 November 2004	Brazil files appellant's submission.
16 November 2004	US & Brazil file appellees' submissions.
16 – 18 November 2004	Third parties state intention to give oral statements.
13-15 December 2004	AB holds oral hearings (parties & third parties).
3 March 2005	The Appellate Body issues a public report.
21 March 2005	DSB Adopts the AB & panel reports.
20 April 2005	US Declares its intention to comply.
4 July 2005	Brazil requests suspension of concessions (prohibited)
6 October 2005	Brazil requests suspension of concessions (actionable)
18 August 2006	Brazil requests compliance panel.
31 March 2006	Compliance report not yet issued.
Time Elapsed to Date	5 ½ Years (!)

(Source: Compiled from WTO Documents & WTO web references)

Annex 5 – Development Aspects for South Africa

In 2006 the OECD conducted a comprehensive study of the South African agricultural sector and released a lengthy report in this regard. The report is entitled:

'OECD Review of Agricultural Policies - South Africa, OECD Paris April 2006'[90].

The OECD study is a two edged sword. While finding South Africa to be a rather robust player in the international agricultural market and making strong linkages between the rural economy, agricultural development and post-Apartheid reconstruction of the country. However, the report is also somewhat jaded as to the level of support that South Africa provides to the maize industry, although this is somewhat qualified. However, in the present maize dispute it is not South Africa that has to defend itself, but rather the US and the WTO legal process is not based on the raising of counter claims or raising of exceptions i.e. raising the argument of 'the pot calling the kettle black' is not a dispute settlement feature. This being said it is also our understanding that the maize industry is able to rebut the negative aspects raised about maize support in the report. On balance we would thus not see the use of the report as problematic. On the contrary it contains several decisive statements on agricultural development and trade that could be most useful. The OECD is certainly a source that carries much weight and will be readily recognized by any WTO panellist.

The report makes the following observation:

> 'In a country like South Africa, higher economic growth is inconceivable without easing profound humanitarian problems, such as social divisions, illiteracy and low education levels, and HIV/AIDS. These problems are largely rooted in rural South Africa, and agricultural development has an important role to play in their resolution. This circular dependence between agricultural and economic growth on the one hand and human development on the other ultimately represents the most difficult challenge facing South Africa's policy makers.'

The point to be made is that stunting the market returns to emerging maize farmers through a suppressed international maize price, severely obfuscates the role that this deeply seated rural maize sector can play in easing South Africa's 'profound humanitarian problems'. Furthermore we find that this pricing anomaly actually destroys the 'circular dependence' between the rural maize producers and human development.

[90] See: http://www.oecd.org/document/31/0,2340,en_2649_201185_36482847_1_1_1_1,00.html

This is egregious effect is compounded in view of South Africa's contribution to the spirit of reform of the global trading system. The OECD report recognises that the South African agricultural industry has become largely independent of state support and internationally more competitive, coming at a cost in that many sectors, including the maize industry, experienced a difficult period of adjustment. In looking to the trade effects of liberalization, they also examine the welfare gains in global trade liberalization, finding that South Africa has a net welfare gain from reform, with reform in agriculture actually accounting for a third of South Africa's welfare gains. Importantly they note that agricultural reform in OECD countries would be a major contributor to this welfare gain. Within these gains they note that 'black and coloured South Africans would become better off as a result of global reform' with white South African households experiencing a slight welfare loss. We note that while South Africa would prefer to release these welfare gains through the Doha Development Agenda, we find ourselves drawn into costly and complex dispute settlement as a second best option at achieving at least a modicum of these elusive welfare gains.

The need for South Africa to provide Development Box support and Green Box style support[91] is emphasized in the OECD report especially in response to adjustment assistance in the face of land reform, with the provision of appropriate support services for land reform beneficiaries being crucial for land reform to develop into sustainable commercial farming. This would be non trade distorting as it represents training, extension services, farm technologies, marketing assistance and financial management. It is observed in the report that agricultural reform is hampered, inter alia, by a lack of financial resources to provide the necessary support. It would be our contention that improving net returns to farmers via a correction in the international price of maize would be a far more effective and equitable method of improving net maize farmer returns as opposed to expensive subsidy programmes that suffer under budgetary constraints even if these spending channels are theoretically open ended under the WTO's agricultural subsidy regimes.

Others have had some success in using these development based arguments. Two examples follow:

Firstly for example the Oxfam study[92] makes the point that:

> 'corn producers around the world would gain as much in higher prices from the abolition of the US's illegal corn subsidies as the UN estimates is needed each

[91] Agreement on Agriculture Articles 6.2 and Annex II.

[92] 'Truth or Consequences: Why the EU and the USA Must Reform Their Subsidies, Or Pay the Price' Oxfam Briefing Paper 81 by Oxfam International, November 2005 at page 4.

year to make health interventions that would prevent the death of 3 million infants a year — US$4bn'.

The second example comes from the submission made by Benin to the Upland Cotton panel where Benin quotes the following from an economic study[93]:

> 'The Minot/Daniels paper describes what this means in human terms. The detailed household surveys carried out in Benin describe the living conditions for cotton farmers:
>
> - 85 per cent of the cotton farmers in Benin have houses with mud or mud-brick walls.
> - 62 per cent live in houses with a dirt floor.
> - 72 per cent have corrugated metal roofs and 28 per cent have straw roofs.
> - 53 per cent of the cotton farmer households get drinking water from a public well, while another 18 per cent use water from a river or lake.
> - Less than 2 per cent have electric lights, and 98 per cent use oil or kerosene lamps.
> - On average, the nearest source of potable water is 430 m away, and the nearest paved road is 36 km away.
> - About 34 per cent of the cotton farmers do not own a chair, 38 per cent do not own a table, and 34 per cent do not own a bed.
>
> Needless to say, farmers living in such conditions are "price takers", not "price makers" in the global cotton market.'

Both these examples have been widely adopted in the popular press and have been cited in several more weighty commentaries on agricultural subsidies.

The South African grain industry is no stranger to employing this type of drafting style in international forums, and it is suggested that similar examples and mildly emotive language style be employed in drafting the South African submissions to the panel and Appellate Body in the maize dispute. The following example is taken from the South African submission to the International Grains Council (IGC) Conference in June 2004[94]:

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[93] Upland Cotton panel report Annex B-5 - third party submission of Benin at paragraph 24.

[94] De Villiers, JF 'Trends in the grain trade - effects on the South African food and feed milling industry' IGC International Grains Conference June 2004, IGC London at page 11.

‘The grain market in South Africa is probably one of the freest markets in the world today and we are very proud of what we have achieved thus far. We are still striving to become increasingly competitive as we improve on our productivity, whilst dealing with the challenges that are unique to our region. We are, however, looking forward to the results of the Doha Round of the World Trade Organisation negotiations. We hope to be allowed not only to level the proverbial ‘playing field’, but also to plough that field, in order for our industry to become a global player to a much larger extent than is currently possible.’