

United States – Subsidies on Upland Cotton

(WT/DS267)

**Executive Summary of the Closing Statement
of the United States of America
at the First Meeting of the Panel with the Parties**

August 4, 2003

1. On the U.S. requests for preliminary rulings, the Panel expressed some interest in the question of what prejudice would result to the United States if we were forced to defend export credit guarantees with respect to commodities other than upland cotton. First and foremost, the United States would have lost the benefit of consultations on these measures. Consultations serve a number of important functions, including helping the parties to understand each others' concerns and aiding in efforts to resolve the dispute. The DSU affirms the importance of consultations and requires that a Member cannot proceed to a panel unless the Member has consulted on that measure.

2. Moreover, to require the United States to address Brazil's allegations on these measures would impose additional burdens on the United States and detract from the time and resources available to respond for those measures that *are* within the terms of reference. The United States has export subsidy reduction commitments with respect to 12 commodities. Each such commodity is therefore subject to individual Peace Clause analysis under Article 13(c). In addition, under Brazil's approach, the type of analysis the United States has offered for upland cotton concerning item (j) of the Subsidies Agreement would be appropriate for all commodities subject to the coverage of the Agriculture Agreement. This would necessitate a commodity-by-commodity analysis of the export credit guarantee programs, as applied, concerning premiums and long-term operating costs and losses (if any).

3. But in the end, the issue of prejudice to the United States does not figure in the question of whether a measure is within the Panel's terms of reference. It is *that* question that underlies the United States' preliminary ruling requests.

4. First, the United States has requested that the Panel find that export credit guarantee measures relating to other eligible agricultural commodities are not within the Panel's terms of reference. While Brazil's *panel* request *did* refer to "export credit guarantees . . . to facilitate the export of US upland cotton and other eligible agricultural commodities," its *consultation* request did not. That consultation request nowhere included the "other eligible agricultural commodities" language, nor did Brazil include these measures in its statement of available evidence. Thus, those measures on other eligible agricultural commodities were not part of the "measures at issue" that Brazil identified in its consultation request as it is required to do under DSU Article 4.4. Contrary to Brazil's statement a few moments ago, the United States and Brazil never consulted on export credit guarantees on commodities other than cotton – not once and certainly not three times. Brazil said as much on the first day of the first panel meeting when it acknowledged that the United States told Brazil at the first consultation that its questions were beyond the scope of the consultations.

5. On the question whether the export credit guarantee programs were one measure or multiple measures: There is no reason why export guarantees for multiple products cannot be multiple measures. Under DSU Article 4.4, it is incumbent upon Brazil to identify in its consultation request "the measures at issue." Here, Brazil identified the measure as the "export credit guarantees . . . to facilitate the export of US upland cotton," and the United States may, and did, rely on that consultation request (including the attached statement of evidence) for notice.

6. For example, if a Member banned imports of all animal products for a stated health reason, and another Member filed a consultation request on the ban solely with respect to imports of beef, that complaining Member could not then expand the scope of the dispute through its written consultation questions or its panel request to challenge that ban with respect to other affected agricultural commodities. This is, however, what Brazil is attempting to do here.

7. Brazil also relies on footnote 1 of its consultation request, which refers to an explanation “below.” Such an explanation expanding the scope of the request to include “other eligible agricultural commodities” is *not* found in the consultation request. DSU Article 4.4 requires Brazil to provide “an identification of the measures at issue,” not a cryptic reference that is not explained further. Despite notice from the United States and despite ample opportunity to submit a new consultation request, Brazil never did so. Therefore, export credit guarantee measures relating to eligible U.S. agricultural commodities other than U.S. upland cotton were not the subject of consultations and pursuant to DSU Articles 4.4, 4.7, and 6.2 do not form part of the Panel’s terms of reference.

8. With respect to production flexibility contract payments and market loss assistance payments, we have explained that these payments were completed, the programs terminated, and the statutory instruments providing them were superseded before Brazil’s consultation request was filed. The measures that Brazil challenges are subsidies or payments provided by these programs. The laws authorizing these payments designated that each such payment was *allocated* to a particular crop or fiscal year. Thus, pursuant to the 1996 Act, the last production flexibility contract payment for fiscal year 2002 was made no later than the end of fiscal year 2002. As Brazil states in its first submission, “[w]ith the passage of the new FSRI Act in May 2002, PFC payments were discontinued.” The last market loss assistance payment was made with respect to the 2001 marketing year (August 1, 2001 - July 31, 2002) pursuant to legislation enacted on August 13, 2001. Because the relevant fiscal year and the relevant marketing year, respectively, had been completed by the time of Brazil’s consultation and/or panel requests, these measures cannot have been consulted upon within the meaning of DSU Article 4.2 *nor* have been “measures at issue” within the meaning of DSU Article 6.2. They therefore do not fall within the Panel’s terms of reference. Brazil’s suggestion that Articles 7.2 to 7.10 of the Subsidies Agreement should supersede the DSU provisions concerning this Panel’s terms of reference is novel. Preliminarily, we note that Article 7.4 does mention the Panel’s terms of reference, but only in the context of setting a 15-day deadline for establishing them, as opposed to the time line under DSU Article 7.1.

9. Finally, with respect to subsidies provided under the Agricultural Assistance Act of 2003 – the cottonseed payment – these are measures that were not even in existence at the time of Brazil’s panel request. As the cottonseed payment had not been made (implementing regulations were not even issued until April 25, 2003) and the legislation authorizing the payments had not been enacted at the time of Brazil’s panel request, this subsidy or measure was not consulted upon and could not have been a measure at issue between the parties. Therefore, the United

States requests that the Panel make preliminary rulings that these three sets of measures are not within its terms of reference.

10. To summarize briefly where our discussions on the Peace Clause have brought us: Brazil suggests in *this* dispute that the word “actions” in the phrase “exempt from actions” only refers to “collective action” by the DSB. However, we note that Brazil’s interpretation runs directly contrary to the view it expressed in its consultation request in the dispute *European Communities – Export Subsidies on Sugar* (WT/DS266/1). With respect to Article 13(c)(ii), which uses the same phrase “exempt from actions” at issue in this dispute, Brazil wrote: “In respect of the claims based on Article 3 of the SCM Agreement, because the export subsidies provided by the EC on sugar do not conform fully to the provisions of Part V of the Agreement on Agriculture, those export subsidies are not *exempt from challenge* by virtue of Article 13(c)(ii) of the Agreement on Agriculture.” That is, in that WTO document Brazil does *not* read the phrase “exempt from actions” to mean “exempt from remedies” or “exempt from collective action by the DSB” but rather “exempt from *challenge*.” Brazil’s interpretation in that WTO consultation request could only result if “exempt from action” in the Peace Clause means “not subject to” the “taking of legal steps to establish a claim” – as the United States has been contending in this dispute. We submit that *this* interpretation by Brazil is correct.

11. The Peace Clause – in Brazil’s words – “exempt[s] from challenge” certain measures. It follows that the Peace Clause is not an affirmative defense but rather a threshold issue for Brazil in this dispute. As Brazil implicitly recognized in both its panel and consultation requests, to even reach the point where it will, as the complaining party, be allowed to pursue its substantive claims, Brazil must first demonstrate that the Peace Clause does not exempt U.S. measures from action – that is “from challenge.”

12. With respect to non-green-box domestic support measures, we have discussed extensively the proviso to Article 13(b)(ii), which reads, “provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.” This text indicates that the relevant test is to compare the product-specific support “decided” during the 1992 marketing year versus the product-specific support that the challenged measures currently in effect grant. As Brazil confirmed for you yesterday, the support to upland cotton “decided” during the 1992 marketing year was established via the target price of 72.9 cents per pound for the deficiency payment and the loan rate of 52.35 cents per pound. Brazil has claimed that if you look at the U.S. laws and regulations, you will not find a statement that the level of support decided was 72.9 cents. We encourage you to look at Exhibit US-5, page 554 of the 1992 Supplement to the U.S. Code; Exhibit US-3, page 328 of the January 1, 1993, Code of Federal Regulations; Exhibit US-2, page 14328 of the April 20, 1992, Federal Register; as well as paragraphs 100-106 of the U.S. first written submission for an explanation of these rates and how the deficiency payment and marketing loans interacted.

13. Brazil has suggested that 72.9 cents per pound does not reflect the level of support because of other decisions by the U.S. Government with respect to acreage reduction and

deficiency payments on less than 100 percent of “base acres.” As indicated, we will address in writing Brazil’s after-the-fact calculations, which also appear to factor in *producer* decisions that were not part of any “decision” by the U.S. Government. However, we note that Brazil’s statements that there were “other decisions” taken by the United States implicitly recognize that the support decided by the United States during the 1992 marketing year relates to rates of support, not budgetary outlays.

14. We have noted that the product-specific support of 72.9 cents per pound decided during marketing year 1992 is far higher than the product-specific support that current measures grant for the 2002 crop – 52 cents per pound. The Peace Clause directs one to compare the product-specific support in 1992 and currently through the phrase “support to a specific commodity.”

15. The ordinary meaning of these words, read in their context in the Agriculture Agreement, indicate that “support to a specific commodity” means “product-specific support.” Various third parties have suggested that these phrases must have different meanings because they are not *identical*. However, in different provisions the Agriculture Agreement uses different words to describe the same concept: product-specific support. For example, in Article 1(a), the basic definition of product-specific support is given as “support . . . provided *for* an agricultural product in favour of the *producers* of the basic agricultural product.” In Article 1(h), the Agreement again refers to product-specific support, not by using that term but by using the words “support for basic agricultural products.” In Annex 3, paragraph 6, the Agreement refers to a “product-specific” AMS not by using those words but by using the phrase “for each basic agricultural product, a specific AMS shall be established.” In fact, only the last of these three examples of provisions that refer to the concept of “product-specific” support even uses the term “specific.” Thus, the use of the phrase “support to a specific commodity” in the Peace Clause to refer to “product-specific support,” is not remarkable in light of these multiple examples of different words in the Agreement that describe the same concept. “Commodity” is also not used elsewhere in the Agreement, but there has been no suggestion that “commodity” should not be interpreted as agricultural “products” subject to the Agreement.

16. On U.S. direct payments, which the United States believes are “green box” measures because they satisfy the criteria set out in Annex 2: As a question from the Chair to Brazil suggested, assessing the conformity of a claimed green box measure against the “fundamental requirement” of the first sentence of paragraph 1 would be a difficult, if not impossible task, for a Panel. Members foresaw the problem and therefore provided guidance on how a measure would fulfill that fundamental requirement – that is, if the measures “conform to the . . . basic criteria” of the second sentence plus any applicable policy-specific criteria, they shall be deemed to have met the fundamental requirement.

17. With respect to the criterion in paragraph 6(b) that the amount of decoupled income support payments not be based on, or linked to, production undertaken in any year after the base period, this provision need not and should not be read as Brazil suggests. The text supports a reading that a Member may not base or link payments to production requirements. The EC

endorsed this view this morning. U.S. direct payments require no particular type of production – indeed, no production is necessary at all. As we have suggested, Brazil’s reading of paragraph 6(b) would prevent a Member from prohibiting a recipient from producing crops – that is, would prevent a measure that bases or links payments to a type or volume of production: none at all. If there is no production at all as a result of the measure, such a measure necessarily can have no “trade-distorting effects or effects on production.” Thus, Brazil’s reading of paragraph 6(b) would *preclude* a Member from establishing a measure that meets the “fundamental requirement” of Annex 2. Paragraph 6(b) need not and should not be read in opposition to that fundamental requirement. In the context provided by the first sentence of Annex 2, then, paragraph 6(b) should be read as establishing that a Member may not base or link payments to requirements to produce any crop in particular – again, U.S. direct payments require no upland cotton production and do not require any production at all.

18. Brazil has repeatedly raised the specter of unchecked U.S. domestic subsidies should the Panel agree with the U.S. interpretation of the Peace Clause. Brazil’s fears are groundless. Of course the United States may not provide subsidies without any limit. U.S. subsidies are disciplined in several ways, and the U.S. has deliberately kept itself within those limits. There are two main disciplines that apply. The first is the U.S. final bound commitment level under the Current Total Aggregate Measurement of Support. The second, as we have discussed at length, is the Peace Clause itself and its effective limitation to a level of producer support of 72.9 cents per pound. The United States has stayed within the boundaries of those limits despite, as outlined in Brazil’s filings, pressure to do otherwise. We are entitled to the benefit of that compliance.

19. We can understand that Brazil might feel that these limits are not enough. New limits may be negotiated in the ongoing agriculture negotiations, in which the United States shares many of the same goals as Brazil. Until that happens, however, Brazil may not seek to overturn the balance of rights and obligations negotiated and agreed by Members in the Uruguay Round. Brazil’s Peace Clause interpretation would do violence to the text of the Agriculture Agreement and would penalize the United States for deciding support to upland cotton producers within the limits set by the Agreement. We therefore ask the Panel to find that Brazil has not established that U.S. domestic support measures breach the Peace Clause and that such measures are therefore exempt from Brazil’s action at this time.