United States – Subsidies on Upland Cotton

(WT/DS267)

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

August 4, 2003

1. The United States has stayed within the disciplines and acted consistently with its WTO obligations negotiated and agreed in the Uruguay Round. We share many of Brazil's objectives with respect to reform of measures that affect agricultural trade, but we obviously do not endorse the means by which Brazil is attempting to obtain changes to WTO-consistent U.S. support measures for upland cotton. Brazil seeks to impose disciplines and achieve results through this litigation that were not agreed in the Uruguay Round through negotiation.

2. The United States has made requests for preliminary rulings that the Panel find that three sets of measures identified by Brazil are not within the Panel's terms of reference. These are: (1) export credit guarantee measures relating to eligible U.S. agricultural commodities other than U.S. upland cotton – these are measures which were not the subject of consultations, and which were not in fact consulted on; (2) production flexibility contract payments and market loss assistance payments – these measures are no longer in effect and had, in fact, terminated and been replaced by the 2002 Act before Brazil's consultation and panel requests; and (3) subsidies provided under the Agricultural Assistance Act of 2003 – these are measures that were not even in existence at the time of Brazil's panel request. As the measures were not and could not have been consulted upon, the United States requests that the Panel make preliminary rulings that none of these measures is within its terms of reference.

3. With respect to non-green-box domestic support measures, the relevant test under the proviso to Article 13(b)(ii) 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. The amount of support decided in 1992 was <u>***72.9 cents***</u> per pound of upland cotton production. The amount of support that current measures grant for the 2002 crop is only <u>***52 cents***</u> per pound. This reflects a deliberate choice by the United States to set payment rates to stay within the Peace Clause limit. Thus, all of the U.S. non-green box domestic support measures at issue in this dispute are exempt from actions based on Peace Clause-specified provisions.

4. Brazil suggests that whether a Member's measures are in breach of the Peace Clause should be judged by comparing the *aggregate outlays* that may be *attributed* to a commodity to the aggregate outlays that were made during the 1992 marketing year that, again, may be attributed to that commodity. Brazil's erroneous analysis stems from three interpretive missteps.

5. First, with respect to measures currently in effect, Brazil mistakenly suggests that support under previous measures in past years is relevant to the Peace Clause comparison. The proviso, however, is written in the present tense and thus, with respect to measures *currently* in effect, calls for a determination of the support that challenged measures *currently* grant. Brazil *nowhere* explains how the support in any previous years is relevant to the present-tense criterion that Peace Clause-exempted measures "do not grant support" in excess of a certain level. In fact, Brazil's analysis of the ordinary meaning and context of the phrase "grant support" assigns no meaning to Members' choice of verb tense.

6. Second, Brazil misunderstands the support that is relevant to the Peace Clause comparison because it misreads the phrase "support to a specific commodity." Brazil and New Zealand have asserted that, had Members intended for the phrase "support to a specific

commodity" to mean "product-specific support," they would have used the latter phrase. With respect, this pushes the general interpretive aid of reading different word choices to carry different meanings too far. It ignores the relevant task for an interpreter, which is to read the text according to its ordinary meaning, in context, and in light of the object and purpose of the agreement. The ordinary meaning of the phrase "support to a specific commodity," in the context of the Agriculture Agreement, is "product-specific support."

7. We note that the Agriculture Agreement suggests that domestic support consists, in part, of product-specific and non-product-specific support. Brazil's interpretation of "support to a specific commodity," however, would apparently also capture "non-product-specific support." Absent a clear indication that such a contrary-to-logic result was intended, the interpreter should read "support to a specific commodity" to exclude "non-product-specific support." We note that the Agriculture Agreement suggests that domestic support consists, in part, of product-specific support and non-product-specific support. Brazil's interpretation of "support to a specific commodity," however, would apparently also capture "non-product-specific support." Absent a clear indication that such a contrary-to-logic result was intended, the interpreter should read "support to a specific commodity" to exclude "non-product-specific support."

8. Third, Brazil ignores the way in which the United States "decided" (that is, "determined" or "pronounced") the product-specific support for upland cotton during the 1992 marketing year. As Brazil explained in its first submission, the Peace Clause text resulted from the EC's desire to protect from challenge measures "decided" in 1992 for purposes of CAP reform, rather than support "provided" during marketing year 1992. That is precisely the approach the United States suggests: examine the product-specific support "decided" during marketing year 1992 and compare it to the product-specific support that measures currently in effect grant. Brazil fails to explain to the Panel how U.S. measures *actually* decided support during the 1992 marketing year in favor of Brazil's pre-baked conclusion that the "term 'decided during the 1992 marketing year' requires an examination of the *amount or quantity of support* . . . for a specific commodity that a WTO Member 'decided' to provide during the 1992 marketing year." In fact, U.S. measures "decided" support in the 1992 marketing year by ensuring upland cotton producer income at a rate of 72.9 cents per pound. Brazil nowhere explains how U.S. domestic support measures could have "decided" the amount of outlays since those outlays resulted from the difference between the income support level and world prices during Marketing Year 1992 beyond the U.S. Government's control.

9. Brazil has argued that the U.S. approach would create an annual "statute of limitations" for the applicability of the Peace Clause and that the problem with this approach is budgetary outlays are not known until after a given marketing year is completed. This comment, rather, points out the difficulties of *Brazil's* approach that *only* budgetary outlays may be examined under the Peace Clause. That is, Brazil effectively concedes that under *its* approach there would be no certainty for Members whether measures are exempt from actions. For example, it would be difficult to know whether budgetary outlays under the 2002 Act exceeded 1992 outlays as of Brazil's panel request in February 2003.

10. With respect to U.S. direct payments, which the United States believes are "green box" measures, Brazil argues that these payments do not satisfy the "fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production" under the first sentence of paragraph 1 of Annex 2. However, the text of Annex 2 indicates that "domestic support measures" shall be deemed to have met this "fundamental requirement" if the measures "conform to the . . . basic criteria" of the second sentence, plus any applicable policy-specific criteria, by beginning the second sentence with "accordingly." This interpretation is supported by relevant context in the Agreement; as the European Communities notes in its third party submission, Articles 6.1, 7.1, and 7.2 refer to the measures "which are not subject to reduction commitments because they qualify under the *criteria* set out in Annex 2."

11. In addition to the basic criteria in paragraph 1, U.S. direct payments must also conform to the five "policy-specific criteria and conditions" set out in paragraph 6 of Annex 2. Brazil brings forward two arguments that direct payments do not satisfy the criterion under paragraph 6(b) of Annex 2 that the amount of payments not be related to, or based on, production undertaken in any year after the base period. First, Brazil argues that by eliminating or reducing payments if recipients harvest certain fruits or vegetables, payments are related to production in a year after the base period. However, no particular type of production is required in order to receive such payments – indeed, no production is necessary at all. Brazil's argument, moreover, proves too much. Under Brazil's analysis, *any* limitation on a producer's choices in a year after the base period that would alter the amount of payment would be inconsistent with paragraph 6(b). However, a requirement that a recipient of direct payments produce *nothing at all* (or see the payment reduced or eliminated) *would* link the amount of payment to the type or volume of production in the current year. Such a requirement would also *ensure* that such payments meet the "fundamental requirement that they have no, or at most minimal, trade-distorting effects or effects on production" because there would be no production at all. Thus, under Brazil's analysis, paragraph 6(b) would *prevent* a payment that would demonstrably achieve the "fundamental requirement" of Annex 2. This result is not required by the text of paragraph 6(b) and should be avoided.

12. Second, Brazil argues that direct payments are based on production in a year after the base period because once one type of direct payment to producers under Annex 2 has been made, *all* subsequent measures providing direct payments must be made with respect to the same base period. The Annex 2 text does not support such a reading, however. Annex 2 says that "[d]omestic support measures for which exemption from the reduction commitments is claimed" shall meet the fundamental requirement of the first sentence through the relevant basic and policy-specific criteria of the second sentence. For example, in the case of decoupled income support, the particular "domestic support measure" must meet "policy-specific criteria and conditions as set out" in paragraph 6. Paragraph 6(a), (b), (c), and (d) relate "such payments" to "a defined and fixed base period." Thus, payments with respect to a given "domestic support measure for which exemption from the reduction commitments is claimed" must satisfy conditions relating to "*a* defined and fixed base period." There is no textual requirement that *all*

domestic support measures for which exemption from the reduction commitments is claimed utilize the *same* "defined and fixed base period." Brazil also reads paragraph 6 as though the text were "*the* defined and fixed base period." However, this is not what the text says nor what the negotiators agreed.

13. Brazil and the rest of the Cairns Group seek to address this very issue by proposing in the ongoing agriculture negotiations that Annex 2, paragraph 6, be amended to change the reference from "a defined and fixed base period" to "a defined, fixed *and unchanging historical* base period." The revised Harbinson text, in Attachment 8, incorporates this Cairns Group proposal by proposing adding to paragraphs 5, 6, 11, and 13 of Annex 2 the text: "Payments shall be based on activities in a fixed and *unchanging historical* base period." Again, Brazil is seeking to gain through litigation what it has not yet gained through negotiation.

14. The Step 2 program has been constructed and implemented in a manner to support the price paid to U.S. upland cotton producers by purchasers of their product. Step 2 is a single program that provides for payments on all sales of all upland cotton produced in the United States in a given marketing year – whether those sales are for export or for domestic consumption. Step 2 payments are provided to merchandisers or manufacturers who use upland cotton as they represent the first step in the marketing chain where these payments could be made and have the greatest impact on producer prices.

15. The authorizing statute plainly does not state that the Step 2 payment is contingent upon export. The statute provides for Step 2 payments to a class of eligible users who constitute the entire universe of potential purchasers of upland cotton from producers. Payment occurs upon demonstration of the requisite use of the cotton. Unlike the facts of *United States - FSC (Recourse to Article 21.5)* , the Step 2 subsidy involves a universally available subsidy on sales of one agricultural product produced entirely in the United States, not tied to exportation or foreign commerce. Stated most simply, U.S. upland cotton does *not* have to be exported to receive the payment. Assuming the conditions in the payment formula are met, all U.S. upland cotton is sold with an entitlement to the Step 2 subsidy, whether it leaves the United States or is consumed there.

16. For nearly 15 years before the inception of obligations under the Agreement on Agriculture, as well as since that time, the core features of the two main agricultural export credit guarantee programs of the United States (GSM-102 and GSM-103) have remained substantially the same. They are well-known and well-established export credit guarantee programs, specifically discussed by negotiators during the Uruguay Round, as well as in the OECD and in the current Doha Round.

17. Article 9.1 of the Agriculture Agreement identifies and lists specific export subsidy programs, also well-known to the negotiators, who wanted to assure that such specific practices were embraced within the definition of an export subsidy for purposes of the Agreement on Agriculture. Other export subsidies are captured within the anti-circumvention provision of

Article 10.1. In contrast, export credit guarantees were not included in either Article 9.1 or 10.1. Instead, as part of the balance struck in the Uruguay Round, negotiators opted to extend the negotiations on this subject but determined to hold Members to a commitment that if and when internationally agreed disciplines emerged, the United States, like all other WTO Members, could only grant export credit guarantees in conformity with such disciplines. To do otherwise would at that time constitute a violation of the Member's obligations under the Agreement on Agriculture.

18. Article 10.2 expresses the two commitments of the Members in this regard: (1) to engage in such negotiations notwithstanding the conclusion of the Uruguay Round and (2) upon development of internationally agreed disciplines to render them WTO commitments through the portal of Article 10.2. Article 10.2 does not state that export credit guarantees shall be subject to such future negotiated disciplines *in addition to* the anti-circumvention provisions of Article 10.1. To the contrary, Article 10.2 and the reference to export credit guarantees is juxtaposed to Article 10.1 to reflect the intention of the drafters to distinguish export credit guarantee programs from other programs that otherwise would be export subsidies subject to Article 10.1.

19. For the foregoing reasons and those set out in our first written submission, the United States believes that U.S. non-green box measures are exempt from actions pursuant to Agriculture Agreement Article 13(b)(ii); U.S. direct payments are exempt from actions pursuant to Agriculture Agreement Article 13(a)(ii); and U.S. export credit guarantee programs for upland cotton and Step 2 payments are consistent with our WTO obligations.