THIRD PARTY ORAL STATEMENT OF AUSTRALIA

28 February 2007

Members of the Panel,

1. Thank you for the opportunity to present the views of Australia.

2. This proceeding raises a number of important issues concerning the scope of Article 21.5 proceedings and the appropriate steps that must be taken by a Member to comply with Articles 4.7 and 7.8 of the *Agreement on Subsidies and Countervailing Measures (SCM Agreement)*.

3. Australia has provided a written submission addressing some of these issues and will not repeat those arguments today. Rather, Australia will concentrate on whether the United States, by repealing the Step 2 programme, but maintaining the two other price-contingent subsidies (that is, the marketing loan programme payments and counter-cyclical payments), has taken appropriate steps to remove the adverse effects or to withdraw the subsidies under Article 7.8 of the *SCM Agreement* in accordance with the recommendations and rulings of the Dispute Settlement Body (DSB). In considering this question, it is important to bear in mind the nature of Article 21.5 proceedings.

Nature of Article 21.5 proceedings

4. The role of an Article 21.5 panel is to determine the existence or consistency with a covered agreement of measures taken to comply with DSB recommendations and rulings. Its mandate does not extend to relitigation of issues that have been conclusively determined in the original dispute. Such is the case in the present proceedings, where measures continue in existence that have been previously ruled upon and remain unchanged. It is uncontested that two of the challenged price-contingent subsidies, which are by far the largest of the subsidies that were challenged in the original proceedings relative to the subsidy that has been withdrawn, have continued under programmes that have not been changed since the recommendations and rulings in the original dispute were adopted by the DSB. In this situation, the Panel's task is limited to a factual determination to that effect.

5. Should it make this determination, the Panel will then need to consider, on the basis of the supporting economic evidence, whether the maintained subsidies continue to cause adverse effects within the meaning of Article 5 of the *SCM Agreement*.

6. This question cannot be answered by confining the Panel's examination to the effect of the subsidies made in 1999-2002. Such an approach, which appears to be advocated by the United States[1], would undermine the remedy that is provided by Article 7.8 of the *SCM Agreement* – that is, to compel the subsidizing Member to take appropriate steps to remove the adverse effects or withdraw the subsidy. This approach would require a successful complainant to bring a fresh actionable subsidies claim with respect to each set of subsidies made subsequently to those originally found to cause adverse effects. This cannot be the remedy that was contemplated by Article 7.8. Moreover, such an approach would also be contrary to Article 21.1 of the DSU, which recognises that prompt compliance with the recommendations and rulings of the DSB is essential to ensure effective resolution of disputes. Article 21.5 of the DSU promotes this aim.[2]

Turning to Brazil's actionable subsidies claim

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[1] *See*, for example, First Submission and Request for Preliminary Rulings of the United States, paras. 45, 146-148; Rebuttal Submission of the United States of America, paras. 17; 33-34.

[2] *United States – Softwood Lumber IV (Article 21.5 – Canada)*, Report of the Appellate Body, WT/DS257/AB/RW, para. 72.

7. The question that is central to Brazil's actionable subsidies claim is whether discontinuation of one price-contingent subsidy but continuation of two other price-contingent subsidies meets the requirements of Article 7.8 of the *SCM Agreement*. In examining this question, Australia submits that the analytical approach adopted in the original proceedings is an appropriate one to be followed by this Panel. The original Panel, after making explicit findings as to the trade-distorting effects of each of the challenged price-contingent subsidies individually, [3] found that the effects of these subsidies, considered collectively, caused significant price suppression in the same world market.[4]

8. Taking the original Panel's findings as to the trade-distorting effects of these subsidies into account, this Panel may then consider whether the collective effect of the continuing subsidies (that is marketing loan programme payments and counter-cyclical payments) is significant price suppression in the same world market.

9. Australia notes that if this approach is followed, then the findings in the original proceedings as to the effect of other causal factors that the United States asserts affect the causal link between the United States' subsidies and the significant price suppression cannot be overlooked.[5] Many of those factors are the same factors that were relied upon by the United States in the original proceedings. Australia submits that it is open to this Panel to reach the same conclusions in relation to those factors as were drawn in the original proceedings. Those conclusions were that these factors did not sever the causal link between United States' subsidies for upland cotton and significant price suppression in the same world market. That is, these factors did not "reduce the effect of the mandatory price-contingent subsidies to a level which cannot be considered 'significant.'"[6]

10. Furthermore, Australia agrees with Brazil that in order to determine whether the effect of the two continuing price-contingent subsidies is "present" serious prejudice, it is necessary to examine a recent period for which essentially complete data exists. That period is, according to Brazil, data for marketing year 2005, there being no complete data as yet for marketing year 2006.[7] In fact that year has not yet finished. In agreeing with Brazil's submission, Australia notes that this approach is the one that was adopted by the Panel in the original proceedings.[8]

11. In finding that the effect of the mandatory price-contingent United States' subsidy measures was significant price suppression in the same world market within the meaning of Article 6.3(c) of the *SCM Agreement*[9], the Panel at first instance had the benefit of extensive economic analysis and modelling presented by Brazil.[10] Updated economic analysis and modelling has been submitted by Brazil in the present proceedings. In Australia's view, this updated economic analysis and modelling represents the same appropriate and conservative economic methodology as that which was taken into account by the Panel in the original proceedings.[11] This data supports Brazil's central assertion that but-for the domestic subsidies at issue, the world price for cotton would be significantly higher.

12. If, as a result of examining the effects of the continued price-contingent subsidies under the marketing loan and counter-cyclical payments programmes, considered collectively and on the basis of the economic evidence presented, the Panel finds that these subsidies collectively cause significant price suppression, then Australia submits that the only conclusion open to this Panel is that the United States has not complied fully with the requirements of Article 7.8

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[3] *See*, for example, WT/DS267/R, paras. 7.1295, 7.1302, 7.1303, 7.1308.
[4] *Ibid*., para. 7.1349.
[5] *Ibid*., paras. 7.1344-46; 7.1357-63; *See* also WT/DS267/AB/R, para. 437.
[6] WT/DS267/R, para. 7.1363; WT/DS267/AB/R, paras. 455-457.
[7] Rebuttal Submission of Brazil to the Panel, paras. 23-24.
[8] WT/DS267/R, paras. 7.1198-9.
[9] *Ibid*., para. 8.1(g)(i).
[10] *Ibid*., paras. 7.1202-9.
[11] *Ibid*., para. 7.1209.

of the *SCM Agreement*. That is, the United States has failed to remove the adverse effects or withdraw the subsidies that were the subject of the DSB's recommendations and rulings, within the meaning of Article 7.8.

Threat of serious prejudice

13. In relation to Brazil's claim in the alternative that the continued subsidies threaten to cause serious prejudice in marketing years 2006 and beyond, Australia submits that it is beside the point for the United States to argue that the programmes under consideration are due to expire in late 2007. The programmes have not expired. There is no guarantee that they will not be rolled over or maintained in another form with adverse effect. Australia therefore submits that the Panel is entitled to consider whether the continuance of subsidies under programmes whose design, structure and operation remain unchanged, would give rise to a threat of serious prejudice.

14. Australia notes that in the original proceedings, the Panel exercised judicial economy with respect to Brazil's claim of threat of serious prejudice relating to the marketing years 2003-2007. The Panel's approach was based on the assumption, since proved to be erroneous, that the statutory and regulatory framework under which the subsidies were granted would be fundamentally altered in response to the Panel's present serious prejudice finding.[12] It is justifiable that Brazil, by seeking a ruling in the alternative concerning the threat of serious prejudice, should wish to avoid this situation being maintained in the future.

15. In conclusion, Australia submits that it is appropriate for this Panel to adopt the analytical approach that was adopted by the Panel in the original proceedings. Given the fact that two of the price-contingent subsidies have continued in unaltered form, it is also appropriate that the original findings, recommendations and rulings relating to those subsidies should form the starting point for this Panel's analysis. The updated evidence submitted by Brazil supports the conclusion that those subsidies, considered collectively, continue to cause adverse effects to the interests of Brazil. Given the continuing adverse effects of these subsidies, Australia submits that the Panel can only conclude that the United States has failed to take appropriate steps to remove those effects or withdraw the subsidy within the meaning of Article 7.8 of the *SCM Agreement*, and has therefore failed to comply fully with the DSB's recommendations and rulings in this dispute.

[12] *Ibid*., para. 7.1501.