

***UNITED STATES – SUBSIDIES ON UPLAND COTTON:***

**Recourse to Article 21.5 of the DSU by Brazil**

**(WT/DS267)**

**Comments of the United States of America  
on Brazil's Answers to the First Set of Questions from the Panel**

March 16, 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."<sup>1</sup> 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.<sup>2</sup> 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."<sup>3</sup> 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.

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<sup>1</sup> *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 108 (citing *Japan – Alcoholic Beverages (AB)*) at 108).

<sup>2</sup> Brazil Responses to Panel Section A-C Questions, para. 4 (February 26, 2007).

<sup>3</sup> Brazil Responses to Panel Section A-C Questions, para. 4 (February 26, 2007).

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."<sup>4</sup> 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 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.*"<sup>5</sup>

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."<sup>6</sup> 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."<sup>7</sup>

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.'"<sup>8</sup> 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

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<sup>4</sup> *U.S. – Softwood Lumber (21.5)*, para. 101 (emphasis in original).

<sup>5</sup> *U.S. – Softwood Lumber (21.5)*, para. 102 (emphasis added).

<sup>6</sup> *U.S. – Softwood Lumber (21.5)*, para. 102.

<sup>7</sup> *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 108 (citing *Japan – Alcoholic Beverages (AB)* at 108).

<sup>8</sup> Brazil Responses to Panel Section A-C Questions, para. 5 (February 26, 2007).

*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”<sup>9</sup> – 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 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*

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<sup>9</sup> Brazil Responses to Panel Section A-C Questions, para. 5 (February 26, 2007).

*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 than 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).<sup>10</sup> 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.<sup>11</sup>

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

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<sup>10</sup> See Panel's Question 35 to Brazil below and Brazil Rebuttal Submission, para. 472.

<sup>11</sup> 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.

purposes of WTO dispute settlement may encompass “[i]n principle, any act or omission attributable to a WTO Member. . . .”<sup>12</sup> 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.<sup>13</sup> 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,<sup>14</sup> 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 meaning of Article 10.1 of the Agreement on Agriculture and they are therefore inconsistent with Article 8 of the Agreement on Agriculture.<sup>15</sup>

14. As is clear from the language cited above, the original panel considered *guarantees* to

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<sup>12</sup> *United States – Corrosion-Resistant Steel (AB)*, para. 81.

<sup>13</sup> 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.

<sup>14</sup> 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.”

<sup>15</sup> *Upland Cotton (Panel)*, para. 8.1(d)(i) (emphasis added).

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*.<sup>16</sup>

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.*”<sup>17</sup> 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.”<sup>18</sup> 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

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<sup>16</sup> *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)

<sup>17</sup> Brazil Rebuttal Submission, para. 378 (emphasis added).

<sup>18</sup> Brazil Rebuttal Submission, para. 378 (emphasis added).



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 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.<sup>19</sup> Although the *EC – Bed Linen* dispute involved a situation where – except for a “minor change”<sup>20</sup> – 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 than 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

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<sup>19</sup> *EC – Bed Linen (AB) (21.5 – India)*, para. 86.

<sup>20</sup> 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.

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)").<sup>21</sup>

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.<sup>22</sup>

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,

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<sup>21</sup> 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 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)."

<sup>22</sup> See Brazil Rebuttal Submission, para.15.

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.

**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.”<sup>23</sup> 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.”<sup>24</sup> 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.”<sup>25</sup>

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.<sup>26</sup> As the United States has explained,<sup>27</sup> 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.”<sup>28</sup> 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.<sup>29</sup>

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

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<sup>23</sup> *Canada – Aircraft (21.5 Brazil) (AB)*, para. 36 (italics in original; underlining added).

<sup>24</sup> *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

<sup>25</sup> *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

<sup>26</sup> See e.g., Brazil’s assertions that *EC – Bed Linen*

<sup>27</sup> 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).

<sup>28</sup> Brazil Responses to Panel Section A-C Questions, para. 47 (February 26, 2007).

<sup>29</sup> *EC – Bed Linen (21.5 – India) (AB)*, paras. 32-35 and 87-95.

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 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."<sup>30</sup> 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."<sup>31</sup> 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

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<sup>30</sup> Brazil Responses to Panel Section A-C Questions, para. 46 (February 26, 2007).

<sup>31</sup> *Canada – Wheat (AB)*, para. 133.

complainant would not be prevented from raising the claim *in a subsequent proceeding*.<sup>32</sup> 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.”<sup>33</sup>

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*.”<sup>34</sup> 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*.<sup>35</sup> Brazil argues that the same reasoning applies here and militates in favor of finding the entire GSM 102 program to be the measure taken to comply in this dispute.<sup>36</sup> 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.<sup>37</sup>

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*.<sup>38</sup> 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

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<sup>32</sup> *EC – Bed Linen (AB)*, para. 96, n. 115.

<sup>33</sup> *EC – Bed Linen (21.5 – India) (AB)*, para. 78.

<sup>34</sup> Brazil Responses to Panel Section A-C Questions, para. 36 (February 26, 2007).

<sup>35</sup> Brazil Responses to Panel Section A-C Questions, para. 36 (February 26, 2007).

<sup>36</sup> Brazil Responses to Panel Section A-C Questions, para. 36 (February 26, 2007).

<sup>37</sup> *United States – Final Countervailing Duty Determination (21.5 – Canada) (AB)*, para. 68.

<sup>38</sup> *Canada – Aircraft (21.5) (AB)*, para. 2.

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.<sup>39</sup> Brazil correctly observes that those are not the precise circumstances at issue here.<sup>40</sup> 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.”<sup>41</sup> 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.”<sup>42</sup> 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 whether those claims “challenge[] a measure which is not a ‘measure taken to comply.’”<sup>43</sup> 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

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<sup>39</sup> Brazil Responses to Panel Section A-C Questions, paras. 48-51 (February 26, 2007).

<sup>40</sup> Brazil Responses to Panel Section A-C Questions, paras. 48-51 (February 26, 2007).

<sup>41</sup> Brazil Responses to Panel Section A-C Questions, para. 52 (February 26, 2007).

<sup>42</sup> Brazil Responses to Panel Section A-C Questions, para. 52 (February 26, 2007) (quoting U.S. Rebuttal Submission, para. 13, n. 19) (emphasis added).

<sup>43</sup> *EC – Bed Linen (21.5 – India) (AB)*, para. 78.

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]*
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."<sup>44</sup> 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."<sup>45</sup>

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 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

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<sup>44</sup> *Canada – Aircraft (21.5 Brazil) (AB)*, para. 36 (italics in original; underlining added).

<sup>45</sup> *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).



raised in Article 21.5 proceedings.”<sup>46</sup>

**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.”<sup>47</sup> 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.”<sup>48</sup> 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.”<sup>49</sup> 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?**

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<sup>46</sup> *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

<sup>47</sup> Brazil Responses to Panel Section A-C Questions, para. 71 (February 26, 2007).

<sup>48</sup> Brazil Responses to Panel Section A-C Questions, para. 70 (February 26, 2007).

<sup>49</sup> *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

**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]***

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<sup>50</sup> 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

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<sup>50</sup> Brazil's Answers to Additional Questions Following Second Panel Meeting, para. 31-32 (20 January 2004).

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."<sup>51</sup>

49. Brazil's newly-asserted approach would flout the "serious" nature of challenges to a Member's "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 well – will necessarily be inconsistent with that Member's WTO obligations."<sup>52</sup> 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."<sup>53</sup> 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

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<sup>51</sup> U.S. – Argentina *OCTG Sunset Reviews (AB)*, paras. 172-173.

<sup>52</sup> U.S. – Argentina *OCTG Sunset Reviews (AB)*, paras. 172-173.

<sup>53</sup> Brazil Responses to Panel Section A-C Questions, para. 84 (February 26, 2007).

“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 be 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<sup>54</sup> against payments allegedly “mandated” to be made in MY 2003-2007<sup>55</sup> and the legal regime providing for these payments.<sup>56</sup> 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.<sup>57</sup> Indeed, in the case of its threat claims against the 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.*”<sup>58</sup> This echoes precisely the

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<sup>54</sup> 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.

<sup>55</sup> *Upland Cotton (Panel)*, para. 3.1(vii).

<sup>56</sup> *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.

<sup>57</sup> 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 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.

<sup>58</sup> Brazil’s 9 September 2003 Further Submission, para. 435 (emphasis added).

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.*”<sup>59</sup>

53. Moreover, Brazil argued that payments could have adverse effects even when the programs that authorized them were no longer in existence<sup>60</sup> and that programs could have adverse effects even when no payments were being made under the programs.<sup>61</sup> 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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<sup>59</sup> *U.S. – Argentina OCTG Sunset Reviews (AB)*, paras. 172 (emphasis added).

<sup>60</sup> 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).

<sup>61</sup> 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”,<sup>62</sup>
- claims of threat of serious prejudice with respect to “U.S. subsidies mandated to be provided in MY 2003-2007;”<sup>63</sup> and
- *per se* claims of threat of serious prejudice<sup>64</sup> 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.<sup>65</sup>

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.”<sup>66</sup> 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*.<sup>67</sup>

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*.<sup>68</sup> The original panel then identified the “challenged measures” that were alleged to be the “subsidies” for purposes of that claim;<sup>69</sup> these were the “user marketing (Step 2) *payments* to domestic users and exporters; marketing loan

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<sup>62</sup> *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.

<sup>63</sup> *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.

<sup>64</sup> 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.

<sup>65</sup> *Upland Cotton (Panel)*, para. 3.1(viii).

<sup>66</sup> *Upland Cotton (Panel)*, para. 3.1(viii)

<sup>67</sup> *Upland Cotton (Panel)*, para. 3.1(vi).

<sup>68</sup> *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 subsidies<sup>1248</sup>; 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*.”)

<sup>69</sup> *Upland Cotton (Panel)*, para. 7.1112-7.1120.

programme payments; PFC payments; MLA payments; DP payments; CCP payments; crop insurance payments; and cottonseed payments.”<sup>70</sup> 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.”<sup>71</sup> The original panel did not consider whether the statutory/regulatory provisions authorizing these payments were also “subsidies.”

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*.<sup>72</sup>

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 <i>SCM Agreement</i>	<b>Finding</b> of WTO-inconsistency against Step 2, marketing loan, and counter-cyclical/market loss assistance programs	7.1416 8.1(g)(i)
“U.S. subsidies provided during MY 1999-2001”	“Present” serious prejudice under Articles 5(c) and 6.3(d) of the <i>SCM Agreement</i>	<b>Rejected</b> for failure to make <i>prima facie</i> case	7.1465 8.1(g)(ii)
“U.S. subsidies provided during MY 1999-2002”	“Present” serious prejudice under Articles XVI:1 and XVI:3 of the GATT 1994	<b>Declined</b> to address, <i>inter alia</i> , because of finding of inconsistency with Articles 5(c) and 6.3(c) of the <i>SCM Agreement</i>	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 <i>SCM Agreement</i>	<b>Declined</b> 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 <i>SCM Agreement</i>	7.1503

<sup>70</sup> *Upland Cotton (Panel)*, para. 7.1120.

<sup>71</sup> *Upland Cotton (Panel)*, paras. 7.1112-7.1120.

<sup>72</sup> *Upland Cotton (Panel)*, paras. 7.1416 (emphasis added).

“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 <i>SCM Agreement</i>	<b>Rejected</b> for failure to make <i>prima facie</i> 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	<b>Declined</b> to address, <i>inter alia</i> , because of finding of inconsistency with Articles 5(c) and 6.3(c) of the <i>SCM Agreement</i>	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 <i>SCM Agreement</i>	<b>Declined</b> 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 <i>SCM Agreement</i>	Same as above	7.1511
“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.”<sup>73</sup> 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.<sup>74</sup>

62. On 21 March 2005, the DSB adopted the Appellate Body report and the original panel report, as modified by the Appellate Body report.<sup>75</sup> 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.”<sup>76</sup>

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

<sup>73</sup> *Upland Cotton (AB)*, para. 496.

<sup>74</sup> *See e.g., Upland Cotton (AB)*, para. 529.

<sup>75</sup> *United States – Subsidies on Upland Cotton*, Action by the Dispute Settlement Body, WT/DS267/20.

<sup>76</sup> *Upland Cotton (Panel)*, para. 7.1416.



– 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”<sup>77</sup> and “section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users of upland cotton.”<sup>78</sup> 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, counter-cyclical and crop insurance ‘payments’ include the legislative and regulatory provisions authorizing those payments unless otherwise indicated.”<sup>79</sup> 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**

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<sup>77</sup> See *Upland Cotton (Panel)*, paras. 8.3(b) and 8.1(e).

<sup>78</sup> See *Upland Cotton (Panel)*, paras. 8.3(c) and 8.1(f).

<sup>79</sup> *Upland Cotton (Panel)*, para. 7.337(ix), n. 466.

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."<sup>80</sup> 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*;"<sup>81</sup> 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*."<sup>82</sup>

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:

- "Brazil's actionable subsidy claims" comprise "first, claims of present serious prejudice resulting from subsidies *provided in MY 1999-2002*;"<sup>83</sup>
- "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

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<sup>80</sup> Brazil Responses to Panel Section A-C Questions, para. 86-87 (February 26, 2007).

<sup>81</sup> *Upland Cotton (Panel)*, para. 7.1108.

<sup>82</sup> *Upland Cotton (Panel)*, para. 3.1(vi) (emphasis added).

<sup>83</sup> Brazil's 9 September 2003 Further Submission, para. 9 (emphasis added).

Brazilian producers export.”<sup>84</sup>

- “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.*”<sup>85</sup>
- “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.”<sup>86</sup>
- “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.”<sup>87</sup>
- “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.”<sup>88</sup>
- “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.*”<sup>89</sup>

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

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<sup>84</sup> Brazil’s 9 September 2003 Further Submission, para. 14 (emphasis added).

<sup>85</sup> Brazil’s 9 September 2003 Further Submission, para. 71 (emphasis added).

<sup>86</sup> Brazil’s 9 September 2003 Further Submission, para. 100 (emphasis added).

<sup>87</sup> Brazil’s 9 September 2003 Further Submission, para. 104 (emphasis added).

<sup>88</sup> Brazil’s 9 September 2003 Further Submission, para. 471 (emphasis added).

<sup>89</sup> Brazil’s 7 October 2003 Second Statement at First Panel Meeting, para. 3 (emphasis added).

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.

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."<sup>90</sup> 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.*<sup>91</sup>

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."<sup>92</sup> 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*.<sup>93</sup>

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<sup>90</sup> Brazil Responses to Panel Section A-C Questions, para. 136 (February 26, 2007).

<sup>91</sup> Brazil's 7 October 2003 Second Statement at First Panel Meeting, para. 3 (emphasis added).

<sup>92</sup> Brazil's 7 October 2003 Second Statement at First Panel Meeting, para. 96 (emphasis added).

<sup>93</sup> *Upland Cotton (Panel)*, para. 7.177.

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.”<sup>94</sup> 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.”

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<sup>95</sup> and Brazil has conceded as much.<sup>96</sup> 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

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<sup>94</sup> Brazil Submission Regarding U.S. Requests for Preliminary Rulings, para. 63.

<sup>95</sup> 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).

<sup>96</sup> Brazil First Written Submission, para. 32.

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<sup>97</sup> 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.<sup>98</sup> 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.<sup>99</sup> Nothing in the original panel report compels such a result.

**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?***

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<sup>97</sup> *Upland Cotton (Panel)*, para. 3.1(vi).

<sup>98</sup> See e.g., *Chile – Price Bands (AB)*, para. 173 (finding that, by making a finding on a matter that was not before it, the Panel acted *ultra petita* and inconsistently with Article 11 of the DSU.) *Chile – Price Bands (AB)*, para. 173.

<sup>99</sup> 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.

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."<sup>100</sup>

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."<sup>101</sup> Brazil has recognized this both in this dispute<sup>102</sup> and others."<sup>103</sup> Brazil has argued that "[i]t is established under WTO law that a Member can only challenge measures of another Member *per se* if such measures mandate a violation of the WTO Agreement."<sup>104</sup> 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*:

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<sup>100</sup> U.S. – Argentina OCTG Sunset Reviews (AB), paras. 172-173.

<sup>101</sup> U.S. – Argentina OCTG Sunset Reviews (AB), paras. 172.

<sup>102</sup> Brazil First Submission in Original Panel Proceeding, para. 244 (citing *US – 1916 Act (AB)*, para. 88).

<sup>103</sup> 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.").

<sup>104</sup> Brazil First Submission in Original Panel Proceeding, para. 244 (citing *US – 1916 Act (AB)*, para. 88).

[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.*"<sup>105</sup>

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.*"<sup>106</sup>

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.'"<sup>107</sup> 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.<sup>108</sup> 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**

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<sup>105</sup> Brazil Further Submission, para. 426 (9 September 2003) (emphasis added).

<sup>106</sup> Brazil Further Submission, para. 435-436 (9 September 2003).

<sup>107</sup> Brazil Responses to Panel Section A-C Questions, paras. 114 and 118 (February 26, 2007).

<sup>108</sup> 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).



***"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?***

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,<sup>109</sup> 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."<sup>110</sup> 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.<sup>111</sup>

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."<sup>112</sup> It is left to the discretion of the Member concerned to determine how best to do so.

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<sup>109</sup> Brazil First Written Submission, para. 32.

<sup>110</sup> Brazil Responses to Panel Section A-C Questions, para. 119 (February 26, 2007).

<sup>111</sup> Brazil Responses to Panel Section A-C Questions, para. 120 (February 26, 2007).

<sup>112</sup> 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.

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 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."<sup>113</sup>

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 letter, in respect of which Brazil seeks relief" are those involving the 2002 FSRI Act and the 2000 Agricultural Risk Protection Act . . . .<sup>114</sup>

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*."<sup>115</sup> 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."<sup>116</sup> The original panel did not consider whether the

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<sup>113</sup> Brazil Responses to Panel Section A-C Questions, para. 119 (February 26, 2007).

<sup>114</sup> Answers of Brazil to Questions from the Panel, para. 15-16 (11 August 2003).

<sup>115</sup> *Upland Cotton (Panel)*, para. 7.1120.

<sup>116</sup> *Upland Cotton (Panel)*, paras. 7.1112-7.1120.

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.”<sup>117</sup> Brazil tries to explain this away by arguing that it was simply being “over-inclusive.”<sup>118</sup> 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.”<sup>119</sup> 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 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.*<sup>120</sup>

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 its case to the original panel, Brazil

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<sup>117</sup> *Upland Cotton (Panel)*, para. 3.1(viii).

<sup>118</sup> Brazil Responses to Panel Section A-C Questions, para. 132 (February 26, 2007).

<sup>119</sup> Brazil Responses to Panel Section A-C Questions, para. 135 (February 26, 2007).

<sup>120</sup> Brazil's 7 October 2003 Second Statement at First Panel Meeting, para. 3 (emphasis added).

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*;<sup>121</sup>
- “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.”<sup>122</sup>
- “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*.”<sup>123</sup>
- “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.”<sup>124</sup>
- “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.”<sup>125</sup>
- “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

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<sup>121</sup> Brazil’s 9 September 2003 Further Submission, para. 9 (emphasis added).

<sup>122</sup> Brazil’s 9 September 2003 Further Submission, para. 14 (emphasis added).

<sup>123</sup> Brazil’s 9 September 2003 Further Submission, para. 71 (emphasis added).

<sup>124</sup> Brazil’s 9 September 2003 Further Submission, para. 100 (emphasis added).

<sup>125</sup> Brazil’s 9 September 2003 Further Submission, para. 104 (emphasis added).

SCM Agreement.”<sup>126</sup>

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 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*,”<sup>127</sup> 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*.<sup>128</sup>

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)<sup>129</sup> and that Brazil’s claims of serious prejudice only applied to “subsidies provided during MY 1999-2002;”<sup>130</sup> 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

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<sup>126</sup> Brazil’s 9 September 2003 Further Submission, para. 471 (emphasis added).

<sup>127</sup> *Upland Cotton (Panel)*, para. 7.1108.

<sup>128</sup> *Upland Cotton (Panel)*, para. 3.1(vi) (emphasis added).

<sup>129</sup> *Upland Cotton (Panel)*, para. 7.1120.

<sup>130</sup> *Upland Cotton (Panel)*, para. 7.1108.

prejudice applied were the payments that had actually been made in MY 1999-2002.<sup>131</sup>

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.”<sup>132</sup> Indeed, it is surprising that Brazil would assert otherwise given that it forcefully argued before the Appellate Body that subsidies provided in MY 1999-2002 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).”<sup>133</sup> 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 do to implement the findings. The original panel may reasonably have considered that, because of both the export subsidy findings against

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<sup>131</sup> 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.

<sup>132</sup> *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 .

<sup>133</sup> *Upland Cotton (AB)*, para. 529.

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."<sup>134</sup> 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 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."<sup>135</sup> 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

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<sup>134</sup> Brazil Responses to Panel Section A-C Questions, para. 145 (February 26, 2007).

<sup>135</sup> Brazil Responses to Panel Section A-C Questions, para. 149 (February 26, 2007).



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.<sup>136</sup> 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<sup>137</sup> as well as the “selected provisions of the FSRI Act of 2002 and the ARP Act of 2000” allegedly mandating those payments.<sup>138</sup> 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.’”<sup>139</sup> 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.<sup>140</sup> Brazil’s assertion of such difficulties for the first time in this proceeding are simply not credible.

### Questions to the United States

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<sup>136</sup> Brazil Responses to Panel Section A-C Questions, para. 152 (February 26, 2007).

<sup>137</sup> *Upland Cotton (Panel)*, para. 7.1503-7.1505.

<sup>138</sup> *Upland Cotton (Panel)*, para. 7.1511.

<sup>139</sup> Brazil Responses to Panel Section A-C Questions, para. 153 (February 26, 2007).

<sup>140</sup> 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).

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"?*
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.<sup>141</sup>
- 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.<sup>142</sup>

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.<sup>143</sup> In *EC – Bed Linen (21.5)*, the

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<sup>141</sup> *United States – Shrimp (Panel) (21.5 – Malaysia)*, para. 5.12.

<sup>142</sup> *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.

<sup>143</sup> 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

EC and India entered into a similar sequencing agreement with virtually identical language.<sup>144</sup> 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)*.

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.<sup>145</sup> 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

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matter referred to arbitration in accordance with Article 22.6.")

<sup>144</sup> 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.")

<sup>145</sup> 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."

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).”<sup>146</sup> 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.”<sup>147</sup> 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.<sup>148</sup> 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.<sup>149</sup> Under the particular facts 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).”<sup>150</sup> 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*.

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<sup>146</sup> *The New Shorter Oxford English Dictionary* at 3206, Volume 2, (1993 Edition) (Exhibit US-125).

<sup>147</sup> *The New Shorter Oxford English Dictionary* at 3050, Volume 2, (1993 Edition) (Exhibit US-126).

<sup>148</sup> *The New Shorter Oxford English Dictionary* at 103, Volume 1, (1993 Edition) (Exhibit US-128).

<sup>149</sup> *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 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.”)

<sup>150</sup> *The New Shorter Oxford English Dictionary* at 3704, Volume 2, (1993 Edition) (Exhibit US-118).

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*.<sup>151</sup> Contrary 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

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<sup>151</sup> 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. . . .").

“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.<sup>152</sup> Indeed, Brazil has acknowledged before that this does not constitute a recommendation.<sup>153</sup> 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*”<sup>154</sup> 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 comply as of the date that the

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<sup>152</sup> 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).

<sup>153</sup> Brazil First Written Submission, para. 32.

<sup>154</sup> Brazil Responses to Panel Section D-E Questions, para. 19 (March 6, 2007) (emphasis added).

matter was referred to it, not as of the date of the end of any implementation period.<sup>155</sup> 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]

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<sup>155</sup> *United States – Shrimp (Panel) (21.5 – Malaysia)*, para. 5.12; *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.



supply based on a number of different factors.”<sup>156</sup> 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:

- U.S. exports for MY 2006 are *down 30 percent* from the levels observed at the same time last year.<sup>157</sup>
- Weekly cotton sales are *31 percent below* the 5-year average.<sup>158</sup>
- And total U.S. export commitments are currently approximately *40 percent below* last year's level and *27 percent* below the 5-year average.<sup>159</sup>
- 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.<sup>160</sup>
- 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.<sup>161</sup>

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<sup>156</sup> Brazil Responses to Panel Section D-E Questions, para. 24 (March 6, 2007) (emphasis added).

<sup>157</sup> Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).

<sup>158</sup> Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).

<sup>159</sup> Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).

<sup>160</sup> February 2007 World Agricultural Supply and Demand Estimates (WASDE) Report (Exhibit US-114).

<sup>161</sup> National Cotton Council Planting Intentions Survey MY 2007 (Exhibit US-115).

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).

#### 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?<sup>162</sup> In particular, does the US disagree with the following statements:<sup>163</sup>*

- *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.

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<sup>162</sup> [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.]

<sup>163</sup> [ORIGINAL FOOTNOTE: These passages are reproduced from para. 7.636 of the report of 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 States have referred to the Westcott (2005)<sup>164</sup> 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.*

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<sup>164</sup> [ORIGINAL FOOTNOTE: Paul A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" (Exhibit US-35).]

- 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?*
  - 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*.<sup>165</sup> 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 are "justified."<sup>166</sup> 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

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<sup>165</sup> *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).")

<sup>166</sup> *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.")

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.”<sup>167</sup>

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).”<sup>168</sup> 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*

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<sup>167</sup> *Brazil – Aircraft (AB)*, para. 19 (emphasis added).

<sup>168</sup> Brazil Responses to Panel Section D-E Questions, para. 40 (March 6, 2007) (emphasis added).

*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.*

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.<sup>169</sup>

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."<sup>170</sup> 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**

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<sup>169</sup> *Brazil – Aircraft (21.5) (AB)*, para. 44.

<sup>170</sup> *Upland Cotton (Panel)*, para. 7.804.

### 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")?*

### 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.<sup>171</sup> 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 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*."<sup>172</sup> 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 --*

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<sup>171</sup> See e.g., *United States – Final Countervailing Duty Determination (21.5 – Canada) (AB)*, para. 68.

<sup>172</sup> Brazil Responses to Panel Section D-E Questions, para. 48 (March 6, 2007) (emphasis added).



*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.”<sup>173</sup> 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.”<sup>174</sup> The panel noted that:

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.<sup>175</sup>

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.’”<sup>176</sup>

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

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<sup>173</sup> *Canada-Aircraft II*, para. 7.399 (emphasis added).

<sup>174</sup> *Canada-Aircraft II*, para. 7.399 (emphasis added).

<sup>175</sup> *Canada-Aircraft II*, para. 7.399.

<sup>176</sup> *Canada-Aircraft II*, para. 7.399.

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, 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.<sup>177</sup> In the case of government services, Article 14(d) applies and provides that a "benefit" may be

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<sup>177</sup> 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."

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 inasmuch 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*.”<sup>178</sup>

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-

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<sup>178</sup> Brazil Responses to Panel Section D-E Questions, para. 62 (March 6, 2007)

provided, and then seek export subsidy findings with respect to all the rest simply on their relative position vis-a-vis the 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.<sup>179</sup>

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.

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<sup>179</sup> 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](http://www.whitehouse.gov/omb/budget/fy2007/pdf/cr_supp.pdf) (Exhibit US-5).