

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Recourse to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU by Brazil

The following communication, dated 4 July 2005, from the delegation of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 4.10 of the SCM Agreement and Article 22.2 of the DSU.

Brazil requests that a special meeting of the Dispute Settlement Body (the "DSB") be held on 15 July 2005 to consider the following agenda item:

United States – Subsidies on Upland Cotton

Recourse to Article 4.10 of the Agreement on Subsidies and Countervailing Measures and Article 22.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes by Brazil

Background

Both the Panel and the Appellate Body in this dispute found some of the US measures under review to violate Article 3 of the Agreement on Subsidies and Countervailing Measures (the "SCM Agreement"). On 21 March 2005, the DSB adopted the Appellate Body report and the report of the Panel, as modified by the Appellate Body. The resulting DSB recommendations and rulings include the recommendation that the United States withdraw, by at the latest within six months of the date of adoption of the Panel report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier), the following prohibited subsidies: (i) the export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice); (ii) Section 1207(a) of the Farm Security and Rural Investment (FSRI) Act of 2002 providing for user marketing (STEP2) payments to exporters of upland cotton; and (iii) Section 1207(a) of the FSRI Act of 2002 providing for user marketing (STEP2) payments to domestic users of upland cotton.

Adoption of appropriate countermeasures under Article 4.10 of the SCM Agreement

The period of compliance expired on 1 July 2005. At the meeting of the DSB on 15 July 2005, Brazil will request authorization from the DSB to take appropriate countermeasures pursuant to Article 4.10 of the SCM Agreement and Article 22.2 of the Dispute Settlement Understanding (the "DSU"), until such a time when the United States withdraws the prohibited export subsidies identified by the Panel and the Appellate Body, in an amount that corresponds:

- (i) to the STEP2 payments made in the most recent concluded marketing year; and

- (ii) to the total of exporter applications received under GSM 102, GSM 103, and SCGP for the most recent concluded fiscal year.

In principle, these countermeasures would take the form of suspension of tariff concessions and related obligations under the GATT 1994 by means of the imposition of additional import duties on a list of products imported from the United States, to be defined by Brazil.

However, Brazil considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector/agreement as that in which the Panel and the Appellate Body have found the violations. Brazil also considers that the circumstances are serious enough to justify the suspension of concessions or obligations under other covered agreements. These considerations are further explained below.

Suspension of concessions and obligations under Article 22.3(c) of the DSU

The suspension of concessions and other obligations corresponding to a value of approximately US\$3 billion¹ wholly applied to the importation of US goods – which amounted to US\$11.3 billion in calendar year 2004 – is neither practicable nor effective for at least two reasons.

First, the imposition of additional import duties affects the costs of inputs and capital goods that are essential to productive chain of the Brazilian industry. As a developing country, Brazil cannot place itself at disadvantage when competing with foreign products both in the domestic and international markets. Second, the rise in import costs will inevitably have a significant negative impact on current efforts to control inflationary pressures. Given the asymmetries between the two economies, additional import duties would have a much greater negative impact on Brazil than on the United States.

Finally, in Brazil's view, the circumstances are serious enough to justify the imposition of appropriate countermeasures under other covered agreements. First, the gravity of the violation; namely, prohibited subsidies which Brazil estimates to amount to approximately US\$3 billion per year. Continuing non-compliance renders the circumstances serious enough to make a case of imposition of appropriate countermeasures under another Agreement. Brazil recalls the Arbitrator's words in *US – FSC (Article 22.6)*: "as we interpret Article 4.10 of the SCM Agreement, a Member is entitled to act with countermeasures that properly take into account the gravity of the breach and the nature of the upset in the balance of rights and obligations in question."² In addition to this, circumstances must be considered serious given the fact that Brazilian producers of upland cotton will continue to suffer serious losses while the United States does not withdraw the measures at issue.

Summary of countermeasures

For the reasons given above, Brazil intends to take appropriate countermeasures in the form of the suspension of tariff concessions and related obligations under the GATT 1994 by imposing additional customs duties on a list of products imported from the United States, to be defined by Brazil.

Given that Brazil considers that it is not practicable or effective to exclusively apply additional import duties, and considering that the circumstances are serious enough, Brazil may resort, to the extent necessary, to countermeasures in the form of suspension of obligations under the

¹ STEP 2 payments estimated for marketing year 2004-2005 and total amount of applications received for export credit guarantees under GSM 102, GSM 103, and SCGP during fiscal year 2004.

² *US – FSC*, recourse to arbitration under Article 22.6 of the DSU, para. 3.48.

following sections of Part II of the Agreement on Trade-Related Aspects of Intellectual Property Rights:

- Section 1: Copyright and related rights
- Section 2: Trademarks
- Section 4: Industrial designs
- Section 5: Patents
- Section 7: Protection of undisclosed information.

Likewise, Brazil may also suspend horizontal and/or sectoral concessions and obligations for all sectors contained in Brazil's Schedule of Specific Commitments (GATS/SC/13) under the General Agreement on Trade in Services. Those sectors are:

- 1. Business Services
- 2. Communication Services
- 3. Construction and Related Engineering Services
- 4. Distribution Services
- 7. Financial Services
- 9. Tourism and Travel Related Services
- 11. Transport Services

Every year, Brazil will notify to the DSB the amount and the form of the suspension of concessions and other obligations in the light of data concerning the operation of the identified programmes in the most recent concluded marketing and fiscal year, as applicable.
