

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 18 October 2004, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel on *United States – Subsidies on Upland Cotton* (WT/DS267/R) and certain legal interpretations developed by the Panel in this dispute.

1. The United States seeks review by the Appellate Body of the Panel's legal conclusion that certain U.S. decoupled income support measures – that is, production flexibility contract payments under the Federal Agricultural Improvement and Reform Act of 1996 ("1996 Act"), direct payments under the Farm Security and Rural Investment Act of 2002 ("2002 Act"), and "the legislative and regulatory provisions which establish and maintain the [direct payments] programme" – are not exempt from actions under Article 13(a) of the *Agreement on Agriculture*.¹ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, that these decoupled income support measures do not conform to Annex 2.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that certain U.S. domestic support measures² are not exempt from actions under Article 13(b) of the *Agreement on Agriculture*.³ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that the challenged U.S. measures granted support to a specific commodity in excess of that decided in marketing year 1992 and therefore breached the proviso of Article 13(b) in each year from marketing year 1999-2002.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of unscheduled agricultural products supported under the programs and one scheduled commodity (rice) are "export subsidies applied in a manner which results in circumvention of United States export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on*

¹See, e.g., Panel Report, paras. 8.1(b), 7.337-7.414.

²See Panel Report, para. 7.337.

³See, e.g., Panel Report, paras. 8.1(c), 7.415-7.647.

Agriculture," are therefore inconsistent with Article 8 of the *Agreement on Agriculture*, and are not exempt from actions under Article 13(c) of the *Agreement on Agriculture*.⁴ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings, include, for example, the Panel's finding that export credit guarantees, notwithstanding Article 10.2 of the *Agreement on Agriculture*, constitute measures subject to Article 10.1 of the *Agreement on Agriculture*.

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of other scheduled agricultural products constitute export subsidies within the meaning of Article 10.1 of the *Agreement on Agriculture*.⁵ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings, include, for example, the Panel's finding that export credit guarantees, notwithstanding Article 10.2 of the *Agreement on Agriculture*, constitute measures subject to Article 10.1 of the *Agreement on Agriculture*.

5. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of unscheduled agricultural products supported under the programs and one scheduled commodity (rice) are *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").⁶ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that the program for each product constitutes an export subsidy for purposes of the WTO Agreements and is provided by the United States at premium rates which are inadequate to cover long-term operating costs and losses of the programs within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement.

6. The United States seeks review by the Appellate Body of the Panel's legal conclusion that section 1207(a) of the 2002 Act, which provides for user marketing (Step 2) payments to exporters of upland cotton, is an export subsidy that is listed in Article 9.1(a) of the *Agreement on Agriculture* that is inconsistent with U.S. obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, is not exempt from actions under Article 13(c) of the *Agreement on Agriculture*, and is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.⁷ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that payments under the user marketing (Step 2) program are contingent on export performance.

7. The United States seeks review by the Appellate Body of the Panel's legal conclusion that section 1207(a) of the 2002 Act providing for user marketing (Step 2) payments to domestic users of upland cotton is an import substitution subsidy prohibited under Articles 3.1(b) and 3.2 of the *Agreement on Subsidies and Countervailing Measures*.⁸ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that domestic support payments that are consistent with a Member's domestic support reduction commitments under the *Agreement on Agriculture* may nonetheless be prohibited under the SCM Agreement.

⁴See, e.g., Panel Report, paras. 8.1(d)(1), 7.762-7.945.

⁵See, e.g., Panel Report, paras. 8.1(d)(2), 7.762-7.945.

⁶See, e.g., Panel Report, paras. 8.1(d)(1), 7.787-7.869, 7.946-7.948.

⁷See, e.g., Panel Report, paras. 7.678-7.761, 8.1(e).

⁸See, e.g., Panel Report, paras. 7.1018-7.1098, 8.1(f).

8. The United States seeks review by the Appellate Body of the Panel's legal conclusion that "the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan programme payments, user marketing (Step 2) payments and MLA payments and CCP payments – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of Articles 6.3(c) and 5(c)" of the SCM Agreement.⁹ This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the following:

- (a) the Panel's finding that Brazil need not demonstrate, and the Panel need not find, the amount of the challenged subsidy that benefits the subsidized product, upland cotton;
- (b) the Panel's finding that subsidies not directly tied to current production of upland cotton (decoupled payments) need not be allocated to all products produced and sold by the firms receiving such subsidies;
- (c) that the Panel could make findings concerning subsidies that no longer existed at the time of panel establishment and that present serious prejudice could be, and was, caused by such subsidies;
- (d) the Panel's finding that the challenged subsidies provided to cotton producers "passed through" to cotton exporters;
- (e) the Panel's finding that there was price suppression "in the same market";
- (f) the Panel's finding that significant price suppression existed;
- (g) the Panel's finding that the price suppression it found under an erroneous legal standard was "significant";
- (h) the Panel's finding that "the effect of" the U.S. subsidies "is" significant price suppression;
- (i) the Panel's finding that "significant price suppression" is sufficient to establish "serious prejudice" for purposes of Articles 5(c) and 6.3 of the SCM Agreement; and
- (j) the Panel's finding that its "'present' serious prejudice findings include findings of inconsistency that deal with the FSRI Act of 2002 and subsidies granted thereunder in MY 2002."¹⁰

9. The United States seeks review by the Appellate Body of the Panel's finding that decoupled payments made with respect to non-upland cotton base acres were within its terms of reference.¹¹ This finding is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that these payments were measures at issue within the meaning of Articles 4.4 and 6.2 of the DSU.

⁹Panel Report, paras. 7.1416, 7.1107-7.1416, 8.1(g)(i).

¹⁰See, e.g., Panel Report, para. 7.1501.

¹¹See, e.g., Panel Report, paras. 7.129-7.136.

10. The United States requests the Appellate Body to find that the Panel failed to set out the findings of fact, the applicability of the relevant provisions, and the basic rationale behind its findings and recommendations, as required by Article 12.7 of the DSU. The Panel's failure to set these out include, for example, the findings or lack of findings concerning the following areas: the amount of the challenged subsidies, including the amount of payments not directly tied to current production of upland cotton (decoupled payments); that significant price suppression existed; the degree of price suppression it deemed "significant"; that "the effect of" the U.S. subsidies "is" significant price suppression; that decoupled payments made with respect to non-upland cotton base acres were within its terms of reference; and the basis for its ability to make findings with respect to subsidies that no longer existed at the time of panel establishment.

11. The United States seeks review by the Appellate Body of the Panel's finding that export credit guarantees to facilitate the export of "other eligible agricultural commodities" besides upland cotton were within its terms of reference.¹² This finding is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that such export credit guarantees were included in Brazil's consultation request and its finding that, contrary to Articles 4.2, 4.4, and 6.2 of the DSU, it could examine measures that were not included in Brazil's request for consultations.

12. The United States seeks review by the Appellate Body of the Panel's finding that Brazil provided the statement of available evidence required by Article 4.2 of the SCM Agreement with respect to export credit guarantee measures relating to eligible United States agricultural products other than upland cotton, and that accordingly, Brazil's claims concerning these measures were within the terms of reference of this dispute.¹³ This finding is in error and is based on erroneous findings on issues of law and related legal interpretations.

13. In the event Brazil appeals the Panel's exercise of judicial economy with respect to Brazil's claims concerning the compatibility of U.S. export credit guarantee measures with Part III of the SCM Agreement,¹⁴ in this U.S. appeal the United States conditionally requests the Appellate Body to find that Brazil also failed to provide a statement of available evidence as required by Article 7.2 of the SCM Agreement, and that accordingly, Brazil's claims concerning these measures would not be within the terms of reference of this dispute.

14. The United States seeks review by the Appellate Body of the Panel's legal conclusion that two types of expired measures, production flexibility contract payments and market loss assistance payments, were within the Panel's terms of reference. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that measures that are no longer in existence as of the date of establishment of a panel are nonetheless within a panel's terms of reference.¹⁵

¹²See, e.g., Panel Report, para. 7.69.

¹³See, e.g., Panel Report, para. 7.103.

¹⁴See, e.g., Panel Report, para. 7.78.

¹⁵See, e.g., Panel Report, para. 7.104-7.122.