WORLD TRADE ORGANIZATION

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Dispute Settlement Body
20 June 2008

MINUTES OF MEETING

Held in the Centre William Rappard
on 20 June 2008

Acting Chairman: Mr. Bruce Gosper (Australia)

Prior to the adoption of the Agenda, Amb. Bruce Gosper, the Chairman of the General Council, welcomed delegations and said that he had been asked to chair the present meeting by Amb. Mario Matus, the Chairman of the DSB. He said that Amb. Matus had asked to excuse himself from chairing the present meeting since he had served as a panelist on the compliance Panel whose report was now before the DSB for consideration.

1. United States – Subsidies on upland cotton: Recourse to Article 21.5 of the DSU by Brazil

(a) Report of the Appellate Body (WT/DS267/AB/RW) and Report of the Panel (WT/DS267/RW and Corr.1)

1. The Chairman recalled that at its meeting on 28 September 2006 the DSB had decided, in accordance with Article 21.5 of the DSU, to refer to the original Panel the matter raised by Brazil concerning the measures taken by the United States to comply with the DSB's recommendations and rulings in this dispute. He recalled that the Report of the Panel had been circulated on 18 December 2007 in document WT/DS267/RW and Corr.1. Subsequently, on 12 February 2008, the United States had notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel. In this connection, he drew attention to the communication from the Appellate Body contained in document WT/DS267/36 transmitting the Appellate Body Report on: "United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil", which had been circulated on 2 June 2008 in document WT/DS267/AB/RW, in accordance with Article 17.5 of the DSU. He reminded delegations that the Appellate Body Report and the Panel Report had been circulated as unrestricted documents. The Reports were now before the DSB for adoption at the request of Brazil. He said that the adoption procedure was without prejudice to the right of Members to express their views on the Reports.

2. The representative of Brazil recalled that three years ago, on 21 March 2005, the Reports of the Appellate Body and the Panel on: "United States – Subsidies on Upland Cotton" had been adopted by the DSB. Both the Panel and the Appellate Body had found that various subsidies granted by the United States on the production, use and exports of cotton (and, as regards export credit guarantees, other commodities) were inconsistent with the US obligations under the Agreement on Agriculture and the SCM Agreement. He recalled that the consultations on this matter had begun in

September 2002 and that the Panel had been established in 2003. The period determined by the DSB for the United States to come into compliance with its obligations had expired in September 2005 (or even earlier than that, in the case of the prohibited export subsidies). At the end of that period, it was Brazil's understanding that the United States had taken very limited action to comply with the DSB's recommendations and rulings. In respect of some key measures, no action had been taken at all. Brazil had decided thereafter to request the establishment of a compliance Panel. The compliance Panel had concluded that, by continuing to act inconsistently with the Agreement on Agriculture and the SCM Agreement, the United States had indeed failed to comply with the DSB's recommendations and rulings. On appeal, the Appellate Body had upheld the compliance Panel's ultimate conclusions in their entirety.

3. Brazil welcomed the adoption of the Reports and was grateful to the Panel, the Appellate Body and the Secretariat for their hard work in all phases of the dispute. Some of the conclusions of the Appellate Body were very important since they had clarified the nature of the implementation obligations of Members with respect to subsidies that had been found to cause adverse effects. First, according to the Appellate Body, the terms of Article 7.8 of the SCM Agreement involved "affirmative action" that was directed at effecting the withdrawal of the subsidy or removal of its adverse effects. Second, the obligation in Article 7.8 was not limited to subsidies granted in the past. In the words of the Appellate Body that meant that, "in the case of recurring annual payments, the obligation under Article 7.8 would extend to payments 'maintained' by the respondent Member beyond the period examined by the panel". Moreover, according to the Appellate Body, the option in Article 7.8 of removing the adverse effects instead of withdrawing the subsidy "cannot be read as allowing a Member to continue to cause adverse effects by maintaining the subsidies that were found to have resulted in adverse effects". Third, the Appellate Body had recognized that the distinction between "as such" and "as applied" claims may not lend itself to a proper analysis of adverse effects cases. This was in the context of an artificial distinction between "payments" and "programmes" that was at the core of the dispute in these compliance proceedings. The Appellate Body had correctly noted that it was difficult to divorce payments from programmes, and that it would be "difficult to conceive how an analysis of whether a programme 'as such' resulted in adverse effects would differ from an analysis of whether payments under a programme have resulted in such effects".

4. All these findings went in the direction of safeguarding the effectiveness of the rules agreed by Members to discipline the use of subsidies. Brazil agreed with the Appellate Body that a different conclusion would have "serious implications for a complaining Member's ability to obtain relief against adverse effects of actionable subsidies". At the DSB meeting when the Reports of the Appellate Body and of the original Panel had been adopted in 2005, Brazil had stated that "this protracted and sometimes painful process has finally come to an end". Brazil, of course, expected that the United States would comply with the clear and unmistakable rulings that had then been made by the DSB. Now, three years after that meeting and after another period of prolonged litigation, Brazil could at least say that this was the last stage where Brazil's arguments could be examined on their merits. Now, in light of findings of continued inconsistency of the US measures with the multilateral rules, Brazil, once again, expressed its hope and expectation that the United States would fully and immediately comply with the DSB's rulings and recommendations on this matter.

5. The signals being received by Brazil, however, were not encouraging. He recalled that the compliance proceedings were about measures that had been enacted as part of the so-called 2002 Farm Bill, pursuant to which US$8.8 billion had been paid to cotton producers from marketing years 2002 to 2005 alone under the three programmes that had been found to cause adverse effects – an average of US$2.2 billion per year. And it was not too much to recall that the original Panel proceedings, started in 2003, referred to US$12.9 billion in subsidies paid in 1999-2002, corresponding, on average, to a subsidization rate of 89.5 per cent. As Members were aware, a new Farm Bill had been very recently approved by the US Congress. According to a report by the International Cotton Advisory Committee (ICAC): "the 2008 Farm Bill introduces few modifications

to the US cotton programme. The structure of subsidies (...) will remain the same. (...) [L]oan rates will be unchanged (...) and the upland target price, currently 72.40 cents per pound, will be reduced to 71.25 cents per pound. (...) "In conclusion, the cotton programme introduced in the 2008 Farm Bill is little different from the cotton programme established by the 2002 Farm Bill. US farmers will face a similar set of policies between 2008/09 and 2012/13 as they faced between 2002/03 and 2007/08."

6. This was a cause of great concern, not only for Brazilian cotton growers, but certainly also for other producers around the world, who may have to continue to suffer the adverse effects of subsidized US cotton production. At the same time, US producers, as recognized by the Appellate Body, were kept isolated from market signals. Such actions raised questions about the willingness of the United States to comply with its obligations in the present case. As stated by the Appellate Body, the obligation enshrined in Article 7.8 of the SCM Agreement "cannot be read as allowing a Member to continue to cause adverse effects by maintaining the subsidies that had been found to have resulted in adverse effects". Brazil hoped that the adoption of the compliance Panel and the Appellate Body Reports provided sufficient incentive for the United States to amend its legislation and ensure compliance with the DSB's rulings. Absent full compliance with those rulings, Brazil would pursue the established procedures in order to obtain the DSB's authorization to take countermeasures vis-à-vis the United States.

7. The representative of the United States said that his country first wished to thank the compliance Panel, the Appellate Body, and the Secretariat staff assisting them for their hard work in this proceeding. The length of time taken by this proceeding, as well as the length of the Reports, had given some sense of their efforts to deal with the voluminous arguments and materials presented in this proceeding. In addition, those efforts and the time and resources spent on this proceeding by all concerned only highlighted that negotiation, and not litigation, was the most effective way to resolve Members' concerns about agricultural trade. The United States, therefore, looked forward to working with Members to conclude the Doha negotiations as soon as possible. Needless to say, the United States was deeply disappointed in the compliance Panel and the Appellate Body Reports. The United States believed it had brought the challenged payments and export credit guarantees into full compliance with the DSB's recommendations and rulings. To find otherwise, the compliance Panel and the Appellate Body had had to make findings on jurisdiction that re-cast or ignored those DSB recommendations and rulings and other findings that assumed conclusions and failed to demand of the complaining party that it fully established its case. Thus, while the quality of the analysis in these Reports had improved compared to the original proceedings, the Reports still did not provide the type and degree of analysis towards which the dispute settlement system should strive. As examples of this, the United States would like to highlight three aspects of the compliance Panel and Appellate Body Reports: first, the findings on jurisdiction under Article 21.5 of the DSU; second, the findings on export credit guarantees; and third, the findings on serious prejudice.

8. As to the first issue, Article 21.5 established the scope of a compliance proceeding as a "disagreement as to the existence of or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB. This provision was clear: the DSB's recommendations and rulings shaped the very scope of the compliance proceeding. The Appellate Body, however, had upheld the compliance Panel's two preliminary rulings on scope by misapplying Article 21.5 and neglecting the fundamental role of the DSB's recommendations and rulings. The first preliminary ruling on Article 21.5 involved US export credit guarantees. In this proceeding, Brazil had challenged US export credit guarantees for pig meat and poultry meat. However, as the compliance Panel and the Appellate Body had agreed, there were no DSB recommendations and rulings concerning export credit guarantees for pig meat and poultry meat, and the United States was not required to take any measure to comply with respect to those export credit guarantees. Any changes made to the GSM 102 export credit guarantee programme concerning pig meat and poultry meat, then, had not been taken to comply with the DSB's recommendations and rulings, and had not properly fallen within the scope of the compliance proceeding.

9. The Appellate Body, in reaching its finding, had made a statement that should be of concern to Members. At paragraph 202 of its Report, the Appellate Body had noted that "when the measures actually 'taken' by the implementing Member are broader than the DSB's recommendations and rulings, we do not see why the scope of the DSB's recommendations and rulings should necessarily limit the scope of the 'measures taken to comply' for purposes of the Article 21.5 proceedings". It was difficult to understand how the scope of the DSB's recommendations and rulings could do anything other than determine or limit the scope of the measures taken to comply. In order to be taken "to comply", there must be something to comply with. For reasons that were not clear, the Appellate Body appeared to be ignoring the plain text of Article 21.5.

10. The United States also found troubling the Appellate Body's dicta that the WTO dispute settlement system did not provide "incentives or disincentives for a WTO Member to take broader or narrower action as part of its implementation efforts".[1] This appeared to be ignoring reality. Of course the WTO dispute settlement system provided incentives and disincentives on the scope of action taken to implement the DSB's recommendations and rulings. One of the main points of the system was to provide incentives to comply. Where a Member went further than necessary for compliance, for example, for administrative efficiency, good governance, or other reasons, the system should not penalize them for doing more than what was required. Otherwise, contrary to what the Appellate Body had said, the system would provide every incentive to limit any action taken only to what was strictly necessary for compliance. This result was desirable neither from the point of view of good governance nor from the point of view of the WTO.

11. The United States was pleased, however, with the finding in the Appellate Body Report on a different question on the scope of Article 21.5. The Appellate Body had corrected the misreading by Brazil and the compliance Panel of the Appellate Body Report in: "US – Softwood Lumber IV" (Article 21.5 – Canada).[2] The Appellate Body had made clear that there was no general rule that any measure that had a "particularly close relationship" to the declared measure to comply with the DSB's recommendations and rulings would also be within the scope of a compliance proceeding. Such a misreading had implied an ever-widening circle of measures within the scope of an Article 21.5 proceeding since once a measure had been found to be closely related to a measure taken to comply, then any measure closely related to that measure would also be a measure taken to comply, which would then sweep in additional measures, and so forth. The Appellate Body had agreed with the United States that the Appellate Body's reasoning in the Softwood Lumber IV report was limited to a circumstance where a measure which had allegedly undone the declared measure taken to comply could also be considered to be within the scope of Article 21.5.

12. The second preliminary ruling on Article 21.5 involved certain payments commencing in September 2005. The Appellate Body had also upheld the compliance Panel's finding that the US marketing loan and counter-cyclical payments made after 21 September 2005 were properly within the scope of the Article 21.5 proceeding. In so doing, both the Appellate Body and the compliance Panel had failed to respect the actual recommendations and rulings of the DSB that formed the basis for a compliance proceeding.

13. The DSB's recommendations and rulings on present serious prejudice pertained to US support payments made during marketing years ("MY") 1999-2002, and not to the programmes under which those payments had been made.[3] The compliance Panel had confirmed that this was correct.[4] The Appellate Body had not reversed that finding, and the DSB was adopting that finding at the present

[1] Appellate Body Report, para. 206.
[2] Idem para. 205.
[3] Original Panel Report, paras. 7.1416, 8.1(g)(i).
[4] Compliance Panel Report, para. 9.54.

meeting. Consequently, there was no question that the compliance Panel and the Appellate Body had considered that payments in later years were not measures "taken to comply".

14. Yet the Appellate Body had found that later payments were within the scope of the compliance proceeding. In so doing, the Appellate Body had ignored the DSB's recommendations and rulings in this dispute by deeming MY 1999-2002 "merely the historical reference period examined by the original panel".[5] And it had considered that US payments made after 21 September 2005 were also subject to the requirement of Article 7.8 of the SCM Agreement to withdraw the subsidy or remove its adverse effects, even though the DSB's recommendations and rulings did not cover payments after MY 2002, or the programmes themselves. In other words, the Appellate Body had inappropriately treated the original Panel's finding on some measures (certain payments) as if it had been a finding on other measures (the programmes or future payments allegedly mandated to be provided). However, Brazil had in fact challenged those other measures in the original proceeding, but the DSB had made no recommendations or rulings on them. The Appellate Body, just as the compliance Panel, had misinterpreted how Article 7.8 of the SCM Agreement and Article 21.5 of the DSU related to one another. The Appellate Body had stated that Article 7.8 "informs the meaning and scope of the DSB's recommendations and rulings arising from the original proceedings".[6] However, Article 7.8 could not re-write the actual DSB recommendations and rulings and particularly the measures subject to the DSB's recommendation. In this dispute, as already noted, the DSB's recommendations and rulings applied only to US payments made during MY 1999-2002. Therefore, under Article 7.8, "the Member granting or maintaining such subsidy" – i.e. those payments – "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy". The sole basis in the text of Article 7.8 that the Appellate Body provided for its approach was the words "granting or maintaining such subsidy".[7] But "such subsidy" meant it applied only to the measures found to be inconsistent, and those had not included payments after MY 2002. So, the Appellate Body misread Article 7.8 in finding that it applied to any measure other than the one found to be a WTO-inconsistent subsidy.

15. The Appellate Body had worried that "the approach advocated by the United States would have serious implications for a complaining Member's ability to obtain relief against adverse effects of actionable subsidies".[8] However, the question was not what was the Appellate Body's view of what relief was desirable, but what was the relief that had been negotiated and agreed by Members in the WTO Agreements. Article 7.8 could not be re-written to apply to additional measures just because that was what a panel or the Appellate Body believed would be a better approach. For example, relief under the DSU was prospective, as the Appellate Body had recognized in this Report. This meant that there may be no relief in some disputes that involved challenges to past actions. However, the fact that there would be no relief unless it was retroactive would not authorize the Appellate Body to declare in such cases that relief would be retroactive. The United States was also concerned with the dicta in the report that "[a] Member would normally not be able to abstain from taking any action [to comply] on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own".[9] Not only was this statement unclear – for example, what did the Appellate Body mean by using the terms "normally" and "on the assumption"? – but it had no apparent legal basis. Whether a subsidy was causing adverse effects – for example, whether a subsidy was causing significant price suppression – depended in large part on economic circumstances. If conditions in the market changed such that a subsidy was no longer causing adverse effects, then what basis was there to believe that a Member should still take some further action? All Article 7.8 required was that the Member remove the adverse effects. If the adverse effects were gone, then what more was there to

[5] Appellate Body Report, para. 237, n. 482.
[6] Idem para. 240.
[7] Idem para. 237.
[8] Idem para. 245.
[9] Idem para. 236.

do? There was nothing in the text of Article 7.8 of the SCM Agreement, or elsewhere in the covered agreements, that precluded such an approach.

16. The United States then turned to the substantive findings of this dispute. At the outset, the United States wished to note that the detailed US arguments on the merits might be found in the compliance Panel and Appellate Body Reports, as well as in the US filings, which were publicly available. Starting with export credit guarantees, the United States welcomed the Appellate Body's finding that, by dismissing the US budgetary re-estimates data on export credit guarantees "on the basis of internally inconsistent reasoning", the compliance Panel had failed to conduct an objective assessment of the matter before it as required by Article 11 of the DSU.[10] In reaching this conclusion, the Appellate Body had agreed with the United States on the standard for making an objective assessment. The Appellate Body had properly understood that the compliance Panel, as the initial trier of facts, should be held to the same standard as that to which any domestic investigating authority was held by a WTO panel in a trade remedies dispute. That is, the compliance Panel was "expected to provide reasoned and adequate explanations and coherent reasoning".[11] It was surprising to hear Brazil and some third participants suggest otherwise – as if WTO panels could provide unreasoned and inadequate explanations for their findings – and the United States was gratified that the Appellate Body had corrected this misapprehension.

17. The United States, however, was disappointed that the Appellate Body relied on what amounted to little more than speculation concerning the design of the GSM 102 programme to uphold the compliance Panel's ultimate finding on export credit guarantees. Official US budget re-estimates data showed that the US export credit guarantee programmes were projected to be strongly profitable, even before the measures taken to comply were adopted. And, in fact, for the years in which the books had closed (FY 1994 and 1995), the data showed an actual profit to the US Government.[12]

18. The third issue on which the United States would comment at the present meeting very briefly were the findings on serious prejudice. The United States was also disappointed that the Appellate Body had upheld the compliance Panel's finding that US marketing loan and counter-cyclical payments continued to cause significant price suppression, thereby constituting present serious prejudice to Brazil's interests, even though the Appellate Body at times had recognized serious weaknesses in the compliance Panel's analysis (by way of example, see Appellate Body Report, paras. 357, 358, 361, and 374). Given the implications of serious prejudice disputes for domestic support programmes, a sensitive area for many Members, the United States considered that the WTO dispute settlement system would be better served by a more robust analysis that could better withstand scrutiny from Members and outside observers. Finally, the United States was compelled to note that the findings on serious prejudice being considered at the present meeting were outdated. The compliance Panel and the Appellate Body Reports had dealt with market conditions from two to three years ago. Since then, US cotton acreage had fallen precipitously, and continued to decline. US cotton planted acreage had fallen by 29.5 per cent in 2007 from the year before and had fallen a further 12.8 per cent in 2008. That is, despite the allegedly market-insulating effects of US payments, US cotton acreage had declined by more than 38.5 per cent in the past two years. And despite the alleged price-suppressing effects of US payments, cotton prices had risen sharply, and futures prices indicated the market expects prices to remain high for the foreseeable future. As a result, the United States had not made any marketing loan payments since September 2007, before circulation of the compliance Panel report, and the United States was making only minimal counter-cyclical payments.

19. The representative of Canada said that her country thanked the Panel, the Appellate Body and the Secretariat for their work on this case. Canada welcomed the Panel and the Appellate Body

[10] Appellate Body Report, para. 295.
[11] Idem para. 293, n. 618.
[12] Idem para. 285.

findings that the United States continued to violate the SCM Agreement through its marketing loan and counter-cyclical payments and its GSM 102 export credit guarantee programme. With respect to the marketing loan and counter-cyclical payments in particular, the Reports confirmed that the United States had failed to implement the DSB's rulings and recommendations by failing to "take appropriate steps to remove adverse effects or withdraw the subsidy". The United States had argued that its obligation under Article 7.8 of the SCM Agreement was limited to removing adverse effects caused by subsidies granted in a particular period of time and did not cover either future payments under the same programmes, or the subsidy programmes themselves. As a third party in these proceedings, Canada had argued that the loophole the United States had sought to establish was a direct challenge to the effectiveness of compliance proceedings in serious prejudice cases.

20. In rejecting the US position, the Appellate Body Report had provided helpful clarification on the obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". It also clarified the relationship between Article 7.8 and Article 21.5 of the DSU. Canada welcomed the Appellate Body's findings as an important contribution to the prompt and effective settlement of disputes. Canada was also pleased with the Appellate Body's findings on the scope of a "measure taken to comply" for purposes of an Article 21.5 proceeding. The Appellate Body's findings that a panel must consider a measure in its totality in an Article 21.5 proceeding, while confirming that the scope of claims that may be raised in an Article 21.5 proceeding was not unbounded, were consistent with previous Appellate Body reports. They would help to encourage prompt compliance with the DSB's recommendations and rulings. And, they would limit the circumstances in which a complainant would need to begin new proceedings in respect of a non-compliant programme, where the programme's coverage extended beyond the recommendations and rulings in the original dispute. Canada also welcomed the Appellate Body's findings on the allegations of the United States in respect of Article 11 of the DSU. Canada was pleased that the Appellate Body had maintained its consistent position that, while a panel must carefully consider and analyse competing evidence submitted by parties, it would not interfere lightly with a panel's exercise of its authority as the trier of fact.

21. Finally, looking beyond this case, Canada was concerned that the Farm Bill recently passed by the US Congress failed to reform major US programmes including programmes at issue in this case, such as the direct payments and the countercyclical payments programmes. Not only did the new Farm Bill lack meaningful reforms, it also raised the possibility of increased subsidies. As a result, the United States had missed an opportunity to make its farm programmes more market-oriented and to decrease the vulnerability of US farm programmes to future challenges.

22. The representative of Australia said that her country welcomed the Reports of the Panel and the Appellate Body in this dispute and joined others in thanking the Appellate Body, the panelists and the Secretariat for their work on the case. The Appellate Body had clarified the scope of proceedings under Article 21.5 of the DSU, where those proceedings concerned recommendations and rulings on actionable subsidies. The findings and conclusions of the Appellate Body gave real effect to the meaning of Article 7.8 of the SCM Agreement. The Appellate Body had thereby ensured that a Member whose interests had been adversely affected by another Member's subsidy was not left without a remedy, should the subsidizing Member fail to take the action envisaged by Article 7.8. The Appellate Body had recognized that compliance with Article 7.8 would usually involve an affirmative action to withdraw the subsidy or remove its adverse effects. Australia expected the United States to take such positive action without delay, in fulfilment of the DSB's recommendations and rulings in this dispute. Australia was of the view that abstaining from taking any action with respect to the subsidies at issue would not achieve compliance in this dispute. Such inaction would be to ignore the United States' obligations owed to all WTO Members.

23. Australia was particularly concerned that the Farm Bill recently passed by the US Congress continued the cotton support programmes at issue in this dispute and reinstated certain elements of

support programmes benefiting cotton production previously found to be WTO-inconsistent. More generally, the 2008 Farm Bill institutionalized trade-distorting support programmes with the potential to provide even greater subsidies to major crops. The continuance of these same support programmes with more generous terms could severely test the ability of the United States to comply with its WTO domestic support commitments in future years, particularly should prices for key commodities return to historic levels.

24. The representative of the European Communities said that the EC had followed this dispute very closely. Many of the issues covered in this dispute, and decided by the Appellate Body and the Panel, were highly relevant for the operation of the WTO Agreements. The Reports clarified WTO rules on export financing, actionable subsidies and the scope of compliance procedures. For example, they confirmed that if payments under a subsidies programme had been found to be inconsistent with the SCM Agreement, and if the defending Member continued to make payments under such programme under the same conditions, those further payments clearly fell within the jurisdiction of a compliance panel. The EC welcomed these Reports. They would provide useful guidance for pending and future disputes.

25. The representative of the United States said that his delegation wished to respond very briefly to some points made in the preceding interventions. First, with reference to Members' comments at the present meeting concerning the 2008 Farm Bill, the Farm Bill was not within the terms of reference of the compliance Panel, nor was it the subject of findings by either the compliance Panel or the Appellate Body. Second, with reference to Canada's comments on direct payments, neither direct payments nor the direct payment programme were subject to any DSB's recommendations in this dispute. Finally, regarding Australia's statement, neither were there any findings in this dispute relating to US domestic support reduction commitments.

26. The DSB took note of the statements, and adopted the Appellate Body Report contained in WT/DS267/AB/RW and the Panel Report contained in WT/DS267/RW and Corr.1, as modified by the Appellate Body Report