United States – Subsidies on Upland Cotton

(WT/DS267)

Answers of the United States of America
to Further Questions from the Panel to the Parties
following the Second Panel Meeting

January 20, 2004

257. The Panel takes note of the Appellate Body Report in *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* (DS244), which was circulated to WTO Members on 15 December 2003. The Panel is aware that this report has yet to be adopted by the Dispute Settlement Body. Nevertheless, the Panel asks the parties to respond to the following related questions.

(d) Does the "requirement" upon the CCC to make available "not less than" $5.5 billion annually in guarantees have a normative character and operation? (see, e.g. Brazil's response to Panel Question 142; Exhibit BRA-297, 7 USC 5641(b)(1); 7 USC 5622(a) & (b); paragraph 201 of US 18 November further rebuttal submissions). Is this requirement "mandatory"? If so, how does the CCC have "discretion" not to make this amount of guarantees available in a given year? USA

1. With respect to the Panel's first question, the United States notes that the Appellate Body's discussion of the "normative character and operation" of an instrument came in the context of its explanation of how to determine whether an instrument is a "measure" subject to challenge in dispute settlement and that the Appellate Body distinguished this question from the separate question of whether the instrument, if a measure, mandates a breach of a WTO obligation under a "mandatory/discretionary" analysis.[1] The Appellate Body explicitly noted that it was not undertaking a comprehensive examination of the relevance or significance of that analysis and, indeed, simply applied it.[2] An analysis of the normative character and operation of this "requirement" to make available not less than $5.5 billion in guarantees is not necessary because the parties do not dispute whether the "requirement" is a "measure."

2. Under a "mandatory/discretionary" analysis, the relevant question would be not whether the requirement to make available $5.5 billion in guarantees per year is as such inconsistent with a provision of the WTO agreements (since Brazil has not claimed that it is), but rather whether the provisions establishing the export credit guarantee programs mandate a breach of any WTO obligation. As we have explained, they do not. As an initial matter, the requirement that the CCC "*make available* . . . not less than $5,500,000,000 in credit guarantees" does not mandate that the CCC actually *issue* any particular level of credit guarantees.[3] This law merely requires that CCC "make available" certain guarantees; the actual issuance of guarantees, however, is within the discretion of the Commodity Credit Corporation, which "may guarantee the repayment

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[1] Appellate Body report, *United States - Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan ("US -Sunset Review)*, WT/DS244/AB/R, adopted 9 January 2004, paras. 78, 81-82, 89, and 93.

[2] *US Sunset Review*, paras. 93, 156, and 172-174.

[3] As the United States has previously noted, except for program year 1992, CCC has *never* issued $5.5 billion in guarantees in any year during the period 1992 to the present. Sales registrations have been as low as $2.876 billion for program year 1997 and have generally hovered in the range of $3.0 billion - $3.2 billion. Further Rebuttal Submission of the United States (November 18, 2003), para. 201; U.S. Further Submission (September 30, 2003), para. 148 and accompanying table entitled CCC Export Credit Guarantee Program Levels, Annual President's Budgets and Actual Sales Registrations, Fiscal Years 1992-2004.

of credit made available to finance commercial export sales of agricultural commodities."[4] The statute makes clear that "[e]xport credit guarantees *issued* pursuant to this section shall contain such terms and conditions as the Commodity Credit Corporation determines to be necessary."[5]

3. The United States has elsewhere noted the various discretionary elements in the operation of the program that tamp down the actual issuance of guarantees. These include the regulatory authorities permitting non-issuance of guarantees with respect to any individual application for an export credit guarantee or to suspend the issuance of export credit guarantees under any particular allocation; limitations on commodities with respect to which guarantees may be made available, total guarantee value for individual commodities, destination, time within which export must occur, and internally established exposure limits applicable to individual bank obligors.[6]

4. Furthermore, and more importantly, Brazil's own approach would require a showing that the programs mandate that the premium rates will be insufficient to cover long-term operating costs and losses of the programs. Brazil has not made such a showing, for the simple reason that the programs do not so mandate. The Commodity Credit Corporation ("CCC") has discretion concerning numerous aspects of any guarantees it may issue, such as the destinations, types of commodities, and length of term of the guarantee. All of these aspects could affect the question of the long-term operating costs and losses of the programs. For example, the credit risk involved in some destinations may be less than for others. Similarly, the risk associated with a guarantee of credit extended for one year may be less than for credit extended for three years.

5. Thus, while the provisions establishing the export credit guarantee programs are measures, they do not mandate an inconsistency with any WTO obligation. Putting aside the U.S. argument that export credit guarantees are not subject to export subsidy disciplines by virtue of Article 10.2 of the *Agreement on Agriculture* until Members conclude their ongoing negotiations and agree on such disciplines, there is no basis to presume, on the basis of the law itself, that the export credit guarantee programs provide export subsidies and threaten to lead to circumvention of U.S. export subsidy reduction commitments.[7] Because the CCC retains the discretion to issue particular guarantees and attach terms and conditions as set out above, the statute alone does not allow a presumption that premium rates will be insufficient to cover long-term operating costs and losses of the programs. Thus, Brazil's argument that the CCC is mandated to "make available" $5.5 billion in export credit guarantees cannot alter the fact that

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[4] 7 U.S.C. 5622(a)(1), (b); *see also id.* 5622(k) (imposing requirement that certain percentages "of the total amount of credit guarantees *issued* for a fiscal year [be] *issued*," not merely made available, with respect to certain products) (italics added).

[5] 7 U.S.C. 5622(g).

[6] U.S. First Written Submission (July 11, 2003), fn. 134; 7 C.F.R. Sections 1493.10(d), 1493.40(b) (Exhibit US-6); U.S. Answer to Panel Question 5 (August 11, 2003), para. 12 (Exhibit US-12); U.S. Rebuttal Submission (August 22, 2003), paras. 180-182; U.S. Further Submission (September 30, 2003), paras. 153-156; U.S. Answer to Panel Question 142 (October 27, 2003), paras. 56-57.

[7] *See* Brazil's Answer to Question 142 from the Panel, para. 88 (October 27, 2003).

the CCC has discretion to control the guarantees actually provided and the terms of those guarantees; as a result, no WTO inconsistency is mandated.

(e) Does the US agree that, under the Budget Enforcement Act of 1990, the Office of Management and Budget classifies the export credit guarantee programs as "mandatory" (see Brazil's response to Panel Question 142, para. 89)? Does this exempt the programmes from the requirement to receive new Congressional budget authority before it undertakes new guarantee commitments (*e.g.* Exhibit BRA-117 (2 USC 661(c)(2))? USA

6. The Budget Enforcement Act of 1990 ("BEA") divides spending into two types: "discretionary" spending and "direct" spending.[8] "Discretionary" spending means budget authority controlled by annual appropriations acts and the outlays that result from that budget authority. "Direct" spending (commonly referred to as "mandatory" spending)[9] means budget authority and outlays resulting from permanent laws as well as "entitlement authority."[10] That is, whether spending is "mandatory" for purposes of the BEA is an accounting classification issue and does not control whether a measure is "mandatory" for a mandatory / discretionary analysis for WTO purposes.

7. The Office of Management and Budget classifies the export credit guarantee programs as "mandatory" because the "budget authority is provided by law other than appropriation Acts."[11] As a result, although the export credit guarantee programs are exempt from the ordinary requirement that budget authority be provided in advance through annual appropriations acts, they remain subject to the continuing availability of budget authority in law other than annual appropriations legislation. Of note, the Office of Management and Budget has also recognized: "While mandatory and discretionary classifications are used for measuring compliance with the BEA, *they do not determine whether a program provides legal entitlement to a payment or benefit*"[12] (italics added). Thus, the classification of these programs as "mandatory" for purposes

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[8] *See* OMB Circular A-11 (2003), Section 15: Basic Budget Laws (available at: http://www.whitehouse.gov/ omb/circulars/a11/current_year/s15.pdf).

[9] *See* OMB Circular A-11 (2003), Section 20: Terms and Concepts (available at: http://www.whitehouse.gov/omb/circulars/a11/current_year/s20.pdf).

[10] This distinction between discretionary spending, mandatory direct spending and mandatory entitlement spending is reflected in the applicable statutory definitions. 2 U.S.C. Section 900(7) and 900(8) provide:

> "(7) The term 'discretionary appropriations' means budgetary resources (except to fund direct-spending programs) provided in appropriation Acts.
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> "(8) The term 'direct spending' means—
> (A) budget authority provided by law other than appropriation Acts;
> (B) entitlement authority; and
> (C) the food stamp program

[11] 2 U.S.C. 900(8).

[12] OMB Circular A-11 (2003), Section 20.9 (emphasis added).

of the BEA merely means that the budget authority is not "discretionary," that is, "provided in appropriation Acts."[13] This accounting classification does not alter CCC's considerable discretion in operating the programs, as explained in more detail in the U.S. answer to Question 257(d), and does not make the programs "mandatory" for purposes of a mandatory / discretionary analysis.

[13] 2 U.S.C. 900(7).