

XV. CONCLUSIONS AND RECOMMENDATION

15.1 In accordance with its mandate under Article 21.5 of the DSU, the Panel has examined the "existence or consistency with a covered agreement of measures taken" by the United States "to comply with the recommendations and rulings" adopted by the DSB in the original proceeding. The Panel concludes that:

With respect to the measure taken by the United States to comply with the DSB recommendations and rulings relating to the original panel's finding of inconsistency with Articles 5 and 6 of the SCM Agreement:

- (a) The United States acts inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to US upland cotton producers pursuant to the FSRI Act of 2002 is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* in the world market for upland cotton constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*. By acting inconsistently with Articles 5(c) and 6.3(c) of the *SCM Agreement* the United States has failed to comply with the DSB recommendations and rulings. Specifically, the United States has failed to comply with its obligation under Article 7.8 of the *SCM Agreement* "to take appropriate steps to remove the adverse effects or... withdraw the subsidy".
- (b) Brazil has not made a *prima facie* case that the effect of marketing loan and counter-cyclical payments provided to US upland cotton producers pursuant to the FSRI Act of 2002 is an increase in the US world market share in upland cotton as compared to the average US world market share during the previous period of three years and that this increase follows a consistent trend over a period when subsidies have been granted. Therefore, it has not been established that the United States acts inconsistently with Articles 5(c) and 6.3(d) of the *SCM Agreement*.

With respect to the measure taken by the United States to comply with the DSB recommendations and rulings relating to the original panel's findings of inconsistency with Articles 10.1 and 8 of the Agreement on Agriculture and Articles 3.1(a) and 3.2 of the SCM Agreement:

- (c) Regarding GSM 102 export credit guarantees issued after 1 July 2005 the United States acts inconsistently with Article 10.1 of the *Agreement on Agriculture* by applying export subsidies in a manner which results in the circumvention of US export subsidy commitments with respect to certain unscheduled products⁷⁹⁰ and certain scheduled products⁷⁹¹, and as a result acts inconsistently with Article 8 of the *Agreement on Agriculture*. Regarding GSM 102 export credit guarantees issued after 1 July 2005 the United States also acts inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement* by providing export subsidies to unscheduled products⁷⁹² and by providing export subsidies to scheduled products⁷⁹³ in excess of the commitments of the United States under the *Agreement on Agriculture*. By acting inconsistently with

⁷⁹⁰ The unscheduled products at issue are (i) in the period 1 July-30 September 2005: cotton, oilseeds (including soybeans/soybean meal), protein meals, fresh vegetables, hides/skins and tallow; and (ii) in the period 1 October 2005-30 September 2006: cotton, oilseeds, soybeans/soybean meal, protein meals, hides/skins, tallow and corn products.

⁷⁹¹ The scheduled products at issue are: (i) in the period 1 July-30 September 2005: rice and poultry meat; and (ii) in the period 1 October 2005-30 September 2006: rice, poultry meat and pig meat.

⁷⁹² *Supra*, footnote 790.

⁷⁹³ *Supra*, footnote 791.

Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement* the United States has failed to comply with the DSB recommendations and rulings. Specifically, the United States has failed to bring its measures into conformity with the *Agreement on Agriculture* and has failed "to withdraw the subsidy without delay".

- (d) With respect to certain export credit guarantees issued prior to 1 July 2005, Brazil has not established that the United States has failed to "withdraw the subsidy without delay".

15.2 The Panel considers that to the extent that the measures taken by the United States to comply with the recommendations and rulings adopted by the DSB in the original proceeding are inconsistent with the obligations of the United States under the covered agreements, these recommendations and rulings remain operative. In this regard, the Panel recalls that the recommendations and rulings that were adopted by the DSB in the original proceeding were as follows:

- "(a) we recommend pursuant to Article 19.1 of the *DSU* that the United States bring its measures listed in paragraphs 8.1(d)(i) and 8.1(e) above into conformity with the *Agreement on Agriculture*;
- (b) as required by Article 4.7 of the *SCM Agreement*, we recommend that the United States withdraw the prohibited subsidies in paragraphs 8.1(d)(i) and 8.1(e) above without delay. The time-period we specify must be consistent with the requirement that the subsidy be withdrawn 'without delay'. In any event, this is at the latest within six months of the date of adoption of the Panel report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier);
- (c) pursuant to Article 4.7 of the *SCM Agreement*, we recommend that the United States withdraw the prohibited subsidy in paragraph 8.1(f) above without delay and, in any event, at the latest within six months of the date of adoption of the Panel report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier); and
- (d) we recall that, in respect of the subsidies subject to our conclusion in paragraph 8.1(g)(i) above, pursuant to Article 7.8 of the *SCM Agreement*:

'7.8 Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy'.

Accordingly, upon adoption of this report, the United States is under an obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'".⁷⁹⁴

15.3 The Panel has set out above in para. 9.79 its views on the interpretation of the obligation under Article 7.8 of the *SCM Agreement* to "take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

⁷⁹⁴ Panel Report, *US – Upland Cotton*, para. 8.3. As stated by the panel in *US – FSC (Article 21.5 – EC II)*, "once the DSB adopts a dispute settlement report, the findings and recommendations in that report become collective, operative DSB rulings and recommendations." *US – FSC (Article 21.5 – EC II)*, para. 7.35.
