

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Recourse to Article 4.10 of the SCM Agreement and Article 22.7 of the DSU by Brazil

The following communication, dated 6 November 2009, from the Permanent Mission of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 22.7 of the DSU and Article 4.10 of the SCM Agreement.

In the original proceedings, the Panel and the Appellate Body found that certain of the measures at issue in this dispute were inconsistent with Articles 3.1(a) and 3.2 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") and Articles 10.1 and 8 of the Agreement on Agriculture. On 21 March 2005, the Dispute Settlement Body ("DSB") adopted the Appellate Body report (WT/DS267/AB/R) and the Panel report (WT/DS267/R and Corr.1), as modified by the Appellate Body report. The resulting DSB recommendations and rulings include the recommendation that the United States bring its measures into conformity with the Agreement on Agriculture and withdraw the prohibited subsidies without delay.

The period of compliance expired on 1 July 2005. On 4 July 2005, Brazil requested authorization from the DSB to take appropriate countermeasures pursuant to Article 4.10 of the *SCM Agreement* and Article 22.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") (WT/DS267/21).

On 5 July 2005, Brazil and the United States informed the DSB of the "Agreed Procedures under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement in the follow-up to the dispute United States – Subsidies on Upland Cotton" (WT/DS267/22).

On 14 July 2005, the United States objected to Brazil's request (WT/DS267/23), and the matter was referred to arbitration pursuant to Article 22.6 of the DSU and Article 4.11 of the SCM Agreement.

On 18 August 2005, following a joint request by Brazil and the United States, the arbitration proceedings were suspended (WT/DS267/25).

On 18 August 2006, Brazil requested the establishment of a panel pursuant to Article 21.5 of the DSU. On 18 December 2007, the compliance Panel report was circulated to Members (WT/DS267/RW). The compliance Panel found that the United States had failed to implement the recommendations of the DSB and continued to act inconsistently with Articles 10.1 and 8 of the Agreement on Agriculture and Articles 3.1(a) and 3.2 of the SCM Agreement. The Appellate Body report, circulated on 2 June 2008, upheld the compliance Panel's conclusions (WT/DS267/AB/RW). On 20 June 2008, the DSB adopted the Appellate Body report and the compliance Panel report, as modified by the Appellate Body report.

On 25 August 2008, Brazil requested the resumption of the arbitration proceedings (WT/DS267/38).

On 31 August 2009, the Arbitrator issued its Decision as follows (WT/DS267/ARB/1):

"6.5 Accordingly, the Arbitrator determines that:

- (a) Brazil may request authorization from the DSB to suspend concessions or other obligations under the Agreements on trade in goods in Annex 1A, at a level not to exceed the value of US\$147.4 million for FY 2006, or, for subsequent years, an annual amount to be determined by applying the methodology described in Annex 4.
- (b) In the event that the total level of countermeasures that Brazil would be entitled to in a given year (footnote 475) should increase to a level that would exceed the threshold described in paragraph 5.201, updated to account for the change in Brazil's total imports from the United States, then, Brazil would also be entitled to seek to suspend certain obligations under the TRIPS Agreement and/or the GATS, as identified in footnote 468, with respect to any amount of permissible countermeasures applied in excess of that figure.

Footnote 475: It is understood that this amount is to be calculated taking into account the entirety of the level of countermeasures that Brazil is entitled to at that point in time, arising both from the application of the formula identified in paragraph 6.5(a) and from the Decision by the Arbitrator contained in WT/DS267/ARB/2."

Article 22.7 of the DSU provides that "the DSB shall be informed promptly of the decision of the arbitrator and shall upon request, grant authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the DSB decides by consensus to reject the request."

Accordingly, Brazil hereby requests authorization from the DSB to suspend the application to the United States of concessions or other obligations in conformity with the Arbitrator's Decision, pursuant to Article 22.7 of the DSU.

Every year, Brazil will notify the DSB of the countermeasures it intends to adopt prior to bringing those measures into force. This annual notice will identify the level of suspension of concessions and other obligations determined by applying the methodology established by the Arbitrator in paragraph 6.5(a) of its Decision and, in light of that level and of the threshold established by the Arbitrator in paragraph 6.5(b) of its Decision, the concessions and obligations subject to suspension.
