

**UNITED STATES – SUBSIDIES ON UPLAND COTTON  
RECOURSE TO ARTICLE 21.5 OF THE DSU BY BRAZIL**

**AB-2008-2**

*Report of the Appellate Body*



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<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007
<i>Canada – Aircraft</i> (Article 21.5 – Brazil)	Appellate Body Report, <i>Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU</i> , WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
<i>Canada – Dairy</i> (Article 21.5 – New Zealand and US)	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
<i>Canada – Dairy</i> (Article 21.5 – New Zealand and US II)	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, 213
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<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, 3243
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<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135
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<i>EC – Sardines</i>	Appellate Body Report, <i>European Communities – Trade Description of Sardines</i> , WT/DS231/AB/R, adopted 23 October 2002, DSR 2002:VIII, 3359
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<i>Japan – Apples</i>	Appellate Body Report, <i>Japan – Measures Affecting the Importation of Apples</i> , WT/DS245/AB/R, adopted 10 December 2003, DSR 2003:IX, 4391

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<i>Korea – Commercial Vessels</i>	Panel Report, <i>Korea – Measures Affecting Trade in Commercial Vessels</i> , WT/DS273/R, adopted 11 April 2005, DSR 2005:VII, 2749
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
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<i>US – FSC</i> (Article 21.5 – EC II)	Appellate Body Report, <i>United States – Tax Treatment for "Foreign Sales Corporations" – Second Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS108/AB/RW2, adopted 14 March 2006
<i>US – Lamb</i>	Appellate Body Report, <i>United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia</i> , WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051
<i>US – Oil Country Tubular Goods Sunset Reviews</i> (Article 21.5 – Argentina)	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/AB/RW, adopted 11 May 2007
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
<i>US – Shrimp</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products</i> , WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755
<i>US – Shrimp</i> (Article 21.5 – Malaysia)	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
<i>US – Softwood Lumber IV</i> (Article 21.5 – Canada)	Appellate Body Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 of the DSU</i> , WT/DS257/AB/RW, adopted 20 December 2005, DSR 2005:XXIII, 11357
<i>US – Softwood Lumber IV</i> (Article 21.5 – Canada)	Panel Report, <i>United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada – Recourse by Canada to Article 21.5 [of the DSU]</i> , WT/DS257/RW, adopted 20 December 2005, upheld by Appellate Body Report, WT/DS257/AB/RW, DSR 2005:XXIII, 11401
<i>US – Softwood Lumber VI</i> (Article 21.5 – Canada)	Appellate Body Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS277/AB/RW, adopted 9 May 2006, and Corr.1
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, 3
<i>US – Upland Cotton</i>	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, and Corr.1, adopted 21 March 2005, as modified by Appellate Body Report, WT/DS267/AB/R, DSR 2005:II-VI, 299

<b>Short Title</b>	<b>Full Case Title and Citation</b>
<i>US – Upland Cotton</i> (Article 21.5 – Brazil)	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW and Corr.1, circulated to WTO Members 18 December 2007
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717



TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Definition
CCC	United States Commodity Credit Corporation
DSB	Dispute Settlement Body
DSU	<i>Understanding on Rules and Procedures Governing the Settlement of Disputes</i>
ETI Act of 2000	United States FSC Repeal and Exterritorial Income Exclusion Act of 2000, Public Law No. 106-519
Ex-Im Bank	United States Export-Import Bank
FAIR Act of 1996	United States Federal Agricultural Improvement and Reform Act of 1996, Public Law No. 104-127
FAPRI	Food and Agricultural Policy Research Institute of Iowa State University and the University of Missouri-Columbia
FCRA	United States Federal Credit Reform Act of 1990, enacted as part of the Omnibus Budget Reconciliation Act of 1990, Public Law No. 101-508
FSRI Act of 2002	United States Farm Security and Rural Investment Act of 2002, Public Law No. 107-171
FY	Fiscal year. In the United States, the fiscal year runs from 1 October of the previous calendar year and ends 30 September of the year with which it is numbered. For example, FY 2008 began on 1 October 2007 and will end on 30 September 2008.
GATT 1994	<i>General Agreement on Tariffs and Trade 1994</i>
GSM 102	General Sales Manager 102
GSM 103	General Sales Manager 103 (Intermediate Credit Guarantee Program)
Illustrative List	Illustrative List of Export Subsidies, Annex I to the <i>SCM Agreement</i>
LCI	Letter of Credit Insurance (an Export-Import Bank programme)
MTI	Medium-Term Export Credit Insurance (an Export-Import Bank programme)
MPRs	Minimum premium rates
MY	Marketing year. The marketing year for cotton runs from 1 August to 31 July of the following year. For example, MY 2007 runs from 1 August 2007 until 31 July 2008.

Abbreviation	Definition
OECD	Organisation for Economic Co-operation and Development
OECD Arrangement	OECD Arrangement on Officially Supported Export Credits
Original Panel Report	Panel Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/R, and Add.1-Add.3, and Corr.1
Panel Report	Panel Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW, 18 December 2007
SCGP	Supplier Credit Guarantee Program
<i>SCM Agreement</i>	<i>Agreement on Subsidies and Countervailing Measures</i>
Step 2 payments	User marketing (Step 2) payments
USCBO	United States Congressional Budget Office
USCRS	United States Congressional Research Service
USDA	United States Department of Agriculture
<i>Working Procedures</i>	<i>Working Procedures for Appellate Review</i> , WT/AB/WP/5, 4 January 2005
WTO	World Trade Organization

WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Subsidies on Upland Cotton  
– Recourse to Article 21.5 of the DSU by Brazil**

United States, *Appellant/Appellee*  
Brazil, *Other Appellant/Appellee*

Argentina, *Third Participant*  
Australia, *Third Participant*  
Canada, *Third Participant*  
Chad, *Third Participant*  
China, *Third Participant*  
European Communities, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
New Zealand, *Third Participant*  
Thailand, *Third Participant*

AB-2008-2

Present:

Baptista, Presiding Member  
Hillman, Member  
Unterhalter, Member

**I. Introduction**

1. The United States and Brazil each appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil* (the "Panel Report").<sup>1</sup> The Panel was established to consider a complaint by Brazil concerning the consistency with the *Agreement on Agriculture* and the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement") of measures taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body (the "DSB") in the original proceedings in *US – Upland Cotton*.<sup>2</sup>

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<sup>1</sup>WT/DS267/RW, 18 December 2007.

<sup>2</sup>The recommendations and rulings of the DSB resulted from the adoption on 21 March 2005, by the DSB, of the Appellate Body Report, WT/DS267/AB/R, and the Panel Report, WT/DS267/R, in *US – Upland Cotton*. In this Report, we refer to the panel in these Article 21.5 proceedings as the "Panel", and to the panel that considered the original complaint brought by Brazil as the "original panel" and to its report as the "original panel report".

2. In the original proceedings, Brazil challenged various United States measures<sup>3</sup> that Brazil alleged constituted actionable subsidies within the meaning of Part III of the *SCM Agreement*, prohibited subsidies within the meaning of Part II of the *SCM Agreement*, export subsidies within the scope of the *Agreement on Agriculture*, and/or subsidies actionable under Article XVI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"). Brazil also challenged certain of these measures under Article III:4 of the GATT 1994.<sup>4</sup> The United States argued that, by virtue of paragraphs (a) and (b) of Article 13 of the *Agreement on Agriculture*, some of the measures were domestic support measures that were exempt from being challenged under the *SCM Agreement* and the GATT 1994.<sup>5</sup>

3. The following conclusions of the original panel are relevant for purposes of these proceedings pursuant to Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"). First, the original panel found that export credit guarantees provided to unscheduled agricultural products (including upland cotton) and to one scheduled product (rice) under three export credit guarantee programmes—the General Sales Manager ("GSM") 102, the GSM 103, and the Supplier Credit Guarantee Program ("SCGP")—are export subsidies applied in a manner that resulted in circumvention of the United States' export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*, and were therefore inconsistent with Article 8 of that Agreement.<sup>6</sup> The original panel further found that, to the extent the export credit guarantees provided with respect to these products were not exempt from action under the *SCM Agreement*, "the GSM 102, GSM 103 and SCGP export credit guarantee programmes are 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 of Export Subsidies in Annex I of the *SCM Agreement*, and therefore constitute *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*."<sup>7</sup> However, with respect to export credit guarantees for pig meat and poultry meat, the original panel found that the United States had established that export credit guarantees under the GSM 102, GSM 103, and SCGP programmes had not been applied

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<sup>3</sup>Brazil made claims in respect of marketing loan programme payments, user marketing (Step 2) payments ("Step 2 payments"), production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, cottonseed payments, export credit guarantees and the FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Public Law No. 106-519 (the "ETI Act of 2000"). Brazil also made claims regarding legislation and regulations underlying certain of these programmes. (See Appellate Body Report, *US – Upland Cotton*, footnote 2 to para. 1; see also Original Panel Report, paras. 7.200-7.250)

<sup>4</sup>See Appellate Body Report, *US – Upland Cotton*, para. 1.

<sup>5</sup>*Ibid.*

<sup>6</sup>See Original Panel Report, para. 8.1(d)(i).

<sup>7</sup>*Ibid.*

in a manner that resulted in circumvention of the United States' export subsidy commitments within the meaning of Article 10.1 and, therefore, were not inconsistent with Article 8 of the *Agreement on Agriculture* and were exempt from action under the *SCM Agreement*.<sup>8</sup>

4. Secondly, as regards Brazil's claims of serious prejudice, the original panel found that the effect of the mandatory price-contingent United States subsidy measures—marketing loan programme payments, user marketing (Step 2) payments ("Step 2 payments"), market loss assistance payments, and counter-cyclical 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*.<sup>9</sup>

5. In the light of its conclusions, the original panel recommended, pursuant to Article 19.1 of the DSU, that the United States bring the export credit guarantees found to be inconsistent with its obligations under the *Agreement on Agriculture* into conformity with that Agreement.<sup>10</sup> The original panel further recommended that, as required by Article 4.7 of the *SCM Agreement*, the United States withdraw the export credit guarantees that were found to be prohibited subsidies without delay and specified that this would have to occur "at the latest within six months of the date of adoption of the Panel report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier)".<sup>11</sup> Finally, as regards the price-contingent subsidies found to cause serious prejudice, the original panel stated that, in accordance with Article 7.8 of the *SCM Agreement*, the United States was "under an obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'" upon adoption of the original panel report.<sup>12</sup>

6. On appeal, the Appellate Body upheld the original panel's finding "that the effect of the marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments (the 'price-contingent subsidies') is significant price suppression within the meaning

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<sup>8</sup>See Original Panel Report, para. 8.1(d)(ii).

<sup>9</sup>See *ibid.*, para. 8.1(g)(i). The original panel also found that Section 1207(a) of the Farm Security and Rural Investment Act of 2002, Public Law No. 107-171 (the "FSRI Act of 2002"), providing for Step 2 payments to exporters of upland cotton constituted an export subsidy that was inconsistent with the United States' obligations under Articles 3.3 and 8 of the *Agreement on Agriculture* and prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*. In addition, the original panel concluded that Section 1207(a) of the FSRI Act of 2002 providing for Step 2 payments to domestic users of upland cotton constituted an import substitution subsidy prohibited by Articles 3.1(b) and 3.2 of the *SCM Agreement*. (See *ibid.*, para. 8.1(e) and (f))

<sup>10</sup>See *ibid.*, para. 8.3(a).

<sup>11</sup>*Ibid.*, para. 8.3(b).

<sup>12</sup>*Ibid.*, para. 8.3(d).

of Article 6.3(c) of the *SCM Agreement*".<sup>13</sup> The Appellate Body also upheld the original panel's finding that "the United States export credit guarantee programmes at issue—GSM 102, GSM 103 and SCGP—constitute a *per se* export subsidy within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*"<sup>14</sup>, and the original panel's findings "that these export credit guarantee programs are export subsidies for purposes of Article 3.1(a) of the *SCM Agreement* and are inconsistent with Articles 3.1(a) and 3.2 of that Agreement".<sup>15</sup> The United States did not appeal the original panel's findings relating to circumvention under Article 10.1 of the *Agreement on Agriculture*. However, in response to Brazil's appeal, the Appellate Body reversed the original panel's finding that actual circumvention in respect of export credit guarantees for pig meat and poultry meat had not been established. Because there were insufficient uncontested facts in the record to complete the legal analysis, the Appellate Body was unable to determine whether the United States' export credit guarantees for pig meat and poultry meat had been applied in a manner that resulted in circumvention of the United States' export subsidy commitments, contrary to Article 10.1 of the *Agreement on Agriculture*.<sup>16</sup>

7. The original panel and Appellate Body reports were adopted by the DSB on 21 March 2005.

8. On 30 June 2005, the United States Department of Agriculture (the "USDA") announced that the United States Commodity Credit Corporation (the "CCC") would no longer accept applications for export credit guarantees under the GSM 103 programme.<sup>17</sup> The USDA also announced that the CCC would use a new fee structure for the GSM 102 and SCGP programmes.<sup>18</sup> In October 2005, the CCC ceased issuing export credit guarantees under the SCGP.<sup>19</sup> On 1 February 2006, United States Congress adopted legislation repealing the Step 2 payments programme for upland cotton effective as of 1 August 2006.<sup>20</sup> Since the adoption of the original panel and Appellate Body reports, the United States has continued to provide marketing loan and counter-cyclical payments to United States

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<sup>13</sup>Appellate Body Report, *US – Upland Cotton*, para. 763(c)(i).

<sup>14</sup>*Ibid.*, para. 763(e)(iv) (quoting Original Panel Report, para. 7.869).

<sup>15</sup>*Ibid.*

<sup>16</sup>See *ibid.*, para. 763(f)(i).

<sup>17</sup>See Panel Report, para. 3.16 (referring to "USDA announces changes to export credit guarantee programs to comply with WTO findings", USDA Foreign Agricultural Service (FAS) Online News Release of 30 June 2005 (Exhibit Bra-502 submitted by Brazil to the Panel); and "Notice to GSM-103 Program Participants", USDA FAS Program Announcement of 30 June 2005 (Exhibit Bra-503 submitted by Brazil to the Panel)).

<sup>18</sup>See Panel Report, para. 3.16.

<sup>19</sup>See *ibid.* (referring to United States' first written submission to the Panel, para. 20, and "Summary of FY 2006 Export Credit Guarantee Programme Activity for GSM-102 as of close of business: 9/30/2006" (Exhibit Bra-513 submitted by Brazil to the Panel)).

<sup>20</sup>See *ibid.*, para. 3.7 (referring to Section 1103 of the Deficit Reduction Act of 2005, Public Law No. 109-171 (Exhibit Bra-435 submitted by Brazil to the Panel)).

producers of upland cotton, and the legislative and regulatory provisions governing these payments remain unchanged.<sup>21</sup>

9. Brazil considered that the United States had failed to bring its measures into conformity with the United States' obligations under the relevant provisions of the *Agreement on Agriculture* and the *SCM Agreement* and requested that the matter be referred to a panel pursuant to Article 21.5 of the DSU.<sup>22</sup> On 28 September 2006, the DSB established the Panel under Article 21.5.<sup>23</sup> Before the Panel in these Article 21.5 proceedings, Brazil claimed that the measures taken by the United States have failed to bring it into compliance with its obligations under the *Agreement on Agriculture* and the *SCM Agreement*.

10. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 18 December 2007. The following rulings made by the Panel concerning the scope of the Article 21.5 proceedings are relevant to this appeal:

In light of the foregoing considerations, the Panel finds that the claims of Brazil relating to export credit guarantees for exports of pig meat and poultry meat are within the scope of this proceeding under Article 21.5 of the DSU.<sup>24</sup> (emphasis omitted)

...

The Panel finds that, although the original panel's finding of "present" serious prejudice did not apply to legal provisions or subsidy programmes in addition to subsidies and subsidy measures, it is not necessary for the Panel to make a ruling on the preliminary objection of the United States because Brazil does not request the Panel to find that the marketing loan and counter-cyclical payment programmes are WTO-inconsistent as such. The Panel also concludes that the original panel's finding of serious prejudice was based on an analysis that took into consideration the legal provisions or subsidy programmes pursuant to which the subsidies were provided. The Panel considers that it is appropriate in this proceeding to conduct a similar analysis of subsidies in the context of the legal provisions or subsidy programmes pursuant to which the subsidies are granted.

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<sup>21</sup>See Panel Report, paras. 3.9 and 3.12. In addition to Step 2 payments, marketing loan payments, and counter-cyclical payments, the original panel's finding of serious prejudice covered market loss assistance payments. According to the original panel, market loss assistance payments were "*ad hoc* emergency and supplementary assistance provided to producers" under "four separate pieces of legislation, one each for the years 1998 through 2001". (Original Panel Report, para. 7.216 (quoted in Panel Report, para. 3.10))

<sup>22</sup>Request for the Establishment of a Panel by Brazil, WT/DS267/30.

<sup>23</sup>See Panel Report, para. 1.2.

<sup>24</sup>*Ibid.*, para. 9.27.

... For this reason, the Panel does not find it necessary to rule on the objection of the United States that since the marketing loan and counter-cyclical programmes are not "measures taken to comply" within the meaning of Article 21.5 of the DSU, Brazil's claims with respect to these programmes are not within the scope of this proceeding.<sup>25</sup> (emphasis omitted)

...

In light of these considerations, the Panel concludes that to the extent marketing loan payments and counter-cyclical payments made by the United States after 21 September 2005 are provided under the same conditions and criteria as the marketing loan payments and counter-cyclical payments subject to the original panel's finding of "present" serious prejudice, they are subject to the obligation of the United States under Article 7.8 of the *SCM Agreement* to take appropriate steps to remove the adverse effects of the subsidy. As a consequence, we also consider that Brazil's claim that the United States has failed to comply with its obligations under Article 7.8 with respect to these payments is properly before this Panel. ...<sup>26</sup>

11. The following findings of the Panel are relevant for this appeal:

*With respect to the measure taken by the United States to comply with the DSB recommendations and rulings relating to the original panel's finding of inconsistency with Articles 5 and 6 of the SCM Agreement:*

(a) The United States acts inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to [United States] upland cotton producers pursuant to the FSRI Act of 2002 is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* in the world market for upland cotton constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*. By acting inconsistently with Articles 5(c) and 6.3(c) of the *SCM Agreement* the United States has failed to comply with the DSB recommendations and rulings. Specifically, the United States has failed to comply with its obligation under Article 7.8 of the *SCM Agreement* "to take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

...

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<sup>25</sup>Panel Report, paras. 9.54 and 9.55.

<sup>26</sup>*Ibid.*, para. 9.81.



*With respect to the measure taken by the United States to comply with the DSB recommendations and rulings relating to the original panel's findings of inconsistency with Articles 10.1 and 8 of the Agreement on Agriculture and Articles 3.1(a) and 3.2 of the SCM Agreement:*

(c) Regarding GSM 102 export credit guarantees issued after 1 July 2005 the United States acts inconsistently with Article 10.1 of the *Agreement on Agriculture* by applying export subsidies in a manner which results in the circumvention of [United States] export subsidy commitments with respect to certain unscheduled products and certain scheduled products, and as a result acts inconsistently with Article 8 of the *Agreement on Agriculture*. Regarding GSM 102 export credit guarantees issued after 1 July 2005 the United States also acts inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement* by providing export subsidies to unscheduled products and by providing export subsidies to scheduled products in excess of the commitments of the United States under the *Agreement on Agriculture*. By acting inconsistently with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement* the United States has failed to comply with the DSB recommendations and rulings. Specifically, the United States has failed to bring its measures into conformity with the *Agreement on Agriculture* and has failed "to withdraw the subsidy without delay".<sup>27</sup> (footnotes omitted)

12. The Panel concluded that "to the extent that the measures taken by the United States to comply with the recommendations and rulings adopted by the DSB in the original proceeding are inconsistent with the obligations of the United States under the covered agreements, these recommendations and rulings remain operative."<sup>28</sup>

13. On 12 February 2008, the United States notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal<sup>29</sup>, pursuant to Rule 20 of the *Working Procedures for Appellate Review*<sup>30</sup> (the "*Working Procedures*"). On 19 February 2008, the United States filed an appellant's submission.<sup>31</sup> On 25 February 2008, Brazil notified the DSB, pursuant to Article 16.4 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal<sup>32</sup>, pursuant to Rule 23(1) and (2) of the *Working Procedures*. On 27 February 2008, Brazil

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<sup>27</sup>Panel Report, para. 15.1.

<sup>28</sup>*Ibid.*, para. 15.2.

<sup>29</sup>WT/DS267/33 (attached as Annex I to this Report).

<sup>30</sup>WT/AB/WP/5, 4 January 2005.

<sup>31</sup>Pursuant to Rule 21 of the *Working Procedures*.

<sup>32</sup>WT/DS267/34 (attached as Annex II to this Report).

filed an other appellant's submission.<sup>33</sup> On 12 March 2008, Chad notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.<sup>34</sup> On 13 March 2008, Brazil and the United States each filed an appellee's submission<sup>35</sup>, and Argentina, Australia, Canada, the European Communities, Japan, and New Zealand each filed a third participant's submission.<sup>36</sup> On the same day, China, India, and Thailand each notified the Appellate Body Secretariat of its intention to appear at the oral hearing as a third participant.<sup>37</sup>

14. After consultation with the Appellate Body Secretariat, Brazil and the United States agreed, in a joint letter dated 19 March 2008, that it would not be possible for the Appellate Body to circulate its Report in this appeal within the 90-day time-limit referred to in Article 17.5 of the DSU. Brazil and the United States agreed that additional time was needed because of the complexity of the issues arising in the appeal and the difficulties encountered by the Appellate Body in scheduling the oral hearing. Brazil and the United States accordingly confirmed that they would deem the Appellate Body Report in these proceedings, issued no later than 2 June 2008, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.<sup>38</sup>

15. The oral hearing in this appeal was held on 14-15 April 2008. The participants and the third participants<sup>39</sup> presented oral arguments and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

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<sup>33</sup>Pursuant to Rule 23(3) of the *Working Procedures*.

<sup>34</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

<sup>35</sup>Pursuant to Rules 22 and 23(4) of the *Working Procedures*. After consultation with the participants, the Appellate Body Division hearing this appeal allocated additional time for filing the appellees' submissions and the third participants' submissions and notifications, pursuant to Rules 16, 22, 23, 24, and 26 of the *Working Procedures*.

<sup>36</sup>Pursuant to Rule 24(1) of the *Working Procedures*.

<sup>37</sup>Pursuant to Rule 24(2) of the *Working Procedures*.

<sup>38</sup>On 11 April 2008, the Appellate Body notified the Chairman of the DSB that the expected date of circulation of its Report was 2 June 2008 (WT/DS267/35).

<sup>39</sup>China, India, and Thailand did not make a statement at the oral hearing.

## II. Arguments of the Participants and the Third Participants

### A. *Claims of Error by the United States – Appellant*

#### 1. Scope of These Article 21.5 Proceedings

##### (a) Export Credit Guarantees for Pig Meat and Poultry Meat

16. The United States argues that the Panel erred in finding that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are properly within the scope of the Article 21.5 proceedings.

17. The United States maintains that, as the Panel itself recognized, the application of the GSM 102 export credit guarantees to an individual product constitutes a measure. The United States adds that, because neither the original panel nor the Appellate Body made findings that export credit guarantees with respect to pig meat and poultry meat were inconsistent with the United States' WTO obligations, the DSB adopted no recommendations and rulings as to these measures. Thus, there could be no "measures taken to comply" relating to pig meat and poultry meat. The United States submits that "[t]he Panel ... disregarded these facts, and considered claims that were beyond the scope of the compliance proceeding under Article 21.5."<sup>40</sup>

18. The United States further alleges that the Panel disregarded the requirements of Article 21.5 by substituting them with a "particularly close relationship" test, erroneously relying on the Appellate Body Reports in *US – Softwood Lumber IV (Article 21.5 – Canada)* and *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*. In the United States' view, the Appellate Body's reasoning in these reports is not applicable because they addressed situations different from the one raised in these proceedings. In *US – Softwood Lumber IV (Article 21.5 – Canada)*, the Appellate Body addressed the situation in which a separate measure was issued at approximately the same time as the one that the responding party declared to be the measure taken to comply, and which was alleged to undo the compliance achieved by the declared measure taken to comply. The United States submits, however, that "the question before *this* Panel was not whether a second measure had undone, superseded, or otherwise replaced compliance with DSB recommendations and rulings

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<sup>40</sup>United States' appellant's submission, para. 40.

regarding export credit guarantees for pig meat and poultry".<sup>41</sup> As there were no such recommendations and rulings in this dispute, the question before the panel and the Appellate Body in *US – Softwood Lumber IV (Article 21.5 – Canada)* does not arise. The dispute in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* concerned a revised administrative determination in an anti-dumping sunset review. The United States asserts that a revision to export credit guarantee programmes cannot in any way be compared to a revision to an administrative determination, and export credit guarantees for pig meat and poultry meat cannot be considered as a "factual basis" for the "wholly separate export credit guarantees that were within the DSB's recommendations and rulings."<sup>42</sup>

19. The United States submits that the Appellate Body's findings in *EC – Bed Linen (Article 21.5 – India)* are "highly instructive"<sup>43</sup> for these Article 21.5 proceedings, because in both disputes there exist no DSB recommendations and rulings that must be implemented with respect to the part of the measure that the complaining party alleged to be within the scope of the Article 21.5 proceedings. Moreover, the United States points out that, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body acknowledged that Article 21.5 proceedings are not intended to provide complaining parties with a second chance to reassert claims that had been unsuccessful in the original proceedings. To allow Brazil to reassert its claims relating to pig meat and poultry meat in these Article 21.5 proceedings would give Brazil such a "second chance"<sup>44</sup>, which, in the United States' view, is not the purpose of Article 21.5.

20. In addition, the United States argues that the Panel's finding raises serious systemic concerns, because it would create a disincentive for WTO Members to take action in response to a finding of WTO-inconsistency beyond the precise scope of the DSB's recommendations and rulings. According to the United States, the Panel's approach sends a signal to WTO Members to make the least possible changes to their measures, for purposes of implementation, so as to avoid having a measure that was not required to be changed pursuant to the DSB's recommendations and rulings subjected to Article 21.5 proceedings. This approach, according to the United States, "would create an incentive for a Member 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"<sup>45</sup> under Article 21.5 of the DSU, even though a programme-wide change, as is the case with respect to the revised GSM 102

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<sup>41</sup>United States' appellant's submission, para. 42. (original emphasis)

<sup>42</sup>*Ibid.*, para. 46.

<sup>43</sup>*Ibid.*, para. 47.

<sup>44</sup>*Ibid.*, para. 49 (referring to Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 74 and 87).

<sup>45</sup>*Ibid.*, para. 54.

programme, would have been preferable because it is easier to administer and improves the programme generally.

21. Therefore, the United States requests the Appellate Body to reverse the Panel's finding that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are within the scope of these Article 21.5 proceedings.

(b) Marketing Loan and Counter-cyclical Payments Made After  
21 September 2005

22. The United States asserts that the Panel erred in concluding that Brazil's claims concerning marketing loan and counter-cyclical payments made after 21 September 2005 were properly within the scope of these Article 21.5 proceedings.<sup>46</sup>

23. The United States submits that "the only measures subject to any finding of WTO-inconsistency, and the DSB's recommendations and rulings based on them, or any implementation obligations, were payments made under the Step 2, marketing loan and counter-cyclical payment program[s] in MY ["marketing year"] 1999-2002 (i.e., through July 31, 2003)."<sup>47</sup> The United States adds that marketing loan and counter-cyclical payments made after 21 September 2005 "were not subject to the DSB's recommendations and rulings", "were not in any way [United States] measures taken to comply", and, therefore, "were outside the scope of the compliance proceeding under Article 21.5" of the DSU.<sup>48</sup>

24. The United States contends that the Panel "fundamentally misunderstood both the obligation of the United States under Article 7.8 of the SCM Agreement and the relationship between Article 7.8 of the SCM Agreement and Article 21.5 of the DSU."<sup>49</sup> According to the United States, "the obligation under Article 7.8 extends only as far as the DSB's recommendations and rulings"<sup>50</sup>, which, in this case, "applied only to the Step 2, market loss assistance, marketing loan, and counter-cyclical payments made during MY 1999-2002, and did not cover either future payments, or the subsidy

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<sup>46</sup>See United States' appellant's submission, para. 56.

<sup>47</sup>*Ibid.*, para. 62.

<sup>48</sup>*Ibid.*

<sup>49</sup>*Ibid.*, para. 63.

<sup>50</sup>*Ibid.*, para. 65.

programs themselves."<sup>51</sup> The Panel, however, incorrectly understood Article 7.8 of the *SCM Agreement* as setting up an "ongoing obligation" with respect to subsidies that were not within the scope of the DSB's recommendations and rulings, despite the fact that "nothing in Article 7.8 refers to such an ongoing, general obligation".<sup>52</sup> Moreover, in the United States' view, "[t]he Panel's interpretation ignores the text of Article 21.5 and would expand a compliance panel's jurisdiction into matters reserved for original proceedings."<sup>53</sup>

25. The United States considers that the Panel improperly relied on the Appellate Body Report in *US – Softwood Lumber IV (Article 21.5 – Canada)*. The United States explains that, in that dispute, the Appellate Body "addressed the distinct issue of what measures could be considered to be part of the measures taken to comply."<sup>54</sup> In the present dispute, marketing loan and counter-cyclical payments made after 21 September 2005 are not "measures taken to comply", but are "original measures challenged by Brazil, and against which the original panel declined to make findings."<sup>55</sup> Furthermore, the United States considers that the Panel's view that there is a "particularly close relationship" between payments made after 21 September 2005 and the recommendations and rulings of the DSB in the original proceedings is "wrong and irrelevant".<sup>56</sup> For the United States, the fact that two separate payments resemble one another may establish similarity, but it does not establish a relationship between them, particularly not a relationship that has any legal relevance for purposes of Article 21.5 of the DSU.

26. The United States further submits that "[d]isallowing Brazil's over-expansive claims in this proceeding would not mean that Members have no remedy to address the adverse effects of a subsidy."<sup>57</sup> The United States asserts that "nothing prevents Members from challenging the present adverse effects of past or current payments; the threat of serious prejudice of past, current, or future payments; or present adverse effects or threat of serious prejudice from payment programs 'as such'."<sup>58</sup> The obligations of a responding Member under Article 7.8 of the *SCM Agreement* depend on what the outcome is of those challenges. In the original proceedings, Brazil succeeded only with

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<sup>51</sup>United States' appellant's submission, para. 65 (referring to Original Panel Report, paras. 8.1(g)(i) and 8.3(d)).

<sup>52</sup>*Ibid.*, para. 66.

<sup>53</sup>*Ibid.*, para. 67.

<sup>54</sup>*Ibid.*, para. 69.

<sup>55</sup>*Ibid.*

<sup>56</sup>*Ibid.*, para. 70 (referring to Panel Report, para. 9.80). (footnote omitted)

<sup>57</sup>*Ibid.*, para. 72.

<sup>58</sup>*Ibid.*

respect to payments made in MY 1999-2002 and, consequently, the obligation in Article 7.8 applies only to those payments. Brazil, however, has not argued that the United States failed to remove the adverse effects of marketing loan and counter-cyclical payments made during MY 1999-2002.

27. Therefore, the United States requests the Appellate Body to reverse the Panel's finding that marketing loan and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.

2. GSM 102 Export Credit Guarantees Issued After 1 July 2005

28. The United States challenges the Panel's finding that the revised GSM 102 export credit guarantee programme constitutes an export subsidy because it is provided against premiums that are inadequate to cover its long-term operating costs and losses under the terms of item (j) of the Illustrative List of Export Subsidies, which is attached as Annex I to the *SCM Agreement* (the "Illustrative List"). The United States advances the following arguments in support of its appeal.

(a) The Panel's Quantitative Analysis

29. The United States contends that the Panel's quantitative analysis under item (j) of the Illustrative List fails because the Panel erroneously found that Brazil presented data sufficient to support a *prima facie* case that GSM 102 export credit guarantees were provided at premiums inadequate to cover long-term operating costs and losses. According to the United States, in conducting its quantitative analysis, the Panel erroneously relied on initial budgetary estimates presented by Brazil and failed to take into account the "flaws inherent in the initial subsidy estimates" and the new budgetary re-estimates submitted by the United States, which show "profitability".<sup>59</sup>

30. The United States argues that the "new re-estimate budgetary data, which came into existence after the original proceeding, indicated the profitability of the GSM 102 program, as well as the other two programs which have been eliminated (GSM 103, SCGP), even before substantial revisions were undertaken to comply with the DSB's recommendations and rulings."<sup>60</sup> The United States adds that two of the cohorts included in the re-estimates data—1994 and 1995—had actually closed, and reflected *actual* experience with the programmes.<sup>61</sup> In contrast, the initial estimates submitted by Brazil for GSM 102 export credit guarantees issued in 2006-2008 were calculated before any use of the programme was made. Moreover, they were derived using government-wide estimation rules that

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<sup>59</sup>United States' appellant's submission, para. 84.

<sup>60</sup>*Ibid.*, para. 80 (referring to United States' first written submission to the Panel, paras. 83, 86-90, and 96; and Panel Report, para. 14.78).

<sup>61</sup>See *ibid.*, para. 80.

impose assumptions of default and recovery rates irrespective of the experience specific to the CCC's programmes, thereby resulting in "an exaggerated projection of losses in the initial subsidy estimate."<sup>62</sup> The United States further asserts that the initial estimates submitted by Brazil were limited to three fiscal years ("FY") only, and that item (j) is concerned with whether premiums charged under an export credit guarantee programme are adequate to cover the long-term operating costs and losses of that programme. By not accounting for the re-estimates data indicating long-term profitability, the United States asserts that the Panel "misapprehended and misapplied the item (j) standard in conducting its quantitative analysis."<sup>63</sup>

31. Furthermore, the United States argues that the cash-basis accounting data submitted by Brazil was "separate and apart from the [United States'] budget accounting approach", and that the "credit guarantee liability"<sup>64</sup> figure in the CCC's Financial Statements submitted by Brazil was merely a balance sheet entry and did not represent a "loss".<sup>65</sup> Recalling the Panel's statement that the CCC's Financial Statements and the cash-basis accounting data "at the very least raise questions"<sup>66</sup> as to whether the re-estimates establish that the export credit guarantee programmes were not provided at a net cost, the United States claims that "[m]erely to 'raise questions' ... is not sufficient to satisfy a burden of putting forward a *prima facie* case."<sup>67</sup> On this basis, the United States argues that the Panel committed a legal error in finding that the initial estimates and other quantitative evidence submitted by Brazil were sufficient to meet its burden of proving that fees charged under the GSM 102 programme are inadequate to cover long-term operating costs and losses. Accordingly, the United States claims that the Panel's conclusion in respect of the quantitative analysis for purposes of item (j) is erroneous as a matter of law.

(b) Comparison with OECD Minimum Premium Rates

32. The United States claims that the Panel has "fundamentally misinterpreted"<sup>68</sup> the requirements of item (j) of the Illustrative List by comparing GSM 102 fees to minimum premium rates ("MPRs") under the Organisation for Economic Co-operation and Development (the "OECD") Arrangement on Officially Supported Export Credits (the "OECD Arrangement"). The United States argues that, even though the Panel recognized that MPRs under the OECD Arrangement have no legal status under item (j) and do not provide a benchmark for agricultural export credit guarantees, it nevertheless

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<sup>62</sup>United States' appellant's submission, para. 82.

<sup>63</sup>*Ibid.*, para. 83.

<sup>64</sup>*Ibid.*, para. 85.

<sup>65</sup>*Ibid.*, para. 86 (referring to Panel Report, para. 14.82).

<sup>66</sup>*Ibid.*, para. 87 (quoting Panel Report, para. 14.88).

<sup>67</sup>*Ibid.*

<sup>68</sup>*Ibid.*, para. 89.



"made determinations under item (j) based on a comparison of GSM 102 program fees to MPRs."<sup>69</sup> According to the United States, neither the OECD Arrangement nor the MPRs are referred to in item (j), and MPRs, promulgated by OECD members, do not explain how the sufficiency of export credit guarantee premiums should be judged. The United States further argues that, in the light of the negotiations for internationally agreed disciplines to govern the provision of export credit guarantees envisaged in Article 10.2 of the *Agreement on Agriculture*, the Panel erred in permitting any application of MPRs, designed for industrial goods, to the GSM 102 programme, which is an agricultural export credit guarantee programme. The United States emphasizes that, to this date, no international disciplines have been agreed under Article 10.2 of the *Agreement on Agriculture* regarding export credit guarantee programmes for agricultural products. Despite the absence of such disciplines, the Panel "would now impose on agricultural export credit guarantees criteria applicable only to industrial goods."<sup>70</sup> In the United States' view, such a result would render Article 10.2 "a nullity".<sup>71</sup>

(c) Structure, Design, and Operation of the Revised GSM 102 Programme

33. The United States contends that, in making findings as to the structure, design, and operation of the revised GSM 102 programme, the Panel relied on an improper comparison between the rate of increase, with risk, of the revised GSM 102 fees and that of fees charged by the United States Export-Import Bank (the "Ex-Im Bank") for two of its insurance programmes: the Letter of Credit Insurance ("LCI") and the Medium-Term Export Credit Insurance ("MTI"). The United States considers these two Ex-Im Bank programmes as "fundamentally dissimilar"<sup>72</sup> to the GSM 102 programme for several reasons, including the fact that the Ex-Im Bank programmes are subject to the MPRs and that the MTI is not available for agricultural goods. Despite these differences, the Panel inappropriately took into account "'the significant difference between the rates of increase for, on the one hand, GSM 102 fees and, on the other hand, the Ex-Im Bank's ... products' to conclude that the GSM 102 program did not have a 'truly risk-based fee structure'".<sup>73</sup>

34. The United States argues that the Panel's legal error in relying on a comparison with Ex-Im Bank programmes was compounded by its improper understanding of scaling of fees as part of an item (j) analysis. According to the United States, "[i]tem (j) does not even impose a 'risk-based'

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<sup>69</sup>United States' appellant's submission, para. 89.

<sup>70</sup>*Ibid.*, para. 99. (emphasis omitted)

<sup>71</sup>*Ibid.*

<sup>72</sup>*Ibid.*, para. 103.

<sup>73</sup>*Ibid.*, para. 101 (quoting Panel Report, para. 14.128).

condition, so the Panel erred in imputing one in the first place and conducting a scaling analysis."<sup>74</sup> The United States submits that, even were a risk-based standard relevant, item (j) does not dictate any specific standards as to scaling, and scaling is only relevant with respect to a comparison of those transactions that are *eligible* under the programme. Thus, in the United States' view, a full examination of whether a programme is risk-based would also have to take into account those transactions that are wholly ineligible.

35. The United States additionally challenges the Panel's finding that the continued existence of a statutory one per cent fee cap under the GSM 102 programme prevented the adoption of risk-based fees. The United States emphasizes that it "fundamentally revised the GSM 102 program to comply with the recommendations and rulings of the DSB", including making "wholesale changes in the eligibility criteria for country risk" and the adoption of "substantially increased fees based on risk for all eligible countries".<sup>75</sup> The United States further notes that the Panel itself was uncertain as to the effect of the 46 per cent average increase in fees (23 per cent trade-weighted) that resulted from these changes. The United States maintains that nothing in item (j) precludes the imposition of a fee cap for an export credit guarantee programme "[a]s long as fees are structured in such a way as to cover long-term operating costs and losses of a program".<sup>76</sup>

36. The United States further submits that the Panel misinterpreted item (j) by taking into account other factors that are not part of a proper analysis under that provision. According to the United States, the Panel erroneously relied on the fact that the CCC has access to funds from the United States Treasury and that it benefits from the full faith and credit of the United States Government, even though such considerations are irrelevant under item (j). The United States argues that the Panel's interpretation "would render item (j) inutile since a government export guarantee program would always be an export subsidy."<sup>77</sup> In addition, the United States contests the Panel's finding that, although the United States sets bank limits with respect to each foreign bank obligor, this does not change the fact that foreign obligor risk is not reflected in GSM 102 fees. The United States asserts that item (j) does not dictate *how* foreign obligor risk should be taken into account by the government extending the export credit guarantees, and that this risk can be mitigated in several ways. The United States emphasizes that "[n]o WTO rule governs how a government program shall be designed to ensure that its premia are adequate to cover long-term operating costs and losses."<sup>78</sup>

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<sup>74</sup>United States' appellant's submission, para. 104.

<sup>75</sup>*Ibid.*, para. 105 (referring to United States' first written submission to the Panel, para. 7).

<sup>76</sup>*Ibid.*, para. 106.

<sup>77</sup>*Ibid.*, para. 111. (emphasis and footnote omitted)

<sup>78</sup>*Ibid.*, para. 113.

Therefore, the Panel erred in concluding that fees were the only proper way to deal with foreign obligor risk.

37. On this basis, the United States submits that the Panel's finding concerning GSM 102 export credit guarantees provided after 1 July 2005 "fails as a matter of law".<sup>79</sup>

(d) Article 11 of the DSU

38. The United States claims that the Panel acted inconsistently with Article 11 of the DSU by failing to undertake an objective assessment of Brazil's claims concerning the revised GSM 102 export credit guarantee programme. First, the United States asserts that the Panel "disregarded the import of the budgetary re-estimates data submitted by the United States"<sup>80</sup> when conducting the quantitative analysis under item (j). Secondly, the United States claims that the Panel, in its "non-quantitative analysis" of the GSM 102 programme, "distorted the meaning of the evidence before it, and made unsubstantiated assumptions to support its findings."<sup>81</sup> More specifically, the United States refers to the Panel's failure to recognize that MPRs are irrelevant for item (j) and to the Panel's reliance on Brazil's comparison of GSM 102 and MPR fees to support the finding that the premiums under the GSM 102 programme were inadequate to cover that programme's long-term operating costs and losses. The United States argues that the Panel "exacerbated its error by adopting Brazil's unsupported assertion that 'if anything, the MPRs would increase if agricultural products were made subject to it'"<sup>82</sup>, adding that "[t]hese conclusory observations were unsupported by evidence on the record".<sup>83</sup> Finally, the United States contends that, despite the "obvious factual distinction"<sup>84</sup> between the GSM 102 programme and the Ex-Im Bank's programmes, the Panel offered no support for its conclusion that this distinction "does not ... fundamentally undermine the value of the [scaling] comparison."<sup>85</sup>

39. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that the United States failed to comply with the DSB's recommendations and rulings relating to the findings of inconsistency of the GSM 102 export credit guarantee programme with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.

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<sup>79</sup>United States' appellant's submission, para. 128.

<sup>80</sup>*Ibid.*, para. 117.

<sup>81</sup>*Ibid.*, para. 120.

<sup>82</sup>*Ibid.*, para. 122 (quoting Panel Report, para. 14.101).

<sup>83</sup>*Ibid.*, para. 122.

<sup>84</sup>*Ibid.*, para. 123.

<sup>85</sup>*Ibid.* (quoting Panel Report, para. 14.125).

3. Serious Prejudice

40. The United States appeals the Panel's finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers pursuant to the Farm Security and Rural Investment Act of 2002<sup>86</sup> (the "FSRI Act of 2002") is significant price suppression in the world market for upland cotton within the meaning of Article 6.3(c) of the *SCM Agreement*, constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*. The United States also submits that the Panel did not carry out an objective assessment of the matter before it as required by Article 11 of the DSU.

(a) Market Insulation

41. The United States submits that the Panel's finding that marketing loan and counter-cyclical payments caused "present" serious prejudice to Brazil by significantly suppressing the world price of upland cotton rested in large part on the Panel's erroneous conclusion that those payments "insulated" United States upland cotton producers from market signals to such an extent that the payments had significant effects on planting, production, exports, and, ultimately, price.<sup>87</sup> The United States argues that the Panel erred in its analysis of how the structure, design, and operation of marketing loan payments and counter-cyclical payments allegedly insulated United States producers by relying excessively on the findings of the original panel. In this respect, the United States notes that the Article 21.5 proceedings "pertained to marketing loan payments and counter-cyclical payments made in MY 2006"<sup>88</sup>, while the original proceedings addressed payments made in a different time period. The United States further argues that, in examining "market insulation", the Panel "did not adequately take into account all factors relevant to producers' planting decisions."<sup>89</sup> These factors "showed that in making these planting decisions, [United States] upland cotton farmers responded in ways that were consistent with market forces, even though they were aware that they might receive marketing loan and counter-cyclical payments if actual prices were below trigger prices."<sup>90</sup>

42. In particular, with respect to *marketing loan payments*, the United States asserts that the Panel "failed to take into account the fact that [United States] producers looked to other factors, aside

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<sup>86</sup>Farm Security and Rural Investment Act of 2002, Public Law No. 107-171 (Exhibit Bra-29 submitted by Brazil to the original panel).

<sup>87</sup>See United States' appellant's submission, para. 132.

<sup>88</sup>*Ibid.*, para. 136. (footnote omitted)

<sup>89</sup>*Ibid.*, para. 134.

<sup>90</sup>*Ibid.*, para. 137.

from the expected price of upland cotton, and responded to them as the market would predict."<sup>91</sup> The United States submits, as an example, that in MY 2005 there was a "shift away from soybean acreage due to concerns about an outbreak of Asian soybean rust at the end of MY 2004"<sup>92</sup>, which, together with other factors, drove planting decisions in that year. Moreover, the United States argues that the Panel's finding of market insulation is inconsistent with a survey of upland cotton farmers "showing that [United States] producers intended to pull back on their upland cotton plantings in MY 2007 by approximately 14 percent in response to such factors as the relatively more attractive expected prices for corn and the poor performance of [United States] exports since August 2006 (at which time the Step 2 program was eliminated)."<sup>93</sup> Finally, the United States argues that the Panel "made no evaluation of producers' expectations that 'actual harvest prices [would be] below the marketing loan rate' in MY 2006 or any other year examined."<sup>94</sup>

43. As regards *counter-cyclical payments*, the United States challenges the Panel's treatment of certain economic studies submitted by the parties. First, the United States argues that the Panel "downplayed the studies' relevance, and then improperly relied on them to support its flawed conclusion that the structure, design, and operation of [United States] counter-cyclical payments had a revenue-insulating effect on [United States] upland cotton producers, that they led to increased acreage and production, and that the 'effect' of the payments was significant price suppression."<sup>95</sup> The United States asserts that "all the research submitted by the United States indicated *minimal* effects of counter-cyclical payments on plantings and production by [United States] producers, and could not reasonably lead to such findings by the Panel."<sup>96</sup> Secondly, the United States argues that "the Panel did not even address the shortcomings of the research submitted by Brazil".<sup>97</sup> The United States also challenges the Panel's treatment of an OECD study<sup>98</sup>, which, in its view, demonstrates that "much of the increase in wealth from farm payments accrues to non-operator landlords and can have no effect on production [because,] [w]here land is rented, some amount of the value of decoupled payments is transferred from operators to the owners of base acres in the form of higher rents and sales values."<sup>99</sup>

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<sup>91</sup>United States' appellant's submission, para. 140. (footnote omitted)

<sup>92</sup>*Ibid.*

<sup>93</sup>*Ibid.*, para. 141. (footnote omitted)

<sup>94</sup>*Ibid.*, para. 142 (quoting Panel Report, para. 10.77).

<sup>95</sup>*Ibid.*, para. 144 (referring to Panel Report, paras. 10.95 and 10.104). (footnote omitted)

<sup>96</sup>*Ibid.*, para. 145. (original emphasis)

<sup>97</sup>*Ibid.*, para. 153.

<sup>98</sup>OECD Paper, "A Review of Empirical Studies of the Acreage and Production Response to US Production Flexibility Contract Payments under the FAIR Act And Related Payments under Supplementary Legislation", AGR/CA/APM(2004)21/FINAL, 30 March 2005 (Exhibit US-32 submitted by the United States to the Panel). (This paper is sometimes referred to as the "Abler and Blandford study", for example, see Panel Report, para. 13.10.)

<sup>99</sup>United States' appellant's submission, para. 149. (footnote omitted)

44. The United States submits that the Panel's finding of market insulation also rests on the flawed conclusion that the "relationship between upland cotton base acre holders and upland cotton production is significant in that it suggests that cotton counter-cyclical payments play a role in maintaining the level of acreage and production at a higher level than would otherwise be the case."<sup>100</sup> The United States explains that, in arriving at this conclusion, the Panel "never actually tested the strength of the alleged relationship between payments and plantings in order to conclude that the former was driving the latter."<sup>101</sup> According to the United States, "the facts showed that the relationship between counter-cyclical payments and planting was weak—upland cotton farmers who also held cotton base acres were planting 40 percent less upland cotton than they had in the period when their collective base acres were established".<sup>102</sup> Moreover, "17 percent of plantings was on farms with no base acres or on farms planting more than their base acres."<sup>103</sup>

45. In addition, the United States claims that "[t]he Panel made several findings that contradict its ultimate conclusion that marketing loan and counter-cyclical payments insulated [United States] producers of upland cotton from market prices."<sup>104</sup> The United States observes that, in determining that United States producers were insulated from market forces, the Panel overlooked its own findings that the United States' shares of world cotton production and exports had remained relatively constant in MY 2002-2005<sup>105</sup>; that in MY 2006 the expected market price of upland cotton was above the marketing loan rate<sup>106</sup>; and that there was no "discernible temporal coincidence" between suppressed world prices and the price-contingent United States subsidies.<sup>107</sup>

46. Finally, the United States submits that the Panel "failed to make any findings as to the degree of market insulation, or the degree of the effects related to that insulation".<sup>108</sup> Instead, the Panel "erroneously assumed that the existence of *any* market-insulating effect, and *any* related production effect, due to [United States] marketing loan and counter-cyclical payments was sufficient to support a finding of significant price suppression."<sup>109</sup> The United States asserts that the Panel's conclusion on market insulation "is inconsistent with the requirement that the degree of effects attributable to support payments be determined before there can be a finding on significant price suppression."<sup>110</sup>

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<sup>100</sup>United States' appellant's submission, para. 154 (quoting Panel Report, para. 10.102).

<sup>101</sup>*Ibid.*, para. 154.

<sup>102</sup>*Ibid.*, para. 156.

<sup>103</sup>*Ibid.*

<sup>104</sup>*Ibid.*, para. 157.

<sup>105</sup>See *ibid.*, paras. 158 and 160.

<sup>106</sup>See *ibid.*, para. 161.

<sup>107</sup>See *ibid.*, paras. 162 and 163 (referring to Panel Report, paras. 10.133 and 10.139).

<sup>108</sup>*Ibid.*, para. 164.

<sup>109</sup>*Ibid.*, para. 165. (original emphasis)

<sup>110</sup>*Ibid.*, para. 166.

(b) Divergence between United States Producers' Total Costs and Market Revenues

47. The United States argues that the Panel's finding that there was a significant gap between the total costs of production of United States upland cotton producers and their market revenue is undermined by the Panel's decision to use total costs, instead of variable costs, as a benchmark; to include overhead costs not specific to upland cotton and non-cash opportunity costs in total costs; and, to discount "off-farm" income from cotton farmers' revenues.

48. The United States argues that "the Panel failed to comprehend that variable costs should be used to properly assess the yearly planting/production effects, if any, attributable to marketing loan and counter-cyclical payments."<sup>111</sup> The United States asserts that it had demonstrated that its cotton farmers covered their variable costs in the period MY 2002-2005, and that in almost all years they covered most, if not all, of their total costs.<sup>112</sup> Moreover, the United States argues that adopting a total costs approach leads to the absurd result that "producers of every single major field crop except for soybeans would have lost money in MY 2005 and, even for soybeans, [United States] farmers would have eked out no more than \$1/acre."<sup>113</sup>

49. The United States submits that, in calculating total costs of production, the Panel improperly relied on USDA crop-specific data, and included "all the items under 'allocated overhead', which were either not specific to upland cotton ... or were not actual cash outlays".<sup>114</sup> The United States also maintains that the Panel should not have considered non-cash opportunity costs corresponding to values attributed to unpaid labour and land that "are not necessarily costs that must be paid off in order for farmers to avoid having to shut down their business."<sup>115</sup> Additionally, the United States argues that the Panel's legal error was compounded by its disregard of off-farm income—and income from other crops—that are an important part of cotton farmers' revenue and "lower the probability of exit by providing farm operator households with another source of income."<sup>116</sup> The United States contends that the Panel ignored new evidence that the United States had submitted on the impact of off-farm income on farm exits, and that the Panel, "while asserting that increasing off-farm revenue

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<sup>111</sup>United States' appellant's submission, para. 178.

<sup>112</sup>See *ibid.*, para. 179.

<sup>113</sup>*Ibid.*, para. 175.

<sup>114</sup>*Ibid.*, para. 182. (footnote omitted)

<sup>115</sup>*Ibid.*, para. 186.

<sup>116</sup>*Ibid.*, para. 191 (quoting R.A. Hoppe and P. Korb, "Understanding US Farm Exits", USDA Economic Research Service, Economic Research Report No. 21 (June 2006) (Exhibit US-46 submitted by the United States to the Panel)).

could signal that farmers were exiting farming, ... never examined whether [United States] cotton producers *actually were* exiting cotton farming."<sup>117</sup>

(c) Economic Simulation Model

50. The United States argues that the Panel overlooked the fundamental flaws of Brazil's economic simulation model. The United States further submits that the model, in any event, showed that the effect of United States subsidies on prices was minimal. The United States adds that it was not sufficient for the Panel to find that the model showed "price suppression" to support a finding of "significant price suppression" within the meaning of Article 6.3(c) of the *SCM Agreement*. According to the United States, in order to properly rely on the results of modelling for its conclusion, the Panel would have had to conclude which model, or models, were appropriate; determine the level of price suppression resulting under that model; and find that such price suppression was of a significant degree. The United States argues that the Panel "never assessed the likely magnitude of the price effects of marketing loan and counter-cyclical payments based on the economic models."<sup>118</sup>

(d) Impact of the Elimination of Step 2 Payments

51. The United States argues that it demonstrated that there was a significant decline in United States production and exports of upland cotton in MY 2006 after the elimination of Step 2 payments. As a result, Brazil had the burden of proving that the impact of the repeal of the Step 2 payments programme on United States production and exports was modest. Therefore, the United States submits that the Panel erred in finding that the elimination of this subsidy did not affect the price suppressing effects of the marketing loan and counter-cyclical payments in the world market for upland cotton.

52. The United States also claims that the Panel misconstrued and overlooked the United States' evidence as to the indirect impact of the elimination of Step 2 payments, which resulted in the substantial decrease of marketing loan payments and no significant increase in counter-cyclical payments. The United States refers, in particular, to a study by the Food and Agricultural Policy Research Institute ("FAPRI"), which shows that the elimination of the Step 2 payments programme results in an average increase of 0.4 cent/lb in the adjusted world price of upland cotton in MY 2006-2010 and a decline of the same amount in the marketing loan payment.<sup>119</sup> In addition, the

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<sup>117</sup>United States' appellant's submission, para. 193. (original emphasis)

<sup>118</sup>*Ibid.*, para. 196.

<sup>119</sup>See *ibid.*, para. 202.



United States asserts that the Panel overlooked important evidence demonstrating that there was unlikely to be an increase in counter-cyclical payments in MY 2006 as a result of the elimination of the Step 2 payments programme. The United States explains that, when United States prices are below the marketing loan rate, the elimination of the Step 2 payments programme—and any consequent decline in farm prices—cannot have any effect on the level of counter-cyclical payments because the payment remains fixed at the maximum level of 13.73 cents/lb.<sup>120</sup>

53. Moreover, according to the United States, the Panel's analysis of the impact of the elimination of Step 2 payments was flawed, because the Panel did not "determine how much of an effect remained after repeal of [the] Step 2 [programme] and how this compared to the original price suppression in order to determine whether the remaining effect, under the Panel's own view, was 'significant'".<sup>121</sup>

(e) Magnitude of Marketing Loan and Counter-cyclical Payments

54. The United States challenges the Panel's finding that, "when considered in conjunction with other factors, the order of magnitude of the marketing loan payments and counter-cyclical payments supports a finding of significant price suppression, even when account is taken of the decline in the amount of marketing loan payments projected for MY 2006."<sup>122</sup> According to the United States, this finding is premised on the Panel's earlier conclusion that the structure, design, and operation of the marketing loan and counter-cyclical payments had an "important revenue-stabilizing effect" on United States farmers, and that the payments bridged "the gap between costs of production and market revenues of [United States] upland cotton producers."<sup>123</sup> The United States considers that the Panel's findings on the structure, design, and operation of the marketing loan and counter-cyclical payments, and on the payments' role in covering the alleged cost-revenue gap, are erroneous. Consequently, it considers that the Panel's finding as to the magnitude of the marketing loan and counter-cyclical payments, which depends on those same findings, also "fails as a matter of law".<sup>124</sup>

(f) Substantial Proportionate Influence on the World Market for Upland Cotton

55. The United States submits that the Panel erred in finding that the United States exerts a "substantial proportionate influence"<sup>125</sup> on the world market for upland cotton, because the Panel did not undertake an analysis of competitive conditions in the upland cotton market. According to the

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<sup>120</sup>See United States' appellant's submission, para. 205.

<sup>121</sup>*Ibid.*, para. 209.

<sup>122</sup>Panel Report, para. 10.111. (footnote omitted)

<sup>123</sup>*Ibid.*

<sup>124</sup>United States' appellant's submission, para. 217.

<sup>125</sup>Panel Report, para. 10.58.

United States, the Panel should have analyzed how United States upland cotton competed with cotton from other sources and how "other factors in the world market, including the predominant role of China, have influenced world prices".<sup>126</sup> Moreover, the United States argues that the Panel overlooked its own finding that United States shares of world production and exports have been stable in recent years.

(g) Other Factors Impacting the World Market Price for Upland Cotton

56. The United States submits that the Panel failed to conduct a proper non-attribution analysis as required by Article 6.3(c) of the *SCM Agreement*. The United States argues that, while the Panel itself recognized that it had an obligation to conduct a non-attribution analysis, it ultimately failed to do so. In the United States' view, "[t]he very use of a but-for analysis ... requires the Panel not to attribute effects to [United States] payments that they are not having."<sup>127</sup>

57. The United States observes that, "[m]issing from the Panel's analysis was any discussion of just how other factors, including China, actually played a role in establishing the world price for upland cotton", and that "the Panel only acknowledged that China had a 'significant role', without examining how price changes could be attributed to that factor."<sup>128</sup> The United States submits that it was not enough for the Panel to dismiss developments concerning the role of China's demand and supply by noting that, "with a share of world exports of around 40 per cent, the United States is capable of exerting a substantial proportionate influence on the world market."<sup>129</sup> The United States argues that the share of United States exports is by itself meaningless, and thus the Panel "should have placed that figure in the context of world market conditions influencing price, including China's role as the largest producer, consumer, and importer of cotton."<sup>130</sup> The United States observes that China's share of world imports rose from 1 per cent in MY 1998 to 44 per cent in MY 2005, and also points to market reports indicating that China's cotton trade played a role in preventing a significant price increase in 2005 and 2006.<sup>131</sup>

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<sup>126</sup>United States' appellant's submission, para. 219.

<sup>127</sup>*Ibid.*, para. 213.

<sup>128</sup>*Ibid.*, para. 214 (quoting Panel Report, para. 10.243).

<sup>129</sup>*Ibid.*

<sup>130</sup>*Ibid.*, para. 214.

<sup>131</sup>See *ibid.*, paras. 211 and 212 (referring to United States' first written submission to the Panel, paras. 314-317; and International Cotton Advisory Committee Report, "Cotton: Review of the World Situation" (May-June 2006) (Exhibit Bra-485 submitted by Brazil to the Panel), p. 7).

(h) Degree of Price Suppression

58. The United States contends that the Panel failed to determine "the *degree* of price suppression that it considered to be 'significant', as applied to the facts before it."<sup>132</sup> The United States notes that Article 6.3(c) of the *SCM Agreement* does not make actionable just any price suppression, but instead expressly requires that the price suppression be "significant". The United States asserts that, by relying on evidence that showed some price effect, however minimal, to establish significant price suppression within the meaning of Article 6.3(c), the Panel "essentially writes the word 'significant' out of Article 6.3(c)."<sup>133</sup>

59. The United States points out that Article 6.3(c) of the *SCM Agreement* "does not define 'significant' price suppression".<sup>134</sup> It observes, however, that the ordinary meaning of "significant" is "important, notable; consequential", and argues that "[w]hat is clear is that a finding of significant price suppression must take into account the *degree* of price suppression that is deemed 'significant', and that the degree must be the equivalent of 'important, notable; consequential'."<sup>135</sup> According to the United States, in order to conduct a proper analysis under Article 6.3(c), the Panel was required to set out the price suppression, if any, as shown by the facts, and to explain how the degree of that suppression was significant, if at all. The United States adds that the Panel, "by merely repeating the term 'significantly', or 'significant', did nothing to satisfy this requirement."<sup>136</sup>

60. The United States concludes by cautioning that, "[i]f left to stand, the Panel's failure to set out the degree of price suppression would have detrimental consequences for the WTO dispute settlement system."<sup>137</sup> This is because "Members would not know how to take appropriate steps to avoid the alleged 'adverse effects' of price-contingent subsidies if it were impossible to discern the 'adverse

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<sup>132</sup>United States' appellant's submission, para. 221. (original emphasis)

<sup>133</sup>*Ibid.*, para. 224.

<sup>134</sup>*Ibid.*, para. 222.

<sup>135</sup>*Ibid.* (quoting *The New Shorter Oxford English Dictionary*, 4th edn, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2860 (Exhibit US-51 submitted by the United States to the Panel). (original emphasis)

<sup>136</sup>United States' appellant's submission, para. 223.

<sup>137</sup>*Ibid.*, para. 225.

effects' that rise to the level of WTO-inconsistency."<sup>138</sup> The United States adds that Members "would be left without guidance as to how to structure programs and payments so as to avoid significant price suppressing effects, and would be deterred from taking likely WTO-consistent actions when confronted with such uncertainty."<sup>139</sup>

(i) Article 11 of the DSU

61. The United States claims that the Panel acted inconsistently with Article 11 of the DSU by failing to carry out an objective assessment of whether marketing loan and counter-cyclical payments made after 21 September 2005 caused significant price suppression in the world market for upland cotton.

62. First, the United States asserts that the Panel, in assessing the structure, design, and operation of marketing loan payments, disregarded the new evidence submitted by the United States and relied exclusively on findings from the original panel and the Appellate Body.<sup>140</sup> The United States additionally argues that the Panel "wilfully distorted and misrepresented the meaning of the economic studies that the United States submitted concerning the effects of counter-cyclical payments on production."<sup>141</sup> Moreover, the United States submits that the Panel "failed to provide a reasoned and adequate explanation for its conclusions"<sup>142</sup> regarding the structure, design, and operation of both marketing loan payments and counter-cyclical payments.

63. Secondly, the United States contends that the Panel "deliberately distorted"<sup>143</sup> the meaning and significance of the evidence on stable United States production and export shares and found that, despite the stable market shares, marketing loan and counter-cyclical payments still insulated United States producers from price signals "to such a degree as to have significant effects"<sup>144</sup> on production and price. The United States points out that stable shares indicated that United States producers "were responding to world market signals in much the same way as foreign producers, and could not have been 'insulated' by [United States] marketing loan and counter-cyclical payments."<sup>145</sup> The United States also argues that the Panel failed to provide a reasoned and adequate explanation for its conclusions and failed to evaluate objectively this evidence.

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<sup>138</sup>United States' appellant's submission, para. 225.

<sup>139</sup>*Ibid.*

<sup>140</sup>See *ibid.*, para. 232.

<sup>141</sup>*Ibid.*, para. 234. (footnote omitted)

<sup>142</sup>*Ibid.*, paras. 233 and 235.

<sup>143</sup>*Ibid.*, para. 237.

<sup>144</sup>*Ibid.*

<sup>145</sup>*Ibid.*, para. 236.

64. Thirdly, the United States submits that the Panel "misrepresented and distorted the results of the [United States'] econometric modeling exercise to fit its own version of what the facts demonstrated", ignored the inherent flaws in Brazil's model that the United States had demonstrated, and "disregarded that ... neither model could support a finding of significant price suppression".<sup>146</sup>

65. Finally, the United States asserts that the Panel "superficially acknowledged that China had a 'significant role', but ignored completely, and never took into account, the [United States'] evidence showing the price changes in the world upland cotton market that could be attributed to that factor."<sup>147</sup> The United States also considers that the Panel failed to provide a reasoned and adequate explanation for its conclusions in the light of an alternative plausible explanation. The United States explains that it had submitted substantial evidence explaining that China is one of the most important "other factors" influencing the world price of upland cotton. This evidence showed that China is the world's largest producer of upland cotton, the world's largest consumer of upland cotton, and the world's largest importer of upland cotton. According to the United States, the evidence also demonstrated China's role in influencing world market prices, including the fact that downward pressure on cotton prices may have resulted from uncertainty over China's supply and demand evolution, as well as ad hoc changes to government policies.<sup>148</sup>

B. *Arguments of Brazil – Appellee*

1. Scope of These Article 21.5 Proceedings

(a) Export Credit Guarantees for Pig Meat and Poultry Meat

66. Brazil submits that the Panel correctly interpreted and applied Article 21.5 of the DSU and properly found that the export credit guarantees for pig meat and poultry meat had a "particularly close relationship" with, and were inextricably linked to, the United States' declared measure taken to comply, that is, the revised GSM 102 programme.

67. Brazil states that Appellate Body jurisprudence makes it clear that measures that are shown to have a "particularly close relationship" to the original measure, the recommendations and rulings of the DSB, and a declared measure taken to comply (if such a measure exists), fall within the scope of

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<sup>146</sup>United States' appellant's submission, para. 240.

<sup>147</sup>*Ibid.*, para. 243.

<sup>148</sup>See *ibid.*, paras. 242 and 243.

proceedings under Article 21.5.<sup>149</sup> Brazil then provides several bases that support its view that the export credit guarantees for pig meat and poultry meat are "inextricably linked" to the declared measure taken to comply. According to Brazil, the measures found to be inconsistent in the original proceedings, and subject to the United States' implementation obligations, included the old GSM 102 programme, and "the United States adopted a single compliance measure—the *amended GSM 102 program*—with a single set of terms and conditions that apply in identical fashion to all products eligible for support, including pig meat and poultry meat."<sup>150</sup> Brazil adds that the manner by which the individual guarantees for pig meat and poultry meat are introduced establishes "a relationship of extreme dependence"<sup>151</sup> between those export credit guarantees and the revised GSM 102 programme, because the individual export credit guarantees are factually and legally dependent on the programme. Brazil further submits that, because the individual export credit guarantees result from the application of the revised GSM 102 programme, "they provide *perfect evidence* of whether the amended GSM 102 program is consistent with the covered agreements" and thus "have a direct impact on whether the United States has fully complied with its export subsidy commitments through the amended GSM 102 program."<sup>152</sup>

68. Brazil asserts that, although none of the individual product-specific export credit guarantees are declared by the United States to be measures taken to comply, "the United States accepts that individual guarantees for unscheduled products and rice are 'measures taken to comply'"<sup>153</sup> subject to these Article 21.5 proceedings. Thus, according to Brazil, the United States apparently accepts the "particularly close relationship" test used by the Panel, because the export credit guarantees for pig meat and poultry meat, and for unscheduled products and rice, "have an identical relationship to the declared ... measure [taken to comply]."<sup>154</sup>

69. Brazil disagrees with the United States' argument that export credit guarantees for pig meat and poultry meat are excluded from these proceedings because the DSB's recommendations and rulings did not specify the export credit guarantees relating to these products. Brazil argues that, contrary to the United States' assertion, a panel established pursuant to Article 21.5 of the DSU has

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<sup>149</sup>See Brazil's appellee's submission, para. 177 (referring to Appellate Body Report, *US – Softwood Lumber IV* (21.5 – Canada), paras. 69-85).

<sup>150</sup>*Ibid.*, para. 186. (original emphasis; footnote omitted)

<sup>151</sup>*Ibid.*, para. 195.

<sup>152</sup>*Ibid.*, para. 198. (original emphasis)

<sup>153</sup>*Ibid.*, para. 201.

<sup>154</sup>*Ibid.*, para. 202; see also *ibid.*, para. 6.

jurisdiction to examine any declared measure taken to comply "in its totality" for its consistency with the covered agreements. Brazil further submits that "measures that are not declared to be 'taken to comply' are also within the scope of Article 21.5 proceedings, if they are 'inextricably linked' and 'closely connected' to the declared compliance measure".<sup>155</sup>

70. In addition, Brazil maintains that the United States is wrong in relying on the Appellate Body Report in *EC – Bed Linen (Article 21.5 – India)*, and in suggesting that Brazil is trying to secure a second chance to pursue its claims on pig meat and poultry meat. Brazil emphasizes that, in these Article 21.5 proceedings, it challenges new export credit guarantees issued under the revised GSM 102 programme, which are different from those at issue in the original proceedings and have not previously been challenged by Brazil.

71. Finally, Brazil takes issue with the United States' argument that the Panel's approach "creates 'disincentives' for comprehensive reform, and 'tell[s] Members to do the least possible changes to their measures'".<sup>156</sup> Brazil considers that "nothing in the DSU compels a Member to reform its law in ways that are not required by the DSB's recommendations and rulings"<sup>157</sup> and neither does WTO law establish any incentive—or disincentive—for Members to take such action. Instead, such reform is made at the sole discretion of the implementing Member, provided that, at a minimum, it complies with the DSB's recommendations and rulings. Thus, in Brazil's view, "[i]f a Member *chooses* to undertake more comprehensive reform *as an integral and inseparable part of its 'measure taken to comply'*, that measure is necessarily subject to Article 21.5 'in its totality'".<sup>158</sup>

72. Brazil therefore requests the Appellate Body to uphold the Panel's finding that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are properly within the scope of these Article 21.5 proceedings.

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<sup>155</sup> Brazil's appellee's submission, para. 205.

<sup>156</sup> *Ibid.*, para. 191 (quoting United States' appellant's submission, paras. 52 and 53).

<sup>157</sup> *Ibid.*, para. 192.

<sup>158</sup> *Ibid.* (original emphasis)

(b) Marketing Loan and Counter-cyclical Payments Made After  
21 September 2005

73. Brazil submits that the Panel correctly found that Brazil's claims regarding marketing loan and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.

74. Brazil makes two preliminary observations regarding the United States' arguments. First, Brazil notes that Article 21.5 proceedings concern "new and different measure[s] that [were] not before the original panel".<sup>159</sup> Accordingly, Brazil rejects the United States' argument that marketing loan and counter-cyclical payments made after 21 September 2005 cannot be included in these proceedings simply because they were not subject to the DSB's recommendations and rulings.<sup>160</sup> Secondly, Brazil observes that, although "the United States has not declared the existence of any 'measure taken to comply'", this "does not preclude a compliance panel from finding that an undeclared measure falls within the scope of Article 21.5."<sup>161</sup>

75. Brazil asserts that marketing loan and counter-cyclical payments made after 21 September 2005 are "substantively identical subsidies"<sup>162</sup> to the payments made in MY 2002. Brazil explains that both sets of payments are made pursuant to the same subsidy programmes under the FSRI Act of 2002, and that the United States has not modified the terms on which the payments are made. According to Brazil, both the old and new payments were made on the basis of exactly the same terms and conditions, to the same recipients, in respect of the same crop. Thus, Brazil contends that "[t]he substantive connections between the payments are much closer than the connections between the measures at issue in *US – Softwood Lumber IV (Article 21.5 – Canada)*".<sup>163</sup>

76. In addition, Brazil submits that a Member does not comply with its obligations under Article 7.8 of the *SCM Agreement* regarding one set of WTO-inconsistent payments by replacing them with another set of identical payments, if these new payments also cause adverse effects. In Brazil's view, the Panel's reliance upon Article 7.8 did not expand, but remained faithful to, the scope of Article 21.5 of the DSU.

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<sup>159</sup>Brazil's appellee's submission, para. 227 (quoting Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41).

<sup>160</sup>See *ibid.*, para. 227.

<sup>161</sup>*Ibid.*, para. 228.

<sup>162</sup>*Ibid.*, para. 235. (emphasis omitted)

<sup>163</sup>*Ibid.*



77. Finally, Brazil argues that if subsequent marketing loan and counter-cyclical payments "are *not* subject to these Article 21.5 proceedings, the grant of annually recurring subsidies becomes ... 'a moving target that escape[s] from [the WTO subsidy] disciplines'." <sup>164</sup> Brazil observes that, under the approach advocated by the United States, the disciplines in Articles 5 and 6 of the *SCM Agreement* regarding the "present" adverse effects of the most obvious form of subsidies—annual cash payments—are reduced to a nullity. Brazil rejects the United States' contention that future payments could be the subject of Article 21.5 proceedings if there is a finding of "threat" of serious prejudice, or if there is a finding against the programmes "as such" in the original proceedings. Brazil points to several difficulties in relying on a "threat" of serious prejudice claim against future payments, including: the fact that future payments cannot be identified as "measures at issue" under Article 6.2 of the DSU because, by definition, they do not exist; the "inherently uncertain" nature of such a claim, because it is based on the likely level of future payments under a programme and the likely future market conditions; and, the need for the "threat" claim to cover payments far into the future to offer a viable remedy. As for the possibility of challenging the subsidy programmes "as such", Brazil observes that the United States itself recognizes that an "as such" claim made in the abstract against a subsidy programme is "difficult, if not impossible, to bring successfully". <sup>165</sup>

78. Accordingly, Brazil requests the Appellate Body to uphold the Panel's finding that marketing loan and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.

## 2. GSM 102 Export Credit Guarantees Issued After 1 July 2005

79. Brazil requests the Appellate Body to uphold the Panel's finding that the revised GSM 102 export credit guarantee programme constitutes an export subsidy because it is provided against premiums which are inadequate to cover its long-term operating costs and losses under item (j) of the Illustrative List of Export Subsidies.

80. Brazil submits that, in its analysis, the Panel relied on a broad range of evidence, made its findings on the basis of the "totality of the evidence" <sup>166</sup>, and did not ascribe decisive meaning or weight to any single piece of evidence. According to Brazil, such evidence included: (i) the United States Government's own initial estimates showing a net cost to the government of operating the revised GSM 102 programme; (ii) re-estimates data showing that, even when updated to account for

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<sup>164</sup>Brazil's appellee's submission, para. 243 (quoting Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.30).

<sup>165</sup>*Ibid.*, para. 251 (referring to United States' appellant's submission, paras. 73 and 135).

<sup>166</sup>*Ibid.*, para. 270 (quoting Panel Report, para. 14.133).

actual results, a net cost is still projected in many fiscal years; (iii) the Financial Statements of the CCC; (iv) cash-accounting data; (v) data showing that the revised GSM 102 fees remain far below the MPRs in the OECD Arrangement; and (vi) various indications that the revised GSM 102 programme is not structured, designed, or operated to cover its long-term costs and losses.<sup>167</sup>

(a) The Panel's Quantitative Analysis

81. Brazil submits that the Panel did not err by relying on the initial budget estimates of the United States Government projecting losses for export credit guarantees issued under the revised GSM 102 programme in 2006-2008. Brazil maintains that the initial estimates, calculated pursuant to the Federal Credit Reform Act of 1990<sup>168</sup> (the "FCRA"), were generated using the net present value methodology that was expressly designed and adopted by the United States Government to accurately measure the costs of federal credit programmes. According to Brazil, initial estimates are "critical tools for prudent fiscal management ... relied upon by credit and banking regulators worldwide, irrespective of subsequent re-estimates."<sup>169</sup> The fact that initial estimates are updated, or re-estimated, annually to account for actual cash flows and changed assumptions does not render these initial estimates unreliable. Brazil emphasizes that the model used to calculate initial estimates "is based on the USDA's own 'loan performance experience'", and that the USDA's self-assessment of the GSM 102 programme indicated that the credit model "currently provide[s] reliable estimates."<sup>170</sup>

82. Brazil further submits that the Panel "neither 'failed to account for', nor 'ignored the import of'"<sup>171</sup>, the United States' evidence and argument regarding alleged deficiencies in the initial estimate process. According to Brazil, the Panel noted that the United States was re-asserting arguments rejected by the original panel, and saw no objective basis for revisiting the original panel's finding that the initial estimates were reliable indicators that the export credit guarantee programmes constituted export subsidies within the meaning of item (j) of the Illustrative List. Brazil submits that, "in an abundance of caution"<sup>172</sup>, the Panel addressed the United States' arguments that the initial estimates were unreliable because they were inflated and were calculated using government-wide, rather than CCC-specific, formulae, but found these arguments unconvincing. The Panel "expressly took the

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<sup>167</sup>See Brazil's appellee's submission, para. 266.

<sup>168</sup>Federal Credit Reform Act of 1990, enacted as part of the Omnibus Budget Reconciliation Act of 1990, Public Law No. 101-508.

<sup>169</sup>Brazil's appellee's submission, para. 310.

<sup>170</sup>*Ibid.*, para. 312 (quoting Panel Report, para. 14.77, in turn quoting USDA's Agricultural Export Credit Guarantee Programs Assessment, at <ExpectMore.gov> (Exhibit Bra-588 submitted by Brazil to the Panel), Section 3.CR2).

<sup>171</sup>*Ibid.*, para. 314 (quoting United States' appellant's submission, paras. 84 and 119).

<sup>172</sup>*Ibid.*, para. 316.

[United States'] evidence into account, and adopted a plausible view on the basis of the evidence as a whole that supported its conclusion regarding the weight to be attached to initial estimates."<sup>173</sup>

83. Brazil adds that the initial estimates for FY 2006-2008 are "not only robust, but of particular importance in these Article 21.5 proceedings"<sup>174</sup>, because these proceedings concern a new fee structure for which, by definition, little past performance data exists. Moreover, contrary to the United States' assertion, Brazil does not consider that reliance on initial estimates for "only" three fiscal years undermines the "long-term" nature of the Panel's assessment<sup>175</sup>, because each estimate reflects the costs "over the lifetime of a cohort", which "typically exceeds ten years".<sup>176</sup>

84. Brazil takes issue with the United States' assertion that the Panel incorrectly allocated the burden of proof under item (j) of the Illustrative List when stating that certain data submitted by Brazil "at the very least raise questions" about the probative value of the re-estimates data.<sup>177</sup> Brazil submits that, because it was the United States that offered the re-estimates data as rebuttal evidence to demonstrate an anticipated profit to the United States Government, the United States bore the burden of proof with respect to that evidence and the argument allegedly supported by it. According to Brazil, the United States submitted the re-estimates data to highlight two points: that the three export credit guarantee programmes at issue in the original proceedings were in fact not provided at a net cost to the United States Government; and that initial estimates in general are not reliable indicators of the long-term net cost of the programmes. Brazil argues that the Panel correctly concluded that the United States had not succeeded in proving either of these two points. The first point had been "definitively disposed of in the original proceedings"<sup>178</sup>, and, with respect to the second point, the USDA itself recently concluded that the FCRA initial estimate methodology "provide[d] reliable estimates".<sup>179</sup> The Panel also attached significance to the "credit guarantee liability" figure in the CCC's 2005-2006 Financial Statements, as well as cash-basis accounting evidence submitted by Brazil. Both sets of data indicated a net loss for the three export credit guarantee programmes subject to the original proceedings. Weighing this evidence, the Panel concluded that evidence provided by Brazil "at the very least raise[d] questions"<sup>180</sup> regarding "whether the United States had succeeded in meeting its burden of proving what it set out to prove with its re-estimates data."<sup>181</sup>

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<sup>173</sup>Brazil's appellee's submission, para. 318. (footnotes omitted)

<sup>174</sup>*Ibid.*, para. 324.

<sup>175</sup>*Ibid.*, para. 326 (quoting United States' appellant's submission, para. 83).

<sup>176</sup>*Ibid.*, para. 327. (emphasis omitted)

<sup>177</sup>See *ibid.*, para. 331 (quoting Panel Report, para. 14.88).

<sup>178</sup>*Ibid.*, para. 342 (quoting Panel Report, para. 14.79).

<sup>179</sup>*Ibid.*, para. 338 (quoting Panel Report, para. 14.77).

<sup>180</sup>*Ibid.*, para. 348 (quoting Panel Report, para. 14.88).

<sup>181</sup>*Ibid.* (original underlining)

(b) Comparison with OECD Minimum Premium Rates

85. Brazil requests the Appellate Body to dismiss the United States' arguments concerning the Panel's reference to the magnitude of difference between the revised GSM 102 fees and OECD MPRs as relevant evidence under item (j) of the Illustrative List. First, Brazil asserts that the Panel did not turn the comparison of the revised GSM 102 fees with the OECD MPRs into a "dispositive"<sup>182</sup> test under item (j). Instead, the Panel "expressly considered the comparison ... as *one piece of evidence among many* informing its assessment whether the revised GSM 102 premiums are adequate to cover the long-term operating costs and losses of the program."<sup>183</sup> Brazil adds that "[t]he United States sees the *absence* from item (j) of express license to consider evidence regarding the OECD MPRs as a *bar* to a panel's consideration of that evidence."<sup>184</sup> Brazil explains that, on the contrary, "the original panel and the Appellate Body interpreted the absence of any prohibition regarding the type of evidence to be considered in an item (j) assessment as an indication of *flexibility* that permits a panel to assess objectively any *evidence* considered relevant to its inquiry."<sup>185</sup> Secondly, Brazil argues that the fact that item (j) does not refer to the OECD Arrangement, whereas the second paragraph of item (k) of the Illustrative List does, similarly does not preclude the Panel's approach to relying on OECD MPRs as relevant evidence. Brazil emphasizes that the Appellate Body's decision in *Brazil – Aircraft* also suggests that the OECD Arrangement offers relevant, indicative evidence under item (j).

86. As regards the United States' allegation that the Panel rendered Article 10.2 of the *Agreement on Agriculture* a nullity by "impos[ing]" the MPRs as a "multilaterally agreed discipline"<sup>186</sup>, Brazil explains that the Panel expressly characterized the comparison of the revised GSM 102 fees to OECD MPRs as an evidentiary matter and not as a legally binding benchmark. Brazil highlights the Panel's statement that "it was the 'magnitude of the difference between MPRs and GSM 102 fees'"<sup>187</sup> that rendered the comparison evidence relevant for purposes of its assessment of the facts under item (j).

(c) Structure, Design, and Operation of the Revised GSM 102 Programme

87. Brazil submits that the Panel correctly examined the structure, design, and operation of the revised GSM 102 programme, and requests the Appellate Body to reject the United States' appeal in this regard.

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<sup>182</sup> Brazil's appellee's submission, para. 375 (quoting United States' appellant's submission, para. 94).

<sup>183</sup> *Ibid.*, para. 376. (original emphasis; footnote omitted)

<sup>184</sup> *Ibid.*, para. 379. (original emphasis)

<sup>185</sup> *Ibid.* (original emphasis; footnote omitted)

<sup>186</sup> *Ibid.*, para. 382 (quoting United States' appellant's submission, para. 99).

<sup>187</sup> *Ibid.*, para. 385 (quoting Panel Report, para. 14.97 (original underlining)).

88. Brazil notes that, as one part of this analysis, the Panel looked at the fees charged for comparable programmes offered by the Ex-Im Bank, "considered 'the rate of increase (or scaling) of fees with increased risk', and found that 'the "scaling" of GSM 102 fees is greatly inferior'"<sup>188</sup> to that for the Ex-Im Bank programmes. Brazil further submits that, when examining the comparison of fee scaling between the GSM 102 programme and the Ex-Im Bank programmes, the Panel "relied on the *extent of the difference* as an *evidentiary indication* of the shortcomings"<sup>189</sup> of the GSM 102 programme. Thus, contrary to the United States' assertion, the Panel did not impose or establish any specific affirmative standards that must be met, except that fees must be adequate to cover the long-term operating costs and losses of the programme.

89. According to Brazil, the Panel's assessment of whether GSM 102 fees are "risk-based" is consistent with item (j) of the Illustrative List because, to the extent that fees do not adequately account for increased risks—such as longer tenors (duration of the guarantee), higher country risk, or higher borrower risk—those fees are not designed "to cover the long-term operating costs and losses" of a programme. Thus, Brazil argues that the Panel properly assessed whether the fees under the revised GSM 102 programme adequately respond to the increased costs of all the risks faced in guaranteed transactions.

90. Brazil also requests the Appellate Body to dismiss the United States' allegations that the Panel incorrectly considered the GSM 102 export credit guarantees and the two Ex-Im Bank programmes to be comparable. Brazil states that, apart from asserting that the Panel erred in accepting Brazil's proffered adjustments for the differences between these programmes, the United States neither explains, nor substantiates, its allegations. Brazil observes that the United States submitted no evidence showing that the risks involved in a transaction differ depending on the product involved. Secondly, Brazil explains that the United States' argument that the GSM 102 programme and the Ex-Im Bank programmes "differ significantly in terms of interest and principal cover" ignores adjustments offered by Brazil and considered by the Panel as "appropriate".<sup>190</sup> Thirdly, Brazil asserts that the Panel correctly found that the alleged difference between the GSM 102 programme and the Ex-Im Bank programmes with respect to recourse benefits for uninsured amounts "*does not exist*".<sup>191</sup>

91. Brazil recalls that the Panel considered the one per cent fee cap as one of the elements indicating insufficient scaling of fees under the revised programme. According to Brazil, contrary to

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<sup>188</sup>Brazil's appellee's submission, para. 431 (quoting Panel Report, para. 14.126 and footnote 757 thereto). (underlining added by Brazil; footnote omitted)

<sup>189</sup>*Ibid.*, para. 433. (original emphasis)

<sup>190</sup>*Ibid.*, para. 452 (quoting United States' appellant's submission, para. 103; and Panel Report, para. 14.125, respectively).

<sup>191</sup>*Ibid.*, para. 453. (original emphasis)

the United States' suggestion that the Panel "interpreted item (j) to 'mandate[]' removal of fee caps to avoid an export subsidy finding"<sup>192</sup>, the Panel did not interpret item (j) to include any such requirement. Rather, the Panel "treated the one-percent fee cap as another element supporting its conclusion that the amended GSM 102 program is not structured, designed and operated to ensure that fees cover long-term costs and losses."<sup>193</sup> Brazil adds that, as the Panel correctly found, removing certain high-risk countries from eligibility under the programme did not change the riskiness of the GSM 102 portfolio sufficiently to enable risk-based fees, despite the statutory one per cent fee cap. Brazil submits that, ultimately, the Panel found Brazil's argument and evidence more persuasive than the United States' argument and evidence, according greater weight to the former than the latter. In Brazil's view, this is not a valid basis for concluding that the Panel committed a reversible legal error because, in applying the law to the facts, the Panel adopted a view that was "more than 'plausible'".<sup>194</sup>

92. Brazil further requests the Appellate Body to reject the United States' challenge against the Panel's reliance on two additional factors in examining the structure, design, and operation of the revised GSM 102 programme, namely: (i) the CCC's unlimited access to United States Treasury funds; and (ii) the fact that revised GSM 102 fees still fail to account for foreign obligor risk. With respect to the first factor, Brazil maintains that "recourse to [United States] Treasury funds is part and parcel of the ordinary course of business for the GSM 102 program" and, therefore, is "a structural element ... on which the compliance Panel was entitled to rely"<sup>195</sup>, as had the original panel. Brazil asserts that, under United States law, the CCC export credit guarantee programmes "are exempted from the usual appropriations requirements"<sup>196</sup>, and that the CCC can "replenish its capital on an annual basis through an unlimited budgetary short-cut".<sup>197</sup> According to Brazil, this indicates that the designers of the GSM 102 programme considered the likelihood of losses high enough to create an exceptional regime. Brazil adds that, because no change had occurred since the original proceedings with regard to this factor, the Panel acted consistently with relevant Appellate Body jurisprudence in not departing from the original panel's reasoning and findings in this regard.

93. With respect to the second factor, Brazil submits that the Appellate Body should reject the United States' assertion that the Panel "erred in concluding that fees were the only proper way to deal with foreign obligor risk".<sup>198</sup> Recalling the item (j) standard, Brazil considers that fees are not

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<sup>192</sup>Brazil's appellee's submission, para. 467 (referring to United States' appellant's submission, paras. 106 and 109).

<sup>193</sup>*Ibid.*, para. 469.

<sup>194</sup>*Ibid.*, para. 473.

<sup>195</sup>*Ibid.*, para. 484.

<sup>196</sup>*Ibid.*, para. 486.

<sup>197</sup>*Ibid.*, para. 487.

<sup>198</sup>*Ibid.*, para. 494 (quoting United States' appellant's submission, para. 113).

designed to adequately "cover" long-term costs and losses if those fees do not adequately account for the increased costs of increased risk, such as higher foreign obligor risk. Brazil argues that the United States offered no evidence to support its assertion that existing exposure limits to control foreign obligor risk are a sufficient alternative to setting fees commensurate to such risk. Brazil further submits that the United States did not offer evidence on the alleged CCC exposure limits for the GSM 102 programme. In contrast, Brazil provided evidence to the Panel in support of its argument that exposure limits and variable fees are used "*in tandem*"<sup>199</sup> by commercial financial institutions to control for the costs associated with borrower risk. In Brazil's view, therefore, the United States "essentially argues that the compliance Panel's error lies in not accepting [the United States'] arguments regarding an '[a]lternative[]' way to account for the costs of foreign obligor risk".<sup>200</sup> Brazil reiterates that "there is no reversible error where a panel adopts 'a plausible view of the facts', 'even though it attributed to these factors a different weight or meaning than did' a party to the dispute."<sup>201</sup>

94. Brazil concludes that the United States has failed to substantiate a reversible error in any of the Panel's intermediate findings and in its overall finding that the revised GSM 102 programme constitutes an export subsidy.

(d) Article 11 of the DSU

95. Brazil submits that the United States has failed to demonstrate that the Panel did not conduct an objective assessment of the matter as required by Article 11 of the DSU. More specifically, Brazil argues that the allegation that the Panel violated Article 11 in its assessment of the United States' evidence and argument regarding deficiencies in the initial estimate process is untenable, because the United States has not demonstrated that the Panel exceeded the bounds of its discretion as the trier of facts. With regard to the United States' argument that the Panel violated Article 11 by failing to assess the evidence concerning the re-estimates, Brazil emphasizes that the Panel "did not uncritically follow the original panel's assessment concerning re-estimates, but objectively assessed the evidence before it."<sup>202</sup> According to Brazil, the Panel was called upon to judge the relative weight and probative value of competing evidence, and the fact that the Panel attributed to competing evidence a different weight or meaning than the United States does not constitute reversible error under Article 11 of the DSU.

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<sup>199</sup>Brazil's appellee's submission, para. 504 (referring to Panel Report, footnote 735 to para. 14.113, in turn referring to Brazil's second written submission to the Panel, footnote 718 to para. 498). (original emphasis)

<sup>200</sup>*Ibid.*, para. 508 (quoting United States' appellant's submission, para. 113).

<sup>201</sup>*Ibid.* (quoting Appellate Body Report, *US – Upland Cotton*, para. 445).

<sup>202</sup>*Ibid.*, para. 354.

96. With respect to the United States' claim that the Panel acted inconsistently with Article 11 by failing to recognize that the OECD MPRs are not relevant for an analysis under item (j) of the Illustrative List, Brazil submits that the Panel simply disagreed with the United States' arguments regarding MPRs and, in so doing, acted consistently with Article 11 of the DSU. Finally, with regard to the United States' assertion that the Panel violated Article 11 because it "offered no support"<sup>203</sup> for its conclusion that the GSM 102 programme and the Ex-Im Bank programmes are similar, Brazil reiterates that, beyond asserting the existence of differences between these programmes, the United States has not explained how the Panel erred in its assessment of the evidence or demonstrated why the Panel exceeded the bounds of its discretion as the trier of facts.

97. Brazil therefore requests the Appellate Body to uphold the Panel's findings under Articles 10.1 and 8 of the *Agreement on Agriculture*, and Articles 3.1(a) and 3.2 of the *SCM Agreement*, as well as its finding that the United States has failed to withdraw the subsidy without delay, and to reject the United States' claim under Article 11 of the DSU.

### 3. Serious Prejudice

98. Brazil requests the Appellate Body to reject the United States' appeal of the Panel's finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers pursuant to the FSRI Act of 2002 is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*. Brazil also requests the Appellate Body to reject the United States' claim that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU. Brazil asserts that, on the basis of the totality of the evidence, the Panel was well within the bounds of its discretion—and fully supported by the evidence—when it found that marketing loan and counter-cyclical subsidies cause significant price suppression.

#### (a) Market Insulation

99. Brazil argues that the United States' appeal relating to market insulation concerns factual aspects of the Panel's findings and that the United States effectively is asking the Appellate Body to "second-guess"<sup>204</sup> the Panel's appreciation and weighing of the evidence before it. Brazil asserts that the Panel's findings "rest on a thorough and proper assessment of the evidence", and that it "did not

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<sup>203</sup>Brazil's appellee's submission, para. 456 (quoting United States' appellant's submission, para. 123).

<sup>204</sup>*Ibid.*, para. 540.



exceed the bounds of its discretion in applying the law to the facts."<sup>205</sup> Moreover, Brazil rejects the United States' contention that the Panel relied excessively on the findings of the panel and the Appellate Body in the original proceedings. Instead, the Panel reviewed these findings and held, based on its own assessment of the updated evidence before it, that these findings remained accurate "*under current factual conditions*".<sup>206</sup> Brazil notes that an Article 21.5 proceeding "is part of a 'continuum of events' and that a compliance panel can be expected to refer and rely on the findings of the panel and the Appellate Body in the original proceeding."<sup>207</sup> Brazil further recalls the Appellate Body's statement that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record."<sup>208</sup>

100. Regarding *marketing loan payments*, Brazil disagrees with the United States that the Panel focused exclusively on the United States' argument that producers' planting decisions were not influenced by the possibility of marketing loan subsidies because expected prices were above the loan rate. Brazil asserts that the Panel did assess the United States' arguments that price expectations and other factors—rather than marketing loan subsidies—explain the planting decisions of United States upland cotton producers. Brazil also recalls that, in the original proceedings, the Appellate Body held that "[t]he way in which United States upland cotton farmers make decisions relating to the production of upland cotton, and the basis on which they make such decisions, are factual matters that fall within the Panel's task of weighing and assessing the relevant evidence"<sup>209</sup>, and asks that the United States' appeal be rejected on the same grounds.

101. Brazil asserts that the fact that expected cash prices were above the marketing loan rate in certain years does not mean that producers did not expect marketing loan payments at the time of planting. In this respect, Brazil notes that the adjusted world price is "consistently much lower than the [United States] cash price", and that United States upland cotton producers would expect marketing loan subsidies "even in situations where the expected *cash* price is above the loan rate".<sup>210</sup> Brazil argues that it demonstrated that the expected adjusted world price for upland cotton was below the marketing loan rate in every year since MY 1999 and that the evidence indicates that "[United

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<sup>205</sup>Brazil's appellee's submission, para. 541.

<sup>206</sup>*Ibid.*, para. 557 (quoting Panel Report, para. 10.104 (original emphasis)).

<sup>207</sup>*Ibid.*, para. 552 (quoting Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121).

<sup>208</sup>*Ibid.*, para. 555 (quoting Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103).

<sup>209</sup>Appellate Body Report, *US – Upland Cotton*, para. 441.

<sup>210</sup>Brazil's appellee's submission, para. 568. (original emphasis)

States] upland cotton producers did expect marketing loan subsidies in each of these years."<sup>211</sup> Moreover, Brazil argues that uncertainty about the actual level of the adjusted world price during the following marketing year, even if the expected adjusted world price is above the loan rate, demonstrates the significance for producers' planting decisions of the "revenue-stabilization"<sup>212</sup> provided by the marketing loan subsidy.

102. Brazil submits that, in the light of these facts, "the United States cannot establish, as it must, that the compliance Panel's finding of market insulation from marketing loan subsidies has no basis in the evidence before it."<sup>213</sup> Instead, according to Brazil, the Panel adopted a plausible view on the basis of the evidence as a whole that supported its conclusion. Brazil adds that, "even if [United States] upland cotton producers had adapted their planting behavior in the direction that market signals would predict—*i.e.*, assuming that the United States' reading of the evidence were correct—this would not undermine the compliance Panel's finding that [United States] marketing loan subsidies 'insulate'—or, in the words of the original panel, 'numb'—[United States] upland cotton producers from market price signals."<sup>214</sup> Brazil observes that the ordinary meaning of the term "insulate" does not require that United States upland cotton producers are shielded altogether from market signals. Brazil submits that the Panel's finding of market insulation would be consistent with evidence showing that United States upland cotton producers react somewhat to market price signals, "just not to the same extent they would absent the [United States] subsidy".<sup>215</sup> Thus, according to Brazil, "*but for* marketing loan and counter-cyclical payments, [United States] upland cotton producers would have reduced their planted acreage by significantly more than merely 14 percent"<sup>216</sup> in MY 2007. Brazil also argues that the Panel did take into account producers' expectations in MY 2006 and concluded that they "had every reason to expect 'very significant' marketing loan payments when making their planting decisions."<sup>217</sup>

103. Regarding *counter-cyclical payments*, Brazil argues that the Panel did not improperly rely on the new studies in isolation to find that the effect of counter-cyclical subsidies is significant price suppression. Brazil submits that the conclusion that the Panel drew from these studies "is not—as the United States argues—that counter-cyclical subsidies have significant production effects; rather, it is that ... these subsidies have the *potential* to cause production-increasing effects."<sup>218</sup> Brazil points out

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<sup>211</sup>Brazil's appellee's submission, para. 568. (emphasis omitted)

<sup>212</sup>*Ibid.*, para. 569.

<sup>213</sup>*Ibid.*, para. 575.

<sup>214</sup>*Ibid.*, para. 577 (quoting Original Panel Report, para. 7.1308). (footnote omitted)

<sup>215</sup>*Ibid.*

<sup>216</sup>*Ibid.*, para. 581. (original emphasis)

<sup>217</sup>*Ibid.*, para. 584. (footnote omitted)

<sup>218</sup>*Ibid.*, para. 596. (original emphasis; footnotes omitted)

that it is only in a subsequent step of the analysis that the Panel satisfied itself that "these potential production effects *in fact* exist with respect to [United States] upland cotton production"<sup>219</sup> and that it did so based on supplementary evidence, including: the fact that the vast majority of upland cotton producers receive counter-cyclical subsidies; the magnitude of these counter-cyclical subsidies; their importance as a share of upland cotton producers' revenue; and, their role in covering a significant part of upland cotton producers' costs.

104. Brazil rejects the argument by the United States that "it is not relevant that 95 percent of [United States] upland cotton production takes place on farms holding upland cotton base", because "[t]his fact would simply be a reflection that areas growing upland cotton in the past exhibit favourable weather and natural endowments to continue to do so."<sup>220</sup> Brazil notes that this argument does not undermine the Panel's finding of market insulation and contradicts the United States' argument that upland cotton producers "actively consider planting alternative crops, including corn and soybeans."<sup>221</sup> Brazil argues that the evidence shows that, throughout the history of the FSRI Act of 2002, roughly 95 per cent of United States upland cotton production has taken place on farms that hold upland cotton base acres and receive counter-cyclical subsidies, which "means that 95 percent of [United States] upland cotton production benefits from the revenue-stabilizing structure, design and operation of this subsidy."<sup>222</sup> Brazil further contends that United States upland cotton producers opt to produce upland cotton, instead of corn and soybeans, because the availability of counter-cyclical subsidies reduces the risk of growing upland cotton, thereby favouring cotton production over alternative crops such as corn and soybeans.

105. Finally, Brazil contends that, contrary to what the United States suggests, there are no inconsistencies between the Panel's finding of market insulation and certain other findings identified by the United States. Brazil asserts that the Panel's finding of market insulation is not undermined by the relatively stable United States shares of world production and exports, because these market shares are determined by the interaction of numerous factors and not only by producers' responses to market prices. Neither is that finding undermined by the fact that expected prices were above the marketing loan rate in MY 2006, because United States upland cotton producers "expected to receive marketing loan subsidies in each of the marketing years at issue, including in MY 2006."<sup>223</sup> In addition, Brazil argues that the alleged absence of a "discernable temporal coincidence" between

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<sup>219</sup>Brazil's appellee's submission, para. 597 (referring to Panel Report, paras. 10.99-10.102 and 10.104). (original emphasis)

<sup>220</sup>*Ibid.*, para. 599 (referring to United States' appellant's submission, paras. 154 and 155).

<sup>221</sup>*Ibid.*, para. 600 (referring to United States' appellant's submission, paras. 138-141).

<sup>222</sup>*Ibid.*, para. 601.

<sup>223</sup>*Ibid.*, para. 680. (footnote omitted)

subsidy payments, increasing exports, and suppressed prices does not undermine the Panel's finding of market insulation, because the Panel never found that temporal coincidence was completely absent. Rather, having assessed the relationship between prices and United States subsidies, the Panel stated that it was "unable to detect a similar '*strong discernible coincidence*' between the [United States] subsidies, the increase in [United States] cotton exports and the drop in world market prices"<sup>224</sup>, and immediately concluded that subsidy payments result in a stabilization of United States cotton producers' revenues.

106. Finally, Brazil states that the Panel was not required to quantify precisely the price-suppressing effects of the United States subsidies, "let alone quantify precisely any intermediate findings of market-insulating or production effects."<sup>225</sup> Brazil adds that, although a quantitative assessment is not required, the Panel did undertake a quantitative assessment of the degree to which marketing loan and counter-cyclical subsidies insulate United States upland cotton producers from market signals.

(b) Divergence between United States Producers' Total Costs and Market Revenues

107. Brazil submits that the Panel properly exercised its discretion in using total costs as a benchmark to assess the effects of the marketing loan and counter-cyclical subsidies on prices. According to Brazil, the Panel correctly examined total costs in assessing long-term developments in the upland cotton industry, appropriately following the analyses undertaken by both the panel and the Appellate Body in the original proceedings. In Brazil's view, because both the original panel and the Appellate Body had relied on total costs to analyze the long-term effects of subsidies, there was no basis for the Panel to treat long-term costs any differently from the way they had been treated in the original proceedings. Furthermore, Brazil notes that the Panel's decision to take into account total costs in its long-term assessment remained "well within [its] discretion"<sup>226</sup> and was supported, not only by the economic literature in general, but, more specifically, by a study from the United States Congressional Research Service (the "USCRS").<sup>227</sup>

108. Brazil observes that the Panel also engaged in a detailed analysis of the effects of the subsidies on short-term annual planting decisions in the context of its assessment of the structure,

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<sup>224</sup>Brazil's appellee's submission, para. 687 (quoting Panel Report, para. 10.135). (emphasis added by Brazil)

<sup>225</sup>*Ibid.*, para. 617. (footnote omitted)

<sup>226</sup>*Ibid.*, para. 722.

<sup>227</sup>*Ibid.*, para. 724 (referring to Congressional Research Service Report for Congress by R. Schnepf and J. Womach, "Potential Challenges to US Farm Subsidies in the WTO" (25 October 2006) (Exhibit Bra-577 submitted by Brazil to the Panel)).

design, and operation of the marketing loan and counter-cyclical subsidies. In this analysis, the Panel considered "evidence presented by both the United States and Brazil regarding annual data assessing *variable* costs."<sup>228</sup> Brazil argues that, had the Panel "focused exclusively on the short-term effects of the [United States] subsidy regime (measured by expected returns against annual *variable* costs)—as the United States asserts it should have—the evidence would unambiguously have shown that marketing loan and counter-cyclical payments distort the economic decision-making of the average [United States] upland cotton producer."<sup>229</sup> Brazil submits that an analysis of expected market revenues and annual variable costs of growing upland cotton, soybeans, or corn shows that, "[o]nly when expected marketing loan and counter-cyclical subsidies are taken into account ... does growing upland cotton become a viable decision compared to growing corn and soybeans."<sup>230</sup>

109. Brazil also contests the United States' allegation that the Panel erred by ignoring off-farm income in its total cost-revenue analysis. Brazil refers to the findings of the original panel, recalled by the Panel, that the references to "subsidized product" and "like product" in Article 6.3(c) of the *SCM Agreement* circumscribe the examination to the upland cotton industry and that "the very fact that the United States relies on such cross-subsidization as a possible source of revenue would tend to support the proposition that upland cotton producers would have lost money over the longer term if they were involved in upland cotton production alone."<sup>231</sup> Moreover, according to Brazil, the Panel "carefully considered the evidence submitted by the United States" and appropriately concluded that it "did not support the [United States'] assertion that *off-farm income negated the significant production effects of the marketing loan and counter-cyclical subsidies*."<sup>232</sup> Brazil submits that the Panel's finding was well within its discretion as the trier of facts and did not amount to a legal error. On the contrary, in Brazil's view, there is a solid evidentiary, economic, and logical foundation for the Panel's conclusion that off-farm income "did not negate the significant production effects of the marketing loan and counter-cyclical subsidies."<sup>233</sup>

110. Additionally, Brazil rejects the United States' argument that the total cost analysis should be limited to total cash costs and should exclude opportunity costs. According to Brazil, the Panel

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<sup>228</sup>Brazil's appellee's submission, para. 731 (referring to Panel Report, paras. 10.185-10.195). (original emphasis)

<sup>229</sup>*Ibid.*, para. 741. (original emphasis)

<sup>230</sup>*Ibid.*, para. 737 (referring to Brazil's oral statement at the Panel meeting, paras. 60-78; Analysis of Planting Decisions Based on Expected Returns (Exhibit Bra-634 submitted by Brazil to the Panel); Brazil's comments on the United States' oral statement at the Panel meeting, paras. 13-27; Analysis of Planting Decisions Based on Expected Returns and Cash Costs (Exhibit Bra-665 submitted by Brazil to the Panel); and Expected Costs and Returns Using Variable Costs (Exhibit Bra-667 submitted by Brazil to the Panel)).

<sup>231</sup>*Ibid.*, para. 745 (quoting Original Panel Report, footnote 1470 to para. 7.1354).

<sup>232</sup>*Ibid.*, para. 749. (original emphasis; footnote omitted)

<sup>233</sup>*Ibid.*, para. 753.

correctly understood that disregarding opportunity costs is contrary to "basic economic principles".<sup>234</sup> Brazil notes that, in arriving at this conclusion, the Panel "relied on USDA economists who also rejected the notion that opportunity costs should be excluded from total costs".<sup>235</sup> Brazil also points out that the Appellate Body, in *Canada – Dairy (Article 21.5 – New Zealand and US II)*, "has already clarified that non-cash 'opportunity' costs are part of cost of production".<sup>236</sup>

111. Finally, in response to the United States' challenge to the Panel's use of USDA cost and market return data, Brazil submits that these data are authentic, accurate, contemporaneous evidence, and have the same credibility as the data used in the original proceedings. Brazil further observes that the USCRS's analysis, which was before the Panel, confirms the accuracy of both the USDA's data on cost and market return and the Panel's reliance upon it. Brazil considers that, like the original panel and the Appellate Body before it, the Panel did not abuse its discretion in using such USDA data to assess the significant long-term gap between total costs of production and market revenue. Therefore, Brazil asserts that the mere fact that the Panel did not agree with the United States' view of the evidence does not amount to legal error under Articles 5(c) and 6.3(c) of the *SCM Agreement*.

(c) Economic Simulation Model

112. Brazil disagrees with the United States' allegation that the parties' econometric modelling was insufficient to support the Panel's finding of significant price suppression. Brazil submits that the Panel never concluded that the econometric modelling of the parties was "'sufficient', in and of itself"<sup>237</sup>, to support a finding of significant price suppression. On the contrary, the econometric modelling was "just one of many facts that [the Panel] considered in its evaluation of whether the

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<sup>234</sup>Brazil's appellee's submission, para. 755 (quoting Panel Report, para. 10.170).

<sup>235</sup>*Ibid.*, para. 756.

<sup>236</sup>*Ibid.*, para. 758 (referring to Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, paras. 102-104).

<sup>237</sup>*Ibid.*, para. 830.

subsidies cause significant price suppression."<sup>238</sup> Brazil contends that, because the United States presents no legal or factual basis that would have required the Panel to exclude the economic simulation model from its overall analysis of the evidence, the United States' appeal must be dismissed. Brazil adds that, "even though the compliance Panel was not in a position to 'judge the claims of the parties about the *exact magnitude*' of the price suppression demonstrated by the economic model, it did identify the range of possibilities, with Brazil demonstrating a change of up to 8.9 percent (MY 2002-2005) or 6.05 percent (MY 2006-2008), and the United States alleging a change as low as 1.41 percent (MY 2002-2005) or approximately 1 percent (MY 2006-2008)."<sup>239</sup> Brazil emphasizes that "even if the Panel had determined that the number at the lowest end of the spectrum advanced by the United States (*i.e.*, approximately 1 percent) were correct, which it did not, this would have still been high enough to constitute significant price suppression, in light of other considerations regarding 'significance'."<sup>240</sup>

(d) Impact of the Elimination of Step 2 Payments

113. Brazil asserts that the Panel properly found that the withdrawal of the Step 2 payments does not eliminate the significant price suppression caused by the marketing loan and counter-cyclical subsidies. Brazil notes that the United States appears to understand that the Panel's duty was to "(i) identify the level of price suppression caused by the original basket of three subsidies in one reference period, (ii) identify the level of price suppression caused by the Step 2 subsidy alone, and (iii) determine whether the remaining price suppression caused by the marketing loan and counter-cyclical subsidies continues to be significant in a different period."<sup>241</sup> However, according to Brazil, "nothing in Part III of the *SCM Agreement* or Article 21.5 of the DSU mandates [this] circuitous approach".<sup>242</sup> Furthermore, if the United States believed that "the withdrawal of the Step 2 subsidy *necessarily* means that the two remaining subsidies *cannot* cause adverse effects, it bore the burden of proving this fact."<sup>243</sup> Brazil asserts that the United States failed to meet its burden, particularly because Brazil demonstrated that the remaining subsidies do, in fact, continue to cause adverse effects, despite the withdrawal of the Step 2 subsidy.

114. Brazil submits that the United States' argument that the Panel was required to determine whether, and to what extent, the withdrawal of the Step 2 payments caused the decline in United

<sup>238</sup>Brazil's appellee's submission, para. 830.

<sup>239</sup>*Ibid.*, para. 842 (referring to Panel Report, paras. 10.201, 10.202, and 10.221). (emphasis added by Brazil)

<sup>240</sup>*Ibid.*, para. 842 (referring to Brazil's first written submission to the Panel, para. 190).

<sup>241</sup>*Ibid.*, para. 868 (referring to United States' appellant's submission, para. 209).

<sup>242</sup>*Ibid.*, para. 869.

<sup>243</sup>*Ibid.*, para. 872. (original emphasis)

States exports in MY 2006 is not relevant to the Panel's assessment of Brazil's claim. This is because the Panel was only required to assess—and did assess—whether United States production and exports, as well as the United States' world market share of production and exports, in MY 2006 were sufficiently large to support a finding that the United States exerted a substantial proportionate influence on world market prices.

115. Brazil asserts that the Panel properly assessed the effects of the withdrawal of Step 2 payments on the magnitudes of the marketing loan and counter-cyclical payments. Brazil notes that, in assessing the effects of the withdrawal of Step 2 payments, the Panel relied on budget documents prepared by the USDA and on an assessment by the United States Congressional Budget Office (the "USCBO"), and correctly concluded that the withdrawal of Step 2 payments "will *reduce* marketing loan subsidies by \$17 million over ten years, but *increase* counter-cyclical subsidies by \$484 million over the same period."<sup>244</sup> Thus, Brazil contends that the Panel adopted a plausible view of the facts when finding "relatively modest changes" in subsidy amounts and that "these changes run counter to one another."<sup>245</sup> In Brazil's view, although the United States might prefer for the Panel to have weighed differently the evidence regarding marketing loan and counter-cyclical payments following the withdrawal of Step 2 payments, it has failed to explain how the Panel erred in making the findings it made.

(e) Magnitude of Marketing Loan and Counter-cyclical Payments

116. Brazil submits that the Panel properly found that the magnitude of the marketing loan and counter-cyclical subsidies was a relevant factor in its assessment, and that this factor, in conjunction with others, supported its finding of significant price suppression. Brazil notes that the United States' appeal appears to be entirely contingent on it prevailing on its appeal of the Panel's findings regarding: "(i) the revenue-stabilizing and market-insulating role of marketing loan and counter-cyclical subsidies; and (ii) their importance to cover [United States] upland cotton producers' cost[s]."<sup>246</sup> However, the magnitude of the subsidy is "one important element that must be considered in a holistic analysis."<sup>247</sup> In Brazil's view, "the magnitude of a subsidy cannot be ignored or disregarded, as the United States wishes the Appellate Body to do, even if one of the panel's findings on another, potentially related, factor were in error—*quod non*."<sup>248</sup>

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<sup>244</sup> Brazil's appellee's submission, para. 95. (original emphasis)

<sup>245</sup> *Ibid.*, para. 892 (quoting Panel Report, para. 10.239).

<sup>246</sup> *Ibid.*, para. 784.

<sup>247</sup> *Ibid.*, para. 787. (emphasis omitted)

<sup>248</sup> *Ibid.*, para. 788.



(f) Substantial Proportionate Influence on the World Market for Upland Cotton

117. Brazil argues that the Panel properly found that the "substantial proportionate influence" exercised by the United States on the world market for upland cotton supports its finding of significant price suppression in that market. Brazil notes that United States world market shares of upland cotton production and exports since MY 1999 are artificially high and reflect the production- and export-enhancing effects of the subsidies at issue. Brazil contends that, "[b]ut for these subsidies, the [United States] market shares would be much smaller."<sup>249</sup> Additionally, Brazil rejects the United States' argument that the relative size of the shares of production and exports alone cannot support a finding of significant price suppression in the world market for upland cotton. In Brazil's view, this argument misrepresents the Panel's finding, because the Panel analyzed this factor "in light of the totality of the evidence before [it]".<sup>250</sup>

(g) Other Factors Impacting the World Market Price for Upland Cotton

118. Brazil requests the Appellate Body to dismiss the United States' claim that the Panel failed to conduct a non-attribution analysis regarding other factors impacting the world market price for upland cotton, in particular, the role of China. Brazil asserts that the Panel's analysis included a comprehensive evaluation of China's role in the world market.

119. Brazil submits that the Panel properly examined the effects of United States subsidies through a "'unitary' counterfactual approach"<sup>251</sup>, examining a wide variety of factors, including the role played by China in the world market. More specifically, Brazil contends that the Panel carefully examined the evidence and arguments from both sides regarding China's role, and appropriately held that "China's role in the market does *not* preclude the United States from exerting a 'substantial proportionate influence' on the world market, nor does it preclude [United States] subsidies from having significant price suppressing effects."<sup>252</sup> According to Brazil, the Panel's findings were properly reasoned, as required by Article 12.7 of the DSU, and had a strong evidentiary basis.

(h) Degree of Price Suppression

120. Brazil rejects the United States' claim that the Panel erred, as a matter of law, in failing to explain the degree of price suppression that it considered to be significant. Brazil observes that,

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<sup>249</sup>Brazil's appellee's submission, para. 796.

<sup>250</sup>*Ibid.*, para. 797 (quoting Panel Report, para. 10.58).

<sup>251</sup>*Ibid.*, para. 917 (referring to Panel Report, para. 10.46).

<sup>252</sup>*Ibid.*, para. 940 (referring to Panel Report, para. 10.244). (original emphasis)

unlike Article 15.2 of the *SCM Agreement*, which explicitly requires consideration of whether subsidized imports suppress or depress prices "to a significant degree", "Article 6.3(c) does not refer to the 'degree of' anything, but simply uses the phrase 'significant price suppression'".<sup>253</sup> Brazil argues that Article 6.3(c) does not require a panel to "quantify precisely what degree of price suppression would be 'significant'".<sup>254</sup> Brazil also notes that the Panel properly followed the same approach adopted by the original panel and approved by the Appellate Body, and endorsed the original panel's finding that, "in the case of a widely traded commodity like upland cotton, 'a relatively small decrease or suppression of prices could be significant'",<sup>255</sup> given the narrow profit margins, the high degree of price sensitivity for sales of a homogenous product, and the sheer size of the market.

121. Furthermore, Brazil submits that the Panel properly based its "significance" finding on the "collective effects" of the subsidies, examining "the totality of the quantitative and qualitative evidence before it"<sup>256</sup>, such as, the United States' share of production and exports; the structure, design, and operation of the United States subsidies; their magnitude; producers' planting decisions, costs of production, and the share of subsidies in their total revenues; and overall price trends in the world market for upland cotton. According to Brazil, the Panel's findings on the various individual factors provide an ample evidentiary basis for its ultimate conclusion that the extent of the price suppression it found was "significant".<sup>257</sup>

(i) Article 11 of the DSU

122. Brazil asserts that the Panel did not exceed the bounds of its discretion as the trier of facts under Article 11 of the DSU in finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers is significant price suppression and thus

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<sup>253</sup>Brazil's appellee's submission, para. 812.

<sup>254</sup>*Ibid.*, para. 823.

<sup>255</sup>*Ibid.*, para. 820 (quoting Panel Report, para. 10.50, in turn quoting Original Panel Report, para. 7.1330).

<sup>256</sup>*Ibid.*, para. 808.

<sup>257</sup>*Ibid.*

fully complied with its duties under Article 11 of the DSU. Brazil also rejects the United States' allegation that the Panel disregarded and distorted evidence submitted by the United States in relation to both marketing loan payments and counter-cyclical payments. In Brazil's view, the United States has not established that the Panel "exceeded the bounds of its discretion, as the trier of fact, in assessing the evidence before it"<sup>258</sup> and "[t]he fact that the Panel accorded the evidence a weight or meaning different than did the United States is not grounds for reversible error."<sup>259</sup> Brazil furthermore rejects the United States' argument that the Panel violated Article 11 of the DSU because it did not expressly address in its analysis arguments made by the United States, and notes that "Article 11 does not require a panel to address each and every argument made by the parties."<sup>260</sup>

123. In particular, Brazil asserts that the Panel "adopted a 'plausible'—indeed, likely the only plausible—view of the facts, fully supported by the evidence before it, when it found that very large price-contingent marketing loan and counter-cyclical subsidies insulate [United States] upland cotton producers from market price signals."<sup>261</sup> Brazil contends that the Panel did not exceed the bounds of its discretion in finding market insulation, even in the light of the relatively stable United States shares of world production and exports. Brazil additionally argues that the Panel did not exceed the bounds of its discretion with respect to the appreciation of the "substantial proportionate influence" exercised by the United States in the world market of upland cotton.

124. As regards the econometric model, Brazil states that the United States has not identified errors in the Panel's assessment that would have precluded reliance on it as part of the evidentiary basis for the significant price suppression finding. Brazil further asserts that the Panel did not "ignore", "distort", or "misrepresent" the United States' arguments and evidence relating to the economic model, but instead carefully considered and rejected them.<sup>262</sup> In Brazil's view, "[t]he essence of the United States' appeal is that, because the Panel disagreed with the United States, it must have exceeded the bounds of its discretion and conducted a non-objective analysis."<sup>263</sup> However, the mere fact that the Panel did not agree with the United States, and attached different weight to the evidence than the United States, does not mean that the evidence cannot support the Panel's conclusions and that the Panel exceeded the bounds of its discretion as the trier of facts.

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<sup>258</sup>Brazil's appellee's submission, para. 640.

<sup>259</sup>*Ibid.*, para. 650. (footnote omitted)

<sup>260</sup>*Ibid.*, para. 135 (referring to Appellate Body Report, *US – Upland Cotton*, para. 446; Appellate Body Report, *Dominican Republic – Import and Sale of Cigarettes*, para. 125; Appellate Body Report, *EC – Poultry*, paras. 135 and 143; and Appellate Body Report, *Japan – Agricultural Products II*, footnote 39 to para. 91).

<sup>261</sup>*Ibid.*, para. 627 (referring to Appellate Body Report, *Brazil – Retreaded Tyres*, para. 206).

<sup>262</sup>See *ibid.*, paras. 844-853.

<sup>263</sup>*Ibid.*, para. 853.

125. Brazil asserts that the Panel properly weighed all the evidence and arguments before it with respect to "other factors" that could be affecting prices, such as China's influence on the world market price of upland cotton. Brazil explains that the Panel "understood that China is a significant player in the world market; but it concluded that the United States—as the world's second largest producer and largest exporter—nonetheless continues to exert substantial influence in the market place."<sup>264</sup> In Brazil's view, the evidence before the Panel amply supports this conclusion, which "constitutes a more-than-'plausible' view of the facts".<sup>265</sup>

126. Brazil argues that the arguments submitted by the United States concerning the reasoning of the Panel do not relate to Article 11 of the DSU but, rather, should have been raised under Article 12.7 of the DSU. As the United States made no claim of error under Article 12.7 of the DSU, for that reason alone, these arguments should be dismissed. In any event, Brazil notes that the Panel did provide a basic rationale for its findings, in accordance with Article 12.7 of the DSU.

C. *Claims of Error by Brazil – Other Appellant*

1. Scope of These Article 21.5 Proceedings: The Revised GSM 102 Programme

127. Brazil appeals the Panel's finding that the revised GSM 102 programme is not the measure that was the subject of Brazil's claim.<sup>266</sup> Brazil's appeal is conditional on the Appellate Body reversing the Panel's finding that Brazil's claims pertaining to pig meat and poultry meat were properly within the scope of these Article 21.5 proceedings.

128. Brazil maintains that the revised GSM 102 programme itself was the declared measure taken to comply and that this was identified in Brazil's request for the establishment of an Article 21.5 panel. Brazil observes that the revised GSM 102 programme "applies, without distinction, to all eligible products falling within its scope".<sup>267</sup> Brazil argues that, "[c]onsistent with the declaration by the United States"<sup>268</sup>, Brazil challenged the revised GSM 102 programme as a measure at issue throughout the Article 21.5 proceedings. Brazil notes that it additionally identified as "measures at issue" individual export credit guarantees issued under the revised GSM 102 programme, including those provided in connection with exports of pig meat and poultry meat.

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<sup>264</sup>Brazil's appellee's submission, para. 941.

<sup>265</sup>*Ibid.*

<sup>266</sup>See *ibid.*, para. 175 (referring to Panel Report, para. 9.25).

<sup>267</sup>*Ibid.*, para. 178.

<sup>268</sup>*Ibid.*, para. 179.

129. Brazil states that it sees no basis on which the Panel could disagree that the measure that is the subject of Brazil's claims is the revised GSM 102 programme itself. According to Brazil, "[a] panel is bound to examine the measure ... identified by the complainant in its panel request, which forms the panel's terms of reference."<sup>269</sup> Brazil further submits that the Panel's finding is "puzzling"<sup>270</sup> because the Panel examined the revised GSM 102 programme under item (j) of the Illustrative List but refused to examine the same measure under Article 10.1 of the *Agreement on Agriculture*.

130. In Brazil's view, the Panel "appears to have considered that Brazil could not identify, as the measure at issue, the GSM 102 program as a whole because Brazil's claims concerning the circumvention of export subsidy commitments were product-specific."<sup>271</sup> Brazil argues that this approach "is flawed because it confuses the sharp distinction between measures and claims".<sup>272</sup> Brazil asserts that, although it made a claim under Article 10.1 of the *Agreement on Agriculture*, the fact that the United States' obligation under that provision applies on a product-specific basis does not mean that the measure at issue must also be product-specific.

131. Brazil recalls the Appellate Body's finding in *EC – Chicken Cuts* that "the identification of the products at issue must flow from the specific measures identified in the panel request", and argues that the Panel did the reverse by "re-defin[ing] the scope of the measures"<sup>273</sup> according to the product-specific character of the obligations. Brazil adds that the Panel, by "unilaterally chang[ing] its terms of reference"<sup>274</sup> and excluding the declared measure taken to comply from these proceedings, also failed to make an objective assessment of the matter as required by Article 11 of the DSU. Brazil therefore requests the Appellate Body to reverse the Panel's finding and to find, instead, that the revised GSM 102 export credit guarantee programme itself was a "measure at issue" before the Panel.

132. In the event that the Appellate Body reverses the Panel's finding, Brazil further requests the Appellate Body to complete the analysis and to find that the revised GSM 102 programme is applied in a manner that circumvents the United States' export subsidy commitments with respect to pig meat and poultry meat, contrary to Articles 10.1 and 8 of the *Agreement on Agriculture*. Brazil explains that it makes this request because, "should the Appellate Body accept the United States' appeal against the compliance Panel's finding that [export credit guarantees] for pig meat and poultry meat were properly before the Panel, this would deprive the Panel's *substantive* finding of its *jurisdictional*

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<sup>269</sup>Brazil's other appellant's submission, para. 180.

<sup>270</sup>*Ibid.*, para. 181.

<sup>271</sup>*Ibid.*, para. 182.

<sup>272</sup>*Ibid.*, para. 184.

<sup>273</sup>*Ibid.*, para. 186 (referring to Appellate Body Report, *EC – Chicken Cuts*, para. 165).

<sup>274</sup>*Ibid.*, para. 190.

basis"<sup>275</sup>, and the dispute between the parties with respect to export credit guarantees for pig meat and poultry meat would remain unresolved.

133. Brazil submits that the measures challenged and the claims made by Brazil relating to export credit guarantees for pig meat and poultry meat are properly within the jurisdiction of the Panel and the Appellate Body. Brazil recalls that, as it has demonstrated, the revised GSM 102 programme is the measure taken to comply, and, thus, Brazil claims that it is entitled to challenge this new measure "in its totality" without any limitation on the claims.<sup>276</sup> More specifically, Brazil argues that it is entitled to challenge the revised GSM 102 programme "under *any provision* of the covered agreements" and "with respect to *any product* falling within the scope of that 'new' measure".<sup>277</sup>

134. Moreover, according to Brazil, there are sufficient factual and legal findings by the Panel to enable the Appellate Body to complete the analysis. Brazil refers to the following two findings of the Panel, and notes that the second finding is not appealed by the United States: (i) the revised GSM 102 programme "constitutes an 'export subsidy' under item (j) of the Illustrative List"<sup>278</sup>; and (ii) the quantity of exports of pig meat and poultry meat "having benefited from GSM 102 export credit guarantees exceeds the [United States' export subsidy] commitments"<sup>279</sup> by 57 and 14 times, respectively. Brazil maintains that, in any event, under Article 10.3 of the *Agreement on Agriculture*, "the *United States* bears the burden of proving" that its exports of pig meat and poultry meat "in excess of its quantity-based reduction commitment levels do *not* benefit from export subsidies".<sup>280</sup> Brazil notes that the United States has made no arguments in this regard. On this basis, Brazil requests the Appellate Body to complete the analysis and to find that the revised GSM 102 export credit guarantee programme is applied in a manner that results in circumvention of the United States' export subsidy commitments with respect to pig meat and poultry meat, contrary to Articles 10.1 and 8 of the *Agreement on Agriculture*, and Articles 3.1(a) and 3.2 of the *SCM Agreement*.

2. Scope of These Article 21.5 Proceedings: Marketing Loan and Counter-cyclical Payments Programmes

135. Brazil claims that the Panel erred in assessing its terms of reference under Article 21.5 of the DSU and concluding that the original panel's "present" serious prejudice findings and conclusions

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<sup>275</sup>Brazil's other appellant's submission, para. 193. (original emphasis; footnote omitted)

<sup>276</sup>See *ibid.*, para. 195 (referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, paras. 87 and 90; Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 146; and Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras. 40 and 41).

<sup>277</sup>*Ibid.*, para. 195. (original emphasis)

<sup>278</sup>*Ibid.*, para. 197 (quoting Panel Report, para. 14.133).

<sup>279</sup>*Ibid.*, para. 198 (quoting Panel Report, para. 14.148).

<sup>280</sup>*Ibid.*, para. 200. (original emphasis)

covered exclusively subsidy payments, and did not extend to subsidy programmes. Brazil's appeal is conditional on the Appellate Body reversing the Panel's finding that payments made after 21 September 2005 under the marketing loan and counter-cyclical payments programmes are measures taken to comply that are properly within the scope of these Article 21.5 proceedings.

136. Brazil cautions about using the labels "as such" and "as applied" to describe the measures at issue in the context of a claim of adverse effects under Article 5 of the *SCM Agreement*. Brazil explains that Article 5 allows a complaining Member to demonstrate that the "use" of a subsidy programme causes "adverse effects". According to Brazil, "if a panel does examine *payments as part of the evidence* of the 'use' of a program that does not prevent the program itself from being a measure that causes adverse effects."<sup>281</sup> Brazil adds that, "[a]lthough this may not be a 'classic' 'as such' challenge to a program in WTO dispute settlement, it is a type of challenge against subsidy programs that is envisaged by Article 5 of the *SCM Agreement*."<sup>282</sup>

137. Brazil does not agree with the Panel that the original panel's reference to "mandatory price-contingent United States subsidy measures" "inevitably"<sup>283</sup> excludes subsidy programmes from the scope of the original panel's findings. For Brazil, "it is possible, at the least, that the original panel's reference to 'mandatory price-contingent ... subsidy measures' includes the four subsidy programs"<sup>284</sup>, and the ambiguity in the formulation "call[s] for further elucidation in light of 'the factual and legal background' provided by the remainder of the original panel report."<sup>285</sup> Brazil proceeds to review the terms of reference of the original panel and the original panel report, and points to several elements that it considers support its view that "the original panel's finding regarding 'mandatory price-contingent United States subsidy measures' must be understood to include the subsidy programs, as set forth in the 'legislative and regulatory provisions providing for payment' of the subsidies."<sup>286</sup> In particular, Brazil refers to: (i) the original panel request, which established the original panel's terms of reference<sup>287</sup>; (ii) the original panel's statement of the measures before it<sup>288</sup>; (iii) the original panel's reasoning regarding those measures, which includes an examination of their "structure", "design", and

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<sup>281</sup> Brazil's other appellant's submission, para. 62. (original emphasis)

<sup>282</sup> *Ibid.*

<sup>283</sup> *Ibid.*, para. 68 (referring to Panel Report, para 9.46, in turn quoting Original Panel Report, para. 8.1(g)(i)).

<sup>284</sup> *Ibid.*, para. 69.

<sup>285</sup> *Ibid.*, para. 70 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 69).

<sup>286</sup> *Ibid.*, para. 122.

<sup>287</sup> See *ibid.*, para. 75.

<sup>288</sup> See *ibid.*, para. 78 (referring to Original Panel Report, para. 7.1107).

"operation"<sup>289</sup>; and (iv) the original panel's reasons for exercising judicial economy with respect to Brazil's claims of "threat" of serious prejudice.<sup>290</sup>

138. Brazil also claims that the Panel's finding that the original panel's conclusions and the DSB's recommendations and rulings related to only the subsidy payments, and not the subsidy programmes, constitutes a violation of the duty to make an "objective assessment of the matter" under Article 11 of the DSU. Brazil argues that the Panel "failed to consider the original panel's own description of the 'measures at issue'" and "failed to examine the original panel's terms of reference, as set forth in the original panel request."<sup>291</sup> Brazil asserts that "[a] compliance panel cannot objectively assess the scope of the original panel's findings if it ignores both the original panel's own statements of the measures at issue, and its terms of reference."<sup>292</sup>

139. In the event that its conditional appeal is accepted, Brazil requests the Appellate Body to find that marketing loan and counter-cyclical payments made after 21 September 2005 constitute "measures taken to comply" with the DSB's recommendations and rulings in the original proceedings, because of the close connection to the marketing loan and counter-cyclical payments programmes that are subject to those recommendations and rulings. Alternatively, Brazil requests the Appellate Body to find that, through the continued use of the marketing loan and counter-cyclical payments programmes, the United States causes serious prejudice to Brazil's interests.

D. *Arguments of the United States – Appellee*

1. Scope of These Article 21.5 Proceedings: The Revised GSM 102 Programme

140. The United States submits that, because the revised GSM 102 programme is not a "measure taken to comply" with the DSB's recommendations and rulings, the Appellate Body should reject Brazil's conditional appeal against the Panel's finding that the GSM 102 programme was not the measure subject to Brazil's claims.

141. The United States recalls that the original panel made findings with respect to specific export credit guarantees for individual products, rather than the GSM 102 programme itself. The United States refers to the original panel's conclusion that, "in respect of exports of upland cotton and other

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<sup>289</sup>See Brazil's other appellant's submission, paras. 93-194 (referring to Original Panel Report, paras. 7.1191-7.1194, 7.1291-7.1296, 7.1305, 7.1332, and 7.1477).

<sup>290</sup>See *ibid.*, para. 106 (referring to Original Panel Report, paras. 7.1498-7.1503).

<sup>291</sup>*Ibid.*, para. 128.

<sup>292</sup>*Ibid.*



unscheduled agricultural products ... and in respect of ... rice"<sup>293</sup>, the United States export credit guarantees were export subsidies applied in a manner resulting in circumvention of its export subsidy commitments. The United States argues that, "[a]s is clear from the language"<sup>294</sup> of this conclusion, the original panel considered specific export credit guarantees for individual products to constitute export subsidies, and the DSB's recommendations and rulings applied to only those export credit guarantees specifically mentioned in this conclusion.

142. The United States submits that, in these Article 21.5 proceedings, Brazil did not assert that the GSM 102 programme itself circumvents the United States' export subsidy commitments but, rather, challenged the GSM 102 programme "as applied" with respect to certain products, including pig meat and poultry meat. The United States contends that Brazil nevertheless "attempts to bring the entire GSM 102 program before the compliance Panel by casting the program as the 'declared' [United States] implementation measure".<sup>295</sup> The United States maintains that "the statements made by the United States when the GSM 102 program was changed do not amount to any such 'declaration' that the GSM 102 program was a measure taken to comply".<sup>296</sup> Furthermore, these statements do not "amount to any acknowledgement about the scope of the DSB recommendations and rulings and the scope of the changes"<sup>297</sup> to the GSM 102 programme.

143. The United States asserts that, although it made changes with respect to export credit guarantees generally, including for pig meat and poultry meat, "it did so as a matter of administrative convenience and not 'to comply'"<sup>298</sup> with the DSB's recommendations and rulings. By casting the revised GSM 102 programme itself as the measure taken to comply, Brazil's approach suggests that "Members should refrain from efficient management or good public policy because otherwise they risk an expedited compliance proceeding with no reasonable period of time to respond to any adverse findings."<sup>299</sup>

144. Furthermore, the United States argues that Brazil mistakenly relies on the Appellate Body's finding in *US – Shrimp (Article 21.5 – Malaysia)* to support its position that a new measure can be challenged in its totality in Article 21.5 proceedings. Noting that the "new measure" referred to in

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<sup>293</sup>United States' appellee's submission, para. 77 (quoting Original Panel Report, para. 8.1(d)(i)).

<sup>294</sup>*Ibid.*, para. 78.

<sup>295</sup>*Ibid.*, para. 80.

<sup>296</sup>*Ibid.*

<sup>297</sup>*Ibid.*

<sup>298</sup>*Ibid.*, para. 86.

<sup>299</sup>*Ibid.*

*US – Shrimp (Article 21.5 – Malaysia)* was the "measure taken to comply", the United States reiterates that the measure taken to comply in these Article 21.5 proceedings encompasses changes to GSM 102 export credit guarantees for unscheduled products and one scheduled product, rice, rather than the revised GSM 102 programme in its totality. In addition, the United States submits that Brazil's reliance on the Appellate Body's finding in *Canada – Aircraft (Article 21.5 – Brazil)* is also misplaced because, in that dispute, Canada was required to withdraw the subsidy with respect to "all [Technology Partnerships Canada] assistance to the Canadian regional aircraft industry".<sup>300</sup> In contrast, in these proceedings, the "measure taken to comply" encompasses only the changes made with respect to a "subset"<sup>301</sup> of GSM 102 export credit guarantees with respect to which the United States was required to implement the DSB's recommendations and rulings.

145. The United States also contests Brazil's claim that the Panel acted inconsistently with Article 11 of the DSU by "unilaterally chang[ing] its terms of reference" and "excluding measures specifically identified"<sup>302</sup> by Brazil. According to the United States, the Panel did not exclude measures listed by Brazil but, rather, addressed Brazil's claims relating to specific GSM 102 export credit guarantees for individual products. The United States argues that, because the revised GSM 102 programme was not the subject of Brazil's claims, the Panel "committed no error by failing to address non-existent claims as to that alleged measure".<sup>303</sup> In any event, the Panel was entitled to limit its review to those claims which must be addressed in order to resolve the matter at issue in this dispute.<sup>304</sup> Thus, because the Panel was able to resolve the dispute by reviewing Brazil's claims as to specific GSM 102 export credit guarantees for individual products, the Panel was not required to consider Brazil's other claims "concerning a different measure", namely, the revised GSM 102 programme in its totality.<sup>305</sup>

146. Finally, the United States contests Brazil's claim that "there are more than sufficient factual and legal findings by the compliance Panel to enable the Appellate Body to complete its legal analysis

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<sup>300</sup>United States' appellee's submission, para. 88 (quoting Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 2). (emphasis added by the United States)

<sup>301</sup>*Ibid.*, para. 88.

<sup>302</sup>*Ibid.*, para. 83 (quoting Brazil's other appellant's submission, para. 190).

<sup>303</sup>*Ibid.*, para. 83.

<sup>304</sup>See *ibid.*, para. 84 (quoting Appellate Body Report, *EC – Poultry*, para. 135).

<sup>305</sup>*Ibid.*, para. 84.

and find that the amended GSM 102 program results in circumvention<sup>306</sup> of the United States' export subsidy commitments with respect to pig meat and poultry meat. The United States submits that it has demonstrated that the Panel erred as a matter of law in finding that the GSM 102 programme constitutes an export subsidy under item (j) of the Illustrative List, and that this finding of the Panel should be reversed.

147. On this basis, the United States requests the Appellate Body to find that the revised GSM 102 export credit guarantee programme is not a "measure taken to comply", to reject Brazil's conditional appeal, and to deny Brazil's request to complete the analysis with respect to GSM 102 export credit guarantees for pig meat and poultry meat.

2. Scope of These Article 21.5 Proceedings: Marketing Loan and Counter-cyclical Payments Programmes

148. The United States considers that the Panel correctly concluded that the "original panel's findings and recommendations with respect to 'present' serious prejudice were limited to payments under the marketing loan and counter-cyclical programs, and did not encompass the programs themselves."<sup>307</sup> Accordingly, the United States requests the Appellate Body to reject Brazil's conditional appeal regarding marketing loan and counter-cyclical payments programmes.

149. The United States asserts that Brazil is "ask[ing] the Appellate Body to revisit the proceedings before the original panel to ascertain whether the compliance Panel correctly interpreted the findings of the original panel."<sup>308</sup> Thus, "Brazil would have the Appellate Body reexamine in full the proceedings of the original panel regarding the measures at issue and the claims made."<sup>309</sup> The United States does not see a "need to revisit and reexamine the original panel proceedings in this way" because "the critical element is the findings of the original panel, as adopted by the DSB, as these set the scope of the compliance proceeding under Article 21.5 of the DSU."<sup>310</sup>

150. The United States submits that Brazil did not make a claim of "present" serious prejudice with respect to the marketing loan and counter-cyclical payments programmes and, consequently, the original panel "could not make"<sup>311</sup> findings with respect to the programmes themselves. Moreover, the United States rejects Brazil's reliance on the "measures at issue" listed in Brazil's request for the

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<sup>306</sup>United States' appellee's submission, para. 89 (quoting Brazil's other appellant's submission, para. 196).

<sup>307</sup>*Ibid.*, para. 20.

<sup>308</sup>*Ibid.*, para. 14.

<sup>309</sup>*Ibid.*

<sup>310</sup>*Ibid.*, para. 15.

<sup>311</sup>*Ibid.*, para. 27.

establishment of the panel. The United States adds that "the issue here is the scope of the [original] panel's findings on the *claims* Brazil presented"<sup>312</sup>, and not the "measures" listed in Brazil's original panel request. According to the United States, Brazil's claim before the original panel "did not include a claim of 'present' serious prejudice with respect to marketing loan and counter-cyclical programs as such."<sup>313</sup> Thus, the United States asserts, the "original panel's findings ... paralleled the claims made by Brazil, showing that the original panel well understood the issues before it."<sup>314</sup>

151. The United States additionally argues that the "fact that the original panel analyzed the 'structure, design, and operation of subsidies' was perfectly consistent with the claims before it regarding *payments* under the marketing loan and counter-cyclical payment programs".<sup>315</sup> The United States explains that, "[c]ontrary to Brazil's position, even a 'simple' payment can be analyzed in terms of 'structure,' 'design,' and 'operation'".<sup>316</sup>

152. The United States also takes issue with Brazil's reliance on the statement made by the original panel when explaining the basis for its exercise of judicial economy on Brazil's claims of "threat" of serious prejudice, that "the United States would make changes in its statutory and regulatory framework as a result of its finding on 'present' serious prejudice".<sup>317</sup> For the United States, this point "actually confirms that Brazil is in error".<sup>318</sup> In the United States' view, if the "measures taken to comply" with the recommendations and rulings of the DSB stretch to include the marketing loan and counter-cyclical payments programmes, "then the original panel would have had no need to discuss claims concerning threat of serious prejudice with respect to future payments—the original panel would have already found that the programs 'as such' caused serious prejudice and that finding (erroneous as it necessarily must be) would have then had implications for any payments under the programs."<sup>319</sup>

153. Finally, the United States disagrees with Brazil's claim that the Panel failed to make an objective assessment of the matter as required by Article 11 of the DSU. The United States asserts that the Panel "undertook a detailed legal analysis of the original panel's report" and the Panel's conclusion "correctly interprets the original panel's findings".<sup>320</sup>

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<sup>312</sup>United States' appellee's submission, para. 30. (original emphasis)

<sup>313</sup>*Ibid.*, para. 31.

<sup>314</sup>*Ibid.*, para. 32.

<sup>315</sup>*Ibid.*, para. 49. (original emphasis)

<sup>316</sup>*Ibid.*, para. 48.

<sup>317</sup>*Ibid.*, para. 55 (referring to Panel Report, para. 7.1501).

<sup>318</sup>*Ibid.*, para. 56.

<sup>319</sup>*Ibid.* (footnote omitted)

<sup>320</sup>*Ibid.*, para. 59.

154. Therefore, the United States requests the Appellate Body to uphold the Panel's finding that the original panel's findings, and the DSB's recommendations and rulings, include only marketing loan and counter-cyclical payments made in MY 1999-2002. Should the Appellate Body reverse the Panel's finding, the United States requests the Appellate Body: (i) to deny Brazil's request to find that marketing loan and counter-cyclical payments made after 21 September 2005 are measures taken to comply with the DSB's recommendations and rulings; and (ii) to deny Brazil's request to find that the United States, through continued use of the marketing loan and counter-cyclical payments programmes, causes serious prejudice to Brazil's interests.

E. *Arguments of the Third Participants*

1. Argentina

155. Argentina agrees with the Panel's finding that marketing loan payments and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings. Argentina disagrees, however, with the reasoning that the Panel used to arrive at this conclusion. According to Argentina, looking at "the original Panel's approach, reasoning, findings and recommendations"<sup>321</sup>, it is clear that the marketing loan and counter-cyclical payments programmes—and not only the payments made pursuant to those programmes—were measures subject to the original panel's findings. Hence, Argentina considers that the marketing loan and counter-cyclical payments programmes are within the scope of these Article 21.5 proceedings and, consequently, the payments made pursuant to those programmes after 21 September 2005 are also within their scope.<sup>322</sup>

2. Australia

156. Australia disagrees with the United States that export credit guarantees issued under the revised GSM 102 programme with respect to pig meat and poultry meat are outside the scope of these Article 21.5 proceedings. Australia maintains that such export credit guarantees "have a 'particularly

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<sup>321</sup> Argentina's third participant's submission, para. 15.

<sup>322</sup> *Ibid.*

close relationship' to the measure taken to comply with the recommendations and rulings"<sup>323</sup> of the DSB, which, Australia contends, is the revised GSM 102 programme. Australia further argues that, even if the Appellate Body finds that the measures taken to comply are the GSM 102 export credit guarantees for those products subject to the DSB's recommendations and rulings (namely, unscheduled products and rice), the export credit guarantees issued under the revised GSM 102 programme for pig meat and poultry meat would still have a "particularly close relationship" to the measures taken to comply. According to Australia, this is because "the amended GSM 102 programme applies, without distinction, to all eligible products falling within its scope."<sup>324</sup>

157. Australia takes issue with the United States' argument that allowing Brazil's claims concerning the export credit guarantees for pig meat and poultry meat in these Article 21.5 proceedings would give Brazil a "second chance"<sup>325</sup> to make such claims. Australia emphasizes that there has been no final resolution to the dispute between the parties in respect of export credit guarantees for pig meat and poultry meat, nor is the Appellate Body's inability to complete the analysis in the original proceedings a basis for excluding Brazil's claims from these Article 21.5 proceedings. Australia adds that, in any event, Brazil's claims in these Article 21.5 proceedings relate to a new measure that was taken to comply with the DSB's recommendations and rulings.

158. Australia submits that the marketing loan and counter-cyclical payments made after 21 September 2005 were properly considered by the Panel to be within the scope of these Article 21.5 proceedings. Australia disagrees with the United States' assertion that the DSB recommendations and rulings applied only to payments made in MY 1999-2002, and did not cover either future payments, or the subsidy programmes themselves. On the contrary, Australia contends that, by continuing to make payments of a subsidy on the same legal basis and under the same conditions and criteria as the subsidy found to have caused serious prejudice in the original proceedings, the United States has failed to fulfil the requirements of Article 7.8 of the *SCM Agreement*. According to Australia, acceptance of the approach advocated by the United States would lead to "a situation in which taking *no action* to remove the adverse effects or to withdraw the subsidy would be sufficient to fulfil the obligations imposed by Article 7.8".<sup>326</sup> In Australia's view, Article 7.8 imposes a positive obligation on the subsidizing Member and "[i]t is clear that lack of action to remove the adverse effects or

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<sup>323</sup> Australia's third participant's submission, para. 7.

<sup>324</sup> *Ibid.*, para. 8.

<sup>325</sup> *Ibid.*, para. 9 (quoting United States' appellant's submission, para. 49).

<sup>326</sup> *Ibid.*, para. 16. (original emphasis)

withdraw the subsidy does not and could not satisfy the subsidizing Member's obligations under Article 7.8".<sup>327</sup>

159. Australia explains that, under the approach advocated by the United States, a complaining Member that was successful in the original proceedings would have to bring a new subsidies claim "with respect to each set of subsidies paid subsequently to those originally found to have caused adverse effects."<sup>328</sup> Australia cautions that this approach raises fundamental systemic concerns relating to the nature of dispute settlement proceedings, as it would lead to a complaining Member becoming involved in a permanent litigation loop of annual challenges concurrent with the expiry of each marketing year. Such an outcome would defeat the object and purpose of Article 21.5 proceedings, and would also be contrary to Articles 3 and 21.1 of the DSU, which recognize that prompt compliance with the rulings and recommendations of the DSB is essential for the effective functioning of the WTO and the effective resolution of disputes.

160. Australia additionally asserts that the Panel did not err in concluding that the United States acted inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement*, in that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers after 21 September 2005 was significant price suppression constituting present serious prejudice to the interests of Brazil. Australia argues that the Panel was entitled to take into account the findings in the original proceedings and that, "rather than placing excessive reliance"<sup>329</sup> on those findings, the Panel examined the facts and evidence, including the new and updated economic evidence that was submitted by both parties to the dispute, before reaching its conclusions concerning the continuing market-insulating effects of the marketing loan and counter-cyclical payments. Australia further submits that the "Panel's findings with respect to market insulation, taken together with the Panel's findings on each of the [additional] factors identified by the Panel, supported its ultimate finding of significant price suppression."<sup>330</sup>

161. Australia also disagrees with the United States' contention that the Panel acted inconsistently with Article 11 of the DSU by failing to carry out an objective assessment of the evidence before it in assessing Brazil's claim of serious prejudice. In Australia's view, many of the United States' submissions amount to arguments that the Panel failed to accord to the evidence the weight that the

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<sup>327</sup> Australia's third participant's submission, para. 16.

<sup>328</sup> *Ibid.*, para. 17.

<sup>329</sup> *Ibid.*, para. 26.

<sup>330</sup> *Ibid.*, para. 27.

United States believes should have been accorded to it.<sup>331</sup> These allegations of error, Australia contends, do not amount to a failure to comply with Article 11, which requires an "egregious error that calls into question the good faith of the panel".<sup>332</sup> According to Australia, the United States has not demonstrated that the Panel exceeded the bounds of its discretion in its appreciation of the evidence, and therefore the Appellate Body should not interfere with the findings of the Panel. Australia submits that, on the contrary, the manner in which the Panel analyzed the facts and evidence—including the new and updated economic evidence—and the way in which it took account of the panel and Appellate Body findings in the original proceedings was appropriate in the circumstances of this case.

### 3. Canada

162. Canada disagrees with the United States' argument that export credit guarantees for pig meat and poultry meat fall outside the scope of these Article 21.5 proceedings because they are separate measures not subject to the DSB's recommendations and rulings. Canada submits that the United States revised the GSM 102 programme in order to comply with the DSB's recommendations and rulings in the original proceedings, and the GSM 102 export credit guarantees for pig meat and poultry meat are not separate measures but are "*part of* the measure taken to comply".<sup>333</sup> This is demonstrated by the fact that, when the United States revised the GSM 102 programme, it did not exclude export credit guarantees for pig meat and poultry meat from the modification. Canada further submits that, even if the export credit guarantees for pig meat and poultry meat were to be considered as separate measures, they are closely related to the declared measure taken to comply. This is because the United States did not treat the GSM 102 export credit guarantees for pig meat and poultry meat differently, but rather modified the entire GSM 102 programme, without distinction as to product coverage.

163. Canada also considers that marketing loan payments and counter-cyclical payments made after 21 September 2005 fall within of the scope of these Article 21.5 proceedings. According to Canada, the position advocated by the United States "is a direct challenge to the effectiveness of

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<sup>331</sup>See Australia's third participant's submission, para. 31.

<sup>332</sup>*Ibid.* (quoting Appellate Body Report, *EC – Hormones*, para. 133).

<sup>333</sup>Canada's third participant's submission, para. 30. (original emphasis)



compliance proceedings in serious prejudice cases."<sup>334</sup> Canada explains that, under the United States' approach, a finding that subsidy payments are causing serious prejudice would have no consequences and require no change in behaviour by the subsidizing Member. This is because a "Member whose subsidy payments are found to cause serious prejudice would be considered to have brought itself into conformity with its obligations where it did nothing affirmative to withdraw the subsidy or remove the adverse effects for payments made during the period in question, even where it continued to make identical subsidy payments prospectively".<sup>335</sup>

164. Canada emphasizes that, pursuant to Article 7.8 of the *SCM Agreement*, the United States was required to withdraw the subsidy at issue or take appropriate steps to remove the adverse effects. In Canada's view, the United States "seeks to divorce"<sup>336</sup> Article 7.8 of the *SCM Agreement* from Article 21.5 of the DSU, and from the object and purpose of the DSU more generally, and to interpret Article 7.8 "to insulate its ongoing subsidy payments from challenge."<sup>337</sup> Canada contends that the United States' position would lead to an "absurd result"<sup>338</sup> where a finding that subsidy payments are causing serious prejudice would have no consequences and require no change of behaviour by the subsidizing Member. The United States' position, Canada argues, ignores that the scope of an Article 21.5 proceeding mandates "scrutiny of the overall effect of the measures taken to comply"<sup>339</sup> in their full context, which, in this case, necessarily includes the continued existence of payments of the sort that the DSB found to be causing serious prejudice. Thus, "[t]he only logical interpretation" of Article 7.8 of the *SCM Agreement* is that "a Member does not take appropriate steps to remove the adverse effects of a subsidy if it continues to provide payments under *the same conditions and criteria as the original subsidy* in a manner that causes adverse effects."<sup>340</sup>

165. Canada adds that it is not entirely clear that the DSB recommendations and rulings apply to the "'combined effects' of a 'basket of measures'"<sup>341</sup> as the United States alleges. Even if they did, the United States' positive obligation under Article 7.8 of the *SCM Agreement* to take appropriate steps to remove the adverse effects refers to the payments made under the four different programmes that were part of the "basket of measures" examined by the original panel. Thus, even if the United States has eliminated one of the payment programmes, in order to assess whether the United States has

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<sup>334</sup>Canada's third participant's submission, para. 17.

<sup>335</sup>*Ibid.*

<sup>336</sup>*Ibid.*, para. 15.

<sup>337</sup>*Ibid.*

<sup>338</sup>*Ibid.*, para. 17.

<sup>339</sup>*Ibid.*, para. 18.

<sup>340</sup>*Ibid.*, para. 21 (quoting Panel Report, para. 9.79). (emphasis added by Canada)

<sup>341</sup>*Ibid.*, para. 22 (referring to United States' appellant's submission, paras. 1 and 68).

fulfilled its obligations under Article 7.8, the Panel must necessarily consider the payments under the "remaining programmes in the 'basket of measures'".<sup>342</sup>

166. Canada submits that it takes no position on the merits of the United States' allegation that the Panel failed to make an objective assessment of the facts before it, in violation of Article 11 of the DSU, in assessing Brazil's claims concerning both GSM 102 export credit guarantees and marketing loan and counter-cyclical payments. Canada notes, however, that the United States makes precisely the sort of allegations that the Appellate Body has described as "very serious" and "going to the very core of the integrity of the WTO dispute settlement process itself".<sup>343</sup> Moreover, Canada recalls the Appellate Body's findings that "[it] will not interfere lightly with the Panel's discretion 'as the trier of facts'"<sup>344</sup>, and that a panel is "not required to accord to factual evidence of the parties the same meaning and weight as do the parties".<sup>345</sup> Thus, Canada maintains that, in order to prevail on its claim that the Panel failed to make an objective assessment of the facts, "the United States must establish not only that the Panel erred in its appreciation of the facts, but that its errors were so egregious as to violate fundamental fairness or to call into question the Panel's good faith."<sup>346</sup>

#### 4. Chad

167. At the oral hearing, Chad made a statement underscoring the importance of cotton for its economy and for the economies of other West African countries. Chad also drew attention to the negative effects that United States subsidies have on Chad's cotton producers. Chad requests the Appellate Body to uphold the Panel's findings, in order to ensure that WTO rules and disciplines apply fully to the cotton sector resulting in a more equitable and market-based system.

#### 5. European Communities

168. The European Communities submits that the United States accepts that the revised GSM 102 programme, as it relates to unscheduled products and one scheduled product (rice), was within the jurisdiction of the Panel. The European Communities argues that there is a "close *nexus*"<sup>347</sup> between this part of the revised GSM 102 programme and the part of the same programme that relates to pig meat and poultry meat. According to the European Communities, this is confirmed by the fact that

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<sup>342</sup>Canada's third participant's submission, para. 22.

<sup>343</sup>*Ibid.*, para. 35 (quoting Appellate Body Report, *EC – Poultry*, para. 133).

<sup>344</sup>*Ibid.*, para. 36 (quoting Appellate Body Report, *US – Upland Cotton*, para. 399).

<sup>345</sup>*Ibid.*, para. 37 (quoting Appellate Body Report, *Japan – Apples*, para. 221).

<sup>346</sup>*Ibid.*, para. 39.

<sup>347</sup>European Communities' third participant's submission, para. 19. (original emphasis)

the United States revised the GSM 102 programme in its entirety. Consequently, the European Communities contends, the Panel did not err when it concluded that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are within the scope of these proceedings. The European Communities nevertheless disagrees with Brazil insofar as it may be suggesting that the question of what is a "measure at issue" in an original panel proceeding is, "in all cases, *entirely* within the hands of the complaining Member."<sup>348</sup>

169. At the oral hearing, the European Communities explained that the issue of whether the revised GSM 102 programme, in its entirety, constitutes the measure taken to comply in this proceeding could be analyzed from both an objective and a subjective perspective. According to the European Communities, the subjective perspective points towards the conclusion that the revised GSM 102 programme is the measure taken to comply, because the statement the United States made at the time of the amendment almost amounts to an admission that the United States considered the revised programme was the measure taken to comply. The European Communities submits that the emphasis placed by Brazil on the subjective perspective is fair. With respect to the objective perspective, the European Communities maintains that the degree of connectedness between the revised GSM 102 programme and the export credit guarantees issued thereunder confirms the proposition that the revised GSM 102 programme should be examined in its totality and is within the scope of these proceedings.

170. The European Communities disagrees with the United States' assertion that marketing loan and counter-cyclical payments made after 21 September 2005 are outside of the scope of these Article 21.5 proceedings. In the European Communities' view, if payments under a subsidy programme have been found to cause adverse effects, the defending Member is obliged to withdraw the subsidy or remove the adverse effects. If the defending Member continues to make payments under such a programme, those further payments clearly fall within the jurisdiction of a compliance panel.

171. In its third participant's submission, the European Communities also raises an issue related to the Panel's composition. The European Communities submits that the Panel erred in finding that it was not within its authority to make a ruling with respect to the propriety of its own composition on the basis that the issue had not been raised by either of the parties to the dispute and concerns the application by the WTO Director-General of the DSU provisions on panel composition. According to the European Communities, such an interpretation is incorrect because the matter concerns the

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<sup>348</sup>European Communities' third participant's submission, para. 20. (original emphasis)

"correct *legal interpretation* of Articles 21.5 and 8.3 of the DSU"<sup>349</sup> and, therefore, falls within the scope of the WTO dispute settlement system, as defined in Article 1 of the DSU. Additionally, the Panel was obliged to make findings in relation to this matter "notwithstanding the fact that it [was] raised by the European Communities as a third party", given the Appellate Body's statement that panels have to address certain issues of a fundamental nature, such as their jurisdiction or authority to decide on a matter, even if the parties remain silent on those issues.<sup>350</sup>

172. The European Communities asserts that, once a party to the dispute has agreed to waive the rule in Article 8.3 of the DSU precluding a citizen from a party or third party from serving on the panel, the DSU contains no provision permitting such agreement to be withdrawn when the matter is referred back to the panel pursuant to Article 21.5 of the DSU. Since the United States accepted an Australian citizen to serve as a panelist in the original proceedings, the European Communities understands that it could not withdraw its agreement in the implementation stage without giving any new reasons other than citizenship. The European Communities emphasizes that, once the citizenship of a panelist has been put aside as a non-issue, and once the panelist has engaged in the dispute, the panelist must be protected, throughout the ensuing proceedings, from inappropriate or capricious pressure from either party. This is consistent with Article 8.6 of the DSU, which provides that the parties shall not oppose panelists other than for "'compelling' reasons".<sup>351</sup>

173. The European Communities requests the Appellate Body to reverse the Panel's findings on this issue and to find, instead, that the Panel had the authority and the obligation to consider the propriety of its own composition. Furthermore, the European Communities requests the Appellate Body to find that the composition of the Panel in this case was inconsistent with Articles 21.5 and 8.3 of the DSU. The European Communities, however, does not request the Appellate Body to make any further consequential reversals, modifications, or findings.

## 6. Japan

174. Japan submits that it takes no position on the merits of the United States' contention that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are outside the scope

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<sup>349</sup>European Communities' third participant's submission, para. 12. (original emphasis)

<sup>350</sup>*Ibid.*, para. 14 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36).

<sup>351</sup>*Ibid.*, paras. 7 and 8.

of these Article 21.5 proceedings. Japan nevertheless recalls certain findings by the Appellate Body which, in Japan's view, should be taken into account when determining whether Brazil's claims relating to pig meat and poultry meat are within the scope of these Article 21.5 proceedings. More specifically, Japan refers to the Appellate Body's finding that a "measure taken to comply" may include a measure that has a "particularly close relationship" with the DSB's recommendations and rulings and a declared measure taken to comply.<sup>352</sup> Furthermore, Japan asserts that the question whether a "close relationship" exists must be examined on a case-by-case basis depending on pertinent facts, including "the timing, nature and effects of the various measures" and "the factual and legal background against which a declared 'measure taken to comply' is adopted."<sup>353</sup>

175. Japan submits that the absence of DSB recommendations and rulings with respect to export credit guarantees for pig meat and poultry meat was not due to the fact that such export credit guarantees were found to be WTO-consistent in the original proceedings. As a result, the situation in these Article 21.5 proceedings is distinct from that in *US – Shrimp (Article 21.5 – Malaysia)* and *EC – Bed Linen (Article 21.5 – India)*. Japan recalls that, in those disputes, the Appellate Body rejected certain claims in the Article 21.5 proceedings concerning "measures ... found to be *WTO-consistent* in the original proceeding[s]".<sup>354</sup> Moreover, Japan maintains that the lack of DSB recommendations and rulings regarding export credit guarantees for pig meat and poultry meat "does not necessarily lead to a conclusion that all claims relating to [these guarantees under the revised GSM 102 programme] are outside the scope of this panel proceeding."<sup>355</sup> Finally, Japan submits that, although it agrees with the United States that measures which undo the compliance achieved by a declared "measure taken to comply" may fall within the scope of Article 21.5 proceedings, it considers that the class of measures falling within the scope of Article 21.5 proceedings is broader than what is proposed by the United States. According to Japan, such measures may include those formally separate from a declared measure taken to comply and, thus, could include the export credit guarantees for pig meat and poultry meat in these Article 21.5 proceedings.

176. Japan considers that the Panel Report does not clearly indicate why the Panel considered that marketing loan and counter-cyclical payments made after 21 September 2005 are within the scope of these Article 21.5 proceedings. Japan requests the Appellate Body to clarify the scope of the DSB recommendations and rulings stemming from the original proceedings. According to Japan, if the

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<sup>352</sup>See Japan's third participant's submission, para. 7 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

<sup>353</sup>*Ibid.*

<sup>354</sup>*Ibid.*, para. 10 (referring to Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 97; and Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 90-100). (emphasis added by Japan)

<sup>355</sup>*Ibid.*, para. 10.

removal of the adverse effects caused by payments made after 21 September 2005 is required by the DSB recommendations and rulings, then such payments were properly before the Panel and there is no need to resort to the "close relationship" test developed in *US – Softwood Lumber IV* (Article 21.5 – Canada). However, if the removal of the adverse effects caused by such payments is considered to be outside the DSB recommendations and rulings, then Japan requests the Appellate Body to focus its analysis on: (i) whether the obligation under Article 7.8 of the *SCM Agreement* creates a "close relationship" between the payments made after 21 September 2005 and the DSB recommendations and rulings—that is, the removal of the adverse effects caused by payments during MY 1999-2002; and (ii) whether the existence of such a "close relationship" is affected by the fact that Brazil explicitly stated during the original panel proceedings that it was not challenging the marketing loan and counter-cyclical payments programmes "as such" and, thus, the original panel did not make any finding with respect to the programmes *per se*.

7. New Zealand

177. New Zealand submits that the Panel was correct in finding that payments made after 21 September 2005 pursuant to the marketing loan and counter-cyclical payments programmes are within the scope of these Article 21.5 proceedings. In New Zealand's view, such payments "are provided under the same conditions and criteria as the marketing loan and counter-cyclical payments subject to the original panel's finding of serious prejudice", and are therefore subject to the United States' obligation under Article 7.8 of the *SCM Agreement* to "take appropriate steps to remove the adverse effects" of the subsidy.<sup>356</sup> New Zealand argues that, "[b]y continuing to use mandatory price-contingent subsidies on the 'same legal basis and subject to the same conditions and criteria' and with the same price suppressing effect"<sup>357</sup>, the United States has not complied with the obligation in Article 7.8 to take "appropriate steps to remove the adverse effects" and with the DSB's recommendations and rulings.<sup>358</sup> Moreover, New Zealand states that the Panel correctly concluded that "there exists a 'particularly close relationship' between the subsidy that [the United States] continues to provide and the recommendations and rulings of the DSB in the original proceeding."<sup>359</sup> New Zealand explains that the United States continues to use the same regulatory and legal framework examined in the original proceedings to provide mandatory and price-contingent subsidies to its cotton producers.

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<sup>356</sup>New Zealand's third participant's submission, para. 1.2.

<sup>357</sup>*Ibid.*, para. 1.3 (quoting Panel Report, para. 9.79). (original emphasis)

<sup>358</sup>*Ibid.*, para. 3.5. (original emphasis)

<sup>359</sup>*Ibid.*, para. 3.8 (quoting Panel Report, para. 9.80).

178. New Zealand further asserts that the United States' arguments amount to an assertion that it can comply with the DSB's recommendations and rulings "by changing nothing"<sup>360</sup>, and continuing to provide the same mandatory price-contingent subsidies that were found to be causing price suppression in the original proceedings. As New Zealand sees it, the "United States' interpretation twists the linkage between the adverse effects provisions of the *SCM Agreement* and the compliance provisions of the DSU into a kind of Mobius strip—a never-ending cycle of challenge and 'implementation'."<sup>361</sup> This, in New Zealand's view, "robs Article 7.8 of the *SCM Agreement* of any utility"<sup>362</sup> and renders pointless Article 21.5 compliance proceedings as they relate to claims of adverse effects. New Zealand also expresses concern that denying an effective remedy in cases of harmful amber box subsidies would significantly undermine both *SCM Agreement* subsidy disciplines and the integrity of the WTO dispute settlement system as a whole.

179. New Zealand asserts that the Panel correctly found that the effect of the marketing loan and counter-cyclical payments is significant price suppression. New Zealand disagrees with the United States' contention that the Panel placed excessive reliance on the findings made in the original proceedings. According to New Zealand, given the significant factual similarities between the original proceedings and the current Article 21.5 proceedings, "it was entirely appropriate to consider the original panel and Appellate Body reports and draw on them as appropriate."<sup>363</sup> New Zealand further argues that, in appealing the Panel's treatment of the economic studies, "the United States continues to blur the line between counter-cyclical payments and decoupled payments."<sup>364</sup> According to New Zealand, counter-cyclical payments, by contrast to decoupled payments, are "clearly and explicitly linked to prices" and "are clearly not green box measures and hence are presumptively trade distorting".<sup>365</sup>

180. New Zealand also disagrees with the United States' allegation that, in determining whether there was "market insulation", the Panel ignored its own finding that United States production and exports fluctuated in the same manner as those of other producers such that United States shares of world cotton production and exports remained stable. New Zealand considers that the "Panel spent considerable time examining"<sup>366</sup> this point and "correctly concluded that the stability of the United States' share of world production and exports does not prove the absence of market insulation."<sup>367</sup> In

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<sup>360</sup>New Zealand's third participant's submission, para. 3.9.

<sup>361</sup>*Ibid.*, para. 3.9.

<sup>362</sup>*Ibid.*

<sup>363</sup>*Ibid.*, paras. 1.6 and 4.6.

<sup>364</sup>*Ibid.*, para. 4.7.

<sup>365</sup>*Ibid.*, para. 4.8.

<sup>366</sup>*Ibid.*, para. 4.11.

<sup>367</sup>*Ibid.*

New Zealand's view, "the critical question is not whether the United States production and exports increased in line with other world production and exports, but rather, what would have happened to the United States production and exports *but for* the guaranteed minimum prices."<sup>368</sup> New Zealand understands that, "but for" the existence of marketing loan and counter-cyclical payments programmes, United States farmers, like cotton farmers in the rest of the world, would experience no such insulation.

181. New Zealand agrees with the Panel's finding of a significant gap between United States upland cotton farmers' total costs of production and market revenues. It also disagrees with the United States' contention that the Panel should have used variable costs instead of total costs of production in its comparison. According to New Zealand, the purpose of comparing costs of production with revenues is to determine whether marketing loan and counter-cyclical payments are playing an important role in affecting the economic viability of United States upland cotton farming. New Zealand explains that, "if United States cotton producers are not covering total costs of production in the long term, they will exit the cotton farming, unless their cotton revenues are 'supplemented' in order to 'finance' this gap."<sup>369</sup>

182. New Zealand further submits that the United States' claim about the significance of the removal of the Step 2 payments programme "is undermined by a comparison of the amounts paid under the various programmes."<sup>370</sup> In New Zealand's view, it is the marketing loan and counter-cyclical payments that underpin producers' price expectations and, therefore, their planting decisions, not Step 2 payments. Moreover, New Zealand contests the United States' argument that the Panel should have considered the effect on prices of China's cotton production and consumption. New Zealand asserts that, even if it were true that China's cotton trade is impacting upon the world market price of cotton, the Panel's findings of price suppression stands independently of any other global factors that might also be suppressing world market prices. New Zealand additionally asserts that the Panel showed full cognizance of the fact that price suppression must be "significant" in order to cause serious prejudice within the meaning of Article 6.3(c) of the *SCM Agreement*.

183. Turning to the United States' claim under Article 11 of the DSU, New Zealand contends that the United States simply repeats "the arguments it made in appealing the 'legal conclusions' of the compliance Panel".<sup>371</sup> For the reasons already stated, New Zealand does not consider that the Panel erred in making its finding of serious prejudice under the *SCM Agreement*, let alone that it made

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<sup>368</sup>New Zealand's third participant's submission, para. 4.11. (original emphasis)

<sup>369</sup>*Ibid.*, para. 4.18.

<sup>370</sup>*Ibid.*, para. 4.22.

<sup>371</sup>*Ibid.*, para. 4.31.



"egregious" errors rising to a level that calls into question the objectivity of the Panel's assessment.<sup>372</sup> Thus, for these same reasons, New Zealand submits that the Appellate Body should reject the United States' appeal under Article 11 of the DSU.

184. As regards Brazil's conditional appeal, New Zealand agrees with Brazil that the Panel incorrectly found that the original panel's findings do not cover the marketing loan and counter-cyclical payments programmes. New Zealand asserts that, "[i]n the circumstances of this case, it is not possible to divorce the payments from the programmes under which they are made", because the "mandatory price contingent nature of the subsidies derives from the conditions and criteria set out in the marketing loan and counter-cyclical payment programmes, and this is central to the analysis of the effects of the actual payments made".<sup>373</sup> New Zealand considers that "the original panel's finding of serious prejudice, which explicitly refers to 'the mandatory price-contingent' subsidy measures, is consistent with this interpretation".<sup>374</sup> New Zealand also finds support for its position in the original panel's statement that "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>375</sup> Moreover, New Zealand does not consider that "the 'as such'/'as applied' lexicon is ... helpful in the present case" because, in accordance with Article 5 of the *SCM Agreement*, "[i]t is the *use* of the subsidy programmes in this case that result[s] in the adverse effects".<sup>376</sup>

### III. Issues Raised in This Appeal

185. The following issues are raised in the appeal filed by the United States:

- (a) whether the Panel erred in finding that Brazil's claims relating to export credit guarantees for pig meat and poultry meat were properly within the scope of the Article 21.5 proceedings;
- (b) whether the Panel erred in finding that Brazil's claims against marketing loan and counter-cyclical payments made by the United States after 21 September 2005 were properly within the scope of the Article 21.5 proceedings;
- (c) whether the Panel erred in finding that export credit guarantees issued under the revised GSM 102 programme after 1 July 2005 constitute export subsidies because

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<sup>372</sup>New Zealand's third participant's submission, para. 4.31 (referring to United States' appellant's submission, para. 230).

<sup>373</sup>*Ibid.*, para. 3.13.

<sup>374</sup>*Ibid.*, para. 3.14.

<sup>375</sup>*Ibid.* (quoting Original Panel Report, para. 7.1501). (emphasis added by New Zealand)

<sup>376</sup>*Ibid.*, para. 3.15. (original emphasis)

they are provided at premium rates which are inadequate to cover the long-term operating costs and losses of the programme, within the meaning of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*;

- (d) whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in its assessment of the revised GSM 102 programme pursuant to item (j) of the Illustrative List;
- (e) whether the Panel erred in finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers pursuant to the FSRI Act of 2002 is significant price suppression, within the meaning of Article 6.3(c) of the *SCM Agreement*, in the world market for upland cotton, constituting "present" serious prejudice to the interests of Brazil, within the meaning of Article 5(c) of the *SCM Agreement*; and
- (f) whether the Panel failed to make an objective assessment of the matter under Article 11 of the DSU in its assessment of Brazil's claim that the effect of marketing loan and counter-cyclical payments is significant price suppression.

186. The following issues are raised in the other appeal filed by Brazil:

- (a) in the event that the Appellate Body reverses the Panel's finding that Brazil's claims pertaining to export credit guarantees provided to pig meat and poultry meat were properly within the scope of the Article 21.5 proceedings, whether the Panel erred or failed to make an objective assessment of the matter, under Article 11 of the DSU, in finding that the measure that is the subject of Brazil's claims is not the revised GSM 102 programme itself; and,
- (b) in the event that the Appellate Body reverses the Panel's finding that Brazil's claims against marketing loan and counter-cyclical payments made after 21 September 2005 were properly within the scope of the Article 21.5 proceedings, whether the Panel erred or failed to make an objective assessment of the matter, under Article 11 of the DSU, in finding that the original panel's conclusions and recommendations addressed only the payments made under the programmes, and not the programmes themselves.

#### **IV. Scope of These Article 21.5 Proceedings: Pig Meat and Poultry Meat**

187. We begin with the United States' appeal of the Panel's finding that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are within the scope of these Article 21.5

proceedings. Before examining the issues raised on appeal, we briefly set out, in Section A, the relevant findings in the original proceedings. In Section B, we describe the measures taken by the United States subsequent to the DSB's recommendations and rulings in the original proceedings. Section C summarizes the Panel's findings in these Article 21.5 proceedings. Section D provides an overview of the claims and arguments raised on appeal by the participants. In Section E, we examine the United States' claim regarding the scope of these Article 21.5 proceedings.

188. Brazil conditionally appeals the Panel's rejection of Brazil's argument that the measure that was the subject of Brazil's claims is the revised General Sales Manager ("GSM") 102 programme itself. Brazil's appeal is premised upon a reversal of the Panel's finding that Brazil's claims pertaining to export credit guarantees for pig meat and poultry meat are properly within the scope of these Article 21.5 proceedings. We address Brazil's other appeal in Section F.

#### A. *Original Proceedings*

189. In the original proceedings, Brazil challenged three United States agricultural export credit guarantee programmes—the GSM 102, the GSM 103, and the Supplier Credit Guarantee Program ("SCGP")—under Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.<sup>377</sup> All three programmes were used to guarantee the repayment of credit made available to finance commercial export sales of United States agricultural commodities.<sup>378</sup> The original panel first determined whether the export credit guarantees constituted an export subsidy within the meaning of Articles 10.1 and 8 of the *Agreement on Agriculture*. For this purpose, the original panel sought contextual guidance from the *SCM Agreement* and, in particular, relied on item (j) of the Illustrative List of Export Subsidies (the "Illustrative List") annexed to that Agreement.<sup>379</sup>

190. Having determined that the export credit guarantee programmes were export subsidies, the original panel proceeded to examine these programmes under Article 10.1 of the *Agreement on Agriculture*. Article 10.1 requires export subsidies not to be applied in a manner that results in circumvention of a WTO Member's export subsidy commitments. The original panel found that the

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<sup>377</sup>See Original Panel Report, para. 7.762.

<sup>378</sup>See Panel Report, para. 3.13. In general, an export credit guarantee is a commitment to cover losses that an exporter would suffer should there be a default on the repayment of the credit granted to the foreign importer to finance the purchase of the exported product. A detailed description of the three programmes is provided in paragraphs 7.242-7.244 of the original panel report, which are reproduced in paragraph 3.14 of the Panel Report.

<sup>379</sup>See Original Panel Report, para. 7.763. Pursuant to item (j) of the Illustrative List, the original panel examined whether the United States export credit guarantee programmes were provided at premium rates which were inadequate to cover the long-term operating costs and losses of the programmes. (See *ibid.*, paras. 7.787-7.869)

United States had granted export subsidies with respect to upland cotton and other unscheduled products.<sup>380</sup> As regards scheduled products, the original panel recalled that Brazil "initially alleged"<sup>381</sup> that the United States provided export subsidies to thirteen scheduled agricultural commodities in excess of its quantitative reduction commitments. The original panel noted the United States' submission that it was in compliance with its quantitative reduction commitments in respect of ten of those products, and that this "would also be true for poultry meat"<sup>382</sup> in fiscal year ("FY") 2002; pig meat was not mentioned by the United States. The original panel concluded that "[i]t has not been established ... that ... actual circumvention has resulted in respect of the twelve other United States scheduled commodities"<sup>383</sup>, including pig meat and poultry meat.

191. On appeal in the original proceedings, Brazil claimed that the original panel erred by failing to find that the United States applied its export credit guarantee programmes in a manner that led to actual circumvention of its export subsidy commitments with respect to pig meat and poultry meat in 2001.<sup>384</sup> In examining Brazil's claim, the Appellate Body noted that, although the original panel recognized that Brazil's claims of circumvention extended to pig meat and poultry meat, the original panel did not mention pig meat in its analysis and used the phrase "would also be true" for poultry meat, hence suggesting uncertainty as to the actual circumvention with respect to poultry meat. Consequently, the Appellate Body reversed the original panel's conclusion that circumvention had not been established in respect of pig meat and poultry meat.<sup>385</sup> Nevertheless, because there were insufficient uncontested facts on the record, the Appellate Body was unable to complete the analysis and determine whether the United States' export credit guarantees had been applied in a manner that

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<sup>380</sup>Original Panel Report, para. 7.875.

<sup>381</sup>Original Panel Report, para. 7.878. Article 10.3 of the *Agreement on Agriculture* provides a special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9, and 10 of that Agreement. The special rule in Article 10.3 applies to scheduled products. (See Appellate Body Report, *US – Upland Cotton*, para. 652) In *Canada – Dairy (Article 21.5 – New Zealand and US II)*, the Appellate Body explained that the burden of proof under Article 10.3 operates as follows:

[W]here a Member exports an agricultural product in quantities that exceed its quantity commitment level, that Member will be treated as if it has granted WTO-inconsistent export subsidies, for the excess quantities, unless the Member presents adequate evidence to "establish" the contrary. This reversal of the usual rules obliges the responding Member to bear the consequences of any doubts concerning the evidence of export subsidization.

(Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 74 (original emphasis))

<sup>382</sup>*Ibid.*, para. 7.879.

<sup>383</sup>*Ibid.*, para. 7.881.

<sup>384</sup>See Appellate Body Report, *US – Upland Cotton*, para. 681.

<sup>385</sup>*Ibid.*, para. 694.

resulted in actual circumvention of the United States' export subsidy commitments for pig meat and poultry meat.<sup>386</sup>

B. *Measures Taken by the United States*

192. Following the adoption of the panel and Appellate Body reports in the original proceedings, the United States made several changes to its export credit guarantee programmes. On 30 June 2005, the United States Department of Agriculture (the "USDA") announced that the United States Commodity Credit Corporation (the "CCC") would no longer accept applications for export credit guarantees under the GSM 103 programme.<sup>387</sup> Subsequently, in October 2005, the CCC ceased issuing export credit guarantees under the SCGP.<sup>388</sup> The GSM 102 programme remained operational, but the USDA announced, on 30 June 2005, that the CCC would use a new fee structure for the GSM 102 programme.<sup>389</sup> Under the new fee structure, fees were increased and now vary according to country risk, length of repayment term (tenor), and repayment frequency (annual or semi-annual).<sup>390</sup> Countries are classified in eight risk categories (0-7), and exports to countries in the riskiest category (7) are classified as ineligible to receive export credit guarantees.<sup>391</sup>

C. *Article 21.5 Proceedings*

193. Before the Panel, Brazil claimed that the measures taken to comply by the United States with regard to the GSM 102 export credit guarantee programme are inconsistent with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.<sup>392</sup> The United States requested the Panel to make a preliminary ruling that Brazil's claims relating to GSM 102

<sup>386</sup>See Appellate Body Report, *US – Upland Cotton*, paras. 693 and 694.

<sup>387</sup>See Panel Report, para. 3.16 (referring to Exhibits Bra-502 and Bra-503 submitted by Brazil to the Panel, *supra*, footnote 17).

<sup>388</sup>See *ibid.* (referring to United States' first written submission to the Panel, para. 20; and Exhibit Bra-513 submitted by Brazil to the Panel, *supra*, footnote 19).

<sup>389</sup>See *ibid.*, para. 3.16. The new fee structure was also applicable to the SCGP until the USDA announced that it would no longer accept application under that programme.

<sup>390</sup>*Ibid.* (referring to "USDA changes its fees to risk-based method for the GSM-102 and Supplier Credit Guarantee programs", USDA FAS Online News Release of 30 June 2005 (Exhibit Bra-504 submitted by Brazil to the Panel); as well as Exhibit Bra-502 submitted by Brazil to the Panel, *supra*, footnote 17; "GSM-102 Guarantee Fee Rate Schedule", USDA FAS Online (Exhibit Bra-505 submitted by Brazil to the Panel); and "SCGP Guarantee Fee Rate Schedule", USDA FAS Online (Exhibit Bra-506 submitted by Brazil to the Panel)).

<sup>391</sup>See *ibid.*, para. 3.16. The Panel noted that "[a] number of countries that were previously eligible were reclassified into this ineligible risk category." (*Ibid.*, footnote 39 to para. 3.16 (referring to United States' first written submission to the Panel, footnote 15; and Country Risk Category (for the GSM-102 and Supplier Credit Guarantee Program) updated on 1 July 2005, USDA FAS Online (Exhibit US-2 submitted by the United States to the Panel))

<sup>392</sup>See *ibid.*, para. 4.2.

export credit guarantees for pig meat and poultry meat were outside the scope of the Article 21.5 proceedings.<sup>393</sup>

194. The Panel described the issue before it as follows:

[W]hether in this proceeding under Article 21.5 of the DSU Brazil may present claims relating to export credit guarantees for pig meat and poultry meat considering that: (i) Brazil presented such claims in the original proceeding; (ii) the original panel rejected these claims; (iii) the Appellate Body reversed the original panel's rejection of these claims, but found itself unable to complete the analysis; such that (iv) the original proceeding did not result in a finding of WTO-inconsistency in respect of export credit guarantees for pig meat and poultry meat.<sup>394</sup>

195. Turning to the measure at issue, the Panel found that the export credit guarantees in respect of pig meat and poultry meat are measures in themselves. According to the Panel, "that the [revised] programme applies to all products in the same manner does not alter the fact that the application of the programme to an individual product constitutes a 'measure'."<sup>395</sup> The Panel then recalled the Appellate Body's finding in *US – Softwood Lumber IV (Article 21.5 – Canada)* that "[s]ome measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB"<sup>396</sup>, may also be subject to review by a panel established under Article 21.5 of the DSU. The Panel considered that the GSM 102 export credit guarantees for pig meat and poultry meat had a "particularly close relationship to the declared measure taken to comply and to the recommendations and rulings of the DSB".<sup>397</sup> The Panel based its finding on the following elements: (i) the revised GSM 102 programme applied in the same manner to all products covered by the programme; (ii) most of the legal and factual issues raised by Brazil's claims relating to export credit guarantees pertain to the revised GSM 102 programme in general, without distinction between individual products to which the programme applies; and (iii) the United States argued that the Panel should examine Brazil's claim solely under the standard contained in item (j) of the Illustrative List, a standard that required the Panel to analyze the GSM 102 programme as a whole, rather than in relation to particular products.<sup>398</sup>

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<sup>393</sup>See Panel Report, para. 9.7.

<sup>394</sup>*Ibid.*, para. 9.21.

<sup>395</sup>*Ibid.*, para. 9.25.

<sup>396</sup>*Ibid.*, para. 9.24 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

<sup>397</sup>*Ibid.*, para. 9.25.

<sup>398</sup>See *ibid.*

196. The Panel then observed that there was no pre-existing jurisprudence regarding the precise question of whether a WTO Member may assert a claim in an Article 21.5 proceeding in respect of which the Appellate Body had found itself unable to complete the analysis in the original proceeding.<sup>399</sup> Nonetheless, the Panel found it "significant" that, in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, the Appellate Body held that a claim relating to an aspect of the measure with respect to which the panel in the original proceeding had exercised judicial economy was properly within the scope of review under Article 21.5 of the DSU.<sup>400</sup> This, according to the Panel, "demonstrates that a claim relating to a measure that has a sufficiently close nexus with the measure taken to comply or with the DSB recommendations and rulings in the original proceeding can be within the scope of Article 21.5 [proceedings]", even though that measure "has not been the subject of DSB recommendations and rulings in the original proceeding."<sup>401</sup> Based on these considerations, the Panel concluded that "the claims of Brazil relating to export credit guarantees for exports of pig meat and poultry meat are within the scope of this proceeding under Article 21.5 of the DSU."<sup>402</sup>

#### D. *Claims and Arguments on Appeal*

197. On appeal, the United States submits that GSM 102 export credit guarantees for pig meat and poultry meat are individual measures and are not subject to the DSB's recommendations and rulings in the original proceedings. Therefore, the United States argues, there "logically"<sup>403</sup> could be no disagreement regarding the existence of "measures taken to comply" or their consistency with the covered agreements with respect to export credit guarantees for pig meat and poultry meat. The United States maintains that the Panel's finding, which rested on a perceived "particularly close relationship" between the GSM 102 export credit guarantees for pig meat and poultry meat, on the one hand, and the declared measure taken to comply with the DSB's recommendations and rulings, on the other hand, is not supported by the text of Article 21.5.<sup>404</sup>

198. Brazil submits that the Panel properly found that the export credit guarantees for pig meat and poultry meat have a "particularly close relationship" with, and are "inextricably link[ed]" to, the

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<sup>399</sup>See Panel Report, para. 9.26.

<sup>400</sup>*Ibid.* (referring to Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 152).

<sup>401</sup>*Ibid.*, para. 9.26.

<sup>402</sup>*Ibid.*, para. 9.27. Having found that these claims were within the scope of its mandate, the Panel proceeded to find that the United States has applied export subsidies in the form of GSM 102 export credit guarantees in a manner which has resulted in the circumvention of the United States' export subsidy reduction commitments for poultry meat and pig meat in the period from 1 October 2005 to 30 September 2006, and for poultry meat in the period from 1 July to 30 September 2005. (See *ibid.*, para. 14.149)

<sup>403</sup>United States' appellant's submission, para. 36.

<sup>404</sup>See *ibid.*, para. 43.

United States' "declared compliance measure", that is, the revised GSM 102 programme.<sup>405</sup> Brazil argues that this "particularly close relationship" arises because the export credit guarantees for pig meat and poultry meat are factually and legally dependent on the GSM 102 programme.<sup>406</sup>

E. *Whether Brazil's Claims Relating to Export Credit Guarantees for Pig Meat and Poultry Meat are within the Scope of These Article 21.5 Proceedings*

199. The issue on appeal is whether Brazil's claims regarding export credit guarantees issued under the revised GSM 102 programme for pig meat and poultry meat are within the scope of these Article 21.5 proceedings.

200. Article 21.5 of the DSU provides, in relevant part:

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such disputes shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it.

201. As in original dispute settlement proceedings, the "matter" in proceedings brought pursuant to Article 21.5 of the DSU consists of two elements: the specific measures at issue and the legal basis of the complaint (that is, the claims).<sup>407</sup> Thus, in order to determine whether Brazil's claims relating to the revised GSM 102 programme concerning pig meat and poultry meat are properly within the scope of these Article 21.5 proceedings, we must first identify the "measure taken to comply" by the United States. We must then determine whether there are any limitations on the claims that may be raised by Brazil with respect to that measure in these Article 21.5 proceedings.

202. The Appellate Body has stated that "the phrase 'measures taken to comply' refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB."<sup>408</sup> It has further explained that "determining the scope of 'measures taken to comply' in any given case must ... involve examination of the recommendations and rulings contained in the original report(s) adopted by the DSB."<sup>409</sup> While the DSB's recommendations and rulings are a relevant starting point for identifying the "measures taken to comply" in an Article 21.5 proceeding, they are not dispositive as to the scope of such measures. Where alternative means of implementation are available, a WTO Member enjoys some discretion in

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<sup>405</sup> Brazil's appellee's submission, paras. 213 and 232.

<sup>406</sup> See *ibid.*, paras. 194-199.

<sup>407</sup> See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78.

<sup>408</sup> Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

<sup>409</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 68.



deciding what measures to take to comply with the DSB's recommendations and rulings. A WTO Member may choose to take measures that are broader than strictly required to comply with the DSB's recommendations and rulings. The identification of the "measure taken to comply" is determined by reference to what a Member has actually done, and not to what a Member might have done, to ensure compliance with the DSB's recommendations and rulings. Therefore, when the measures actually "taken" by the implementing Member are broader than the DSB's recommendations and rulings, we do not see why the scope of the DSB's recommendations and rulings should necessarily limit the scope of the "measures taken to comply" for purposes of the Article 21.5 proceedings.

203. As we noted earlier<sup>410</sup>, the original panel found that Brazil had not established that export credit guarantees for pig meat and poultry meat resulted in circumvention of the United States' export subsidy commitments. The Appellate Body reversed this finding, but was unable to complete the analysis of Brazil's claims. Thus, although Brazil's claims were extensively argued, there were no findings of consistency or inconsistency specifically addressed to the export credit guarantees for pig meat and poultry meat that were part of the DSB's recommendations and rulings in the original proceedings. Following the adoption of the DSB's recommendations and rulings, the United States revised the fee structure of the GSM 102 programme. The changes to the fee structure were taken in relation to the GSM 102 programme in its totality. The new fee structure applies to export credit guarantees provided to all eligible commodities under the revised GSM 102 programme; individual guarantees are issued under the same terms and conditions and no distinction is made on a commodity-specific basis. In the Panel's view, "that the [revised GSM 102] programme applies to all products in the same manner does not alter the fact that the application of the programme to an individual product constitutes a 'measure'."<sup>411</sup> The Panel's finding does not take due account of the programme-wide nature of the changes made by the United States. The changes made to the GSM 102 programme apply equally to all eligible commodities and the terms and conditions of the programme are the same for guarantees issued with respect to all eligible commodities.<sup>412</sup> Treating the revised GSM 102 programme in an integrated manner is consistent with the Appellate Body's statement in *US – Shrimp (Article 21.5 – Malaysia)* that "the task of a panel in a matter referred to it by the DSB for an Article 21.5 proceeding is to consider that new measure in its totality."<sup>413</sup>

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<sup>410</sup>See *supra*, para. 190.

<sup>411</sup>Panel Report, para. 9.25.

<sup>412</sup>If one were to follow the Panel's approach to the extreme, every individual export credit guarantee issued under the revised GSM 102 programme would be a distinct "measure".

<sup>413</sup>Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 87.

204. This conclusion is also supported by the United States' own description of its implementation efforts.<sup>414</sup> In these Article 21.5 proceedings, the United States rejected the description of the revised GSM 102 programme as the "measure taken to comply". Yet, statements made by United States Government agencies when the changes to the GSM 102 programme were adopted indicate the opposite. For instance, a USDA press release explains that the changes to the GSM 102 programme were made "to comply with a recent World Trade Organization (WTO) cotton decision in a dispute with Brazil."<sup>415</sup> Similarly, in the answers to the "Frequently Asked Questions" published on its website, the USDA indicates that the changes made to the GSM 102 (as well as to the GSM 103 and the SCGP) programme were taken in response to a key finding in the recent WTO dispute with Brazil related to this programme.<sup>416</sup> The United States maintains that these are merely press statements and have no legal relevance.<sup>417</sup> We agree that these statements, on their own, are not dispositive. The statements, however, indicate that the United States itself considered that the revisions made to the GSM 102 programme were adopted with the objective of complying with the DSB's recommendations and rulings in the original dispute.

205. We recall that, after finding that GSM 102 export credit guarantees for pig meat and poultry meat were distinct measures in themselves, the Panel went on to find that these measures have a "particularly close relationship to the declared measure taken to comply and to the recommendations and rulings of the DSB"<sup>418</sup> and, consequently, were properly within the scope of the Article 21.5 proceedings.<sup>419</sup> The Panel referred to the Appellate Body's findings in *US – Softwood Lumber IV (Article 21.5 – Canada)* that "[s]ome measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB, may also be susceptible to review by a panel acting under Article 21.5."<sup>420</sup> In our view, the Appellate Body's reasoning in *US – Softwood Lumber IV (Article 21.5 – Canada)* addressed a different situation. In that case, two distinct measures were taken under two separate legal provisions: (i) a determination under Section 129, which is the United States' legal framework for issuing new determinations to comply with recommendations and rulings of the DSB; and (ii) an administrative review

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<sup>414</sup>The Appellate Body has stated that a "Member's designation of a measure as one taken 'to comply', or not, is relevant" but not "conclusive" to determining what constitutes such a measure. (Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 73)

<sup>415</sup>See Exhibit Bra-502 submitted by Brazil to the Panel, footnote 17 (as referred to in Panel Report, footnote 38 to para. 3.16).

<sup>416</sup>See "Frequently Asked Questions: Risk-Based Fees", USDA FAS Online (Exhibit Bra-501 submitted by Brazil to the Panel).

<sup>417</sup>United States' response to questioning at the oral hearing.

<sup>418</sup>Panel Report, para. 9.25.

<sup>419</sup>See *ibid.*, para. 9.26.

<sup>420</sup>*Ibid.*, para. 9.24 (quoting Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

determination, which was required to be issued in the ordinary course of the application of the United States' countervailing duty laws. Because the administrative review determination had the effect of undermining compliance with the DSB's recommendations and rulings, and because both measures concerned the same analysis of subsidies for softwood lumber production, the Appellate Body found that the administrative review determination was so "inextricably linked" and "clearly connected"<sup>421</sup> to the Section 129 determination as to fall within the scope of the Article 21.5 panel's mandate. The Appellate Body's reasoning in *US – Softwood Lumber IV (Article 21.5 – Canada)* is not applicable in this dispute. The dispute in *US – Softwood Lumber IV (Article 21.5 – Canada)* concerned the identification of closely connected measures so as to avoid circumvention. In this case, we must determine whether a single programme may be permissibly atomized.

206. The United States contends that there are systemic problems if the identification of the "measure taken to comply" goes beyond the recommendations and rulings of the DSB. The United States raises two related objections. First, the United States argues that it would give WTO Members an incentive to make the least possible changes to their measures in response to DSB recommendations and rulings.<sup>422</sup> Secondly, the United States submits that it would "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"<sup>423</sup> pursuant to Article 21.5 of the DSU. The Appellate Body has stated that, where alternative means of achieving compliance are possible, the choice of means "belongs, in principle, to the implementing Member".<sup>424</sup> Because it is for the implementing Member to choose among alternative means of implementation, WTO dispute settlement cannot be said to provide incentives or disincentives for a WTO Member to take broader or narrower action as part of its implementation efforts. In other words, the WTO dispute settlement system is neutral in terms of the breadth of the actions to be adopted by the implementing Member, provided the changes are sufficient to bring that Member into compliance with its WTO obligations.

207. The United States also refers to the fact that Article 21.5 proceedings are "on an expedited basis with no reasonable period of time [for the responding Member] to come into compliance".<sup>425</sup> Following the original proceedings, the United States was given a "reasonable period of time" to implement the DSB's recommendations and rulings. The United States could have excluded pig meat and poultry meat from the revised GSM 102 programme. However, the United States revised the

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<sup>421</sup> Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, paras. 81 (referring to Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.41) and 90.

<sup>422</sup> United States' appellant's submission, para. 53.

<sup>423</sup> *Ibid.*, para. 54.

<sup>424</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 184.

<sup>425</sup> United States' appellant's submission, para. 52.

GSM 102 fee structure on a programme-wide basis, thereby changing the terms and conditions for all guarantees issued under the programme, including export credit guarantees for pig meat and poultry meat. Under these circumstances, we do not consider that the unavailability of a new "reasonable period of time" gives rise to the "systemic concerns" alleged by the United States. Moreover, it is a characteristic of Article 21.5 proceedings that no reasonable period of time for implementation is available if the new measure taken to comply with the DSB's recommendations and rulings is found to be WTO-inconsistent.

208. Having said that, we must now determine whether there is any limitation on the scope of the claims that can be raised by Brazil in these Article 21.5 proceedings.

209. The United States draws our attention to *EC – Bed Linen (Article 21.5 – India)*, where the Appellate Body found that India could not reassert in the Article 21.5 proceedings a claim that it had asserted in the original proceedings. The United States considers it "highly instructive" that in both *EC – Bed Linen (Article 21.5 – India)* and in the present dispute there are no DSB recommendations and rulings that must be implemented with respect to the part of the measure that the complaining party alleged to be within the scope of the Article 21.5 proceedings.<sup>426</sup> According to the United States, "[t]o allow Brazil's claims here would essentially give Brazil another chance, this time before the compliance panel, to argue against GSM 102 guarantees with respect to exports of pig meat and poultry meat."<sup>427</sup>

210. We agree with the United States that the scope of claims that may be raised in an Article 21.5 proceeding is not unbounded. As the Appellate Body found in *EC – Bed Linen (Article 21.5 – India)*, a complainant who had failed to make out a *prima facie* case in the original proceedings regarding an element of the measure that remained unchanged since the original proceedings may not re-litigate the same claim with respect to the unchanged element of the measure in the Article 21.5 proceedings.<sup>428</sup> Similarly, a complainant may not reassert the same claim against an unchanged aspect of the measure that had been found to be *WTO-consistent* in the original proceedings.<sup>429</sup> Because adopted panel and Appellate Body reports must be accepted by the parties to a dispute<sup>430</sup>, allowing a party in an Article 21.5 proceeding to re-argue a claim that has been decided in adopted reports would indeed

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<sup>426</sup>See United States' appellant's submission, para. 47.

<sup>427</sup>*Ibid.*, para. 49.

<sup>428</sup>See Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.

<sup>429</sup>See Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 96.

<sup>430</sup>*Ibid.*, para. 97; and Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.

provide an unfair "second chance" to that party. The situation before us is different. Brazil's claims against export credit guarantees provided under the original GSM 102 programme to pig meat and poultry meat were not resolved on the merits in the original proceedings, because the Appellate Body was unable to complete the analysis as a result of there being insufficient factual findings or undisputed facts on the record.<sup>431</sup> Thus, allowing Brazil's claims in this case would not raise the due process concerns identified by the United States. Brazil is not unfairly getting a "second chance" to make a case that it failed to make out in the original proceedings such that the finality of the DSB's recommendations and rulings would be compromised. There is an additional distinction between the facts before the Appellate Body in *EC – Bed Linen (Article 21.5 – India)* and the facts before us in this case. In *EC – Bed Linen (Article 21.5 – India)*, India challenged an unchanged aspect of the European Communities' measure.<sup>432</sup> In the present case, the revised GSM 102 programme is a new measure.

211. We do not suggest that Brazil could raise just any claim in these Article 21.5 proceedings, without limitation, against the revised GSM 102 programme. A complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not. Brazil has referred to *Canada – Aircraft (Article 21.5 – Brazil)* as support for the proposition that, because the "measure taken to comply" is a new measure, a complaining Member may raise new claims against that measure in the Article 21.5 proceedings.<sup>433</sup> The Appellate Body's statement in *Canada – Aircraft (Article 21.5 – Brazil)* refers to the situation in which the responding Member is seeking to circumvent its compliance obligations by replacing the WTO-inconsistent measure with a new measure that is also WTO-inconsistent, albeit with a provision not at issue in the original proceedings. This is not the situation in this dispute.

212. Finally, we note that "the aim of Article 21.5 of the DSU is to promote the prompt compliance with DSB recommendations and rulings and the consistency of 'measures taken to comply' with the covered agreements by making it unnecessary for a complainant to begin new proceedings and by making efficient use of the original panelists and their relevant experience."<sup>434</sup> Moreover, having an Article 21.5 panel examine Brazil's claims against export credit guarantees

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<sup>431</sup>See Appellate Body Report, *US – Upland Cotton*, paras. 693 and 694.

<sup>432</sup>Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 89.

<sup>433</sup>In *Canada – Aircraft (Article 21.5 – Brazil)*, the Appellate Body stated that, in order to "examine fully the 'consistency with a covered agreement of the measures taken to comply', as required by Article 21.5 of the DSU", a panel acting under Article 21.5 of the DSU should not be "restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure". (Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41)

<sup>434</sup>Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151.

provided under the revised GSM 102 programme to upland cotton and certain other products, while a new panel examines Brazil's claims against export credit guarantees provided under the same programme to pig meat and poultry meat, would not be the most efficient use of WTO dispute settlement procedures.<sup>435</sup>

213. In sum, we are of the view that the revised GSM 102 programme is "a measure taken to comply" within the meaning of Article 21.5 of the DSU. In addition, we find that Brazil is not precluded from asserting its claims in relation to export credit guarantees issued under the revised GSM 102 programme for pig meat and poultry meat. Accordingly, we *uphold* the Panel's finding, in paragraph 9.27 of the Panel Report, that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are properly within the scope of these Article 21.5 proceedings.

F. *Brazil's Other Appeal*

214. Brazil appeals the Panel's finding that the revised GSM 102 programme itself was not the measure that was the subject of Brazil's claims.<sup>436</sup> However, this appeal is conditional on the Appellate Body reversing the Panel's finding that Brazil's claims pertaining to export credit guarantees provided to pig meat and poultry meat are properly within the scope of these Article 21.5 proceedings. Should this condition be fulfilled, Brazil requests the Appellate Body to complete the analysis and find that the revised GSM 102 programme itself is applied in a manner that results in circumvention of the United States' export subsidy commitments with respect to pig meat and poultry meat.<sup>437</sup>

215. The United States submits that, because the revised GSM 102 programme is not a measure taken to comply with the DSB's recommendations and rulings, the Appellate Body should reject Brazil's conditional appeal.<sup>438</sup>

216. We have upheld the Panel's conclusion that Brazil's claims pertaining to pig meat and poultry meat are properly within the scope of these Article 21.5 proceedings. Accordingly, the condition upon which Brazil's other appeal is predicated has not been met, making it unnecessary for us to address it further.

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<sup>435</sup>See Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 151.

<sup>436</sup>See Brazil's other appellant's submission, para. 165 (referring to Panel Report, para. 9.25).

<sup>437</sup>See *ibid.*, paras. 192-201.

<sup>438</sup>See United States' appellee's submission, paras. 64, 74, and 75.

**V. Scope of These Article 21.5 Proceedings: Marketing Loan and Counter-cyclical Payments Made After 21 September 2005**

217. We turn next to the United States' appeal of the Panel's finding that marketing loan and counter-cyclical *payments* made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.

218. We begin, in Section A, with a summary of the findings made in the original proceedings. Section B describes the measures taken by the United States following the adoption of the DSB recommendations and rulings in the original proceedings. A summary of the Article 21.5 proceedings is then provided in Section C. Section D provides an overview of the arguments raised on appeal by the participants and the third participants. In Section E, we analyze whether the Panel properly found that marketing loan and counter-cyclical payments made after 21 September 2005 are within the scope of these Article 21.5 proceedings.

219. Brazil conditionally appeals the Panel's finding that the original panel's conclusions and recommendations addressed only the *payments* made under the marketing loan and counter-cyclical payments programmes, and not the *programmes* themselves. Brazil's appeal is conditional upon our reversal of the Panel's finding that marketing loan and counter-cyclical *payments* made after 21 September 2005 are within the scope of these Article 21.5 proceedings. We address Brazil's conditional appeal in Section F.

**A. Original Proceedings**

220. After reviewing the evidence submitted by Brazil in support of its claim of serious prejudice, the original panel found 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 [market loss assistance] payments and [counter-cyclical] payments—is significant price suppression in the same world market for upland cotton in the period MY [("marketing year")] 1999-2002 within the meaning of Articles 6.3(c) and 5(c) of the *SCM Agreement*."<sup>439</sup> In the "Conclusions and Recommendations" section of its report, the original panel concluded:

- (g) concerning serious prejudice to the interests of Brazil:
  - (i) the effect of the mandatory price-contingent United States subsidy measures—marketing loan programme payments, user marketing (Step 2) payments, [market loss assistance] payments and [counter-cyclical] payments—is significant price

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<sup>439</sup>Original Panel Report, para. 7.1416.

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*[.]<sup>440</sup>

221. In the light of its conclusion, the original panel recalled the obligation set out in Article 7.8 of the *SCM Agreement* and observed 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'."<sup>441</sup> The Appellate Body upheld the original panel's finding of serious prejudice under Article 6.3(c) of the *SCM Agreement*.<sup>442</sup>

B. *Measures Taken by the United States*

222. The United States Congress enacted legislation<sup>443</sup> on 1 February 2006 repealing the user marketing (Step 2) payments ("Step 2 payments") programme, which was one of the price-contingent subsidy measures covered by the original panel's finding of serious prejudice.<sup>444</sup> The Panel noted that "[i]t is not in dispute that the United States presently provides marketing loan and counter-cyclical payments on the same legal basis and subject to the same conditions and criteria as the marketing loan payments and counter-cyclical payments that were subject to the panel's finding of 'present' serious prejudice".<sup>445</sup>

C. *Article 21.5 Proceedings*

223. Before the Panel, the United States submitted that "the subsidies subject to the obligation in Article 7.8 of the *SCM Agreement* to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy' were the subsidies provided during MY 1999-2002 which the original panel had found to cause 'present' serious prejudice in MY 1999-2002."<sup>446</sup> Thus, the United States argued that marketing loan and counter-cyclical payments made after 21 September 2005 "are not properly

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<sup>440</sup>Original Panel Report, para. 8.1.

<sup>441</sup>*Ibid.*, para. 8.3(d).

<sup>442</sup>See Appellate Body Report, *US – Upland Cotton*, para. 763(c)(i).

<sup>443</sup>Section 1103 of the Deficit Reduction Act of 2005, Public Law No. 109-171; see also Panel Report, para. 3.7.

<sup>444</sup>The Step 2 payments programme was repealed effective as of 1 August 2006. In addition to Step 2 payments, marketing loan payments, and counter-cyclical payments, the original panel's finding of serious prejudice covered market loss assistance payments. According to the original panel, market loss assistance payments were "ad hoc emergency and supplementary assistance provided to producers" under "four separate pieces of legislation, one each for the years 1998 through 2001". (Original Panel Report, para. 7.216 (quoted in Panel Report, para. 3.10))

<sup>445</sup>Panel Report, para. 9.79; see also *ibid.*, paras. 3.9 and 3.12.

<sup>446</sup>*Ibid.*, para. 9.73. (footnote omitted)



within the scope of these Article 21.5 proceedings".<sup>447</sup> Brazil responded that "even if in this dispute the original panel had made findings limited to payments made in MY 1999-2002, the obligation of the United States under Article 7.8 would not be limited to the removal of the adverse effects of payments made in that period."<sup>448</sup> Brazil explained that, "if a panel makes a finding of 'present' adverse effects, such a finding applies beyond the historical period considered by the panel and ... the Member whose subsidies cause such adverse effects is therefore obligated under Article 7.8 to take appropriate steps to fully withdraw the present, ongoing and future effects of the subsidies."<sup>449</sup>

224. At the outset of its analysis, the Panel observed that, "[s]ince the original panel made a finding of present serious prejudice in respect of subsidies provided during MY 1999-2002, the question arises whether the obligation to take appropriate steps to remove the adverse effects only applies to payments of subsidies made in those years."<sup>450</sup> The Panel next interpreted the requirement in Article 7.8 of the *SCM Agreement* to "take appropriate steps to remove the adverse effects" of the subsidy:

In our view, the remedy under Article 7.8 must be viewed in its relationship to the obligation in Article 5 not to cause through the use of any subsidy referred to in Articles 1.1 and 1.2 of the *SCM Agreement* adverse effects to the interests of other Members. It must serve to restore conformity with the Member's obligation to avoid causing adverse effects through the use of any subsidy. As a consequence, a Member does not take appropriate steps to remove adverse effects of a subsidy if it continues to provide payments under the same conditions and criteria as the original subsidy in a manner that causes adverse effects.<sup>451</sup>

225. The Panel rejected the "interpretation advocated by the United States, whereby the obligation under Article 7.8 of the *SCM Agreement* is limited to the removal of the adverse effects caused by subsidies granted in a particular period of time".<sup>452</sup> As the Panel saw it, the United States' interpretation "implies that it would not be possible to review in an Article 21.5 proceeding whether a Member causes adverse effects by continuing to grant subsidies under the same conditions and criteria

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<sup>447</sup>Panel Report, para. 9.73. (footnotes omitted) Article 7.9 of the *SCM Agreement* provides that, "[i]n the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures". The panel and Appellate Body reports in the original proceedings were adopted on 21 March 2005. Thus, as Brazil explains, the six-month period referred to in Article 7.9 expired on 21 September 2005. (See Brazil's first written submission to the Panel, paras. 41 and 42)

<sup>448</sup>Panel Report, para. 9.74.

<sup>449</sup>*Ibid.* (footnote omitted)

<sup>450</sup>*Ibid.*, para. 9.78.

<sup>451</sup>*Ibid.*, para. 9.79.

<sup>452</sup>*Ibid.*

as the subsidies found to have caused adverse effects."<sup>453</sup> According to the Panel, "[s]uch an interpretation fails to take into account the relationship between Article 7.8 and Article 5 of the *SCM Agreement* and thus fails to interpret Article 7.8 in its proper context."<sup>454</sup>

226. Having interpreted Article 7.8 of the *SCM Agreement*, the Panel turned to the Appellate Body's jurisprudence concerning measures that may be challenged in Article 21.5 proceedings. The Panel observed that the Appellate Body has held that "measures taken to comply", within the meaning of Article 21.5 of the DSU, include "measures with a particularly close relationship to the declared 'measure taken to comply', and to the recommendations and rulings of the DSB."<sup>455</sup> The Panel further reasoned that, "where payments of a subsidy have been found to cause serious prejudice and the Member in question continues to provide the same subsidy under the same conditions and criteria, there exists 'a particularly close relationship' between the subsidy that the Member continues to provide and the recommendations and rulings of the DSB in the original proceeding."<sup>456</sup>

227. The Panel concluded:

[T]o the extent marketing loan payments and counter-cyclical payments made by the United States after 21 September 2005 are provided under the same conditions and criteria as the marketing loan payments and counter-cyclical payments subject to the original panel's finding of "present" serious prejudice, they are subject to the obligation of the United States under Article 7.8 of the *SCM Agreement* to take appropriate steps to remove the adverse effects of the subsidy. As a consequence, we also consider that Brazil's claim that the United States has failed to comply with its obligations under Article 7.8 with respect to these payments is properly before this Panel. In our view this claim pertains to a disagreement between the parties as to the "existence or consistency with a covered agreement of measures taken to comply" with the recommendations and rulings of the DSB.<sup>457</sup>

D. *Claims and Arguments on Appeal*

228. On appeal, the United States claims that the Panel erred in finding that marketing loan and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings. According to the United States, the only measures subject to the DSB's recommendations and rulings concerning present serious prejudice "were payments made under the

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<sup>453</sup>Panel Report, para. 9.79.

<sup>454</sup>*Ibid.*

<sup>455</sup>*Ibid.*, para. 9.80 (referring to Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 77).

<sup>456</sup>*Ibid.*, para. 9.80.

<sup>457</sup>*Ibid.*, para. 9.81.

Step 2, marketing loan and counter-cyclical payment programs in MY 1999-2002 (i.e., through July 31, 2003)."<sup>458</sup> Therefore, the United States asserts, the "marketing loan and counter-cyclical payments made after September 21, 2005 were not subject to the DSB's recommendations and rulings" and "the payments made after September 21, 2005 were not in any way [United States] measures taken to comply with other recommendations and rulings of the DSB."<sup>459</sup>

229. In the United States' view, the Panel's erroneous finding resulted from its fundamental misunderstanding of both the obligation of the United States under Article 7.8 of the *SCM Agreement* and the relationship between Article 7.8 of the *SCM Agreement* and Article 21.5 of the DSU.<sup>460</sup> The United States emphasizes that "the obligation under Article 7.8 extends only as far as the DSB's recommendations and rulings", and that, "[i]n this dispute, the DSB's recommendations and rulings applied only to the Step 2, market loss assistance, marketing loan, and counter-cyclical payments made during MY 1999-2002, and did not cover either future payments, or the subsidy programs themselves."<sup>461</sup> The United States further submits that "[d]isallowing Brazil's over-expansive claims in this proceeding would not mean that Members have no remedy to address the adverse effects of a subsidy."<sup>462</sup> It explains that a WTO Member may challenge: (i) the present adverse effects of past or current payments; (ii) the threat of serious prejudice of past, current, or future payments; or (iii) the programmes "as such".<sup>463</sup> The obligations of the responding Member under Article 7.8 of the *SCM Agreement* would depend on the outcome of those challenges.

230. Brazil submits that the Panel correctly interpreted and applied Article 7.8 of the *SCM Agreement* and Article 21.5 of the DSU in finding that marketing loan and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.<sup>464</sup> Brazil argues that the United States "fails to recognize that ... Article 21.5 concerns '*new and different measure[s] that [were] not before the original panel*' and that are, therefore, *not* the same measures found to be WTO-inconsistent in the original proceedings."<sup>465</sup> Consequently, in Brazil's view, the United States is wrong to suggest that the new marketing loan and counter-cyclical payments cannot

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<sup>458</sup>United States' appellant's submission, para. 62.

<sup>459</sup>*Ibid.*

<sup>460</sup>See *ibid.*, para. 63.

<sup>461</sup>*Ibid.*, para. 65 (referring to Original Panel Report, paras. 8.1(g)(i) and 8.3(d)).

<sup>462</sup>*Ibid.*, para. 72.

<sup>463</sup>See *ibid.*

<sup>464</sup>Brazil's appellee's submission, heading III.B.4, p. 60.

<sup>465</sup>*Ibid.*, para. 227 (quoting Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41). (emphasis added by Brazil)

be included in these proceedings just because they were not subject to the DSB's recommendations and rulings.<sup>466</sup>

231. According to Brazil, the Panel properly found that a particularly close relationship exists between the old and the new marketing loan and counter-cyclical payments, such that the latter are subject to these Article 21.5 proceedings.<sup>467</sup> Brazil submits that the United States' actions in this case involve replacing the old marketing loan and counter-cyclical payments, and their effects, with a stream of new payments in increased amounts that are substantively identical, made to the same recipients, for the same crops, and on the same terms and conditions. Given the substantive nature, timing, and effects of the new payments at issue—which were the first replacement measures adopted after the end of the implementation period—the Panel correctly concluded that the new payments are "measures taken to comply".<sup>468</sup> Finally, Brazil cautions about the consequences of accepting the United States' position, which would mean that the grant of annually recurring subsidies becomes "a moving target that escape[s] from [the WTO subsidy] disciplines".<sup>469</sup>

232. Argentina<sup>470</sup>, Australia<sup>471</sup>, Canada<sup>472</sup>, the European Communities<sup>473</sup>, and New Zealand<sup>474</sup> assert that the Panel did not err in finding that marketing loan and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.<sup>475</sup>

E. *Whether Marketing Loan and Counter-cyclical Payments Made After 21 September 2005 are Properly within the Scope of These Article 21.5 Proceedings*

233. Brazil and the United States disagree on whether the original panel's findings extend to the marketing loan and counter-cyclical payments *programmes*, or are limited to the *payments* made under the programmes. The Panel in these Article 21.5 proceedings concluded that the original panel's findings were addressed to the *payments*, and not to the *programmes* themselves. Brazil conditionally appeals this finding, but requests that we address its claim only if we reverse the Panel's

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<sup>466</sup>Brazil's appellee's submission, para. 227.

<sup>467</sup>*Ibid.*, para. 232.

<sup>468</sup>*Ibid.*, para. 256.

<sup>469</sup>*Ibid.*, para. 243 (quoting Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.30).

<sup>470</sup>Argentina's third participant's submission, para. 6. Argentina's argument, however, focuses on the Panel's finding concerning the marketing loan and counter-cyclical payments programmes.

<sup>471</sup>Australia's third participant's submission, para. 19.

<sup>472</sup>Canada's third participant's submission, para. 23.

<sup>473</sup>European Communities' third participant's submission, para. 25.

<sup>474</sup>New Zealand's third participant's submission, para. 3.10.

<sup>475</sup>Japan requests that the Appellate Body "clarify the scope of the DSB's recommendations and rulings" when applying the "particularly close relationship" test to marketing loan and counter-cyclical payments made after 21 September 2005. (Japan's third participant's submission, para. 12)

finding on the admissibility of Brazil's claim against marketing loan and counter-cyclical *payments* made after 21 September 2005.<sup>476</sup>

234. We have some difficulty accepting the notion that a subsidy programme and the payments provided under that programme can be assessed separately. While the payments may cause adverse effects, the amount of the payments, beneficiaries, and the terms and conditions of eligibility will be provided in the subsidy programme or legislation authorizing those payments. However, because Brazil has made it clear that its appeal is conditional upon our reversal of the Panel's findings concerning the payments, we begin our analysis by considering the United States' claim that the Panel erred in finding that marketing loan and counter-cyclical *payments* made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.

235. In cases like this one, involving a determination that subsidies have resulted in adverse effects to the interests of another WTO Member, Article 7.8 of the *SCM Agreement* provides that "the Member *granting or maintaining*" the subsidy "shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy".<sup>477</sup> Article 7.8 is one of the "special or additional rules and procedures on dispute settlement contained in the covered agreements"<sup>478</sup> that are identified in Article 1.2 and Appendix 2 of the DSU, which prevail over the general DSU rules and procedures to the extent that there is a difference between them. As we see it, Article 7.8 specifies the actions that the respondent Member must take when a subsidy granted or maintained by that Member is found to have resulted in adverse effects to the interests of another Member. This means that, in order to determine whether there is compliance with the DSB's recommendations and rulings in a case involving such actionable subsidies, a panel would have to assess whether the Member concerned has taken one of the actions foreseen in Article 7.8 of the *SCM Agreement*. We agree, therefore, with the Panel that we must also take into account Article 7.8 of the *SCM Agreement* in order to determine the proper scope of these Article 21.5 proceedings.<sup>479</sup>

236. Pursuant to Article 7.8, the implementing Member has two options to come into compliance. The implementing Member: (i) shall take appropriate steps to remove the adverse effects; or (ii) shall withdraw the subsidy. The use of the terms "shall take" and "shall withdraw" indicate that

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<sup>476</sup>Brazil's other appellant's submission, para. 204.

<sup>477</sup>(emphasis added) Article 7.8 of the *SCM Agreement* reads in full:

Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

<sup>478</sup>Article 1.2 of the DSU.

<sup>479</sup>See Panel Report, paras. 9.79-9.81.

compliance with Article 7.8 of the *SCM Agreement* will usually involve some action by the respondent Member. This affirmative action would be directed at effecting the withdrawal of the subsidy or the removal of its adverse effects. A Member would normally not be able to abstain from taking any action on the assumption that the subsidy will expire or that the adverse effects of the subsidy will dissipate on their own.<sup>480</sup>

237. The question then becomes: With respect to which subsidies must the implementing Member take such action? Such action would certainly be expected with respect to subsidies granted in the past and which may have formed the basis of a panel's determination of present serious prejudice and adverse effects.<sup>481</sup> However, we do not see the obligation in Article 7.8 as being limited to subsidies granted in the past. Article 7.8 expressly refers to a Member "granting or maintaining such subsidy". The verb "maintain" suggests, to us, that the obligation set forth in Article 7.8 is of a continuous nature, extending beyond subsidies granted in the past. This means that, in the case of recurring annual payments, the obligation in Article 7.8 would extend to payments "maintained" by the respondent Member beyond the time period examined by the panel for purposes of determining the existence of serious prejudice, as long as those payments continue to have adverse effects.<sup>482</sup> Otherwise, the adverse effects of subsequent payments would simply replace the adverse effects that the implementing Member was under an obligation to remove. Such a reading of Article 7.8 would not give meaning and effect to the term "maintain", which is distinct from the term "grant", and has also been included in that Article. Indeed, it would render the term "maintain" redundant. In addition, it would fail to give meaning and effect to the obligation to "take appropriate steps to remove the adverse effects" in Article 7.8, and to the requirement under Article 21.5 to "comply" with the DSB's recommendations and rulings, including the requirement to take the remedial action foreseen in Article 7.8 as a consequence of a finding of adverse effects.

238. Our interpretation of Article 7.8 is consistent with the context provided by Article 4.7 of the *SCM Agreement*, which applies in cases involving prohibited subsidies. In *US – FSC (Article 21.5 – EC II)*, the Appellate Body stated that, "if, in an Article 21.5 proceeding, a panel finds that the measure taken to comply with the Article 4.7 recommendation made in the original proceedings does

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<sup>480</sup>See Australia's third participant's submission, para. 16.

<sup>481</sup>As noted below, the use of a historical reference or investigation period will usually be necessary when examining a claim of serious prejudice. (See *infra*, para. 243)

<sup>482</sup>As we see it, the period MY 1999-2002 was merely the historical reference period examined by the original panel. As an evidentiary matter, that period determined the data set that the original panel would examine. (See Original Panel Report, paras. 7.1198 and 7.1199) Although the original panel referred to the period MY 1999-2002 in the conclusion that it reached at the end of its analysis of significant price suppression (*ibid.*, para. 7.1416), it made no reference to any time period in the "Conclusions and Recommendations" section of its report, nor in its discussion of the United States' obligations under Article 7.8 of the *SCM Agreement*. (*Ibid.*, paras. 8.1(g)(i) and 8.3(d))

not achieve *full* withdrawal of the prohibited subsidy—either because it leaves the entirety or part of the original prohibited subsidy in place, or because it replaces that subsidy with another subsidy prohibited under the *SCM Agreement*—the implementing Member continues to be under the obligation to achieve full withdrawal of the subsidy".<sup>483</sup> Similarly, a Member would not comply with the obligation in Article 7.8 to withdraw the subsidy if it leaves an actionable subsidy in place, either entirely or partially, or replaces that subsidy with another actionable subsidy. We recognize that, unlike Article 4.7, Article 7.8 gives Members the option of removing the adverse effects as an alternative to withdrawing the subsidy. The availability of this option is arguably a consequence of the fact that actionable subsidies are not prohibited *per se*; rather, they are actionable to the extent they cause adverse effects. Nevertheless, the option of removing the adverse effects cannot be read as allowing a Member to continue to cause adverse effects by maintaining the subsidies that were found to have resulted in adverse effects. As observed earlier, if the contrary proposition were accepted, the adverse effects of subsequent subsidies, especially in the case of recurrent subsidies, would simply replace the adverse effects that the implementing Member was required to remove, making the obligation in Article 7.8 to "take appropriate steps to remove the adverse effects" meaningless.

239. Our interpretation of Article 7.8 is also consistent with the approach taken under the *SCM Agreement* with respect to countervailing duty measures. A determination that the existence of a subsidy causes material injury provides a basis for the prospective application of countervailing duty measures. Thus, even though the basis for a countervailing duty determination is the injury determined to exist in the past, the remedial measures are prospective.

240. The United States submits that "the obligation under Article 7.8 extends only as far as the DSB's recommendations and rulings"<sup>484</sup>, and asserts that Article 7.8 cannot modify "the terms of reference or the scope of compliance proceedings under Article 21.5 of the DSU".<sup>485</sup> We believe the United States misinterprets the relevance of Article 7.8 for interpreting the scope of DSB recommendations and rulings in cases where subsidies are found to cause adverse effects. Article 7.8 informs the meaning and scope of the DSB's recommendations and rulings arising from the original proceedings. In our view, Article 7.8 specifies the actions that the United States had to take in order to comply with the DSB's recommendations and rulings.<sup>486</sup> To the extent a WTO Member fails to

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<sup>483</sup> Appellate Body Report, *US – FSC (Article 21.5 – EC II)*, para. 84 (referring to subsidies provided under the Foreign Sales Corporation ("FSC") Act of 1984 and the FSC Repeal and Extraterritorial Income Exclusion ("ETI") Act of 2000, and not fully withdrawn by the Jobs Creation Act of 2004).

<sup>484</sup> United States' appellant's submission, para. 65.

<sup>485</sup> *Ibid.*, para. 66.

<sup>486</sup> See New Zealand's third participant's submission, para. 3.3. New Zealand explains that this result does not "amount to 'somehow modifying Article 21.5 of the DSU' as the United States claims" but rather "is simply the result of effective treaty interpretation". (*Ibid.*, para. 3.4)

comply with the requirement in Article 7.8 that it take steps to remove the adverse effects or withdraw the subsidy, because it maintains the subsidy, it cannot be said to have achieved full compliance with these DSB recommendations and rulings.

241. Brazil and several of the third participants have cautioned that accepting the United States' approach would deny effective relief to WTO Members who successfully demonstrate that subsidies provided by another Member have resulted in adverse effects.<sup>487</sup> The United States, however, rejects the notion that its interpretation would "undermine the effectiveness of Article 7.8"<sup>488</sup> of the *SCM Agreement*. It asserts that "[d]isallowing Brazil's over-expansive claims in this proceeding would not mean that Members have no remedy to address the adverse effects of a subsidy" because "[n]othing prevents Members from challenging the present adverse effects of past or current payments; the threat of serious prejudice of past, current, or future payments; or present adverse effects or threat of serious prejudice from payment programs 'as such.'"<sup>489</sup>

242. We examine, first, the United States' argument that Brazil could have challenged the programmes "as such". As we indicated above<sup>490</sup>, we have difficulty accepting the notion that payments under a subsidy programme can be assessed separately from the programmes or legislation pursuant to which those payments are made.<sup>491</sup> This is because the terms and conditions, beneficiaries, amounts, and other aspects of a payment will be set in the programme or authorizing legislation, especially in the case of annually recurring payments. The difficulty of divorcing the payments from the programmes, in this case, is evident in the Panel's approach to this issue. Despite finding that only the payments were properly within the scope of the Article 21.5 proceedings, the Panel nevertheless considered that it could not exclude completely from its assessment the programmes under which the payments were provided.<sup>492</sup>

243. Moreover, even if a complainant brings an "as such" challenge to a subsidy programme, it is difficult to see how a panel would assess whether the subsidy has resulted in adverse effects without reviewing the payments actually made under that programme during a past reference period. The

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<sup>487</sup>See *infra*, footnote 499.

<sup>488</sup>United States' appellant's submission, para. 71 (quoting Panel Report, para. 9.80).

<sup>489</sup>*Ibid.*, para. 72.

<sup>490</sup>See *supra*, para. 234.

<sup>491</sup>The European Communities and New Zealand expressed similar views at the oral hearing.

<sup>492</sup>See Panel Report, para 9.54. Because "the original panel's finding of serious prejudice was based on an analysis that took into consideration the legal provisions or subsidy programmes pursuant to which the subsidies were provided", the Panel "consider[ed] that it is appropriate in this proceeding to conduct a similar analysis of subsidies in the context of the legal provisions or subsidy programmes pursuant to which the subsidies are granted." (*Ibid.*)



United States acknowledges that "serious prejudice, by its nature, is fact-specific and depends on the situation in the market, a situation that may be constantly changing such that the terms and conditions for a subsidy that causes serious prejudice during one time period are not causing serious prejudice for another time period."<sup>493</sup> Thus, we find it difficult to conceive how an analysis of whether a programme "as such" resulted in adverse effects would differ from an analysis of whether payments under a programme have resulted in such effects.<sup>494</sup>

244. Secondly, the United States asserts that payments made after 21 September 2005 would have been covered by the DSB's recommendations and rulings if Brazil had succeeded in its threat of serious prejudice claim in the original proceedings. The United States notes, in this regard, that the original panel "declined to make any finding of 'threat' of serious prejudice with respect to payments allegedly 'mandated' to be made in MY 2003-2007; and ... declined to make any find[ing] of 'threat' of serious prejudice with respect to the Step 2, marketing loan, and counter-cyclical payment programs themselves (which would have implicated *all* payments under the programs)."<sup>495</sup> However, a claim of serious prejudice may relate to a different situation than a claim of *threat* of serious prejudice. A claim of *present* serious prejudice relates to the existence of prejudice in the past, and present, and that may continue in the future. By contrast, a claim of *threat* of serious prejudice relates to prejudice that does not yet exist, but is imminent such that it will materialize in the near future. Therefore, a threat of serious prejudice claim does not necessarily capture and provide a remedy with respect to the same scenario as a claim of present serious prejudice.<sup>496</sup> A distinction between injury and threat of injury also exists in the context of countervailing duty measures. Once a

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<sup>493</sup>United States' appellant's submission, para. 73.

<sup>494</sup>We do not believe that only DSB recommendations and rulings of "as such" WTO-inconsistency create implementation obligations with prospective effect. DSB recommendations and rulings involving findings of "as applied" WTO-inconsistency also give rise to prospective implementation obligations as of the adoption of the panel and Appellate Body reports. Indeed, remedies in WTO law are generally understood to be prospective in nature.

<sup>495</sup>United States' appellant's submission, para. 60. (original emphasis; footnote omitted)

<sup>496</sup>See *ibid.* The original panel declined to make a finding on Brazil's threat of serious prejudice claim partly because it considered that:

[b]ecause the Panel's "present" serious prejudice findings include findings of inconsistency that 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.* We recall that, pursuant to Article 7.8 of the *SCM Agreement*, the United States is under an obligation to "take appropriate steps to remove the adverse effects or ... withdraw the subsidy".

(Original Panel Report, para. 7.1501 (emphasis added; footnote omitted))

determination of present material injury is made, a Member may impose countervailing duties on future imports without any obligation to demonstrate a threat of material injury.

245. Thus, the approach advocated by the United States would have serious implications for a complaining Member's ability to obtain relief against adverse effects of actionable subsidies. Under such an approach, a complaining Member that has demonstrated that subsidies provided by another Member have resulted in adverse effects would obtain relief only with respect to any lingering effects of the subsidies provided during the period examined by the panel.<sup>497</sup> As Australia notes<sup>498</sup>, such panel findings would essentially be declaratory in nature, because there would be no impact on subsidies granted or maintained after the panel made its finding. The complaining Member would have to initiate another dispute to obtain relief with respect to payments made after the period examined by the panel, even if those subsidies are recurring payments or otherwise of the same nature as those found to have resulted in adverse effects. Even if the complaining Member were to succeed in its claims a second time, the subsidizing Member could provide further subsidies after the second panel's ruling, and the complaining Member would have to initiate yet another dispute, and this cycle could continue. As Brazil and several of the third participants have warned, the inability of a complaining Member to obtain relief against subsidies that result in adverse effects to its interests would seriously undermine the disciplines contained in Articles 5 and 6 of the *SCM Agreement*.<sup>499</sup>

246. The approach advocated by the United States would not only compromise the effectiveness of the provisions on actionable subsidies in the *SCM Agreement*, it is also difficult to reconcile with the objectives of the DSU. According to Article 3.3, one of the objectives of the DSU is "the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member". Article 21.1 further provides that "[p]rompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members".

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<sup>497</sup>This assumes that it is even possible to remove the effects of a subsidy that has already been granted.

<sup>498</sup>Australia's responses to questioning at the oral hearing.

<sup>499</sup>See Brazil's appellee's submission, para. 245. Australia asserts that the approach advocated by the United States "would lead to a complaining Member becoming involved in a permanent litigation loop of annual challenges concurrent with the expiry of each marketing year", thereby "defeat[ing] the object and purpose of Article 21.5 proceedings, and would also be contrary to Articles 3 and 21.1 of the DSU, which recognize that prompt compliance with the recommendations and rulings of the DSB is essential to the effective functioning of the WTO and the effective resolution of disputes." (Australia's third participant's submission, para. 17 (footnote omitted)) Canada describes the United States' position as "a direct challenge to the effectiveness of compliance proceedings in serious prejudice cases". (Canada's third participant's submission, para. 17) New Zealand submits that "[t]he United States' interpretation twists the linkage between the adverse effects provisions of the *SCM Agreement* and the compliance provisions of the DSU into a ... never-ending cycle of challenge and 'implementation'", and adds that "[s]uch an interpretation robs Article 7.8 of the *SCM Agreement* of any utility and renders pointless Article 21.5 compliance proceedings as they relate to adverse effects claims of this nature". (New Zealand's third participant's submission, para. 3.9)

Requiring a WTO Member to initiate new proceedings to challenge the same type of recurrent subsidies that were found to result in adverse effects, simply because the subsidies were provided subsequent to the original proceedings, does not promote "prompt settlement" nor "prompt compliance". Moreover, the issue before us is one of admissibility. Even if the claim is allowed to proceed in an Article 21.5 proceeding, the complaining Member would still have to establish the existence of adverse effects that allegedly result from the subsidies at issue.

247. It is undisputed that the only action the United States had taken to comply with the DSB's recommendations and rulings concerning serious prejudice, and thereby with its obligations under Article 7.8 of the *SCM Agreement*, was the repeal of the Step 2 payments programme effective as of 1 August 2006.<sup>500</sup> The United States has not contested that it continues to provide marketing loan and counter-cyclical payments to United States producers of upland cotton and that "the legislative and regulatory provisions governing these ... payments have not been changed".<sup>501</sup> Thus, the question that remained before the Panel was whether the United States had taken "appropriate steps to remove the adverse effects" of the subsidies found to have resulted in adverse effects to the interests of Brazil. In order to respond to that question, it was proper for the Panel to examine the marketing loan and counter-cyclical payments made by the United States after the expiration of the implementation period on 21 September 2005.

248. Accordingly, we agree with the Panel that, "to the extent marketing loan payments and counter-cyclical payments made by the United States after 21 September 2005 are provided under the same conditions and criteria as the marketing loan payments and counter-cyclical payments subject to the original panel's finding of 'present' serious prejudice, they are subject to the obligation of the United States under Article 7.8 of the *SCM Agreement* to take appropriate steps to remove the adverse effects of the subsidy".<sup>502</sup> We further agree that, as a consequence, Brazil's claim that the United States failed to comply with its obligations under Article 7.8 with respect to those payments was properly within the scope of the Article 21.5 proceedings, because the "claim pertains to a disagreement between the parties as to the 'existence or consistency with a covered agreement of measures taken to comply' with the recommendations and rulings of the DSB."<sup>503</sup> More precisely, the claim relates to whether the measure taken by the United States achieves full compliance with the

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<sup>500</sup>See Panel Report, para. 3.7.

<sup>501</sup>*Ibid.*, paras. 3.9 and 3.12. See also *ibid.*, para. 9.79, noting that "[i]t is not in dispute that the United States presently provides marketing loan and counter-cyclical payments on the same legal basis and subject to the same conditions and criteria as the marketing loan payments and counter-cyclical payments that were subject to the panel's finding of 'present' serious prejudice".

<sup>502</sup>*Ibid.*, para. 9.81.

<sup>503</sup>*Ibid.*

DSB's recommendations and rulings as informed by the obligation of the United States under Article 7.8 of the *SCM Agreement*.

249. For these reasons, we *uphold* the Panel's finding, in paragraph 9.81 of the Panel Report, that Brazil's claims against marketing loan and counter-cyclical payments made by the United States after 21 September 2005 are properly within the scope of these Article 21.5 proceedings.

F. *Brazil's Other Appeal*

250. In its other appeal, Brazil claims that the Panel erred in concluding that the original panel's findings did not cover the marketing loan payment and counter-cyclical payments *programmes*.<sup>504</sup> According to Brazil, the Panel's finding constitutes a legal error or, alternatively, a failure to make an objective assessment of the matter under Article 11 of the DSU.<sup>505</sup> Brazil's appeal is conditional on the Appellate Body reversing the Panel's finding that payments made after 21 September 2005, under the marketing loan payments and counter-cyclical payments *programmes*, are measures taken to comply that are properly within the scope of these Article 21.5 proceedings.<sup>506</sup>

251. In the event that its conditional appeal is accepted, Brazil requests the Appellate Body to find that marketing loan and counter-cyclical payments made after 21 September 2005 constitute measures taken to comply with the DSB's recommendations and rulings in the original proceedings because of the close connection to the marketing loan and counter-cyclical payments *programmes* that are subject to those recommendations and rulings. Alternatively, Brazil requests the Appellate Body to find that, through the continued use of the marketing loan and counter-cyclical payments *programmes*, the United States causes serious prejudice to Brazil's interests.<sup>507</sup>

252. The United States asserts that the "original panel's findings and recommendations with respect to 'present' serious prejudice were limited to payments under the marketing loan and counter-cyclical programs, and did not encompass the programs themselves".<sup>508</sup> It explains that the original panel

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<sup>504</sup>See Brazil's other appellant's submission, para. 46 (referring to Panel Report, para. 9.54).

<sup>505</sup>Brazil submits that, "[i]n mischaracterizing the scope of the original panel's findings, and of the DSB's recommendations and rulings, the Panel failed to make an 'objective assessment of the matter before it'." (Brazil's other appellant's submission, paras. 127) In particular, Brazil alleges that the Panel failed to consider the original panel's description of the "measures at issue" and failed to examine the original panel's terms of reference, as set forth in the original panel request. Brazil adds, however, that "the Appellate Body need not address this claim under Article 11 of the DSU if it finds that the compliance Panel erred under Article 21.5 of the DSU in examining its terms of reference pursuant to the DSB's recommendations and rulings regarding the subsidy programs". (*Ibid.*, para. 130)

<sup>506</sup>See *ibid.*, para. 204.

<sup>507</sup>*Ibid.*, para. 205.

<sup>508</sup>United States' appellee's submission, para. 20 (referring to Original Panel Report, paras. 7.1416 and 8.1(g)(i)).

"conducted its analysis consistent with Brazil's claims, which, ... did not include a claim of 'present' serious prejudice regarding the marketing loan and counter-cyclical payment programs themselves".<sup>509</sup> In addition, the United States argues that Brazil has failed to demonstrate that the Panel failed to discharge its duties under Article 11 of the DSU by "disregarding or misconstruing"<sup>510</sup> the findings of the original panel, or the parties' arguments concerning those findings. Thus, the United States requests the Appellate Body to uphold the Panel's finding that "the original panel's findings, and the DSB's recommendations and rulings, include only marketing loan and counter-cyclical payments made in MY 1999-2002".<sup>511</sup>

253. Argentina and New Zealand support Brazil's conditional appeal.<sup>512</sup> By contrast, the European Communities considers that the original panel's findings related to the marketing loan and counter-cyclical payments and not to the programmes authorizing those payments.<sup>513</sup>

254. We have upheld the Panel's finding that marketing loan and counter-cyclical payments made after 21 September 2005 are properly within the scope of these Article 21.5 proceedings and, therefore, the condition on which Brazil's other appeal is predicated has not been fulfilled. Consequently, we do not need to address Brazil's other appeal.

## **VI. GSM 102 Export Credit Guarantees**

255. We turn now to the United States' appeal of the Panel's conclusion that export credit guarantees issued after 31 July 2005 under the revised GSM 102 programme constitute export subsidies because they are provided at premiums which are inadequate to cover the long-term operating costs and losses of the programme, within the meaning of item (j) of the Illustrative List. We begin our analysis by providing a summary of the relevant aspects of the original proceedings in Section A and a description of the measures taken by the United States to comply with the DSB's recommendations and rulings in Section B. This is followed by summaries of the Panel's findings in these Article 21.5 proceedings in Section C and of the claims and arguments raised on appeal in Section D. We then analyze in Section E the specific issues raised in the United States' appeal against the Panel's assessment of the revised GSM 102 programme under item (j) of the Illustrative List. Finally, in Section F, we set out our conclusions.

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<sup>509</sup>United States' appellee's submission, para. 24.

<sup>510</sup>*Ibid.*, para. 59.

<sup>511</sup>*Ibid.*, para. 90 (referring to Panel Report, para. 9.49).

<sup>512</sup>See Argentina's third participant's submission, para. 17; and New Zealand's third participant's submission, para. 3.11.

<sup>513</sup>See European Communities' third participant's submission, para. 26.

A. *Original Proceedings*

256. As described above<sup>514</sup>, Brazil challenged three export credit guarantee programmes in the original proceedings: the GSM 102, the GSM 103, and the SCGP. The GSM 102 programme guarantees the repayment of credit made available to finance export sales of agricultural commodities on credit terms between 90 days and 3 years. To obtain the guarantee, the exporter had to pay a fee calculated on the basis of guaranteed value, according to a schedule of rates applicable to different credit terms and repayment intervals. The fee is capped by law at one per cent of the guaranteed value.<sup>515</sup> The GSM 103 programme operated in a similar fashion to the GSM 102 programme, although the GSM 103 programme guaranteed export credits with longer terms (between three and ten years) and the fees under GSM 103 were not capped by law.<sup>516</sup> Finally, the SCGP guaranteed credits provided by the exporter to the purchaser for a term not exceeding 180 days.<sup>517</sup> Like the GSM 102, fees for the SCGP are capped by law at one per cent of the dollar amount guaranteed.<sup>518</sup>

257. The original panel and the Appellate Body found that export credit guarantees provided under the GSM 102, GSM 103, and SCGP programmes to unscheduled products (including upland cotton) and one scheduled product (rice) constituted export subsidies applied in a manner that resulted in circumvention of the United States' export subsidy commitments, and were thereby inconsistent with Articles 10.1 and 8 of the *Agreement of Agriculture*.<sup>519</sup> To the extent that these subsidies did not fully conform to the *Agreement on Agriculture*, these export credit guarantees were also found to be prohibited export subsidies within the meaning of Articles 3.1(a) and 3.2 of the *SCM Agreement*.<sup>520</sup>

B. *Measures Taken by the United States*

258. Following the adoption of the original panel and Appellate Body reports, the USDA announced that, as of 1 July 2005, it would no longer accept applications under the GSM 103 programme and would apply a new fee structure to the GSM 102 and SCGP programmes. Under the new fee structure, fees were increased and different fees are applicable depending on country risk, repayment term, and repayment frequency.<sup>521</sup> More specifically, countries are classified into eight

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<sup>514</sup>See *supra*, para. 189.

<sup>515</sup>Panel Report, para. 3.14.

<sup>516</sup>*Ibid.*

<sup>517</sup>*Ibid.*

<sup>518</sup>Original Panel Report, para. 7.244.

<sup>519</sup>*Ibid.*, para. 8.1(d)(i).

<sup>520</sup>Appellate Body Report, *US – Upland Cotton*, para. 763(e)(iv).

<sup>521</sup>Fees were increased by 46 per cent on average (23 per cent on a weighted-average basis). (Panel Report, para. 14.119)

risk categories, according to the extent of the risk. Credit guarantees for exports to countries in a higher risk category are subject to higher fees, and exports to countries in the highest risk category are not eligible for credit guarantees. However, the one per cent statutory fee cap was maintained. Subsequently, in October 2005, the United States announced that it would no longer issue export credit guarantees under the SCGP.<sup>522</sup>

### C. *Article 21.5 Proceedings*

259. In the Article 21.5 proceedings, Brazil claimed that "GSM 102 export credit guarantees provided to exports of unscheduled products and exports of three scheduled products—rice, pig meat and poultry meat—since the end of the implementation period, i.e. 1 July 2005" resulted in circumvention of the United States' export subsidy commitments, contrary to Articles 10.1 and 8 of the *Agreement of Agriculture*, and are consequently also prohibited export subsidies contrary to Article 3.1(a) and 3.2 of the *SCM Agreement*.<sup>523</sup>

260. The Panel observed that it would first determine whether GSM 102 export credit guarantees constitute "export subsidies" within the meaning of Article 10.1 of the *Agreement on Agriculture*. The Panel noted that, because "the *Agreement on Agriculture* does not contain a comprehensive definition" of the term "export subsidy", it would refer to the *SCM Agreement* for contextual guidance.<sup>524</sup> In particular, the Panel said it would determine whether GSM 102 guarantees are "export subsidies" by applying the standard set out in item (j) of the Illustrative List.<sup>525</sup> In order to determine whether export credit guarantees under the GSM 102 programme were provided at "premium rates that are inadequate to cover its long term operating costs and losses", the Panel conducted a "two-step analysis".<sup>526</sup> It first reviewed evidence of a "quantitative nature submitted by the parties" and then it examined "evidence pertaining to elements of the 'structure, design and operation' of the GSM 102 programme submitted by Brazil".<sup>527</sup>

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<sup>522</sup>Panel Report, para. 3.16.

<sup>523</sup>*Ibid.*, para. 14.40. (footnote omitted)

<sup>524</sup>*Ibid.*, para. 14.48.

<sup>525</sup>*Ibid.*, para. 14.52. In addition to claiming that the export credit guarantees did not meet the benchmark in item (j) of the Illustrative List, Brazil claimed that the export credit guarantees meet the definition of an export subsidy under the terms of Articles 1.1 and 3.1(a) of the *SCM Agreement*, (that is, that they are "financial contributions" that confer a "benefit" and are contingent upon export performance). Brazil described these two lines of inquiry as separate claims and asked the Panel to resolve the latter one first. The Panel, however, rejected Brazil's request because it considered the two lines of inquiry as alternative arguments, rather than separate claims. It went on to state that it would only address Brazil's argument based on the definition of an export subsidy in Articles 1.1 and 3.1(a) if it did not resolve the matter under item (j) of the Illustrative List. Because the Panel made a finding under item (j), it found it unnecessary to address Brazil's other argument. (*Ibid.*, paras. 14.49-14.53 and para. 14.135)

<sup>526</sup>*Ibid.*, para. 14.64.

<sup>527</sup>*Ibid.*

261. As regards the evidence of a "quantitative nature", the Panel noted that the United States budgets for 2007 and 2008 continued to project a loss in connection with GSM 102 export credit guarantees issued between 2006 and 2008.<sup>528</sup> The Panel agreed with the original panel that "consistently positive initial subsidy estimates provide an indication by the [United States] government that it expects the export credit guarantee programmes ... to be run at a net cost".<sup>529</sup> The Panel considered it "highly significant that the [United States] Government continues to project, at the time of their issuance, that new GSM 102 guarantees issued under the revised programme will be provided at a net cost."<sup>530</sup> The Panel rejected the United States' arguments that the initial estimates were unreliable because they were established before any use is made of the programme and were calculated on the basis of government-wide estimation rules without regard to CCC's actual default experience. According to the Panel, these initial estimates were subsequently re-adjusted in the United States budgets of the two years subsequent to the fiscal year in which the initial estimate appears<sup>531</sup>, and in no case had such an adjustment turned a positive subsidy estimate into a negative one.<sup>532</sup> The Panel additionally noted a USDA statement that the credit models used to calculate the subsidy estimate "currently provide reliable estimates"<sup>533</sup>, and concluded that the CCC's estimation method is relied upon by the United States' government itself to assess the long-term net costs of its export credit guarantee programmes.

262. The Panel also considered new budget data submitted by the United States concerning cumulative subsequent re-estimates of the initial subsidy estimates on a cohort-specific basis for the

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<sup>528</sup>Panel Report, para. 14.69.

<sup>529</sup>*Ibid.*, para. 14.71 (referring to Original Panel Report, para. 7.843).

<sup>530</sup>*Ibid.*, para. 14.71.

<sup>531</sup>*Ibid.*, para. 14.76. As the Panel noted, "[e]ach annual budget provides long-term subsidy estimates for three cohorts of export credit guarantees: the cohort of guarantees to be issued in the fiscal year that has not yet begun (for instance, in the 2008 budget, the 2008 cohort), the cohort of guarantees issued in the fiscal year that has partly elapsed at the time the budget is released (in the 2008 budget, the 2007 cohort), and the cohort of guarantees issued in the fiscal year that has most recently ended (in the 2008 budget, the 2006 cohort)." (*Ibid.*, footnote 681 to para. 14.76) In addition, the estimates are subject to further re-estimates over the lifetime of a cohort. (See *infra*, footnote 534)

<sup>532</sup>*Ibid.*, para. 14.76 (referring to Exhibit Bra-617 submitted by Brazil to the Panel and Exhibit US-8 submitted by the United States to the Panel). The Panel explained:

We need not quantify such a cost. Therefore, the fact that the initial subsidy estimate may be overstated does not, in our view, mean that it is not a reliable predictor of a net cost to the [United States] Government.

(*Ibid.*, para. 14.76)

<sup>533</sup>*Ibid.*, para. 14.77 (referring to Exhibit Bra-588 submitted by Brazil to the Panel, *supra*, footnote 170).



period 1992-2006.<sup>534</sup> A cohort is comprised of all guarantees issued in a given year.<sup>535</sup> The United States submitted a table showing an anticipated profit of US\$926 million for the 1992-2002 cohorts (which are the cohorts examined by the original panel) and of US\$403 million for the 1992-2006 cohorts. The Panel was not convinced that the re-estimates data established that all positive initial estimates would eventually turn into negative ones. The Panel noted, in particular, that the United States Government continued to project, for the new cohorts issued under the revised GSM 102 after 1 July 2005, that the guarantees would be provided at a long-term net cost.<sup>536</sup> Moreover, it observed that the re-estimates data ("except those related to the 1994 and 1995 cohorts, which have closed") were still *estimates*, albeit revised, and they did not establish that the programmes were not provided at a net cost to the government.<sup>537</sup> In addition, the Panel reviewed cash accounting evidence submitted by Brazil and relevant figures reported in the CCC's Financial Statements, both of which, in the Panel's view, pointed to the programmes being provided at a net cost to the United States Government.<sup>538</sup>

263. The Panel concluded:

[N]otwithstanding the reestimates data submitted by the United States, we find it highly significant that the [United States] Government continues, at the time of their issuance, to project that new GSM 102 export credit guarantees will, in the long-term, be provided at a net cost to the Government. In light of this, we consider that the initial subsidy estimates provide a strong indication that GSM 102 export credit guarantees are provided against premia which are inadequate to cover the long-term operating costs and losses of the GSM 102 programme.<sup>539</sup>

264. The Panel next examined a comparison submitted by Brazil of the premiums charged under the revised GSM 102 programme and the minimum premium rates (the "MPRs") provided in the Organisation for Economic Co-operation and Development (the "OECD") Arrangement on Officially Supported Export Credits (the "OECD Arrangement"). The Panel observed that the MPRs do not

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<sup>534</sup>Pursuant to the Federal Credit Reform Act of 1990 (the "FCRA") (*supra*, footnote 168), initial subsidy estimates in annual budgets are subject to re-estimations until a cohort is closed. The CCC is required to re-estimate the subsidy cost throughout the life of each cohort to account for differences between the original assumptions of cash flow and actual cash flow or revised assumptions about future cash flow. (Panel Report, paras. 14.78 and 14.79; Original Panel Report, footnote 1003 to para. 7.843) Only the 1994 and 1995 cohorts have closed. (Panel Report, para. 14.81) According to the United States, this re-estimate process "project[ed] cashflows to and from the government over the life of the cohort". (United States' response to Question 111 posed by the Panel, Panel Report, p. D-430, para. 240)

<sup>535</sup>Panel Report, para. 14.57.

<sup>536</sup>*Ibid.*, para. 14.80.

<sup>537</sup>*Ibid.*, para. 14.81.

<sup>538</sup>*Ibid.*, paras. 14.81-14.87.

<sup>539</sup>*Ibid.*, para. 14.89.

provide a legally binding benchmark for determining whether a programme constitutes an export subsidy within the scope of item (j).<sup>540</sup> Nevertheless, the Panel opined that the MPRs are relevant "from an evidentiary point of view".<sup>541</sup> In the light of the magnitude of the difference between the MPRs and the fees under the revised GSM 102 programme (the MPRs are on average 106 per cent above GSM 102 fees), the Panel considered that "the MPRs may provide an indication, on an informed basis, of the fact that GSM 102 fees are set at a level which is insufficient to cover the long term operating costs and losses."<sup>542</sup>

265. Turning to the structure, design, and operation of the revised GSM 102 programme, the Panel recalled the original panel's finding that the CCC has access to funds from the United States Treasury and benefits from the full faith and credit of the United States Government. According to the Panel, "this is still the case" with respect to the revised GSM 102 programme.<sup>543</sup> Furthermore, the Panel recalled the original panel's finding that the fees charged by the CCC were not "risk based" either with respect to country risk or the credit-worthiness of the borrower in an individual transaction. With regard to borrowers' credit-worthiness, the Panel found that the GSM 102 fees were not risk-based insofar as they did not take into account the risk of default that is specific to an individual foreign obligor.<sup>544</sup> With regard to country risk, the Panel concluded that the non-repeal of the one per cent fee cap was an indication that the fees charged for GSM 102 export credit guarantees were still not "risk-based".<sup>545</sup>

266. The Panel found that this conclusion was confirmed by the evidence presented by Brazil with respect to the insufficient "scaling" (namely, the rate of increase) of GSM 102 fees in relation to the risks that the programme does take into consideration—country risk and length of tenor. As the Panel explained, Brazil's evidence showed significant differences between the rates of increase, based on country risk, of GSM 102 fees and the fees charged by the United States Export-Import Bank (the "Ex-Im Bank") for two of its programmes: the Letter of Credit Insurance (the "LCI") and the Medium-Term Export Credit Insurance (the "MTI").<sup>546</sup> In the Panel's view, the fact that the financial products being compared are not identical did not fundamentally undermine the evidentiary relevance

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<sup>540</sup>Panel Report, para. 14.94.

<sup>541</sup>*Ibid.*, para. 14.95. The Panel added that the MPRs "may be regarded as representing an assessment, developed by and agreed upon by the export credit experts of the Participants to the Arrangement, of the premia levels that are necessary to ensure that export credit guarantee programmes cover their long-term operating costs and losses". (*Ibid.*, para. 14.96)

<sup>542</sup>*Ibid.*, para. 14.97.

<sup>543</sup>*Ibid.*, para. 14.110.

<sup>544</sup>*Ibid.*, para. 14.115.

<sup>545</sup>*Ibid.*, para. 14.120.

<sup>546</sup>*Ibid.*, para. 14.125.

of the comparison of the scaling of their fees.<sup>547</sup> The Panel found, therefore, that the significant difference between the scaling of fees suggested that the one per cent statutory fee cap on GSM 102 fees prevented the adoption of a truly risk-based fee structure by the CCC.<sup>548</sup>

267. On the basis of its examination of the structure, design, and operation of the GSM 102 programme, the Panel concluded:

In light of these considerations – the CCC's access to funds from the [United States] Treasury, which facilitates the functioning of the programme, the fact that GSM 102 fees do not vary with foreign obligor risk, the fact that the one per cent fee cap has not been repealed and in our view prevents the adoption of risk-based fees (notably due to the insufficient "scaling" of GSM 102 fees) – we conclude that the GSM 102 programme is not designed to cover its long term operating costs and losses.<sup>549</sup>

268. In concluding its analysis under item (j), the Panel stated:

We find that Brazil has met its burden of proof in this respect and that it has established that the GSM 102 export credit guarantee programme constitutes an "export subsidy" because it is provided against premiums which are inadequate to cover its long term operating costs and losses under the terms of item (j) of the Illustrative List.<sup>550</sup>

The Panel emphasized that it reached this conclusion "on the basis of the totality of the evidence submitted by Brazil in this respect".<sup>551</sup>

269. The Panel further found that, by applying the GSM 102 export credit guarantees in a manner that resulted in circumvention of its export subsidy commitments regarding three scheduled products (rice, pig meat, and poultry meat) and unscheduled products (including upland cotton) supported by the guarantees, the United States acted inconsistently with Articles 10.1 and 8 of the *Agreement on Agriculture*.<sup>552</sup> To the extent that the GSM 102 export credit guarantees did not conform to the provisions of the *Agreement on Agriculture*, the Panel found that the United States also "acted inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement* by providing export subsidies to unscheduled products and by providing export subsidies to scheduled products in excess of its commitments under the *Agreement on Agriculture*".<sup>553</sup> Consequently, the Panel concluded that the

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<sup>547</sup>Panel Report, para. 14.126.

<sup>548</sup>*Ibid.*, para. 14.128.

<sup>549</sup>*Ibid.*, para. 14.131.

<sup>550</sup>*Ibid.*, para. 14.133.

<sup>551</sup>*Ibid.*

<sup>552</sup>*Ibid.*, paras. 14.140 and 14.149.

<sup>553</sup>*Ibid.*, paras. 14.150 and 14.156.

United States had failed to comply with the DSB's recommendations to bring its measures into conformity with the *Agreement on Agriculture*, and had failed to comply with the DSB's recommendation, pursuant to Article 4.7 of the *SCM Agreement*, to withdraw the prohibited subsidies.<sup>554</sup>

D. *Claims and Arguments on Appeal*

270. The United States challenges on appeal several aspects of what it describes as the Panel's application of item (j) to the facts of the case. First, the United States submits that, in conducting its quantitative analysis, the Panel erroneously relied on initial budgetary estimates presented by Brazil even though Brazil accounted for neither the "flaws inherent in the initial subsidy estimates", such as government-wide default and recovery rates, nor the new re-estimates submitted by the United States that show "profitability".<sup>555</sup> Secondly, the United States alleges that the Panel inappropriately made a comparison of GSM 102 fees to MPRs under the OECD Arrangement despite recognizing that the latter do not have any legal status as a benchmark for examining agricultural export credit guarantees pursuant to item (j).<sup>556</sup> Thirdly, the United States argues that the Panel erred in comparing the "scaling" of the fees under the revised GSM 102 programme with fees under the "fundamentally dissimilar" programmes of the United States Ex-Im Bank.<sup>557</sup> Fourthly, the United States maintains that the Panel erred in finding that the continued existence of the one per cent fee cap prevented the imposition of risk-based fees.<sup>558</sup> Finally, the United States asserts that the Panel "fundamentally misinterpreted" item (j) in relying on certain factors not foreseen by that provision, including the fact that the CCC has unlimited access to United States Government funds and that the GSM 102 fees do not reflect foreign obligor risk.<sup>559</sup>

271. The United States also argues that the Panel failed to make "an objective assessment of the matter", as required by Article 11 of the DSU, with respect to Brazil's claim that the GSM 102 export credit guarantees constituted export subsidies. According to the United States, the Panel: (i) disregarded the import of the budgetary re-estimates data submitted by the United States;<sup>560</sup> and (ii) distorted the meaning of the evidence on record when relying on "flawed" comparisons between GSM fees and MPRs<sup>561</sup>, and a comparison of the "scaling" of fees under the GSM 102 programme

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<sup>554</sup>Panel Report, paras. 14.150 and 14.157.

<sup>555</sup>United States' appellant's submission, para. 84.

<sup>556</sup>*Ibid.*, para. 89.

<sup>557</sup>*Ibid.*, para. 103.

<sup>558</sup>*Ibid.*, para. 109.

<sup>559</sup>*Ibid.*, para. 110.

<sup>560</sup>*Ibid.*, para. 117.

<sup>561</sup>*Ibid.*, para. 121.

and the Ex-Im Bank's export credit insurance programmes, despite "the obvious factual distinctions" between these programmes.<sup>562</sup>

272. Brazil responds that the Panel properly relied on the initial estimates in the United States budget data in reviewing the revised GSM 102 programme pursuant to item (j), because the evidence in the record "provides a more than plausible basis for concluding that the initial estimates are significant indicators that new GSM 102 guarantees issued under the revised programme will be provided at a cost."<sup>563</sup> Moreover, Brazil maintains that the Panel did not ignore the evidence submitted by the United States relating to re-estimates, and that it was within the bounds of the Panel's discretion to have attributed to the evidence a different weight or meaning than did the United States.<sup>564</sup> Brazil further submits that the Panel did not consider the comparison of the new GSM 102 fees to the OECD MPRs as "dispositive" and that, in any event, consideration of the comparison is consistent with the Panel's discretion as the trier of facts.<sup>565</sup> Furthermore, Brazil maintains that the Panel properly assessed whether revised GSM 102 fees adequately respond to the increased costs of risk—including country risk and tenor length—by comparing the scaling of fees under the revised GSM 102 programme and the Ex-Im Bank's programmes. In so doing, the Panel did not "dictate ... specific standards as to scaling" but relied on the extent of the difference as an evidentiary indication of the shortcomings of the GSM 102 programme.<sup>566</sup> Brazil additionally argues that the Panel properly treated the one per cent fee cap as another element supporting its conclusion that the revised GSM 102 programme is not structured, designed, and operated to ensure that fees cover long-term costs and losses, without according "presumptive weight to such evidence".<sup>567</sup> Finally, Brazil argues that the Panel was entitled to rely on the fact that the CCC has access to government funds<sup>568</sup>, and submits that the Panel's consideration of the revised GSM 102 programme's failure to account for foreign obligor risk represents a proper interpretation of item (j), because the fact that the new GSM 102 fees failed to account for costs associated with increased foreign obligor risk "is not cured by diversifying the riskiness of its portfolio through exposure limits".<sup>569</sup> On this basis, Brazil concludes that the United States failed to substantiate error in any of the Panel's intermediate findings, much less error in its

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<sup>562</sup>United States' appellant's submission, para. 123.

<sup>563</sup>Brazil's appellee's submission, para. 306.

<sup>564</sup>*Ibid.*, para. 362.

<sup>565</sup>*Ibid.*, paras. 376 and 391.

<sup>566</sup>*Ibid.*, para. 433.

<sup>567</sup>*Ibid.*, paras. 469 and 470.

<sup>568</sup>*Ibid.*, para. 484.

<sup>569</sup>*Ibid.*, para. 506.

overall finding that the revised GSM 102 programme constitutes an export subsidy which was based on the totality of a broad range of evidence.<sup>570</sup>

273. With respect to the United States' claim under Article 11 of the DSU, Brazil submits that the United States' allegation that the Panel should not have attached the weight it did to Brazil's arguments and evidence is insufficient to demonstrate that the Panel did not make an objective assessment of the matter.<sup>571</sup>

E. *The Panel's Assessment of the Revised GSM 102 Programme under Item (j) of the Illustrative List of Export Subsidies*

274. Before turning to the specific issues raised in the United States' appeal, we consider it useful to recall certain general observations made by the Appellate Body concerning the interpretation of item (j) of the Illustrative List of Export Subsidies, referred to in Article 3.1 of the *SCM Agreement*.

275. Article 3.1 of the *SCM Agreement* provides, in relevant part:

Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

- (a) subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I<sup>5</sup>; (footnote omitted)

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<sup>5</sup>Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

276. Item (j) of the Illustrative List reads:

The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.

277. The Appellate Body has explained that "the measure of value under item (j) is the overall cost to the government, as the service provider, of providing the service."<sup>572</sup> It has described the test set out in item (j) as "essentially financial, as it requires a panel to look at the financial performance of an export credit guarantee program, that is, its revenues from premiums and its long-term operating costs

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<sup>570</sup>Brazil's appellee's submission, para. 510.

<sup>571</sup>*Ibid.*, paras. 459 and 510.

<sup>572</sup>Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US I)*, para. 93.

and losses".<sup>573</sup> According to the Appellate Body, "the focus of item (j) is on the inadequacy of the premiums".<sup>574</sup> This focus implies that "what is required is a finding on whether the premiums are insufficient and thus whether the specific export credit guarantee program at issue constitutes an export subsidy".<sup>575</sup> Item (j) does not require "a finding of the precise difference between premiums and long-term operating costs and losses".<sup>576</sup> Nor does item (j) require a panel "to choose one particular basis for the calculation" of the adequacy of the premiums.<sup>577</sup>

278. Thus, to the extent relevant data is available, an analysis under item (j) will primarily involve a quantitative evaluation of the financial performance of a programme. Such an analysis will focus on the difference, if any, between the revenues derived from the premiums charged under the programme and its long-term operating costs and losses. An analysis under item (j) may examine both retrospective data relating to a programme's historical performance and projections of its future performance. Evidence concerning a programme's structure, design, and operation may be relevant in situations where financial data is not available. It may also serve as a supplementary means for assessing the adequacy of premiums where relevant data are available. We note that the Panel was presented with various financial data relating to the performance of the revised GSM 102 programme. Thus, as a general matter, we consider it appropriate for the Panel to have first examined the evidence of a quantitative nature submitted by the parties before evaluating evidence concerning the structure, design, and operation of the programme as additional elements for appraisal.

1. The Panel's Quantitative Analysis under Item (j)

279. The Panel reviewed four pieces of evidence in its quantitative analysis under item (j). The Panel began by examining evidence submitted by Brazil regarding the initial subsidy estimates reported in the 2007 and 2008 United States budgets. Observing that these estimates projected losses for the 2006, 2007, and 2008 cohorts, the Panel stated that "[i]t is in our view highly significant that the [United States] Government continues to project, at the time of their issuance, that new GSM 102 guarantees issued under the revised programme will be provided at a net cost."<sup>578</sup> The United States submitted subsidy re-estimates data, which concerned the period 1992-2006, and which became available after the original proceedings, to demonstrate that its export credit guarantee programmes were not provided at a net cost to the United States Government "even before it took measures to

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<sup>573</sup> Appellate Body Report, *US – Upland Cotton*, para. 667.

<sup>574</sup> *Ibid.*, para. 666. (footnote omitted)

<sup>575</sup> *Ibid.*

<sup>576</sup> *Ibid.*

<sup>577</sup> *Ibid.*, para. 665.

<sup>578</sup> Panel Report, para. 14.71.

comply with the DSB recommendations."<sup>579</sup> The Panel reviewed the re-estimates data, but did not consider that they established that the revised GSM 102 programme did not operate at a loss.<sup>580</sup> In reaching this conclusion, the Panel examined two additional pieces of quantitative evidence submitted by Brazil, namely: (i) the CCC's consolidated Financial Statements for FY 2005 and FY 2006, which report a "credit guarantee liability" of US\$220 million in relation to the CCC's GSM 102, GSM 103, and SCGP export credit guarantee programmes<sup>581</sup>; and (ii) cash-basis accounting data compiled by Brazil concerning the cumulative receipts and disbursements under the GSM 102, GSM 103, and SCGP programmes between 1992 and 2005, which shows a net loss of over US\$689 million.<sup>582</sup>

280. On appeal, the United States claims that the Panel "improperly failed to take into account ... the undisputed evidence of profit" reflected in the subsidy re-estimates data, which became available after the original proceedings and which were "in marked contrast to the analogous figures considered by the original panel".<sup>583</sup> The United States further claims that the Panel failed to conduct an objective assessment of the matter, as required by Article 11 of the DSU, because it "disregarded the import of the budgetary re-estimates data submitted by the United States."<sup>584</sup>

281. As background, we note that the initial estimates submitted by Brazil were made pursuant to the Federal Credit Reform Act of 1990<sup>585</sup> (the "FCRA"), which is intended to "measure more accurately the costs of Federal credit programs" and applies to United States federal credit agencies such as the CCC.<sup>586</sup> Accordingly, the CCC is required to make annual subsidy estimates of the cost (in net present value terms) associated with the export credit guarantees issued in a given year (referred to as a "cohort").<sup>587</sup> These initial subsidy estimates are subsequently re-adjusted in the budgets prepared for the two years following the budget year in which the initial estimate appears.<sup>588</sup> The FCRA further requires that the initial estimate (as adjusted in the third budget year since the issuance of the guarantees) be subject to annual re-estimates over the lifetime of the cohort, that is, until all guarantees in a cohort are closed.<sup>589</sup> These re-estimates "take into account all factors that may have affected the estimate of each component of the cash flows, including prepayments, defaults,

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<sup>579</sup>Panel Report, para. 14.78.

<sup>580</sup>*Ibid.*, para. 14.89.

<sup>581</sup>*Ibid.*, para. 14.81.

<sup>582</sup>*Ibid.*, para. 14.84. Brazil constructed the cash-basis accounting calculations using data from the United States Budgets for FY 1993-2006. (*Ibid.*, footnote 701 to para. 14.85)

<sup>583</sup>United States' appellant's submission, para. 77.

<sup>584</sup>*Ibid.*, para. 117.

<sup>585</sup>Federal Credit Reform Act of 1990, enacted as part of the Omnibus Budget Reconciliation Act of 1990, Public Law No. 101-508.

<sup>586</sup>Panel Report, footnote 668 to para. 14.69.

<sup>587</sup>*Ibid.*

<sup>588</sup>*Ibid.*, para. 14.76. See also *supra*, footnote 531.

<sup>589</sup>*Ibid.*, para. 14.78.



delinquencies, and recoveries', to the extent that those factors have changed since the initial estimate was made".<sup>590</sup> Consequently, re-estimates are "revisions of the subsidy cost estimate of a cohort ... based on information about the actual performance and or estimated changes in future cash flows of the cohort".<sup>591</sup> Re-estimates are tracked in Table 8 of the Federal Credit Supplement accompanying the budget.<sup>592</sup>

282. The re-estimates data submitted by the United States in these Article 21.5 proceedings cover the period 1992-2006. The data for the period 1992-2005 relate to export credit guarantees issued under the GSM 102, GSM 103, and SCGP programmes, while the data for 2006 relate to export credit guarantees issued under the revised GSM 102 programme. The re-estimates data record a downward trend in the costs associated with the three export credit programmes during the period 1992-2006. As the Panel noted, the table shows an aggregate overall anticipated profit of US\$926 million for the 1992-2002 cohorts (the cohorts examined by the original panel) and US\$403 million anticipated profit for the 1992-2006 cohorts.<sup>593</sup>

283. The United States asserts that the retrospective data, showing profitability over 15 years under the three export credit guarantee programmes examined by the original panel, is "compelling" evidence as to what one should anticipate under the revised GSM 102 programme, particularly because two programmes have ceased to be operational, and the revision to the fee structure of the remaining GSM 102 programme has resulted in higher fees.<sup>594</sup> Consequently, this "new information undermined the initial subsidy estimates submitted by Brazil, which the Panel relied on to find that the premia under the GSM 102 program were inadequate to cover the program's long-term operating costs and losses".<sup>595</sup>

284. Thus, the re-estimates data were a central piece of evidence that the United States adduced in the Panel proceedings as part of its defence against Brazil's claims under item (j). In addressing this evidence, the Panel began by recalling that, in the original proceedings, the United States also submitted cumulative re-estimates data for the three export credit guarantee programmes at issue in

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<sup>590</sup>Original Panel Report, para. 7.843 (quoting Section 185.3(x) of *Executive Office of the President, Office of Management and Budget, June 2002: Circular No. A-11, Part 5: Federal Credit Programs*, p. 185-12 (Exhibit Bra-116 submitted by Brazil to the original panel)). See also Panel Report, footnote 686 to para. 14.78.

<sup>591</sup>Original Panel Report, footnote 1005 to para. 7.843.

<sup>592</sup>Panel Report, footnote 681 to para. 14.76.

<sup>593</sup>*Ibid.*, para. 14.79.

<sup>594</sup>United States' responses to questioning at the oral hearing.

<sup>595</sup>United States' appellant's submission, para. 119.

those proceedings. The Panel recognized that, unlike in the original proceedings, the re-estimates data submitted by the United States in these Article 21.5 proceedings showed an overall profit. Nevertheless, the Panel stated, in paragraph 14.80 of its Report:

The original panel was not persuaded that cohort reestimates, over time, would necessarily not give rise to a net cost to the United States Government. Similarly, we are not convinced that the re-estimates data submitted by the United States establishes that all positive subsidy estimates—and in particular, those for cohorts 2006-2008—will eventually turn into negative ones.<sup>596</sup>

285. In the *US – Softwood Lumber VI (Article 21.5 – Canada)*, the Appellate Body noted that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record".<sup>597</sup> There has been, however, a change in the evidence from the original proceedings to these Article 21.5 proceedings. The re-estimates data submitted by the United States in these Article 21.5 proceedings are not the same as those submitted in the original proceedings. The data submitted in the original proceedings covered the period 1992-2002 and showed an overall net cost to the United States Government of \$230 million<sup>598</sup> for the entire period. The original panel recognized the relevance of this figure because it "reveals that over the long term the United States government anticipates that it may not break even with its export credit guarantee programmes".<sup>599</sup> The data submitted in these Article 21.5 proceedings cover the period 1992-2006 and, as the Panel itself recognized, the data now projects overall profits for the same programmes over a longer period of time. Moreover, the original panel noted that, for the 1994 cohort, "a cohort that [was] on the verge of closing"<sup>600</sup>, the re-estimates data still showed a net cost. The re-estimates data submitted in these Article 21.5 proceedings indicate that the 1994 cohort has closed and was profitable.<sup>601</sup> The same occurs with the 1995 cohort.<sup>602</sup>

286. Thus, whereas the original panel "was not persuaded that cohort reestimates, over time, would necessarily not give rise to a net cost", the re-estimates data before the Panel project overall profits for

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<sup>596</sup>Panel Report, para. 14.80. (footnote omitted)

<sup>597</sup>Appellate Body, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.

<sup>598</sup>Original Panel Report, para. 7.852.

<sup>599</sup>*Ibid.*, para. 7.854.

<sup>600</sup>*Ibid.*, para. 7.853 and footnote 1028 thereto.

<sup>601</sup>Panel Report, para. 14.81; United States' response to Question 111 posed by the Panel, Panel Report, p. D-440, paras. 277 and 278.

<sup>602</sup>*Ibid.*

the period 1992-2006, and the two cohorts that have already closed show actual profits. Accordingly, the original panel's reasoning, as quoted by the Panel in paragraph 14.80 of its Report, was not applicable given that the factual circumstances have changed.

287. The Panel reasoned that, "because [the re-estimates] are revised *estimates*, they do not establish that the programmes were provided at no net cost to the United States Government".<sup>603</sup> We focus upon the Panel's reasoning because it is this reasoning that gives rise to serious concern. Neither the initial estimates, nor the re-estimates, are a final and definitive account of the financial performance of the programmes concerned. Rather, they are both *projections* (except for the two closed cohorts) and are hence subject to uncertainty. The Panel considered that this uncertainty provided a basis for marginalizing the re-estimates data. At the same time, the Panel considered the initial estimates of central importance despite the fact that they suffered from the same uncertainty given that they too are estimates. If anything, the re-estimates might be expected to be more reliable because they reflect the historical performance of the programme. They also include two closed cohorts (1994 and 1995) for which the data is final. Moreover, the re-estimates data cover a longer period of time and thus provide a basis for a long-term assessment, the very question at issue under item (j).

288. After considering the re-estimates data, the Panel went on to examine two additional pieces of quantitative evidence submitted by Brazil. In particular, the Panel noted that the CCC's consolidated Financial Statements for FY 2005 and FY 2006 report a "credit guarantee liability" of US\$220 million in relation to the CCC's GSM 102, GSM 103, and SCGP export credit guarantee programmes.<sup>604</sup> The Panel recalled the original panel's finding that the credit guarantee liability figure is "another indicator, used and relied upon by the United States government, to assess the estimated long-term cost" to the government of export credit guarantees.<sup>605</sup> Following the same line of reasoning, the Panel relied on the definitions from the CCC's Financial Statements and observed that the credit guarantee liability figure represents "the *estimated* net cash outflow (loss) of the guarantees on net present value basis" and "records a liability and an expense to the extent ... CCC will be unable to recover claim payments".<sup>606</sup> According to the Panel, therefore, the "credit guarantee liability"

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<sup>603</sup>Panel Report, para. 14.81. (original emphasis)

<sup>604</sup>*Ibid.*

<sup>605</sup>*Ibid.* (quoting Original Panel Report, para. 7.855). We note that the United States submitted before the Panel that the original panel's explanation in paragraph 7.855 of its report, specifically quoted by the Panel, "is an accurate and proper definition of liability". (United States' response to Question 107 posed by the Panel, Panel Report, p. D-438, para. 271)

<sup>606</sup>Panel Report, para. 14.82 and footnote 693 thereto (referring to Audit Report, Commodity Credit Corporation, Consolidated Financial Statements – Fiscal Years 2006 and 2005 (November 2006) (Exhibit Bra-585 submitted by Brazil to the Panel), p. 11 of Notes to the Financial Statements). (emphasis added)

reported in the CCC's Financial Statements indicates that, "with respect to guarantees that were outstanding as of 30 September 2006, the [United States] Government estimates future disbursements of US\$220 million".<sup>607</sup> The Panel noted that the credit guarantee liability figure also represented an *estimated* loss by the United States Government.<sup>608</sup> The Panel did not provide any reasoning, however, as to why it was appropriate to place strong reliance on this evidence, which is an estimated figure, while not relying on the re-estimates data "because they are estimates".

289. The final category of quantitative evidence reviewed by the Panel was the cash basis accounting data submitted by Brazil. This data concerned cumulative receipts and disbursements under the GSM 102, GSM 103, and SCGP programmes between 1992 and 2005, and shows a net loss of over US\$689 million.<sup>609</sup> As the Panel noted, however, this cash basis accounting data "only capture[] receipts and disbursements to date" and "do[] not ... record *projected* receipts and disbursements, including (as the United States indicates) projected recoveries under rescheduled amounts".<sup>610</sup> By this observation, the Panel appeared to recognize the major difference between Brazil's cash basis accounting data and the re-estimates data, in that the former record actual receipts and disbursements to date, whereas the latter project future costs on a net present value basis. Given that the Panel itself recognized the different nature of these data, we find it somewhat puzzling that the Panel referred to the cash basis accounting data as one of the factors affecting the reliability of the re-estimates.<sup>611</sup>

290. After reviewing these four categories of quantitative evidence, the Panel stated:

In conclusion, notwithstanding the reestimates data submitted by the United States, we find it highly significant that the [United States] Government continues, at the time of their issuance, to project that new GSM 102 export credit guarantees will, in the long-term, be provided at a net cost to the Government. In light of this, we consider that the initial subsidy estimates provide a strong indication that GSM 102 export credit guarantees are provided against premia which are inadequate to cover the long-term operating costs and losses of the GSM 102 programme.<sup>612</sup>

291. Thus, the Panel dismissed the import of the re-estimates data as estimates, yet concluded that the initial estimates provided a "strong indication" that the GSM 102 programme is expected to run at

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<sup>607</sup>Panel Report, para. 14.83.

<sup>608</sup>*Ibid.*

<sup>609</sup>*Ibid.*, para. 14.84. The source of the data is the United States Budgets for FYs 1993-2006. (*Ibid.*, footnote 701 to para. 14.85) On appeal, except for stating that the cash basis accounting data are "separate and apart from the [United States] budget accounting approach", the United States does not provide other arguments against the Panel's review of this data. (United States' appellant's submission, para. 85)

<sup>610</sup>Panel Report, para. 14.87. (original emphasis)

<sup>611</sup>*Ibid.*, para. 14.88.

<sup>612</sup>*Ibid.*, para. 14.89.

a net cost. However, all the quantitative evidence examined by the Panel, except for the cash basis accounting data submitted by Brazil, are estimates, or projections, of future financial performance. There is no rationale offered by the Panel as to why it marginalized the re-estimates data while, at the same time, accepting the initial estimates as "provid[ing] a strong indication"<sup>613</sup> that the GSM 102 programme is expected to run at a net cost.

292. The Panel's treatment of the competing evidence submitted by the parties is therefore internally inconsistent. The initial estimates, the re-estimates, and the CCC's Financial Statements are all routinely produced by the United States Government, yet obvious discrepancies exist among them. For example, both the re-estimates data and the credit guarantee liability figure relate to the financial performance of the CCC's export credit guarantee programmes up to 2006, but the former project profits, whereas the latter projects losses. The Panel did not reconcile these discrepancies. If this was not possible, the Panel should have provided a reasoned explanation as to why it preferred one category of quantitative evidence over the other. Instead, the Panel dismissed the import of the re-estimates, which were the central piece of evidence relied on by the United States, on the basis of reasoning that, in our view, is internally incoherent, and compounded the matter by relying on evidence that suffered from the same limitation as the re-estimates. The Panel's treatment of the evidence submitted by the parties lacked even-handedness.

293. Brazil underscores that, as the trier of facts, the Panel was entitled to determine the probative value and relative weight of the re-estimates data submitted by the United States.<sup>614</sup> According to Brazil, the fact that "the compliance Panel attributed to the competing evidence a different weight or meaning than did the United States does not constitute reversible legal error in the application of item (j) to the facts."<sup>615</sup> We agree that the Appellate Body has consistently held that it would not interfere lightly with a panel's exercise of its authority as the trier of facts.<sup>616</sup> The Appellate Body has explained that, under Article 11 of the DSU, "a panel is charged with the mandate to determine the facts of the case and to arrive at factual findings. In carrying out this mandate, a panel has the duty to

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<sup>613</sup>Panel Report, para. 14.89.

<sup>614</sup>Brazil's appellee's submission, para. 362.

<sup>615</sup>*Ibid.* (footnote omitted)

<sup>616</sup>See, for example, Appellate Body Report, *EC – Asbestos*, para. 161; Appellate Body Report, *EC – Hormones*, para. 132; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *Japan – Apples*, para. 222; Appellate Body Report, *Korea – Dairy*, para. 137; and Appellate Body Report, *US – Wheat Gluten*, para. 151.

examine and consider all the evidence before it"<sup>617</sup>, and may not "disregard" evidence or "appl[y] a double standard of proof".<sup>618</sup>

294. Our concern with the Panel's treatment of the re-estimates, however, is not directed towards its weighing of the evidence. Rather, there is a lack of explanation and coherent reasoning by the Panel that led it to marginalize the re-estimates. The Panel was presented with a class of quantitative evidence that is based on estimates, including the initial estimates, the re-estimates, and the CCC's Financial Statements, but effectively disregarded the re-estimates data submitted by the United States. The error is amplified by the fact that the Panel unquestioningly accepted the initial estimates and CCC Financial Statements submitted by Brazil, although they too are based on estimates. The Panel's internally incoherent treatment of the same class of quantitative evidence thus vitiates the conclusion it drew based on the financial data submitted by the parties.

295. In sum, we find that, by dismissing the import of the re-estimates data submitted by the United States on the basis of internally inconsistent reasoning, the Panel did not make "an objective assessment of the matter before it, including an objective assessment of the facts of the case", under Article 11 of the DSU. Consequently, the Panel erred in its intermediate conclusion that "the initial subsidy estimates provide a strong indication that GSM 102 export credit guarantees are provided against premia which are inadequate to cover the long-term operating costs and losses of the GSM 102 programme."<sup>619</sup>

296. Having reversed the Panel's intermediate finding, we turn to examine whether we can complete the analysis and make our own assessment of the quantitative evidence on the record. In the past, the Appellate Body has completed the legal analysis when there was a sufficient factual basis in the panel record to enable it to do so.<sup>620</sup>

297. The United States and Brazil disagree on the significance of the initial estimates and re-estimates data on record. According to the United States, the re-estimates data are "highly probative" because they "demonstrated that the export credit guarantee programs in the aggregate—

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<sup>617</sup>Appellate Body Report, *Korea – Dairy*, para. 137.

<sup>618</sup>Appellate Body Report, *Korea – Alcoholic Beverages*, para. 164. In cases concerning a panel's examination of determinations by domestic investigating authorities, the Appellate Body has also held that a panel must assess "whether the explanations provided by the authority are 'reasoned and adequate' ... and [assess] the coherence of its reasoning." (Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97) In cases where a panel operates as the initial trier of facts, such as this one, it would similarly be expected to provide reasoned and adequate explanations and coherent reasoning.

<sup>619</sup>Panel Report, para. 14.89.

<sup>620</sup>See, for example, Appellate Body Report, *Canada – Periodicals*, p. 24, DSR 1997:I, 449, at 469; Appellate Body Report, *Australia – Salmon*, para. 118; Appellate Body Report, *US – Shrimp*, para. 124; and Appellate Body Report, *US – Section 211 Appropriations Act*, para. 352.

even before the adoption of the new fee structure for the GSM 102 program and the elimination of the longer-term GSM 103 export credit guarantee program and the riskier SCGP—charged premium rates more than adequate to cover long-term operating costs and losses of the three programs".<sup>621</sup> By contrast, Brazil argues that historical data regarding the export credit guarantee programmes, such as the re-estimates, have serious limitations because they merely reflect one possible outcome (in this case, profits), whereas the initial estimates reflect an evaluation of all possible outcomes regarding the programmes' financial performance.<sup>622</sup>

298. The Panel itself recognized that it is "factually correct" that "the initial estimates are established before any use is made of the programme and ... are based on the *projected use* of the programme".<sup>623</sup> The Panel also noted that the initial estimates are "subsequently re-adjusted in the United States Budget two years after the budget year in which the initial estimates appears"<sup>624</sup> and, "[i]n subsequent years, re-estimates are tracked in Table 8 of the Federal Credit Supplement accompanying the budget".<sup>625</sup> These re-estimates show a consistent downward trend in the estimated costs of the export credit guarantee programmes, thus calling into question the reliability of the initial estimates for purposes of evaluating the programme's "long-term operating costs and losses".

299. Although the measure subject to these proceedings is the GSM 102 programme, as revised since July 2005, the re-estimates data cannot be dismissed simply because the data concern the financial performance of the three programmes examined in the original proceedings. As noted by the Panel, "GSM 102 export credit guarantees made up 93 per cent of the CCC guarantees portfolio".<sup>626</sup> Under the revised fee structure, fees for GSM 102 export credit guarantees were increased by 23 per cent (on a weighted-average basis).<sup>627</sup> It is not unreasonable to assume that the increase of fees resulting from the revision of the GSM 102 programme would accentuate the downward trend shown in the re-estimates data for the 15-year period. Thus, we consider that the re-estimates data, which show better-than-expected historical performance, are an important indicator of the revised GSM 102 programme's likely future performance.

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<sup>621</sup>United States' appellant's submission, paras. 117-119.

<sup>622</sup>Brazil's response to questioning at the oral hearing.

<sup>623</sup>Panel Report, para. 14.76. (original emphasis)

<sup>624</sup>*Ibid.* The Panel stated that "[i]n no case has such an adjustment turned a positive subsidy estimate into a negative one". (*Ibid.*) The Panel, in stating such, referred to Exhibit Bra-617, *supra*, footnote 532, which contains the initial estimates as they first appeared in United States budgets and as re-adjusted in the two subsequent United States budgets. However, these "re-adjustments" in the third year are not final, as the Panel itself noted, but continue to be re-estimated in subsequent years and recorded in Table 8 of the Federal Credit Supplement accompanying the budget. (*Ibid.*, para. 14.76 and footnote 681 thereto)

<sup>625</sup>*Ibid.*, footnote 681 to para. 14.76.

<sup>626</sup>*Ibid.*, para. 14.118.

<sup>627</sup>*Ibid.*, para. 14.119.

300. We recall that Brazil also submitted to the Panel the CCC's audited Financial Statements, which are another indicator of the performance of the CCC's export credit guarantee programmes up to 2006. Both the re-estimates data submitted by the United States and the audited Financial Statements of the CCC were routinely produced by the United States Government, and neither were produced specifically for this dispute. In these circumstances, both are relevant for the appraisal of the long-term financial performance of the revised GSM 102 programme. While the re-estimates data project overall profits of US\$403 million under the CCC's export credit guarantee programmes for the period 1992-2006<sup>628</sup>, the CCC's Financial Statements estimate a credit guarantee liability of US\$220 million with respect to post-1991 guarantees that were outstanding as of 30 September 2006.<sup>629</sup> Although, at the oral hearing, we tried to explore possible ways of reconciling these two figures, we did not get a clear explanation from either party as to how this could be done.

301. Thus, the quantitative evidence submitted by Brazil and the United States support two plausible conclusions that one could draw regarding the profitability of the revised GSM 102 programme: (i) the CCC's Financial Statements indicate that the programme is making losses; and (ii) the re-estimates data indicate that the programme is making profits. Therefore, the critical quantitative data before the Panel give rise to conflicting conclusions. The data also give rise to similar probabilities that point to opposite conclusions as to the binary outcome in item (j), that is, whether a programme is making a loss or not. We recall, however, that the Panel also examined other evidence adduced by Brazil, "which further convince[d]"<sup>630</sup> the Panel that the premiums under the revised GSM 102 programme are inadequate to cover its long-term operating costs and losses, within the meaning of item (j). This evidence includes a comparison between fees under the revised GSM 102 programme and the OECD MPRs, and various elements relating to the structure, design, and operation of the programme. We now turn to examine the United States' arguments regarding the Panel's consideration of this evidence in order to determine whether the evidence as assessed by the Panel makes one of the two probable outcomes that emerge from the quantitative evidence more likely than not.

## 2. Comparison with MPRs under the OECD Arrangement

302. The United States submits that the Panel "fundamentally misinterpreted" the requirements of item (j) in "[making] determinations" under that provision based on a comparison of GSM 102 programme fees with MPRs under the OECD Arrangement.<sup>631</sup> According to the United States,

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<sup>628</sup>Panel Report, para. 14.79.

<sup>629</sup>*Ibid.*, para. 14.83.

<sup>630</sup>*Ibid.*, para. 14.90.

<sup>631</sup>United States' appellant's submission, para. 89.



"[d]espite its recognition of the inapplicability of the OECD Arrangement and MPRs", the Panel "compared OECD MPRs to fees charged under the GSM 102 program, and found that comparison dispositive for purposes of the item (j) analysis."<sup>632</sup> The United States adds that the Panel acted inconsistently with Article 11 of the DSU by "disregard[ing] the irrelevancy of the [OECD Arrangement] MPRs" for purposes of the analysis under item (j).<sup>633</sup>

303. In our view, the United States exaggerates the importance the Panel attached to the fee comparison of GSM 102 fees with the MPRs in its overall analysis under item (j). After reviewing the budgetary evidence described above, the Panel turned to review the evidence relating to MPRs submitted by Brazil. At the outset, the Panel made clear that it did not consider the MPRs to be directly applicable in determining whether an export credit guarantee programme falls within the scope of item (j).<sup>634</sup> The Panel emphasized that item (j) makes no reference to the OECD Arrangement and that the MPRs do not provide a legally binding benchmark for purposes of an analysis under item (j). As the Panel explained:

While the MPRs were developed at least in part to ensure that Participants would comply with item (j), item (j) itself does not refer to the OECD Arrangement or to any other international agreement or benchmark in determining whether the premia are inadequate to cover the long term operating costs and losses of export credit guarantee programmes and other programmes covered by item (j) of the Illustrative List. As the United States points out, this contrasts with the second paragraph of item (k) of the Illustrative List, where such a reference is made. In consequence, there is in our view no basis to treat the OECD MPRs as providing a legally binding benchmark to determine whether an export credit guarantee programme falls within the scope of item (j) of the Illustrative List.<sup>635</sup>  
(footnote omitted)

304. The Panel further noted that the OECD Arrangement does not cover exports of agricultural commodities and applies only to government support for credit terms of two years or more.<sup>636</sup> Thus, the Panel did not consider that the OECD MPRs constituted a valid benchmark under item (j).

305. Although the Panel recognized that MPRs have no legal status in the context of an analysis under item (j), it did consider them relevant "*from an evidentiary point of view*".<sup>637</sup> In particular, what the Panel found relevant was the *magnitude* of the difference between the MPRs and the GSM 102

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<sup>632</sup>United States' appellant's submission, para. 94.

<sup>633</sup>*Ibid.*, para. 121.

<sup>634</sup>Panel Report, para. 14.94.

<sup>635</sup>*Ibid.*

<sup>636</sup>*Ibid.* (footnote omitted)

<sup>637</sup>*Ibid.*, para. 14.95. (emphasis added)

fees. Based on the comparison submitted by Brazil, the Panel observed that, "[o]n average, the MPRS are 106 per cent above GSM 102 fees".<sup>638</sup> The magnitude of the difference in the fees is repeatedly emphasized by the Panel in its reasoning. The Panel explained that, "in this particular case, because of the magnitude of the difference between the MPRs and GSM 102 fees, the MPRs may provide an indication, on an informed basis, of the fact that GSM 102 fees are set at a level which is insufficient to cover the long term operating costs and losses of the programme."<sup>639</sup> The Panel emphasized that it took into account the comparison of MPRs and GSM 102 fees "because of the importance of the difference between them".<sup>640</sup> The Panel immediately cautioned that it was "not suggest[ing] that any difference in this respect could be relied upon as an indication that an export guarantee programme meets the criteria of item (j) of the Illustrative List".<sup>641</sup>

306. Therefore, contrary to the United States' assertions, the Panel did not make a definitive determination under item (j) on the basis of the comparison between MPRs and GSM 102 fees, nor did the Panel find "that comparison dispositive for purposes of the item (j) analysis".<sup>642</sup> Consequently, we see no basis in the Panel's analysis for the United States' argument that the Panel misinterpreted the requirements in item (j) by imposing a legal benchmark not specified therein.

307. In addition, the United States argues that the Panel acted inconsistently with Article 11 of the DSU by making "conclusory observations ... unsupported by evidence" that "the MPRS would increase if agricultural products were made subject to it", because industrial products "offer a better security".<sup>643</sup> We recall the Panel's emphasis on the "magnitude of the difference between MPRs and GSM 102 fees" when it found that the MPRS "may provide an indication" that the GSM 102 fees are inadequate to cover long-term operating costs and losses.<sup>644</sup> Noting that MPRS are on average 106 per cent above GSM 102 fees, the Panel stated that "there is ... no reason why the MPRS should be lowered were agricultural products to fall under its product coverage."<sup>645</sup> It is within this context that the Panel agreed with Brazil's submission that, "if anything, the MPRS would increase if agricultural products were made subject to it".<sup>646</sup> Thus, even if these observations, taken in isolation, were to be unsupported by specific evidence, they do not undermine the Panel's overall conclusion that the significant difference in fees provides an additional evidentiary basis for its analysis under item (j).

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<sup>638</sup>Panel Report, para. 14.98. (footnote omitted)

<sup>639</sup>*Ibid.*, para. 14.97. (original underlining)

<sup>640</sup>*Ibid.*

<sup>641</sup>*Ibid.* (original emphasis)

<sup>642</sup>United States' appellant's submission, para. 94.

<sup>643</sup>*Ibid.*, para. 122 (quoting Panel Report, para. 14.101).

<sup>644</sup>*Ibid.*, paras. 14.97 and 14.98.

<sup>645</sup>*Ibid.*, para. 14.101.

<sup>646</sup>*Ibid.*

3. Structure, Design, and Operation of the Revised GSM 102 Programme

308. We turn next to examine the United States' arguments concerning the elements relied on by the Panel in analyzing the structure, design, and operation of the revised GSM 102 programme. These elements are: (i) the one per cent statutory fee cap applicable under the GSM 102 programme; (ii) a comparison of the "scaling" of fees under the GSM 102 programme and the two credit insurance programmes of the Export-Import Bank; (iii) the fact that foreign obligor risk is not reflected in revised GSM 102 fees; and (iv) the CCC's access to government funds.

309. The United States maintains that the Panel "erred as a matter of law in relying on the one per cent fee cap as proof that the revised GSM 102 program was not risk-based".<sup>647</sup> According to the United States, nothing in item (j) says that, just because a programme has a fee cap, it cannot satisfy the test that premium rates cover long-term operating costs and losses. We do not consider that the Panel made such a conclusion. Rather, the Panel focused its analysis on the "*effects* of the remaining presence of the one per cent fee cap"<sup>648</sup>—namely, how the fee cap affects the adequacy of the fees in relation to risks—and did not find that a fee cap, in itself, necessarily prevents a programme from covering its long-term operating costs and losses, as the United States' argument seems to suggest.

310. The United States further claims that the Panel erred in relying on the comparison of "scaling" of fees under the revised GSM 102 programme and the Ex-Im Bank programmes for its analysis under item (j).<sup>649</sup> We recall that Brazil submitted a comparison of the rate of increase, corresponding to increased risk (by country risk category and length of tenor), of fees charged by the GSM 102 programme with the rate of increase of fees under two programmes of the Ex-Im Bank—the LCI and the MTI. The Panel reviewed this comparison and concluded that the "significant difference between the rates of increase" for GSM 102 fees and for the LCI and the MTI suggests that "the [one] per cent fee cap ... does indeed prevent the adoption of a truly risk-based fee structure by the CCC."<sup>650</sup>

311. The United States submits that the Ex-Im Bank programmes are "fundamentally dissimilar" to the GSM 102 programme.<sup>651</sup> According to the United States, "[i]n addition to the fact that [LCI and MTI] are subject to MPRs, and that MTI is not available for agricultural goods, [LCI and MTI] differ significantly in terms of interest and principal cover, as well as the availability of recourse to a third party for uninsured amounts."<sup>652</sup> Despite these dissimilarities, the United States argues, the Panel

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<sup>647</sup>United States' appellant's submission, para. 109.

<sup>648</sup>Panel Report, para. 14.121. (emphasis added)

<sup>649</sup>United States' appellant's submission, para. 101.

<sup>650</sup>Panel Report, para. 14.128.

<sup>651</sup>United States' appellant's submission, para. 103.

<sup>652</sup>*Ibid.*

"acceded to Brazil's proffered adjustments to take into account these differences and force a scaling comparison".<sup>653</sup>

312. We note that, rather than "forcing a comparison" despite the dissimilarities between the programmes, the Panel specifically addressed the dissimilarities by reviewing various adjustments made in the evidence submitted by Brazil to render the LCI and the MTI more analogous to the GSM 102 programme, and considered them to be "appropriate".<sup>654</sup> Furthermore, the Panel did not focus on the differences between the amount of fees charged under the GSM 102 programme and under the Ex-Im Bank programmes. Rather, the comparisons were intended to show that, due to the limitation placed by the one per cent fee cap, the revised GSM 102 fees increase much slower, in response to the increased risk, than the rate of increase of the fees charged under the Ex-Im Bank programmes. We therefore do not consider that it was improper for the Panel to conclude that "[t]he fact that the financial products being compared are not identical" did not fundamentally undermine the evidentiary value of the comparisons regarding scaling of fees under the programmes.<sup>655</sup>

313. In addition, the United States contests the relevance of scaling to an analysis under item (j), arguing that "[i]tem (j) does not even impose a 'risk-based' condition", and that the only condition under item (j) is whether the premiums under an export credit guarantee programme are adequate to cover its long-term operating costs and losses.<sup>656</sup> We agree that the analysis of risk is not expressly required by the text of item (j) in assessing the adequacy of premiums of an export credit guarantee programme. However, an export credit guarantee programme exposed to risk of default is more likely to incur costs and losses if its design and structure do not adequately safeguard against such risk. Therefore, we consider that risk is a relevant factor in the assessment of a programme's structure, design, and operation under item (j).<sup>657</sup>

314. The United States argues that, "[e]ven were a risk based standard relevant, item (j) does not indicate any specific standards as to scaling."<sup>658</sup> We concur that item (j) does not impose a standard as to scaling. The Panel did not impose such a standard. Rather, the Panel reviewed the scaling

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<sup>653</sup>United States' appellant's submission, para. 103.

<sup>654</sup>Panel Report, para. 14.125.

<sup>655</sup>*Ibid.*, para. 14.126.

<sup>656</sup>United States' appellant's submission, para. 104.

<sup>657</sup>We note that the original panel, in a finding not subject to appeal, stated that, "where a programme does not provide for premium rates that are fully reflective of the risks of a particular transaction, this might be one indicator that the programme was set up in such a way that its long-term operating costs and losses have to be borne, in total or in part, by the government." (Original Panel Report, para. 7.805 (quoted in Panel Report, para. 14.108))

<sup>658</sup>United States' appellant's submission, para. 104.

comparison with the Ex-Im Bank programmes to appraise the effect of the one per cent fee cap under the revised GSM 102 programme. The Panel noted that the scaling comparisons "convincingly demonstrated that the GSM 102 fees only minimally respond to increased country risk and increased risk in the form of longer tenors", as compared to the LCI and the MTI fees.<sup>659</sup> In particular, the Panel found that, "while the fees for lowest country risk categories are relatively similar between GSM 102 and the LCI and MTI, there is a sharp difference between the fees charged by the Ex-Im Bank and the CCC for the highest risk categories."<sup>660</sup>

315. We note that the United States itself acknowledges that "[s]caling is ... relevant with respect to a comparison of those transactions that are eligible under the program."<sup>661</sup> The United States nevertheless contends that "[a] full examination of whether a program is risk-based would also take into account those transactions that are wholly ineligible [and for which] the current fee is effectively infinite".<sup>662</sup> The comparisons provided by Brazil were made between individual eligible countries in the corresponding risk categories of the revised GSM 102 programme and the Ex-Im Bank programmes.<sup>663</sup> In our view, the fact that a number of countries are ranked as "ineligible" under the revised GSM 102 programme does not affect the validity of the fee comparisons insofar as the eligible countries are concerned.

316. The United States further maintains that the Panel acted inconsistently with Article 11 of the DSU by accepting Brazil's evidence regarding "scaling" of fees under the GSM 102 and the Ex-Im Bank programmes. According to the United States, despite the "obvious factual distinction" regarding the product coverage under the Ex-Im Bank MTI and the GSM 102 programme, the Panel concluded that the distinction does not fundamentally undermine the value of the comparison but offered "no support for this conclusion".<sup>664</sup> We recall that the Panel found that the differences regarding product coverage did not undermine the value of the comparison, because the relevant comparison being conducted was between the rates of increase of the fees, rather than the fees themselves.<sup>665</sup> Moreover,

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<sup>659</sup>Panel Report, para. 14.127.

<sup>660</sup>*Ibid.*, para. 14.127. In making this observation, the Panel referred to certain graphs submitted by Brazil showing that Ex-Im Bank fees rise more sharply than GSM 102 fees in response to increased risks involved in a transaction. (*Ibid.*, footnote 758 to para. 14.127) The Panel further noted that, for a tenor of 36 months, the GSM 102 fee and the MTI fee for a country falling within risk category 2 are, respectively, 0.637 per cent and 1.060 per cent. For a country falling within risk category 6, however, the GSM 102 fee is 1 per cent, whereas the MTI fee is increased to 4.325 per cent. (*Ibid.*, footnote 759 to para. 14.127)

<sup>661</sup>United States' appellant's submission, para. 104.

<sup>662</sup>*Ibid.*

<sup>663</sup>See, for example, Exhibits Bra-693 and Bra-694 submitted by Brazil to the Panel (as referred to in Panel Report, para. 14.125 and footnote 755 thereto).

<sup>664</sup>United States' appellant's submission, para. 123.

<sup>665</sup>Panel Report, para. 14.126.

the Panel examined the adjustments made by Brazil which, in the Panel's view, made the Ex-Im Bank's programmes more comparable to the GSM 102 programme.

317. According to the United States, the Panel failed to conduct an objective assessment of the matter, as required by Article 11 of DSU, when it stated, "[without] any basis in the evidence", that the 100 per cent increase in fees under the revised GSM 102 programme between the lowest and highest risk category "suggests that fees insufficiently take account of" risk.<sup>666</sup> The United States' argument does not take full account of the context in which the Panel's statement is made. The Panel made the observation that fees insufficiently take account of risk *after* reviewing the evidence showing that the rate of increase of the fees charged under the Ex-Im Bank programmes is significantly higher than 100 per cent.<sup>667</sup> The Panel noted, in particular, that, "while the fees for the lowest country risk categories are relatively similar between GSM 102 and the LCI and MTI, there is a sharp difference between the fees charged by the Ex-Im Bank and the CCC for the highest risk categories."<sup>668</sup> When seen in the context in which it was made, the Panel's statement does have a basis.

318. The United States contests two other factors relied on by the Panel as "not germane to an analysis under item (j)."<sup>669</sup> First, the United States argues that the Panel erroneously concluded that "the fact that the United States sets bank limits with respect to each foreign bank obligor does not ... alter the fact that foreign obligor risk is not reflected in GSM 102 fees."<sup>670</sup> The United States argues that nothing in item (j) specifies how a government programme shall be designed to ensure the adequacy of premiums, and managing foreign obligor risk is one important way to ensure this adequacy. Therefore, according to the United States, the Panel erred in concluding that "fees were the only proper way to deal with foreign obligor risk."<sup>671</sup> This, however, is not what the Panel concluded. Rather, the Panel highlighted "the fact that foreign obligor risk is not reflected in GSM 102 fees"<sup>672</sup>, and noted Brazil's argument that "prudent fiscal management compels commercial banks to take

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<sup>666</sup>United States' appellant's submission, para. 124 (quoting Panel Report, para. 14.129).

<sup>667</sup>See, for example, Brazil's first written submission to the Panel, para. 400, Figure 32 (referred to in Panel Report, para. 14.127 and footnote 758 thereto). This figure contains tables showing that fees under the Ex-Im Bank programmes increase by much more than 100 per cent between the lowest and highest country risk categories.

<sup>668</sup>Panel Report, para. 14.127 and footnote 759 thereto (referring to the respective fees under the GSM 102 programme and under the LCI and the MTI for individual countries in risk categories 0 to 6 (Exhibit Bra-536 submitted by Brazil to the Panel)). We note that, in an apparent clerical error in footnote 759, the Panel referred to Exhibit Bra-548, which does not contain the evidence the Panel described in this footnote.

<sup>669</sup>United States' appellant's submission, para. 110.

<sup>670</sup>Panel Report, para. 14.115.

<sup>671</sup>United States' appellant's submission, para. 113.

<sup>672</sup>Panel Report, para. 14.115.

varying borrower risk into account *not only* via exposure limits, *but also* through fees".<sup>673</sup> Thus, the Panel recognized the relevance of exposure limits, but found that setting exposure limits alone was insufficient to account for foreign obligor risk, when such risk was not adequately taken into account in the determination of fees for the transactions within the exposure limits.

319. In addition, the United States submits that the Panel mistakenly relied on the fact that the CCC has access to funds from the United States Treasury and that it benefits from the full faith and credit of the United States government, even though "[s]uch considerations ... are irrelevant under item (j)".<sup>674</sup> The United States maintains that, according to the Panel's "overly-broad approach, a government-backed export credit ... program could never satisfy the item (j) test because ... the unlimited access to government funds discourages the design of a programme that meets long-term operating costs and losses".<sup>675</sup> We share the view that access to government funds, alone, is not a significant factor for purposes of determining profitability under item (j). The Panel, however, did not seem to place much emphasis on this factor. Rather, the Panel recalled that this was a factor taken into account by the original panel and confirmed that the CCC still has the same access to government funds.<sup>676</sup>

320. In sum, we are not persuaded that the Panel erred in finding that "the GSM 102 programme is not designed to cover its long term operating costs and losses."<sup>677</sup>

321. At the outset of its analysis, the Panel stated that it would "first conduct [its] analysis as if Brazil bore the burden of proof with respect to both the quantitative and the subsidization elements of its claims, *i.e.* as if Article 10.3 [of the *Agreement on Agriculture*] did not apply".<sup>678</sup> We have found that the Panel failed to make an objective assessment of the matter, as required under Article 11 of the DSU, in its assessment of the quantitative evidence submitted by the parties.<sup>679</sup> We have explained, furthermore, that the two critical pieces of evidence, the re-estimates data and the CCC Financial Statements, tend to show that, in the long run, the revised GSM 102 programme may be either profit-making or loss-making. Also, we stated our view that the analysis under item (j) should proceed primarily on the basis of quantitative evidence, where such evidence is available. We have recognized, however, that evidence relating to the structure, design, and operation has a supplementary role to play in an assessment conducted under item (j). The Panel, in this case, relied

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<sup>673</sup>Panel Report, para. 14.113. (emphasis added; footnote omitted)

<sup>674</sup>United States' appellant's submission, para. 111.

<sup>675</sup>*Ibid.*

<sup>676</sup>Panel Report, para. 14.110.

<sup>677</sup>*Ibid.*, para. 14.131.

<sup>678</sup>*Ibid.*, para. 14.47.

<sup>679</sup>See *supra*, para. 295.

on several elements relating to the structure, design, and operation of the revised GSM 102 programme, and we have not found flaws in the Panel's analysis of this evidence. The Panel recognized that these elements are not in and of themselves dispositive. Nonetheless, according to the Panel, the evidence on the structure, design, and operation supports the proposition that the revised GSM 102 programme operates at a loss. We recall that we have found that the quantitative data give rise to opposite conclusions with similar probabilities as to the binary outcome in item (j). The Panel's finding on the structure, design, and operation, in the light of the two plausible outcomes with similar probabilities that emerge from the quantitative evidence, provides a sufficient evidentiary basis for the conclusion that it is more likely than not that the revised GSM 102 programme operates at a loss. Therefore, we consider that Brazil has succeeded in establishing that the revised GSM 102 programme is provided at premiums that are inadequate to cover its long-term operating costs and losses.

#### F. *Conclusion*

322. For these reasons, we consider that the Panel did not err in finding that "the GSM 102 export credit guarantee programme constitutes an export subsidy because it is provided against premiums which are inadequate to cover its long-term operating costs and losses under the terms of item (j) of the Illustrative List".<sup>680</sup>

323. Accordingly, we *uphold* the Panel's findings that GSM 102 export credit guarantees issued after 1 July 2005 are export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement* and Article 10.1 of the *Agreement on Agriculture*.<sup>681</sup> Therefore, the Panel's findings in paragraphs 14.140, 14.149, 14.150, 14.156, 14.157, and 15.1(c) also stand.

### VII. **Serious Prejudice**

324. We turn finally to the United States' appeal of the Panel's finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers is significant price suppression in the world market for upland cotton, constituting "present" serious prejudice to the interests of Brazil, within the meaning of Articles 5(c) and 6.3 of the *SCM Agreement*. Section A summarizes the findings made in the original proceedings, and Section B describes the measures taken by the United States to comply with the DSB's recommendations and rulings. The Article 21.5 proceedings are summarized in Section C. Section D provides an overview of the arguments raised on appeal by the participants and third participants. In Section E, we discuss the Panel's findings of

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<sup>680</sup>Panel Report, para. 14.133.

<sup>681</sup>*Ibid.*, para. 14.134.



"present" serious prejudice under Articles 5(c) and 6.3 of the *SCM Agreement*. Finally, in Section F, we set out our conclusions.

A. *Original Proceedings*

325. In the original proceedings, Brazil challenged several United States domestic support measures under Articles 5 and 6 of the *SCM Agreement*. Brazil argued that these measures were not exempt from being challenged as actionable subsidies under paragraphs (a) and (b) of Article 13 of the *Agreement on Agriculture*, and that they caused serious prejudice to its interests, within the meaning of Article 5(c) of the *SCM Agreement*, because their effect was to significantly suppress the price of upland cotton, within the meaning of Article 6.3(c) of the *SCM Agreement*.<sup>682</sup>

326. Having found that the United States domestic support measures were not exempt from challenge under Article 13 of the *Agreement on Agriculture*, the original panel found that the effect of the mandatory price-contingent United States subsidy measures—marketing loan payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments—was 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*.<sup>683</sup> The Appellate Body upheld the original panel's findings.<sup>684</sup>

327. In accordance with Article 7.8 of the *SCM Agreement*, which specifies the remedies applicable in cases where subsidies have been determined to result in adverse effects, the original panel stated that, upon adoption of the panel report, "the United States [was] under an obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'".<sup>685</sup>

B. *Measures Taken by the United States*

328. On 1 February 2006, United States Congress enacted legislation amending the Farm Security and Rural Investment Act of 2002<sup>686</sup> (the "FSRI Act of 2002") by repealing the Step 2 payments programme, which was one of the price-contingent subsidy measures covered by the original panel's

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<sup>682</sup>Original Panel Report, para. 3.1(vi).

<sup>683</sup>*Ibid.*, paras. 7.1416 and 8.1(g)(i).

<sup>684</sup>Appellate Body Report, *US – Upland Cotton*, para. 496.

<sup>685</sup>Original Panel Report, para. 8.3(d).

<sup>686</sup>Farm Security and Rural Investment Act of 2002, Public Law No. 107-171; see Original Panel Report, para. 7.201.

finding of serious prejudice.<sup>687</sup> The Step 2 payments programme was repealed effective as of 1 August 2006.<sup>688</sup> The Panel noted that it is undisputed that the United States continues to provide marketing loan and counter-cyclical payments to United States producers of upland cotton, and that the legislative and regulatory provisions governing these payments have not been changed.<sup>689</sup>

C. *Article 21.5 Proceedings*

329. On 18 August 2006, Brazil requested the establishment of a panel pursuant to Article 21.5 of the DSU, because it considered that the United States had failed to implement the recommendations and rulings of the DSB stemming from the original dispute.<sup>690</sup> Brazil claimed that the repeal of the Step 2 payments programme is insufficient to bring the United States into compliance with the DSB's recommendations and rulings.<sup>691</sup> In particular, Brazil claimed that payments made under the marketing loan and counter-cyclical payments programmes continued to cause "present" serious

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<sup>687</sup>In addition to Step 2 payments, marketing loan payments, and counter-cyclical payments, the original panel's finding of serious prejudice covered market loss assistance payments. According to the original panel, market loss assistance payments were "ad hoc emergency and supplementary assistance provided to producers" under "four separate pieces of legislation, one each for the years 1998 through 2001". (Original Panel Report, para. 7.216 (quoted in Panel Report, para. 3.10))

<sup>688</sup>Section 1103 of the Deficit Reduction Act of 2005, Public Law No. 109-171; see also Panel Report, para. 3.7.

<sup>689</sup>Panel Report, paras. 3.9 and 3.12.

<sup>690</sup>Request for the Establishment of a Panel by Brazil, WT/DS267/30.

<sup>691</sup>Brazil also claimed before the Panel that the United States had taken no actions to comply with the DSB's recommendations and rulings during the period between 22 September 2005 and 31 July 2006—that is, between the expiration of the six-month time period set out in Article 7.9 of the *SCM Agreement* and the effective date on which the Step 2 payments programme was repealed. The Panel disagreed with Brazil that Article 21.5 of the DSU contemplated a finding on the existence of or consistency with a covered agreement of a measure taken to comply at the end of the six-month period set out in Article 7.9 of the *SCM Agreement*, in addition to a finding on the existence of a measure taken to comply as of the date of the establishment of an Article 21.5 panel. Therefore, the Panel found that it was not appropriate to make a finding on Brazil's claim that the United States had failed to take any measures to remove the adverse effects or to withdraw the three price-contingent upland cotton subsidy programmes between 22 September 2005 and 31 July 2006. (Panel Report, paras. 9.70 and 9.71) This finding of the Panel was not appealed by Brazil.

prejudice to the interests of Brazil in the form of significant price suppression in the world market for upland cotton according to Article 6.3(c) of the *SCM Agreement*.<sup>692</sup>

330. At the outset of its analysis, the Panel said it would adopt a "unitary" approach to determine whether the effect of the marketing loan and counter-cyclical payments was significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. Therefore, it did "not separate the question of the existence of significant price suppression from the issue of the causal relationship between significant price suppression and the subsidies at issue."<sup>693</sup> Moreover, relying on the Panel Report in *Korea – Commercial Vessels*, the Panel said it would adopt a "but for" approach to analyze whether the effect of the subsidies is significant price suppression.<sup>694</sup> Thus, in order to determine whether the effect of marketing loan and counter-cyclical payments to upland cotton producers was significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, the Panel considered it necessary to determine whether, "but for" these subsidies, the world market price for upland cotton would have increased significantly, or would have increased by significantly more than was in fact the case.<sup>695</sup>

331. Having set out the approach it would follow, the Panel turned to the assessment of the

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<sup>692</sup>Brazil also made a claim of threat of serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*. Having found "present" serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*, the Panel considered it unnecessary to make additional findings with respect to Brazil's claim of *threat* of serious prejudice. (Panel Report, para. 11.4) This finding of the Panel was not appealed by Brazil.

In addition to its price suppression claims under Articles 5(c) and 6.3(c) of the *SCM Agreement*, Brazil alleged under Articles 5(c) and 6.3(d) that the effect of the marketing loan and counter-cyclical payments in MY 2005 was an increase in the United States' share of the world market for upland cotton. Brazil argued that the United States' share of the world market for upland cotton in MY 2005 increased as compared to the average United States world market share during MY 2002-2004. In analyzing the United States' world market share, the Panel relied on world production data (rather than on world export data). (*Ibid.*, para. 10.264) The Panel found that the evidence submitted did not support Brazil's argument that there was an increase in the United States' world market share of upland cotton as compared to the average United States world market share during the previous three years. Thus, the Panel concluded that Brazil had not made a *prima facie* case. (*Ibid.*, para. 10.268) This finding of the Panel was not appealed by Brazil.

<sup>693</sup>Panel Report, para. 10.46.

<sup>694</sup>See *ibid.*, para. 10.48 (referring to Panel Report, *Korea – Commercial Vessels*, paras. 7.537 and 7.612).

<sup>695</sup>See *ibid.*, para. 10.49. In addition, the Panel agreed with the original panel that the term "significant" in Article 6.3(c) of the *SCM Agreement* relates to "the degree of the price suppression or depression in the context of the prices that have been affected" and that "the 'significance' of any degree of price suppression may vary from case to case, depending on the factual circumstances". (*Ibid.* (referring to Original Panel Report, paras. 7.1328 and 7.1329)) The Panel also quoted the following statement of the original panel:

... for a basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices could be significant because, for example, profit margins may ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes traded on the markets experiencing the price suppression.

(*Ibid.*, para. 10.50 (quoting Original Panel Report, para. 7.1330))

evidence submitted by Brazil in support of its claim. The Panel considered a number of factors, taken collectively, to determine whether the effect of marketing loan and counter-cyclical payments to United States upland cotton producers was significant price suppression in the world market for upland cotton.

332. First, the Panel reviewed data on the United States' share of world upland cotton production and world upland cotton exports, and concluded that the United States exerts a substantial proportionate influence on the world market for upland cotton.<sup>696</sup> The Panel then examined the structure, design, and operation of the marketing loan and counter-cyclical payments.<sup>697</sup> The Panel found that marketing loan and counter-cyclical payments affected the level of United States upland cotton acreage and production as a result of their mandatory and price-contingent nature, and their revenue-stabilizing effect.<sup>698</sup>

333. The next factor examined by the Panel was the alleged "large magnitude" of the marketing loan and counter-cyclical payments.<sup>699</sup> The Panel recalled that, although the Appellate Body had found in the original proceedings that a precise quantification of the amount of a subsidy was not required in an analysis under Article 6.3(c) of the *SCM Agreement*, it had also held that the magnitude of a subsidy and its relationship to prices were factors relevant to an analysis of whether the effect of a subsidy is significant price suppression.<sup>700</sup> Having reviewed the data on the record, the Panel found that the order of magnitude of the marketing loan and counter-cyclical subsidies was such that, in conjunction with other factors, this element supported a finding that significant price suppression was the effect of the marketing loan and counter-cyclical payments.<sup>701</sup>

334. The Panel also examined Brazil's claim that there was a "link between high levels of [United States] subsidies and high levels of [United States] planted acreage, production and exports".<sup>702</sup> The Panel noted that the fact that the United States' share of world cotton production and exports remained relatively constant during the period MY 2002-2005 suggested that United States cotton producers

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<sup>696</sup>See Panel Report, paras. 10.52-10.58. Over the period MY 2002-2005, the average United States' share of world upland cotton production and exports was 19.7 per cent and 40.5 per cent, respectively. For MY 2006, the projected United States' share of world upland cotton production and exports was 18.6 per cent and 36.3 per cent, respectively. (See *ibid.*, paras. 10.56 and 10.57)

<sup>697</sup>See *ibid.*, paras. 10.59-10.105.

<sup>698</sup>See *ibid.*, para. 10.104. The Panel emphasized that it considered this factor in conjunction with other factors, such as: (i) the fact that the adjusted world price in most recent years had been below the marketing loan rate; (ii) the magnitude of the marketing loan and counter-cyclical payments; (iii) the importance of these subsidies as a share of the revenues of United States upland cotton producers; and (iv) the role of these subsidies in covering a significant part of the costs of production of these producers.

<sup>699</sup>See *ibid.*, paras. 10.106-10.111.

<sup>700</sup>See *ibid.*, para. 10.109 (referring to Appellate Body Report, *US – Upland Cotton*, para. 461).

<sup>701</sup>See *ibid.*, para. 10.111.

<sup>702</sup>*Ibid.*, paras. 10.112-10.127.

had increased production and exports in the same proportion as had foreign cotton producers.<sup>703</sup> However, according to the Panel, the United States' stable share of world cotton production and exports did not mean an absence of insulation of United States producers from market price signals, but that the degree of price insulation that the original panel had found had become weaker, possibly because prices were not as depressed as during the period examined by the original panel.<sup>704</sup>

335. Next, the Panel examined Brazil's assertion that there was a "discernible temporal coincidence"<sup>705</sup> of suppressed world market prices and large marketing loan and counter-cyclical payments. The Panel observed that, while the United States' share of world production and exports remained stable in MY 2002-2006, world upland cotton prices did not sharply decline over the same period, as they had done in MY 1998-2001. Instead, in MY 2002-2006, world upland cotton prices went through "intermittent peaks and troughs"<sup>706</sup>, rising strongly from MY 2002 to MY 2003, declining sharply in MY 2004, and climbing again in MY 2005 and MY 2006. The Panel explained that, the fact that recent years had not witnessed the sharp decline in the world market price for upland cotton that occurred during the period considered by the original panel, does not necessarily mean that there is currently no price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.<sup>707</sup>

336. The Panel then turned to Brazil's argument that there was a gap between long-term costs of production and market revenues of United States upland cotton producers.<sup>708</sup> In comparing market revenues and costs of production, the Panel considered it essential to look at medium- to long-term developments in the United States upland cotton sector. As a consequence, the Panel compared the market revenue with total costs of production (which included both variable and fixed costs).<sup>709</sup> The Panel found that there was a significant gap between the total costs of production of United States upland cotton producers and their market revenue, suggesting that the subsidies at issue are an important factor affecting the economic viability of United States upland cotton farming.<sup>710</sup>

337. The next factor examined by the Panel was the impact of the elimination of Step 2 payments.<sup>711</sup> The Panel considered that, given that less than one year had passed since the Step 2

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<sup>703</sup>See Panel Report, para. 10.127.

<sup>704</sup>*Ibid.*

<sup>705</sup>*Ibid.*, para. 10.128.

<sup>706</sup>*Ibid.*, para. 10.141.

<sup>707</sup>See *ibid.*, para. 10.146.

<sup>708</sup>See *ibid.*, para. 10.147.

<sup>709</sup>The Panel also found that: (i) certain items such as land, unpaid labour, and capital recovery costs should be counted as fixed costs (Panel Report, para. 10.166); (ii) non-cash opportunity costs should be counted as part of total costs (para. 10.170); and (iii) off-farm income did not play a significant role in sustaining the economic viability of United States upland cotton farmers (para. 10.184).

<sup>710</sup>Panel Report, para. 10.196.

<sup>711</sup>*Ibid.*, paras. 10.223-10.239.

payments programme was terminated, and that the amount of Step 2 payments was much smaller than the amount of marketing loan and counter-cyclical payments, it was not possible "to determine with any ... precision or confidence just how much of the projected decline in [United States] exports of upland cotton [was] due to the elimination of the Step 2 payments."<sup>712</sup> The Panel further considered that the evidence on the effect of the elimination of Step 2 payments on the amounts of marketing loan and counter-cyclical payments suggested that "the indirect impacts on [United States] production and exports are likely to be small, given the relatively modest changes projected in the amounts of marketing loan and counter-cyclical payments, and the fact that these changes run counter to one another."<sup>713</sup>

338. The Panel also considered economic simulations conducted by the parties, estimating the impact of the United States subsidies on world prices for upland cotton.<sup>714</sup> The Panel noted that there was disagreement between the parties on the adequacy of the model chosen and on the appropriate parameter values (demand and supply elasticity and coupling factor), which led to divergent results as to the magnitude of the impact of United States subsidies on the world price. Although the United States did not present its own model and criticized Brazil's model, it ran a simulation using Brazil's model with the parameters it deemed to be appropriate. For MY 2005, Brazil's simulation estimated that removal of marketing loan and counter-cyclical payments would have increased the world price of cotton by 9.3 per cent to 10.7 per cent, while the simulation conducted by the United States showed an increase of between 1.41 per cent and 2.26 per cent over the period MY 2002-2005.<sup>715</sup> The Panel found that all the simulations conducted by the parties pointed in the direction that marketing loan and counter-cyclical payments led to an increase in United States production and exports of cotton that then led to the suppression of world prices.<sup>716</sup>

339. Finally, in considering other factors which might also have an impact on the world market price for upland cotton, the Panel recalled that it had adopted a "but for" approach to the question of whether the effect of United States marketing loan and counter-cyclical payments to upland cotton producers was significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.<sup>717</sup> The Panel observed that, because it had followed this approach, it was not necessary to undertake a comprehensive analysis of other factors affecting the world market price for upland

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<sup>712</sup>Panel Report, para. 10.231.

<sup>713</sup>*Ibid.*, para. 10.239.

<sup>714</sup>See *ibid.*, paras. 10.197-10.222.

<sup>715</sup>*Ibid.*, paras. 10.201 and 10.202.

<sup>716</sup>*Ibid.*, para. 10.222.

<sup>717</sup>See *ibid.*, paras. 10.240-10.243.

cotton. Rather, the question before the Panel was whether the evidence supported the conclusion that, in the absence of the United States marketing loan and counter-cyclical subsidies, "the world market price would increase significantly".<sup>718</sup> The Panel considered that, while China may have played a significant role in the market for upland cotton, this did not diminish the significance of the impact of United States subsidies on the world price for upland cotton resulting from their effect on the United States' supply to the world market. The Panel noted that developments concerning the role of China's demand and supply did not change the fact that, with a share of world exports of around 40 per cent, the United States was capable of exerting a substantial proportionate influence on the world market.<sup>719</sup>

340. On the basis of its evaluation of these factors, the Panel found that the United States acted inconsistently with Articles 5(c) and 6.3(c) of the *SCM Agreement*, in that the effect of marketing loan and counter-cyclical payments was significant price suppression in the world market for upland cotton, within the meaning of Article 6.3(c), constituting "present" serious prejudice to the interests of Brazil, within the meaning of Article 5(c).<sup>720</sup> The Panel concluded that the United States had failed to comply with the recommendations and rulings of the DSB because it had failed "to take appropriate steps to remove the adverse effects or ... withdraw the subsidy"<sup>721</sup>, as required under Article 7.8 of the *SCM Agreement*.<sup>722</sup>

#### D. *Claims and Arguments on Appeal*

341. The United States claims that the Panel erred in finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers pursuant to the FSRI Act of 2002 is significant price suppression in the world market for upland cotton, within the meaning of Article 6.3(c) of the *SCM Agreement*, constituting "present" serious prejudice to the interests of Brazil, within the meaning of Article 5(c) of the *SCM Agreement*.

342. In particular, the United States argues that the Panel erred in: (i) finding that the United States marketing loan and counter-cyclical payments insulated United States upland cotton producers from market signals<sup>723</sup>; (ii) finding that there was a gap between market revenues and the production costs of United States upland cotton producers<sup>724</sup>; (iii) its assessment of the economic simulations conducted by the parties<sup>725</sup>; (iv) its evaluation of the impact of the elimination of Step 2 payments on

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<sup>718</sup>Panel Report, para. 10.243.

<sup>719</sup>See *ibid.*, para. 10.243.

<sup>720</sup>*Ibid.*, para. 10.256.

<sup>721</sup>*Ibid.*, para. 15.1(a).

<sup>722</sup>*Ibid.*, para. 10.257.

<sup>723</sup>See United States' appellant's submission, para. 133.

<sup>724</sup>See *ibid.*, para. 165.

<sup>725</sup>See *ibid.*, para. 196.

United States upland cotton production and exports and on marketing loan and counter-cyclical payments<sup>726</sup>; (v) its consideration of the alleged large magnitude of marketing loan and counter-cyclical payments<sup>727</sup>; (vi) finding that the United States exerted a substantial proportionate influence on the world market for upland cotton<sup>728</sup>; (vii) failing to conduct a proper non-attribution analysis as required by Article 6.3(c) of the *SCM Agreement* in respect of other factors, particularly China's role in the world upland cotton market<sup>729</sup>; and (viii) failing to determine the degree of price suppression it considered to be significant within the meaning of Article 6.3(c) of the *SCM Agreement*.<sup>730</sup>

343. The United States also claims that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU, because it deliberately disregarded, and refused to consider, evidence submitted by the United States; wilfully distorted and misrepresented this evidence; and failed to provide a reasoned and adequate explanation of its conclusions in the light of other plausible alternative explanations.<sup>731</sup>

344. Brazil responds that the Panel did not err in finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers is significant price suppression, constituting "present" serious prejudice to the interests of Brazil, within the meaning of Articles 5(c) and 6.3(c) of the *SCM Agreement*.

345. More specifically, Brazil argues that the Panel: (i) did not exceed the bounds of its discretion in finding that marketing loan and counter-cyclical subsidies insulate United States upland cotton producers from market price signals by stabilizing their revenue<sup>732</sup>; (ii) properly exercised its discretion in relying on total costs of production and market revenue data generated by the USDA when finding that there was a gap between market revenues and production costs of United States upland cotton producers<sup>733</sup>; (iii) did not err in relying on the economic simulations as support for its finding of significant price suppression<sup>734</sup>; (iv) did not err in finding that the withdrawal of the Step 2 payments does not eliminate the significant price-suppressing effects of the marketing loan and counter-cyclical subsidies<sup>735</sup>; (v) properly found that the large magnitude of marketing loan and counter-cyclical subsidies supports its finding of significant price suppression<sup>736</sup>; (vi) properly found

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<sup>726</sup>See United States' appellant's submission, para. 197.

<sup>727</sup>See *ibid.*, para. 217.

<sup>728</sup>See *ibid.*, paras. 218 and 219.

<sup>729</sup>See *ibid.*, para. 214.

<sup>730</sup>See *ibid.*, para. 221.

<sup>731</sup>See *ibid.*, paras. 227-243.

<sup>732</sup>See Brazil's appellee's submission, para. 624.

<sup>733</sup>See *ibid.*, paras. 707-777.

<sup>734</sup>See *ibid.*, paras. 838-843.

<sup>735</sup>See *ibid.*, para. 900.

<sup>736</sup>See *ibid.*, para. 790.



that the substantial proportionate influence exercised by the United States on the world market for upland cotton supports its finding of significant price suppression in that market<sup>737</sup>; (vii) properly assessed the role of other factors, including the role of China in the world market for upland cotton<sup>738</sup>; and (viii) properly found that the price suppression caused by the subsidies is of a "significant"<sup>739</sup> degree, based on a comprehensive consideration of both qualitative and quantitative factors.

346. Brazil submits that the Panel did not exceed the bounds of its discretion as the trier of facts under Article 11 of the DSU in finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers is significant price suppression.<sup>740</sup> Brazil also asserts that certain arguments of the United States that are directed at the sufficiency of the Panel's reasoning do not properly belong under Article 11 of the DSU, but should have been raised under Article 12.7 of the DSU.<sup>741</sup> Brazil argues that the United States made no claim of error under Article 12.7 of the DSU and that, for this reason alone, these arguments should be dismissed.<sup>742</sup> In any event, Brazil notes that the Panel did provide a basic rationale for its findings.<sup>743</sup>

347. Australia, Canada, and New Zealand address the Panel's finding of serious prejudice in their third participant's submissions. Australia submits that, in finding that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers is significant price suppression, the Panel acted within its discretion in the appreciation of the evidence and made appropriate use of the findings in the original proceedings.<sup>744</sup> As regards the United States' claims under Article 11 of the DSU, Australia asserts that the conduct of the Panel in assessing the evidence presented to it was not such as to give rise to "the deliberate disregard of, or refusal to consider, the evidence submitted to a panel" nor to "the willful distortion or misrepresentation" of that evidence so as to amount to an "egregious error that calls into question the good faith of a panel".<sup>745</sup> Canada addresses the claims of the United States under Article 11 of the DSU exclusively, arguing that "the Appellate Body should accord to the Panel's appreciation of the evidence the same deference it has routinely accorded in other cases."<sup>746</sup> Finally, New Zealand states that the Panel correctly concluded that United States upland cotton producers are insulated from market signals and correctly relied on

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<sup>737</sup>See Brazil's appellee's submission, para. 804.

<sup>738</sup>See *ibid.*, para. 941.

<sup>739</sup>See *ibid.*, paras. 806-829.

<sup>740</sup>See *ibid.*, para. 136.

<sup>741</sup>See *ibid.*, para. 142.

<sup>742</sup>See *ibid.*, paras. 156 and 157.

<sup>743</sup>See *ibid.*, para. 158.

<sup>744</sup>See Australia's third participant's submission, para. 23.

<sup>745</sup>*Ibid.*, para. 31.

<sup>746</sup>Canada's third participant's submission, para. 40.

several other factors in supporting its finding of present serious prejudice.<sup>747</sup> Moreover, New Zealand argues that the Panel did not make "egregious" errors rising "to a level that calls into question the objectivity of the Panel's assessment"<sup>748</sup>, which is required for a claim under Article 11 of the DSU to succeed.

E. *The Panel's Findings of "Present" Serious Prejudice under Articles 5(c) and 6.3(c) of the SCM Agreement*

348. We begin our analysis by addressing the United States' claim that the Panel failed to determine the degree of price suppression that it found to be "significant" within the meaning of Article 6.3(c) of the *SCM Agreement*. We then turn to the Panel's analysis of causation and to the United States' claim that the Panel failed to conduct a proper non-attribution analysis, as required by Article 6.3(c) of the *SCM Agreement*. Next, we discuss the standard of review applicable in our examination of the various other errors the United States alleges that the Panel made in its assessment of the various factors supporting its finding of significant price suppression. In the light of the applicable standard of review, we finally consider the United States' argument that the Panel erred in its evaluation of the various factors supporting its finding of significant price suppression.

1. Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

349. In terms of Article 6.3(c) of the *SCM Agreement*, "serious prejudice", in the sense of Article 5(c) of the *SCM Agreement*, may arise where:

... the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market.

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<sup>747</sup>See New Zealand's third participant's submission, paras. 4.3 and 4.16-4.30.

<sup>748</sup>*Ibid.*, para. 4.31.

350. In the original proceedings, the Appellate Body agreed with the following description of price suppression provided by the original panel:

Thus, "*price suppression*" refers to the situation where "prices"—in terms of the "amount of money set for sale of upland cotton" or the "value or worth" of upland cotton—either are prevented or inhibited from rising (i.e. they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been. *Price depression* refers to the situation where "prices" are pressed down, or reduced.[\*]<sup>749</sup> (emphasis added by the Appellate Body)

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[\*original footnote 1388] In the remainder of our analysis, we use the term "price suppression" to refer both to an actual decline (which otherwise would not have declined, or would have done so to a lesser degree) and an increase in prices (which otherwise would have increased to a greater degree).

The Appellate Body observed that "'the situation where 'prices' ... are prevented or inhibited from rising' and 'the situation where "prices" are pressed down, or reduced' may overlap."<sup>750</sup> However, it disagreed with the original panel's use of the term "price suppression" as short-hand for both price suppression and price depression, noting that Article 6.3(c) refers to the two as distinct concepts.<sup>751</sup>

351. At a conceptual level, we see some differences between the concepts of "price depression" and "price suppression" as defined in the original proceedings. While price depression is a directly observable phenomenon, price suppression is not so. Falling prices can be observed; by contrast, price suppression concerns whether prices are less than they would otherwise have been in consequence of various factors, in this case, the subsidies. The identification of price suppression, therefore, presupposes a comparison of an observable factual situation (prices) with a counterfactual situation (what prices would have been) where one has to determine whether, in the absence of the subsidies (or some other controlling phenomenon), prices would have increased or would have increased more than they actually did. Price depression, by contrast, can be directly observed, in that falling prices are observable. The determination of whether such falling prices are the effect of the subsidies will require consideration of what prices would have been absent the subsidies. Thus, counterfactual analysis is an inescapable part of analyzing the effect of a subsidy under Article 6.3(c) of the *SCM Agreement*.

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<sup>749</sup>Original Panel Report, para. 7.1277 and footnote 1388 thereto (quoted in Appellate Body Report, *US – Upland Cotton*, para. 423).

<sup>750</sup>Appellate Body Report, *US – Upland Cotton*, para. 424 (quoting Original Panel Report, para. 7.1277).

<sup>751</sup>See Appellate Body Report, *US – Upland Cotton*, para. 424.

352. In the original proceedings, the panel conducted a two-step analysis of whether "price suppression" existed and whether it was "significant". In the first step, the original panel examined: (i) the relative magnitude of United States production and exports; (ii) general price trends; and (iii) the nature of the subsidies.<sup>752</sup> Under the second step, the original panel interpreted the term "significant" as meaning "important, notable ... consequential"<sup>753</sup>, and noted that the term may have a "numeric"<sup>754</sup> connotation, but that the nature of the market and of the product under consideration may enter into such assessment as well. The original panel recalled its assessment of the evidence in the light of the same three factors mentioned above, and concluded that it was not looking at an "insignificant or unimportant world price phenomenon".<sup>755</sup>

353. By contrast, in these Article 21.5 proceedings, the Panel stated that it would adopt a "unitary"<sup>756</sup> approach and would not separate into three analytical steps whether there was price suppression in the world market for upland cotton, whether this price suppression was significant, and whether a causal relationship existed between this significant price suppression and the subsidies. The Panel found support for this approach in the finding of the Appellate Body in the original proceedings that "it would be difficult to make a judgement on significant price suppression without taking into account the effect of the subsidies."<sup>757</sup>

354. Because of the counterfactual nature of price suppression, it is difficult to separate price suppression from its causes. Hence, the Panel's "unitary" analysis", at least in respect of identifying price suppression and its causes, has a sound conceptual foundation.

355. In this case, the Panel was required to consider the impact of marketing loan and counter-cyclical payments on the prices of upland cotton on the world market. Brazil did not allege that marketing loan and counter-cyclical payments to United States upland cotton farmers have a direct impact on world market prices. Rather, these payments are alleged to have had an impact on farmers' planting decisions and, consequently, on domestic upland cotton production levels. Thus, the analysis should initially focus on the effects of the subsidies on production levels by examining whether there was more production than there otherwise would have been as a result of the marketing loan and counter-cyclical payments. It is the marginal production attributable to the marketing loan and counter-cyclical payments that matters. If there were to be increased upland cotton production, the

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<sup>752</sup>See Original Panel Report, para. 7.1280.

<sup>753</sup>*Ibid.*, para. 7.1325.

<sup>754</sup>*Ibid.*, para. 7.1329.

<sup>755</sup>*Ibid.*, para. 7.1332. The Appellate Body did not disturb the original panel's analysis. (See Appellate Body Report, *US – Upland Cotton*, paras. 429 ff)

<sup>756</sup>Panel Report, para. 10.46.

<sup>757</sup>Appellate Body Report, *US – Upland Cotton*, para. 433.

analysis would then focus on whether that increase in supply had effects on prices in the world market. All else being equal, the marginal production attributable to the subsidy would be expected to have an effect on world prices, particularly if the subsidy is provided in a country with a meaningful share of world output.

356. Given the focus on production and price effects, an analysis of price suppression would normally include a quantitative component.<sup>758</sup> There is some inherent difficulty in quantifying the effects of subsidies, because, as we have indicated, the increase in prices, absent the subsidies, cannot be directly observed. One way to undertake the analysis is to use economic modelling or other quantitative techniques. These techniques can be used to estimate whether there are higher levels of production resulting from the subsidies and, in turn, the price effects of that production. Economic modelling and other quantitative techniques provide a framework to analyze the relationship between subsidies, other factors, and price movements.

357. Brazil presented an economic simulation model before the Panel. The United States criticized certain structural aspects of the economic simulation model presented by Brazil, as well as the parameters used in that model. Instead of offering its own model, the United States ran Brazil's model using its own preferred parameters. The results of both simulations were presented to the Panel. The Panel provided an extensive discussion of the simulations presented by both parties, the differences in the parameters used by each, and the explanations provided by each party to justify their choice of parameters.<sup>759</sup> It also described the results of the various simulations.<sup>760</sup> The Panel concluded that "all the simulations conducted by the parties support the view that [United States] marketing loan and counter-cyclical payments have led to an increase in [United States] production and exports of cotton that have then suppressed world prices."<sup>761</sup> Because the examination of price suppression necessarily involves an analysis of what would have been the case in the absence of an intervening event, modelling exercises are likely to be an important analytical tool that a panel should scrutinize. The relative complexity of a model and its parameters is not a reason for a panel to remain agnostic about them. Like other categories of evidence, a panel should reach conclusions with respect to the

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<sup>758</sup>The original panel stated that "the 'significance' of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance". It added that "[o]ther considerations, including the nature of the 'same market' and the product under consideration may also enter into such an assessment, as appropriate in a given case." (Original Panel Report, para. 7.1329 (footnote omitted); see also Appellate Body Report, *US – Upland Cotton*, para. 434) These findings were not disturbed by the Appellate Body. (Appellate Body Report, *US – Upland Cotton*, para. 490)

<sup>759</sup>See Panel Report, paras. 10.197-10.222.

<sup>760</sup>The results are graphically set out in Figure 4 at *ibid.*, para. 10.203.

<sup>761</sup>*Ibid.*, para. 10.222.

probative value it accords to economic simulations or models presented to it. This kind of assessment falls within the panel's authority as the initial trier of facts in a serious prejudice case.

358. In the present case, the Panel did not take a position on which parameters were more appropriate to measure the effect of the subsidies at issue on prices, or the appropriateness of the structure of the model itself. The Panel simply concluded that all simulations showed increases of production and exports and the consequential suppression of prices. While the Panel appropriately examined the model, the parameters used by each party, and the arguments made by the parties<sup>762</sup>, and noted the different results generated by the simulations conducted by each party, the Panel could have gone further in its evaluation and comparative analysis of the economic simulations and the particular parameters used.

359. We proceed to consider the specific aspects of the Panel's analysis challenged by the United States, namely, the Panel's alleged failure to determine the degree of price suppression it found to be "significant", the Panel's non-attribution analysis, and the other allegations of error raised by the United States.

2. The United States' Claim that the Panel Failed to Determine the Degree of Price Suppression It Found to Be "Significant"

360. The United States claims on appeal that the Panel failed to determine what degree of price suppression was "significant"<sup>763</sup>, as required by Article 6.3(c) of the *SCM Agreement*.

361. The Panel adopted, as indicated, a "unitary" approach". It did not, as the original panel did, separate its analysis into three steps to determine whether there was price suppression in the world market for upland cotton, whether this price suppression was significant, and whether a causal relationship existed between such significant price suppression and the subsidies.<sup>764</sup> Rather, in undertaking a unitary analysis, the Panel considered both quantitative and qualitative elements in its assessment. It made a quantitative assessment of significance by evaluating the magnitude of the subsidies, the gap between United States upland cotton producers' revenues and costs of production, the United States' share of world production and exports, and the economic simulations; and it made

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<sup>762</sup>We note that in paragraph 10.198 of its Report, the Panel stated that it had considered "in some detail the arguments made by the parties about the model, its assumptions and results" and that, to the extent possible, it had "provided [its] assessment of these arguments, and based on that arrived at an overall conclusion about the simulation results." However, its overall conclusion in paragraph 10.222 is limited to the consideration that "all the simulations conducted by the parties support the view that [United States] marketing loan and counter-cyclical payments have led to an increase in [United States] production and exports of cotton that have then suppressed world prices".

<sup>763</sup>United States' appellant's submission, para. 221.

<sup>764</sup>See Panel Report, para. 10.46.

a qualitative assessment by evaluating the structure, design, and operation of the subsidies. The adoption of a unitary approach, however, did not absolve the Panel from clearly explaining its position on the question of "significance". The Panel could have provided a clearer explanation of how the factors that it examined supported its finding that the price suppression was "significant".

362. In our view, several of the factors evaluated by the Panel support the proposition that the effect of the marketing loan and counter-cyclical payments is "significant" price suppression in the world market for upland cotton. The Panel noted that there was some disagreement between Brazil and the United States on the exact magnitude of the subsidies, particularly in relation to counter-cyclical payments, with the United States' data showing lower payments than Brazil's data.<sup>765</sup> The data submitted by the United States showed that marketing loan payments exceeded US\$1.7 billion in MY 2004, and US\$1.2 billion in MY 2005.<sup>766</sup> The United States indicated that counter-cyclical payments to upland cotton production exceeded US\$800 million in MY 2004 and in MY 2005.<sup>767</sup> In other words, the subsidies provided to upland cotton production under the marketing loan and counter-cyclical payments programmes exceeded US\$2 billion in both MY 2004 and MY 2005. This magnitude of the marketing loan and counter-cyclical payments is significant not only in absolute terms, but also as a share of United States producers' total revenues. The Panel found, in this regard, that "[t]he share of marketing loan payments and counter-cyclical payments in total revenues of [United States] upland cotton producers was 35 per cent in MY 2004 and 27 per cent in MY 2005."<sup>768</sup>

363. Although the Panel did not quantify the effect of these subsidies on upland cotton plantings and production, it established that the marketing loan and counter-cyclical payments "affect the level of [United States] upland cotton acreage and production as a result of their mandatory and price-contingent nature and their revenue-stabilizing effect."<sup>769</sup> Moreover, the Panel found that "there exists a significant gap between the total costs of production of [United States] upland cotton producers and

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<sup>765</sup>The Panel provided a table comparing the results of various calculations provided by Brazil and the United States of the amounts of counter-cyclical payments to United States upland cotton producers. (See Table 2A, Panel Report, para. 10.32)

<sup>766</sup>See *ibid.*, para. 10.24, Table 1: Marketing Loan Payments, MY 2002-2005 (referring to data provided by the United States in its response to Question 4 posed by the Panel, Panel Report, p. D-140, para. 14).

<sup>767</sup>See *ibid.*, para. 10.32, Table 2A: Counter-cyclical Payments (non-Annex IV Methodology), MY 2002-2005 (referring to data provided by the United States in its response to Question 4 posed by the Panel, *ibid.*, p. D-141, para. 16).

<sup>768</sup>*Ibid.*, para. 10.111. (footnote omitted)

<sup>769</sup>*Ibid.*, para. 10.248. The United States has appealed the Panel's findings with respect to the "market-insulating" effects of the marketing loan and counter-cyclical payments. The United States claims are examined *infra*, para. 387. We uphold the Panel's findings.

their market revenue."<sup>770</sup> The gap between revenues and costs was found to exist in four of the five years examined by the Panel, if ginning costs are included in the calculation, or in three of the five years, if ginning costs are excluded.<sup>771</sup> Costs exceeded market revenues by between 3.7 per cent and 71.9 per cent, if ginning costs are included, or by 12.3 per cent and 83.6 per cent, if ginning costs are excluded.<sup>772</sup> The Panel reasoned in this regard:

[V]iewed together with other evidence on the record, including the fact that the adjusted world price in most recent years has been below the marketing loan rate, the magnitude of the marketing loan and counter-cyclical payments, the importance of these subsidies as a share of the revenues of [United States] upland cotton producers and their role in covering a significant part of the costs of production of these producers, it is reasonable to conclude that without these subsidies the level of [United States] upland cotton acreage and production would likely be significantly lower.<sup>773</sup> (footnote omitted)

The effect of marketing loan and counter-cyclical payments on production of upland cotton was confirmed in the economic simulations conducted by the parties. Even when run using the parameters that the United States considered to be appropriate, the simulation showed 12 per cent to 18 per cent additional production of upland cotton due to marketing loan and counter-cyclical payments in the period MY 2002-2005.<sup>774</sup>

364. The Panel also found that "the United States exerts a substantial proportionate influence on the world market for upland cotton".<sup>775</sup> According to the Panel, the United States' share of world upland cotton production was 19.6 per cent in MY 2002, 20.9 per cent in MY 2005, and was projected to be 18.6 per cent in MY 2006.<sup>776</sup> The United States' share of world exports of upland cotton was 39.9 per cent in MY 2002, 39.8 per cent in MY 2005, and was projected to be 36.3 per cent in MY 2006.<sup>777</sup> We understand the Panel's finding to imply that, given the United States' significant shares of world exports and production, the increased production resulting from the marketing loan and counter-cyclical payments would have an effect on the world market for upland cotton and would be reflected in the world market price of upland cotton.

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<sup>770</sup>Panel Report, 10.196. The United States has also challenged the Panel's assessment of the difference between United States upland cotton producers' revenues and costs. These claims are addressed *infra*, para. 419. We also uphold the Panel's findings in this regard.

<sup>771</sup>See *ibid.*, paras. 10.189 and 10.190, Tables 6A and 6B.

<sup>772</sup>*Ibid.*

<sup>773</sup>*Ibid.*, para. 10.104.

<sup>774</sup>See United States' first written submission to the Panel, Annex I, Table A8, p. 14.

<sup>775</sup>Panel Report, para. 10.58.

<sup>776</sup>See *ibid.*, para. 10.58.

<sup>777</sup>*Ibid.*



365. The Panel found confirmation for this proposition in the economic simulations. The simulation with the parameters preferred by the United States showed that the removal of marketing loan and counter-cyclical payments would have increased the world price of upland cotton by 1.41 per cent to 2.26 per cent in the period MY 2002-2005.<sup>778</sup> The simulation run with the parameters suggested by Brazil showed that, in MY 2002-2005, the world price of upland cotton would have been higher by 8.2 to 8.9 per cent in the absence of the marketing loan and counter-cyclical payments.<sup>779</sup> The Panel further noted the significance of even relatively small changes in price for commodity products such as upland cotton, endorsing the original panel's view that:

... for a basic and widely traded commodity, such as upland cotton, a relatively small decrease or suppression of prices could be significant because, for example, profit margins may ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes traded on the markets experiencing the price suppression.<sup>780</sup>

The United States has not challenged the accuracy of this statement. Thus, the range of price effects resulting from the simulations would fall within the Panel's view of what constitutes "significant" price suppression in the specific context of the world price of upland cotton.

366. Therefore, we find that the evidence on the record supports the Panel's conclusion that the effect of the marketing loan and counter-cyclical payments is "significant" price suppression, within the meaning of Article 6.3(c) of the *SCM Agreement*.

### 3. Causation and Non-attribution

367. The United States submits that the Panel failed to conduct a proper non-attribution analysis under Article 6.3(c) of the *SCM Agreement*, despite having recognized that it had an obligation to do so.<sup>781</sup> According to the United States, "[m]issing from the Panel's analysis was any discussion of just how other factors, including China, actually played a role in establishing the world price for upland cotton."<sup>782</sup>

368. The Appellate Body explained in the original proceedings that Articles 5 and 6.3 of the *SCM Agreement* do not contain the more elaborate and precise "causation" and "non-attribution" language

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<sup>778</sup>See Panel Report, para. 10.202.

<sup>779</sup>See *ibid.*, para. 10.201.

<sup>780</sup>Original Panel Report, para. 7.1330 (quoted in Panel Report, para. 10.50).

<sup>781</sup>See United States' appellant's submission, para. 210.

<sup>782</sup>*Ibid.*, para. 214.

found in the trade remedy provisions of the *SCM Agreement*.<sup>783</sup> This means that "a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression".<sup>784</sup> In the original proceedings, the Appellate Body found that the original panel's approach with respect to causation and non-attribution was similar to that reflected in Appellate Body findings in the context of other WTO agreements, which defined a causal link as involving "a genuine and substantial relationship of cause and effect"<sup>785</sup> and required the non-attribution of effects caused by other factors. The Appellate Body "agree[d] with the [original panel] that it is necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies", explaining that, "[i]f the significant price suppression found in the world market for upland cotton were caused by factors other than the challenged subsidies, then that price suppression would not be 'the effect of' the challenged subsidies in the sense of Article 6.3(c)."<sup>786</sup>

369. The approach to causation and non-attribution taken by the Panel in these Article 21.5 proceedings differs from the approach taken by the original panel. In the original proceedings, the panel's approach consisted of "examin[ing] whether or not 'the effect of the subsidy' is significant price suppression which [it had] found to exist in the same world market".<sup>787</sup> The original panel then separately "consider[ed] the role of other alleged causal factors in the record before [it] which may [have] affect[ed] [the] analysis of the causal link between the United States subsidies and the significant price suppression."<sup>788</sup> The Panel in these Article 21.5 proceedings "adopted a 'but for' approach to the question of whether the effect of [United States] marketing loan and counter-cyclical subsidies to upland cotton producers is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*".<sup>789</sup> The Panel also considered that, having adopted a "but for" approach, "it is not necessary in this respect to undertake a comprehensive evaluation of factors affecting the world market price for upland cotton."<sup>790</sup>

370. We recall that "a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression".<sup>791</sup> Articles 5(c) and 6.3(c) of the *SCM Agreement* do not exclude, therefore, that a panel could examine

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<sup>783</sup>See Article 15.5 of the *SCM Agreement*. See also Article 3.5 of the *Anti-Dumping Agreement* and Article 4.2(b) of the *Agreement on Safeguards*.

<sup>784</sup>Appellate Body Report, *US – Upland Cotton*, para. 436.

<sup>785</sup>*Ibid.*, para. 438.

<sup>786</sup>*Ibid.*, para. 437.

<sup>787</sup>*Ibid.*, para. 437 (quoting Panel Report, para. 7.1345).

<sup>788</sup>Appellate Body Report, *US – Upland Cotton*, para. 437 (quoting Original Panel Report, para. 7.1346).

<sup>789</sup>Panel Report, para. 10.243.

<sup>790</sup>*Ibid.*

<sup>791</sup>Appellate Body Report, *US – Upland Cotton*, para. 436.

causation based on a "but for" approach. We have explained that a price suppression analysis is counterfactual in nature. The Panel's choice of a "but for" approach reflects this. In consequence, the Panel had to determine whether the world price of upland cotton would have been higher in the absence of the subsidies (that is, *but for* the subsidies).

371. In the original proceedings, the Appellate Body observed that:

... the ordinary meaning of the transitive verb "suppress" implies the existence of a subject (the challenged subsidies) and an object (in this case, prices in the world market for upland cotton). This suggests that it would be difficult to make a judgement on significant price *suppression* without taking into account the effect of the subsidies. The Panel's definition of price suppression, explained above, reflects this problem; it includes the notion that prices "do not increase when they *otherwise* would have" or "they do actually increase, but the increase is less than it *otherwise* would have been". The word "otherwise" in this context refers to the hypothetical situation in which the challenged subsidies are absent. Therefore, the fact that the Panel may have addressed some of the same or similar factors in its reasoning as to significant price suppression and its reasoning as to "effects" is not necessarily wrong.<sup>792</sup> (original emphasis; footnotes omitted)

The Panel's choice of a "but for" approach, therefore, is consistent with the definition of price suppression endorsed by the Appellate Body in the original proceedings, insofar as the counterfactual determination of whether price suppression exists cannot be separated from the analysis of the effects of the subsidies.

372. We note that Article 6.3(c) does not use the word "cause" but, rather, provides that serious prejudice may arise where "the effect of the subsidy is ... significant price suppression". The Appellate Body stated in the original proceedings that the text of Article 6.3(c) nevertheless requires the establishment of a causal link between the subsidy and the significant price suppression.<sup>793</sup> We agree that Article 6.3(c) requires the establishment of a causal link, but we observe that, while the term "cause" focuses on the factors that may trigger a certain event, the term "effect of" focuses on the results of that event. The effect—price suppression—must result from a chain of causation that is linked to the impugned subsidy.

373. The United States has not appealed the Panel's choice of a "but for" approach *per se*. Instead, the United States argues that the Panel erred in declining to carry out a comprehensive evaluation of other factors affecting the world market price for upland cotton. According to the United States,

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<sup>792</sup> Appellate Body Report, *US – Upland Cotton*, para. 433.

<sup>793</sup> See *ibid.*, para. 435.

"[t]he very use of a but-for analysis ... requires the Panel not to attribute effects to [United States] payments that they are not having."<sup>794</sup>

374. The Panel does not clearly articulate the standard implicated in its "but for" approach. Brazil submits that the Panel's "but for" standard "effectively *isolated* the effects of [United States] subsidies from the effects of other factors."<sup>795</sup> New Zealand asserts that the Panel's finding—that without the United States subsidies the price of upland cotton would be higher—"stands independent of any other global factors that might also be suppressing world market prices".<sup>796</sup> This may somewhat oversimplify the position. A subsidy may be necessary, but not sufficient, to bring about price suppression. Understood in this way, the "but for" test may be too undemanding. By contrast, the "but for" test would be too rigorous if it required the subsidy to be the only cause of the price suppression. Instead, the "but for" test should determine that price suppression is the effect of the subsidy and that there is a "genuine and substantial relationship of cause and effect".<sup>797</sup>

375. The United States argues that the Panel was required to conduct a non-attribution analysis as part of its "but for" approach. While we agree that Article 6.3(c) requires the Panel to have ensured that the effects of other factors on prices did not dilute the "genuine and substantial" link between the subsidies and the price suppression, Article 6.3(c) leaves some discretion to panels in choosing the methodology used for this assessment. In the light of this flexibility, it would not have been improper for the Panel to have assessed the effect of other factors as part of its counterfactual analysis, rather than conducting a separate analysis of non-attribution. In our view, the Panel's "but for" standard, understood as we have set out above, is permissible under Article 6.3(c) of the *SCM Agreement*, and it is consistent with the Panel's counterfactual analysis of price suppression.

376. The United States relied upon only one other factor that it considered required a non-attribution analysis. That factor is China's role in the upland cotton market. The Panel considered that "based on the evidence before it, ... while China may play a significant role in the market for upland cotton, this does not diminish the significance of the impact of [United States] subsidies on the world price for upland cotton as a result of their effect on [United States] supply to the world market".<sup>798</sup> It further noted that "[d]evelopments concerning the role of China's demand and supply

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<sup>794</sup>United States' appellant's submission, para. 213.

<sup>795</sup>Brazil's appellee's submission, para. 921. (original emphasis)

<sup>796</sup>New Zealand's third participant's submission, para. 4.25.

<sup>797</sup>Appellate Body Report, *US – Upland Cotton*, para. 438 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 69).

<sup>798</sup>Panel Report, para. 10.243.

do not change the fact that, with a share of world exports of around 40 per cent, the United States is capable of exerting a substantial proportionate influence on the world market".<sup>799</sup>

377. The United States asserts that China is "one of the most important 'other' factors influencing the world price of upland cotton."<sup>800</sup> According to the United States, China is "the world's largest producer of upland cotton, the world's largest consumer of upland cotton and world's largest importer of upland cotton" with "its share of world imports rising from only 1% in MY 1998 to 44% in MY 2005".<sup>801</sup> The United States also asserts that "downward pressure on cotton prices may also have resulted from uncertainty over China's supply and demand statistics, as well as *ad hoc* changes to government policies."<sup>802</sup>

378. As we review the United States' arguments, we have considerable difficulty understanding how China's increasing consumption and imports of cotton could have contributed to the suppression of the world price of cotton. To the contrary, the additional demand from China's imports would have been likely to contribute positively to world prices. We are also not persuaded that the United States has established how uncertainties over China's supply and demand statistics and *ad hoc* changes in government policies have contributed to price suppression. In both cases, the United States asserts that China has an impact on world upland cotton prices, but fails to demonstrate how China's role impacts *negatively* on world prices. The United States relies on a report of the International Cotton Advisory Committee, which notes that "uncertainties regarding statistics on cotton production, consumption, and stocks" make it "difficult to estimate the gap between supply and use in China ..., and therefore to predict the level of Chinese imports from one season to another", and that the "timing and amount of import quotas released by China ... has thus become precious information to evaluate the need for cotton by Chinese mills."<sup>803</sup> The report further suggests that "the lack of information about the future releases of these import quotas may contribute to pushing prices downward".<sup>804</sup> However, the same report is unambiguous about the general overall effect of China on the price of cotton, stating that, "[i]n the past 25 years, significant increases in Chinese imports resulted in hikes in international cotton prices".<sup>805</sup> Moreover, the evidence submitted by the United States suggests that uncertainty about China's demand may cause price volatility in the world upland cotton market.

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<sup>799</sup>Panel Report, para. 10.243.

<sup>800</sup>United States' appellant's submission, para. 211. In its appellant's submission, the United States sometimes refers to "other factors", in the plural. However, it only makes arguments on the role of China.

<sup>801</sup>*Ibid.*

<sup>802</sup>*Ibid.*, para. 212.

<sup>803</sup>United States' first written submission to the Panel, para. 315 (quoting International Cotton Advisory Committee (ICAC) Report, p. 7 (Exhibit Bra-485 submitted by Brazil to the Panel, *supra*, footnote 131).

<sup>804</sup>*Ibid.* (emphasis added by United States omitted)

<sup>805</sup>*Ibid.*

However, we are not persuaded that the evidence of volatility demonstrates *prima facie* that Chinese consumption of cotton and policies have a suppressing effect on the price of upland cotton in the world market. The effects of volatility appear to be inconclusive. Therefore, while the Panel agreed with the United States that "China may play a significant role in the market for upland cotton"<sup>806</sup>, it properly concluded that this does not diminish price suppressing effects of marketing loan and counter-cyclical payments.

379. For these reasons, we find that the Panel did not err in finding that the role of China's trade in cotton "does not attenuate the link between significant price suppression and the subsidies at issue in this proceeding".<sup>807</sup>

380. The United States also argues that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, by disregarding evidence that the United States had submitted that was relevant to the non-attribution analysis, and by failing to provide a reasoned and adequate explanation for its conclusions in the light of possible alternative explanations.<sup>808</sup>

381. We have found that the Panel's finding concerning the role of China is not inconsistent with Article 6.3(c) of the *SCM Agreement*. We disagree with the assertion by the United States that the Panel "ignored completely, and never took into account"<sup>809</sup>, evidence concerning the role of China submitted by the United States.<sup>810</sup> Although its analysis of China's role may be succinct, the Panel considered, "*based on the evidence before it*, that while China may play a significant role in the market for upland cotton, this does not diminish the significance of the impact of [United States] subsidies on the world price for upland cotton as a result of their effect on [United States] supply to the world market."<sup>811</sup> Moreover, we stated above that the evidence submitted by the United States on the role of China in the world cotton trade does not establish that China is a factor that contributes to the suppression of world upland cotton prices. We do not believe, therefore, that the Panel was required to conduct a more thorough analysis of the role of China in the light of the evidence

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<sup>806</sup>Panel Report, para. 10.243.

<sup>807</sup>*Ibid.*, para. 10.252.

<sup>808</sup>See United States' appellant's submission, para. 243.

<sup>809</sup>*Ibid.*

<sup>810</sup>Brazil argues that the United States should have raised this claim under Article 12.7 of the DSU. We are not persuaded by the argument put forward by Brazil that such a claim should have been raised under Article 12.7 of the DSU and that, as it was not, it should fail for that reason. We recall that Article 12.7 requires panels to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind any findings and recommendations it makes.

<sup>811</sup>Panel Report, para. 10.243. (emphasis added)

submitted by the United States. In our view, therefore, the Panel did take into account the evidence submitted by the United States on the role of China and properly reached the conclusion that China's role in the world cotton trade did not impact negatively on world upland cotton prices. For the same reasons, we also do not believe that the Panel failed to provide a "reasoned and adequate explanation" for its conclusions in the light of "possible alternative explanations"<sup>812</sup>, as alleged by the United States.<sup>813</sup>

4. Other Allegations of Error Raised by the United States

(a) Standard of Review

382. The United States claims that the Panel erred in its evaluation of the various elements, which supported its finding that marketing loan and counter-cyclical payments cause significant price suppression. In particular, the United States asserts that the Panel erred: (i) in finding that marketing loan and counter-cyclical payments insulated United States producers of upland cotton from market signals; (ii) in finding that there was a significant gap between the total costs of production of United States upland cotton producers and their market revenues; (iii) in its evaluation of the economic simulations conducted by the parties; (iv) in its evaluation of the impact of the withdrawal of Step 2 payments; and (v) in its assessment of the magnitude of the marketing loan and counter-cyclical payments and the alleged substantial proportionate influence of the United States in the world upland cotton market.

383. Before turning to the arguments raised by the United States, we address the preliminary question of the applicable standard of review, bearing in mind that, with respect to some of these claims, the United States has challenged the Panel's findings under both Article 6.3(c) of the *SCM Agreement* and Article 11 of the DSU.

384. We recall that, in the original dispute, the Appellate Body stated:

Pursuant to Article 17.6 of the DSU, appeals are "limited to issues of law covered in the panel report and legal interpretations developed by the panel". To the extent that the United States' arguments concern the Panel's appreciation and weighing of the evidence, we note from the outset that the Appellate Body will not interfere lightly with the Panel's discretion "as the trier of facts". At the same time, the Appellate Body has previously pointed out that the "consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue". Whether the Panel properly interpreted the requirements of Article 6.3(c) of

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<sup>812</sup>See Appellate Body Report, *US – Lamb*, para. 106.

<sup>813</sup>United States' appellant's submission, para. 243.

the *SCM Agreement* and properly applied that interpretation to the facts in this case is a legal question. This question is different from whether the Panel made "an objective assessment of the matter before it, including an objective assessment of the facts of the case", in accordance with Article 11 of the DSU.<sup>814</sup> (footnotes omitted)

385. The United States has characterized its appeal under Article 6.3(c) of the *SCM Agreement* as one relating to the Panel's application of the law to the facts, although it has also brought some claims under Article 11 of the DSU that challenge the objectivity of the Panel's assessment of the facts. We recognize that the boundary between an issue that is purely factual and one that involves mixed issues of law and fact is often difficult to draw. However, we consider that many of the United States' claims against the Panel's evaluation of the elements supporting its finding of significant price suppression are primarily directed at the Panel's appreciation and weighing of the evidence, and the inferences that the Panel drew from the evidence, both of which fall within its authority that is recognized under Article 11 of the DSU.<sup>815</sup> Therefore, we shall review those claims and arguments raised by the United States concerning the application of the law to the facts under the legal standard of Article 6.3(c) of the *SCM Agreement*, and those claims and arguments concerning the Panel's appreciation and weighing of the evidence under Article 11 of the DSU.

386. The United States claims that, in its finding of significant price suppression, the Panel relied excessively on the findings in the original panel and Appellate Body reports.<sup>816</sup> As the Panel recognized, the Appellate Body has stated that proceedings under Article 21.5 of the DSU do not occur in isolation, but are part of a "continuum of events"<sup>817</sup>, and "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record".<sup>818</sup> Thus, in this case, it was appropriate for the Panel to have relied on the findings from the original proceedings unless "any change in the underlying evidence in the record" would have justified departing from them. It is undisputed "that the conditions of application of the marketing loan and counter-cyclical payments, as defined in the relevant provisions of the FSRI Act of 2002, are the same at present as when the original panel analyzed these measures."<sup>819</sup> On appeal, however, the United States asserts that "[t]he facts in the original proceeding and this compliance proceeding vary in fundamental ways which make unsupportable the Panel's reliance on the original

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<sup>814</sup> Appellate Body Report, *US – Upland Cotton*, para. 399.

<sup>815</sup> See Appellate Body Report, *EC – Sardines*, para. 299.

<sup>816</sup> See United States' appellant's submission, para. 135.

<sup>817</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.

<sup>818</sup> Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.

<sup>819</sup> Panel Report, para. 10.71.



panel and Appellate Body reports on issues related to market insulation."<sup>820</sup> According to the United States, this is so because the DSB's recommendations and rulings related to a package of payments that included Step 2 payments, which have been repealed.<sup>821</sup> We note that the Panel specifically addressed the repeal of Step 2 payments and analyzed the impact of the elimination of these payments, an issue to which we return below.<sup>822</sup> As regards marketing loan and counter-cyclical payments, the Panel concluded that "[n]othing in the facts presented ... in this proceeding would appear to warrant a conclusion different from the conclusion drawn by the panel and the Appellate Body in the original proceeding".<sup>823</sup>

(b) Market Insulation

387. The United States claims that the Panel erred in finding that marketing loan and counter-cyclical payments insulated United States producers of upland cotton from market signals.<sup>824</sup> In particular, the United States challenges the Panel's evaluation of upland cotton producers' planting decisions<sup>825</sup>; the Panel's assessment of the economic studies submitted by the parties about the impact of counter-cyclical payments on production<sup>826</sup>; and the Panel's analysis of the relationship between upland cotton base acres and production.<sup>827</sup> The United States also argues that the Panel made several findings that contradict its conclusion that marketing loan and counter-cyclical payments insulated United States producers of upland cotton from market signals.<sup>828</sup> Finally, the United States challenges the Panel's alleged failure to determine the degree of market insulation and the degree of production effects related to that insulation.<sup>829</sup>

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<sup>820</sup>United States' appellant's submission, para. 136. The United States adds:  
Neither the original panel nor the Appellate Body addressed the precise serious prejudice claims that Brazil made before the Panel. The findings and recommendations of the original panel and Appellate Body, and the recommendations and rulings of the DSB, related to the package of Step 2, market loss assistance, marketing loan, and counter-cyclical payments made in MY 1999-2002. The compliance proceeding pertained to marketing loan payments and counter-cyclical payments made in MY 2006. Whether these payments insulated [United States] upland cotton producers, and ultimately, whether they caused significant price suppression, was a question of first impression, which involved the consideration of new evidence on market conditions and producers' expectations.

(*Ibid.* (footnotes omitted))

<sup>821</sup>See United States' appellant's submission, para. 136.

<sup>822</sup>See *infra*, para. 436.

<sup>823</sup>Panel Report, para. 10.82.

<sup>824</sup>See United States' appellant's submission, para. 132.

<sup>825</sup>See *ibid.*, para. 134.

<sup>826</sup>See *ibid.*, paras. 144 and 145.

<sup>827</sup>See *ibid.*, para. 154.

<sup>828</sup>See *ibid.*, para. 157.

<sup>829</sup>See *ibid.*, para. 164.

388. Before examining the specific arguments raised by the United States, we note that the Panel did not examine whether marketing loan or counter-cyclical payments, "taken individually, [were] a cause of significant price suppression", nor did the Panel "pronounce on the relative importance of each of these subsidies in causing significant price suppression".<sup>830</sup> Instead, the Panel "conduct[ed] an examination of the collective effects of the marketing loan and counter-cyclical payments".<sup>831</sup>

(i) *Factors Relevant to Planting Decisions*

389. The United States submits that the Panel "did not adequately take into account all factors relevant to producers' planting decisions"<sup>832</sup>, and, instead, placed "excessive reliance" on the findings from the original proceedings.<sup>833</sup> We have determined that the Panel did not improperly rely on the findings from the original proceedings, considering that the conditions of application of the marketing loan and counter-cyclical payments are the same as when the original panel analyzed these measures.

390. The United States points to several elements the Panel allegedly failed to take into account, which show that "[United States] producers looked to other factors, aside from the expected price of upland cotton, and responded to them as the market would predict."<sup>834</sup> First, the United States asserts that "in MY 2003-2007, producers' decisions on planting [upland] cotton were consistent with expectations concerning the costs and revenues of competing crops."<sup>835</sup> We observe that the United States' argument regarding competing crops was examined by the Panel, albeit in a separate section of its report.<sup>836</sup> The Panel dismissed the relevance of the data submitted by the United States on the relationship between cotton and soybean prices:

The Panel notes, in this regard, that the ratio of cotton futures prices to soybean futures prices and [United States] cotton planted acreage only moved in the same direction in MY 2006. In MY 2003, the ratio of cotton futures prices to soybeans futures prices increased sharply while cotton planted acreage declined. The ratio decreased in both MY 2004 and MY 2005, while planted acreage increased in both years. Thus, even if we agree with the argument of the United States that futures prices of alternative crops to cotton need to be taken into account, the data does not support an important role for this ratio of cotton futures prices to soybeans futures prices.<sup>837</sup>

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<sup>830</sup>Panel Report, para. 10.51.

<sup>831</sup>*Ibid.*, para. 10.51.

<sup>832</sup>United States' appellant's submission, para. 134.

<sup>833</sup>See *ibid.*, para. 135.

<sup>834</sup>*Ibid.*, para. 140.

<sup>835</sup>*Ibid.*

<sup>836</sup>See Panel Report, Section X.B.7, dealing with the alleged link between high levels of United States subsidies and high levels of United States planted acreage, production and exports.

<sup>837</sup>*Ibid.*, para. 10.124.

391. The fact that "the relationship of [United States] planted acreage to the soybean and cotton futures ratio did move in the same direction"<sup>838</sup> in MY 2006 is, in our view, insufficient to rebut the data from other years in which such relationship moved in opposite directions, or the other evidence on which the Panel relied.<sup>839</sup> The United States also asserts that, in MY 2005, there was a shift from soybean to cotton production "due to concerns about an outbreak of Asian soybean rust in MY 2004."<sup>840</sup> A USDA document cited by the United States in support of this argument indicates that the gains in upland cotton planted acres only "partly"<sup>841</sup> reflected the impact of Asian rust. Moreover, we observe that, while the United States provides fragmentary evidence as to the impact of the price of competing crops on upland cotton planting decisions, it does not provide a systematic account of substitutability between upland cotton and other crops.

392. The United States' argument appears to focus on the short-term impact of marketing loan payments, that is, on how they affect year-to-year planting decisions. However, nothing in Article 6.3(c) of the *SCM Agreement* suggests that the examination of the effect of a subsidy must focus exclusively on the short-term perspective. Whether production of a particular product is higher than it would have been in the absence of the subsidy is often a critical issue in establishing whether the effect of the subsidy is significant price suppression. In our view, the effect of a subsidy on production can also be assessed on the basis of a long-term perspective that focuses on how the subsidy affects decisions of producers to enter or exit a given industry. The Panel considered, in this regard, that "the evidence on the record, notably the evidence regarding the role of marketing loan and counter-cyclical payments in covering the difference between the market revenue of [United States] upland cotton producers and their costs of production, supports the view that these subsidies have a long-term impact on acreage and production of upland cotton by affecting decisions of [United States] cotton farmers to enter or exit cotton farming."<sup>842</sup>

393. Secondly, the United States refers to "survey evidence of MY 2007 upland cotton planting intentions, showing that [United States] producers intended to pull back on their upland cotton plantings".<sup>843</sup> As the United States recognizes<sup>844</sup>, the Panel examined this survey in its analysis of the

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<sup>838</sup>United States' appellant's submission, footnote 157 to para. 140.

<sup>839</sup>The United States also submits that the comparison it submitted of planted upland cotton acreage to the ratio of soybean and cotton future prices was a simplified analysis, and that other crops and extraneous factors could, and did, influence farmers' decisions. (*Ibid.*) Given that this point was offered by the United States in rebuttal, we consider that it bears the responsibility for any limitations in the evidence that it presented.

<sup>840</sup>*Ibid.*, para. 140.

<sup>841</sup>Cotton and Wool Situation and Outlook Yearbook (November 2005) (Exhibit Bra-448 submitted by Brazil to the Panel), p. 2 (quoted in United States' first written submission to the Panel, para. 234).

<sup>842</sup>Panel Report, para. 10.83.

<sup>843</sup>United States' appellant's submission, para. 141.

<sup>844</sup>See *ibid.*

impact of the elimination of Step 2 payments, indicating that the reduction of plantings would be "consistent" with the argument that the elimination of that programme is having an effect. Thus, as we see it, the decline in plantings in MY 2007 could be, at least in part, explained by the fact that Step 2 payments were no longer available, and does not demonstrate that marketing loan and counter-cyclical payments do not "insulate" producers from market signals.

394. In addition, the United States submits that the Panel erred by failing to evaluate whether producers actually expected that harvest prices would be below the marketing loan rate in MY 2006 or in any other year.<sup>845</sup>

395. The Panel, like the original panel, considered that the marketing loan payments operate as a safety net, stabilizing producers' revenue and influencing producers' decisions regardless of the level of expected prices. This is so because, at the time of planting, upland cotton producers know they will receive a payment should the actual harvest price be below the loan rate. We find no flaws with this logic. Furthermore, we do not see why the Panel was required to establish whether producers, in fact, expected harvest prices to fall below the loan rate. In any event, the Panel observed that "in most recent years actual market prices have been lower than expected market prices at the time of planting and ... the adjusted world price has been below the marketing loan rate".<sup>846</sup> In our view, it is not unreasonable to assume that producers were aware of these historical trends and that, on this basis, they would have expected to receive a payment in the event that the price fell below the loan rate, even when the expected price was above the loan rate.

396. We further observe that some of the United States' arguments seem to be premised on a particular understanding of the Panel's finding: that marketing loan and counter-cyclical payments completely insulate United States producers from other factors that may affect planting decisions. We do not consider that the Panel adopted such a rigid view of market insulation. Instead, we understand the Panel to have taken the position that marketing loan and counter-cyclical payments make United States upland cotton producers less responsive to other factors that affect planting decisions. This is evident from the Panel's finding that "the degree of price insulation that the original panel found is

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<sup>845</sup>The United States focuses on the following statement of the Panel:

[E]ven if expected market prices at the time of planting are higher than the marketing loan rate and producers do not expect to receive marketing payments at that time, the availability of marketing loan payments can be considered to influence planting decisions. While [United States] upland cotton producers may be uncertain at the time of planting as to whether actual harvest prices will be below the marketing loan rate, there is no uncertainty as to the fact that, if actual harvest prices are below the marketing loan rate, they will receive marketing loan payments.

(Panel Report, para. 10.77 (footnote omitted))

<sup>846</sup>*Ibid.*, para. 10.81.

now weaker".<sup>847</sup> Moreover, the Panel referred to the original panel's description of price-contingent subsidies (which include marketing loan and counter-cyclical payments) as "numbing the response of United States producers to production adjustment decisions when prices are low".<sup>848</sup> The use of the term "numbing" also suggests that the Panel intended "market insulation" to mean "lower responsiveness" rather than complete insulation. While the Panel clearly took into account the new evidence submitted by the parties, it did not find that market insulation was reduced to such an extent that subsidies would no longer have an effect on the production and prices of upland cotton.

397. Turning to the structure, design, and operation of marketing loan payments, the Panel made a comprehensive assessment of the arguments and the evidence before it. The Panel referred to the findings made in the original proceedings, which was the proper thing for it to do considering that Article 21.5 and original proceedings are part of a "continuum of events"<sup>849</sup> and that the programs authorizing marketing loan payments remained unchanged. More importantly, it is clear from the Panel Report that the Panel examined the new arguments and evidence submitted by the parties. For instance, the Panel examined upland cotton price patterns from the most recent years before concluding that the relationship found by the original panel between (higher) expected harvest prices and (lower) actual prices has not changed.<sup>850</sup>

398. For these reasons, we do not consider that the United States has demonstrated that the Panel improperly relied on the conclusions from the original proceedings or failed to take into account other factors that may have influenced producers' planting decisions. We recall that, in the original proceedings, in addressing the appeal by the United States relating to the specific reasons behind the original panel's conclusions that the effect of the price-contingent subsidies was significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, the Appellate Body noted:

The way in which United States upland cotton farmers make decisions relating to the production of upland cotton, and the basis on which they make such decisions, are factual matters that fall within the Panel's task of weighing and assessing the relevant evidence, and we will not review these matters. However, in our view, the application of the legal requirements of Article 6.3(c) to the facts determined by the Panel falls within the scope of appellate review.<sup>851</sup>

399. The United States also claims, under Article 11 of the DSU, that the Panel failed to carry out an objective assessment of the facts, because it disregarded the new evidence submitted by the United

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<sup>847</sup>Panel Report, para. 10.127.

<sup>848</sup>*Ibid.*, para. 10.67 (quoting Original Panel Report, para. 7.1308).

<sup>849</sup>Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 121.

<sup>850</sup>See Panel Report, paras. 10.80 and 10.81.

<sup>851</sup>Appellate Body Report, *US – Upland Cotton*, para. 441.

States on producers' expectations and competing crops; relied exclusively on findings from the panel and the Appellate Body in the original proceedings; and failed to provide a reasoned and adequate explanation for its conclusions in the light of plausible alternative explanations.<sup>852</sup> In our view, the Panel did not fail to analyze the new evidence and arguments submitted by the United States, nor did it, in the light of the reasons given above, rely excessively on the findings from the original proceedings. For these reasons, we do not believe that the Panel failed to carry out an objective assessment of the facts, as required by Article 11 of the DSU.

(ii) *Studies on the Production Impact of Counter-cyclical Payments*

400. Next, the United States challenges the Panel's evaluation of certain studies<sup>853</sup> submitted by the parties on the effects of counter-cyclical payments on plantings and production.<sup>854</sup> The United States argues that the Panel downplayed and improperly interpreted the studies submitted by the United States<sup>855</sup> and that it "did not even address the shortcomings of the research submitted by Brazil."<sup>856</sup> In our view, the United States is asking us to review the Panel's appreciation and weighing of these studies, which is a matter that was within the Panel's authority as the trier of facts. It is evident from

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<sup>852</sup>See United States' appellant's submission, paras. 232 and 233.

<sup>853</sup>The following studies were submitted by the United States: B. Goodwin and A. Mishra, "Another Look at Decoupling: Additional Evidence on the Production Effects of Direct Payments" (2005) 87(5) *American Journal of Agricultural Economics* 1200 (Exhibit US-41 submitted by the United States to Panel); W. Lin and R. Dismukes, "Supply Response Under Risk: Implications for Counter-cyclical Payments' Production Impacts" (2005) 29(1) *Review of Agricultural Economics* 64 (Exhibit US-85 submitted by the United States to the Panel); W. Lin and R. Dismukes, "Risk Considerations in Supply Response: Implications for Counter-Cyclical Payments' Production Impact," Selected Paper, American Agricultural Economics Association (July 2005) (Exhibit US-34 submitted by the United States to the Panel); P.A. Westcott, "Counter-Cyclical Payments Under the 2002 Farm Act: Production Effects Likely to be Limited" (2005) 20(3) *Choices* (a publication of the American Agricultural Economics Association) p. 201 (Exhibit US-35 submitted by the United States to the Panel); C.E. Young, A. Effland, P.A. Westcott, and D. Johnson, "US Agricultural Policy: Overview and Recent Analyses", presented at the 93rd seminar of the European Association of Agricultural Economists, "The Impacts of Decoupling and Cross Compliance on Agriculture in the Enlarged EU" held on 22-23 September 2006 in Prague, Czech Republic (Exhibit US-40 submitted by the United States to the Panel); Abler and Blandford study, Exhibit US-32 submitted by the United States to the Panel, *supra*, footnote 98).

The following studies were submitted by Brazil: B. Goodwin and A. Mishra, "Are 'Decoupled' Farm Payments Really Decoupled? An Empirical Evaluation" *American Journal of Agricultural Economics* (Exhibit Bra-618 submitted by Brazil to the Panel); N. Key, R. Lubowski and M. Roberts, "Farm-Level Production Effect From Participation in Government Commodity Programs: Did the 1996 Federal Agricultural Improvement and Reform Act Make a Difference?" (2005) 87(5) *American Journal of Agricultural Economics* 1211 (Exhibit Bra-566 submitted by Brazil to the Panel); C.R. McIntosh, J.F. Shogren, and E. Dohlman, "Supply Response to Counter-Cyclical Payments and Base Acre Updating under Uncertainty: An Experimental Study" *American Journal of Agricultural Economics* (Exhibit Bra-565 submitted by Brazil to the Panel); E.J. O'Donoghue and J. Whitaker, "How distorting are direct payments?", paper prepared for presentation at the 2006 American Agricultural Economics Association in Long Beach, California (Exhibit Bra-568 submitted by Brazil to the Panel).

<sup>854</sup>See United States' appellant's submission, para. 145.

<sup>855</sup>See *ibid.*, para. 144 and footnote 165 thereto.

<sup>856</sup>*Ibid.*, para. 153.

the Panel Report that the Panel carefully reviewed the studies submitted by both parties and reached its own conclusions as to the meaning and significance of these studies for the present dispute. It found that the studies were of "somewhat limited relevance", because none of them "specifically analyzes the experience with counter-cyclical payments to growers of upland cotton".<sup>857</sup> The Panel also found that all of the studies concurred that counter-cyclical payments can or may have production effects, because they increase wealth and reduce risk aversion, thus leading farmers to increase production.<sup>858</sup>

401. As we indicated earlier, the Panel did not assess whether counter-cyclical payments, taken individually, were a cause of significant price suppression but, rather, conducted "an examination of the collective effects of the marketing loan and counter-cyclical payments".<sup>859</sup> Therefore, the Panel's evaluation of the production effects of counter-cyclical payments must be understood in the light of the collective assessment of the two subsidy measures.

402. The Panel observed that the studies submitted by the United States examine other types of payments programmes (such as production flexibility contract payments), or examine counter-cyclical payments provided to producers of crops other than upland cotton (such as corn, wheat, and soybean). The Panel noted that some of the studies that examined the effects of counter-cyclical payments on plantings of other crops did not carry out an empirical analysis of their effects but, rather, are surveys of other studies. In addition, the Panel pointed out that there was "some variation in the type and quality of the studies: some are published or slated to be published in academic journals while others are articles in newsletters or unpublished manuscripts".<sup>860</sup> The Panel considered that the studies submitted by Brazil suffered from similar shortcomings.

403. The United States also claims, under Article 11 of the DSU, that the Panel failed to carry out an objective assessment of the facts, because it wilfully distorted and misrepresented the meaning of the economic studies submitted by the United States on the effects of counter-cyclical payments on production, and failed to provide a reasoned and adequate explanation for its conclusions in the light of plausible alternative explanations.<sup>861</sup> The Panel relied on the new studies on counter-cyclical payments submitted by the parties only "insofar as they provide new information [that was] not available to the original panel reflecting the experience with the operation of counter-cyclical

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<sup>857</sup>Panel Report, para. 10.91.

<sup>858</sup>*Ibid.*, para. 10.92.

<sup>859</sup>*Ibid.*, para. 10.51.

<sup>860</sup>*Ibid.*, paras. 10.91 and 10.92.

<sup>861</sup>See United States' appellant's submission, para. 234.

payments to upland cotton."<sup>862</sup>

404. In our view, the arguments presented by the United States do not succeed in demonstrating that the Panel erred in its evaluation of the economic studies submitted by the United States on the effects of counter-cyclical payments on production. To the contrary, the Panel made a careful evaluation of the studies. For this reason, we do not consider that the Panel wilfully distorted and misrepresented the studies submitted by the United States on counter-cyclical payments, nor that it failed to provide a reasoned and adequate explanation for its conclusions in the light of plausible alternative explanations. The fact that the Panel accorded to the studies a different meaning and weight than did the United States does not constitute a failure to make an objective assessment of the matter under Article 11 of the DSU.

405. The United States also argues that the Panel erred in finding that "a strongly positive relationship exists between recipients of upland cotton counter-cyclical payments who hold upland cotton base acres and those who continue to plant upland cotton" because it "never actually tested the strength of the relationship between payments and plantings in order to conclude that the former was driving the latter."<sup>863</sup> The Panel based this finding on data which showed that, in MY 2005, 95 per cent of cotton acreage was planted on farms that held upland cotton base acres and that 83 per cent of cotton planted acreage corresponded directly to cotton base acres eligible for counter-cyclical payments.<sup>864</sup> We note that the United States does not question the accuracy of these data, although it disagrees with the conclusions the Panel reached based on the data. With respect to the United States' argument that 40 per cent of upland cotton base acres are not currently planted to upland cotton, the Panel found that "[United States] upland cotton base acres are not a reliable measure to compare to annual [United States] upland cotton acreage"<sup>865</sup>, considering that total base acres have been historically higher than total production. The Panel explained that, when given an opportunity to update their base acres, only those farmers producing more than in the past have elected to update, while those producing less declined to do so.<sup>866</sup>

406. We see nothing improper in the Panel's reasoning that the fact that 83 per cent of cotton planted acreage corresponded directly to upland cotton base acres supports the conclusion that a

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<sup>862</sup>Panel Report, para. 10.90.

<sup>863</sup>United States' appellant's submission, para. 154.

<sup>864</sup>See Panel Report, footnote 341 to para. 10.97, and footnote 350 to para. 10.102.

<sup>865</sup>*Ibid.*, footnote 341 to para. 10.97.

<sup>866</sup>Relying on an argument made by Brazil, the Panel noted that the high level of upland cotton base relative to production reflects the fact that with consecutive base updates, United States farms elected to update only if that would increase their high payment upland cotton base, while they declined to update if this would have decreased upland cotton base in favour of a lower payment crop base. (*Ibid.*, footnote 341 to para. 10.97)



strongly positive relationship exists between recipients of upland cotton counter-cyclical payments who hold upland cotton base acres and those who continue to plant upland cotton. In any event, we consider that, on this issue, the United States is essentially challenging the inferences drawn by the Panel from the evidence before it, and this is a matter that was within the Panel's authority as the trier of facts. We note that the United States did not raise a claim under Article 11 of the DSU on this issue.

(iii) *The Panel's Alleged Contradictory Findings*

407. Next, the United States argues that the Panel "made several findings that contradict its ultimate conclusion that marketing loan and counter-cyclical payments insulated [United States] producers of upland cotton from market prices."<sup>867</sup>

408. First, the United States refers to the Panel's finding that "[t]he fact that the [United States]' share of production and exports has remained relatively constant in MY 2002-2005 suggests to us that [United States] producers have increased production and exports in proportionately the same way as foreign producers."<sup>868</sup> The United States submits that, "[i]f the [United States]' share of world production and exports was stable, and if [United States] producers acted in much the same way as those in other countries, then the Panel could not rationally have found that [United States] payments insulated [United States] producers to any meaningful degree."<sup>869</sup> The Panel did not disregard the fact that the United States' market share of world upland cotton production had remained stable in MY 2002-2005. The Panel specifically addressed this issue and noted that "the stable [United States] share of world production and exports does not mean an absence of insulation of [United States] producers from market price signals."<sup>870</sup> Rather, it means that "the degree of price insulation that the original panel found is now weaker possibly because prices are not as depressed as during the period examined by the original panel."<sup>871</sup> The Panel further explained that "insulation of [United States] producers from market price signals applies in particular when expected prices are below intervention levels", and that it is "less when expected cotton prices are above their intervention levels".<sup>872</sup> Therefore, we do not consider that the Panel "overlooked"<sup>873</sup> its own findings in this regard. Its conclusions do not lack a rational basis, nor are they contradictory.

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<sup>867</sup>United States' appellant's submission, para. 157.

<sup>868</sup>Panel Report, para. 10.127.

<sup>869</sup>United States' appellant's submission, para. 160.

<sup>870</sup>Panel Report, para. 10.127.

<sup>871</sup>*Ibid.*

<sup>872</sup>*Ibid.*

<sup>873</sup>United States' appellant's submission, para. 157.

409. Secondly, the United States refers to the Panel's finding that "Brazil's claim of insulation of [United States] producers from market price signals applies in particular when expected prices are below their intervention levels. ... However, *the degree of insulation is less when expected cotton prices are above their intervention levels. In such a situation, [United States] cotton producers should respond to higher expected cotton prices much in the same way as foreign cotton producers.*"<sup>874</sup> The United States points out that it demonstrated to the Panel that, "in MY 2006, the year relevant to the analysis of 'present' significant price suppression, the expected market price of upland cotton was above the marketing loan rate"<sup>875</sup> and, thus, "[a]ccording to the Panel's own logic, [United States] producers should have responded just as foreign producers did, a fact proven by the existence of stable [United States] shares of world upland cotton production and exports."<sup>876</sup>

410. We note that, while the United States' share of world upland cotton production remained stable in MY 2002-2005, the United States has been providing subsidies to upland cotton over a long period of time. Therefore, the fact that its shares of world upland cotton production remained stable over a three-year period is not necessarily indicative of a reduction in the market insulating effects of the subsidies.

411. Contrary to the United States' assertion, the Panel did take into account the fact that, in MY 2006, the expected market price of upland cotton was above the marketing loan rate. The Panel stated that:

... the fact that [United States] cotton producers know that they will receive marketing loan payments whenever the adjusted world price is below the marketing loan rate continues to be an important factor affecting the level of acreage planted to cotton (and thus the level of production), even when, *as in MY 2006*, the expected market price for upland cotton at the time of planting is higher than the marketing loan rate.<sup>877</sup> (emphasis added)

Thus, the Panel considered that, even when expected prices were higher than the marketing loan rate, the availability of marketing loan payments affected plantings.

412. Moreover, in the statement to which the United States draws attention, the Panel acknowledges that "the degree of insulation is *less* when expected cotton prices are above their

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<sup>874</sup>United States' appellant's submission, para. 161 (quoting Panel Report, para. 10.127). (emphasis added by the United States)

<sup>875</sup>*Ibid.* The United States explains that it also showed a similar pattern in MY 2003 and MY 2004. In MY 2005, where expected prices were below the marketing loan rate, the United States explained that other factors drove planting decisions. (*Ibid.*, footnote 192 to para. 161)

<sup>876</sup>*Ibid.*, para. 161.

<sup>877</sup>Panel Report, para. 10.81.

intervention levels".<sup>878</sup> The Panel was not suggesting that there would be no insulation when expected prices are higher than the marketing loan rate but, rather, that such insulation would be of a lesser degree. The Panel's following statement—that, "[i]n such a situation, [United States] cotton producers should respond to higher expected cotton prices much in the same way as foreign cotton producers"<sup>879</sup>—should be read in the light of the previous statement. In other words, the Panel was indicating that, given that the degree of insulation would be less when expected prices were higher than the marketing loan rate, the behaviour of United States farmers, in those situations, should diverge less from the behaviour of their foreign competitors. Therefore, we do not see a contradiction in the Panel's statements, as the United States suggests.

413. Thirdly, the United States refers to the Panel's finding that "the data ... indicates that with respect to several key factors relied upon by the original panel in finding 'a discernible temporal coincidence' of suppressed world market prices and the price-contingent [United States] subsidies, the current situation is *significantly* different from the situation considered by the original panel."<sup>880</sup> The United States also draws attention to the Panel's conclusion that "two factors—first, that other major cotton producers were increasing their production and exports at the same time as [United States] producers and second, that prices received by [United States] cotton producers were not declining dramatically during this period—make it more difficult to discern a pronounced temporal coincidence between the [United States] subsidies, the increase in [United States] cotton exports and the drop in world market prices."<sup>881</sup> In the United States' view, the absence of a discernible temporal coincidence reinforced the United States' arguments that marketing loan and counter-cyclical payments did not insulate United States producers from market signals. Therefore, the United States argues that, in finding that marketing loan and counter-cyclical payments insulated United States producers, the Panel contradicted its own findings regarding the lack of discernible temporal coincidence.<sup>882</sup>

414. The difficulty in discerning a temporal coincidence between the United States subsidies, the increase in United States exports, and the drop in market prices, does not, in our view, necessarily undermine the Panel's finding on market insulation. The Panel did take into account the fact that the share of United States production and exports was not increasing, but it did not consider that this fact undermined its conclusion regarding market insulation made on the basis of a number of factors, such

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<sup>878</sup>Panel Report, para. 10.127. (emphasis added)

<sup>879</sup>*Ibid.*

<sup>880</sup>United States' appellant's submission, para. 162 (quoting Panel Report, para. 10.133). (emphasis added by the United States)

<sup>881</sup>*Ibid.* (quoting Panel Report, para. 10.139).

<sup>882</sup>See *ibid.*, para. 163.

as their mandatory and price-contingent nature and their revenue-stabilizing effect. Therefore, we do not consider that the Panel's finding on the difficulty of discerning a temporal coincidence between the United States subsidies, upland cotton exports, and upland cotton prices necessarily contradicts its finding on market insulation.

415. The United States has also raised a claim under Article 11 of the DSU that the Panel failed to carry out an objective assessment of the facts, because it "deliberately distorted" the meaning and significance of the evidence on stable United States shares of world upland cotton production and exports, and failed to provide a reasoned and adequate explanation for its conclusions in the light of plausible alternative explanations.<sup>883</sup> We do not consider that the arguments presented by the United States succeed in demonstrating that the Panel erred in its evaluation of the meaning and significance of the evidence on stable United States shares of world upland cotton production and exports. As we explained above, the Panel did not disregard or distort the meaning and significance of such evidence, nor did it fail to provide a reasoned and adequate explanation for its conclusions in the light of plausible alternative explanations. We, therefore, find that the Panel did not fail to carry out an objective assessment of the facts, as required by Article 11 of the DSU.

(iv) *Degree of Market Insulation*

416. Finally, the United States claims that the Panel failed to determine the degree of market insulation. As the Appellate Body explained in the original proceedings, "Article 6.3(c) does not set forth any specific methodology for determining whether the effect of a subsidy is significant price suppression" and, consequently, "[t]here may well be different ways to make this determination".<sup>884</sup> Accordingly, Article 6.3(c) does not specifically require a panel to determine whether a subsidy "insulates" producers, nor does it require a quantification of the degree of such insulation. What Article 6.3(c) does require is that the price suppression be "significant", which the Appellate Body has understood as "connoting something that can be characterized as 'important, notable or consequential'".<sup>885</sup> However, the fact that the price suppression must be "significant" does not mean that a panel examining various factors that support a finding of significant price suppression, as did the Panel, must make a determination precisely quantifying the effects of each factor. A factor that itself is not "significant" may, together with other factors (whether individually shown to be of a significant degree or not), establish "significant price suppression". What needs to be significant is the degree of price suppression, not necessarily the degree of each factor used as an indicator for

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<sup>883</sup> See United States' appellant's submission, para. 237.

<sup>884</sup> Appellate Body Report, *US – Upland Cotton*, para. 427.

<sup>885</sup> *Ibid.*, para. 426.

establishing its existence. Nor does each factor necessarily have to be capable of demonstrating, to the same extent, significant price suppression.

417. In the present case, the Panel examined market insulation as part of its examination of the structure, design, and operation of the marketing loan and counter-cyclical payments. The structure, design, and operation of the payments, in turn, were one of several elements on which the Panel based its conclusion that the effect of marketing loan and counter-cyclical payments is "significant price suppression". Moreover, the Panel emphasized that, "in determining whether the structure, design and operation of these subsidies support a finding of significant price suppression *under current factual conditions*, we need to consider this factor in conjunction with other facts."<sup>886</sup>

418. Article 6.3(c) requires a demonstration of "significant" price suppression. It does not require that panels make a determination of "significance" for each of the factors examined in its price suppression analysis. We do not consider that the Panel erred by not determining the precise degree of market insulation<sup>887</sup>, which is but one factor in the Panel's overall analysis.

(c) Costs of Production

419. The United States claims that the Panel erred in finding that there is "a significant gap between the total costs of production of [United States] upland cotton producers and their market revenue".<sup>888</sup> In particular, the United States disagrees with the Panel's decision to: (i) use total costs of production as the relevant parameter instead of variable costs<sup>889</sup>; (ii) use only crop-specific cost data published by the USDA<sup>890</sup>; (iii) include opportunity costs for items such as unpaid labour and owned land in total costs of production<sup>891</sup>; and (iv) disregard off-farm income and income from other crops in calculating producers' revenues.<sup>892</sup>

420. We note that the United States has not raised a claim under Article 11 of the DSU against the Panel's determination that there is a significant gap between costs of production and revenues of United States upland cotton producers. Therefore, pursuant to Article 17.6 of the DSU, we can only

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<sup>886</sup>Panel Report, para. 10.104. (original emphasis)

<sup>887</sup>The Panel implicitly made a quantitative assessment of the degree of market insulation when it noted that such insulation is now weaker than it was in the period considered in the original proceedings. (See Panel Report, para. 10.127) In its appellee's submission, Brazil argues that, although it was not required to do so, the Panel did quantify the degree of market insulation resulting from marketing loan and counter-cyclical payments by quantifying their order of magnitude and their importance as a share of the revenue of United States upland cotton producers. (See Brazil's appellee's submission, paras. 618-620)

<sup>888</sup>United States' appellant's submission, para. 168 (quoting Panel Report, para. 10.196).

<sup>889</sup>See *ibid.*, paras. 170-172.

<sup>890</sup>See *ibid.*, para. 181.

<sup>891</sup>See *ibid.*, paras. 184-188.

<sup>892</sup>See *ibid.*, para. 189.

review the claim by the United States to the extent that it relates to an error of interpretation or application of Article 6.3(c) of the *SCM Agreement*.

421. In the original proceedings, the United States made similar arguments concerning the calculation of production costs and revenues.<sup>893</sup> The Appellate Body found that the original panel had not erred in finding that "the six-year period from 1997-2002 ... lends itself to an assessment of the medium- to longer-term examination of developments in the United States upland cotton industry"<sup>894</sup> and, as a consequence, in relying on total rather than variable costs of production. The original panel also relied on USDA cost data and declined to take into account off-farm income, noting that it was examining "costs and market revenues ... of the upland cotton industry".<sup>895</sup>

422. In *US – Softwood Lumber VI (Article 21.5 – Canada)*, the Appellate Body noted that "doubts could arise about the objective nature of an Article 21.5 panel's assessment if, on a specific issue, that panel were to deviate from the reasoning in the original panel report in the absence of any change in the underlying evidence in the record".<sup>896</sup> The only relevant difference between the situation before the Panel and the original proceedings in this dispute is the length of the review period considered to establish whether significant price suppression exists: six years in the original proceedings (MY 1997-2002) as opposed to five years in the Article 21.5 proceedings (MY 2002-2006). In our view, this difference does not justify a departure from the costs and revenues methodology used by the original panel, or from the medium- to long-term analysis contemplated in the original panel report, considering also that compliance measures subject to Article 21.5 proceedings by their very nature will be in force for a shorter period of time. Moreover, the marketing loan and counter-cyclical programmes remained unchanged since the original proceedings.<sup>897</sup> Therefore, considering that relevant circumstances in the current proceedings have not changed since the original proceedings, it was proper for the Panel not to have deviated from the approach of the panel and the Appellate Body in the original proceedings, which relied on total costs of production, and did not to take into account off-farm income when comparing production cost with revenues.

423. The Panel's decision to undertake an analysis over the medium- to long-term and, therefore, to compare market revenues with total costs, rather than with variable costs, is consistent with the approach adopted by the Appellate Body in *Canada – Dairy (Article 21.5 – New Zealand and US)*.

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<sup>893</sup>See Appellate Body Report, *US – Upland Cotton*, paras. 452 and 453; and Original Panel Report, para. 7.1354 and footnote 1470 thereto.

<sup>894</sup>Appellate Body Report, *US – Upland Cotton*, para. 453 (quoting Original Panel Report, para. 7.1354).

<sup>895</sup>Original Panel Report, footnote 1470 to para. 7.1354.

<sup>896</sup>Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 103.

<sup>897</sup>See Panel Report, paras. 3.9 and 3.12.

The Appellate Body explained, in that case, that "fixed and variable costs are the total amount which the producer must spend in order to produce [a commodity] and the total amount it must recoup, in the long-term, to avoid making losses".<sup>898</sup> The fact that a producer does not recover the total costs of production may indicate that it is covering its losses from some other source, such as subsidies.<sup>899</sup> Consequently, we do not consider that the Panel erred in using total costs of production when calculating whether there was a gap between producers' costs of production and revenues.

424. In any event, the methodology used by the Panel in determining which production costs and revenues to compare to establish whether there is a gap between upland cotton producers' costs of production and revenues is not an issue of legal interpretation or application under Article 6.3(c) of the *SCM Agreement*. The existence of a revenue gap is not a legally required benchmark under Article 6.3(c). In other words, there is no legal consequence under Article 6.3(c) that necessarily flows from the fact that there is a gap between producers' revenues and costs. Rather, it is merely one of the elements that the Panel considered in determining whether there was "significant price suppression". Thus, the profitability of upland cotton production is a factual matter, the evaluation of which fell to the Panel to determine.

425. Regarding the use by the Panel of crop-specific data published by the USDA, we observe that the Panel relied on USDA cost of production surveys<sup>900</sup>, which combined total costs and total returns from upland cotton lint and cottonseed.<sup>901</sup> This type of cost data was also relied upon by the original panel in making its findings about United States upland cotton producers' cost of production. The Panel referred to the original panel's statement that these "data are calculated in accordance with a methodology which the USDA itself has deemed to be a sufficiently reliable reflection of United States upland cotton producers' costs and revenues."<sup>902</sup> Although the Panel agreed with the United

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<sup>898</sup> Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 87.

<sup>899</sup> See *ibid.*

<sup>900</sup> The United States also argues that using USDA cost data would lead to the absurd result that total cost of production was greater than market returns for nearly all United States field crops in MY 2005. (United States' appellant's submission, paras. 174-176) We note that, in response, Brazil refers to a report prepared by the United States Congressional Research Service, which indicates, based on USDA data, that it is only with the aid of subsidies that a substantial portion of United States production (of all crops) is made economically viable. (Brazil's appellee's submission, paras. 770 and 771 (referring to Schnepf and Womach, "Potential Challenges to US Farm Subsidies in the WTO" (Exhibit Bra-577 submitted by Brazil to the Panel), *supra*, footnote 227))

<sup>901</sup> See Panel Report, para. 10.185.

<sup>902</sup> Original Panel Report, para. 7.1354.

States that imputing values to resources for which there are no market transactions is not as reliable as direct market valuation, the Panel noted that "the methodology used by the USDA conforms to standards recommended by the [American Agricultural Economics Association], and the application of that methodology probably produces the best estimates that can be achieved."<sup>903</sup>

426. We see no reasons to interfere with the Panel's decision to rely on data calculated on the basis of a methodology that the United States Government itself deems to be reliable and which was accepted by the panel in the original proceedings. Despite considering that the United States Government deemed the cost data relied upon by the original panel (including revenues from cottonseed and costs from ginning) to be sufficiently reliable, the Panel also took into account the approach proposed by the United States in its submissions, which included only revenues from cotton lint and excluded ginning costs. The Panel found that, even excluding the revenues from cottonseed and the ginning costs, a significant gap existed between market revenues and total costs of production.<sup>904</sup>

427. As for non-cash opportunity costs for items such as unpaid labour and owned land, the Panel agreed with Brazil that such costs should be included in the calculation of total costs of production, because this was consistent with the basic economic principle that resources allocation is guided by opportunity cost. The Panel noted that all resources that a farmer uses to produce cotton have a cost (whether this must be paid in cash or not), which is the value they can obtain when employed in the next best alternative. In addition, the Panel noted that, by applying the methodology used by the USDA, it was possible to impute opportunity costs and arrive at a reliable estimate of total costs.<sup>905</sup>

428. Moreover, we note that, in *Canada – Dairy (Article 21.5 – US and New Zealand II)*, the Appellate Body ruled that non-cash opportunity costs such as family labour or cost of capital should have been included in the calculation of the cost of production of milk, noting that "the [cost of production standard] must cover all of the economic resources invested in the production ...

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<sup>903</sup>Panel Report, para. 10.169.

<sup>904</sup>See *ibid.*, paras. 10.190, 10.191 and 10.196.

<sup>905</sup>See *ibid.*, paras. 10.169 and 10.170.



irrespective of whether the resources involve an actual cash cost."<sup>906</sup> The Panel's approach was consistent with the approach followed by the Appellate Body in *Canada – Dairy (Article 21.5 – US and New Zealand II)*. We see no reason, therefore, to interfere with the Panel's decision to include non-cash opportunity costs for items such as unpaid labour and owned land in the calculation of total costs of production.

429. Turning to the Panel's decision not to take into account off-farm income and income from other crops in calculating producers' revenues, we recall that the original panel had already rejected the United States' request to include off-farm income as part of United States upland cotton producers' revenues. The original panel reasoned that its examination of costs and revenues should be confined to the upland cotton industry, considering that the legal focus of its analysis under Articles 5 and 6.3(c) of the *SCM Agreement* was on the subsidized product of upland cotton lint. The original panel also noted that the very fact that United States upland cotton farmers relied on cross-subsidization from off-farm income and income from other crops supported the proposition that, in the long term, they would lose money if they were involved in upland cotton production alone.<sup>907</sup>

430. The Panel in these Article 21.5 proceedings noted the reasoning of the original panel in rejecting off-farm income and turned to two new studies, which, according to the United States, "note the increased prevalence of off-farm employment and off-farm income for farm households in the United States".<sup>908</sup> The Panel noted that the new studies submitted by the United States demonstrate that off-farm income has grown in importance to farm operators' income, but are ambivalent as to the

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<sup>906</sup>Appellate Body Report, *Canada – Dairy (Article 21.5 – US and New Zealand II)*, para. 102. The Appellate Body also found that:

... For the dairy farmer, and his or her family, the investment of services in the dairy enterprise has an economic cost, as those services cannot be put to an alternative remunerative use. ... [F]rom the perspective of economic theory, any labour and management services provided to an enterprise involve such an economic "opportunity" cost. ...

The same is also true of any equity the owner invests in the dairy enterprise. The allocation of such capital is, clearly, an investment of economic resources and carries an economic opportunity cost to the owner because the capital cannot simultaneously be invested elsewhere.

(*Ibid.*, paras. 103 and 104 (footnotes omitted))

<sup>907</sup>See Original Panel Report, footnote 1470 to para. 7.1354.

<sup>908</sup>Panel Report, para. 10.178.

impact of off-farm income on farm exit.<sup>909</sup> The Panel concluded that, due to this ambivalence, the new studies submitted by the United States did not succeed in showing that off-farm income played a role in sustaining the economic viability of upland cotton farming and that, therefore, the studies failed to undermine Brazil's argument that United States producers would exit upland cotton farming without the support of marketing loan and counter-cyclical payments.

431. In our view, it was reasonable for the Panel to exclude off-farm income from United States upland cotton producers' income. First, considering that the Panel was assessing the profitability of upland cotton producers, we agree that its analysis should have been limited to costs and revenues related to upland cotton. Secondly, assuming that off-farm income plays a role in keeping upland cotton producers in business, such cross-subsidization by other activities appears to confirm, rather than contradict, the Panel's conclusion that upland cotton production is not economically viable for some producers. Thirdly, the Panel properly concluded that the studies produced by the United States are inconclusive as to the role played by off-farm income in upland cotton production.

432. The exclusion of off-farm income is one component of the Panel's determination of the existence of a revenue gap. We have already considered that the profitability of upland cotton production is a factual matter, the evaluation of which fell within the Panel's authority. Accordingly, we see no reason to interfere with the Panel's decision to rely on total costs, use USDA crop-specific data, include opportunity costs for items such as unpaid labour and owned land, and exclude off-farm income. We, therefore, find that the Panel's evaluation of these factors was proper and within the bounds of its authority as the trier of facts. The United States has not made a claim under Article 11 of the DSU with respect to the Panel's finding on the existence of a revenue gap, nor in relation to the components of the Panel's determination.

(d) Economic Simulation Model

433. The United States claims that the Panel erred in its evaluation of the economic simulations conducted by the parties regarding the impact of United States' subsidies on world prices for upland cotton. In particular, the United States submits that, "to rely on the results of modeling for its

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<sup>909</sup>Panel Report, paras. 10.180-10.184. For instance, the study by Hoppe and Korb notes that:

Off-farm work could hypothetically affect exits in two ways. First, off-farm work may be the first step in an exit from farming, which would be reflected in higher exits for farms the operators of which work off-farm. Second, off-farm work might lower the probability of exit by providing farm operator households with another source of income.

(Hoppe and Korb, "Understanding US Farm Exits" (Exhibit US-46 submitted by the United States to the Panel), *supra*, footnote 116, p. 20)

conclusion, the Panel would have had to have concluded which model or models were appropriate, determined the level of price suppression resulting from that model, and found that such price suppression was *significant*".<sup>910</sup>

434. We have already considered that, while the Panel appropriately examined the model, the parameters used by each party, and the arguments made by the parties, it could have gone somewhat further in its evaluation and comparative analysis of the economic simulations and the particular parameters used. We nevertheless concluded that, in its assessment of the simulations, the Panel did not commit an error of law.

435. The United States asserts that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, because it overlooked flaws in Brazil's economic simulation model and it misrepresented and distorted the results of the simulation conducted by the United States.<sup>911</sup> We disagree that the Panel "overlooked the flaws" in Brazil's economic model, considering that the Panel expressly stated that it was "mindful of the criticism by the United States that Brazil's model 'has no foundation within economic circles'" and that Brazil's model "needs to earn the confidence of this Panel".<sup>912</sup> Nor do we consider that the Panel "misrepresented and distorted" the results of the simulations carried out by the United States. The arguments presented by the United States on appeal do not succeed in demonstrating that the Panel erred in its evaluation of the economic simulation. Contrary to the United States' assertion, the Panel did not find that the United States' simulation demonstrated that the price suppression was significant. The Panel's finding was that the model, when run using parameters preferred by the United States, also showed price suppression, which the United States does not deny. The United States, rather, contends that the results showed that the price suppression would be minimal.<sup>913</sup> The Panel simply did not take a view on the significance of the results. Moreover, the Panel did not rely exclusively on the results of the

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<sup>910</sup>United States' appellant's submission, para. 196. (original emphasis)

<sup>911</sup>See *ibid.*, paras. 196 and 240.

<sup>912</sup>Panel Report, para. 10.220 (quoting United States' second written submission to the Panel, Annex I, para. 7). See also *ibid.*, paras. 10.202, 10.205, 10.207, and 10.216.

<sup>913</sup>The United States explains that:

Using long-run values for supply and demand elasticities, complete removal of the two programs would only show an increase in world prices of 2.26 per cent over the period MY 2002-2005 and 1.52 per cent over the period MY 2006-2008. Even though the [United States] estimates were overstated given the structural flaws in Brazil's model for which the United States was unable to adjust, the magnitude of the price suppression as demonstrated by the [United States] adjustments to the Brazilian model could hardly be called "significant".

(United States' appellant's submission, para. 238 (footnotes omitted))

simulations; rather, it noted that all simulations conducted by the parties "support the view" that marketing loan and counter-cyclical payments have led to an increase in United States production and exports of upland cotton that would then have suppressed world prices, a conclusion the Panel also reached on the basis of other elements and indicators. Thus, the results of the simulations were one of several elements on which the Panel based its finding under Article 6.3(c) of the *SCM Agreement*. In our view, the Panel's assessment of the economic simulations falls within its authority as the trier of facts and we have not been persuaded that the Panel exceeded the bounds of its authority.

(e) Impact of the Elimination of Step 2 Payments

436. The United States challenges the Panel's analysis of the impact of the elimination of Step 2 payments on three grounds. First, the United States argues that it demonstrated that there was a significant decline in United States production and exports of upland cotton in MY 2006 after the repeal of Step 2 payments.<sup>914</sup> As a result, the United States submits, Brazil had the burden of proving that the impact of the repeal of Step 2 payments on United States production and exports was modest. Therefore, the United States considers that the Panel erred in finding that "the elimination of this subsidy does not affect the price suppressing effects of the marketing loan payments and counter-cyclical payments in the world market for upland cotton."<sup>915</sup>

437. In our view, the United States' argument is based on a mischaracterization of Brazil's claim and of the findings of the Panel. As the complainant in these Article 21.5 proceedings, Brazil set out to prove that the effect of marketing loan and counter-cyclical payments was significant price suppression, within the meaning of Article 6.3(c) of the *SCM Agreement*. This did not require Brazil to establish that the impact of the elimination of Step 2 payments was "modest", though it did require it to demonstrate that the payments under the other two programmes (marketing loan and counter-cyclical payments) caused significant price suppression. We observe that the Panel's finding of significant price suppression did not rest on the impact of the elimination of Step 2 payments. The Panel found significant price suppression based on the following: its examination of the structure, design, and operation of marketing loan and counter-cyclical payments; the existence of a gap between United States upland cotton producers' costs of production and revenues; and the large magnitude of the subsidies and the substantial proportionate influence of the United States in the world market for upland cotton. Therefore, the Panel's finding of significant price suppression stands independently of the impact of the elimination of Step 2 payments.

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<sup>914</sup>See United States' appellant's submission, para. 198.

<sup>915</sup>*Ibid.*, para. 199 (quoting Panel Report, para. 10.253).

438. Secondly, the United States contends that the Panel misconstrued and overlooked the United States' evidence as to the *indirect impact* of the repeal of Step 2 payments, which will result, according to the United States, in the substantial decrease of marketing loan payments and in no significant increase of counter-cyclical payments.<sup>916</sup>

439. In assessing the indirect impact of the elimination of Step 2 payments, the Panel referred to projections of the United States Congressional Budget Office (the "USCBO"), which it found "credible"<sup>917</sup>, and according to which "lower [United States] prices due to elimination of Step 2 would lead to an increase in counter-cyclical payments of \$484 million over the 2006-2015 period" and "higher world prices would reduce the cost of cotton marketing loans by \$17 million over the 2006-2015 period."<sup>918</sup> The United States does not contest the accuracy of these figures but, rather, refers to other projections from a study by the Food and Agricultural Policy Research Institute (the "FAPRI"), which show that the elimination of the Step 2 payments programme results in an average increase of 0.4 cent/lb in the adjusted world price in MY 2006-2010, and a decline of the same amount in the marketing loan payments.<sup>919</sup>

440. In our view, the Panel did not exceed its authority as the trier of facts when it decided to rely on the USCBO projections after having found them to be credible.<sup>920</sup> We note, moreover, that the Panel specifically took note of the point made by the United States<sup>921</sup> that the projected reduction in marketing loan payments would apply only to MY 2006 and MY 2007, since no payments were expected beyond that date.<sup>922</sup> However, the Panel still found this projected reduction (US\$17 million) to be modest compared to the annual payments under the marketing loan programme and the increase

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<sup>916</sup>See United States' appellant's submission, para. 201.

<sup>917</sup>Panel Report, para. 10.238.

<sup>918</sup>Congressional Budget Office Cost Estimate, 20 October 2005, Agricultural Reconciliation Act of 2005, as approved by the Senate Committee on Agriculture, Nutrition, and Forestry on 19 October 2005, (Exhibit Bra-482 submitted by Brazil to the Panel), p. 5.

<sup>919</sup>See United States' appellant's submission, para. 202.

<sup>920</sup>The Appellate Body has repeatedly stated that the credibility and weight of the evidence is within the panel's discretion as the trier of facts. Appellate Body Report, *EC – Hormones*, para. 132; Appellate Body Report, *US – Wheat Gluten*, para. 151; Appellate Body Report, *EC – Sardines*, para. 299; Appellate Body Report, *US – Carbon Steel*, para. 142; Appellate Body Report, *Japan – Apples*, para. 221.

<sup>921</sup>See United States' appellant's submission, para. 204.

<sup>922</sup>See Panel Report, para. 10.238.

in counter-cyclical payments projected by the USCBO (US\$484 million).<sup>923</sup> The Panel also noted that it would not be enough simply to compare the magnitude of the reduction in marketing loan payments with that of the increase in counter-cyclical payments, because the production inducing effects of marketing loan payments were greater than those of counter-cyclical payments. Overall, however, the Panel found that the indirect effects of the elimination of Step 2 payments on United States production and exports would likely be small, considering the modest projected reduction in marketing loan payments coupled with significant increases in counter-cyclical payments and the fact that these changes would run counter to one another.<sup>924</sup>

441. Finally, according to the United States, the Panel's analysis of the impact of the elimination of Step 2 payments was flawed, because the Panel did not determine how much of an effect remained after the repeal of Step 2 payments, and how this compared to the price suppression found to exist in the original proceedings, in order to determine whether the remaining effect was significant.<sup>925</sup> The Panel set out to determine whether the effect of marketing loan and counter-cyclical payments was present serious prejudice in the form of significant price suppression, and for this purpose conducted an evaluation of several factors. There is no requirement in Article 6.3(c) of the *SCM Agreement* that a panel follow a particular methodology<sup>926</sup>, much less a requirement that a panel adopt an approach that involves subtracting the price suppressing effects of the repealed measure (in this case, the Step 2 payments). We do not see why the Panel could not have analyzed the price suppressing effects of the remaining marketing loan and counter-cyclical payments instead of analyzing the effects of the bundle of price-contingent subsidies at issue in the original proceedings and then subtracting the impact of the repeal of the Step 2 payments programme. In any event, even if the Panel did not precisely quantify the effect of the elimination of Step 2 payments, it did examine the amount of Step 2 payments before their elimination, the impact of the elimination upon export volumes, and the likely increase and decrease in marketing loan and counter-cyclical payments resulting from the elimination of Step 2 payments.

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<sup>923</sup>According to data submitted by Brazil, the projected amount of marketing loan payments in MY 2006 was US\$650 million based on USDA Budget Estimates, US\$475 million based on data from the FAPRI, and US\$757 million based on February 2007 USDA stochastic projections. (Panel Report, para. 10.25 (footnotes omitted)) Brazil also submitted data on projected counter-cyclical payments. Based on USDA Budget Estimates, allocated counter-cyclical payments to United States upland cotton producers were projected at US\$715 million in MY 2006, US\$516 million in MY 2007, and US\$449 million in MY 2008, MY 2009, and MY 2010. Based on the July 2006 FAPRI Baseline Update for US Agricultural Markets, projected allocated counter-cyclical payments were US\$912 million in MY 2006, US\$825 million in MY 2007, US\$732 million in MY 2008, US\$679 million in MY 2009, and US\$686 million in MY 2010. (See Panel Report, para. 10.33 (footnotes omitted))

<sup>924</sup>See *ibid.*, para. 10.239.

<sup>925</sup>See United States' appellant's submission, para. 209.

<sup>926</sup>See Appellate Body Report, *US – Upland Cotton*, para. 427.

(f) Magnitude of the Subsidies

442. The United States challenges the Panel's finding that, "when considered in conjunction with other factors, the order of magnitude of the marketing loan payments and counter-cyclical payments supports a finding of significant price suppression, even when account is taken of the decline in the amount of marketing loan payments projected for MY 2006."<sup>927</sup> According to the United States, this finding is premised on the Panel's earlier conclusion that the structure, design, and operation of the marketing loan and counter-cyclical payments had an "important revenue-stabilizing effect" on United States farmers, and that the payments bridged "the gap between costs of production and market revenues of [United States] upland cotton producers."<sup>928</sup> Since the United States considers that the Panel's findings on the structure, design, and operation of the marketing loan and counter-cyclical payments, and on the payments' role in covering the alleged cost-revenue gap, are erroneous, it considers that "the Panel's finding as to the magnitude of the marketing loan and counter-cyclical payments, which depends on those same findings, also fails as a matter of law."<sup>929</sup>

443. We agree that the Panel linked the probative value of the magnitude of the subsidies, for purposes of the analysis of significant price suppression, to its findings on the structure, design, and operation of the subsidies and on the gap between costs of production and market revenues of United States upland cotton producers.<sup>930</sup> We have already found that the Panel did not err in its findings on the structure, design, and operation of the marketing loan and counter-cyclical payments, including its findings on the market-insulating effects of those payments, and on the gap between producers' revenues and costs.<sup>931</sup> Therefore, given that the United States has not offered any additional arguments that could substantiate its challenge of the Panel's findings on the magnitude of the subsidies, we see no reason to disturb these findings.

(g) Substantial Proportionate Influence on the World Market for Upland Cotton

444. The United States claims that the Panel erred in finding that the United States exerts a substantial proportionate influence on the world market for upland cotton, because it overlooked how United States upland cotton competed with cotton from other sources<sup>932</sup> and the fact that the United

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<sup>927</sup>United States' appellant's submission, para. 216 (quoting Panel Report, para. 10.111).

<sup>928</sup>*Ibid.*

<sup>929</sup>*Ibid.*, para. 217.

<sup>930</sup>See Panel Report, para. 10.111. The Panel explained that "the relevance of the magnitude of the subsidies in this connection must also be assessed in light of our analysis above of the structure, design and operation of the subsidies".

<sup>931</sup>See *supra*, Sections VII.E.4(b) and (c).

<sup>932</sup>See United States' appellant's submission, para. 219.

States' shares of world production and exports of upland cotton have remained stable in recent years.<sup>933</sup>

445. The Panel found that, with 20.9 per cent of world upland cotton production and 39.8 per cent of world upland cotton exports in MY 2005, the United States exerted a substantial proportionate influence on the world market for upland cotton, even taking into account the projected declines in these shares in MY 2006.<sup>934</sup> The Panel referred to an analysis of a consultant retained by Brazil "of the functioning of the world market for upland cotton".<sup>935</sup> In this analysis, the consultant indicated that, "because China is a 'relatively small exporter[]', it has 'less of an impact on the discovery of world cotton prices'".<sup>936</sup> The Panel also discussed the role of China in its brief non-attribution analysis.

446. We do not see a contradiction between the fact that United States shares of world production and exports of upland cotton have remained stable at consistently high levels between MY 2002 and MY 2007 and the Panel's findings of substantial proportionate influence of the United States in the world market for upland cotton. This is because stable high United States shares of world production and exports of upland cotton could be seen as evidence of the fact that the United States continued to exert a substantial proportionate influence in the period examined by the Panel, just as it had during the period examined by the original panel. We also observe that the Panel specifically noted that this element supported its finding of significant price suppression when "analyzed in the light of the totality of the evidence".<sup>937</sup> Therefore, we do not consider that the Panel erred in finding that the United States exerts a substantial proportionate influence on the world market for upland cotton.<sup>938</sup>

#### F. *Conclusion*

447. For all the reasons stated above, the United States has not persuaded us that the Panel incorrectly interpreted the requirements of Article 6.3(c) of the *SCM Agreement* or erred in applying that provision to the facts of the case. We also find that the Panel did not fail to comply with its duties under Article 11 of the DSU to make an objective assessment of the matter before it, including an objective assessment of the facts of the case. We therefore *uphold* the Panel's findings, in paragraphs 10.256 and 15.1(a) of the Panel Report, that the United States acts inconsistently with its

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<sup>933</sup>See United States' appellant's submission, para. 220.

<sup>934</sup>See Panel Report, para. 10.58. For United States shares of production and exports in previous years, see *ibid.*, para. 10.56.

<sup>935</sup>See *ibid.*, footnote 279 to para. 10.58.

<sup>936</sup>Brazil's appellee's submission, para. 930 (quoting Declaration of Andrew Macdonald, attached as Annex II to Brazil's first written submission to the Panel, para. 23).

<sup>937</sup>Panel Report, para. 10.58.

<sup>938</sup>See *ibid.*



obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers pursuant to the FSRI Act of 2002 is significant price suppression, within the meaning of Article 6.3(c) of the *SCM Agreement*, in the world market for upland cotton constituting "present" serious prejudice to the interests of Brazil, within the meaning of Article 5(c) of the *SCM Agreement*. In addition, we *uphold* the Panel's consequential finding, in paragraphs 10.257 and 15.1(a) of the Panel Report, that "by acting inconsistently with Articles 5(c) and 6.3(c) of the *SCM Agreement* the United States has failed to comply with the DSB recommendations and rulings" and "[s]pecifically, the United States has failed to comply with its obligation under Article 7.8 of the *SCM Agreement* 'to take appropriate steps to remove the adverse effects or ... withdraw the subsidy'."

### **VIII. Findings and Conclusions**

448. For the reasons set out in this Report, the Appellate Body:

- (a) as regards the scope of these Article 21.5 proceedings:
  - (i) upholds the Panel's finding, in paragraph 9.27 of the Panel Report, that Brazil's claims relating to export credit guarantees for pig meat and poultry meat are properly within the scope of these Article 21.5 proceedings. Because the condition on which it is predicated has not been fulfilled, the Appellate Body does not find it necessary to consider Brazil's other appeal that the Panel erred when it found that the measure that is the subject of Brazil's claims is not the revised GSM 102 programme itself; and
  - (ii) upholds the Panel's finding, in paragraph 9.81 of the Panel Report, that Brazil's claims against marketing loan and counter-cyclical payments made by the United States after 21 September 2005 are properly within the scope of these Article 21.5 proceedings. Because the condition on which it is predicated has not been fulfilled, the Appellate Body does not find it necessary to consider Brazil's other appeal that the Panel erred in finding that the original panel's conclusions and recommendations addressed only the payments made under the marketing loan and counter-cyclical payments programmes, and not the programmes themselves;
- (b) as regards the revised GSM 102 export credit guarantee programme:

- (i) finds that the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU, because it dismissed the import of the re-estimates data submitted by the United States on the basis of internally inconsistent reasoning. Consequently, the Appellate Body reverses the Panel's intermediate finding, in paragraph 14.89 of the Panel Report, that "the initial subsidy estimates provide a strong indication that GSM 102 export credit guarantees are provided against premia which are inadequate to cover the long-term operating costs and losses of the GSM 102 programme";
- (ii) upholds the Panel's finding, in paragraph 14.131 of the Panel Report, that "the GSM 102 programme is not designed to cover its long term operating costs and losses";
- (iii) upholds, albeit for reasons that differ from those of the Panel, the Panel's conclusion, in paragraph 14.133 of the Panel Report, that "the GSM 102 export credit guarantee programme constitutes an 'export subsidy' because it is provided against premiums which are inadequate to cover its long term operating costs and losses under the terms of item (j) of the Illustrative List". Consequently, upholds the Panel's finding, in paragraph 14.134 of the Panel Report, that GSM 102 export credit guarantees issued after 1 July 2005 are export subsidies within the meaning of Article 3.1(a) of the *SCM Agreement* and Article 10.1 of the *Agreement on Agriculture*; and
- (iv) in the light of this, the following findings, in paragraphs 14.140, 14.149, 14.150, 14.156, 14.157, and 15.1(c) of the Panel Report, also stand:
  - regarding export credit guarantees issued under the revised GSM 102 programme after 1 July 2005 the United States acts inconsistently with Article 10.1 of the *Agreement on Agriculture* by applying export subsidies in a manner which results in the circumvention of United States' export subsidy commitments with respect to certain unscheduled products and certain scheduled products, and as a result acts inconsistently with Article 8 of the *Agreement on Agriculture*;

- regarding export credit guarantees issued under the revised GSM 102 programme after 1 July 2005, the United States also acts inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement* by providing export subsidies to unscheduled products and by providing export subsidies to scheduled products in excess of the commitments of the United States under the *Agreement on Agriculture*; and
  - by acting inconsistently with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*, the United States has failed to comply with the DSB recommendations and rulings. Specifically, the United States has failed to bring its measures into conformity with the *Agreement on Agriculture* and has failed "to withdraw the subsidy without delay"; and
- (c) as regards whether the effect of marketing loan and counter-cyclical payments is significant price suppression:
- (i) upholds the Panel's findings, in paragraphs 10.256, 10.257, and 15.1(a) of the Panel Report, that:
    - the United States acts inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to United States upland cotton producers pursuant to the FSRI Act of 2002 is significant price suppression, within the meaning of Article 6.3(c) of the *SCM Agreement*, in the world market for upland cotton, constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*; and
    - by acting inconsistently with Articles 5(c) and 6.3(c) of the *SCM Agreement*, the United States has failed to comply with the DSB's recommendations and rulings; specifically, the United States failed to comply with its obligation under Article 7.8 of the *SCM Agreement* "to take appropriate steps to remove the adverse effects or ... withdraw the subsidy"; and

- (ii) finds that the Panel did not fail to make an objective assessment of the matter before it, as required by Article 11 of the DSU, in its analysis of Brazil's claim that the effect of the marketing loan and counter-cyclical payments is significant price suppression.

449. The Appellate Body recommends that the DSB request the United States to bring its measures, found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the *Agreement on Agriculture* and the *SCM Agreement*, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 16th day of May 2008 by:

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Luiz Olavo Baptista  
Presiding Member

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Jennifer Hillman  
Member

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David Unterhalter  
Member

ANNEX I

**WORLD TRADE  
ORGANIZATION**

**WT/DS267/33**  
19 February 2008

(08-0733)

Original: English

**UNITED STATES – SUBSIDIES ON UPLAND COTTON**

Recourse to Article 21.5 of the DSU by Brazil

Notification of an Appeal by the United States  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 12 February 2008, from the Delegation of the United States, is being circulated to Members.

Pursuant to Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 20 of the Working Procedures for Appellate Review, the United States hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the report of the panel in *United States – Subsidies on Upland Cotton: Recourse to Article 21.5 of the DSU by Brazil* (WT/DS267/RW) ("Panel Report") and certain legal interpretations developed by the panel in this dispute.

1. The United States seeks review by the Appellate Body of the panel's finding that Brazil's claims relating to GSM 102 export credit guarantees for exports of pig meat and poultry meat were within the scope of this proceeding under Article 21.5 of the DSU.<sup>1</sup> This finding is in error and is based on erroneous findings on issues of law and related legal interpretations.
2. The United States seeks review by the Appellate Body of the panel's finding that Brazil's claim that the United States failed to comply with its obligation under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") with respect to marketing loan payments and counter-cyclical payments made by the United States after September 21, 2005 was properly before the panel.<sup>2</sup> This finding is in error and is based on erroneous findings on issues of law and related legal interpretations.
3. The United States seeks review by the Appellate Body of the panel's legal conclusion that as to GSM 102 export credit guarantees issued after July 1, 2005, the United States acted inconsistently with Article 10.1 of the *Agreement on Agriculture* by applying export subsidies in a manner which resulted in the circumvention of U.S. export subsidy commitments with respect to unscheduled

<sup>1</sup>See, e.g., Panel Report, paras. 9.20-9.27.

<sup>2</sup>See, e.g., Panel Report, paras. 9.75-9.81.

products and certain scheduled products, and as a result acted inconsistently with Article 8 of the *Agreement on Agriculture*.<sup>3</sup> The United States also seeks review by the Appellate Body of the panel's related legal conclusion that the United States acted inconsistently with Articles 3.1(a) and 3.2 of the *SCM Agreement* by providing export subsidies to unscheduled products and by providing export subsidies to scheduled products in excess of U.S. commitments under the *Agreement on Agriculture*.<sup>4</sup> These conclusions are in error and are based on erroneous findings on issues of law and related legal interpretations.

4. The United States requests the Appellate Body to find that the panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU with respect to Brazil's claims that the GSM 102 export credit guarantees constituted prohibited export subsidies. The panel's failure to undertake an objective assessment includes, for example, the following:

- (a) The panel disregarded and misconstrued the import of the GSM 102 export credit guarantee budgetary re-estimates data submitted by the United States<sup>5</sup>;
- (b) When conducting its analysis under item (j) of the Illustrative List of Export Subsidies to the *SCM Agreement*, the panel relied upon assumptions not supported by evidence on the record<sup>6</sup> and on inappropriate comparisons of fees.<sup>7</sup>

5. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States failed to comply with the DSB's rulings and recommendations relating to the original panel's findings of inconsistency with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.<sup>8</sup> This erroneous conclusion is based on the panel's erroneous legal conclusions and failure to undertake an objective assessment, described in paragraphs 3-4 above.

6. The United States seeks review by the Appellate Body of the panel's finding that the United States acted inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to U.S. upland cotton producers after September 21, 2005 was significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* in the world market for upland cotton constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.<sup>9</sup> This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations.

7. The United States requests the Appellate Body to find that the panel failed to make "an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements" as required by Article 11 of the DSU with respect to Brazil's claims of present serious prejudice. The panel's failure to undertake an objective assessment includes, for example, the following:

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<sup>3</sup>See, e.g., Panel Report, paras. 14.89, 14.97, 14.110, 14.115, 14.120, 14.128-14.129, 14.131, 14.133(a)-(c), 14.134, 14.140, 14.149, 15.1(c).

<sup>4</sup>See, e.g., Panel Report, paras. 14.156, 15.1(c).

<sup>5</sup>See, e.g., Panel Report, paras. 14.80-14.81.

<sup>6</sup>See, e.g., Panel Report, paras. 14.101, 14.125, 14.129.

<sup>7</sup>See, e.g., Panel Report, paras. 14.94-14.103, 14.124-14.128, 14.129-14.131.

<sup>8</sup>See, e.g., Panel Report, paras. 14.150, 14.157, 15.1(c), 15.2.

<sup>9</sup>See, e.g., Panel Report, paras. 10.50, 10.58, 10.104, 10.111, 10.196, 10.222, 10.231, 10.239, 10.243, 10.247-10.256, 15.1(a).

- (a) The panel disregarded and misconstrued evidence on the record concerning the structure, design, and operation of marketing loan and counter-cyclical payments<sup>10</sup>;
- (b) The panel disregarded and misconstrued evidence on the record and its own finding that the U.S. share of world upland cotton production and exports was stable over MY 2002-2005<sup>11</sup>;
- (c) The panel misconstrued the results of U.S. econometric modeling concerning the effect of U.S. marketing loan and counter-cyclical payments on the world price for upland cotton<sup>12</sup>;
- (d) The panel disregarded and misconstrued evidence concerning the alleged gap between the costs of production and the revenues of U.S. upland cotton farmers<sup>13</sup>;
- (e) The panel disregarded evidence relevant to ensuring that the effect of other factors on upland cotton prices was not improperly attributed to U.S. marketing loan and counter-cyclical payments.<sup>14</sup>

8. The United States seeks review by the Appellate Body of the panel's legal conclusion that the United States failed to comply with the DSB's rulings and recommendations related to the original panel's findings of inconsistency with Articles 5 and 6 of the *SCM Agreement*.<sup>15</sup> This erroneous conclusion is based on the panel's erroneous legal conclusions and failure to undertake an objective assessment, described in paragraphs 6-7 above.

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<sup>10</sup>See, e.g., Panel Report, paras. 10.61-10.82, 10.92-10.95.

<sup>11</sup>See, e.g., Panel Report, paras. 10.127, 10.251.

<sup>12</sup>See, e.g., Panel Report, paras. 10.221-10.222, 10.251.

<sup>13</sup>See, e.g., Panel Report, paras. 10.176, 10.184, 10.195-10.196.

<sup>14</sup>See, e.g., Panel Report, para. 10.243.

<sup>15</sup>See, e.g., Panel Report, paras. 10.257, 15.1(a), 15.2-15.3.



ANNEX II

**WORLD TRADE  
ORGANIZATION**

**WT/DS267/34**  
29 February 2008

(08-0923)

Original: English

**UNITED STATES – SUBSIDIES ON UPLAND COTTON**

Recourse to Article 21.5 of the DSU by Brazil

Notification of an Other Appeal by Brazil  
under Article 16.4 and Article 17 of the Understanding on Rules  
and Procedures Governing the Settlement of Disputes (DSU),  
and under Rule 23(1) of the Working Procedures for Appellate Review

The following notification, dated 25 February 2008, from the Delegation of Brazil, is being circulated to Members.

1. Pursuant to Articles 16.4 and 17.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Rule 23 of the *Working Procedures for Appellate Review*, Brazil appeals certain issues of law and legal interpretations in the Panel Report in *United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil*.<sup>1</sup>

2. Brazil's first appeal is contingent on the Appellate Body reversing the compliance Panel's finding, in accordance with the United States' appeal, that payments made after 21 September 2005 pursuant to the Marketing Loan Payments ("ML") program and Counter-Cyclical Payments ("CCP") program were within the scope of this proceeding under Article 21.5 and, therefore, properly before the compliance Panel.<sup>2</sup>

3. In that event, Brazil seeks reversal of the compliance Panel's finding that the DSB's recommendations and rulings in the original proceedings, and the original panel's recommendations and conclusions, included only the ML and CCP payments, and not also the ML and CCP programs.<sup>3</sup> This finding constitutes an error by the compliance Panel under Article 21.5 of the DSU. Alternatively, in making this finding, the compliance Panel failed to make an objective assessment of the matter under Article 11 of the DSU.

4. Brazil furthermore requests that the Appellate Body find:

<sup>1</sup>WT/DS267/RW, circulated on 18 December 2007.

<sup>2</sup>Panel Report, paras. 9.75 to 9.81, as challenged in the United States' Appellant's Submission, Section II.B, paras. 56 to 74.

<sup>3</sup>Panel Report, paras. 9.44 to 9.55, in particular para. 9.47.

- (a) that the ML and CCP payments made after 21 September 2005 constitute measures taken to comply with the DSB's recommendations and rulings in the original proceedings within the meaning of Article 21.5 of the DSU, because of the close connection to the ML and CCP programs subject to those recommendations and rulings; or, alternatively,
- (b) that the United States, through the continued use of the ML and CCP programs, causes serious prejudice to Brazil's interests within the meaning of Articles 5(c) and 6.3(c) of the *Agreement on Subsidies and Countervailing Measures*.

5. Second, in the event that the Appellate Body reverses, in accordance with the United States' appeal, the compliance Panel's finding that Brazil's claims "relating to export credit guarantees ["ECGs"] for exports of pig meat and poultry meat" were properly before the compliance Panel<sup>4</sup>, Brazil requests that the Appellate Body find that the compliance Panel erred in rejecting Brazil's view that "the measure that is the subject of [Brazil's] claims is the amended [General Sales Manager ("GSM")] programme itself".<sup>5</sup> This finding is inconsistent with Article 21.5 of the DSU. Alternatively, in making this finding, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU. Brazil requests that the Appellate Body find, instead, that the amended GSM program itself was the measure taken to comply for purposes of Article 21.5 of the DSU, was the measure subject to Brazil's claims, and was properly before the compliance Panel.

6. As part of this conditional appeal relating to ECGs, Brazil further requests that the Appellate Body find that the United States applies the GSM 102 program in a manner that results in circumvention of U.S. export subsidy commitments with respect to pig meat and poultry meat, contrary to Articles 10.1 and 8 of the *Agreement on Agriculture*, as well as to Articles 3.1(a) and 3.2 of the *SCM Agreement*.

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<sup>4</sup>Panel Report, para. 9.27, as challenged in the United States' Appellant's Submission, Section II.A, paras. 33 to 55.

<sup>5</sup>Panel Report, para. 9.25.