

# THIRD PARTY ORAL STATEMENT OF NEW ZEALAND

28 February 2007

Mr Chairman, Members of the Panel,

## *Introduction*

1. New Zealand has a systemic interest in this dispute and welcomes the opportunity to participate in this oral hearing. We wish to make brief comments on three areas, recognising that our views have been presented to you already in our third party submission. Firstly we will comment on why we believe the marketing loan payments and counter-cyclical payments are indeed within the scope of this Article 21.5 proceeding; secondly we will make a brief comment on the burden of proof in a case such as this; and finally we will explain why we believe the marketing loan payments and counter-cyclical payments continue to cause adverse effects.

## **The scope of this 21.5 proceeding**

2. In our view the payments made under the marketing loan payments programme and the counter-cyclical payments programme are clearly within the scope of this proceeding. The panel was clear in paragraph 8.1(g)(i) of its report that its finding was about the "effect of the mandatory price-contingent United States subsidy measures." A reference to payments does not alter that finding. Payments are not mandatory subsidy measures; they are simply the means by which the subsidy measures are implemented. The distinction made by the United States between payments and programmes would undermine the disciplines on actionable subsidies in the SCM Agreement.

3. Of particular importance is the need to give effect to the remedy provided for in Article 7.8 of the SCM Agreement, as referred to by the original Panel in this dispute. This is the first time the relationship between Article 21.5 of the DSU and Article 7.8 of the SCM Agreement has come before a compliance proceeding. Given that the marketing loan and counter-cyclical payments programmes have not been withdrawn, the United States cannot now avoid its obligation under Article 7.8 of the SCM Agreement to remove the adverse effects of those subsidy programmes by claiming that they are not measures taken to comply within the meaning of Article 21.5 of the DSU. In New Zealand's view, if the measures are not withdrawn Article 7.8 of the SCM Agreement then requires the Panel to determine whether steps have been taken to remove the adverse effects found to exist by the original Panel. It must then determine whether any steps that have been taken are "appropriate", that is whether they are measures that are capable of removing the adverse effects. Article 21.5 of the DSU cannot be invoked as a barrier to such an analysis.

## **Marketing Loan Payments and Counter-Cyclical Payments continue to cause significant price suppression and increase the world market share**

## *Burden of proof*

4. As in our submission, we wish to make a brief comment regarding the burden of proof in a case such as this. The DSB recommendations and rulings of 21 March 2005 covered three programmes: the step 2 payments programme; the marketing loan payments programme; and the counter-cyclical payments programme. Having chosen to remove only one of those programmes the United States now claims that Brazil has the burden of showing that the remaining two programmes cause serious prejudice. The United States conveniently ignores the fact that the original Panel had already evaluated the evidence and made a finding that all three programmes cause adverse effects. A Member should not have the burden of proving something that has already been decided by the original panel. In this case that would deprive the actionable subsidies provisions of the SCM Agreement of their proper effect.

5. Since an implementing Member has the option of either withdrawing the subsidising measure or removing the adverse effects under Article 7.8 of the SCM Agreement, an implementing Member that fails to withdraw the measure in question then should have the burden of showing that it has removed the adverse effects. Thus, in the present case proof by Brazil that the measures found by the original panel to cause adverse effects have not been withdrawn should establish a prima facie case that implementation has not occurred. In New Zealand's view, the burden would then be on the United States to prove that the adverse effects caused by those subsidising measures have been removed.

*The adverse effects from the Marketing Loan Programme and the Counter-Cyclical Programme remain*

6. We agree with Brazil that the removal of the Step-2 programme had a relatively modest impact. A comparison of the amounts paid under the various programmes shows significant differences. Step 2 payments are small compared to marketing loan and counter-cyclical payments. In the most recent year, 2005, for example, the Step 2 payments were US\$350 million. In the same year, the marketing loan and counter-cyclical programme payments amounted to US\$2,170 million. The US cannot ignore the much larger volume of subsidisation under the two programmes that have not been withdrawn or modified.

7. Also, it is possible – and likely – that the counter-cyclical payments could increase to compensate for the removal of the Step 2 programme. The United States argues against this line of reasoning given that there was no increase in counter-cyclical payments in the current year. What the United States fails to make clear is that those payments are already at their maximum rate. If that were not the case there could indeed be a compensatory effect for the removal of the Step 2 programmes.

8. The United States attempts to counter Brazil's arguments about the trade-distorting effects of counter-cyclical payments by blurring the line between counter-cyclical payments and decoupled payments. But, counter-cyclical payments are not real decoupled payments.

9. Real decoupled payments are green box measures and cannot be linked to the type or volume of production or be related to or based on prices. Counter-cyclical payments, by contrast, are clearly and explicitly linked to prices. The fact that in many years such payments are likely to be paid out at the maximum rate does not change the fact that they are linked to prices. The question is, what would farmers do differently if there were no counter-cyclical payments and farmers were, essentially, "guaranteed" 13.73 cents per pound less for their cotton.

10. Indeed, the United States fails to accurately explain the role of expectations in the market place. While it is possible that removal of the Step-2 programme will decrease the marketing loan payments, this argument ignores the fact that these programmes are distorting whether or not payments are made under them. Producers know that the loan rate is there to support them and that there is a target price they will receive either from the market or the government.

11. In fact, the proposition that marketing loan payments are distorting is almost self-evident. Marketing loan payments are amber box measures, the category in which are included the non-prohibited measures with the most trade distorting effect on production and trade. Producer expectations are generated because of applied administrative prices under a subsidisation programme – because of a guaranteed price, regardless of what happens in the market place – not because of financial transfers in any one year. Producers are aware that they are insulated from the market place by government support and it is this guarantee of insulation that affects producer decision making.

12. The United States tries to convince you that producers respond to market signals, and that the marketing loan programme and counter-cyclical programme do not insulate producers from the market. But, in the absence of the marketing loan and counter-cyclical programmes – programmes that guarantee certain prices to producers of cotton in the US – would the United States market share of cotton be at current levels? The link that is necessary to examine is that between domestic, guaranteed prices and United States production. And that is the source of the problem.

13. The United States contests the Brazilian argument that absent the payments farmers would exit cotton production. This ignores the evidence. Over some years over half of the revenues received by United States cotton farmers has come from subsidisation. The idea that if these subsidies were not there, producers who have been deprived of half of their income would carry on planting cotton is little short of absurd.

14. The United States also claims that the econometric modelling provided by Brazil is flawed, but the arguments of the United States are either an attempt to reargue what was litigated before the original panel and the Appellate Body and lost, or are inconsequential.

15. The United States itself demonstrates that if the marketing loan and counter-cyclical payments programmes were eliminated there would be a reduction in United States cotton exports of up to 25 per cent in 2002-2005 and 17 per cent in 2006-2008. That is a very clear measure of what United States world market share would be in the absence of the marketing loan and counter-cyclical payments programmes.

#### *Conclusion*

16. In conclusion, in New Zealand's view, Brazil has demonstrated that the United States has failed to either withdraw the marketing loan and counter-cyclical payments programmes or to remove the adverse effects of those programmes as required by Article 7.8 of the SCM Agreement. Accordingly, the United States has failed to comply with the recommendations and rulings of the DSB.