September 12, 2007

David Yocis
Assistant General Counsel
Office of the U.S. Trade Representative
600 17th Street, NW
Washington, DC

Re: Agricultural Subsidies (Brazil) (DS365); Request for Comments

Dear Mr. Yocis:

The purpose of this letter is to provide comments concerning a WTO dispute settlement proceeding regarding United States domestic support and export credit guarantees for agricultural products. The undersigned organizations urge the United States to strongly oppose the allegations of Brazil and other countries that the United States has exceeded its total aggregate measurement of support (AMS) for the years 1999, 2000, 2001, 2002, 2004 and 2005.

The request for consultations filed by Brazil resembles an elaborate fishing expedition designed to have a WTO panel second guess each and every notification of the United States regarding its domestic agricultural support programs. The request includes not only traditional commodity programs, but also includes crop insurance programs, emergency livestock feeding programs, disaster programs, programs pertaining to irrigation, tax exemptions, energy subsidies, farm ownership loans, income tax concessions, budget impacts of grazing livestock on Federal land, and any non-notified domestic support measure or subsidy, to list only a few.

Specifically Brazil asserts that the United States has incorrectly claimed that the decoupled payment programs operated under the current and previous farm bills were "green box" programs and therefore exempt from the AMS calculation. Brazil asserts that payments under the non-insured crop disaster assistance programs and emergency feed and livestock indemnity programs (among others) did not conform to the criteria for payments for relief from natural disasters. Another specific allegation is that the United States incorrectly notified the Market Loss Assistance Payments provided through annual disaster legislation as non-product specific AMS instead of product-specific AMS.

Some of Brazil's specific assertions of incorrect notification of domestic support are undoubtedly the outgrowth of a Panel finding that Production Flexibility Contract ("PFC") payments made with respect to historical cotton base were not exempt from an analysis under Article 13 of the Uruguay Round Agricultural Agreement. The Panel in that case indicated it believed the PFC payments under the 1996 FAIR Act did not meet the requirements of Annex 2, paragraph 6 of the URAA as the program had the legal and practical effect of limiting the production of fruits and vegetables.

In its second challenge to the export credit guarantee program, Brazil is seeking an even broader interpretation from the WTO than it received in the panel report issued in the first cotton dispute. Brazil states:

> *Through these measures, the United States makes available export credit guarantees, contingent on the export of US agricultural products, at premium rates and on other terms more favourable than those which are otherwise available in the market. These measures therefore constitute export subsidies under the Agreement on Agriculture and the SCM Agreement. The United States provides these export subsidies: (i) in excess of its export subsidy reduction commitments for scheduled products; and, (ii) for unscheduled products. These measures therefore violate Articles 3.3, 8, 9.1 and 10.1 of the Agreement on Agriculture. Additionally, these measures are prohibited export subsidies contrary to Article 3.1(a) and 3.2 of the SCM Agreement.*

In short, Brazil is abandoning the traditional definition of an export subsidy applicable to credit and credit guarantee programs and is attempting to carve out a new avenue to challenge U.S. programs, namely, whether or not a U.S. program contains terms "more favourable than those which are otherwise available on the market." In so doing, Brazil clearly intends to expand the concept of an export subsidy far beyond anything contemplated by the members during the URAA negotiations. Such an expansion then permits Brazil to exaggerate the amount of "subsidy" associated with the export credit guarantee program and thereby stipulate the U.S. has exceeded its URAA commitments even with respect to those commodities that have an export subsidy component in their notified schedules.

Discussion

The failure of the United States to notify its AMS for any crop year subsequent to 2001 has created considerable uncertainty for some observers as to the willingness of the United States to live up to its WTO commitments. It has also led to uncertainty within the U.S. Congress as to the proper classification of domestic support programs as it works to craft new farm legislation that provides an effective safety net for U.S. producers and that complies with our country's WTO obligations. It also makes it more difficult for U.S. producers to interpret a potentially new agriculture agreement under the Doha Round when they have not been given notice as to their own government's WTO classification of current programs.

As a first step in responding to the Brazil request for consultations and in keeping with our WTO obligations, the United States should promptly notify its AMS for the years 2002 through 2006. A notification by the United States at this time will be viewed skeptically by other members of the WTO, particularly given the interpretation of PFC payment classification included in the report of the first cotton panel. We respectfully suggest that, notwithstanding the cotton dispute, the U.S. should notify PFC and Direct Payments as green box programs. The cotton panel's findings were specific to the question of whether the United States had violated Article 13 of the URAA and did not specifically address the larger question of U.S. classification.

Whether or not PFC payments or Direct Payments are ultimately classified as green box programs, they are certainly not amber box subsidies. They are decoupled from production and price. They do not distort production or trade. Further, if any WTO Panel (or the U.S. government) should rely on the interpretation of the first cotton panel, namely that the fruit and vegetable planting restrictions link these programs to a factor of production and, in fact, limit

production of fruit and vegetables, then those same restrictions (and the WTO's interpretation of their impact) lead to the logical conclusion that these programs, if not green, are properly classified as "blue box" programs as they meet all of the criteria of that classification, including the requirement that they be "production-limiting." The United States should vigorously oppose claims by Brazil and others that the U.S. has violated its AMS limits.

The United States should also oppose Brazil's repetitive claims against the United States export credit guarantee programs. It is clear that the United States' extemporaneous interpretation of the Uruguay Round Agricultural Agreement was that the export credit guarantee programs were not restricted by that agreement. In the Statement of Administrative Action that accompanied the URAA implementing legislation, the Administration stated to Congress that the U.S. export credit guarantee program would not be affected by the URAA. That statement was one of the premises upon which Congress based its approval of the agreement.

About 10 years later, a WTO dispute settlement panel disagreed with the interpretation of the URAA maintained by the United States both at the time the agreement was signed and at the time the agreement was implemented by the U.S. Congress. Either the lack of appropriate language in the URAA to protect the export credit guarantee program or an off-base WTO Panel opinion has left this program susceptible to challenge. The United States has made significant modifications in the program which in turn have harmed U.S. agricultural exports and have denied U.S. agricultural producers access to an effective marketing tool. In any case, it is critical that USTR work to refute these allegations against the export credit guarantee program as well as strive to ensure that such interpretational reversals are not a part of the implementation of a potential Doha Round agreement.

It defies belief that the export credit guarantee program, which is currently being operated "in the black" by the U.S. is somehow providing an export subsidy for U.S. commodities.

Given the breadth and scope of the Brazilian claims, we urge USTR to consult with U.S. commodity groups to develop a mechanism through which U.S. agricultural interests can assist USTR in defending this case. Effective communication and coordination will be important as this case progresses. Further, such cooperation can help ensure the U.S. presents the best arguments should a Panel be formed.

The request for consultations posited by Brazil is a poorly disguised fishing expedition designed to pressure the United States into more Doha concessions concerning agricultural support and, if effective, designed to undermine support for the agricultural sector of the United States. This tactic can run both ways, however. We are mindful that Brazil also maintains a significant number of agricultural programs designed to help its producers, including subsidized loan programs, lax enforcement of environmental and intellectual property rights, and even programs that appear to be substantial export subsidies. If Brazil and other countries have determined to litigate rather than negotiate within the WTO, the United States may have no choice but to respond in kind.

Sincerely,

American Soybean Association

National Association of Wheat Growers

National Farmers Union

National Cotton Council

National Sorghum Producers

American Sugar Alliance

Western Peanut Growers Association

USA Rice Federation

National Barley Growers Association

National Sunflower Association

USA Dry Pea and Lentil Council

US Canola Association

Southern Peanut Farmers Federation

Georgia Peanut Commission