United States – Subsidies on Upland Cotton

(WT/DS267)

Closing Statement of the United States of America at the Second Meeting of the Panel with the Parties

December 3, 2003

1. Thank you, Mr. Chairman and members of the Panel. Given the extensive evidence and arguments presented by the United States in its previous submissions and statements in this dispute, we make just a few concluding remarks.

I. CCC Export Credit Guarantee Programs Issues

A. Brazil Wrongly Minimizes the Significance of Article 10.2 of the Agreement on Agriculture

2. Brazil's assertions in its oral statement yesterday regarding the CCC export credit guarantee programs invite a brief response today.

3. First, as discussed in the colloquy following Mr. Moulis's question today, Brazil asserts that Article 10.2 of the Agreement on Agriculture reflects merely a banal compromise to accommodate potential "additional obligations regarding notification, consultation, and information exchange."[1] Brazil implausibly asserts that the obvious transition between the language of the Draft Final Act that would have imposed significant substantive disciplines on export credit guarantees and the absence of such language in the Article 10.2 ultimately adopted can be fully explained as reflecting merely an agreement to work on such pedestrian disciplines as information exchange.

4. Brazil asserts that the Members had agreed on the applicability of export subsidy disciplines to export credit guarantees and that Article 10.2 was an apparently insignificant "good faith agreement." However, Article 10.2 did not arise only because "other participants were not willing to offer more than general disciplines included in Article 10.1." It arose because part of the grand compromise of the Agreement on Agriculture was that export credit guarantees were excluded from the export subsidy disciplines.

5. Ironically, however, Brazil's statement further serves to illustrate that export credit guarantees were *not* considered export subsidies under the Agreement on Agriculture. In

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[1] Statement of Brazil - Second Panel Meeting (2 December 2003), para. 74.

December, 1994, the Preparatory Committee for the World Trade Organization issued *Notification Requirements and Formats Under the WTO Agreement on Agriculture.*[2] These notification requirements remain in effect. Elaborate reporting requirements are set forth for Members with respect to numerous aspects of the disciplines of the agreement, including with respect to export subsidies.[3] However, no reporting requirement is indicated for export credit guarantees. This is consistent with treatment of such programs as outside export subsidy disciplines. Had the parties agreed that all were "willing to offer" at least "the general disciplines included in Article 10.1"[4] then it would have been logical to include reporting requirements for such purposes. It is hard to imagine parties willing to make such an offer in the absence of the United States, among the largest providers of export credit guarantees. In fact, the United States never offered to include export credit guarantees in Article 10.1, and the Members never so agreed. Indeed, the agreement reflected in Article 10.2 is expressly to the contrary.

6. Article 10.2, furthermore, would be unnecessary for mere "notification, consultation, and information exchange." Had export credit guarantees been subject to export subsidy disciplines, Article 18 of the Agreement on Agriculture, to review the progress in the implementation of commitments negotiated under the Uruguay Round reform program, and the Notification Requirements, which are still in effect, could amply accommodate any "notification, consultation, and information exchange."[5]

B. Brazil Invents a Standard Not Required under Article 10.3 of the Agreement on Agriculture

7. Second, with respect to Article 10.3 of the Agreement on Agriculture, Brazil asserts that the only way for the United States to satisfy any burden applicable under that provision is "to demonstrate the absence of subsidization on a transaction-by-transaction basis."[6] Such a

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[2] PC/IPL/12, circulated 2 December 1994 (exhibit US-99).
[3] See, e.g., Exhibit US-99, paras. 1(c), 1(e), 1(i), 2; Table ES:1 and Supporting Tables ES:1 and ES:2.
[4] Statement of Brazil - Second Panel Meeting (2 December 2003), para. 74.
[5] See, e.g., Article 18.5, 18.6, and 18.7.
[6] Statement of Brazil - Second Panel Meeting (2 December 2003), para. 78.

standard would obviously be impossible to satisfy. Perhaps more importantly, Article 10.3 requires no such demonstration. Brazil is simply making this up. The only authority it offers for this novel proposition is a Third Party Submission of Canada, which itself offers no authority for the assertion.

8. Article 10.3 applies only to export subsidy *reduction* commitments. We believe that Brazil agrees at least with that. Brazil has alleged that the United States has exceeded only its quantitative export subsidy reduction commitments and only during the period July 2001-June 2002. The United States has demonstrated that with respect to 12 of the 13 commodities for which the United States has reduction commitments the respective exports during that period under the export credit guarantee program did not exceed applicable quantitative reduction commitments. Other than the Dairy Export Incentive Program applicable to cheese and skim milk powder, with respect to which the United States previously noted in a prior submission[7] the issuance of export subsidies, the United States provided no export subsidies for the other scheduled commodities. To avoid any further ambiguity the United States submits a copy of its notification concerning export subsidy commitments for fiscal year 2001, which reflects no export subsidies provided by the United States other than for cheese and skim milk powder.[8]

C. Brazil's Recent Statements Concerning the Correct Analysis under Item(j) are Inconsistent and Incorrect

9. Third, with respect to item (j) Brazil directly acknowledges its view that the relevant period of time for examination is 10 years.[9] Yet Brazil disingenuously urges the Panel to examine allegedly "uncollectible amounts" on pre-1992 guarantees, and defaults of Iraq and Poland, which commenced in 1990 and the 1980's, respectively.[10]

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[7] Further Rebuttal Submission (18 November 2003), fn. 150.
[8] *Notification*, G/AG/N/USA/47, circulated 6 June 2003 (exhibit US-100).
[9] Statement of Brazil - Second Panel Meeting (2 December 2003), para. 81.
[10] Statement of Brazil - Second Panel Meeting (2 December 2003), para. 84.

10. Brazil also mysteriously alleges that "according to CCC's 2002 financial statements, CCC has been relieved of what the United States argues are onerous government-wide accounting rules that 'compel' projection of enormous losses."[11] CCC, however, has never been so "relieved." It remains compelled to adhere to the requirements of the federal Credit Reform Act of 1990, and relevant provisions of the Office of Management and Budget Circular A-11, implementing that legislation. CCC remains subject to government-wide requirements for subsidy estimates and the risk categories mandated by OMB with respect to exposure to debt from different countries. The government-wide rules continue to dictate the methodology for calculation of estimates, and reestimates, and as the United States has previously noted, a principal reason for overly high initial estimates is continuously overly optimistic projections of program use. Also, as the United States has previously noted, the result of the estimate (and reestimate) process is simply carried forward to the CCC financial statements; Brazil continues to misrepresent the $411 million figure in the 2002 financial statement as well as to mistakenly assert the inclusion of "enormous uncollectible amounts . . . on post-1991 guarantees."

D. Brazil Continues to Wrongly Assert that the Issuance of CCC Export Credit Guarantees is Unbounded

11. Fourth, with respect to Brazil's circumvention arguments, Brazil continues to insist that notwithstanding the myriad programmatic impediments to issuance of guarantees the export credit guarantee programs are a runaway train, beyond the ability of CCC to "stem or otherwise control the flow of" CCC export credit guarantees. With respect, this is simply not so.

12. Similarly, in its oral statement, Brazil has increased the supposed annual mandatory minimum dollar amount of guarantees to $6.5 billion from $5.5 billion.[12] As the United States has previously observed, CCC has never remotely approached issuing any such fancifully large amount of export credit guarantees.[13]

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[11] Statement of Brazil - Second Panel Meeting (2 December 2003), para. 83.

[12] *Compare* Statement of Brazil - Second Panel Meeting (2 December 2003), para. 91, *with* Answer of Brazil to Panel Question 142 (October 27, 1993) paras. 95, 100.

[13] U.S. Further Rebuttal Submission (November 18, 2003), para. 201.

II. Actionable Subsidy Issues

13. We have reviewed Brazil's evidence and arguments underlying Brazil's actionable subsidy claims and found them lacking. I will not repeat our criticisms of fundamental errors in Brazil's legal interpretations. I do note that the evidence on the record does *not* demonstrate that U.S. producers are unresponsive to market price signals, does *not* demonstrate significant price suppression in *any* "same market," does *not* demonstrate an increase in world market share, and does *not* demonstrate a threat of serious prejudice. My comments today go principally to the consistency, or lack thereof in Brazil's arguments.

A. Brazil Has Failed to Establish All of the Elements Necessary to Establish Its Subsidies Claims

14. Consider the fundamental issue of identifying the subsidized product and the subsidy.

1. Brazil has not identified which products benefit from the subsidy

15. If Brazil cannot distinguish the benefit to cotton provided by a subsidy from the benefit to other products – that is, attribute the subsidy to the recipient's production – then it will lead to double-counting of the subsidy benefit. Recall the example we provided in the opening statement with respect to soybeans and cotton. If a producer grows both soybeans and cotton and receives a $1 payment not tied to production of any crop, according to Brazil's approach, the *entire* $1 payment is attributed to and support for upland cotton. However, were Brazil to bring a dispute settlement proceeding against U.S. support for soybeans (as was reported almost occurred roughly two years ago), under Brazil's approach, the entire $1 payment would *also* be support for soybeans. The same $1 payment cannot provide both $1 in benefit to cotton and $1 in benefit to soybeans – that's double-counting. Therefore, the payment must be attributed across the value of the recipient's production. As noted in our further rebuttal submission Brazil *would* attribute the value of the payment across all of a recipient's production for countervailing duty purposes.

2. Brazil has not quantified the subsidy benefit attributable to upland cotton

16. If Brazil cannot properly quantify the amount of subsidy benefit to upland cotton producers, how can the Panel analyze the effect of the subsidy? Brazil cannot both claim that it need not quantify the benefit and at the same time argue that the subsidies provide $12.9 billion in aggregate support.

17. Similarly, if Brazil cannot properly identify the level of subsidization of the exported product, the Panel's analysis will be impacted. Again, Brazil cannot claim that it need not identify the subsidization rate and at the same time claim a 95 percent subsidization rate over the 1999-2002 marketing year period.

3. Brazil has not expensed the recurring payments at issue, contrary to its countervailing duty practice and inconsistent with its arguments in this dispute

18. Finally, Brazil cannot both expense the *entire* amount of these subsidies it admits are "recurring" to the year for which the payment was received (for example, marketing year 1999) and *also* claim that the subsidy continues to exist in a later year in which *new* recurring subsidies are made (for example, marketing year 2002). That is, if the subsidy continues to exist in a later year, it *must* have been allocated to future production. Indeed, Brazil would expense these recurring payments for purposes of countervailing duties.

19. The Panel must demand consistency from Brazil. It is not enough for Brazil to say that those concepts are for countervailing duty purposes, not for serious prejudice purposes. We were not aware that the concept and definition of "subsidy" as used in Part III and Part V of the Subsidies Agreement were intended to have different meanings. In fact, there is nothing in the Subsidies Agreement to suggest that they should mean different things.

20. Brazil not only rejects the Subsidies Agreement Annex IV methodology with respect to these issues, and not only rejects its *own* countervailing duty methodology, but does not provide

any rational method of approaching these issues. Brazil's approach results in dramatically inflated quantities of support and dramatically inflated levels of subsidization. The Panel should reject Brazil's unprincipled approach to subsidy identification issues.

B. Brazil's Approach to Its Serious Prejudice Claims and the Peace Clause Must Be Consistent

21. Similarly, as indicated in the U.S. opening statement, the Panel must demand consistency from Brazil between its arguments for purposes of serious prejudice and the Peace Clause.

22. Brazil cannot rely on the *rate* of support in U.S. law and regulations for purposes of its threat and *per se* claims and *deny* their relevancy to the Panel's Peace Clause analysis.

23. With respect to decoupled payments (such as direct payments), Brazil cannot attribute part of a decoupled payment to upland cotton producers and part to non-producers, and *simultaneously* claim that such decoupled payments are *not* non-product-specific support. They *are* non-product-specific support because they are (in the language of Article 1(a) of the Agreement on Agriculture) "support provided to agricultural producers in general" and because they are *not* (in the language of Article 1(a)) "support provided *for an agricultural product* in favor of the producers of an agricultural product." That is, Brazil has acknowledged that some recipients of, for example, direct payments are not producers of upland cotton; they are "producers in general." Under the Agreement on Agriculture, support (such as direct payments) cannot at the same time be both product-specific support and non-product-specific support. Thus, these payments would not form part of the Peace Clause analysis.

24. It is clear that, under Brazil's approach, there can be no non-product-specific support for purposes of the Peace Clause. This results because a subsidy payment can always be traced to a final recipient and then can always be attributed to whatever products he produces. One problem with this result is that a Member can then have no certainty that it will be in compliance with the Peace Clause in any given year.

25. Consider a hypothetical: under Brazil's outlay approach to the Peace Clause, if a Member gave only decoupled support to producers, but in a given year all the recipients of the payment decided *only* to produce one commodity, the support (outlays) attributed to that commodity in that year could exceed the 1992 support level. But that would purely be a function of the recipients' decisions, not the decision of the United States. Brazil's approach therefore would rob Members of the ability to decide their support in a way to ensure conformity with Peace Clause requirements, and it must be rejected.

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26. Mr. Chairman, we thank you and the other members of the Panel and the Secretariat for your time and efforts in this dispute. We look forward to answering your written questions.