ANNEX D-8

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS (SECTIONS A-C)

(27 February 2007)

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Exhibit US-	Title
112	CCC Commodity Estimates Book, Feb. 5, 2007 (Program Yields)

A. GENERAL QUESTIONS

Questions to both parties

1. Is Brazil/US of the view that a party to a dispute referred to a panel established under Article 21.5 of the DSU (a party in a compliance panel) can make the same legal argument as it did in the original Panel proceedings?

1. Article 21.5 "compliance" proceedings are limited in terms of the *claims* that can be made and the *measures* in respect of which the claims can be made. As the Appellate Body has explained, "[p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB."[1] Moreover, "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply,' that *claim* cannot properly be raised in Article 21.5 proceedings."[2] While Article 21.5 of the DSU does not set out any similar express limitation on the legal arguments that can be made in a compliance proceeding, the necessary implication of the limitation on claims and measures is that, for legal arguments to be relevant in a compliance proceeding, they must relate to claims and measures that are properly within the scope of DSU Article 21.5.

2. The Appellate Body has explained that "Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel."[3] Accordingly, it is not clear that parties would make *exactly* the same legal arguments in a compliance proceeding (*i.e.*, in support of claims against measures taken to comply) as those it made in the original proceeding (*i.e.*, in support of original claims against original measures). Nonetheless, nothing in Article 21.5 of the DSU precludes parties from applying the same *logic* or *reasoning* in the two different contexts. Indeed, the situation with Brazil in this proceeding, where it has made one set of arguments in the original proceeding and then made directly contradictory arguments in the compliance proceeding – for example, regarding the effects of the Step 2 Program and the appropriateness of the FAPRI approach to modeling – would appear to be exceptional and not the approach required by Article 21.5 of the DSU.

2. Could each party explain its view on the question of whether, and to what extent, this Panel must rely on the legal and factual analysis underlying the original panel's findings? What are the relevant provisions of the DSU in this regard?

3. The relevance of an original panel's legal and factual analysis to the resolution of the matter presented to a compliance panel depends on the measure challenged in the compliance proceeding.

4. Where a complaining party claims that a Member has *failed* to implement the recommendations and rulings of the DSB – *i.e.*, that no measure taken to comply exists – the original panel's analysis (as modified by the Appellate Body) is a key consideration. In that case, it is important to examine the DSB's recommendations and rulings in order to determine whether the responding Member was, in fact, required to take measures to come into compliance and, if so, the scope of the obligation to do so. As the DSB's recommendations and rulings are based on the original panel's analysis (as modified by the Appellate Body), that analysis is important in discerning what the DSB's recommendations and rulings actually are in the particular dispute.[4]

5. The second case is one in which the complaining party agrees that a Member has taken measures to comply with the recommendations and rulings of the DSB but challenges its "consistency

[1] *Canada – Aircraft (21.5 Brazil) (AB)*, para. 36 (italics in original; underlining added).
[2] *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).
[3] *Canada – Aircraft (21.5 Brazil) (AB)*, para. 41.
[4] *See e.g., United States – Final Countervailing Duty Determination (21.5 – Canada) (AB)*, para. 68.

with a covered agreement." In that case, the original panel's legal and factual analysis may be much less important. As the Appellate Body reasoned in *Canada – Aircraft (21.5 – Brazil*), "Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel."[5] Accordingly, "the relevant facts bearing upon the 'measure taken to comply' may be different from the relevant facts relating to the measure at issue in the original proceedings."[6] Moreover, "the claims, arguments and factual circumstances which are pertinent to the 'measure taken to comply' will not, necessarily, be the same as those which were pertinent in the original dispute."[7] The Appellate Body has, therefore, clarified that:

> the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the 'consistency with a covered agreement of the measures taken to comply,' as required by Article 21.5 of the DSU.[8]

6. The same reasoning precludes "restricting" a panel to following the exact same legal and factual reasoning as the original panel.[9] However, under DSU Article 11, the task of a compliance panel – like that of an original panel – is to make an "*objective* assessment of the matter before it, including an *objective* assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." In so doing, it may well consider that the reasoning of the original panel to be persuasive on points that are apposite. The Appellate Body confirmed this in *United States – Shrimp (21.5 – Malaysia)*, where the Appellate Body found that the compliance panel was justified in "taking into account the reasoning" in the adopted Appellate Body report from the original proceeding. The Appellate Body recalled, in this regard that adopted panel and Appellate Body report "are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[10]

B. QUESTIONS WITH RESPECT TO BRAZIL'S REQUEST UNDER ARTICLE 13.1

Questions to the US

> ***3. Is the United States arguing that Brazil must identify the subsidized product for each of the types of subsidies from which it claims serious prejudice? Is the United States arguing that payments which permit planting flexibility are not tied to the production of upland cotton, so that they must be allocated by Brazil across the total value of production of each recipient?***

7. The United States *does* consider that Brazil must identify the subsidized product for each of the types of subsidies from which it claims serious prejudice. As the Appellate Body explained in the original proceeding, this is a requirement of Article 6.3(c) itself:

> the 'subsidized product' must be properly identified for purposes of significant price suppression under Article 6.3(c) of the SCM Agreement. And if the challenged

[5] *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.
[6] *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.
[7] *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.
[8] *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.
[9] This is also consistent with the fact that there is no principle of *stare decisis* applicable in WTO dispute settlement.
[10] *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 108 (citing *Japan – Alcoholic Beverages (AB)* at 108).

> payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market.[11]

8. The same requirement exists with respect to Article 6.3(d) of the *SCM Agreement*, which specifically refers to "subsidized primary product or commodity."[12]

9. Brazil and the United States agreed in the original proceeding – and the original panel found – that the "subsidized product" was upland cotton lint.[13] Brazil has signaled that it considers that the same "subsidized product" is at issue here in this compliance proceeding.[14] Under the Appellate Body's reasoning it is necessary to ensure that "the challenged payments do . . . , in fact, subsidize that product."[15] The challenged payments, in the case of counter-cyclical payments, are payments in respect of upland cotton base acres.[16] The United States maintains that the appropriate allocation methodology for payments such as the counter-cyclical payments – which are not tied to the production or sales of any particular product – can be found in Annex IV of the *SCM Agreement*. That Annex sets out methodologies for determining the rate of "subsidization" of a "product" for purposes of the now-defunct Article 6.1(a) of the *SCM Agreement*.

10. Annex IV does not apply directly to the serious prejudice determinations under Articles 5(c) and 6.3(c). However, as it is the only allocation methodology that Members have agreed in the *SCM Agreement* and deals specifically with the question of how to allocate subsidies that are not tied to production or sale of a given product, it provides essential context.[17]

11. Under paragraph 2 of Annex IV, "the value of the product" that is subsidized in the case of subsidies that are not tied to production or sales is equal to "the total value of the recipient firm's sales."[18] (By way of contrast, where a "subsidy is tied to the production or sale of a given product, the value of the [subsidized] product shall be calculated as the total value of the recipient firm's sales of

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[11] *Upland Cotton (AB)*, para. 472.

[12] Article 6.3(d) of the *SCM Agreement* provides that "the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted." (Footnote omitted).

[13] *See Upland Cotton (AB)*, para. 407, nn. 450-451 (stating that "the subsidized product is United States upland cotton lint. (Panel Report, paras. 7.139, 7.1221-7.1224 and footnote 191 to para. 7.139)" and "[t]he United States and Brazil confirmed during the oral hearing that they do not contest this identification of the subsidized product.")

[14] Brazil First Written Submission, para. 80.

[15] *Upland Cotton (AB)*, para. 472.

[16] As the United States explained in its letter dated January 19, 2007 and again in its rebuttal submission "support-conferring measures with respect to non-cotton historical base acres" were *not* included in the support found to exceed the limitation in the Peace Clause proviso, such measures were exempt by virtue of the Peace Clause in the *Agreement on Agriculture* from actions, including Brazil's serious prejudice claims. Therefore, there could have been no, and there were no, DSB recommendations and rulings with respect to such measures, and counter-cyclical payments for non-cotton base acres are not "measures taken to comply" within the meaning of DSU Article 21.5.

[17] While this methodology was not applied in the original proceeding, the primary reason was Brazil's insistence that no precise calculation need be undertaken in the context of claims under Part III of the *SCM Agreement*. *See e.g., Upland Cotton (AB)*, paras. 98 ("the remedy under Part III focuses on the effects of the subsidy, rather than the imposition of duties, and, according to Brazil, the size of a subsidy does not necessarily determine its effects") and 467. To the extent that calculation of the precise amount of the subsidy is undertaken – and the United States continues to believe that it is important that this be done – it is appropriate to use the allocation methodology in Annex IV.

[18] *SCM Agreement*, Annex IV, para. 2 (footnote omitted).

that product."[19]) Thus, Annex IV suggests a methodology for determining the amount of a non-tied subsidy that benefits a given product: the subsidy would be allocated to the product according to the ratio of the value of sales of that product to the total value of the recipient firm's sales. In this way, the Annex IV methodology recognizes that a payment that is not tied to the production or sale of a given product benefits all of the products the recipient produces. Allocating such a non-tied payment exclusively to one product over another would be economically arbitrary. Annex IV indicates an economically neutral methodology to allocate the benefits of non-tied subsidies to which Members have agreed.

12. Applying that methodology in the present circumstance yields the following results:

Value of cotton production for farm household that harvested cotton (2003-2005)

	2003	2004	2005	2003-2005 average
Total value of farm production	388,720	367,634	406,181	387,512
Total value of cotton	162,379	198,276	189,831	183,495
Cotton as percent of total	41.8%	53.9%	46.7%	47.4%

Source: 2003-05 USDA Agricultural Resource Management Survey.

Allocating counter-cyclical payments (million dollars)

	2003	**2004**	**2005**
Total CCP payments (A)	392	1,375	1,375
Ratio of total cotton base acres up to cotton planted acres to total cotton base acres (B)[1/]	59.1%	59.0%	60.2%
CCP payments paid on total cotton base acres on farms that planted cotton (C = A * B)	231.7	811.3	827.8
Cotton as percent of total on farms that harvested cotton (D)	41.8%	53.9%	46.7%
CCP payments allocated based on cotton's share of total crop value (E = D * C)	96.8	437.3	386.6
As percent of total CCPs (F= E/A)	24.7%	31.8%	28.1%

[1/]U.S. First Written Submission, para 224

[19] *SCM Agreement*, Annex IV, para. 3 [italics added].

4. Does the United States contest the accuracy of the figures for 2003 – 2005 cited in "Table 6" of Brazil's first submission and "Table 5" of Brazil's rebuttal submission? If so, please provide the accurate figures, or the figures the US deems to be more accurate.

13. The United States does not agree that the figures in "Table 6" of Brazil's first written submission for MY2004 and MY2005 are accurate for marketing loan payments.[20] These payments are composed of three separate components – loan deficiency payments ("LDP"), marketing loan gains ("MLG"), and certificate exchange gains ("CEG"). As Brazil notes, USDA budget projections now include a "stochastic add-on" to account for variability in the projections.[21] But this "add-on" is done only for projection purposes. Brazil has incorrectly included the projected figures – including the "add-on" for MY 2004 and MY 2005.[22]

14. The actual outlays for MY 2004 and MY 2005 are the following:

	MY2004	MY2005
LDP	374	256
MLG	10	8
CEG	1,396	1,005
TOTAL	**1,780**	**1,269**

15. The United States understands that Brazil intends the counter-cyclical payment figures shown in "Table 5" of Brazil's rebuttal submission to supercede the counter-cyclical payment figures shown in "Table 6" of its first written submission. Brazil has sought to allocate counter-cyclical payments in respect of upland cotton base acres using the so-called "cotton-to-cotton" methodology.[23] For the reasons discussed in response to question 3 above, the United States considers that the methodology set out in Annex IV of the *SCM Agreement* is the more accurate and more appropriate approach.

16. Nonetheless, the United States has attempted to test the calculations conducted by Brazil in Table 5 of its Rebuttal Submission. Brazil cites Exhibit BRA-567 (Agricultural Outlook Indicators, Table 19) as the source of payments rates and payments yields. However, this source only includes data through MY 2002. The United States has used publicly available data to try and replicate Brazil's figures. These figures are shown below:

[20] The United States considers that only the MY 2005 data is relevant for purposes of Brazil's "present" serious prejudice claims. Nonetheless, for sake of completeness, the United States has tested that figures for MY 2003-2005. The United States has not tested the figures shown for crop insurance payments, direct payments, PFC payments, MLA payments, or cottonseed payments, as these are not at issue in the present proceeding.

[21] Budget Estimates from USDA's Mid-Session Review (Exhibit BRA-456).

[22] *See* Budget Estimates from USDA's Mid-Session Review (Exhibit BRA-456).

[23] The Appellate Body indicated that the so-called cotton-to-cotton methodology was appropriate for the Peace Clause analysis. *See Upland Cotton (AB)*, para. ("for purposes of the comparison envisaged by Article 13(b)(ii), the values of the four measures, namely, production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments in the years 1999, 2000, 2001, and 2002 are properly determined by using the "cotton to cotton" methodology. . . .")

Item	MY2003	MY2004	MY2005
Total cotton base acres up to cotton planted acres (a) [1/]	**11,108**	**11,041**	**11,155**
Payment acres (b) [2/]	**9,442**	**9,385**	**9,482**
Program yield (c) [3/]	**639**	**636**	**634**
Payment rate (d) [4/]	**.0393**	**.1373**	**.1373**
CCP payment (e) [5/]	**237**	**820**	**825**

[1/] U.S. First Written Submission, December 15, 2007, para. 224.
[2/] 85 percent of cotton base acres (a).
[3/] Data for MY 2002 is from Budget Estimates from USDA's Mid-Session Review (Exhibit BRA-456). Other years are from CCC Commodity Estimates Book, Feb. 5, 2007, page 202 (Exhibit US-112).
[4/] MY2003 is from FSA Press Release 0455.04, available at http://content.fsa.usda.gov/pas/FullStory.asp?StoryID=1897.
[5/] The CCP payments (e) are equal to b*c*d.

Question to Brazil

5. The Panel refers to Brazil's communication dated 22 January 2007 concerning its request in relation to Article 13.1 of the DSU. Is it correct for the Panel to understand that as far as data for 2005 is concerned, data included in Exhibit US-64 satisfies all of the requests Brazil made in Part A of Annex 1 of its 1 November communication?

C. QUESTIONS CONCERNING THE PRELIMINARY OBJECTIONS RAISED BY THE UNITED STATES

1. Preliminary objections of the United States in respect of claims of Brazil regarding export credit guarantees in respect of pig meat and poultry meat

Question to both parties

6. The parties disagree with respect to whether in a proceeding under Article 21.5 of the DSU a party may present a claim that was raised in the original proceeding but on which no finding of WTO-inconsistency was made due to the fact that the Appellate Body was unable to complete the analysis.

a. Could the parties explain the legal basis in the text of Article 21.5 of the DSU and other relevant provisions of the DSU for their position on this question?

b. Could the parties explain whether and how their position on this issue is consistent with prior panel and Appellate Body reports?

17. Where there is no finding of WTO-inconsistency with respect to a measure – whether it is because the panel or Appellate Body was unable to make proper findings, because the complaining party failed to make a *prima facie* case, or some other reason – there are no DSB recommendations and rulings in respect of the measure. As the measure has never been found to be *out* of compliance with any covered agreement there logically is no question of bringing it *into* compliance. A WTO panel is not permitted to presume that a Member is out of compliance and there is no basis to expect that a Member should do so despite its own carefully considered views of what its WTO obligations

entail.[24] Simply put, an implementation obligation arises only when DSB recommendations and rulings exist that require implementation.

18. Under Article 21.5 of the DSU, "compliance" proceedings may address two categories of matters: (a) that measures taken to comply with recommendations and rulings of the DSB do not exist; and (b) that (extant) measures taken to comply with recommendations and rulings of the DSB are not consistent with a covered agreement.[25] In both cases, a necessary predicate is that there be DSB recommendations and rulings.

19. Where a measure is not subject to any DSB recommendations and rulings because no finding of WTO-inconsistency has been found in respect of it, there is, logically, no basis for any claim that a Member has not implemented the DSB's recommendations and rulings in respect of the measure (*i.e.*, that no measure taken to comply *exists* with respect to the measure). Moreover, unless the original measure is *itself* considered to be a measure taken to comply with other recommendations and rulings – and any such determination must be compelled by the particular the recommendations and rulings that are issued, not the unilateral assertions of the complaining party – there is no basis for claims to be made against the measure in a compliance proceeding alleging that it is inconsistent with a covered agreement. In short, the measure would not be the type of measure properly within the scope of Article 21.5 and the claims that could be made against it would not be the type of claims properly within the scope of that provision.

20. This reasoning is consistent with the reasoning in prior Appellate Body reports interpreting the scope of Article 21.5. For example, in *Canada – Aircraft (21.5 – Brazil)*, the Appellate Body clarified that:

> [p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures taken to comply with the recommendations and rulings" of the DSB. In our view, the phrase *"measures taken to comply" refers to measures which have been, or which should be, adopted by a* Member *to bring about compliance with the recommendations and rulings of the DSB.*[26]

21. The Appellate Body, thus, confirmed that the focus of compliance proceedings is on the DSB's recommendations and rulings – whether they have been complied with and, if so, whether the compliance measures are themselves consistent with the covered agreement.

22. The Appellate Body's (consistent) reasoning in *EC – Bed Linen (21.5 – India)* is even more salient. There the Appellate Body confirmed again that "the mandate of Article 21.5 panels is to examine either the 'existence' of 'measures taken to comply' or, more frequently, the 'consistency with

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[24] It is well-established that Members' measures cannot be presumed to be WTO-inconsistent. *See e.g., United States – Argentina OCTG Sunset Reviews (AB)*, paras. 173 ("The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged 'as such.'")

[25] The fact that "compliance" proceedings deal with implementation of recommendations and rulings is apparent not only from the text of Article 21.5 but also its context; for example, the fact that it is part of Article 21, which deals in the whole with "Surveillance of Implementation of Recommendations and Rulings." The first paragraph of DSU Article 21.1 provides that "prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members." And the provisions that follow all relate to implementation. For example, Articles 21.3 and 21.4 of the DSU deal with rules and procedures for establishing a reasonable period of time to implement the recommendations and rulings of the DSB. Article 21.5 deals with the dispute settlement procedures available when there is a disagreement as to whether a Member has implemented DSB recommendations and rulings consistently with its WTO obligations. And Article 21.6 deals with surveillance by the DSB of implementation by Members.

[26] *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 36 (emphasis added).

a covered agreement' of *implementing measures*."[27] The Appellate Body acknowledged that the Article 21.5 panel proceeding was *not* intended to provide complaining parties with a "second chance" to reassert claims that had been unsuccessful in the original proceeding.[28] Indeed, there the Appellate Body rejected India's attempt to reassert the same claim against an aspect of an antidumping determination (the "other factors" analysis) that had been dismissed by the original panel for failure to make a *prima facie* case.[29]

23. In doing so, the Appellate Body tracked precisely the reasoning set out above as to why measures are outside the scope of Article 21.5 proceedings when they have never been found to be WTO-inconsistent and are not themselves measures taken to comply. Specifically, the Appellate Body concluded, first, that "the investigating authorities of the European Communities were not required to change the determination as it related to the 'effects of other factors' in this particular dispute."[30] In other words, the Appellate Body recognized that there was no basis for a claim regarding the *existence* of measures taken to comply in respect of that aspect of the determination. Next, the Appellate Body noted that "we do not see why that part of the redetermination that merely incorporates elements of the original determination on 'other factors' would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute."[31] In other words, the Appellate Body determined that the "other factors" determination was not itself a measure taken to comply with any DSB recommendations and rulings.

24. Although *EC – Bed Linen (21.5 – India)* involved slightly different facts than those at issue here – namely, there, a finding of WTO-inconsistency was made because of a failure by the complaining party to make a *prima facie* case rather than because the Appellate Body had insufficient facts before it to determine whether the measures at issue were WTO-inconsistent – the reasoning in both cases is the same. Where there is neither a basis for a claim of *existence* of measures taken to comply (because there are no DSB recommendations and rulings that must be implemented with respect to the measure) nor a claim of *consistency with a covered agreement* (because the measure is not a measure taken to comply with other DSB recommendations and rulings), neither the measure nor any claims against it are properly within the scope of an Article 21.5 proceeding.

Questions to Brazil

7. Is Brazil of the view that it is only in the circumstances identified by the Appellate Body in EC – Bed Linen (Article 21.5 – India) that the scope of Article 21.5 proceedings is limited by the scope of the original proceedings? [Paragraphs 11-15 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling]

8. How does Brazil respond to the arguments of the United States that Brazil "incorrectly assumes that the standard is one of whether there has been a 'final resolution' of the issue in the original proceeding" and that Brazil misreads the Appellate Body report in EC – Bed Linen (Article 21.5 – India) and confuses the issue of "the scope of a compliance proceeding pursuant to Article 21.5 of the DSU" and the distinct issue of "when a claim against a specific measure or aspect of a measure can be considered to be 'finally resolved' for purposes of WTO dispute settlement"? [Paragraphs 8 and 12 of the Rebuttal Submission of the United States]

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[27] *EC – Bed Linen (21.5 – India) (AB)*, para. 79 (emphasis added).
[28] *EC – Bed Linen (21.5 – India) (AB)*, para. 74.
[29] *EC – Bed Linen (21.5 – India) (AB)*, para. 87.
[30] *EC – Bed Linen (21.5 – India) (AB)*, para. 86.
[31] *EC – Bed Linen (21.5 – India) (AB)*, para. 86.

9. What are the comments of Brazil on the arguments in footnote 22 of the United States' rebuttal submission?

Question to the US

10. Could the United States explain why it considers that what it describes as the "final resolution" standard is not the correct standard to decide whether Brazil's claims regarding export credit guarantees for pig meat and poultry meat are within the scope of this proceeding?

25. Article 21.5 of the DSU defines the scope of compliance proceedings conducted pursuant to that provision. It defines the measures that are properly within the scope of a compliance proceeding – "measures taken to comply with the recommendations and rulings of the DSB." And it defines the claims that can be made in respect of such measures – (a) claims regarding the "existence" of measures taken to comply and (b) claims regarding the "consistency with a covered agreement" of measures taken to comply. Article 21.5 does not define the scope of claims properly reviewed in a compliance proceeding in terms of whether or not the claims have been finally resolved.

26. Whether or not a claim has been finally resolved between parties to a dispute is a separate question. As the Appellate Body explained in *EC - Bed Linen*, that question is governed by Article 17.14 of the DSU, which provides that "an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute . . . ."[32] The Appellate Body clarified that the same reasoning applies also with respect to any *unappealed* finding included in an adopted panel report.[33] Where a particular claim has been finally resolved with respect to a particular measure (or component of a measure) that was the subject of the claim, that particular resolution is binding on the parties and cannot be raised again on the basis of the same facts and arguments in any other proceeding. By contrast, even where a claim is outside the limited scope of a "compliance" proceeding under Article 21.5 of the DSU, it may well be raised in a separate proceeding.

2. Preliminary objections of the United States with respect to claims of Brazil regarding marketing loan and counter-cyclical payment programs

Questions to Brazil

11. Is Brazil of the view that a finding under Article 6 of the SCM Agreement that a "subsidy" is causing serious prejudice necessarily always applies to both the subsidy "payments" and the subsidy "program"? [Paragraphs 31-35 of Submission of Brazil Regarding US Requests for Preliminary Ruling and paragraph 38 of the Rebuttal Submission of Brazil]

12. In paragraph 44 of its Rebuttal Submission, Brazil states:

> ***"Accordingly, there is no need for Brazil to challenge per se the FSRI Act of 2002. Nor does it assert an 'as applied' challenge to the FSRI Act of 2002. Rather, Brazil challenges the counter-cyclical and marketing loan Programs in the FSRI Act of 2002 and the payments that such programs require to U.S. upland cotton farmers, as they cause adverse effects." (emphasis added)***

[32] *EC – Bed Linen (21.5 – India) (AB)*, para. 91.

[33] *EC – Bed Linen (21.5 – India) (AB)*, para. 93 ("an unappealed finding included in a panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of that claim.")

Could Brazil please explain:

a. How its claims against "programs and payments... as they cause adverse effects" differ from claims against programs as such?

b. How these claims differ from claims against programs as applied?

13. In paragraph 45 of its Rebuttal Submission, Brazil refers to the failure of the United States "to implement the original recommendation of the DSB requiring the United States to take actions concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments".

a. Does Brazil consider that the statement in paragraph 7.1501 of the original panel report that "the United States is obliged to take action concerning its present statutory and regulatory framework..." forms an integral part of the recommendation made by the original panel in paragraph 8.3(d) of its report?

b. Does Brazil consider that the absence of actions by the United States "concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments" is in itself a sufficient basis for this Panel to find that the United States has not complied with the DSB recommendation under Article 7.8 of the SCM Agreement?

c. Is there any difference, in Brazil's view, between, on the one hand, the nature of the action the United States was obliged to take with respect to its statutory and regulatory framework as a consequence of the recommendation in paragraph 8.3(d) of the original panel report and, on the other, the nature of the action the United States would have been obliged to take if the original panel had found that the relevant provisions of this statutory and regulatory framework were WTO-inconsistent as such?

14. Could Brazil please explain how this Panel should interpret the relationship between the three categories of measures identified in paragraph 3.1(v),(vii) and (viii) of the original panel report? Is it the view of Brazil that "subsidies provided" or "subsidies mandated to be provided" must be interpreted to encompass both payments of subsidies and the regulatory provisions pursuant to which such payments were "provided" or "mandated to be provided"?

15. Does Brazil agree or disagree with the United States that the listing of certain legislative and regulatory provisions in paragraph 7.1107 of the original panel report reflects the original panel's view that "payments under a program constitute programs 'as applied'"? [Paragraphs 46-47 of the Rebuttal Submission of the United States]

16. Could Brazil clarify whether or not its claim in this Article 21.5 proceeding regarding a threat of serious prejudice caused by marketing loan and counter-cyclical payments is a claim with respect to the marketing loan and counter-cyclical payment programs as such? [Paragraphs 237-314 of the First Written Submission of Brazil]

Questions to the United States

17. The United States argues in paragraph 16 of its Rebuttal Submission that "[a]ccording to Brazil, its claims apply not only to the marketing loan and counter-cyclical payment Programs, as such, but to the Programs in addition to all payments authorized under the Programs" (original emphasis). The United States also argues in this respect that "it is abundantly clear that the original panel did not make any finding under Article 5(c) and 6.3(c) of the SCM Agreement against the marketing loan and counter-cyclical payment Programs, as such, whether alone or in addition to payments". [Paragraph 43 of Rebuttal Submission of the United States]

a. How does the United States respond to the argument of Brazil that the United States mischaracterizes Brazil's claims in these proceedings in that Brazil is not challenging the subsidy programs at issue as such? [Paragraph 31 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling; paragraph 33 of Rebuttal Submission of Brazil]

27. Brazil asserts in paragraph 31 of its submission regarding the U.S. preliminary ruling requests – the same paragraph noted by the Panel above – that it is "challenging in this proceeding the U.S. subsidies inasmuch as they cause adverse effects." According to Brazil "the *measures that constitute these "subsidies"* are the statutory and regulatory provisions of the FSRI Act of 2002 that relate to upland cotton, *i.e.*, the marketing loan and counter-cyclical payment provisions" as well as payments under the Program that allegedly "have been and will continue to be made over the lifetime of the FSRI Act of 2002, *i.e.*, until MY 2007. . . ."[34] Therefore, Brazil contradicts its own statement that it is not challenging the marketing loan and counter-cyclical payment Programs "as such." As the Appellate Body explained in *United States – Sunset Reviews on OCTG from Argentina*: "[b]y definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations."[35]

28. Brazil's statement cited above indicates that it is not seeking to challenge the marketing loan and counter-cyclical payment *only* "as such," and that it is seeking to *also* challenge the Programs "as applied" (*i.e.*, the payments under the Program). However, tacking on claims "as applied" does not relieve Brazil of proving its claims against the marketing loan and counter-cyclical payment Programs "as such." This includes the obligation of proving that application of "the statutory and regulatory provisions of the FSRI Act of 2002 that relate to upland cotton, *i.e.*, the marketing loan and counter-cyclical payment provisions" "will necessarily be inconsistent with that Member's WTO obligations."[36] Indeed, as the Appellate Body has emphasized:

> In our view, "as such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. . . .In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than "as applied" claims. We also expect that measures subject to "as such" challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that

[34] Brazil Submission Regarding U.S. Requests for Preliminary Rulings, para. 31.
[35] *United States – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.
[36] *United States – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.

> Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged "as such."[37]

b. Could the United States also comment in this regard on the arguments in paragraph 31 of the Third Party Submission of Chad? Does the United States agree or disagree with the proposition that statutory or regulatory provisions can be challenged on an as applied basis and that Brazil's claims in the original proceeding "were as applied claims regarding measures that included legislative and regulatory provisions"?

29. To the extent that Chad is arguing that Brazil's claims in the original proceeding were *limited* to "as applied" claims, the United States respectfully disagrees. That argument cannot be reconciled with the original panel's own explanation of the claims made by Brazil in the original proceeding. Specifically, the original panel explained that "concerning selected provisions of the FSRI Act of 2002 and the ARP Act of 2000," Brazil was challenging "the following sections" as "violat[ing], *as such*, Articles 5(c), 6.3(c), 6.3(d) of the SCM Agreement and Articles XVI: 1 and 3 of the GATT 1994 to the extent that they relate to upland cotton . . . ."[38]

30. On the question of whether the application of statutory and regulatory provisions can be challenged in WTO dispute settlement, the United States agrees that statutory and regulatory provisions can be challenged "as applied." Indeed, in the original dispute, Brazil challenged payments made under, *inter alia*, the Step 2, marketing loan, and counter-cyclical payment Program in MY 1999-2002 as having caused significant price suppression and serious prejudice to the interests of Brazil within the meaning of Articles 5(c) and 6.3(c) of the *SCM Agreement*.[39] That constituted a challenge to the application of the Programs in those years. And Brazil prevailed on that claim:

> [i]n conclusion, in light of all of these considerations, we find that the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan program *payments*, user marketing (Step 2) *payments* and MLA *payments* and CCP *payments* – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of Articles 6.3(c) and 5(c) of the SCM Agreement.[40]

31. Brazil did not prevail, however, on its claims regarding payments allegedly "mandated" to be provided in MY 2003-2007 (*i.e.*, the (alleged) application of the Programs in future marketing years).[41] Nor did Brazil prevail on its claims regarding, *inter alia*, the Step 2, marketing loan and counter-cyclical payment program *per se*.[42] The question is whether Brazil has any basis now, in this "compliance" proceeding, to make claims in respect of those measures again.

32. There is no such basis. Under the express terms of Article 21.5 of the DSU, a "compliance" proceeding under Article 21.5 of the DSU provides for an assessment of whether a Member has complied with the recommendations and rulings of the DSB consistently with its WTO obligations. Where there are no DSB recommendations and rulings in respect of statutory and regulatory provisions as such, and there are no DSB recommendations and rulings in respect of the application of those provisions in future years, there is no implementation obligation in respect of those measures. Therefore, there is no basis for a claim that measures taken to comply do not *exist* with respect to

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[37] *United States – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.
[38] *Upland Cotton (Panel)*, para. 3.1(viii).
[39] *Upland Cotton (Panel)*, para. 3.1(vi) (emphasis added).
[40] *Upland Cotton (Panel)*, para. 7.1416 (emphasis added).
[41] *Upland Cotton (Panel)*, paras. 7.1503-7.1505.
[42] *Upland Cotton (Panel)*, paras. 7.1511.

them. Moreover, where the measures have not been changed in order to comply with any recommendations and rulings, there is no basis for claims regarding their "consistency with a covered agreement." The fact that the *application* of statutory and regulatory provisions can be challenged does not change that analysis.

18. The United States submits that the only measures subject to the DSB's recommendation under Article 7.8 of the SCM Agreement are payments made under the Step 2, marketing loan, and counter-cyclical payment programs in 1999-2002. The United States also asserts, in this regard, that Brazil fails to submit evidence "as to the present effects, if any, of the measures that were subject to the original panel's actionable subsidy finding".

a. Do these statements mean that the United States considers that the DSB recommendation under Article 7.8 of the SCM Agreement only obliged the United States to ensure that payments made in 1999-2002 would no longer have any adverse effects?

33. The recommendation of the original panel – which was adopted by the DSB – was that the United States was "under an obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy.'"[43] Therefore, consistent with Article 7.8 of the *SCM Agreement*, the United States had a choice between withdrawing the "subsidy" subject to the original panel's "present" serious prejudice finding *or* removing its adverse effects.

34. The subsidies that were subject to Brazil's claim of "present" serious prejudice were "the subsidies provided during MY 1999-2002,"[44] including Step 2, marketing loan, and counter-cyclical *payments*.[45] The panel concluded that these subsidies caused "present" serious prejudice in the years MY 1999-2002:

> [i]n conclusion, in light of all of these considerations, we find that the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan program *payments*, user marketing (Step 2) *payments* and MLA *payments* and CCP *payments* – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of Articles 6.3(c) and 5(c) of the SCM Agreement[46]

35. It was these subsidies that were, thus, also the subject to the U.S. "obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy.'"[47]

b. Could the United States comment on the argument of New Zealand in paragraph 4.08 of the Third Party Submission of New Zealand?

36. New Zealand argues in paragraph 4.08 of its third party submission that "the United States distinction between payments and programs leads to an absurd result" because, according to New Zealand, "serious prejudice would have to proved annually in the light of payments that have been made by which time the adverse effects have already occurred and it would be too late to

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[43] *Upland Cotton (Panel)*, para. 8.3(d).

[44] *Upland Cotton (Panel)*, para. 3.1(vi). *See also Upland Cotton (Panel)*, para. 7.1108 ("Brazil claims that United States subsidies provided during MY 1999-2002 have caused, cause and continue to cause "serious prejudice" to Brazil's interests. . . .")

[45] *Upland Cotton (Panel)*, para. 7.1120.

[46] *Upland Cotton (Panel)*, para. 7.1416 (emphasis added).

[47] *Upland Cotton (Panel)*, para. 8.3(d).

withdraw the measure that caused them."[48] New Zealand's argument appears to be based on a number of incorrect assumptions that do not square even with the facts of this dispute.

37. First, New Zealand assumes that the distinction between the payments and Programs is a "United States distinction."[49] In fact, the distinction between payments and Programs is one of *fact* that Brazil recognized when it brought separate claims against particular payments and the Programs themselves in the original proceeding.[50] The original panel recognized this distinction in its resolution of the separate claims raised by Brazil.[51] And the distinction has been recognized and respected in other disputes.[52]

38. Second, New Zealand appears to assume incorrectly that recognizing the *fact* that payments are measures distinct from the statutory and regulatory provisions that authorize them means that the latter cannot be challenged in WTO dispute settlement. That is not a necessary implication of recognizing that payments and Programs are distinct measures. Indeed, this dispute is a case in point that Programs *can* be challenged as such.[53] Brazil simply did not prevail on the claims against the Programs as such. The fact is, however, that Brazil only prevailed on its claims regarding particular payments made in MY 1999-2002.

39. Third, New Zealand appears to ignore the fact that a complaining Member may make claims of "threat" of serious prejudice about payments in future years (or, indeed, regarding the Program authorizing the payments) should it not want to make claims of "present" serious prejudice against particular payments that have been made or claims against the Programs, *per se*. This, too, is illustrated in this dispute.

40. Fourth, New Zealand appears to assume that the effects of a recurring payment are limited to the year in which the subsidy is paid so that "the subsidy is over and the subsidizing effect is past" "annually." This argument was rejected by the Appellate Body in this dispute: "The context of Article 6.3(c) within Part III of the SCM Agreement does not support the suggestion that the effect of a subsidy is immediate, short-lived, or limited to one year, regardless of whether or not it is paid every year."[54] Indeed, the Appellate Body used this reasoning to conclude that Brazil could challenge U.S. payments made in MY 1999-2001, not just the payments in MY 2002, the year in which Brazil initiated the original proceeding.[55] Here, again, New Zealand's argument is contradicted by the facts of this dispute.

19. Regarding the argument of the United States that the marketing loan and counter-cyclical payments programs are not measures "taken to comply", is it the view of the United States that Article 21.5 of the DSU only applies to measures actually taken by a party to comply and does not apply to measures that a Member should have taken to comply?

41. The United States considers that Article 21.5 of the DSU provides two categories of claims: (a) claims that no measure taken to comply exist and (b) claims that measures taken to comply exist but that these measures are not consistent with a covered agreement. In the first case, there is – by definition – no measure taken to comply and, in that sense, the "measure" could be the absence of

[48] New Zealand Third Party Submission, para. 4.08.
[49] New Zealand Third Party Submission, para. 4.08.
[50] *See Upland Cotton (Panel)*, paras. 3.1(vi)-(viii) and U.S. Rebuttal Submission, paras. 30-37.
[51] New Zealand Third Party Submission, para. 4.08.
[52] *See e.g., Brazil – Aircraft (21.5 II – Canada)*, para. 2.1.
[53] *See Upland Cotton (Panel)*, paras. 3.1(vi)-(viii) and U.S. Rebuttal Submission, paras. 30-37.
[54] *Upland Cotton (AB)*, para. 477.
[55] *Upland Cotton (AB)*, paras. 484.

"measures that a Member should have taken to comply." In the second case, there is a measure taken to comply and that is the only proper subject of any WTO-inconsistency in the proceeding.

20. How does the United States respond to the argument in the Third Party Submission of Japan that the Appellate Body report in EC – Bed Linen (Article 21.5 – India) does not support the argument of the United States that the marketing loan and counter-cyclical payments programs are not within the scope of this Article 21.5 proceeding?

42. Japan appears to misunderstand the U.S. argument. Contrary to Japan's assertion, the United States has *not* argued that a complaining Member is "cut[] off" from "access to review under Article 21.5" where the responding Member has taken no action to comply with the recommendations and rulings of the DSB.[56] To the contrary, the United States notes that Article 21.5 specifically contemplates that a complaining Member can invoke "compliance" review under that provision "where there is disagreement as to the *existence* . . . of measures taken to comply with the recommendations and rulings." (Emphasis added) The United States considers that this covers the situation where a Member has taken no measures to comply with recommendations and rulings.

43. The U.S. arguments to which Japan refers deal with the question of what measures may be subject to new or renewed "claims of consistency with a covered agreement" in an Article 21.5 proceeding. Article 21.5 of the DSU provides that such claims can only be made in respect of *measures taken to comply* with the recommendations and rulings of the DSB. In the present case, neither the marketing loan and counter-cyclical payment Programs – nor the Programs and "all payments" thereunder – are measures taken to comply with any DSB recommendations and rulings. The fact that they have not been changed, either to implement any DSB recommendations and rulings or for any other reason, confirms this. And as these measures are not "measures taken to comply," they cannot – under the express terms of Article 21.5 – be subject to new and renewed "claims of consistency with a covered agreement."

44. The Appellate Body's reasoning in *EC – Bed Linens* is entirely consistent with the U.S. argument. The Appellate Body recognized there that "[i]f a claim challenges a measure which is not a 'measure taken to comply,' that claim cannot properly be raised in Article 21.5 proceedings."[57] In other words, an Article 21.5 proceeding is about whether implementation of DSB recommendations and rulings is consistent with a Member's WTO obligations. As the Appellate Body recognized, it does not provide complaining Members with a "second chance" to make "claim[s] which, as a legal and practical matter, could have been raised and pursued in the original dispute."[58]

3. Claim of Brazil regarding the failure of the United States to comply with the DSB recommendations between 21 September 2005 and 1 August 2006

Questions to Brazil

21. Could Brazil please explain whether its request for a finding that the United States failed to comply with the DSB recommendations between 21 September 2005 and 1 August 2006 is supported by prior panel practice in Article 21.5 proceedings? [Paragraph 68 of the Rebuttal Submission of the United States]

22. How does Brazil respond to the argument of the European Communities that "the lack of positive action taken by the United States to comply with the panel and Appellate Body's findings and recommendations between the implementation date

[56] Japan Third Party Submission, para. 18.
[57] *EC – Bed Linen (21.5 – India) (AB)*, para. 78.
[58] *EC – Bed Linen (21.5 – India) (AB)*, para. 74.

of 21 September 2005 and 31 July 2006 is not necessarily fatal to its defence"? [Paragraph 48 of the Third Party Submission of the European Communities]

Question to the United States

23. Does the United States consider that the text of Article 21.5 of the DSU should be interpreted to mean that a compliance panel may only review the "existence" or "consistency" with a covered agreement of measures taken to comply as of the date that the matter was referred to the panel and not as of the date of the end of the implementation period? [Paragraph 68 of the Rebuttal Submission of the United States]

45. In paragraph 68 of the U.S. rebuttal submission, the United States explained that Brazil has not identified any textual basis for making *both* (a) a claim about "existence" of measures taken to comply with a recommendation of the DSB relating to factual circumstances that both parties agree no longer even exist *and* (b) a claim about "measures taken to comply" with respect to the *same* recommendation of the DSB under factual circumstances that both parties agree *do* actually exist.

46. To the contrary, as the panel recognized in *United States – Shrimp (21.5 Malaysia)*, a finding such as the one described in (a) above regarding superceded facts does not "favour[] a prompt settlement of the dispute."[59] Similarly, the panel in *EC – Bed Linen (21.5 – India)* declined to "make two decisions on the existence or consistency of measures taken to comply – one as of the end of the reasonable period of time, and one as of the date of establishment of the Panel"[60] because "[w]e do not consider that it would be either necessary or appropriate, as a matter of judicial economy, to first examine whether compliance had occurred as of the end of the reasonable period of time, and second consider compliance as of the later date."[61] This clarification by the *EC – Bed Linen (21.5 – India)* panel – that the issue is one of "judicial economy" – is especially helpful. "Judicial economy" refers to the principle that panels have to "[make] findings only on those claims that such panels concluded were necessary to resolve the particular matter."[62] In *EC – Bed Linens*, the complaining party did not show that findings regarding compliance as of the end of the implementation period would be "necessary or appropriate" to resolving the particular matter before the panel. Similarly, here, Brazil has not shown that the requested findings regarding compliance under the superceded facts that existed on the date of implementation are necessary or appropriate to resolving the particular matter before this Panel.

[59] *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 5.12.
[60] *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.
[61] *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.
[62] *United States – Shirts and Blouses (21.5 – India) (AB)*, p. 18.

ANNEX D-9

RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS (SECTIONS D&E)

(6 March 2007)

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127	*The New Shorter Oxford English Dictionary* at 2543, Volume 2, (1993 Edition)
128	*The New Shorter Oxford English Dictionary* at 103, Volume 1, (1993 Edition)
129	*The New Shorter Oxford English Dictionary* at 1421, Volume 1, (1993 Edition)
130	*The New Shorter Oxford English Dictionary* at 195, Volume 1, (1993 Edition)

D. CLAIMS OF BRAZIL REGARDING PRESENT SERIOUS PREJUDICE

1. General

Questions to both parties

24. Could the parties explain how they interpret the phrases "take appropriate steps to remove the adverse effects" and "withdraw the subsidy" in Article 7.8 of the SCM Agreement ?

1. "[T]ake appropriate steps to remove the adverse effects" and "withdraw the subsidy" in Article 7.8 refer to the two options available to a responding Member "where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy [of the responding Member] has resulted in adverse effects to the interests of another Member within the meaning of Article 5." To interpret these two phrases, it is necessary to examine the "ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[1]

2. With respect to the first option – "take appropriate steps to remove the adverse effects" – "take" refers, *inter alia*, to "undertake and perform" "make oneself responsible for (a duty etc.)" "adopt or choose for a particular purpose" or "receive or obtain (something given, bestowed, or administered).[2] "Steps" – especially in the sense of "taking steps" – refers to "an action, measure, or proceeding, esp. one of a series, which leads towards a result."[3]

3. In the context of Article 7.8 of the *SCM Agreement*, the particular "result" towards which steps are to be taken is the removal of adverse effects. "Remove" is defined, *inter alia*, as "the action of taking away or getting rid of a thing."[4] The thing to be "removed," under Article 7.8 of the *SCM Agreement*, is "the adverse effects." Although Article 7.8 does not specify that it is the adverse effects *of the subsidy*, as found in the adopted panel report or Appellate Body report, that should be "removed," this is apparent from the context.[5]

4. Article 7.8 does not specify what precise steps are to be taken to "remove the adverse effects." But it does provide that these steps must be "appropriate." In other words, they must be "specially suitable (*for, to*)" the removal of the adverse effects found to exist in the panel and Appellate Body reports.[6] This confirms the fact-specific nature of adverse effects findings and remedies in respect thereof. What is "appropriate" – i.e., "specially suitable (*for, to*)" – for removing the adverse effects in a particular case will depend on the facts of the situation and the particular adverse effects found to exist.

5. With respect to the second option – "withdraw the subsidy" – "withdraw" means, among other things, "cause to decrease or disappear" and "take back or away (something bestowed or enjoyed)."[7] According to Article 7.8 of the *SCM Agreement*, the thing to be "caused to decrease or disappear" or "taken back or away" is the "subsidy." Again, the context makes clear that the "subsidy" at issue is the one identified in the panel or Appellate Body report as resulting in adverse effects to the interests of another Member within the meaning of Article 5 of the *SCM Agreement*.

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[1] *See e.g., EC – Chicken Classification (AB)*, paras. 175.
[2] *The New Shorter Oxford English Dictionary* at 3206, Volume 2, (1993 Edition) (Exhibit US-125).
[3] *The New Shorter Oxford English Dictionary* at 3050, Volume 2, (1993 Edition) (Exhibit US-126).
[4] *The New Shorter Oxford English Dictionary* at 2543, Volume 2, (1993 Edition) (Exhibit US-127).
[5] For example, the very next provision, Article 7.9 of the *SCM Agreement*, discusses the situation where a Member "has not taken appropriate steps to remove the adverse effects *of the subsidy*. . . ."
[6] *The New Shorter Oxford English Dictionary* at 103, Volume 1, (1993 Edition) (Exhibit US-128).
[7] *The New Shorter Oxford English Dictionary* at 3704, Volume 2, (1993 Edition) (Exhibit US-118).

25. How do the parties interpret the relationship between Article 7.8 of the SCM Agreement and Article 21.5 of the DSU?

6. Article 7.8 of the *SCM Agreement* establishes the obligation of a responding Member "where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy [of the responding Member] has resulted in adverse effects to the interests of another Member within the meaning of Article 5." In that situation, the responding Member has two available options under Article 7.8. As discussed above, the Member may either (a) "take appropriate steps to remove the adverse effects" or (b) may "withdraw the subsidy."

7. Article 21.5 of the DSU deals with the use of dispute settlement procedures to decide disagreements about the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings of the DSB.

8. There is no cross-reference in either Article 7.8 of the *SCM Agreement* or Article 21.5 of the DSU to the other provision. However, given the obligation under Article 7.8 to either "take appropriate steps to remove the adverse effects" or "withdraw the subsidy,"to the extent there is disagreement as to whether the responding Member has satisfied its obligations, Article 21.5 of the DSU provides for dispute settlement procedures to decide the disagreement. In other words, a complaining party could have recourse under Article 21.5 of the DSU to claim that there is no measure taken to comply by the Member concerned (i.e., the adverse effects have not been removed or the subsidy not withdrawn) or that the measure taken to comply is not consistent with a covered agreement.

26. Could the parties explain whether they agree or disagree with the arguments of New Zealand in its Third Party Submission that Article 7.8 of the SCM Agreement has certain consequences for the burden of proof in an Article 21.5 proceeding? [Paragraphs 5.04-5.06 of the Third party Submission of New Zealand]

9. The United States disagrees with New Zealand's argument that "Article 7.8 of the *SCM Agreement* operates to distribute the burden of proof somewhat differently" in a compliance proceeding.[8] That argument has no legal basis. Article 7.8 provides the following:

> 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.

10. This provision says nothing about the burden of proof in Article 21.5 proceedings, let alone that it reverses the well-established rule that a complaining party – whether in an original proceeding or a compliance proceeding – bears the burden of proving its claims.[9] Just as in any other Article 21.5 proceeding, the complaining party continues to have the burden to prove its claim that a measure

[8] New Zealand Third Party Submission, para. 5.06.

[9] *See e.g., Canada – Dairy (21.5 – U.S. and New Zealand)*, para. 6.4 ("The Panel does not consider that the rules on the allocation of the burden of proof change simply because a claim is made in the context of Article 21.5 DSU proceedings.") (citing to Appellate Body report in *Brazil – Aircraft (21.5 – Canada)*, para. 66). The United States also notes that New Zealand's argument is based on a flawed reading of the findings in the original proceeding. New Zealand assumes that the original panel found the marketing loan, counter-cyclical payment and step 2 "programs" to be causing serious prejudice. However, as is clear from the original panel report, the original panel expressly stated it was declining to do so. *See* U.S. First Written Submission, paras. 31-44; U.S. Rebuttal Submission, paras. 16-63.

taken to comply does not exist (i.e., the adverse effects have not been removed or the subsidy not withdrawn) or that a measure taken to comply is not consistent with a covered agreement.

27. Could the parties comment on the following statement of the European Communities:

> ***"The text of Article 7.8 of the SCM Agreement does not state expressly that a Member that has been requested by the DSB to implement its recommendations and rulings under Article 7.8 of the SCM Agreement has to do anything" (original emphasis)***

11. The United States agrees with the European Communities' statement to the extent that it means that Article 7.8 does not specify any particular steps for removing the adverse effects of a subsidy or withdrawing a subsidy. The decision is left to the responding Member. In the case of the first option (removing the adverse effects), the only guidance provided in the text is that the steps taken must be "appropriate."[10] What is "appropriate" in a particular case is to be determined on a fact-specific basis given the particular subsidy, adverse effects, and other circumstances at issue. In the case of the second option (withdrawing the subsidy), there is no limitation whatsoever on how to remove the subsidy. And it may not always be necessary to change the measure itself. It is possible that market or other conditions may change such that a subsidy is no longer causing adverse effects or the measure is no longer a subsidy (*e.g.*, because it no longer confers a benefit).

28. The parties present divergent views with respect to the relevant marketing year to be considered by the panel in its analysis of Brazil's serious prejudice claims.

a. Could the parties explain what they consider to be the relevant legal considerations by which the Panel should be guided in determining whether MY 2005 or MY 2006 is the appropriate marketing year?

12. The United States considers that the present marketing year – MY 2006 – is the relevant period to consider whether the present "effect" of any subsidy "is . . . significant price suppression in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*. This is compelled by the use of the present-tense term "is" in that provision. "Is" means "that which exists, that which is; the fact or quality of existence."[11] "Is" comes from the verb "to be," which itself means, *inter alia*, "have place in the realm of fact, exist, live" "be the case or the fact; obtain."[12] To determine the effect (if any) of a subsidy that "exists" at present, it is plainly necessary to look at the present period (or marketing year). It is possible that certain data for MY 2006, the present marketing year, may not be available. In that circumstance, it is appropriate to look at historical data as a *proxy* for the "present" period.[13] However, where reliable data is available for MY 2006, or any part thereof, the Panel should consider that data in assessing Brazil's "present" serious prejudice claims. This is especially apt where the particular data for MY 2006 *is* available and complete, including, for example, futures data that would have been considered by U.S. producers at the time of planting for MY 2006 (*i.e.*, in the period January-March 2006).

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[10] *See* discussion of "appropriate" in response to Question 24 above.

[11] *The New Shorter Oxford English Dictionary* at 1421, Volume 1, (1993 Edition) (Exhibit US-129).

[12] *The New Shorter Oxford English Dictionary* at 195, Volume 1, (1993 Edition) (Exhibit US-130).

[13] *See* Brazil First Written Submission, para. 49 ("Full-year data on marketing loan and counter-cyclical payments to U.S. upland cotton farmers for MY 2006 – the first year in which Step 2 is not provided – will not be available until September 2007. *Nevertheless*, the compliance Panel can determine whether the repeal of the Step 2 program is sufficient to bring the new "basket of measures" supporting U.S. upland cotton farmers into conformity with the covered agreements, based on data covering the full 2005 marketing year.") (emphasis added)

b. Do the parties agree or disagree with the argument of the European Communities that in a dispute involving a claim of present serious prejudice the parties must provide the "most recent reasonably available" data? [Paragraphs 43 and 54-55 of the Third Party Submission of the European Communities]

13. As noted above, the United States agrees that, for a claim of "present" serious prejudice, the present marketing year and any (reliable) data relating to that marketing year are the most relevant.[14]

Questions to the United States

29. Does the United States contest the fact that a "strong positive relationship between upland cotton (base acre) producers receiving annual payments and upland cotton production" exists?[15] In particular, does the US disagree with the following statements[16]:

- ***a very large proportion of farms with upland cotton base acres continue to plant upland cotton in the year of payment;***
- ***the overwhelming majority of farms enrolled in the programs which plant upland cotton also hold upland cotton base;***

14. To clarify, the United States considers "strong positive relationship" to be a characterization of facts, rather than facts themselves. The facts are the following.

- On farms that have upland cotton base acres (and thus may receive cotton counter-cyclical payments), the ratio of cotton *planted* acres to total upland cotton *base* acres was only 60 percent in MY 2002-2005. In other words, U.S. upland cotton farmers were planting only approximately 60 percent of the cotton acres that they planted in the historical period used to calculate base acres.
- Second, a significant portion of U.S. upland cotton planted acreage (over MY 2002-2005, an average of about 17 per cent) is on farms with cotton planted acreage that exceeds cotton base acres, or, indeed, on farms with no cotton base acres at all.

15. The debate between the parties is as to what these facts signify. In the view of the United States, these facts support a number of the U.S. arguments. For example, these facts confirm that U.S. farmers do, in fact, use the planting flexibility afforded by the direct and counter-cyclical payment programs. By contrast, Brazil argues that U.S. farmers are somehow induced to plant upland cotton simply because they hold base acres on which they may receive payments based on upland

[14] The United States does not necessarily endorse, however, all of the additional positions that the European Communities takes regarding the alleged "obligation" of a responding party to refer to the most recently-available data in its first written submission, regardless of what the complaining party argues. *See* European Communities' Third Party Submission, para. 55. These additional arguments appear to touch on the issue of burden of proof in an Article 21.5 proceeding. As the United States notes above, the burden in a DSU Article 21.5 proceeding is on *a complaining party* to prove a breach of the identified covered agreements; it does *not* fall in the first instance on the responding party.

[15] [ORIGINAL FOOTNOTE: See para. 131 of Brazil's first submission. The Panel clarifies that this phrase refers to the fact that "the recipients who hold upland cotton base acres" and "those who continue to plant upland cotton" overlap with each other to a great extent. (See para. 7.637 of the report of the original panel.) The Panel understands that Brazil uses this phrase in the same sense.]

[16] [ORIGINAL FOOTNOTE: These passages are reproduced from para. 7.636 of the report of the original panel.]

cotton payment rates. But Brazil has not explained why, if this is so, payment recipients are planting 40 percent fewer acres than they planted in the historical period used to calculate base acres.

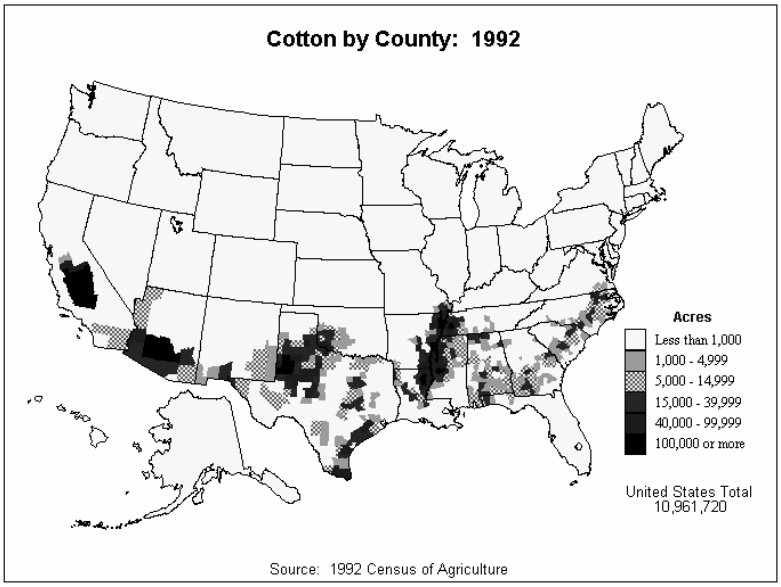
16. The second fact is also notable in the U.S. view. It shows that a significant – and growing percentage – of cotton is grown on farms that do not hold *any* upland cotton base acreage or on planted acreage that is in excess of the upland cotton base acreage held by a farm. That is, for these cotton farmers, there can be no link – even alleged – between cotton base counter-cyclical payments and current production because these farmers are growing cotton on acreage *beyond* their cotton base acreage, if any. This data reinforces other evidence submitted by the United States; for example, data regarding cost of production shows that most U.S. production (at least 92 per cent) market revenue not only covers variable costs of production but also *all* total costs of production. Thus, even on Brazil's own theory, counter-cyclical payments play no part in inducing continued cotton production for the vast majority of U.S. cotton production. And, as for the other 8 percent of U.S. production, Brazil has not even related its theory to them, to show any "significant" price suppression resulting from marketing loan and counter-cyclical payments.

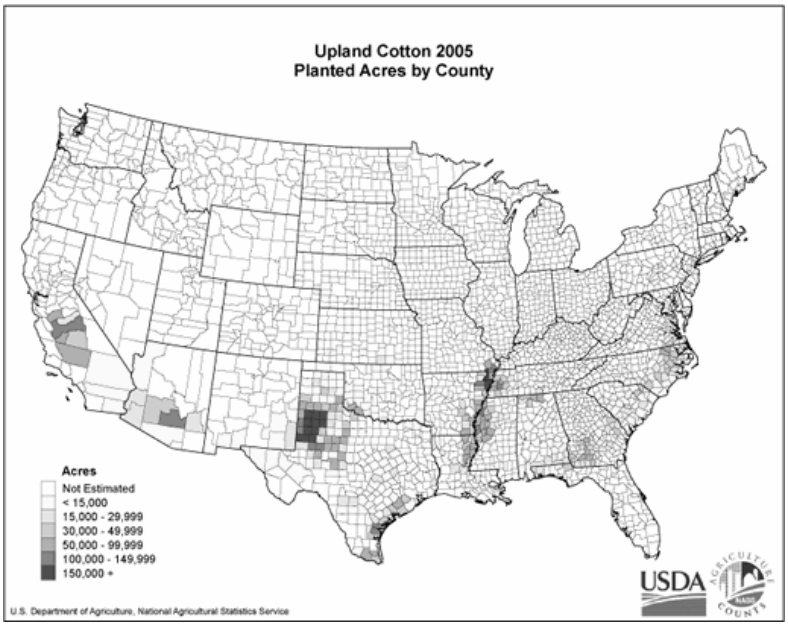
17. These are the facts that the United States considers to be the most relevant because they focus on the level of upland cotton *planting* and *production* and the relationship that these bear – if any – to payments. The United States recalls in this regard that Brazil's claim focuses on *precisely* this same relationship. Yet, inexplicably, Brazil seeks to dismiss these facts as "unimportant statistics."[17] Rather, Brazil argues that the focus should be on whether upland cotton is grown on farms that hold even one base acre of upland cotton. Brazil notes, in this regard, that "95 percent of actual U.S. upland cotton planted acreage was planted on farms that received upland cotton counter-cyclical payments in MY 2005."[18]

18. The United States does not contest this figure but strongly disagrees with the conclusions that Brazil asks the Panel to draw from this; namely, that this is somehow evidence of the allegedly production-inducing *effects* of the counter-cyclical payment program. In fact, Brazil appears to confuse cause and effects.

19. Upland cotton is grown in a limited number of areas in the United States, primarily in a few southern and western states, where the weather and other conditions are ideal for upland cotton production. Upland cotton was grown in these areas well before the counter-cyclical payment program came into effect and continues to be grown there now. Continued planting of upland cotton on this farmland is not the effect of any government payment; it is a function of the fact that upland cotton can be grown easily in these areas but cannot be grown in others (for example, cotton seedlings would likely freeze if planted in April in Montana but flourish in the warmer temperatures in Texas at that time). As shown in the maps below, cotton is grown in the same states and – in large part – the same counties in 2005 as it was in 1992, well before the counter-cyclical payments came into effect. The same would be true if one were to go back even decades earlier in time.

[17] Brazil Rebuttal Submission, para. 157.
[18] Brazil Rebuttal Submission, para. 157.





20. Base acres were assigned based on what U.S. farmers were producing in a historical period. If U.S. farmers were planting upland cotton in the historical period, they were able to enrol upland cotton base acres for purposes of the direct and counter-cyclical payment programs. Many farmers in the southern United States were planting upland cotton – often, as one in a rotation of crops – in the historical period because it made sense for them to do so as an agronomical matter. Many of the same farms produce *some* upland cotton today for the same reasons that they did so at the time that base acres were enrolled – farmers have experience and expertise growing upland cotton in those areas, they have equipment that they can use in that production, and they know they can grow upland cotton with good results given the particular growing conditions in the region.

21. Brazil seeks to claim whatever planting continuity exists as evidence that counter-cyclical payments cause U.S. producers to plant upland cotton where they would otherwise not have done so.

But there is no basis for such a conclusion. That is the equivalent of claiming as "evidence" of the effects of subsidies that wine grapes have historically been grown and continue to be grown today in certain regions of France, or that olives have been grown and are grown today in certain Mediterranean regions. The fact that some amount of farmland historically used to produce cotton continues to be good – from an agronomical standpoint – for the production of that crop and continues to be used to grow that crop is hardly remarkable and is *not* evidence of any production-inducing effects of the counter-cyclical payment program.

22. In short, Brazil has yet to establish either the relevance of the farm data it seeks to have the Panel consider or why the other – more relevant – acreage data presented by the United States should be ignored. Brazil's only argument appears to be that the original panel considered similar data to that pressed by Brazil in the panel's assessment of payments made in MY 1999-2002. But this argument does not withstand scrutiny. The original panel may have looked at how much upland cotton is grown on farms today that historically produced cotton. However, it could *not* have considered this to be persuasive evidence of any alleged production-inducing effects of the U.S. government payments because it did not find *direct* payments (or, in earlier years, the production flexibility contract payments) to have significant production and price effects. The exact same relationship exists between counter-cyclical payments and upland cotton base acreage as between direct payments and upland cotton base acreage. Indeed, the base acreage is exactly the *same* for both programs. If this relationship was strong evidence of production and price effects, as Brazil alleges, there would have been little basis for the original panel to find against the counter-cyclical/market loss assistance payments, but not direct/production flexibility contract payments, made in MY 1999-2002. The fact that the panel did not make the same finding of significant price suppression with respect to direct/production flexibility contract payments confirms that the relationship to base acreage is not persuasive evidence of any price-inducing effects of either program. It is simply evidence that certain regions in the United States are well-suited to growing upland cotton. Cotton was a viable crop for most farmers to include in their rotation before the counter-cyclical payment program (and direct payment program) came into effect and it continues to be a viable crop now.

23. Turning back to the question regarding the two statements above, for the reasons just explained, the United States considers that the relevant question for assessing the effects of counter-cyclical payments is not the percentage of farms, but the level of acreage planted to upland cotton (*vis-a-vis* upland cotton base acres). The data regarding such planted acreage are consistent with the fact that farmers use the planting flexibility afforded by the counter-cyclical payment program and make choices based on market considerations, not any "inducement" by counter-cyclical payments.

Question to Brazil

30. How does Brazil respond to the argument of the United States that "whether or not the marketing loan and counter-cyclical payment programs or payments under the programs cause significant price suppression is a question of first impression"? [Rebuttal Submission of the United States, paragraph 219]

2. The structure, design and operation of the countercyclical and marketing loan payment programs

Question to the United States

31. Brazil claims that the structure, design and operation of US counter-cyclical payments stimulate US upland cotton production. Both Brazil and the United States have referred to the Westcott (2005)[19] study to provide support for their

[19] [ORIGINAL FOOTNOTE: Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" (Exhibit US-35).]

opposing analysis of the possible production impact of counter-cyclical payments. In its rebuttal, Brazil quotes the following passage from Westcott:

> ***So where do CCPs fit compared with other farm commodity programs in the 2002 Farm Act? Marketing loans are fully coupled since they are available on all production and their link to market prices means they affect production decisions of farmers. Direct payments are mostly decoupled, since they are paid on a fixed, historically-based quantity rather than on current production and are not dependent on market prices or other factors that would affect production. …***
>
> ***CCPs fall in between these two programs, having some properties similar to mostly decoupled direct payments and other properties similar to fully coupled marketing loans. Like direct payments, CCPs do not depend on current production since they are paid on a fixed, historically-based quantity. However, similar to marketing loans, CCPs are linked to market prices so there may be some influence on current production decisions of farmers, which would potentially make CCPs at least partially or somewhat coupled.***

a. Does the United States agree with this characterization of the CCP?

24. The United States agrees that counter-cyclical payments differ from direct payments in one respect; namely, they are provided on the basis of historical base acres and payment yields *when the season-average farm price falls below a certain threshold.* Direct payments, by contrast, are paid *regardless of prices* on the basis of historical base acres and payment yields. The United States also agrees that, to the extent that payments under the counter-cyclical payment program are provided only when certain price conditions prevail, this conditionality is an aspect in which counter-cyclical payments are similar to marketing loan payments.

25. That said, the question under Articles 5 and 6.3(c) of the *SCM Agreement* is not on the form of subsidies but their *effects*. And, as the United States has explained, the possible effects of payments under the counter-cyclical payment program on acreage decisions are much closer to those of direct payments than marketing loan payments. As discussed below, marketing loan payments are paid in respect of actual production. By contrast, **"farmers retain nearly full planting flexibility and may receive CCPs for the base acreage crop regardless of whether that crop (or any crop) is planted on those acres."**[20] This is *precisely* the same as for direct payments.

26. Given that the only salient difference between the structure of direct payments and counter-cyclical payments is that the latter are only provided when certain market conditions prevail, rather than automatically in each year, the question is whether this fact somehow results in a production effect in the case of the latter that does not obtain in the case of the former. Some researchers – including Westcott – conclude that the link to prices may, in some circumstances result in indirect production effects stemming primarily from lowered risk of price volatility. The United States agrees. However, the United States also agrees with Westcott and others that the degree of any such production effects is likely to be minimal and mitigated by a number of factors. For example, Westcott notes in this regard that:

[20] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 202 (Exhibit US-35).

(a) where prices are expected to be above maximum threshold – counter-cyclical payments behave just like the fixed direct payments[21];

(b) "cross-commodity effect[s] suggest[] that CCPs may provide a general reduction in revenue risks rather than a crop-specific effect. Net returns among alternative crops would remain the primary consideration underlying production choices;"[22]

(c) "while a number of studies indicate that farmers are risk averse (Chavas and Holt, 1990, 1996, for example), other risk reduction instruments already exist to manage risks. Thus, with revenue risk reduction now provided by CCPs as part of farm programs, farmers may adjust their use of these other farm and nonfarm risk management strategies;"[23] and

(d) "a large portion of output in the U.S. agricultural sector is produced by a small share of large producers. . . . Evidence that risk aversion decreases as income rises (Chavas and Holt, 1990, 1996) suggests that risk aversion may also tend to decline as the size of farms increases. Thus, with larger farms that account for most production being less averse to facing risk, this lowers potential production effects of CCPs due to risk reduction. And while smaller farms may be more risk averse in their farm enterprise, off-farm income may reduce the overall level of household income risk."[24]

27. On the basis of these and other factors, Westcott concludes that "there are several mitigating factors which suggest that overall production effects of CCPs through revenue risk reduction are likely to be limited."[25] The United States agrees with that assessment. Other studies submitted by the United States examining the empirical evidence of production effects – for example, a 2007 study by Lin & Dismukes in which the authors found that "[t]he effect of CCPs on producers' planting decisions . . . appears to be *very negligible* – an increase in the acreage of major field crops of less than 1% . . . ."[26] – confirm that the effects of the counter-cyclical payments are, in fact, very limited.

b. How would the United States respond to the argument that, by design, counter-cyclical payments are in some measure coupled to production decisions because part of the payments is contingent on the actual realization of market prices?

28. The United States does not consider counter-cyclical payments to be "coupled to production decisions" at all because, as Westcott notes, "farmers retain nearly full planting flexibility and may receive CCPs for the base acreage crop regardless of whether that crop (or any crop) is planted on those acres."[27] A farmer simply does not have to produce upland cotton to get payments on upland cotton base acres. Indeed, the question reflects this because it notes that the contingency is realization

[21] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 203 (Exhibit US-35).

[22] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 204 (Exhibit US-35).

[23] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 204 (Exhibit US-35).

[24] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 204 (Exhibit US-35).

[25] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 205 (Exhibit US-35).

[26] Lin, William and Dismukes, Robert. "Supply Response Under Risk: Implications for Counter-cyclical Payments' Production Impacts," *Review of Agricultural Economics–Volume 29, Number 1–Pages 64-86*, forthcoming, p. 83 (Exhibit US-85) (emphasis added).

[27] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 202 (Exhibit US-35).

of particular market *prices*, not the realization of any production by an individual producers. The market price is an independent trigger.

29. Nonetheless, as noted above, the United States agrees that counter-cyclical payments – like direct payments – may have some limited effects on risk and wealth which in turn translate into some limited effect on production. For example, the link between counter-cyclical payments and season-average farm prices may, in some circumstances, result in indirect production effects stemming from lowered risk of price volatility. This question of effects is the one that is important under Article 6.3(c) of the *SCM Agreement*. And, in that context, the question is one of *degree – i.e.*, whether any risk and wealth effects are such that they are substantially impacting production, and exports, and, ultimately, suppressing world market prices to a "significant" degree. The evidence before the Panel confirms that they are not. Indeed, as Westcott concluded, "there are several mitigating factors which suggest that overall production effects of counter-cyclical payments through revenue risk reduction are likely to be limited."[28] This is confirmed by recent empirical studies examining the effects of counter-cyclical payments.[29]

3. Economic simulation model

Question to the United States

> ***32. Brazil has presented a partial equilibrium model to simulate the effects of eliminating US upland cotton payments, particularly the marketing loan and counter-cyclical payments. In both its submission and rebuttal, the United States has provided reactions to the simulation model.***
>
> > ***a. Would it be accurate to describe the United States' response as constituting a general acceptance of the framework of analysis adopted by Brazil but contesting the assumptions made regarding the values of the parameters, the supply and demand elasticities and the "coupling factor", used in the model? (The coupling factor is the amount by which the expected price is increased by each dollar per unit of subsidy payments.)***

30. Before addressing the Panel's question, the United States clarifies that the coupling factor, as used in FAPRI models and the Sumner II model, are coefficients used in an effort to compare the effects of payments that are not coupled to any production (such as direct payments and counter-cyclical payments) with the effects of other payments (for example, market revenue), which are made directly in respect of production. In the case of direct payments and counter-cyclical payments, most of the coupling factors currently used have been based on the analyst's judgment. As more empirical data become available, the data provide a guide for analysts in determining the appropriate coupling factor to assign.

31. Turning to the Panel's question, although the United States considers that a partial equilibrium model may be an appropriate tool for conducting an assessment of the effects of the Step 2, marketing loan, and counter-cyclical payment programs on world market prices, the United States does not consider that Brazil's new model is appropriate. The United States has identified a number of important flaws in the model, including that the model:

- lacks cross-commodity impacts and cross-price elasticities, potentially leading to biased price effects;

[28] Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" at 205 (Exhibit US-35).

[29] *See* U.S. First Written Submission, paras. 207-214; U.S. Rebuttal Submission, paras. 226-252.

- is static with no explicit relationships for changes in cotton stock levels and no stocks equation;

- contains foreign supply elasticities that are different from FAPRI that underestimate the response of foreign producers to changes in world prices;

- treats production flexibility payments and direct payments differently even though they operate in the same way;

- incorporates Step 2 payments directly into the producer revenue function as fully coupled payment, and

- appears to ignore statutory parameters, for example by including counter-cyclical payment rates in each of the various price expectations that sometimes exceed the statutory maximum.[30]

32. These are some of the problems that arise as a result of the general structure of the model itself, and the simplified, reduced nature of the assessment it attempts to conduct. Further, and even more substantial, biases result from the flawed econometric parameters used by the model. These have been addressed in detail in the U.S. submissions.

33. Not only does the United States not accept the particular model used by Brazil and the parameters and assumptions that it utilizes, but the United States disagrees with Brazil regarding the question that the model aims to address. Brazil appears to assume that the question before the Panel is the "short-run" impact of "shocking" the system with complete elimination of the marketing loan and counter-cyclical payment programs.[31] It is not. Under Article 6.3(c) the question is what, if any, degree of price suppression exists *presently* as a result of the marketing loan and counter-cyclical payments and whether this degree of price suppression is "significant." To the extent a counterfactual assessment is undertaken, it is only to assess what the price equilibrium would be at present if marketing loan and counter-cyclical payments had been lower, different, or did not exist. The question is not what prices will look like in the short-run adjustment period if the marketing loan and counter-cyclical payments are suddenly eliminated. Indeed, Members are not even required to eliminate measures found to be actionable subsidies; they are given a choice between "withdrawing" the subsidy or removing its adverse effects. Thus, in addition to the fact that the economic literature supports a long-term assessment, Brazil's argument that it is necessary to look at the short-run effects of total elimination of the programs is incorrect as a matter of textual interpretation.

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[30] The maximum counter-cyclical payments paid on 85 percent of base and program yields can not exceed 13.73 cents. Yet Dr. Sumner incorporates a value as high as 19.10 cents, which is 39 percent greater than the maximum allowed rate. Brazil attempts to explain this away at the Panel meeting are unavailing. Brazil explained that Dr. Sumner divided total counter-cyclical payments by production to determine a per-pound rate. But this does not track how farmers view counter-cyclical payments. The question if one of farmers' expectations and farmers do not enter the planting season with an assumption that the counter-cyclical payment rate could be as much as 30% above the statutory maximum. Moreover, all upland cotton base acres are not planted to upland cotton. Brazil's approach fails to take that fact into account. It should also be noted that Brazil chose not to adopt this approach in the cost-of-production analysis included in Brazil's oral statement. In that analysis, Brazil correctly used the statutory maximum rate for counter-cyclical payments.

[31] *See e.g.*, Brazil First Written Submission, Annex I, paras. 28-29. Brazil's economist attempts to justify, for example, the use of an unrealistic and disproportionately small rest-of-world supply elasticity on the basis that Brazil is seeking to assess the short-run effects of "the shock of removing U.S. cotton subsidies." *See* Brazil First Written Submission, Annex I, para. 28. It is puzzling, therefore, that Brazil's economist denied in the meeting with the Panel that Brazil had used such language or such an approach.

34. The total effect of all of these flaws in Brazil's model is to grossly overstate any possible effects of the marketing loan and counter-cyclical payments. The United States demonstrated that without changing the structural flaws in the model, but simply re-calibrating the "key elasticities" and some other basic assumptions to reflect FAPRI and other well-established parameters – many of which Brazil acknowledged and used in the original proceeding – the effects estimated by Brazil's new model decline sharply. *Complete* removal of the marketing loan and counter-cyclical payment programs results in world prices increasing by only 1.41 percent over baseline levels over the period MY 2002-2005 and 0.96 percent over the period MY 2006-2008. Long-run values for supply and demand elasticities taken from the UNCTAD-FAO ATPSM model shows removal of marketing loans and counter-cyclical programs resulting in an increase in world prices of 2.26 percent over the period MY 2002-2005 and 1.52 percent over the period MY 2006-2008. *These dramatically lower price impacts result from only some very basic, preliminary adjustments to Dr. Sumner's model.* More detailed analysis and re-calibration would reduce the price effects even more.

35. It is critical that the Panel understand the flaws in the Sumner II model and their significance to this dispute because Brazil has submitted virtually no valid empirical evidence to support its claims that the U.S. marketing loan and counter-cyclical payment programs are causing "present" significant price suppression. Rather, Brazil's claim depends, critically, on the new econometric modeling conducted for purposes this dispute. The fact that even this econometric modeling is fundamentally flawed confirms that Brazil has no basis for its claims.

b. In its First Written Submission and Rebuttal Submission, the United States uses the same value of 1 that Brazil adopts for the coupling factor assigned to marketing loan payments. Does this imply an acceptance by the United States that, by design, marketing loan payments provide a one-for-one incentive to upland cotton production?

36. The United States does not agree with the characterization that marketing loan payments provide a "one-for-one incentive to production." This may be understood to suggest that every dollar of marketing loan expenditures in a particular year can be assigned a production effect, which is not the case. As the United States has argued, whether or not the marketing loan creates any incentive to produce depends upon the expected prices that exist at planting time. Even Brazil, through its economic model, accepts – and ostensibly attempts to implement – this principle in this proceeding.[32]

37. Nonetheless, the fact that a coupling factor of 1 is attributed to marketing loan payments means that a dollar anticipated under the marketing loan program is expected to have the same effect in respect of production as a dollar anticipated in market revenue. As payments are made on a per-unit basis with respect to upland cotton that is ultimately produced, a common modeling convention is to assume a coupling factor of 1 for the marketing loan program. The United States has not disputed the use of this coupling factor by Brazil in this proceeding.

c. In its First Written Submission and Rebuttal Submission, the United States used a non-zero value of 0.25 (not much lower from the 0.4 that Brazil adopts) for the coupling factor assigned to counter-cyclical payments. Does this imply an acceptance by the United States that, by design, counter-cyclical payments are partially tied to upland cotton production, and of a

[32] *See* Brazil First Written Submission, Annex I, para. 36 ("U.S. cotton producers respond to the *expected* prices and *expected* rates of subsidy that apply at the time planting and other key decisions are made in the production cycle") (emphasis added) and Brazil First Written Submission, Annex I, para. 58 ("[t]he magnitude of the impact on incentives to produce cotton is equal to the *expected* difference between the loan rate, which is known at planting time, and the grower's *expectations* at the time of planting about the AWP for cotton that will apply when the grower makes that marketing loan transaction.") (emphasis added). Brazil Further Submission, Annex I, paras. 17-18.

magnitude (25 cents to a dollar of counter-cyclical payments) not very far from Brazil's own estimate (of 40 cents to a dollar of counter-cyclical payments)?

38. No. 0.25 percent was the coupling factor used in the FAPRI model, which was originally relied upon by Brazil itself and was lauded by Brazil as follows:

> The FAPRI model has been widely used for policy analysis in the United States and elsewhere for almost 20 years. U.S. commodity groups, including the U.S. cotton industry, have regularly used the FAPRI model to analyze farm commodity program options. The FAPRI model is also the key model used by the U.S. Congress in considering farm program options. For almost two decades the U.S. Congress has provided special appropriations to support the continued use and development of the FAPRI model. In both the 1996 and the 2002 Farm Bill processes, the FAPRI model provided the most influential projections of likely program impacts.[33]
>
> FAPRI is the most influential organization in the United States analyzing farm policy and its effects on U.S. and world commodity markets, i.e., that has the highest reputation and experience in answering the kind of "but for" questions faced by this Panel.[34]

39. FAPRI assumes a 0.25 coupling factor for counter-cyclical payments on the following basis:

> Because CCPs are made on a fixed base, they can be considered at least partially decoupled from production decisions (thus their inclusion in the decoupled payment term in the area equations). However, CCPs do depend on prices, and risk-averse producers may have a positive supply response to the price insurance offered by the program. The 0.25 parameter is based on analyst judgment, reflecting the notion that the crop-specific effect of CCPs on production is likely to be positive, but modest.[35]

40. The United States adopted the FAPRI coupling factor because of Brazil's express acknowledgment of the expertise and reputation of FAPRI researchers in assessing "likely program impacts" and "in answering the kind of 'but for' questions faced by this Panel."[36] But the United States considers that this coupling factor is high. In fact, the empirical research supports a lower coupling factor, closer to zero. For example, the United States has discussed a 2007 study by Lin & Dismukes in which the authors examined the following question: "[g]iven the market price scenario for major field crops [corn, wheat, and soybeans] perceived by producers at planting decision times, how would CCPs have affected plantings of 2005 major field crops in the North Central region.."[37] The authors found that "[t]he effect of CCPs on producers' planting decisions . . . appears to be *very negligible* – an increase in the acreage of major field crops of less than 1% . . . ."[38]

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[33] Brazil Further Submission, para. 214.

[34] Answers of Brazil to Questions from the Panel After 2nd Meeting, paras. 21-24 (22 December 2003).

[35] Westhoff, Patrick, Scott Brown and Chad Hart. "When Point Estimates Miss the Point: Stochastic Modeling of WTO Restrictions" FAPRI Policy Working Paper #01-05, December 2005, page 6 (Exhibit US-58).

[36] Answers of Brazil to Questions from the Panel After 2nd Meeting, paras. 21-24 (22 December 2003).

[37] Lin, William and Dismukes, Robert. "Supply Response Under Risk: Implications for Counter-cyclical Payments' Production Impacts," *Review of Agricultural Economics–Volume 29, Number 1–Pages 64-86*, (Spring 2007), p. 81 (Exhibit US-85). *See* U.S. Rebuttal Submission, para. 229-234.

[38] Lin, William and Dismukes, Robert. "Supply Response Under Risk: Implications for Counter-cyclical Payments' Production Impacts," *Review of Agricultural Economics–Volume 29, Number 1–Pages 64-86*, forthcoming, p. 83 (Exhibit US-85) (emphasis added).

41. Similarly, the United States discussed a 2005 study by Goodwin & Mishra reported the results of a survey of farmers asking them to rate the factors important to their acreage decisions on a 5-point scale ranging from "not at all important" to "very important."[39] The study finds that almost half of farmers surveyed (44 per cent) – in a nationwide survey comprising about 4,125 observations – indicated that counter-cyclical payments were strongly "not at all important" to their acreage decisions. The other substantial percentage (43 per cent) indicated either ambivalence (that counter-cyclical payments were "neither important or unimportant") or that counter-cyclical payments were "unimportant" to their acreage decisions. This too confirms that counter-cyclical payments have minimal effects on production.

42. Although these studies and the others discussed in the U.S. submissions support a coupling factor much lower than 0.25, the United States has used that factor as a conservative measure and to illustrate the grossly exaggerated nature of Brazil's modeling results. Brazil does not even use this 0.25 factor, which may be too high in and of itself. Rather, Brazil has used a much higher 0.40 factor that finds *no support* in empirical research or the economic literature. The 0.40 factor is not – in the U.S. view – close to the 0.25 factor used by FAPRI, as suggested in the question above. Indeed, Brazil's coupling factor is more than 60 percent higher than the FAPRI factor, and it is without any legitimate basis in the economic literature or in empirical analysis. This, once again, confirms that the econometric modeling upon which much of Brazil's case depends is flawed and not capable of supporting Brazil's claims of significant price suppression.

E. EXPORT CREDIT GUARANTEES

1. Permissibility of an *a contrario* interpretation of item (j) of the Illustrative List

Questions to the United States

> ***33. Please discuss whether (and if so, how) the panel rulings in Korea – Vessels and Brazil – Aircraft (21.5) (I and II) affect the United States' approach to the interpretation of the relationship between item (j) of the Illustrative List and Article 3.1(a) of the SCM Agreement.***

43. As the Panel's questions 33 and 34 both deal with the question of the proper interpretation of item (j) and Articles 1.1 and 3.1(a) of the *SCM Agreement*, and the relationship between those provisions, the United States addresses the questions together here.

44. At the outset, the United States recalls that the issue is whether item (j) of the Illustrative List demonstrates definitively how the general definitional elements in Articles 1 and 3.1(a) of the *SCM Agreement* apply in the case of the export credit guarantees. The text of the *SCM Agreement* confirms that it does. As the United States has explained[40], item(j) "illustrates" the application of the general definition of "export subsidy" set out in Articles 1.1 and 3.1(a) to the specific context of export credit guarantees. "Illustrate," means, *inter alia*, "shed light on, light up, illumine" and "make clear, elucidate, explain; esp. clarify or support using examples, give an example or illustration of, exemplify."[41] According to the ordinary meaning of the term "illustrate," therefore, item (j) "makes clear" how the Article 1/3.1(a) definition applies in respect of each particular type of measure set out in the Illustrate List. It clarifies which export credit guarantees *do* provide export subsidies within the meaning of Article 1.1 and 3.1(a) and those that *do not*. The distinguishing factor – under item (j) – is

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[39] **Goodwin, B. and A. Mishra. "Another Look at Decoupling: Additional Evidence on the Production Effects of Direct Payments."** ***American Journal of Agricultural Economics*** **87(5):1200-1210, 2005 (Exhibit US-41).**

[40] U.S. First Written Submission, paras. 62-70

[41] *The New Shorter Oxford English Dictionary* at 1311, Volume 1, (1993 Edition) (Exhibit US-24).

whether the premium rates charged under the export credit guarantee program are inadequate to cover the long-term operating costs and losses of the program.

45. This interpretation of item (j) is supported not only by the ordinary meaning of the term "illustrate" but also by other provisions relating to the relationship between item (j) and the general definition in Articles 1.1 and 3.1(a) of the *SCM Agreement*. Thus, for example, Article 1 of the *SCM Agreement* provides that "*[f]or the purpose of this Agreement*, a subsidy shall be deemed to exist if . . . there is a financial contribution by a government . . . and a benefit is thereby conferred."[42] Moreover, Article 3.1(a) of the *SCM Agreement* expressly includes as subsidies "within the meaning of Article 1" any "subsidies contingent . . . upon export performance, *including those illustrated in Annex I*."[43] It is, therefore, plain that item (j) applies the general definition of "export subsidy" set out in 1.1 and 3.1(a) of the *SCM Agreement*. It does not establish any second or alternative standards for "export subsidy" as Brazil has argued in this dispute.

A. Footnote 5 of the SCM Agreement is entirely consistent with the U.S. interpretation

46. Brazil argues, nonetheless, that footnote 5 of the *SCM Agreement* somehow erases all of the textual guidance discussed above. Specifically, Brazil argues that the U.S. approach would require what Brazil terms an "*a contrario*" reading of item (j) and, according to Brazil, such an interpretation is "definitively foreclose[d]" by footnote 5.[44] This argument does not withstand scrutiny, as Brazil has itself recognized in other disputes.[45]

47. Footnote 5 – which modifies the prohibition on export subsidies contained in Article 3.1(a) – provides that "[m]easures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement." As such, Footnote 5 confirms two things – first, that Annex I is relevant in determining whether or not measures constitute "export subsidies" and, second, that where Annex I "refer[s] to" measures as not constituting export subsidies, no further analysis is necessary to determine whether the measures are prohibited subsidies under Article 3.1(a).

48. Brazil's argument – for purposes of this dispute – is that, under footnote 5, item (j) can only be understood to provide dispositive clarification as to what constitutes an "export subsidy" in the case of export credit guarantees if it were to include an "affirmative statement" about the conditions under which export subsidies do *not* exist.[46] However, footnote 5 says nothing about an "affirmative statement." Nor is an "affirmative statement" required under the ordinary meaning of the term "refer." Indeed, "refer" means, *inter alia*, "to make reference or allusion or direct the attention to something."[47] And "allusion," in turn, means "[a] covert, passing, or indirect reference (to); *popularly* any reference to."[48] It is, thus, clear that measures "referred to" in Annex I as not constituting export subsidies can include *both* measures that are *expressly* referred to as not constituting export subsidies (though there is actually only one such measure, described in the second paragraph of item (k))[49] and measures that are *implicitly* referred to as not constituting export

[42] Emphasis added.
[43] Emphasis added.
[44] Brazil Rebuttal Submission, para.563.
[45] *See e.g., Brazil – Aircraft (AB)*, paras. 14 and 19.
[46] *See* Brazil Rebuttal Submission, para. 465 and 467.
[47] *See The New Shorter Oxford English Dictionary* at 2520, Volume 1, (1993 Edition) (Exhibit US-116).
[48] *See The New Shorter Oxford English Dictionary* at 57, Volume 1, (1993 Edition) (Exhibit US-117) (emphasis in original).
[49] The second paragraph of item (k) provides that "if a Member is a party to an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members), or if in practice a Member applies the interest rates provisions of the relevant undertaking, an export credit practice

subsidies, such as the provision of export credit guarantee programs at premium rates which *are* adequate to cover the long-term operating costs and losses of the programs. Brazil confirmed to the Appellate Body in *Brazil – Aircraft (21.5)* that item (j) contains just such an implicit reference:

> Footnote 5 of the SCM Agreement specifies that Annex I contains not only a list of prohibited export subsidies, but also measures that do not constitute export subsidies, such as in items (b), (h), (i) and (k). Comparing the structure of item (j) and item (k), the two provisions share a similar structure in that they define practices that constitute prohibited export subsidies with *language that limits the scope of the definition. In the case of item (j) regarding export credit guarantee or insurance programs, the limiting language is "premium rates which are inadequate to cover the long-term operating costs and losses of the programs."*[50]

49. Because Brazil ultimately argued that its legal theory in that dispute was grounded "on an *'a contrario*' interpretation of the text of the first paragraph of item (k)," and not footnote 5, the Appellate Body did not end up interpreting that provision. Nonetheless, the Appellate Body did indicate that it accepted Brazil's argument that the first paragraph of item (k) could be read *a contrario* to determine when measures are "justified."[51] That result is equally appropriate here.

50. There are also other factors that undermine Brazil's interpretation of footnote 5 of the *SCM Agreement*. For example, Brazil's interpretation is undermined by the negotiating history of the provision. The negotiating history shows that Members agreed to delete from an earlier draft language that would have required an *express* reference in order for the provisions of the footnote to apply. Specifically, footnote 5 first appeared in the third draft agreement prepared by the Chairman of the Negotiating Group on Subsidies.[52] In that draft, footnote 5 read as follows: "[m]embers *expressly* referred to in the Illustrative List as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement."[53] The word "expressly" was not retained, however. In the very next draft, the word was deleted from the footnote,[54] demonstrating that the drafters intended to expand the scope of footnote 5 beyond those measures containing an "affirmative statement" that particular measures do not constitute export subsidies.

51. The U.S. interpretation of item (j) and the relationship between that provision and the general definition of "export subsidy" in Article 1.1 and 3.1(a) is not only textually sound and consistent with the negotiating history, it is the only logical interpretation.[55] There is no reason why drafters would have gone to the trouble of crafting in the Illustrative List specific and detailed rules for particular

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which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement."

[50] *Brazil – Aircraft (AB)*, para. 19 (emphasis added).

[51] *Brazil – Aircraft (21.5) (AB)*, para. 80 (arguing that, if Brazil had made the correct factual showing under paragraph 1, "we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List.")

[52] MTN.GNG/NG10/W/38/Rev. 2 (2 November 1990).

[53] MTN.GNG/NG10/W/38/Rev. 2 (2 November 1990) (emphasis added).

[54] MTN.GNG/NG10/W/38/Rev. 3 (6 November 1990).

[55] The United States notes, in this regard, the principle of *generalia specialibus non derogant*, which holds that "a matter governed by a specific provision, dealing with it as such, is thereby taken out of the scope of the general provision dealing with the category of subject to which that matter belongs, and which otherwise might govern it as part of that category." Gerald Fitzmaurice, *The Law and Procedure of the Court of International Justice, 1951-4: Treaty Interpretation and Other Treaty Points*, 1957 British Y.B. Int'l L. 236; *see also Case Concerning Payment of Serbian Loans*, P.C.I.J. Ser. A, No. 20/21, page 30; and Grotius, *De Iure Belli Ac Pacis*, Lib. II, Cap. XVI, XXIX (Classics, 3, 1929). While the United States does not suggest that this principle applies directly here, the United States finds the logic of the principle compelling and notes that the U.S. interpretation of Articles 1, 3.1(a), and item (j), discussed above, is consistent with this logic.

types of measures, such as those for export credit guarantees in item (j), if those rules could be ignored in favour of more general rules elsewhere in the *SCM Agreement*.

52. By contrast, Brazil's interpretation ignores the textual guidance in the *SCM Agreement* regarding the relationship between Articles 1.1/3.1(a) and item (j), but it would – if applied – nullify or render redundant a number of provisions of the *SCM Agreement*. For example, under Brazil's interpretation, footnote 5 would become largely redundant. Specifically, Brazil's argument assumes that footnote 5 only exempts from the prohibition on export subsidies those measures that are *expressly* referred to in the Illustrative List as not constituting export subsidies. However, to the extent that measures *are* expressly referred to as not constituting export subsidies in the Illustrative List, they are not subject to the prohibition on "export subsidies" in any event. In other words, the language of Articles 1, 3.1(a), and the Illustrative List would be sufficiently clear – without footnote 5 – to establish that measures expressly identified as not constituting export subsidies will not be subject to prohibitions on export subsidies. If – as Brazil argues – the point of footnote 5 is simply to reiterate that point, footnote 5 would serve a purely redundant function. Such an interpretation is disfavoured under customary rules of treaty interpretation. As the Appellate Body has explained, "[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."[56]

53. Similarly, Brazil's interpretation would call into question the need for item (d) of the Illustrative List.[57] Brazil contends that Articles 1 and 3.1(a) provide an independent basis to challenge as an export subsidy *any* export-contingent financial contribution that places the recipient in a better position than in the market. Item (d), however, establishes a two part test that requires *both* a showing of preferential treatment of products for export vis-a-vis products for domestic consumption *and*, in the case of goods, a showing that goods are being provided on terms and conditions more favourable than those available in the market. In the case of goods, the showing that would have to be made to satisfy the second part of the two-part test appears to be exactly the same showing that, under Brazil's interpretation, would – alone – be sufficient to demonstrate the existence of an export subsidy under Articles 1 and 3.1(a) of the *SCM Agreement*. Why would any rational complaining party choose to use the two-part test in item (d) if it could simply demonstrate the existence of an export subsidy under Articles 1.1 and 3.1(a) on the basis of one of the two parts? Again, Brazil's interpretation simply leads to manifestly absurd results.

54. For the reasons above, the more plausible textual interpretation is that there is only one definition of "export subsidy" in the *SCM Agreement* – its elements are laid out in Articles 1.1 and 3.1(a) – and item (j) of the Illustrative List controls on the question of how that definition applies in the case of export credit guarantees.

B. The panel reports in Korea – Ships and Brazil – Aircraft do not detract from the proper interpretation of item (j)

55. The panel reports in *Brazil – Aircraft* and *Korea – Ships* do not detract from the proper interpretation of item (j) of the Illustrative List discussed above. For one, all of these reports consider the relevant question to be whether the items of the Illustrative List are available as an "affirmative defense;" in other words, whether measures found to be "export subsidies" under the general definitional elements set out in Articles 1.1 and 3.1(a) can nonetheless be excused if the conditions in

[56] *United States – Gasoline (AB)*, p. 23.

[57] Item (d) of the Illustrative List identifies as an export subsidy "[t]he provision by governments or their agencies . . . of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favourable than for provision of like or directly competitive products or services for use in the production of goods for domestic consumption, *if (in the case of products) such terms or conditions are more favourable than those commercially available on world markets to their exporters*." (Emphasis added)

the Illustrative List are satisfied.[58] The United States does not consider this to be the relevant question here. Indeed, the United States has never argued that item (j) constitutes an "affirmative defense." Rather, as explained above, the United States view is that item (j) "clarifies" dispositively how the elements of "export subsidy" in Articles 1.1 and 3.1(a) apply in the case of export credit guarantees. The suggestion that item (j) provides an "affirmative defense" suggests that the standard contained therein is different from the standard in Articles 1.1 and 3.1(a); an argument that Brazil – not the United States – has made in this proceeding. This is an argument with which the United States disagrees. And, in that limited sense, the U.S. position is consistent with that of the panels in *Brazil – Aircraft* and *Korea – Ships*.

56. The United States does not, however, consider that the panels in *Brazil – Aircraft* and *Korea – Ships* properly interpreted footnote 5 of the *SCM Agreement*. In particular, neither panel considered the full breadth of the ordinary meaning of the term "referred to" in footnote 5; namely, the fact that the term may well encompass both measures that are *expressly* referred to as not constituting export subsidies and measures that are *implicitly* referred to as not constituting export subsidies. Indeed, in *Korea – Ships*, even the European Communities – the complaining party in that dispute – agreed that "in law item (j) could be read to include a proviso, and thereby 'refer' to export credit guarantees as not constituting export subsidies to the extent that the premium rates cover the long-term operating costs and losses of the programs."[59] This is the same point made by Brazil in the *Brazil – Aircraft* dispute about the implicit reference in item (j) to measures that do not constitute prohibited export subsidies:

> Footnote 5 of the SCM Agreement specifies that Annex I contains not only a list of prohibited export subsidies, but also measures that do not constitute export subsidies, such as in items (b), (h), (i) and (k). Comparing the structure of item (j) and item (k), the two provisions share a similar structure in that they define practices that constitute prohibited export subsidies with *language that limits the scope of the definition. In the case of item (j) regarding export credit guarantee or insurance programs, the limiting language is "premium rates which are inadequate to cover the long-term operating costs and losses of the programs."*[60]

57. The United States agrees with Brazil's – and the European Communities' – assessment of item (j) and the implicit reference therein to the measures that do not constitute prohibited export subsidies.

58. The United States also considers that the panels in *Brazil – Aircraft* and *Korea – Ships* failed to give due consideration to the Appellate Body's analysis in *Brazil – Aircraft* in which it indicated that it accepted Brazil's argument that the first paragraph of item (k) can be read in an *a contrario* fashion.[61] Brazil concedes that the Appellate Body made this finding but argues that such an *a*

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[58] *See e.g., Brazil – Aircraft (21.5 II – Canada)*, paras. 5.272 ([t]he question before us is whether a measure which has been found to be a subsidy contingent upon export performance within the meaning of Article 3.1(a) of the *SCM Agreement* is nevertheless not prohibited if it is a 'payment' which is not 'used to secure a material advantage in the field of export credit terms' within the meaning of the first paragraph of item (k).") and 5.276 ("[w]e have concluded that . . . the first paragraph of item (k) cannot, as a legal matter, be invoked as an affirmative defence."); *Korea – Ships (21.5 – EC)*, para. 7.193 ("[i]n light of out findings that certain [guarantees] constitute subsidies, and that such subsidies are contingent on export performance, we will be required to find that such [guarantees] are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement* unless we uphold Korea's claim that they benefit from a safe haven pursuant to item (j) of the Illustrative List.")

[59] *Korea – Ships (21.5 – EC)*, para. 7.1299. The EC simply "reject[ed] the application of item (j) on the facts of [that] case." *Korea – Ships (21.5 – EC)*, para. 7.1299.

[60] *Brazil – Aircraft (AB)*, para. 19 (emphasis added).

[61] *Brazil – Aircraft (21.5) (AB)*, para. 80 (arguing that, if Brazil had made the correct factual showing under paragraph 1, "we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List.")

contrario reading must be limited to the first paragraph in item (k).[62] There is no legitimate or principled basis for that assertion and, in fact, Brazil expressly argued in the *Brazil – Aircraft* dispute that "[t]here is nothing in the text of either item (j) or (k) to support the conclusion that an *a contrario* argument is permitted in one but not the other."[63] If item (k) can be read *a contrario* – and Brazil has conceded that it can – then item (j) can be read *a contrario* as well.

34. Does the United States considers that item (j) of the Illustrative List is one of the provisions to which footnote 5 of the SCM Agreement applies? What impact does this have for the United States' interpretation of the interaction between item (j) of the Illustrative List and Article 3.1(a) of the SCM Agreement?

59. Please see response to Question 33 above.

35. How does the United States address Brazil's argument that permitting an a contrario reading of item (j) would prevent a Member from challenging specific export credit guarantees or cohorts of such guarantees granted by a Member, as opposed to export credit guarantee programs [see paragraphs 472 ff. of Brazil's Rebuttal]

60. Brazil appears to confuse the question of the measures that may be challenged as providing prohibited export subsidies and the standard for whether the measures are prohibited export subsidies in item (j). WTO Members agreed, in item(j), that a prohibited export subsidy would exist when premia under an export credit guarantee program are not adequate to cover the long-term operating costs and losses of the program. This is the test to apply in considering whether export credit guarantees are prohibited export subsidies or not. This test applies regardless of whether a Member chooses to challenge all guarantees under a program or particular guarantees. Indeed, the United States recalls, in this regard, that Brazil only successfully challenged those export credit guarantees in respect of exports of unscheduled products and rice in the original proceeding. Therefore, even the facts of this dispute undermine Brazil's assertion that a complaining Member could only challenge an export credit guarantee program as a whole, not any subset of guarantees. A complaining Member may challenge whatever guarantees it chooses, but to establish whether or not they are prohibited export subsidies, the relevant consideration is whether the program is being operated in such a way that the premiums collected are inadequate to cover the long-term costs and losses of the program.

61. Brazil suggests that the U.S. interpretation is "not compatible with Article 1.1(a)(1)(i)" because that provision identifies loan *guarantees* and not export credit guarantee *programs* as financial contributions.[64] Here, again, Brazil's argument incorrectly conflates the measures that can be challenged as conferring export subsidies and the standard for whether those measures do, in fact, do so. The fact that loan guarantees – or more specifically, export credit guarantees – constitute financial contributions does not change the analysis of the conditions under which those guarantees may be deemed to be prohibited export subsidies for purposes of the *SCM Agreement*.[65]

Questions to Brazil

36. What is Brazil's reading of the Appellate Body's statement in paragraph 80 of its Report in Brazil – Aircraft (21.5) that it "... would have been prepared to find that

[62] *See e.g.*, Brazil Oral Statement, para. 235 ("Brazil's position is not inconsistent with the Appellate Body's dicta, in *Brazil – Aircraft (Article 21.5 proceeding)*, that it 'would have been prepared,' in effect, to accept an *a contrario* reading of the first paragraph of item (k) of the Illustrative List.")

[63] *See Brazil – Aircraft (21.5 – Canada)*, para. 6.59, n. 58 (quoting Oral Statement of Brazil at the Meeting of the Panel, para. 34) (underlining added).

[64] Rebuttal Submission of Brazil, para. 473

[65] The same flaw is apparent in Brazil's arguments relating to Article 3.1(a) of the *SCM Agreement*.

the payments made under the revised PROEX are justified under item (k) of the Illustrative List"? Should the Panel take this statement into account in deciding whether item (j) can be interpreted a contrario?

2. Outstanding export credit guarantees / measures taken to comply

Questions to Brazil

37. Brazil relies on the panel and Appellate Body Reports in Brazil – Aircraft (21.5) in support of its arguments that the United States has not "withdrawn" the subsidy and is, "[a]t a minimum... prohibited from making 'payments' on claims against" any outstanding export credit guarantees [Paragraph 397 of Brazil's Rebuttal Submission]. Please discuss how the findings of the panel and Appellate Body in that case apply to the provision of the US export credit guarantees at issue.

3. "Benefit" under Articles 1 and 3.1(a) of the SCM Agreement

Question to the United States

38. Please discuss the relevance of the original panel's characterization, in paragraph 6.31 of its report, of Brazil's reliance on Articles 1 and 3.1(a) of the SCM Agreement as "not a separate claim, but merely another argument" on the United States' view in this respect (and notably the United States statement, in paragraph 67 of its First Written Submission, that "... the panel in the original proceeding specifically declined to address Brazil's alleged 'claim' under Articles 1 and 3.1(a) of the SCM Agreement")?

62. As reflected in the U.S. statement quoted by the Panel above, Brazil has erroneously alleged both in this proceeding and in the original proceeding that it presents separate "claims" under item (j) of the Illustrative List on the one hand and Articles 1 and 3.1(a) on the other, regarding whether the export credit guarantees at issue are prohibited export subsidies. The original panel disagreed. Instead, the original panel found that "Brazil's allegation invoking the elements of Articles 1 and 3.1(a) of the SCM Agreement is not a separate claim, but merely another argument, on a different factual basis, as to how the United States export credit guarantee programs would meet the definition of an export subsidy in Article 3.1(a) of the SCM Agreement."[66]

63. The original panel then went on to *decline* to address what Brazil had alleged was its "claim" – and what the panel properly re-classified as an "argument" – under Articles 1 and 3.1(a) of the *SCM Agreement*. The original panel explained that "[g]iven our finding in paragraphs 7.946-7.948 [regarding item (j)], we do not believe that it is necessary to address Brazil's additional arguments about how the Article 3.1(a) definitional elements would be fulfilled on another factual basis in order to resolve this dispute."[67] In other words, it was the original panel's view that this dispute could and should be resolved through implementation of the recommendations and rulings of the DSB based on the factual findings under item (j).

64. The same views were shared by the Appellate Body, which rejected Brazil's arguments that the "[original] Panel's failure 'to examine Brazil's claim [or, argument, according to the original panel] . . . leaves open a dispute and creates uncertainty concerning the scope of the United States' obligations, and the consistency of its existing measures with those obligations."[68] According to the Appellate Body, "[t]he Panel found that the United States' export credit guarantee programs constitute

[66] *Upland Cotton (Panel)*, para. 6.31.
[67] *Upland Cotton (Panel)*, para. 6.31.
[68] *Upland Cotton (AB)*, para. 727.

a prohibited export subsidy under Article 3.1(a) because they do not meet the criteria in item (j) of the Illustrative List of Export Subsidies. This finding, in our view, is sufficient to resolve the matter."[69]

65. The United States has implemented the DSB's recommendations and rulings relating to export credit guarantees; in particular, paying close attention to the guidance provided by the original panel regarding the standard in item (j) of the *SCM Agreement*. As the United States has shown, export credit guarantees under the GSM 102 program are provided at premium rates that are more than adequate to cover the long-term costs and losses of the program. The panel and Appellate Body properly found that this inquiry resolved the dispute in the original proceeding. The same result is appropriate here as well for all the reasons discussed above.

Questions to Brazil

39. The Panel understands the United States to argue that it has relied on the Panel's findings under item (j) to implement the DSB recommendations with respect to export credit guarantees. How would this, in Brazil's view, affect the compliance panel's role in this proceeding? Was the United States also expected to implement changes in order to make its export credit guarantee programs consistent with article 1.1 and 3.1(a) of the SCM Agreement, even though there were no findings of the original panel in this respect?

40. In paragraph 410 of its Rebuttal, Brazil refers to paragraph. 7.398 of the Panel Report in Canada – Aircraft II. The Panel notes, however, that in the same paragraph, the Canada -- Aircraft II panel also indicated that there would be a "'benefit' when the cost-saving for a Bombardier customer for securing a loan with an IQ loan guarantee is not offset by IQ's fees". Please discuss, in light of this sentence, whether the Panel should read the Canada – Aircraft II panel as having rejected the "total cost of funds" as the proper benchmark under Article 14(c) of the SCM Agreement.

Questions to both parties

41. What are the relevant considerations to guide the Panel in the selection of a market benchmark in this case?:

a. That the institution that provides the product is, on the whole, or on a program or product-specific basis, profitable? If so, is "any" profit sufficient to qualify an institution/ product/program as a relevant "market benchmark" or must the institution/product/program achieve a certain level of profit? Must the Panel conduct an examination of the level of profit achieved by commercial or private actors operating in the field?

b. Are the institution/program/products' stated goals relevant in assessing whether they can be used as a "market benchmark"?

c. Is the "governance" of the institution relevant?

d. What other factors are relevant?

66. The issue of what is an appropriate benchmark cannot be addressed in the abstract. It is necessary to determine, first, what the text of the *SCM Agreement* provides about the particular benchmark to be selected in the circumstances of the particular case. If the question presented is

[69] *Upland Cotton (AB)*, para. 732.

whether export credit guarantees provided prohibited export subsidies within the meaning of the *SCM Agreement*, the precise measure by which this is determined is set out in item (j) of the Illustrative List in Annex I. That provision clarifies that the relevant consideration is the long-term operating costs and losses of a program. Where the premiums collected are inadequate to cover the long-term operating costs and losses of a program, the export credit guarantees confer prohibited export subsidies. Where the premiums collected are *not* inadequate to cover the long-term operating costs and losses of a program, the export credit guarantees do *not* confer prohibited export subsidies.

67. Brazil argues that Article 1.1 and 3.1(a) establish a second, alternative benchmark for prohibited export subsidies. For the reasons discussed above, the United States strongly disagrees. Nonetheless, even under Brazil's (incorrect) argument, it is the text of the *SCM Agreement* from which one can draw guidance as to the particular "benchmark" to be used. Specifically, Article 14 of the *SCM Agreement* interprets and applies the definition of "benefit" set out in Article 1.1 and has been relied upon by the Appellate Body as important contextual guidance in interpreting "benefit" for purposes of Article 1.1 of the *SCM Agreement*.[70] Indeed, it has even been invoked by Brazil to justify its arguments in this proceeding.[71] Article 14 specifically identifies the different benchmarks that are relevant with respect to different types of government-provided measures.

68. Article 14(c) deals with loan guarantees and provides that the proper comparison – in assessing whether a benefit has been conferred (and the amount thereof) – is between "the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee." Under Article 14(c), the "market benchmark" that must be sought is, thus, a commercially-available loan that could be obtained without the government guarantee. A "benefit" is deemed to be conferred pursuant to Article 14(c) where there is a positive difference between "the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee."

69. The question, then, is how to identify a "comparable commercial loan" within the meaning of Article 14(c). As the text indicates, the focus of the analysis is on the loan itself – it is the loan that must be "commercial" and "comparable." The characteristics of the entity providing the loan are not necessarily determinative as to whether or not the loan itself is "commercial" and, therefore, appropriate for use as a benchmark under Article 14(c). While these characteristics may well be relevant considerations in assessing whether the loan itself is a "commercial" loan in a particular case, factors such as the overall profitability of a particular institution or its stated goals, or the manner of its governance, may not necessarily – and in all cases – correlate to whether the loan is "commercial." In short, the question of what constitutes an appropriate "market benchmark" – a "comparable commercial loan" under Article 14(c) – is a fact-specific question that looks to the (non-government guaranteed) loans that a particular obligor is actually able to obtain on the market.

70. Although Brazil bears the burden of proof, it has not even attempted to make the kind of particularized showing contemplated under Article 14(c) of the *SCM Agreement*; it has not shown that the overall cost, including fees, of each of the loans guaranteed by the government is less than overall cost of a comparable commercial loan that could actually be obtained without a government guarantee. Instead, Brazil has relied on sweeping and erroneous assertions that obligors on loans guaranteed under the GSM 102 program can *never* obtain any other financing of any kind and that the United States could *never* provide an export credit guarantee without also providing an export subsidy. These arguments simply do not square with the evidence submitted by the United States showing that such obligors are in fact able to obtain financing even without GSM 102 guarantees and on terms better than those available *with* GSM 102 guarantees. The declining level of use of the GSM 102 program in recent years is even further evidence of this.

[70] *Canada – Aircraft (AB)*, para. 155.
[71] Brazil First Written Submission, paras. 371-375

4. Claims under item (j) of the Illustrative List

Question to the United States

42. How does the United States address Brazil's arguments with respect to the MPRs under the OECD Arrangement?

71. There is no merit to Brazil's argument that GSM 102 export credit guarantees should be deemed to fail to meet the standard in item (j) of the Illustrative List because – allegedly – "the fees for GSM 102 [export credit guarantees] fall below the minimum premium rates ('MPRs') provided in the Organization for Economic Co-operation and Development's ('OECD') Arrangement on Officially Supported Export Credits . . ."[72] First, item (j) of the *SCM Agreement* clearly provides that the proper comparison is between the "premium rates" charged under the particular programs and "the long-term operating costs and losses" of the programs themselves. The text of the *SCM Agreement* does *not* provide that the Arrangement on Officially Supported Export Credits sets the standard by which to assess whether export credit guarantees constitute export subsidies under item (j) of the *SCM Agreement*.

72. Indeed, this is in contrast to the very next item in the Illustrative List – item (k), dealing with export credits – which *does* expressly refer to such an Arrangement[73] and *does* provide that it establishes a basis for determining whether or not a measure constitutes a prohibited export subsidy. It is, therefore, clear that when the drafters intended that a separate undertaking establish a standard for assessing WTO-consistency, they knew precisely how to reflect this in the text. The fact that no such reference is found in item (j) is clear evidence that the OECD Arrangement does not establish the standard for the fees that ought to be charged for export credit guarantees in order to meet the standard set in item (j).

Question to Brazil

43. What is Brazil's reaction to paragraph 25 of Japan's Third Party Submission?

[72] Brazil First Written Submission, para. 438.

[73] Item (k) refers to "an international undertaking on official export credits to which at least twelve original Members to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original Members)." The Appellate Body explained in *Brazil – Aircraft* that "[t]he OECD Arrangement is an 'international undertaking on official export credits' that satisfies the requirements of the proviso in the second paragraph in item (k).")

ANNEX D-10

BRAZIL'S COMMENTS ON THE RESPONSES OF THE UNITED STATES TO THE PANEL'S FIRST SET OF QUESTIONS

(16 March 2007)

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LIST OF ABBREVIATIONS

Arrangement	OECD Arrangement on Officially Supported Export Credits
AWP	Adjusted World Price
CCPs	Counter-Cyclical Payments
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECG	Export Credit Guarantee
EBRD	European Bank for Reconstruction and Development
FAIR Act	Federal Agricultural Improvement and Reform Act of 1996
FAPRI	Food and Agricultural Policy Research Institute
FSRI Act	Farm Security and Rural Investment Act of 2002
FY	Fiscal Year
GSM 102	General Sales Manager 102
GSM 103	General Sales Manager 103
IDB	Inter-American Development Bank
IFC	International Finance Corporation
MPRs	Minimum Premium Rates
MY	Marketing Year
OECD	Organization for Economic Co-operation and Development
SCGP	Supplier Credit Guarantee Program
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
U.S.	United States
USDA	U.S. Department of Agriculture
WTO	World Trade Organization

TABLE OF CASES

Short Title	Full Case Title and Citation
Australia – Salmon (Article 21.5 – Canada)	Panel Report, *Australia – Measures Affecting Importation of Salmon – Recourse to Article 21.5 of the DSU by Canada*, WT/DS18/RW, adopted 20 March 2000, DSR 2000:IV, 2031
Brazil – Aircraft	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/AB/R, adopted 20 August 1999, DSR 1999:III, 1161
Brazil – Aircraft (21.5)	Appellate Body Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada* to Article 21.5 of the DSU, WT/DS46/AB/RW, adopted 4 August 2000, DSR 2000:VIII, 4067
Brazil – Aircraft (Article 21.5 – Canada)	Panel Report, *Brazil – Export Financing Programme for Aircraft – Recourse by Canada to Article 21.5 of the DSU*, WT/DS46/RW, adopted 4 August 2000, modified by Appellate Body Report, WT/DS46/AB/RW, DSR 2000:IX, 4093
Canada – Aircraft (21.5)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Aircraft Credits and Guarantees	Panel Report, *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, WT/DS222/R and Corr.1, adopted 19 February 2002, DSR 2002:III, 849
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, 965
EC – CVDs on DRAMs	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Selected Customs Matters	Appellate Body Report, *European Communities – Selected Customs Matters*, WT/DS315/AB/R, adopted 11 December 2006
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3 and 4, adopted 23 July 1998, DSR 1998:VI, 2201
Korea – Commercial Vessels	Panel Report, *Korea – Measures Affecting Trade in Commercial Vessels*, WT/DS273/R, adopted 11 April 2005
U.S. – Gasoline	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, DSR 1996:I, 3
U.S. – Shrimp (21.5)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
U.S. – Softwood Lumber IV (21.5)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU*, WT/DS257/AB/RW, adopted 20 December 2005
U.S. – Upland Cotton	Appellate Body Report, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, adopted 21 March 2005

Short Title	Full Case Title and Citation
U.S. – Upland Cotton	Panel Report, *United States – Subsidies on Upland Cotton*, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS/267/AB/R
U.S. – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323

TABLE OF EXHIBITS

Calculation of Total MY 2005 Counter-Cyclical Payments On Farms Growing Upland Cotton	Exhibit 670
U.S. Department of Agriculture's 2007 Farm Bill Proposal	Exhibit 671
Rangarajan Sundaram, *A First Course in Optimization Theory* (Cambridge Univ. Press, 1996) at Appendix A, Set Theory and Logic: An Introduction	Exhibit 672

A. GENERAL QUESTIONS

Questions to both parties

1. Is Brazil/US of the view that a party to a dispute referred to a panel established under Article 21.5 of the DSU (a party in a compliance panel) can make the same legal argument as it did in the original Panel proceedings?

1. Generally Brazil agrees with the United States' view regarding the legal arguments that can be made in Article 21.5 proceedings. However, the United States suggests that Brazil's approach in these proceedings contradicts its approach in the original proceeding with respect of the Step 2 program and the appropriateness of the FAPRI approach to modeling. Brazil has explained that its Step 2-related arguments in these proceedings are consistent with its arguments in the original proceeding.[1] Moreover, Professor Sumner and Brazil have explained that the new model is more appropriate to assess the question before this compliance Panel.[2]

2. Could each party explain its view on the question of whether, and to what extent, this Panel must rely on the legal and factual analysis underlying the original panel's findings? What are the relevant provisions of the DSU in this regard?

2. Brazil refers the compliance Panel to its responses to questions 2 and 30, which address the relevant legal provisions of the DSU, applicable jurisprudence, as well as the application of those provisions and jurisprudence to the facts of this case. Contrary to the U.S. response, Appellate Body and panel rulings suggest that where a compliance panel examines the effects of one or more identical subsidies challenged in the original proceeding, it must rely on and accept any relevant findings of the original panel, as modified by the Appellate Body, absent a fundamental change in the underlying conditions of competition.

B. QUESTIONS WITH RESPECT TO BRAZIL'S REQUEST UNDER ARTICLE 13.1 DSU

Questions to the US

3. Is the United States arguing that Brazil must identify the subsidized product for each of the types of subsidies from which it claims serious prejudice? Is the United States arguing that payments which permit planting flexibility are not tied to the production of upland cotton, so that they must be allocated by Brazil across the total value of production of each recipient?

3. Brazil agrees with the United States that the subsidized product at issue in this dispute is upland cotton lint.[3] Brazil also agrees with the United States that, as a matter of fact, the challenged measures should subsidize the product at issue to support a finding that they cause the adverse effects claimed.[4] Finally, Brazil agrees with the United States that counter-cyclical subsidies benefit the production of upland cotton.[5]

4. The disagreement between the parties concerns two issues: first, the methodology by which to quantify the general order of magnitude of the counter-cyclical subsidies benefiting upland cotton; second, whether counter-cyclical subsidies paid on base other than upland cotton base are properly before the compliance Panel.

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[1] Brazil's Rebuttal Submission, paras. 48-90; Brazil's Oral Statement, paras. 135-144.

[2] Brazil's Rebuttal Submission, Annex I; Brazil's Oral Statement, paras. 92-121; Exhibit Bra-659 (Statement of Professor Sumner Concerning Various U.S. Arguments).

[3] U.S. 27 February response to question 3, paras. 7-9.

[4] U.S. 27 February response to question 3, para. 9.

[5] U.S. 27 February response to question 3, para. 9.

5. First, the United States continues to advocate the use of the methodology provided for in Annex IV of the *SCM Agreement* to allocate the amount of counter-cyclical subsidies benefiting upland cotton.[6] Both the original panel and the Appellate Body rejected the applicability of that methodology in the original dispute.[7] Indeed, Annex IV provides for a methodology to precisely quantify the magnitude of subsidies, in terms of their cost to the government, for the express purposes of the now expired rebuttable *presumption* of serious prejudice under Article 6.1(a) of the *SCM Agreement*. By contrast, under Articles 5(c) and 6.3 of the *SCM Agreement*, the compliance Panel is called to make an assessment of "the effect of the subsidy". This requires, to some extent, a more qualitatively and less quantitative assessment of the economic reality of how U.S. counter-cyclical subsidies support the production of upland cotton, not application of a one-size fits all methodology.[8] Indeed, the Appellate Body pointed out that these provisions "suggest that a panel has a certain degree of discretion in selecting the appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression".[9] In other words, Article 6.3 provides the necessary flexibility for a panel to take into account the economic reality of the measures, products and markets at issue.

6. As Brazil has explained in numerous instances, U.S. upland cotton production is economically viable only due to counter-cyclical subsidies. Moreover, as discussed in more detail in Brazil's comments to the U.S. response to question 29, there is a strongly positive correlation between upland cotton planting and holding upland cotton base. In fact, in MY 2005, 95 percent of U.S. upland cotton production took place on farms holding upland cotton base. This economic reality remains the same as the economic reality in MY 2002.

7. Any methodology to allocate counter-cyclical subsidies to upland cotton that serves as the basis for assessing "the effect of the subsidy" must take these economic realities into account. Brazil's methodology does so. Indeed, the original panel confirmed that it was "appropriate" and might even understate the real amount of support provided by counter-cyclical subsidies to upland cotton.[10] Brazil therefore maintains that the compliance Panel should adopt the Brazil's approach to determining the magnitude of the subsidies at issue.

8. Second, the United States asserts that the recommendations and rulings of the DSB related to counter-cyclical payments made only on upland cotton base. This is allegedly because the Appellate Body, in selecting a methodology for determining the amount of "support" "grant[ed]" in MY 2002 to upland cotton, within the meaning of Article 13(b)(ii) of the *Agreement on Agriculture*, relied on the amount of upland cotton counter-cyclical payments.[11] Again, the United States errs.

9. The findings of the original panel and the Appellate Body under Article 13(b)(ii) of the *Agreement on Agriculture* relate to the question whether support granted to upland cotton in MY 2002 exceeded support decided in MY 1992. The Appellate Body is clear that it applies a "methodology" for assessing whether U.S. measures are covered by Article 13(b)(ii).[12] While the *methodology* applied by the Appellate Body might have related to counter-cyclical payments with respect to upland cotton base only, the corresponding finding is that "support to" upland cotton exceeded support decided in 1992. In other words, any support for upland cotton was subject to the original panel's assessment under Part III of the *SCM Agreement*. Consequently, the original panel's findings and the recommendations and rulings of the DSB are not limited to counter-cyclical payments for upland

[6] U.S. 27 February response to question 3, paras. 9-11.
[7] *See* Panel Report, *U.S. – Upland Cotton*, paras. 7.1183-7.1190; Appellate Body Report, *U.S. – Upland Cotton*, paras. 461-467.
[8] Panel Report, *U.S. – Upland Cotton*, paras. 7.1183-7.1190.
[9] Appellate Body Report, *U.S. – Upland Cotton*, para. 436.
[10] Panel Report, *U.S. – Upland Cotton*, para. 7.646.
[11] U.S. 27 February response to question 3, para. 9 and footnote 16.
[12] Appellate Body Report, *U.S. – Upland Cotton*, paras. 377-380.

cotton base only. They cover any counter-cyclical payments that support the production of upland cotton, which are therefore properly before this compliance Panel.

10. Finally, Brazil corrects errors in the U.S. calculation, under the inapplicable Annex IV, of the amount of counter-cyclical subsidies allocated to upland cotton. First, rather than allocating all upland cotton base related counter-cyclical payments received by farms producing upland cotton, the United States only allocates those received up to the amount of upland cotton planted acres on the farm – in other words the basis for the Cotton-to-Cotton Methodology. The United States thus ignores a portion of upland cotton counter-cyclical payments received by farms producing upland cotton and that very likely supports the production of upland cotton. Brazil corrects this error in the table below, which otherwise reproduces the second U.S. table at paragraph 12 of its response.

Table 1. – Allocating Cotton Counter-Cyclical Payments

	2003	**2004**	**2005**
Total CCP payments (A)	$392 million	$1,375 million	$1,375 million
Upland cotton base acres on farms that plant upland cotton (B)[13]	NA	NA	13,470,412 acres
Total upland cotton base acres (C)[14]	NA	NA	18,474,000 acres
Ratio of upland cotton base acres on farms that plant upland cotton (D=B/C)	NA	NA	72.92%
CCP payments to farms that planted cotton (E=A*D)	$286 million	$1,003 million	$1,003 million
Cotton as percent of total on farms that harvested cotton (F)[15]	41.80%	53.90%	46.70%
CCP payments allocated based on cotton's share of total crop value (G=E*F)	$119 million	$540 million	$468 million
As percent of total CCPs (H= G/A)	30.48%	39.30%	34.05%

11. Second, Brazil uses the USDA base and planted acreage data provided for MY 2005 only to determine the amount of total counter-cyclical payments received by farms producing upland cotton and allocates them, under the inapplicable Annex IV methodology, to upland cotton based on the share of the value of the upland cotton crop of total farm production.[16]

[13] Exhibit Bra-625 (Calculation of MY 2005 Counter-Cyclical Payments Allocated to Upland Cotton)
[14] Exhibit Bra-639 (Commodity Estimates Book for FY 2008 President's Budget, p. 190)
[15] U.S. 27 February response to question 3, para. 12.
[16] Brazil notes that the data presented by the United States in the first table at paragraph 12 of its 27 February response to question 3 does not indicate whether it is applicable to all farms producing upland cotton. Brazil therefore has not means to determine the reliability of this data.

Table 2. – Allocating Total Counter-Cyclical Payments

	2005
Total cotton CCP payments (A)	$1,375 million
Cotton CCP payments on farms that plant cotton (B)[17]	$1,011 million
Other CCP payments on farms that plant cotton (C)[18]	$224 million
Total CCP payments on farms that plant cotton (D=B+C)	$1,235 million
Cotton as percent of total on farms that harvested cotton (E)	46.70%
CCP payments allocated based on cotton's share of total crop value (F=D*E)	$577 million
As percent of total CCPs (G= F/A)	41.95%

12. Brazil reiterates that, while pointing out these errors in the U.S. implementation of the inapplicable Annex IV methodology, it maintains that the compliance Panel should adopt the Brazil's approach to determining the magnitude of the subsidies at issue.

4. Does the United States contest the accuracy of the figures for 2003 – 2005 cited in "Table 6"[19] of Brazil's first submission and "Table 5"[20] of Brazil's rebuttal submission? If so, please provide the accurate figures, or the figures the US deems to be more accurate.

13. The United States' objections to the data in Table 6 of Brazil's First Written Submission and Table 5 of Brazil's Rebuttal Submission are inconsequential, and in many instances, incorrect.

14. First, the "actual outlays" presented by the United States are very similar to those in Table 6 of Brazil's First Written Submission. In fact, the United States reports greater marketing loan subsidy outlays in MY 2005 ($1,269 million)[21] than those reported in Table 6 of Brazil's First Written Submission ($1,257 million). In any event, USDA released updated budget information in February 2007.[22] The new marketing loan subsidy totals are very similar to those reported in Table 6 of Brazil's First Written Submission:

Figure 3. – Marketing Loan Payments in MY 2004-2005[23]

	MY 2004	**MY 2005**
LDP	$387	$256
MLG	$10	$8
CEG	$1,415	$1,005
TOTAL	**$1,812**	**$1,269**

[17] Sum of cotton counter-payments on category A and B farms, *see* Exhibit Bra-670 (Calculation of Total MY 2005 Counter-Cyclical Payments On Farms Growing Upland Cotton).

[18] Sum of non-cotton counter-cyclical payments on category A, B and C farms. *See* Exhibit Bra-670 (Calculation of Total MY 2005 Counter-Cyclical Payments On Farms Growing Upland Cotton).

[19] Immediately preceding para. 112 of Brazil's first submission.

[20] Immediately following para. 173 of Brazil's rebuttal submission.

[21] U.S. 27 February response to question 4, para. 14.

[22] Exhibit Bra-639 (Commodity Estimates Book for FY 2008 President's Budget, p. 190).

[23] Exhibit Bra-639 (Commodity Estimates Book for FY 2008 President's Budget, p. 190).

15. Contrary to what the Untied States "understands,"[24] Brazil does not intend that the figures in Table 6 of its First Written submission be superseded by the figures in Table 5 of its Rebuttal Submission. The figures in Table 6 of Brazil's First Written Submission are based on the ratio of counter-cyclical subsidies under "Brazil's allocation methodology" to total counter-cyclical subsidies in MY 2002.[25] By contrast, the figures in Table 5 of Brazil's Rebuttal Submission are based on the "Cotton-to-Cotton Methodology."[26]

16. Applying Brazil's Methodology to USDA's MY 2005 base and planted acreage data, the only data provided by the United States, results in MY 2005 counter-cyclical subsidies allocated to upland cotton in the amount of $868 million, about $45 million less than what was estimated in Table 6 of Brazil's First Written Submission. Brazil is not able to calculate counter-cyclical subsidies under Brazil's allocation methodology in MY 2003-2004 because the United States has still not provided data on planted acreage and base acreage.[27]

17. As the original panel pointed out, Brazil recalls that both the "Cotton-to-Cotton Methodology" and "Brazil's Methodology" are conservative.[28] Under both methodologies, million of dollars of counter-cyclical subsidies paid to upland cotton farmers are not counted as support to upland cotton. Consider a typical cotton farm with 2,000 acres planted to upland cotton. If a farmer has 2,500 upland cotton base acres, the counter-cyclical payments tied to those 500 "extra" base acres, up to $37,000 per year[29], are not allocated as support to upland cotton. In reality, it is very likely that some or all of these "extra" payments support the production of upland cotton.

18. Finally, the United States "test" of the calculations in Table 5 of Brazil's Rebuttal Submission is curious, considering that Table 5 is based directly on data submitted by the United States.[30] In any event, the amounts calculated by the United States are not significantly different from the figures in Table 5 of Brazil's Rebuttal Submission.

Question to Brazil

5. The Panel refers to Brazil's communication dated 22 January 2007 concerning its request in relation to Article 13.1 of the DSU. Is it correct for the Panel to understand that as far as data for 2005 is concerned, data included in Exhibit US-64 satisfies all of the requests Brazil made in Part A of Annex 1 of its 1 November communication?

C. QUESTIONS CONCERNING THE PRELIMINARY OBJECTIONS RAISED BY THE UNITED STATES

1. Preliminary objections of the United States in respect of claims of Brazil regarding export credit guarantees in respect of pig meat and poultry meat

Question to both parties

6. The parties disagree with respect to whether in a proceeding under Article 21.5 of the DSU a party may present a claim that was raised in the original proceeding but on which no finding of

[24] U.S. 27 February response to question 4, para. 15.
[25] Brazil's First Written Submission, para. 116-118.
[26] Panel Report, *U.S. – Upland Cotton*, para. 7.642.
[27] Brazil originally requested data on base and planted acreage for MY 2002-2006 on 29 June 2006. *See* Question 3 of Annex 2b of Brazil's data request submitted on 1 November 2006.
[28] Panel Report, *U.S. – Upland Cotton*, para. 7.646.
[29] 500 base acres * 634 pounds per acre * 0.1373 dollars per pound * 0.85 = $37,000, *see* U.S. 27 February response to question 4, para. 16.
[30] Table 5 of Brazil's Rebuttal Submission is directly based off of the information in the U.S. First Written Submission, para. 224.

WTO-inconsistency was made due to the fact that the Appellate Body was unable to complete the analysis.

a) Could the parties explain the legal basis in the text of Article 21.5 of the DSU and other relevant provisions of the DSU for their position on this question?

b) Could the parties explain whether and how their position on this issue is consistent with prior panel and Appellate Body reports?

19. The United States notes in its response that compliance panels are restricted to review of "measures taken to comply" and argues, more specifically, that such panels are limited to examining elements or aspects of "measures taken to comply" that are in some sense changed from the measure at issue in the original proceedings.

20. However, as Brazil noted in its own response to question 6, even assuming that the United States is correct, it does not mean that Brazil's claims concerning GSM 102 export credit guarantees ("ECGs") pig meat and poultry meat are outside the scope of this Panel's review.

21. In its claims concerning pig meat and poultry meat, Brazil is indeed challenging a "measure taken to comply". While the United States describes the "measure" subject to Brazil's claim as "pig meat and poultry meat GSM 102 guarantees"[31], no such measure has ever existed, either in the original proceedings or following the implementation deadline. While Brazil's claims of inconsistency are product-specific with respect to scheduled products, the measure subject to those claims is not product-specific, as the United States asserts. Instead, the measure subject to Brazil's claims of WTO-inconsistency, "in its totality"[32], is the GSM 102 program as amended by the United States' "measures taken to comply", in particular the modified GSM 102 fee schedule (including the removal of certain risk categories from eligibility).[33]

22. As Brazil noted in its response to question 6, there is no factual basis for the United States to characterize the measure subject to Brazil's claims of inconsistency as "the pig meat and poultry meat GSM 102 guarantees".[34] Neither the amended GSM 102 program in its totality, nor the individual amendments, set out terms or conditions that differ as between different eligible products.[35] The measure does not apply on a product-specific basis; the terms and conditions for ECGs under the GSM 102 program as amended by the modified GSM 102 fee schedule are the same for pig meat, poultry meat, and all other eligible scheduled as well as unscheduled products.

23. Thus, Brazil's challenge concerning pig meat and poultry meat relates to a new aspect of a new measure – the modified fee schedule that is part of the amended GSM 102 program. In that situation, none of the limits on the scope of Article 21.5 proceedings discussed by the United States in its response (or, indeed, any other limits) apply.

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[31] U.S. Rebuttal Submission, para. 10 ("In other words, as Brazil expressly concedes, there have *never* been any findings of WTO inconsistency against the pig meat and poultry meat GSM 102 guarantees, and consequently there were no DSB recommendations and rulings against these measures with which the United States was obligated to comply.") (emphasis added). *See also Id*., paras. 14, 15.

[32] Appellate Body Report, *U.S. – Softwood Lumber IV (21.5)*, para. 67; Appellate Body Report, *U.S. – Shrimp (21.5)*, para. 87.

[33] *See* WT/DS267/30, paras. 8 ((ii) and (iii)), 26. Throughout its response, Brazil will refer to the measure subject to its claims as "the GSM 102 program as amended by the modified GSM 102 fee schedule".

[34] U.S. Rebuttal Submission, para. 10.

[35] Brazil's 26 February response to question 6, para. 29. The same can be said of the "old" GSM 102, before it was amended on 1 July 2005.

24. A similar situation arose in *Canada – Aircraft (21.5)*. In that dispute, Canada amended the terms and conditions of an export subsidy program.[36] The Appellate Body held that the "measure taken to comply" was "a new measure, the *revised* TPC program", which was "separate and distinct" from the *original* TPC program.[37] Similarly, in this dispute, the United States also amended the terms and conditions of an export subsidy program. The "measure taken to comply" is, therefore, "a new measure, the *revised* [GSM 102] program".

25. With respect to a new measure, the Appellate Body held that a compliance panel operating under the authority of Article 21.5 "is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings."[38] Thus, a compliance panel can assess any claims made with respect to the new measure.

Questions to Brazil

7. Is Brazil of the view that it is only in the circumstances identified by the Appellate Body in EC – Bed Linen (Article 21.5 – India) that the scope of Article 21.5 proceedings is limited by the scope of the original proceedings? [Paragraphs 11-15 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling]

8. How does Brazil respond to the arguments of the United States that Brazil "incorrectly assumes that the standard is one of whether there has been a 'final resolution' of the issue in the original proceeding" and that Brazil misreads the Appellate Body report in EC – Bed Linen (Article 21.5 – India) and confuses the issue of "the scope of a compliance proceeding pursuant to Article 21.5 of the DSU" and the distinct issue of "when a claim against a specific measure or aspect of a measure can be considered to be 'finally resolved' for purposes of WTO dispute settlement"? [Paragraphs 8 and 12 of the Rebuttal Submission of the United States]

9. What are the comments of Brazil on the arguments in footnote 22 of the United States' rebuttal submission?

Question to the US

10. Could the United States explain why it considers that what it describes as the "final resolution" standard is not the correct standard to decide whether Brazil's claims regarding export credit guarantees for pig meat and poultry meat are within the scope of this proceeding?

26. Brazil refers to compliance Panel to its comment on the U.S. response to question 6, above.

2. Preliminary objections of the United States with respect to claims of Brazil regarding marketing loan and counter-cyclical payment programmes

Questions to Brazil

11. Is Brazil of the view that a finding under Article 6 of the SCM Agreement that a "subsidy" is causing serious prejudice necessarily always applies to both the subsidy "payments" and the subsidy "programme"? [Paragraphs 31-35 of Submission of Brazil Regarding US Requests for Preliminary Ruling and paragraph 38 of the Rebuttal Submission of Brazil]

12. In paragraph 44 of its Rebuttal Submission, Brazil states:

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[36] Appellate Body Report, *Canada – Aircraft (21.5)*, para. 34.
[37] Appellate Body Report, *Canada – Aircraft (21.5)*, para. 36 (italics in original, underlining added).
[38] Appellate Body Report, *Canada – Aircraft (21.5)*, para. 41.

> "*Accordingly, there is no need for Brazil to challenge per se the FSRI Act of 2002.* Nor does it assert an 'as applied' challenge to the FSRI Act of 2002. Rather, Brazil challenges the counter-cyclical and marketing loan programs in the FSRI Act of 2002 and the payments that such programmes require to U.S. upland cotton farmers, as they cause adverse effects." (emphasis added)

Could Brazil please explain:

a) How its claims against "programmes and payments... as they cause adverse effects" differ from claims against programmes as such?

b) How these claims differ from claims against programmes as applied?

13. In paragraph 45 of its Rebuttal Submission, Brazil refers to the failure of the United States "to implement the original recommendation of the DSB requiring the United States to take actions concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments".

a) Does Brazil consider that the statement in paragraph 7.1501 of the original panel report that "the United States is obliged to take action concerning its present statutory and regulatory framework..." forms an integral part of the recommendation made by the original panel in paragraph 8.3(d) of its report?

b) Does Brazil consider that the absence of actions by the United States "concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments" is in itself a sufficient basis for this Panel to find that the United States has not complied with the DSB recommendation under Article 7.8 of the SCM Agreement?

c) Is there any difference, in Brazil's view, between, on the one hand, the nature of the action the United States was obliged to take with respect to its statutory and regulatory framework as a consequence of the recommendation in paragraph 8.3(d) of the original panel report and, on the other, the nature of the action the United States would have been obliged to take if the original panel had found that the relevant provisions of this statutory and regulatory framework were WTO-inconsistent as such?

14. Could Brazil please explain how this Panel should interpret the relationship between the three categories of measures identified in paragraph 3.1(v),(vii) and (viii) of the original panel report? Is it the view of Brazil that "subsidies provided" or "subsidies mandated to be provided" must be interpreted to encompass both payments of subsidies and the regulatory provisions pursuant to which such payments were "provided" or "mandated to be provided"?

15. Does Brazil agree or disagree with the United States that the listing of certain legislative and regulatory provisions in paragraph 7.1107 of the original panel report reflects the original panel's view that "payments under a programme constitute programmes 'as applied'"? [Paragraphs 46-47 of the Rebuttal Submission of the United States]

16. Could Brazil clarify whether or not its claim in this Article 21.5 proceeding regarding a threat of serious prejudice caused by marketing loan and counter-cyclical payments is a claim with respect to the marketing loan and counter-cyclical payment programmes as such? [Paragraphs 237-314 of the First Written Submission of Brazil]

Questions to the United States

17. The United States argues in paragraph 16 of its Rebuttal Submission that "[a]ccording to Brazil, its claims apply not only to the marketing loan and counter-cyclical payment programs, as such, but to the programs in addition to all payments authorized under the programs" (original emphasis). The United States also argues in this respect that "it is abundantly clear that the original panel did not make any finding under Article 5(c) and 6.3(c) of the SCM Agreement against the marketing loan and counter-cyclical payment programs, as such, whether alone or in addition to payments". [Paragraph 43 of Rebuttal Submission of the United States]

a) How does the United States respond to the argument of Brazil that the United States mischaracterizes Brazil's claims in these proceedings in that Brazil is not challenging the subsidy programmes at issue as such? [Paragraph 31 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling; paragraph 33 of Rebuttal Submission of Brazil]

b) Could the United States also comment in this regard on the arguments in paragraph 31 of the Third Party Submission of Chad? Does the United States agree or disagree with the proposition that statutory or regulatory provisions can be challenged on an as applied basis and that Brazil's claims in the original proceeding "were as applied claims regarding measures that included legislative and regulatory provisions"?

27. Brazil has addressed the United States' arguments in its 26 February 2007 replies to Questions 11 and 15. In addition, Brazil disagrees with the United States continued efforts to label and compartmentalize Brazil's claims in this Article 21.5 proceeding as "as applied" or "per se." These terms are not found in the compliance Panel's terms of reference. Nor did the original Panel use these terms in making its "present" (as opposed to "threat") findings, conclusions and recommendations. The Appellate Body recently relied upon the U.S. assertion that certain claims under the covered agreements are "not readily classifiable in the categories of 'as such' and 'as applied.'"[39] Indeed, claims under Articles 5 and 6 of the *SCM Agreement* are just the type of WTO provisions that are not readily classifiable into such arbitrary classifications.

28. Claims under Article 5(c) and 6.3 deal with the "effects" of "subsidies."[40] These provisions oblige subsidizing Members not to cause serious prejudice to the interests of another Member through the "use of any subsidy." Nowhere does Article 5 or 6.3 require "subsidies" to be broken down into "legislative and regulatory" subsidies and "payment subsidies", nor do these provisions require that these subsidies be assessed separately. When a legislative and regulatory program of subsidies mandates payments – such as the marketing loan and CCP provisions of the FSRI Act of 2002 – an examination of the "effects" of the "program" subsidy necessarily includes an assessment of the circumstances in which mandatory subsidy payments are made, the nature and operation of the payment subsidies, the recipients and magnitude of the subsidy payments, and the impact of those subsidy payments in the marketplace.[41] In this dispute, Brazil's claims have always extended to the subsidy programs and subsidy payments.

29. Nor do Articles 5 and 6.3 of the *SCM Agreement* anticipate that the operation of legislative and regulatory subsidy frameworks must be challenged in "as applied" or "per se" claims. As the United States itself has argued, these Articles require panels to address "present" – as opposed to "threat" – serious prejudice caused by the effects of any subsidy.[42] Assessment of "present" serious

[39] Appellate Body Report, *EC – Selected Customs Matters*, para. 165 (quoting U.S. argument).
[40] Brazil's 16 January Response to U.S. Request for Preliminary Rulings, paras. 31-34.
[41] Brazil's 26 February response to question 11, paras. 83-84.
[42] U.S. 6 March response to question 28, para. 12.

prejudice requires the use of a historical "reference period" to assess the causal connection between subsidies and adverse effects. When adverse effects findings, conclusions, and recommendations are made, affirmed on appeal, and adopted by the DSB, they remain "present" serious prejudice findings, conclusions and recommendations. After the six month period anticipated by Article 7.9 of the *SCM Agreement*, the adverse effects subject to the findings, conclusions, and recommendations continue to be "present" adverse effects . This means the appropriate steps under Article 7.8 must fully withdraw the "present" and "ongoing" adverse effects caused by the subsidies. That includes effects caused by subsidy legislation and regulatory provisions as well as subsidy payments mandated by such provisions.

30. Such ongoing "present" serious prejudice findings were made by the original Panel. It described its findings in June 2004 as "present serious prejudice."[43] (The *Indonesian Autos* panel made similar findings in using the term "*actual* serious prejudice" to distinguish a claim of "*threat* of serious prejudice."[44]) The original panel's serious prejudice conclusions, also made in June 2004, did *not* include any timeframe and used the present tense phrase to describe the effects of the contested subsidies: "is significant price suppression. . . ."[45] The adverse effect that the United States was required to remove under Article 7.8 of the *SCM Agreement*, by 21 September 2005, "is significant price suppression", *i.e.*, present serious prejudice.

31. Thus, the original panel's "present" serious prejudice findings – not framed in terms of "as applied" or "per se" – were entirely consistent with an assessment of "effects" in serious prejudice claims under Articles 5 and 6.3 of the *SCM Agreement.* The original panel's "present" serious prejudice findings fully explains why it found that the United States was obligated to make changes to its statutory and regulatory framework.[46] As explained in Brazil's 26 February reply to Question 11 and its earlier submissions, this is because the original panel considered that the U.S. statutory and regulatory framework, which would last until the end of MY 2007[47], were found to cause present serious prejudice, and because those findings reflect *ongoing present* serious prejudice. The original panel correctly concluded that the only way to remove adverse effects from *ongoing* mandatory, price-contingent subsidies that continue to cause "present" serious prejudice is to change the statutory and regulatory framework.[48]

18. The United States submits that the only measures subject to the DSB's recommendation under Article 7.8 of the SCM Agreement are payments made under the Step 2, marketing loan, and counter-cyclical payment programmes in 1999-2002. The United States also asserts, in this regard, that Brazil fails to submit evidence "as to the present effects, if any, of the measures that were subject to the original panel's actionable subsidy finding".

a) Do these statements mean that the United States considers that the DSB recommendation under Article 7.8 of the SCM Agreement only obliged the United States to ensure that payments made in 1999-2002 would no longer have any adverse effects?

b) Could the United States comment on the argument of New Zealand in paragraph 4.08 of the Third Party Submission of New Zealand?

32. Brazil notes that the United States answer to these questions are premised on the incorrect view that the original Panel found only that the subsidies causing "present" serious prejudice were

[43] Panel Report, *U.S. – Upland Cotton*, para. 7.1499-7.1503.
[44] Panel Report, *Indonesia – Autos*, para. 14.257.
[45] Panel Report, *U.S. – Upland Cotton*, para. 8.1(g)(i).
[46] Panel Report, *U.S. – Upland Cotton*, para. 7.1499-7.1503.
[47] Panel Report, *U.S. – Upland Cotton*, para. 7.1500.
[48] Panel Report, *U.S. – Upland Cotton*, para. 7.1501.

payments made within a defined period. In fact, as Brazil explained in reply to Question 11, in its earlier submissions, and at the meeting with the Panel, the original panel found that the subsidy programs and the subsidy payments mandated by those programs were causing serious prejudice. The United States' arguments that its implementation obligations pertain solely to past payments are, therefore, misplaced.

19. Regarding the argument of the United States that the marketing loan and counter-cyclical payments programmes are not measures "taken to comply", is it the view of the United States that Article 21.5 of the DSU only applies to measures actually taken by a party to comply and does not apply to measures that a Member should have taken to comply?

33. The United States agrees that Article 21.5 proceedings concern either measures taken to comply or the absence of such measures. In this dispute, the original panel found that marketing loan and counter-cyclical payments programs, and mandatory payments made under these programs, were part of the "basket of measures" that causes "present" serious prejudice. The United States "measures taken to comply" – *i.e.*, the repeal of the Step 2 program and the continuation of the marketing loan and counter-cyclical payments programs – continue to cause "present" serious prejudice. Hence, the United States has failed (1) to withdraw the subsidy or (2) to take appropriate steps to remove the present adverse effects found to exist.

20. How does the United States respond to the argument in the Third Party Submission of Japan that the Appellate Body report in EC – Bed Linen (Article 21.5 – India) does not support the argument of the United States that the marketing loan and counter-cyclical payments programmes are not within the scope of this Article 21.5 proceeding?

34. Brazil refers to its comments on the United States' answer to Question 19. Brazil also notes that, in paragraph 44 of its answers, the United States quotes from the panel in EC – Bed Linen (India – Article 21.5) to the effect that Members do not have a second chance, in Article 21.5 proceedings, to raise claims that could have been raised in the original proceedings. The United States mistakenly attributes this quote to the Appellate Body. In fact, the Appellate Body merely included the Panel's statement in its summary of those findings.[49] However, the Appellate Body's own ruling in that dispute was considerably narrower than the panel's. The Appellate Body ruled that the complainant does not have a second chance, in Article 21.5 proceedings, to raise claims that were *finally resolved* in the original proceedings.[50]

3. Claim of Brazil regarding the failure of the United States to comply with the DSB recommendations between 21 September 2005 and 1 August 2006

Questions to Brazil

21. Could Brazil please explain whether its request for a finding that the United States failed to comply with the DSB recommendations between 21 September 2005 and 1 August 2006 is supported by prior panel practice in Article 21.5 proceedings? [Paragraph 68 of the Rebuttal Submission of the United States]

22. How does Brazil respond to the argument of the European Communities that "the lack of positive action taken by the United States to comply with the panel and Appellate Body's findings and recommendations between the implementation date of 21 September 2005 and 31 July 2006 is not necessarily fatal to its defence"? [Paragraph 48 of the Third Party Submission of the European Communities]

[49] Appellate Body Report, *EC – Bed Linen (21.5)*, para. 74.
[50] Appellate Body Report, *EC – Bed Linen (21.5)*, para. 96.

Question to the United States

23. Does the United States consider that the text of Article 21.5 of the DSU should be interpreted to mean that a compliance panel may only review the "existence" or "consistency" with a covered agreement of measures taken to comply as of the date that the matter was referred to the panel and not as of the date of the end of the implementation period? [Paragraph 68 of the Rebuttal Submission of the United States]

35. In its 27 February response, the United States reiterates its position that the compliance Panel is legally precluded from making a finding that the United States failed to comply with the recommendations and rulings of the DSB between 21 September 2005 and 31 July 2006.[51] As support, the United States refers to the panel reports in *U.S. – Shrimp (21.5)* and *EC – Bed Linen (21.5)*.[52]

36. Brazil notes, first, that the circumstances in this dispute are distinct from the circumstances in the two disputes cited: while there was no Article 22.6 arbitration pending in these two disputes, there are two DSU Article 22.6 arbitrations pending in the present dispute – one in connection with the recommendations under Article 4.7 of the *SCM Agreement* and one in connection with the recommendation under Article 7.8 of the Agreement. The circumstances of this dispute, therefore, resemble the circumstances faced by the panel in *Australia – Salmon (21.5)*. That panel made a finding with respect to past non-compliance.[53] This compliance Panel should do the same.

37. The United States refers to the concept of judicial economy, relied on by the panels in *U.S. – Shrimp (21.5)* and *EC – Bed Linen (21.5)*, as allegedly supporting its position that the compliance Panel should refrain from making such a finding.[54] However, the basis cited by the United States for the exercise of judicial economy does not exist. Brazil explained, in its response to Panel question 21, that a finding by the compliance Panel regarding the U.S. failure to implement between 21 September 2005 and 31 July 2006 will assist the arbitrator in the pending arbitration under Article 7.10 of the *SCM Agreement* and Article 22.6 of the DSU in performing their assessment of the countermeasures requested by Brazil.[55] A finding of non-compliance is therefore "necessary to resolve the particular matter."[56]

38. The United States points out that there is no disagreement between the parties as the failure of the United States to comply with the recommendations and rulings of the DSB between 21 September 2005 and 31 July 2006. In these circumstances, it is puzzling that the United States argues against a finding by the compliance Panel to this effect – a finding that will assist the parties in their pending arbitration and, thus, serves to the goal of "prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired," within the meaning of Article 3.3 of the DSU.

D. CLAIMS OF BRAZIL REGARDING PRESENT SERIOUS PREJUDICE

1. General

Questions to both parties

24. Could the parties explain how they interpret the phrases "take appropriate steps to remove the adverse effects" and "withdraw the subsidy" in Article 7.8 of the SCM Agreement?

[51] U.S. 27 February response to question 23, para. 45.
[52] U.S. 27 February response to question 23, para. 46.
[53] Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.30, 8.1(i).
[54] U.S. 27 February response to question 23, para. 46.
[55] Brazil's 26 February response to question 21, paras. 154-157.
[56] Appellate Body Report, *U.S. – Shirts and Blouses*, p. 18.

39. In paragraphs 4 and 5 of its response, the United States states that an "appropriate step" under Article 7.8 is one involving the "removal of the adverse effects found to exist in the panel and Appellate Body reports." This implies that the "removal of adverse effects" language in Article 7.8 only addresses *past* adverse effects, not *present, ongoing* and *future* adverse effects. Such an erroneous interpretation of Article 7.8 follows logically from the equally erroneous U.S. interpretations that (a) "present" (as opposed to "threat") Article 6.3 claims are necessarily "as applied" claims that involve adverse effects occurring in a historical period of time, and (b) only "per se" challenges to subsidies can result in any prospective relief from the effects of subsidies. From this logic, the United States implies that the "appropriate steps" of subsidizing Member need only involve an appropriate period of time for the effects of *past* subsidies to dissipate.

40. Brazil refers the Panel to its 26 February answer to Question 11, as well as its comments on the U.S. 27 February 2007 responses to Question 17 set out above. Brazil's earlier submissions demonstrated the fallacy of the U.S. assertions as well as their inconsistency with the findings and conclusions of the original panel, as affirmed by the Appellate Body and adopted by the DSB.[57] In these findings and conclusions, the original panel held that the U.S. subsidy programs, together with the payments mandated by these programs, cause serious prejudice, and the original panel expressly stated that the United States was obliged to take appropriate steps to change its "present statutory and regulatory framework."[58]

25. How do the parties interpret the relationship between Article 7.8 of the SCM Agreement and Article 21.5 of the DSU?

41. Brazil refers the Panel to its response to Question 25 while noting that the more limited response of the United States does not appear to conflict with the interpretation of Articles 21.5 and Article 7.8 advanced by Brazil.

26. Could the parties explain whether they agree or disagree with the arguments of New Zealand in its Third Party Submission that Article 7.8 of the SCM Agreement has certain consequences for the burden of proof in an Article 21.5 proceeding? [Paragraphs 5.04-5.06 of the Third party Submission of New Zealand]

42. Brazil refers the Panel to its response to Question 26 while noting that the more limited response of the United States is consistent with paragraphs 20-21 of Brazil's response. Brazil also notes that the United States does not address the hypothetical set out in paragraph 22 of Brazil's response which appears to be relevant to the point raised by New Zealand.

27. Could the parties comment on the following statement of the European Communities:

> "The text of Article 7.8 of the *SCM Agreement* does not state expressly that a Member that has been requested by the DSB to implement its recommendations and rulings under Article 7.8 of the *SCM Agreement* has to *do* anything" (original emphasis)

43. Brazil disagrees with the United States, and refers the Panel to its 26 February answer to Question 22, which addresses a similar statement made by the European Communities. In sum, Article 7.8 requires action, not inaction, no later than the end of the six-month implementation period following adoption by the DSB of the panel or Appellate Body report contemplated by Article 7.9 of the *SCM Agreement*. Doing nothing is not undertaking action. Having taken *no* action whatsoever by 21 September 2005, the United States had "not taken appropriate steps to remove the adverse effects

[57] Brazil's 26 February response to question 11, para. 99-108; 134-150; Brazil's Rebuttal Submission, paras. 33-45; Brazil's 16 January Response to U.S. Requests for Preliminary Rulings, paras. 31-34.

[58] Panel Report, *U.S. – Upland Cotton*, para. 7.1501.

of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report and the Appellate Body report". Further, with respect to the specific action required under Article 7.8 in this case, Brazil refers the Panel to its comments above on the U.S. responses to Questions 17(a) and (b).

28. The parties present divergent views with respect to the relevant marketing year to be considered by the panel in its analysis of Brazil's serious prejudice claims.

a) Could the parties explain what they consider to be the relevant legal considerations by which the Panel should be guided in determining whether MY 2005 or MY 2006 is the appropriate marketing year?

b) Do the parties agree or disagree with the argument of the European Communities that in a dispute involving a claim of present serious prejudice the parties must provide the "most recent reasonably available" data? [Paragraphs 43 and 54-55 of the Third Party Submission of the European Communities]

44. Both Brazil and the United States appear generally to agree that the Panel should examine data from both MY 2005 and MY 2006 in assessing Brazil's claims of serious prejudice as well as Brazil's claims of threat of serious prejudice. Because MY 2006 data will remain incomplete throughout the Panel's consideration of Brazil's claims, it is necessary for the Panel to rely *primarily* on MY 2005 data.

45. Brazil notes that the United States does not refer to the methodological tool of a "reference period" in its response to this question. This is the tool used by the original panel in assessing Brazil's "present" (as opposed to "threat") serious prejudice claims.[59] The U.S. argument in paragraph 12 of its answer to question 28 implies that only effects of marketing loan and counter-cyclical payment programs and payments existing in MY 2006 would be subject to any implementation obligation of the United States in this proceeding. However, the necessary use of a particular time period to assess the existence of serious prejudice does not limit or otherwise circumscribe the *measures* at issue before a panel. Nor does it limit the implementation obligations of a subsidizing Member to removing the adverse effects caused during the reference period.

Questions to the United States

29. Does the United States contest the fact that a "strong positive relationship between upland cotton (base acre) producers receiving annual payments and upland cotton production" exists?[60] *In particular, does the US disagree with the following statements*[61]*:*

- *a very large proportion of farms with upland cotton base acres continue to plant upland cotton in the year of payment;*
- *the overwhelming majority of farms enrolled in the programs which plant upland cotton also hold upland cotton base?*

46. To begin, Brazil disagrees with the United States' assertion that the existence of a "strong positive relationship between cotton (base acre) producers receiving annual payments and upland

[59] Brazil's 6 March 2007 response to question 28.

[60] See para. 131 of Brazil's first submission. The Panel clarifies that this phrase refers to the fact that "the recipients who hold upland cotton base acres" and "those who continue to plant upland cotton" overlap with each other to a great extent. (*See* para. 7.637 of the report of the original panel.) The Panel understands that Brazil uses this phrase in the same sense.

[61] These passages are reproduced from para. 7.636 of the report of the original panel.

cotton production" is a characterization of facts.[62] As the compliance Panel's question suggests, it is a fact. Moreover, it is a fact that the United States cannot make vanish by pointing out two other facts. Indeed, Brazil welcomes that the United States does not contest, as it cannot, that 95 percent of U.S. upland cotton acreage was on farms holding upland cotton base.[63] The parties disagreement relates to the relative importance of certain facts, including the "strong positive relationship between cotton (base acre) producers receiving annual payments and upland cotton production", and their relevance for Brazil's arguments.

47. Brazil's claims in this dispute relate, *inter alia*, to the effect of counter-cyclical subsidies in sustaining – not necessarily inducing additional acreage, as the United States erroneously claims[64] – current U.S. upland cotton production. In other words, Brazil looks to current producers of upland cotton and the relationship between current upland cotton production and upland cotton counter-cyclical subsidies. The facts show that the overwhelming majority of current U.S. upland cotton production is undertaken by historic upland cotton producers receiving upland cotton counter-cyclical payments. By contrast, the U.S. arguments focus solely on facts regarding this relationship from the perspective of historic, not current, producers of upland cotton, pointing out that some historic upland cotton producers receiving upland cotton counter-cyclical payments do no longer produce upland cotton.[65] This different focus explains much of the divergence between the parties.

48. In particular, the United States argues that a "significant portion" of upland cotton planted acreage was not on upland cotton base acreage. Viewed from the relevant perspective of current upland cotton production, the relevant figures tell a very different story. In MY 2005, 83 percent of cotton planted acreage was on cotton base acreage. This is the more significant portion of U.S. upland cotton acreage. Moreover, of the remaining 17 percent, 12 percent was on farms that "overplanted" their cotton base acreage and 5 percent was on farms that did not have any upland cotton base acreage.[66] In other words, 95 percent of U.S. upland cotton acreage is on farms that hold upland cotton base. These facts demonstrate that there continues to be a "strong positive relationship between upland cotton (base acre) producers receiving annual payments and upland cotton production."[67] Indeed, these percentages remain essentially unchanged from the same ratios that the original panel assessed for MY 2002 and based on which it made this finding.[68] The "growing" percentage of historic upland cotton farms that exit upland cotton production – referred to by the United States[69] – simply does not exist.

49. The United States makes a great deal of the fact that 40 percent of upland cotton base acres are not currently planted to upland cotton.[70] First, Brazil notes that at no time in recent history has U.S. upland cotton acreage been 18.4 million acres – the amount of upland cotton base. The high level of upland cotton base relative to production reflects the fact that with consecutive base updates, U.S. farms elected to update only if that would increase their high payment upland cotton base. In case an update would have decreased high payment upland cotton base in favour of lower payment crop base, U.S. farms declined to update. Thus, U.S. upland cotton base acres are not a reliable measure to compare to annual U.S. upland cotton acreage.

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[62] U.S. 6 March response to question 29, para. 14.
[63] U.S. 6 March response to question 29, para. 18.
[64] It is telling that the United States does not footnote to any of Brazil's submissions. As Brazil has clarified, it is not arguing that counter-cyclical subsidies induce production. Rather, Brazil argues that it maintains production by keeping current producers of upland cotton in business.
[65] U.S. 6 March response to question 29, para. 14.
[66] Exhibit US-64 (2005 Crop Year Subcategories).
[67] Panel Report, *U.S. – Upland Cotton*, para. 7.1302.
[68] Brazil's Rebuttal Submission, paras. 153-163.
[69] U.S. 6 March response to question 29, para. 16.
[70] *See, e.g.*, U.S. 6 March response to question 29, paras. 14-15.

50. Brazil has never disputed that some farmers have used their planting flexibility and collect upland cotton counter-cyclical subsidies without growing upland cotton. The same basic percentage of use of planting flexibility (40 percent) was the situation before the original panel. Contrary to the U.S. assertions, this is irrelevant to Brazil's adverse effects claims. Brazil claims are that counter-cyclical subsidies received by current producers of upland cotton are critical to ensure a profit for those farms that currently do produce upland cotton. The fact that there are other farms that decide to put these funds to other uses is irrelevant to Brazil's claim today, exactly as it was irrelevant to Brazil's claims in 2003 before the original panel.

51. Moreover, the United States asserts out that it is not surprising that much of U.S. upland cotton production continues to be on farms that hold upland cotton base because growing upland cotton is possible only in certain regions.[71] It may not be surprising to the United States, but it is strong evidence of a strongly positive relationship. Despite the U.S. claims that these subsidies are "decoupled," the fact that 95 percent of U.S. upland cotton is grown on farms that hold upland cotton base shows just how coupled these subsidies, as well as direct payments, are.

52. The U.S. Congress provided for counter-cyclical payments rates for historic producers of upland cotton for exactly the same reason that the United States notes here: historic producers of upland cotton would be current producers of upland cotton; and those continuing producers would have high costs requiring counter-cyclical subsidies to grow upland cotton profitably (and avoid bankruptcy). Thus, counter-cyclical subsidies are a means to support current upland cotton production. As the United States argues, given climatic and other conditions, historic producers are likely to continue to grow upland cotton. As Brazil has argued and established throughout these proceedings, U.S. upland cotton producers "can grow upland cotton with good results given the particular growing conditions in the region"[72] only in light of mandated marketing loan and counter-cyclical payments. Historically, U.S. producers were able to do so in light of at least 70 years of U.S. subsidization of U.S. upland cotton production with federal funds.

53. Finally, Brazil notes that the compliance Panel's question refers to the proportion of <u>farms</u> with upland cotton base acres that continue to plant cotton. In MY 2005, the only year for which the United States produced data, this proportion was 73 percent.[73] Instead of presenting the figure in question, the United States provides "the ratio of cotton planted acres to total planted acres"[74] on farms that have upland cotton base acres. This ratio, calculated under the "Cotton-to-Cotton Methodology," allocates counter-cyclical payment on a one base acre to one planted acre basis.[75] The "Cotton-to-Cotton Methodology" does not cover 13 percent of counter-cyclical subsidies – $179 million – in MY 2005 that are paid to currently upland cotton producing farms, but relate to base acres in excess of planted acres. These payments could be considered to support upland cotton production.

54. With respect to the U.S. direct payment related arguments, Brazil refers the compliance Panel to its comments on the U.S. answer to question 31, below.

<u>Question to Brazil</u>

30. How does Brazil respond to the argument of the United States that "whether or not the marketing loan and counter-cyclical payment programs or payments under the programs cause significant price suppression is a question of first impression"? [Rebuttal Submission of the United States, paragraph 219]

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[71] U.S. 6 March response to question 29, para. 19-21.
[72] U.S. 6 March response to question 29, para. 20.
[73] *See* Table 2, above.
[74] U.S. 6 March response to question 29, para. 14.
[75] *See* Panel Report, *U.S. – Upland Cotton*, para. 7.641.

2. The structure, design and operation of the countercyclical and marketing loan payment programs

Question to the United States

31. Brazil claims that the structure, design and operation of US counter-cyclical payments stimulate US upland cotton production. Both Brazil and the United States have referred to the Westcott (2005)[76] *study to provide support for their opposing analysis of the possible production impact of counter-cyclical payments. In its rebuttal, Brazil quotes the following passage from Westcott:*

> So where do CCPs fit compared with other farm commodity programs in the 2002 Farm Act? Marketing loans are fully coupled since they are available on all production and their link to market prices means they affect production decisions of farmers. Direct payments are mostly decoupled, since they are paid on a fixed, historically-based quantity rather than on current production and are not dependent on market prices or other factors that would affect production. …
>
> CCPs fall in between these two programs, having some properties similar to mostly decoupled direct payments and other properties similar to fully coupled marketing loans. Like direct payments, CCPs do not depend on current production since they are paid on a fixed, historically-based quantity. However, similar to marketing loans, CCPs are linked to market prices so there may be some influence on current production decisions of farmers, which would potentially make CCPs at least partially or somewhat coupled.

a) Does the United States agree with this characterization of the CCP?

55. The United States understandably continues to downplay the significance of the direct link between upland cotton prices and counter-cyclical subsidies, arguing that any production effects are mitigated by a number of factors.[77] Brazil has already responded to a number of these arguments, including the incorrect assertion that counter-cyclical subsidies behave like direct payments when prices are "expected" to be above 65.73 cents per pound.[78] The past four years (MY 2002-2005) illustrate that expectations are not good indicators of actual outcomes.[79] Farmers recognize this, and assign some probability that prices will be lower, or higher than they expect.

56. The second mitigating factor cited by the United States, that "net returns among alternative crops would remain the primary consideration underlying production choices," ignores the importance of planting restrictions and the potential for base acre updates as well as the effect of risk reduction on expected net returns. As discussed further below, planting the base crop, in this case upland cotton, significantly reduce uncertainty about revenue. This is because market revenue and counter-cyclical subsidies are inversely related for upland cotton, whereas there is no such relationship between upland cotton counter-cyclical subsidies and the planting of other crops. In that case, farmers risk low market prices for the crop planted and high upland cotton prices, resulting in low or no counter-cyclical subsidies. The risk reduction effect, thus, has a significant impact on the expected net returns from planting the base crop or alternative crops. Further, the empirical literature confirms that the 2002

[76] Exhibit US-35 (Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited").

[77] U.S. 6 March response to question 31(b), para. 26.

[78] Brazil's Rebuttal Submission, para. 131.

[79] As Brazil explained in its Rebuttal Submission, expectations were significantly wrong in both MY 2003 and 2004. *See* Brazil's Rebuttal Submission, para. 131.

base acre update and the potential for future base acre updates sustains and even increases program crop acreage.[80]

57. Brazil further recalls that counter-cyclical subsidies are part of a structured basket of policies that guarantee holders of upland cotton base (and 83 percent of cotton acres) an institutional price of 72.4 cents per pound of upland cotton. There are, of course, important caveats to this policy, such as the fact that direct and counter-cyclical subsidies are made on 85 percent of historic acreage and fixed yields. However, the compliance Panel should not lose sight of the fact that upland cotton counter-cyclical subsidies are based on a target price for *upland cotton*, not some other crop, or some measure of a farmer's income. The original panel observed that "in the price range from the loan rate up to the target price minus the DP payment rate, changes in producer revenues due to changes in market prices are partly offset by the countercyclical payments if the base acreage crop is planted, thereby reducing total revenue risk associated with price variability."[81] Throughout this proceeding, the United States has attempted to divorce counter-cyclical subsidies from their direct link to the market for upland cotton.

58. The United States also argues that counter-cyclical subsidies might simply replace other risk management instruments employed by farmers.[82] Brazil notes that farmers will naturally use risk reduction tools that are the most cost effective. By providing a risk reduction tool for free, *i.e.*, counter-cyclical subsidies, farmers plant more of the program crop for two reasons. First, they are allowed to achieve lower risk than would be accepted with other costly risk reduction instruments (such as diversification or more conservative use of credit). Farmers therefore plant more than they otherwise would because one of the risk management instruments, a required "input" into upland cotton production, is cheaper. Second, with risk for upland cotton mitigated by upland cotton counter-cyclical subsidies, farmers face less risk than they otherwise would if they had to resort to other risk management tools. Therefore, risk averse farmers plant more upland cotton and their bankers and landlords encourage planting upland cotton because this reduces their risk of default by the farmer.

59. Next, the United States argues that upland cotton farms are large and that large farms are less risk averse than small farms, suggesting that, therefore, upland cotton counter-cyclical subsidies have no appreciable effects.[83] However, the notion that large commercial growers of upland cotton are less risk averse in the their upland cotton enterprises is not established by any data or other sources. In fact, there are a few facts that would tend to suggest otherwise. Large upland cotton growers are more likely to have more of their total resource base tied to upland cotton and, thus, have a stronger incentive to mitigate against revenue losses from low prices. This is precisely the benefit that the counter-cyclical subsidies provide. Furthermore, large growers are more likely to use substantial debt in financing their operation than small growers. Lenders in turn are more likely to limit the credit line available unless a grower can assure repayment even when market prices are low. Again, this is precisely the benefit that counter-cyclical subsidies provide. Thus, the notion that large upland cotton growers will exhibit less risk aversion than smaller growers has no factual basis and seems inconsistent with certain facts characterizing U.S. upland cotton production.

60. Aside from these more specific points, Brazil notes that Westcott and the United States accept the fact that counter-cyclical subsidies reduce the risk of upland cotton production and that this risk

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[80] *See* Exhibit Bra-565 (McIntosh, Christopher R., Jason F. Shogren and Erik Dohlman, "Supply Response to Counter-Cyclical Payments and Base Acre Updating under Uncertainty: An Experimental Study," forthcoming paper in the American Journal of Agricultural Economics, November 2006) and Exhibit Bra-568 (O'Donoghue, Erik J. and James Whitaker, "How distorting are direct payments?," Paper prepared for presentation at the 2006 American Agricultural Economics Association in Long Beach, CA, p. 2-3, accessed December 2006 at http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=21797).

[81] Panel Report, *U.S. – Upland Cotton*, para. 7.1302.

[82] U.S. 6 March response to questions 31, paras. 26-27.

[83] U.S. 6 March response to questions 31, paras. 26-27.

reduction provides incentive to grow more upland cotton than in their absence. The U.S. attempts to minimize this effect are off the mark. Rather, the evidence supports Brazil's argument that the risk-mitigating benefits of counter-cyclical subsidies are significant, and that they provide a substantial additional incentive to maintain upland cotton acreage.

61. The United States asserts that counter-cyclical payments have effects closer to those of direct payments than marketing loan payments. For the reasons set out above, Brazil does not agree with this characterization. Yet, contrary to the U.S. assertion, the original panel did not find that direct payments were decoupled from production. It found that, because they were not price-contingent, they did not contribute to significant price suppression in the same manner as the price-contingent U.S. subsidies.[84] Moreover, it held that they can have production effects when

> considered in conjunction with the market loss and countercyclical component, respectively. We incorporate our description of the measure in Section VII:C, including the requirement to use the land for an agricultural use or conserving use. These [direct] payments provide an incentive to maintain land in agricultural use. Moreover, while a producers has the ability to vary production among crops, the strongly positive relationship between upland cotton (base acre) producers receiving annual payments and upland cotton production shows that they are, to a certain degree, an incentive for continuity. We also refer to and incorporate our findings on these measures in Section VII:D.[85]

62. In others words, the original panel found that these payments have production effects and maintain farmers in the production of upland cotton. This is consistent with the evidence that direct payments contribute significantly to covering upland cotton producers' cost of production and that over 90 percent of upland cotton production takes place on farms that hold upland cotton base.[86]

63. In commenting on the original panel's finding regarding direct payments, the Appellate Body held that "subsidies that are not price-contingent … could have some effect on production and exports and contribute to price suppression."[87] Thus, direct payments are capable of contributing and do contribute to serious prejudice. Westcott concedes this point, finding "direct payments may still have some influence on production, reflecting general wealth effects, changes in risk attitudes, and providing liquidity to farmers."[88] However, Westcott does not fully consider the production effects of counter-cyclical subsidies, as he does not consider two of the most important factors contributing to their production effects: (i) planting restrictions and (ii) the potential for base updates.[89]

64. In this context, Brazil recalls the survey results of Goodwin and Mishra (2005), that questioned what farmers intend to do with direct payments. If direct payments were truly "decoupled" and did not affect production decisions, one would expect that they would be used toward family savings, consumption and other non-farm uses. This is not what the survey results reveal. Instead, 68 percent of farmers reported that they intend to use direct payments on the farm. Even more

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[84] Panel Report, *U.S. – Upland Cotton*, para. 7.1307.
[85] Panel Report, *U.S. – Upland Cotton*, footnote 1417.
[86] Panel Report, *U.S. – Upland Cotton*, Attachment to Section VII:D.
[87] Appellate Body Report, *U.S. – Upland Cotton*, footnote 589.
[88] Exhibit US-35 (Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited").
[89] Brazil notes that, in 2002 for example, farmers were allowed to update not only program acres for both the direct and counter-cyclical payment program, but also program yields for the counter-cyclical payment program only.

troubling, 34 percent indicated that they intend to devote direct payments to covering their operating costs of production.[90]

65. USDA's 2007 farm bill proposal sheds further light on the importance of direct payments for upland cotton as opposed to other program crops. The proposal calls for an immediate 66 percent increase in direct payments for upland cotton, with much more modest increases in direct payments for other program crops. The USDA explains the rational for drastically increasing cotton direct payments by explaining that

> While program crop prices are generally expected to remain firm or increase over the next few years, upland cotton is an exception. The combination of increases in upland cotton yields per acre and declining U.S. upland cotton textile production is expected to limit price gains and result in substantial cotton program expenditures, compared to other commodities.[91]

66. This explanation of the "problem" facing upland cotton farmers clearly demonstrates that the proposed large increase in upland cotton direct payments are designed to support upland cotton production. As USDA's data demonstrates and as the United States admits, historic producers are often current producers of upland cotton. If direct payments were truly decoupled, and did not affect production, why would USDA propose to drastically increase direct payments for upland cotton and not other program crops? The reason is, of course, that USDA proposes to compensate for possible income losses of current upland cotton producers that may result from proposed changes in other programs. The fact that USDA considers compensating them by increasing the direct payments paid to historic producers of upland cotton is further demonstration of the "strong positive relationship between upland cotton (base acre) producers receiving annual payments and upland cotton production." That strong positive relationship is not likely to change simply because future legislation may change the name of the payments from "counter-cyclical" to "direct."

67. The 2007 USDA farm bill proposal also calls for an increase in direct payments for beginning farmers. The rational for this proposal once again sheds light on how direct payments, and presumably counter-cyclical payments, are used to expand production. USDA explains that "to better prepare beginning farmers to face the initial financial burdens associated with entering production agriculture, the Administration recommends that beginning farmers receive an increased direct payment rate."[92] This USDA explanation is yet another fact demonstrating that direct payments are not decoupled from production. Instead, direct payments are designed to help farmers finance capital investments in "equipment, including planting, cultivation and harvest machinery, [which] exemplifies the financial barriers to entering production agriculture."[93]

68. In sum, unlike direct payments, counter-cyclical subsidies are dependent on the price of upland cotton. This makes counter-cyclical subsidies more coupled to the production of upland cotton than direct payments. The fact that counter-cyclical subsidies have other attributes similar to direct payments does not diminish their ability to affect production.

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[90] Exhibit US-41 (Goodwin B.K. and Mishra A. "Another Look at Decoupling: Additional Evidence on the Production Effects of Direct Payments." *American Journal of Agricultural Economics* 87(5):1200-1210 (2005), Table 3 at p. 1206).

[91] Exhibit Bra-671 (U.S. Department of Agriculture's 2007 Farm Bill Proposal, p. 14, accessed March 2007 at http://www.usda.gov/documents/07finalfbp.pdf).

[92] Exhibit Bra-671 (U.S. Department of Agriculture's 2007 Farm Bill Proposal, p. 16, accessed March 2007 at http://www.usda.gov/documents/07finalfbp.pdf).

[93] Exhibit Bra-671 (U.S. Department of Agriculture's 2007 Farm Bill Proposal, p. 16, accessed March 2007 at http://www.usda.gov/documents/07finalfbp.pdf).

b) How would the United States respond to the argument that, by design, counter-cyclical payments are in some measure coupled to production decisions because part of the payments is contingent on the actual realization of market prices?

69. The United States asserts that "the market price is an independent trigger" for counter-cyclical subsidies.[94] This is a remarkable assertion in view of the structure, design and operation of counter-cyclical subsidies. Brazil recalls that counter-cyclical subsidies are made with respect to a particular commodity on the basis of an institutional target price. When the market price of that commodity falls below the trigger price, counter-cyclical subsidies result. Far from being independent, market prices directly link counter-cyclical subsidies to upland cotton production. As explained above, this link is crucial for the risk reduction function of counter-cyclical subsidies. The notion that market price are an "independent trigger" is inconsistent Westcott's finding that "CCPs are linked to market prices so there may be some influence on current production decisions of farmers."[95]

70. Contrary the U.S. assertion[96], however, the evidence demonstrates that counter-cyclical subsidies not only have the potential to cause adverse effects, but that they do cause adverse effects. Brazil has addressed the alleged "mitigating factors" in its comments on the U.S. response to the previous question.

3. Economic simulation model

Question to the United States

32. Brazil has presented a partial equilibrium model to simulate the effects of eliminating US upland cotton payments, particularly the marketing loan and counter-cyclical payments. In both its submission and rebuttal, the United States has provided reactions to the simulation model.

a) Would it be accurate to describe the United States' response as constituting a general acceptance of the framework of analysis adopted by Brazil but contesting the assumptions made regarding the values of the parameters, the supply and demand elasticities and the "coupling factor", used in the model? (The coupling factor is the amount by which the expected price is increased by each dollar per unit of subsidy payments.)

71. In its response, the United States identifies a number of "important flaws" in Professor Sumner's model.[97] These are the same criticisms raised in the U.S. Oral Statement[98] and the U.S. Rebuttal Statement.[99] Professor Sumner addressed each of these issues in Brazil's Comments on the U.S. Oral Statement.[100] Brazil will not repeat these arguments here.

72. The United States also criticizes the counter-factual question that Professor Sumner's model was designed to address, *i.e.*, what would happen if marketing loan and counter-cyclical subsidies were eliminated? The United States incorrectly asserts that "to the extent that a counterfactual assessment is undertaken, it is only to assess what the price equilibrium would be at present if marketing loan and counter-cyclical payments had been *lower, different,* or *did not exist*."[101] First, Article 6.3 requires an counterfactual examination of effects *but for* "the subsidy." This does not

[94] U.S. 6 March response to question 31(b), para. 28.
[95] Exhibit US-35 (Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited").
[96] U.S. 6 March response to question 31(b), para. 29.
[97] U.S. 6 March answer to question 32(a), para. 31.
[98] U.S. Oral Statement, Statement of Dr. Glauber, para. 3.
[99] U.S. Rebuttal Submission, Annex I, para. 4.
[100] Brazil's 16 January Comments on the U.S. Oral Statement, paras. 35-56.
[101] U.S. 6 March answer to questions 32(a), para. 33 (emphasis added).

involve assessing effects of a "lower" or "changed" subsidy, but "effects" of "*the* subsidy." Article 6.3 also requires assessing whether "the effect of the subsidy" "is" "significant price suppression." From a textual point of view, this requires assessment of the existence of *present* "significant price suppression" under market conditions during the reference period – not those that would exist over a sufficiently long time for any shock to result in a new equilibrium. Thus, the assessment of the effects of a subsidy is short-term and does not involve a long-term analysis.

73. These general principles are even more applicable in an Article 21.5/Article 7.8 proceeding. Any Member that makes changes to reduce or limit the subsidy still maintains the "subsidy." Articles 7.8 and 7.9 of the *SCM Agreement* require the *full* removal of all adverse effects (assuming no withdrawal of the subsidy) within only six months. This short time period also reflects the fact that the complaining Member has already endured years of market distortions through adverse effects. As a textual matter, it is thus entirely appropriate for the compliance Panel to examine the adverse effects of "the subsidy" through a counter-factual that assesses the present effects of eliminating the subsidy.

74. Finally, the United States concludes that Professor Sumner's model "grossly overstate[s] any possible effects of the marketing loan and counter-cyclical payments,"[102] and are considerably higher than the U.S. estimates applying Professor Sumner's model to others sets of parameters.[103] As explained in Brazil's Closing Statement, Professor Sumner's findings are consistent with the academic literature. The United States simulation results, on the other hand, are smaller than any other study that has examined the effects of U.S. upland cotton subsidies on world market prices.[104]

b) In its First Written Submission and Rebuttal Submission, the United States uses the same value of 1 that Brazil adopts for the coupling factor assigned to marketing loan payments. Does this imply an acceptance by the United States that, by design, marketing loan payments provide a one-for-one incentive to upland cotton production?

75. Brazil welcomes the United States acceptance of a coupling factor of 1 for marketing loan subsidies. Brazil agrees with the United States that expectations of marketing loan subsidies are what ultimately drives their production effects.[105] Brazil recalls that upland cotton farmers have expected to receive marketing loan subsidies in every year under the FSRI Act of 2002.[106] Even if farmers did not "expect" to receive marketing loan subsidies (*i.e.*, farmers expected the AWP to be above the loan rate), the marketing loan program would still provide a benefit to upland cotton farmers by eliminating the risk of lower than expected prices.[107]

76. Furthermore, as explained by Professor Sumner in his Annex I analysis[108], the impact of a reduction in expected marketing loan subsidies is at least as large as a decrease in the expected market price. In addition to the direct incentive effect, marketing loan subsidies function as a hedge against a fall in market prices. Farmers generally respond to less risk by expanding output. By this logic, it would be appropriate to assign marketing loan payments a coupling factor of greater than 1.

c) In its First Written Submission and Rebuttal Submission, the United States used a non-zero value of 0.25 (not much lower from the 0.4 that Brazil adopts) for the

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[102] U.S. 6 March answer to question 32(a), para. 34.
[103] U.S. 6 March response to question 32(a), para. 34.
[104] Brazil's Closing Statement, para. 23. *See also* Exhibit Bra-659 (Statement of Professor Sumner Concerning Various U.S. Arguments).
[105] U.S. 6 March answer to question 32(b), para. 36.
[106] Brazil's Rebuttal Submission, paras. 106-107.
[107] *See* Brazil's Oral Statement, paras. 80-82. *See also* Exhibit Bra-659 (Statement of Professor Sumner Concerning Various U.S. Arguments, paras. 48-56).
[108] *See* "Analysis of Effects of U.S. Upland Cotton Subsidies on Upland Cotton Prices and Quantities by Daniel Sumner," Brazil's First Written Submission, Annex I, para. 58.

> *coupling factor assigned to counter-cyclical payments. Does this imply an acceptance by the United States that, by design, counter-cyclical payments are partially tied to upland cotton production, and of a magnitude (25 cents to a dollar of counter-cyclical payments) not very far from Brazil's own estimate (of 40 cents to a dollar of counter-cyclical payments)?*

77. In its response, the United States asserts that "the empirical research supports a lower coupling factor, closer to zero."[109] Brazil disagrees.

78. The study cited by the United States to support this assertion examines corn, wheat and soybean acreage in the North Central region. Upland cotton is not produced in the North Central region. Most upland cotton producing regions, including the Southeast, Delta and Far West, are suitable for a number of substitute crops, such as soybeans, rice, peanuts, corn, sorghum, hay, fruits, nuts and vegetables. By contrast, the North Central region grows almost exclusively three crops – wheat, corn and soybeans. In addition, the simulation conducted by Lin and Dismukes does not examine removing the counter-cyclical subsidies for a single crop, but examines the simultaneous removal of counter-cyclical subsidies for all crops. Under these circumstances, it is not surprising that Lin and Dismukes find small acreage impacts from counter-cyclical subsidies.[110]

79. As in other studies that examine field crops in U.S. Midwest, the low acreage response to counter-cyclical subsidies is most likely driven by low elasticities of supply for wheat, corn and soybeans. This study does not examine whether counter-cyclical subsidies are decoupled from production. Instead, it examines whether counter-cyclical subsidies increase acreage for corn, wheat and soybeans in the North Central Region. This question has two parts. First, how coupled to production are counter-cyclical subsidies (*i.e.*, what is the coupling factor)? Second, what is the elasticity of supply for soybeans, wheat and corn in this region? The impact of counter-cyclical subsidies on acreage is a product of these two effects. Goodwin and Mishra's 2005 study, also cited by the United States, confirms that the elasticities of supply for soybeans, wheat and corn are low. Therefore, the effect of counter-cyclical subsidies on acreage is bound to be low, independent of whether or not counter-cyclical subsidies are coupled to production.

80. Finally, Brazil notes that this study examines only a few of the many mechanisms through which counter-cyclical subsidies might effect production. As explained by Professor Sumner, it focuses on the truncation of the effective price distribution and how an increase in wealth might reduce risk aversion, and, increase quantity supplied. The study does not examine how increased wealth might increase on-farm investment, or how counter-cyclical subsidies constrain planting choices and increase incentives to plant because of potential base updating.

81. The United States next cites the survey results in a 2005 study by Goodwin and Mishra to support its assertion that the CCP coupling factor is "closer to zero."[111] The United States seizes on the results that show that 44 percent of farmers think counter-cyclical subsidies are "not at all important" to acreage decisions.[112] As Professor Sumner explained in Exhibit Bra-659, this result is unremarkable. This is because, as the United States fails to mention, the exact same percentage of farms surveyed, 44 percent, did not have any base acres. In other words, they were not entitled to receive counter-cyclical subsidies.[113]

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[109] U.S. 6 March answer to question 32(c), para. 40.
[110] Exhibit Bra-659 (Statement of Professor Sumner Concerning Various U.S. Arguments, para. 20).
[111] U.S. 6 March response to question 32(c), para. 40.
[112] U.S. Rebuttal Submission, para. 235.
[113] Exhibit US-41 (Goodwin B.K. and Mishra A. "Another Look at Decoupling: Additional Evidence on the Production Effects of Direct Payments." *American Journal of Agricultural Economics* 87(5):1200-1210 (2005), Table 3 at p. 1206).

82. Yet, the survey does allow a comparison of the relative importance of different variables that may affect production decisions. In this regard, Brazil notes that 23 percent of farmers also thought that expected commodity prices were "not at all important" and 20 percent thought that the cost of inputs were "not at all important." In relation to these findings, the survey results show that variable factors like counter-cyclical and direct payments are about half as important as the cost of inputs and the expected commodity price. That suggests a coupling factor of about 0.5, higher that what Professor Sumner uses in his model.

83. Brazil also notes that the survey is based on a national sample of farms. In 2002 and 2003, the years in which the survey was conducted, counter-cyclical subsidies were only made for rice, upland cotton and peanut base acres, a small subset of U.S. base acreage. Given that most farmers had not received counter-cyclical subsidies, it is reasonable that many of them indicated that counter-cyclical subsidies were "neither important nor unimportant." The fact that even some of those farmers thought that counter-cyclical subsidies were important to acreage decisions suggests their potential supply effects for crops like cotton, where the payments are large, made on a consistent basis and necessary to cover costs of production.

84. The importance of counter-cyclical subsidies in the sub-sample of upland cotton farms would be much higher than the national average, given that they are the ones who actually received the payments. Brazil recalls that when arguing for the institutionalization of counter-cyclical subsidies, the former Chairman of the National Cotton Council of America testified that "during the past three years, many cotton farmers have avoided bankruptcy only because Congress has authorized emergency relief to supplement the FAIR Act's inadequate fixed payments."[114] Emergency market loss assistance subsidies were the predecessor to counter-cyclical subsidies.

85. Contrary to United States arguments, the empirical literature does not support a coupling factor below 0.25. As Brazil has long maintained, even a coupling factor for upland cotton of 0.4 is decidedly conservative. Brazil refers the Panel to the ample evidence provided in its written submissions[115] and those of its economic expert, Professor Sumner[116], to support this position.

E. EXPORT CREDIT GUARANTEES

1. Permissibility of an *a contrario* interpretation of item (j) of the Illustrative List

Questions to the United States

33. Please discuss whether (and if so, how) the panel rulings in Korea – Vessels and Brazil – Aircraft (21.5) (I and II) affect the United States' approach to the interpretation of the relationship between item (j) of the Illustrative List and Article 3.1(a) of the SCM Agreement.

86. Brazil refers the compliance Panel to its comment on the U.S. response to question 34, below.

34. Does the United States considers that item (j) of the Illustrative List is one of the provisions to which footnote 5 of the SCM Agreement applies? What impact does this have for the United States' interpretation of the interaction between item (j) of the Illustrative List and Article 3.1(a) of the SCM Agreement?

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[114] Panel Report, *U.S. – Upland Cotton*, footnote 1471, referring to Exhibit Bra-109 (Testimony (Full) of Robert McLendon, Chairman, NCC Executive Committee, Before the House Agricultural Committee. National Cotton Council (NCC)).

[115] Brazil's First Written Submission, paras. 128-131; Brazil's Rebuttal Submission, paras. 111-166; and Brazil's Opening Statement, paras. 40-53.

[116] Annex I to Brazil's First Written Submission, paras. 59-66; Annex I to Brazil's Rebuttal Submission, paras. 30-39; Exhibit Bra-659 (Statement of Professor Sumner Concerning Various U.S. Arguments, paras. 17-41).

87. Brazil has already explained in some detail its understanding of the interrelationship among, and proper reading of, Articles 1.1 and 3.1, the Illustrative List, and footnote 5 of the *SCM Agreement*.[117] Brazil has explained that the United States seeks an *a contrario* reading of the Illustrative List, and of item (j) in particular, and that that reading is not only incorrect, but has been rejected by both of the panels that have directly considered the United States' argument. Brazil will not repeat those arguments here, but rather incorporates them by reference, and focuses instead on aspects of the U.S. argument that have been articulated for the first time in these proceedings in the United States' answers to the Panel's questions.

88. The United States' position that item (j) "demonstrates definitively how the general definitional elements in Articles 1 and 3.1(a) of the *SCM Agreement* apply in the case of export credit guarantees"[118] rests on a textually and logically flawed understanding of the Illustrative List.

89. First, the United States maintains that each "type" of measure identified in an item – apparently any item – on the Illustrative List is defined as an export subsidy (or not) by the terms of that item's description in the Illustrative List. For example, according to the United States, item (j) "'makes clear' how the Article 1/3.1(a) definition applies in respect of each particular type of measure set out in the Illustrative List."[119]

90. This reading, however, imports into Article 3.1(a) terms that are nowhere to be found there. Article 3.1(a) specifies that subsidies contingent upon export performance "including those [export-contingent subsidies] illustrated in Annex 1" are prohibited. It does *not* say "those types [of export-contingent subsidies] defined in Annex 1" are prohibited. Yet the United States would have this Panel read such additional, and different, terms into the *SCM Agreement*. Instead of understanding the Illustrative List to comprise illustrations, or examples, of prohibited export subsidies, the United States wishes the Illustrative List to be read as definitions of types of prohibited export subsidies. That wish is without textual foundation.

91. Second, while the United States asserts that its reading of footnote 5 and the Illustrative List "is the only logical interpretation,"[120] in setting out that reading, the United States commits an elementary mistake of logic.

92. The Panel will recall that while Article 3.1(a) describes Annex I as illustrating measures that are export-contingent subsidies, footnote 5 indicates that Annex I may under certain conditions refer to measures that are not export subsidies. The United States collapses these two principles, assuming that when an item in the Illustrative List describes the circumstances in which a type of measure is an export subsidy, by automatic implication it also describes the circumstances in which that type of measure is not an export subsidy, *i.e.*, where the circumstances set out in the item are not met. For example, the United States argues that item (j) "clarifies which export credit guarantees *do* provide export subsidies within the meaning of Article 1/3.1(a) and those that *do not*"[121], and that "Annex I is relevant in determining whether or not measures constitute 'export subsidies'".[122] In other words, on the United States' view, *every* item in the Illustrative List not only identifies measures that are export subsidies, but also simultaneously identifies, by negative implication, measures that are not export subsidies.

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[117] *See, e.g.*, Brazil's Rebuttal Submission, paras. 451-481; Brazil's Oral Statement, paras. 233-238; Brazil's 6 March response to question 36, paras. 37-43.

[118] U.S. 6 March response to question 33, para. 44.

[119] U.S. 6 March response to question 33, para. 44.

[120] U.S. 6 March response to question 33, para. 51.

[121] U.S. 6 March response to question 33, para. 54 (italics in original, underlining added).

[122] U.S. 6 March response to question 33, para. 47 (underlining added).

93. The premise to the United States' argument – that a statement of circumstances in which a measure constitutes an export subsidy also automatically illustrates circumstances in which a measure does not constitute an export subsidy – involves a serious logical flaw. Assume two propositions – P and Q. The statement "If P, then Q" means that if proposition P is true, then proposition Q is also true. On its own, the statement "If P, then Q" says nothing about the situation in which P is not true; where P is not true, Q is not necessarily false.[123] Consider a simple illustration. The statement that a cow is a quadruped ("If cow, then quadruped") is true. But it would be incorrect to assume that because an animal is not a cow, it is not a quadruped ("If not cow, then not quadruped").

94. Footnote 5 is consistent with this fundamental logical principle, by specifying that the Illustrative List only identifies measures that are not export subsidies where a measure is "referred to . . . as not constituting" an export subsidy ("If not P, then not Q"). Otherwise, an item in the Illustrative List does nothing more than identify circumstances under which a measure is an export subsidy ("If P, then Q").

95. Along with being logically invalid, the United States' view leaves no role at all for footnote 5 of the *SCM Agreement.* If every item of the Illustrative List can be interpreted *a contrario*, it is the United States, and not Brazil, that would have this Panel "adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility".[124] Footnote 5 serves no purpose if a type of measure will always be deemed to be "*implicitly* referred to as not constituting [an] export subsid[y]"[125] whenever the definitional elements of an item on the Illustrative List covering that type of measure are not met.

96. In its response, the United States argues that if footnote 5 is read consistent with its ordinary meaning – *i.e.* as labelling "not prohibited" measures that are "referred to . . . as not constituting export subsidies" – then it would be redundant and ineffective because a measure that is not an export subsidy already would not be prohibited under Articles 1 and 3.1(a).[126]

97. The United States fails to recognize, however, that this argument is answered by its own proposition – that the term "referred to" in footnote 5 could be read to encompass more than affirmative statements that a measure is not an export subsidy.[127] The phrase "referred to" may potentially encompass less explicit references than that of the second paragraph of item (k), such as items (h) and (i)'s "provided that" clauses or the first and last sentences of Footnote 59. The panel in *Brazil – Aircraft (21.5)* also embraced that possibility.[128] Where Brazil parts ways with the United States is at the U.S. suggestion that *all* measures of the types referred to in items on the list are "implicitly referred to" whenever they fall short of the items' terms. This renders the action verb "refer" completely passive. The U.S. position reads out any requirement whatsoever that the text of an item in the Illustrative List contain an actual "reference", *i.e.*, a positive or deliberate signal by WTO Members that a measure is being characterized as not being an export subsidy.

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[123] *See, e.g.*, "Critical Thinking and Argumentation" (Identifies one of the "most common logical errors" as "If A then B, then it is not the case that If Not A then Not B".), available at http://www.staffs.ac.uk/schools/humanities_and_soc_sciences/philosophy/.resource/critthink.html. *See also* Exhibit Bra-672 (Rangarajan Sundaram, *A First Course in Optimization Theory* (Cambridge Univ. Press, 1996) at Appendix A, Set Theory and Logic: An Introduction, p. 245) ("Given two propositions P and Q, the statement 'If P then Q" is interpreted as the statement that if the proposition P is true, then the statement Q is also true. ... We stress the point that ['If P then Q] only says that if P is true, then Q is also true. It has nothing to say about the case where P is *not* true; in this case, Q could be either true or false.").

[124] Appellate Body Report, *U.S. – Gasoline*, p. 23.

[125] U.S. 6 March response to question 33, para. 48.

[126] U.S. 6 March response to question 33, para. 52.

[127] U.S. 6 March response to question 33, para. 48.

[128] Panel Report, *Brazil – Aircraft (21.5)*, para. 6.36.

98. The same observation, that footnote 5 potentially extends beyond item (k), second paragraph, also answers a U.S. assertion regarding the negotiating history of footnote 5.[129] According to the United States, the negotiating history leads to the conclusion that "referred to" requires no "reference" at all – *i.e.* no affirmative statement or indication that a measure is not an export subsidy. The United States rests this conclusion on the fact that an earlier text of Footnote 5 included the word "expressly" before "referred to", while the final version uses only "referred to".

99. But the panels in both *Brazil – Aircraft (21.5)* and *Korea – Vessels* considered this very same argument, and the very same negotiating history, and rejected the reading that the United States here puts forward.[130] Those panels concluded that although the change may have broadened the scope of footnote 5, perhaps to reach provisions like items (h) and (i)'s proviso clauses, it cannot be read as broadly as the United States proposes. The panels considered that the negotiating history was at most inconclusive, and that it could not drive them to disregard the plain meaning of footnote 5's "referred to" requirement.

100. As Brazil has explained, the items on the Illustrative List offer claimants a *per se* evidentiary path to establish that a measure is an export subsidy prohibited under Articles 1 and 3.1(a). The United States has objected that on this approach, item (d) would be rendered inutile; according to the United States, claimants would never use item (d) to prove the existence of an export subsidy, because item (d) requires not only proof of the same "benefit" that would have to be established under Articles 1 and 3.1(a), but also further proof of preferential treatment of exports relative to products for domestic consumption.

101. The United States' view rests on too narrow a reading of Articles 1 and 3.1(a), however. In fact, *both* parts of item (d) track the showing that would need to be made under Articles 1 and 3.1(a) directly: the preferential treatment requirement that the United States claims is additive can rather be seen as the parallel to Article 3.1(a)'s export contingency requirement, but without the specific Article 1 elements of proof such as "financial contribution." Thus, item (d) does still provide a useful *per se* evidentiary path for establishing a violation of Articles 1 and 3.1(a).

102. For the reasons above, and those set forth in Brazil's earlier submissions, the United States' advocacy of an *a contrario* reading of item (j) should be rejected.

35. How does the United States address Brazil's argument that permitting an a contrario reading of item (j) would prevent a Member from challenging specific export credit guarantees or cohorts of such guarantees granted by a Member, as opposed to export credit guarantee programs [see paragraphs 472 ff. of Brazil's Rebuttal]

103. The United States has advanced the remarkable proposition that the only measure of an ECG's consistency with the *SCM Agreement* is whether the ECG program under which that guarantee is issued charges premia that cover its long-term operating costs and losses. Thus, the United States maintains that a complaining Member can only succeed in establishing that individual ECGs are contrary to the prohibited subsidy disciplines of the *Agreement* if those ECGs were granted under an ECG program that does not break even.[131]

104. Brazil has explained that this interpretation conflicts with the text of Articles 1 and 3.1, and that it is not plausible that the U.S. approach reflects the Members' intent in this regard.[132] Brazil

[129] U.S. 6 March response to question 33, para. 50.
[130] Panel Report, *Brazil – Aircraft (21.5)*, paras. 6.39-6.41; Panel Report, *Korea – Vessels*, paras. 7.200-7.201.
[131] U.S. 6 March response to question 35, para. 60.
[132] Brazil's Rebuttal Submission, paras. 472-476.

would only note here that the U.S. approach is inconsistent with the United States' own position regarding the proper application of item (j) of the Illustrative List.

105. The United States has explained its view that for "each particular type of measure set out in the Illustrate [*sic*] List", the item constitutes the exclusive and definitive means for determining whether the measure is or is not a prohibited export subsidy within the meaning of Articles 1 and 3.1(a).[133]

106. Even accepting that an item in the Illustrative List fully occupies the field for the "type" of measure addressed in the item (a proposition that Brazil rejects), the "type" of measure identified in item (j) is "export credit guarantee or insurance programmes" or "exchange risk programmes". Thus, by the United States' own reasoning, challenges to individual ECGs should not be governed by item (j) at all, as that item deals only with the "programmes." In support of its product-specific circumvention claims under Article 10.1 of the *Agreement on Agriculture*, Brazil has established the existence of an export subsidy in several ways. For instance, Brazil has demonstrated that under a country-by-country, tenor-by-tenor benchmarking analysis, GSM 102 ECGs constitute export subsidies because they are export-contingent financial contributions offered on terms that confer "benefits".

107. Even if item (j) occupies the field, by the terms of the U.S. argument, it does so only with respect to the measures it addresses – "export credit guarantee or insurance programmes" and "exchange risk programmes". It says nothing about the circumstances under which, for example, individual ECGs constitute export subsidies, and thus does not address the demonstration described by Brazil in the previous paragraph. Specifically, Brazil's approach under Articles 1/3.1(a) proves that GSM 102 ECGs are export subsidies, *country-by-country*, and *tenor-by-tenor*. Brazil's approach under item (j) proves that the GSM 102 *program* is an export subsidy.

Questions to Brazil

36. What is Brazil's reading of the Appellate Body's statement in paragraph 80 of its Report in Brazil – Aircraft (21.5) that it "... would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List"? Should the Panel take this statement into account in deciding whether item (j) can be interpreted a contrario*?*

2. Outstanding export credit guarantees / measures taken to comply

Questions to Brazil

37. Brazil relies on the panel and Appellate Body Reports in Brazil – Aircraft (21.5) in support of its arguments that the United States has not "withdrawn" the subsidy and is, "[a]t a minimum... prohibited from making 'payments' on claims against" any outstanding export credit guarantees [Paragraph 397 of Brazil's Rebuttal Submission]. Please discuss how the findings of the panel and Appellate Body in that case apply to the provision of the US export credit guarantees at issue.

3. "Benefit" under Articles 1 and 3.1(a) of the *SCM Agreement*

Question to the United States

38. Please discuss the relevance of the original panel's characterization, in paragraph 6.31 of its report, of Brazil's reliance on Articles 1 and 3.1(a) of the SCM Agreement as "not a separate claim, but merely another argument" on the United States' view in this respect (and notably the United States statement, in paragraph 67 of its First Written Submission, that "... the panel in the original

[133] U.S. 6 March response to question 35, para. 44.

proceeding specifically declined to address Brazil's alleged 'claim' under Articles 1 and 3.1(a) of the SCM Agreement")?

108. The lack of precision in the United States' response is alarming. To be precise, Brazil is making two claims. First, Brazil claims that the United States applies export subsidies in a manner that results in circumvention of its export subsidy commitments for unscheduled products, and for rice, pig meat and poultry meat, in contravention of Articles 10.1 and 8 of the *Agreement on Agriculture*. Second, and as a result of the first violation, Brazil claims that the United States maintains export subsidies, in contravention of Articles 3.1(a) and 3.2 of the *SCM Agreement*.

109. As one element of these claims, Brazil must demonstrate the existence of an export subsidy. It has done so in two ways. First, invoking the elements of Articles 1 and 3.1(a) of the *SCM Agreement*, Brazil has demonstrated that GSM 102 ECGs are export subsidies because they are export contingent financial contributions provided to recipients on below-market terms. Second, invoking the elements of item (j) of the Illustrative List in the alternative, Brazil has demonstrated that the GSM 102 program is an export subsidy because the Commodity Credit Corporation fails to charge premia sufficient to meet its long-term operating costs and losses.

110. Whether these are separate *claims*, or instead separate *arguments*, is irrelevant in the circumstances of these Article 21.5 proceedings. In *Canada – Aircraft (21.5)*, the Appellate Body concluded that the claims and arguments at issue in Article 21.5 proceedings will naturally differ from the claims and arguments at issue in the original proceedings:

> *[I]n carrying out its review under Article 21.5 of the DSU, a panel is not confined to examining the "measures taken to comply" from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings*. Although these may have some relevance in proceedings under Article 21.5 of the DSU, Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel. In addition, the relevant facts bearing upon the "measure taken to comply" may be different from the relevant facts relating to the measure at issue in the original proceedings. It is natural, therefore, that *the claims, arguments and factual circumstances which are pertinent to the "measure taken to comply" will not, necessarily, be the same as those which were pertinent in the original dispute*. Indeed, the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the "consistency with a covered agreement of the measures taken to comply," as required by Article 21.5 of the DSU.[134]

111. If invoking the elements of Articles 1 and 3.1(a), on the one hand, and of item (j), on the other, are separate *claims*, Brazil has demonstrated that none of the limits subsequently imposed by the Appellate Body on the claims properly subject to Article 21.5 review apply.[135]

112. As argued on appeal in the original proceedings, Brazil considers that invoking the elements of Articles 1 and 3.1(a), on the one hand, and of item (j), on the other, are indeed separate claims. Among other reasons, Brazil notes that the approaches involve the proof of separate things. As noted in Brazil's comment on the U.S. response to question 35, Brazil's approach under Articles 1 and 3.1(a) proves that GSM 102 ECGs are export subsidies, country-by-country, and tenor-by-tenor.

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[134] Appellate Body Report, *Canada – Aircraft (21.5)*, para. 41 (emphasis added).
[135] Brazil's 26 February response to question 6, paras. 10-62.

Nonetheless, if, as the United States insists[136], invoking the elements of Articles 1 and 3.1(a), on the one hand, and of item (j), on the other, are separate *arguments*, the Appellate Body's statements in *Canada – Aircraft (21.5)* leave Brazil free to pursue both arguments in these Article 21.5 proceedings, and no subsequent jurisprudence holds otherwise.

113. The United States' proposition that because the recommendation and ruling of the DSB to "withdraw the subsidy" was based on a finding by the original panel and the Appellate Body that the GSM 102 program constitutes an export subsidy under item (j), the compliance Panel's assessment should both start[137] and, indeed, end[138] with an assessment of the GSM 102 program under item (j), should be rejected. The U.S. view enjoys no support in the covered agreements or the jurisprudence.

114. To leave not a shadow of doubt, Brazil has requested review by the compliance Panel of Brazil's evidence and argument under item (j) solely if the compliance Panel does not consider sufficient the evidence and argument raised by Brazil under Articles 1 and 3.1(a).[139] As previously noted by Brazil, this position applies whether or not the Articles 1/3.1(a) and the item (j) approaches are separate *claims*, or instead separate *arguments*.[140]

115. First and foremost, Brazil seeks a finding that GSM 102 ECGs constitute export contingent financial contributions provided to recipients on below-market terms. Given the low cost of funds enjoyed by the CCC and the backing offered the GSM 102 program by the U.S. Treasury, merely charging premia sufficient to break even is insufficient.[141] Recipients of GSM 102 ECGs are receiving guarantees on terms that are well below market. By arguing item (j) strictly in the alternative, Brazil seeks to avoid a repeat of the original proceedings, where the dispute was evidently not, as the United States' alleges, "resolved".[142]

116. The United States asserts that "this dispute could and should be resolved through *implementation* of the recommendations and rulings of the DSB *based on the factual findings under item (j)*."[143] This assertion reflects a fundamental misunderstanding of the nature of Article 21.5 proceedings. As Brazil has noted elsewhere, the United States cannot escape its obligations by arguing that it relied on the factual and legal basis for the original panel's finding that the GSM 102 program constitutes an export subsidy – item (j) of the Illustrative List. The question in these compliance proceedings is not limited to whether the United States has cured the basis on which the original panel found a violation. Instead, the Appellate Body has emphasized that the question for a compliance panel is whether the "new measure" is consistent with all obligations in the covered agreements.[144]

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[136] U.S. 6 March response to question 38, paras. 62-63. *See also* U.S. First Written Submission, para. 64 (footnote 97).

[137] U.S. First Written Submission, paras. 66, 67.

[138] U.S. 6 March response to question 38, para. 65.

[139] Brazil's Oral Statement, paras. 225-227; Brazil's First Written Submission, para. 363.

[140] Brazil's First Written Submission, para. 363.

[141] Brazil's Oral Statement, para. 228 ("The CCC enjoys a low cost of funds, by virtue of the fact that it borrows from the U.S. Treasury and benefits from the full faith and credit of the U.S. government. It is entirely possible that the GSM 102 program could charge fees that meet its costs and losses, but that are, at the same time, below what would be charged by a market-based entity.")

[142] U.S. 6 March response to question 38, para. 65.

[143] U.S. 6 March response to question 38, para. 63 (emphasis added).

[144] Appellate Body Report, *Canada – Aircraft (21.5)*, para. 40. *See also Id.*, para. 41 (In Article 21.5 proceedings, "a panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments and factual circumstances that related to the measure that was the subject of the original proceedings.").

117. In any event, the Panel will recall that "full *withdrawal* of a prohibited subsidy within the meaning of Article 4.7 of the *SCM Agreement* cannot be achieved by a 'measure taken to comply' that replaces the original subsidy with yet another subsidy found to be prohibited."[145]

118. Even had the United States withdrawn the elements of the GSM 102 program that made it an export subsidy under item (j), it would not have achieved full withdrawal of the subsidy in the present circumstances, since it has "replace[d] the original subsidy with yet another" prohibited subsidy – the provision of export-contingent GSM 102 ECGs at below-market fees. It has, therefore, failed to achieve "full withdrawal" of the subsidy, consistent with the Article 4.7 recommendation. In urging the Panel not to examine whether its compliance measure confers export-contingent "benefits", the United States seeks precisely to escape its obligation to fully withdraw the prohibited subsidy.

Questions to Brazil

39. The Panel understands the United States to argue that it has relied on the Panel's findings under item (j) to implement the DSB recommendations with respect to export credit guarantees. How would this, in Brazil's view, affect the compliance panel's role in this proceeding? Was the United States also expected to implement changes in order to make its export credit guarantee programmes consistent with article 1.1 and 3.1(a) of the SCM Agreement, even though there were no findings of the original panel in this respect?

40. In paragraph 410 of its Rebuttal, Brazil refers to paragraph. 7.398 of the Panel Report in Canada – Aircraft II. The Panel notes, however, that in the same paragraph, the Canada – Aircraft II panel also indicated that there would be a "'benefit' when the cost-saving for a Bombardier customer for securing a loan with an IQ loan guarantee is not offset by IQ's fees". Please discuss, in light of this sentence, whether the Panel should read the Canada – Aircraft II panel as having rejected the "total cost of funds" as the proper benchmark under Article 14(c) of the SCM Agreement.

Questions to both parties

41. What are the relevant considerations to guide the Panel in the selection of a market benchmark in this case?:

a) That the institution that provides the product is, on the whole, or on a program or product-specific basis, profitable? If so, is "any" profit sufficient to qualify an institution/ product/program as a relevant "market benchmark" or must the institution/product/program achieve a certain level of profit? Must the Panel conduct an examination of the level of profit achieved by commercial or private actors operating in the field?

b) Are the institution/program/products' stated goals relevant in assessing whether they can be used as a "market benchmark"?

c) Is the "governance" of the institution relevant?

d) What other factors are relevant?

[145] Appellate Body Report, *U.S. – FSC (21.5 II)*, para. 83 (italic emphasis in original; underlining supplied).

119. In its response, as elsewhere in these proceedings, the United States asserts that the only way to assess the WTO consistency of an ECG program is under the "cost to government" standard in item (j).[146] Brazil has rebutted this assertion elsewhere, and will not repeat those arguments here.[147] As noted above in comments on the U.S. response to question 35, however, even if item (j) satisfies the terms of footnote 5 to the *SCM Agreement*, it would serve as no defense to Brazil's demonstration that GSM 102 ECGs (rather than the GSM 102 program) constitute export subsidies.

120. The United States also asserts that even if the "cost to government" standard under item (j) is not determinative, the only way to determine the existence of a "benefit" from an ECG in an export subsidy case is through a quantitative assessment under what it deems the "total cost of funds" approach in Article 14(c).[148] Again, Brazil has rebutted this assertion elsewhere, given the circumstances of this dispute, and will not repeat those arguments here.[149]

121. Brazil notes, however, that the United States grossly misrepresents the findings of two panels that have applied a fee-based comparison as an expression of the standard in Article 14(c). In describing the analysis in *EC – DRAMS*[150], the United States ignores a critical passage from the panel report:

> One possible approach … would be to compare the guarantee provided by the government with a comparable guarantee provided by the market. *If the government charges less than a market fee for its guarantee in light of the specific circumstances of the case, there would be a benefit to the recipient.*[151]

122. Moreover, the United States misrepresents the finding of the panel in *Canada – Aircraft Credits and Guarantees*. The panel in that dispute indeed concluded that "it is safe to assume that such cost difference would not be covered by [guarantee] fees if it is established that [the guarantee] fees are not market-based."[152] The panel did not, as the United States asserts, "*require[]* Brazil, as the complaining party, to provide 'arguments or information regarding what the [airline] might have had to pay on a *comparable commercial loan* absent the *IQ* loan guarantee.'"[153] Rather, the panel found that Brazil had not made a showing either that the airline secured better terms on a commercial loan with the government guarantee, or that "IQ's fee for its loan guarantee to [the airline] is not market based."[154] The panel report does not support the conclusion drawn by the United States – that the "total cost of funds" approach suggested by the United States is "required" as the sole, determinative standard. In fact, the panel report supports Brazil's position, which is that in light of the

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[146] U.S. 6 March response to question 41, para. 66.

[147] Brazil's Closing Statement, para. 24; Brazil's Oral Statement, paras. 225-238; Brazil's Rebuttal Submission, paras. 454-481.

[148] U.S. 6 March response to question 41, paras. 67-70; U.S. Opening Statement (Check against delivery version), paras. 31-39; U.S. Rebuttal Submission, paras. 137-144; U.S. First Written Submission, paras. 107, 133-134, 138.

[149] Brazil's Closing Statement, paras. 28-29; Brazil's Oral Statement, paras. 193-208; Brazil's Rebuttal Submission, paras. 400-413.

[150] U.S. Comments on Brazil's Oral Statement, para. 17.

[151] Panel Report, *EC – CVDs on DRAMs*, para. 7.189 (emphasis added). Under its fee-based approach, the panel continued to find a *per se* basis on which to establish that a government guarantee confers a "benefit". *See Id*. ("We note in this respect, that none of the parties (...) before us in the course of the panel proceedings has argued that a private market operator would have provided an export guarantee similar to the one that was provided by the KEIC so that the fees could be compared. This implies that, if one opts to examine benefit by looking at the difference between the government providing a financial contribution, and the market doing so, *then it would be clear that a benefit was provided, as no private market operator was even argued to have been willing to provide such a guarantee*.") (emphasis added).

[152] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.345.

[153] U.S. Comments on Brazil's Oral Statement, para. 18 (emphasis in original).

[154] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.399.

circumstances, a fee-based comparison is one acceptable means of showing the "benefit" from a government guarantee.

123. Turning to the remainder of the U.S. response, Brazil notes its general agreement with the United States' observation that "factors such as the overall profitability of a particular institution or its stated goals, or the manner of its governance, may not necessarily – and in all cases – correlate to whether the loan is 'commercial'".[155] However, this observation is considerably more muted than the United States' categorical observation, when measures other than its own were at issue, that evidence regarding an entity's profitability is "irrelevant" to the assessment of "benefit" under Article 1.1(b).[156] Brazil tends to agree with this latter, stronger sentiment, for the reasons stated in its own response to question 41.[157]

124. Brazil turns to comments on the "evidence" offered by the United States in an attempt to rebut Brazil's showing that GSM 102 ECGs are unique financing instruments with no parallel at market, and that the entire purpose of the GSM 102 program is to facilitate credit for foreign obligors that do not enjoy other options at market. In these circumstances, Brazil argues that GSM 102 ECGs confer "benefits" and constitute subsidies *per se*. (Brazil has also demonstrated, country by country, and tenor by tenor, that GSM 102 fees are dramatically below even non-market benchmarks, and therefore confer "benefits" on U.S. exporters.[158])

125. **First**, the Panel will recall Professor Sundaram's conclusion that there is no commercial credit protection product available in the marketplace that is comparable to a GSM 102 ECG.[159] The Panel will note that the United States has not provided a single example of a product offered by a market-based entity that imparts the essential qualities of a GSM 102 ECG cited by Professor Sundaram.

126. The United States attempts to draw support from *Brazil – Aircraft* for its position that government guarantees cannot confer "benefits" *per se*, just because they are unique financial instruments with no parallel at market. The United States argues that this position must be correct, because in *Brazil – Aircraft*, "[t]he panel did not consider whether PROEX payments were a 'unique financial instrument'."[160] As is evident from a cursory review of the report, however, the panel did not undertake this consideration because the complaining Member, Canada, did not make such a claim. In those circumstances, it is not surprising that the panel did not consider it. Indeed, in those circumstances, it would have constituted reversible error for the panel to have done so.

127. In any event, Brazil finds the U.S. position most surprising. The United States has recently argued that unique support without any parallel at market, provided to recipients who are not otherwise creditworthy, should not only be considered a subsidy, but should be a *prohibited* subsidy *per se*. The United States has argued that prohibited subsidies should include "… egregious government intervention such as … lending to … companies with poor financial prospects unable to attract commercial financing or other funding of companies or projects that would not otherwise receive conventional commercial financing."[161] Moreover, in *Canada – Aircraft Credits and*

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[155] U.S. 6 March response to question 41, para. 69.

[156] Response of the United States to Questions from the Parties, *Korea – Measures Affecting Trade in Commercial Vessels*, 22 March 2004, paras. 6-7, accessed February 2007 at http://www.ustr.gov/assets/Trade_Agreements/Monitoring_Enforcement/Dispute_Settlement/WTO/Dispute_Settlement_Listings/asset_upload_file769_5561.pdf.

[157] Brazil's 6 March response to question 41, paras. 58-66.

[158] Brazil's First Written Submission, paras. 381-406. *See also Id*., Annexes III (Statement of Professor Rangarajan Sundaram) and IV (Methodology for Comparison of GSM 102 Fees with Fees for ExIm Bank Products), and Exhibits Bra-536 and Bra-537.

[159] Brazil's First Written Submission, paras. 377-378, and Annex III (Statement of Professor Rangarajan Sundaram), para. 7.

[160] U.S. Comments on Brazil's Oral Statement, para. 22.

[161] TN/RL/GEN/94 (16 January 2006).

Guarantees, the United States similarly argued that where the government offers a unique product that can not be replicated at market, a benefit is conferred *per se*.[162]

128. **Second**, the Panel will recall the statement in the GSM 102 regulations that the program operates "where U.S. financial institutions would be unwilling to provide financing without CCC's guarantee," and "where the guarantee is necessary to secure financing of the export."[163] Similarly, in a self-assessment of the program, USDA's Foreign Agriculture Service ("FAS") repeatedly notes that "[t]he program is primarily targeted to countries not considered to be investment grade", and that it is in place to "make commercial credit available at a reduced cost to higher risk markets."[164] In fact, GSM 102 administrators consider the program to be successful if, among other things, foreign obligors in countries that have improved their financial standing and reached investment grade stop using the program.[165]

129. In these circumstances, where no financing would be available without a government guarantee, the guarantee confers a "benefit" *per se*. As noted by the panel in *EC – DRAMS*, where no commercial loan could be secured by a recipient in the absence of a government guarantee, a benefit exists *per se*.[166]

130. To support its *per se* claim, Brazil has relied on Professor Sundaram's statement[167] and the types of normative statements made by the U.S. government concerning the GSM 102 program, quoted above. Nonetheless, the United States considers that "[t]hese arguments do not square with the **evidence** submitted by the United States showing that **such** obligors are in fact able to obtain financing even without GSM 102 guarantees and on terms better than those available *with* GSM 102 guarantees."[168]

131. In this sentence, the United States employs a sleight of hand with its use of the words "evidence" and "such" – meaning presumably GSM 102 – obligors.

132. The United States does not cite to the "evidence" it has offered in this regard. The United States may be referring to the three examples of syndicated loans described in a letter from [[ ]], a U.S. bank and significant participant in the GSM 102 program.[169] This letter and these loans hardly meet the standard of "evidence", for a number of reasons.

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[162] Panel Report, *Canada – Aircraft Credits and Guarantees*, Annex C-2 (para. 7) ("If the commercial market does not offer a particular borrower the exact terms offered by the government, then the government is providing a benefit to the recipient whenever those terms are more favourable than the terms that are available in the market.").

[163] Exhibit Bra-519 (7 C.F.R. § 1493.10(a)(2), GPO Access Online, January 2006, accessed July 2006 at http://www.gpoaccess.gov/cfr/index.html) (emphasis added).

[164] Exhibit Bra-588 (Agricultural Export Credit Guarantee Programs Assessment, ExpectMore.gov, Section 5.1, accessed January 2007 at http://www.whitehouse.gov/OMB/expectmore/detail.10002020.2005.html). For other similar excerpts, *see* Brazil's Rebuttal Submission, para. 418.

[165] Exhibit Bra-588 (Agricultural Export Credit Guarantee Programs Assessment, ExpectMore.gov, pg. 10 (section regarding "Program Performance Measures"), accessed January 2007 at http://www.whitehouse.gov/OMB/expectmore/detail.10002020.2005.html) ("measures how much export credit guarantee use declines per year in countries that reach investment grade and how much U.S. agricultural exports increase to those countries").

[166] Panel Report, *EC – CVDs on DRAMs*, para. 7.190.

[167] Brazil's First Written Submission, Annex III (Statement of Professor Rangarajan Sundaram), para. 7.

[168] U.S. 6 March response to question 41, para. 70 (bold and underline added; italics in original).

[169] U.S. Rebuttal Submission, paras. 146-153; U.S. First Written Submission, paras. 119-131; Exhibit US-22.

133. The United States has not provided any documentary evidence at all to establish any of the facts of these alleged transactions; in Exhibit US-22, it relies instead on a single secondary source, a brief statement by an [[ ]] to characterize them. The absence of such documentary evidence deprives the compliance Panel of the opportunity to examine the validity, much less the representativeness, of the only three data points that the United States offers. In contrast, Brazil has offered exhaustive analyses of GSM 102 and ExIm fees based on over one thousand data points, all of which are transparent and readily replicable by the United States and this compliance Panel.

134. What little we know about the three examples offered by the United States does not inspire confidence in the quality of the "evidence". One of the three examples, that of the [[ ]] bank, shows that GSM 102 places the bank in a <u>better</u> position than it would have been in the market.[170] This "evidence" quite evidently does not establish, as the United States asserts in its response to question 41, that GSM 102 foreign obligors are able to obtain commercial financing without GSM 102 guarantees, "on terms better than those available *with* GSM 102 guarantees."[171] The second of the three examples, concerning the [[ ]] banks, is not a real example at all, since [[ ]] tells us it "[[ ]]."[172]

135. That leaves precisely one data point, the example concerning the [[ ]] bank. Apparently on the basis of this <u>one data point</u>, the United States remarkably believes that it has demonstrated that a "<u>large number of</u> investment-grade participants" can obtain financing at lower annualized costs than under GSM 102.[173]

136. This one data point does not, as the United States asserts, constitute "**<u>evidence</u>**" that "**<u>such</u>** [*i.e.*, GSM 102 foreign] obligors are in fact able to obtain financing even without GSM 102 guarantees and on terms better than those available *with* GSM 102 guarantees."[174] The United States has not demonstrated that the [[ ]] bank – or, indeed, the banks in the other two examples – are GSM 102 foreign obligors.[175] The United States has not identified the bank (much less provided the loan documents[176]), to allow Brazil and the Panel to determine whether the bank indeed features on the list of CCC-approved foreign obligors published on the GSM 102 website.[177] Thus, while the United States asserts that it has provided "evidence" regarding "such" GSM 102 foreign obligors, it has done no such thing.

137. What is more, the United States has failed to show that the banks in its examples are even <u>similar</u> to GSM 102 foreign obligors. The United States has stated that the [[ ]] and [[ ]] banks are investment grade.[178] As noted above, the entire objective of the GSM 102 program is to

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[170] Brazil's Rebuttal Submission, para. 426.

[171] U.S. 6 March response to question 41, para. 70.

[172] Exhibit US-22.

[173] U.S. Comments on Brazil's Oral Statement, para. 15 (emphasis added).

[174] U.S. 6 March response to question 41, para. 70 (bold and underline added; italics in original).

[175] For similar reasons, it is false for the United States to assert that it has provided evidence "showing that commercial lenders regularly involved in both the GSM-102 program and other lending ... do provide – and have provided – unsecured financing to foreign banks <u>that are CCC-approved obligors</u> ...." U.S. Comments on Brazil's Oral Statement, para. 12 (emphasis added).

[176] By refusing to provide the loan documents, the United States has deprived Brazil and the Panel of the opportunity to test the many assertions made by the United States regarding factual elements of the loans in paragraphs 119-130 of its First Written Submission, and paragraphs 146-153 of its Rebuttal Submission. In fact, in its Rebuttal Submission, the United States fails to offer even *indirect* evidence to support its assertions; while it appears to quote from a second [[ ]] communication, it does not even provide that communication (though as noted above, the communication in itself would be insufficient). U.S. Rebuttal Submission, paras. 149, 150.

[177] *See* <u>http://www.fas.usda.gov/excredits/foreignbanks.html</u>.

[178] U.S. Rebuttal Submission, para. 150.

provide cover for, and therefore to enable credit in, countries that are below investment grade. In its self-assessment of the program, USDA goes out of its way to emphasize, in passage after passage, that the program is primarily targeted to non-investment grade countries.[179] The examples provided by the United States do not prove anything about the ability of foreign obligors like those targeted by GSM 102 "to obtain financing even without GSM 102 guarantees."[180]

138. Moreover, the United States inaccurately asserts that Brazil "acknowledges" that the [[ ]] examples show lower annualized costs than under GSM-102[181], Brazil recalls that it has heavily criticized the [[ ]] examples, both for lack of evidentiary veracity and as not offering a valid comparison.[182]

139. In addressing Professor Sundaram's critique of the U.S. "average life" approach, the United States asserts that short- and long-term ratings are the same; as a result, the United States argues that if it shows that the short-term borrowing cost is lower than some threshold amount, it follows that the long-term borrowing costs are also lower.[183] This is false. For the "same" rating category, borrowing rates vary substantially based on maturity.[184] The correlation between short- and long-term rates for borrowers in a single rating category is not as suggested by the United States.

140. The United States erroneously argues that in its critique of the [[ ]] examples, Brazil ignores "the pricing of risk inherent in the transactions".[185] The United States mischaracterizes Brazil's critique. Brazil's critique is simple: that bullet loans (such as those in the [[ ]] examples) and amortizing loans (such as those backed by GSM 102 ECGs) are not comparable, because they involve different patterns of default exposure.[186] The United States' comments are not responsive to this critique. Rather, the United States asserts that bullet loans and amortizing loans are comparable, because in an amortizing loan, one third of the principal gets paid earlier, and one third gets paid later, than the bullet loan.[187] This argument merely reinforces Brazil's critique – the patterns of exposure in these two different types of loans are different, making the comparison the United States seeks to make invalid.

4. Claims under item (j) of the Illustrative List

Questions to the United States

42. How does the United States address Brazil's arguments with respect to the MPRs under the OECD Arrangement?

141. The United States' response fails to address the purpose for which Brazil offered the comparison between OECD MPRs and GSM 102 fees. As noted in its response to question 43, Brazil does not contend that the OECD MPRs constitute a strict quantitative benchmark for analysis of the U.S. upland cotton ECG fees. Rather, this comparison offers the compliance Panel a *qualitative* reference point for appreciating the degree to which GSM 102 fees fall below internationally-accepted

[179] *See* Brazil's Rebuttal Submission, para. 418.
[180] U.S. 6 March response to question 41, para. 70 (bold and underline added; italics in original).
[181] U.S. Comments on Brazil's Oral Statement, para. 12.
[182] Brazil's Closing Statement, para. 26; Brazil's Oral Statement, paras. 209-223; Brazil's Rebuttal Submission, paras. 420-432.
[183] U.S. Comments on Brazil's Oral Statement, para. 14.
[184] S. Trück et al, "The Term Structure of Credit Spreads and Credit Default Swaps – an empirical investigation", September 2004, available at http://www.pstat.ucsb.edu/research/papers/spreads200904.pdf (finding a positive relationship between maturity and spreads could be observed for investment grade debt).
[185] U.S. Comments on Brazil's Oral Statement, para. 15.
[186] Brazil's Oral Statement, paras. 211-215, 219-222.
[187] U.S. Comments on Brazil's Oral Statement, para. 15.

standards for ECG programs that are, according to the OECD, structured and designed to break even.[188]

142. The United States asserts that use of any external reference point, like the OECD MPRs, to determine whether an ECG program breaks even is not permitted. According to the United States, use of any such external reference point is only allowed if the particular reference point is specifically mentioned in "[t]he text of the *SCM Agreement* . . ."[189]

143. The U.S. position is untenable. The original panel noted that "item (j) does not set forth, or require us to use, any one particular methodological approach nor accounting philosophy in conducting our examination."[190] Despite this fact, the original panel referred to, and the Appellate Body confirmed, reliance on a number of different external reference points, including one supported by the United States in these Article 21.5 proceedings – the net present value methodology required by the U.S. Federal Credit Reform Act of 1990 ("FCRA"). The FCRA is not, of course, referred to in the text of the *SCM Agreement*.

144. Panels and the Appellate Body have frequently relied on reference points and benchmarks external to and not specified in the text of the *SCM Agreement*. Virtually every benchmark used for the purposes of assessing the "benefit" flowing from a government financial contribution will be drawn from sources external to the *SCM Agreement*. The U.S. position notwithstanding, the Appellate Body has even relied on reference points or benchmarks drawn from the OECD Export Credit Arrangement, even where the provision of the *SCM Agreement* at issue did not specifically direct the interpreter to do so. In interpreting the phrase "used to secure a material advantage in the field of export credit terms", from paragraph 1 to item (k) of the Illustrative List, the Appellate Body concluded that

> the *OECD Arrangement* can be appropriately viewed as one example of an international undertaking providing a specific market benchmark by which to assess whether payments by governments, coming within the provisions of item (k), are "used to secure a material advantage in the field of export credit terms".[191]

145. Here, as in *Brazil – Aircraft*, the context suggests that the OECD Arrangement is an appropriate reference point. Paragraph 1 of item (k) – like item (j) – speaks to export credits, which are, after all, covered by the OECD Arrangement. In that circumstance, the Appellate Body found that paragraph 2 of item (k), and the reference therein to the OECD Arrangement, formed relevant context for the identification of a benchmark for the purposes of paragraph 1 of item (k), even if paragraph 1 did not specifically mention the Arrangement. Similar considerations could apply to item (j), which similarly addresses export credits covered by the OECD Arrangement.

146. The OECD Arrangement does not establish *the only* standard for the fees that ought to be charged for export credit guarantees in order to meet the standard set in item (j). This, however, does not invalidate the use of the OECD MPRs as useful reference points for a showing that GSM 102 fees are not designed to cover long-term operating costs and losses of the program. The United States'

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[188] Brazil's 6 March response to question 43, para. 69; Brazil's Oral Statement, para. 51.

[189] U.S. 6 March response to question 42, para. 71.

[190] Panel Report, *U.S. – Cotton Subsidies*, para. 7.804.

[191] Appellate Body Report, *Brazil – Aircraft*, para. 181. *See also* Appellate Body Report, *Brazil – Aircraft (21.5)*, paras. 61, 64.

assertion that reference points or benchmarks external to the *SCM Agreement* – including the OECD Export Credit Arrangement – are irrelevant unless they are specifically mentioned, is in error and should be rejected.

Question to Brazil

43. What is Brazil's reaction to paragraph 25 of Japan's Third Party Submission?

ANNEX D-11

UNITED STATES' COMMENTS ON THE RESPONSES OF BRAZIL TO THE PANEL'S FIRST SET OF QUESTIONS

(16 March 2007)

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1. The United States provides comments on certain of Brazil's responses to the first set of questions from the Panel below. The absence of a comment with respect to any particular response by Brazil should not be understood to imply that the United States agrees with Brazil's response.

A. GENERAL QUESTIONS

Questions to both parties

1. Is Brazil/US of the view that a party to a dispute referred to a panel established under Article 21.5 of the DSU (a party in a compliance panel) can make the same legal argument as it did in the original Panel proceedings?

2. Could each party explain its view on the question of whether, and to what extent, this Panel must rely on the legal and factual analysis underlying the original panel's findings? What are the relevant provisions of the DSU in this regard?

2. The United States agrees to the extent that Brazil acknowledges that where the claim in a proceeding pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") is one of the consistency of a measure taken to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB"), the prior adopted panel and Appellate Body reports in the dispute "should be taken into account where they are relevant."[1] However, the United States strongly disagrees with any suggestion by Brazil that this consideration applies any differently – or more strongly – in Article 21.5 proceedings that in original proceedings.[2] Contrary to Brazil's assertions, the Appellate Body has never stated that "the objective of 'security and predictability' applies with particular force in Article 21.5 proceedings."[3] As an initial matter, the United States notes that "security and predictability" is not the objective of the DSU in the sense of interpreting a treaty in light of the treaty's object and purpose. Rather security and predictability are the result of the correct operation of the DSU. Furthermore, it is clear why the Appellate Body would not make such a statement, since it would elevate Article 21.5 proceedings above all others. Moreover, Brazil's citation to *U.S. – Softwood Lumber IV (21.5*) in support of this proposition is misplaced.

3. *U.S. – Softwood Lumber IV (21.5*) involved an Article 21.5 panel's review of a redetermination of injury by the U.S. International Trade Commission ("ITC"). The Appellate Body considered, there, the extent to which the Article 21.5 panel would need to rely on the findings of the original panel regarding the ITC's original determination. Both the ITC's original determination and its redetermination related to *the exact same factual situation – i.e.,* the impact of the *same* subsidized imports in the *same* period on the *same* industry. The question in the Article 21.5 proceeding was whether the ITC's *reassessment* of the evidence in regard to that factual situation was consistent with the WTO provisions cited by Canada.

4. The Appellate Body noted that Canada's arguments "seem to assume that a panel is *required* to evaluate the facts in an Article 21.5 proceeding in exactly the same way as it evaluated those facts in the original panel proceedings, and to hold an investigating authority making a redetermination to the inferences that it drew from the same evidence in the original determination."[4] The Appellate Body explained that this was *not* the case. It noted that the ITC had provided additional reasoning and explanation and had also reopened the record to collect more information about the impact of the

[1] *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 108 (citing *Japan – Alcoholic Beverages (AB)* at 108).

[2] Brazil Responses to Panel Section A-C Questions, para. 4 (February 26, 2007).

[3] Brazil Responses to Panel Section A-C Questions, para. 4 (February 26, 2007).

[4] *U.S. – Softwood Lumber (21.5)*, para. 101 (emphasis in original).

subsidized imports. The Appellate Body explained that "in these circumstances, *we do not see why the Panel would be bound by the findings of the original panel*."[5]

5. Brazil neglects to note this primary reasoning of the Appellate Body and, instead, cites (selectively) to the Appellate Body's clarification that "[t]his does not mean that a panel operating under Article 21.5 of the DSU should not take account of the reasoning of an investigating authority in an original determination, or of the reasoning of the original panel."[6] The language cited by Brazil is simply an application of the general principle that prior adopted panel and Appellate Body reports in the dispute "should be taken into account where they are relevant."[7]

6. Further, contrary to Brazil's assertions, the Appellate Body did *not* state in *U.S. – Softwood Lumber IV (21.5*) that "[i]f a compliance panel 'deviate[d] from the original panel's findings on a 'specific issue,' without a fundamental change in the domestic legal framework and/or facts warranting this deviation, it would suggest that the compliance panel is acting in an arbitrary fashion that does not meet the requirements of an 'objective assessment."[8] To the contrary, if such reasoning had been applied in *U.S. – Softwood Lumber IV (21.5*), it would have directly undermined the Appellate Body's analysis therein. The ITC's injury redetermination in that dispute did not – and could not – involve any "fundamental change in the domestic legal framework and/or facts." Both the ITC's original determination and redetermination (and, thus, the original panel proceeding and Article 21.5 proceeding) related to the impact of the *same* subsidized imports in the *same* period on the *same* industry. Thus, the reasoning asserted by Brazil would have, in fact, bound the compliance panel to the original panel's findings, in direct contradiction to the Appellate Body's clarification that the compliance panel was not so bound.

7. Moreover, the contrast between the facts of the *U.S. – Softwood Lumber IV (21.5*) dispute and this one illustrates the unreasonableness of Brazil's efforts to bind this Panel's hands in its assessment of the issues before it. Unlike in *U.S. – Softwood Lumber IV (21.5*), the present dispute does *not* involve a redetermination of the impact of the *same* subsidized imports in the *same* period on the *same* industry. Rather, Brazil is attempting to advance claims in this proceeding against measures that were *not* subject to recommendations and rulings in the original dispute. Further, Brazil is asserting here price suppressive and world market share effects in a time period, and under market conditions, *never* assessed by the original panel. The reasoning asserted by Brazil – that an Article 21.5 panel is allegedly not permitted to 'deviate from the original panel's findings on a 'specific issue,' without a fundamental change in the domestic legal framework and/or facts"[9] – makes even less sense in the circumstances of this dispute (where there is a change in the relevant measures and in the relevant facts) than in *U.S. – Softwood Lumber IV (21.5*) (where there was no such change). By its nature, a serious prejudice claim will depend on the facts applicable to a particular period, such as the existence of displaced sales or price undercutting. Accordingly, an Article 21.5 panel will need to assess the facts applicable to the period at issue in the Article 21.5 proceeding and will not necessarily be able to rely on the original panel's findings.

B. QUESTIONS WITH RESPECT TO BRAZIL'S REQUEST UNDER ARTICLE 13.1 DSU

Questions to the US

3. Is the United States arguing that Brazil must identify the subsidized product for each of the types of subsidies from which it claims serious prejudice? Is the

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[5] *U.S. – Softwood Lumber (21.5)*, para. 102 (emphasis added).

[6] *U.S. – Softwood Lumber (21.5)*, para. 102.

[7] *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 108 (citing *Japan – Alcoholic Beverages (AB)* at 108).

[8] Brazil Responses to Panel Section A-C Questions, para. 5 (February 26, 2007).

[9] Brazil Responses to Panel Section A-C Questions, para. 5 (February 26, 2007).

United States arguing that payments which permit planting flexibility are not tied to the production of upland cotton, so that they must be allocated by Brazil across the total value of production of each recipient?

4. Does the United States contest the accuracy of the figures for 2003 – 2005 cited in "Table 6" of Brazil's first submission and "Table 5" of Brazil's rebuttal submission? If so, please provide the accurate figures, or the figures the US deems to be more accurate.

Question to Brazil

5. The Panel refers to Brazil's communication dated 22 January 2007 concerning its request in relation to Article 13.1 of the DSU. Is it correct for the Panel to understand that as far as data for 2005 is concerned, data included in Exhibit US-64 satisfies all of the requests Brazil made in Part A of Annex 1 of its 1 November communication?

C. QUESTIONS CONCERNING THE PRELIMINARY OBJECTIONS RAISED BY THE UNITED STATES

1. Preliminary objections of the United States in respect of claims of Brazil regarding export credit guarantees in respect of pig meat and poultry meat

Question to both parties:

6. The parties disagree with respect to whether in a proceeding under Article 21.5 of the DSU a party may present a claim that was raised in the original proceeding but on which no finding of WTO-inconsistency was made due to the fact that the Appellate Body was unable to complete the analysis.

a. Could the parties explain the legal basis in the text of Article 21.5 of the DSU and other relevant provisions of the DSU for their position on this question?

b. Could the parties explain whether and how their position on this issue is consistent with prior panel and Appellate Body reports?

8. Rather than responding to the specific questions asked by the Panel above, Brazil expounds over 15 pages on why its claims with respect to GSM 102 export credit guarantees in respect of pig meat and poultry meat are within the scope of this proceeding. Leaving aside that Brazil's response is not, in fact, directly responsive to the question posed, it also fails to withstand scrutiny.

A. *Specific Export Credit Guarantees Are Measures And Those Guarantees Provided In Support of Exports of Pig Meat, Poultry Meat, And Other Scheduled Products (Other that Rice) Have Never Been Subject to Any DSB Recommendations and Rulings*

9. Brazil argues, first, that (a) "no such 'measure' [as export credit guarantees in respect of exports of pig meat and poultry meat] exists;" (b) the only "measure" capable of being subject to Brazil's claims of WTO-inconsistency is the GSM 102 *program* in its entirety; and (c) it is simply Brazil's *claims* under Articles 10 and 8 of the *Agreement on Agriculture* and 3.1(a) and 3.2 of the *SCM Agreement* that are limited to specific products. These arguments lack merit.

10. First, it is surprising to find Brazil arguing now that specific GSM 102 guarantees – in this case, those guarantees issued in support of export transactions involving pig meat and poultry meat – do not constitute "measures." This argument is at odds with Brazil's arguments elsewhere that an *a contrario* reading of item (j) would prevent a Member from challenging specific export credit guarantees (*i.e.*, as opposed to the export credit guarantee *programs* generally*).*[10] If specific guarantees cannot even constitute "measures," as Brazil now asserts, Brazil's complaints about being able to make claims against specific guarantees would be entirely moot.[11]

11. In any event, Brazil provides no basis for its assertion that export credit guarantees in respect of exports of pig meat and poultry meat are not "measures." Certainly, Brazil makes no effort to reconcile its argument with the clarification by the Appellate Body that a "measure" for purposes of WTO dispute settlement may encompass "[i]n principle, any act or omission attributable to a WTO Member. . . ."[12] The provision of specific guarantees would certainly seem to fit within this broad scope of "measure."

12. Second, Brazil's assertion that its export subsidy-related claims in the original and present proceeding apply with respect to the GSM 102 program, as such, rather than to the *application* of the program in particular cases (*i.e.*, particular export credit guarantees) is inconsistent with Brazil's prior arguments and the original panel's resolution of Brazil's claims. The United States recalls that, in order to avoid the mandatory-discretionary distinction in the original panel proceeding, Brazil expressly stated that its claims of actual circumvention under the *Agreement on Agriculture* were "akin to . . . 'as applied' claim[s]" with respect to the export credit guarantees themselves, and were not against the programs under which they were provided.[13] The scope of measures subject to Brazil's claims under the *SCM Agreement* was necessarily circumscribed to the same extent because, by virtue of the Peace Clause[14], only those export subsidies inconsistent with the circumvention provisions of the *Agreement on Agriculture* would even be *subject* to claims under the *SCM Agreement*.

13. Consistent with this, the original panel found that:

> in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice) . . . United States export credit *guarantees* under the GSM 102, GSM 103 and SCGP export credit guarantee programmes are export subsidies applied in a manner which results in circumvention of United States' export subsidy commitments, within the

[10] *See* Panel's Question 35 to Brazil below and Brazil Rebuttal Submission, para. 472.

[11] Article 6.2 of the DSU requires that a request for panel establishment identify both the "specific measures at issue" and provide "a brief summary of the legal basis of the complaint" (i.e., the claim). If specific guarantees cannot even be measures, as Brazil alleges, no claim could *ever* be made with respect to them in WTO dispute settlement.

[12] *United States – Corrosion-Resistant Steel (AB)*, para. 81.

[13] *See* Brazil's Answers to Additional Questions Following Second Panel Meeting, para. 11 (according to Brazil "it is therefore not relevant to this claim whether the CCC programs are mandatory or discretionary.") Indeed, had Brazil's claims been with respect to the programs, they would have failed because the programs themselves are clearly *not* mandatory. If they had been, the United States certainly could not have ceased issuing GSM 103 and SCGP guarantees – as it has done – nor could the United States have removed from eligibility obligations in certain higher-risk countries under the GSM 102 program.

[14] Under the Peace Clause of the *Agreement on Agriculture*, "export subsidies that conform fully to the provisions of Part V of this Agreement . . . shall be . . . exempt from actions based on Articles XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement." Article 13(c)(ii) of the *Agreement on Agriculture*. An export subsidy found to be inconsistent with Articles 10 and 8 of the *Agreement on Agriculture* would not "conform fully to the provisions of Part V of this Agreement" and, thus, would not be "exempt from actions based on Articles XVI of GATT 1994 or Articles 3, 5 and 6 of the Subsidies Agreement."

> meaning of Article 10.1 of the Agreement on Agriculture and they are therefore inconsistent with Article 8 of the Agreement on Agriculture.[15]

14. As is clear from the language cited above, the original panel considered *guarantees* to constitute export subsidies. And it was only those guarantees "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)" to which the finding of actual circumvention applied. Because the panel found that these measures did not "conform fully to the provisions of Part V of the Agreement on Agriculture," the guarantees were also subject to – and ultimately found to be inconsistent with – the prohibition on export subsidies in the *SCM Agreement*.[16]

15. Brazil has no basis to assert now that its claims in the original proceeding, and the original panel's findings, were actually against the export credit guarantee programs themselves and that the particular application of the programs to certain export transactions (*i.e.*, particular guarantees) does not even constitute a "measure." This even contradicts Brazil's own clarification in its rebuttal submission that "*Brazil does not assert that the GSM 102 program itself circumvents the United States' export subsidy commitments, within the meaning of Article 10.1 of the Agreement on Agriculture*."[17] Rather, according to Brazil, its claim is that "the United States has *applied* the GSM 102 program in a manner that circumvents U.S. export subsidy commitments with respect to unscheduled products, and with respect to three scheduled products – rice, pig meat and poultry meat."[18] The United States regrets that, even at this late stage, Brazil continues to shift its arguments on such fundamental issues as the measures subject to its claims.

16. Third, Brazil's assertion that its *claims* are product-specific does not alter the analysis. That just means that Brazil's claims relate to guarantees provided in respect of exports of particular products. Calling these claims "product-specific" does not change the fact that only particular guarantees – those provided in respect to the particular "product" at issue – are the subject of the claims. Where those guarantees were not the subject of any DSB recommendations and rulings and are not measures taken to comply with any DSB recommendations and rulings, there is no basis for a claim to be considered with respect to them in a DSU Article 21.5 proceeding. That is the situation here.

17. Fourth, the analysis would not change even if one were to assume – incorrectly – that export credit *guarantees* are not specific measures and that the original panel's findings applied to the GSM 102 program itself. Even then, to give meaning to the original panel's analysis under Articles 10.1 and 8 of the *Agreement on Agriculture* and the Peace Clause, one must acknowledge that the original findings of WTO-inconsistency did not apply to the *entire* program but rather those aspects of it that related to guarantees "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)." The question in an Article 21.5 proceeding, then, is whether the complaining party has shown that proper implementation measures have been taken with respect to *that aspect of the measure found to be*

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[15] *Upland Cotton (Panel)*, para. 8.1(d)(i) (emphasis added).

[16] *Upland Cotton (Panel)*, para. 8.1(d)(i). By contrast, the original panel specifically found "in respect of exports of unscheduled agricultural products not supported under the programmes and other scheduled agricultural products," including pig meat and poultry meat, that "export credit *guarantees* under the GSM 102, GSM 103 and SCGP export credit guarantee programmes have not been applied in manner which either results in, or which threatens to lead to, circumvention of United States export subsidy commitments within the meaning of Article 10.1 and that they therefore are not inconsistent with Article 8 of the Agreement on Agriculture. *Upland Cotton (Panel)*, para. 8.1(d)(ii) (emphasis added). As such, the Peace Clause applied and the panel "treat[ed] them as if they are exempt from actions based on Article XVI of the GATT 1994 and Article 3 of the SCM Agreement in this dispute." *Upland Cotton (Panel)*, para. 8.1(d)(ii)

[17] Brazil Rebuttal Submission, para. 378 (emphasis added).

[18] Brazil Rebuttal Submission, para. 378 (emphasis added).

WTO-inconsistent. As the Appellate Body recognized in *EC – Bed Linen (21.5)*, the mandate of a DSU Article 21.5 panel does not extend to examining even those aspects of a measure that were *not* found to be WTO-inconsistent in the original proceeding.[19] Although the *EC – Bed Linen* dispute involved a situation where – except for a "minor change"[20] – the challenged aspect of the measure had remained more or less unchanged between the original proceeding and the compliance proceeding, the reasoning therein applies with equal force to the GSM 102 export credit guarantees in respect of poultry meat and pig meat. The United States turns to that issue and, more generally, Brazil's (incorrect) assertions that the GSM 102 export credit guarantees in respect of exports of pig meat and poultry meat are measures taken to comply next.

B. ***GSM 102 Guarantees Provided In Support of Exports of Pig Meat, Poultry Meat, And Other Scheduled Products (Other that Rice) Are Not Measures Taken To Comply With Any DSB Recommendations and Rulings***

18. For the reasons above, export credit guarantees in respect of exports of pig meat and poultry meat clearly *are* measures for purposes of WTO dispute settlement. However, they are *not* measures that were ever subject to any DSB recommendations and rulings.

19. Recall that there are two categories of claims that may be made in Article 21.5 proceedings – regarding (a) the existence of measures taken to comply in respect of original measures or (b) the consistency of measures taken to comply with a covered agreement. Because GSM 102 export credit guarantees in respect of exports of pig meat and poultry meat are not original measures that were subject to any DSB recommendations and rulings, Brazil has no basis to make claims in the first category with respect to those guarantees. The United States could not have taken any measures to comply with respect to DSB recommendations and rulings in respect of those guarantees because there are no DSB recommendations and rulings in respect of those guarantees.

20. The question, then, is whether Brazil has any basis to make claims in the second category with respect to those guarantees (*i.e.*, claims that GSM 102 guarantees in respect of exports of pig meat and poultry meat are not consistent with a covered agreement). Under Article 21.5 of the DSU, Brazil could only do so if these guarantees were themselves measures taken to comply with recommendations and rulings of the DSB. Contrary to Brazil's assertions, however, they are not.

21. Brazil argues that GSM 102 guarantees in respect of pig meat and poultry meat became measures taken to comply with the DSB's recommendations and rulings simply because they were affected by some of the changes made by the United States in respect of the measures that *were* subject to the DSB's recommendations and rulings (*i.e.*, GSM 102, GSM 103, and SCGP guarantees "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)").[21]

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[19] *EC – Bed Linen (AB) (21.5 – India)*, para. 86.

[20] According to the Appellate Body, the European Communities did "expand[] its findings in the redetermination with respect to the development of consumption of bed linen in order to take into account slightly different figures on domestic industry sales." *EC – Bed Linen (21.5) (AB)*, para. 72, n. 67. However, India's claim in the Article 21.5 proceedings apparently "did not rely on this minor change." *EC – Bed Linen (21.5) (AB)*, para. 72, n. 67.

[21] For example, the United States did not cease issuing GSM 103 and SCGP guarantees only "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)." The United States did not narrowly limit application of the new risk-based fee schedule to GSM 102 guarantees "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)" the application of the new risk-based fee schedule implemented to address the original panel's findings. Nor did the United States reclassify certain high-risk countries into ineligible categories solely with

22. Brazil makes the remarkable assertion that because the United States went above and beyond its WTO obligations it should be subject to greater exposure to challenge in an Article 21.5 proceeding than if it had narrowly circumscribed its changes so they applied solely to export credit guarantees "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)":

> During implementation, the United States could have taken steps to amend the GSM 102 program exclusively with respect to the terms and conditions applicable to rice and unscheduled products. However, it did not do so. Instead, it revised the general terms and conditions of the program, including the guarantee fee schedule, adopting an amended GSM 102 program that still applies on a non-product-specific basis.[22]

23. In other words, Brazil *admits* that the United States had no WTO obligation to take any action with respect to guarantees under the program in respect of exports of products *other* than "rice and unscheduled products." Brazil also effectively *admits* that, if the terms and conditions applicable in respect of those guarantees had remained precisely the same as before, those guarantees could not be the subject of the present Article 21.5 proceeding regardless of whether those terms and conditions were consistent with any covered agreement. Brazil's contention is, however, that those guarantees come within the scope of this compliance proceeding simply because the United States did not wall them off from changes affecting guarantees in respect of exports of rice and unscheduled products. This argument does not make sense either from a textual or a practical standpoint.

24. The measures taken by the United States to comply with the recommendations and rulings of the DSB are the various changes made by the United States – including the changes to the fee schedule and the conditions for eligibility – *to the measures that were subject to the original export subsidy finding to bring them into compliance*. The question presented to the Panel is whether Brazil has proven that these U.S. changes have failed to bring *those measures* into compliance with the recommendations and rulings (and the other provisions of the covered agreements cited by Brazil). The question is *not* what effect the changes might have had on other measures that were *not* required to be brought into compliance with any DSB recommendations and rulings.

25. The fact that the changes made to transform the original measures into measures taken to comply may affect more than just the original measures does not render all other affected measures themselves measures taken to comply. That would effectively treat *any* changed measure as a "measure taken to comply" regardless of whether it is actually changed to comply with any DSB recommendations or rulings or – as in the present case, where changes were applied on a program-wide basis for ease of administration and to improve the programs generally – for other reasons entirely. This would not only read "taken to comply" out of Article 21.5 of the DSU altogether but would have entirely undesirable implications. A Member would be forced to create a tangle of separate regimes to address the application of a measure in different situations simply to avoid exposure to a dispute settlement challenge under the expedited procedures of an Article 21.5 proceeding with the accompanying disadvantages. Moreover, the incentive would be for Members to make the most limited changes possible and to retain the status quo – even at the cost of general improvements – because any broader approach would simply be rewarded with exposure to challenge in Article 21.5 proceedings.

26. Nothing in the WTO Agreement compels such a result. Moreover, none of the prior Appellate Body reports discussed by Brazil even address this particular situation, let alone suggest that Brazil's approach is appropriate.

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respect to export credit guarantees "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)."

[22] *See* Brazil Rebuttal Submission, para.15.

C. ***The Reasoning in Prior Disputes Confirms that Brazil Cannot Impermissibly Extend the Scope of this Proceeding to GSM 102 Guarantees In Respect of Exports of Pig Meat and Poultry Meat***

27. Contrary to Brazil's assertions, the reasoning in prior disputes does not support Brazil's efforts impermissibly to extend the scope of this proceeding to claims against measures that were never subject to any DSB recommendations and rulings and that are not measures taken to comply with any such recommendations and rulings. Nor could it. This limitation is established by Article 21.5 of the DSU itself.

28. To the contrary, the Appellate Body has expressly acknowledged that "[p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB."[23] Moreover, "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply,' that *claim* cannot properly be raised in Article 21.5 proceedings."[24] This reasoning applies regardless of whether a complaining party attempts to make the "same" claim or a "new" claim in an Article 21.5 proceeding – if the measure subject to the claim is "not a 'measure taken to comply,' that *claim* cannot properly be raised in Article 21.5 proceedings."[25]

29. Nothing in the prior Appellate Body reports discussed by Brazil undermines this reasoning or supports Brazil's attempts to challenge the GSM 102 export credit guarantees in respect of exports of pig meat and poultry meat. Indeed, much of Brazil's analysis continues to rely on the fundamentally flawed assertion that a "final resolution" standard governs the claims that are properly within the scope of an Article 21.5 proceeding.[26] As the United States has explained[27], this is not the proper standard set out in the text of Article 21.5.

30. ***EC – Bed Linen (21.5):*** Brazil argues, for example, that "the circumstances that prevented India from renewing, in Article 21.5 proceedings in *EC – Bed Linen*, the same claim it had pursued in the original proceedings, are *not* present in the current dispute."[28] This is not true. In the *EC – Bed Linen* dispute, the Appellate Body found that India was precluded from raising certain claims in respect of the "other factors" assessment in a dumping redetermination on two different grounds: (a) it was not a part of the "implementation measure" and, thus, was outside the scope of an Article 21.5 proceeding *and* (b) by failing to appeal the original panel's rejection of the same claim against the exact same aspect of the measure taken to comply in the original proceeding, India had accepted the rejection of the claims by the original panel as a "final resolution" of the dispute between the parties and therefore could not raise it again in *any* subsequent proceeding.[29]

31. Brazil correctly observes that the present dispute is *not* identical to *EC – Bed Linen (Article 21.5 – India)* on the question of whether or not the original panel's rejection of Brazil's claims against the pig meat and poultry meat constitutes a "final resolution" of the matter for purposes of WTO dispute settlement; certainly, Brazil is not precluded from challenging those measures in a new dispute. However, on the question of whether the claims are subject to review *in an Article 21.5 proceeding*, the outcome in this dispute is the same as in *EC – Bed Linen (Article 21.5 – India)*. Like the claims made by India in that dispute, Brazil's claims here against the pig meat and poultry meat

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[23] *Canada – Aircraft (21.5 Brazil) (AB)*, para. 36 (italics in original; underlining added).

[24] *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

[25] *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

[26] *See e.g.*, Brazil's assertions that *EC – Bed Linen*

[27] Including in response to the Panel's Question 10, *see* U.S. Answers to Parts A-C of First Set of Panel Questions, paras. 25-26 (February 27, 2007).

[28] Brazil Responses to Panel Section A-C Questions, para. 47 (February 26, 2007).

[29] *EC – Bed Linen (21.5 – India) (AB)*, paras. 32-35 and 87-95.

GSM 102 guarantees are not claims against a "measure taken to comply" and, as such, are outside the scope of this proceeding by operation of the express limitations in Article 21.5 of the DSU.

32. Brazil also asserts that the Appellate Body reached certain "conclusions" about the situations in which claims could be raised *in Article 21.5 proceedings* where an original proceeding involves an exercise of false judicial economy. According to Brazil, the circumstances in the present dispute are "similar" to the exercise of false judicial economy because the "original panel erroneously excluded [export credit guarantees] for pig meat and poultry meat from its findings regarding Brazil's circumvention claim."[30] Not only does Brazil's argument simply *presume* that the original Panel's findings would have extended to export credit guarantees for pig meat and poultry meat – a finding that the Appellate Body specifically found was *not* supported by sufficient uncontested facts on the record before it – but Brazil attempts to equate two fundamentally different things.

33. The Appellate Body has explained that judicial economy "allows a panel to refrain from making multiple findings that the same measure is inconsistent with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute."[31] Here, by contrast, the Appellate Body did not decline to make findings because other findings existed with respect to GSM 102 export credit guarantees. Rather, it did not find sufficient facts to make *any* finding of WTO-inconsistency with respect to the GSM 102 export credit guarantees in respect of exports of pig meat and poultry meat. This distinction is an important one. This is *not* a situation where the United States had an obligation to implement DSB recommendations and rulings with respect to those guarantees on the basis of certain WTO provisions but not others with respect to which the original panel/Appellate Body had exercised judicial economy. The United States simply had *no implementation obligations whatsoever* in respect of those measures. Moreover, as explained above, the GSM 102 export credit guarantees in respect of exports of pig meat and poultry meat are not measures taken to comply with any recommendations and rulings. In these circumstances, Article 21.5 of the DSU does not permit claims against those measures in a compliance proceeding.

34. In any event, contrary to Brazil's assertions, the Appellate Body did *not* conclude that claims with respect to which an original panel had exercised false judicial economy could automatically be reasserted in an Article 21.5 proceeding. This is evident even from the language cited by Brazil from that dispute: "in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel's false exercise of judicial economy, such that a complainant would not be prevented from raising the claim *in a subsequent proceeding*."[32] This discussion does not deal with the scope of an Article 21.5 proceeding. Indeed, this language is part of the Appellate Body's separate discussion of what claims can be considered to be "finally resolved" such that they could not be the subject of *any* subsequent WTO dispute settlement proceeding. On the question of the scope of an Article 21.5 proceeding, the Appellate Body was unequivocal: "[i]f a claim challenges a measure which is not a 'measure taken to comply,' that claim cannot properly be raised in Article 21.5 proceedings."[33]

35. ***Canada – Aircraft (21.5):*** Brazil asserts that "[t]he situation in these Article 21.5 proceeding is very similar to the situation that arose in the Article 21.5 proceeding in *Canada – Aircraft*."[34] According to Brazil, Canada "amended the terms and conditions of an export subsidy program" and, thus, the Appellate Body found that the "measure taken to comply" was the revised export subsidy *program*.[35] Brazil argues that the same reasoning applies here and militates in favor of finding the

[30] Brazil Responses to Panel Section A-C Questions, para. 46 (February 26, 2007).
[31] *Canada – Wheat (AB)*, para. 133.
[32] *EC – Bed Linen (AB)*, para. 96, n. 115.
[33] *EC – Bed Linen (21.5 – India) (AB)*, para. 78.
[34] Brazil Responses to Panel Section A-C Questions, para. 36 (February 26, 2007).
[35] Brazil Responses to Panel Section A-C Questions, para. 36 (February 26, 2007).

entire GSM 102 program to be the measure taken to comply in this dispute.[36] What Brazil fails to acknowledge is that the scope of the measure taken to comply with the recommendations and rulings of the DSB is determined by reference – logically – to the recommendations and rulings of the DSB. As the Appellate Body explained:

> A . . . feature of the first sentence of Article 21.5 is the express link between the "measures taken to comply" and the recommendations and rulings of the DSB. Accordingly, determining the scope of "measures taken to comply" in any given case must also involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB. Because such recommendations and rulings are directed at the measures found to be inconsistent in the original proceedings, such an examination necessarily involves consideration of those original measures.[37]

36. In *Canada – Aircraft (21.5)*, Canada was required to withdraw the subsidy with respect to *all* "[Technology Partnerships Canada or "TPC"] assistance to the Canadian regional aircraft industry" consistent with Article 4.7 of the *SCM Agreement*.[38] Unlike the recommendations and rulings in the present dispute, Canada was not required to withdraw the subsidy only with respect to a subset of the TPC assistance. It is only natural, therefore, that the "measure taken to comply" in that dispute would be the changes made with respect to *all* TPC assistance, rather than some subset thereof. By contrast, here, it is to be expected that the "measure taken to comply" encompasses only the changes made with respect to that subset of measures with respect to which the United States had an implementation obligation. Thus, far from supporting Brazil's argument that the *entire* GSM 102 program is suddenly somehow a "measure taken to comply," the reasoning in *Canada – Aircraft (21.5)* confirms that Brazil's argument is not tenable.

37. ***U.S. – Shrimp (21.5):*** Brazil notes that in *U.S. – Shrimp (21.5)*, the Appellate Body found that claims were not properly part of an Article 21.5 proceeding where they challenged an aspect of a measure that was found to be WTO-consistent in an original proceeding and remained unchanged between the original and compliance proceeding.[39] Brazil correctly observes that those are not the precise circumstances at issue here.[40] However, the outcome in that dispute is consistent with the U.S. position that – where there is no finding of WTO-inconsistency with respect to a measure *and* the measure is not taken to comply with any DSB recommendations and rulings – neither the measure nor any claims with respect to it are properly the subject of a DSU Article 21.5 proceeding.

38. ***Canada – Dairy (21.5 II):*** Brazil asserts that the factual situation in *Canada – Dairy (21.5 II)* is "precisely the situation in which Brazil finds itself."[41] However, even Brazil's explanation of the facts of that dispute confirms that this is not a correct statement. As Brazil acknowledges, *Canada – Dairy (21.5 II)* involved the question of whether a *second* Article 21.5 proceeding could be initiated "where the Appellate Body was unable to reach a decision [in an earlier proceeding] regarding the WTO-consistency of certain Canadian *measures taken to comply* because of a lack of sufficient facts."[42] There is no question before this Panel of whether a second Article 21.5 proceeding is permissible. Nor has the Appellate Body been asked to address, in this dispute, the question of whether any U.S. *measures taken to comply* are WTO-inconsistent. Indeed, it is not clear how the Appellate Body would have reached such an issue without this Panel having even completed a first Article 21.5 proceeding. Rather, the question implicated by Brazil's claims in this proceeding is

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[36] Brazil Responses to Panel Section A-C Questions, para. 36 (February 26, 2007).

[37] *United States – Final Countervailing Duty Determination (21.5 – Canada) (AB)*, para. 68.

[38] *Canada – Aircraft (21.5) (AB)*, para. 2.

[39] Brazil Responses to Panel Section A-C Questions, paras. 48-51 (February 26, 2007).

[40] Brazil Responses to Panel Section A-C Questions, paras. 48-51 (February 26, 2007).

[41] Brazil Responses to Panel Section A-C Questions, para. 52 (February 26, 2007).

[42] Brazil Responses to Panel Section A-C Questions, para. 52 (February 26, 2007) (quoting U.S. Rebuttal Submission, para. 13, n. 19) (emphasis added).

whether those claims "challenge[] a measure which is not a 'measure taken to comply.'"[43] If they do, they are not properly within the scope of this proceeding. Neither that question – nor one similar to it – was at issue in *Canada – Dairy (21.5 II)*. To the contrary, all the parties to that dispute *agreed* that the Canadian measures at issue were "taken to comply" with the DSB recommendations and rulings in that dispute. The only question there was whether the WTO dispute settlement provisions would permit a second Article 21.5 proceeding.

39. ***Conclusion:*** The reasoning in the reports examined by Brazil does not support its efforts to draw into the scope of this proceeding claims with respect to GSM 102 guarantees in respect of exports of pig meat and poultry meat.

Questions to Brazil

> ***7. Is Brazil of the view that it is only in the circumstances identified by the Appellate Body in EC – Bed Linen (Article 21.5 – India) that the scope of Article 21.5 proceedings is limited by the scope of the original proceedings? [Paragraphs 11-15 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling]***
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> ***8. How does Brazil respond to the arguments of the United States that Brazil "incorrectly assumes that the standard is one of whether there has been a 'final resolution' of the issue in the original proceeding" and that Brazil misreads the Appellate Body report in EC – Bed Linen (Article 21.5 – India) and confuses the issue of "the scope of a compliance proceeding pursuant to Article 21.5 of the DSU" and the distinct issue of "when a claim against a specific measure or aspect of a measure can be considered to be 'finally resolved' for purposes of WTO dispute settlement"? [Paragraphs 8 and 12 of the Rebuttal Submission of the United States]***

40. Brazil's response to this question suggests that Brazil misunderstands the U.S. position. Contrary to Brazil's suggestions, the United States does *not* agree that the scope an Article 21.5 proceeding is determined by reference to whether or not claims have been "finally resolved." The United States considers that to be a distinct question regarding the circumstances under which a particular matter can no longer be the subject of *any* subsequent WTO dispute settlement proceeding.

41. By contrast, the scope of a proceeding pursuant to Article 21.5 of the DSU is established by Article 21.5 itself. As is clear from the text, such proceedings are limited in terms of the *claims* that can be made and the *measures* in respect of which the claims can be made. Examining the text, the Appellate Body has explained, "[p]roceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those 'measures *taken to comply* with the recommendations and rulings' of the DSB."[44] Moreover, "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply,' that *claim* cannot properly be raised in Article 21.5 proceedings."[45]

42. Brazil incorrectly suggests in its response to this question that the U.S. objection is limited to the *measure* that Brazil challenges in this Article 21.5 proceeding but that the United States accepts that Brazil claims can be made in this proceeding. In fact, the U.S. objection is to *both* the measures challenged by Brazil – GSM 102 export credit guarantees in respect of pig meat and poultry meat which were not subject to the DSB's recommendations and rulings and are not measures taken to comply with any such recommendations and rulings – as well as all *claims* in respect of those

[43] *EC – Bed Linen (21.5 – India) (AB)*, para. 78.
[44] *Canada – Aircraft (21.5 Brazil) (AB)*, para. 36 (italics in original; underlining added).
[45] *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

measures. As the Appellate Body has made clear, "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply,' that *claim* cannot properly be raised in Article 21.5 proceedings."[46]

9. What are the comments of Brazil on the arguments in footnote 22 of the United States' rebuttal submission?

43. Brazil appears to argue that it is entitled to ignore the Appellate Body's finding that there were insufficient uncontested facts to support any finding of WTO-inconsistency with respect to GSM 102 export credit guarantees in respect of exports of pig meat and poultry meat. According to Brazil, the present situation is "the effective equivalent of the exercise of judicial economy."[47] And, in Brazil's view, the Appellate Body "concluded" in *EC – Bed Linen (21.5)* that "the exercise of judicial economy with respect to a claim raised in the original proceedings does not bar a complaining Member from reasserting that same claim in Article 21.5 proceedings."[48] The United States disagrees with Brazil both as to its assertion that the present circumstance is the "effective equivalent" of the exercise of judicial economy and its argument that the Appellate Body somehow indicated that a complaining party could simply reassert *in an Article 21.5 proceeding* any claims with respect to which an original panel had exercised false judicial economy. Judicial economy occurs when the arbitral body decides it need not reach an issue in order to resolve a dispute, but here the Appellate Body did not decide it need not reach the issue. Rather, the Appellate Body found that it lacked sufficient basis to make a finding on the claim. These two situations are not "effectively equivalent" – they are quite different.

44. As explained above, Brazil persists in ignoring (a) the actual arguments made by the EC in *EC – Bed Linens (21.5)*, (b) the fact that the EC and the Appellate Body distinguished between arguments regarding the scope of a DSU Article 21.5 proceeding and those regarding claims "finally resolved" for purposes of WTO dispute settlement, and (c) the Appellate Body's unequivocal clarification that, in terms of the former, the salient question under Article 21.5 is whether the claims presented relate to the existence or consistency with a covered agreement of *measures taken to comply* with the recommendations and rulings of the DSB. As the Appellate Body explained "[i]f a *claim* challenges a *measure* which is not a 'measure taken to comply,' that *claim* cannot properly be raised in Article 21.5 proceedings."[49] It did not qualify this in any way or suggest that this was subject to a further consideration of whether false judicial economy had been exercised with respect to the claim.

Question to the US

10. Could the United States explain why it considers that what it describes as the "final resolution" standard is not the correct standard to decide whether Brazil's claims regarding export credit guarantees for pig meat and poultry meat are within the scope of this proceeding?

2. Preliminary objections of the United States with respect to claims of Brazil regarding marketing loan and counter-cyclical payment programmes

Questions to Brazil

11. Is Brazil of the view that a finding under Article 6 of the SCM Agreement that a "subsidy" is causing serious prejudice necessarily always applies to both the subsidy "payments" and the subsidy "programme"? [Paragraphs 31-35 of

[46] *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).
[47] Brazil Responses to Panel Section A-C Questions, para. 71 (February 26, 2007).
[48] Brazil Responses to Panel Section A-C Questions, para. 70 (February 26, 2007).
[49] *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

Submission of Brazil Regarding US Requests for Preliminary Ruling and paragraph 38 of the Rebuttal Submission of Brazil]

45. The Panel's question is specific, asking for Brazil's views as to whether serious prejudice findings are such that they must "necessarily always" apply simultaneously to the legislative/regulatory provisions authorizing payments and payments themselves. Brazil uses the opportunity, however, to attempt to shore up its unfounded arguments that the Panel should disregard the original panel report and find that the findings of "present" serious prejudice therein applied to Step 2, marketing loan, and counter-cyclical payment programs as well as payments thereunder (a "measure" that was never even subject to a *claim* of "present" serious prejudice in the original proceeding).

46. The United States addresses what appears to be Brazil's response to the specific question, first, and then addresses Brazil's *post hoc* attempts to change the findings of the original panel and the recommendations and rulings of the DSB.

A. There Is No Basis For Brazil's New Argument that Any Finding that Particular Payments Are Causing Serious Prejudice Necessarily Means that the Program Providing for the Payment is Per Se *WTO-Inconsistent*

47. Brazil appears to argue that whenever payments are made pursuant to a program, any finding that particular payments are causing serious prejudice necessarily redounds to the program as such, so that the 'legal/regulatory provisions' for the grant or maintenance of the subsidies[50] must be treated as being WTO-inconsistent as such. Brazil identifies no citation, support, or other basis for this argument. Nor can it.

48. The Appellate Body has clarified that:

> "[A]s such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct.
>
> The implications of such challenges are obviously more far-reaching than "as applied" claims. We also expect that measures subject to 'as such' challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged "as such.[51]

49. Brazil's newly-asserted approach would flout the "serious" nature of challenges to a Members' "laws, regulations, or other instruments of a Member that have general and prospective application" by permitting a finding of WTO-inconsistency against such measures *without* any actual showing that "a Member's conduct – not only in a particular instance that has occurred, but in future situations as

[50] Brazil's Answers to Additional Questions Following Second Panel Meeting, para. 31-32 (20 January 2004).

[51] *U.S. – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.

well – will necessarily be inconsistent with that Member's WTO obligations."[52] Under Brazil's approach a showing about "a particular instance" would automatically be sufficient for a finding that "a Member's conduct . . . in [all] future situations . . . will necessarily be inconsistent with that Member's WTO obligations." Brazil has identified nothing in Article 6 of the *SCM Agreement* – or any other provision of the WTO agreement – that permits such an approach.

50. The sole justification that Brazil appears to offer is an assertion that because a challenge to particular payments may require an assessment of how the program operates and, conversely, because a challenge to a program requires an assessment of the effects of particular payments, any distinction between the WTO-consistency of programs and payments is "artificial."[53] This argument makes little sense. It is hardly remarkable that it may be necessary to examine the "laws, regulations, or other instruments of a Member" in determining whether their application in a particular instance is WTO-consistent. Nor is it remarkable that an examination of the application of "laws, regulations, or other instruments of a Member" is necessary to determine whether those measures are themselves WTO-consistent. This is true in any circumstance where either the "laws, regulations, or other instruments of a Member" or their application are at issue; it is not unique to claims under Article 6 of the *SCM Agreement*. Brazil fails to explain why this renders any distinction between the WTO-consistency of the "laws, regulations, or other instruments of a Member" themselves and their application in particular circumstances "artificial." Indeed, Brazil's argument would undermine the clear distinction drawn by the Appellate Body in *U.S. – Argentina OCTG Sunset Reviews* and scores of other disputes between claims against these distinct measures.

51. In any event, the United States does not recall that Brazil clarified it was making an "artificial" distinction between programs and payments in the original dispute when it made separate serious prejudice claims relating to payments made in MY 1999-2002, future payments allegedly mandated to be made in MY 2003-2007, and specific provisions of the 2002 FSRI Act and the 2000 Agricultural Risk Protection Act. Nor does the United States recall Brazil arguing that the original panel was making an "artificial" distinction between payments and programs when – tracking the claims presented to it – the original panel set out to separately address the effects of payments made in MY 1999-2002, the effects of payments allegedly mandated to made in future marketing years, and the effect of specific provisions of the 2002 FSRI Act and the 2000 Agricultural Risk Protection Act.

52. To the contrary, Brazil specifically acknowledged that a claim against the specific provisions of the 2002 FSRI Act and the 2000 Agricultural Risk Protection Act would have different implications and requirements than a claim against specific payments thereunder. For example, Brazil made separate claims of *threat* of serious prejudice[54] against payments allegedly "mandated" to be made in MY 2003-2007[55] and the legal regime providing for these payments.[56] In so doing, Brazil expressly acknowledged to the original panel that the claims were comprised of distinct elements because of the different measures at issue.[57] Indeed, in the case of its threat claims against the

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[52] *U.S. – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.

[53] Brazil Responses to Panel Section A-C Questions, para. 84 (February 26, 2007).

[54] The claims were under Articles 5(c) and 6.3(c) of the *SCM Agreement*, Articles 5(c) and 6(d) of the *SCM Agreement*, and Article XVI:1 of the GATT 1994.

[55] *Upland Cotton (Panel)*, para. 3.1(vii).

[56] *Upland Cotton (Panel)*, para. 3.1(viii). These claims too were under Articles 5(c) and 6.3(c) of the *SCM Agreement*, Articles 5(c) and 6(d) of the *SCM Agreement*, and Article XVI:1 of the GATT 1994.

[57] To take just one example, Brazil explained how a showing of the mandatory nature of the statutory/regulatory provisions was a "required element" for its *per se* claims but not for the "threat" of serious prejudice claims "that do not involve claims regarding the 'per se' validity of the statutes":

> The mandatory nature of the U.S. subsidies is relevant to (a) Brazil's "per se" claims as well as (b) Brazil's threat of serious prejudice claims that do not involve claims regarding its "per se" validity of the statutes. The evidence of mandatory (or "normative") measures is a required element for Brazil's "per se" claims. And a threat of serious prejudice under Article 6.3

programs as such, Brazil asked the original panel to find that the "provisions of the 2002 FSRI Act and the 2000 ARP Act together with their implementing regulations, as listed above, *cannot be applied in a WTO consistent manner*."[58] This echoes precisely the Appellate Body's reasoning in *U.S. – Argentina OCTG Sunset Reviews* that "[b]y definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – *will necessarily be inconsistent with that Member's WTO obligations*."[59]

53. Moreover, Brazil argued that payments could have adverse effects even when the programs that authorized them were no longer in existence[60] and that programs could have adverse effects even when no payments were being made under the programs.[61] In other words, Brazil argued that the *effects* of the programs and the payments could well be distinct.

54. Brazil's new argument for purposes of this proceeding that a finding under Articles 5 and 6 of the *SCM Agreement* automatically applies to both programs and the payments made thereunder is inconsistent with all of Brazil's prior arguments noted above and is unsupported by the text of any covered agreement.

B. Brazil's Efforts to Expand the Original Panel's Findings of WTO-Inconsistency and the DSB's Recommendations and Rulings are Unavailing

55. Not only does Brazil fail to show that findings under Articles 5 and 6 necessarily apply to both programs and payments, as a general matter, but it identifies no basis to expand the original panel's findings of "present" serious prejudice to the Step 2, marketing loan, and counter-cyclical payment programs and all payments thereunder.

(1) Brazil continues to ignore the evidence showing that it only challenged – and the original panel only found – "present" serious prejudice with respect to a package of payments made in MY 1999-2002

56. The United States recalls that in the section of the original panel report entitled "Parties' Requests for Findings and Recommendations," the panel set out the claims presented by Brazil as follows:

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and 5(c) will be more likely to exist if the subsidies are mandatory, i.e., that the subsidies must be paid to eligible producers, exporters, and users.

Brazil's Answers to Additional Questions Following Second Panel Meeting, para. 18 (20 January 2004). Brazil's explanation shows not only that Brazil separately challenged the "per se" validity of the statutes and the payments authorized to be made under the statutes – despite its argument now that no distinction can be drawn between them "in the circumstances of this dispute" – but that it considered the claims to entail distinct factual showings.

[58] Brazil's 9 September 2003 Further Submission, para. 435 (emphasis added).

[59] *U.S. – Argentina OCTG Sunset Reviews (AB)*, paras. 172 (emphasis added).

[60] *See Upland Cotton (Panel)*, paras. 7.105, 7.107-7.122. Brazil argued that, even though, the legislation providing for PFC and MLA payments had expired, it "pursues claims . . . in respect of the subsidies and domestic support provided under the expired programmes and authorizing legislation, in other words, *the payments themselves*" because, according to Brazil, these payments continued to cause adverse effects to its interests. *Upland Cotton (Panel)*, para. 7.108 (emphasis added).

[61] For example, Brazil argued that "the very existence of the mandatory marketing loan, Step 2 and counter-cyclical payment program alone impacts farmers' planting decisions" even when no payments were being made under them. Brazil's Answers to Additional Questions Following Second Panel Meeting, para. 20 (20 January 2004)

- claims of "present" serious prejudice with respect to "U.S. subsidies provided during MY 1999-2002"[62];

- claims of threat of serious prejudice with respect to "U.S. subsidies mandated to be provided in MY 2003-2007;"[63] and

- *per se* claims of threat of serious prejudice[64] against "selected provisions of the FSRI Act of 2002 and the ARP Act of 2000" providing for these subsidies, to the extent relevant to upland cotton, and their implementing regulations.[65]

57. The original panel did *not* identify a "present" serious prejudice claim under Article 5(c) and 6.3(c) of the *SCM Agreement* as one of the claims "concerning selected provisions of the FSRI Act of 2002 and the ARP Act of 2000."[66] Nor did the original panel identify "selected provisions of the FSRI Act of 2002 and the ARP Act of 2000" as part of the measures subject to Brazil's claims of "present" serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*.[67]

58. To the contrary, the original panel identified only "the subsidies provided during MY 1999-2002" as the measures subject to Brazil's claim of "present" serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*.[68] The original panel then identified the "challenged measures" that were alleged to be the "subsidies" for purposes of that claim[69]; these were the "user marketing (Step 2) *payments* to domestic users and exporters; marketing loan programme *payments*; PFC *payments*; MLA *payments*; DP *payments*; CCP *payments*; crop insurance *payments*; and cottonseed *payments*."[70] The original panel found that these constituted "subsidies" within the meaning of Article 1 of the *SCM Agreement* because they were "financial contributions" (mostly in the form of "grants") conferring a "benefit."[71] The original panel did not consider whether the statutory/regulatory provisions authorizing these payments were also "subsidies."

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[62] *Upland Cotton (Panel)*, para. 3.1(vi)). In the case of Brazil's "present" serious prejudice claims under Articles 5(c) and 6.3(d) of the *SCM Agreement*, the Panel understood Brazil as alleging that the relevant period was MY 1999 through MY 2001.

[63] *Upland Cotton (Panel)*, para. 3.1(vii)). In the case of Brazil's threat of serious prejudice claims under Articles 5(c) and 6.3(d) of the *SCM Agreement*, the Panel understood Brazil as alleging that the relevant period was MY 2002-2007.

[64] The original panel clarified that Brazil's claims against the programs *per se* were ones of threat of serious prejudice in *Upland Cotton (Panel)*, para. 7.1507. Brazil confirms in its response to the U.S. preliminary ruling requests that its '"per se' claim before the original panel was raised as a claim of 'threat of serious prejudice.'" *See* Brazil Submission Regarding U.S. Requests for Preliminary Rulings, para. 70, n. 94.

[65] *Upland Cotton (Panel)*, para. 3.1(viii).

[66] *Upland Cotton (Panel)*, para. 3.1(viii)

[67] *Upland Cotton (Panel)*, para. 3.1(vi).

[68] *Upland Cotton (Panel)*, para. 3.1(vi). *See also Upland Cotton (Panel)*, para. 7.1108 ("Brazil claims that United States subsidies provided during MY 1999-2002 have caused, cause and continue to cause "serious prejudice" to Brazil's interests. . . .") and para. 7.1112 ("Brazil alleges that all of the challenged measures constitute "subsidies". According to Brazil, most of them – user marketing (Step 2) payments to domestic users and exporters; marketing loan programme payments; production flexibility contract payments; market loss assistance payments; direct payments; counter-cyclical payments; crop insurance subsidies1248; and cottonseed payments – provide "financial contributions" in the form of "grants" to participating United States producers, processors, users or exporters of upland cotton within the meaning of Article 1.1(a)(1)(i) of the *SCM Agreement*.")

[69] *Upland Cotton (Panel)*, para. 7.1112-7.1120.

[70] *Upland Cotton (Panel)*, para. 7.1120.

[71] *Upland Cotton (Panel)*, paras. 7.1112-7.1120.

59. The original panel then found that only certain of the identified "subsidies" – namely, Step 2 payments, marketing loan payments, and counter-cyclical/market loss assistance payments provided in MY 1999-2002 – caused serious prejudice to the interests of Brazil under Articles 5(c) and 6.3(c):

> [i]n conclusion, in light of all of these considerations, we find that the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan programme *payments*, user marketing (Step 2) *payments* and MLA *payments* and CCP *payments* – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of Articles 6.3(c) and 5(c) of the SCM Agreement.[72]

60. As shown in the table below, the original panel did not make any further finding of WTO inconsistency with respect to Brazil's claims.

Measure Challenged	**Claim Made**	**Resolution by Original Panel**	**Paragraph in Panel Report**
"U.S. subsidies provided during MY 1999-2002"	"Present" serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*	**Finding** of WTO-inconsistency against Step 2, marketing loan, and counter-cyclical/market loss assistance programs	7.14168.1(g)(i)
"U.S. subsidies provided during MY 1999-2001"	"Present" serious prejudice under Articles 5(c) and 6.3(d) of the *SCM Agreement*	**Rejected** for failure to make *prima facie* case	7.14658.1(g)(ii)
"U.S. subsidies provided during MY 1999-2002"	"Present" serious prejudice under Articles XVI:1 and XVI:3 of the GATT 1994	**Declined** to address, *inter alia*, because of finding of inconsistency with Articles 5(c) and 6.3(c) of the *SCM Agreement*	7.1476
"U.S. subsidies" allegedly "mandated" to be provided during MY 2003-2007	"Threat" of serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*	**Declined** to address in light of finding of inconsistency with Articles 5(c) and 6.3(c) and 3.1(a) and 3.2 of the *SCM Agreement*	7.1503
"U.S. subsidies" allegedly "mandated" to be provided during MY 2002-2007	"Threat" of serious prejudice under Articles 5(c) and 6.3(d) of the *SCM Agreement*	**Rejected** for failure to make *prima facie* case	7.1504
"U.S. subsidies" allegedly "mandated" to be provided during MY 2003-2007	"Threat" of serious prejudice under Articles XVI:1 and XVI:3 of the GATT 1994	**Declined** to address, *inter alia*, because of finding of inconsistency with Articles 5(c) and 6.3(c) of the *SCM Agreement*	7.1505
"selected provisions of the FSRI Act of 2002 and the ARP Act of 2000"	"Threat" of serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*	**Declined** to address in light of findings regarding export subsidies, import subsidies, "present" serious prejudice, and "threat" of serious prejudice	7.1511
"selected provisions of the FSRI Act of 2002 and the ARP Act of 2000"	"Threat" of serious prejudice under Articles 5(c) and 6.3(d) of the *SCM Agreement*	Same as above	7.1511

[72] *Upland Cotton (Panel)*, paras. 7.1416 (emphasis added).

Measure Challenged	Claim Made	Resolution by Original Panel	Paragraph in Panel Report
"selected provisions of the FSRI Act of 2002 and the ARP Act of 2000"	"Threat" of serious prejudice under Articles XVI:1 and XVI:3 of the GATT 1994	Same as above	7.1511

61. Upon appeal, the Appellate Body upheld the original panel's finding "that the effect of marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments is significant price suppression within the meaning of Article 6.3(c) of the SCM Agreement."[73] Brazil did not appeal the panel's decisions to reject or decline to address its claims regarding "U.S. subsidies" allegedly "mandated" to be provided in MY 2003-2007 or the *per se* claims with respect to the programs. Moreover, Brazil's arguments to the Appellate Body reflected the understanding that the original panel's "present" serious prejudice finding applied only with respect to subsidies provided in MY 1999-2002.[74]

62. On 21 March 2005, the DSB adopted the Appellate Body report and the original panel report, as modified by the Appellate Body report.[75] This included adoption of the single actionable-subsidy related finding that "the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan programme *payments*, user marketing (Step 2) *payments* and MLA *payments* and CCP *payments* – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of Articles 6.3(c) and 5(c) of the SCM Agreement."[76]

63. Brazil has not even attempted to reconcile its argument that the original panel's findings of "present" serious prejudice applied to the Step 2, marketing loan, and counter-cyclical payments with all of the facts above. Nor has Brazil addressed the other clear textual signals that – consistent with the claims presented to it – the original panel's findings of "present" serious prejudice were made with respect to payments made in MY 1999-2002. For example:

- The fact that the panel's prohibited subsidy-related conclusions and recommendations regarding the Step 2 program, *as such*, expressly refer to "section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton"[77] and "section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users of upland cotton."[78] If the findings and conclusions in paragraphs 8.3(d) and 8.1(g)(i) of the original panel report also pertained to the Step 2 program, *as such*, together with the marketing loan program and counter-cyclical payment program, the panel would certainly have included the same specific kind of reference, rather than a reference to *payments*.

- The fact that in Section VII:D of the Panel Report, dealing with the evaluation of domestic support measures under Article 13 of the *Agreement on Agriculture*, the original panel expressly stated that, "[i]n this Section of our report, the Panel will consider the current programmes 'as applied' and 'as such' together. Therefore, references to marketing loan programme, user marketing (step 2), direct,

[73] *Upland Cotton (AB)*, para. 496.
[74] *See e.g.*, *Upland Cotton (AB)*, para. 529.
[75] *United States – Subsidies on Upland Cotton*, Action by the Dispute Settlement Body, WT/DS267/20.
[76] *Upland Cotton (Panel)*, para. 7.1416.
[77] *See Upland Cotton (Panel)*, paras. 8.3(b) and 8.1(e).
[78] *See Upland Cotton (Panel)*, paras. 8.3(c) and 8.1(f).

> counter-cyclical and crop insurance 'payments' include the legislative and regulatory provisions authorizing those payments unless otherwise indicated."[79] No similar statement can be found in Section VII:G, which is the section including the original panel's analysis of the effects of the subsidies alleged to be causing serious prejudice. In fact, the original panel in Section VII:G clearly distinguishes payments from provisions providing for those payments. Nor is there any similar statement made in connection with the recommendation in paragraph 8.3(d) of the panel report (or paragraph 8.1(g)(i), which contains the conclusion on actionable subsidies to which the recommendation relates).

64. For the reasons above, it is clear that the original panel did *not* make any finding under Article 5(c) and 6.3(c) of the *SCM Agreement* against the marketing loan and counter-cyclical payment programs, as such, whether alone or in addition to payments.

(2) Brazil seeks to read aspects of the original panel report out of context and inconsistently with the clear evidence that the findings of "present" serious prejudice were with respect to a package of payments made in MY 1999-2002

65. Brazil's arguments to the contrary grasp at isolated statements in the original panel report and attempt to attribute to them meaning that is directly undermined by all of the evidence above. First, Brazil argues that the original panel found both payments and programs to be part of its terms of reference and that "[t]he United States did not appeal these findings."[80] This argument is irrelevant. The United States does not dispute that the original panel considered both programs and payments to be within its terms of reference. The question is what measures were subject to the original panel's finding of "present" serious prejudice.

66. Second, Brazil attempts to attach significance to the fact that the listing of the "measures at issue" in paragraph 7.1107 does not include a "temporal limitation." Brazil argues that this means that the original panel was disregarding its own clear acknowledgment:

- in the very next paragraph – under the heading "Overview of Brazil's present serious prejudice claims under the *SCM Agreement* and GATT 1994" – that "Brazil claims that United States *subsidies provided during MY 1999-2002* have caused, cause and continue to cause 'serious prejudice' to Brazil's interests by [*inter alia*] . . . significantly suppressing upland cotton prices in the United States, world and Brazilian markets in violation of Articles 5(c) and 6.3(c) of the SCM Agreement;"[81] and

- in paragraph 3.1(vi) that "Brazil requests that the Panel make the following findings . . . concerning present serious prejudice to the interests of Brazil: the *subsidies provided during MY 1999-2002* caused and continue to cause serious prejudice to the interests of Brazil by suppressing upland cotton prices in the U.S., world, and Brazilian markets for upland cotton in violation of Articles 5(c) and 6.3(c) of the *SCM Agreement*."[82]

67. According to Brazil, by not including a "temporal limitation" in paragraph 7.1107, the original panel was also ignoring Brazil's repeated clarifications in the original proceeding that its claims of "present" serious prejudice applied to subsidies provided in MY 1999-2002:

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[79] ***Upland Cotton (Panel)*, para. 7.337(ix), n. 466.**

[80] Brazil Responses to Panel Section A-C Questions, para. 86-87 (February 26, 2007).

[81] *Upland Cotton (Panel)*, para. 7.1108.

[82] *Upland Cotton (Panel)*, para. 3.1(vi) (emphasis added).

- "Brazil's actionable subsidy claims" comprise "first, claims of present serious prejudice resulting from subsidies *provided in MY 1999-2002*;"[83]

- "The U.S. subsidies *provided during MY 1999-2002* cause present significant price suppression in the world and Brazilian market, as well as in markets where Brazilian producers export."[84]

- "Brazil's first serious prejudice claim relates to the significant price suppression caused by U.S. actionable subsidies in violation of Articles 5(c) and 6.3(c) of the SCM Agreement. The measures involved are *subsidies provided in each year between MY 1999-2002, under the 1996 FAIR Act, the 2000 ARP Act and the 2002 FSRI Act*."[85]

- "The first [Brazilian adverse effects claim] is that the effect of the U.S. subsidies *provided during each of the MY 1999-2002* have caused and continue to cause significant price suppression in the U.S., Brazilian, and other world markets for upland cotton."[86]

- "Brazil sets forth evidence below from which the Panel may conclude that the effects of the *U.S. subsidies in MY 1999-2002* is significant price suppression in MY 1999-2002 in the U.S., world and Brazilian market, as well as in third country markets where Brazil exported its upland cotton."[87]

- "Based on the arguments and evidence presented above, Brazil requests that this Panel make the following findings and recommendations . . . The U.S. subsidies *provided during MY 1999-2002* caused and continue to cause serious prejudice to the interest of Brazil by suppressing upland cotton prices in the U.S., world and Brazilian markets for upland cotton in violation of Articles 5(c) and 6.3(c) of the SCM Agreement."[88]

- "First, I will discuss Brazil's present serious prejudice claims that relate to U.S. subsidies provided for the production, export and use of U.S. upland cotton during the period MY 1999-2002. The four-year period in which these subsidies were provided is *both the period of time covering the measures challenged by Brazil as well as the period of investigation to examine present serious prejudice caused by the U.S. subsidies under Articles 5(c) and 6.3 of the SCM Agreement*."[89]

68. Brazil's argument regarding the absence of a "temporal limitation" in paragraph 7.1107 is simply not credible. Rather, the more logical explanation is that the original panel was identifying in paragraph 7.1107 the types of measures at issue in the case of Brazil's "present" serious prejudice claims – specifically, payments and, thus, the application of the "legislative and regulatory provisions" providing for such payments. The original panel then went on to explain and address the *specific* payments (*i.e.*, application of the "legislative and regulatory provisions" in particular years) that were subject to the claims of "present" serious prejudice.

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[83] Brazil's 9 September 2003 Further Submission, para. 9 (emphasis added).
[84] Brazil's 9 September 2003 Further Submission, para. 14 (emphasis added).
[85] Brazil's 9 September 2003 Further Submission, para. 71 (emphasis added).
[86] Brazil's 9 September 2003 Further Submission, para. 100 (emphasis added).
[87] Brazil's 9 September 2003 Further Submission, para. 104 (emphasis added).
[88] Brazil's 9 September 2003 Further Submission, para. 471 (emphasis added).
[89] Brazil's 7 October 2003 Second Statement at First Panel Meeting, para. 3 (emphasis added).

69. Third, Brazil argues that MY 1999-2002 was simply a "reference period" and did not "circumscribe[] the *measures* involved in Brazil's present serious prejudice claims."[90] This is directly contradicted by Brazil's own repeated reference to "subsidies provided in MY 1999-2002" as the measures subject to its "present" serious prejudice claims, as well as its own *express* acknowledgment that:

> Brazil's present serious prejudice claims . . . relate to U.S. subsidies provided for the production, export and use of U.S. upland cotton during the period MY 1999-2002. The four-year period in which these subsidies were provided is *both the period of time covering the measures challenged by Brazil as well as the period of investigation to examine present serious prejudice caused by the U.S. subsidies under Articles 5(c) and 6.3 of the SCM Agreement*."[91]

70. Fourth, Brazil asserts as "evidence" that the "present" serious prejudice claims applied to programs, not payments, the fact that the original panel decided not to apply the precise quantification rules in Part V of the *SCM Agreement*. According to Brazil, "[i]f the original panel's findings had related to 'payments' alone, and not to the subsidy program, its reasoning would have been very different indeed."[92] Brazil's argument, again, makes little sense. As Brazil well knows, the original panel declined to apply the precise quantification rules in Part V because it found that this was not required in the case of *any* claims under Part III of the *SCM Agreement*, not because it was examining the effects of programs, as Brazil asserts:

> In view of the contrast in the text, context, legal nature and rationale of the provisions in Part III of the SCM Agreement relating to a multilateral assessment as to whether a Member is causing, through the use of any subsidy, "adverse effects" in the form of "serious prejudice to the interests of another Member" and Part V of the Agreement relating to obligations of a Member in conducting a unilateral countervailing duty investigations, we decline to transpose directly the quantitative focus and more detailed methodological obligations of Part V into the provisions of Part III of the SCM Agreement.[93]

71. Nor is it surprising that the original panel would have looked to how the Step 2, marketing loan, and counter-cyclical payment programs operate generally in assessing whether particular payments under those programs were causing adverse effects. Payments are the application of programs in particular circumstances. It is absurd for Brazil to suggest that a finding of "present" serious prejudice could only be understood to have been made with respect to specific payments, if the original panel had put on blinders regarding the structure, nature, and operation of programs pursuant to which the payments were provided.

72. Finally, Brazil again underscores the statement by the original panel that "[b]ecause the Panel's 'present' serious prejudice finding deal with the FSRI Act of 2002 and subsidies granted thereunder in MY 2002, the United States is obliged to take action concerning its present statutory and regulatory framework as a result of our 'present' serious prejudice finding."[94] As the United States has explained, however, Brazil's reliance on this language is misplaced. The panel states that its "present" serious prejudice findings "deal with" the statute; it does not state that it found the statutory provisions to be WTO-inconsistent, as such, as Brazil suggests. Indeed, the panel's statement is properly understood as reflecting the panel's view that payments under a program constitute programs "as applied" and, thus, a finding against payments is a finding against programs "as applied."

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[90] Brazil Responses to Panel Section A-C Questions, para. 136 (February 26, 2007).
[91] Brazil's 7 October 2003 Second Statement at First Panel Meeting, para. 3 (emphasis added).
[92] Brazil's 7 October 2003 Second Statement at First Panel Meeting, para. 96 (emphasis added).
[93] *Upland Cotton (Panel)*, para. 7.177.
[94] Brazil Submission Regarding U.S. Requests for Preliminary Rulings, para. 63.

73. Moreover, regarding the original panel's statement that the United States would be "obliged to take action concerning" the statutory/regulatory provisions as a result of the "present" serious prejudice finding, the United States notes, first, that this is not a recommendation[95] and Brazil has conceded as much.[96] Rather, this appears to be a statement of the original panel's views as to what would be a likely response of the United States to the recommendation that the original panel *did* make to remove the adverse effects of, or withdraw, the "subsidy" that the original panel had identified. And the United States did indeed take action to repeal the Step 2 program. While the original panel may have considered that the adverse effects of the "subsidy" it was examining would be eliminated through "action concerning" the statutory provisions authorizing the payments, this does not change the fact that the "subsidy" it was examining was a package of payments made in MY 1999-2002 under the Step 2, marketing loan, and counter-cyclical payment programs, and not the programs, as such, or the programs in addition to payments thereunder.

(3) Conclusion

74. As shown above and in the U.S. submissions, there is no basis for Brazil's efforts to rewrite the original panel report. Brazil demands that this Panel find that the original panel acted inappropriately; that the original panel disregarded the very matter that it expressly *recognized* Brazil as having presented[97] and made findings on different matters not before it without so much as an explanation or any identification of the legal basis for such action, and in complete disregard of the fact that similar action has been found impermissible in other disputes.[98] Moreover, Brazil asks the Panel to believe that the original panel made findings of WTO-inconsistency against certain programs, as such, and against payments allegedly mandated to be made in certain future years without even addressing the extensive arguments that the parties made in respect of those claims, and without making any of the factual findings that *Brazil* conceded would be necessary to support an affirmative finding of WTO-inconsistency.[99] Nothing in the original panel report compels such a result.

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[95] The original panel's recommendations simply provide, in relevant part, that "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'" subject to the conclusion in paragraph 8.1(g)(i). Paragraph 8.1(g)(i) provides that "the effect of the mandatory price-contingent United States subsidy measures – marketing loan programme *payments*, user marketing (Step 2) *payments*, MLA *payments* and CCP *payments* – is significant price suppression in the same world market within the meaning of Article 6.3(c) of the SCM Agreement constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*." *Upland Cotton (Panel)*, para. 8.1(g)(i).

[96] Brazil First Written Submission, para. 32.

[97] *Upland Cotton (Panel)*, para. 3.1(vi).

[98] *See e.g., Chile – Price Bands (AB)*, para. 173 (finding that, by making a finding on a mater that was not before it, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU.") *Chile – Price Bands (AB)*, para. 173.

[99] For example, in the case of its claims against the challenged programs, *per se*, Brazil asked the Panel "to find that the mandatory provisions of the 2002 FSRI Act and the 2000 ARP Act together with their implementing regulations, as listed above, *cannot be applied in a WTO consistent manner*." Brazil's 9 September 2003 Further Submission, para. 435-436. Explaining what this would mean in the context of this dispute, Brazil argued "[f]irst, the Panel needs to evaluate whether the U.S. subsidies will *necessarily threaten* to cause serious prejudice at price levels below the trigger prices of the U.S. subsidies. Second, the Panel needs to consider whether the U.S. subsidies threaten to cause serious prejudice *even at price levels at which only crop insurance subsidies and direct payments are made*." Brazil's 9 September 2003 Further Submission, para. 426 (emphasis added). The original panel did not conduct the requested evaluation and did not make the requested findings.

12. In paragraph 44 of its Rebuttal Submission, Brazil states:

> ***"Accordingly, there is no need for Brazil to challenge per se the FSRI Act of 2002. Nor does it assert an 'as applied' challenge to the FSRI Act of 2002. Rather, Brazil challenges the counter-cyclical and marketing loan programs in the FSRI Act of 2002 and the payments that such programmes require to U.S. upland cotton farmers, as they cause adverse effects." (emphasis added)***
>
> ***Could Brazil please explain:***
>
> ***a. How its claims against "programmes and payments... as they cause adverse effects" differ from claims against programmes as such?***
>
> ***b. How these claims differ from claims against programmes as applied?***

75. First, Brazil's response to these questions – in particular, its acknowledgment that there is no "practical difference between challenging the programs and payments, and challenging the programs as such" – confirm that Brazil is attempting to make an "as such" challenge without establishing any of the necessary facts. Again, the United States reiterates the Appellate Body's caution that:

> "[A]s such" challenges against a Member's measures in WTO dispute settlement proceedings are serious challenges. By definition, an "as such" claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations. In essence, complaining parties bringing 'as such' challenges seek to prevent Members *ex ante* from engaging in certain conduct.
>
> The implications of such challenges are obviously more far-reaching than "as applied" claims. We also expect that measures subject to 'as such' challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member's international obligations, including those found in the covered agreements, and that the enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged "as such.[100]

76. Consistent with the very "definition" of as such challenges, to successfully prosecute this type of challenge, a complaining party must show that "a Member's conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member's WTO obligations."[101] Brazil has recognized this both in this dispute[102] and others."[103] Brazil has argued that "[i]t is established under WTO law that a Member can only challenge measures

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[100] *U.S. – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.

[101] *U.S. – Argentina OCTG Sunset Reviews (AB)*, paras. 172.

[102] Brazil First Submission in Original Panel Proceding, para. 244 (citing *US – 1916 Act (AB)*, para. 88).

[103] *See e.g., Canada – Aircraft II (Panel)*, paras. 7.56-7.58 ("Given that Brazil's claims are in respect of the programmes as such, the mandatory/discretionary distinction would traditionally apply. . . .There is . . . no disagreement between the parties regarding the applicability of the mandatory/discretionary distinction.").

of another Member *per se* if such measures mandate a violation of the WTO Agreement."[104] The United States agrees fully.

77. Indeed, in the original proceeding, Brazil had argued that, in order to make an affirmative finding of WTO-inconsistency against the challenged programs, *per se*:

> [T]he Panel needs to evaluate whether the U.S. subsidies will *necessarily threaten to cause serious prejudice* at price levels below the trigger prices of the U.S. subsidies. Second, the Panel needs to consider whether the U.S. subsidies *threaten to cause serious prejudice even at price levels at which only crop insurance subsidies and direct payments are made*."[105]

78. Similarly, Brazil asked the Panel "to find that the mandatory provisions of the 2002 FSRI Act and the 2000 ARP Act together with their implementing regulations, as listed above, *cannot be applied in a WTO consistent manner*."[106]

79. The fact that the original panel neither conducted the requested evaluations, nor made any findings along the lines requested by Brazil confirms – once again – that the panel made no adverse effects finding with respect to the Step 2, marketing loan, and counter-cyclical payment programs as such (either alone or in addition to any payments). Moreover, Brazil's express acknowledgment of its obligations in making an as such claim in the original proceeding underscores the unreasonableness of its efforts to evade those obligations here.

80. Second, it is remarkable that having carefully set out "as applied" and "as such" claims in the original proceeding, Brazil now asserts that "serious prejudice claims are among those that cannot be readily classifiable as 'as such' and 'as applied.'"[107] Brazil asserted no difficulty in "classifying" the claims in the original proceeding. The original panel had no difficulty in resolving Brazil's claims as so "classified." And panels in other disputes have not had such difficulty either.[108] Brazil's assertion of such difficulties for the first time in this proceeding – and with the aim of impermissibly expanding the scope of this proceeding – are not credible.

13. In paragraph 45 of its Rebuttal Submission, Brazil refers to the failure of the United States "to implement the original recommendation of the DSB requiring the United States to take actions concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments".

a. Does Brazil consider that the statement in paragraph 7.1501 of the original panel report that "the United States is obliged to take action concerning its present statutory and regulatory framework..." forms an integral part of the recommendation made by the original panel in paragraph 8.3(d) of its report?

b. Does Brazil consider that the absence of actions by the United States "concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments" is in itself a sufficient basis

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[104] Brazil First Submission in Original Panel Proceding, para. 244 (citing *US – 1916 Act (AB)*, para. 88).

[105] Brazil Further Submission, para. 426 (9 September 2003) (emphasis added).

[106] Brazil Further Submission, para. 435-436 (9 September 2003).

[107] Brazil Responses to Panel Section A-C Questions, paras. 114 and 118 (February 26, 2007).

[108] *See e.g., Korea – Ships (Panel)*, para. 7.679 (examining serious prejudice from "a relative handful of individual subsidized transactions" and not the programs providing for the subsidization as such).

for this Panel to find that the United States has not complied with the DSB recommendation under Article 7.8 of the SCM Agreement?

c. Is there any difference, in Brazil's view, between, on the one hand, the nature of the action the United States was obliged to take with respect to its statutory and regulatory framework as a consequence of the recommendation in paragraph 8.3(d) of the original panel report and, on the other, the nature of the action the United States would have been obliged to take if the original panel had found that the relevant provisions of this statutory and regulatory framework were WTO-inconsistent as such?

81. The United States offers two comments in regard to Brazil's responses to these questions.

82. First, the United States notes that having conceded that the language in paragraph 7.1501 was *not* part of any recommendation by the original panel[109], Brazil now changes its position and asserts that "the statement in paragraph 7.1501 of the original panel report forms an integral part of the recommendation made by the original panel in paragraph 8.3(d) of its report."[110] Indeed, Brazil goes even further and argues now that the panel's recommendation required the United States to take "actions . . . 'concerning *its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments*'" even though paragraph 7.1501 states no such thing.[111]

83. These assertions are fundamentally at odds with DSU Article 19.1. Article 19.1 of the DSU controls on the question of the recommendations that a panel can make where it "concludes that a measure is inconsistent with a covered agreement." In those circumstances, the panel "*shall* recommend that the Member concerned bring the measure into conformity with that agreement." The term "shall" confirms that this is the *required* recommendation; a panel is not free to recommend something else. Contrary to Brazil's allegations, the Appellate Body has clarified that panels do not have authority to dictate to Members the specific way to "bring the measure into conformity with that agreement."[112] It is left to the discretion of the Member concerned to determine how best to do so.

84. The same result obtains upon an analysis of Article 7.8 of the *SCM Agreement*, which establishes the obligations of a Member "where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy [of the responding Member] has resulted in adverse effects to the interests of [another] Member within the meaning of Article 5." In those circumstances, the responding Member may either "take appropriate steps to remove the adverse effects" or "withdraw the subsidy." Article 7.8 of *SCM Agreement* does not provide that a panel may dictate precisely how the Member is to meet these obligations. And, indeed, were a panel to do so, it would raise serious concerns under that provision, Article 3.2 of the DSU, which provides that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements," and Article 19.2 of the DSU, which provides that "in [its] findings and recommendations, the panel . . . cannot add to or diminish the rights and obligations provided in the covered agreements."

85. Thus, the United States does not consider that it is appropriate to interpret the language in paragraph 7.1501 in the manner asserted by Brazil, which would attribute to the original panel action inconsistent with Article 19.1 of the DSU and Article 7.8 of the *SCM Agreement*. Rather, the

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[109] Brazil First Written Submission, para. 32.

[110] Brazil Responses to Panel Section A-C Questions, para. 119 (February 26, 2007).

[111] Brazil Responses to Panel Section A-C Questions, para. 120 (February 26, 2007).

[112] *See e.g., EC – Customs (AB)*, para. 134. Indeed, while Article 19.1 of the DSU permits panels to "suggest ways in which the Member concerned could implement the recommendations," it is clear from the text that such a suggestion is not a recommendation and is not binding.

United States considers that the more logical understanding of the language in paragraph 7.1501 is that it is a statement of the original panel's views as to what would be a likely response of the United States to implement the recommendation to remove the adverse effects of, or withdraw, the "subsidy" that the original panel had identified, particularly in light of the fact that the original panel was at the same time making a finding that the Step 2 program was a prohibited subsidy and so the United States would in fact be obliged to change its statutory and regulatory framework as part of its response to that prohibited subsidy finding.

86. Second, the United States disagrees with Brazil's assertion that "the action required by the United States would have been the same" if the recommendation in paragraph 8.3(d) of the panel report had applied to the Step 2, counter-cyclical payment, and marketing loan programs, as such, rather than against particular payments made under those programs in MY 1999-2002, as was the case. If the recommendation had applied to programs, as such, the "action required by the United States" would have been to either (a) withdraw the programs themselves or (b) remove the adverse effects of the programs. As the recommendation applied to certain payments made in MY 1999-2002, the "action required by the United States" was to either (a) withdraw the particular payments; or (b) remove the adverse effects of the specific payments. While it is conceivable that the United States could *choose* to take the same or similar steps in both cases, this does not mean that the "action required by the United States" would be the same.

14. Could Brazil please explain how this Panel should interpret the relationship between the three categories of measures identified in paragraph 3.1(v),(vii) and (viii) of the original panel report? Is it the view of Brazil that "subsidies provided" or "subsidies mandated to be provided" must be interpreted to encompass both payments of subsidies and the regulatory provisions pursuant to which such payments were "provided" or "mandated to be provided"?

87. Please see the U.S. comments regarding Brazil's response to Question 11 above. The United States notes, in addition, that Brazil provides no citation or other basis for its assertion that "the measures identified in paragraphs 3.1(vi) and 3.1(vii)" – *i.e.*, "U.S. subsidies provided during MY 1999-2002" and "U.S. subsidies mandated to be provided in MY 2003-2007" – "must be interpreted to encompass the statutory and legislative framework establishing the contested subsidy programs, as well as payments mandated by those programs."[113]

88. Brazil's argument is also inconsistent with its own clarification in the original proceeding that:

> Brazil's . . . Panel Request . . . challenges two types of domestic support 'measures' provided to upland cotton and various different types of export subsidy measures. The first type of domestic support "measure" is the *payment* of subsidies for the production and use of upland cotton. These *payments* were and continue to be made between MY 1999 to the present (and will be made through MY 2007) through the various statutory and regulatory instruments listed on pages 2-3 of Brazil's Panel Request. Brazil referred to these payments at pages 2-3 of the Panel Request as *'subsidies and domestic support provided under' or 'mandated to be provided' under the various listed statutory and regulatory instruments*. . . .Brazil's "Further Submission" on 9 September 2003 will provide considerable detail concerning the effects of the subsidies provided and mandated to be provided by the United States. *It is these effects in respect of which Brazil seeks relief with respect to the first type of domestic support measures.*
>
> A second type of domestic support "measure" challenged by Brazil are *legal instruments as such*. The "legislative and regulatory provisions, by number and

[113] Brazil Responses to Panel Section A-C Questions, para. 119 (February 26, 2007).

> letter, in respect of which Brazil seeks relief" are those involving the 2002 FSRI Act and the 2000 Agricultural Risk Protection Act . . . .[114]

89. Brazil's new argument is also inconsistent with the original panel's analysis of the subsidies subject to Brazil's "present" serious prejudice claims. As noted above, the original panel identified as the "challenged measures" that were alleged to be the "subsidies" for purposes of Brazil's "present" serious prejudice claims the following – "user marketing (Step 2) *payments* to domestic users and exporters; marketing loan programme *payments*; PFC *payments*; MLA *payments*; DP *payments*; CCP *payments*; crop insurance *payments*; and cottonseed *payments*."[115] The original panel found that these constituted "subsidies" within the meaning of Article 1 of the *SCM Agreement* because they were "financial contributions" (mostly in the form of "grants") conferring a "benefit."[116] The original panel did not consider whether the statutory/regulatory provisions authorizing these payments were also "subsidies."

90. Finally, Brazil's argument makes little sense in light of the fact that Brazil made separate claims of *threat* of serious prejudice "concerning selected provisions of the FSRI Act of 2002 and the ARP Act of 2000."[117] Brazil tries to explain this away by arguing that it was simply being "over-inclusive."[118] Brazil provides no explanation of why it would be "over-inclusive" in the case of its threat claims but not when it came to the "present" serious prejudice claims. These arguments are nothing more than *post hoc* attempts to change the claims Brazil presented in the original proceeding and the resolution thereof.

15. Does Brazil agree or disagree with the United States that the listing of certain legislative and regulatory provisions in paragraph 7.1107 of the original panel report reflects the original panel's view that "payments under a programme constitute programmes 'as applied'"? [Paragraphs 46-47 of the Rebuttal Submission of the United States]

91. For the reasons set out in prior U.S. submissions and the U.S. comments regarding Brazil's response to Question 11 above, there is no merit to Brazil's assertion that the original panel's finding of "present" serious prejudice applied to the Step 2, marketing loan, and counter-cyclical payment programs and all payments thereunder. The further bases asserted by Brazil in response to this question also fail to withstand scrutiny.

92. First, Brazil argues that "[t]he United States' 'as applied' argument incorrectly transforms the original panel's decision to use MY 2002, and the longer period of MY 1999 – MY 2002, as 'reference periods,' into a period that circumscribes the *measures* involved in Brazil's present serious prejudice claims."[119] Yet this is precisely what Brazil clarified in the resumed session of the first meeting with the panel in the original proceeding:

> First, I will discuss Brazil's present serious prejudice claims that relate to U.S. subsidies provided for the production, export and use of U.S. upland cotton during the period MY 1999-2002. *The four-year period in which these subsidies were provided is both the period of time covering the measures challenged by Brazil as well as the*

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[114] Answers of Brazil to Questions from the Panel, para. 15-16 (11 August 2003).
[115] *Upland Cotton (Panel)*, para. 7.1120.
[116] *Upland Cotton (Panel)*, paras. 7.1112-7.1120.
[117] *Upland Cotton (Panel)*, para. 3.1(viii).
[118] Brazil Responses to Panel Section A-C Questions, para. 132 (February 26, 2007).
[119] Brazil Responses to Panel Section A-C Questions, para. 135(February 26, 2007).

> *period of investigation to examine present serious prejudice caused by the U.S. subsidies under Articles 5(c) and 6.3 of the SCM Agreement*.[120]

93. Brazil cannot explain this away by asserting that this was a unique statement by Brazil and not representative of Brazil's actual position (as it attempted to do in the meeting with the Panel). It is difficult to credit that in the presentation of it case to the original panel, Brazil would provide an incorrect statement on an issue as fundamental as the measures subject to its claims of "present" serious prejudice. In any event, other assertions by Brazil in the original proceeding fully confirm that the measures subject to Brazil's "present" serious prejudice claim – and, hence, the original panel's finding of "present" serious prejudice – were subsidies provided in MY 1999-2002, not subsidies allegedly "mandated" to be provided in later years and not the statutory/regulatory provisions authorizing the payments:

- "Brazil's actionable subsidy claims" comprise "first, claims of present serious prejudice resulting from subsidies *provided in MY 1999-2002*;"[121]

- "The U.S. subsidies *provided during MY 1999-2002* cause present significant price suppression in the world and Brazilian market, as well as in markets where Brazilian producers export."[122]

- "Brazil's first serious prejudice claim relates to the significant price suppression caused by U.S. actionable subsidies in violation of Articles 5(c) and 6.3(c) of the SCM Agreement. The measures involved are *subsidies provided in each year between MY 1999-2002, under the 1996 FAIR Act, the 2000 ARP Act and the 2002 FSRI Act*."[123]

- "The first [Brazilian adverse effects claim] is that the effect of the U.S. subsidies *provided during each of the MY 1999-2002* have caused and continue to cause significant price suppression in the U.S., Brazilian, and other world markets for upland cotton."[124]

- "Brazil sets forth evidence below from which the Panel may conclude that the effects of the *U.S. subsidies in MY 1999-2002* is significant price suppression in MY 1999-2002 in the U.S., world and Brazilian market, as well as in third country markets where Brazil exported its upland cotton."[125]

- "Based on the arguments and evidence presented above, Brazil requests that this Panel make the following findings and recommendations . . . The U.S. subsidies *provided during MY 1999-2002* caused and continue to cause serious prejudice to the interest of Brazil by suppressing upland cotton prices in the U.S., world and Brazilian markets for upland cotton in violation of Articles 5(c) and 6.3(c) of the SCM Agreement."[126]

94. Second, as discussed above, the fact that there is no "temporal limitation" in paragraph 7.1107 is not remarkable. That paragraph simply describes the types of measures at issue. In the very next

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[120] Brazil's 7 October 2003 Second Statement at First Panel Meeting, para. 3 (emphasis added).
[121] Brazil's 9 September 2003 Further Submission, para. 9 (emphasis added).
[122] Brazil's 9 September 2003 Further Submission, para. 14 (emphasis added).
[123] Brazil's 9 September 2003 Further Submission, para. 71 (emphasis added).
[124] Brazil's 9 September 2003 Further Submission, para. 100 (emphasis added).
[125] Brazil's 9 September 2003 Further Submission, para. 104 (emphasis added).
[126] Brazil's 9 September 2003 Further Submission, para. 471 (emphasis added).

paragraph – under the heading "Overview of Brazil's present serious prejudice claims under the *SCM Agreement* and GATT 1994" – the panel expressly clarified that "Brazil claims that United States *subsidies provided during MY 1999-2002* have caused, cause and continue to cause 'serious prejudice' to Brazil's interests by [*inter alia*] . . . significantly suppressing upland cotton prices in the United States, world and Brazilian markets in violation of Articles 5(c) and 6.3(c) of the SCM Agreement;"[127] This is consistent with paragraph 3.1(vi), in which the original panel set out the claim presented as follows:

> Brazil requests that the Panel make the following findings . . . concerning present serious prejudice to the interests of Brazil: the *subsidies provided during MY 1999-2002* caused and continue to cause serious prejudice to the interests of Brazil by suppressing upland cotton prices in the U.S., world, and Brazilian markets for upland cotton in violation of Articles 5(c) and 6.3(c) of the *SCM Agreement*.[128]

95. Similarly, there is no merit to Brazil's efforts to claim the absence of a temporal limitation in paragraph 8.1(g) as evidence that the finding of "present" serious prejudice applies to Step 2, marketing loan, and counter-cyclical programs and all payments thereunder. There was no reason for the panel to have included such a limitation in that paragraph given that:

- the panel had already explained earlier in its report what the "subsidies" were (certain payments)[129] and that Brazil's claims of serious prejudice only applied to "subsidies provided during MY 1999-2002;"[130] and

- the only "subsidies" that were even capable of causing "present" serious prejudice were the ones provided in MY 1999-2002 and not the ones allegedly "mandated" to be provided in MY 2003-2007.

The latter not only were *not* the subject of Brazil's present serious prejudice claims but also were not yet even in existence at that time. Thus, the original panel may reasonably have considered it unnecessary to specify that the particular payments to which the finding of "present" serious prejudice applied were the payments that had actually been made in MY 1999-2002.[131]

96. Third, Brazil argues that the use of the present tense in Article 8.1(g) – "the effect of mandatory price-contingent United States subsidy measures . . . *is* significant price suppression" – signals that the "subsidy measures" could not have been payments made in the past. This argument is flawed for a number of reasons. First, the original panel's conclusion in paragraph 7.1416, on which the finding in paragraph 8.1(g) is based, expressly states that "the effect ... is significant price suppression ... *in the period MY 1999-2002*." Thus, Brazil's argument does not even comport with the panel's own express conclusions.

97. Second, Brazil's argument assumes that payments made in the past could not be causing *present* significant price suppression. This is undermined by the Appellate Body finding precisely to the contrary – "the effects of a 'recurring' subsidy may continue after the year in which it is paid."[132]

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[127] *Upland Cotton (Panel)*, para. 7.1108.

[128] *Upland Cotton (Panel)*, para. 3.1(vi) (emphasis added).

[129] *Upland Cotton (Panel)*, para. 7.1120.

[130] *Upland Cotton (Panel)*, para. 7.1108.

[131] Indeed, the conclusion of the panel's report necessarily is based on and reiterates the panel's findings as set out previously in the report. *See Upland Cotton (Panel)*, para. 7.1416. The conclusion could not alter that previous finding since the panel then would not have set out the basic rationale behind its findings as required DSU Article 12.7.

[132] *Upland Cotton (AB)*, para. 484, although the Appellate Body did not explain that in fact in this instance the effects did indeed persist nor what these effects were nor how they persisted.

Indeed, it is surprising that Brazil would assert otherwise given that it forcefully argued before the Appellate Body that subsidies provided in MY1999-2002 must be found to be capable of having "present" effects at the time of the appeal (*i.e.*, in late 2004 to 2005) in order for it to have any remedy in the dispute. Brazil argued, specifically, that if the U.S. arguments to the contrary were credited "Brazil will have no remedy under Article 7.8 of the SCM Agreement for its serious prejudice, since it is allegedly legally impossible for the MY 2002 price-contingent recurring subsidies to have any adverse effects after 31 August 2003 (the close of MY 2002)."[133] It is difficult to see how Brazil could claim to have "no remedy" if, as Brazil attempts to argue now, the original panel had actually made a "serious prejudice" finding not only against the Step 2, marketing loan, and counter-cyclical payments made in MY 1999-2002 but also the programs themselves and all payments (including future payments) allegedly "mandated" to be made under the programs. Indeed, Brazil's argument only makes sense if – as is actually the case – the original panel's serious prejudice finding applied in respect of payments made in MY 1999-2002.

98. Fourth, Brazil argues again that the original panel would not have stated that the United States was obligated to take action concerning its "present statutory and regulatory framework" unless the statutory and regulatory framework was, as such, the measure subject to the original panel's finding of "present" serious prejudice. This is simply incorrect. Brazil attempts to conflate two distinct issues: (a) what measures were subject to findings/DSB recommendations and rulings and (b) what the United States could to do to implement the findings. The original panel may reasonably have considered that, because of both the export subsidy findings against the Step 2 program as such and the adverse effects findings against the Step 2, marketing loan, and counter-cyclical payment programs as applied in particular years, the United States would take action with respect to the statutory/regulatory framework. But this does not change the fact that the adverse effects findings were made with respect to the application of the Step 2, marketing loan, and counter-cyclical payment programs in MY 1999-2002, not the programs as such.

99. In conclusion, there is no basis for Brazil's reading of the original panel's report that would, rather, re-write what is found there. To the contrary, the evidence – including, *inter alia*, Brazil's own explanation of its claims in the original proceeding, the original panel's explanation of the claims presented to it, the original panel's resolution of those claims (and, in particular, its rejection or refusal to address all but the single "present" serious prejudice claim in respect of payments made in MY 1999-2002), the absence of factual findings that Brazil expressly stated would be *necessary* for an "as such" adverse effects finding against the Step 2, marketing loan, and counter-cyclical payment programs, and Brazil's own explanation to the Appellate Body that it would have a "remedy" only to the extent that payments made in MY 1999-2002 were considered to have continuing effects past the year in which they were made – confirm that the original panel made a finding of "present" serious prejudice with respect to payments made under the Step 2, marketing loan, and counter-cyclical payment programs in MY 1999-2002, not with respect to any future payments and not with respect to the programs *per se*.

100. Finally, there is no merit to Brazil's argument that "even assuming that the original panel's findings of present serious prejudice were 'as applied' findings limited to marketing loan and counter-cyclical payments made during a particular historical period (***quod non***), subsequent payments made under the same program are also subject to the United States' implementation obligations."[134] Brazil cites to *U.S. – Softwood Lumber IV (21.5)* to support this argument. However, that dispute said nothing about whether a complaining party could, in *post hoc* fashion, attempt to add to the measures found to be WTO-inconsistent by asserting that other measures not found to be WTO-inconsistent are similar. Rather, that dispute addressed the distinct issue of what measures could be considered to be part of the *measure taken to comply*. Future payments in MY 2003-2007 are not measures taken to comply with any recommendations and rulings. To the contrary, they were original measures that

[133] *Upland Cotton (AB)*, para. 529.
[134] Brazil Responses to Panel Section A-C Questions, para. 145 (February 26, 2007).

were challenged by Brazil but against which the original panel made no finding of WTO-inconsistency. The reasoning in *U.S. – Softwood Lumber IV (21.5)* does not allow Brazil to escape that fact.

101. There is similarly no merit to Brazil's assertion that, if its arguments were not credited, "WTO dispute would dissolve into a 'Groundhog Day' situation, with no remedy available to Members suffering adverse effects."[135] That is, in fact, an absurd assertion. Under the reasoning of the original panel, nothing prevents Members from challenging present adverse effects of past or current payments, threat of serious prejudice of past, current, or future payments, or present adverse effects or threat of serious prejudice from payment programs as such. Indeed, Brazil availed itself of many of those opportunities in the present dispute. The obligations of a responding Member depend on what the outcome is of those challenges. Where, as here, a complaining Member only *prevails* on one claim – that of "present" serious prejudice with respect to particular payments made in particular years – the Member is bound by that outcome. It cannot seek to avoid that outcome either through *post hoc* attempts to rewrite the original panel report, or by asserting in a compliance proceeding that other measures are like the ones subject to the original panel's findings.

16. Could Brazil clarify whether or not its claim in this Article 21.5 proceeding regarding a threat of serious prejudice caused by marketing loan and counter-cyclical payments is a claim with respect to the marketing loan and counter-cyclical payment programmes as such? [Paragraphs 237-314 of the First Written Submission of Brazil]

102. The United States offers two comments in respect of Brazil's response to this question. First, Brazil suggests that the Panel "follow[] the approach of the original panel, as upheld by the Appellate Body" in assessing Brazil contingent claim of threat of serious prejudice.[136] This suggestion is baseless, of course, because the original panel *declined* to address Brazil's claims of threat of serious prejudice both with respect to payments allegedly mandated to be provided in future marketing years under the Step 2, marketing loan, and counter-cyclical payment programs[137] as well as the "selected provisions of the FSRI Act of 2002 and the ARP Act of 2000" allegedly mandating those payments.[138] There was, thus, no "approach" taken by the original panel with respect to any threat claims and no such "approach" was upheld by the Appellate Body. The question of how to assess those claims is, thus, a question of first impression before this Panel.

103. Second, Brazil asserts that it "considers that serious prejudice claims are among those that cannot be readily classifiable as 'as such' and 'as applied.'"[139] The United States notes, again, that Brazil asserted no difficulty in "classifying" the claims in the original proceeding. The original panel had no difficulty in resolving Brazil's claims as so "classified." And panels in other disputes have not had such difficulty either.[140] Brazil's assertion of such difficulties for the first time in this proceeding are simply not credible.

Questions to the United States

17. The United States argues in paragraph 16 of its Rebuttal Submission that "[a]ccording to Brazil, its claims apply not only to the marketing loan and counter-cyclical payment programs, as such, but to the programs in addition to all payments

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[135] Brazil Responses to Panel Section A-C Questions, para. 149 (February 26, 2007).
[136] Brazil Responses to Panel Section A-C Questions, para. 152 (February 26, 2007).
[137] *Upland Cotton (Panel)*, para. 7.1503-7.1505.
[138] *Upland Cotton (Panel)*, para. 7.1511.
[139] Brazil Responses to Panel Section A-C Questions, para. 153 (February 26, 2007).
[140] *See e.g., Korea – Ships (Panel)*, para. 7.679 (examining serious prejudice from "a relative handful of individual subsidized transactions" and not the programs providing for the subsidization as such).

authorized under the programs" (original emphasis). The United States also argues in this respect that "it is abundantly clear that the original panel did not make any finding under Article 5(c) and 6.3(c) of the SCM Agreement against the marketing loan and counter-cyclical payment programs, as such, whether alone or in addition to payments". [Paragraph 43 of Rebuttal Submission of the United States]

a. How does the United States respond to the argument of Brazil that the United States mischaracterizes Brazil's claims in these proceedings in that Brazil is not challenging the subsidy programmes at issue as such? [Paragraph 31 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling; paragraph 33 of Rebuttal Submission of Brazil]

b. Could the United States also comment in this regard on the arguments in paragraph 31 of the Third Party Submission of Chad? Does the United States agree or disagree with the proposition that statutory or regulatory provisions can be challenged on an as applied basis and that Brazil's claims in the original proceeding "were as applied claims regarding measures that included legislative and regulatory provisions"?

18. The United States submits that the only measures subject to the DSB's recommendation under Article 7.8 of the SCM Agreement are payments made under the Step 2, marketing loan, and counter-cyclical payment programmes in 1999-2002. The United States also asserts, in this regard, that Brazil fails to submit evidence "as to the present effects, if any, of the measures that were subject to the original panel's actionable subsidy finding".

a. Do these statements mean that the United States considers that the DSB recommendation under Article 7.8 of the SCM Agreement only obliged the United States to ensure that payments made in 1999-2002 would no longer have any adverse effects?

b. Could the United States comment on the argument of New Zealand in paragraph 4.08 of the Third Party Submission of New Zealand?

19. Regarding the argument of the United States that the marketing loan and counter-cyclical payments programmes are not measures "taken to comply", is it the view of the United States that Article 21.5 of the DSU only applies to measures actually taken by a party to comply and does not apply to measures that a Member should have taken to comply?

20. How does the United States respond to the argument in the Third Party Submission of Japan that the Appellate Body report in EC – Bed Linen (Article 21.5 – India) does not support the argument of the United States that the marketing loan and counter-cyclical payments programmes are not within the scope of this Article 21.5 proceeding?

3. Claim of Brazil regarding the failure of the United States to comply with the DSB recommendations between 21 September 2005 and 1 August 2006

Questions to Brazil

21. Could Brazil please explain whether its request for a finding that the United States failed to comply with the DSB recommendations between 21 September 2005 and

1 August 2006 is supported by prior panel practice in Article 21.5 proceedings? [Paragraph 68 of the Rebuttal Submission of the United States]

104. Brazil argues that the Panel should attach significance to the fact that *Australia – Salmon (21.5)* involved a suspended arbitration and that the two disputes discussed by the United States – *EC – Bed Linen (21.5)* and *U.S. – Shrimp (21.5)* – did not. The United States recalls that in the more recent disputes discussed by the United States, the panels properly determined that it was appropriate to review the "existence" or "consistency with a covered agreement of measures taken to comply as of the date that the matter was referred to it, not as of the date of the end of any implementation period:

- In *United States – Shrimp (21.5)* the panel considered "that it should take into account all the relevant facts occurring until the date the matter was referred to it. By applying this approach, an Article 21.5 panel can reach a decision that favours a prompt settlement of the dispute. Indeed, it avoids situations where implementing measures allowing for compliance with the DSB recommendations and rulings would be disregarded simply because they occur after the end of the reasonable period of time.[141]

- In *EC – Bed Linen (21.5)*, the panel noted that "[i]t appears India considers that we must make two decisions on the existence or consistency of measures taken to comply – one as of the end of the reasonable period of time, and one as of the date of establishment of the Panel. We do not consider that it would be either necessary or appropriate, as a matter of judicial economy, to first examine whether compliance had occurred as of the end of the reasonable period of time, and second consider compliance as of the later date.[142]

105. The distinction that Brazil attempts to draw between the present dispute and *EC – Bed Linen (21.5)* and *U.S. – Shrimp (21.5)* is meaningless. In the *United States – Shrimp* dispute, the United States and Malaysia entered into a "sequencing agreement" very similar to the one that exists in this proceeding between Brazil and the United States which would permit Malaysia to request DSB authorization to suspend concessions pursuant to Article 22.6 of the DSU – and would permit the United States to refer the matter to arbitration pursuant to Article 22.6 – at any time following the completion of the Article 21.5 proceeding.[143] In *EC – Bed Linen (21.5)*, the EC and India entered into a similar sequencing agreement with virtually identical language.[144] Hence, the outcome of the *EC – Bed Linen* and *U.S. – Shrimp* Article 21.5 proceedings could have had *exactly* the same implication for an Article 22.6 arbitration as in this dispute or in *Australia – Salmon (21.5)*.

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[141] *United States – Shrimp (Panel) (21.5 – Malaysia)*, para. 5.12.

[142] *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.

[143] *See* Understanding between Malaysia and the United States Regarding Possible Proceedings under Articles 21 and 22 of the DSU, WT/DS58/16 (circulated January 12, 2000) ("If on the basis of the proceedings under Article 21.5 Malaysia decides to initiate proceedings under Article 22, the United States will not assert that Malaysia is precluded from obtaining DSB authorization because Malaysia's request was made outside the 30-day time period specified in the first sentence of Article 22.6. This is without prejudice to the rights of the United States to have the matter referred to arbitration in accordance with Article 22.6.")

[144] *See* Understanding between India and the European Communities Regarding Procedures under Articles 21 and 22 of the DSU, WT/DS141/11 (circulated September 21 2001) ("If on the basis of the results of proceedings under Article 21.5 of the DSU that might be initiated by India no later than 31 March 2002, India decides to initiate proceedings under Article 22 of the DSU, the EC will not assert that India is precluded from obtaining DSB authorization because India's request was made outside the 30 day time-period specified in the first sentence of Article 22.6 of the DSU.")

106. This fact did not compel the *EC – Bed Linen (21.5)* and *U.S. – Shrimp (21.5)* panels to assess compliance at of the moment of the termination of the reasonable period of time for implementation. And there is even less basis for such an assessment here given that this would require an assessment of a factual scenario that the parties agree no longer exists.

107. Considerations of suspension of concessions/countermeasures are not only inappropriate guides for a *compliance* panel's assessment of the matters referred to it but such considerations do not support Brazil's position regarding findings of compliance in past periods. Suspension of concessions/countermeasures are not available retroactively; they may only be invoked so long as a breach exists under the *present* factual circumstances.[145] The approach taken by the panels in *EC – Bed Linen (21.5)* and *U.S. – Shrimp (21.5)* respect and are fully consistent with this fact. The same approach is appropriate in this dispute.

22. How does Brazil respond to the argument of the European Communities that "the lack of positive action taken by the United States to comply with the panel and Appellate Body's findings and recommendations between the implementation date of 21 September 2005 and 31 July 2006 is not necessarily fatal to its defence"? [Paragraph 48 of the Third Party Submission of the European Communities]

108. The United States disagrees with Brazil's argument that – in all cases – some positive action by a responding Member is required in order to satisfy an obligation under Article 7.8 of the *SCM Agreement* to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy."

109. Contrary to Brazil's arguments, the ordinary meaning of the phrase "take appropriate steps" is sufficiently broad to encompass situations where changes are brought about not by particular actions by the responding Member itself but by other factors (for example, changes in market conditions, the passage of time, or some other extraneous change). As the United States explained in its response to Question 24 from the Panel, "take" means both "undertake and perform" – as Brazil asserts – but also "receive or obtain (something given, bestowed, or administered).[146] This term is, thus, entirely capable of encompassing both an active or a passive role on the part of a responding Member. "Steps" – especially in the sense of "taking steps" – refers to "an action, measure, or proceeding, esp. one of a series, which leads towards a result."[147] Together these terms recognize that some positive change must come about. But, they do not *require* that the change be solely attributable to actions by the responding Member.

110. Brazil not only reads "take" "steps" too narrowly but it reads out of Article 7.8 of the *SCM Agreement* the term "appropriate," which is the specific guidance provided in that provision as to the nature of the steps to be taken. "Appropriate" means, *inter alia*, be "specially suitable (*for, to*)" the removal of the adverse effects found to exist in the panel and Appellate Body reports.[148] There is no basis to exclude the possibility *a priori* that – given the particular adverse effects found to exist in the panel and Appellate Body reports – a responding Member may not need to take positive steps in order to "remove the adverse effects." Indeed, the original panel specifically allowed for such a possibility in recognizing that the effects of subsidies dissipate over time.[149] Under the particular facts

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[145] Thus, for example, Article 22.8 of the DSU clarifies that "[t]he suspension of concessions or other obligations shall be temporary and shall only be applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member that must implement recommend or rulings proves a solution to the nullification or impairment of benefits, or a mutually satisfactory solution is reached."

[146] *The New Shorter Oxford English Dictionary* at 3206, Volume 2, (1993 Edition) (Exhibit US-125).

[147] *The New Shorter Oxford English Dictionary* at 3050, Volume 2, (1993 Edition) (Exhibit US-126).

[148] *The New Shorter Oxford English Dictionary* at 103, Volume 1, (1993 Edition) (Exhibit US-128).

[149] *Upland Cotton (Panel)*, para. 7.1179, n. 1298 ("We do not disagree with the general proposition underlying . . . [the] "expensing" rules [in Part V of the *SCM Agreement*], which we understand to be that, with

of a dispute – for example, the present dispute in which the subsidies challenged and found to be WTO-inconsistent were payments made under the Step 2, marketing loan, and counter-cyclical payment programs in MY 1999-2002 – it may well be that any adverse effects have dissipated and no further steps need to be taken to remove them. In those circumstances, it could be "appropriate" for a Member not to take any further steps to remove the adverse effects. Certainly, Brazil has not shown that any adverse effects of the package of payments made in MY 1999-2002 remain today that the United States has an outstanding obligation to remove.

111. A similar analysis could apply with respect to the obligation to "withdraw the subsidy." As explained in the U.S. response to Question 24, "withdraw" means, among other things, "cause to decrease or disappear" and "take back or away (something bestowed or enjoyed)."[150] According to Article 7.8 of the *SCM Agreement*, the thing to be "caused to decrease or disappear" or "taken back or away" is the "subsidy." Depending on the circumstances, extraneous factors may have caused the subsidy to "decrease or disappear" or be "taken away" without specific action by the responding Member itself. There is no reason to assert that the Member could not, in such a circumstance, be found to have fulfilled its obligations under Article 7.8 of the *SCM Agreement*.

Question to the United States

23. Does the United States consider that the text of Article 21.5 of the DSU should be interpreted to mean that a compliance panel may only review the "existence" or "consistency" with a covered agreement of measures taken to comply as of the date that the matter was referred to the panel and not as of the date of the end of the implementation period? [Paragraph 68 of the Rebuttal Submission of the United States]

D. CLAIMS OF BRAZIL REGARDING PRESENT SERIOUS PREJUDICE

1. General

Questions to both parties

24. Could the parties explain how they interpret the phrases "take appropriate steps to remove the adverse effects" and" withdraw the subsidy" in Article 7.8 of the SCM Agreement?

112. The United States has addressed a number of the interpretive flaws in Brazil's analysis above in response to Question 22 and refers the Panel to the discussion there.

113. The United States notes, in addition, that Brazil is wrong to assert that the original findings of WTO-inconsistency apply with respect to the Step 2, marketing loan, and counter-cyclical payment programs and all payments thereunder. As such, Brazil's arguments about what "appropriate steps" were available to the United States within the meaning of Article 7.8 of the *SCM Agreement* are also off the mark.

114. The United States also disagrees with Brazil's assertion that the original panel *dictated* what the particular "appropriate steps" must be pursuant to Article 7.8 of the *SCM Agreement*.[151] Contrary

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the passage of time, a subsidy's effects may diminish. For example, a subsidy granted 9 or 10 years ago would indubitably be less likely to affect producers decisions now than it did 8 years ago.")

[150] *The New Shorter Oxford English Dictionary* at 3704, Volume 2, (1993 Edition) (Exhibit US-118).

[151] Brazil Responses to Panel Section D-E Questions, para. 7 (March 6, 2007) ("the original panel identified the particular *appropriate step* under Article 7.8 that the United States must take regarding the 'basket' of price-contingent and mandatory subsidies found to cause present significant price suppression. . . .").

to Brazil's assertion, nothing in Article 7.8 of the *SCM Agreement* – or any other provision of the WTO agreement – provides a reviewing panel with such authority. Indeed, unlike Article 4.7 of the *SCM Agreement* or Article 19.1 of the DSU, Article 7.8 does not even *discuss* the *recommendation* that a panel must make where it determines that a subsidy is causing adverse effects within the meaning of Article 5 of the *SCM Agreement*. It simply sets out the general obligation on a Member that find itself in the situation "where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy [of the Member] has resulted in adverse effects to the interests of [another] Member within the meaning of Article 5." This obligation is either to "take appropriate steps to remove the adverse effects" of the subsidy or "withdraw the subsidy." Nothing in Article 7.8 of the *SCM Agreement* binds the Members' discretion in this regard.

115. Moreover, the United States does not consider that the panel intended to dictate "appropriate steps" in noting that the United States would be "obliged to take action concerning" the statutory/regulatory provisions as a result of the "present" serious prejudice finding.[152] Indeed, Brazil has acknowledged before that this does not constitute a recommendation.[153] Rather, this appears to be a statement of the original panel's views as to what would be a likely response of the United States to the recommendation that the original panel *did* make (*i.e.*, to remove the adverse effects of, or withdraw, the "subsidy" that the original panel had identified). And, indeed, the United States did "take action concerning" the statutory/regulatory provisions when it terminated the Step 2 program.

116. While the original panel may have considered that the adverse effects of the "subsidy" it was examining would be eliminated through "action concerning" the statutory provisions authorizing the payments, this does not change the fact that the "subsidy" it was examining was a package of payments made in MY 1999-2002 under the Step 2, marketing loan, and counter-cyclical payment programs, and not the programs, as such, or the programs in addition to payments thereunder. Nor does it change the fact that – under Article 7.8 of the *SCM Agreement* – other actions or changes might also have been appropriate to "remove the adverse effects or . . . withdraw the subsidy"' subject to the conclusion in paragraph 8.1(g)(i) of the original panel report.

25. How do the parties interpret the relationship between Article 7.8 of the SCM Agreement and Article 21.5 of the DSU?

117. The United States agrees that Article 21.5 of the DSU permits review of a disagreement as to whether a Member has implemented the obligations set out in Article 7.8 of the *SCM Agreement*. However, the United States disagrees with Brazil's outline of the steps this Panel allegedly "must" take under these provisions. In particular, there is no basis for Brazil's assertion that "the compliance Panel, under Article 7.8 of the *SCM Agreement* and Article 21.5 of the DSU, *must first assess Brazil's claims that no measures taken to comply exist with respect to the period 21 September 2005 and 1 August 2006*"[154] As the United States has explained, neither Article 7.8 of the *SCM Agreement* nor Article 21.5 of the DSU – nor any other provision of the WTO agreement – requires making findings of compliance as of the end of the six-month period set out in Article 7.9 of the *SCM Agreement*. Moreover, prior panels in *EC – Bed Linen* and *U.S. – Shrimp* have properly determined that it was appropriate to review the "existence" or "consistency with a covered agreement" of measures taken to

[152] The original panel's recommendations simply provide, in relevant part, that "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'" subject to the conclusion in paragraph 8.1(g)(i). Paragraph 8.1(g)(i) provides that "the effect of the mandatory price-contingent United States subsidy measures – marketing loan programme *payments*, user marketing (Step 2) *payments*, MLA *payments* and CCP *payments* – is significant price suppression in the same world market within the meaning of Article 6.3(c) of the SCM Agreement constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*." *Upland Cotton (Panel)*, para. 8.1(g)(i).

[153] Brazil First Written Submission, para. 32.

[154] Brazil Responses to Panel Section D-E Questions, para. 19 (March 6, 2007) (emphasis added).

comply as of the date that the matter was referred to it, not as of the date of the end of any implementation period.[155] As discussed above, this approach is equally appropriate here (if not more so given that the parties agree that the facts and circumstances have changed since the end of the six-month period set out in Article 7.9 of the *SCM Agreement*).

26. Could the parties explain whether they agree or disagree with the arguments of New Zealand in its Third Party Submission that Article 7.8 of the SCM Agreement has certain consequences for the burden of proof in an Article 21.5 proceeding? [Paragraphs 5.04-5.06 of the Third party Submission of New Zealand]

27. Could the parties comment on the following statement of the European Communities:

> ***"The text of Article 7.8 of the SCM Agreement does not state expressly that a Member that has been requested by the DSB to implement its recommendations and rulings under Article 7.8 of the SCM Agreement has to do anything" (original emphasis)***

118. Please see the U.S. comments regarding Brazil's response to Questions 22 and 24 above.

28. The parties present divergent views with respect to the relevant marketing year to be considered by the panel in its analysis of Brazil's serious prejudice claims.

a. Could the parties explain what they consider to be the relevant legal considerations by which the Panel should be guided in determining whether MY 2005 or MY 2006 is the appropriate marketing year?

119. Brazil devotes its entire response to arguing that the proper "reference period" for the Panel's analysis is MY 2005. However, the Panel's question does not ask for an identification of a "reference period;" it asks what "the relevant marketing year" is for purposes of Brazil's serious prejudice claims. The United States maintains that the two are distinct questions.

120. On the question of the relevant marketing year for purposes of Brazil's serious prejudice claims, the United States maintains that, under the text of Articles 6.3(c) and 6.3(d), the proper inquiry is as to the *present* effect of any challenged measures. Accordingly, the present period (or marketing year) – in this case MY 2006 – is the relevant one. While the United States does not disagree that data from earlier marketing years may be considered where reliable data regarding MY 2006 is not available (as a *proxy)*, this cannot obscure the fact that the relevant query is as to effects given *present* facts and circumstances.

121. This is especially true given that – as Brazil finally acknowledges – a comparison to "historical data shows that there have been fairly significant shifts of prices, demand, [and] supply based on a number of different factors."[156] The United States appreciates this acknowledgment that, in fact, market and production conditions *have* changed substantially, especially since the termination of the Step 2 program. As the United States has explained, since the termination of the Step 2 program:

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[155] *United States – Shrimp (Panel) (21.5 – Malaysia)*, para. 5.12; *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.

[156] Brazil Responses to Panel Section D-E Questions, para. 24 (March 6, 2007) (emphasis added).

- U.S. exports for MY 2006 are *down 30 percent* from the levels observed at the same time last year.[157]

- Weekly cotton sales are *31 percent below* the 5-year average.[158]

- And total U.S. export commitments are currently approximately *40 percent below* last year's level and *27 percent* below the 5-year average.[159]

- Forecasts for the future are similarly gloomy. As the United States explained in the meeting with the Panel, in February of this year, USDA lowered the U.S. cotton export forecast for MY 2006 by nearly 8 percent, following a 2 percent downward revision in January.[160]

- These downward revisions are taking place at the same time that USDA estimates record *high* foreign cotton mill use, which means that U.S. share of foreign consumption is expected to drop from 16 percent in MY 2005 to 12 percent in MY 2006.

- Moreover, U.S. share of world exports is expected to drop from 40 percent in MY 2005 to 36 percent in MY 2006.

- U.S. domestic mill use for MY 2006 is projected at just 5 million bales, the lowest since MY 1931.

- And the declining demand for U.S. upland cotton is also being reflected in planting and production decisions. The annual survey of planting intentions conducted by the National Cotton Council indicates that U.S. upland cotton plantings are likely to be down an average of 14 percent in MY 2007 from 2006 levels.[161]

122. Under these conditions, it is the historical data that Brazil presses that should be viewed with caution. Whatever the data say about any effects that existed in the historical period is unlikely to be true under the very different conditions that exist at present. While the Panel may – in some cases – have to rely on that data because reliable or complete data does not exist for the present marketing year, it is appropriate to keep in mind the different conditions that exist at present in assessing Brazil's claims.

b. Do the parties agree or disagree with the argument of the European Communities that in a dispute involving a claim of present serious prejudice the parties must provide the "most recent reasonably available" data? [Paragraphs 43 and 54-55 of the Third Party Submission of the European Communities]

123. Please see the U.S. response to Question 28 and comments above regarding Brazil's response to Question 28(a).

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[157] Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).
[158] Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).
[159] Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).
[160] February 2007 World Agricultural Supply and Demand Estimates (WASDE) Report (Exhibit US-114).
[161] National Cotton Council Planting Intentions Survey MY 2007 (Exhibit US-115).

Questions to the United States

29. Does the United States contest the fact that a "strong positive relationship between upland cotton (base acre) producers receiving annual payments and upland cotton production" exists?[162] In particular, does the US disagree with the following statements[163]:

- ***a very large proportion of farms with upland cotton base acres continue to plant upland cotton in the year of payment;***

- ***the overwhelming majority of farms enrolled in the programs which plant upland cotton also hold upland cotton base;***

Question to Brazil

30. How does Brazil respond to the argument of the United States that "whether or not the marketing loan and counter-cyclical payment programs or payments under the programs cause significant price suppression is a question of first impression"? [Rebuttal Submission of the United States, paragraph 219]

124. The United States welcomes Brazil's acknowledgment that whether or not the marketing loan and counter-cyclical payment programs or payments under the programs cause significant price suppression is a question of first impression. The United States respectfully requests that the Panel bear this in mind as it addresses Brazil's repeated assertions that the U.S. arguments have all been rejected – and the issues before this Panel have all been decided – by the original panel.

125. The United States does offer two brief clarifications, however, in this regard. First, contrary to Brazil's assertions, the United States does not take the position that all of the findings of the original panel are "irrelevant." Indeed, Brazil's failure to provide even a single citation to a U.S. submission in support of this assertion confirms that it is unfounded.

126. Second, Brazil assumes that the sole reason that the question above is one of first impression is because the original panel did not consider whether *these particular measures* caused significant price suppression. This is not the only basis. The original panel also did not consider what the effects of any measures would be *in the present period and under the kind of market conditions that exist at present*. To the contrary, as discussed above, the measures subject to the original panel's analysis were certain payments made in MY 1999-2002 and the question examined by the panel was as to the effects that those payments had in MY 1999-2002. These limitations cannot be ignored in assessing the relevance of findings made by the original panel.

2. The structure, design and operation of the countercyclical and marketing loan payment programs

Question to the United States

31. Brazil claims that the structure, design and operation of US counter-cyclical payments stimulate US upland cotton production. Both Brazil and the United

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[162] ***[ORIGINAL FOOTNOTE: See para. 131 of Brazil's first submission. The Panel clarifies that this phrase refers to the fact that "the recipients who hold upland cotton base acres" and "those who continue to plant upland cotton" overlap with each other to a great extent. (See para. 7.637 of the report of the original panel.) The Panel understands that Brazil uses this phrase in the same sense.]***

[163] ***[ORIGINAL FOOTNOTE: These passages are reproduced from para. 7.636 of the report of the original panel.]***

States have referred to the Westcott (2005)[164] study to provide support for their opposing analysis of the possible production impact of counter-cyclical payments. In its rebuttal, Brazil quotes the following passage from Westcott:

> ***So where do CCPs fit compared with other farm commodity programs in the 2002 Farm Act? Marketing loans are fully coupled since they are available on all production and their link to market prices means they affect production decisions of farmers. Direct payments are mostly decoupled, since they are paid on a fixed, historically-based quantity rather than on current production and are not dependent on market prices or other factors that would affect production. …***
>
> ***CCPs fall in between these two programs, having some properties similar to mostly decoupled direct payments and other properties similar to fully coupled marketing loans. Like direct payments, CCPs do not depend on current production since they are paid on a fixed, historically-based quantity. However, similar to marketing loans, CCPs are linked to market prices so there may be some influence on current production decisions of farmers, which would potentially make CCPs at least partially or somewhat coupled.***

a. Does the United States agree with this characterization of the CCP?

b. How would the United States respond to the argument that, by design, counter-cyclical payments are in some measure coupled to production decisions because part of the payments is contingent on the actual realization of market prices?

3. Economic simulation model

Question to the United States

32. Brazil has presented a partial equilibrium model to simulate the effects of eliminating US upland cotton payments, particularly the marketing loan and counter-cyclical payments. In both its submission and rebuttal, the United States has provided reactions to the simulation model.

a. Would it be accurate to describe the United States' response as constituting a general acceptance of the framework of analysis adopted by Brazil but contesting the assumptions made regarding the values of the parameters, the supply and demand elasticities and the "coupling factor", used in the model? (The coupling factor is the amount by which the expected price is increased by each dollar per unit of subsidy payments.)

b. In its First Written Submission and Rebuttal Submission, the United States uses the same value of 1 that Brazil adopts for the coupling factor assigned to marketing loan payments. Does this imply an acceptance by the United States that, by design, marketing loan payments provide a one-for-one incentive to upland cotton production?

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[164] ***[ORIGINAL FOOTNOTE: Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" (Exhibit US-35).]***

c. In its First Written Submission and Rebuttal Submission, the United States used a non-zero value of 0.25 (not much lower from the 0.4 that Brazil adopts) for the coupling factor assigned to counter-cyclical payments. Does this imply an acceptance by the United States that, by design, counter-cyclical payments are partially tied to upland cotton production, and of a magnitude (25 cents to a dollar of counter-cyclical payments) not very far from Brazil's own estimate (of 40 cents to a dollar of counter-cyclical payments)?

E. EXPORT CREDIT GUARANTEES

1. Permissibility of an *a contrario* interpretation of item (j) of the Illustrative List

Questions to the United States

33. Please discuss whether (and if so, how) the panel rulings in Korea – Vessels and Brazil – Aircraft (21.5) (I and II) affect the United States' approach to the interpretation of the relationship between item (j) of the Illustrative List and Article 3.1(a) of the SCM Agreement.

34. Does the United States considers that item (j) of the Illustrative List is one of the provisions to which footnote 5 of the SCM Agreement applies? What impact does this have for the United States' interpretation of the interaction between item (j) of the Illustrative List and Article 3.1(a) of the SCM Agreement?

35. How does the United States address Brazil's argument that permitting an a contrario reading of item (j) would prevent a Member from challenging specific export credit guarantees or cohorts of such guarantees granted by a Member, as opposed to export credit guarantee programs [see paragraphs 472 ff. of Brazil's Rebuttal].

Questions to Brazil

36. What is Brazil's reading of the Appellate Body's statement in paragraph 80 of its Report in Brazil – Aircraft (21.5) that it "... would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List"? Should the Panel take this statement into account in deciding whether item (j) can be interpreted* a contrario*?

127. Brazil's response to this question does not withstand scrutiny. Nor is Brazil's response credible in light of the directly contradictory positions taken by Brazil where its measures were at issue and an *a contrario* interpretation of item (k) would have accrued to its benefit.

128. The United States recalls that in *Brazil – Aircraft (21.5)*, Brazil expressly argued that an *a contrario* interpretation of items in the Illustrative List was possible entirely separate from any application of footnote 5 of the *SCM Agreement*.[165] Following from this, the Appellate Body noted that it was not interpreting footnote 5 but that it, nonetheless, was prepared to accept Brazil's argument that the first paragraph of item (k) could be read *a contrario* to determine when measures

[165] *Brazil – Aircraft (21.5) (AB)*, para. 57 ("Brazil emphasizes, first of all, that its argument that subsidies under the revised PROEX are 'permitted' was not based on footnote 5 but rather on an 'a contrario' interpretation of the text of the first paragraph of item (k).")

are "justified."[166] The Appellate Body's silence as to footnote 5 simply derived from Brazil's own arguments in that dispute, it was not a signal that footnote 5 of the *SCM Agreement* does not apply to item (j) or item (k).

129. Moreover, the United States recalls, again, Brazil's argument in that dispute that footnote 5 *did* in fact apply to items (j) and (k) and that both contained the kind of limitation encompassed by footnote 5:

> Footnote 5 of the SCM Agreement specifies that Annex I contains not only a list of prohibited export subsidies, but also measures that do not constitute export subsidies, such as in items (b), (h), (i) and (k). Comparing the structure of item (j) and item (k), the two provisions share a similar structure in that they define practices that constitute prohibited export subsidies with *language that limits the scope of the definition. In the case of item (j) regarding export credit guarantee or insurance programs, the limiting language is "premium rates which are inadequate to cover the long-term operating costs and losses of the programs."*[167]

130. In light of those arguments, it is curious that Brazil now suggests that "item (k) is substantively distinct from other Illustrative List items" such that the Appellate Body's acceptance of an *a contrario* reading "would not extend beyond item (k)."[168] Brazil asserts that this is because the "material advantage" clause in the first paragraph of item (k) is allegedly "closely related" to the 'benefit' standard under Article 1.1. Brazil asserts that, by contrast, item (j) "tells one nothing about whether [export credit guarantees] confer benefits on recipients relative to market benchmarks" and would allegedly "eliminate any consideration of that 'benefit'." Importantly, none of this was set out *by the Appellate Body* to explain its decision to accept an *a contrario* interpretation of item (k). Instead, it is simply *post hoc* reasoning by Brazil to avoid application of the same interpretive considerations to the U.S. measures that Brazil would have benefitted from in *Brazil – Aircraft (21.5)* had it made the proper factual showing.

131. The Appellate Body did not indicate that the permissibility of an *a contrario* interpretation depended on the proximity of the standard set out in the Illustrative List to the one asserted by Brazil as being the *sole* standard of "benefit" under Article 1.1(a) of the *SCM Agreement*. Nor has the Appellate Body stated that "benefit" under Article 1.1(a) of the *SCM Agreement* must be understood to require an assessment of "benefit to the recipient" even where the drafters specifically *agreed* in the Illustrative List that a different approach is appropriate in assessing whether particular measures are prohibited export subsidies. Indeed, if it had done so, the Appellate Body would effectively have rendered inutile footnote 5 of the *SCM Agreement*. That footnote recognizes that – for provisions of the Illustrative List, which either explicitly or implicitly limit the measures that may be deemed export subsidies – it is the Illustrative List itself that definitely clarifies the conditions under which the listed measures will be considered "subsidies" within the meaning of Article 1.1 that are "export contingent" within the meaning of Article 3.1(a).

2. Outstanding export credit guarantees / measures taken to comply

Questions to Brazil

37. Brazil relies on the panel and Appellate Body Reports in Brazil – Aircraft (21.5) in support of its arguments that the United States has not "withdrawn" the subsidy

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[166] *Brazil – Aircraft (21.5) (AB)*, para. 80 (arguing that, if Brazil had made the correct factual showing under paragraph 1, "we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List.")

[167] *Brazil – Aircraft (AB)*, para. 19 (emphasis added).

[168] Brazil Responses to Panel Section D-E Questions, para. 40 (March 6, 2007) (emphasis added).

and is, "[a]t a minimum... prohibited from making 'payments' on claims against" any outstanding export credit guarantees [Paragraph 397 of Brazil's Rebuttal Submission]. Please discuss how the findings of the panel and Appellate Body in that case apply to the provision of the US export credit guarantees at issue.

132. As the United States explained in its oral statement before the Panel, the reasoning in the *Brazil – Aircraft (21.5)* dispute does *not* support Brazil's arguments that the United States has not "withdrawn" the subsidy with respect to the challenged export credit guarantees or Brazil's assertions about "performing on" export credit guarantees.

133. *Brazil – Aircraft (21.5)* involved the issuance by Brazil of WTO-inconsistent bonds. Brazil asserted the right, in that dispute, to continue to issue these WTO-inconsistent bonds even after the end of the reasonable period of time to "withdraw" them simply because it had entered into letters of commitment to provide them prior to the end of the reasonable period of time. The Appellate Body disagreed with Brazil. The Appellate Body noted that:

> The existence of a "subsidy" was not contested by Brazil in the proceedings before the original panel; and Brazil also conceded before the original panel that subsidies under PROEX were export contingent. The only issue before us now is whether the continued issuance of NTN-I bonds by Brazil after 18 November 1999, pursuant to letters of commitment issued before 18 November 1999, is consistent with the recommendation of the DSB to "withdraw" the prohibited export subsidies within 90 days.[169]

134. In the Appellate Body's view, continuing to provide WTO-inconsistent bonds on precisely the same terms and conditions as before was not consistent with Brazil's obligation to withdraw the export subsidy.

135. The U.S. export credit guarantees are not like Brazil's WTO-inconsistent bonds. Brazil's bonds continued to be prohibited export subsidies both before and after the date of implementation. By contrast, since July 1, 2005 (and, indeed, even before that time), U.S. export credit guarantees ceased being part of any program that is being operated at a "net cost to the government."[170] Thus, unlike Brazil, the United States has not attempted to continue providing prohibited export subsidies past the date of implementation. Unlike Brazil, the United States has withdrawn the subsidy that was found to exist with respect to any export credit guarantees outstanding at the end of the implementation period and all export credit guarantees issued thereafter.

3. "Benefit" under Articles 1 and 3.1(a) of the SCM Agreement

Question to the United States

38. Please discuss the relevance of the original panel's characterization, in paragraph 6.31 of its report, of Brazil's reliance on Articles 1 and 3.1(a) of the SCM Agreement as "not a separate claim, but merely another argument" on the United States' view in this respect (and notably the United States statement, in paragraph 67 of its First Written Submission, that "... the panel in the original proceeding specifically declined to address Brazil's alleged 'claim' under Articles 1 and 3.1(a) of the SCM Agreement")?

[169] *Brazil – Aircraft (21.5) (AB)*, para. 44.
[170] *Upland Cotton (Panel)*, para. 7.804.

Questions to Brazil

39. The Panel understands the United States to argue that it has relied on the Panel's findings under item (j) to implement the DSB recommendations with respect to export credit guarantees. How would this, in Brazil's view, affect the compliance panel's role in this proceeding? Was the United States also expected to implement changes in order to make its export credit guarantee programmes consistent with article 1.1 and 3.1(a) of the SCM Agreement, even though there were no findings of the original panel in this respect?

136. Brazil's assertion that the U.S. reliance on the original Panel's findings under item (j) "should not affect the compliance Panel's role in these Article 21.5 proceedings" is regrettable and incorrect. As the United States explained in response to Question 2, it is important to examine the DSB's recommendations and rulings – and the factual findings underpinning them – in order to determine whether the responding Member was, in fact, required to take measures to come into compliance and, if so, the scope of the obligation to do so.[171] Contrary to Brazil's assertion, this Panel's role specifically *includes* looking to the DSB's recommendations and rulings and the findings in the original dispute and determining whether the United States has heeded them. It clearly has done so here.

137. Brazil's asserts that, to the extent the United States "somehow relied" on the findings of the panel and Appellate Body in the original dispute, the United States is seeking to "escape the export subsidy disciplines of the *Agreement on Agriculture* and the *SCM Agreement*."[172] This accusation is baseless. Moreover, it assumes Brazil's own arguments that there is a separate standard for what is a prohibited export subsidy exists under Article 1.1 and 3.1(a) of the *SCM Agreement* and that different standard involves different implementation obligations from which the United States is seeking to "escape." That Brazil specifically made the same arguments to the panel and Appellate Body and that they nevertheless *declined* to address any separate "claims" or "arguments" under the allegedly different standard in Article 1.1 and 3.1(a) of the *SCM Agreement* is consistent with the fact that no such different standard exists.

40. In paragraph 410 of its Rebuttal, Brazil refers to paragraph. 7.398 of the Panel Report in Canada – Aircraft II. The Panel notes, however, that in the same paragraph, the Canada -- Aircraft II panel also indicated that there would be a "'benefit' when the cost-saving for a Bombardier customer for securing a loan with an IQ loan guarantee is not offset by IQ's fees". Please discuss, in light of this sentence, whether the Panel should read the Canada – Aircraft II panel as having rejected the "total cost of funds" as the proper benchmark under Article 14(c) of the SCM Agreement.

138. Brazil concedes in response to this question that the panel in *Canada – Aircraft II* did *not* reject the standard in Article 14(c) of the *SCM Agreement*, but that it simply found that – in the particular circumstances of that dispute – it was "safe to assume" that the test in Article 14(c) would be satisfied if the fees charged for the IQ loan guarantees were not "market based."[173] In fact, even while the panel asserted that it was "safe" to make such an assumption, the panel actually *required* Brazil to provide "arguments or information regarding what the [airline] might have had to pay on a *comparable commercial loan* absent the *IQ* loan guarantee."[174] The panel noted that:

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[171] *See e.g., United States – Final Countervailing Duty Determination (21.5 – Canada) (AB)*, para. 68.
[172] Brazil Responses to Panel Section D-E Questions, para. 48 (March 6, 2007) (emphasis added).
[173] *Canada-Aircraft II*, para. 7.399 (emphasis added).
[174] *Canada-Aircraft II*, para. 7.399 (emphasis added).

> Brazil has made no arguments to the effect that 'there is a difference between the amount that the [Mesa Air Group] pays on a loan guaranteed by [IQ] and the amount that the [Mesa Air Group] would pay on a comparable commercial loan absent the [IQ] guarantee', adjusted for any difference in fees. In particular, although Brazil does not deny that loan guarantees are available on a commercial basis, Brazil has failed to adduce any arguments or information regarding what Mesa Air Group might have had to pay on a comparable commercial loan absent the IQ loan guarantee.[175]

139. On the basis of *that* failure on the part of Brazil – as well as Brazil's failure to "make any other argument to the effect that IQ's fee for its loan guarantee to Mesa Air Group is not market based" – the panel "reject[ed] Brazil's claim that the IQ loan guarantee to Mesa Air Group confers a 'benefit.'"[176]

140. In this dispute, Brazil has again failed to make the kind of particularized showing contemplated under Article 14(c) of the *SCM Agreement*; it has not shown that the overall cost, including fees, of each of the loans guaranteed by the government is less than overall cost of a comparable commercial loan that could be obtained without a government guarantee. Nor has Brazil provided any basis why it would be "safe to assume" that the test in Article 14(c) would be satisfied in the present dispute simply by showing a difference in fees between GSM 102 guarantees and other commercially-available guarantees. Indeed, given the evidence submitted by the United States showing that – contrary to Brazil's assertions – foreign obligors are in fact able to obtain financing even without GSM 102 guarantees and on terms better than those available *with* GSM 102 guarantees, it is clear that it is *not* safe to make such an assumption here.

Questions to both parties

> ***41. What are the relevant considerations to guide the Panel in the selection of a market benchmark in this case?:***
>
> ***a. That the institution that provides the product is, on the whole, or on a program or product-specific basis, profitable? If so, is "any" profit sufficient to qualify an institution/ product/program as a relevant "market benchmark" or must the institution/product/program achieve a certain level of profit? Must the Panel conduct an examination of the level of profit achieved by commercial or private actors operating in the field?***
>
> ***b. Are the institution/program/products' stated goals relevant in assessing whether they can be used as a "market benchmark"?***
>
> ***c. Is the "governance" of the institution relevant?***
>
> ***d. What other factors are relevant?***

141. The United States disagrees with Brazil's arguments in response to this question on the threshold matter of *what benchmark* is needed for purposes of this case. Contrary to Brazil's assertions, the proper "benchmark" is not a commercially-available *guarantee* similar to GSM 102. This is not the relevant consideration under *either* item (j) of the Illustrative List or Article 14(c) of the *SCM Agreement*. Under item (j), to determine whether an export subsidy exists in the case of export credit guarantees, the proper consideration is whether premiums charged are inadequate to cover the long-term operating costs and losses of a program. That is the standard for assessing whether export credit guarantees are export subsidies for purposes of the *SCM Agreement*. Moreover,

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[175] *Canada-Aircraft II*, para. 7.399.
[176] *Canada-Aircraft II*, para. 7.399.

under Article 14(c), the proper consideration of "benefit" is whether and how much the guarantees affect the terms of the *underlying* loans. Brazil has no basis to ask this Panel to ignore all of the textual provisions dealing with export credit and loan guarantees and to adopt out of whole cloth a standard that looks simply to *fees* for different guarantees.

142. Indeed, as the United States has explained, Brazil's asserted approach would undermine the express recognition of Members in Article 14(c) of the *SCM Agreement* that provision of loan guarantees are fundamentally different from the provision of other government services.[177] In the case of government services, Article 14(d) applies and provides that a "benefit" may be calculated only where "the provision [of the service] is made for less than adequate remuneration" which "shall be determined in relation to prevailing market conditions for the . . . service in question in the country of provision (including price, quality, availability, marketability, transportation and other conditions of purchase. . .)." In that context, a comparison of fees for a government service against the fees charged in the market for a comparable service is the proper approach. However, Article 14(c) specifically *precludes* such an approach for loan guarantees. Recognizing that a loan guarantee is made for the sole purpose of *supporting a loan transaction* and becomes an integral part of that transaction, Article 14(c) requires an assessment of the total costs of the transaction to assess whether a "benefit" is actually conferred by the guarantee.

143. For these reasons, the United States considers that Brazil's arguments regarding the appropriate benchmark in this case are flawed at the outset. Nonetheless, Brazil's clarifications in response to this question are useful insomuch as they confirm the unreasonable – not to mention unsupported – approach advanced by Brazil.

144. Specifically, Brazil clarifies that it is advancing a one-way theory under which it may use government-provided guarantees as a benchmark to show that GSM 102 guarantees are *WTO-inconsistent* but the United States may never use guarantees provided by a government or so-called "public" entity to show that the GSM 102 guarantees are *WTO-consistent*. Brazil argues that no government/public entity could ever supply a market benchmark – regardless of its profitability, stated goals, or any other factor, and regardless of whether the particular product that provides the benchmark is offered on market terms. In Brazil's view, this is necessary "to avoid circumvention of the disciplines in the *SCM Agreement*."[178]

145. At the same time, however, Brazil states that it is "willing to accept" government-provided guarantees as a benchmark "[i]n the circumstances of these particular proceedings" to demonstrate WTO-inconsistency. Brazil then proceeds to ask the Panel to assume that Ex-Im Bank guarantees are provided at below-market rates and to find that any guarantees under the GSM 102 program confer a benefit simply if the fees for the particular guarantees are lower to any extent that the allegedly "comparable" Ex-Im Bank guarantees. This is nothing more than an exercise in circular logic. Brazil has not shown that (a) a consideration of fees alone is appropriate in determining whether export credit guarantees or loan guarantees confer a benefit; (b) Ex-Im Bank guarantees are provided at below-market rates; or (c) fees for GSM 102 guarantees would be provided at below-market rates simply if they were below the fees charged by another government agency.

146. Indeed, Brazil's approach would lead to absurd results. For example, unless *all government-provided guarantees* are provided at precisely the same level of fees, a complaining Member like Brazil could simply point to the guarantees with the highest fees, assert that these guarantees are themselves provided at below-market rates because they are government-provided, and then seek export subsidy findings with respect to all the rest simply on their relative position vis-a-vis the

[177] The "*financial contribution*" by the government is itself different in the two contexts. The "financial contribution," in the case of a loan guarantee is "the potential direct transfer[] of funds or liabilities." In the case of other kinds of services, the provision of the service itself is the "financial contribution."

[178] Brazil Responses to Panel Section D-E Questions, para. 62 (March 6, 2007)

guarantees with the highest fees. In fact, that is effectively what Brazil is seeking to do here. There is no basis in the text for Brazil's approach.

147. The unreasonableness of Brazil's approach confirms once again that Brazil is attempting to unilaterally reclassify export credit guarantees as *per se* prohibited export subsidies, in disregard of the specific provisions agreed to by the Members Articles 1.1, 3.1(a), and 3.2 of the *SCM Agreement* and item (j) of the Illustrative List, as well as Articles 10.1, 10.2 and 8 of the *Agreement on Agriculture*.

4. Claims under item (j) of the Illustrative List

Question to the United States

42. How does the United States address Brazil's arguments with respect to the MPRs under the OECD Arrangement?

Question to Brazil

43. What is Brazil's reaction to paragraph 25 of Japan's Third Party Submission?

148. Although the United States does not agree fully with Japan's analysis, it concurs that MPRs under the OECD Arrangement are not an appropriate consideration in assessing whether guarantees under the U.S. export credit guarantee programs have been provided consistently with item (j) of the Illustrative List. The United States does not consider that this turns on any factual distinctions between MPRs and fees charged under the fees charged under the GSM 102 program (though the United States agrees that there are many such distinctions that would render them not comparable, in any event). Rather, as the United States explained in its response to Question 42, item (j) of the *SCM Agreement* clearly provides that the proper comparison is between the "premium rates" charged under the particular programs and "the long-term operating costs and losses" of the programs themselves. The text of the *SCM Agreement* does *not* provide that the Arrangement on Officially Supported Export Credits sets the standard by which to assess whether export credit guarantees constitute export subsidies under item (j) of the *SCM Agreement*.

149. Thus, Brazil's assertion that its discussion of MPRs "offers the compliance Panel a *qualitative* reference point for appreciating the degree to which GSM 102 fees fall below internationally-accepted standards for [export credit guarantee] programs that are, according to the OECD, structured and designed to break even" – even if true (and given the factual distinctions between the two contexts, it is not) – is irrelevant. Item (j) looks to the programs themselves, not any alleged "internationally-accepted standards." This is in contrast to the very next item in the Illustrative List – item (k), dealing with export credits – which *does* contemplate consideration of "internationally-accepted standards." The absence of such a reference in item (j) confirms what the text already states – the appropriate comparison is between the premiums and long-term operating costs and losses of the actual programs themselves.

150. As discussed in the U.S. submissions, the current United States budget data now reflects that the U.S. export credit guarantees have been provided at premiums well in excess of the long-term operating costs of the programs. For cohorts 1992-2002, subsidy estimates and re-estimates by cohort, show a negative subsidy net of all re-estimates, of US$762,676,594. For cohorts 1992-2005, the figure is also a negative subsidy: US$166,549,780. These numbers indicate that the United States has earned a *profit* on its programs in these amounts. In addition, with respect to the only extant

export credit guarantee program (GSM-102), the budget data also reflects that for every fiscal year cohort since 1992 the net lifetime re-estimates have been negative.[179]

151. The current aggregate U.S. budget accounting data for all programs shows that, for the fourteen-year period commencing with fiscal year 1992, the export credit guarantee programs, under the fee structure *preceding* the changes implemented on July 1, 2005, received hundreds of millions of dollars more in premia and interest than required to pay out in operating costs and losses, including interest. The financial strength of the GSM 102 program has only been further *enhanced* by the changes made by the United States to implement the DSB's recommendations and rulings.

[179] 2007 U.S. Government Budget Credit Supplement: Table 8 – Loan Guarantees: Subsidy Reestimates, p. 43 http://www.whitehouse.gov/omb/budget/fy2007/pdf/cr_supp.pdf (Exhibit US-5).