

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Recourse to Article 21.5 of the DSU by Brazil

Notification of an Appeal by the United States
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 12 February 2008, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel in *United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil* (WT/DS267/RW) ("Panel Report") and certain legal interpretations developed by the panel in this dispute.

1. The United States seeks review by the Appellate Body of the panel's finding that Brazil's claims relating to GSM 102 export credit guarantees for exports of pig meat and poultry meat were within the scope of this proceeding under Article 21.5 of the DSU.¹ This finding is in error and is based on erroneous findings on issues of law and related legal interpretations.
2. The United States seeks review by the Appellate Body of the panel's finding that Brazil's claim that the United States failed to comply with its obligation under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") with respect to marketing loan payments and counter-cyclical payments made by the United States after September 21, 2005 was properly before the panel.² This finding is in error and is based on erroneous findings on issues of law and related legal interpretations.
3. The United States seeks review by the Appellate Body of the panel's legal conclusion that as to GSM 102 export credit guarantees issued after July 1, 2005, the United States acted inconsistently with Article 10.1 of the *Agreement on Agriculture* by applying export subsidies in a manner which resulted in the circumvention of U.S. export subsidy commitments with respect to unscheduled products and certain scheduled products, and as a result acted inconsistently with Article 8 of the *Agreement on Agriculture*.³ The United States also seeks review by the Appellate Body of the panel's related legal conclusion that the United States acted inconsistently with Articles 3.1(a) and 3.2 of the

¹ See, e.g., Panel Report, paras. 9.20-9.27.

² See, e.g., Panel Report, paras. 9.75-9.81.

³ See, e.g., Panel Report, paras. 14.89, 14.97, 14.110, 14.115, 14.120, 14.128-14.129, 14.131, 14.133(a)-(c), 14.134, 14.140, 14.149, 15.1(c).

SCM Agreement by providing export subsidies to unscheduled products and by providing export subsidies to scheduled products in excess of U.S. commitments under the *Agreement on Agriculture*.⁴ These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations.

4. The United States requests the Appellate Body to find that the panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU with respect to Brazil's claims that the GSM 102 export credit guarantees constituted prohibited export subsidies. The panel's failure to undertake an objective assessment includes, for example, the following:

- (a) The panel disregarded and misconstrued the import of the GSM 102 export credit guarantee budgetary re-estimates data submitted by the United States⁵;
- (b) When conducting its analysis under item (j) of the Illustrative List of Export Subsidies to the *SCM Agreement*, the panel relied upon assumptions not supported by evidence on the record⁶ and on inappropriate comparisons of fees.⁷

5. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States failed to comply with the DSB's rulings and recommendations relating to the original panel's findings of inconsistency with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.⁸ This erroneous conclusion is based on the panel's erroneous legal conclusions and failure to undertake an objective assessment, described in paragraphs 3-4 above.

6. The United States seeks review by the Appellate Body of the panel's finding that the United States acted inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to U.S. upland cotton producers after September 21, 2005 was significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* in the world market for upland cotton constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.⁹ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations.

7. The United States requests the Appellate Body to find that the panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU with respect to Brazil's claims of present serious prejudice. The panel's failure to undertake an objective assessment includes, for example, the following:

- (a) The panel disregarded and misconstrued evidence on the record concerning the structure, design, and operation of marketing loan and counter-cyclical payments¹⁰;

⁴ See, e.g., Panel Report, paras. 14.156, 15.1(c).

⁵ See, e.g., Panel Report, paras. 14.80-14.81.

⁶ See, e.g., Panel Report, paras. 14.101, 14.125, 14.129.

⁷ See, e.g., Panel Report, paras. 14.94-14.103, 14.124-14.128, 14.129-14.131.

⁸ See, e.g., Panel Report, paras. 14.150, 14.157, 15.1(c), 15.2.

⁹ See, e.g., Panel Report, paras. 10.50, 10.58, 10.104, 10.111, 10.196, 10.222, 10.231, 10.239, 10.243, 10.247-10.256, 15.1(a).

¹⁰ See, e.g., Panel Report, paras. 10.61-10.82, 10.92-10.95.

- (b) The panel disregarded and misconstrued evidence on the record and its own finding that the U.S. share of world upland cotton production and exports was stable over MY 2002-2005¹¹;
- (c) The panel misconstrued the results of U.S. econometric modeling concerning the effect of U.S. marketing loan and counter-cyclical payments on the world price for upland cotton¹²;
- (d) The panel disregarded and misconstrued evidence concerning the alleged gap between the costs of production and the revenues of U.S. upland cotton farmers¹³;
- (e) The panel disregarded evidence relevant to ensuring that the effect of other factors on upland cotton prices was not improperly attributed to U.S. marketing loan and counter-cyclical payments.¹⁴

8. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States failed to comply with the DSB's rulings and recommendations related to the original panel's findings of inconsistency with Articles 5 and 6 of the *SCM Agreement*.¹⁵ This erroneous conclusion is based on the panel's erroneous legal conclusions and failure to undertake an objective assessment, described in paragraphs 6-7 above.

¹¹ See, e.g., Panel Report, paras. 10.127, 10.251.

¹² See, e.g., Panel Report, paras. 10.221-10.222, 10.251.

¹³ See, e.g., Panel Report, paras. 10.176, 10.184, 10.195-10.196.

¹⁴ See, e.g., Panel Report, para. 10.243.

¹⁵ See, e.g., Panel Report, paras. 10.257, 15.1(a), 15.2-15.3.