

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

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

**(WT/DS267)**

**Opening Statement of the United States of America  
at the Meeting of the Panel with the Parties**

February 27, 2007

## **I. INTRODUCTION AND OVERVIEW**

1. Mr. Chairman and members of the Panel, good morning. The United States welcomes this opportunity to present its views in this dispute. We appreciate the time and effort that the Panel and Secretariat have already invested in this dispute, and recognize that although this is the only meeting we will have with the Panel, the hard work is far from over.

2. A large volume of evidence and argument is before you in the parties' submissions. This morning, Brazil presented an additional large volume of evidence – much of it entirely new – in effect, submitting a second rebuttal submission not provided for in this Panel's working procedures. The United States presentation was, of course, prepared with regard to the evidence and arguments submitted by Brazil prior to today. So, it does not reflect Brazil's shifting arguments and evidence – including what appears to be a new theory of price suppression. Brazil now argues that it is “perceived or estimated unsold current-year stocks” that allow the United States to “drive” – or in the new Brazilian terminology, “lead” – world market prices. Before, including throughout the entire original proceeding when U.S. exports were increasing, Brazil's theory was that it was the *export* of U.S. production – allegedly flooding the market with “subsidy-fueled” U.S. production – that was causing price suppression. The facts have changed – U.S. export levels are no declining, as is U.S. export market share. So, Brazil's theory shifts to fit the facts. This new theory is no more persuasive than the last. And we would hope to have the opportunity to address it in greater detail in writing.

3. We will not review our submissions in detail today. Rather, we will discuss the applicable analytical framework and, as we do so, will discuss generally how the parties'

evidence and arguments are relevant. We hope this will assist the Panel in assessing the information and arguments before it.

## **II. MEASURES TAKEN TO COMPLY**

4. At the outset, the United States recalls that this is a compliance proceeding. The question for this Panel is whether Brazil has established that the U.S. measures taken to comply with the DSB's recommendations and rulings are inconsistent with the covered agreements cited by Brazil.<sup>1</sup> The burden is on Brazil to prove its claims in this regard.

5. We will begin by reviewing what the United States has done to comply.

- **First, the United States stopped operating the Supplier Credit Guarantee Program (or "SCGP").**

6. Of the three export credit guarantee programs examined in the original proceeding, the SCGP was the only one the use of which had *not* been in decline in recent years. Largely because it covered the risk of foreign importers themselves, not banks, the SCGP was also the only program experiencing significant claims on recently issued guarantees. By ceasing to operate the SCGP, the United States improved substantially the risk profile of the portfolio of programs examined by the original panel. There have been no *new* guarantees issued under the SCGP since October 1, 2005. Moreover, *all* guarantees under the program – regardless of when issued – have since expired.

- **Second, the United States ceased operating the GSM 103 program.**

7. Although use of the GSM 103 program had been declining in recent years, that program increased potential exposure to default because it authorized longer-term export credit

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<sup>1</sup>DSU Article 21.5.

guarantees with terms ranging from 3 to 10 years. By ceasing to operate the program, the United States also improved the overall risk profile of the portfolio of programs that was before the original panel.

- **Third, the United States overhauled GSM 102, the remaining export credit guarantee program.**

8. The budget data show – indisputably – that the premiums under the three U.S. export credit guarantee programs were more than adequate to cover their long-term operating costs and losses even before the United States took steps to implement the DSB’s recommendations and rulings. And, of the three programs originally examined, the GSM 102 program exhibited the lowest risk profile. In fact, the United States has not experienced a single claim on any GSM 102 guarantee since October 1, 2004. While there have been claims on guarantees issued in earlier fiscal years, the value of the claims is minuscule in comparison to the total value of guarantees in each year.

9. Nonetheless, to implement the DSB’s recommendations and rulings, the United States undertook substantial modifications to make the GSM 102 program even more risk-based. Tracking the factual findings made by the original panel, the United States imposed a new fee schedule under which higher fees are assessed for obligations in higher-risk countries. Fees now rise with each of six “eligible” risk categories and, within each category, with the term of the loan (up to a maximum of three years). As a result, fees have increased 46 percent on average over fiscal year 2004, the last year in which the old fee schedule applied. Further, the United States reclassified into an ineligible risk category twenty-two countries posing a higher risk of default that had been eligible for GSM 102 guarantees before July 1, 2005. All of these changes

increased the premiums and decreased the likelihood of incurring substantial operating costs and losses over the long-term for what had already been a profitable program.

- **Fourth, the United States eliminated the Step 2 program.**

10. Since fiscal year 2000, the Step 2 program had provided between approximately \$200 million and \$600 million dollars per year to merchandisers and manufacturers for the export and domestic use of U.S. upland cotton. The program was designed to provide support to U.S. producers by allowing them to compete for export and domestic sales where U.S. upland cotton prices were being undercut by cheaper foreign cotton. Since the termination of that program, demand for U.S. cotton has weakened. U.S. exports in MY 2006 are sharply lower than in recent years. U.S. exports for MY 2006 are *down 30 percent* from the levels observed at the same time last year.<sup>2</sup> Weekly cotton sales are *31 percent below* the 5-year average.<sup>3</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>4</sup> Looking to China – the single largest buyer of U.S. cotton – one finds that U.S. share of China's December imports was only 16.5 percent; less than *half* the average share held by the United States in the previous four years.<sup>5</sup> Indeed, U.S. share of China's imports in December were lower than at any time in *any* of the previous four years.<sup>6</sup>

11. And the picture continues to deteriorate as the marketing year progresses. This month, the U.S. Department of Agriculture ("USDA") lowered the U.S. cotton export forecast for MY 2006 by nearly 8 percent, following a 2 percent downward revision in January.<sup>7</sup> At the same

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<sup>2</sup>Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).

<sup>3</sup>Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).

<sup>4</sup>Weekly Export Performance Report for week ending February 15, 2007 (Exhibit US-113).

<sup>5</sup>U.S. Rebuttal Submission, paras. 207-209.

<sup>6</sup>U.S. Rebuttal Submission, paras. 207-209.

<sup>7</sup>February 2007 World Agricultural Supply and Demand Estimates (WASDE) Report (Exhibit US-114).

time, however, 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. And 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.

12. 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>8</sup>

13. In response to the changes implemented by the United States, Brazil raises a large number of claims, many of which aim to sweep into this proceeding measures that were *not* even found to be WTO-inconsistent and that are *not* measures taken to comply with any DSB recommendations and rulings. These include claims against GSM 102 guarantees in respect of pig meat and poultry meat exports and claims against the marketing loan and counter-cyclical payment programs plus all payments thereunder. Neither those claims, nor Brazil's claims regarding U.S. compliance in past periods, are properly within the scope of this Article 21.5 proceeding. The United States has therefore requested that they be rejected.

14. Brazil's claims suffer many other legal and factual flaws as well. We will turn to those issues next. My colleague, Mr. Bonner, will address Brazil's claims regarding export credit guarantees. We will then move to Brazil's actionable subsidy claims.

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<sup>8</sup>National Cotton Council Planting Intentions Survey MY 2007 (Exhibit US-115).

### III. CLAIMS IN RESPECT OF EXPORT CREDIT GUARANTEES FOR EXPORTS OF UNSCHEDULED PRODUCTS AND RICE

15. Thank you, Mr. Chairman, members of the Panel. Brazil pursues separate claims against (1) GSM 102 guarantees issued subsequent to July 1, 2005 (the date for implementation) and (2) GSM 102, GSM 103, and SCGP guarantees issued prior to that date.

#### A. GSM 102 Guarantees Issued Subsequent to July 1, 2005

16. In the case of the former, Brazil argues that, notwithstanding any U.S. measures taken to comply, GSM 102 guarantees are inconsistent with Articles 10.1 and 8 of the *Agreement on Agriculture* and 3.1(a) and 3.2 of the *SCM Agreement*. These claims turn largely on a single question – whether the GSM 102 guarantees are “export subsidies” under the *SCM Agreement*.

1. Item (j) of the Illustrative List Demonstrates Dispositively the Circumstances Under Which Export Credit Guarantees Are Considered Export Subsidies Within the Meaning of Articles 1 and 3.1(a)

17. In order to answer that question, it is first necessary to identify the proper standard for assessing whether export credit guarantees provide “export subsidies.” In the U.S. view, there is only one definition of “export subsidy” in the *SCM Agreement* and its elements are set out in Articles 1.1 and 3.1(a) of the *SCM Agreement*. Article 1.1 defines a “subsidy” as comprising two elements. In relevant part, the first element is a “financial contribution by a government” and the second element is a “benefit” conferred by virtue of the “financial contribution.” To constitute an “*export* subsidy,” moreover, a third element must be satisfied; namely, the subsidy “within the meaning of Article 1” must be “contingent . . . upon export performance.”

18. To show how *these* definitional elements apply in particular circumstances, Article 3.1(a) refers to the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*. In the case

of export credit guarantees, it is item (j) that applies. Item (j) provides that “export subsidies” exist where a government provides “export credit guarantee . . . programmes . . . at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.” It is on this basis that item (j) “illustrates” – or “clarifies” – those export credit guarantees that *are* export subsidies, as opposed to those export credit guarantees that are not.

19. This was how the original panel determined whether the GSM 102, GSM 103, and SCGP export credit guarantees were providing “export subsidies” in the original proceeding. This was also the basis for the DSB’s recommendations and rulings regarding the guarantees. And this was the analysis that the United States observed in implementing the DSB’s recommendations and rulings.

2. Guarantees Under the GSM 102 Program Are Provided At Premiums That Are More Than Adequate To Cover the Long-Term Operating Costs and Losses of the Program

20. The original panel explained that “in general terms, the test for determining whether an export credit guarantee programme satisfies the terms of item (j) is the net cost to the government, as the service provider, of providing the service under the export credit guarantee programmes.”<sup>9</sup> As discussed at the start of our presentation, the United States has taken a number of measures to increase the premiums and lower the potential long-term operating costs and losses of the portfolio of export credit guarantee programs examined by the original panel. The financial data in U.S. budget shows that the export credit guarantee programs operate now at entirely profitable levels.

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<sup>9</sup>*Upland Cotton (Panel)*, para. 7.804.

21. While U.S. budget data available in the period examined by the original panel indicated an overall loss of approximately \$230 million for the cohorts examined (1992-2002),<sup>10</sup> current budget data indicate a reversal in that result of approximately one billion dollars. ***The very same cohorts of guarantees show a profit exceeding \$762 million.***<sup>11</sup>

22. Recall that the U.S. budget data reflect initial estimates for each cohort of guarantees that are calculated on the basis of certain generic government-wide assumptions. The initial figures are then re-estimated periodically, a process in the U.S. federal accounting methodology that is specifically designed to capture actual program experience as each cohort ages. This means that although actual program experience *is* reflected in the U.S. budget data, it takes some time for the data to reflect an accurate picture of how each cohort is actually performing.

23. The United States anticipated in the original proceeding that the data would show this kind of result over time.<sup>12</sup> However, the data simply had not caught up to the reality at that point. The evidence now of the positive performance of the same cohorts initially examined by the original panel demonstrates the re-estimation process at work. The budget numbers, calculated on what Brazil has characterized as an “ideal basis,”<sup>13</sup> clearly show now that the premia charged before were adequate to cover long-term operating costs and losses. As the United States has since eliminated the two most risky programs, substantially increased its fees, and substantially reduced its risk-exposure to operating losses, the profitability of the only remaining export credit guarantee program is now even more assured.

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<sup>10</sup>*Upland Cotton (Panel)*, paras. 7.852, 7.53 and fn. 1025. See also, U.S. Answers to Panel Question 221(a) Following Second Panel Meeting (22 December 2003)

<sup>11</sup>U.S. First Written Submission, paras. 87-88.

<sup>12</sup>*Upland Cotton (Panel)*, para. 7.842, 7.843, 7.853, and fn. 1028.

<sup>13</sup>Statement of Brazil, First Panel Meeting, para. 129 (22 July 2003). Rebuttal Submission of Brazil, para. 112 (22 August 2003) (characterizing the Federal Credit Reform Act formula as “a true reflection of cost.”)

3. Articles 1.1 and 3.1(a) Do Not Establish A “Different Benchmark” From The One In Item (j) For Establishing Whether Export Credit Guarantees Are Export Subsidies

24. Brazil has provided no credible rebuttal to the U.S. evidence. It has concentrated its efforts, instead, on finding a “back-door” way to attack the guarantees. Toward this end, it has claimed an “entitlement” to challenge GSM 102 guarantees under the general definitional elements in Articles 1.1 and 3.1(a) and then, if it fails in that regard, to raise an argument under item (j) “in the alternative.”<sup>14</sup> Brazil’s approach is based on an incorrect interpretation of the *SCM Agreement*.

25. Specifically, Brazil assumes that “Articles 1.1/3.1(a) and item (j) offer . . . *different benchmarks* to demonstrate that a measure is an export subsidy.”<sup>15</sup> That assumption finds no support in the text of the *SCM Agreement*. To the contrary, Article 1 states that the definition of “subsidy” established therein applies “for purposes of this Agreement.” Nothing suggests that this definition ceases to apply at the threshold of Annex I, as Brazil’s argument indicates. Article 3.1(a) also clarifies that the measures illustrated in Annex I are subsidies “within the meaning of Article 1.” Similarly, the definition of “illustrate” confirms that item (j) demonstrates the application of the general definition in Articles 1.1 and 3.1(a) to export credit guarantees.<sup>16</sup> Item (j) would not “make clear” “elucidate” or “clarify” how the definition in Article 1.1 and 3.1(a) applies if it were to apply a “*different benchmark*[.]”<sup>17</sup> than the one in Articles 1.1 and 3.1(a). To the contrary, item (j)’s very *function* is to “make clear” those export

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<sup>14</sup>Brazil Rebuttal Submission, para.457.

<sup>15</sup>Brazil Rebuttal Submission, para.470 (emphasis in original).

<sup>16</sup>See U.S. First Written Submission, para. 69 and Oxford English Dictionary, p. 1311 (Exhibit US-24).

<sup>17</sup>Brazil Rebuttal Submission, para.470 (emphasis in original).

credit guarantees that are prohibited by virtue of the definition of export subsidy in Articles 1.1 and 3.1(a). This function would be frustrated if Brazil’s interpretation were accepted.

26. In fact, Brazil’s approach would lead to untenable results. For example, suppose that the Panel were to find that the export credit guarantees do *not* provide a “financial contribution” that confers a “benefit,” and, thus, are *not* “subsidies” under Article 1.1 or “export subsidies” within the meaning of Article 3.1(a). Under Brazil’s approach, the Panel could nonetheless find – in the “alternative” – that export credit guarantees constitute prohibited export *subsidies* under item (j). In other words, the guarantees could be found to be subsidies *without* meeting the definition of “subsidy” that expressly applies “for the purpose” of the whole *SCM Agreement* and notwithstanding that item (j) – the provision under which the finding is ultimately made – is supposed to be an “illustration” of what constitutes an export-contingent subsidy “within the meaning of Article 1.” The text cannot be read in a manner that is not consistent with its own terms.

27. Brazil does not address all of these arguments directly. Rather, its argument in response is that the U.S. approach would require what Brazil terms an “*a contrario*” reading of item (j). According to Brazil, footnote 5 of the *SCM Agreement* allegedly “definitively forecloses” such an interpretation.<sup>18</sup> With respect, this is incorrect. And Brazil has itself recognized as much in other disputes.<sup>19</sup>

28. There is nothing in the text to support Brazil’s position that footnote 5 would only permit a definitive reading of item (j) only if the latter contained an “affirmative statement” about when

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<sup>18</sup>Brazil Rebuttal Submission, para.563.

<sup>19</sup>See e.g., *Brazil – Aircraft (AB)*, paras. 14 and 19.

export subsidies do *not* exist.<sup>20</sup> Footnote 5 says nothing about an “affirmative statement”; it simply states that “[m]easures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.”

29. And an “affirmative statement” is not required under the ordinary meaning of the term “refer.” To the contrary, the ordinary meaning confirms that “referred to” can include measures that are either *expressly* or *implicitly* “referred to” as not constituting export subsidies.<sup>21</sup> Brazil explained to the Appellate Body, in *Brazil – Aircraft (21.5)* that item (j) contains just such an implicit reference.<sup>22</sup> Because Brazil ultimately argued that its legal theory in that dispute was grounded “on an ‘a contrario’ interpretation of the text of the first paragraph of item (k),” and not footnote 5, the Appellate Body did not interpret the latter provision. Nonetheless, it did indicate that it accepted Brazil’s argument that the first paragraph of item (k) could be read *a contrario* to determine when measures are “justified.”<sup>23</sup> That result is equally appropriate here.

30. Brazil’s interpretation of footnote 5 is undermined also by the negotiating history, which shows that Members agreed to delete from an earlier draft language that would have required an

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<sup>20</sup>See Brazil Rebuttal Submission, para. 465 and 467.

<sup>21</sup>See Oxford English Dictionary, p. 2520 (Exhibit US-116) (defining “refer” as, *inter alia*, “to make reference or allusion or direct the attention to something”) and Oxford English Dictionary, p. 57 (Exhibit US-117) (defining “allusion,” *inter alia*, as “[a] covert, passing, or indirect reference (to); *popularly* any reference to.”) (emphasis in original).

<sup>22</sup>*Brazil – Aircraft (AB)*, para. 19 (“Footnote 5 of the SCM Agreement specifies that Annex I contains not only a list of prohibited export subsidies, but also measures that do not constitute export subsidies, such as in items (b), (h), (i) and (k). Comparing the structure of item (j) and item (k), the two provisions share a similar structure in that they define practices that constitute prohibited export subsidies with *language that limits the scope of the definition. In the case of item (j) regarding export credit guarantee or insurance programs, the limiting language is ‘premium rates which are inadequate to cover the long-term operating costs and losses of the programs.’*”) (emphasis added).

<sup>23</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.”)

*express* reference in order for the provisions of the footnote to apply.<sup>24</sup> Moreover, that interpretation would – if applied – nullify or render redundant a number of provisions of the *SCM Agreement*, including footnote 5 itself. As the Appellate Body has explained, “[a]n interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility.”<sup>25</sup>

3. Brazil Has Not Shown That GSM 102 Guarantees Provide A “Benefit”

31. For the reasons discussed, the Panel’s analysis properly ends with an assessment under item (j). Any further examination, however, would only confirm that the GSM 102 guarantees are not prohibited export subsidies as Brazil fails to demonstrate any distinct “benefit” under Article 1.1(b). Indeed, Brazil attempts to show a “benefit” on a theory that, if credited, would undermine not only item (j) and other provisions of the *SCM Agreement* – for the reasons just discussed – but also the logic of Articles 1.1(a) and Article 14(c) of the *SCM Agreement*.

32. The United States notes that Article 14 does not apply directly in this context; it applies, instead, “for the purpose of Part V” of the *SCM Agreement*. Nonetheless, because it interprets and applies the definition of “benefit” set out in Article 1.1, it has been relied upon by the Appellate Body as important contextual guidance in interpreting “benefit”<sup>26</sup> and, indeed, it has been invoked by Brazil to justify its approach here.<sup>27</sup>

33. Article 14(c) provides that a government loan guarantee confers a benefit for countervailing duty purposes *only* where there is “a difference between the amount that the firm

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<sup>24</sup> Compare MTN.GNG/NG10/W/38/Rev. 2 (2 November 1990) and MTN.GNG/NG10/W/38/Rev. 3 (6 November 1990).

<sup>25</sup> *United States – Gasoline (AB)*, p. 23.

<sup>26</sup> *Canada – Aircraft (AB)*, para. 155.

<sup>27</sup> Brazil First Written Submission, paras. 371-375

receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee.” The “benefit” is measured as “the difference between these two amounts adjusted for any differences in fees.”

34. Article 14(c), thus, recognizes that the provision of a loan guarantee is fundamentally different from the provision of other government services. Indeed, 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.”

35. In the case of government services, Article 14(d) applies and provides that a “benefit” may be calculated only where “the provision [of the service] is made for less than adequate remuneration” which “shall be determined in relation to prevailing market conditions for the . . . service in question in the country of provision (including price, quality, availability, marketability, transportation and other conditions of purchase. . .).” In that context, a comparison of fees for a government service against the fees charged in the market for a comparable service is the proper approach.

36. But, Article 14(c) specifically *precludes* such an approach for loan guarantees. Instead, it recognizes that a loan guarantee is made for the sole purpose of *supporting a loan transaction*; the guarantee becomes an integral part of that transaction and has no value beyond it. The particular fee assessed for a guarantee is affected by the terms of the underlying loan transaction, who the parties are to the underlying loan transaction, the nature of the goods being purchased and sold, and any number of other factors. In turn, the terms of the underlying loan transaction

and the costs and fees associated with that financing may be affected by the fees assessed. An assessment of the total costs of the transaction is necessary to assess whether a “benefit” is actually conferred by the guarantee. A simple comparison of the fee charged for the issuance of one loan guarantee to the fee charged for another may provide an incomplete and distorted picture in this regard.

37. Brazil purports to invoke Article 14(c) of the *SCM Agreement* to support its approach.<sup>28</sup> But – under the guise of identifying a “severable benefit” – Brazil actually attempts to conduct the kind of simple comparison of fees that *Article 14(d)* allows for assessing whether a government-provided service confers a benefit, but that *Article 14(c)* specifically *precludes* with respect to loan guarantees.

38. Given the inconsistency of its position with the logic in Article 14(c), Brazil tries to show that *other* panels have adopted an (incorrect) interpretation of that provision along the lines of Brazil’s argument and presses this Panel either to do the same or to dismiss Article 14 altogether as not applying outside the context of countervailing duty investigations (despite having invoked the provision itself as context).<sup>29</sup> Neither argument has merit. The two panel reports cited by Brazil do not support the argument that Article 14(c) should be “boiled down” to a comparison of fees in all cases as Brazil asserts here.<sup>30</sup> Moreover, as noted earlier, the fact that Article 14(c)

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<sup>28</sup>Brazil First Written Submission, paras. 371-375

<sup>29</sup>Brazil First Written Submission, para. 372.

<sup>30</sup>See *Canada – Aircraft II (Panel)*, para. 7.398 (noting that “taking into account the textual guidance afforded by Article 14(c), we consider that an IQ loan guarantee will confer a ‘benefit’ when ‘there is a difference between the amount that the first receiving the loan pays on a loan guaranteed by [IQ] and the amount that the firm would pay on a comparable commercial loan absent the [IQ] guarantee. In this case, the *difference shall be the difference between these two amounts adjusted for any difference in fees*” but noting that, in the circumstances of that case, it was “safe to *assume*” that there would be no benefit if the fees charged for the guarantees were “market based.”) (emphasis added) and *European Communities – CVDs on DRAMs (Panel)*, para. 7.190 (“If . . . one examines the question of benefit in light of Article 14(c) of the *SCM Agreement* concerning loan guarantees, it

applies directly in the case of proceedings under Part V of the *SCM Agreement* does not preclude it from providing important contextual guidance here.<sup>31</sup> Indeed, that is presumably why Brazil invoked that provision itself in this proceeding.

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

40. Moreover, even though they are not part of the inquiry under Article 14(c), Brazil's other sweeping theories – including of GSM 102 guarantees being a unique financial instrument – have been shown to be factually unsupported. These arguments too are unavailing in the face of the evidence of financial products entirely comparable with those offered by the United States from private, profit-seeking entities that are not agencies or instrumentalities of any government.

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appears that the examination is to focus on the difference between the amount paid on a loan guaranteed by the government, compared to the amount that would have to be paid on a comparable commercial loan. absent the government guarantee.”)

<sup>31</sup>*Canada – Aircraft (AB)*, para. 155.

41. The fact is that Brazil has not demonstrated that GSM-102 guarantees presently confer export subsidies.

**B. GSM 102, GSM 103, and SCGP Guarantees Issued Prior to July 1, 2005**

42. In the case of the GSM 102, GSM 103, and SCGP guarantees issued prior to July 1, 2005, Brazil’s claim is that no measure taken to comply exists. Again, the facts show this argument to be unfounded.

43. To comply, the United States was obligated to “withdraw the prohibited subsidies [identified] in paragraph[] 8.1(d)(i)” of the original panel report. That paragraph explained that “prohibited subsidies” were conferred because guarantees under the GSM 102, GSM 103, and SCGP program had been “provided by the United States government at premium rates which are inadequate to cover long-term operating costs and losses of the programmes within the meaning of item (j) of the Illustrative List.” “Withdraw” means, among other things, “cause to decrease or disappear” and “take back or away (something bestowed or enjoyed).”<sup>32</sup> The U.S. obligation, thus, was to “cause to decrease or disappear” or “take away” the provision of “the service under the export credit guarantee programmes” at a “net cost to the government, as the service provider.”<sup>33</sup> And the United States has done so.

44. In the case of the SCGP and GSM 103 guarantees, the United States has ceased providing “the service under the export credit guarantee programmes” altogether. As a result, there is no longer even any “provision by [a] government . . . of export credit guarantee . . . programmes” within the meaning of item (j), let alone at “premium rates which are inadequate to cover the

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<sup>32</sup>Oxford Dictionary, p. 3704 (Exhibit US-118).

<sup>33</sup>*Upland Cotton (Panel)*, para. 7.804.

long-term operating costs and losses of the programmes.” In the case of SCGP guarantees, the guarantees themselves have all expired as well. Moreover, with respect to GSM 102 guarantees, U.S. actions to increase premiums and lower potential long-term costs and losses render guarantees under that program fully consistent with item (j). In short, the United States has withdrawn the subsidy with respect to all export credit guarantees.

45. There is no merit to Brazil’s attempts to call into question the fact that SCGP guarantees have expired on the basis that the United States is continuing to *recover* money on claims that it has paid out on SCGP guarantees in the past. Nor is there any basis for Brazil’s argument that the United States is not permitted to make itself whole by collecting on claims paid out on export credit guarantees that were issued prior to July 1, 2005. Indeed, it is difficult to escape the irony in Brazil’s argument that the United States should not be able to *recover* money because it has allegedly provided a *financial contribution* in the past. In any event, the *SCM Agreement* concerns itself with the provision of subsidies by governments; not their ability to collect monies properly owed to them by foreign obligors.

46. Moreover, nothing in the *SCM Agreement* provides that “withdrawing” a “subsidy” allegedly “taking the form of a program” “includes an obligation to abstain from performing on commitments outstanding under that program as of the deadline for implementation.”<sup>34</sup> That argument improperly equates “performing on commitments under the program” with the “subsidy” itself. Such an equation was appropriate in *Brazil – Aircraft (21.5)*, where Brazil continued to issue new WTO-inconsistent bonds even after the period of implementation on the

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<sup>34</sup>Brazil Rebuttal Submission, para. 396.

basis that it had pre-existing contractual obligations to do so.<sup>35</sup> However, it is not accurate here, where the guarantees are not themselves prohibited subsidies.

47. Indeed, it is surprising to see Brazil invoking *Brazil – Aircraft (21.5)* in this context.<sup>36</sup>

The United States recalls that, in that dispute, Canada did not try to stop Brazil from continuing to honor WTO-inconsistent government bonds issued prior to the implementation date and outstanding as of that date. It simply asked that Brazil cease issuing *new bonds* pursuant to letters of commitment entered into before the date for implementation.<sup>37</sup> The bonds at issue in that dispute could be redeemed on a semi-annual basis over the course of *fifteen years*.<sup>38</sup> Thus, Brazil's bonds continued to be outstanding and, presumably, to be honored by the Brazilian government for more than a *decade* after the date of implementation without any change whatsoever that would render them WTO-consistent. This is hardly the picture of "abstinence" from activity that Brazil has attempted to paint.

48. In any event, 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>39</sup> Thus, unlike Brazil, the United States has not attempted to continue providing prohibited export subsidies past the date of implementation.

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<sup>35</sup>*Brazil – Aircraft (AB)*, para. 45.

<sup>36</sup>Brazil Rebuttal Submission, para. 396.

<sup>37</sup>*Brazil – Aircraft (AB)*, para. 43.

<sup>38</sup>*Brazil – Aircraft (AB)*, para. 12.

<sup>39</sup>*Upland Cotton (Panel)*, para. 7.804.

49. Mr. Chairman, that brings us to the end of our presentation regarding the export credit guarantee programs. My colleague, Ms. Kibria, will continue by addressing Brazil's actionable subsidy related claims.

#### IV. ACTIONABLE SUBSIDY RELATED CLAIMS

50. Mr. Chairman, a number of erroneous assumptions must be made even to get to Brazil's actionable subsidy related claims in this proceeding. The Panel must disregard the fact that the original panel's finding of present serious prejudice applied to *payments* made in MY 1999-2002 under the Step 2, marketing loan, and counter-cyclical payment programs.<sup>40</sup> It must disregard the fact that Brazil did not make *claims* of "present" serious prejudice in the original proceeding against the Step 2, marketing loan, and counter-cyclical payment programs either alone or in addition to payments thereunder.<sup>41</sup> It must also disregard the fact that the original panel expressly declined to make *any* serious prejudice finding against either the Step 2, marketing loan, and counter-cyclical payment programs or future payments thereunder in MY 2003-2007. The Panel must simply assume, instead, that the original panel's "present" serious prejudice finding extends to the Step 2, marketing loan, the counter-cyclical payment *programs* and – as recently clarified by Brazil<sup>42</sup> – *all payments* authorized thereunder.

51. In addition, the Panel must ignore the fact that the original panel's finding of "present" serious prejudice was limited to the period MY 1999-2002 and was made in light of the particular market conditions that had existed during that time. Despite the fact that the original

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<sup>40</sup>*Upland Cotton (Panel)*, para.

<sup>41</sup>See U.S. Rebuttal Submission, paras. 30-37.

<sup>42</sup>Brazil Submission Regarding U.S. Requests for Preliminary Rulings, para. 31.

panel could not have known the *actual* market conditions – and did not examine the *likely* market conditions – in MY 2006, the Panel must assume that the original panel made a finding that “present” serious prejudice would exist at this time as a result of the measures challenged in the original proceeding.

52. Only then – after making all of these incorrect assumptions – does the Panel arrive at the starting point of Brazil’s serious prejudice-related claims. As there is no basis on which to make any of these assumptions, Brazil’s claims fail at the outset. Nonetheless, there are more flaws if one probes further.

53. Following from the assumptions just discussed, Brazil’s main argument is that the elimination of the Step 2 program was essentially meaningless and the marketing loan and counter-cyclical payment programs and all payments thereunder continue to cause “present” serious prejudice in the sense of significant price suppression within the meaning of Articles 5(c) and 6.3(c) of the *SCM Agreement*. Despite the large volume of the submissions that Brazil has made to date, however, the fact remains that termination of the Step 2 program ended payments that Brazil had insisted in the original proceeding were likely to be the single most trade distortive subsidies in the present marketing year. The ramifications of eliminating that program are still being worked out in the market but the evidence to date shows that since termination, there has been a substantial decline in U.S. upland cotton exports, which is in turn being reflected in a pull-back in plantings and production for MY 2007. Moreover, the evidence confirms that payments under the two programs that remain – the marketing loan and counter-cyclical payment programs – are not causing present significant price suppression.

1. Brazil Fails To Substantiate Its Arguments That Termination of the Step 2 Program Was Effectively Meaningless

54. The evidence and arguments submitted by Brazil regarding the termination of the Step 2 program are difficult to credit. They are unsubstantiated, internally contradictory and inconsistent with arguments that Brazil made in the original proceeding on such fundamental issues as the effects of Step 2 payments on exports and world market prices.

55. Indeed, Brazil’s submissions are almost devoid of any acknowledgment that Brazil argued and, indeed, convinced the original panel to declare the Step 2 program to be a prohibited export subsidy. As the Appellate Body has explained, export subsidies are prohibited because they are “dependent for [their] existence on export performance” and are specifically “‘tied to’ the export performance.”<sup>43</sup> They are, thus, by definition expected to induce exports and deemed so likely to distort trade that no examination of their actual trade effects is required under the *SCM Agreement* in order for a finding against them. Moreover, unlike actionable subsidies, Members have no option to remove their adverse effects; the subsidy must itself be withdrawn, whether by eliminating the measure itself or the benefit provided, or by removing the export contingency that rendered the measure an export subsidy.

56. Having convinced the original panel to make an export subsidy finding against the Step 2 program – in response to which the United States eliminated the program completely – how can Brazil now allege that termination of the program has “no impact on the level of U.S. . . . exports”? Moreover, given that Brazil’s theory of price suppression centers on whether U.S. upland cotton is exported, how can Brazil now allege that elimination of that allegedly *export-*

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<sup>43</sup>*Canada – Aircraft (21.5 – Brazil) (AB)*, para. 47.

*contingent* subsidy has “little positive impact on the world price for cotton in the long term”<sup>44</sup>

These are questions to which Brazil has yet to provide a credible answer.

57. Are we to understand that there is little effect on exports because the Step 2 program was such an inefficient export subsidy that it did not, in fact, induce any exports? Not according to Brazil, which argued in the original proceeding that “it is difficult to imagine how a subsidy could be *more* of an export subsidy than the Step 2 export provisions. . . . [The program] plays an important role in stimulating and maintaining the present record high U.S. upland cotton world export market share. . . .”<sup>45</sup>

58. Are we to understand that there is little effect on world prices because Step 2 payments were not paid directly to producers or directly in respect of production, as Brazil now alleges? Not according to Brazil, which criticized the United States in the original proceeding for focusing on the production effects, emphasizing that this “ignore[d] the effects on world prices from the *export-enhancing nature* of the Step 2 program.”<sup>46</sup> According to Brazil, “Professor Sumner’s analysis concluded that removing solely the Step 2 program has relatively small effects on U.S. production . . . , but large effects on the world market price.”<sup>47</sup>

59. The contradictions in Brazil’s arguments fatally undermine their credibility. Moreover, while Brazil may now consider termination of the Step 2 program to be inconsequential, the loss of the program has not been meaningless to U.S. producers and exporters. Since the termination

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<sup>44</sup>Brazil First Written Submission, para. 206 (quoting Brazil First Written Submission, Annex II, paras. 41-43).

<sup>45</sup>Brazil’s Rebuttal Submission to the Panel Regarding the “Peace Clause” and Non-Peace Clause Related Claims,” para. 128 (22 August 2003) (emphasis in original).

<sup>46</sup>Brazil Appellee Submission, paras. 743-44.

<sup>47</sup>Brazil Appellee Submission, para. 742 (citing Brazil Further Submission, Annex I, paras. 57-58, 66-72 and Table I.5f).

of the program, U.S. exports are at exceptionally low levels – the United States discussed some of these statistics at start of this presentation – and the forecasts for this marketing year and the next continue to be poor. It is simply too early to know precisely how much of this decline is attributable to the loss of the Step 2 program. Undoubtedly some of it is not. But what is clear is that Brazil’s assertion that termination of the Step 2 program has “no impact on the level of U.S. production or exports” and “little positive impact on the world price for cotton” finds little basis in the empirical evidence. The evidence, in fact, supports exactly the opposite conclusion.

2. Brazil does not demonstrate that marketing loan and counter-cyclical payments are causing “present” significant price suppression

60. Nor are marketing loan and counter-cyclical payments presently significantly “suppressing” world market prices within the meaning of Articles 5(c) and 6.3(c) of the *SCM Agreement*. Brazil’s theory, in general terms, is – or was – that “payments-cause-overproduction-cause--price-suppression.” To support its theory, though, Brazil would have to:

- Submit persuasive evidence showing that marketing loan payments and counter-cyclical payments are *actually* inducing U.S. farmers to plant more cotton than they otherwise would.
- Show that the *degree* of effect on U.S. farmers’ planting decisions, production, and export is such as to have impacts on world market prices.
- And submit evidence to show that the *degree* of effect on world market prices is “significant” within the meaning of Article 6.3(c).

61. Brazil has not done so.

**a. Evidence of *actual* production inducing effects.**

62. In assessing the evidence and arguments submitted by Brazil, it is important to bear in mind that a claim of “present” serious prejudice under Articles 5(c) and 6.3(c) requires a

showing that significant price suppression *actually* exists under the prevailing market conditions. Brazil cannot simply allege – or attempt to show – that marketing loan and counter-cyclical payments have the *potential* to induce production.

63. It is also important to note that Articles 5(c) and 6.3(c) are concerned with the *effects* of subsidies, not their form. Thus, Brazil’s efforts to show that marketing loan and counter-cyclical payment programs provide income support in times of low prices do not go far. Nothing in the *SCM Agreement* or any other agreement prohibits income support categorically. To the contrary, the *Agreement on Agriculture* even recognizes that income support measures may be categorized as “green box” measures, or measures that, by definition, have “no, or at most minimal, trade-distorting effects or effects on production.”<sup>48</sup> Even where income support is linked to prices – or for some other reason is not within the “green box”<sup>49</sup> – it is not automatically deemed to cause significant production and price effects, as Brazil appears to imply. This would improperly turn income support into a prohibited subsidy. The Appellate Body has clarified that “[t]he universe of subsidies is vast. Not all subsidies are inconsistent with the *SCM Agreement*. The *only* ‘prohibited’ subsidies are those identified in Article 3 of the *SCM Agreement*. . . .”<sup>50</sup> Income support, which is neither contingent on export nor on import substitution, falls outside the scope of that provision.

64. Again, Brazil’s claim requires an examination of the *effects* on trade of whatever measure is challenged and, in particular, whether the effect is significant price suppression. Given Brazil’s particular theory of planting effects leading to price effects, it is necessary to examine

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<sup>48</sup> *Agreement on Agriculture*, Annex 2, para. 1.

<sup>49</sup> *Agreement on Agriculture*, Annex 2, para. 6(b).

<sup>50</sup> *Canada – Aircraft (21.5 – Brazil)*, para. 47 (emphasis added).

the actual planting decisions made by U.S. farmers. We must ask whether U.S. farmers are, in fact, induced to plant upland cotton by the marketing loan and counter-cyclical payments where they otherwise would not have done so. In assessing the answer, we must keep in mind how the marketing loan and counter-cyclical payment programs operate.

65. At a minimum, any assessment must be grounded in the understanding that in each year when a farmer sits down to decide whether to plant cotton, he does not *know* with certainty (a) what prices will be for cotton at the time of harvest, (b) what prices will be for competing crops at that time, (c) what his yields will ultimately be, (d) whether he might ultimately get a marketing loan payment on cotton or other crops, and (e) whether the season-average farm price for the upcoming marketing year will ultimately be below the threshold at which he might receive a counter-cyclical payment with respect to any upland cotton *base acres* that he holds. The farmer's planting decision *must* be made on the basis of *expectations* about, *inter alia*, weather, supply, demand, prices, government payments, and variable costs. Whether or not his expectations ultimately turn out to be correct or incorrect is not a relevant factor in his planting decision; he cannot rewind time and make different production decisions based on how things *actually* turn out.

66. While Brazil has acknowledged (at least some) of these basic facts of upland cotton production,<sup>51</sup> little of the evidence and arguments submitted by Brazil actually take these facts into account and show – on the basis thereof – significant production effects under the market conditions prevailing at present.

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<sup>51</sup>See e.g., Brazil First Written Submission, Annex I, para. 36 (emphasis added) (“U.S. cotton producers respond to the *expected* prices and *expected* rates of subsidy that apply at the time planting and other key decisions are made in the production cycle.”)

67. By contrast, the United States has submitted evidence that takes into account the actual operation of the marketing loan and counter-cyclical payment programs and shows *minimal* effects on production, including:

- Recent studies – examining, for example, the effects of counter-cyclical payments on plantings of major field crops in MY 2005 – that show that counter-cyclical payments may have some possible risk and wealth effects but have only had minimal effects on plantings.
- A nationwide survey in which 87 percent of U.S. farmers surveyed – out of a total of over 4,000 observations – indicated that counter-cyclical payments were “not at all important,” “unimportant” or “neither important or unimportant” to their acreage decisions.
- Evidence that much of counter-cyclical payments is, in fact, passed through to non-operator landowners in the form of higher rents and land values and, therefore, is not even available to affect production.
- Data showing that substantially less upland cotton (40 percent less) is planted by holders of upland cotton base acres today than at the time base acres were set, undermining Brazil’s argument that U.S. farmers plant to get payments under the counter-cyclical payment program despite the express planting flexibility allowed.
- A significant and growing portion of U.S. upland cotton planted acreage (an average of about 17 percent over MY 2002-2005) is on farms with cotton planted acreage that exceeds cotton base acres, or, indeed, on farms with no cotton base acres, indicating that U.S. farmers plant cotton even when they do have equivalent upland cotton base acreage.
- Evidence showing that futures prices for harvest-time contracts were above the marketing loan rate in MY 2006 and that, even in earlier years when they were not, the evidence shows that U.S. farmers’ planting decisions were driven by market factors, not expectation of payments under the marketing loan program.

68. This evidence contradicts Brazil’s theory that marketing loan and counter-cyclical payments have significant effects on planting.

69. Brazil purports to demonstrate *indirect* production effects through its claim that U.S. planting, production, and exports are not responsive to prices. However, Brazil's comparisons are flawed in that they ignore basic facts of upland cotton production; for example, by comparing planting decisions in a marketing year to the *actual* prices that develop many months later<sup>52</sup> or to the futures prices of upland cotton *alone*.<sup>53</sup>

70. And here, again, the theory that Brazil advances of alleged market insulation is at variance with the empirical evidence. Indeed, Brazil's theory depends on the notion that the income support provided by marketing loan and counter-cyclical payments causes U.S. farmers to produce and U.S. exporters to export when anticipated low prices cause producers and exporters elsewhere to pull back. If that were true, one would expect to see U.S. share of world production and world exports increase. But that is not what one finds. Rather, U.S. share of world production and exports has been stable over the entire period of the FSRI Act and, indeed – in terms of production – for many years before that as well. This shows that, contrary to Brazil's arguments, U.S. producers and exporters have reacted to market signals in their production and exports in a similar way to their foreign counterparts.

71. Brazil has argued that U.S. producers cannot meet their total costs without marketing loan and counter-cyclical payments. Brazil asserts that this shows that without marketing loan and counter-cyclical payments, many U.S. producers would not have remained in business and continued planting upland cotton.

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<sup>52</sup>See e.g., Brazil First Written Submission, paras. 144-145.

<sup>53</sup>See e.g., Brazil First Written Submission, paras. 142-143 and Brazil Rebuttal Submission, paras. 221-224.

72. Mr. Chairman, Members of the Panel, please direct your attention to **Table A.1**,<sup>54</sup> which is reproduced from the U.S. rebuttal submission, so you have seen it before.<sup>55</sup> As you can see from this chart, the overwhelming majority of U.S. production (*92 percent*) takes place on low- and mid-cost farms that meet both their variable (or operating) costs and also their total costs of production. This means that, for *92 percent of U.S. production* of upland cotton, Brazil's theory of a cost-revenue gap fails as a matter of fact.

73. In other words, with respect to 92 percent of U.S. production, it is not necessary even to reach the arguments regarding the other flaws in Brazil's reasoning regarding the alleged cost-revenue gap. That gap simply does not exist. Nonetheless, there *are* other problems in Brazil's analysis as well. This includes the fact that Brazil incorrectly assumes that total costs of producing upland cotton are determinative for both year-to-year planting decisions and for longer-term decisions, such as whether to continue or exit upland cotton farming. In the former case, it is variable costs that are relevant and, in the latter, it is the *total* cost/revenue balance of the farm – of which costs and revenues for upland cotton is one factor – that is relevant.

74. Moreover, as just discussed, the evidence shows that U.S. producers not only meet their variable costs with market revenue from sales of upland cotton, but also their total costs. Brazil's latest efforts to inflate variable costs by shifting into that category such items as land, labor, and capital recovery costs are unavailing given that – for most U.S. production – farmers are meeting *both* their total costs and their variable costs. These efforts are also without support in the economic literature or in fact.

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<sup>54</sup>Exhibit US-119.

<sup>55</sup>U.S. Rebuttal Submission, para. 337.

75. In sum, substantial evidence shows that the marketing loan and counter-cyclical payments are having at most minimal production effects under the prevailing market conditions.

**b. Whether marketing loan and counter-cyclical payments are affecting production and exports such as to impact world market prices to any significant degree.**

76. Turning to the second issue – regarding the *degree* of any possible effects on world market prices, the United States notes that the *only* evidence that Brazil has submitted purporting to examine the price effects of marketing loan and counter-cyclical payments specifically are the results of the modeling exercise that it has conducted for purposes of this proceeding. That exercise is conducted using a model entirely different from the one advanced by Brazil in the original proceeding but virtually identical to one that was published in 2005, in a CATO institute publication, by Dr. Sumner, Brazil’s economist.

77. In the CATO publication, Dr. Sumner warned that his model “abstract[s] from many complexities that would be important to get more precise estimates” and that “[t]he simple model laid out here does not represent the depth of analysis that would be appropriate to support a trade remedy proceeding or a serious prejudice claim before a WTO panel.”<sup>56</sup> The United States agrees. My colleague, Dr. Glauber, will discuss some of the key flaws in that model.

78. Dr. Joseph Glauber is the Deputy Chief Economist of the US Department of Agriculture. The Office of the Chief Economist is responsible for coordinating supply, demand and price forecasts for USDA. It also coordinates USDA’s annual baseline projections for major commodities prepared for submission of the President’s annual budget proposals. As such, Dr.

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<sup>56</sup>Daniel A. Sumner. “Boxed In: Conflicts Between U.S. Farm Policies and WTO Obligations.” Center for Trade Policy Studies, The Cato Institute, December 2005. (Exhibit US-108)

Glauber has extensive experience with the use of econometric models to estimate the effects of U.S. commodity programs on world cotton markets.

[Statement of Dr. Joseph W. Glauber]

79. Mr. Chairman, before turning to the last question – of “significant” price suppression – there are two issues touched upon by Dr. Glauber that we should address in light of the test under Article 6.3(c).

80. First, as Dr. Glauber noted, Brazil appears to assume that the question before the Panel relates to the “short-run” impact of “shocking the system” with complete elimination of the marketing loan and counter-cyclical payment programs. It is not. Under Article 6.3(c) the question is what, if any, degree of price suppression exists *presently* as a result of the marketing loan and counter-cyclical payment programs and whether this degree of price suppression is “significant.” To the extent a counterfactual assessment is undertaken, it is only to assess what the price equilibrium would be at present if marketing loan and counter-cyclical payments had been lower, different, or did not exist. Article 6.3(c) does not ask what prices will look like in the short-run adjustment period if the marketing loan and counter-cyclical payments are suddenly eliminated. Indeed, Members are not even required to eliminate measures found to be actionable subsidies; they are given a choice between “withdrawing” the subsidy or removing its adverse effects. Thus, in addition to the fact that the economic literature supports a long-term assessment, Brazil’s argument that it is necessary to look at the short-run effects of total elimination of the programs cannot be accurate as a textual matter.

81. Second, and on a somewhat related note, it is not credible for Brazil to argue for a disproportionately small rest-of-world supply response on the basis that “there is imperfect transmission of price changes” because “market institutions, centralized crop marketing, government policies, limited information, and high per-unit transportation costs partially insulate producers in certain regions of the world” from any alleged price changes.<sup>57</sup> The United States recalls that Brazil insisted in the original proceeding that different domestic prices were intimately connected and that a change in U.S. prices would be reflected fairly immediately in the prices of all major cotton producers. For this purpose Brazil submitted the charts labeled Chart 1 and 2 purporting to show the “interconnectedness” of the A-Index and B-Index of major producers of upland cotton in the world. We are simply too far down the road for Brazil to change its position now on such fundamental issues as whether prices are connected and there is a “world market” for cotton.

**c. Has Brazil shown that the degree of effect on world market prices is “significant” within the meaning of Article 6.3(c)?**

82. This brings us to the last issue, whether Brazil has shown that any degree of effect on world market prices is “significant” within the meaning of Article 6.3(c). Brazil has not done so. In Brazil’s first submission, Brazil simply referred back to the same evidence it had submitted purporting to show price suppression and argued that “even a fraction of the effects found by Professor Sumner would constitute price suppression, based on its effect on [the] large volume of sales in the world market.”<sup>58</sup> In its rebuttal submission, Brazil did not address the issue at all.

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<sup>57</sup>Brazil First Written Submission, Annex I, para. 28.

<sup>58</sup>Brazil First Written Submission, para. 190.

83. There is no textual basis for Brazil’s lone theory of “significant” price suppression – that, effectively, any amount of price suppression is “significant” because the world upland cotton market is a high volume market. Brazil’s approach would effectively create a *per se* rule of “significant” price suppression for certain markets involving large volumes of sales. Such a rule is not found in Articles 5(c) or 6.3(c) of the *SCM Agreement* or any other provision.

84. Moreover, Brazil’s theory would lead to untenable results. Imagine, for example, that a Member considers that another is subsidizing products in a low-volume, high-value market – for example, the market for ships or aircraft. Under Brazil’s theory, the complaining Member would have to show a high degree of price suppression in that case because there is not a “large volume of sales in the world market” even though a 1% impact on the price of a multi-billion dollar ship or aircraft may have substantially more impact on the revenue of the producer thereof than a 1% impact on the price for a bale of cotton.

85. Contrary to Brazil’s assertions, it is necessary to make a *showing* on the facts of a dispute that any proven price suppression is “significant.” Brazil has not attempted to make such a showing here. And, in any event, a finding of “significant” price suppression is not justified under the circumstances. For example, assume, *arguendo*, that any possible price suppression were in the range of 1 to 1.5 percent as estimated in the re-calibrated run of the Sumner II model for MY 2006-2008. This result is overstated given the structural flaws in Brazil’s model for which the United States has not been able to adjust. Nonetheless, it translates into a *less than one cent per pound* impact on world market prices at present A-Index levels.<sup>59</sup> Brazil has provided no basis whatsoever for its claims that this degree of price suppression – even less than

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<sup>59</sup>The average A-Index for January 2007 is 60.44 cents/lb.

a cent per pound, in conservative terms – constitutes “significant” price suppression. If such unfounded assertions were to prevail, they would effectively write “significant” out of Article 6.3(c) entirely.

#### **IV. CONCLUSION**

86. In conclusion, Mr. Chairman, the United States has implemented the DSB’s recommendations and rulings. The United States has done so consistently with our WTO obligations and after careful examination of the guidance provided by the original panel. The United States has eliminated two export credit guarantee programs entirely, going beyond what was required to withdraw any export subsidy conferred by those measures. And the United States has substantially overhauled the third, lowest-risk program. We have also eliminated a third program, the Step 2 program, payments under which were claimed by Brazil to be prohibited export subsidies, among the most distortive of subsidy measures.

87. Moreover, substantial evidence confirms that payments under the marketing loan and counter-cyclical payment programs are not causing present significant price suppression. This includes evidence that fully 92 percent of U.S. upland cotton is produced without help from payments. Recent studies examining the actual operation of the counter-cyclical payment program also confirm that any possible production effect of counter-cyclical payments is minimal, as one would expect given that owners of base acres get payments regardless of whether they produce cotton or not. And, in the case of the marketing loan payments, the evidence shows that there have been low expectations of government payments in the present marketing year, which means that farmers are unlikely to have been planting to any substantial degree “for payments” rather than on the basis of market-based revenue expectations.

Expectations of marketing loan payments in the future are even lower still. And, in fact, both the marketing loan and counter-cyclical payment programs are due to expire at the end of current marketing year.

88. Under these circumstances there is no basis for Brazil’s allegations of “present” significant price suppression. And Brazil’s suggestion that such a finding should be made on nothing more than the bare assertion that *any* amount of price suppression is “significant” is deeply troubling.

89. The United States thanks the Panel for its attention. In the interest of time we will not prolong our presentation with a discussion of Brazil claims under Articles 5(c) and 6.3(d) or its contingent claims of threat of serious prejudice. We stand ready, however, to answer any questions you may have either in that respect or any other regard.