United States – Subsidies on Upland Cotton

(WT/DS267)

Comments of the United States of America
to the February 11, 2004, Answers of Brazil to
Panel Question 276

February 18, 2004

Question 276. "The Panel notes the parties' responses and comments relating to Question No. 252 concerning the time period within which any prohibited measure must be withdrawn within the meaning of Article 4.7 of the SCM Agreement. Please supplement your original response, taking into account the particular nature of each alleged prohibited subsidy measure (i.e. "Step 2" payments under Section 1207(a) of the 2002 FSRI Act, export credit guarantee programmes and the ETI Act) and the functioning of the US legal and regulatory system in respect of these measures."

1. The United States appreciates this opportunity to comment on the response of Brazil to Panel question 276, posed on February 3, 2004. As an initial matter, the United States notes that the question poses a hypothetical situation: that any of the measures at issue in this dispute might be found to be a prohibited subsidy. The United States of course has explained that Brazil has not shown that any of the measures at issue is a prohibited subsidy. That being said, the United States offers the following comments on Brazil's response.

2. Of note, in its response Brazil has recognized that its previous answer to Question 252 from the Panel was inadequate. In full, that answer provided: "Brazil suggests that the Panel follow the precedent of all previous WTO panels that made findings of prohibited subsidies and specify that the measure must be withdrawn within 90 days."[1] Brazil has now revised – from 90 days to six months – its recommendation to the Panel of the time period that would constitute withdrawing "without delay" subsidies allegedly provided by the export credit guarantee programs. However, Brazil's response sets out a faulty analysis of the meaning of "without delay" in Article 4.7 as applied in previous reports and therefore identifies what would be inappropriately short time periods for withdrawal of the measures at issue if they were prohibited subsidies, which they are not.

3. Article 4.7 of the *Agreement on Subsidies and Countervailing Measures* ("Subsidies Agreement") establishes that "[i]f the measure in question is found to be a prohibited subsidy, the panel shall recommend that the subsidizing Member withdraw the subsidy without delay. In this regard, the panel shall specify in its recommendation the time-period within which the measure must be withdrawn." The Agreement does not further define "without delay," although Brazil concedes that the "text [of Article 4.7] does not state 'immediately.'"[2]

4. Past panels have dealt with the meaning of the term "without delay," and have concluded that this involves an examination of the nature of the changes to be effected and the domestic legal process involved. For example, in *Canada – Certain Measures Affecting the Automotive Industry*, the panel found that "in examining what time-period would represent withdrawal 'without delay' in a particular case, we consider that we may take into account the nature of the steps necessary to withdraw the prohibited subsidy."[3] Similarly, in *Australia – Subsidies*

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[1] Brazil's Answer to Question 252 from the Panel, para. 167 (22 December 2003) (footnotes omitted).

[2] Brazil's Answer to Question 276 from the Panel, para. 2.

[3] WT/DS139/R, WT/DS142/R, paras. 11.6-11.7 (adopted as modified June 19, 2000) (italics added).

Provided to Producers and Exporters of Automotive Leather,[4] the panel found that "the nature of the measures and issues regarding implementation might be relevant" to the time period for withdrawal of the subsidies."[5]

5. The analysis by these panels is similar to that undertaken by arbitrators under Article 21.3 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") in considering the period of time for a Member to implement DSB recommendations and rulings. There, arbitrators have also considered that Article 21.3 calls for an analysis of the nature of the changes to be effected and "the shortest period possible within the legal system of the Member to implement the recommendations and rulings of the DSB."[6] Thus, in practical terms, the "reasonable period of time" standard of DSU Article 21.3 has been interpreted to mean something akin to without "delay" ("procrastination; lingering; putting off"[7]).

6. DSU Article 21.3 is part of the context of Article 4.7. Brazil attempts to distinguish Article 4.7 of the Subsidies Agreement from Article 21.3 of the DSU.[8] However, Brazil argues that a key difference is that Article 21.3 uses the term "reasonable." Brazil thus appears to argue that under Article 4.7 any time period specified should not be reasonable. The United States agrees that there are differences between Article 4.7 of the Subsidies Agreement and Article 21.3 of the DSU. But those differences do not amount to a requirement that panels require unreasonable actions. Rather, one key difference is that DSU Article 21.3(c) provides arbitrators with a "guideline" that the "reasonable period of time" to implement panel or Appellate Body recommendations "should not exceed 15 months from the date of adoption of a panel or Appellate Body report" whereas Article 4.7 does not.[9]

7. In the current dispute, the measures at issue all involve legislation and any change would require legislative action. Brazil has proposed that withdrawal "without delay" should be considered to mean withdrawal within 90 days for allegedly prohibited subsidies under the Step 2 program and the ETI Act and withdrawal within 6 months for alleged export subsidies under the export credit guarantee programs. However, Brazil's proposed time periods are not supported by

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[4] WT/DS126/R, paras. 10.4-10.7 (adopted June 16, 1999).

[5] *See also* the panel reports in the *Aircraft* disputes between Canada and Brazil, in which the panels took into account the nature of the measures and the procedures which may be required to implement the panels' recommendations.

[6] Report of the Arbitrator, *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217/14, WT/DS234/22, para. 42 (13 June 2003) (quotation marks and footnote omitted) (citing 3 previous reports of arbitrators).

[7] *The New Shorter Oxford English Dictionary*, vol. 1, at 623 (1993 ed.).

[8] Brazil's response to Question 276, para. 2.

[9] In the earliest arbitrations under Article 21.3(c), arbitrators viewed the guideline as meaning that each party bore the burden of proof that the reasonable period of time should depart from the 15 months period, which would be a significant difference from Article 4.7. That approach has now evolved into the practice described above of the shortest possible period of time within the legal system of the Member to implement the recommendations and rulings of the DSB.

considerations relating to the nature of the measures at issue nor the U.S. legislative process that would be necessary to effect changes to those measures.

8. Specifically, Brazil concedes that statutory changes would be necessary to withdraw the allegedly prohibited subsidies at issue in this dispute.[10] However, the panel reports Brazil cites as support for the proposition that "without delay" generally means 90 days dealt with subsidies that required *only executive or administrative action* to withdraw:[11]

> • In *Canada – Certain Measures Affecting the Automotive Industry*, the panel found: "we note that the [challenged measures] are both Orders-in-Council, and as such are *acts of the executive, and not the legislative branch* of government. *The amendment of an act of the executive branch can normally be effectuated more quickly than would be the case if legislative action were required*."[12] The report further notes that "in those disputes involving a prohibited subsidy in which legislative action was not required, panels have specified a time-period of 90 days."[13]
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> • In *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*,[14] taking into account that the dispute involved payments made under a grant contract between the Australian Government and a private company, the panel recommended that the measures be withdrawn within 90 days.
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> • In *Canada – Export Credits and Loan Guarantees for Regional Aircraft*,[15] involving executive action concerning financing provided by Canada for particular transactions, the panel found that "Canada should withdraw the export subsidies within 90 days ("without delay").
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> • In *Brazil – Export Financing Programme for Aircraft*, with respect to payments under the interest rate equalization component of PROEX,[16] the panel report found that, "taking

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[10] Brazil's Answer to Question 276 from the Panel, para. 10 (11 February 2004) (eliminating Step 2 "simply requires the repeal of Section 1207(a) of the 2002 FSRI Act); *id.*, para. 11 (for export credit guarantee programs, "the prohibited subsidies must be withdrawn by enacting the necessary changes to the statutes and regulations providing for GSM102, GSM 103, and SCGP"); *id.*, para. 12 (90 days "represents an appropriate period of time . . . to withdraw the ETI Act").

[11] Brazil's Answer to Question 276 from the Panel, para. 10 n.15.

[12] WT/DS139/R, WT/DS142/R, paras. 11.6-11.7 (adopted as modified June 19, 2000) (italics added).

[13] *Id.*, para. 11.7 n. 910 (citing panel reports in *Australia – Leather*, *Brazil – Aircraft*, and *Canada – Aircraft*).

[14] WT/DS126/R, paras. 10.4-10.7 (adopted June 16, 1999).

[15] WT/DS222/R, paras. 8.1-8.4 (adopted February 19, 2002).

[16] PROEX was being maintained by provisional measures issued by the Brazilian Government on an monthly basis, and the financing terms for which interest rate equalization payments were made were set by Ministerial Decrees. WT/DS46/R, paras. 2.1, 2.3 (adopted August 20, 1999).

> into account the nature of the measures and the procedures which may be required to implement our recommendation," Brazil should withdraw the measures within 90 days.[17]
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> • In *Canada – Measures Affecting the Export of Civilian Aircraft*,[18] with respect to certain executive action concerning financing and funds provided to the Canadian civil aircraft industry, the panel report found that, "[t]aking into account the procedures that may be required to implement our recommendation," Canada should withdraw the measures within 90 days.

Thus, in every panel report in which the "without delay" time period has been set as 90 days, only executive action (and not statutory amendment) has been necessary. Thus, these reports offer little guidance to the Panel, other than to indicate that 90 days would *not* be an adequate time period, given that Brazil recognizes that legislation would be required to modify the measures in dispute.

9. Brazil notes, almost in passing, that "[t]here is only one precedent applying the Article 4.7 'without delay' provision to prohibited subsidy measures requiring legislative changes"[19]: the panel report in *United States – FSC*.[20] However, Brazil fails to quote or discuss that panel report's discussion of the "without delay" language, which would seem to be particularly relevant given that Brazil has challenged the ETI Act – the successor to the FSC program – in this dispute. Brazil erroneously cites this report as supporting the proposition that "without delay" generally means withdrawal within 90 days,[21] but there is no discussion of a 90-day period in the report.

10. Upon finding that the FSC scheme provided export subsidies inconsistent with Article 3.1(a) of the Subsidies Agreement, the *FSC* panel first recommended, "pursuant to Article 4.7 of that Agreement, that the DSB request the United States to withdraw the FSC subsidies without delay."[22] The panel examined what should be its recommendation with respect to the time-period within which the measure must be withdrawn. The panel noted that the time period specified "must be consistent with the requirement that the subsidy be withdrawn 'without delay.'" The panel then went on to find, and recommend:

> Given that the implementation of the Panel's recommendation will require legislative action (a fact recognized by the European Communities), that the United States fiscal year 2000 starts on 1 October 1999, and that this report is not

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[17] *Id.*, paras. 8.2-8.5.

[18] WT/DS70/R, paras. 10.3-10.4 (adopted as modified August 20, 1999).

[19] Brazil's Answer to Question 276 from the Panel, para. 5 (11 February 2004).

[20] Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/R (adopted March 20, 2000) ("*United States – FSC*").

[21] Brazil's Answer to Question 276 from the Panel, para. 10 n.15 (11 February 2004).

[22] *United States – FSC*, WT/DS108/R, para. 8.3.

> scheduled for circulation to Members until September 1999 (and, if appealed, might not be adopted until as late as early spring 2000), it is not in our view a practical possibility that the United States could be in a position to take the necessary legislative action by 1 October 1999. That being so, and acting in good faith, there is no way that this could be described as a 'delay.' However, this objective timing constraint would not be present with effect from the following fiscal year (2001), which commences on 1 October 2000. As this would be the first practicable date by which the United States could implement our recommendation, it satisfies the 'without delay' standard found in Article 4.7. Accordingly, we specify that FSC subsidies must be withdrawn at the latest with effect from 1 October 2000.[23]

Brazil recognizes that statutory changes would be necessary to modify the measures at issue in this dispute. However, Brazil fails to discuss the various considerations identified by the *FSC* panel report, such as the potential date of circulation of the Panel's report and the effect of appeal on the timing of adoption. Neither does Brazil discuss whether there would be a "practical possibility" of legislative action within its suggested time periods.

11. With respect to the potential date of circulation, the Panel's current schedule provides for the final report to be issued to the parties on May 19. Circulation to all Members would be upon translation into the official WTO languages. Conservatively assuming one month for completion of translation of what may be a very lengthy panel report, the report would be circulated in mid-June. Panel reports may not be considered for adoption until 20 days after they have been circulated to all Members[24] – approximately early July. If the Panel report is appealed, the Appellate Body report will likely be issued 90 days from the notice of appeal[25] – approximately early October. The Appellate Body report would be adopted (unless the DSB decides by consensus not to adopt it) within 30 days of circulation[26] – approximately early November.

12. The current U.S. Congress is scheduled to adjourn on October 1, 2004. Accordingly, no legislative action would be possible until after the new Congress convenes in 2005 and organizes itself. The United States has previously stated that, in the event of a prohibited subsidy finding, it should be given until the end of "this year" to complete the legislative process. However, given the probable time line for this dispute noted above, that is not a possibility.

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[23] *United States – FSC*, WT/DS108/R, para. 8.8.

[24] DSU Article 16.1.

[25] See *Statistical Information on Recourse to WTO Dispute Settlement Procedures: Background Note by the Secretariat*, Job(03)/225, circulated 11 December 2003, Section IV.B and Table 8.

[26] DSU Article 17.14.

13. Once the new Congress convenes and organizes (a process that we would not expect to be completed before mid-February), any legislation would then need to proceed through the legislative process. In the United States, this involves the following.[27]

The U.S. Legislative Process

14. Under the United States system of constitutional government, any changes to a federal statute must be enacted by the U.S. Congress, which sets its own procedures and timetable. The Executive branch of the U.S. Government has no control over these procedures and timetable. Securing the enactment of legislation in the U.S. Congress is a complex and lengthy process. Moreover, only a small fraction of the thousands of bills introduced in each Congress ever become law. This indicates that the process of obtaining the votes necessary to enact legislation is difficult and time-consuming. Viewed in this light, there is no "practical possibility" that this process will take, as Brazil suggests, 3 months for the Step 2 program and ETI Act and 6 months (including time for administrative action) for the export credit guarantee programs.

15. The power to legislate is vested in the United States Congress, which has two chambers, the House of Representatives and the Senate. Both chambers must approve all legislation in identical form, before it is sent to the President of the United States for signature or other action. Only after presidential approval does proposed legislation become law. Proposed legislation that will become public law usually takes the form of a "bill". From the time that a bill is introduced in Congress to the time that it is approved by both chambers, it will have passed through at least ten steps. These ten steps include: (1) the bill is introduced in the House of Representatives or the Senate by a member of Congress; (2) the bill is referred to a standing committee or committees having jurisdiction over the subject matter of the bills, which may also refer the proposed legislation to various subcommittees; (3) the merits of the bill are considered by a subcommittee, which may include public hearings; (4) when hearings are completed, the subcommittee meets to "mark-up" the bill (make changes and amendments) prior to deciding whether to recommend (or "report") the bill to the full committee; (5) the full committee (considering the subcommittee's report) may conduct further study and hearings and then votes whether to report the bill, either as originally introduced without amendment, or as revised, to the full House; (6) the House considers the bill on its merits and, after voting on amendments, the House immediately votes on the bill itself with any adopted amendments; (7) if the bill is passed, the bill must be referred to the Senate, which, following its own legislative process and consideration, may approve the bill as received, reject it, ignore it, or change it; (8) if the Senate amends the bill or passes its own similar but not identical legislation, a conference committee is organized to reconcile differences between the House and Senate versions; (9) if the committee reaches agreement on a single bill, a "conference report" must be approved by both chambers, in

[27] A more detailed description of the U.S. legislative process may be found in paragraphs 21-35 of the Submission of the United States in the Arbitration under Article 21.3(c) of the DSU in the dispute *United States – Continued Dumping and Subsidy Offset Act of 2000*, WT/DS217 & 234 (April 13, 2003) (available at http://www.ustr.gov/enforcement/briefs.shtml).

identical form, or the revised legislation dies; and (10) after the bill proposed by the conference committee is approved by both chambers, it is sent to the President for approval. Most bills that are introduced do not survive this process to become law, and those that do are likely to have been significantly amended along the way.

16. In addition, Brazil has recognized that a finding that the programs are prohibited export subsidies would necessarily require "changes to the statutes and regulations" providing for the programs.[28] The regulatory changes could not be made until after the legislative changes are finalized. Thus, the time period that would constitute withdrawal "without delay" would have to allow for both legislative and regulatory changes.

17. No panel report considering Article 4.7 has ever awarded a period of less than three months. Moreover, panels have found that "[t]he amendment of an act of the executive branch can normally be effectuated more quickly than would be the case if legislative action were required."[29]

18. Indeed, in a recent arbitration under DSU Article 21.3(c) in a dispute where compliance by the United States involved both legislative and regulatory action, the arbitrator concluded that 15 months was the reasonable period of time for implementation.[30]

19. In light of the foregoing considerations, under the hypothetical situation that any of the measures at issue would be a prohibited subsidy, the United States suggests that a panel recommendation that the measure be withdrawn 15 months after adoption of the DSB recommendations and rulings would be "without delay" in the circumstances of this dispute.

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[28] Brazil's Answer to Question 276 from the Panel, para. 11.

[29] *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/R, WT/DS142/R, paras. 11.6-11.7.

[30] Award of the Arbitrator, *United States – Anti-dumping Measures on Certain Hot-rolled Steel Products from Japan: Arbitration under Article 21.3(c) of the DSU*, WT/DS184/13, circulated 19 February 2002.