

**UNITED STATES – SUBSIDIES ON UPLAND COTTON**

Recourse to Article 21.5 of the DSU by Brazil

*Request for the Establishment of a Panel*

The following communication, dated 18 August 2006, from the delegation of Brazil to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

1. On 21 March 2005, the Dispute Settlement Body ("DSB") adopted the Appellate Body report and the Panel report<sup>1</sup>, as modified by the Appellate Body report, in *United States – Subsidies on Upland Cotton*, WT/DS267.<sup>2</sup>

**A. Relevant Findings, and Recommendations and Rulings**

2. Brazil summarizes below the findings of the Appellate Body and the Panel, and the recommendations and rulings of the DSB, that are relevant to this communication. Those findings, and recommendations and rulings, relate to (i) actionable subsidies and (ii) prohibited export subsidies.

3. The Panel and Appellate Body found, *inter alia*, that the price-contingent US marketing loan, counter-cyclical and Step 2 programs in the Farm Security and Rural Investment Act ("FSRI Act") of 2002 caused significant price suppression in the world market for upland cotton in violation of Articles 5(c) and 6.3(c) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").<sup>3</sup> In paragraph 8.1(g)(i) of its report, the Panel found that:

"[T]he effect of the mandatory price-contingent United States subsidy measures – marketing loan programme payments, user marketing (Step 2) payments, MLA payments and CCP payments – is significant price suppression in the same world market within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*."

<sup>1</sup> WT/DS267/AB/R ("Appellate Body Report, *US – Upland Cotton*"); WT/DS267/R ("Panel Report, *US – Upland Cotton*").

<sup>2</sup> WT/DSB/M/186.

<sup>3</sup> Panel Report, *US – Upland Cotton*, paras. 8.1(g)(i) and 7.1416.

The recommendations and rulings adopted by the DSB directed the United States, under Article 7.8 of the *SCM Agreement*, to remove the adverse effects caused by these subsidies, or to withdraw the subsidies, by 21 September 2005.<sup>4</sup>

4. The Panel found that three export credit guarantee ("ECG") programs maintained by the United States to support the export of US agricultural products – the General Sales Manager 102 ("GSM 102"), General Sales Manager 103 ("GSM 103") and Supplier Credit Guarantee ("SCGP") Programs<sup>5</sup> – constitute export subsidies under Article 10.1 of the *Agreement on Agriculture*. The Panel further found that these three ECG programs are export subsidies applied in a manner that results in actual circumvention of US export subsidy commitments for rice, and other products – including upland cotton – for which the United States has not undertaken export subsidy reduction commitments ("unscheduled" products) and which were supported by the ECG programs. The Panel therefore concluded that these three ECG programs are inconsistent with Articles 10.1 and 8 of the *Agreement on Agriculture*.

5. Having found that these three ECG programs constitute export subsidies for purposes of its analysis of Brazil's claims under the *Agreement on Agriculture*, the Panel also found that for purposes of Brazil's claims under Part II of the *SCM Agreement*, the programs are similarly prohibited subsidies under Articles 3.1(a) and 3.2 of the *SCM Agreement*.<sup>6</sup>

6. As a result of these findings, the Panel recommended that the United States bring these three ECG programs, with respect to upland cotton and other unscheduled supported products, and to rice, into conformity with the *Agreement on Agriculture*.<sup>7</sup> Pursuant to Article 4.7 of the *SCM Agreement*, the Panel additionally recommended that the United States withdraw these prohibited subsidies without delay, and by no later than 1 July 2005.<sup>8</sup>

7. The Appellate Body affirmed these recommendations.<sup>9</sup> In addition, the Appellate Body reversed the Panel's finding that Brazil had failed to make a *prima facie* case that the United States had applied ECGs in a manner that resulted in actual circumvention of its export subsidy commitments with respect to pig meat and poultry meat, within the meaning of Article 10.1 of the *Agreement on Agriculture*; however, the Appellate Body was unable to complete the analysis for this claim.<sup>10</sup>

## **B. Measures Taken by the United States to Comply**

8. To implement the recommendations and rulings of the DSB, the United States took the following actions:

- (i) On 3 February 2006, the United States Congress approved a bill that repeals the Step 2 subsidy program for upland cotton.<sup>11</sup> The bill was signed into law on 8 February 2006,<sup>12</sup> and took effect on 1 August 2006.

---

<sup>4</sup> Panel Report, *US – Upland Cotton*, para. 8.3(d).

<sup>5</sup> See 7 U.S.C. § 5622; 7 CFR Part 1493.

<sup>6</sup> Panel Report, *US – Upland Cotton*, para. 8.1(d)(i).

<sup>7</sup> Panel Report, *US – Upland Cotton*, para. 8.3(a).

<sup>8</sup> Panel Report, *US – Upland Cotton*, para. 8.3(b).

<sup>9</sup> Appellate Body Report, *US – Upland Cotton*, paras. 763, 764.

<sup>10</sup> Appellate Body Report, *US – Upland Cotton*, para. 763(f)(i).

<sup>11</sup> Deficit Reduction Act of 2005, US Public Law 109-171, Section 1103.

<sup>12</sup> WT/DSB/M205, 17 February 2006, para. 91.

- (ii) The US Department of Agriculture ("USDA") announced that as of 1 July 2005, it would no longer take applications for ECGs under GSM 103;<sup>13</sup>
- (iii) As of 1 July 2005, USDA amended the fee schedules for ECGs issued under the GSM 102 and SCGP programs.<sup>14</sup>

### C. Non-existence of Measures, and Omissions/Deficiencies of Existing Measures

9. Brazil believes that measures taken by the United States to comply with the recommendations and rulings of the DSB in some respects do not exist, and to the extent they do exist, are not consistent with the *Agreement on Agriculture* and the *SCM Agreement*. Brazil identifies below instances in which US measures do not exist, as well as omissions and deficiencies with respect to those measures taken to comply that do exist.

#### 1. Non-existence and omissions/deficiencies regarding the actionable subsidy-related recommendations and rulings of the DSB

10. With respect to the actionable subsidy-related recommendations and rulings of the DSB, Brazil believes that the United States has failed to take appropriate steps to remove the adverse effects or withdraw the subsidies found to cause adverse effects. The United States' failure to take these steps results in US subsidies for upland cotton causing serious prejudice to the interests of Brazil, within the meaning of Articles 5(c) and 6.3 of the *SCM Agreement*.

11. Brazil divides its concerns regarding the US failure to take appropriate steps to remove the adverse effects or withdraw the subsidies into two parts: the non-existence of measures taken to comply, and the consistency of those measures taken to comply with the covered agreements.

#### (a) Non-existence of measures taken to comply

12. First, the only measure taken by the United States to comply with the adverse effects-related recommendations and rulings of the DSB (*i.e.*, the repeal of the Step 2 program, cited as measure taken to comply (i) in Section B above), did not take effect until 1 August 2006, or over 10 months following the expiry of the implementation period, on 21 September 2005. At least during the period 21 September 2005 through 31 July 2006, measures taken to comply did not exist, within the meaning of Article 21.5 of the DSU.

13. Second, the United States has taken no measures whatsoever to comply with the recommendations and rulings of the DSB concerning the US marketing loan and counter-cyclical payment programs under the FSRI Act of 2002, as amended, as well as payments made under these

---

<sup>13</sup> See "USDA announces changes to export credit guarantee programs to comply with WTO Findings," USDA FAS Online News Release, 30 June 2005, available at [http://www.fas.usda.gov/scripts/PressRelease/pressrel\\_dout.asp?PrNum=0092-05](http://www.fas.usda.gov/scripts/PressRelease/pressrel_dout.asp?PrNum=0092-05). See also "Notice to GSM-103 Program Participants", USDA FAS Program Announcement, 30 June 2005, available at <http://www.usda.gov/documents/0094GSM103Notice.doc>.

<sup>14</sup> See "USDA announces changes to export credit guarantee programs to comply with WTO Findings," USDA FAS Online News Release, 30 June 2005, available at [http://www.fas.usda.gov/scripts/PressRelease/pressrel\\_dout.asp?PrNum=0092-05](http://www.fas.usda.gov/scripts/PressRelease/pressrel_dout.asp?PrNum=0092-05). See also "USDA changes its fees to risk-based method for the GSM-102 and Supplier Credit Guarantee programs", USDA FAS Online News Release, 30 June 2005, available at [http://www.fas.usda.gov/scripts/PressRelease/pressrel\\_dout.asp?PrNum=0093-05](http://www.fas.usda.gov/scripts/PressRelease/pressrel_dout.asp?PrNum=0093-05). See also GSM-102 Fee Schedule, available at [www.fas.usda.gov/excredits/gsm102fees.html](http://www.fas.usda.gov/excredits/gsm102fees.html), and SCGP Fee Schedule, available at [www.fas.usda.gov/excredits/scgpftees.html](http://www.fas.usda.gov/excredits/scgpftees.html).

programs. In this respect, measures taken to comply do not exist, within the meaning of Article 21.5 of the DSU.

14. As a consequence of these two failures, the United States has failed, as directed by the recommendations and rulings of the DSB, to take appropriate steps to remove the adverse effects of or to withdraw the subsidies from the US marketing loan, counter-cyclical and Step 2 payment programs under the FSRI Act of 2002, as amended, as well as payments made under these programs. These failures mean that, as in previous marketing years, the US marketing loan, counter-cyclical and Step 2 payment programs under the FSRI Act of 2002, as amended, taken alone and/or considered together, as well as payments made under these programs, cause:

- significant price suppression in the world market for upland cotton, within the meaning of Article 6.3(c) of the *SCM Agreement*; and
- an increase in the US share in the world market for upland cotton in marketing year 2005, within the meaning of Article 6.3(d) of the *SCM Agreement*.

**(b) Inconsistency of measures taken to comply with the covered agreements**

15. The measure taken by the United States to comply with the adverse effects-related recommendations and rulings of the DSB, identified as item (i) in Section B above, is deficient, because it fails to remove the adverse effects or withdraw the subsidies, and results in inconsistencies with Articles 5 and 6.3 of the *SCM Agreement*. Specifically, the deficiency manifests itself in three inconsistencies:

**(i) Serious prejudice, with Step 2**

16. Brazil believes that the US marketing loan, counter-cyclical and Step 2 payment programs under the FSRI Act of 2002, as amended, taken alone and/or considered together, as well as payments made under these programs, cause:

- significant price suppression in the world market for upland cotton within the meaning of Article 6.3(c) of the *SCM Agreement*; and
- an increase in the US share in the world market for upland cotton in marketing year 2005, within the meaning of Article 6.3(d) of the *SCM Agreement*.

**(ii) Serious prejudice, without Step 2**

17. Notwithstanding the US measure taken to comply with the actionable subsidy-related recommendations and rulings of the DSB (*i.e.*, the repeal of the Step 2 program effective 1 August 2006, cited as measure taken to comply (i) in Section B above), Brazil considers that the US marketing loan and counter-cyclical payment programs under the FSRI Act of 2002, as amended, as well as payments made under those programs, cause serious prejudice to the interests of Brazil, within the meaning of Article 5(c) and 6.3 of the *SCM Agreement*.

18. Specifically, irrespective of the effects of the Step 2 program or payments thereunder, the US marketing loan and counter-cyclical payment programs under the FSRI Act of 2002, as amended, as well as payments made under those programs, cause:

- significant price suppression in the world market for upland cotton within the meaning of Article 6.3(c) of the *SCM Agreement*; and

- an increase in the US share in the world market for upland cotton in marketing year 2005, within the meaning of Article 6.3(d) of the *SCM Agreement*.

**(iii) Threat of serious prejudice**

19. Finally, Brazil believes that the United States threatens to cause serious prejudice to the interests of Brazil, within the meaning of Articles 5(c) and 6.3 of the *SCM Agreement*, and footnote 13 thereto, by failing to take appropriate steps to remove the adverse effects or withdraw WTO-inconsistent subsidies for upland cotton.

20. Specifically, Brazil believes that the US marketing loan and counter-cyclical payment programs under the FSRI Act of 2002, as amended, as well as payments mandated to be made thereunder, threaten to cause significant price suppression in the world market for upland cotton in marketing years 2006<sup>15</sup> and until the expiry or repeal of these programs.

**2. Non-existence and omissions/deficiencies regarding the ECG-related recommendations and rulings of the DSB**

21. Brazil believes that despite the measures taken to comply cited as items (ii) and (iii) in Section B above, the United States has failed to implement the DSB's recommendation that it withdraw the prohibited ECG-related export subsidies without delay, under the *SCM Agreement*, and otherwise bring itself into conformity with its obligations, under the *Agreement on Agriculture*. Specifically, Brazil believes that measures taken to comply with the recommendations and rulings of the DSB with respect to the ECG programs do not exist in some respects, and to the extent they exist, are not consistent with the *Agreement on Agriculture* and the *SCM Agreement*. In either case, the United States has failed to withdraw fully the ECG-related prohibited subsidies subject to the recommendations and rulings of the DSB.

22. Brazil divides its concerns regarding the US failure to withdraw fully the ECG-related prohibited subsidies into two parts: the non-existence of measures taken to comply, and the consistency of those measures taken to comply with the covered agreements.

**(a) Non-existence of measures taken to comply**

23. Brazil believes that with respect to ECGs issued under the GSM 102, GSM 103 and SCGP programs prior to 1 July 2005, but still outstanding subsequent to 1 July 2005, the United States has taken no action whatsoever to withdraw the subsidy and otherwise bring itself into conformity with its obligations. With respect to these outstanding ECGs, measures taken to comply do not exist, within the meaning of Article 21.5 of the DSU.

24. In this respect, Brazil's concerns with the US failure to take measures to comply extend to ECGs issued under the GSM 102, GSM 103 and SCGP programs prior to 1 July 2005, but still outstanding subsequent to 1 July 2005, to support the export of: upland cotton and other unscheduled products; and, rice.

**(b) Inconsistency of measures taken to comply with the covered agreements**

25. Brazil believes that the United States provides export subsidies (under Articles 1, 3.1(a) and 3.2 of the *SCM Agreement*, as well as under item (j) to the Illustrative List of Export subsidies included as Annex I to the *SCM Agreement* (the "Illustrative List")) through the GSM 102 and SCGP programs, and ECGs provided under these programs, and has applied those export subsidies

---

<sup>15</sup> Marketing year 2006 lasts from 1 August 2006 until 31 July 2007.

subsequent to 1 July 2005 in a manner that results in circumvention of the United States' export subsidy commitments. In this respect, the United States' measures taken to comply are not consistent with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.

26. Specifically, and notwithstanding the US measures taken to comply cited as items (ii) and (iii) in Section B above, the GSM 102 and SCGP programs, and ECGs provided thereunder, are export subsidies under the *Agreement on Agriculture* and the *SCM Agreement*, based on the following two grounds:

- The programs and ECGs provided thereunder provide and constitute financial contributions (loan guarantees) that confer benefits on recipients, within the meaning of Article 1 of the *SCM Agreement*, and that are contingent upon export performance, within the meaning of Article 3.1(a) of the *SCM Agreement*; and, separately and independently,
- The programs do not levy premium rates adequate to cover the long-term operating costs and losses of the GSM 102 and SCGP programs, within the meaning of item (j) of the Illustrative List.

27. Further, subsequent to 1 July 2005, ECGs under the GSM 102 and SCGP programs have been applied to circumvent US export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture*. Brazil is concerned that ECGs under the GSM 102 and SCGP programs have been provided subsequent to 1 July 2005 to support the export of: upland cotton and other unscheduled products; and, rice, pigmeat and poultry meat, in excess of US reduction commitment levels for those products.<sup>16</sup>

28. As a result and to the extent of this violation of Article 10.1 (and, as a consequence, Article 8) of the *Agreement on Agriculture*, the GSM 102 and SCGP programs, and ECGs provided thereunder, are subject to the prohibition against export subsidies included in Articles 3.1 and 3.2 of the *SCM Agreement*. On the grounds cited in paragraph 26 above, Brazil believes that the GSM 102 and SCGP programs, and ECGs provided thereunder, are prohibited export subsidies, within the meaning of Articles 3.1(a) and 3.2 of the *SCM Agreement*.

#### **D. Conclusion**

29. Accordingly, because there is disagreement as to the existence and consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB, within the meaning of Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Brazil seeks recourse to dispute settlement under this provision.<sup>17</sup> Brazil requests that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

---

<sup>16</sup> Exports that benefited from GSM 102 and SCGP ECGs subsequent to 1 July 2005 are currently reflected in the July 2005 and September 2005 (fiscal year end), as well as July 2006 "Monthly Summary of Export Credit Guarantee Activity," USDA FAS Online, available at <http://www.fas.usda.gov/excredits/Monthly/ecg.html>.

<sup>17</sup> Brazil notes that informal discussions regarding this matter were held with the United States on 19 July 2006; however, consultations within the meaning of Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") were not held.