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UNITED STATES – SUBSIDIES ON UPLAND COTTON

AB-2004-5

Report of the Appellate Body

TABLE OF CASES CITED IN THIS REPORT

Short Title	Full Case Title and Citation
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Argentina – Footwear (EC)	Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515
Argentina – Textiles and Apparel	Panel Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, adopted 22 April 1998, as modified by the Appellate Body Report, WT/DS56/AB/R, DSR 1998:III, 1033
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Canada – Aircraft	Appellate Body Report, Can*ada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377
Canada – Aircraft (Article 21.5 – Brazil)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft – Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 4299
Canada – Autos	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2985
Canada – Dairy	Appellate Body Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R and Corr.1, adopted 27 October 1999, DSR 1999:V, 2057
Canada – Dairy	Panel Report, *Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/R, WT/DS113/R, adopted 27 October 1999, as modified by the Appellate Body Report, WT/DS103/AB/R, WT/DS113/AB/R, DSR 1999:VI, 2097
Canada – Dairy (Article 21.5 – New Zealand and US)	Appellate Body Report, *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*, WT/DS103/AB/RW, WT/DS113/AB/RW, adopted 18 December 2001, DSR 2001:XIII, 6829
Canada – Dairy (Article 21.5 – New Zealand and US II)	Appellate Body Report, *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*, WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003
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EC – Bananas III	Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591
EC – Bed Linen (Article 21.5 – India)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/AB/RW, adopted 24 April 2003
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EC – Sardines	Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002
EEC – Animal Feed Proteins	GATT Panel Report, *EEC – Measures on Animal Feed Proteins*, adopted 14 March 1978, BISD 25S/49
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India – Autos	Panel Report, *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002
India – Patents (US)	Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9
Indonesia – Autos	Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R and Corr.1, 2, 3, and 4, adopted 23 July 1998, DSR 1998:VI, 2201
Italy – Agricultural Machinery	GATT Panel Report, *Italian Discrimination Against Imported Agricultural Machinery*, adopted 23 October 1958, BISD 7S/60
Japan – Alcoholic Beverages II	Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97
Japan – Apples	Appellate Body Report, *Japan - Measures Affecting the Importation of Apples*, WT/DS245/AB/R, adopted 10 December 2003
Korea – Alcoholic Beverages	Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R, DSR 1999:I, 44
Korea – Dairy	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3
Mexico – Corn Syrup (Article 21.5 – US)	Appellate Body Report, *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States*, WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6675
US – Canadian Tuna	GATT Panel Report, *United States – Prohibition of Imports of Tuna and Tuna Products from Canada*, adopted 22 February 1982, BISD 29S/91
US – Carbon Steel	Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002

US – Certain EC Products	Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373
US – Certain EC Products	Panel Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/R and Add.1, adopted 10 January 2001, as modified by the Appellate Body Report, WT/DS165/AB/R, DSR 2001:II, 413
US – Corrosion-Resistant Steel Sunset Review	Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004
US – Cotton Yarn	Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, DSR 2001:XII, 6027
US – FSC	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619
US – FSC (Article 21.5 – EC)	Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55
US – FSC (Article 21.5 – EC)	Panel Report, *United States – Tax Treatment for "Foreign Sales Corporations" – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS108/RW, adopted 29 January 2002, as modified by the Appellate Body Report, WT/DS108/AB/RW, DSR 2002:I, 119
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US – Lead and Bismuth II	Appellate Body Report, *United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2595
US – Line Pipe	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/AB/R, adopted 8 March 2002
US – Section 211 Appropriations Act	Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, 589
US – Shrimp (Article 21.5 – Malaysia)	Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, 6481
US – Softwood Lumber IV	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004
US – Steel Safeguards	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248AB/R, WT/DS249AB/R, WT/DS251AB/R, WT/DS252AB/R, WT/DS253AB/R, WT/DS254AB/R, WT/DS258AB/R, WT/DS259AB/R, adopted 10 December 2003

US – Wheat Gluten	Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, 717
US – Wool Shirts and Blouses	Appellate Body Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R and Corr.1, adopted 23 May 1997, DSR 1997:I, 323
US – Wool Shirts and Blouses	Panel Report, *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, adopted 23 May 1997, as upheld by the Appellate Body Report, WT/DS33/AB/R, DSR 1997:I, 343

TABLE OF ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AMS	Aggregate Measurement of Support
Anti-Dumping Agreement	*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*
CCC	Commodity Credit Corporation
CCP payments	counter-cyclical payments
DP payments	direct payments
DSB	Dispute Settlement Body
DSU	*Understanding on Rules and Procedures Governing the Settlement of Disputes*
ETI Act	FSC Repeal and Extraterritorial Income Exclusion Act of 2000, Public Law 106-519
FAIR Act of 1996	Federal Agriculture Improvement and Reform Act of 1996, Public Law 104-127
FSRI Act of 2002	Farm Security and Rural Investment Act of 2002, Public Law 107-171
GATT 1994	*General Agreement on Tariffs and Trade 1994*
GSM 102	General Sales Manager 102
GSM 103	General Sales Manager 103
MLA payments	market loss assistance payments
peace clause	Article 13 of the *Agreement on Agriculture*
Panel Report	Panel Report, *United States – Subsidies on Upland Cotton* ("*US – Upland Cotton*"), WT/DS267/R, and Corr.1, 8 September 2004
PFC payments	production flexibility contract payments
price-contingent subsidies	Marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments
SCGP	Supplier Credit Guarantee Program
SCM Agreement	*Agreement on Subsidies and Countervailing Measures*
Step 2 payments	User marketing (Step 2) payments
USDA	United States Department of Agriculture
Vienna Convention	*Vienna Convention on the Law of Treaties*, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679
Working Procedures	*Working Procedures for Appellate Review*
WTO	World Trade Organization
WTO Agreement	*Marrakesh Agreement Establishing the World Trade Organization*

WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Subsidies on Upland Cotton

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

Argentina, *Third Participant*
Australia, *Third Participant*
Benin, *Third Participant*
Canada, *Third Participant*
Chad, *Third Participant*
China, *Third Participant*
European Communities, *Third Participant*
India, *Third Participant*
New Zealand, *Third Participant*
Pakistan, *Third Participant*
Paraguay, *Third Participant*
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*
Venezuela, *Third Participant*

AB-2004-5

Present:

Janow, Presiding Member
Baptista, Member
Ganesan, 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* (the "Panel Report").[1] The Panel was established on 18 March 2003 to consider claims by Brazil regarding various United States measures[2] that Brazil alleged constituted actionable subsidies within the meaning of Part III of the *Agreement on Subsidies and Countervailing Measures* (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 alleged that certain of these measures were inconsistent with Article III:4 of the GATT 1994. The United States argued that some

[1]WT/DS267/R, 8 September 2004.

[2]Brazil made claims in respect of marketing loan program payments, user marketing (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 106-519) (the "ETI Act of 2000"). Brazil also made claims regarding legislation and regulations underlying certain of these programs. All of these measures are described more fully in paragraphs 7.200 to 7.250 of the Panel Report and are discussed further in the relevant sections of this Report.

of the measures were domestic support measures that were exempt from certain actions by virtue of paragraphs (a) and (b) of Article 13 of the *Agreement on Agriculture*.

2. The Panel Report was circulated to Members of the World Trade Organization (the "WTO") on 8 September 2004. In paragraph 7.194 of its Report, the Panel made the following findings with respect to whether certain measures fell within its terms of reference:

> The Panel rules that the following measures, as addressed in document WT/DS267/7, are within its terms of reference:
>
> (i) export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities;
>
> (ii) production flexibility contract payments and market loss assistance payments[.][3]

3. The Panel also ruled, in paragraph 7.196 of its Report, that:

> ... in its request for consultations in document WT/DS267/1, Brazil provided a statement of available evidence with respect to export credit guarantees under the GSM 102, GSM 103 and SCGP programmes relating to upland cotton and eligible agricultural commodities other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.

4. With respect to the substantive issues raised by the parties, the Panel set out the following conclusions in paragraph 8.1 of its Report:

> (a) Article 13 of the *Agreement on Agriculture* is not in the nature of an affirmative defence;
>
> (b) PFC payments[4], DP payments[5], and the legislative and regulatory provisions which establish and maintain the DP programme, do not satisfy the condition in paragraph (a) of Article 13 of the *Agreement on Agriculture*;

[3]The Panel also ruled that production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments to upland cotton producers with respect to non-upland cotton base acres; cottonseed payments under both Public Law 106-224 and Public Law 107-25 (for the 2000 crop); storage payments and interest subsidies that implement the marketing loan program; and payments under programs and provisions within the Panel's terms of reference made after the date on which the Panel was established, were all within its terms of reference. (See Panel Report, para. 7.194(iii)-(vi)) The Panel also ruled that certain other measures fell outside of its terms of reference: see Panel Report, para. 7.195

[4]Production flexibility contract payments. Production flexibility contract payments are described by the Panel in paras. 7.212 ff of the Panel Report and are discussed further *infra*, para. 251.

[5]Direct payments. Direct payments are described by the Panel in paras. 7.218 ff of the Panel Report and are discussed further *infra*, para. 312.

(c) United States domestic support measures considered in Section VII:D of this report[6] grant support to a specific commodity in excess of that decided during the 1992 marketing year and, therefore, do not satisfy the conditions in paragraph (b) of Article 13 of the *Agreement on Agriculture* and, therefore, are not exempt from actions based on paragraph 1 of Article XVI of the *GATT 1994* or Articles 5 and 6 of the *SCM Agreement*;

(d) concerning United States export credit guarantees under the GSM 102[7], GSM 103[8] and SCGP[9] export credit guarantee programmes:

(i) in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice):

- United States export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes are export subsidies applied in a manner which results in circumvention of United States' export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture* and they are therefore inconsistent with Article 8 of the *Agreement on Agriculture*;

- as they do not conform fully to the provisions of Part V of the Agreement on Agriculture, they do not satisfy the condition in paragraph (c) of Article 13 of the *Agreement on Agriculture* and, therefore, are not exempt from actions based on Article XVI of the *GATT 1994* or Articles 3, 5 and 6 of the *SCM Agreement*;

[6]In Section VII:D of the Panel Report, the Panel considered the following measures for purposes of calculating support during the implementation period in which Article 13 of the *Agreement on Agriculture* applies: marketing loan program payments, user marketing (Step 2) payments to domestic users (and not to exporters), production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments for the 1999, 2000, and 2002 crops of cottonseed. (Panel Report, para. 7.537 and footnote 695 thereto)

[7]General Sales Manager 102 ("GSM 102"). The United States' export credit guarantee programs, including the GSM 102 program, are described by the Panel in paras. 7.236 ff of the Panel Report and are discussed further *infra*, paras. 586-587.

[8]General Sales Manager 103 ("GSM 103"). The United States' export credit guarantee programs, including the GSM 103 program, are described by the Panel in paras. 7.236 ff of the Panel Report and are discussed further *infra*, paras. 586 and 588.

[9]Supplier Credit Guarantee Program ("SCGP"). The United States' export credit guarantee programs, including the SCGP program, are described by the Panel in paras. 7.236 ff of the Panel Report and are discussed further *infra*, paras. 586 and 589.

- United States export credit guarantees under 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*.

(ii) however, in respect of exports of unscheduled agricultural products not supported under the programmes and other scheduled agricultural products:

- the United States has established that export credit guarantees under the GSM 102, GSM 103 and SCGP export credit guarantee programmes have not been applied in [a] manner which either results in, or which threatens to lead to, circumvention of United States export subsidy commitments within the meaning of Article 10.1 and that they therefore are not inconsistent with Article 8 of the *Agreement on Agriculture*;

- in these circumstances, and as Brazil has also not made a prima facie case before this Panel that the programmes do not conform fully to the provisions of Part V of the *Agreement on Agriculture*, this Panel must treat them as if they are exempt from actions based on Article XVI of the *GATT 1994* and Article 3 of the *SCM Agreement* in this dispute.

(e) concerning section 1207(a) of the FSRI Act of 2002[10] providing for user marketing (Step 2) payments to exporters of upland cotton:

(i) section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton is an export subsidy, listed in Article 9.1(a) of the *Agreement on Agriculture*, provided in respect of upland cotton, an unscheduled product. It is, therefore, inconsistent with the United States' obligations under Articles 3.3 and 8 of the *Agreement on Agriculture;*

[10]Farm Security and Rural Investment Act of 2002 (the "FSRI Act of 2002"); Public Law 107-171.

(ii) as it does not conform fully to the provisions of Part V of the *Agreement on Agriculture*, it does not satisfy the condition in paragraph (c) of Article 13 of the *Agreement on Agriculture* and, therefore, is not exempt from actions based on Article XVI of the *GATT 1994* or Articles 3, 5 and 6 of the *SCM Agreement;*

(iii) section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters of upland cotton is an export subsidy prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*.

(f) concerning section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users of upland cotton: it is an import substitution subsidy prohibited by Articles 3.1(b) and 3.2 of the *SCM Agreement*;

(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, MLA payments[11] and CCP payments[12] -- 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*;

(ii) however, Brazil has not established that:

- the effect of PFC payments, DP payments and crop insurance 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*; or

[11]Market loss assistance payments. Market loss assistance payments are described by the Panel in paras. 7.216 ff of the Panel Report and are discussed further *infra*, para. 251 and footnote 368.

[12]Counter-cyclical payments. Counter-cyclical payments are described by the Panel in paras. 7.223 ff of the Panel Report and are discussed further *infra*, footnote 370.

- the effect of the United States subsidy measures listed in paragraph 7.1107 of Section VII:G of this report[13] is an increase in the United States' world market share within the meaning of Article 6.3(d) of the *SCM Agreement* constituting serious prejudice within the meaning of Article 5(c) of the *SCM Agreement.*

(h) concerning the ETI Act of 2000:

(i) Brazil has not made a prima facie case before this Panel that the ETI Act of 2000 and alleged export subsidies provided thereunder are inconsistent with Articles 10.1 and 8 of the *Agreement on Agriculture* in respect of upland cotton;

(ii) with respect to the condition in Article 13(c)(ii) of the *Agreement on Agriculture*, as Brazil has also not made a prima facie case before this Panel that they do not conform fully to the provisions of Part V of the *Agreement on Agriculture* in respect of upland cotton, this Panel must treat them as if they are exempt from actions based on Article XVI of the *GATT 1994* and Article 3 of the *SCM Agreement* in this dispute. (footnotes omitted)

5. Based on these conclusions, the Panel recommended that the United States bring the measures listed in paragraphs 8.1(d)(i) and 8.1(e) of the Panel Report into conformity with the *Agreement on Agriculture*[14]; and withdraw the prohibited subsidies listed in paragraphs 8.1(d)(i), 8.1(e) and 8.1(f) of the Panel Report without delay and, at the latest, within six months of the date of adoption of the Panel Report by the Dispute Settlement Body (the "DSB") or 1 July 2005 (whichever is earlier).[15] With respect to the "mandatory price-contingent United States subsidy measures" addressed in paragraph 8.1(g)(i) of the Panel Report, the Panel noted that, pursuant to Article 7.8 of the *SCM Agreement*, "upon adoption of [the Panel Report] the United States is under an obligation to 'take appropriate steps to remove the adverse effects or ... withdraw the subsidy'."[16]

[13]The Panel listed the following measures in paragraph 7.1107 of its Report: "(i) user marketing (Step 2) payments to domestic users and exporters; (ii) marketing loan programme payments; (iii) production flexibility contract payments; (iv) market loss assistance payments; (v) direct payments; (vi) counter-cyclical payments; (vii) crop insurance payments; (viii) cottonseed payments for the 2000 crop; and (ix) legislative and regulatory provisions currently providing for the payment of measures in (i), (ii), (v), (vi) and (vii) above".

[14]Panel Report, para. 8.3(a).

[15]*Ibid*., paras. 8.3(b) and 8.3(c).

[16]*Ibid*., para. 8.3(d).

6. On 18 October 2004, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU), and filed a Notice of Appeal[17] pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").[18] On 28 October 2004, the United States filed its appellant's submission.[19] On 2 November 2004, Brazil filed an other appellant's submission.[20] On 16 November 2004, Brazil and the United States each filed an appellee's submission.[21]

7. On 16 November 2004, Argentina, Australia, Canada, China, the European Communities, and New Zealand each filed a third participant's submission, and Benin and Chad filed a joint third participants' submission.[22] India, Pakistan, Paraguay, Venezuela, and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu notified the Appellate Body of their intention to appear at the oral hearing.[23]

8. After consultation with the Appellate Body Secretariat, Brazil and the United States noted, in letters filed on 10 December 2004, 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 for several reasons: the issues arising in this

[17]WT/DS267/17, 18 October 2004, attached as Annex 1 to this Report.

[18]WT/AB/WP/4, 1 May 2003. Revised *Working Procedures* were circulated by the Appellate Body during the course of these proceedings (WT/AB/WP/5, 4 January 2005). These revised *Working Procedures*, however, apply only to appeals initiated after 1 January 2005 and therefore did not apply to this appeal.

[19]Pursuant to Rule 21(1) of the *Working Procedures*. In a letter dated 1 November 2004, Brazil, without requesting action by the Appellate Body, drew attention to the failure by the United States to submit its appellant's submission in a timely fashion. Brazil observed that the United States' appellant's submission was submitted on 28 October 2004 after the deadline of 5:00 p.m. that had been established by the Division in the *Working Schedule* issued pursuant to Rule 26 of the *Working Procedures*.

[20]Pursuant to Rule 23(1) of the *Working Procedures*.

[21]Pursuant to Rules 22 and 23(3) of the *Working Procedures*, respectively.

[22]Pursuant to Rule 24(1) of the *Working Procedures*.

[23]Pursuant to Rule 24 of the *Working Procedures*. The notifications were received on the following dates: India, 16 November 2004; Pakistan, 17 November 2004; Paraguay, 17 November 2004; Venezuela, 17 November 2004; and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, 18 November 2004.

appeal were particularly numerous and complex compared to prior appeals, which increased the burden on the Appellate Body and WTO translation services; WTO translation services were unavailable during the WTO holiday period; and the Appellate Body was likely to be considering two or three other appeals during the same period. Brazil and the United States accordingly confirmed that they would deem the Appellate Body Report in this proceeding, issued no later than 3 March 2005, to be an Appellate Body Report circulated pursuant to Article 17.5 of the DSU.[24]

9. The oral hearing in this appeal was held on 13-15 December 2004. The participants and third participants presented oral arguments (with the exception of Pakistan, Paraguay, and Venezuela) and responded to questions posed by the Members of the Division hearing the appeal.

II. Arguments of the Participants and the Third Participants

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

1. Domestic Support

(a) Terms of Reference – Expired Measures

10. The United States contends that the Panel was wrong to reject its argument that payments under the expired production flexibility contract and market loss assistance programs were outside the Panel's terms of reference. The United States asks the Appellate Body to reverse the Panel's finding because these measures had expired before Brazil requested consultations.

11. Article 4.2 of the DSU provides that consultations are to cover "any representations made by another Member *concerning measures affecting the operation of any covered agreement* taken within the territory of the former".[25] The United States submits that measures that have expired before a request for consultations cannot be measures that are "affecting the operation of any covered agreement" at the time the request is made; consequently, they cannot be measures within the scope of the "dispute" referred to in Article 4.7, with respect to which a complaining Member can request the establishment of a panel. It was common ground that the legislation authorizing production flexibility contract payments and market loss assistance payments expired before Brazil's consultation and panel requests. They thus cannot have been within the scope of consultations under Article 4.2.

[24]On 16 December 2004, the Appellate Body notified the Chair of the DSB that the expected date of circulation of its Report was 3 March 2005. (WT/DS267/18, 20 December 2004)

[25]United States' appellant's submission, para. 501. (emphasis added by the United States)

12. In response to the Panel's concern that the United States' position would mean that subsidy payments made in the past might never be the subject of challenge in WTO dispute settlement, the United States distinguishes between recurring and non-recurring subsidies. A non-recurring subsidy is a type of subsidy the benefits of which are allocated to future production. As such, a non-recurring subsidy can be regarded as continuing in existence beyond the period during which it is granted, and may continue to be actionable even after the authorizing program or legislation has expired. A recurring subsidy, by contrast, is typically provided year after year and is provided for current rather than future production. Once production has occurred and a measure has been replaced or superseded, there would no longer be any measure in existence to challenge. Market loss assistance and production flexibility contract payments were both subsidies paid for particular fiscal or crop years. As such, the benefit of these subsidies should have been attributed only to the particular year of payment and should not have been attributed to subsequent years. Thus, by the time of Brazil's consultation and panel requests[26], the only measure to consult upon and at issue under the DSU was the 2002 marketing year production flexibility contract payments; the other payments were all outside the Panel's terms of reference.

13. According to the United States, the Panel's conclusion is also inconsistent with Article 6.2 of the DSU, which requires that a panel request "identify the specific measures at issue". A measure that has expired cannot be a measure that is "at issue". This is confirmed by the context provided by Article 3.7 of the DSU, which contemplates the withdrawal of measures found to be inconsistent with the covered agreements, and Article 19.1 of the DSU, which contemplates a measure that "is inconsistent" with a covered agreement.

14. In addition to appealing the Panel's finding that payments under the expired production flexibility contract and market loss assistance programs were within its terms of reference, the United States lists this Panel finding as an example of the Panel's failure to meet the requirements of Article 12.7 of the DSU, which requires panels to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind its findings.

(b) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

15. The United States appeals the Panel's finding that production flexibility contract payments, direct payments, and the legislative and regulatory provisions that establish and maintain the direct payment program[27] are not exempt from actions by virtue of paragraph (a) of Article 13 of the

[26]Request for Consultations by Brazil, WT/DS267/1, G/L/571, G/SCM/D49/1, G/AG/GEN/54, 3 October 2002; Request for the Establishment of a Panel by Brazil, WT/DS267/7, 7 February 2003.

[27]Panel Report, para. 7.388.

Agreement on Agriculture (the "peace clause"). The United States observes that the sole basis for this finding was the Panel's conclusion that these measures do not conform fully to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* (the "green box")[28], which conditions green box coverage and exemption under the peace clause upon the amount of payments not being related to the type or volume of production. The United States argues that, to make this finding, the Panel had to find that banning a recipient from producing a certain range of products was the same as conditioning the amount of payment on the type of production. The United States submits that paragraph 6(b) of Annex 2 permits such a partial ban.

16. The United States points out that, in order to receive production flexibility contract payments or direct payments, a producer is not required to produce a particular (or, indeed, any) crop. Instead, payments are based on a farm's historical acreage and yields during a base period. Farmers may plant any commodity or crop, subject to limitations concerning the planting of fruits and vegetables (and wild rice in the case of direct payments).[29] Where fruits, vegetables, or wild rice are produced, payments are eliminated or reduced, subject to certain exceptions.

17. Although the ordinary meaning of the term "related to" implies a relation or connection that could be positive or negative, the ordinary meaning does not identify which type of connection is meant under paragraph 6(b) of Annex 2. Turning to the context, the United States notes that this paragraph speaks of the "amount of such payments" not being related to or based on the type or volume of production. The United States argues that "[t]he Panel assumes that the 'amount of such payments' can be related to the current type of production (that is, of fruits or vegetables) because in some circumstances a recipient that produces fruits or vegetables receives less payment than that recipient otherwise would have been entitled to."[30] However, given that the payment relating to fruits, vegetables, or wild rice is zero, the "amount of such payments" is not related to fruit, vegetable, or wild rice production, because for the acres concerned, there is no payment at all. As regards the phrase "production ... undertaken by the producer" in paragraph 6(b), the United States notes that the term "undertaken" means, *inter alia*, to "attempt". In this case, the planting flexibility limitations ban a recipient from producing a certain range of products. This does not relate to the production "attempted"; rather, it relates to the type of production *not* attempted. Taken together, the ordinary meaning of the terms "amount of such payments" and "production ... undertaken" indicate that

[28]Paragraph 6(b) of Annex 2 to the *Agreement on Agriculture* provides that:

> The amount of such payments in any given year shall not be related to, or based on, the type or volume of production (including livestock units) undertaken by the producer in any year after the base period.

[29]Panel Report, paras. 7.376-7.382.

[30]United States' appellant's submission, para. 26 (referring to Panel Report, para. 7.383).

payments are not "related to" current production within the meaning of paragraph 6(b) when a Member conditions payments on a recipient not producing certain products.

18. According to the United States, this interpretation is consistent with the "fundamental requirement" set out in paragraph 1 of Annex 2 of the *Agreement on Agriculture* that measures exempted from reduction commitments "have no, or at most minimal, trade-distorting effects or effects on production". The United States submits that "a condition that a recipient not produce certain products serves the fundamental requirement of Annex 2".[31] The United States further argues that the effect of the planting flexibility limitations at issue is minimal and does not result in increased production, pointing to evidence on the record showing that 47 per cent of farms receiving production flexibility contract payments or direct payments in the 2002 marketing year planted no upland cotton at all. Indeed, in finding that Brazil had not established that the effect of the United States' decoupled income support payments was significant price suppression, the Panel implicitly found that production flexibility contract payments and direct payments do not have more than minimal effects on production. For the United States, an explicit decision not to support a particular type of production does not relate the amount of payments to the type of production undertaken by the producer. Rather, such a decision serves the fundamental requirement that "green box" measures have no more than minimal trade-distorting effects, because a measure that conditions payment on not producing something does not create production inducements.

19. The United States also submits that the context provided by paragraph 6(e) confirms its reading of paragraph 6(b). Paragraph 6(e) provides: "[n]o production shall be required in order to receive such payments"; it does not preclude a Member from requiring non-production. A proper reading reveals that paragraphs 6(b) and 6(e) serve different purposes. As a Member may, under paragraph 6(e), require a recipient not to produce, it would not make sense to then prohibit a Member, under paragraph 6(b), from making the amount of payment contingent on fulfilling the requirement not to produce.

20. Furthermore, the United States argues that the Panel was incorrect to find contextual support for its interpretation of paragraph 6(b) in paragraphs 11(b) and 11(e) of Annex 2. Paragraphs 6(b) and 11(b) contain similar requirements about not relating payments to the type or volume of production, but paragraph 11(b) refers explicitly to paragraph 11(e), which permits requirements not to produce a particular product. The United States maintains that the context in which paragraphs 6(b) and 11(b) appear is very different. In the context of paragraph 6, an explicit authorization of requirements not to produce is not required as it is already implicit within the

[31]United States' appellant's submission, para. 22.

provisions. The United States notes that paragraph 11 pertains to payments "to assist the financial or physical restructuring of a producer's operations".[32] Although such aid is for restructuring of operations that will continue to produce, paragraph 11(e) imposes a constraint on the degree to which a government can interfere in the form that restructuring will take, by requiring that payments must not "mandate or in any way designate the agricultural products to be produced". A requirement not to produce certain products could be understood to fall within the prohibition in paragraph 11(e) against "in any way" designating the products to be produced. In order to allow such requirements, paragraph 11(e) clarifies that they are permitted. The United States submits that, in the light of the broad prohibition in paragraph 11(e), the requirement in paragraph 11(b) could be understood to *preclude* conditioning payment on *not* producing certain products, as this could be understood to be designating, in some way, the products to be produced. According to the United States, this would undermine the prohibition in paragraph 11(e). The cross-reference in paragraph 11(b) to the exception in paragraph 11(e) thus simply serves to make clear that conditioning payments on *not* producing does not conflict with the prohibition under paragraph 11(e) on designating in any way the products to be produced.

21. In addition, the United States submits that the Panel's reading of paragraph 6(b) would require payments even if a recipient's production was illegal. Therefore, a Member would be prohibited from reducing or eliminating payments for prohibited types of production such as narcotic crops, unapproved biotech varieties, or environmentally damaging production.

(c) Article 13(b) of the *Agreement on Agriculture*

22. The United States appeals the Panel's finding that the United States' non-green box domestic support measures are not exempt from actions by virtue of paragraph (b) of Article 13 of the *Agreement on Agriculture*. The Panel found that those measures failed to satisfy, for each marketing year from 1999-2002, the proviso to Article 13(b)(ii), which reads "provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year".

(i) *Interpretation of "support to a specific commodity"*

23. The United States contends that the Panel erred in interpreting the phrase "support to a specific commodity" in Article 13(b)(ii). The ordinary meaning of this phrase encompasses "'assistance' or 'backing' 'specially ... pertaining to a particular' 'agricultural crop' or ... for a 'precise,

[32]United States' appellant's submission, para. 45 (quoting paragraph 11(a) of Annex 2 to the *Agreement on Agriculture*).

exact, definite' 'agricultural crop'".[33] The ordinary meaning implies that support to a specific commodity excludes support that is not for a precise, exact, definite agricultural crop.

24. Context for interpreting the phrase "support to a specific commodity" may be found in other provisions of the *Agreement on Agriculture* that contain the terms "support", "specific" and "commodity". Annex 3 deals with "Calculation of the Aggregate Measurement of Support" ("AMS"). Paragraph 1 of that Annex clarifies that two types of support are to be calculated: first, support is calculated "on a product-specific basis", and, second, "[s]upport which is non-product specific shall be totalled into one non-product-specific AMS in total monetary terms". Article 1(a) of the *Agreement on Agriculture* contains this same distinction between "support ... provided for an agricultural product in favour of the producers of the basic agricultural product" and a residual category of "non-product-specific ... support". Article 1(h) also makes this distinction by dividing total support into "non-product-specific support" and "support for basic agricultural products". For the United States, the terms "support for basic agricultural products" in Article 1(h) and "support ... provided for an agricultural product in favour of the producers of the basic agricultural product" in Article 1(a) are virtually synonymous with the phrase "support for a specific commodity" in Article 13(b)(ii). The context of these provisions thus suggests that this phrase also means product-specific support.

25. The Panel relied on the different choice of specific words in Articles 1(a) and 13(b)(ii) in finding that the former was not pertinent to the interpretation of the latter. The United States argues, however, that the concept of product-specific support is expressed in different terms in different places in the *Agreement on Agriculture*. Indeed, nowhere in the Agreement is the precise phrase "product-specific support" used, although the Panel had no difficulty in finding that such a concept exists. Thus, the fact that the phrase "product-specific support" was not used in Article 13 does not prevent an interpretation that the concept nevertheless applies.

26. The United States disagrees with the Panel's reasoning that the categories of product-specific and non-product-specific support are not pertinent to the analysis under Article 13(b) because the proviso to Article 13(b)(ii) begins with the phrase "such measures", which refers to all the domestic support measures falling under Article 6 identified in the chapeau to Article 13(b), and not just to product-specific and non-product-specific support subject to reduction commitments. The United States notes that the Panel itself recognized that certain domestic support measures falling under Article 6 could be excluded from the comparison of support under Article 13(b)(ii): the Panel's approach "exclud[es] all other support, which either grants support to other specific commodities or

[33]United States' appellant's submission, para. 85 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, pp. 2972 and 3152).

does not grant support to any specific commodity".[34] The Panel also noted that "Brazil acknowledges this implicitly in that it does not challenge very widely available support, such as infrastructure or irrigation subsidies, some of which, presumably, deliver support to upland cotton either directly or indirectly".[35] Thus the mere fact that all domestic support measures falling under Article 6 are identified in the chapeau of Article 13(b) does not resolve the issue of whether a particular measure grants "support to a specific commodity".

27. The United States finds relevant context in Articles 3 and 6 of the *Agreement on Agriculture.* Under these provisions, a Member must comply with its domestic support reduction commitments. These commitments, however, are expressed on a total aggregate basis with no product-specific caps on support. Because there are no product-specific caps, a Member can comply with its overall reduction commitments while increasing support to a particular agricultural commodity. Article 13(b) provides shelter from actions for domestic support measures that conform to the reduction commitments. However, Members recognized that an increase in product-specific support, even within overall reduction commitment levels, could present an enhanced risk of production or trade effects. The proviso to Article 13(b)(ii) thus makes the exemption it provides conditional upon a Member not shifting support between commodities such that the level of product-specific support exceeds that decided for any one commodity in the 1992 marketing year.

28. Turning to the measures at issue, the United States observes that the Panel's reasoning means that payments to producers that do not produce cotton at all are deemed to be "support to upland cotton". The United States contends that the Panel erred in finding that payments based on past production during a base period currently grant support to production of that commodity. Production flexibility contract payments, market loss assistance, direct payments, and counter-cyclical payments do not specify upland cotton as a commodity to which they grant support, as the Panel implied. In fact, payments under these programs do not require any production at all. Indeed, uncontested facts show that 47 per cent of the farms receiving these payments did not plant a single acre of upland cotton. The United States asserts that payments cannot be deemed to grant support to a crop the recipient does not produce. Such payments do not grant support to a specific commodity. In the light of the context provided by Articles 1(a), 1(h), and 6.4 and Annex 3 of the *Agreement on Agriculture*, such payments are properly seen as non-product-specific support to agricultural producers in general.

[34]United States' appellant's submission, para. 96 (quoting Panel Report, para. 7.502).

[35]*Ibid*.

29. The United States observes that the Panel correctly rejected all six of the methodologies proposed by Brazil for allocating decoupled payments as support to upland cotton. However, in the "Attachment to Section VII:D" the Panel included one allocation methodology that reduced payments on base acres to account only for the number of acres planted with upland cotton. The United States argues that, by including this methodology, the Panel endorsed it as an alternative to its own approach, in the event that the Panel's approach was found to be incorrect. The Panel labelled its finding in this regard as factual; however, the finding is patently legal, not sheltered from appellate review. The United States also contends that any methodology that allocates payments under the decoupled programs to upland cotton planted as a result of independent producer decisions beyond government control cannot reflect the support to a specific commodity that a Member has "decided", and thus is not appropriate for Article 13(b)(ii).

(ii) *Calculation methodology for price-based measures*

30. The United States submits that the Panel did not compare properly the support current measures "grant" to that "decided" during the 1992 marketing year. The ordinary meaning of "grant" is to "bestow as a favour" or "[g]ive or confer (a possession, a right, etc.) formally".[36] The ordinary meaning of "decide" is to "[d]etermine on as a settlement, pronounce in judgement" and "[c]ome to a determination or resolution *that, to do, whether*".[37] Read in their context, as two halves of a comparison, these terms must allow the relevant "support" to be compared. The phrase "grant support", read in the light of the verb "decided", means the support that Members determine to "bestow" or "give or confer", and thus the focus of the peace clause comparison is on the support a Member decides. The United States submits that the Panel essentially agreed "that the Peace Clause proviso compares the support a Member determines through its measures, not 'support [that] was spent due to reasons beyond the control of the government'."[38]

31. Against this background, the United States contends that a proper application of Article 13(b)(ii) must reflect the way in which the United States "decided" support in the 1992 and 1999-2002 marketing years. In those years, the support "decided" by the United States was a rate of support.

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[36]United States' appellant's submission, para. 65 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 1131).

[37]*Ibid*., para. 65 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 607). (original emphasis)

[38]*Ibid*., para. 66 (quoting Panel Report, para. 7.487).

32. The United States submits that it was possible for the Panel to have recourse to the rules for the calculation of the AMS set out in Annex 3 of the *Agreement on Agriculture*, so long as the appropriate calculation method was used. In the case of price-based measures (such as marketing loan program payments in the 1992 marketing year and the implementation period, and deficiency payments in the 1992 marketing year only), paragraph 10 of Annex 3 permits two different approaches: budgetary outlays or using "the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price" ("price gap" methodology). In the context of a comparison under the peace clause, only the price gap methodology reflects the support "decided" by the United States' price-based measures. By focusing on the gap between an external reference price (here, the actual price for determining rates for the years 1986-1988) and the applied administered price, the price gap methodology eliminates movements in market prices as a component of the measurement of support and focuses solely on those elements that a Member can control. By holding the reference price "fixed", support measured using a price gap calculation shows the effect of changes in the level of support decided by a Member, rather than changes in budgetary outlays that result from movements in market prices that Members do not control.

(iii) *Recalculation of the peace clause comparison*

33. On the basis of its arguments regarding calculation methodology and the interpretation of the phrase "support to a specific commodity", the United States recalculates the support to upland cotton in the 1992 marketing year and implementation period support between 1999-2002 using the price gap methodology for marketing loan program payments and deficiency payments, on the one hand, and excluding production flexibility contract payments, market loss assistance, direct payments, and counter-cyclical payments, on the other hand, because they are not "support to a specific commodity". The result is that the United States' support to upland cotton does not exceed that decided in the 1992 marketing year in any year of the implementation period. The United States accordingly requests the Appellate Body to reverse the Panel's findings regarding Article 13(b) and to find that it is entitled to the protection of the peace clause.

2. Serious Prejudice

(a) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

34. The United States appeals the Panel's finding that the effect of the price-contingent subsidies[39] is significant price suppression 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*. The United States asks the Appellate Body to reverse the Panel's finding that the effect of the price-contingent subsidies is significant price suppression. The United States also submits that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind several aspects of this finding, as required by Article 12.7 of the DSU.

35. First, the United States submits that the Panel erred in interpreting the term "same market" in Article 6.3(c) of the *SCM Agreement* as including a "world market". Under Article 6.3(c), the price suppression must occur in a market that includes the subsidized product and the like product. Identifying the relevant market as a world market fails to give meaning to the word "same" in Article 6.3(c) because "there is no 'other' world market where the products can be found".[40] The United States relies on Article 6.6 and Annex V of the *SCM Agreement* on "Procedures for Developing Information Concerning Serious Prejudice" to substantiate this view. The United States also indicates that, although the subsidized product and the like product must be found in the same market, the Panel did not make a finding that United States and Brazilian upland cotton compete in the world market that it had identified for upland cotton. In addition, the United States contends that the Panel acknowledged that different conditions of competition would prevail in the markets of different Members and that, therefore, each market in which the two products are found would need to be examined separately.

36. The United States submits that the Panel's reading of "same market" in Article 6.3(c) contradicts its reasoning in relation to Article 6.3(d) of the *SCM Agreement*, which, according to the United States, demonstrates that no "world market" price prevails in any "world market" for upland cotton. Moreover, according to the United States, the Panel should have focused on the effect of the challenged subsidies on the *Brazilian* price of upland cotton, rather than their effect on any "world

[39]The Panel characterized marketing loan program payments, user marketing (Step 2) payments, market loss assistance payments, and counter-cyclical payments as "price-contingent" subsidies. (Panel Report, para. 8.1(g)(i))

[40]United States' appellant's submission, para. 311.

market" price, because only significant suppression of Brazilian prices could lead to serious prejudice to the interests of Brazil under Article 5(c) of the *SCM Agreement*.

37. Secondly, the United States argues that, in finding significant price suppression, the Panel "prejudged the result of its analysis of 'the effect of the subsidy'".[41] According to the United States, the Panel used circular logic: first, assuming causation in finding price suppression, and then, using its conclusion on price suppression to support its finding of causation. In addition, the Panel failed to take into account the effect of removing the price-contingent subsidies on all participants in the relevant market. Even if removing these subsidies would lead to lower United States production of cotton (which the United States contests), other producers could be expected to enter the market to increase supply. These supply changes would need to be included in assessing the effect on prices of removing the price-contingent subsidies. The United States also claims that, in concluding that the price suppression it had found was "significant", the Panel should have identified the degree of price suppression it had found and should have explained why it regarded this degree as "significant". The United States argues that, in failing to do so, the Panel failed to comply with Article 12.7 of the DSU.

38. Thirdly, the United States contends that the Panel erred in finding that "the effect of" the price-contingent subsidies is significant price suppression under Article 6.3(c) of the *SCM Agreement*. The United States refers to the Panel's conclusion that the price-contingent subsidies are linked to world prices for upland cotton, "thereby numbing the response of United States producers to production adjustment decisions when prices are low".[42] However, according to the United States, the "relevant economic decision"[43] for a farmer is what to plant and, at the time of planting, the relevant price is what the farmer expects to receive when the crop is subsequently harvested, not the current price. Therefore, the Panel should have examined whether the price-contingent subsidies stimulate *planting* of upland cotton, rather than whether they stimulate *production* or harvesting. The United States submits that the Panel failed to set out the basic rationale for its analysis of the "effect of the subsidy" as required by Article 12.7.

39. The United States also suggests that the Panel failed to examine evidence showing that the price-contingent subsidies did not suppress upland cotton prices: United States planting of cotton acreage corresponded with expected market prices of cotton and competing crops; changes in United States cotton acreage corresponded with changes by cotton farmers throughout the world; and the United States' share of world cotton production was stable during the relevant period. In addition, the

[41]United States' appellant's submission, para. 158.

[42]*Ibid*., para. 162 (quoting Panel Report, para. 7.1308).

[43]*Ibid*., para. 161.

Panel's identification of the relative shares of world cotton exports cannot demonstrate the effect of the subsidy in the absence of an analysis of competition between United States cotton and cotton from other sources. Moreover, according to the United States, the Panel's finding of a "discernible temporal coincidence"[44] between suppressed market prices and the price-contingent subsidies is flawed and, in any case, could involve only correlation and not causation.

40. The United States further disputes, in relation to the Panel's reasoning in determining the "effect" of the subsidy, the Panel's conclusion that a comparison between the average total cost of production and market revenue in the United States demonstrates that the effect of the price-contingent subsidies is significant price suppression. As reflected in economics literature, farmers make planting decisions based on *variable* rather than *total* costs of production. The Appellate Body's decision in *Canada – Dairy (Article 21.5 – New Zealand and US)* is not relevant to this issue. Had the Panel examined variable costs, it would have seen that United States upland cotton producers more than covered their variable costs from 1997 to 2002, apart from in 2001. In addition, even if average total costs were not covered, the evidence before the Panel demonstrates that farmers had other sources of income to cover the shortfall.

41. Fourthly, the United States argues that the Panel erred in finding that Brazil need not demonstrate, and that the Panel need not find, the amount of the challenged subsidies that benefits upland cotton in establishing serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*. The United States contends that the Panel "misunderstood"[45] the United States' argument as requiring the transposition of methodologies from Part V to Part III of the *SCM Agreement*. Instead, it is the text of Articles 5(c) and 6.3(c) that requires a quantification of benefit. Articles 5(c) and 6.3(c) of the *SCM Agreement* both use the word "subsidy", which is defined in Article 1 as involving the conferral of a benefit, as confirmed by Article 14 of the *SCM Agreement*. Article 6.3(c) refers to a "subsidized product". Therefore, what is at issue is the amount of the subsidy that benefits a particular product. This reading is supported by Article 6.8 of the *SCM Agreement*, which provides for panels to determine serious prejudice on the basis of, *inter alia*, information submitted under Annex V of the *SCM Agreement*. According to the United States, this includes information necessary to establish the amount of subsidization (paragraph 2 of Annex V) and information concerning the amount of the subsidy (paragraph 5 of Annex V).

42. For Brazil's claims to succeed, therefore, the United States maintains that the challenged subsidies would have to subsidize upland cotton and confer a benefit on United States "producers,

[44]United States' appellant's submission, para. 208 (referring to Panel Report, paras. 7.1351-7.1352).

[45]*Ibid*., para. 258.

users, and/or exporters of upland cotton".[46] In addition, any benefit conferred by the challenged subsidies on products other than upland cotton cannot be included in determining the effect of the subsidies. However, the Panel attributed all counter-cyclical and market loss assistance payments to upland cotton. In fact, counter-cyclical and market loss assistance payments to recipients who did not produce upland cotton did not benefit upland cotton at all and therefore could not have caused serious prejudice and, in fact, fell outside the Panel's terms of reference altogether. As for counter-cyclical and market loss assistance payments to recipients who produced both upland cotton and other products, the Panel should have allocated the payments across the different products in assessing the effects of the payments in respect of upland cotton. Annex IV of the *SCM Agreement*[47] provides an "economically neutral" allocation methodology[48], and paragraphs 2 and 5 of Annex V of the *SCM Agreement* provide support for the argument that it may be necessary to allocate subsidies across the total value of the recipient's sales. As the Panel did not identify the amount of counter-cyclical and market loss assistance payments benefiting upland cotton, its serious prejudice finding regarding those payments is invalid. In addition, the United States submits that this amounted to a failure by the Panel to set out the basic rationale behind its findings and recommendations in accordance with Article 12.7 of the DSU.

43. Along similar lines, the United States contends that the Panel should have determined the extent to which subsidies provided with respect to *raw* cotton benefit *processed* cotton. Instead, the Panel "improperly assumed"[49] that subsidies provided to producers of raw cotton flowed to producers of processed cotton. The United States maintains that the Appellate Body's conclusion in *US – Softwood Lumber IV* that a subsidy bestowed on an input cannot be presumed to have passed through to the processed product is based on the definition of a subsidy, which applies to both Part III and Part V of the *SCM Agreement*.[50] Therefore, according to the United States, the Panel erred in finding that "pass-through" principles do not apply to Part III of the *SCM Agreement*.

44. Finally, the United States asserts that the Panel erred in making serious prejudice findings with respect to the price-contingent subsidies for marketing years 1999 to 2001. Even if the Panel was not required to determine the amount of the benefit flowing from the price-contingent subsidies to the subsidized product, the Panel had to determine whether the benefit from these subsidies continued

[46]United States' appellant's submission, para. 245 (quoting Brazil's request for establishment of a panel, *supra*, footnote 26, p. 1).

[47]"Calculation of the Total Ad Valorem Subsidization (Paragraph 1(a) of Article 6)".

[48]United States' appellant's submission, para. 269.

[49]*Ibid*., para. 303.

[50]*Ibid*., paras. 304 and 305 (referring to Appellate Body Report, *US – Softwood Lumber IV*, paras. 140 and 142).

when the Panel was established in 2002. This is because, under Article 11 of the DSU, the Panel could make findings only with respect to subsidies that could "form part of Brazil's claims"[51] and, under Article 19.1 of the DSU, the Panel could make recommendations only with respect to measures that still exist. In addition, the United States maintains that the Panel "failed to adequately set out the legal basis for its examination of subsidies that no longer existed at the time of panel establishment" as required by Article 12.7 of the DSU.[52]

45. According to the United States, an annually recurring subsidy should be "allocated" or "expensed"[53] to the year to which it relates, whereas a non-recurring subsidy, such as an investment subsidy or equity infusion, should be allocated over time. In the United States' view, a payment no longer confers a benefit after the year to which it is allocated, and therefore it is no longer a "subsidy" under Article 1 of the *SCM Agreement*. Price-contingent subsidies for marketing years 1999 to 2001 were annually recurring subsidies that the Panel should have allocated to those years. The United States argues that the Panel did not find that these subsidies had "continuing effects" when the Panel was established and, therefore, that the Panel could not have found that these subsidies were "causing present serious prejudice".[54]

46. For these reasons, the United States requests the Appellate Body to reverse the Panel's finding that the effect of the price-contingent subsidies is significant price suppression 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*.

3. Import Substitution Subsidies and Export Subsidies

(a) Step 2 Payments

(i) *To domestic users*

47. The United States claims that the Panel erred in concluding that user marketing (Step 2) payments ("Step 2 payments") provided to domestic users of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, constitute import substitution subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.

[51]United States' appellant's submission, para. 296.

[52]*Ibid*., para. 327.

[53]*Ibid*., para. 283.

[54]*Ibid*., para. 292.

48. In the United States' view, the Panel's conclusion fails to give meaning to the introductory phrase "Except as provided in the Agreement on Agriculture" in Article 3 of the *SCM Agreement*. This phrase applies not only to export subsidies covered by Article 3.1(a) of the *SCM Agreement*, but also to import substitution subsidies covered by Article 3.1(b). The United States contends that giving proper meaning to the introductory phrase of Article 3 of the *SCM Agreement* requires treating Step 2 payments to domestic users as domestic support subject to reduction commitments under Article 6 of the *Agreement on Agriculture*.

49. The United States points out that paragraph 7 of Annex 3 of the *Agreement on Agriculture* requires that "[m]easures directed at agricultural processors shall be included [within a WTO Member's AMS] to the extent that such measures benefit the producers of the basic agricultural products". This is consistent with the objective of the *Agreement on Agriculture* of providing for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time. The United States submits that it has regularly reported Step 2 payments among the domestic support measures it provides to agricultural producers and includes them in the calculation of total AMS. Thus, the United States asserts, provided that they are within its domestic support reduction commitments, Step 2 payments to domestic users are not inconsistent with the United States' WTO obligations.

50. The United States explains that the lack of any reference to domestic content subsidies in Article 13(b) of the *Agreement on Agriculture* does not support the Panel's interpretation. Article 13(b) does not refer to Article 3 of the *SCM Agreement* because the substantive obligation of Article 3.1(b) does not apply to domestic content subsidies in favour of agricultural producers.

51. Consequently, the United States requests that the Appellate Body reverse the Panel's finding that Step 2 payments to domestic users of United States upland cotton are import substitution subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.

(ii) *To exporters*

52. The United States claims that the Panel erred in concluding that Step 2 payments provided to exporters of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are export subsidies covered by Article 9.1(a) of the *Agreement on Agriculture* and, therefore, inconsistent with Articles 3.3 and 8 of that Agreement. The United States also asserts that the Panel erroneously concluded that Step 2 payments to exporters are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*, because they are not exempted from action by Article 13(c) of the *Agreement on Agriculture*.

53. The United States argues that Step 2 payments are not contingent on export performance because upland cotton does not need to be exported to trigger eligibility; domestic users are also eligible. The program under which Step 2 payments are granted is indifferent as to whether the recipient of the payment is an exporter or a domestic user. Step 2 payments to exporters and domestic users are governed by a single legislative provision and a single set of regulations. The form and payment rate to domestic users and exporters are identical, and payments are made from a unified fund. Rather than being an export-contingent subsidy, the United States reports Step 2 payments as product-specific amber box domestic support for cotton within its AMS.

54. The United States submits that the facts in this case are similar to those before the panel in *Canada – Dairy*, where the panel found that payments contingent on use, without regard to the nature of the use, do not involve an export subsidy for purposes of Articles 9 and 10 of the *Agreement on Agriculture*.[55] The distinctions drawn by the Panel between the circumstances in this case and those in *Canada – Dairy* are based on a mischaracterization by the Panel of facts in the latter case.[56] Finally, the United States contends that the Panel's finding in respect of Step 2 payments to *exporters* seems to be based on the Panel's determination to find that Step 2 payments to *domestic users* are a prohibited import substitution subsidy.

55. The United States therefore requests that the Appellate Body reverse the Panel's finding that Step 2 payments to exporters are an export subsidy listed in Article 9.1(a) that is inconsistent with the United States' obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*. The United States also requests that the Appellate Body reverse the Panel's findings that Step 2 payments to exporters are not exempt from action under Article 13(c) of the *Agreement on Agriculture* and are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*.

(b) Export Credit Guarantees

(i) *Panel's terms of reference*

56. The United States asserts that the Panel erred in concluding that export credit guarantees[57] to facilitate the export of United States agricultural commodities other than upland cotton were within its

[55]United States' appellant's submission, paras. 444-445 (referring to Panel Report, *Canada – Dairy*, para. 7.41 and footnote 496 to para. 7.124).

[56]*Ibid*., paras. 447-452 (referring to Panel Report, paras. 7.718 and 7.725).

[57]The export credit guarantees at issue are the General Sales Manager 102 and 103 programs and the Supplier Credit Guarantee Program, which are described *infra*, paras. 586-589. See also Panel Report, paras. 7.236-7.244.

terms of reference. According to the United States, there is a clear progression between the measures included in the request for consultations under Article 4 of the DSU and the measures identified in the request for the establishment of a panel, which forms the basis for a panel's terms of reference.[58] The United States contends that a measure that is not included in the request for consultations may not form part of a panel's terms of reference.

57. In this case, the United States argues, the Panel erred in finding that Brazil's request for consultations identified export credit guarantees to agricultural commodities other than upland cotton as challenged measures. A plain reading of Brazil's request for consultations does not support the Panel's conclusion. The request identified the challenged measures as "subsidies provided to US producers, users and/or exporters of upland cotton".[59] Although footnote 1 to this sentence reads "Except with respect to export credit guarantee programs as explained below", none of the subsequent references to export credit guarantees in the request for consultations identified other United States agricultural commodities. Moreover, the statement of evidence attached to Brazil's request for consultations, pursuant to Article 4 of the *SCM Agreement*, did not mention commodities other than upland cotton, providing further proof that the request for consultations did not extend beyond export credit guarantees for upland cotton. That the request for consultations did not include export credit guarantees to other agricultural commodities is confirmed by the fact that Brazil included new language in its request for the establishment of a panel.

58. According to the United States, the Panel also erred in finding that "actual" consultations included export credit guarantees to agricultural commodities other than upland cotton. The fact that Brazil posed written questions to the United States about export credit guarantees for other commodities does not mean that Brazil and the United States held consultations about the topic. Were it otherwise, a complaining party could unilaterally alter the scope of consultations without regard to the requirements of Article 4.4 of the DSU, the time-frames, and the impact on third parties seeking to determine whether to join the consultations. The Panel also ignored the fact that, at the first consultations meeting, the United States expressed the view that Brazil's request with respect to export credit guarantees was clearly limited to upland cotton, and that no discussion of export credit guarantees for any commodity other than upland cotton took place during the consultations. The United States also argues that what is determinative of the scope of consultations is the text of Brazil's request for consultations and not the text of Brazil's written questions.

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[58]United States' appellant's submission, para. 466 (referring to Appellate Body Report, *Brazil – Aircraft*, para. 131).

[59]*Ibid*., para. 457 (quoting the Request for Consultations by Brazil, *supra*, footnote 26).

59. The United States contends that the facts in this case are similar to those in *US – Certain EC Products*. In that case, the Appellate Body found that a particular measure was not part of the panel's terms of reference because it was not the subject of consultations.[60] Similarly, in this case, export credit guarantees to other agricultural commodities may not form part of the Panel's terms of reference because they were not the subject of consultations.

60. The United States therefore requests that the Appellate Body reverse the Panel's conclusion that export credit guarantees to United States agricultural commodities other than upland cotton were within the Panel's terms of reference. The United States adds that, because the Panel had no authority to make findings with respect to export credit guarantees for agricultural commodities other than upland cotton, all of the Panel's findings with respect to such commodities must also be reversed.

(ii) *Statement of available evidence*

61. The United States submits that the Panel erroneously concluded that Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to United States agricultural commodities other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.

62. The United States explains that the statement of evidence that was annexed to Brazil's request for consultations contains two paragraphs specifically referring to the United States' export credit guarantee programs. The Panel correctly noted that the first paragraph is textually limited to upland cotton.[61] The United States submits, however, that the Panel failed to draw the proper conclusion about the second paragraph. Although the second paragraph does not refer to upland cotton, it contains no suggestion that it expands on the programs described in the preceding paragraph, which refers to export credit guarantee programs that allegedly provide certain benefits to United States upland cotton. In the context of the paragraph that precedes it, the second paragraph must be understood to refer to the same programs—that is, to export credit guarantee programs that allegedly provide certain benefits to upland cotton. In addition, the United States points out that the second paragraph in Brazil's request for consultations does not refer to any commodity. Consequently, even if the second paragraph is construed to refer to programs that provide benefits to products other than cotton, it is difficult to see how that paragraph meets the requirements of Article 4.2 of the

[60]United States' appellant's submission, para. 485 (referring to Appellate Body Report, *US – Certain EC Products*, para. 70).

[61]*Ibid*., para. 495 (referring to Panel Report, para. 7.84).

SCM Agreement, as it does not provide information about the "existence" or "nature" of the subsidies allegedly provided by the export credit guarantee programs to products other than upland cotton.

63. The United States therefore requests that the Appellate Body reverse the Panel's finding and that it find, instead, that Brazil did not provide a statement of available evidence with respect to the United States' export credit guarantee programs as they relate to agricultural commodities other than upland cotton.

(iii) *Article 10.2 of the Agreement on Agriculture*

64. The United States alleges that the Panel erred in finding that the United States' export credit guarantee programs in respect of exports of upland cotton and other unscheduled agricultural products, and in respect of one scheduled product (i.e., rice), are export subsidies applied in a manner that results in circumvention of the United States' export subsidy commitments within the meaning of Article 10 of the *Agreement on Agriculture* and are therefore inconsistent with Article 8 of that Agreement. In addition, the United States submits that, although the Panel did not find that the United States had circumvented such commitments with respect to scheduled commodities other than rice, it nevertheless erred in concluding that the programs as applied to these scheduled agricultural products constitute export subsidies within the meaning of the *Agreement on Agriculture*.

65. The United States contends that the Panel erroneously analyzed whether export credit guarantees are export subsidies subject to the disciplines of Article 10.1 solely by reference to the *SCM Agreement*, ignoring important context in Article 10 of the *Agreement on Agriculture*. According to the United States, the proper context in which to analyze the meaning of Article 10.1 with respect to export credit guarantees is Article 10.2 of the *Agreement on Agriculture*, the only provision that explicitly addresses these specific kinds of measures. Article 10.2 reflects the fact that, during the Uruguay Round, WTO Members did not agree on disciplines applicable to agricultural export credits, export credit guarantees, or insurance programs. Unable to reach agreement on such disciplines within the Uruguay Round, WTO Members opted to continue discussions, deferring the imposition of substantive disciplines until a consensus was achieved.

66. According to the United States, this interpretation of Article 10.2 is consistent with Article 10 as a whole. Article 10.2 contributes to the prevention of circumvention of export subsidy commitments by imposing two obligations on Members: first, they must undertake to work toward the development of internationally agreed disciplines on export credit guarantees; and, second, "after agreement on such disciplines", they must provide export credit guarantees "only in conformity

therewith".[62] Moreover, excluding export credit guarantees from the application of Article 10.1 is consistent with the treatment of food aid transactions under Article 10. Because Article 10.4 of the *Agreement on Agriculture* does not explicitly exempt food aid transactions from the applicability of Article 10.1, the Panel's interpretative approach would mean that all food aid transactions constitute export subsidies under Article 10.1.

67. The United States submits that the negotiating history confirms its interpretation that Article 10.2 excludes export credit guarantees from the export subsidy disciplines in Article 10.1. The negotiating history reflects that WTO Members initially included export credit guarantees as a subject for negotiation but later specifically elected not to include those practices as exports subsidies in respect of goods covered by the *Agreement on Agriculture*. The Panel's explanation that the negotiators deleted the language on export credits from a 1991 draft of Article 9 because it was "mere surplusage"[63] is inconsistent with the fact that other practices included in the Illustrative List of Export Subsidies of the *SCM Agreement* were also listed in Article 9.1 of the *Agreement on Agriculture*, such as direct subsidies contingent upon export performance, or transport and freight charges provided at more favourable rates.

68. The United States argues that reliance on the negotiating history in this case is appropriate, under Article 32 of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*"[64]), because the Panel's interpretation leads to a manifestly unreasonable result. Had export credit guarantees remained in Article 9, then the United States and other providers of export credit guarantees would have been expressly permitted to include such measures in their respective export subsidy reduction commitments. In the absence of a reference in Article 9, the United States was foreclosed from including them. It defies logic, as well as the object and purpose of the *Agreement on Agriculture*, to take the view of the Panel whereby such measures would be treated as already disciplined export subsidies, yet such measures would not be permitted to be included within the applicable reduction commitments expressly contemplated by the text.

69. The United States also requests that the Appellate Body reverse the Panel's finding that export credit guarantees for agricultural commodities are subject to Articles 3.1 and 3.2 of the *SCM Agreement*. The United States explains that export credit guarantees are not listed in Article 9.1 of the *Agreement on Agriculture* and are exempt, through the operation of Article 10.2, from the export subsidy disciplines in Article 10.1. Because export credit guarantees are not subject to export subsidy disciplines under the *Agreement of Agriculture*, the export subsidy disciplines of the

[62]Quoting from Article 10.2 of the *Agreement on Agriculture*.

[63]United States' appellant's submission, para. 379 (quoting Panel Report, para. 7.940).

[64]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

SCM Agreement are also inapplicable to these measures pursuant to Article 21.1 of the *Agreement on Agriculture* and the introductory language of Article 3.1 of the *SCM Agreement*.

(iv) *Burden of proof*

70. The United States submits that the Panel erred in three different ways in respect of the application of the burden of proof in assessing the United States' export credit guarantee programs under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.

71. First, the United States asserts that the Panel erred by applying the "special rules" on burden of proof provided in Article 10.3 of the *Agreement on Agriculture* in its examination of Brazil's claim under the *SCM Agreement*. The United States argues that the special rules in Article 10.3 of the *Agreement on Agriculture* do not apply in the context of the *SCM Agreement*.

72. In addition, the United States submits that the Panel erred by applying the special rules on burden of proof in Article 10.3 of the *Agreement on Agriculture* in examining whether the United States circumvented its export subsidy commitments with respect to upland cotton and certain other *unscheduled* agricultural products. According to the United States, Article 10.3 does not apply at all in respect of export subsidies to an agricultural good for which the respondent has no reduction commitments.

73. Finally, the United States refers to three specific instances in which the Panel allegedly erred in applying the burden of proof. The first example is the Panel's statement that the premiums charged by the Commodity Credit Corporation (the "CCC") for the export credit guarantees "are not geared toward *ensuring* adequacy to cover long-term operating costs and losses for the purposes of item (j)".[65] The United States asserts that this is a much higher threshold than that provided in the text of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*. Next, the United States takes issue with the Panel's statements that "[i]n terms of the structure, design and operation of the ... programmes [we] believe that the programmes are not designed to avoid a net cost to government"[66] and that the Panel was entitled to inquire whether revenue "would be likely to cover the total of all operating costs and losses under the programme".[67] According to the United States, "[t]o 'avoid a net cost' prospectively is simply not the requirement of item (j)", and the "'likelihood'

[65]United States' appellant's submission, para. 406 (quoting Panel Report, para. 7.859). (emphasis added by the United States)

[66]*Ibid*., para. 407 (quoting Panel Report, para. 7.857).

[67]*Ibid*., para. 407 (quoting Panel Report, para. 7.805).

standard of performance" imposed by the Panel is higher than that found in item (j).[68] The third example cited by the United States is the Panel's statement that "[w]e have not been persuaded that cohort re-estimates over time, will *necessarily* not give rise to a net cost to the United States government."[69] The United States contends, however, that under the applicable burden of proof it is not for the United States to make such incontrovertible demonstrations to the Panel.

(v) *Necessary findings of fact*

74. The United States asserts that the Panel erred by failing to make certain factual findings that were necessary for the Panel's analysis of whether premiums are adequate to cover the long-term costs and losses of the United States' export credit guarantee programs, under item (j) of the Illustrative List of Export Subsidies. According to the United States, the Panel made no findings "on the basis for and monetary extent to which the United States has allegedly not covered its long-term operating costs and losses for the CCC export credit guarantee programs".[70]

75. In particular, the United States asserts that the Panel should have made a specific finding on the treatment of rescheduled debt. The United States explains that the Panel did not conclude that rescheduled debt was an operating cost or loss. Instead, the Panel "stated only vaguely" that it shared Brazil's concern that the United States' treatment of rescheduled debt understates the net cost to the United States government associated with the export credit guarantee programs.[71]

76. The United States argues that the Panel's failure to make these factual findings compels the reversal of the Panel's determination in respect of item (j) of the Illustrative List of Export Subsidies.

B. *Arguments of Brazil – Appellee*

1. Domestic Support

(a) Terms of Reference – Expired Measures

77. Brazil submits that the Appellate Body should reject the United States' request to reverse the Panel's finding that expired production flexibility contract and market loss assistance payments were

[68]United States' appellant's submission, para. 407.

[69]*Ibid*., para. 408 (quoting Panel Report, para. 7.853). (emphasis added by the United States) In the same paragraph, the United States mentions the following statement by the Panel: "[w]hile there may be a possibility (based on the experience of certain of other cohorts) that this figure may diminish over the lifetime of the cohort concerned, there is no assurance that this figure will *necessarily* evolve towards, and conclude as, zero or a negative figure." (Panel Report, footnote 1028 to para. 7.853) (emphasis added by the United States)

[70]United States' appellant's submission, para. 419.

[71]*Ibid*., para. 416.

outside the Panel's terms of reference. Brazil argues that neither Article 4.2 nor Article 6.2 of the DSU precludes a panel from analyzing payments made in the past in the context of serious prejudice claims. Brazil focuses on the context provided by Article 3.3 of the DSU, which states that a purpose of dispute settlement is the "prompt settlement of situations in which a Member considers that any benefits accruing to it ... are being impaired by measures taken by another Member". For Brazil, as long as the impairment is current, then the status in domestic law of the measure causing impairment is irrelevant.

78. Brazil notes that the current case involves allegations of "adverse effects" and "serious prejudice" under the provisions of the *SCM Agreement* and the GATT 1994. A breach of these provisions does not necessarily arise when an actionable subsidy is granted, but only when adverse effects occur, and the breach continues for the entire period during which the adverse effects continue. The effects of an actionable subsidy, which "affect[] the operation of" the *SCM Agreement* in the sense of Article 4.2 of the DSU, may well linger even after the measure providing for the subsidy expires. There is thus no basis for the United States' claim that the subsidies in question "cannot" be measures affecting the operation of any covered agreement. In particular, there is no justification in this context for the distinction, drawn by the United States, between recurring and non-recurring subsidies. The inquiry as to whether a subsidy continues to cause adverse effects beyond the year in which it was granted is a substantive judgment, and cannot be treated as a "jurisdictional hurdle".[72] Brazil finds support for its position in the view of the panel in *Indonesia – Autos*, which found that past, present, and future subsidies can be the subject of dispute settlement, as the effect of such measures may cause serious prejudice to the interests of a Member.

79. Brazil also disputes the United States' claims regarding Article 12.7 of the DSU. In Brazil's view, the Panel fulfilled the requirements of Article 12.7 in its Report. Many of the United States' claims under Article 12.7 are, in reality, allegations of error concerning the Panel's exercise of its discretion under Article 11 of the DSU and should be dismissed for want of specification of a claim under that provision.

(b) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

80. Brazil considers that production flexibility contract and direct payment programs are not green box measures falling under Annex 2 of the *Agreement on Agriculture* and are thus not exempt from actions pursuant to Article 13(a) of that Agreement. Brazil requests the Appellate Body to

[72]Brazil's appellee's submission, para. 255.

uphold the Panel's finding, under paragraph 6(b) of Annex 2, that production flexibility contract payments under the FAIR Act of 1996[73] and direct payments under the FSRI Act of 2002 relate the amount of the payment to the type of production undertaken by recipients because these payments are made solely if a producer grows crops other than fruits and vegetables (and, in the case of direct payments, wild rice as well).

81. Brazil relies upon the Panel's finding that paragraph 6(b) of Annex 2 addresses both positive requirements that certain products be produced and negative requirements that certain products not be produced. Brazil submits that the Panel correctly held that the words "related to," in paragraph 6(b) of Annex 2, preclude the establishment of any kind of relationship between the amount of a payment and the type of production undertaken. Accordingly, the text requires that the amount of a decoupled payment not be affected, influenced, or dependent, in any way, upon the type of crop planted. Brazil contends that the United States inappropriately seeks to read into paragraph 6(b) an exception for planting restrictions. Brazil observes that where the drafters intended to provide such an exception, they did so explicitly, as is evidenced by paragraphs 11(b) and 11(e) of Annex 2. For Brazil, Annex 2 cannot simply be reduced to the proposition that a measure is exempt if it is consistent with the fundamental requirement established in paragraph 1 that such measures have no, or at most minimal, trade-distorting effects or effects on production. Such an interpretation would overlook the policy-specific criteria in the other paragraphs of Annex 2.

82. Brazil nevertheless agrees with the United States that the expression in paragraph 6(b) "related to ... the type ... of production" does not preclude a Member from making decoupled payments conditional upon producers undertaking no production at all. Brazil highlights, however, that a total ban on production is different from a partial ban, because payment is conditional upon the planting of certain crops as opposed to others. The Panel's factual findings support this view: the Panel found that the planting flexibility limitations impose a "significant constraint" on production decisions.[74] Brazil argues that, under the production flexibility contract and direct payment measures, the amount of payment is always "related to" the type of production undertaken. If permitted crop "types" are produced exclusively, a full payment is made. If a small quantity of "prohibited" crops is produced, the amount of payment is reduced. If a larger quantity of prohibited crops is produced, no payment is made.

83. Furthermore, the various findings by the Panel contradict the United States' basic assertion that "a condition that a recipient not produce certain products serves the fundamental requirement of

[73]Federal Agriculture Improvement and Reform Act of 1996 (the "FAIR Act of 1996"); Public Law 104-127.

[74]Brazil's appellee's submission, para. 287 (quoting Panel Report, para. 7.386).

Annex 2, that measures have no more than minimal trade-distorting effects and effects on production."[75] Rather, a partial prohibition creates incentives for the production of certain crops, and disincentives for the production of prohibited crops. In essence, the Panel found that planting flexibility limitations *did* channel production away from fruits, vegetables (and wild rice) and towards other commodities, such as upland cotton. Brazil thus disputes the distinction put forward by the United States between measures that make payment contingent upon the production of "permitted" crops and those that make payment contingent upon the non-production of "prohibited" crops. As the Panel found on the facts of this case, their effects are the same. The Panel found that "the planting flexibility limitations provide a monetary incentive for payment recipients not to produce the prohibited crops"[76], and that production flexibility contract payments and direct payments have positive production effects by restricting production choices and keeping land dedicated to the production of the permitted crops. Thus, providing income support, whilst also excluding income support when certain types of crop are produced, relates the amount of the income support to the type of production undertaken within the meaning of paragraph 6(b).

84. Finally, Brazil takes issue with the United States' assertion that the Panel's interpretation would require a Member to make decoupled income support payments even if the recipient produced illegal crops or crops damaging to the environment. There was no basis for the Panel to address this issue because the planting flexibility limitations at issue do not pertain to the production of illegal or environmentally-damaging crops. In any event, nothing in the *Agreement on Agriculture* suggests that the word "production" means anything other than *lawful* production. The Panel properly declined to consider the hypothetical situations not created by the United States' measures at issue in the dispute.

(c) Article 13(b) of the *Agreement on Agriculture*

85. Brazil submits that the United States' non-green box domestic support measures are not exempt from actions by virtue of Article 13(b)(ii) of the *Agreement on Agriculture*, and asks the Appellate Body to uphold the Panel's finding that the United States granted implementation period support to upland cotton in excess of that decided in the 1992 marketing year, within the meaning of that provision. Brazil argues that the Panel's interpretation of Article 13(b)(ii) was consistent with its ordinary meaning, context and object and purpose, and that the methodological choices made by the Panel in undertaking the comparison required by Article 13(b)(ii) were reasonable and within the bounds of its discretion as the trier of fact.

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[75]Brazil's appellee's submission, para. 291 (quoting the United States' appellant's submission, para. 22).

[76]*Ibid*., para. 320 (quoting Panel Report, para. 7.386).

(i) *Interpretation of "support to a specific commodity"*

86. Brazil contends that the Panel correctly interpreted the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture* to mean "all non-green box support measures that clearly or explicitly define a commodity as one to which they bestow or confer support".[77] This includes crop insurance and the three subsidies described by the United States as "product-specific" domestic support (marketing loan program payments, Step 2 payments, and cottonseed payments), as well as the four measures characterized by the United States as "decoupled" payments (production flexibility contract payments, direct payments, market loss assistance, and counter-cyclical payments).

87. Brazil submits that the United States' interpretation of the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture* is that support falling within the proviso to Article 13(b)(ii) must require production of only one specific crop. Brazil observes that this argument was rejected by the Panel, which concluded that nothing in the text of Article 13(b)(ii) suggests that relevant measures must provide support only to a single commodity, and noted that a single measure could provide support to multiple specific commodities. Brazil agrees with the Panel that "[i]f a measure specifies more than one commodity, it would be appropriate to measure the amount of support granted to each of them in accordance with the terms of the measure itself."[78] The practical effect of the extremely narrow United States reading of Article 13(b)(ii) is to erase US $4.2 billion in production flexibility contract payments, direct payments, market loss assistance, and counter-cyclical payments to recipients who actually grew upland cotton in the 1999-2002 marketing years, even though these four subsidies covered a significant portion of upland cotton producers' costs of production during this period. Brazil contends that the crucial conclusion drawn by the Panel from this data was a clear linkage between historic upland cotton producers and present upland cotton producers. The Panel found that "the overwhelming majority of farms enrolled in the programmes which plant upland cotton also hold upland cotton base", specifically, 96.1 per cent in the 2002 marketing year.[79] For Brazil, the evidence on record and the Panel's findings contradict the United States' factual assertions that there is no connection between current payments under the production flexibility contract, direct payment, market loss assistance, and counter-cyclical payment programs on the one hand, and current upland cotton production on the other.

88. Brazil agrees with the Panel's conclusion that the deliberate decision of the drafters *not* to use in Article 13(b)(ii) readily available terms, such as "product-specific" and "non-product-specific"

[77]Brazil's appellee's submission, para. 358 (quoting Panel Report, para. 7.494).

[78]*Ibid*., para. 371 (quoting Panel Report, para. 7.483).

[79]*Ibid*., para. 383 (quoting Panel Report, para. 7.636).

(and the definitions in Articles 1(a) and (h) of the *Agreement on Agriculture*) means that the drafters intended the term "support to a specific commodity" to have a unique meaning. The Panel properly found that this unique phrase does not mean "product-specific domestic support" because "the class of measures which is covered by paragraph (b) [of Article 13] is broader than either" that term or the phrase "support … provided for an agricultural product in favour of the producers".[80] The Panel correctly focused on the fact that the term "support to a specific commodity" in Article 13(b)(ii) refers to *all* measures set out in the chapeau to Article 13(b). There was therefore no basis in the text to limit the measures covered by Article 13(b)(ii) solely to measures requiring production of a single commodity. Brazil adds that such an interpretation would be contrary to the object and purpose of the *Agreement on Agriculture*, creating a new category of trade-distorting domestic support that would evade the limits set by the Members for exempting domestic support measures from actions under the *SCM Agreement* and the GATT 1994. Under the United States' interpretation, as long as measures do not require production of a *single* commodity, they would *never* be counted as implementation period support for purposes of the peace clause comparison, effectively insulating such measures from serious prejudice actions.

89. In addressing the manner in which the value of support under the production flexibility contract, market loss assistance, direct payment, and counter-cyclical payment programs should be calculated, Brazil submits that the Appellate Body should be wary of setting the evidentiary bar too high for complaining Members seeking to demonstrate precise amounts of support to a specific commodity for purposes of Article 13(b)(ii). Brazil contends that the Appellate Body should affirm the Panel's use of the total budgetary outlays to upland cotton base acres. Brazil observes, however, that the Panel endorsed in the "Attachment to Section VII:D" two other approaches for allocating implementation period support under these programs to upland cotton: the "cotton-to-cotton" methodology and "Brazil's methodology". Brazil maintains that, under any of these approaches, the United States granted support to upland cotton in the years 1999, 2000, 2001, and 2002 in excess of that decided during the 1992 marketing year.

(ii) *Calculation methodology for price-based measures*

90. In addressing the United States' arguments regarding the appropriate methodology for calculating the value of certain United States price-based measures (the marketing loan program payments and deficiency payments), Brazil agrees with the Panel that "the use of the verb 'decided' stands in contrast to the use of the verb 'grant' in relation to the same noun 'support' in the same

[80]Brazil's appellee's submission, para. 390 (quoting Panel Report, para. 7.491).

proviso."[81] The Panel found that "despite the contrast, the proviso calls for a comparison which necessarily requires the two halves of the comparison to be expressed in the same units of measurement."[82] The Panel further noted that "[a] difference between the support that a government decides and the support that its measures grant is that one is expressed in terms of prior determinations of levels of support and the other in terms of subsequent support provided."[83] The Panel concluded by stating that "'[d]ecided' refers to what the government determines, but 'grant' refers to what its measures provide."[84] Brazil submits that the Panel's explanation and reasoning for its interpretation are consistent with the ordinary meaning of the term in its context, and are supported by the Appellate Body's decision in *Brazil – Aircraft*.

91. Brazil contends that the United States incorrectly implies that the Panel agreed with the United States that the peace clause proviso "compares the support a Member determines through its measures, not 'support [that] was spent due to reasons beyond the control of the government'".[85] Brazil argues that the Panel explicitly rejected this contention and concluded that "the text indicates that implementation period support must be measured in terms of support that measures 'grant', rather than what was budgeted or *estimated*."[86]

92. Against this background, Brazil argues that the plain text of paragraph 10 of Annex 3 to the *Agreement on Agriculture* permits the use of *either* a budgetary outlay *or* a price gap methodology for calculating the value of price-based payments. There is no textual basis for concluding, for purposes of the peace clause, that only price gap methodology may be used. Brazil also notes the Panel's factual finding that the United States adopted a budgetary outlay methodology in accounting for marketing loan program payments in its AMS notifications. Brazil observes that when the United States agreed with other WTO Members on its base level AMS, the United States chose to calculate marketing loan program payments using a budgetary outlay methodology. Brazil argues that the United States' decision to use budgetary outlays instead of price gap methodology for notifying the value of marketing loan program payments is legally binding on the United States. This conclusion follows from the text of Articles 6.3 and 3.2 of the *Agreement on Agriculture*. Nothing in Article 6 or any other provision of the *Agreement on Agriculture* permits a Member to change the methodology

[81]Brazil's appellee's submission, para. 340 (quoting Panel Report, para. 7.435).

[82]Panel Report, para. 7.435.

[83]*Ibid*., para. 7.436.

[84]*Ibid*., para. 7.476.

[85]Brazil's appellee's submission, para. 346 (quoting the United States' appellant's submission, para. 66).

[86]*Ibid*., para. 346 (quoting Panel Report, para. 7.557). (emphasis added by Brazil)

used to calculate the value of price-based measures, once that methodology has been used in AMS notifications.

93. Brazil also notes that, although the Panel primarily relied on a budgetary outlay methodology, it also made alternative factual findings regarding the use of price gap methodology for the calculation of marketing loan program payments in the implementation period and for the 1992 benchmark period, as well as for deficiency payments in the 1992 benchmark period only. Brazil highlights the Panel's finding that under *either* approach the United States grants support to upland cotton in excess of that decided in the 1992 marketing year; the Panel found that "both methodologies lead to the same result."[87] As a result, even if the legal grounds for the United States' appeal were valid, the facts on record would require the Appellate Body to uphold the Panel's conclusions that the United States granted support in each of the 1999-2002 marketing years that exceeded the "support decided during the 1992 marketing year".

2. Serious Prejudice

(a) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

94. Brazil submits that the Panel properly found that the effect of the price-contingent subsidies is significant price suppression 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*. Brazil asks the Appellate Body to uphold this finding, and to find that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU. Brazil argues that many of the United States' arguments[88], and particularly those concerning serious prejudice, involve allegations that the Panel failed to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case" pursuant to Article 11 of the DSU. Brazil requests the Appellate Body to ignore these arguments because the United States has not made a proper claim of error under Article 11 of the DSU.

95. First, in response to the United States' argument that the market in which a panel assesses significant price suppression under Article 6.3(c) cannot be a "world market", Brazil maintains that the subsidized and like products must be present in the market examined. Brazil submits that the ordinary meaning of the text of Article 6.3(c) of the *SCM Agreement* indicates that this provision

[87]Panel Report, para. 7.555.

[88]Brazil lists the relevant arguments in Annex A of its appellee's submission.

"may apply to *any* 'market,' from local to global, and everything in between".[89] This contrasts with paragraphs (a), (b), and (d) of Article 6.3, which expressly qualify the type of market at issue. It is also consistent with the object and purpose of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*") (which addresses barriers to "world trade") and the *Agreement on Agriculture* (which addresses "world agricultural markets").[90] Brazil maintains that the Panel found, as a matter of fact, that a world market exists for upland cotton.[91] In addition, contrary to the assertion of the United States, Brazil contends that the Panel did find that United States and Brazilian cotton are present in the world market.[92] However, Brazil agrees with the Panel that the existence of a world market does not preclude the possibility of other markets, and that a world market does not necessarily exist for all products. Brazil refutes the United States' suggestion that the Panel did not find that *Brazilian* prices in the world market for upland cotton were significantly suppressed.[93] In Brazil's view, the Panel found that "Brazilian prices, *i.e.*, prices in Brazil and prices received for Brazilian exports, are significantly suppressed".[94]

96. Secondly, in relation to the United States' allegation that the Panel used circular reasoning to find "significant price suppression", Brazil emphasizes that several factors relate to both the "effect of the subsidy" and "significant price suppression", and the Panel gave separate explanations of these factors in terms of the "effect" and the "suppression". Brazil states that the Panel did take into account supply responses from third countries that would flow from removal of the price-contingent subsidies, in taking into account econometric models that incorporated such supply responses.[95] Brazil also states that the Panel examined the ordinary meaning of the word "significant", properly concluded that it is the degree of price suppression that matters rather than the degree of significance, and provided substantial reasons for its conclusion that the degree of price suppression it had found in the present dispute was significant.

97. Thirdly, in relation to the United States' challenge to the Panel's finding of the "effect" of the price-contingent subsidies, Brazil points out that the Panel did examine the United States' arguments regarding the "farmer's planting decision" and the responsiveness of United States producers to price

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[89]Brazil's appellee's submission, para. 628. (original emphasis)

[90]*Ibid*., para. 633. (emphasis omitted)

[91]*Ibid*., paras. 619 and 622 (referring to Panel Report, paras. 7.1274 and 7.1311).

[92]*Ibid*., paras. 644 and 808 (referring to Panel Report, paras. 7.1266, 7.1282-7.1284 and 7.1313).

[93]*Ibid*., paras. 799-801 (referring to Panel Report, paras 7.1311 and 7.1313).

[94]*Ibid*., para. 802.

[95]*Ibid*., paras. 793-798 (referring to Panel Report, paras. 7.1205, 7.1209, and 7.1215).

signals.[96] Brazil explains that United States upland cotton farmers base planting decisions on expected net returns, meaning expected market prices together with expected government support. According to Brazil, the record contains ample evidence to support the Panel's view that the United States exercises a significant influence on the world market price for upland cotton. Even if movements in planted upland cotton acreage of United States producers correspond with those of other producers (which Brazil disputes), this would not detract from the Panel's finding that the overall level of upland cotton production by United States producers would be significantly lower in the absence of the price-contingent subsidies. The Panel properly assessed the nature of the price-contingent subsidies and properly found a temporal coincidence between those payments and suppressed upland cotton prices, based not merely on the end points of the 1998-2001 marketing year period, but on more detailed data. Finally, Brazil maintains that the Panel properly found that United States upland cotton producers were able to continue to produce upland cotton by virtue of the price-contingent subsidies. Although variable costs may be most relevant in the short term, the Panel found that upland cotton producers must cover their total costs of production in the mid- to long-term. According to Brazil, the fact that United States producers might have been able to cover the costs of upland cotton production through other agricultural production as well as "off-farm income"[97] is irrelevant to the question of the effect of the price-contingent subsidies on the United States industry producing upland cotton.

98. Fourthly, in response to the United States' arguments regarding the quantification of subsidies, Brazil states that neither the text nor the context of Articles 5(c) and 6.3 of the *SCM Agreement* imposes a "preliminary requirement to quantify exactly the amount of each subsidy prior to examining whether it causes adverse effects".[98] Brazil supports its interpretation by reference to Article 6.1(a) and Annex IV of the *SCM Agreement*, which, unlike Article 6.3, impose quantification methodologies. Brazil also distinguishes the analysis required under Part III of the *SCM Agreement* from that required under Part V of that Agreement. Under Part V, it is necessary to calculate the exact amount of subsidization in order to avoid imposing excess countervailing duties. However, the remedy under Part III focuses on the effects of the subsidy, rather than the imposition of duties, and, according to Brazil, the size of a subsidy does not necessarily determine its effects. Finally, Brazil contests the United States' reliance on Annex V of the *SCM Agreement*. In Brazil's view, Annex V sets out procedures for the collection of information and does not require the Panel to

[96]Brazil's appellee's submission, para. 168 (referring to the United States' appellant's submission, para. 324).

[97]*Ibid*., para. 788 (referring to the United States' appellant's submission, para. 224).

[98]*Ibid*., para. 467.

use such information, and the references to an "amount" in paragraphs 2 and 5 of Annex V are directed towards Article 6.1(a) rather than Article 6.3 of the *SCM Agreement*.

99. In response to the United States' arguments regarding the allocation of counter-cyclical payments and market loss assistance payments to upland cotton, Brazil argues that the methodology in Annex IV of the *SCM Agreement* applies only to Article 6.1 and not to Article 6.3(c), and that Annex IV has now expired. In any case, the Panel did find a "strongly positive relationship" between those payments and the production of upland cotton.[99]

100. Brazil contends that the United States' arguments distinguishing between "raw" and "processed" cotton improperly raise new factual and legal issues not before the Panel, including a suggestion that raw cotton is a product distinct from processed cotton. Brazil submits that the Panel found, and the parties agreed, that upland cotton lint is the only subsidized product at issue in this dispute. Moreover, according to Brazil, the Panel found that all price-contingent subsidies benefited the subsidized product (upland cotton), regardless of the stage at which they were provided. Brazil rejects the United States' reliance on the Appellate Body Report in *US – Softwood Lumber IV*.

101. Finally, Brazil responds to the United States' arguments as to the allocation of recurring subsidies to a particular year as follows. Articles 5(c) and 6.3 of the *SCM Agreement* do not explicitly exempt consideration of effects of annually recurring subsidies beyond the year in which they are paid. Furthermore, the United States' interpretation would create a new category of non-actionable subsidies. For example, according to Brazil, the United States' argument would exclude all the subsidies challenged by Brazil because they would be deemed to have no effects after 1 August 2003, well before the Panel circulated its Report. The possibility of making an "as such" claim against the subsidy programs as a whole would provide little comfort because these types of claims can be difficult to prove. Brazil also suggests that "WTO Members provide agricultural subsidies largely on a 'recurring' annual basis"[100] and, therefore, one would have expected an explicit exclusion of such subsidies from the disciplines of particularly Part III of the *SCM Agreement* and the *Agreement on Agriculture* if this were the intention of the drafters. The United States' contrary assertion improperly excludes the possibility for Members to seek the removal of adverse effects of any subsidies (whether recurring or otherwise), as reflected in Article 7.8 of the *SCM Agreement*.

102. In relation to the findings that the Panel made regarding the subsidies at issue in this dispute, Brazil challenges the United States' contention that the Panel made no findings regarding the effects in marketing year 2002 of subsidies paid in marketing years 1999 to 2001. The Panel explained its

[99]Brazil's appellee's submission, para. 523 (quoting Panel Report, para. 7.1226).

[100]*Ibid*., para. 559.

decision to examine serious prejudice over a period including marketing year 2002, and its findings indicate that it regarded the effects of certain subsidies as continuing in that year. In addition, Brazil submits that no "bright lines"[101] can be drawn between upland cotton subsidies paid in different marketing years, because the marketing year runs from 1 August to 31 July, and upland cotton is planted in one marketing year and harvested in the next.

3. Import Substitution Subsidies and Export Subsidies

(a) Step 2 Payments

(i) *To domestic users*

103. Brazil requests that the Appellate Body uphold the Panel's conclusion that Step 2 payments to domestic users of United States upland cotton, provided under Section 1207(a) of the FSRI Act of 2002, are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*. Brazil submits that the Panel correctly held that the *Agreement on Agriculture* and the *SCM Agreement* apply cumulatively, unless there is an exception or a conflict. Such an exception must be explicitly stated.[102] According to Brazil, in *EC – Bananas III*, the Appellate Body found that the *Agreement on Agriculture* permits inconsistencies with obligations in other covered agreements solely if this is "explicitly" stated in the text.[103] Similarly, an explicit exception would be required for the *Agreement on Agriculture* to exempt certain measures from the prohibition in Article 3.1(b) of the *SCM Agreement*.

104. Brazil contends that no such exception is provided in the *Agreement on Agriculture* or in the *SCM Agreement*. The introductory phrase in Article 3.1 of the *SCM Agreement* ("[e]xcept as provided in the Agreement on Agriculture") does not mean that Article 3.1 does not apply to domestic support measures conforming to the *Agreement on Agriculture*; instead, it confirms that Article 3.1 of the *SCM Agreement* applies unless it conflicts with specific provisions of the *Agreement on Agriculture*. This interpretation is confirmed by Article 21.1 of the *Agreement on Agriculture* and by the absence of any exception in Article 13 of the *Agreement on Agriculture* regarding Article 3.1(b).

105. Brazil asserts that, under the *Agreement on Agriculture*, WTO Members are entitled to grant domestic support in favour of agricultural producers. However, this does not create a conflict with Article 3.1(b) of the *SCM Agreement*, because it is perfectly possible for Members to grant domestic

[101]Brazil's appellee's submission, para. 570.

[102]*Ibid*., para. 832 (referring to Appellate Body Report, *US – Cotton Yarn*, para. 120).

[103]*Ibid*., para. 833 (referring to Appellate Body Report, *EC – Bananas III*, para. 157).

support without making payments contingent on domestic content. In other words, Members can fully enjoy their right to grant domestic support and still comply with Article 3.1(b) of the *SCM Agreement*. This interpretation is consistent with a primary objective of the WTO agreements, namely, avoiding discrimination under the national treatment rule. It is also consistent with an adopted GATT panel report regarding a domestic support measure to agricultural producers that was contingent on the purchase of domestic goods. That panel recognized that the GATT contracting parties were entitled to grant support to agricultural producers but found that this could be done without granting domestic content subsidies.[104] The panel held that a domestic content subsidy in favour of agricultural producers was inconsistent with Article III:4 of the GATT 1947. Therefore, Brazil contends that domestic support under the *Agreement on Agriculture* can and must be granted consistently with Article 3.1(b) of the *SCM Agreement*.

(ii) *To exporters*

106. Brazil requests the Appellate Body to uphold the Panel's findings that Step 2 payments to exporters of United States upland cotton are contingent upon export performance and, consequently, are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and are prohibited under Articles 3.1(a) and 3.2 of the *SCM Agreement*.

107. Brazil agrees with the Panel that the principles set out by the Appellate Body in *US – FSC (Article 21.5 – EC)* apply to Step 2 payments to exporters.[105] In one situation under the Step 2 measure, proof of exportation is required as a condition of payment. This export contingency is not dissolved because the payment can also be made in another situation, on other conditions.

108. Brazil adds that, contrary to the United States' argument on appeal, this is not a measure that establishes a single set of conditions applying to all upland cotton produced in the United States.[106] On its own terms, the measure does not apply to all United States production of upland cotton. Instead, the measure carves out of that overall production two classes of upland cotton that may, on certain conditions, receive subsidies. In so doing, the measure targets two well-defined classes of

[104]Brazil's appellee's submission, para. 860 (referring to GATT Panel Report, *Italy – Agricultural Machinery*, para. 16).

[105]*Ibid*., paras. 881-884 (referring to Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 113 and 119 and Appellate Body Report, *Canada – Aircraft*, para. 179).

[106]*Ibid*., para. 890 (referring to the United States' appellant's submission, para. 444).

recipients and does not address either all United States production of upland cotton, or all "uses" of United States upland cotton.

109. Brazil also takes issue with the United States' assertion that Step 2 payments are contingent on use and not exportation. According to Brazil, Step 2 payments are not contingent on "use" in any meaningful sense. The measure is indifferent as to whether, how or when the upland cotton is "used." The criterion is not "use", but simply "exportation". Provided that the upland cotton is "shipped" from the United States, it would not matter if the upland cotton were never used, for instance, because its quality deteriorated during shipping or even because the ship carrying it sank. A subsidy would still be paid because of "exportation" from the United States.

110. Finally, Brazil distinguishes the facts in the present dispute from those before the panel in *Canada – Dairy*. In that case, a single regulatory class applied to all Canadian production of milk destined for a particular end-use. [107] In contrast, in the present case, the measure under which Step 2 payments are made explicitly establishes two mutually exclusive regulatory categories that apply to some, but not all, United States production of upland cotton.

111. Brazil requests, therefore, that the Appellate Body reject the United States' appeal and uphold the Panel's finding that Step 2 payments to exporters of United States upland cotton are contingent upon export performance and, consequently, are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and are prohibited under Articles 3.1(a) and 3.2 of the *SCM Agreement*.

(b) Export Credit Guarantees

(i) *Panel's terms of reference*

112. Brazil asks the Appellate Body to uphold the Panel's conclusion that export credit guarantees to facilitate the export of United States agricultural commodities other than upland cotton were within the Panel's terms of reference.

113. Brazil asserts that the measures included in its request for consultations, as well as in its request for establishment of a panel, were the General Sales Manager 102 ("GSM 102") program, the General Sales Manager 103 ("GSM 103") program, and the Supplier Credit Guarantee Program (the "SCGP"). Under Unites States law, each of these measures applies to all eligible agricultural products. Adding a particular product or products to Brazil's request for establishment would not, therefore, have constituted the addition of *measures*. In any event, Brazil argues that its request for

[107]Brazil's appellee's submission, paras. 894-899 (referring to Panel Report, *Canada – Dairy*, paras. 2.39 and 7.41).

consultations, in fact, identified the United States' export credit guarantee measures in connection with all eligible commodities, without any limitation to upland cotton.

114. Additionally, Brazil asserts that, irrespective of the measures identified in Brazil's request for consultations, the Panel found, as a matter of fact, that "consultations were held" on the export credit guarantee measures in connection with all eligible commodities, as required by Article 6.2 of the DSU.[108] Brazil explains that the Appellate Body has held that as long as consultations were held on a measure included in a request for establishment of a panel, that measure is properly within a panel's terms of reference, irrespective of whether the measure was included in the request for consultations.[109] This is consistent with the purpose of consultations, which is to offer Members the opportunity to engage in good faith discussions with a view to resolving a trade dispute. The process necessarily involves collecting information that will shape the substance and scope of the dispute, should consultations fail.

(ii) *Statement of available evidence*

115. Brazil asks the Appellate Body to deny the United States' claim that the Panel erred in concluding that Brazil provided a statement of available evidence with respect to the United States' export credit guarantee programs as they relate to agricultural commodities other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.

116. According to Brazil, its statement of available evidence not only identified the measures at issue—the export credit guarantee measures—but also indicated the characteristics of those measures that had led Brazil to suspect that they constituted export subsidies. Brazil argues that this is consistent with the Appellate Body's interpretation of the requirements of Article 4.2 of the *SCM Agreement*.[110] Specifically, Brazil's statement describes the failure of the United States' export credit guarantee programs to establish premium rates that cover long-term operating costs and losses, which are central elements in determining whether a program constitutes an export subsidy under item (j) of the Illustrative List of Export Subsidies included as Annex I to the *SCM Agreement*. Further, the Panel found that the documentary evidence cited by Brazil to support its preliminary view was a link to a United States government website with data showing that revenues for the export credit guarantee programs do not cover long-term operating costs and losses.[111] The evidence

[108]Brazil's appellee's submission, para. 211 (quoting Panel Report, para. 7.61).

[109]*Ibid*., para. 213 (refering to Appellate Body Report, *Brazil – Aircraft*, paras. 132-133).

[110]*Ibid*., paras. 228-229 (referring to Appellate Body Report, *US – FSC*, para. 161).

[111]*Ibid*., para. 226 (referring to Panel Report, paras. 7.92-7.93).

addressed the failure of the export credit guarantee programs to cover long-term operating costs and losses overall, rather than in connection with upland cotton alone.

117. Thus, Brazil asserts, its statement of available evidence meets the requirements of Article 4.2, by identifying the export credit guarantee programs, and providing and describing available evidence of the character of those measures as export subsidies, across all eligible commodities.

(iii) *Article 10.2 of the Agreement on Agriculture*

118. Brazil requests that the Appellate Body reject the United States' appeal of the Panel's finding that export credit guarantees are subject to the export subsidy disciplines in Article 10.1 of the *Agreement on Agriculture*.

119. Brazil asserts that subsidized export credit guarantees are covered by the general definition of "export subsidies" under Article 1(e) of the *Agreement on Agriculture*. These measures are, therefore, subject to Article 10.1 of the *Agreement on Agriculture*, unless an express exception is provided in Article 10.2. The text of Article 10.2 establishes two obligations, but does not provide an exception. It requires WTO Members to negotiate multilateral rules to regulate agricultural export credit measures specifically, and to apply those rules once they are agreed. The text of Article 10.2 may be contrasted with several other WTO provisions that also require negotiations, but that state explicitly that the existing disciplines do not apply in the meantime.[112] The inclusion of such exceptions in other provisions highlights the lack of an exception in Article 10.2.

120. Brazil argues that the Panel's interpretation is consistent with the context and object and purpose of Article 10.2. Each of the paragraphs in Article 10 pursues the aim of preventing circumvention of export subsidy commitments and, thereby, contributes to the purpose of the *Agreement on Agriculture* of establishing specific binding commitments on export competition. Article 10.1 does so by disciplining export subsidies not listed in Article 9.1, as well as non-commercial transactions. Article 10.3 does so by reversing the usual rules on the burden of proof where Members have exported products in excess of their quantity reduction commitment levels. Article 10.4 does so by providing specific disciplines on food aid that ensure it is used for legitimate purposes and not to circumvent export subsidy commitments. Therefore, Article 10.2 must be interpreted in a manner that ensures that it contributes to the purpose of preventing circumvention of commitments on export competition. The United States' interpretation of Article 10.2 would leave

[112]Brazil's appellee's submission, paras. 916-917 (referring to footnote 15 to Article 6.1(a) and footnote 24 to Article 8.2(a) of the *SCM Agreement*, and Article XIII of the *General Agreement on Trade in Services*).

Members free to grant unlimited export subsidies in the form of export credit guarantees and would permit wholesale circumvention of commitments.

121. Brazil takes issue with the United States' assertion that the Panel's interpretation is an "assault" on international food aid.[113] According to Brazil, food aid is subject to the specific disciplines in Article 10.4 of the *Agreement on Agriculture*, as well as the general disciplines in Article 10.1. Article 10.4 pursues the aim of preventing circumvention by ensuring that, consistently with the international regulation of food aid, such transactions do not result in "harmful interference" with trade.[114] Further, Article 10.4(a) adds to the disciplines by prohibiting food aid that is "tied" to or contingent upon "commercial exports" of agricultural products. This is not an "assault" on food aid; rather, it ensures that food aid is used for legitimate humanitarian purposes and not for illegitimate trade-distortion.

122. Brazil, moreover, disagrees with the conclusions drawn by the United States from the negotiating history of the *Agreement on Agriculture*. Brazil explains that the negotiating history confirms that export credit guarantees are, indeed, subject to Article 10.1. Members had known since 1960 that subsidized export credit guarantees were covered by the term "export subsidies". During the negotiations, Members repeatedly expressed the intention to subject these measures to export subsidy disciplines, and they never once expressed the intention to exclude them from such disciplines. In addition, Brazil rejects the United States' contention that the Panel's reading of Article 10.2 gives rise to a result that is "manifestly unreasonable".[115] At the close of the Uruguay Round, Members agreed that they would calculate their respective export subsidy commitment levels exclusively on the basis of the export subsidies listed in Article 9.1. They chose to leave out of that calculation the export subsidies in Article 10.1.[116] This is not an unjust implementation of the Uruguay Round, but the logical consequence of the bargain Members struck. Brazil emphasizes that the Panel's interpretation does not mean that Members cannot grant export credit guarantees. Instead, it means that *subsidized* export credit guarantees are subject to discipline as trade-distorting measures, and cannot be used to override export subsidy commitments.

[113]Brazil's appellee's submission, para. 940 (quoting the United States' appellant's submission, para. 350).

[114]*Ibid*., para. 940 (quoting paragraph 3, FAO "Principles of Surplus Disposal and Consultative Obligations", and Article IX(d) of the Food Aid Convention).

[115]*Ibid*., para. 926 (quoting the United States' appellant's submission, para. 384).

[116]*Ibid*., para. 927.

123. Finally, Brazil asserts that, even if Article 10.2 were to exempt export credit guarantees for agricultural commodities from the disciplines in the *Agreement on Agriculture*, these measures would still be subject to Article 3 of the *SCM Agreement*.[117]

(iv) *Burden of proof*

124. Brazil submits that, even if correct, none of the United States' arguments in respect of the Panel's application of the burden of proof would lead to a reversal of the Panel's conclusion that the United States' export credit guarantee programs constitute export subsidies under the *Agreement on Agriculture* and the *SCM Agreement*. Irrespective of which party bore the burden of proof and the role of Article 10.3 of the *Agreement on Agriculture*, the Panel explicitly found that Brazil had established that the premiums charged under the United States' export credit guarantee programs were inadequate to cover long-term operating costs and losses for purposes of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.[118] Having concluded that Brazil had successfully demonstrated that the United States' export credit guarantee programs constitute export subsidies under item (j) as context for the interpretation of the term "export subsidies" in Articles 10.1 and 8 of the *Agreement on Agriculture*, the Panel similarly concluded that the export credit guarantee programs constitute prohibited export subsidies under item (j) of the Illustrative List of Export Subsidies and Articles 3.1(a) and 3.2 of the *SCM Agreement*.[119]

125. Brazil also takes issue with the United States' assertion that the Panel required the United States to offer "incontrovertible demonstrations to the Panel" that, under the net present value accounting methodology, data trends indicated profits for the programs.[120] Brazil explains that, as the party asserting that these trends existed, the United States bore the burden of proving their existence. In the statement challenged by the United States, the Panel simply found that the United States had not met this burden. The Panel made this finding based on data submitted by the United States. Given that the United States has not alleged that the Panel failed to make an objective assessment of the facts under Article 11 of the DSU, Brazil argues that the United States' appeal should be denied on these grounds alone.

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[117]At the oral hearing, however, Brazil clarified that if Article 10.2 were to exempt export credit guarantees for agricultural commodities from the disciplines in the *Agreement on Agriculture*, Article 3 of the *SCM Agreement* would not be applicable to such measures.

[118]Brazil's appellee's submission, paras. 1023-1024 (referring to Panel Report, para. 7.867).

[119]*Ibid*., para. 1024 (referring to Panel Report, paras. 7.946-7.948).

[120]*Ibid*., para. 1025 (quoting the United States' appellant's submission, para. 408).

(v) *Necessary findings of fact*

126. Brazil asserts that the United States' claim that the Panel did not make the necessary findings of fact should have been brought under Article 11 of the DSU and that, having failed to bring such a claim, the United States is precluded from challenging the Panel's appreciation of the facts.

127. In any event, Brazil submits that neither item (j), nor Articles 3.1(a) and 3.2 of the *SCM Agreement*, nor Articles 10.1 and 8 of the *Agreement on Agriculture*, required the Panel to make specific factual findings on the "monetary extent to which" premium rates are inadequate to cover the long-term operating costs and losses of the United States' export credit guarantee programs.[121] It was sufficient for the Panel to have found that, under any and all methodologies that it reviewed and accepted, premium rates are *inadequate* to cover the long-term operating costs and losses of the export credit guarantee programs.

128. In addition, Brazil asserts that the Panel made sufficient factual findings for its conclusion that premium rates are inadequate to cover the long-term operating costs and losses of the export credit guarantee programs. Specifically, the Panel assessed the performance of the export credit guarantee programs under the elements of item (j) in various ways. In its assessment of the *past* performance of the export credit guarantee programs during the period 1992-2002, the Panel used two accounting methodologies—net present value accounting and cash basis accounting—to determine whether premium rates are inadequate to cover the long-term operating costs and losses of the programs.

129. Brazil therefore requests that the Appellate Body uphold the Panel's finding that the United States' export credit guarantee programs constitute export subsidies within the meaning of item (j) of the Illustrative List of Export Subsidies and Articles 3.1 and 3.2 of the *SCM Agreement*.

C. *Claims of Error by Brazil – Appellant*

1. Domestic Support

(a) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

130. Brazil conditionally appeals the Panel's exercise of judicial economy with respect to Brazil's claim that the "updating" of base acreage for direct payments under the FSRI Act of 2002 renders that program inconsistent with paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. Brazil's appeal is conditional on the Appellate Body reversing the Panel's finding that production flexibility

[121]Brazil's appellee's submission, para. 1046 (quoting the United States' appellant's submission, para. 419).

contract payments and direct payments are not decoupled income support under paragraph 6(b) of Annex 2 and thus not entitled to peace clause protection by virtue of Article 13(a) of the *Agreement on Agriculture*.

131. Brazil argues that the Panel made factual findings to the effect that the FSRI Act of 2002 created a new "base period" of time (marketing years 1998-2001) according to which upland cotton producers' eligibility for direct payments could be calculated. This new base period could replace the base period that had prevailed under the FAIR Act of 1996 (i.e., 1993-1995) for the calculation of production flexibility contract payments. In practical terms, the FSRI Act of 2002 gave producers who planted more upland cotton during 1998-2001 the chance to "update", that is, increase, the quantity of base acres for which they received direct payments.

132. Brazil recalls that paragraph 6(a) of Annex 2 states that "[e]ligibility for such payments shall be determined by clearly-*defined criteria* such as income, status as a producer or landowner, *factor use or production level in a defined and fixed base period*".[122] "Factor use" encompasses quantities of eligible farmland used in a historical period, such as the "base acres" used in the production flexibility contract and direct payment programs. Similarly, "production level" encompasses quantities of production based on historical acreage and yields, such as those used under the production flexibility contract and direct payment programs to calculate payments. If either the historical acreage or yields are updated, the result is a change in one of the "clearly-defined criteria". Yet paragraph 6(a) requires that both the "factor use" and "production level" criteria be set out in "a" single "fixed" base period.

133. Brazil notes that the ordinary meaning of the term "fixed" in relation to a base period is that the defined base period cannot be changed or updated. Accordingly, there can be only one period of time to establish these values; there can be no "updating" of the base period. Brazil contends that the context supports its interpretation. Moreover, the object and purpose of paragraph 6 of Annex 2 is to ensure that decoupled payments "have no, or at most minimal, trade-distorting effects or effects on production".[123] Paragraphs 5 and 6 of Annex 2 make clear that the purpose of "decoupled income support" is to break the link between production decisions and the amount of support. If that link is maintained, then domestic support is not entitled to the exemption from reduction commitments. Brazil submits that the United States' interpretation would effectively allow a Member to re-link last year's production to this year's payment. This would void paragraph 6(a) of any *effet utile*.

[122]Brazil's other appellant's submission, para. 246. (emphasis added by Brazil)

[123]*Ibid*., para. 251 (quoting para. 1 of Annex 2 of the *Agreement on Agriculture*).

134. Brazil submits that the undisputed facts on the record reveal that production flexibility contract payments and direct payments were made to the same persons, on the same land, based on the same yield and payment formula, under the same conditions, and with the same limitations. Given these similarities, the option for a producer to select a new "fixed base period" other than the original "fixed base period" means that the direct payments are not green box measures under paragraph 6(a) of Annex 2. Brazil requests the Appellate Body to find accordingly.

2. Serious Prejudice

(a) World Market Share under Article 6.3(d) of the *SCM Agreement*

135. Brazil appeals the Panel's finding that Brazil failed to establish a *prima facie* case of inconsistency with Articles 5(c) and 6.3(d) of the *SCM Agreement*. Brazil asks the Appellate Body to reverse the Panel's finding that the words "world market share" in Article 6.3(d) mean "the portion of the world's supply that is satisfied by the subsidizing Member's producers"[124] and to find instead that "world market share" means "world market share of *exports*".[125] In addition, if the Appellate Body reverses the Panel's finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, Brazil calls on the Appellate Body to complete the analysis under Article 6.3(d) and to find that the effect of these subsidies is an increase in the United States' world market share of exports within the meaning of Article 6.3(d), thereby constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.

136. As regards the interpretation of the term "world market share" in Article 6.3(d) of the *SCM Agreement*, Brazil first draws support from the text of that provision. Article 6.3(d) does not specify whether "world market share" refers to world market share of production or world market share of something else. However, the use of the word "trade" in footnote 17 to Article 6.3(d) suggests that Article 6.3(d) is directed towards a Member's share of world trade in a product, which requires a focus on *exports* rather than *production*.

137. Secondly, Brazil refers to the context of Article 6.3(d). Brazil argues that Article XVI:3 of the GATT 1994 addresses a Member's "share of world export trade" and that similarities between Article XVI:3 and Article 6.3(d) require the phrase "world market share" in the latter provision to be read in the same way. Brazil also points to the context provided by paragraphs (a) and (b) of Article 6.3, as well as Articles 6.4 and 6.7, and argues that the focus of a serious prejudice analysis

[124]Brazil's other appellant's submission, para. 269 (quoting Panel Report, para. 7.1434).

[125]*Ibid*., para. 380(9). (original emphasis)

under Article 6.3 is on the effects of the subsidies on like products from the complaining Member. According to Brazil, "[t]hese effects are either manifest in aggregated volume effects on the exports of a complaining Member under Articles 6.3(a), 6.3(b) and 6.3(d), or in price effects on the like product of the complaining Member in the 'same market' under Article 6.3(c)".[126]

138. Thirdly, Brazil relies on the object and purpose of Articles 5(c) and 6.3 of the *SCM Agreement*, which it characterizes as being to discipline subsidies causing serious prejudice to the interests of another Member. As stated in Article XVI:1 of the GATT 1994 (to which footnote 13 to Article 5(c) of the *SCM Agreement* refers), serious prejudice is reflected in trade effects, namely decreased imports or increased exports. Increased production is taken into account in a serious prejudice analysis, because it may have trade effects. However, by focusing solely on the United States' share of world upland cotton production, the Panel disregarded the significant increase in the United States' share of world upland cotton exports from 1999 to 2002, which caused serious prejudice to other Members' producers who were competing against the subsidized exports. The Panel's interpretation means that the subsidizing Member's world market share may be significantly affected by unrelated increases in production in third countries, even if this additional production is consumed domestically. Brazil suggests that this would render Article 6.3(d) "largely inutile"[127] in disciplining the use of subsidies to increase market share.

139. For these reasons, Brazil asks the Appellate Body to reverse the Panel's interpretation of "world market share" under Article 6.3(d) of the *SCM Agreement* and to find instead that "world market share" means world market share of *exports*. Should it do so, and if the Appellate Body reverses the Panel's finding of significant price suppression under Article 6.3(c) of the *SCM Agreement*, Brazil asks the Appellate Body to complete the analysis under Article 6.3(d).

140. According to Brazil, factual findings by the Panel and undisputed facts on the record would allow the Appellate Body to complete the analysis under Article 6.3(d). The Panel's findings show that the United States' world market share of exports in marketing year 2002 was 39.9 percent, representing an increase over the previous three-year average of 28.4 percent.[128] Moreover, the Panel's assessment of the effects of the subsidies in its analysis under Article 6.3(c) confirms that the subsidies in question result in an increase in world market share, stimulate exports, and enhance the competitiveness of United States producers in world trade. Brazil submits that the Panel's causation and non-attribution analyses under Article 6.3(c) are also relevant for the causation analysis under

[126]Brazil's other appellant's submission, para. 287.

[127]*Ibid*., para. 295.

[128]*Ibid*., para. 301.

Article 6.3(d). It is appropriate for the Appellate Body to complete the analysis in this way because the Panel did address all the elements of Brazil's claim under Article 6.3(d) and, even if it had not, Articles 6.3(c) and 6.3(d) claims are "closely related" and "part of a logical continuum".[129] According to Brazil, both claims relate to the adverse effects of and serious prejudice caused by actionable subsidies pursuant to Article 5(c) of the *SCM Agreement*, and Articles 6.3(c) and 6.3(d) are "closely-linked steps in determining the consistency of"[130] actionable subsidies under the *SCM Agreement*.

3. Import Substitution Subsidies and Export Subsidies

(a) Share of World Export Trade under Article XVI:3 of the GATT 1994

141. Brazil appeals the Panel's finding that the second sentence of Article XVI:3 of the GATT 1994 applies only to export subsidies as defined in the *Agreement on Agriculture* and the *SCM Agreement*. Brazil asks the Appellate Body to reverse the Panel's finding that this sentence applies only to export subsidies and to find instead that it applies to "*any form of subsidy* which operates to increase the export of any primary product".[131] In addition, if the Appellate Body reverses the Panel's finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, and if the Appellate Body does not find that the effect of these subsidies is an increase in the United States' world market share of exports within the meaning of Article 6.3(d) constituting serious prejudice within the meaning of Article 5(c) of the *SCM Agreement*, Brazil calls on the Appellate Body to complete the analysis and to find that these subsidies are applied in a manner that results in the United States having "more than an equitable share of world export trade in" upland cotton, contrary to the second sentence of Article XVI:3 of the GATT 1994.

142. In relation to the subsidies subject to the second sentence of Article XVI:3 of the GATT 1994, Brazil first refers to the text of this sentence and, in particular, the words "any form of subsidy". The ordinary meaning of these words suggests that Article XVI:3 applies to every subsidy, no matter what kind or how many. In addition, the second sentence specifies that it does not matter whether the subsidy is granted "directly or indirectly". Brazil points out that, in contrast to the first sentence of Article XVI:3, which is concerned with subsidies *on the export* of primary products, the second sentence is concerned with any subsidies that have export-enhancing effects.

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[129]Brazil's other appellant's submission, paras. 313 and 314 (quoting Appellate Body Report, *Canada – Periodicals*, p. 24, DSR 1997:1, 449 at 469; Appellate Body Report, *EC – Asbestos*, para. 79).

[130]*Ibid*., para. 314 (quoting Appellate Body Report, *Canada – Periodicals*, p. 24, DSR 1997:1, 449 at 469).

[131]*Ibid*., para. 317 (quoting the GATT 1994, Article XVI:3). (emphasis added by Brazil)

143. Secondly, turning to the broader context of Article XVI:3, Brazil contends that Part A of Article XVI disciplines subsidies in general, and Part B of Article XVI disciplines "Export Subsidies" (as specified in the heading to Part B) in particular. The wording of the provisions in Part B shows that "export subsidies" in this context means "subsidies on the export" of a primary product (under the first sentence of Article XVI:3) and subsidies that operate "to increase the export of any primary product" (under the second sentence of Article XVI:3). Brazil argues that, in contrast, the export subsidy disciplines in the *SCM Agreement* and the *Agreement on Agriculture* are concerned with the narrower concept of "subsidies contingent upon export performance".[132]

144. Brazil also refers, for contextual support, to Article 13 of the *Agreement on Agriculture*. Article 13(c)(ii) provides a limited exemption for agricultural export subsidies from Article XVI of the GATT 1994, suggesting that Article XVI:3 could otherwise apply to such subsidies. Similarly, Brazil contends that the conditional exemption in Article 13(a)(ii) suggests that, in principle, green box domestic support is subject to challenge under the second sentence of Article XVI:3.

145. Thirdly, with respect to the object and purpose of Article XVI of the GATT 1994 and Articles 5 and 6 of the *SCM Agreement*, Brazil suggests that these provisions are intended to prevent subsidies granted by Members from having certain adverse outcomes or effects. The purpose of disciplining adverse effects of subsidies in the second sentence of Article XVI:3 of the GATT 1994 would be frustrated if this sentence was interpreted to apply only to subsidies contingent on export performance. This interpretation would deprive the second sentence of Article XVI:3 of *effet utile*, because the disciplines in that sentence would no longer apply to many subsidies having export-enhancing effects.

146. Brazil adds that Article XVI:3 of the GATT 1994 continues to apply despite the disciplines in the *SCM Agreement* and the *Agreement on Agriculture*.[133] In interpreting the covered agreements harmoniously and giving effect to all of them, the second sentence of Article XVI:3 must apply to measures that are also subject to the *SCM Agreement* and the *Agreement on Agriculture*. The rules in Article 21.1 of the *Agreement on Agriculture* and the General Interpretative Note to Annex 1A of the *WTO Agreement* do not apply, because no conflict exists between the second sentence of Article XVI:3 of the GATT 1994 and the disciplines in the *Agreement on Agriculture* and the *SCM Agreement*.

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[132]Brazil's other appellant's submission, para. 333 (quoting Article 1(e) of the *Agreement on Agriculture* and referring to Article 3.1(a) of the *SCM Agreement*).

[133]*Ibid*., para. 345 (referring to Appellate Body Report, *Korea – Dairy*, para. 75; and Appellate Body Report, *Argentina – Footwear (EC)*, para. 81).

147. For these reasons, Brazil asks the Appellate Body to reverse the Panel's finding that the second sentence of Article XVI:3 of the GATT 1994 applies only to export subsidies as defined in the *Agreement on Agriculture* and the *SCM Agreement* and to find instead that this sentence applies to any form of subsidy that operates to increase the export of any primary product. Should it do so, and if the Appellate Body reverses the Panel's finding of significant price suppression under Article 6.3(c) of the *SCM Agreement* and does not find serious prejudice pursuant to Articles 5(c) and 6.3(d) of the *SCM Agreement*, Brazil asks the Appellate Body to complete the analysis under Article XVI:3 of the GATT 1994.

148. Brazil contends that the Panel's factual findings and the undisputed facts on the panel record are sufficient for the Appellate Body to find that the price-contingent subsidies caused the United States to have "more than an equitable share of world export trade", contrary to Article XVI:3 of the GATT 1994. The Panel made factual findings, pursuant to Article 6.3(c) of the *SCM Agreement*, regarding the United States' share of world export trade and the effect of the subsidies on that share. Brazil also submits that the Panel's non-attribution analysis would allow the Appellate Body to conclude that it was the subsidies in question that led to the United States' world market share reaching a level that is more than equitable, at the expense of other, more efficient producers.

(b) Export Credit Guarantees

(i) *Threat of circumvention*

149. Brazil asserts that the Panel erred in the interpretation and application of Article 10.1 of the *Agreement on Agriculture* by finding that "threat" of circumvention of export subsidy commitments would arise only if beneficiaries had an "absolute" or "unconditional statutory legal entitlement" to receive the subsidies such that the United States would "necessarily" be required to grant subsidies after the commitment level had been reached.[134] Brazil also takes issue with the Panel's statement that a "threat" could not arise if circumvention was just a *possibility*.[135]

150. According to Brazil, by its very nature, an obligation that covers the "threat" of circumvention deals with a future event whose actual occurrence is merely a possibility that cannot be assured with certainty.[136] Brazil adds that, even though the ordinary meaning of the term "threat" can encompass events that are a possibility or that appear likely, it can also include events whose occurrence is indicated or portended by circumstances. Furthermore, the meaning of the term "threatens" is clarified by its immediate context, particularly the word "[p]revention" in the title of Article 10.

[134]Brazil's other appellant's submission, paras. 85-89 (quoting Panel Report, paras. 7.883 and 7.892).

[135]*Ibid*., paras. 89 and 114 (referring to Panel Report, para. 7.893).

Brazil thus contends that, to give proper meaning to the aim of prevention, the threat obligation should be read so as to thwart, forestall, or stop circumvention from occurring by requiring a Member to take appropriate precautionary action. If, on the contrary, the degree of likelihood necessary to trigger the threat obligation were set too high, the threat obligation would fail to prevent circumvention, contrary to the express aim of the provision.

151. Brazil distinguishes the meaning of "threatens" in the context of Article 10.1 of the *Agreement on Agriculture* from the connotation of that term in other covered agreements. It explains that the *Agreement on Safeguards* and the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*") require a higher degree of likelihood because, under both Agreements, the demonstration of "threat" triggers the right of a WTO Member to apply trade remedy measures involving suspension or modification of WTO commitments. In contrast, Article 10.1 of the *Agreement on Agriculture* aims at the effective enforcement of a Member's export subsidy obligations. Brazil submits that the Panel's reading of Article 10.1 runs counter to the Appellate Body's decision in *US – FSC*, where the Appellate Body held that Article 10.1 applies if a measure "allows for" circumvention[137], whereas the Panel insisted that circumvention must be required by legal entitlement. Brazil submits that the assessment of whether a threat exists under Article 10.1 must be done on a case-by-case basis and suggests a list of factors that could be considered as part of the assessment.[138]

152. Brazil also contends that the Panel erred by confining its examination of threat of circumvention to scheduled agricultural products other than rice and to unscheduled products "not supported"[139] under the United States' export credit guarantee programs.[140] Brazil explains that, in addition to alleging actual circumvention in respect of rice, it also included this product in its claim of threat of circumvention. Brazil observes, furthermore, that it drew no distinctions between supported and unsupported products. Thus, the Panel's analysis of threat of circumvention should have included rice and all unscheduled products eligible to receive support under the export credit guarantee programs, regardless of whether they were in fact supported by such programs in the past.

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[136]*Ibid*., para. 94 (referring to Appellate Body Report, *US – Lamb*, para. 125).

[137]Brazil's other appellant's submission, paras. 126-129 (quoting Appellate Body Report, *US – FSC*, para. 152).

[138]*Ibid*., para. 105.

[139]When the Panel refers to products supported under the export credit guarantee programs, the Panel is referring to products for which there was evidence in the record showing that they were not only eligible under the programs, but that export credit guarantees were in fact received in connection with exports of those products. (Panel Report, para. 6.32)

[140]Brazil's other appellant's submission, para. 132 (quoting Panel Report, para. 7.882).

153. Brazil argues that the Panel should have made a finding of threat of circumvention notwithstanding its conclusion on actual circumvention in respect of rice and unscheduled products supported under the United States' export credit guarantee programs. The prohibitions on actual and threatened circumvention are two separate obligations under Article 10.1 of the *Agreement on Agriculture*. The concepts of actual and threatened circumvention in Article 10.1 are different from the notions of injury and threat of injury in the trade remedies context. Article 10.1 does not confer rights, but imposes obligations. Accordingly, to hold that a Member has actually circumvented its export subsidy commitments in the past does not make it irrelevant to conclude that the Member continues to threaten circumvention in the future.

154. If the Appellate Body agrees with Brazil and modifies the Panel's interpretation of Article 10.1, Brazil requests that the Appellate Body complete the analysis of its claims. Brazil argues that the United States maintains export credit guarantees for a very wide range of scheduled and unscheduled agricultural products. These measures are subject to special budgetary rules that provide permanent and unlimited budget authority to the CCC to grant export credit guarantees. Therefore, Brazil asserts, no budgetary limits are imposed on the value of the subsidies that can be granted.

155. Brazil states that, even though the United States alleged before the Panel that the export credit guarantee programs are not unlimited because they impose certain conditions on the grant of subsidies, these conditions have no rational relationship whatsoever to ensuring respect for the United States' export subsidy commitments. There is no evidence on the record, according to Brazil, to demonstrate that any of the applicable conditions has ever been applied with a view to ensuring respect for the United States' export subsidy commitments. Moreover, none of these conditions has prevented the United States from consistently granting export credit guarantees for both scheduled and unscheduled products in violation of these commitments. Brazil contends that the authority that the United States enjoys to grant export credit guarantees in violation of its export subsidy commitments, coupled with the consistent pattern of granting behaviour in violation of those commitments, establishes that the United States' export credit guarantees are applied in a manner that threatens to lead to circumvention of the United States' export subsidy commitments for all eligible products, under Article 10.1 of the *Agreement on Agriculture*.

(ii) *Actual circumvention*

156. Brazil claims that the Panel erred in the application of Article 10.1 of the *Agreement on Agriculture*, and did not discharge its duties under Article 11 of the DSU, by finding that the United States' export credit guarantees are applied in a manner that results in circumvention of the United States' export subsidy commitments for only one scheduled product, namely rice.

157. Brazil submits that, according to uncontested evidence on the record, supplied by the United States, actual circumvention also occurred for pig meat and poultry meat in 2001.[141] According to figures supplied by the United States, in fiscal year 2001, the volume of pig meat and poultry meat benefiting from export credit guarantees exceeded the United States' reduction commitment levels for these products. The Panel took explicit cognizance of this information, but nonetheless failed to apply a proper interpretation of Article 10.1 to the admitted facts. Likewise, the Panel failed to make an objective assessment of the matter, including of admitted and uncontested facts supplied by the United States, as required by Article 11 of the DSU.

158. Therefore, Brazil requests that the Appellate Body modify the Panel's finding that the United States' export credit guarantees are applied in a manner that results in actual circumvention with respect to only one scheduled product, namely, rice, and that it find, based on the undisputed facts on the record, that export credit guarantees are applied in a manner that also results in actual circumvention with respect to pig meat and poultry meat.

(iii) *Articles 1.1 and 3.1(a) of the SCM Agreement*

159. Brazil appeals the Panel's finding that, having found that the United States' export credit guarantee programs are export subsidies under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*, it was unnecessary to address Brazil's claim that these programs constitute export subsidies under the terms of Articles 1.1 and 3.1(a) of the *SCM Agreement*. In declining to make a finding under these two Articles, the Panel erred in the interpretation and application of Article 3.1(a) of the *SCM Agreement*, as well as of Article 3.7 of the DSU.

160. According to Brazil, the Panel failed to recognize that Article 3.1(a) includes multiple and distinct obligations that differ from those deriving from item (j) of the Illustrative List of Export Subsidies. Most importantly, while a measure may no longer constitute an export subsidy under

[141]In its other appellant's submission, Brazil also claimed that the Panel erred by failing to find actual circumvention of the United States' export subsidy reduction commitments for vegetable oil in 2002. (Brazil's other appellant's submission, paras. 208-209) At the oral hearing, however, Brazil indicated that it was no longer pursuing this claim in respect of vegetable oil.

item (j), the same measure can still constitute an export subsidy under Articles 1.1 and 3.1(a) of the *SCM Agreement*. In the present dispute, a claim under item (j) of the Illustrative List of Export Subsides requires a determination whether the programs involved a "net cost" to the United States government. In contrast, a claim under Articles 3.1(a) and 1.1 necessitates a determination of whether the programs constitute "financial contributions" that confer a "benefit" (within the meaning of Article 1.1 of the *SCM Agreement*) on recipients of export credit guarantees[142] and are "contingent … upon export performance" (within the meaning of Article 3.1(a) of the *SCM Agreement*). These are two separate claims regarding two separate obligations imposed upon the United States. The first obligation of the United States is to refrain from maintaining export credit guarantee programs that entail financial contributions, confer benefits, and are contingent upon export performance, while its second obligation is to refrain from maintaining export credit guarantee programs that incur a net cost to the United States government.

161. Brazil submits that, by failing to examine these distinct claims, the Panel misapplied the principle of judicial economy[143] and failed to provide for a "prompt settlement" and "positive solution" of the dispute as required by Articles 3.3 and 3.7 of the DSU. The Panel's misapplication of the principle of judicial economy means that the recommendations and rulings of the DSB may not be sufficiently precise to resolve the dispute. The Panel left unresolved the dispute between the parties as to whether the export credit guarantee programs involve a "benefit", and the steps that the United States must take to implement its obligations under the *SCM Agreement* will therefore be unclear.

162. If the Appellate Body were to reverse the Panel's finding, Brazil requests that the Appellate Body complete the analysis and find that the United States' export credit guarantee programs constitute export subsidies under Articles 1.1 and 3.1(a) of the *SCM Agreement*. Brazil submits that it is undisputed that export credit guarantees constitute "financial contributions" and that the programs are "contingent … upon export performance". Regarding the third element, i.e. whether the export credit guarantee programs confer a benefit within the meaning of Article 1.1(b) of the *SCM Agreement*, Brazil notes that the Appellate Body has sufficient factual findings and undisputed facts on the record to complete the analysis. Brazil explains that the record demonstrates that the United States' export credit guarantee programs confer a benefit because they: (i) are not risk-based; (ii) are below relevant benchmarks, including the fees charged by the United States Export-Import Bank for its own guarantees; and (iii) enable non-creditworthy purchasers of United States agricultural exports to secure loans they would otherwise be unable to secure.

[142]Brazil's other appellant's submission, paras. 29-30 (referring to Appellate Body Report, *Canada – Aircraft*, paras. 154, 157).

[143]*Ibid*., paras. 33-34 (referring to Appellate Body Report, *Australia – Salmon*, paras. 222-224).

(iv) *ETI Act of 2000*

163. Brazil appeals the finding of the Panel that Brazil did not establish a *prima facie* case of inconsistency of the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the "ETI Act of 2000"), and export subsidies granted thereunder in respect of upland cotton, with Articles 8 and 10.1 of the *Agreement on Agriculture*. Brazil acknowledges that the United States enacted legislation, on 25 October 2004, that "seems to repeal most of the illegal aspects of the ETI Act of 2000"[144] and, consequently, Brazil does not ask the Appellate Body to complete the analysis and to find that ETI Act export subsidies provided with respect to upland cotton exports are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.

164. Brazil contends that it challenged before the Panel exactly the same measure that the panel and the Appellate Body in *US – FSC (Article 21.5 – EC)* held to be inconsistent with the *Agreement on Agriculture* and the *SCM Agreement*. Except for the fact that Brazil challenges only the ETI Act export subsidies to upland cotton (and not with respect to all products), the "measure" and the "claims" in the present case are identical to those in *US – FSC (Article 21.5 – EC)*. According to Brazil, the United States has never challenged this identity.

165. Brazil alleges that the United States "effectively admitted" the inconsistency of the ETI Act of 2000 with Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement* and never contested Brazil's claims on their merits.[145] Brazil explains that it presented to the Panel all the evidence and argumentation that had been before the panel and the Appellate Body in the earlier dispute relating to the ETI Act of 2000. Brazil incorporated by reference into its submissions (i) the panel report in *US – FSC (Article 21.5 – EC)*, (ii) the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, and (iii) all submissions of the European Communities in that case. Brazil contends that an approach whereby the complaining Member incorporates by reference the reasoning of another panel, as modified by the Appellate Body, is consistent with the Appellate Body's reasoning in *Mexico – Corn Syrup (Article 21.5 – US)*.[146]

[144]Brazil's other appellant's submission, para. 214.

[145]*Ibid*., para. 222.

[146]*Ibid*., para. 224 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109).

166. Brazil asserts that, in addition to referencing the European Communities' claims and arguments in *US – FSC (Article 21.5 – EC)*, it presented arguments and evidence that addressed the specific nature of its claims, in particular with respect to Article 13(c)(ii) of the *Agreement on Agriculture*. Brazil submits that it identified the relevant portions of the *US – FSC (Article 21.5 – EC)* panel report that determined that the ETI Act of 2000 provides export subsidies. Specifically, that panel found that the ETI Act of 2000 (i) provides financial contributions within the meaning of Article 1.1(a)(ii) of the *SCM Agreement*, (ii) confers benefits within the meaning of Article 1.1(b), and thus (iii) bestows subsidies within the meaning of the *SCM Agreement* that (iv) are contingent upon export performance within the meaning of Article 3.1(a) of the *SCM Agreement*. Based on these arguments and findings, the Panel had more than sufficient evidence and arguments before it to conduct an objective examination of the consistency of the measure with the *Agreement on Agriculture* and the *SCM Agreement*. According to Brazil, the distinctions drawn by the Panel between the present dispute and the claims in *US – FSC (Article 21.5 – EC)* have no basis.

167. Brazil adds that, under Article 17.14 of the DSU, the parties to a dispute are unconditionally bound by adopted panel and Appellate Body reports.[147] Therefore, the United States is bound by the decision of the DSB to adopt the panel and Appellate Body Reports in *US – FSC (Article 21.5 – EC)* and the recommendation by the DSB that the United States bring the ETI Act of 2000 into conformity with the *Agreement on Agriculture* and the *SCM Agreement*. Despite the legal impossibility of the United States arguing that an identical measure subject to identical claims is WTO-consistent, the Panel nevertheless refused to take this into account in its assessment of the facts of the case and the matter before it.

168. Brazil states, moreover, that the ETI Act of 2000 is a measure that *all* WTO Members, *including the respondent*, have decided, through the adoption by the DSB of the relevant panel and Appellate Body reports, is inconsistent with the obligations of the United States under a covered agreement. The general rules on the burden of proof under the DSU, in essence, *presume* that a Member is in compliance with its obligations under WTO law and require a complaining Member to make a *prima facie* case that this presumption is misplaced. However, where the Members have decided in the DSB that a measure does not conform to a covered agreement, there is no basis for presuming that the same measure is in compliance with WTO law in another dispute. Any such presumption contradicts a formal DSB decision of the Members of the WTO.

[147]Brazil's other appellant's submission, para. 234 (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. 90-96).

169. Accordingly, Brazil requests the Appellate Body to find that the Panel erred in the interpretation and application of the burden of proof when finding that Brazil had not established *prima facie* that the ETI Act of 2000 violates Articles 8 and 10.1 of the *Agreement on Agriculture* and Article 3.1(a) and 3.2 of the *SCM Agreement*.

D. *Arguments of the United States – Appellee*

1. Domestic Support

(a) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

170. The United States submits that the Appellate Body should reject Brazil's conditional appeal that direct payments under the FSRI Act of 2002 are not in conformity with the green box criteria set forth in paragraph 6(a) of Annex 2 to the *Agreement on Agriculture*, because the program uses a "defined and fixed base period" different from that established for the production flexibility contract program under the FAIR Act of 1996. The United States argues that the direct payment program employs "a defined and fixed base period" within the meaning of paragraph 6(a) and Brazil's appeal relies on an erroneous reading of that paragraph, such that once one type of green box payment to producers is made, *all* subsequent measures providing such support must be made with respect to the same base period.

171. The United States argues that the ordinary meaning of the terms "defined and fixed base period", as used in paragraph 6(a), requires a base period to be "set out precisely" and to be kept "stationary or unchanging in relative position."[148] Direct payments under the FSRI Act of 2002 satisfy this requirement because eligibility is determined by historical production of any of a number of crops (including upland cotton) in a base period that is "definite" (set out in the FSRI Act of 2002) and "stationary or unchanging in a relative position" (that is, does not change for the duration of the FSRI Act of 2002). There is no textual requirement in paragraph 6(a) that new decoupled income support measures must utilize the *same* "defined and fixed base period" as any prior measures. Furthermore, the use of "a" defined and fixed base period contrasts with the use of the phrase "*the* base period" in other provisions of Annexes 2 and 3 of the *Agreement on Agriculture*. The United States emphasizes that the direct payment and production flexibility contract programs are different measures. There is thus no legal requirement that they use the same base period, so long as they each make use of a "defined and fixed" base period.

[148]United States' appellee's submission, para. 128 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, pp. 618 and 962).

172. The United States argues that Brazil's interpretation would foreclose reform options to Members with past green-box support programs, contrary to the object and purpose of the *WTO Agreement*. In addition, Brazil's interpretation of paragraph 6(a) would render direct payments under the FSRI Act of 2002 non-green box, even though the Panel implicitly found that such payments had no more than minimal trade-distorting effects or effects on production.

2. Serious Prejudice

(a) World Market Share under Article 6.3(d) of the *SCM Agreement*

173. The United States maintains that the Panel correctly found that Brazil did not establish a *prima facie* case of inconsistency with Articles 5(c) and 6.3(d) of the *SCM Agreement*. The United States requests the Appellate Body to uphold this finding. In particular, the United States requests the Appellate Body to dismiss Brazil's argument that the words "world market share" in Article 6.3(d) refer to "world market share of *exports*".[149] Even if the Appellate Body accepts this argument by Brazil, the United States requests the Appellate Body to dismiss the conditional request of Brazil that the Appellate Body complete the analysis and find that the effect of the price-contingent subsidies is an increase in the United States' world market share within the meaning of Article 6.3(d), thereby constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.

174. According to the United States, Brazil's reading of "world market share" as meaning "world market share of export trade" is erroneous. First, the United States endorses the Panel's finding that, by using the term "market", Members intended a meaning broader than the share of "exports" or "trade". The United States contests Brazil's view that the Panel's interpretation of Article 6.3(d) reduces the provision to inutility. The United States agrees with the Panel that Article 6.3(d) calls for an examination of the portion of the world *market* that is satisfied by the subsidizing Member's producers. Nevertheless, the United States stresses that the Panel erroneously equated this examination with an examination of only that portion of the world's *supply* that is satisfied by the subsidizing Member's producers. The United States contends that the Panel should have looked at the level of world *sales* or *consumption* of cotton, rather than simply the world supply.

175. Secondly, as to the context of Article 6.3(d), the United States submits that the Panel was correct to conclude that the use of the phrase "world market share" (as opposed to the different formulations found in Article XVI:3 of the GATT 1994 and Article 27.6 of the *SCM Agreement*)

[149]United States' appellee's submission, para. 145 (quoting Brazil's other appellant's submission, para. 271). (original emphasis)

implies that Members did not want to restrict "world market share" to a Member's share of "world export trade" or "world trade". Similarly, unlike paragraphs (a) and (b) of Article 6.3, paragraph (d) of Article 6.3 is not explicitly restricted to any particular exports or imports or geographical area. The United States contends that the use of the word "trade" in footnote 17 to Article 6.3(d), but not in the text of the Article itself, implies that "world market share" does not include merely shares in world "trade".

176. Even if Brazil's interpretation of the words "world market share" in Article 6.3(d) were correct, the United States submits that the Appellate Body would not have sufficient factual findings and uncontroverted facts before it to complete the analysis under Article 6.3(d). The United States emphasizes that the Panel made no analysis with respect to causation and market share under Article 6.3(d). In the United States' submission, the Panel's "flawed"[150] analysis regarding the effect of the subsidy under Article 6.3(c) is not relevant to Brazil's request that the Appellate Body complete the analysis under Article 6.3(d) of the *SCM Agreement*.

3. Import Substitution Subsidies and Export Subsidies

(a) Share of World Export Trade under Article XVI:3 of the GATT 1994

177. The United States submits that the Panel properly found that Article XVI:3 of the GATT 1994 applies only to export subsidies as defined in the *Agreement on Agriculture* and the *SCM Agreement*. However, if the Appellate Body finds that Article XVI:3 applies to subsidies other than export subsidies, the United States asks the Appellate Body to find that Brazil has not established that the United States acted inconsistently with Article XVI:3 of the GATT 1994.

178. Beginning with the scope of Article XVI of the GATT 1994, the United States emphasizes that the text of Article XVI distinguishes between "Subsidies in General" (Part A) and "Additional Provisions on Export Subsidies" (Part B). By locating Article XVI:3 in Part B, Members agreed that Article XVI:3 is an additional provision on export subsidies. The term "export subsidy" is now defined in the *SCM Agreement* and the *Agreement on Agriculture* as referring to subsidies that are contingent on export performance. Both the context provided by these Agreements, as well as their drafting history, confirm that the export subsidies referred to in Article XVI:3 are also subsidies contingent on export performance. According to the United States, the Panel was correct to rely on Article 3.1(a) of the *SCM Agreement*, item (l) of the Illustrative List of Export Subsidies in Annex I

[150]United States' appellee's submission, para. 164.

of the *SCM Agreement*, and the drafting history of the *Tokyo Round Subsidies Code* in concluding that Article XVI:3 of the GATT 1994 is concerned with certain export subsidies on primary products.

179. The United States contends that, even if the Appellate Body reverses the Panel's interpretation of the scope of Article XVI:3, there would be insufficient undisputed facts on the record or factual findings by the Panel for the Appellate Body to complete the analysis. The United States observes that the Panel made no findings on causation relative to trade share. As the "causation"[151] requirement under Article XVI:3 of the GATT 1994 differs from that under Article 6.3(c) of the *SCM Agreement*, and as the United States has appealed the Panel's analysis under Article 6.3(c), that analysis cannot support a finding of inconsistency under Article XVI:3. Regarding the standard for determining what is "more than an equitable share" of world export trade under Article XVI:3, the United States understands Brazil to argue that the demonstration of "any causal relationship between an increase in exports and the subsidies provided" would suffice.[152] However, the United States regards this standard as inadequate, because it renders the language "more than an equitable share" inutile, and it would transform Article XVI:3 into an outright prohibition on export-enhancing subsidies.

(b) Export Credit Guarantees

(i) *Threat of circumvention*

180. The United States requests that the Appellate Body uphold the Panel's finding that no threat of circumvention exists under Article 10.1 of the *Agreement on Agriculture* with respect to "unsupported" agricultural products for which no export credit guarantees have been provided.

181. The United States asserts that, contrary to Brazil's argument, the Panel's finding that the export credit guarantee programs do not threaten circumvention of export subsidy commitments is not an articulation of a broad standard that circumvention of export subsidy commitments would be "threatened" only "if beneficiaries had an 'absolute' or 'unconditional ... legal entitlement' to receive the subsidies such that the United States would 'necessarily' be ['']required' to grant subsidies after the commitment level had been reached".[153] Rather, in concluding that the programs did not pose a threat of circumvention, the Panel was simply responding to and declining to adopt Brazil's erroneous factual and legal characterizations of the program.

[151]United States' appellee's submission, para. 182.

[152]*Ibid*., para. 183 (quoting Brazil's other appellant's submission, para. 373).

[153]*Ibid*., para. 6 (quoting Brazil's other appellant's submission, para. 3).

182. The United States submits, furthermore, that the Panel rightly distinguished these programs from the mandatory subsidies at issue in *US – FSC*, and that the Panel's decision presents no conflict with that Appellate Body Report. Brazil effectively argued that a mere possibility of issuance of export credit guarantees presented a threat of circumvention, and the Panel simply did not adopt this theory in the context of the export credit guarantee programs.

183. In addition, the United States asserts that the Appellate Body need not complete the analysis regarding threat of circumvention as requested by Brazil. First, the Panel did not err in its analysis of threat of circumvention. Secondly, the Panel appropriately exercised judicial economy in declining to examine threat of circumvention with respect to those agricultural products for which it found actual circumvention. Further analysis was not necessary to resolve the matter in dispute as it would not affect implementation of the obligation to apply export subsidies only in conformity with applicable WTO commitments.

(ii) *Actual circumvention*

184. The United States asserts that the Appellate Body should reject Brazil's request for additional findings of actual circumvention of export subsidy commitments for pig meat and poultry meat.[154] According to the United States, Brazil has not asserted a proper claim under Article 11 of the DSU. The United States points out that Brazil does not appeal the Panel's findings that the facts did not demonstrate that subsidized exports exceeded the United States' quantitative reduction commitments for poultry meat and pig meat. Therefore, Brazil's appeal pursuant to Article 11 of the DSU is improper as it does not "stand by itself" and is not "substantiated with respect to the challenged findings".[155]

185. The United States submits that, in any event, the data do not support the conclusions that Brazil advances. Brazil's allegation of actual circumvention related to the period July 2001 through June 2002. In contrast, quantitative data on exports under the United States' export credit guarantee programs are maintained on a fiscal year basis, which extends from 1 October to 30 September. Even if this difference between periods can be overcome, the United States argues that the actual data also support the Panel's finding that Brazil did not demonstrate actual circumvention for these products.

[154]The United States also rejected the allegations in respect of vegetable oil made by Brazil in its other appellant's submission.

[155]United States' appellee's submission, para. 50 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 498).

(iii) *Articles 1.1 and 3.1(a) of the SCM Agreement*

186. The United States asserts that the Appellate Body should reject Brazil's request for further findings under Article 3.1(a) of the *SCM Agreement* in addition to the finding the Panel made in respect of item (j) of the Illustrative List of Export Subsidies. The United States submits that, in the light of the Panel's finding that the United States' export credit guarantee programs constitute a prohibited export subsidy because the premium rates were inadequate to cover the long-term operating costs and losses of the program, any additional findings by the Panel would have been redundant. Neither item (j) nor the Illustrative List of Export Subsidies imposes obligations *per se*; instead, the obligation regarding export subsidies is found in Articles 3.1(a) and 3.2 of the *SCM Agreement*. Furthermore, Brazil's interpretation would render the Illustrative List of Export Subsidies meaningless. In the United States' view, a practice that does not constitute a prohibited export subsidy under the standard set forth in a particular item of the Illustrative List, such as item (j), cannot constitute a prohibited export subsidy under some other standard. This was the approach advocated by Brazil in the *Brazil – Aircraft* dispute. Moreover, the United States argues that an additional finding by the Panel would have had no effect on implementation. Whether or not a separate finding of "benefit" were made under Article 1.1, the Panel's recommendations would remain precisely the same.

187. The United States also observes that Brazil misconstrues what the Panel decided. The Panel did not decline to address a claim raised by Brazil. Instead, the Panel declined to make additional *factual findings* that Brazil requested. In any event, the United States contends that Brazil misinterprets the concept of judicial economy and that, even if Brazil made a separate claim, the Panel was within the bounds of its discretion in exercising judicial economy with respect to that claim.

188. Finally, the United States disagrees with Brazil's assertion that there are sufficient undisputed facts in the record that would enable the Appellate Body to complete the analysis. According to the United States, it vigorously contested Brazil's allegations of fact in this regard and affirmatively demonstrated that the export credit guarantee programs do not confer such a benefit. The United States explains that no benefit is conferred because identical financial instruments are available in the marketplace in the form of "forfaiting"[156]; there is no correlation between the issuance of the export credit guarantee and the ability of an importer to secure a loan; and the CCC conducts a risk assessment with respect to the foreign banks to whose risk it is exposed.

[156]United States' appellee's submission, para. 93.

(iv) *ETI Act of 2000*

189. The United States submits that the Appellate Body should reject Brazil's request that it find that the Panel erred in concluding that Brazil did not make a *prima facie* case that the ETI Act of 2000 is inconsistent with the United States' WTO obligations.

190. According to the United States, the Appellate Body should not rule on Brazil's appeal because Brazil acknowledges that the appeal is not necessary to resolve the dispute between the parties. Brazil states that it does not ask the Appellate Body to complete the analysis with respect to its claims. Brazil, therefore, is not asking the Appellate Body to make findings that would result in DSB rulings and recommendations with respect to the ETI Act of 2000.[157] For that reason alone, the Appellate Body should decline to decide Brazil's appeal.

191. The United States contends that, in any event, Brazil did not make a *prima facie* case with respect to the ETI Act of 2000. Brazil simply did not present any evidence at all regarding the ETI Act of 2000 itself. In its submission, Brazil gave a brief description of the proceedings in the *US – FSC (Article 21.5 – EC)* dispute and then asked the Panel "to apply the reasoning as developed by the panel and as modified by the Appellate Body in that case *mutatis mutandis*".[158] In essence, therefore, Brazil was not asking the Panel to make an objective assessment of the ETI Act of 2000, but merely to adopt findings from a previous proceeding. The Panel acted properly under the DSU, including Article 11, by declining to find that the "short shrift" that Brazil gave to the ETI Act of 2000 satisfied Brazil's burden to make its *prima facie* case concerning that Act.[159]

192. The United States asserts that the rules of burden of proof in the WTO are well settled. Contrary to Brazil's arguments, a finding of inconsistency in one dispute does not establish a finding of inconsistency in another dispute between different parties. Such an approach would in effect impose the concept of *stare decisis* on the WTO dispute settlement system. The United States also disagrees with Brazil's assumption that it is legally impossible for a party to argue that an identical measure subject to identical claims that were successful in a previous WTO dispute is WTO-consistent. The reasoning of a panel or the Appellate Body in one dispute is not binding on another panel or the Appellate Body in a separate dispute. Furthermore, while the measure may remain the

[157]United States' appellee's submission, paras. 101-104 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 483 and Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323 at 340).

[158]*Ibid*., para. 106 (quoting Brazil's written submission to the Panel, paras. 315-327).

[159]*Ibid*., para. 12.

same, the circumstances may change. Thus, irrespective of the ruling in the previous dispute, Brazil had the burden of establishing a *prima facie* case.

193. Finally, the United States argues that the Appellate Body's reasoning in *Mexico – Corn Syrup (Article 21.5 – US)* does not support Brazil's approach. Brazil exaggerates the Appellate Body's statements in that Report and does not explain why a complainant's obligation to make a *prima facie* case should be interpreted similarly to a panel's obligation to set forth its basic rationale pursuant to Article 12.7 of the DSU.

E. *Arguments of the Third Participants*

1. Argentina

(a) Article 13(a) of the *Agreement on Agriculture*

194. Argentina considers that green box measures must respect the "fundamental requirement" of paragraph 1 of Annex 2 of avoiding trade-distorting or production effects. Argentina submits that this requirement is additional to compliance with the policy-specific criteria of paragraph 6.

(i) *Article 13(a) of the Agreement on Agriculture – Planting Flexibility Limitations*

195. Argentina submits that production flexibility contract payments and direct payments do not comply with paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* because the amount of these payments is related to the type of production after the base period. Argentina disagrees with the United States' view that paragraph 6(b) does not prevent the conditioning of payment upon fulfilling the requirement not to produce certain crops. Argentina considers that the Panel rightly affirmed that "the planting flexibility limitations provide a monetary incentive for payment recipients not to produce the prohibited crops".[160] For Argentina, there is effectively little difference between a "positive" and a "negative" list of permitted crops. The context provided by paragraphs 11(b) and 11(e) of Annex 2 supports this view. Although Argentina agrees with the United States that paragraph 6(b) ensures that the amount of payments must not be used to induce a recipient to produce a particular type of crop, the production flexibility contract and direct payments fail to meet this requirement. Argentina considers that the flexibility enjoyed by producers to plant different crops is illusory. The amount of the payments depends on the type of production. The growing of fruits and vegetables is prohibited under these programs, with the effect of channelling production towards other, permitted crops.

[160]Argentina's third participant's submission, para. 15 (quoting Panel Report, para. 7.386).

(ii) *Article 13(a) of the Agreement on Agriculture – Base Period Update*

196. Argentina agrees with Brazil that the option under the FSRI Act of 2002 to update base acres is inconsistent with paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. Argentina submits

that the term "defined" in paragraph 6(a) refers to the need for the base period to be clearly determined. Likewise, the term "fixed" refers to the need for the base period to be defined in terms that prevent it from being shifted or modified *a posteriori*. The term "fixed" indicates that payments made in accordance with the criteria stipulated in paragraph 6(a) must always rely on the same base period, and no change is possible. Paragraph 6(a) thus allows Members to identify their own base period; however, once that period is determined, the period must remain fixed. Otherwise, the choice of the word "a" in paragraph 6(a) would be difficult to explain. Argentina thus agrees with Brazil that if the structure, design, and eligibility criteria of an original measure containing a "fixed base period" and the structure, design, and eligibility criteria of its successor have not been significantly modified, then it is not legitimate to update the "fixed base period" under the successor measure. Accordingly, the terms of the direct payment program under the FSRI Act of 2002 are inconsistent with the requirements set forth in paragraph 6(a) of Annex 2.

(b) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

197. Argentina agrees with Brazil that the market examined in assessing significant price suppression under Article 6.3(c) of the *SCM Agreement* may be a world market, and that a panel need not quantify precisely the amount of a subsidy in conducting such an assessment.[161]

(c) World Market Share under Article 6.3(d) of the *SCM Agreement*

198. Argentina agrees with Brazil that the words "world market share" in Article 6.3(d) of the *SCM Agreement* refer to the subsidizing Member's share of the world export market.[162]

(d) Step 2 Payments to Domestic Users

199. Argentina agrees with the Panel's conclusion that Step 2 payments to domestic users of upland cotton constitute a subsidy contingent upon the use of domestic over imported goods that is prohibited by Articles 3.1(b) and 3.2 of the *SCM Agreement*, and that WTO Members are not authorized by the *Agreement on Agriculture* to provide such subsidies.

[161] Argentina's statement at the oral hearing.

[162] *Ibid*.

(e) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

200. Argentina submits that the United States' export credit guarantee programs constitute export subsidies in breach of the anti-circumvention provision contained in Article 10.1 of the *Agreement on Agriculture* and, consequently, they are inconsistent with Article 8 and are not exempt from action under Article 13(c) of that Agreement. Argentina disagrees with the United States' view that no disciplines apply to export credit guarantee programs. On the contrary, under the terms of Article 10.1 of the *Agreement on Agriculture*, export credit guarantee programs constituting export subsidies should not be applied in a manner that results in, or threatens to lead to, circumvention of export subsidy commitments.

(f) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

201. According to Argentina, the Panel's findings in respect of the United States' export credit guarantee programs are not complete. In not finding that such programs are also subsidies in accordance with the definition contained in Article 1 of the *SCM Agreement* and the prohibition in Article 3.1(a) of the same Agreement, the Panel did not bear in mind that different obligations stem from those Articles and that, similarly, the course of implementation adopted by a Member in respect of a finding of inconsistency only on the basis of item (j) of the Illustrative List of Export Subsidies may be different. Accordingly, Argentina contends that a finding of inconsistency in respect of the United States' export credit guarantees programs is also possible and should be made on the basis of Articles 1 and 3.1(a) of the *SCM Agreement*.

2. Australia

(a) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

202. Australia requests that the Appellate Body uphold the Panel's conclusion that production flexibility contract payments, direct payments, and the legislative and regulatory provisions that establish and maintain the direct payment program, do not fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture.* Australia submits that making a payment conditional upon the non-production of a particular product is one way in which a Member can relate the "amount of ... payment[]" to the current "type or volume of production". Australia contends that the argument advanced by the United States would introduce an exception into paragraph 6(b) of Annex 2 that has no textual basis. Australia submits that the Panel's interpretation does not prevent payments from being disallowed in the case of illegal production because reducing the payment to zero would be

based on the illegality of the activity, not "the type or volume of production". In addition, a Member could otherwise justify such a measure pursuant to Article XX of the GATT 1994.

(b) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

203. Australia submits that the updating of base acres by the FSRI Act of 2002 means that the direct payments are not green box measures. Australia argues that the meaning of paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* is that, once a base period has been "defined and fixed" pursuant to paragraph 6(a), decoupled income support payments may not be "connected" to or "[f]ound[ed], buil[t] or construct[ed]" on the type of production or the volume of production undertaken by a producer in a later period.[163] Australia says that the Panel found that the direct payments program is the successor to the production flexibility contract program and that the two programs are identical in a number of important respects. The option under the FSRI Act of 2002 for producers to update their base acres is not consistent with the requirement of paragraph 6(a) that there be one "defined and fixed base period".

(c) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

204. Australia refers to the United States' argument that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind certain of its findings and recommendations regarding Article 6.3(c) of the *SCM Agreement*, as required by Article 12.7 of the DSU.[164] According to Australia, this argument suggests that the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. Australia notes that the Appellate Body has recognized the discretion of a panel in choosing the evidence on which it relies.[165]

(d) Step 2 Payments to Domestic Users and Exporters

205. Australia requests that the Appellate Body uphold the Panel's conclusions that Step 2 payments to domestic users constitute subsidies that are inconsistent with the requirements of Article 3.1(b) of the *SCM Agreement*.

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[163]Australia's third participant's submission, para. 42 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 187 and Vol. 2, p. 2534 in relation to the words "based on" and, "related to" in paragraph 6(b) of Annex 2 to the *Agreement on Agriculture*).

[164]*Ibid*., para. 19 (referring to the United States' appellant's submission, paras. 150 and 322-331).

[165]*Ibid*., para. 21 (referring to Appellate Body Report, *EC – Hormones*, para. 135).

206. Australia submits that the Appellate Body should also uphold the Panel's conclusions that Step 2 payments to exporters are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*. In the event that the Appellate Body determines that the Step 2 program is not export-contingent, Australia requests that the Appellate Body find that the Step 2 program *as a whole* is contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the *SCM Agreement*. Furthermore, in that case, the Appellate Body should find that the chapeau to Article 3.1 of the *SCM Agreement* does not serve to exempt such local content subsidies from the application of Article 3.1(b) of that Agreement.

(e) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

207. Australia disagrees with the United States' argument that export credit guarantees are excluded from the application of Article 10.1 of the *Agreement on Agriculture* and Article 3.1(a) of the *SCM Agreement*. According to Australia, the United States has incorrectly applied Articles 31 and 32 of the *Vienna Convention* to the interpretation of Article 10.1 of the *Agreement on Agriculture*. Article 10.1 applies to all "[e]xport subsidies not listed in paragraph 1 of Article 9". The meaning of this provision is clearly discernible from its text and it does not provide for any exceptions. The context of Article 10.2 does not support an interpretation that would be contrary to its plain words, particularly because it is not constructed as an exception provision. The object and purpose of Article 10.1 relate to the prevention of circumvention of commitments, in relation to *all* export subsidies other than those listed in Article 9.1 of the *Agreement on Agriculture*. Furthermore, the application of Article 10.1 to export credit guarantees defined as export subsidies does not lead to a result that is manifestly unreasonable because not all export credit guarantees are export subsidies within the meaning of the *Agreement on Agriculture* and the *SCM Agreement*. It is open to the United States, within the existing WTO framework, to design and maintain measures that fall outside the definition of an export subsidy, which is, in fact, what the United States asserts it has done. In contrast, acceptance of the United States' arguments could lead to a result that is manifestly absurd or unreasonable by encouraging other WTO Members to seek to avoid the anti-circumvention obligations of Article 10.1 of the *Agreement on Agriculture*.

208. Australia also rejects the United States' contention that Article 21.1 of the *Agreement on Agriculture* and the chapeau to Article 3.1 of the *SCM Agreement* render Article 3.1(a) of the *SCM Agreement* inapplicable to export credit guarantee programs.

3. Benin and Chad

(a) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

209. Benin and Chad agree with Brazil that the Panel correctly found that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. Benin and Chad contend that many of the United States' arguments regarding Article 6.3(c) relate to factual findings by the Panel that are not subject to appellate review in the absence of a claim by the United States that the Panel failed to comply with Article 11 of the DSU.

210. Benin and Chad agree with the Panel's finding that it was not required to quantify precisely the amount of the subsidy in assessing Brazil's claim under Article 6.3(c) of the *SCM Agreement*, and that the amount of a subsidy is not necessarily determinative in such an assessment. This is consistent with the different purposes of Parts III and V of the *SCM Agreement*.

(b) World Market Share under Article 6.3(d) of the *SCM Agreement*

211. Benin and Chad support the request by Brazil that the Appellate Body reverse the Panel's interpretation of the term "world market share" in Article 6.3(d) of the *SCM Agreement*. Benin and Chad agree with Brazil that "world market share" means world market share of *exports*. If the Appellate Body adopts this interpretation, Benin and Chad request the Appellate Body to complete the analysis under Article 6.3(d) and to find that the effect of the price-contingent subsidies was an increase in the world market share of the United States contrary to Article 6.3(d). In turn, Benin and Chad ask the Appellate Body to find that they have also suffered serious prejudice under Article 6.3(d) as a result of the increase in the United States' world market share of exports.

212. According to Benin and Chad, the Panel's interpretation of "world market share" as world market share of *production* inappropriately shifts the inquiry away from the *effect* of the subsidy towards unrelated factors, such as production levels in third country markets. A subsidy may have the effect of increasing significantly the exports of a Member, even though the Member's world share of production remains stable or diminishes. Therefore, in the submission of Benin and Chad, the Panel's interpretation could lead to a situation where changes in the supply by a third country determine whether a subsidizing Member's world market share increases or decreases.

213. Benin and Chad state that, if the Appellate Body rejects the Panel's interpretation of "world market share" under Article 6.3(d), there are sufficient undisputed facts on the record for the Appellate Body to complete the analysis and to find that the United States acted inconsistently with Article 6.3(d). The evidence before the Panel indicates that those Members that have lost market

share as a result of the price-contingent subsidies include, at least, Brazil and the "Francophone African nations of Benin and Chad".[166] Benin and Chad disagree with the Panel's finding that "the serious prejudice under examination by a WTO panel is the serious prejudice experienced by the complaining Member".[167]

214. Benin and Chad argue that the Appellate Body should take into account the impact of United States upland cotton subsidies on the "fragile economies of West and Central Africa"[168], as reflected in the Panel's findings and evidence on the record. Benin and Chad point out that Article 24.1 of the DSU, which requires particular consideration to be given to the special situation of least-developed country Members, would be given meaning if the Appellate Body acknowledged that the increase in the United States' world market share caused serious prejudice to Benin and Chad by reducing their market share. Furthermore, nothing in the text of Article 6.3(d) limits a finding of serious prejudice to the complaining party. Therefore, Benin and Chad urge the Appellate Body to draw conclusions under Article 6.3(d) that would require the United States to withdraw the subsidy or remove the adverse effects, not only with respect to Brazil, but also with respect to Benin and Chad.

(c) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

215. Benin and Chad support Brazil's position that the Panel improperly exercised judicial economy by refusing to address Brazil's claim that the United States violated Articles 1.1 and 3.1(a) of the *SCM Agreement* with respect to export credit guarantees. Benin and Chad also support Brazil's request that the Appellate Body complete the analysis as it has sufficient factual findings before it to do so.

216. Benin and Chad explain that, under item (j) of the Illustrative List of Export Subsidies, Brazil's claim is that the export credit guarantee programs operate at a loss or below the cost to the government. In contrast, under Article 3.1(a), Brazil's claim is that the programs are financial contributions that confer a benefit on recipients within the meaning of Article 1.1 of the *SCM Agreement* and that they are contingent upon export performance. Thus, Brazil's claims under item (j) of the Illustrative List of Export Subsidies and Article 3.1(a) were distinct, and the Panel's

[166]Benin and Chad's third participants' submission, para. 85. (emphasis omitted)

[167]*Ibid*., para. 6 (quoting Panel Report, para. 7.1403).

[168]*Ibid*., para. 9.

refusal to address Brazil's claim under Article 3.1(a) leaves an important and distinct claim unresolved. Accordingly, it was improper for the Panel to have exercised judicial economy.[169]

4. Canada

(a) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

217. Canada considers that the Panel was correct in finding that production flexibility contract payments and direct payments do not meet the requirements of paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*. For Canada, nothing in the text of paragraph 6(b) supports the distinction the United States seeks to draw between "positive" and "negative" effects on production. If payments are conditioned on a recipient not undertaking a type of production, then the payment is related to the type of production. Canada thus agrees with the Panel's interpretation that paragraph 6(b) excludes any "typ[e] of relationship between the amount of such payments and the type of production after the base period".[170] Canada argues that this approach is supported by the object and purpose of Annex 2 and the context provided by the fundamental requirement set out in paragraph 1 of Annex 2.

218. Canada agrees with the United States that the fundamental requirement in paragraph 1 of Annex 2 is relevant context in understanding the criterion in paragraph 6(b) that the measure not be related to the type or volume of production. However, a Member does not have an independent basis for claiming that the measure qualifies as a "green box" measure because it has minimal trade-distorting effects. Canada disagrees with the United States' conclusion, based on its interpretation of paragraph 6(e), that a Member is not prohibited under paragraph 6(b) from conditioning payment on non-production of a particular product. Canada considers that paragraph 6(e) is a prohibition against requiring production as a condition of payment, but does not necessarily authorize a Member to impose a requirement not to produce a particular crop. With regard to the planting flexibility limitations under the production flexibility contract payment and direct payment programs, Canada disagrees with the United States that the amount of payments "does not relate to fruit or vegetable production since for that base acre there would be *no payment at all*".[171] For Canada, this interpretation is contrary to the ordinary meaning of the term "related to" and leads to the unreasonable result that a Member could circumvent the requirement in paragraph 6(b) by

[169]Benin and Chad's third participants' submission, paras. 105-108 (referring to Appellate Body Report, *Australia – Salmon*, para. 223 and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133).

[170]Canada's third participant's submission, para. 13 (quoting Panel Report, para. 7.366).

[171]*Ibid*., para. 20 (quoting the United States' appellant's submission, para. 26). (original emphasis)

encouraging certain types of production as long as it does so through a negative list by excluding certain other types of production.

(b) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

219. Canada argues that the direct payments do not fully conform to paragraph 6(a) of Annex 2 of the *Agreement on Agriculture* because of the base period update in the FSRI Act of 2002. Canada submits that the ordinary meaning of the terms "defined and fixed base period" in paragraph 6(a) indicates that the base period cannot vary or change. This is confirmed by the context provided by paragraphs 6(b) and (d), which refer to "any year after the base period", as well as the object and purpose of paragraph 6, which is to identify the types of payments that are minimally trade-distorting. Canada contends that, as the Panel found that direct payments under the FSRI Act of 2002 are closely related to and a successor to the production flexibility contract payments, the base period for direct payments should not be different from the base period for production flexibility contract payments. The fact that payments are provided under new legislation does not in itself allow a modification to the base period under the predecessor program. Otherwise, the requirement that there be a "fixed base period" would become meaningless. By allowing updating of base acreage, the United States is altering the base period contrary to paragraph 6(a).

(c) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

220. Canada submits that the Panel correctly found that, to the extent that export credit guarantees meet the definition of export subsidies, they will be subject to the anti-circumvention disciplines of Article 10.1 of the *Agreement on Agriculture*. The United States' argument that Article 10.2 of the *Agreement on Agriculture* exempts export credit guarantees from the subsidy disciplines under that Agreement has no basis in the text, context, object and purpose, or negotiating history. Canada asserts that the text of Article 10.2 does not explicitly indicate an intention to exclude the application of other, existing disciplines. Indeed, such an interpretation would contradict the stated object and purpose of Article 10 as a whole, which is the "Prevention of Circumvention of Export Subsidy Commitments". Furthermore, the fact that export credit guarantee programs may not be subject to the notification requirement of the *Agreement on Agriculture* does not lead to the conclusion that they are not subject to the other disciplines of that Agreement.

221. Canada also agrees with the Panel's conclusion that the United States violated Articles 3.3 and 8 of the *Agreement on Agriculture* by providing export subsidies otherwise than in conformity with that Agreement with respect to upland cotton and other unscheduled commodities. In addition, Canada states that the Panel's interpretation of Article 10.1 with respect to scheduled products is consistent with the Appellate Body's analysis in *US – FSC*.[172]

(d) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

222. Canada asserts that, if the Appellate Body reverses the Panel's finding that the United States' export credit guarantee programs constitute *per se* prohibited export subsidies under item (j) of the Illustrative List of Export Subsidies, it will still be necessary to consider whether the export credit guarantee programs constitute export subsidies under Articles 1 and 3.1(a) of the *SCM Agreement*. Even if the United States' export credit programs charge adequate fees under the item (j) standard, they may still confer an export subsidy. If they did, the export credit guarantees would have to be provided in a manner consistent with Article 10.1 of the *Agreement on Agriculture*.

5. China

(a) Terms of Reference – Expired Measures

223. China submits that the Panel was correct to find that expired production flexibility contract and market loss assistance payments were within the Panel's terms of reference. The Panel's interpretation of Articles 4.2 and 6.2 of the DSU is in accordance with the text, context, and object and purpose of the DSU, as well as the intention of the drafters. China recalls that Article 4.2 of the DSU indicates that consultations are to cover "any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former". China "agrees with the Panel that based on the analysis of the context and the object of Article 4.2, the term 'affecting' in Article 4.2 is used as a gerund, describing the way in which they relate to a covered agreement, and has no temporal significance".[173] China notes that Brazil's claims in this case relate to serious prejudice under the provisions of the *SCM Agreement* and the GATT 1994. China agrees with the panel in *Indonesia – Autos* that, "[i]f ...past subsidies were not relevant to [a] serious prejudice analysis as they were 'expired measures'..., it is hard to imagine any situation where a panel would be able to determine the existence of actual serious prejudice".[174]

[172]Canada's third participant's submission, para. 40 (referring to Appellate Body Report, *US – FSC*, para. 152).

[173]China's third participant's submission, para. 19.

[174]*Ibid*., para. 26 (quoting Panel Report, *Indonesia – Autos*, para. 14.206).

China submits that neither the context cited by the United States nor the decisions of the panel and Appellate Body in *US – Certain EC Products* support the view that expired measures may not fall within the terms of reference of a panel.

(b) Article 13(b) of the *Agreement on Agriculture* - Interpretation of "support to a specific commodity"

224. China supports the Panel's finding that the phrase "support to a specific commodity" in Article 13(b) of the *Agreement on Agriculture* does not mean "product-specific domestic support". China submits that the word "specific" in Article 13(b)(ii) is inserted to avoid lump-sum treatment of measures generally applicable to a number of commodities. Unlike the phrase "product-specific support", the phrase "support to a specific commodity" refers to the level of support delivered to a specific commodity, thus combining both product-specific support and the portion of support attributable to upland cotton under a program that is available to a number of products.

(c) Terms of Reference – Export Credit Guarantees

225. China submits that the Appellate Body should uphold the Panel's conclusion that export credit guarantees to facilitate the export of United States agricultural commodities other than upland cotton were within the Panel's terms of reference. According to China, the Panel correctly concluded that Brazil identified export credit guarantees to agricultural commodities other than upland cotton in its request for consultations. During the consultations, Brazil also posed questions to the United States on the export credit guarantees that related to agricultural commodities other than upland cotton. These questions did not expand the scope of the consultations request, but merely clarified its content. In addition, China states that Brazil's recognition that the United States objected to the questions relating to agricultural commodities other than upland cotton does not lead to the conclusion that consultations were not held on the subject. Finally, China asserts that a WTO Member cannot refuse to respond to questions during consultations on the basis of its own uncertainty as to the scope of the consultations.

6. European Communities

(a) Article 13(a) of the *Agreement on Agriculture* – Planting Flexibility Limitations

226. The European Communities supports the United States' appeal of the Panel's finding that planting flexibility limitations disqualify a measure from the coverage of paragraph 6 of Annex 2 of the *Agreement on Agriculture*. The European Communities notes that the United States has placed limitations on the crops that may be grown by farmers receiving production flexibility contract

payments and direct payments. In doing so, the United States ensures fair competition domestically and limits distortions internationally. If upheld, the Panel's findings would have the perverse effect of increasing subsidization and the likelihood of trade distortions.

227. The European Communities observes that paragraph 6(b) prevents the amount of the payments from being related to the type of production; it does not address eligibility for payments. With this in mind, the European Communities submits that "the fact of making ineligible for payments the land used to produce a certain commodity is not incompatible with paragraph 6(b)".[175] Furthermore, the Panel correctly noted that paragraphs 6(b) and 6(e) lay down distinct requirements and that each of them must be given meaning. The European Communities considers that the Panel's interpretation of paragraph 6(b) would render redundant paragraph 6(e). The Panel's reading is that any payment conditional upon a production requirement (which, as such, is incompatible with paragraph 6(e)) would be deemed to be "related to" the "volume" of production and would therefore be incompatible with paragraph 6(b). The European Communities argues that the Panel should not have relied upon paragraph 11 of Annex 2 because that provision appears in a context very different from that of the provisions of paragraph 6.

(b) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

228. With regard to Brazil's conditional cross-appeal regarding base period updates, the European Communities notes that the Panel made factual findings that there was no evidence to suggest that farmers expected further updates in future years. The European Communities does not consider that paragraph 6(a) of Annex 2 of the *Agreement on Agriculture* precludes adjustments to base periods, although it agrees with Brazil that a "defined and fixed" base period cannot be determined from the perspective of five-yearly subsidization legislation, but rather should be viewed in a longer-term perspective. The European Communities considers that it cannot be open to a Member to resort to wholesale updating of base periods by linking the criteria of "defined and fixed" to specific legislative packages.

(c) Article 13(b) of the *Agreement on Agriculture*

229. The European Communities supports the Unites States' request for the Appellate Body to reverse the Panel's interpretation of Article 13(b) of the *Agreement on Agriculture*, particularly in respect to the methodology for calculating support and the meaning of "support to a specific commodity". With regard to the methodology, the European Communities agrees with the United States that the Panel should not have used budgetary outlays to calculate support "decided" in respect

[175]European Communities' third participant's submission, para. 15.

of price-based measures, but rather should have used price gap methodology. The European Communities contends that this approach is crucial for the interpretation of the specific term "decided", in contrast to the term "granted". The European Communities also agrees with the United States that the Panel was incorrect in finding that support under schemes based on historical production of specific crops could be considered "support to a specific commodity" in the implementation period in the sense of Article 13(b)(ii).

(d) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

230. In relation to the United States' arguments regarding the quantification of subsidies, the European Communities agrees with Brazil that, in assessing significant price suppression under Article 6.3(c) of the *SCM Agreement*, it is not necessary to determine the precise amount of the subsidy or the amount of the benefit conferred on the subsidized product. This is consistent with the differences between Parts III and V of the *SCM Agreement*. Paragraph 7 of Annex IV of the *SCM Agreement*, to which the United States refers, is an exception to the general rule that a panel need not quantify or allocate a subsidy (other than a pre-WTO subsidy) to the products concerned.

231. The European Communities contests the United States' arguments regarding past "recurring" subsidies. Article 6.3(c) is drafted in the present tense and therefore should apply to the past, present, and future. The European Communities asserts that a subsidy comprises an act (a financial contribution) and that it may have an effect on the recipient (a benefit) and an effect on the market and other Members (adverse effects). However, the United States erroneously equates the concepts of "benefit" and "adverse effects". The subsidies challenged in the present dispute are programs that continue and that therefore may have adverse effects in the future, even if they confer a benefit in only one particular year. Therefore, the European Communities considers that the Panel correctly included past recurring subsidies in its analysis under Article 6.3(c). However, the European Communities maintains that it would have been "desirable"[176] for the Panel to distinguish between programs that had expired and programs that were still in force when the Panel was established.

(e) Relationship between the *Agreement on Agriculture* and the *SCM Agreement*

232. The European Communities raises an issue concerning the Panel's jurisdiction that it considers the Appellate Body should take up on its own motion. According to the European Communities, the *SCM Agreement* does not apply to domestic support and export subsidies in

[176]European Communities' third participant's submission, para. 61.

respect of agricultural products because the *Agreement on Agriculture* contains "provisions dealing specifically with the same matter".[177]

(f) Step 2 Payments to Domestic Users

233. The European Communities agrees with the United States' claim that the Panel erred in finding that Step 2 payments to domestic users are inconsistent with Article 3.1(b) of the *SCM Agreement*. In addition to endorsing the arguments put forward by the United States, the European Communities argues that the Panel incorrectly sought an explicit carve out from Article 6.3 of the *Agreement on Agriculture* for import substitution subsidies, when such a carve out is unnecessary in the light of Article 21.1 of that Agreement and the introductory phrase of Article 3.1 of the *SCM Agreement*. The European Communities submits that paragraph 7 of Annex 3 of the *Agreement on Agriculture* recognizes that WTO Members have a right to provide import substitution subsidies. The Panel's interpretation to the contrary renders the language of paragraph 7 of Annex 3 redundant.

7. India

234. Pursuant to Rule 24 of the *Working Procedures*, India chose not to submit a third participant's submission. In its statement at the oral hearing, India disagreed with the United States that Brazil had to establish the amount of the price-contingent subsidies that benefit upland cotton in making its claim of serious prejudice under Articles 5(c) and 6.3 of the *SCM Agreement*.

8. New Zealand

(a) Article 13(a) of the *Agreement on Agriculture* – Base Period Update

235. New Zealand supports Brazil's contention that the direct payments under the FSRI Act of 2002 do not meet the criteria set out in paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. According to New Zealand, the factual findings made by the Panel establish that direct payments cannot be green box payments because farmers had an opportunity to update base acreage, contrary to this provision. New Zealand notes that the language and context of paragraph 6(a) contemplate a single base period that is fixed and unchanging to ensure that such support is clearly de-linked from production. To conclude otherwise would create an internal inconsistency in paragraph 6, because a Member could avoid obligations under paragraphs 6(b), 6(c), and 6(d) not to link payments to production, prices, or factors of production employed in subsequent years, by establishing a new base period from time to time. New Zealand observes that the Panel found that the direct payment

[177]European Communities' third participant's submission, para. 6 (quoting Appellate Body Report, *EC – Bananas III*, para. 155).

program is a successor to the production flexibility contract program and that the base period update had the effect of increasing the level of payments under the program.

(b) Article 13(b) of the *Agreement on Agriculture*

236. New Zealand contests the United States' appeal of the Panel's finding that the United States' measures at issue are not exempt from action pursuant to Article 13(b)(ii) of the *Agreement on Agriculture*. New Zealand argues that Members drafting the proviso to Article 13(b) were principally concerned with limiting the effect of domestic support measures on trade. New Zealand argues that the manner in which "support" is identified and calculated in the comparison required by Article 13(b)(ii) must reflect Members' intentions to limit the effects of such measures to those that existed in the 1992 marketing year and to ensure that measures are not exempt from actions when their effect is a significantly higher level of trade distortion in the implementation period than in the 1992 marketing year.

(i) *Calculation methodology for price-based measures*

237. New Zealand considers that the Appellate Body should uphold the Panel's finding that, on the facts of this case, budgetary outlays provide an appropriate measurement of support for the purposes of the comparison required by Article 13(b)(ii). New Zealand argues that a Member may not justify a failure to meet its obligations under the *Agreement on Agriculture* on the ground that it has adopted measures that rely on factors beyond the government's control. If a Member adopts a non-green box domestic support measure that determines the amount of support provided on the basis of factors the government cannot control, then the Member must accept the risk that support granted in the implementation period may be in excess of that decided in the 1992 marketing year. Furthermore, New Zealand disagrees with the argument advanced by the United States that only a price gap calculation can reflect support "decided" by the United States' price-based measures. New Zealand argues that this argument would read the term "grant" out of Article 13(b)(ii) altogether.

(ii) *Interpretation of "support to a specific commodity"*

238. New Zealand argues that the Appellate Body should reject the United States' argument that Article 13(b)(ii) of the *Agreement on Agriculture* requires a comparison of only "product-specific" support. For New Zealand, the chapeau of Article 13(b) makes it clear that the measures subject to the proviso of Article 13(b)(ii) are all "domestic support measures that conform fully to the provisions of Article 6" of the *Agreement on Agriculture* (that is, both product-specific and non-product-specific support to upland cotton). The use of the word "specific" in Article 13(b)(ii) refers only to the fact that the comparison is to be made on a commodity-by-commodity basis. In New Zealand's

view, the Panel correctly found that "support to a specific commodity" means all support to a commodity, whether product-specific or not. New Zealand also agrees with the Panel's finding that measures that "identify and allocate support based on an express linkage to specific commodities"[178] provide support to those commodities within the meaning of Article 13(b)(ii). Accordingly, even a measure that provides support to a number of different commodities also provides support to those specific commodities individually. New Zealand adds that not only do the words "product-specific support" not appear in Article 13(b)(ii), but the concept of product-specific support is not relevant to the comparison under this provision because Article 13(b)(ii) requires an analysis that is fundamentally different from that required under those provisions of the *Agreement on Agriculture* that distinguish between product-specific and non-product-specific support.

239. Finally, New Zealand disagrees with the United States' assertion that counter-cyclical payments and market loss assistance payments are "decoupled". As the Panel recognized, the amount of payment under these programs is clearly linked to current prices, which means that they cannot be green box measures in terms of Annex 2 of the *Agreement on Agriculture*.

(c) Significant Price Suppression under Article 6.3(c) of the *SCM Agreement*

240. New Zealand agrees with Brazil that the Panel correctly found that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c), constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.

241. New Zealand agrees with Brazil that the term "in the same market" in Article 6.3(c) can include a world market, although this does not preclude the possibility of other markets. New Zealand also agrees that, although a world market does not necessarily exist for every product, a world market and a world price do exist for upland cotton.

242. New Zealand submits that the Panel was correct in rejecting the United States' argument that the price-contingent subsidies did not suppress prices because, in the absence of these subsidies, new suppliers would have increased supply and maintained the world price. In response to the United States' arguments regarding the effect of the subsidies on the planting decisions of farmers, New Zealand argues that this effect is a key aspect of the Panel's analysis under Article 6.3(c), which led it to conclude that the subsidies insulated United States cotton producers from declines in world prices. Moreover, the Panel correctly found that the gap between total production costs and market revenue constituted evidence that the price-contingent subsidies enabled United States upland cotton producers to increase supply, leading to price suppression in the world market.

[178]New Zealand's third participant's submission, para. 3.16 (quoting Panel Report, para. 7.484).

243. New Zealand agrees with Brazil that a panel is not required, in assessing significant price suppression under Article 6.3(c), to quantify precisely the amount of the subsidy. As the Panel found, claims under Parts III and V of the *SCM Agreement* differ, and the quantitative and pass-through methodologies applicable under Part V are not necessarily transferable to Part III. Although the magnitude of a subsidy may be relevant in some cases, it is not necessarily determinative of the nature or extent of the effects of the subsidy.

244. New Zealand disagrees with the United States' arguments regarding past recurring subsidies, which would effectively preclude Members from bringing claims of serious prejudice against recurring subsidies, even though payments under subsidy programs over an extended period can have effects in later years.

(d) World Market Share under Article 6.3(d) of the *SCM Agreement*

245. New Zealand supports Brazil's appeal of the Panel's finding that the "world market share" of the subsidizing Member under Article 6.3(d) refers to the share of the world market supplied by the subsidizing Member. Defining "world market share" as including all production, instead of only exports, distracts from the trade focus of the *SCM Agreement* and subverts the underlying rationale of Article 6.3(d). New Zealand supports Brazil's request for the Appellate Body to complete the analysis under Article 6.3(d).

(e) Export Credit Guarantees – Articles 10.1 and 10.2 of the *Agreement on Agriculture*

246. New Zealand asserts that the Panel was correct in finding that export credit guarantee programs are subject to the non-circumvention obligation under Article 10.1 of the *Agreement on Agriculture*, and that the United States' export credit guarantee programs provide export subsidies that breach Article 10.1 and are not exempt from action under the *SCM Agreement*. In New Zealand's view, Article 10.1 clearly applies to export credit guarantee programs that involve the granting of export subsidies. Article 10.2 does not create any exception that may contradict the clear meaning of Article 10.1. The United States' interpretation would create a loophole for WTO Members to circumvent their export subsidy reduction commitments through export credit guarantee programs. In such a case, New Zealand observes that Article 10.2 would, itself, circumvent the anti-circumvention provisions.

(f) Export Credit Guarantees – Articles 1 and 3.1(a) of the *SCM Agreement*

247. New Zealand agrees with Brazil that the Panel erred in exercising judicial economy by refusing to make a finding relating to the United States' export credit guarantee programs under Articles 1.1 and 3.1(a) of the *SCM Agreement*. In New Zealand's view, a measure that no longer constitutes an export subsidy under item (j) of the Illustrative List of Export Subsidies may still constitute an export subsidy under Articles 1.1 and 3.1(a) of the *SCM Agreement*. Therefore, New Zealand requests the Appellate Body to complete the analysis and find that the United States' export credit guarantee programs are export subsidies under Articles 1.1 and 3.1(a) of the *SCM Agreement*.

9. Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu

248. Pursuant to Rule 24 of the *Working Procedures*, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu chose not to submit a third participant's submission. In its statement at the oral hearing, the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu agreed with the United States that using planting flexibility limitations in association with production flexibility contract payments and direct payments does not render these measures inconsistent with paragraph 6(b) of Annex 2 to the *Agreement on Agriculture*.

III. Issues Raised in this Appeal

249. The following issues are raised in this appeal:

(a) as regards procedural matters:

(i) in relation to production flexibility contract payments and market loss assistance payments:

- whether the Panel erred in finding, in paragraphs 7.118, 7.122, 7.128, and 7.194(ii) of the Panel Report, that Articles 4.2 and 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU") do not exclude expired measures from the potential scope of consultations or a request for establishment of a panel and, therefore, that production flexibility contract payments and market loss assistance payments fell within the Panel's terms of reference; and

- whether the Panel, contrary to Article 12.7 of the DSU, failed to set out the findings of fact, the applicability of relevant provisions, or the basic rationale behind this finding; and

(ii) in relation to export credit guarantee programs:

- whether the Panel erred in finding, in paragraph 7.69 of the Panel Report, that the United States' export credit guarantees relating to eligible United States agricultural commodities other than upland cotton were within its terms of reference; and

- whether the Panel erred in finding, in paragraph 7.103 of the Panel Report, that Brazil provided a statement of available evidence with respect to export credit guarantees relating to eligible United States agricultural commodities other than upland cotton, as required by Article 4.2 of the *Agreement on Subsidies and Countervailing Measures* (the "*SCM Agreement*");

(b) as regards the application of Article 13 of the *Agreement on Agriculture* to this dispute:

(i) in relation to Article 13(a)(ii):

- whether the Panel erred in finding, in paragraphs 7.388, 7.413, 7.414, and 8.1(b) of the Panel Report, that production flexibility contract payments and direct payments are not green box measures that fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture* based on its finding, in paragraph 7.385 of the Panel Report, that the amount of production flexibility payments and direct payments is related to the type of production undertaken by a producer after the base period; and, therefore, that these measures are not exempt from actions based on Article XVI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994") and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

- whether the updating of base acres for direct payments under the FSRI Act of 2002 means that direct payments are not green box

measures that fully conform to paragraph 6(a) of Annex 2 of the *Agreement on Agriculture* and, therefore, that these measures are not exempt from actions based on Article XVI of the GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*, because they are not determined by clearly-defined criteria in a *defined and fixed base period*[179]; and

(ii) in relation to Article 13(b)(ii), whether the Panel erred in finding, in paragraphs 7.608 and 8.1(c) of the Panel Report, that user marketing (Step 2) payments ("Step 2 payments") to domestic users, marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments (the "challenged domestic support measures") granted, in the years 1999, 2000, 2001, and 2002, support to a specific commodity, namely, upland cotton, in excess of that decided during the 1992 marketing year and, therefore, that these measures are not exempt from actions based on Articles 5 and 6 of the *SCM Agreement* and Article XVI:1 of the GATT 1994 by virtue of Article 13(b)(ii) of *Agreement on Agriculture*, based on its findings:

- in paragraph 7.494 of the Panel Report, that the phrase "grant support to a specific commodity" in Article 13(b)(ii) refers to all non-green box support measures that clearly or explicitly define a commodity as one to which they bestow or confer support and does not mean "product-specific domestic support";

- in paragraphs 7.518 and 7.520 of the Panel Report, that the challenged domestic support measures are non-green box support measures that clearly or explicitly define a commodity, namely, upland cotton, as one to which they bestow or confer support; and

- in paragraphs 7.561 and 7.562 of the Panel Report, that an appropriate comparison between the level at which measures "grant support" in the implementation period and that "decided during

[179]Brazil's appeal is conditional on the Appellate Body reversing the finding of the Panel that "direct payments, production flexibility contract payments, and the legislative and regulatory provisions that establish and maintain the direct payment program" do not fully conform to paragraph 6(b) of Annex 2 and, consequently, do not satisfy the condition in paragraph (a) of Article 13 of the *Agreement on Agriculture*.

the 1992 marketing year" may be achieved, with respect to marketing loan program payments and deficiency payments, through the use of a methodology other than the price gap methodology described in paragraph 10 of Annex 3 of the *Agreement on Agriculture*;

(c) as regards serious prejudice:

(i) in relation to Article 6.3(c) of the *SCM Agreement*:

- whether the Panel erred in finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, 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 of Article 6.3(c) of the *SCM Agreement*, based on its findings:

(A) regarding the "market" and "price" in assessing whether "the effect of the subsidy is ... significant price suppression ... in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*:

- in paragraphs 7.1238-7.1240 of the Panel Report, that the "same market" may be a "world market";

- in paragraph 7.1247 of the Panel Report, that a "world market" for upland cotton exists; and

- in paragraph 7.1274 of the Panel Report, that "the A-Index can be taken to reflect a world price in the world market for upland cotton"; and

(B) regarding the "effect" of the price-contingent subsidies under Article 6.3(c) of the *SCM Agreement*:

- in paragraphs 7.1312 and 7.1333 of the Panel Report, that "significant price suppression" occurred within the meaning of Article 6.3(c);

- in paragraphs 7.1355 and 7.1363 of the Panel Report, that "a causal link exists" between the price-contingent subsidies and the significant price suppression found by the Panel under Article 6.3(c) and that this link is not attenuated by other factors raised by the United States;

- in paragraphs 7.1173, 7.1186, and 7.1226 of the Panel Report, that it was not required to quantify precisely the benefit conferred on upland cotton by the price-contingent subsidies and, consequently, not identifying the precise amount of counter-cyclical payments and market loss assistance payments that benefited upland cotton; and

- in paragraph 7.1416 of the Panel Report, that the effect of the price-contingent subsidies for marketing years 1999 to 2002 "is significant price suppression ... in the period MY 1999-2002"; and

- whether the Panel, contrary to Article 12.7 of the DSU, failed to set out the findings of fact, the applicability of relevant provisions, or the basic rationale behind its finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*; and

(ii) in relation to Article 6.3(d) of the *SCM Agreement*:

- whether the Panel erred in finding, in paragraph 7.1464 of the Panel Report, that the words "world market share" in Article 6.3(d) of the *SCM Agreement* refer to the "share of the world market supplied by the subsidizing Member of the product concerned"; and

- whether the Appellate Body should complete the analysis of whether the effect of the price-contingent subsidies is an increase in the

United States' world market share of exports in upland cotton within the meaning of Article 6.3(d) of the *SCM Agreement*[180];

(d) as regards user marketing (Step 2) payments, whether the Panel erred:

(i) in finding, in paragraphs 7.1088, 7.1097-7.1098, and 8.1(f) of the Panel Report, that Step 2 payments to *domestic users* of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*; and

(ii) in finding, in paragraphs 7.748-7.749, 7.760-7.761, and 8.1(e) of the Panel Report, that Step 2 payments to *exporters* of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* that are inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(e) as regards export credit guarantee programs, whether the Panel erred:

(i) in finding, in paragraphs 7.901, 7.911, and 7.932 of the Panel Report, that Article 10.2 of the *Agreement on Agriculture* does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement;

(ii) in the manner that it applied the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(iii) by failing to make the necessary findings of fact in assessing whether the United States' export credit guarantee programs are provided at premium rates that are inadequate to cover long-term operating costs and losses within the meaning of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*;

[180]Brazil's request for the Appellate Body to complete the analysis of this issue is conditional on the Appellate Body reversing the finding of the Panel that the effect of the price-contingent subsidies was significant price suppression in terms of Article 6.3(c) of the *SCM Agreement*.

(iv) in finding, in paragraphs 7.947 and 7.948 of the Panel Report, that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the *SCM Agreement* and are consequently inconsistent with Article 3.2 of that Agreement; and

(v) by exercising judicial economy, as noted in paragraph 6.31 of the Panel Report, in respect of Brazil's claim that the United States' export credit guarantee programs are export subsidies within the meaning of Articles 1.1 and 3.1(a) of the *SCM Agreement*, having already found that these measures were export subsidies covered by item (j) of the Illustrative List of Export Subsidies and, therefore, were inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(f) as regards circumvention of export subsidy commitments, whether the Panel erred:

(i) in the application of Article 10.1 of the *Agreement on Agriculture* and by failing to meet the requirements of Article 11 of the DSU, in finding, in paragraph 7.881 of the Panel Report, that Brazil did not establish that the United States' export credit guarantees are "applied in a manner that results in … circumvention" of the United States' export subsidy commitments with respect to pig meat and poultry meat in 2001[181];

(ii) in paragraphs 7.882-7.883 and 7.896 of the Panel Report, in interpreting and applying the phrase "threatens to lead to ... circumvention" in Article 10.1 of the *Agreement on Agriculture*; and

(iii) in paragraph 7.882 and footnote 1061 of the Panel Report, by confining its examination of threat of circumvention to scheduled products other than rice and unsupported unscheduled products;

(g) as regards the FSC Repeal and Extraterritorial Income Exclusion Act of 2000 (the "ETI Act of 2000"), whether the Panel erred in finding that Brazil did not establish a *prima facie* case that the ETI Act of 2000 and the subsidies granted

[181]At the oral hearing, Brazil indicated that it was not pursuing this claim in respect of vegetable oil.

thereunder are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1 and 3.2 of the *SCM Agreement*, in respect of upland cotton; and

(h) as regards Article XVI:3 of the GATT 1994:

(i) whether the Panel erred in finding, in paragraph 7.1016 of the Panel Report, that Article XVI:3 of the GATT 1994 "applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*"; and

(ii) whether the Appellate Body should complete the analysis of whether the price-contingent subsidies caused the United States to have "more than an equitable share of world export trade" in upland cotton, in violation of the second sentence of Article XVI:3 of the GATT 1994.[182]

IV. Preliminary Issues

A. *Terms of Reference – Expired Measures*

1. Introduction

250. The United States appeals the Panel's finding that two subsidy measures, namely, production flexibility contract payments with the exception of those made in the 2002 marketing year and market loss assistance payments, can be the subject of consultations under the DSU and hence fell within the Panel's terms of reference, notwithstanding the fact that the legislative basis for these payments had expired at the time those terms of reference were set.[183]

251. Production flexibility contract payments were a form of income support under the Federal Agriculture Improvement and Reform Act of 1996 (the "FAIR Act of 1996"); they were discontinued with the passage of the Farm Security and Rural Investment Act of 2002 (the "FSRI Act of 2002") in May 2002. The last production flexibility contract payments were scheduled to be made "not later

[182]Brazil's request for the Appellate Body to complete the analysis of this issue is conditional on two events: (i) the Appellate Body reversing the finding of the Panel that the effect of the price-contingent subsidies was significant price suppression in terms of Article 6.3(c) of the *SCM Agreement*; and, (ii) the Appellate Body declining Brazil's request for a ruling that the United States' measures at issue resulted in an increase in the United States' world market share in upland cotton in terms of Article 6.3(d) of the *SCM Agreement*.

[183]Notwithstanding paragraph 9 of the United States' Notice of Appeal, the United States explained during the oral hearing that it does not appeal the Panel's finding, in paragraph 7.132 of the Panel Report, that payments with respect to non-upland cotton base acres were within its terms of reference.

than" 30 September 2002[184], in connection with the 2002 crop. Market loss assistance payments were *ad hoc* annual payments made through legislation enacted by the United States Congress between 1998 and 2001. Each such payment was made through a separate piece of legislation, the last of which was enacted on 13 August 2001, for the marketing year 2001 (1 August 2001 – 31 July 2002) crop.[185]

252. Before the Panel, the United States argued that production flexibility contract payments and market loss assistance payments could not be within the terms of reference because they had expired prior to Brazil's request for consultations. The United States argued that Article 4.2 of the DSU provides that consultations may cover only "measures affecting" the operation of a covered agreement, and that expired measures are not "measures affecting" the operation of a covered agreement.[186] Brazil asked the Panel to reject the United States' request, submitting that a panel is required to examine the effects flowing from expired measures in order to conduct an objective assessment of a serious prejudice claim.[187]

253. The Panel noted that Brazil had not pursued claims with respect to the legislation underlying the programs; instead, Brazil's claim was limited to the WTO-consistency of the payments made under those programs.[188] In its reasoning, the Panel said it did:

> ... not consider that Article 4.2 [of the DSU] supports an interpretation that a request for consultations cannot concern measures that have expired, or payments made under programmes that are no longer in effect, where the Member requesting consultations represents that benefits accruing to it directly or indirectly under the covered agreements are being impaired by those measures.[189]

254. It added that "the Panel's terms of reference refer to Brazil's request for establishment of a panel, not its request for consultations."[190] The Panel also recalled that "Article 6.2 of the *DSU* provides that a request for establishment of a panel should identify the 'specific measures at issue' and

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[184]See Panel Report, paras. 7.107 and 7.212-7.215. See also "Answers of the United States to the Panel's Questions Posed Following the First Session of the First Substantive Panel Meeting" (11 August 2003), Panel Report, p. I-84, para. 35.

[185]For further discussion of the nature of production flexibility contract payments and market loss assistance payments, insofar as they are relevant to this issue, see Panel Report, paras. 7.107 and 7.212-7.217.

[186]See Panel Report, paras. 7.104 and 7.113.

[187]See Panel Report, para. 7.105.

[188]*Ibid*., para. 7.108.

[189]*Ibid*., para. 7.118.

[190]*Ibid*., para. 7.121.

does not address the issue of the status of the measures at all."[191] On this basis, the Panel indicated that it did not believe that:

> Article 4.2, and hence Article 6.2, of the *DSU* excludes expired measures from the potential scope of a request for establishment of a panel.[192]

255. In the light of this finding (and having rejected a further claim by the United States that market loss assistance payments were not identified with adequate specificity in Brazil's request for establishment of a panel[193]), the Panel concluded:

> Therefore, in light of our conclusion at paragraph 7.122, ... the Panel rules that PFC and MLA payments, as addressed in document WT/DS267/7, fall within its terms of reference.[194]

2. Appeal by the United States

256. The United States claims that the Panel erred in reaching this conclusion and requests the Appellate Body to reverse the Panel's finding that Articles 4.2 and 6.2 of the DSU do not exclude expired measures from the potential scope of consultations or a request for establishment of a panel.[195] It also asserts that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU.[196] The United States submits that it was undisputed that the legislation authorizing both of these types of payments had expired before Brazil submitted its request for consultations.[197]

257. The United States observes that Article 4.2 of the DSU provides that consultations may cover "any representations made by another Member *concerning measures affecting the operation of any covered agreement* taken within the territory of the former".[198] The United States focuses on the present tense of the verb "affecting" in this Article and contends that expired measures cannot be

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[191]Panel Report, para. 7.121.

[192]*Ibid*., para. 7.122.

[193]*Ibid*., para. 7.127. This finding has not been appealed.

[194]*Ibid*., para. 7.128. This final finding was reiterated in paragraph 7.194(ii) of the Panel Report.

[195]United States' Notice of Appeal, *supra*, footnote 17, para. 14; United States' appellant's submission, para. 515.

[196]United States' appellant's submission, para. 150.

[197]*Ibid*., para. 500.

[198]United States' appellant's submission, para. 501 (quoting Article 4.2 of the DSU). (emphasis added by the United States)

measures "affecting", in the present, the operation of a covered agreement.[199] Thus, according to the United States, production flexibility contract and market loss assistance payments cannot be said to be currently "affecting" the operation of any covered agreement. Consequently, they cannot be measures falling within the scope of "specific measures at issue" in terms of Article 6.2 of the DSU.[200]

258. Brazil responds that neither Article 4.2 nor Article 6.2 of the DSU precludes a panel from analyzing payments made in the past in the context of serious prejudice claims. Brazil focuses on the context provided by Article 3.3 of the DSU, which states that a purpose of dispute settlement is the "prompt settlement of situations in which a Member considers that any benefits accruing to it ... are being impaired by measures taken by another Member". For Brazil, as long as the impairment is *current*, the status in domestic law of the measure causing that impairment is irrelevant. Brazil notes that the present dispute involves allegations of "adverse effects" and "serious prejudice" under the provisions of the *SCM Agreement* and the GATT 1994. A breach of the relevant provisions of these Agreements does not occur when an actionable subsidy is granted, but rather when the adverse effects arise. Brazil finds support for its position in the view of the panel in *Indonesia – Autos*, which found that past, present, and future subsidies can be the subject of dispute settlement, as the effect of such measures may be serious prejudice to the interests of a Member.[201]

3. Scope of Consultations under Article 4.2 of the DSU

259. Article 4.2 of the DSU governs what measures may be the subject of consultations and provides as follows:

> Each Member undertakes to accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former. (footnote omitted)

260. It is clear from Article 4.2 that, although a requested Member is under an obligation to engage in "consultation" on "any" representations made by another Member, such representations must pertain to "measures affecting the operation of any covered agreement". The United States argues that Article 4.2 of the DSU limits the obligation of the requested Member to representations concerning measures that are actually "*affecting*" the operation of any covered agreement. The United States stresses the temporal significance of the present tense of the word "affecting" and asserts that

[199] *Ibid*., para. 501.

[200] United States' appellant's submission, paras. 502 and 512.

[201] Brazil's appellee's submission, para. 256 (referring to Panel Report, *Indonesia – Autos*, para. 14.206).

"[m]easures that have expired before a request for consultations *cannot* be measures 'affecting the operation of any covered agreement' at the time the request is made".[202]

261. We agree with the Panel that the word "affecting" refers primarily to "the way in which [measures] relate to a covered agreement".[203] As the Appellate Body stated in *EC – Bananas III*, "[t]he ordinary meaning of the word 'affecting' implies a measure that has 'an effect on'" something else.[204] At the same time, we also concur with the United States that the ordinary meaning of the word "affecting" suggests a temporal connotation. As the United States submits, the present tense of the phrase "affecting the operation of any covered agreement" denotes that the effects of such measures must relate to the present impact of those measures on the operation of a covered agreement. It is not sufficient that a Member alleges that challenged measures affected the operation of a covered agreement in the past; the representations of the Member requesting consultations must indicate that the effects are occurring in the present.[205]

262. Whether or not a measure is still in force is not dispositive of whether that measure is currently affecting the operation of any covered agreement. Therefore, we disagree with the United States' argument that measures whose legislative basis has expired are incapable of affecting the operation of a covered agreement in the present and that, accordingly, expired measures *cannot* be the subject of consultations under the DSU.[206] In our view, the question of whether measures whose legislative basis has expired affect the operation of a covered agreement currently is an issue that must be resolved on the facts of each case. The outcome of such an analysis cannot be prejudged by excluding it from consultations and dispute settlement proceedings altogether.

263. We consider that requesting Members should enjoy a degree of discretion to identify, in their request for consultations under Article 4.2, matters relating to the covered agreements for discussion in consultations. As the Appellate Body observed in *Mexico – Corn Syrup (Article 21.5 – US)*, consultations present an opportunity for clarifying factual and legal issues, and for narrowing the scope of a dispute, and for resolving differences between WTO Members.[207] We do not think it would advance the purpose of consultations if Article 4.2 were interpreted as excluding *a priori* measures whose legislative basis may have expired, but whose effects are alleged to be impairing the benefits accruing to the requesting Member under a covered agreement. Nor, indeed, do we find

[202]United States' appellant's submission, para. 501. (emphasis added)

[203]Panel Report, para. 7.115.

[204]Appellate Body Report, *EC – Bananas III*, para. 220.

[205]This does not exclude the possibility that the effects of a measure may occur in future.

[206]United States appellant's submission, para. 501.

[207]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

textual support in the provision itself for doing so. Thus, we do not read Article 4.2 of the DSU as precluding a Member from making representations on measures whose legislative basis has expired, where that Member has reason to believe that such measures are still "affecting" the operation of a covered agreement.

264. We find contextual support for this interpretation in Article 3.3 of the DSU[208], which underscores the importance of the "prompt settlement" of certain situations that, in the absence of settlement, could undermine the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members. We note, first, that Article 3.3 focuses not upon "existing" measures, or measures that are "currently in force" but, rather, upon "measures taken" by a Member, which includes measures taken in the past.[209] We also observe that Article 3.3 envisages that disputes arise when a Member "considers" that benefits accruing to it are being impaired by measures taken by another Member. By using the word "considers", Article 3.3 focuses on the perception or understanding of an aggrieved Member. This does not exclude the possibility that a Member requesting consultations may have reason to believe that a measure is still impairing benefits even though its legislative basis has expired.[210]

265. We recall that the Panel observed that:

> Brazil's request for consultations alleges that the use of the measures specified in the request "causes adverse effects, i.e. serious prejudice" to its interests. We note the present tense of this allegation. The request concerns the way in which measures were affecting the operation of a covered agreement at the time of consultations, and it states that Brazil had reason to believe that these subsidies were resulting in serious prejudice at that time.[211]

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[208]Article 3.3 of the DSU provides:

> 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 is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

[209]Indeed, as the Panel noted, in the sense that "PFC and MLA payments had already been made at the date of the establishment of the Panel", "they had not expired, but had simply occurred in the past". (Panel Report, para. 7.110)

[210]Whether the Member's belief proves to be correct is a substantive matter to be addressed in the consultations, or—if consultations fail—before a panel. We note that Brazil's request for consultations in regard to this matter was based not only on Article 4 of the DSU, but also on Article 7.1 of the *SCM Agreement* (as well as Article XXII of the GATT 1994). (See Request for Consultations by Brazil, WT/DS267/1, 3 October 2002, p. 1) Article 7.1 authorizes a Member to request consultations whenever it "has reason to believe" that any subsidy referred to in Article 1 "results in" certain effects listed in that provision. Article 7.1 thus recognizes that questions regarding the results of subsidization are potentially contentious matters.

[211]Panel Report, para. 7.119.

266. For the Panel, these aspects of the request for consultations were sufficient for Brazil to meet the requirements of Article 4.2 of the DSU. We see no error in the Panel's approach to this question. Whether or not a subsidy program is still in force at the time consultations were requested does not answer the question whether any payments previously made under that program are currently affecting the operation of a covered agreement in the sense of Article 4.2. Brazil, in these proceedings, represented in its request for consultations that payments under the production flexibility contract and market loss assistance programs continued to affect its rights under the *SCM Agreement*. In our view, this was sufficient to meet the requirements of Article 4.2 of the DSU.

4. Measure at Issue under Article 6.2 of the DSU

267. In addition to its arguments under Article 4.2 of the DSU, the United States contends that an expired measure cannot be a measure that is "at issue" in terms of Article 6.2 of the DSU. The United States also argues that a finding to the contrary would be difficult to reconcile with the terms of Articles 3.7 and 19.1 of the DSU, which contemplate the "withdrawal" of a measure found to be inconsistent with the covered agreements, or a recommendation that a measure found to be inconsistent with a covered agreement be brought into conformity. The United States argues that the remedies described in Articles 3.7 and 19.1 are essentially prospective in nature.

268. We understand these arguments by the United States to be largely dependent upon its arguments regarding Article 4.2 of the DSU: if, as the United States contends, a measure may not be the subject of consultations then, *ipso facto*, it may not be a measure "at issue" in the sense of Article 6.2. Having rejected the United States' arguments regarding Article 4.2, we do not find the United States' additional arguments under Article 6.2 compelling.

269. The only temporal connotation contained in the ordinary meaning of the expression "at issue", as used in Article 6.2 of the DSU, is expressed by its present tense: measures must be "at issue"—or, putting it another way, "in dispute"—at the time the request is made. Certainly, nothing inherent in the term "at issue" sheds light on whether measures at issue must be currently in force, or whether they may be measures whose legislative basis has expired.

270. The relevant context for Article 6.2 in this regard includes Articles 3.3 and 4.2 of the DSU. As we have concluded above, those provisions do not preclude a Member from making representations with respect to measures whose legislative basis has expired, if that Member considers, with reason, that benefits accruing to it under the covered agreements are still being impaired by those measures. If the effect of such measures remains in dispute following consultations, the complaining party may, according to Article 4.7 of the DSU, request the

establishment of a panel, and the text of Article 6.2 does not suggest that such measures could not be the subject of a panel request as "specific measures at issue".

271. The United States purports to find support for its position in the ruling of the Appellate Body in *US – Certain EC Products*, where the Appellate Body reversed the panel's decision to make a recommendation under Article 19.1 of the DSU that the United States bring the measure at issue in that case (the "3 March Measure") into conformity with the covered agreements, on the grounds that the panel had already found that the measure had expired. However, that case involved a situation different from the present one. There, the 3 March Measure had been the subject of consultations, but had expired. The expiry of the 3 March Measure did not prevent it being a "measure at issue" for purposes of Article 6.2 of the DSU. Indeed, neither the panel nor the Appellate Body found that the 3 March Measure was outside the panel's terms of reference, and both the panel and Appellate Body addressed that measure in their rulings.[212]

272. The question whether an expired measure is susceptible to a recommendation under Article 19.1 of the DSU is a different matter. The Appellate Body in *US – Certain EC Products* confirmed that the 3 March Measure had ceased to exist. It noted that there was an obvious inconsistency between the finding of the panel that "the 3 March Measure is no longer in existence" and the panel's subsequent recommendation that the Dispute Settlement Body (the "DSB") request the United States to bring the 3 March Measure into conformity with its WTO obligations.[213] Thus, the fact that a measure has expired may affect what recommendation a panel may make. It is not, however, dispositive of the preliminary question of whether a panel can address claims in respect of that measure.[214]

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[212]This contrasts with the treatment of the other measure raised in that proceeding (the "19 April action"). It was in force, but had not been the subject of consultations. The panel and Appellate Body both ruled that the absence of consultations on the 19 April action required its exclusion from the terms of reference. (Appellate Body Report, *US – Certain EC Products*, para. 82; Panel Report, *US – Certain EC Products*, paras. 6.89 and 6.128)

[213]Appellate Body Report, *US – Certain EC Products*, paras. 81-82.

[214]This conclusion is consistent with the approach taken by GATT and WTO panels to questions relating to the expiry of measures after the initiation of dispute settlement proceedings, but before those proceedings have been completed. See, for example, GATT Panel Report, *EEC – Apples I (Chile)*, paras. 2.4 and 4.1 ff; Panel Report, *India – Autos*, para. 7.29. GATT and WTO panels have frequently made findings with respect to measures withdrawn after the establishment of the panel. See, for example, GATT Panel Report, *EEC – Animal Feed Proteins*, para. 2.4; GATT Panel Report, *US – Canadian Tuna*, para. 4.3; Panel Report, *US – Wool Shirts and Blouses*, para. 6.2; and Panel Report, *Indonesia – Autos*, para. 14.9. Even in cases where a panel has chosen not to rule on measures that had been terminated during the course of proceedings, panels have recognized that "[o]n several occasions, panels have considered measures that were no longer in force". (Panel Report, *Argentina – Textiles and Apparel*, para. 6.12. (footnote omitted)) In none of these cases has a panel or the Appellate Body premised its decision on the view that, *a priori*, an expired measure could not be within a panel's terms of reference.

273. It is important to recognize the particular characteristics of *subsidies* and the nature of Brazil's claims against the production flexibility contract and market loss assistance subsidy payments. Article 7.8 of the *SCM Agreement* provides that, where it has been determined that "any subsidy has *resulted* in adverse effects to the interests of another Member", the subsidizing Member must "take appropriate steps *to remove the adverse effects* or ... withdraw the subsidy". (emphasis added) The use of the word "resulted" suggests that there could be a time-lag between the payment of a subsidy and any consequential adverse effects.[215] If expired measures underlying past payments could not be challenged in WTO dispute settlement proceedings, it would be difficult to seek a remedy for such adverse effects. Further—in contrast to Articles 3.7 and 19.1 of the DSU—the remedies under Article 7.8 of the *SCM Agreement* for adverse effects of a subsidy are (i) the withdrawal of the subsidy *or* (ii) the removal of adverse effects. Removal of adverse effects through actions other than the withdrawal of a subsidy could not occur if the expiration of a measure would automatically exclude it from a panel's terms of reference.

274. For these reasons, we find the United States' reliance upon the prospective character of the remedies described in Articles 3.7 and 19.1 of the DSU unconvincing. We therefore *reject* the United States' argument that production flexibility contract payments and market loss assistance payments were outside the Panel's terms of reference by virtue of Article 6.2 of the DSU.

5. Article 12.7 of the DSU

275. The United States also alleges that, contrary to Article 12.7 of the DSU, the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind its finding that Articles 4.2 and 6.2 of the DSU do not exclude expired measures from the potential scope of a request for the establishment of a panel.

276. The Appellate Body stated in *Mexico – Corn Syrup (Article 21.5 – US)*:

[215]We observe, in this regard, that the United States concedes that at least *some* subsidies can have effects for years after the date on which they are paid. Thus, the United States distinguishes between "non-recurring" subsidies and "recurring" subsidies. Although the United States believes that the effects of recurring subsidies are limited to the year for which they are paid, the United States *accepts* that the effects of non-recurring subsidies may spread out well into the future. (United States' appellant's submission, para. 508)

> Article 12.7 establishes a minimum standard for the reasoning that panels must provide in support of their findings and recommendations. Panels must set forth explanations and reasons sufficient to disclose the essential, or fundamental, justification for those findings and recommendations.[216]

The Appellate Body clarified:

> [w]hether a panel has articulated adequately the "basic rationale" for its findings and recommendations must be determined on a case-by-case basis, taking into account the facts of the case, the specific legal provisions at issue, and the particular findings and recommendations made by a panel. Panels must identify the relevant facts and the applicable legal norms. In applying those legal norms to the relevant facts, the reasoning of the panel must reveal how and why the law applies to the facts. In this way, panels will, in their reports, disclose the essential or fundamental justification for their findings and recommendations.[217]

The Appellate Body also explained that this "does not, however, necessarily imply that Article 12.7 requires panels to expound at length on the reasons for their findings and recommendations."[218]

277. We note that compliance with Article 12.7 of the DSU is to be determined on a case-by-case basis. With regard to the current proceedings, as discussed above, we see no error in the Panel's conclusion regarding its ability to make findings with respect to subsidies whose legislative basis had expired at the time of panel establishment. Although the Panel's reasoning with respect to this issue may be brief, the Panel set out the necessary findings of fact, the applicability of relevant provisions, and the basic rationale behind its findings. The Panel noted that the parties agreed on the key factual element that was relevant to this part of its analysis, namely, that the legislation under which production flexibility contract and market loss assistance payments were made had expired, and went

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[216]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 106. It also noted that:

> ... the duty of panels under Article 12.7 of the DSU to provide a "basic rationale" reflects and conforms with the principles of fundamental fairness and due process that underlie and inform the provisions of the DSU. In particular, in cases where a Member has been found to have acted inconsistently with its obligations under the covered agreements, that Member is entitled to know the reasons for such finding as a matter of due process. In addition, the requirement to set out a "basic rationale" in the panel report assists such Member to understand the nature of its obligations and to make informed decisions about: (i) what must be done in order to implement the eventual rulings and recommendations made by the DSB; and (ii) whether and what to appeal.

(*Ibid*., para. 107) (footnote omitted)

[217]*Ibid*., para. 108.

[218]*Ibid*., para. 109.

on to discuss relevant factual aspects.[219] The Panel cited and discussed Article 4.2, in particular the meaning and significance of the term "affecting" in that provision.[220] As we have done, the Panel interpreted Article 4.2 in the light of the context provided by Article 3.3 of the DSU.[221] It addressed Article 6.2 of the DSU[222], and also situated the question of "expired measures" in the context of the actionable subsidies claims made by Brazil in this case.[223] Given these inquiries and considerations by the Panel, we see no reason to find that the Panel failed to meet the requirements of Article 12.7 of the DSU in relation to whether the expired production flexibility contract and market loss assistance payments fell within its terms of reference.

B. *Terms of Reference – Export Credit Guarantees*

1. Introduction

278. We turn now to the United States' claim that the Panel erred in finding that its terms of reference were not limited to export credit guarantees to upland cotton, but also included export credit guarantees to other eligible United States agricultural commodities.[224]

279. The United States requested the Panel to "rule that export credit guarantee measures relating to eligible United States agricultural commodities (other than upland cotton) are not within its terms of reference because this 'measure' was not the subject of Brazil's request for consultations".[225] Brazil responded that "both its request for consultations and the accompanying statement of available evidence, as well as the questions it posed to the United States during consultations, revealed that they covered export credit guarantee measures relating to *all* eligible United States agricultural commodities".[226]

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[219]Panel Report, para. 7.108.

[220]*Ibid*., paras. 7.112-7.115.

[221]*Ibid*., para. 7.116-7.117.

[222]*Ibid*., para. 7.121.

[223]*Ibid*., paras. 7.109-7.110.

[224]We note that, during the interim review, Brazil requested the Panel "to conclude that GSM 102, GSM 103 and SCGP also constitute prohibited export subsidies within the meaning of item (j) and Article 3.1(a) of the *SCM Agreement*, for all products not covered by the *Agreement on Agriculture*". The Panel rejected Brazil's request, explaining that its "terms of reference include[d] export credit guarantees to facilitate the export of United States upland cotton and other eligible *agricultural* commodities as addressed in document WT/DS267/7". (Panel Report, para. 6.37. (original emphasis))

[225]Panel Report, para. 7.55. (footnote omitted)

[226]*Ibid*., para. 7.57. (footnote omitted; emphasis added)

280. The Panel found that "the *actual* consultations did include export credit guarantee measures relating to all eligible agricultural commodities".[227] The Panel then examined the text of Brazil's request for consultations, "[a]ssuming *arguendo* that the scope of the written request for consultations is determinative, rather than the scope of the actual consultations".[228] It found "that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself".[229] Accordingly, the Panel made the following ruling in response to the United States' request:

> [T]he Panel rules that export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities as addressed in document WT/DS267/7, are within its terms of reference.[230]

2. Arguments on Appeal

281. On appeal, the United States asserts that the Panel erred in finding that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations.[231] In addition, the United States takes issue with the Panel's finding that consultations were *actually* held on the export credit guarantee programs relating to agricultural commodities including, but not limited to, upland cotton.[232] The United States argues, in this regard, that the fact that Brazil posed written questions on the export credit guarantees relating to agricultural commodities including, but not limited to, upland cotton does not mean that consultations were *actually* held on all those products, especially considering that the United States objected to discussing them during the consultations on the basis that they were not included in the request for consultations.[233]

282. Brazil requests that we reject the United States' appeal. It contends that its request for consultations identified three United States export credit programs, namely, the General Sales Manager 102 ("GSM 102") and General Sales Manager 103 ("GSM 103") programs and the Supplier

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[227]Panel Report, para. 7.61. (original italics; underlining added)

[228]*Ibid*., para. 7.62.

[229]*Ibid*., para. 7.65. The Panel explained that the title of this dispute, "United States – Subsidies on Upland Cotton", "did not appear in the original communication sent from the Permanent Mission of Brazil to the Permanent Mission of the United States", but rather "was added by the [WTO] Secretariat when it circulated a copy of the request for consultations to Members". Consequently, the Panel did not consider the title to be "a legally relevant consideration here". (*Ibid*., footnote 131 to para. 7.64)

[230]Panel Report, para. 7.69. (footnote omitted)

[231]United States' appellant's submission, para. 474.

[232]*Ibid*., para. 471.

[233]*Ibid*., paras. 471-472.

Credit Guarantee Program (the "SCGP").[234] By their own terms, each of these measures applies to all eligible products.[235] Therefore, there was no need to specify the product scope of these measures.[236] Brazil submits that, in any event, its request for consultations in fact identified the export credit guarantee programs in connection with all eligible commodities, without any limitation to upland cotton.[237] Finally, Brazil asserts that, irrespective of the measures identified in Brazil's request for consultations, the Panel found, as a matter of fact, that "consultations were held" on the export credit guarantee programs in connection with all eligible commodities, as required by Article 6.2 of the DSU.[238]

3. Did the Panel's Terms of Reference Include Other Eligible Agricultural Commodities?

283. The United States claims on appeal that the Panel's terms of reference were limited to export credit guarantees to upland cotton, and did not include export credit guarantees to other eligible agricultural commodities. This claim is premised on the allegation that, in its request for the establishment of a panel, Brazil expanded the product scope in respect of which it challenges the United States' export credit guarantee programs to include other eligible agricultural products in addition to upland cotton. The United States submits that the request for consultations and the consultations themselves, however, were limited to export credit guarantees to upland cotton. Brazil contends that its request for consultations and the consultations held covered *all* agricultural products eligible for export credit guarantees.[239]

284. Before addressing the question of whether Brazil expanded, in its panel request, the scope of products in respect of which it challenged the United States' export credit guarantee programs, we note that the Appellate Body has explained previously that, "pursuant to Article 7 of the DSU, a

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[234]These programs are described *infra*, paras. 586-589.

[235]See Panel Report, footnote 1056 to para. 7.875.

[236]Brazil's appellee's submission, para. 195.

[237]*Ibid*., para. 202.

[238]Brazil's appellee's submission, paras. 208-209. Brazil reads the Appellate Body Report in *Brazil – Aircraft* as meaning that as long as "consultations were held" on a measure included in a request for establishment of a panel, that measure is properly within a panel's terms of reference, irrespective of whether the measure was included in the request for consultations. (*Ibid*., para. 213 (referring to Appellate Body Report, *Brazil – Aircraft*, paras. 132-134)) Brazil adds that this is consistent with the purpose of consultations. (*Ibid*., para. 214)

[239]In addition, Brazil submits that the Panel's terms of reference are determined by the panel request, and that its panel request referred to all agricultural products eligible for the United States' export credit guarantees.

panel's terms of reference are governed by the request for establishment of a panel".[240] However, the Appellate Body has also explained that "as a general matter, consultations are a prerequisite to panel proceedings"[241] and has underscored the importance and benefits of consultations:

> We agree ... on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3.7 of the DSU. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.[242]

285. The requirements that apply to a request for consultations are set out in Article 4.4 of the DSU, which provides, in relevant part:

> Any request for consultations shall be submitted in writing and shall give the reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint.

The Appellate Body has stated that "Articles 4 and 6 of the DSU ... set forth a process by which a complaining party must request consultations, and consultations must be held, before a matter may be referred to the DSB for the establishment of a panel".[243] At the same time, however, the Appellate Body has said that it does not believe that "Articles 4 and 6 of the DSU ... require a *precise and exact identity* between the specific measures that were the subject of consultations and the specific

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[240]Appellate Body Report, *US – Carbon Steel*, para. 124. Article 7.1 of the DSU provides:

> Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel:
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> > To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).

The United States does not dispute that Brazil's request for the establishment of a panel included export credit guarantees to eligible agricultural commodities including, but not limited to, upland cotton.

[241]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 58.

[242]*Ibid*., para. 54.

[243]Appellate Body Report, *Brazil – Aircraft*, para. 131.

measures identified in the request for the establishment of a panel".[244] We need not elaborate further on the relationship between a panel's terms of reference and the requirement that "consultations were held", because, as we explain below, we are satisfied that, in this case, the Panel had a reasonable basis to conclude that the request for consultations included export credit guarantees to eligible agricultural commodities including, but not limited to, upland cotton.

286. In reviewing the Panel's analysis, we are faced with the question whether the scope of the consultations is determined by the written request for consultations or by what actually happens in the consultations. The Panel looked first at what actually happened during the consultations. It observed that Brazil submitted in writing to the United States 21 questions regarding export credit guarantee programs, seeking information on, *inter alia*, the total volume and value of exports of United States agricultural goods guaranteed by these programs.[245] According to the Panel, "[t]his shows that the *actual* consultations did include export credit guarantee measures relating to all eligible agricultural commodities".[246] The Panel then examined the text of Brazil's request for consultations, "[a]ssuming *arguendo* that the scope of the written request for consultations is determinative, rather than the scope of the actual consultations".[247]

287. We believe that the Panel should have limited its analysis to the request for consultations because we are inclined to agree with the panel in *Korea – Alcoholic Beverages*, which stated that "[t]he only requirement under the DSU is that consultations were in fact held ... [w]hat takes place in those consultations is not the concern of a panel".[248] Examining what took place in the consultations would seem contrary to Article 4.6 of the DSU, which provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." Moreover, it would seem at odds with the requirements in Article 4.4 of the DSU that the request for

[244]Appellate Body Report, *Brazil – Aircraft*, para. 132. (original emphasis) The Appellate Body found, in that case, that certain measures that came into effect after consultations were held were nevertheless within the Panel's terms of reference, emphasizing that the measures did not change the essence of the challenged export subsidies. In *US – Certain EC Products*, the Appellate Body found that one of the measures challenged by the European Communities was not properly before the Panel. The Appellate Body explained that, although the panel request referred to the measure, it was not possible for it to conclude "on this basis *alone*" that the measure was within the Panel's terms of reference. It noted that the European Communities' request for consultations did not refer to the measure and that the European Communities acknowledged that the measure was not the subject of the consultations. In its ruling, the Appellate Body also emphasized that the particular measure was "separate" and "legally distinct" from another measure challenged by the European Communities. (Appellate Body Report, *US – Certain EC Products*, paras. 69-75) (original emphasis)

[245]The United States acknowledged that Brazil posed questions during the consultations that went beyond upland cotton. (Panel Report, para. 7.61) According to the Panel, the United States declined to respond to these questions during the consultations. (Panel Report, 7.67)

[246]Panel Report, para. 7.61. (original emphasis)

[247]*Ibid*., para. 7.62.

[248]Panel Report, *Korea – Alcoholic Beverages*, para. 10.19.

consultations be made in writing and that it be notified to the DSB. In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed. Ultimately, however, it is not necessary for us to inquire into this part of the Panel's analysis because the Panel also found "that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself".[249] We turn, therefore, to examine whether there is a sufficient basis for the Panel's conclusion in this regard.

288. Brazil's request for consultations states, in relevant part[250]:

> The measures that are the subject of this request are prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton[1], as well as legislation, regulations, statutory instruments and amendments thereto providing such subsidies (including export credits), grants, and any other assistance to the US producers, users and exporters of upland cotton ("US upland cotton industry"). The measures include the following:
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> ...
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> - Export subsidies, exporter assistance, export credit guarantees, export and market access enhancement to facilitate the export of US upland cotton provided under the Agricultural Trade Act of 1978, as amended, and other measures such as the GSM-102, GSM-103, and SCGP programs ...
>
> ...
>
> Regarding export credit guarantees, export and market access enhancement provided under the Agricultural Trade Act of 1978, as amended, and other measures such as the GSM-102, GSM-103, and SCGP programs, Brazil is of the view that these programs, as applied and as such, violate Articles 3.3, 8, 9.1, and 10.1 of the Agreement on Agriculture and are prohibited export subsidies under Article 3.1(a) and item (j) of the Illustrative List of Export Subsidies included as Annex I to the SCM Agreement. Subsidies provided under these programs are also actionable subsidies for the purpose of Brazil's claims under Article 6.3 of the SCM Agreement.
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> [1] Except with respect to export credit guarantee programs as explained below.

289. According to the Panel, footnote 1 to Brazil's request for consultations "should have indicated to the careful reader that the subject of the request for consultations, with respect to export credit

[249]Panel Report, para. 7.65.

[250]Request for Consultations by Brazil, *supra*, footnote 26, pp. 1-2 and 4.

guarantee measures only, was different from those 'provided to US producers, users and/or exporters of upland cotton'".[251] The Panel also observed that the second paragraph after the footnote dealing with export credit guarantee programs referred to the programs as applied and as such, and it did not refer specifically to upland cotton. The Panel therefore concluded that "export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself."[252]

290. The United States contends that the Panel ignored the first paragraph after the footnote and drew the wrong conclusion from the second paragraph. According to the United States, "it is simply not the case that a 'plain reading' of the [second] paragraph 'includes all eligible agricultural commodities'." Rather, it "shows that the [second] paragraph mentions *no* commodities at all".[253] The United States also asserts that the Panel "overlooked the context that th[e] first paragraph provided for the second".[254] The first paragraph, the United States points out, refers to exports subsidies, exporter assistance, and export credit guarantees to facilitate the export of *upland cotton* under a series of listed measures. A comparison of the first and second paragraphs shows that "the second did not describe measures, but, rather, described the *legal basis* for Brazil's complaint".[255] The United States submits that the Panel should therefore have concluded that "the two paragraphs complemented one another" and, "[t]hat being the case, there is no reason to believe (and certainly the Panel gave none) that the product scope of the second paragraph was broader than the 'upland cotton' mentioned in the first paragraph".[256] Finally, the United States argues that, "[e]ven assuming that the omission of the words 'upland cotton' from the second paragraph had some significance", the Panel gave no explanation as to "why the omission of those words should extend the product scope to 'all eligible agricultural commodities' rather than some other product scope".[257]

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[251]Panel Report, para. 7.63.

[252]*Ibid*., para. 7.65.

[253]United States' appellant's submission, para. 476 (quoting Panel Report, para. 7.64). (original emphasis)

[254]*Ibid*., para. 477.

[255]*Ibid*., (original emphasis)

[256]*Ibid*., para. 477.

[257]*Ibid*., para. 479.

291. We have examined carefully Brazil's request for consultations and we find that it provides a sufficient basis for the Panel to have concluded that the request included export credit guarantees to eligible agricultural commodities including, but not limited to, upland cotton. Footnote 1 of the request for consultations, which states "Except with respect to export credit guarantee programs as provided below", alerts the reader that there is something different about Brazil's claims relating to the United States' export credit guarantee programs. Furthermore, the fact that the footnote follows immediately after the term "upland cotton" suggests that this difference relates to the product scope. It was not unreasonable, therefore, for the Panel to conclude that footnote 1 "should have indicated to the careful reader that the subject of consultations, with respect to export credit guarantee measures only, was different from those 'provided to US producer, users and/or exporters of upland cotton'".[258] In addition, in the second paragraph dealing with export credit guarantees after the footnote, Brazil refers to the programs "as such", which suggests a broad challenge, rather than one limited to a specific agricultural commodity. In our view, therefore, the footnote, together with the reference to the programs "as such" in the second paragraph, provide a reasonable basis for the Panel's conclusion "that export credit guarantee measures relating to all eligible agricultural commodities were included in Brazil's request for consultations, based on its reading of the text of the request itself."[259]

292. The United States also cites the lack of any reference to agricultural commodities other than upland cotton in the statement of available evidence that is annexed to Brazil's request for consultations as "further proof that the request did not extend beyond export credit guarantees for upland cotton".[260] The United States raised this point as a separate claim on appeal and, therefore, we deal with this allegation in the next section of this Report. Below we uphold the Panel's finding that Brazil provided a statement of available evidence with respect to the United States' export credit guarantee programs as they relate to eligible agricultural products including, but not limited to, upland cotton[261] and, consequently, this argument does not support the United States' position on this issue.

[258]Panel Report, para. 7.63.

[259]*Ibid*., para. 7.65. The facts of this case differ from those in *US – Certain EC Products*, on which the United States relies. In that case, the measure was not mentioned in the request for consultations because it was not even in existence at the time. (Appellate Body Report, *US – Certain EC Products*, para. 70)

[260]United States' appellant's submission, para. 461.

[261]See *infra*, para. 309.

293. We emphasize that consultations are but the first step in the WTO dispute settlement process. They are intended to "provide the parties an opportunity to define and delimit the scope of the dispute between them".[262] We also note that Article 4.2 of the DSU calls on a WTO Member that receives a request for consultations to "accord sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member". As long as the complaining party does not expand the scope of the dispute, we hesitate to impose too rigid a standard for the "precise and exact identity"[263] between the scope of consultations and the request for the establishment of a panel, as this would substitute the request for consultations for the panel request. According to Article 7 of the DSU, it is the request for the establishment of a panel that governs its terms of reference, unless the parties agree otherwise. [264]

294. For these reasons, we uphold the Panel's ruling, in paragraph 7.69 of the Panel Report, that "export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities ... are within its terms of reference".

C. *Statement of Available Evidence – Export Credit Guarantees*

1. Introduction

295. We now examine the United States' claim that the Panel erred in finding that Brazil's statement of available evidence was not limited to the United States' export credit guarantees to upland cotton, but also included export credit guarantee measures relating to other eligible United States agricultural products, as required by Article 4.2 of the *SCM Agreement*.

296. The United States requested the Panel to rule that Brazil "could not advance claims under ... Article 4 ... of the *SCM Agreement* with respect to export credit guarantee measures on eligible agricultural commodities other than upland cotton because it did not include a statement of available

[262]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 54.

[263]Appellate Body Report, *Brazil – Aircraft*, para. 132. (emphasis omitted)

[264]Appellate Body Report, *US – Carbon Steel*, para. 124.

evidence with respect to such export credit guarantees in accordance with Articl[e] 4.2 ... of that Agreement".[265]

297. In examining the United States' request, the Panel noted that Brazil's statement of available evidence contained two paragraphs specifically referring to the United States' export credit guarantee programs[266], and observed that the first paragraph is "textually limited to upland cotton", while the second paragraph "is not so limited".[267] The Panel then rejected the United States' contention that the lack of a reference to upland cotton in the second paragraph could not expand the scope of the statement of available evidence.[268] According to the Panel, when the second "paragraph is read in light of footnote 1 of the request for consultations, a careful reader should have been alerted to the fact that this paragraph referred to alleged subsidies arising from export credit guarantees under the challenged programmes, without any limitation to upland cotton or any other particular product or products".[269] Furthermore, the Panel stated that Brazil's statement of evidence referred to a website of the United States Congressional Budget Office, which includes data pertaining to the spending and

[265]Panel Report, para. 7.70. The Panel explained that the United States initially argued that Brazil's statement of available evidence as regards export credit guarantees was limited to upland cotton and did not extend to other eligible agricultural commodities, demonstrating that Brazil's request for consultations was limited to export credit guarantees relating to upland cotton. The request for a specific ruling on the adequacy of the statement of available evidence was made by the United States in its submission of 30 September 2003. (Panel Report, para. 7.71)

In addition, the Panel noted that the United States had made allegations under both Articles 4.2 and 7.2 of the *SCM Agreement*. The Panel observed that Article 4.2 relates to prohibited subsidies and Article 7.2 relates to claims against actionable subsidies. Then, the Panel stated that it was not necessary for it to rule on the United States' claim relating to Article 7.2 because: (i) Brazil challenged only one United States export credit guarantee program—GSM 102—as an actionable subsidy that caused serious prejudice; (ii) this allegation was limited to upland cotton; and (iii) the Panel had exercised judicial economy with respect to the claim. Thus, the Panel limited its examination to "whether Brazil included a statement of available evidence with respect to export credit guarantees on other eligible agricultural products in accordance with the requirement pertaining to its *export* subsidy allegations in Article 4.2 of the *SCM Agreement*". (Panel Report, paras. 7.73-7.74, 7.76, and 7.78-7.79) (original emphasis)

In its Notice of Appeal, the United States asserted that, in the event that Brazil appealed the Panel's exercise of judicial economy with respect to Brazil's claims concerning the compatibility of the United States' export credit guarantee measures with Part III of the *SCM Agreement*, the United States would conditionally request the Appellate Body to find that Brazil also failed to provide a statement of available evidence as required by Article 7.2 of the *SCM Agreement* and, accordingly, Brazil's claims concerning these measures were not within the Panel's terms of reference. (Notice of Appeal, *supra*, footnote 17, para. 13) The United States did not pursue this claim further in its appellant's submission. In any event, the condition on which the United States' appeal was based was not met, as Brazil did not appeal the Panel's exercise of judicial economy concerning the compatibility of the United States' export credit guarantee measures with Part III of the *SCM Agreement*.

[266]Panel Report, para. 7.83.

[267]*Ibid*., para. 7.84.

[268]*Ibid*., para. 7.84.

[269]*Ibid*., para. 7.85. (footnoted omitted) Footnote 1 of Brazil's request for consultations reads: "Except with respect to export credit guarantee programs as explained below". See *supra*, para. 288.

offsetting receipts of the Commodity Credit Corporation (the "CCC"). Neither the reference to the website nor the data on the website "contain any indication of limitation of Brazil's allegations concerning the export credit guarantee programmes to any specific product, such as, for example, upland cotton".[270]

298. Therefore, the Panel found:

> [A]ssuming *arguendo* that the United States' request was timely[[271]], the Panel rules that Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to upland cotton and eligible United States agricultural products other than upland cotton, as required by Article 4.2 of the *SCM Agreement*.[272]

299. On appeal, the United States argues that the Panel's ruling is erroneous. The United States submits that Brazil's statement of evidence contains two paragraphs specifically referring to the United States' export credit guarantee programs.[273] The first paragraph is textually limited to upland cotton, as the Panel correctly found. Although the second paragraph does not refer to upland cotton, it contains no suggestion that it expands on the programs described in the preceding paragraph.[274] The United States further submits that, even if the second paragraph were construed to refer to programs that provide benefits to products other than upland cotton, it is "difficult to see" how that paragraph meets the requirements of Article 4.2 of the *SCM Agreement*, as it does not provide information about the "existence" or "nature" of the subsidies allegedly provided by the export credit guarantee programs to products in addition to upland cotton.[275]

300. Brazil submits that its statement of available evidence not only identifies the measures at issue—the United States' export credit guarantee programs—but also indicates the characteristics of those measures that had led Brazil to suspect that they constituted export subsidies, as required by the Appellate Body in *US – FSC*.[276] Specifically, Brazil's statement describes the failure of the export credit guarantee programs to establish premium rates that cover long-term operating costs and losses,

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[270]Panel Report, paras. 7.92-7.93.

[271]Brazil had argued that the United States' request was untimely. The Panel found it unnecessary to rule on the timeliness of the United States' request, in the light of its ruling on the substantive question. (Panel Report, footnote 160 to para. 7.103)

[272]Panel Report, para. 7.103. (footnotes omitted)

[273]United States' appellant's submission, para. 494.

[274]*Ibid*., paras. 495-496.

[275]United States' appellant's submission, para. 497.

[276]Brazil's appellee's submission, paras. 228-229 (referring to Appellate Body Report, *US – FSC*, para. 161).

which are central elements in a determination of whether a program constitutes an export subsidy under item (j) of the Illustrative List of Export Subsidies included as Annex I to the *SCM Agreement*.[277] Furthermore, the Panel made a factual finding that the documentary evidence cited by Brazil to support its preliminary view included a link to a United States government website with data showing that revenues for the export credit guarantee programs do not cover long-term operating costs and losses, which addressed the programs overall, rather than in connection with only upland cotton.[278] Thus, according to Brazil, its statement of available evidence met the requirements of Article 4.2, by identifying the export credit guarantee measures, and providing and describing available evidence of "the character of" those measures, across all eligible commodities, as export subsidies.[279]

2. Did Brazil's Statement of Available Evidence Include Export Credit Guarantees to Other Eligible Agricultural Commodities?

301. The issue raised on appeal is whether the Panel correctly concluded that Brazil's statement of available evidence was not limited to export credit guarantees to upland cotton and included export credit guarantees to other eligible agricultural commodities.[280] The requirement that a party challenging a prohibited subsidy provide a statement of available evidence is set out in Article 4.2 of the *SCM Agreement*, which provides:

> A request for consultations under paragraph 1 shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.

Article 4.2 is included in Appendix 2 of the DSU as a special or additional rule on dispute settlement.

302. The Appellate Body has stated that Article 4.2 of the *SCM Agreement* must be read and applied together with Article 4.4 of the DSU, which sets out the requirements for the request for consultations, "so that a request for consultations relating to a prohibited subsidy claim under the *SCM Agreement* must satisfy the requirements of both provisions".[281] It has also explained that the

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[277]Brazil's appellee's submission, para. 230.

[278]*Ibid*., paras. 231-232 (referring to Panel Report, paras. 7.92-7.93).

[279]*Ibid*., para. 233.

[280]The United States does not contest that Brazil submitted a statement of available evidence together with its request for consultations. Nor does the United States contest that Brazil's statement of available evidence referred to the United States' export credit guarantees as they relate to upland cotton.

[281]Appellate Body Report, *US – FSC*, para. 159.

"additional requirement of 'a statement of available evidence' under Article 4.2 of the *SCM Agreement* is distinct from—and not satisfied by compliance with—the requirements of Article 4.4 of the DSU".[282]

303. Brazil's statement of available evidence is annexed to its request for consultations. As the Panel noted[283], the statement contains the following two paragraphs referring specifically to the United States' export credit guarantee programs:

> US export credit guarantee programs have caused serious prejudice to Brazilian upland cotton producers by providing below-market financing benefits for the export of competing US upland cotton;
>
> US export credit guarantee programs, since their origin in 1980 and up [to] the present, provide premium rates that are inadequate to cover the long-term operating costs and losses of the programs; in particular there were losses caused by large-scale defaults totalling billions of dollars that have not been reflected in increased premiums to cover such losses[.][284]

304. The United States asserts that Brazil's statement of evidence does not mention any agricultural commodity other than upland cotton when it refers to the United States' export credit guarantee programs. This is correct. At the same time, however, we observe that the second paragraph is not expressly limited to upland cotton. Rather, that paragraph refers to the United States' export credit guarantee programs in a general way, suggesting that the reference is to the programs as a whole and not just as they relate to one specific agricultural commodity. The allegation in that paragraph that the premium rates are inadequate to cover the long-term operating costs and losses of the programs is equally broad and does not suggest that it is only with respect to upland cotton that premiums are insufficient to offset costs and losses. As the Panel explained, when the second "paragraph is read in light of footnote 1 of the request for consultations, a careful reader should have been alerted to the fact that this paragraph referred to alleged subsidies arising from export credit guarantees under the challenged programmes, without any limitation to upland cotton or any other particular product or products".[285] Thus, we do not find that it was unreasonable for the Panel to have "read Brazil's statement of available evidence, insofar as Brazil's export subsidy claims are concerned, to refer to

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[282]Appellate Body Report, *US – FSC*, para. 161.

[283]Panel Report, para. 7.83.

[284]Statement of available evidence annexed to the Request for Consultations by Brazil, *supra*, footnote 26, para. 3.

[285]Panel Report, para. 7.85. (footnote omitted) The text of footnote 1 is reproduced, *supra*, footnote 269.

each of the three challenged United States export subsidy programmes as they relate to upland cotton and other eligible agricultural products".[286]

305. The United States submits that, even if the second paragraph were construed to refer to programs that provide benefits to products in addition to upland cotton, it is "difficult to see"[287] how that paragraph meets the requirements of Article 4.2 of the *SCM Agreement*, as it does not provide information about the "existence" or "nature" of the subsidies allegedly provided by the export credit guarantee programs to products in addition to upland cotton. The Panel rejected the United States' argument because it considered that:

> Brazil's statement of available evidence indicates Brazil's view that the character of the alleged subsidy lay in the provision of export credit guarantees under programmes "at premium rates that are inadequate to cover the long-term operating costs and losses of the programs; in particular there were losses caused by large-scale defaults totalling billions of dollars that have not been reflected in increased premiums to cover such losses."[288]

From this, the Panel concluded that Brazil "had evidence available to it at that time which led it to conclude that the United States was providing a prohibited export subsidy of this nature and character under the three identified export subsidy programmes, without any limitation to a particular product or products".[289]

306. We recall that Article 4.2 requires that the request for consultations "include a statement of available evidence with regard to the existence and nature of the subsidy in question". In *US – FSC*, the Appellate Body explained that this means that "it is available evidence of the character of the measure as a 'subsidy' that must be indicated, and not merely evidence of the existence of the measure".[290] We observe that, in Brazil's statement of available evidence, the second paragraph that deals specifically with the United States' export credit guarantee programs does not simply refer to their existence. In that paragraph, Brazil indicates that the export credit guarantees have the

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[286]Panel Report, para. 7.86.

[287]United States' appellant's submission, para. 497.

[288]Panel Report, para. 7.89 (quoting statement of available evidence, *supra*, footnote 284, para. 3).

[289]*Ibid*., para. 7.90.

[290]Appellate Body Report, *US – FSC*, para. 161. In that case, the European Communities did not provide a separate statement of available evidence, but argued that such a statement was contained in the request for consultations itself. The Panel found that the consultations request may have contained a statement of available evidence. The Appellate Body noted that it "would have preferred that the Panel give less relaxed treatment to this important distinction" between the existence and the character of the measure as a subsidy, but it ultimately ruled that the United States' objection to the request for consultations had been untimely and therefore it did not rule on whether the consultations request included a statement of available evidence. (*Ibid*., paras. 155, 161, and 165)

"character" of a subsidy because the premiums charged are insufficient to cover the long-term operating costs and losses. Brazil goes further by stating that this situation is especially due to the fact that the premiums have not increased despite "large-scale defaults totalling billions of dollars".[291]

307. In addition, as the Panel pointed out, Brazil referred to a website of the United States Congressional Budget Office. This website includes projections of the mandatory spending of the United States federal government. One of the tables provided on the website contains a line-item that specifically refers to spending by the CCC, which, according to the title of the table, already takes into account offsetting receipts. Thus, by referring to this website, Brazil's statement of evidence was also indicating that the export credit guarantees have the "character" of a subsidy because the premiums charged are insufficient to cover the long-term operating costs and losses. Therefore, the Panel had a reasonable basis to conclude that Brazil's statement of evidence met the requirements of Article 4.2 of the *SCM Agreement*.

308. We recognize that the statement of available evidence plays an important role in WTO dispute settlement. The adequacy of the statement of available evidence must be determined on a case by case basis. As the Panel stated, moreover, the "statement of available evidence ... is the starting point for consultations, and for the emergence of more evidence concerning the measures by reason of the clarification of the 'situation'".[292] It is, therefore, important to bear in mind that the requirement to submit a statement of available evidence applies in the earliest stages of WTO dispute settlement, and that the requirement is to provide a "statement" of the evidence and not the evidence itself.[293]

309. For these reasons, we *uphold* the Panel's ruling, in paragraph 7.103 of the Panel Report, that "Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to upland cotton and eligible United States agricultural products other than upland cotton, as required by Article 4.2 of the *SCM Agreement*". (footnote omitted)

[291]Statement of available evidence annexed to the Request for Consultations by Brazil, *supra*, footnote 26, para. 3.

[292]Panel Report, para. 7.100.

[293]Panel Report, *Australia – Automotive Leather II*, para. 9.19.

V. Domestic Support

A. *Article 13(a) of the Agreement on Agriculture – Planting Flexibility Limitations*

1. Introduction

310. We turn now to consider appeals by the United States and Brazil regarding the application of Article 13 of the *Agreement on Agriculture* (often referred to as the "peace clause"). We first address the issue of whether two types of payment—production flexibility contract payments and direct payments—are entitled to the exemption from action established by paragraph (a) of Article 13.

311. Production flexibility contract payments were introduced by the FAIR Act of 1996 for the 1996-2002 marketing years, and were made to certain historical producers of seven eligible commodities, including upland cotton. Historical producers could enroll acres upon which upland cotton had been grown during a base period and were allocated upland cotton "base acres" (as well as a farm-specific yield per acre), for which payment would be made at a rate specified each year for upland cotton. The production flexibility contract program dispensed with the requirement that producers continue to plant upland cotton in order to receive payments; instead, payments would generally be made regardless of what the producer chose to grow, and whether or not the producer chose to produce anything at all. However, there were limits to this planting flexibility. Specifically, payments were reduced or eliminated if fruits and vegetables (other than lentils, mung beans, and dry peas) were planted on upland cotton base acres, subject to certain other exceptions. [294]

312. Direct payments were introduced by the FSRI Act of 2002 for the 2002-2007 marketing years. They essentially replaced production flexibility contract payments under the FAIR Act of 1996, while also expanding the program to take in historical production of some additional commodities.[295] Both production flexibility contract payments and direct payments were available for the 2002 crop, but production flexibility contract payments made for that crop were deducted from direct payments made for that crop.[296] Like production flexibility contract payments for upland cotton, direct payments for upland cotton were dependent on base acres allocated by reference to the

[294]Panel Report, paras. 7.212-7.215 and 7.376-7.378. The exceptions from planting flexibility limitations related to regions with a history of double cropping or farms with a history of planting fruits or vegetables on contract acreage. (*Ibid*., para. 7.378)

[295]*Ibid*., paras. 7.218-7.219 and 7.397. The Panel discusses similarities and differences between the production flexibility contract program and the direct payment program in paragraphs. 7.398-7.399.

[296]*Ibid*., para. 7.220.

production of upland cotton during certain base periods.[297] The payments were made each year at a rate fixed for the entire 2002-2007 period at 6.67 cents per pound of upland cotton. As was the case under the production flexibility contract program, producers were not required to grow any particular crop in order to receive direct payments, and could choose to grow nothing at all. In addition to fruits and vegetables (other than lentils, mung beans, and dry peas), wild rice was added to the planting flexibility limitations.[298]

313. The Panel found that the amount of payments under the production flexibility contract program and the direct payment program is "related to the type of production undertaken by the producer after the base period."[299] On this basis, the Panel found that these payments and "the legislative and regulatory provisions that provide for the planting flexibility limitations in the DP programme" do not fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*.[300] The Panel concluded that these measures are thus not green box measures[301], and added that these measures "do not comply with the condition in paragraph (a) of Article 13 of the *Agreement on Agriculture*" and are therefore "non-green box measures covered by paragraph (b) of Article 13."[302]

2. Appeal by the United States

314. The United States appeals the Panel's finding that direct payments, production flexibility contract payments, and the legislative and regulatory provisions that establish and maintain the direct payments program, are not green box measures sheltered from challenge by virtue of Article 13(a) of the *Agreement on Agriculture*. The United States does not dispute that the amount of payments under the production flexibility contract and direct payment programs depended upon a formula that centred on "base acres" tied to the historical production of upland cotton.[303] Nor does the United States dispute that there are limitations on producers' ability to plant any product, if those producers wish to

[297]There was a limited opportunity for producers to elect a different base period for the calculation of upland cotton base acres for direct payments under the FSRI Act of 2002 from that prevailing for production flexibility contract payments under the FAIR Act of 1996. (Panel Report, paras. 7.220-7.221) Brazil has conditionally appealed the Panel's exercise of judicial economy in respect of Brazil's claim that this "updating" of base acres contravenes paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*. We address this conditional appeal below at section V.B of this Report.

[298]Panel Report, paras. 7.220, 7.222, and 7.379-7.381. As was the case under the production flexibility contract program, there were limited exceptions to the planting flexibility limitations.

[299]*Ibid*., para. 7.385.

[300]*Ibid*., para. 7.388.

[301]*Ibid*., para. 7.413.

[302]*Ibid*., para. 7.414.

[303]United States' appellant's submission, para. 17.

receive production flexibility or direct payments with respect to upland cotton base acres.[304] In the case of production flexibility contract payments, these limitations related to the growing of fruits and vegetables. In the case of direct payments, the limitations extended to wild rice as well.[305] Beyond these limitations, however, the United States stresses that a producer can receive production flexibility contract payments or direct payments regardless of the agricultural products that the producer chooses to grow and irrespective of whether it chooses to produce any product at all.[306]

315. The United States takes issue with the Panel's finding that the planting flexibility limitations mean that the "amount of payments" under the production flexibility contract and direct payment programs is "related to the type of production undertaken by the producer after the base period", within the meaning of paragraph 6(b) of Annex 2 to the *Agreement on Agriculture*.[307] According to the United States, a *negative* direction in respect of production of certain goods—that is, conditioning payment on a producer's *non*-production of certain goods—does not make the amount of payments "related to the type of production". The United States submits that this interpretation serves the "fundamental requirement" found in paragraph 1 of Annex 2 that green box measures "have no, or at most minimal, trade-distorting effects or effects on production".

316. Brazil requests that the Appellate Body uphold the Panel's finding, under paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*, that production flexibility contract and direct payments relate "the amount of" the payment to "the type of production undertaken" by recipients.[308] The grounds for the Panel's finding are that production flexibility contract and direct payments are made solely if production is undertaken of crops other than fruits and vegetables (and, in the case of direct payments, wild rice as well). Brazil agrees with the Panel that this relates the amount of payments to production of the "permitted" crops. As the Panel found, if "permitted" crops alone are produced, a full payment is made. If a small quantity of "prohibited" crops is produced, the "amount of payment" is reduced. If a larger quantity of "prohibited" crops is produced, no payment is made.[309]

317. Brazil submits that the distinction drawn by the United States between "permitted" (or positive) and "prohibited" (or negative) categories of crops is artificial because the effect of both

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[304]See, for example, United States' appellant's submission, paras. 17 ff.

[305]United States' appellant's submission, para. 18.

[306]*Ibid*.

[307]Panel Report, para. 7.385; United States' appellant's submission, paras. 22 ff.

[308]Panel Report, para. 7.385; Brazil's appellee's submission, paras. 260 ff.

[309]Brazil's appellee's submission, para. 285 (referring to Panel Report, paras. 7.382-7.383). The participants, like the Panel, refer to "permitted" and "prohibited" crops, in the sense that crops not subject to planting flexibility limitations are eligible to receive payments, while fruits and vegetables (and wild rice) are not eligible to receive payments. We generally prefer to refer to these categories as "covered" or "eligible" crops, on the one hand, and "excluded" crops on the other.

categories is identical: in both cases, production is channelled *away from* certain "prohibited" crops (for which no payments are made) and *towards* other "permitted" crops (for which payments are made). Thus, the incentives and disincentives are precisely the same. In both cases, "the amount of" the payment is intrinsically "related to" undertaking production of the "permitted" crops, and not undertaking production of the "prohibited" crops. According to Brazil, the Panel's factual findings support this view because it found that the prohibition on fruits and vegetables (and wild rice in respect of direct payments) imposes "significant constraints" on production decisions and creates incentives for the production of eligible crops rather than those crops that are prohibited.[310]

3. Analysis

318. Article 13 of the *Agreement on Agriculture*, entitled "Due Restraint", provides in relevant part that:

> During the implementation period, notwithstanding the provisions of GATT 1994 and the Agreement on Subsidies and Countervailing Measures (referred to in this Article as the "Subsidies Agreement"):
>
> (a) domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be: ...
>
> (ii) exempt from actions based on Article XVI of GATT 1994 and Part III of the Subsidies Agreement; ...

319. Accordingly, domestic support that conforms fully to the provisions of Annex 2—that is "green box" support, which is exempt from the domestic support reduction obligations of the *Agreement on Agriculture*—is also exempt, during the implementation period[311], from actions based on Article XVI of GATT 1994 and the actionable subsidies provisions of Part III of the *SCM Agreement*.

320. The United States claims that production flexibility contract payments and direct payments are domestic support that conforms fully to the provisions of Annex 2 because they are "[d]ecoupled income support" within the meaning of paragraph 6 of that Annex. Annex 2 is entitled "Domestic

[310]Brazil's appellee's submission, paras. 285-286 (quoting Panel Report, para. 7.386).

[311]The "implementation period" during which Article 13 applies is defined in Article 1(f) of the *Agreement on Agriculture* as "the nine-year period commencing in 1995". "Year", for purposes of Article 1(f) "and in relation to the specific commitments of a Member" is defined in Article 1(i) and is "the calendar, financial or marketing year specified in the Schedule relating to that Member".

Support: The Basis for Exemption from the Reduction Commitments" and provides, in relevant part, as follows:

> 1. Domestic support measures for which exemption from the reduction commitments is claimed shall meet the *fundamental requirement* that they have *no, or at most minimal, trade-distorting effects or effects on production*. Accordingly, all measures for which exemption is claimed shall conform to the following basic criteria:
>
> (a) the support in question shall be provided through a publicly-funded government programme (including government revenue foregone) not involving transfers from consumers; and,
>
> (b) the support in question shall not have the effect of providing price support to producers;
>
> plus policy-specific criteria and conditions as set out below.
>
> ...
>
> 5. *Direct payments to producers*
>
> Support provided through direct payments (or revenue foregone, including payments in kind) to producers for which exemption from reduction commitments is claimed shall meet the basic criteria set out in paragraph 1 above, plus specific criteria applying to individual types of direct payment as set out in paragraphs 6 through 13 below. ...
>
> 6. *Decoupled income support*
>
> (a) Eligibility for such payments shall be determined by *clearly-defined criteria* such as income, status as a producer or landowner, factor use or production level in a *defined and fixed base period*.
>
> (b) *The amount of such payments in any given year shall not be related to, or based on, the type or volume of production* (including livestock units) undertaken by the producer in any year *after* the base period.
>
> ...
>
> (e) *No production shall be required* in order to receive such payments. (emphasis added)

321. Paragraph 6, entitled, "[d]ecoupled income support" applies to one type of "direct payment" to producers that may benefit from exemption from reduction commitments and protection under the peace clause. Paragraph 6(a) sets forth that eligibility for payments under a decoupled income support program must be determined by reference to certain "clearly-defined criteria" in a "defined

and fixed base period". Paragraph 6(b) requires the severing of any link between the *amount of payments* under such a program and the *type or volume of production* undertaken by recipients of payments under that program in any year after the base period. Paragraphs 6(c) and 6(d) serve to require that payments are also decoupled from *prices* and *factors of production employed* after the base period. Paragraph 6(e) makes it clear that "[n]o production shall be required in order to receive ... payments" under a decoupled income support program.

322. As we noted above[312], there is no disagreement between the participants that the amount of payments under the production flexibility contract and direct payment programs depended upon a formula that centred on "base acres", which were established on the basis of the historical production of upland cotton. Nor does the United States dispute that there are limitations on producers' ability to produce certain products, while also receiving production flexibility contract payments or direct payments with respect to upland cotton base acres. Therefore, the question before us regarding the consistency of production flexibility contract payments and direct payments with paragraph 6(b) of Annex 2 is a limited one. It does not concern a measure *requiring* producers to grow certain crops in order to receive payments; it also does not concern a measure with complete planting *flexibility* that provides payments without regard whatsoever to the crops that are grown. Indeed, it does not concern a measure that requires the production of any crop at all; nor does it involve a measure that totally *prohibits* the growing of any crops as a condition for payments. The question before us in this appeal thus concerns a measure with a *partial* exclusion combining planting flexibility and payments with the reduction or elimination of the payments when the excluded crops are produced, while providing payments even when no crops are produced at all.

323. In addressing the question of the consistency of such a measure with paragraph 6(b), we note that under this provision, for income support to be *decoupled*, the "amount of such payments ... shall not be related to ... the type or volume of production ... undertaken by the producer in any year after the base period". It is uncontested that the amount of payments under the production flexibility contract and direct payment programs may be affected, depending upon whether a producer plants a crop that is permitted under the production flexibility contract or direct payment programs, or a crop that is covered by the planting flexibility limitations.[313] The United States focuses on the term "related to" and contends that the amount of payments under the production flexibility contract and direct payment programs is not "related to" the type of production as proscribed by paragraph 6(b).

[312]*Supra*, para. 314.

[313]United States' appellant's submission, para. 18.

324. The ordinary meaning of the term "related to" in paragraph 6(b) of Annex 2 denotes some degree of *relationship* or *connection* between two things[314], here the amount of payment, on the one hand, and the type or volume of production, on the other. It covers a broader set of connections than "based on", which term is also used to describe the relationship between two things covered by paragraph 6(b).[315] Nothing in the ordinary meaning of the term "related to" suggests that the connections covered by this expression may not encompass connections of either a "positive" nature (including directions or requirements to do something) or a "negative" nature (including prohibitions or requirements not to do something) or a combination of both. As the Panel indicated, the ordinary meaning of the term "related to" conveys "a very general notion".[316] Indeed, the United States agrees that, as far as its ordinary meaning in the abstract is concerned, the term "related to" may be broad enough to capture both positive and negative connections, but argues that the context of paragraph 6(b) requires a more limited interpretation of the term, namely, only as covering a "positive" connection between the "amount of ... payments" and the "type ... of production".[317] Like the Panel, however, we are of the view that, in the context of paragraph 6(b), the term "related to" covers both positive and negative connections between the amount of payment and the type of production.

325. Paragraph 6 of Annex 2, entitled "[d]ecoupled income support", seeks to decouple or de-link direct payments to producers from various aspects of their production decisions and thus aims at neutrality in this regard. Subparagraph (b) decouples the payments from production; subparagraph (c) decouples payments from prices; and subparagraph (d) decouples payments from factors of production. Subparagraph (e) completes the process by making it clear that no production shall be required in order to receive such payments. Decoupling of payments from production under paragraph 6(b) can only be ensured if the payments are not related to, or based upon, either a positive

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[314]See *Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.), (Oxford University Press, 2002), Vol. 2, p. 2520; see also Panel Report, para. 7.366; United States' appellant's submission, para. 25; and Brazil's appellee's submission, para. 282.

[315]The Panel noted that "base" in this context may be defined as to "found, build, or construct *(up)on* a given base, build up *around* a base (chiefly *fig.*)": Panel Report, para. 7.366 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 1, p. 187). Like the expression "related to", the expression "based on" also requires a connection between two or more things. However, even though "based on" does not require a strict relationship between two things (see, e.g., Appellate Body Report, *EC – Hormones*, paras. 165-166 and 171), the meaning of "based on" indicates a relatively close connection between the things being linked. By contrast, the meaning of "related to" can apply to connections more general in nature than situations in which one thing is "based on" another (see, e.g., Appellate Body Report, *US – Softwood Lumber IV*, para. 89, where the Appellate Body interpreted broadly the phrase "in relation to" in Article 14(d) of the *SCM Agreement*). Accordingly, the meaning of the term "related to" cannot be entirely subsumed into the meaning of "based on".

[316]Panel Report, para. 7.366.

[317]United States' appellant's submission, para. 25.

requirement to produce certain crops or a negative requirement not to produce certain crops or a combination of both positive and negative requirements on production of crops.

326. In contrast to the other subparagraphs of paragraph 6, paragraph 6(e) does explicitly distinguish between positive and negative production requirements, because it prohibits positive requirements to produce. The Panel reasoned that "[i]f paragraph 6(b) could be satisfied by ensuring that no production was required to receive payments, paragraph 6(e) would be redundant".[318] We agree with the Panel that the context provided by paragraph 6(e) indicates that a measure that provided payments, even if a producer undertook no production at all, would not, for that reason alone, necessarily comply with paragraph 6(b). This is because other elements of that measure might still relate the amount of payments to the type or volume of production, contrary to the requirement of paragraph 6(b).

327. The United States seems to argue that the Panel's interpretation of the relationship between paragraphs 6(b) and 6(e) would subsume paragraph 6(e) within the scope of paragraph 6(b), thereby rendering it redundant.[319] In our view, however, paragraph 6(e) continues to serve a purpose distinct from that of paragraph 6(b). It highlights a different aspect of decoupling income support. In prohibiting Members from making green-box measures contingent on production, paragraph 6(e) implies that Members are allowed, in principle, to require no production at all. Accordingly, payments conditioned on a total ban on any production may qualify as decoupled income support under paragraph 6(e). Even assuming that payments contingent on a total production ban could be seen to relate the amount of the payment to the *volume* of production within the meaning of paragraph 6(b)—the volume of production being nil—giving meaning and effect to both paragraphs 6(b) and 6(e) suggests a reading of paragraph 6(b) that would not disallow a total ban on any production.

328. In addressing the United States' argument on this point, we recall that the measures at issue in this appeal do not provide for payments contingent on a *total ban* on production of *any* crops. The measures at issue here combine payments and planting flexibility in respect of certain covered crops with the reduction or elimination of such payments when certain other excluded crops are produced. The United States argues that, if paragraph 6(e) means that a Member may require a producer not to produce a particular product, "it would not make sense to then prohibit a Member, under paragraph 6(b), from making the amount of payment contingent on fulfilling that requirement".[320]

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[318]Panel Report, para. 7.368.

[319]United States' appellant's submission, paras. 38-42.

[320]*Ibid*., para. 38. (emphasis omitted)

However, in our view, the mere fact that under paragraph 6(e) "[n]o production shall be required in order to receive such payments" does not mean that a partial exclusion of certain crops from payments, coupled with production flexibility regarding other crops, must be consistent with paragraph 6(b).

329. We agree with the Panel that a partial exclusion of some crops from payments has the potential to channel production towards the production of crops that remain eligible for payments.[321] In contrast to a total production ban, the channelling of production that may follow from a partial exclusion of some crops from payments will have *positive* production effects as regards crops eligible for payments. The extent of this will depend on the scope of the exclusion. We note in this regard that the Panel found, as a matter of fact, that planting flexibility limitations at issue in this case "significantly constrain production choices available to PFC and DP payment recipients and effectively eliminate a significant proportion of them".[322] The fact that farmers may continue to receive payments if they produce nothing at all does not detract from this assessment because, according to the Panel, it is not the option preferred by the "overwhelming majority" of farmers, who continue to produce some type of permitted crop.[323] In the light of these findings by the Panel, we are unable to agree with the United States' argument that the planting flexibility limitations only negatively affect the production of crops that are excluded.

330. We are not persuaded otherwise by the United States' reliance upon the terms "amount of such payments" and "undertaken" in the text of paragraph 6(b). According to the United States, the Panel assumes that the "amount of such payments" in paragraph 6(b) can be related to the current type of production because, in some circumstances, a recipient that produces fruits, vegetables or wild rice "receives less payment than that recipient otherwise would have been entitled to".[324] However, for the United States, in that case, the only "amount" of payment that is even arguably "related to" current production is "zero"[325], because those crops are excluded from payment eligibility. The United States further argues, with respect to the phrase "production ... undertaken by the producer", that the ordinary meaning of the term "undertake" includes to "attempt". In this case, the planting flexibility limitations on a certain range of products, with respect to base acreage, would not relate the amount of payments

[321]Panel Report, para. 7.367. Indeed, as Brazil submits, this will tend to be the case where the prohibition prevents a producer, intent on maximizing profit, from growing the best alternative crop. In that case, the producer will tend to choose the next best alternative from amongst the permitted crops. (Brazil's appellee's submission, para. 321, citing evidence, referred to in footnote 511 of the Panel Report, from Brazil's expert, Professor Sumner)

[322]Panel Report, para. 7.386.

[323]*Ibid*., para. 7.386.

[324]United States' appellant's submission, para. 26.

[325]*Ibid*.

to production "attempted" by the recipient; rather, the amount of payment is related to or based on the type of production *not* "attempted".[326]

331. In our view, the concepts of "type or volume of production ... undertaken by the producer" and the "amount of ... payments" are linked in paragraph 6(b) by the requirement that one "not be related to" the other. This requires a consideration of *the relationship* between the type or volume of production and the amount of payment under a program after the base period. A program that disallows payments when certain crops are produced relates the amount of the payment to the type of production undertaken. The flexibility to produce and receive payment for certain crops covered by a program, combined with the reduction or elimination of such payments when excluded crops are produced, creates a link with the type of production undertaken contrary to paragraph 6(b). This is so because the opportunity for farmers to receive payments for producing covered crops, while less or no such payments are made to farmers who produce excluded crops, provides an incentive to switch from producing excluded crops to producing crops eligible for payments.

332. The United States also contends that its measures, which condition payment on the non-production of certain products, "further the fundamental requirement [in paragraph 1 of Annex 2 to the *Agreement on Agriculture*] that such measures 'have no, or at most minimal, trade-distorting effects or effects on production'"[327], because their only effects are to reduce production of the prohibited crops.[328] It follows, for the United States, that paragraph 6(b) should not address "negative" prohibitions on the production of certain crops, such as the United States' measures, given that they comply, inherently, with the fundamental requirement.[329] Brazil argues that if paragraph 6(b) is violated, this *ipso facto* violates the fundamental requirement of paragraph 1 of Annex 2 and further analysis is not required.[330]

333. We note that the first sentence of paragraph 1 of Annex 2 lays down a "fundamental requirement" for green box measures, such that they must have "no, or at most minimal, trade-distorting effects or effects on production". The second sentence of paragraph 1 provides that, "[a]ccordingly", green box measures must conform to the basic criteria stated in that sentence, "plus"

[326]United States' appellant's submission, para. 27.

[327]Paragraph 1 of Annex 2 to the *Agreement on Agriculture*.

[328]United States' appellant's submission, para. 36.

[329]See *ibid*., paras. 32-35.

[330]Brazil's responses to questioning at the oral hearing.

the policy-specific criteria and conditions set out in the remaining paragraphs of Annex 2, including those in paragraph 6.[331]

334. As we have noted, the Panel found that the planting flexibility limitations in this case "significantly constrain" production decisions.[332] However one reads the "fundamental requirement" in paragraph 1 of Annex 2, given the factual findings of the Panel, the facts of this case do not present a situation in which the planting flexibility limitations demonstrably have "no, or at most minimal," trade-distorting effects or effects on production.

335. We find further support for our interpretation of paragraph 6(b) in the context provided by paragraph 11 of Annex 2, entitled "Structural adjustment assistance provided through investment aids". Several of the subparagraphs of paragraph 11 are phrased in similar terms to those of paragraph 6. Indeed, like paragraph 6(b), paragraph 11(b) requires that the "amount of ... payments ... shall not be related to ... the type or volume of production ... undertaken by the producer in any year after the base period." However, unlike paragraph 6(b), paragraph 11(b) ends with the phrase "other than as provided for under criterion (e) below". Criterion 11(e) specifically envisages that "payments shall not mandate or in any way designate the agricultural products to be produced by the recipients except to require them not to produce a particular product".

336. We note that the exception provided by paragraph 11(e) and the link to paragraph 11(e) in paragraph 11(b) explicitly *authorize* the type of "negative" requirements not to produce that the United States argues is implicitly *permitted* by the terms of paragraph 6(b). In the light of the similarity of the language chosen in paragraphs 6(b) and 11(b), like the Panel, we attach significance to the fact that the drafters saw as necessary an explicit authorization of negative requirements not to produce under paragraph 11(b). In our view, this indicates that the ordinary meaning of the terms in paragraph 11(b) would otherwise exclude an interpretation allowing such negative requirements. The use of identical language in paragraphs 6(b) and 11(b), except for the reference in paragraph 11(b) to paragraph 11(e), suggests that the meaning of the terms in paragraph 6(b) must be the same as in paragraph 11(b). Accordingly, a comparison of these provisions confirms that the terms of paragraph 6(b) encompass both positive as well as negative connections between the amount of payments under a program and the type of production undertaken.

337. We note that the United States argues that the context in which paragraphs 11(b) and 6(b) appear is very different. The United States notes that paragraph 11 pertains to payments "to assist the

[331]We note in this regard that the Panel's exercise of judicial economy regarding Brazil's claim that the United States measures at issue fail to conform with the "fundamental requirement" of paragraph 1 of Annex 2 has not been appealed. (See Panel Report, para. 7.412)

[332]*Ibid*., para. 7.386.

financial or physical restructuring of a producer's operations"[333] and paragraph 6(e) imposes a constraint on the degree to which a government can interfere in the form that restructuring will take. As a requirement not to produce certain products could be understood to fall within the prohibition in paragraph 11(e) against "in any way" designating the products to be produced, it clarifies that negative requirements are permitted. The United States submits that, in the light of the broad prohibition in paragraph 11(e), "the requirement in paragraph 11(b) … could be understood to preclude conditioning payment on not producing certain products since this could be understood as in some way designating the products to be produced".[334] This required the explicit cross-reference to paragraph 11(e). According to the United States, because the same considerations do not apply in the case of paragraph 6(b), no specific authorization of partial prohibitions on production is required, as it remains implicit in the text of the provision.[335]

338. We are not persuaded by this argument. Like Brazil, we believe that a more compelling reason for the specific authorization of negative requirements not to produce a particular crop may be found in the fact that paragraph 11 addresses "structural adjustment", which may be achieved only by providing financial incentives to shift production away from certain products. In our view, the considerations submitted by the United States do not render the meaning of the terms used in paragraph 11(b) different from the meaning of the same terms as used in paragraph 6(b).

339. Finally, we note that the United States has also argued that the Panel's interpretation, with which we agree, would require a Member to continue to make decoupled income support payments, even if a producer's production is *illegal*, for example involving the production of opium poppy, unapproved biotech varieties or environmentally-damaging production.[336] According to the United States, this is a logical consequence of a finding that, to comply with paragraph 6(b) of Annex 2, a measure may not condition payments upon the non-production of certain products, while permitting production of others.

340. In our view, questions regarding the problem of illegal production contrast starkly with the situation addressed in the present case. It remains perfectly *legal* for a holder of upland cotton base acres to grow fruits, vegetables or wild rice in the United States. The consequence of growing such crops is simply the reduction or elimination of production flexibility contract or direct payments to the holders of upland cotton base acres. Our interpretation of paragraph 6(b) would not prevent a WTO

[333]Paragraph 11(a) of Annex 2 to the *Agreement on Agriculture*.

[334]United States' appellant's submission, paras. 45-47.

[335]*Ibid*., para. 47.

[336]*Ibid*., paras. 53-55 and footnote 45.

Member from making illegal the production of certain crops. Nor would it prevent a Member from providing decoupled income support while at the same time making the production of certain crops illegal. As Brazil states, there is nothing in the *Agreement on Agriculture* to suggest that the term "production" in paragraph 6 of Annex 2 refers to anything other than *lawful* production.[337] In addition, we observe that specific provisions of the *Agreement on Agriculture* recognize, and exempt from reduction commitments, domestic support programs that address the problem of production of illicit narcotic crops in developing countries[338] or payments under certain environmental programs.[339]

4. Conclusion

341. For all these reasons, we *uphold* the Panel's finding in paragraphs 7.388, 7.413, 7.414 and 8.1(b) of the Panel Report that conditioning production flexibility contract payments and direct payments on a producer's compliance with planting flexibility limitations regarding certain products, coupled with the flexibility to produce certain other products, means that the amount of payments under those measures is related to the type of production undertaken by a producer after the base period, within the meaning of paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*.

342. Accordingly, we also *uphold* the Panel's finding, in paragraphs 7.413 and 7.414 of the Panel Report, that production flexibility contract payments and direct payments are not "decoupled income support" within the meaning of paragraph 6, are not green box measures exempt from the reduction commitments by virtue of Annex 2 of the *Agreement on Agriculture*, and are not, therefore, sheltered from challenge by virtue of paragraph (a) of Article 13 of the *Agreement on Agriculture*. Rather, these measures are support covered by the chapeau to paragraph (b) of Article 13, and are to be taken into account in the analysis of that provision.

B. *Article 13(a) of the Agreement on Agriculture – Base Period Update*

343. The Panel indicated that it had "already found that [direct] payments fail to conform to the provisions of paragraph 6 of Annex 2 due to the planting flexibility limitations". For this reason, it indicated that it was "therefore unnecessary for the purposes of this dispute to make findings on their conformity with paragraph 6 due to the updating" of base acres.[340] Brazil conditionally appeals the Panel's exercise of judicial economy on the issue of whether the base period update under the direct

[337]Brazil's appellee's submission, para. 315.

[338]Article 6.2 of the *Agreement on Agriculture* exempts from domestic support reduction commitments that would otherwise be applicable "domestic support to producers in developing country Members to encourage diversification from growing illicit narcotic crops".

[339]See paragraph 12 of Annex 2 to the *Agreement on Agriculture*.

[340]Panel Report, para. 7.393.

payments program is consistent with paragraph 6(a) of Annex 2.[341] Brazil's appeal is conditional on the Appellate Body reversing the Panel's finding that direct payments, the legislative and regulatory provisions that establish and maintain the direct payments program, as well as payments under the production flexibility contract program, do not fall within the terms of paragraph (a) of Article 13 because they are not consistent with paragraph 6(b) of Annex 2.

344. Having upheld the Panel's finding under paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*, the condition upon which Brazil's appeal regarding the updating of base acres under paragraph 6(a) rests is not fulfilled. It is therefore unnecessary for us to address this issue further.

C. *Article 13(b) of the Agreement on Agriculture – Non-Green Box Domestic Support*

1. Introduction

345. Having rejected the United States' appeal of the Panel's finding that production flexibility contract payments under the FAIR Act of 1996 and direct payments under the FSRI Act of 2002 are not green box measures sheltered from challenge by the provisions of Article 13(a) of the *Agreement on Agriculture*, we now turn to consider the United States' appeal regarding the application of Article 13(b) of the *Agreement on Agriculture*.

346. Article 13 of the *Agreement on Agriculture* is entitled "Due Restraint" and applies during the implementation period.[342] Article 13(b) of the *Agreement on Agriculture* provides, in relevant part:

> [D]omestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6, shall be:
>
> ...
>
> (ii) exempt from actions based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement, provided that such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year; ...

[341]Brazil's other appellant's submission, paras. 237 ff.

[342]The "implementation period" during which Article 13 applies is defined in Article 1(f) of the *Agreement on Agriculture* as "the nine-year period commencing in 1995". "Year", for purposes of Article 1(f) "and in relation to the specific commitments of a Member" is defined in Article 1(i) and "refers to the calendar, financial or marketing year specified in the Schedule relating to that Member".

347. Subparagraph (ii) to Article 13(b) exempts non-green box domestic support measures described in the chapeau from actions based on Article XVI:1 of GATT 1994 and Articles 5 and 6 of the *SCM Agreement*. This exemption is, however, subject to a proviso and is thus made conditional upon a requirement that "such measures do not grant support to a specific commodity in excess of that decided during the 1992 marketing year". The dispute in the present appeal relates to the interpretation and application of this proviso to certain United States domestic support measures.[343]

348. Before the Panel, the United States claimed that its non-green box domestic support measures did not "grant support to a specific commodity in excess of that decided during the 1992 marketing year" and thus were consistent with the proviso to subparagraph (ii) of Article 13(b) of the *Agreement on Agriculture*. Hence, they were entitled to the exemption from action provided by Article 13(b).[344]

349. The Panel rejected the United States' argument that its measures did not "grant support to a specific commodity in excess of that decided during the 1992 marketing year". The Panel calculated values of support that were "decided during the 1992 marketing year" (the "1992 benchmark") as well as values of support by which the measures at issue "grant[ed] support to a specific commodity"—namely, upland cotton—in each of the years 1999, 2000, 2001, and 2002 ("implementation period support"). The Panel tabulated support attributable to upland cotton under the relevant United States domestic support measures and concluded that the support granted in each relevant year of the implementation period exceeded the 1992 benchmark.[345] Accordingly, the Panel found that:

> Brazil has discharged its burden to show that the United States domestic support measures at issue grant support to a specific commodity in excess of that decided during the 1992 marketing year.[346]

[343]Step 2 payments to domestic users; marketing loan program payments; production flexibility contract payments; market loss assistance payments; direct payments; counter-cyclical payments; crop insurance payments; and, cottonseed payments for the 2000 crop. (Panel Report, para. 7.337)

[344]The Panel noted that Brazil did not claim that the United States' domestic support measures do not comply with the conditions set out in the chapeau of Article 13(b). (Panel Report, paras. 7.415-7.416)

[345]*Ibid*., paras. 7.596-7.597. The Panel indicated that the United States' implementation period support exceeded the 1992 benchmark regardless of whether, for certain price-based support measures, budgetary outlays or price gap methodology was used. (*Ibid*., para. 7.597)

[346]*Ibid*., para. 7.598.

350. After finding that evidence and arguments presented by the United States did not rebut Brazil's case[347], the Panel concluded:

> [i]n light of the above findings, ... that the [relevant] United States domestic support measures ... grant support to a specific commodity in excess of that decided during the 1992 marketing year and that, therefore, they are not exempt from actions based on paragraph 1 of Article XVI of the *GATT 1994* or Articles 5 and 6 of the *SCM Agreement*.[348]

2. Appeal by the United States

351. The United States appeals the Panel's finding that its relevant domestic support measures granted, during the implementation period, "support to a specific commodity in excess of that decided during the 1992 marketing year", and the consequential finding that these measures are therefore susceptible to challenge under the actionable subsidies provisions of Articles 5 and 6 of the *SCM Agreement* and Article XVI:1 of the GATT 1994.

352. The United States challenges, in particular, two elements of the Panel's reasoning. The United States first appeals the Panel's *interpretation* of the phrase "grant support to a specific commodity" in the proviso to Article 13(b)(ii), and, in particular, its finding that four types of payments made with respect to historical production of upland cotton—production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments—grant support to the specific commodity upland cotton, even though producers have flexibility under these programs to grow crops other than upland cotton or not to plant any crop at all. According to the United States, properly construed, the phrase "support to a specific commodity" refers to "product-specific support"[349], which would exclude payments under these "non-product-specific" base acre dependent measures.[350] It adds that, even if the Panel is correct in its interpretation that "support to a specific commodity" refers to all "non-green box support measures that clearly or explicitly define a commodity as one to which they bestow or confer support"[351], the Panel erred in the application of its test by allocating to upland cotton all payments to historic upland cotton base acres under these four programs, including those that went to planted commodities other than upland cotton.[352]

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[347]Panel Report, para. 7.607.

[348]*Ibid*., para. 7.608.

[349]United States' appellant's submission, para. 93.

[350]*Ibid*., para. 105.

[351]Panel Report, para. 7.494(i).

[352]United States' appellant's submission, paras. 101-107.

353. Secondly, the United States contests the Panel's use of budgetary outlay methodology to measure the value of support, for purposes of the comparison envisaged by Article 13(b)(ii), of two types of price-based payments: marketing loan program payments and deficiency payments.[353] In this regard, the United States argues that the Panel erred in reading the word "grant" in Article 13(b)(ii) as meaning something actually provided, and not in harmony with the term "decided".[354] The United States argues that this led the Panel erroneously to conclude that it could use a calculation methodology other than the price-gap methodology described in paragraph 10 of Annex 3 to the *Agreement on Agriculture* to measure the value of these price-based measures. According to the United States, only the price gap methodology can reflect the nature of the support "decided" under these programs because it filters out fluctuations in market prices; indeed, only the price gap methodology can measure those aspects of support that the government of a Member can control.[355]

354. The United States, having "corrected" the Panel's calculations for its alleged errors using its own methodologies, asserts that its domestic support measures at issue did not grant a level of product-specific support in any relevant year of the implementation period in excess of the 1992 benchmark.[356] On this basis, the United States argues that its domestic support measures are consistent with the proviso to Article 13(b)(ii) of the *Agreement on Agriculture* and are, therefore, exempt from challenge under the peace clause.[357]

355. Brazil argues that if the Appellate Body upholds the Panel's finding with respect to the interpretation of the phrase "support to a specific commodity" and thereby finds that production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments cannot be excluded from the calculation of support under Article 13(b)(ii), then, regardless of the methodology used to calculate the value of marketing loan program payments and deficiency payments, the United States measures would still exceed the 1992 benchmark.[358] Brazil contends that the Panel was correct to find that "support to a specific commodity" does not mean "product-specific support", or support that is directed specifically at only one product, but may capture all "non-green

[353]Marketing loan program payments in respect of both the 1992 benchmark and the implementation period support, and deficiency payments in respect of the 1992 benchmark only. (United States' appellant's submission, para. 72)

[354]*Ibid*., paras. 64-68. The United States reiterates this argument in the section of its appellant's submission dealing with the interpretation of the phrase "support to a specific commodity": see *ibid*., paras. 114-116.

[355]*Ibid*., paras. 69-75.

[356]*Ibid*., paras. 120-122.

[357]*Ibid*., paras. 122-124.

[358]Brazil's appellee's submission, para. 330.

box measures, that clearly or explicitly define a commodity as one to which they bestow or confer support".[359]

356. Brazil also contends that the Panel was correct to use budgetary outlays for its analysis of the United States' price-based measures. Brazil observes that paragraph 10 of Annex 3 of the *Agreement on Agriculture* permits, in principle, the use of *either* budgetary outlays or the price gap methodology for payments based on price gaps.[360] There is thus no textual basis to say that only price gaps may be used to measure these types of payments. Brazil also submits that the Panel correctly found that the term "grant" refers to what a measure actually provides[361], and therefore contests the United States' claim that factors beyond the control of government, such as market price fluctuations, must be filtered out of the analysis envisaged by the proviso to Article 13(b)(ii) through use of the price gap methodology.[362] Brazil also points out that the United States notified the level of support conferred by the marketing loan program for purposes of its base level Aggregate Measurement of Support ("AMS"), as well as in subsequent AMS notifications, through use of a budgetary outlay methodology.[363] According to Brazil, WTO Members should be able to rely upon AMS notifications to determine whether the notifying Member was entitled, during the implementation period, to the protection conferred by the peace clause.

357. Finally, Brazil illustrates that, even using the price gap methodology to calculate the level of support under the deficiency payment and marketing loan payment programs, total United States support still exceeded the 1992 benchmark in each relevant year of the implementation period.[364]

3. Analysis

358. The United States appeals the Panel's finding that the United States' non-green box domestic support measures granted "support to a specific commodity", namely, upland cotton, during the implementation period, "in excess of that decided during the 1992 marketing year", and the consequential finding that this support was therefore not sheltered from challenge under Article XVI:1 of the GATT 1994 or Articles 5 and 6 of the *SCM Agreement.* The United States' appeal in this regard has two dimensions. First, the United States challenges the Panel's *interpretation* of the phrase "support to a specific commodity" used in the proviso to Article 13(b)(ii) and its *application*

[359]Brazil's appellee's submission, paras. 369 and 385 (quoting Panel Report, para. 7.481).

[360]*Ibid*., para. 350.

[361]*Ibid*., paras. 344 ff.

[362]*Ibid*., paras. 346 and 351.

[363]*Ibid*., paras. 352 ff.

[364]*Ibid*., paras. 442-445.

to four of the domestic support measures. These measures are production flexibility contract payments, market loss assistance payments, direct payments, and counter-cyclical payments.[365] The question whether or not these four measures grant "support to a specific commodity" is at the heart of the difference between the participants in regard to the comparison contemplated by Article 13(b) of the *Agreement on Agriculture*.[366] Secondly, the United States takes issue with the Panel's adoption of a budgetary outlay *methodology* to measure the value of two price-based support measures for the comparison under the proviso to Article 13(b)(ii).

(a) Interpretation of "Support to Specific Commodity"

359. We address first the meaning of the phrase "support to a specific commodity" in Article 13(b)(ii). We then discuss the application of this interpretation to four domestic support measures: production flexibility contract payments[367], market loss assistance payments[368], direct payments[369] and counter-cyclical payments[370]. These four measures did not exist in 1992. Therefore, this part of the United States' appeal affects the calculation of *only* the support granted during the implementation period.[371]

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[365]The United States characterizes these measures as "decoupled" from production. (United States' appellant's submission, para. 104)

[366]On the basis that these four measures are not "support to a specific commodity", the United States has assigned zero values to them in its calculations under the proviso to Article 13(b)(ii). (*Ibid*., para. 120)

[367]We describe briefly production flexibility contract payments *supra*, para. 311.

[368]Market loss assistance payments were provided to recipients of production flexibility contract payments through *ad hoc* legislation as additional assistance to producers to make up for losses caused by low commodity prices. Market loss assistance payments were proportionate to the production flexibility contract payments made to the recipient, and the amount paid depended on the amount allocated to market loss assistance payments for the relevant crop year. Accordingly, eligibility criteria for the market loss assistance payments were, essentially, the same as for the production flexibility contract payments. (See Panel Report, paras. 7.216-7.217)

[369]We describe briefly direct payments *supra*, para. 312.

[370]Counter-cyclical payments supplement, for covered commodities, direct payments and any payments made under the marketing loan program. The eligibility requirements and planting flexibility requirements are the same as under the direct payment program, and they are also dependent on base acres. Counter-cyclical payments supplement producer incomes by filling the gap between, on the one hand, the market price and payments under the marketing loan program and the direct payments program and, on the other hand, a target price established for upland cotton at 72.4 cents per pound. (See Panel Report, paras. 7.223-7.226)

[371]We observe that the United States does not dispute that other payments, namely those under the marketing loan program (for a description of marketing loan program payments, see Panel Report, paras. 7.204-7.208), Step 2 payments (for a description of Step 2 payments, see Panel Report, paras. 7.209-7.211), deficiency payments (for a description of deficiency payments, see Panel Report, footnote 294 to para. 7.213), and cottonseed payments (for a description of cottonseed payments, see Panel Report, paras. 7.233-7.235), result in "support to a specific commodity". (United States' appellant's submission, para. 120 and Table 2) Nor does the United States appeal the Panel's finding that the crop insurance program (for a description of the crop insurance program, see Panel Report, paras. 7.227-7.232) results in "support to a specific commodity", although it adds that it disagrees with the conclusion of the Panel. (See United States' appellant's submission, footnote 134)

360. We note that payments in respect of each of these measures are calculated by reference to "base acres" upon which certain commodities (including upland cotton) were grown in a base period, but upon which a producer currently may or may not grow upland cotton. We refer to these four types of payment in this section as the "base acre dependent payments".

361. We turn to our analysis of the phrase "such measures ... grant[ing] support to a specific commodity" in Article 13(b)(ii). The Panel found and the participants do not dispute that the relevant United States measures grant "support"[372]; similarly, the Panel found[373] and the participants agree[374] that upland cotton is a "commodity" in the sense of that provision.

362. The key element, however, is the significance of the qualifying word "specific" in this phrase. The Panel described the ordinary meaning of the term "specific" as "clearly or explicitly defined; precise; exact; definite"[375] and as "specially or peculiarly pertaining to a particular thing or person, or a class of these; peculiar (*to*)".[376] In our view, the term "specific" in the phrase "support to a specific commodity" means the "commodity" must be clearly identifiable. The use of term "to" connecting "support" with "a specific commodity" means that support must "specially pertain" to a particular commodity in the sense of being conferred on that commodity. In addition, the terms "such measures ... grant" indicates that a discernible link must exist between "such measures" and the particular commodity to which support is granted. Thus, it is not sufficient that a commodity happens to benefit from support, or that support ends up flowing to that commodity by mere coincidence. Rather, the phrase "such measures" granting "support to a specific commodity" implies a discernible link between the support-conferring measure and the particular commodity to which support is granted.

363. Therefore, we agree with the Panel insofar as it found that the ordinary meaning of the phrase "such measures ... grant[ing] support to a specific commodity" *includes* "non-green box measures

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[372]See Panel Report, paras. 7.518-7.520 and, for example, United States' appellant's submission, para 105. We recognize that the United States qualifies this by emphasizing that, in its view, they grant "non-product-specific" support.

[373]Panel Report, paras. 7.480 and 7.518-7.520.

[374]See United States' appellant's submission, paras. 85 and 104; and Brazil's appellee's submission, para. 385.

[375]Panel Report, para. 7.481 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2972).

[376]*Ibid*., para. 7.482 (quoting *The New Shorter Oxford English Dictionary*, L. Brown (ed.) (Clarendon Press, 1993), Vol. 2, p. 2972). The Panel found that this second definition was more appropriate in another context, but we believe that both of these definitions shed light upon the meaning of "specific" in "support to a specific commodity".

that clearly or explicitly define a commodity as one to which they bestow or confer support".[377] This is because the Panel's test requires that a commodity be specified in the measure, and that the support be conferred on that commodity. We believe, however, that the terms of this definition do not exhaust the scope of measures that may grant "support to a specific commodity". We note in this regard that the Panel looked, in applying its test, to factors such as eligibility criteria and payment rates, as well as the relationship between payments and current market prices of the commodity in question.[378] In our view, the Panel was correct to consider such matters, as the requisite link between a measure granting support and a specific commodity may be discerned not just from an explicit specification of the commodity in the text of a measure, as the Panel's test—on its face—seems to imply, but also from an analysis of factors such as the characteristics, structure or design of that measure.[379]

364. Moving to the context of the proviso to Article 13(b)(ii), we note that the United States argues that "support to a specific commodity" should be interpreted as meaning "product-specific support". The United States emphasizes the similarities between the phrase "support to a specific commodity" in Article 13(b)(ii) and two phrases in Article 1 of the *Agreement on Agriculture* that refer to product-specific support: "support for basic agricultural products"[380] and "support ... provided for an agricultural product in favour of the producers of the basic agricultural product".[381] The United States argues that the meaning of all of these phrases must be the same.

365. These phrases do provide important context for the interpretation of Article 13(b)(ii). In our view, "support to a specific commodity" certainly *includes* "product-specific" support. However, like the Panel, we do not believe that the scope of the phrase "support to a specific commodity" in the proviso to Article 13(b)(ii) is exhausted by taking into account the category of product-specific support alone.

366. This is for at least two reasons. First, we note that the drafters chose *not* to use phrases such as support "provided for an agricultural product in favour of the producers of the basic agricultural product" or "support for basic agricultural products" in Article 13(b)(ii), but rather chose the distinct

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[377]Panel Report, para. 7.494(i).

[378]*Ibid*., paras. 7.510-7.517.

[379]Although we observe that the Panel correctly identified the elements that we believe are inherent in the term "support to a specific commodity", the Panel's articulation of the test was not absolutely clear. We also note that the Panel appears to have misapplied the test for "support to a specific commodity" by attributing to upland cotton the total budgetary outlays with respect to upland cotton base acres. See *infra*, para. 375.

[380]This phrase is found in Article 1(h) of the *Agreement on Agriculture*. (United States' appellant's submission, para. 88)

[381]This phrase is found in Article 1(a) of the *Agreement on Agriculture*. (United States' appellant's submission, para. 88)

phrase "support to a specific commodity". This choice of different words by the drafters gives a preliminary indication that they may have intended to convey different meanings.[382]

367. Secondly, and more importantly, the United States' argument fails to reckon with the fact that the scope of domestic support measures that may grant "support to a specific commodity" under Article 13(b)(ii) is broader than just "product-specific support" in the sense of Article 1 and Annex 3. The proviso to Article 13(b)(ii) mentions only the term "such measures" granting support; but the meaning of this term can be clarified by reference to the chapeau of Article 13(b) because, as the Panel noted, "[t]he chapeau of paragraph (b) and subparagraph (ii) form part of a single sentence."[383] The chapeau identifies the categories of support measures covered by that provision. These are:

> ... domestic support measures that conform fully to the provisions of Article 6 of this Agreement including direct payments that conform to the requirements of paragraph 5 thereof, as reflected in each Member's Schedule, as well as domestic support within *de minimis* levels and in conformity with paragraph 2 of Article 6 ...

368. Measures covered by Article 6 include both product-specific and non-product-specific amber box support subject to reduction commitments. In addition, measures covered by the chapeau *also* include product-specific and non-product-specific support within *de minimis* levels. They further include blue box support provided in accordance with Article 6.5, as well as development box support, provided according to the provisions of Article 6.2, for both of which the distinction between product-specific and non-product specific support for purposes of the AMS calculation has little practical relevance.[384] Like the Panel, we believe that the use of the term "such measures" in the proviso to Article 13(b)(ii) indicates that all such measures identified in the chapeau of Article 13(b) may qualify as granting "support to a specific commodity" and are eligible to be included in the analysis. By contrast, under the United States' argument, domestic support measures listed in the chapeau (with the exception of product-specific amber box support) could not be "support to a specific commodity" even if they confer support on a specific commodity and there is a discernible link between the measure and that commodity.

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[382]We note in this regard that, for example, Article 6.4(a)(i) of the *Agreement on Agriculture* mentions "product-specific domestic support", whereas Article 13 does not mention or cross-refer to it.

[383]Panel Report, para. 7.470.

[384]The only type of domestic support clearly excluded from support covered by Article 13(b) is green box support, which does not need to conform with the provisions of Article 6, but rather must conform with the provisions of Annex 2. Green box support, however, qualifies for the exemption from actions provided by Article 13(a).

369. In addition, the United States supports its position by reference to the obligations in Articles 3 and 6 of the *Agreement on Agriculture*, which lay down reduction commitments for total AMS comprising both product-specific and non-product-specific support, but provide no product-specific caps. In the United States' view, because the reduction commitments do not cap product-specific support, the proviso in Article 13(b)(ii) disciplines the degree to which a Member that is in conformity with its reduction commitments can shift support between particular commodities.[385]

370. Indeed, as the United States correctly points out, Article 13(b)(ii) serves to create a discipline upon Members that seek the shelter of the peace clause during the implementation period. We are not convinced, however, that this discipline is limited to "product-specific support" as defined in Article 1 of the *Agreement on Agriculture*. Rather, it extends to all measures that grant "support to a specific commodity", in the sense that the support is conferred on a specific commodity, and there is a discernible link between the measure and the specific commodity concerned.

(b) Application of Article 13(b)(ii) to the Measures at Issue

371. The proviso to Article 13(b)(ii) requires an assessment of whether the relevant United States non-green box domestic support measures grant, during the implementation period, "support to a specific commodity in excess of that decided during the 1992 marketing year".

372. As we have explained above, the term "such measures ... grant support to a specific commodity" comprises two elements: first, a non-green box measure actually confers support on the specific commodity in question; and second, there is a discernible link between the measure and the commodity, such that the measure is directed at supporting that commodity. Such a discernible link may be evident where a measure explicitly defines a specific commodity as one to which it bestows support. Such a link might also be ascertained, as a matter of fact, from the characteristics, structure or design of the measure under examination. Conversely, support that does not actually flow to a commodity or support that flows to a commodity by coincidence rather than by the inherent design of the measure cannot be regarded as falling within the ambit of the term "support to a specific commodity".

373. With these considerations in mind, we turn now to the application of this interpretation to four measures that the United States claims do not grant "support to a specific commodity": the *production flexibility contract payments*, *market loss assistance payments*, *direct payments* and *counter-cyclical payments*. We refer to these measures as "base acre dependent payments" because each of these measures provides payments based on a calculation in which a payment rate, specific to

[385]United States' appellant's submission, para. 98.

upland cotton, is multiplied by an ascertained quantity of upland cotton, which, in turn, is a product of a farm's historical planting of upland cotton (its "upland cotton base acres") and its historical yield of upland cotton per acre.[386] For purposes of the Article 13(b)(ii) comparison, the Panel outlined three alternative methodologies, and therefore three different calculations, in respect of these measures in its Article 13(b)(ii) analysis.[387] We also note that in calculating support granted to upland cotton the United States has ascribed a zero value to the four aforementioned domestic support measures. For purposes of these proceedings, we do not find it necessary to go beyond the Panel record, and thus limit our consideration to these four alternative calculations.

374. The Panel ultimately based its calculations in respect of the base acre dependent payments on the *total* budgetary outlays with respect to upland cotton base acres under each program.[388] The United States contends that this calculation methodology led the Panel to include, as support to upland cotton, payments to producers who did not plant upland cotton.[389] For the United States, there is "[no] question that payments cannot be deemed to grant support to a crop the recipient does not produce".[390] In addition, the United States contends that the Panel erred in finding that the base acre dependent programs "clearly and explicitly specif[y] upland cotton ... as a commodity to which they grant support".[391] In the view of the United States, these measures do no such thing. The United States emphasizes that producers receive payments under the base acre dependent programs irrespective of whether and how much upland cotton they plant, and regardless of whether they plant anything at all.[392] For the United States, the "Panel's error stems largely from its assertion that merely identifying *historical* criteria relating to a commodity according to which payments will be made would render such payments 'support to a specific commodity'."[393]

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[386]We note that each of these programs applied not just to upland cotton, but also to other eligible commodities. We also note that market loss assistance payments did not involve a separate calculation involving these criteria. Rather, market loss assistance payments served to supplement production flexibility contract payments and were made proportionate to a producer's production flexibility contract payments. (Panel Report, para. 7.217)

[387]See Panel Report, para. 7.596 and "Attachment to Section VII:D" (Panel Report, paras. 7.634-7.647).

[388]*Ibid*., paras. 7.580-7.583.

[389]United States' appellant's submission, para. 106.

[390]*Ibid*.

[391]*Ibid*., para. 103 (quoting Panel Report, para. 7.518).

[392]United States' appellant's submission, para. 104.

[393]*Ibid*., para. 105. (original emphasis) The United States points out that "base acres" are not "physical acres" but hypothetical acres for calculation of decoupled payments to producers, who are free to produce whatever crop they choose or to produce no crop at all. (United States' responses to questions during the oral hearing)

375. We agree with the United States that payments made with respect to historical upland cotton base acres to commodities other than upland cotton or to producers who produced no commodities at all cannot be deemed to be support granted to upland cotton for purposes of the Article 13(b)(ii) comparison. The Article 13(b)(ii) assessment must be limited to support conferred on planted upland cotton; support flowing to other commodities that were planted, or support that was given where no commodities were produced must of course be removed from the assessment. We reject, therefore, the Panel's calculation methodology to the extent that it failed to limit the Article 13(b)(ii) calculation to payments with respect to upland cotton base acres corresponding to physical acres actually planted with upland cotton.

376. We observe, however, that the Panel acknowledged that a producer with upland cotton base acres may plant any crop other than the excluded fruits, vegetables, and wild rice, but it found that there was "a strongly positive relationship between those recipients who hold upland cotton base acres and those who continue to plant upland cotton, despite their entitlement to plant other crops".[394] The Panel further observed that data provided by the United States showed that "a very large proportion of farms with upland cotton base acres continue to plant upland cotton in the year of payment"[395], and that "the overwhelming majority of farms enrolled in the programmes which plant upland cotton also hold upland cotton base".[396]

377. We note in this regard that the Panel included, in "Attachment to Section VII:D" to its Report, and described as "appropriate"[397], an alternative calculation using certain methodologies submitted by Brazil for allocating support to acres actually planted with upland cotton under the base acre dependent programs. The first part of this calculation, the "cotton to cotton" methodology, allocated, for each *planted* acre of upland cotton, payments associated with one upland cotton base acre. The second part ("Brazil's methodology") took the results of the "cotton to cotton" methodology and then added to it payments made with respect to non-upland cotton base acres corresponding to physical acres that were actually planted with upland cotton.[398] The "cotton to cotton" methodology limits the Article 13(b)(ii) calculation to payments with respect to cotton base acres corresponding to physical acres that were actually planted with upland cotton.

378. We turn next to the United States' contention that the mere fact that a measure is based on *historical* production of upland cotton is not a sufficient basis for a finding that the measure grants at

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[394]Panel Report, para. 7.637.

[395]*Ibid*., para. 7.636. (footnote omitted)

[396]*Ibid*., para. 7.636.

[397]*Ibid*., para. 7.646.

[398]See *Ibid*., paras. 7.640-7.642.

present "support to [the] specific commodity" upland cotton. We agree that none of the base acre dependent programs expressly ties support to continued production of upland cotton. However, the absence of an express reference in the legislation to continued production of upland cotton does not mean that the payments do not grant support to upland cotton. This is because a link between the four measures at issue and the continued production of upland cotton is discernible from the characteristics, structure and operation of those measures.

379. We note in this regard the reasoning of the Panel:

> Where, for example, these measures specify commodities in the eligibility criteria and payment rates, they constitute support to the commodities specified in that way. This applies *a fortiori* where the payments are determined according to, or are related to, current market prices of the specific commodities.[399]

On this basis, the Panel highlighted several factors revealing a close nexus between payments with respect to historic upland cotton base acres under the production flexibility contract, market loss assistance, direct payment and counter-cyclical payment measures, and the continued production of upland cotton on an equivalent number of physical acres at present. The Panel noted that payments under each program were based on "very specific eligibility criteria", primarily the production of upland cotton in a historical base period.[400] The Panel also observed that, in the case of each of the measures, a particular payment rate was specified for upland cotton.[401] Yield calculations were also specific to upland cotton and related to historical upland cotton yields per acre.[402] In the case of market loss assistance payments, payments were specifically designed to compensate for low prices for upland cotton.[403] In the case of counter-cyclical payments, the payment rate for upland cotton is directly linked to the market price of upland cotton in the year of payment.[404] In our view, these characteristics and operational factors of the measures in question demonstrate a link between payments made with respect to historic upland cotton base acres and the continued production of upland cotton.

380. We underline that these Panel findings do not pertain to *all* payments to *current* producers of upland cotton, but rather are limited to payments to producers with respect to historic *upland*

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[399]Panel Report, para. 7.484.

[400]*Ibid*., paras. 7.513-7.516.

[401]*Ibid*., para. 7.635.

[402]See *ibid*., paras. 7.513-7.516.

[403]*Ibid*., para. 7.515.

[404]*Ibid*., para. 7.516.

cotton base acres.[405] Indeed, we see little in the Panel's finding or on the record that would allow us to discern a link between the support-conferring measures with respect to non-cotton historical base acres and current production of upland cotton. We do not, therefore, accept the methodology submitted by Brazil that included, in the Article 13(b)(ii) calculation, payments with respect to both cotton and non-cotton base acres flowing to current production of upland cotton. We believe that only the "cotton to cotton" methodology, included by the Panel in "Attachment to Section VII:D" to its Report as an "appropriate"[406] alternative calculation, sufficiently demonstrates a discernible link between payments under base acre dependent measures (related to upland cotton) and upland cotton.

381. Finally, we address the United States' argument that the calculation methodology under Article 13(b)(ii) must be based on only those factors that the government of a Member can control, excluding, for example, producer decisions regarding what crops to grow within the scope of production flexibility allowed by the measures.[407] In advancing this contention, the United States relies upon the following statement of the Panel:

> [If] the proviso [to Article 13(b)(ii)] focused on where support was spent due to reasons beyond the control of the government, such as producer decisions on what to produce within a programme, it would introduce a major element of unpredictability into Article 13, and render it extremely difficult to ensure compliance.[408]

382. The United States finds support for this view in the terms "grant" and "decided" in Article 13(b)(ii), and claims that "the focus of the Peace Clause comparison is on the support a Member decides".[409] We note that the verbs "grant" and "decided" have distinct meanings. We agree with the observation of the Panel that "'[d]ecided' refers to what the government determines, but 'grant' refers to what its measures provide."[410] In Article 13(b)(ii), each of these words has been chosen to govern one side of the comparison required by that proviso. In the light of the distinct meanings of these words, and the distinct roles they play in the context of Article 13(b)(ii), we reject the idea that the word "grant", which is applicable to implementation period support, must be read to mean the same thing as "decided", which is applicable to the 1992 benchmark level of support.

383. Moreover, we do not accept that unpredictability of producer decisions under planting flexibility rules, *per se*, could modify the specific requirements set out in the proviso to

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[405]See *supra*, footnote 184.

[406]Panel Report, para. 7.646.

[407]United States appellant's submission, paras. 64-67 and 114-117.

[408]Panel Report, para. 7.487.

[409]United States appellant's submission, para. 66.

[410]Panel Report, para. 7.476.

Article 13(b)(ii). What is relevant for the comparison is the support that the measure actually grants during the implementation period. Indeed, we agree with Brazil that a certain degree of unpredictability in the volume of the payments flowing to particular commodities is inherent in many of the support measures disciplined by the *Agreement on Agriculture*, including measures granting support to a specific commodity.[411] The existence of such unpredictability cannot be a ground to alter the basis of comparison under the proviso to Article 13(b)(ii) from what is actually "grant[ed]" in the implementation period to what is only "decided".

384. For the reasons stated above, we conclude that payments with respect to upland cotton base acres to producers currently growing upland cotton under the production flexibility contract, market loss assistance, direct payment and counter-cyclical payment measures, calculated in accordance with the "cotton to cotton" methodology, are support granted to the specific commodity upland cotton in the sense of Article 13(b)(ii) of the *Agreement on Agriculture*.[412]

(c) Methodology for Calculating the Value of Price-Based Payments

385. The United States' appeal regarding the Panel's decision to use the budgetary outlay methodology and not the price gap methodology described in paragraph 10 of Annex 3 to the *Agreement on Agriculture* for certain price-based payments concerns calculation of the amounts of two types of payments: (i) payments under the *marketing loan program*, which are relevant to the calculation of both the 1992 benchmark level of support and support during the implementation period; and (ii) *deficiency payments*, made in accordance with the FACT Act of 1990, which were replaced by production flexibility contract payments under the FAIR Act of 1996, and which are therefore relevant only to the calculation of the 1992 benchmark level of support.[413]

[411]Thus, in the case of measures that compensate for price fluctuations, unless a limit is set on total payments, a government has little control over the eventual amount of payments. In addition, we recall that the export subsidies at issue in *US – FSC* took the form of a foregoing of tax revenue, with the precise amount of the revenue foregone, and the nature of the specific products that it went to support, being dependent upon the actions of private corporations claiming the exemption. In that case, therefore, it could also be said that whether the United States would exceed product-specific export subsidy commitments would also depend on private producers' decisions to claim tax exemptions.

[412]For the Panel's findings on the value of production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments using the "cotton to cotton" methodology see Panel Report, para. 7.641.

[413]United States' appellant's submission, para. 72; Panel Report, para. 7.213. We observe that the United States' arguments relating to the use of the price gap methodology to measure marketing loan program payments and deficiency payments extend only to the analysis required under Article 13(b)(ii) of the *Agreement on Agriculture*; the United States does not argue that a price gap calculation is required in the context of an analysis of significant price suppression under Article 6.3(c) of the *SCM Agreement*.

386. Payments to upland cotton under the marketing loan program could take one of several forms. In each case, however, gains to producers under this program accrued on the basis of a gap between a reference price tied to the market price of upland cotton, known as the "adjusted world price", and the "loan rate" fixed, from time to time, for the marketing loan program.[414] Deficiency payments for upland cotton were based on the gap between either the loan rate under the marketing loan program, or the national average market price for upland cotton (whichever was higher) and a target price of 72.9 cents per pound of upland cotton. In the event that the loan rate or market price fell below the target price, deficiency payments filled the deficit.[415]

387. The United States claims that both of these price-based measures represent "non-exempt direct payments ... dependent on a price gap", the value of which should be calculated by reference to the price gap methodology described in paragraph 10 of Annex 3 to the *Agreement on Agriculture*.[416]

388. In addressing this issue, we—like the Panel—note that Article 13(b)(ii) gives no specific guidance regarding *how* the "support" that measures granted in the implementation period or that was decided during the 1992 marketing year should be calculated. The Panel therefore turned to the broader context of the *Agreement on Agriculture* and chose to "apply the principles of AMS methodology" in accordance with Annex 3 of the *Agreement on Agriculture*, with certain modifications.[417] We observe that, on appeal, neither of the participants, nor indeed any of the third participants that addressed this issue, suggested that the Panel erred in seeking guidance for its calculations in the principles set out in Annex 3.

389. Against this background, we observe that paragraph 10 of Annex 3 provides that "non-exempt direct payments ... dependent on a price gap" may be measured using either price gap methodology or budgetary outlay methodology.[418] The Panel chose to rely upon actual budgetary outlays[419], but

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[414]For a description of payments under the marketing loan program, see Panel Report, paras. 7.204-7.208.

[415]For a description of deficiency payments, see Panel Report, footnote 294 to para. 7.213.

[416]United States' appellant's submission, paras. 71-73 (quoting paragraph 10 of Annex 3 to the *Agreement on Agriculture*).

[417]Panel Report, para. 7.552.

[418]Paragraph 10 of Annex 3 to the *Agreement on Agriculture* sets forth:

> Non-exempt direct payments: non-exempt direct payments which are dependent on a price gap shall be calculated either using the gap between the fixed reference price and the applied administered price multiplied by the quantity of production eligible to receive the administered price, or using budgetary outlays.

[419]See, for example, Panel Report, para. 7.596. We reproduce the Panel's findings with respect to the values attributable to deficiency payments and payments under the marketing loan program using budgetary outlays in Table 1 of Annex 2.

included in its Report findings regarding the value of support in each relevant year calculated according to price gap methodology as well.[420]

390. As we explain in the next section, our conclusion that the United States granted, during the relevant years of the implementation period, "support to a specific commodity", namely, upland cotton, "in excess of that decided during the 1992 marketing year" holds irrespective of whether the Panel's budgetary outlay calculations or its price gap calculations are used to attribute values to marketing loan program payments and deficiency payments. Therefore, it is unnecessary for us to decide here which methodology must be used for purposes of the comparison envisaged by Article 13(b)(ii) with respect to these two types of payment.[421]

(d) Conclusion Regarding the Application of Article 13(b)(ii)

391. We recall, once again, that the proviso to Article 13(b)(ii) of the *Agreement on Agriculture* sets forth that, during the implementation period in which Article 13 applies, non-green box domestic support measures must not "grant support to a specific commodity in excess of that decided during the 1992 marketing year", if such measures are to enjoy exemption from actions "based on paragraph 1 of Article XVI of GATT 1994 or Articles 5 and 6 of the Subsidies Agreement".[422]

392. In our review above, we have concluded that, for purposes of the comparison envisaged by Article 13(b)(ii), the values of the four measures, namely, production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments in the years 1999, 2000, 2001, and 2002 are properly determined by using the "cotton to cotton" methodology, and we have therefore modified the Panel's findings in this regard. We further note that the United States has

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[420]See Panel Report, para. 7.564 and footnote 727 to para. 7.565. We reproduce the Panel's findings with respect to the values attributable to deficiency payments and payments under the marketing loan program using price gap methodology in each relevant year in Table 2 of Annex 2.

[421]At the oral hearing, the United States confirmed that it may become unnecessary to rule on its appeal regarding calculation methodology, should the Panel's conclusions with respect to the phrase "support to a specific commodity" in Article 13(b)(ii) be upheld by the Appellate Body. (United States' response to questioning at the oral hearing)

[422]We note at this point that we agree with the Panel that:

> There is no requirement to quantify the excess, but the decisive question is whether there is any excess. Thus, it would not be strictly necessary ... to make a precise calculation of the amount of the excess if it is clear that, on the basis of the proper evidentiary standard, there is an excess of some degree.

(Panel Report, para. 7.419)

We also note, however, that fairly detailed calculations regarding the values attributable to United States implementation period support is available to us in these proceedings.

not appealed the Panel's findings regarding the values attributable to three further support measures, namely, Step 2 payments to domestic users, crop insurance and cottonseed payments.[423]

393. Adding, to the values of the seven measures mentioned above, the values for deficiency payments and marketing loan program payments calculated using *either* budgetary outlays[424] *or* price gap methodology[425], we conclude that the United States' domestic support measures in question granted "support to a specific commodity", namely, upland cotton, that was "in excess of that decided during the 1992 marketing year" in each relevant year of the implementation period.

394. It follows that the condition set out in the proviso to Article 13(b)(ii) of the *Agreement on Agriculture* has not been met by the United States. We *uphold*, therefore, the Panel finding, in paragraph 7.608 of its Report, that the United States' domestic support measures challenged by Brazil are not entitled to the exemption provided by the peace clause from actions under Article XVI:1 of the GATT 1994 and Articles 5 and 6 of the *SCM Agreement*.

VI. Serious Prejudice

A. *Significant Price Suppression under Article 6.3(c) of the SCM Agreement*

1. Introduction

395. The United States appeals the Panel's finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of 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 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*. The United States raises several objections to the Panel's analysis leading to this finding. The United States also asks us to find that the Panel failed to set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU. Brazil, for its part, raises a preliminary issue under Article 11 of the DSU.

396. In this section of this Report, we begin our analysis by addressing the preliminary argument of Brazil regarding Article 11 of the DSU. We then turn to the various errors that the United States alleges that the Panel made in making its finding of significant price suppression under Article 6.3(c) of the *SCM Agreement*. In doing so, we examine the United States' objections to the "market" and

[423]For Panel findings on the value of support under these programs, see Panel Report, para. 7.596. See also Tables 1 and 2 of Annex 2.

[424]See Table 1 of Annex 2.

[425]See Table 2 of Annex 2.

"price" that the Panel examined in its analysis of the price-contingent subsidies pursuant to Article 6.3(c). We then consider the Panel's order of analysis under Article 6.3(c). Next, we assess the other alleged errors in the Panel's reasoning leading to its finding that the effect of the price-contingent subsidies is significant price suppression. These include the Panel's alleged failure to quantify the amount of the price-contingent subsidies benefiting upland cotton or to allocate the effect of the subsidies to the appropriate period of time. We then consider the implications of this appeal for the Panel's finding regarding serious prejudice under Article 5(c) of the *SCM Agreement*. Finally, we address the United States' claim that the Panel failed to comply with the requirements of Article 12.7 of the DSU.

2. Objective Assessment under Article 11 of the DSU

397. Brazil argues that many of the United States' arguments, particularly those concerning serious prejudice, involve allegations that the Panel failed to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case" pursuant to Article 11 of the DSU.[426] Brazil requests us to dismiss the United States' arguments that Brazil lists in Annex A to its appellee's submission, on the basis that the United States has not made a proper claim of error under Article 11 of the DSU.[427]

398. In its opening statement delivered at the oral hearing, the United States confirmed that it has not made an Article 11 claim in this appeal. Rather, the United States claims that the Panel erred in its interpretation of Article 6.3(c) of the *SCM Agreement* and in applying this interpretation to the facts in this dispute. The United States also requests us not to dismiss certain of its arguments as requested by Brazil. Under these circumstances, there is no need for us to rule that the United States makes no Article 11 claim. We also refrain from ruling on whether the Panel complied with Article 11 of the DSU. Moreover, we decline to dismiss the United States' arguments that Brazil lists in Annex A to its appellee's submission on the basis that an Article 11 claim was not properly set out by the United States.

399. We are nevertheless mindful of the scope of appellate review with respect to legal and factual matters. 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

[426]Brazil's appellee's submission, paras. 105 and 146.

[427]*Ibid*., para. 146.

the Appellate Body will not interfere lightly with the Panel's discretion "as the trier of facts".[428] 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".[429] Whether the Panel properly interpreted the requirements of Article 6.3(c) of 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.[430] Therefore, the Panel's application of the legal requirements of Article 6.3(c) of the *SCM Agreement* to the facts of this case falls within the scope of our review in this appeal, despite the fact that the United States does not claim that the Panel erred under Article 11 of the DSU.

3. Relevant Market under Article 6.3(c) of the *SCM Agreement*

400. Turning to the question of the relevant "market", we observe that Article 6.3(c) of the *SCM Agreement* addresses the situation where "the effect of the subsidy is ... significant price suppression ... in the same *market*". (emphasis added) As the Panel suggested[431], and the parties agree[432], it is up to the complaining Member to identify the market in which it alleges that the effect of a subsidy is significant price suppression and to demonstrate that the subsidy has that effect within the meaning of Article 6.3(c). Before the Panel, Brazil identified the following as relevant markets for its claim under Article 6.3(c): (a) the world market for upland cotton; (b) the Brazilian market; (c) the United States market; and (d) 40 third country markets where Brazil exports its cotton and where United States and Brazilian upland cotton are found.[433] In contrast, the United States argued before the Panel that the relevant market under Article 6.3(c) must be "a particular domestic market of a Member", and that it cannot be a "world market".[434]

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[428]"Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts." (Appellate Body Report, *EC – Hormones*, para. 132) See also 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.

[429]Appellate Body Report, *EC – Hormones*, para. 132.

[430]On this question, the Appellate Body has made several pronouncements in previous appeals. See, for example, Appellate Body Report, *EC – Hormones*, para. 133; Appellate Body Report, *Korea – Dairy*, para. 137; Appellate Body Report, *Japan – Apples*, para. 222.

[431]Panel Report, para. 7.1246.

[432]The United States and Brazil indicated their agreement on this point in response to questioning during the oral hearing.

[433]Panel Report, para. 7.1230.

[434]*Ibid*., para. 7.1231.

401. The Panel regarded the absence of any geographic limitation or reference to imports or exports in the text of Article 6.3(c), in contrast to Articles 6.3(a) and (b) and 15.2 of the *SCM Agreement*, as indicating that the "same market" under Article 6.3(c) could be a "world market".[435] Applying this interpretation to the facts of the present dispute, the Panel concluded that a "world market" for upland cotton does exist.[436] The Panel further stated that "[w]here price suppression is demonstrated in [the world] market, it may not be necessary to proceed to an examination of each and every other possible market where the products of both the complaining and defending Members are found".[437] In the present dispute, having found that "price suppression has occurred in the same world market"[438], the Panel decided that it was not "necessary to proceed to any further examination of ... alleged price suppression in individual country markets".[439] Thus, the Panel's analysis of the world market for upland cotton formed the basis for its finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c).

402. On appeal, the United States submits that the Panel erred in interpreting the words "same market" in Article 6.3(c) of the *SCM Agreement* as including a "world market".[440] It also submits that the Panel's finding that a "world market" exists for upland cotton is inconsistent with certain of its other findings.[441] The United States also argues that, in any case, the Panel did not make a finding that United States and Brazilian upland cotton compete in the world market that it had identified for upland cotton.[442] Brazil contends that significant price suppression under Article 6.3(c) "may apply to *any* 'market,' from local to global, and everything in between".[443]

403. We begin our analysis of this issue by identifying the ordinary meaning of the word "market" in the context of Article 6.3(c). Article 6.3(c) of the *SCM Agreement* indicates that:

> Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
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> ...

[435]Panel Report, paras. 7.1238-7.1240.

[436]*Ibid*., para. 7.1247.

[437]*Ibid*., para. 7.1252.

[438]*Ibid*., para. 7.1312.

[439]*Ibid*., para. 7.1315.

[440]United States' appellant's submission, para. 307.

[441]*Ibid*., paras. 318 and 319. The United States submits that the Panel failed to reconcile its interpretation of the "same market" in Article 6.3(c) with its reading of the phrase "world market" under Article 6.3(d).

[442]United States' appellant's submission, para. 321.

[443]Brazil's appellee's submission, para. 628. (original emphasis)

> (c) 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*[.] (emphasis added)

404. The Panel described the ordinary meaning of the word "market" as:[444]

> "a place ... with a demand for a commodity or service"[1355]; "a geographical area of demand for commodities or services"; "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices".[1356]

[1355] *The New Shorter Oxford English Dictionary*, (1993).

[1356] *Merriam-Webster Dictionary online*.

405. We accept that this is an adequate description of the ordinary meaning of the word "market" for the purposes of this dispute, and we do not understand the parties to dispute it.[445] This ordinary meaning does not, of itself, impose any limitation on the "geographical area" that makes up any given market. Nor does it indicate that a "world market" cannot exist for a given product. As the Panel indicated, the "degree to which a market is limited by geography will depend on the product itself and its ability to be traded across distances".[446]

406. The only express qualification on the type of "market" referred to in Article 6.3(c) is that it must be "the same" market. Aside from this qualification (to which we return below), Article 6.3(c) imposes no explicit geographical limitation on the scope of the relevant market. This contrasts with the other paragraphs of Article 6.3: paragraph (a) restricts the relevant market to "the market of the subsidizing Member"; paragraph (b) restricts the relevant market to "a third country market"; and paragraph (d) refers specifically to the "world market share". We agree with the Panel[447] that this difference may indicate that the drafters did not intend to confine, *a priori*, the market examined under Article 6.3(c) to any particular area. Thus, the ordinary meaning of the word "market" in Article 6.3(c), when read in the context of the other paragraphs of Article 6.3, neither requires nor excludes the possibility of a national market or a world market.[448]

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[444]Panel Report, para. 7.1236.

[445]As indicated by the United States and Brazil in response to questioning during the oral hearing.

[446]Panel Report, para. 7.1237.

[447]*Ibid*., paras. 7.1238-7.1240.

[448]This stands to reason, given that the purpose of the "actionable subsidies" provisions in Part III of the *SCM Agreement* is to prevent Members from causing adverse effects to the interests of other Members through the use of specific subsidies, wherever such effects may occur.

407. Turning to the phrase "in the same market", it is clear to us from a plain reading of Article 6.3(c) that this phrase applies to all four situations covered in that provision, namely, "significant price undercutting", "significant price suppression, price depression [and] lost sales". We read the Panel Report and the participants' submissions as endorsing this interpretation.[449] The phrase "in the same market" suggests that the subsidized product in question (United States upland cotton in this case)[450] and the relevant product of the complaining Member must be "in the same market". In this appeal, the Panel and the participants agree that United States upland cotton[451] and Brazilian upland cotton[452] must be "in the same market" for Brazil's claim under Article 6.3(c) to succeed.[453] Furthermore, the participants agree that these are like products.[454]

408. When can two products be considered to be "in the same market" for the purposes of a claim of significant price suppression under Article 6.3(c)? Article 6.3(c) does not provide an explicit answer. However, recalling that one accepted definition of "market" is "the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices"[455], it seems reasonable to conclude that two products would be in the same market if they were engaged in actual or potential competition in that market. Thus, two products may be "in the same market" even if they are not necessarily sold at the same time and in the same place or country. As the Panel correctly pointed out, the scope of the "market", for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs.[456] This market for a particular product could well be a

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[449]Panel Report, paras. 7.1248 and 7.1251; United States' appellant's submission, para. 310; Brazil's appellee's submission, paras. 636 and 638.

[450]See *infra*, footnote 451.

[451]Specifically, the subsidized product is United States upland cotton lint. (Panel Report, paras. 7.139, 7.1221-7.1224 and footnote 191 to para. 7.139) The Panel explained that upland cotton, upon harvest, comprises cotton lint and cottonseed. The cotton lint is separated from the cottonseed through "ginning". (Panel Report, footnote 258 to para. 7.197)

[452]Panel Report, footnote 258 to para. 7.197 and paras. 7.1221-7.1224. The United States and Brazil confirmed during the oral hearing that they do not contest this identification of the subsidized product and the other relevant product.

[453]Accordingly, we need not decide whether, in a claim of significant price suppression under Article 6.3(c), the product identified by the complainant must be "like" the relevant subsidized product. We note in this regard that the term "in the same market" appears twice in Article 6.3(c). In the case of *significant price undercutting*, the "subsidized product" must be "compared with the price of a *like product* of another Member in the same market". (emphasis added) This raises the question whether the other three situations mentioned in Article 6.3(c) (namely, "significant price suppression, price depression [and] lost sales") include a requirement that the subsidized product and the relevant product of the complainant be "like".

[454]Panel Report, paras. 7.1248 and 7.1251; United States' appellant's submission, para. 310; Brazil's appellee's submission, paras. 636 and 638.

[455]Panel Report, para. 7.1236 (quoting *Merriam-Webster Dictionary online*).

[456]Panel Report, para. 7.1237 and footnote 1357 to para. 7.1240.

"world market". However, we agree with the Panel that the fact that a world market exists for one product does not necessarily mean that such a market exists for every product.[457] Thus the determination of the relevant market under Article 6.3(c) of the *SCM Agreement* depends on the subsidized product in question. If a world market exists for the product in question, Article 6.3(c) does not exclude the possibility of this "world market" being the "same market" for the purposes of a significant price suppression analysis under that Article.

409. According to the United States, if the market examined pursuant to a claim of significant price suppression under Article 6.3(c) is a "world market", then the subsidized product and any like product will necessarily be in that market and the word "same" in Article 6.3(c) would have no meaning.[458] We do not agree with this argument. As we have explained above, there is no *per se* geographical limitation of a market under Article 6.3(c). It could well be a national market, a world market, or any other market. It is for the complaining party to identify the market where it alleges significant price suppression and to establish that that market exists. In doing so, it is for the complaining party to establish that the subsidized product and its product are in actual or potential competition in that alleged market. If that market is established to be a "world market", it cannot be said, for that reason alone, that the two products are not in the "same market" within the meaning of Article 6.3(c).

410. For these reasons, we agree with the Panel that, depending on the facts of the case, a "world market" may be the "same market" for the purposes of a claim of significant price suppression under Article 6.3(c) of the *SCM Agreement*.[459]

411. We now examine the United States' objection to the Panel's examination of the "world market for upland cotton"[460] in the particular circumstances of this dispute. The United States submits that the Panel's finding that a world market for upland cotton exists is inconsistent with the Panel's suggestion that the United States price for upland cotton is different from the "world price" represented by the A-Index.[461] Essentially, the United States appears to argue that no world market for upland cotton can exist if there is no world price for upland cotton. In our view, whether a world market for upland cotton and a world price for upland cotton exist in the circumstances of this case

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[457]*Ibid*., footnote 1357 to para. 7.1240.

[458]"One can speak of a 'same' regional or national market because there are 'other' regional or national markets where the subsidized and like product may (or may not) compete. One cannot speak of a 'same' world market in the same way because there is no 'other' world market where the products can be found." (United States' appellant's submission, para. 311)

[459]Panel Report, paras. 7.1238-7.1244.

[460]*Ibid*., paras. 7.1247 and 7.1274.

[461]United States' appellant's submission, para. 319 (referring to Panel Report, para. 7.1213).

are factual questions. The Panel Report indicates that the Panel examined the evidence before it and concluded on the basis of that evidence that a world market for upland cotton exists[462] and that a world price in that market also exists and is reflected in the A-Index.[463] We see no reason to disturb the Panel's findings of fact in this regard.[464]

412. The United States also contends that the Panel did not make a finding that United States and Brazilian upland cotton were both in the world market that it had identified for upland cotton.[465] As we explained earlier[466], the words "in the same market" in Article 6.3(c) of the *SCM Agreement* mean that subsidized United States upland cotton and Brazilian upland cotton must be engaged in actual or potential competition in the market in which the effect of the challenged subsidy is alleged to be significant price suppression. In this regard, we note that the Panel expressly stated that the market it examined pursuant to Article 6.3(c) had to be a market "in which both Brazilian and United States upland cotton were present and competing for sales"[467] and "where competition exists between Brazilian and United States upland cotton".[468]

413. Whether or not Brazilian and United States upland cotton competed in the "world market for upland cotton"[469] during the period the Panel examined is a factual question. As we stated earlier[470], two products may be "in the same market" even if they are not necessarily sold in the same place and at the same time, as long as they are engaged in actual or potential competition. We recall that, in addition to the "world market", Brazil identified "40 third country markets ... where United States and Brazilian like upland cotton is found".[471] We also note that, based on an assessment of the relevant facts, the Panel concluded, as a matter of fact, that these two products did compete in the world

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[462]Panel Report, paras. 7.1245-7.1252.

[463]*Ibid*., paras. 7.1260-7.1274. The Panel's "four main reasons" for this conclusion regarding the A-Index were: prices of Brazilian and United States upland cotton are "constituent elements" of the A-Index; "key market participants" perceive the A-Index as reflecting the world market price for upland cotton; the International Cotton Advisory Council treats the A-Index in a similar manner; and the Economic Research Service of the United States Department of Agriculture (the "USDA") has itself referred to the A-Index as the world price. In addition, "the United States 'adjusted world price' is *based on* and *derived from* the A-Index". (*Ibid*., paras. 7.1265-7.1271) (original emphasis)

[464]See Appellate Body Report, *EC – Hormones*, para. 132. See also Appellate Body Report, *US – Wheat Gluten*, para. 151.

[465]United States' appellant's submission, para. 320.

[466]*Supra*, paras. 407-408.

[467]Panel Report, para. 7.1248.

[468]*Ibid*., para. 7.1251.

[469]*Ibid*., paras. 7.1247 and 7.1274.

[470]*Supra*, para. 408.

[471]Panel Report, para. 7.1230.

market for upland cotton. In particular, the Panel referred to "the world upland cotton market, and the relative proportion of that market enjoyed by the United States and Brazil".[472]

414. We are therefore not persuaded by the United States' arguments that the Panel erred with respect to whether United States and Brazilian upland cotton were "in the same market" according to Article 6.3(c).

4. Relevant Price under Article 6.3(c) of the *SCM Agreement*

415. We now turn to the United States' arguments on appeal with respect to the relevant "price" under Article 6.3(c). The Panel found that "the A-Index can be taken to reflect a world price in the world market for upland cotton that is sufficient to form the basis for our analysis as to whether there is price suppression in the same world market within the meaning of Article 6.3(c) for the purposes of this dispute".[473] The United States argues that, even if the Panel properly found that the effect of the price-contingent subsidies is significant suppression of the *world price* for upland cotton, this could not constitute significant price suppression for purposes of Brazil's claim under Article 6.3(c) of the *SCM Agreement*. According to the United States, Brazil had to show that the effect of the challenged subsidies is significant suppression of "the price of Brazilian upland cotton in the 'world market.'"[474]

416. We have already found that the "market" referred to in Article 6.3(c), in connection with significant price suppression, can be a "world market"[475], and that the Panel was correct in examining the world market for upland cotton in the present dispute.[476] The question before us is whether it was sufficient for the Panel to analyze the price of upland cotton in general in the world market or whether the Panel was required to analyze the price of Brazilian upland cotton in the world market and find significant price suppression with respect to that price.

417. In our view, it was sufficient for the Panel to analyze the price of upland cotton in general in the world market. The Panel did so by relying on the A-Index. The Panel specifically found, based on its reading of the evidence before it:

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[472]*Ibid*., para. 7.1313. See also *ibid*., para. 7.1246.

[473]Panel Report, para. 7.1274. According to the Panel, the "A-Index" "is a composite of an average of the five lowest price quotes from a selection of the principal upland cottons traded in the world market obtained by Cotlook, a private UK-based organization". (Panel Report, para. 7.1264)

[474]United States' appellant's submission, para. 239.

[475]*Supra*, para. 410.

[476]*Supra*, para. 414.

> [P]rices for upland cotton transactions throughout the world are ... largely determined by the A-Index price.[477]

Therefore, the Panel found that the A-Index adequately reflected prices in the world market for upland cotton.[478] The Panel also found that "developments in the world upland cotton price would inevitably affect prices" wherever Brazilian and United States upland cotton compete, "due to the nature of the world prices in question and the nature of the world upland cotton market, and the relative proportion of that market enjoyed by the United States and Brazil".[479] It was not necessary, in these circumstances, for the Panel to proceed to a separate analysis of the prices of Brazilian upland cotton in the world market.

418. For these reasons, we reject the United States' contention that the Panel erred in its analysis of significant price suppression under Article 6.3(c) of the *SCM Agreement* "in not examining Brazilian upland cotton prices in the 'world market'".[480]

5. Significant Price Suppression as the Effect of the Price-Contingent Subsidies

(a) Introduction

419. We now address the reasons the Panel provided for its ultimate finding under Article 6.3(c). First, the Panel found that price suppression had occurred within the meaning of Article 6.3(c)[481] after examining three main considerations: "(a) the relative magnitude of the United States' production and exports in the world upland cotton market; (b) general price trends [in the world market as revealed by the A-Index]; and (c) the nature of the subsidies at issue, and in particular, whether or not the nature of these subsidies is such as to have discernible price suppressive effects".[482] Next, the Panel found that the price suppression it had found to exist was "significant" price suppression under Article 6.3(c)[483], "given the relative magnitude of United States production and exports, the overall price trends we identified in the world market, ... the nature of the mandatory United States subsidies in question ... and the readily available evidence of the order of magnitude of the subsidies".[484]

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[477]Panel Report, para. 7.1311.

[478]*Ibid*., para. 7.1274.

[479]*Ibid*., para. 7.1313.

[480]United States' appellant's submission, para. 238.

[481]Panel Report, para. 7.1312.

[482]*Ibid*., para. 7.1280.

[483]*Ibid*., para. 7.1333.

[484]Panel Report, para. 7.1332. (footnotes omitted) We address the United States' arguments regarding the magnitude or quantification of the subsidies *infra*, paras. 459-472.

420. The Panel went on to find that "a causal link exists between" the price-contingent subsidies and the significant price suppression it had found[485], for four main reasons:[486]

> [T]he United States exerts a substantial proportionate influence in the world upland cotton market.[487]
>
> [T]he [price-contingent subsidies] are directly linked to world prices for upland cotton, thereby insulating United States producers from low prices.[488]
>
> [T]here is a discern[i]ble temporal coincidence of suppressed world market prices and the price-contingent United States subsidies.[489]
>
> [C]redible evidence on the record concerning the divergence between United States producers' total costs of production and revenue from sales of upland cotton since 1997 ... supports the proposition that United States upland cotton producers would not have been economically capable of remaining in the production of upland cotton had it not been for the United States subsidies at issue and that the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs.[490]

421. Finally, the Panel found that the following "other causal factors alleged by the United States"[491] "do not attenuate the genuine and substantial causal link that we have found between the United States mandatory price-contingent subsidies at issue and the significant price suppression. Nor do they reduce the effect of the mandatory price-contingent subsidies to a level which cannot be considered 'significant'"[492]:

> [W]eakness in world demand for cotton due to competing, low-priced synthetic fibres, and weak world economic growth.[493]
>
> [B]urgeoning United States textile imports, reflecting the strong United States dollar since the mid-1990's and declining United States competitiveness in textile and apparel production[.][494]

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[485]Panel Report, para. 7.1355.

[486]*Ibid*., para. 7.1347.

[487]*Ibid*., para. 7.1348.

[488]*Ibid*., para. 7.1349.

[489]*Ibid*., para. 7.1351.

[490]*Ibid*., para. 7.1353. (footnotes omitted)

[491]*Ibid*., para. 7.1357.

[492]*Ibid*., para. 7.1363.

[493]Panel Report, para. 7.1358.

[494]*Ibid*., para. 7.1359.

> [T]he strong United States dollar since the mid-1990's[.][495]
>
> China subsidized the release of millions of bales of government stocks between 1999 and 2001[.][496]
>
> [U]pland cotton planting decisions ... are driven by other factors such as (1) the effect of technological factors of upland cotton production ... (2) the relative movement of upland cotton prices *vis-à-vis* prices of competing crops ... (3) the expected prices for the upcoming crop year.[497]

(b) Appeal by the United States

422. In addition to the alleged errors already discussed in connection with the relevant "market" and "price", the United States contends on appeal that the Panel erred in finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.[498] These errors, according to the United States, are:

(a) in relation to the effects of the price-contingent subsidies:

(i) failing to analyze "the relevant production decision faced by farmers – that is, the decision on what to plant"[499];

(ii) ignoring data indicating that United States upland cotton production responded to market signals[500];

(iii) "failing to examine supply response in other countries – that is, to what extent other countries would increase supply in response to any alleged decrease in cotton production resulting from the absence of U.S. payments"[501]; and

(iv) "the four main, cumulative grounds the Panel identified supporting a finding of causation do not withstand scrutiny"[502];

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[495] *Ibid*., para. 7.1360.

[496] *Ibid*., para. 7.1361.

[497] *Ibid*., para. 7.1362.

[498] *Ibid*., paras. 7.1416 and 8.1(g)(i).

[499] United States' appellant's submission, paras. 136 and 154.

[500] *Ibid*., para. 155.

[501] United States' appellant's submission, para. 227.

[502] *Ibid*., para. 180.

(b) in relation to the quantification of subsidies:

(i) "accepting Brazil's argument that, for purposes of a serious prejudice claim, Brazil need not allege and demonstrate, and the Panel need not find, the amount of the challenged subsidy that benefits upland cotton"[503];

(ii) finding "that subsidies not tied to current production of upland cotton (decoupled payments) need not be allocated over the total sales of the recipients"[504]; and

(iii) failing to determine "the extent to which processed cotton benefits from subsidies provided with respect to raw cotton"[505]; and

(c) in relation to the effect of subsidies over time:

(i) concluding "that the payments need not be allocated to the marketing year to which they relate"[506]; and

(ii) "making a finding of present serious prejudice related to past recurring subsidy payments", in the absence of a finding "that the past recurring subsidy payments at issue (that is, those from marketing years 1999-2001) had continuing effects at the time of panel establishment".[507]

(c) Meaning of "Significant Price Suppression"

423. A central question before the Panel with regard to Article 6.3(c) of the *SCM Agreement* was whether the effect of the subsidy is "significant price suppression".[508] It is worth setting out the Panel's understanding of the meaning of the term "price suppression". In explaining this term, the Panel stated, in paragraph 7.1277 of the Panel Report:

[503]*Ibid*., para. 240.

[504]*Ibid*., para. 264.

[505]*Ibid*., para. 301.

[506]*Ibid*., para. 277.

[507]*Ibid*., para. 278.

[508]According to the Panel, Brazil claimed that certain United States subsidies "significantly suppress[ed] upland cotton prices" within the meaning of Article 6.3(c). (Panel Report, para. 7.1108(i))

> 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.[1388]

> [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). (emphasis added)

424. Although the Panel first identified "price suppression" and "price depression" as two separate concepts in paragraph 7.1277, footnote 1388 of the Panel Report suggests that, for its analysis, the Panel used the term "price suppression" to refer to both price suppression and price depression. We recognize that "the situation where 'prices' ... are prevented or inhibited from rising" and "the situation where 'prices' are pressed down, or reduced"[509] may overlap. Nevertheless, it would have been preferable, in our view, for the Panel to avoid using the term "price suppression" as short-hand for both price suppression and price depression, given that Article 6.3(c) of the *SCM Agreement* refers to "price suppression" and "price depression" as distinct concepts. We agree, however, that the Panel's description of "price suppression" in paragraph 7.1277 of the Panel Report reflects the ordinary meaning of that term, particularly when read in conjunction with the French and Spanish versions of Article 6.3(c)[510], as required by Article 33(3) of the *Vienna Convention on the Law of Treaties* (the "*Vienna Convention*").[511]

425. The Panel described its task in assessing "price suppression" under Article 6.3(c) as follows:

> We need to examine whether these prices were suppressed, that is, lower than they would have been without the United States subsidies in respect of upland cotton.[512]

426. As regards the word "significant" in the context of "significant price suppression" in Article 6.3(c), the Panel found that this word means "important, notable or consequential".[513]

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[509]Panel Report, para. 7.1277.

[510]The French version states, in part, "la subvention ... a pour effet d'*empêcher des hausses de prix* ou de déprimer les prix ... dans une mesure notable"; the Spanish version states, in part, "la subvención ... tenga un efecto significativo de contención de la *subida de los precios*, reducción de los precios". (emphasis added)

[511]Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679. Article 33(3) provides: "The terms of the treaty are presumed to have the same meaning in each authentic text."

[512]Panel Report, para. 7.1288. See also *ibid*., para. 7.1279.

427. Article 6.3(c) does not set forth any specific methodology for determining whether the effect of a subsidy is significant price suppression. There may well be different ways to make this determination. However, we find no difficulty with the Panel's approach in the particular circumstances of this dispute. We therefore turn to an examination of how the Panel carried out its assessment.

(d) Panel's Order of Analysis

428. In addressing Brazil's claims of serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*, the Panel began by examining whether the effect of the challenged subsidies was significant price suppression within the meaning of Article 6.3(c). The Panel explained that it adopted this order of analysis because both parties agreed that the Panel could not make an affirmative finding of serious prejudice under Article 5(c) without making an affirmative finding that the effect of the challenged subsidies is significant price suppression within the meaning of Article 6.3(c).[514] Neither party appeals this decision by the Panel.

429. Having determined the relevant products, market, and price, the Panel continued its analysis with respect to Article 6.3(c) in the following order:

> Is there "price suppression"?[515]
>
> Is it "significant" price suppression?[516]
>
> "The effect of the subsidy"[517]

430. The United States contests the Panel's decision to address "significant price suppression" before addressing "the effect of the subsidy", arguing that "[a] finding of price suppression *without* any prior finding of 'the effect of the subsidy' would be meaningless; how could one know that prices were lower than they otherwise would have been without knowing what allegedly caused the prices to be lower?".[518] The United States also contends that the Panel used "circular" reasoning by assuming causation in finding price suppression and using its conclusion on price suppression to support its finding on causation (the effect of the subsidy).[519]

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[513]*Ibid*., para. 7.1326.

[514]*Ibid*., para. 7.1228.

[515]*Ibid*., heading (ii) to paras. 7.1275-7.1315.

[516]*Ibid*., heading (iii) to paras. 7.1316-7.1333.

[517]*Ibid*., heading (k) to paras. 7.1334-7.1363.

[518]United States' appellant's submission, para. 230. (original emphasis)

[519]*Ibid*., para. 131.

431. As noted above, Article 6.3(c) is silent as to the sequence of steps to be followed in assessing whether the effect of a subsidy is significant price suppression. We note that Article 6.8 indicates that the existence of serious prejudice pursuant to Articles 5(c) and 6.3(c) is to be determined on the basis of information submitted to or obtained by the panel, including information submitted in accordance with Annex V of the *SCM Agreement*.[520] Annex V provides some limited guidance about the type of information on which a panel might base its assessment under Article 6.3(c). But we find little other guidance on this issue. The text of Article 6.3(c) does not, however, preclude the approach taken by the Panel to examine first whether significant price suppression exists and then, if it is found to exist, to proceed further to examine whether the significant price suppression is the effect of the subsidy. The Panel evidently considered that, in the absence of significant price suppression, it would not need to proceed to analyze the effect of the subsidy. We see no legal error in this approach.

432. One might contend that, having decided to separate its analysis of significant price suppression from its analysis of the effects of the challenged subsidies, the Panel's price suppression analysis should have addressed prices without reference to the subsidies and their effects. For instance, in its significant price suppression analysis, the Panel could have addressed purely price developments in the world market for upland cotton, such as whether prices fell significantly during the period under examination or whether prices were significantly lower during that period than other periods. Then, in its "effects" analysis, the Panel could have addressed causal factors related to the nature of the subsidies, their relationship to prices, their magnitude, and their impact on production and exports. In this causal analysis, the Panel could also have addressed factors other than the challenged subsidies that may have been suppressing the prices in question.

433. However, 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.[521] The Panel's definition of price suppression, explained above[522], 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

[520]Annex V contains "Procedures for Developing Information Concerning Serious Prejudice".

[521]Similarly, it might be difficult to ascertain whether imports or exports are "displace[d]" or "impede[d]" under paragraphs (a) or (b) of Article 6.3 of the *SCM Agreement* without considering the effect of the challenged subsidy. By way of contrast, it might be possible to determine whether the world market share of a subsidizing Member has increased within the meaning of Article 6.3(d) before assessing whether any increase is the effect of the subsidy.

[522]*Supra*, para. 423.

it *otherwise* would have been".[523] 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.[524]

434. The specific factors that the Panel examined in determining whether or not "price suppression" had occurred were: "(a) the relative magnitude of the United States' production and exports in the world upland cotton market; (b) general price trends; and (c) the nature of the subsidies at issue, and in particular, whether or not the nature of these subsidies is such as to have discernible price suppressive effects".[525] In the absence of explicit guidance on assessing significant price suppression in the text of Article 6.3(c), we have no reason to reject the relevance of these factors for the Panel's assessment in the present case. An assessment of "general price trends"[526] is clearly relevant to significant price suppression (although, as the Panel itself recognized, price trends alone are not conclusive).[527] The two other factors—the nature of the subsidies and the relative magnitude of the United States' production and exports of upland cotton—are also relevant for this assessment. We are not persuaded that the fact that these latter factors were also considered in connection with the Panel's analysis of "the effect of the subsidy"[528] amounts to legal error for that reason alone.

[523]Panel Report, para. 7.1277. (emphasis added)

[524]An analysis under Article 6.3(c) *SCM Agreement* could involve assessing similar facts from different perspectives in order to answer different factual and legal questions when addressing "significant price suppression" and "the effect of" the challenged subsidies.

[525]Panel Report, para. 7.1280.

[526]*Ibid*., para. 7.1286. See also *ibid*., para. 7.1310.

[527]*Ibid*., para. 7.1288.

[528]We discuss these factors *infra*, paras. 449 and 450.

435. Turning to the Panel's assessment of the "effect of the subsidy"[529], the Panel addressed the question whether there was a "causal link"[530] between the price-contingent subsidies and the significant price suppression it had found. It then addressed the impact of "[o]ther alleged causal factors".[531] We observe that Article 6.3(c) does not use the word "cause"; rather, it states that "the effect of the subsidy is ... significant price suppression". However, the ordinary meaning of the noun "effect" is "[s]omething ... caused or produced; a result, a consequence".[532] The "something" in this context is significant price suppression, and thus the question is whether significant price suppression is "caused" by or is a "result" or "consequence" of the challenged subsidy. The Panel's conclusion that "[t]he text of the treaty requires the establishment of a causal link between the subsidy and the significant price suppression"[533] is thus consistent with this ordinary meaning of the term "effect". This is also confirmed by the context provided by Article 5(c) of the *SCM Agreement*, which provides:

> No Member should cause, through the use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members, i.e.:
>
> ...
>
> (c) serious prejudice to the interests of another Member.

436. As the Panel pointed out, "Articles 5 and 6.3 ... do not contain the more elaborate and precise 'causation' and non-attribution language" found in the trade remedy provisions of the *SCM Agreement*.[534] Part V of the *SCM Agreement*, which relates to the imposition of countervailing duties, requires, *inter alia*, an examination of "any known factors other than the subsidized imports which at the same time are injuring the domestic industry".[535] However, such causation requirements have not been expressly prescribed for an examination of *serious prejudice* under Articles 5(c) and Article 6.3(c) in Part III of the *SCM Agreement*. This suggests 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 under Article 6.3(c).

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[529]Panel Report, heading (k) to paras. 7.1334-7.1363.

[530]*Ibid*., heading (i) to paras. 7.1347-7.1356.

[531]*Ibid*., heading (ii) to paras. 7.1357-7.1363.

[532]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 793.

[533]Panel Report, para. 7.1341.

[534]*Ibid*., para. 7.1343.

[535]See Article 15.5 of the *SCM Agreement*. Article 3.5 of the *Anti-Dumping Agreement* and Article 4.2(b) of the *Agreement on Safeguards* are broadly analogous to Article 15.5 of the *SCM Agreement*.

437. Nevertheless, we agree with the Panel that it is necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies.[536] Pursuant to Article 6.3(c) of the *SCM Agreement*, "[s]erious prejudice in the sense of paragraph (c) of Article 5 may arise" when "the effect of *the subsidy* is ... significant price suppression". (emphasis added) If 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). Therefore, we do not find fault with the Panel's approach of "examin[ing] whether or not 'the effect of the subsidy' is the significant price suppression which [it had] found to exist in the same world market"[537] and separately "consider[ing] the role of other alleged causal factors in the record before [it] which may affect [the] analysis of the causal link between the United States subsidies and the significant price suppression."[538]

438. The Panel's approach with respect to causation and non-attribution is similar to that reflected in Appellate Body decisions in the context of other WTO agreements. In connection with the *Agreement on Safeguards*, the Appellate Body has stated that a causal link "between increased imports of the product concerned and serious injury or threat thereof"[539] "involves a genuine and substantial relationship of cause and effect between these two elements"[540], and it has also required non-attribution of effects caused by other factors.[541] In the context of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), the Appellate Body has stated: "[i]n order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not 'attributed' to dumped imports, they must appropriately assess the injurious effects of those other factors."[542] It must be borne in mind that these provisions of the *Agreement on Safeguards* and the *Anti-Dumping Agreement*, as well as the provisions of Part V of the *SCM Agreement*, relate to a determination of "injury" rather than "serious prejudice", and they apply in different contexts and with different purposes. Therefore, they must not be automatically transposed into Part III of the *SCM Agreement*. Nevertheless, they may suggest ways of assessing whether the effect of a subsidy is significant price suppression rather than it being the effect of other factors.

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[536]Panel Report, para. 7.1344.

[537]*Ibid*., para. 7.1345.

[538]*Ibid*., para. 7.1346.

[539]Article 4.2(b) of the *Agreement on Safeguards*. Compare Article 15.5 of the *SCM Agreement* and Article 3.5 of the *Anti-Dumping Agreement*.

[540]Appellate Body Report, *US – Wheat Gluten*, para. 69.

[541]Appellate Body Report, *US – Line Pipe*, para. 208.

[542]Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

(e) Rationale for the Panel's Finding that the Effect of the Price-Contingent Subsidies is Significant Price Suppression

439. We now address the United States' appeal relating to the specific reasons behind the Panel's conclusion that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. The United States alleges that the Panel ignored or failed to take into account certain evidence and arguments in analyzing the effect of the price-contingent subsidies, and that the four main grounds on which the Panel based its analysis "do not withstand scrutiny".[543] We begin by addressing the three key elements that the United States alleges the Panel failed to include in its analysis, and then we address the reasons the Panel relied upon for its conclusion that the effect of the price-contingent subsidies is significant price suppression.

440. First, the United States contends that the Panel failed to address the relevant economic decision faced by United States upland cotton farmers at the time of planting, namely, the decision of whether to plant upland cotton or alternative crops (and how much of each). According to the United States, planted acreage of United States upland cotton responds to expected market prices at the time of harvest, rather than current prices at the time of planting.[544] Brazil counters that farmers decide what to plant based on expected market prices as well as expected payments under the challenged subsidy programs, such that planted acreage responds to both these factors.[545] Brazil also points out that farmers sell their upland cotton throughout the course of a year, at whatever prices they can obtain during the year.[546] During the oral hearing, the United States accepted that farmers decide what to plant based on expected market prices as well as expected subsidies.[547] However, according to the United States, for the 1999-2001 and 2003 crop years, when farmers made their planting decisions, the expected upland cotton price (that is, the price the farmers expected to receive upon harvest) was higher than the "income guarantee set by the marketing loan rate, suggesting that the effect of the subsidy on the planting decision was minimal".[548]

441. We note that the United States presented extensive evidence and arguments to the Panel in relation to expected prices and planting decisions.[549] Brazil also points to several questions asked by

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[543]United States' appellant's submission, para. 180. See *supra*, para. 420.

[544]United States' appellant's submission, paras. 154 and 155.

[545]Brazil's appellee's submission, para. 692.

[546]Brazil's response to questioning at the oral hearing.

[547]See also United States' further rebuttal submission to the Panel, paras. 95-97.

[548]United States' statement and response to questioning at the oral hearing.

[549]See, for example: United States' further submission to the Panel, paras. 55-60; United States' further rebuttal submission to the Panel, paras. 95-97 and 152-177.

the Panel and responses to the Panel regarding planting decisions of United States upland cotton producers to demonstrate that the Panel was aware of the United States' arguments in this regard and took them into account.[550] The Panel Report makes it clear that the Panel specifically addressed "upland cotton planting decisions", "expected prices", and "expected market revenue".[551] 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.[552]

442. Turning first to Chart 2 at paragraph 7.1293 of the Panel Report, the United States submits that it is defective because it "assumes that cotton production decisions are made continuously throughout the marketing year", it "does not identify the planting decision period", and it "does not identify the expected harvest season prices at the time of that planting decision".[553] The Panel explained that it used this chart to demonstrate "that the per unit payment under the marketing loan programme increases when the gap between the adjusted world price and the loan rate widens"[554] and "that except for a short period in MY 2000, the adjusted world price was *below* the marketing loan rate throughout virtually *the whole period from* MY 1999-2002".[555] The Panel concluded from this graph, in connection with marketing loan program payments, that "[t]he further the adjusted world price drops, the greater the extent to which United States upland cotton producers' revenue is insulated from the decline, numbing United States production decisions from world market signals".[556]

443. The Panel explained how the marketing loan program payments operate and found that these payments accounted for more than half of United States upland cotton producer revenue.[557] This demonstrates that, in assessing the effect of marketing loan program payments under Article 6.3(c), the Panel took into account the magnitude of the payments relative to the revenue of United States

[550]Brazil's appellee's submission, para. 685 (referring, *inter alia*, to Brazil's response to Question 167 posed by the Panel (Panel Report, pp. I-216-217, para.151); United States' response to Question 212 Posed by the Panel (Panel Report, p. I-360, para. 51); Question 213 Posed by the Panel (Panel Report, p. I-361)).

[551]Panel Report, para. 7.1362.

[552]See the discussion *supra*, para. 399.

[553]United States' statement at the oral hearing.

[554]Panel Report, para. 7.1293.

[555]*Ibid*., para. 7.1294. (original emphasis)

[556]*Ibid*., para. 7.1294.

[557]*Ibid*., para. 7.1294.

upland cotton producers and found that marketing loan program payments made up a significant proportion of producers' revenue.[558]

444. During the oral hearing, the United States presented data to show that, when planting decisions were made for the 1999, 2000, 2001, and 2003 upland cotton crops, the *expected* upland cotton price upon harvest was higher than the marketing loan rate.[559] Accordingly, the United States contends, the marketing loan program payments would have had only a minimal effect on planting decisions, because farmers would have expected to receive a higher price from the sale of their upland cotton and no marketing loan program payments.

445. We note, based on the evidence provided by the United States, that, for four of the five upland cotton crops between 1999 and 2003, the *expected* harvest price at the time of making planting decisions was always substantially higher than the *actual* price realized at the time of harvest of the crop. This suggests that although farmers had expected higher prices in making their planting decisions, they were also aware that if actual prices were ultimately lower, they would be "insulated"[560] by government support, including not only marketing loan program payments but also counter-cyclical payments, which were based on a target upland cotton price of 72.4 cents per pound.[561] We are therefore satisfied that the Panel adopted a plausible view of the facts in connection with expected prices and planting decisions, even though it attributed to these factors a different weight or meaning than did the United States. As the Appellate Body has said, it is not necessary for panels to "accord to factual evidence of the parties the same meaning and weight as do the parties".[562]

446. Turning to the second key element of the United States' submission, the United States argues that the Panel ignored data showing that "U.S. cotton planted acreage did respond to expected market prices of cotton and other competing crops", "U.S. farmers change cotton acreage commensurately with changes made by cotton farmers in the rest of the world", and "the U.S. share of world cotton production has been stable, again demonstrating that U.S. farmers respond to the same market signals as cotton farmers in the rest of the world do".[563] The Panel Report contains several passages

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[558]We return to the issue of quantification of the price-contingent subsidies in section VI.A.5(f) below.

[559]This data corresponds with the United States' written argument that "the uncontroverted evidence before the Panel ... showed that U.S. cotton plantings respond to expected prices *at the time planting decisions are taken*". (United States' appellant's submission, para. 137) (original emphasis) The United States presented similar data to the Panel. (See, for example, United States' further rebuttal submission to the Panel, paras. 162-163)

[560]Panel Report, para. 7.1294.

[561]*Ibid*., para. 7.225.

[562]Appellate Body Report, *Australia – Salmon*, para. 267.

[563]United States' appellant's submission, para. 155.

suggesting that the Panel did take into account evidence of this kind. For example, the Panel considered the United States' evidence regarding expected upland cotton prices[564] and set out the United States' share of world upland cotton production during the relevant period.[565] It would not amount to an error in the application of Article 6.3(c) to the facts of this case for the Panel not to address specifically in its Report every item of evidence provided and to refer explicitly to every argument made by the parties, if the Panel considered certain items or arguments less significant for its reasoning than others.[566]

447. We now address the third key element of the United States' submission. The United States argues that "the Panel should have considered to what extent other market participants would increase supply or reduce demand in response to any alleged increase in cotton prices resulting from the absence of U.S. payments".[567] Brazil responds that the Panel took this factor into account because it took into account relevant aspects of certain econometric models incorporating this factor: "the models track price effects that would occur as a result of reduced U.S. upland cotton supply *and* increased supply from other countries".[568] The participants agree that these models incorporate the supply response of third countries.[569] The dispute lies in whether the Panel *took into account* supply responses of third countries, as reflected in these models or otherwise.

448. Whether and to what extent other upland cotton producers would have increased supply or reduced demand in the absence of the United States' price-contingent subsidies is ultimately an empirical inquiry. The answer to this inquiry depends on an assessment of various factors bearing on the ability of cotton producers to assess and respond to supply and demand in the world upland cotton market. We note that the Panel indicated expressly that it had taken the models in question into account.[570] It would have been helpful had the Panel revealed how it used these models in examining the question of third country responses. Nevertheless, we are not prepared to second-guess the Panel's

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[564]Panel Report, para. 7.1362.

[565]*Ibid*., para. 7.1282. In this paragraph, the Panel stated: "In the marketing years 1999 to 2002, the respective shares of the United States in world production of upland cotton were approximately 19.2, 19.3, 20.6 and 19.6 per cent, respectively".

[566]Appellate Body Report, *EC – Hormones*, paras. 135 and 138.

[567]United States' appellant's submission, para. 237.

[568]Brazil's appellee's submission, paras. 793-798 (referring to Panel Report, paras. 7.1205, 7.1209, and 7.1215). (original emphasis)

[569]In relation to models presented by Brazil, both parties refer to Brazil's further submission to the Panel of 9 September 2003, paras. 9-10 of Annex I (which is entitled "A Quantitative Simulation Analysis of the Impact of U.S. Cotton Subsidies on Cotton Prices and Quantities by Professor Daniel Sumner"). (United States' appellant's submission, para. 235; Brazil's appellee's submission, para. 793) In relation to third party studies, see United States' appellant's submission, para. 236 and Brazil's appellee's submission, paras. 795-796.

[570]Panel Report, paras. 7.1205, 7.1209 and 7.1215.

appreciation and weighing of the evidence before it, and we do not see any error on the part of the Panel in the application of the law to the facts in addressing this question.

449. We now turn to the four main grounds[571] on which the Panel based its conclusion that "a causal link exists between" the price-contingent subsidies and the significant price suppression it had found[572], which the United States contests.[573] The first reason the Panel provided for finding a "causal link"[574] was the "substantial proportionate influence" of the United States "in the world upland cotton market ... flow[ing] ... from the magnitude of the United States production and export of upland cotton".[575] The United States counters that, "absent some analysis of how U.S. cotton competes with cotton from other sources, relative sizes are meaningless."[576] We agree that, in and of itself, the degree of influence of the United States in the world market for upland cotton may not be conclusive as to the effect of the price-contingent subsidies on prices in that market. However, if the price-contingent subsidies increased United States production and exports or decreased prices for United States upland cotton, then the fact that United States production and exports of upland cotton significantly influenced world market prices would make it more likely that the effect of the price-contingent subsidies is significant price suppression. Accordingly, this fact seems to support the Panel's conclusion, when read in conjunction with its other findings.

450. The second reason the Panel provided for finding a "causal link"[577] was its view that the price-contingent subsidies "are directly linked to world prices for upland cotton".[578] This conclusion flowed from the Panel's earlier assessment—in connection with its analysis of significant price suppression—of the *nature* of the price-contingent subsidies.[579] The nature of a subsidy plays an important role in any analysis of whether the effect of the subsidy is significant price suppression under Article 6.3(c). With respect to marketing loan program payments, the Panel found that "[t]he further the adjusted world price drops, the greater the extent to which United States upland cotton producers' revenue is insulated from the decline".[580] As a result, during the 1999-2002 marketing years, United States production and exports remained stable or increased, even though prices of

[571]United States' appellant's submission, para. 180.

[572]Panel Report, para. 7.1355.

[573]United States' appellant's submission, para. 180.

[574]Panel Report, para. 7.1347.

[575]*Ibid*., para. 7.1348.

[576]United States' appellant's submission, para. 183.

[577]Panel Report, para. 7.1347.

[578]*Ibid*., para. 7.1349.

[579]*Supra*, para. 434.

[580]Panel Report, para. 7.1294.

United States upland cotton decreased.[581] The Panel found that Step 2 payments stimulate domestic and foreign demand for United States upland cotton[582] by "eliminating any positive difference between United States internal prices and international prices of upland cotton".[583] The Panel stated that Step 2 payments "result in lower world market prices than would prevail in their absence".[584] Finally, the Panel found that market loss assistance payments and counter-cyclical payments are made in response to low prices for upland cotton[585] and stimulate United States production of upland cotton by reducing the "total and per unit revenue risk associated with price variability".[586] The United States contends that the Panel's analysis of the price-contingent subsidies was "deficient".[587] However, the Panel found that the price-contingent subsidies stimulated United States production and exports of upland cotton and thereby lowered United States upland cotton prices.[588] This seems to us to support the Panel's conclusion that the effect of the price-contingent subsidies is significant price suppression.[589]

451. The third reason the Panel provided for finding a "causal link"[590] was that "there is a discern[i]ble temporal coincidence of suppressed world market prices" and the price-contingent subsidies.[591] The United States describes this as "an exercise in spurious correlation".[592] However, in our view, one would normally expect a discernible correlation between significantly suppressed prices and the challenged subsidies if the effect of these subsidies is significant price suppression. Accordingly, this is an important factor in any analysis of whether the effect of a subsidy is significant price suppression within the meaning of Article 6.3(c). However, we recognize that mere correlation between payment of subsidies and significantly suppressed prices would be insufficient, without more, to prove that the effect of the subsidies is significant price suppression.

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[581]Panel Report, para. 7.1296.

[582]*Ibid*., para. 7.1299.

[583]*Ibid*., para. 7.1298.

[584]*Ibid*., para. 7.1299.

[585]*Ibid*., para. 7.1301.

[586]*Ibid*., para. 7.1302 and footnote 1410 to para. 7.1302.

[587]United States' appellant's submission, para. 185.

[588]Panel Report, para. 7.1291, 7.1295-7.1296, 7.1299, and 7.1308-7.1311.

[589]We do not exclude the possibility that challenged subsidies that are not "price-contingent" (to use the Panel's term) could have some effect on production and exports and contribute to price suppression.

[590]Panel Report, para. 7.1347.

[591]*Ibid*., para. 7.1351.

[592]United States' appellant's submission, para. 208.

452. The fourth reason the Panel provided for finding a "causal link"[593] was the "divergence between United States producers' total costs of production and revenue from sales of upland cotton since 1997".[594] The United States argues that the Panel should have examined variable rather than total costs[595] in assessing whether "United States upland cotton producers would ... have been economically capable of remaining in the production of upland cotton had it not been for the United States subsidies at issue".[596]

453. We agree with the general proposition of the United States that variable costs may play a role in farmers' decision-making as to whether to plant upland cotton or some alternative crop, and how much of each crop to plant. From a short-term perspective, variable costs may be particularly important. However, from a longer-term perspective, total costs may be relevant. Based on the evidence before it regarding upland cotton production in the United States, the Panel concluded 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".[597] The Panel found that "the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs".[598] In the circumstances of this dispute, we do not consider that the Panel's reliance on total rather than variable costs of production amounts to an error vitiating the Panel's analysis under Article 6.3(c).

454. Finally, we consider the "other causal factors alleged by the United States"[599] to have had an effect on prices. The United States argues that the Panel erred in addressing upland cotton planting decisions as an "other causal factor", given that the United States maintained that the price-contingent subsidies did not cause price suppression at all.[600] We disagree. We have already addressed the United States' arguments with respect to planting decisions, and we find no fault in the Panel's consideration of the issue of "planting decisions".[601]

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[593]Panel Report, para. 7.1347.

[594]*Ibid*., para. 7.1353. (footnote omitted)

[595]United States' appellant's submission, para. 215.

[596]Panel Report, para. 7.1353.

[597]*Ibid*., para. 7.1354.

[598]*Ibid*., para. 7.1353.

[599]*Ibid*., para. 7.1357.

[600]United States' appellant's submission, para. 138.

[601]*Supra*, paras. 440-445.

455. The United States also argues that United States upland cotton exports increased during 1998-2002[602] because textile imports increased in the same period, leading to a decline in the use of cotton by domestic mills.[603] The Panel regarded this factor as "concerning support, rather than suppression, of world cotton prices".[604] However, even assuming that increasing textile imports led to increased exports of upland cotton, this does not mean that the price-contingent subsidies did not have the effect of significant price suppression. It was not unreasonable for the Panel to conclude that the "effect" of the price-contingent subsidies was significant price suppression, even if some other factor might also have price-suppressive effects.[605]

456. The remaining three "other causal factors" that the Panel examined were weakness in world demand for upland cotton, the strong United States dollar, and the release by China of government upland cotton stocks between 1999 and 2001.[606] The United States does not specifically address these three factors in its appellant's submission. However, the Panel's discussion of these "other factors" was part of the reasoning leading to the Panel's conclusion under Article 6.3(c), which the United States does appeal.[607] The Panel found that the United States' argument that weak demand caused low prices was inconsistent with the increase in United States upland cotton production and the absence of "pronounced declines" in world upland cotton consumption.[608] With regard to the United States dollar, the Panel stated that exchange rates would affect market prices, but that market prices did not guide "United States producer decisions (except to the extent that, when they are lower than the marketing loan rate, they dictate the magnitude of United States government subsidies to producers)".[609] The Panel pointed to evidence on the record confirming that marketing loan program payments and Step 2 payments "offset" declines in market prices.[610] With respect to upland cotton stocks released by China, the Panel agreed with the United States (and Brazil) that "an infusion of a large amount of supply onto the market would exert a downward pressure on prices".[611] However, the

[602]The United States also argues that 1998 was an inappropriate base year for the Panel's examination because of unusually weak world demand and reduced United States production due to drought. (United States' appellant's submission, para. 209)

[603]United States' appellant's submission, para. 211.

[604]Panel Report, para. 7.1359.

[605]In this regard, see *supra*, para. 437 and *infra*, para. 457.

[606]Panel Report, paras. 7.1358, 7.1360, and 7.1361.

[607]In appealing this finding, the United States refers in a footnote to paras. 7.1107-7.1416 and 8.1(g)(i) of the Panel Report. (United States' appellant's submission, footnote 531 to para. 516(8))

[608]Panel Report, para. 7.1358.

[609]*Ibid*., para. 7.1360.

[610]*Ibid*., footnote 1477 to para. 7.1360.

[611]*Ibid*., para. 7.1361.

Panel pointed out that the stock released by the Chinese government "was smaller in magnitude than the United States exports over this period".[612]

457. The Panel concluded:

> Although some of these factors may have contributed to lower, and even suppressed, world upland cotton prices during MY 1999-2002, they do not attenuate the genuine and substantial causal link that we have found between the United States mandatory price-contingent subsidies at issue and the significant price suppression. Nor do they reduce the effect of the mandatory price-contingent subsidies to a level which cannot be considered "significant".[613]

In sum, the Panel Report shows that it examined the other factors raised by the United States. Although the Panel found that some of them had price-suppressive effects, it did not attribute those effects to the United States' price-contingent subsidies.

458. Unlike in certain other instances under the WTO agreements, a panel conducting an analysis under Article 6.3(c) of the *SCM Agreement* is the first trier of facts, rather than a reviewer of factual determinations made by a domestic investigating authority. Bearing this in mind, we underline the responsibility of panels in gathering and analyzing relevant factual data and information in assessing claims under Article 6.3(c) in order to arrive at reasoned conclusions. In this case, the voluminous evidentiary record before the Panel included several economic studies, and substantial data and information. For its part, the Panel posed a large number of questions to which the parties submitted detailed answers. Overall, the Panel evidently conducted an extensive analysis, but we believe that, in its reasoning, the Panel could have provided a more detailed explanation of its analysis of the complex facts and economic arguments arising in this dispute. The Panel could have done so in order to demonstrate precisely how it evaluated the different factors bearing on the relationship between the price-contingent subsidies and significant price suppression. Nevertheless, in the light of the Panel's examination of the relevant evidence, coupled with its legal reasoning, we find no legal error in the Panel's causation analysis.

(f) Amount of the Price-Contingent Subsidies

459. In reaching the conclusion that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*, the Panel made the following statements with respect to the amount of the price-contingent subsidies as a whole:

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[612]Panel Report, para. 7.1361.

[613]*Ibid*., para. 7.1363.

> We have readily available information on the record showing us that the price-contingent subsidies in question involve very large amounts of United States government money benefiting United States upland cotton.[614]
>
> [W]hile we do not believe that it is strictly necessar[y] to calculate precisely the amount of the subsidies in question, we observe that we have readily available information on the record showing us that the price-contingent subsidies in question involve very large amounts of United States government money benefiting United States upland cotton production.[615]

In addition, the Panel made statements regarding the amount of individual price-contingent subsidies, namely marketing loan program payments and Step 2 payments.[616]

460. On appeal, the United States raises several points. First, the United States argues that the Panel was required to quantify the amount of the price-contingent subsidies benefiting upland cotton.[617] Secondly, the United States submits that counter-cyclical and market loss assistance payments to recipients who did not produce upland cotton did not benefit upland cotton at all and therefore could not have caused serious prejudice.[618] As for counter-cyclical and market loss assistance payments to recipients who produced both upland cotton and other products, the Panel should have "allocated [the subsidies] over the total sales of the recipients".[619] Thirdly, the United States maintains that the Panel erred, in its Article 6.3(c) analysis, by failing to identify the amount of benefit flowing to processed cotton from price-contingent subsidies paid to producers of raw cotton.[620]

461. Beginning with the text of Article 6.3(c), we note that this provision does not state explicitly that a panel needs to quantify the amount of the challenged subsidy. However, in assessing whether "the effect of the subsidy is ... significant price suppression", and ultimately serious prejudice, a panel

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[614]Panel Report, para. 7.1308.

[615]*Ibid*., para. 7.1349.

[616]"While we do not believe it is necessary to calculate the precise amount of the subsidies in question, we observe that we have this information readily available on the record. This is a very large amount". (Panel Report, paras. 7.1297 and 7.1300) (footnote omitted)

[617]United States' appellant's submission, para. 240. The United States does not contest the Panel's view that, in assessing the price-contingent subsidies under Article 6.3(c), it was not required to quantify *precisely* the amount of the subsidies benefiting upland cotton. (See United States' appellant's submission, para. 258; Panel Report, paras. 7.1173, 7.1186 and 7.1226) The United States clarified this point in response to questioning during the oral hearing.

[618]United States' appellant's submission, para. 242.

[619]*Ibid*., para. 264.

[620]*Ibid*., para. 301 and footnote 314 to para. 301. In response to questioning during the oral hearing, the United States confirmed that its appeal regarding "raw" and "processed" cotton relates to all the price-contingent subsidies.

will need to consider the effects of the subsidy on prices. The magnitude of the subsidy is an important factor in this analysis.[621] A large subsidy that is closely linked to prices of the relevant product is likely to have a greater impact on prices than a small subsidy that is less closely linked to prices. All other things being equal, the smaller the subsidy for a given product, the smaller the degree to which it will affect the costs or revenue of the recipient, and the smaller its likely impact on the prices charged by the recipient for the product. However, the size of a subsidy is only one of the factors that may be relevant to the determination of the effects of a challenged subsidy. A panel needs to assess the effect of the subsidy taking into account all relevant factors.

462. In order for a panel to find that a subsidy has the effect of significant price suppression, or some other effect mentioned in Article 6.3(c), the panel must determine that the payment is a specific subsidy within the meaning of Articles 1 and 2 of the *SCM Agreement*.[622] The Panel did so in this dispute[623], and we do not understand the United States to contest this conclusion. Rather, the United States argues that a panel needs to quantify the amount of the "benefit" conferred on the subsidized product by a challenged subsidy.[624] However, the definitions of a specific subsidy in Articles 1 and 2 do not expressly require the quantification of the "benefit" conferred by the subsidy on any particular product.

463. Turning to the context of Article 6.3(c), we note that Article 6.1(a)—which has now expired—contains the only reference in Part III of the *SCM Agreement* to a calculation of *ad valorem* subsidization of a product. Footnote 14 to Article 6.1(a) explains that this calculation is to be performed in accordance with Annex IV on the "Calculation of the Total Ad Valorem Subsidization (Paragraph 1(a) of Article 6)". No similar provisions are found in Article 6.3(c), which suggests that no precise quantification is envisaged in that provision.

464. The United States does not argue, as a general matter, that the methodologies in Part V of the *SCM Agreement* apply directly to a serious prejudice analysis under Part III of the *SCM Agreement*.[625] However, the United States identifies Part V as providing relevant context for the

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[621] *Supra*, para. 432.

[622] As the United States points out, the word "subsidy" in Article 6.3(c) is defined in Article 1.1 of the *SCM Agreement*, and the subsidies subject to the disciplines in Part III of the *SCM Agreement* (including Articles 5(c) and 6.3(c)) must be "specific" pursuant to Article 1.2. A "subsidy" as defined in the *SCM Agreement* involves the conferral of a "benefit" under Article 1.1(b). (See United States' appellant's submission, paras. 244 and 245)

[623] Panel Report, paras. 7.1120 and 7.1154.

[624] United States' appellant's submission, para. 246.

[625] *Ibid*., para. 258, as confirmed during the oral hearing.

interpretation of Articles 5(c) and 6.3(c) of the *SCM Agreement*.[626] We note that the apparent rationale for Part III differs from that for Part V of the *SCM Agreement*. Under Part V, the amount of the subsidy must be calculated because, under Article 19.4 of the *SCM Agreement* and Article VI:3 of the GATT 1994, countervailing duties cannot be levied in excess of that amount. In contrast, under Part III, the remedy envisaged under Article 7.8 of the *SCM Agreement* is the withdrawal of the subsidy or the removal of the adverse effects. This remedy is not specific to individual companies. Rather, it targets the effects of the subsidy more generally. Article 6.3(c) thus goes in the same vein and does not require a precise quantification of the subsidies at issue.

465. The provisions of the *SCM Agreement* regarding quantification of subsidies reveal that the methodological approaches to quantification may be quite different, depending on the context and purpose of quantification.[627] The absence of any indication in Article 6.3(c) as to whether one of these methods, or any other method, should be used suggests to us that no such precise quantification was envisaged as a necessary prerequisite for a panel's analysis under Article 6.3(c).

466. Pursuant to Article 6.8, "the existence of serious prejudice" under Article 6.3(c) "should be determined on the basis of the information submitted to or obtained by the panel, including information submitted in accordance with the provisions of Annex V" of the *SCM Agreement*. The United States is correct that Annex V refers to "information ... as necessary to establish the existence and amount of subsidization" (in paragraph 2) and "data concerning the amount of the subsidy in question" (in paragraph 5)[628], but Annex V also refers to other information.[629] This demonstrates that the amount of the subsidy, as well as other elements, are relevant for the assessment of whether price suppression exists. But we do not read Annex V as mandating the precise quantification of subsidies in order to determine their effect under Article 6.3(c).

467. In sum, reading Article 6.3(c) in the context of Article 6.8 and Annex V suggests that a panel should have regard to the magnitude of the challenged subsidy and its relationship to prices of the product in the relevant market when analyzing whether the effect of a subsidy is significant price

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[626]United States' appellant's submission, para. 260.

[627]In relation to countervailing duties, Article 19.4 of the *SCM Agreement* specifies that the amount of the subsidy is to be "calculated in terms of subsidization per unit of the subsidized and exported product". Article 14 of the *SCM Agreement* adds that this calculation is to be done "in terms of the benefit to the recipient". In contrast, under Article 6.1(a) and paragraph 1 of Annex IV of the *SCM Agreement*, which relate to a claim of serious prejudice as mentioned above, the "total ad valorem subsidization of a product" is to be calculated "in terms of the cost to the granting government". (footnote omitted)

[628]United States' appellant's submission, paras. 247-252.

[629]For example, paragraph 3 of Annex V refers to information such as "customs data concerning imports and declared values of the products concerned". Paragraph 5 of Annex V refers to information such as "prices of the subsidized product, prices of the non-subsidized product, prices of other suppliers to the market, changes in the supply of the subsidized product to the market in question and changes in market shares".

suppression. In many cases, it may be difficult to decide this question in the absence of such an assessment. Nevertheless, this does not mean that Article 6.3(c) imposes an obligation on panels to quantify precisely the amount of a subsidy benefiting the product at issue in every case. A precise, definitive quantification of the subsidy is not required.

468. In the present case, the Panel could have been more explicit and specified what it meant by "very large amounts"[630], beyond including cross-references to its earlier findings regarding certain subsidies. Nevertheless, the information before the Panel clearly supports the Panel's general statements regarding the magnitude of the price-contingent subsidies.[631]

469. In addition to its arguments regarding quantification, the United States contends that the Panel should have used an allocation methodology to determine the amount of "decoupled" market loss assistance payments and counter-cyclical payments that benefits a given product. It argues that Annex IV of the *SCM Agreement* contains an "economically neutral"[632] allocation methodology agreed by WTO Members, pursuant to which "the subsidy would be allocated to the product according to the ratio of sales of that product to the total value of the recipient firm's sales".[633] It is clear that use of the Annex IV methodology is not expressly *required* by Article 6.3(c). We also observe that the Panel described as "appropriate"[634] certain alternative allocation methodologies to the one it relied upon that sought to reduce the amount of payments with respect to upland cotton base acres within the base acre dependent programs to account only for payments corresponding to acres that were actually planted with upland cotton.[635] In our view, even using these alternative allocation methodologies for market loss assistance payments and counter-cyclical payments, the Panel's conclusion regarding the order of magnitude of the price-contingent subsidies stands.[636]

470. Finally, we address the related United States argument that the Panel failed to determine the extent to which the "benefit" of price-contingent subsidies paid to producers of "raw" cotton flowed through to "processed" cotton. We note that the Panel seemed to regard market loss assistance payments and counter-cyclical payments as benefiting the production of upland cotton lint.[637] As for

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[630]*Supra*, para. 459.

[631]Panel Report, paras. 7.596 and 7.641; United States' response to questions posed by the Panel (Panel Report, p. I-126, para. 211).

[632]United States' appellant's submission, para. 269.

[633]*Ibid*., para. 268.

[634]Panel Report, para. 7.646.

[635]*Ibid*., "Attachment to Section VII:D", paras. 7.634-7.647.

[636]Table 3 of Annex 2.

[637]Panel Report, para. 7.1226 and footnote 258 to para. 7.197. See *supra*, para. 407 and footnote 451.

marketing loan program payments and Step 2 payments, the Panel suggested that it is a condition of eligibility for these payments that harvested cotton containing cotton lint and cottonseed "be 'baled' and/or 'ginned'".[638]

471. The United States contends that the Appellate Body's reasoning in *US – Softwood Lumber IV* indicates that it cannot be presumed that a "subsidy", as defined in Article 1.1 of the *SCM Agreement*, provided to a producer of an input (such as raw cotton) "passes through" to the producer of the processed product (in this case, upland cotton lint).[639] However, the Appellate Body's reasoning in that dispute focuses not on the requirements for establishing serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*, but on the conduct of countervailing duty investigations pursuant to Part V of the *SCM Agreement*.[640]

472. As we have already noted[641], the requirement in Article VI:3 of the GATT 1994 and Article 19.4 of the *SCM Agreement* that countervailing duties on a product be limited to the amount of the subsidy accruing to that product finds no parallel in the provisions on actionable subsidies and pertinent remedies under Part III of the *SCM Agreement*. Therefore, the need for a "pass-through" analysis under Part V of the *SCM Agreement* is not critical for an assessment of significant price suppression under Article 6.3(c) in Part III of the *SCM Agreement*. Nevertheless, we acknowledge that the "subsidized product" must be properly identified for purposes of significant price suppression under Article 6.3(c) of the *SCM Agreement*. And if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market.

473. For these reasons, we find that the Panel did not err in its assessment of the amount of the subsidies for the purpose of its analysis under Article 6.3(c) of the *SCM Agreement*.

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[638]Panel Report, footnote 258 to para. 7.197. See also *ibid*., footnotes 1339 and 1340 to para. 7.1225.

[639]United States' appellant's submission, paras. 304 and 305 (quoting Appellate Body Report, *US – Softwood Lumber IV*, para. 142).

[640]Appellate Body Report, *US – Softwood Lumber IV*, paras. 140-142. The Appellate Body there addressed the need for authorities to ensure that the subsidy at issue confers a benefit on the product against which countervailing duties are to be imposed (pursuant to Article 1.1 of the *SCM Agreement*) and that those duties do not exceed the total amount of the subsidy accruing to that product (pursuant to Article VI:3 of the GATT 1994). The facts in that case are also quite different from those in the present dispute. In *US – Softwood Lumber IV*, it was undisputed that lumber is a distinct product from trees or logs, and countervailing duties were imposed on exported lumber and not on trees or logs. (Appellate Body Report, *US – Softwood Lumber IV*, para. 124) In contrast, in the present dispute, no such clear distinction exists between cotton lint and "raw cotton", meaning (presumably) harvested cotton containing cottonseed and cotton lint.

[641]*Supra*, para. 464.

(g) Effect of the Price-Contingent Subsidies Over Time

474. The United States asserts that the Panel erred in making serious prejudice findings with respect to the price-contingent subsidies provided in marketing years 1999 to 2001.[642] According to the United States, a "recurring" subsidy payment does not confer a benefit after the year for which it is paid, and therefore it is no longer a "subsidy" under Article 1 of the *SCM Agreement*. A subsidy that is paid annually must be "allocated" or "expensed"[643] to the year "for which the payment is made"[644], and the effect of such a payment cannot be "significant price suppression" in any other year. The price-contingent subsidies "are made annually with respect to a particular marketing year"[645], and therefore the effect of those subsidies cannot extend to any later marketing year. In any case, the United States argues that the Panel did not find that these subsidy payments had "continuing effects".[646] The Panel was established in marketing year 2002[647] and, therefore, the Panel could not have found that the effect of the price-contingent subsidies for marketing years 1999 to 2001 is significant price suppression.[648]

475. We observe that the United States' contention that the effect of a subsidy must be "allocated" or "expensed" to the year in which it is paid is confined to "recurring" subsidies, that is, subsidies paid on an annual basis. The United States acknowledges that "non-recurring" subsidies could be "allocated" to subsequent years as well. Article 6.3(c) of the *SCM Agreement* applies to a subsidy whether it is "recurring" or "non-recurring". This Article does not suggest that the effect of a subsidy is limited to or continues only for a specified period of time.

476. In this appeal, we are asked to address the limited question of whether the effect of a subsidy may continue beyond the year in which it was paid, in the context of a significant price suppression analysis under Article 6.3(c) of the *SCM Agreement*. Whether the effect of a subsidy begins and

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[642]See *supra*, para. 422(c). "Because the recurring subsidies provided in each of marketing years 1999, 2000, and 2001 ceased to exist when the benefit was used up for production in those years, the effect of those subsidies cannot be the subject of subsidies claims in marketing year 2002." (United States' appellant's submission, para. 284)

[643]United States' appellant's submission, para. 284.

[644]The United States argues that "recurring" subsidies should be "allocated ... to the marketing year to which they relate". (United States' appellant's submission, para. 275) In response to questioning during the oral hearing, the United States clarified that when it refers to the year to which a subsidy *relates* it means "the year for which the payment is made".

[645]United States' appellant's submission, para. 291.

[646]*Ibid*., para. 278.

[647]The DSB established the Panel on 18 March 2003. (WT/DS267/15; Panel Report, para. 1.2) "The date on which the Panel was established fell during the 2002 marketing year for upland cotton in the United States, which began on 1 August 2002 and ended on 31 July 2003." (Panel Report, para. 7.185)

[648]United States' appellant's submission, para. 278.

expires in the year in which it is paid or begins in one year and continues in any subsequent year, and how long a subsidy can be regarded as having effects, are fact-specific questions. The answers to these questions may depend on the nature of the subsidy and the product in question. We see nothing in the text of Article 6.3(c) that excludes *a priori* the possibility that the effect of a "recurring" subsidy may continue after the year in which it is paid. Article 6.3(c) deals with the "effect" of a subsidy, and not with the financial accounting of the amount of the subsidy.[649]

477. The context of Article 6.3(c) within Part III of the *SCM Agreement* does not support the suggestion that the effect of a subsidy is immediate, short-lived, or limited to one year, regardless of whether or not it is paid every year. Article 6.2 of the *SCM Agreement* refers to the possibility of the subsidizing Member demonstrating that "the subsidy in question *has not resulted* in any of the effects enumerated in paragraph 3".[650] (emphasis added) The word "resulted" in this sentence highlights the temporal relationship between the subsidy and the effect, in that one might expect a time lag between the provision of the subsidy and the resulting effect.[651] In addition, the use of the present perfect tense in this provision implies that some time may have passed between the granting of the subsidy and the demonstration of the absence of its effects.[652]

478. Article 6.4 of the *SCM Agreement* is also relevant context for interpreting Article 6.3(c). Article 6.4 requires that the displacement or impeding of exports be demonstrated "over an appropriately representative period", which "shall be at least one year", so that "clear trends" in changes in market share can be demonstrated.[653] This suggests that the effect of a subsidy under Article 6.4 must be examined over a sufficiently long period of time and is not limited to the year in which it was paid. As the Panel has also pointed out in the context of Article 6.3(c), "[c]onsideration

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[649]Although the accounting treatment of a subsidy may be relevant, it does not control the assessment of the effect of the subsidy under Article 6.3(c).

[650]The French version of Article 6.2 states that "la subvention ... n'a eu aucun des effets énumérés au paragraphe 3". The Spanish version of Article 6.2 states "la subvención en cuestión no ha producido ninguno de los efectos enumerados en el párrafo 3".

[651]The Spanish version of Article 6.2 uses the word "producido" for "resulted", again suggesting a time lag between the provision of the subsidy and the resulting effect. The French version of Article 6.2 uses a more neutral term, "eu", which includes but perhaps does not emphasize this temporal connotation as strongly. See *supra*, footnote 650.

[652]The French and Spanish versions of Article 6.2 also use the present perfect tense. See *supra*, footnote 650.

[653]Article 6.4 reads in relevant part:

> [T]he displacement or impeding of exports shall include any case in which ... it has been demonstrated that there has been a *change* in relative shares of the market to the disadvantage of the non-subsidized like product (*over an appropriately representative period* sufficient to demonstrate clear *trends* in the development in the market for the product concerned, which, in normal circumstances, shall be *at least one year*). ... (emphasis added)

of developments over a period of longer than one year ... provides a more robust basis for a serious prejudice evaluation than merely paying attention to developments in a single recent year".[654]

479. The United States supports its arguments regarding the "allocation" of "recurring" and "non-recurring" subsidies by referring to several sources.[655] The United States submits that "the Appellate Body has acknowledged that 'non-recurring' subsidies may be allocated over time"[656], citing the following statement of the Appellate Body in *US – Lead and Bismuth II*:

> [W]e agree with the Panel that while an investigating authority may presume, in the context of an administrative review under Article 21.2, that a "benefit" continues to flow from an untied, non-recurring "financial contribution", this presumption can never be "irrebuttable".[657]

In our view, this statement does not support the United States' argument. A proper reading of this statement reveals that it was made in the context of Part V of the *SCM Agreement*, and it focuses on the *benefit* flowing from a "non-recurring" financial contribution rather than the *effect* of a subsidy. Indeed, the Appellate Body's conclusion that investigating authorities cannot adopt an irrebuttable presumption that a benefit continues to flow from certain non-recurring financial contributions highlights the importance of examining the particular characteristics of a given subsidy in evaluating its impact.

480. In addition, the United States refers to paragraph 7 of Annex IV to the *SCM Agreement*[658], which provides that "[s]ubsidies granted prior to the entry into force of the WTO Agreement, the benefits of which are allocated to future production, shall be included in the overall rate of subsidization." Although this provision recognizes that the benefits of some subsidies may be allocated to future production, it does not specify that this applies exclusively to "non-recurring"

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[654]Panel Report, para. 7.1199.

[655]United States' appellant's submission, paras. 282 and 283, citing: *SCM Agreement*, paragraph 7 of Annex IV; Guidelines on Amortization and Depreciation adopted by the Tokyo Round Committee on Subsidies and Countervailing Measures, SCM/64, BISD 32S/154 (25 April 1985), para. 1; *Anti-Dumping Agreement*, Article 2.2.1.1; Appellate Body Report, *US – Lead and Bismuth II*, para. 62; Report by the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures, G/SCM/W/415/Rev.2 (15 May 1998), Recommendation 1 and paras. 1-12.

[656]United States' appellant's submission, para. 283.

[657]Appellate Body Report, *US – Lead and Bismuth II*, para. 62.

[658]The title of Annex IV of the *SCM Agreement* is "Calculation of the Total Ad Valorem Subsidization (Paragraph 1(a) of Article 6)". (footnote omitted)

subsidies. In any event, as the Panel noted, the "effect" of a subsidy cannot be equated with the "benefit" of a subsidy.[659]

481. The United States also points to Article 2.2.1.1 of the *Anti-Dumping Agreement*, which relates to the calculation of costs in constructing a normal value under Article 2.2, in order to calculate a dumping margin in certain circumstances. Article 2.2.1.1 states, in relevant part, that "costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production". However, this provision pertains to the method of calculation of producers' costs in constructing the normal value of a product, which is a different inquiry. It does not apply in assessing the effect of a subsidy under Article 6.3(c) of the *SCM Agreement*.

482. For these reasons, we are not persuaded by the United States' contention that the effect of annually paid subsidies must be "allocated" or "expensed" solely to the year in which they are paid and that, therefore, the effect of such subsidies cannot be significant price suppression in any subsequent year. We do not agree with the proposition that, if subsidies are paid annually, their effects are also necessarily extinguished annually.

483. Turning to the effect of the subsidies at issue in this appeal, we note that the Panel found that the effect of the price-contingent subsidies for marketing years 1999 to 2002[660] "is significant price suppression ... in the period MY 1999-2002".[661] The Panel did not specify which subsidies had effects in which years; nor did it specifically state that the effect of the subsidies for marketing years 1999-2001 was significant price suppression in marketing year 2002. This is consistent with the Panel's earlier statement regarding the way in which it would conduct its analysis:

> [I]n our price suppression analysis under Article 6.3(c), we examine one effects-related variable – prices – and one subsidized product – upland cotton. To the extent a sufficient nexus with these exists among the subsidies at issue so that their effects manifest themselves collectively, we believe that we may legitimately treat them as a "subsidy" and group them and their effects together.[662]

484. For this reason, the Panel examined the price-contingent subsidies for marketing years 1999 to 2002 as a group[663], and its finding of significant price suppression in marketing years 1999 to

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[659]Panel Report, para. 7.1179.

[660]*Ibid*., para. 7.1108.

[661]*Ibid*., para. 7.1416. Before the Panel, Brazil also claimed that United States subsidies to be granted from marketing year 2003 to marketing year 2007 threaten to cause serious prejudice to Brazil's interests. (*Ibid*., para. 7.1478) However, the payments to be made in marketing years 2003-2007 and the issue of *threat* of serious prejudice under the *SCM Agreement* do not form part of this appeal.

[662]*Ibid*., para. 7.1192.

[663]Panel Report, para. 7.1290.

2002[664] applied to this group of subsidies. As we noted above, the effects of a "recurring" subsidy may continue after the year in which it is paid.[665] Given that the Panel found significant price suppression in the period 1999 to 2002 as a whole, and this period includes the marketing year 2002, we are unable to agree with the United States' assertion that the Panel erred in not making a specific finding that the price-contingent subsidies for marketing years 1999 to 2001 "had continuing effects at the time of panel establishment".[666]

6. Serious Prejudice under Article 5(c) of the *SCM Agreement*

485. Having found that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*[667], the Panel then considered whether the United States had caused adverse effects in the form of serious prejudice to the interests of Brazil through the use of these subsidies, contrary to Article 5(c) of the *SCM Agreement*. The Panel found that the significant price suppression it had found under Article 6.3(c) of the *SCM Agreement* amounted to serious prejudice within the meaning of the Article 5(c) of the *SCM Agreement*[668], based on the following findings:

> [A]n affirmative conclusion that the effects-based situation in Article 6.3(c) exists is a sufficient basis for an affirmative conclusion that "serious prejudice" exists for the purposes of Article 5(c) of the *SCM Agreement*.[669]
>
> [A]ssuming *arguendo* that any sort of additional demonstration is necessary to establish that the "significant price suppression" we have found to exist in the same world market constitutes prejudice amounting to "serious prejudice" within the meaning of Article 5(c), ... Brazil has also fulfilled that burden.[670]

486. Thus, the Panel provided two alternative reasons for finding that the significant price suppression it had found amounted to serious prejudice within the meaning of the Article 5(c) of the *SCM Agreement*.[671] The Panel's primary reason was that if the effect of a subsidy is significant price suppression within the meaning of Article 6.3(c), this is sufficient, without more, to conclude that the

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[664]*Ibid*., para. 7.1416.

[665]*Supra*, para. 482.

[666]United States' appellant's submission, para. 278.

[667]Panel Report, paras. 7.1355-7.1356 and 7.1363.

[668]*Ibid*., paras. 7.1395 and 8.1(g)(i).

[669]*Ibid*., para. 7.1390.

[670]*Ibid*., para. 7.1391.

[671]Panel Report, paras. 7.1395 and 8.1(g)(i).

subsidizing Member has caused serious prejudice to the interests of another Member within the meaning of Article 5(c).[672] The Panel's alternative reason was that, even if this is not sufficient, Brazil had fulfilled the burden of demonstrating that the United States had caused serious prejudice to the interests of Brazil within the meaning of Article 5(c).[673]

487. In its Notice of Appeal, and in the "Conclusion" section of its Appellant's Submission, the United States challenged the Panel's finding "that 'significant price suppression' is sufficient to establish 'serious prejudice' for purposes of Articles 5(c) and 6.3 of the SCM Agreement".[674] Brazil asks us to dismiss this claim because the United States did "not appear to have advanced arguments in its Appellant's Submission" in relation to it.[675] In response to questioning during the oral hearing, the United States clarified that, in its Notice of Appeal, it intended to challenge only the first of the two findings mentioned above (that is, the Panel's finding in paragraph 7.1390 of the Panel Report). However, the United States indicated that it did not pursue this claim in its appellant's submission.

488. As neither party has appealed the Panel's finding in paragraph 7.1390 of the Panel Report (regarding the sufficiency of a finding of an effect under Article 6.3(c) for a finding of serious prejudice under Article 5(c), in general terms) or the Panel's alternative finding in paragraph 7.1391 of the Panel Report (regarding serious prejudice to the interests of Brazil in the particular circumstances of this dispute), we express no opinion on either of those findings. Nor do we address the Panel's consequential finding that the significant price suppression that it had found to be the effect of the price-contingent subsidies under Article 6.3(c) of the *SCM Agreement* amounted to serious prejudice within the meaning of Article 5(c) of the *SCM Agreement*.[676] Accordingly, upon adoption of the Panel Report by the DSB, the Panel's findings in paragraphs 7.1390 and 7.1391 of the Panel Report as mentioned above[677] would stand, without endorsement or rejection by the Appellate Body.

7. Basic Rationale under Article 12.7 of the DSU

489. The United States contends that, contrary to Article 12.7 of the DSU, the Panel failed to set out the basic rationale behind its finding that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. Article 12.7 of the

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[672]*Ibid*., para. 7.1390.

[673]*Ibid*., para. 7.1391.

[674]United States' Notice of Appeal (WT/DS267/17, 18 October 2004, attached as Annex 1 to this Report), para. 8(i); United States' appellant's submission, para. 516(8)(i).

[675]Brazil's appellee's submission, para. 1084.

[676]Panel Report, paras. 7.1395 and 8.1(g)(i).

[677]*Supra*, para. 485.

DSU requires a panel to set out in its report "the findings of fact, the applicability of relevant provisions and the basic rationale behind any findings and recommendations that it makes".

490. The United States submits that the Panel "provided no explanation of what degree of price suppression it had found to be 'significant.'"[678] In fact, the Panel based its reasoning in this regard on the ordinary meaning of "significant"[679], explaining that the "significance" of price suppression could, depending on the circumstances, have both quantitative and qualitative aspects.[680] We find that the Panel adequately explained the basis for its conclusion that the price suppression it had found was "significant" with the meaning of Article 6.3(c).[681] We therefore see no failure on the part of the Panel to comply with Article 12.7 of the DSU in this regard.

491. The United States also argues that the Panel "failed to set out the basic rationale behind its findings and recommendations ... with respect to the amount of the subsidy".[682] We have already held that the Panel did not err in interpreting or applying Article 6.3(c) of the *SCM Agreement* in relation to the amount of the challenged subsidies.[683] In addition, we note that the Panel articulated a basic rationale for its conclusions in this regard.[684] Accordingly, we decline to find an error on the part of the Panel under Article 12.7 of the DSU.

492. In addition, the United States contends that, contrary to Article 12.7 of the DSU, the Panel failed to set out the basic rationale behind several steps in its reasoning leading to the conclusion that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. The United States contends that the Panel "prejudged ... the outcome of its causation analysis" in making its finding of price suppression[685] and that the Panel

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[678]United States' appellant's submission, para. 330.

[679]Panel Report, para. 7.1325 (referring to *The New Shorter Oxford English Dictionary* (1993)).

[680]"The 'significance' of any degree of price suppression ... may not solely depend upon a given level of numeric significance". (Panel Report, para. 7.1329)

[681]Panel Report, paras. 7.1316-7.1333.

[682]United States' appellant's submission, para. 326.

[683]*Supra*, para. 473.

[684]Panel Report, paras. 7.1166-7.1190. In assessing the need to quantify the benefit conferred on upland cotton by the subsidies at issue, the Panel compared the specific provisions in Parts III and V of the *SCM Agreement*, as well as certain aspects of Articles VI and XVI of the GATT 1994. It highlighted the different remedies contained in the provisions of Part III and V and the rationale behind these different parts. The Panel identified the specific arguments of the United States that it was addressing as well as the relevant Appellate Body pronouncements. The Panel's basic rationale for deciding that it need not quantify precisely the benefit conferred on upland cotton by the subsidies at issue appears to have been that "the more precise quantitative concepts and methodologies found in Part V of the *SCM Agreement* are not directly applicable in our examination of Brazil's actionable subsidy claims under Part III of the *SCM Agreement*". (Panel Report, para. 7.1167)

[685]United States' appellant's submission, para. 325.

"never explained why it did not analyze the farmer's planting decision and the use of expected prices".[686] In the present dispute, the Panel set out the basic rationale for its findings on "significant price suppression" and the "causal link" with the price-contingent subsidies.[687] As we have already explained, the Panel did address the "planting decision" and "expected prices"[688], and the overlap between different sections of the Panel's analysis stemmed in part from the elements that constitute "price suppression" under Article 6.3(c).[689]

493. In its appellant's submission, the United States argues that the Panel failed to comply with Article 12.7 of the DSU, *inter alia*, in making its findings as to: (i) "why the processed cotton was a 'subsidized product' and why [the Panel] could assume that all of the subsidies paid to cotton producers for raw cotton passed through to the processor"[690]; and (ii) "why any price suppression that it found meant that there was serious prejudice to the interests of Brazil".[691]

494. However, paragraph 10 of the United States' Notice of Appeal (which contains the United States' allegations in connection with Article 12.7 of the DSU) does not refer to the "subsidized product", "pass through", or "serious prejudice". Nor does the general statement in paragraph 10 of the issues covered in the United States' claim under Article 12.7 of the DSU appear to extend to these two findings.[692]

495. We acknowledge that the wording of paragraph 10 of the United States' Notice of Appeal (and, in particular, the use of the words "for example") suggests that the findings listed in this paragraph are simply *examples* of findings challenged in connection with Article 12.7 of the DSU, and that the United States' claim of error under Article 12.7 extends to other Panel findings. In other words, paragraph 10 purports to provide an illustrative rather than exhaustive list of the findings that the United States intends to challenge under Article 12.7 of the DSU. However, the fact that paragraph 10 purports to provide an illustrative list is not conclusive as to whether the Notice of

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[686]*Ibid*., para. 324.

[687]Panel Report, paras. 7.1275-7.1363. The Panel referred to and addressed a great deal of factual evidence provided by the parties. The Panel also clearly identified the provisions of the covered agreements that it considered relevant to this issue and gave detailed explanations for its conclusions at each step.

[688]*Supra*, para. 441.

[689]*Supra*, para. 433.

[690]United States' appellant's submission, para. 328.

[691]*Ibid*., para. 329.

[692]It could be argued that the "pass-through" issue is encompassed in the reference to "the amount of the challenged subsidies" in paragraph 10. However, if the United States wished to include this issue in its claim of error under Article 12.7, as described in paragraph 10 of the Notice of Appeal, one might have expected it to do so more explicitly, given that a substantive claim of error regarding the need for a "pass-through" analysis is raised specifically in paragraph 8(d) of the Notice of Appeal in respect of the issues appealed regarding "serious prejudice".

Appeal contains a sufficient reference to the Panel's findings described in paragraph 493 above for us to conclude that these findings are included in the United States' appeal. The significance of terms such as "for example" is likely to depend on the particular claim in question and the particular context in which the term is used in a given appeal. In our view, the United States' Notice of Appeal did not provide adequate notice to Brazil, as contemplated by Rule 20(2) of the *Working Procedures for Appellate Review* (the "*Working Procedures*")[693], that the United States intended to make a claim of error under Article 12.7 of the DSU with respect to the Panel's findings described in paragraph 493 above. We therefore decline to rule on these findings in connection with Article 12.7 of the DSU.

8. Conclusion

496. For these reasons, the United States has not persuaded us that the Panel committed a legal error in interpreting the relevant legal requirements of Article 6.3(c) or in applying its interpretation to the facts of this case. We therefore *uphold* the Panel's finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of marketing loan program payments, Step 2 payments, market loss assistance payments, and counter-cyclical payments is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.[694] We also find that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU.

B. *World Market Share under Article 6.3(d) of the SCM Agreement*

1. Introduction

497. In addition to its claim that it had suffered serious prejudice resulting from price suppression under Article 6.3(c) of the *SCM Agreement*, Brazil also made claims before the Panel alleging that the effect of the challenged subsidies was serious prejudice resulting from an increase in the United States' world market share in upland cotton under Article 6.3(d) of that Agreement.[695] The principal disagreement between the parties regarding the application of Article 6.3(d) related to the meaning of the phrase contained therein, "world market share". Brazil submitted that this phrase meant "a Member's share of the world market for exports"[696], and put forward evidence regarding increases in

[693]See *supra*, footnote 18.

[694]See *supra*, para. 488.

[695]The Panel listed the following as subsidies at issue for purposes of Brazil's claim under Article 6.3(d) of the *SCM Agreement*: "user marketing (Step 2) payments to domestic users and exporters; marketing loan programme payments; [production flexibility contract] payments; [market loss assistance] payments; [direct] payments; [counter-cyclical] payments; crop insurance payments; and cottonseed payments". (Panel Report, para. 7.1418) (footnote omitted)

[696]Panel Report, para. 7.1424. (footnote omitted)

the United States' share of the world market for exports of upland cotton. The United States contended that the United States' share of the "world market" for upland cotton encompassed all consumption of all upland cotton, including consumption by a country of its own cotton production.[697]

498. The Panel rejected Brazil's contention that the "world market share" referred to in Article 6.3(d) was limited to the world market for exports.[698] The Panel also rejected the United States' argument that "world market share" focuses on a Member's share of consumption, based largely upon an interpretation of the object and purpose of subsidies disciplines[699] and logical inconsistencies in the United States' arguments.[700] Instead, the Panel reached the view that:

> ... the phrase "world market share" of the subsidizing Member in Article 6.3(d) of the *SCM Agreement* refers to share of the world market supplied by the subsidizing Member of the product concerned.[701]

499. In view of the fact that the evidence and argumentation submitted by Brazil "focused exclusively upon a different, and in [the Panel's] view erroneous, legal interpretation of the phrase 'world market share' in Article 6.3(d)", the Panel found that "Brazil has not established a prima facie case of violation of Article 6.3(d) or Article 5(c) of the *SCM Agreement*".[702]

500. Brazil appeals the Panel's finding that it failed to make a *prima facie* case of violation under Article 6.3(d) (and Article 5(c)) of the *SCM Agreement*. Its appeal has two sequential elements. First, Brazil appeals the Panel's legal interpretation of Article 6.3(d). Brazil stresses that its appeal regarding the Panel's legal interpretation of the phrase "world market share" is *not conditional*.[703] Brazil suggests that the text of Article 6.3(d) is silent on the question of whether "world market share" refers to world market share of *exports* or world market share of something else.[704] However, the use of the word "*trade*" in footnote 17 to Article 6.3(d) (in the context of "multilaterally agreed specific rules apply to the trade in the product or commodity") suggests that the focus of the provision is upon a Member's share of world *trade* in a product, which requires a focus on *exports*, not *production*, as the Panel found.[705] Brazil argues that Article XVI:3 of the GATT 1994 addresses a

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[697] *Ibid*., para. 7.1425.

[698] *Ibid*., paras. 7.1438-7.1450, and 7.1455-7.1463.

[699] *Ibid*., paras. 7.1451-7.1453.

[700] *Ibid*., footnote 1527 to para. 7.1451.

[701] *Ibid*., para. 7.1464. (underlining added)

[702] *Ibid*., para. 7.1465. (footnote omitted)

[703] Brazil's other appellant's submission, para. 264.

[704] *Ibid*., para. 275.

[705] Brazil's other appellant's submission, paras. 276-277.

Member's "share of world export trade" and that structural similarities between Article XVI:3 and Article 6.3(d) require the phrase "world market share" in the latter provision to be read in the same way.[706] Brazil also points to the context provided by paragraphs (a) and (b) of Article 6.3, as well as Articles 6.4 and 6.7, and argues that the focus of a serious prejudice analysis under Article 6.3 is on the effects of the subsidies on like products from the complaining Member.[707] In addition, Brazil argues that the Panel's reasoning subverts the object and purpose of the *SCM Agreement*, which is to reduce trade distortions caused by subsidies. The Panel's reading denies any remedy to countries that lose market share to subsidized products.[708]

501. Secondly, Brazil requests us to complete the analysis of its claim of serious prejudice under Article 6.3(d). Brazil makes this element of its appeal *conditional* upon us reversing the Panel's findings that United States price-contingent subsidies[709] caused significant price suppression in terms of Article 6.3(c) of the *SCM Agreement*. Brazil submits that findings by the Panel and undisputed facts on the record would allow us to complete the analysis and find a violation of Article 6.3(d) by the United States.[710]

502. The United States counters that the Panel was correct to reject the Brazilian interpretation that "world market share" in Article 6.3(d) means "world market share of exports". The Panel correctly reasoned that nothing in the ordinary meaning of "world market share" suggests that it should not include the domestic market of the Member concerned.[711] The United States recalls that the Panel distinguished between Article 6.3(d) (which deals with "world market share") and Article XVI:3 of GATT 1994 (which deals with "share of world export trade") and suggests that the distinct choice of words reflected in these provisions contains important context to suggest that the coverage of Article 6.3(d) is different from that of Article XVI:3.[712] The United States rebuts Brazil's arguments regarding footnote 17 to Article 6.3(d) by stressing that the term "trade" in the footnote does not purport to limit the scope of the otherwise broad term "world market share" in the text of

[706]*Ibid*., paras. 275-280.

[707]*Ibid*., paras. 281-288.

[708]*Ibid*., paras. 289-294.

[709]That is, marketing loan program payments, Step 2 payments, market loss assistance payments and counter-cyclical payments.

[710]Brazil's other appellant's submission, paras. 296-315.

[711]Indeed (and although the United States does not appeal this point), the United States stresses that the Panel's interpretation that the focus in the phrase "world market share" is upon production is too narrow, because it focuses only on *supply* in the world "market" and not upon *demand*. A correct interpretation would take into account demand—that is *consumption*—as well. On this basis, the focus in Article 6.3(d) is not upon a share of the world's supply or production, but rather upon total *sales*. (United States' appellee's submission, paras. 148-152)

[712]United States' appellee's submission, para. 153.

Article 6.3(d) itself.[713] Other elements of the context in which Article 6.3(d) appears, such as paragraphs (a) and (b) of Article 6.3 and Articles 6.4 and 6.7 of the *SCM Agreement*, explicitly limit the aspects of the market that they address. This contrasts with Article 6.3(d), which focuses only upon the general concept "world market share". The United States also contests Brazil's view that the Panel's interpretation of Article 6.3(d) reduces the provision to inutility.[714] With respect to Brazil's conditional request to complete the analysis, the United States submits that, even if the Appellate Body accepts Brazil's arguments with respect to the interpretation of Article 6.3(d), there are insufficient facts available for the Appellate Body to complete the analysis of Brazil's claim on this matter. The United States observes that the Panel did not undertake an analysis regarding a causal link between the subsidies at issue and an increase in the United States' world market share of exports in upland cotton, and that the causation analysis regarding price suppression under 6.3(c) could not be transposed into an analysis of world market share under Article 6.3(d).[715]

503. Benin and Chad, third participants in this appeal, support Brazil's interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*.[716] Benin and Chad argue that, in the event we agree with Brazil that "world market share" refers to a Member's share of world exports, then we should complete the analysis. In the view of Benin and Chad, the undisputed evidence on record demonstrates that the effect of the United States' subsidies is serious prejudice to the interests of Benin and Chad as well, within the meaning of Articles 6.3(d) and 5(c) of the *SCM Agreement*. Benin and Chad submit that the "interests of another Member" in Article 5(c) are not limited only to the interests of the complaining Member and ask us to find accordingly.[717]

2. Analysis

504. Article 6.3 of the *SCM Agreement* provides, in relevant part:

> Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
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> ...
>
> (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity[17] as compared to the average share it had during the previous period of three years and this

[713] *Ibid*., paras. 154-156.

[714] *Ibid*., para. 161.

[715] *Ibid*., paras. 163-165.

[716] Benin and Chad's third participants' submission, paras. 75-79.

[717] *Ibid*., paras. 80-91.

> increase follows a consistent trend over a period when subsidies have been granted.
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> [17] Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question.

505. As we have noted above, the four subparagraphs of Article 6.3 describe circumstances in which a subsidy has certain effects, which, in turn, may constitute serious prejudice under Article 5(c).[718] Article 6.3(d) addresses a situation in which subsidies have the effect of increasing the "world market share of the subsidizing Member in a particular subsidized product or commodity". The Panel held that the phrase "world market share" of the subsidizing Member in Article 6.3(d) of the *SCM Agreement* "refers to share of the world market *supplied* by the subsidizing Member of the product concerned".[719] As Brazil had failed to submit evidence pertaining to this legal interpretation, the Panel found that Brazil had failed to make a *prima facie* case of violation of this provision.[720]

506. Brazil's appeal with respect to the application of Article 6.3(d) of the *SCM Agreement* has two elements. First, Brazil appeals the Panel's interpretation of the phrase "world market share" in that provision. Second, Brazil requests us to complete the analysis of this issue and rule that the effect of certain United States subsidies is an increase in the world market share of the United States in upland cotton. This second element of Brazil's appeal is *conditional* upon us reversing the Panel's findings with respect to the interpretation of Article 6.3(c) of the *SCM Agreement*.

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[718]On the relationship between Articles 5(c) and 6.3 of the *SCM Agreement*, see *supra*, paras. 485-488.

[719]Panel Report, para. 7.1464. (emphasis added)

[720]*Ibid*., para. 7.1465.

507. We observe with regard to the interpretation of the phrase "world market share" in Article 6.3(d) that, above[721], we upheld the Panel's finding that the effect of the price-contingent subsidies at issue in these proceedings is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*. We observe, therefore, that the condition upon which the second part of Brazil's appeal is contingent is *not* fulfilled, and thus there is no need for us to complete the analysis and to examine whether or not the United States subsidies at issue have the effect of increasing the United States' world market share in upland cotton.

508. Nor do we believe that it is necessary to make a finding on the interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*. We recall that Article 17.12 of the DSU requires that the "Appellate Body shall address each of the issues raised in accordance with paragraph 6 [of Article 17] during the appellate proceeding". In addition, we note that Article 3.3 of the DSU explains that:

> 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 is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members.

For its part, Article 3.4 of the DSU provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Similarly, Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute".

509. In *US – Wool Shirts and Blouses*, the Appellate Body cautioned that:

> Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute.[722]

510. With this in mind, we observe that although an interpretation by the Appellate Body, in the abstract, of the meaning of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*

[721] *Supra*, para. 496.

[722] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:I, 323 at 340.

might offer at best some degree of "guidance" on that issue, it would not affect the resolution of this particular dispute.[723] Indeed, irrespective of whether we were to uphold or reverse the Panel's finding on this issue, upon adoption of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation. Thus, although we recognize that there may be cases in which it would be useful for us to review an issue, despite the fact that our ruling would not result in rulings and recommendations by the DSB, we find no compelling reason for doing so in this case.

511. Accordingly, we believe that an interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement* is unnecessary for purposes of resolving this dispute. We emphasize that we neither uphold nor reverse the Panel's findings on the interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*.

512. Finally, we recall that Article 24.1 of the DSU requires that "[a]t all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members". We fully recognize the importance of this provision. However, we recall that Benin and Chad request us to find that their interests have suffered serious prejudice in the sense of Article 5(c) of the *SCM Agreement*, if we find Brazil has suffered serious prejudice as a result of an increase in the United States' world market share in upland cotton in the sense of Article 6.3(d) of the *SCM Agreement*. As we do not find it necessary to rule on Brazil's appeal regarding the interpretation of the phrase "world market share" in Article 6.3(d), we therefore are not in a position to accede to Benin and Chad's request to complete the analysis and to find that, in addition to Brazil, Benin and Chad also have suffered serious prejudice to their interests in the sense of Articles 6.3(d) and 5(c) of the *SCM Agreement*. We note that Benin and Chad's request to complete the analysis was predicated upon us reversing the Panel's interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*.[724] This condition is not met.

[723]We note, in this regard, that, in *US – Steel Safeguards*, the Appellate Body noted that "several participants expressed an interest in having [it] rule on causation as it would provide guidance to Members on applying safeguard measures in the future consistently with their WTO obligations". (Appellate Body Report, *US – Steel Safeguards*, para. 484) Despite this request for guidance, the Appellate Body declined to make a ruling on this specific aspect of the case. (Appellate Body Report, *US – Steel Safeguards*, para. 483)

[724]Benin and Chad's third participants' submission, para. 83.

VII. Import Substitution Subsidies and Export Subsidies

A. *Step 2 Payments to Domestic Users*

1. Introduction

513. We examine next the United States' claims against the Panel's findings relating to the Step 2 payments provided to domestic users and exporters of United States upland cotton under Section 1207(a) of the FSRI Act of 2002.

514. According to the Panel[725], the program pursuant to which Step 2 payments are granted has been authorized since 1990 under successive legislation, including the FAIR Act of 1996[726] and the FSRI Act of 2002.[727] Under the program, marketing certificates or cash payments (collectively referred to by the Panel as "user marketing (Step 2) payments")[728] are issued to eligible domestic users and exporters of eligible upland cotton when certain market conditions exist such that United States cotton pricing benchmarks are exceeded. "Eligible upland cotton" is defined as "domestically produced baled upland cotton which bale is opened by an eligible domestic user ... or exported by an eligible exporter".[729] An "eligible domestic user" of upland cotton is defined under the regulations as:

> A person regularly engaged in the business of opening bales of eligible upland cotton for the purpose of manufacturing such cotton into cotton products in the United States (domestic user), who has entered into an agreement with CCC[730] to participate in the upland cotton user marketing certificate program.[731]

[725]Panel Report, para. 7.209.

[726]Section 136 of the FAIR Act of 1996, reproduced in Exhibits BRA-28 and US-22.

[727]Section 1207 of the FSRI Act of 2002, reproduced in Exhibits BRA-29 and US-1, implemented under 7 CFR 1427, Subpart C, reproduced in Exhibit BRA-37.

[728]The Panel explained that "[f]or the purposes of this dispute, on the basis of the views of the parties, we make no distinction between user marketing (Step 2) cash payments and marketing certificates". (Panel Report, footnote 284 to para. 7.209, referring to Brazil's and the United States' respective responses to Panel Question No. 110 (a))

[729]7 CFR Section 1427.103(a).

[730]Additional information about the CCC is provided, *infra*, footnote 859; see also Panel Report, para. 7.702.

[731]7 CFR Section 1427.104(a)(1).

515. For its part, an "eligible exporter" of upland cotton is:

> A person, including a producer or a cooperative marketing association ... regularly engaged in selling eligible upland cotton for exportation from the United States (exporter), who has entered into an agreement with CCC to participate in the upland cotton user marketing certificate program.[732]

516. The Panel explained that, under the FAIR Act of 1996, the United States Secretary of Agriculture "issued user marketing (Step 2) payments to domestic users and exporters of upland cotton for documented purchases by domestic users and sales for export by exporters made in a week following a consecutive four-week period when the lowest price quotation for United States cotton delivered to Northern Europe exceeded the Northern Europe price quotation by more than 1.25 cents per pound, and the adjusted world price did not exceed 130 per cent of the marketing loan rate for upland cotton."[733] The payments to domestic users and exporters are calculated "at a rate per pound equal to the difference between the two price quotations during the fourth week of the period, minus the 1.25 cents per pound threshold".[734] Step 2 payments continued to be authorized under the FSRI Act of 2002, although with certain modifications. The Panel pointed out that "[i]n particular, application of the 1.25 cents per pound threshold has been delayed until 1 August 2006 (i.e. for the 2002 through 2005 marketing years)".[735] The consequence of this, the Panel explained, is that "Step 2 payments are issued following a consecutive four-week period when the lowest price quotation for United States cotton delivered to Northern Europe exceeded the Northern Europe price quotation by any amount and the adjusted world price did not exceed 134 per cent (not 130 per cent, as under the FAIR Act of 1996) of the marketing loan rate".[736] Domestic users and exporters receive payments that are calculated "at a rate per pound equal to the difference between the two price quotations during the fourth week of the period, with no reduction for the threshold".[737]

517. We address first the United States' appeal of the Panel findings in respect of Step 2 payments to *domestic users* of United States upland cotton. We examine the United States' appeal of the

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[732]7 CFR Section 1427.104(a)(2).

[733]Panel Report, para. 7.210.

[734]*Ibid*., para. 7.210 (referring to Section 136(a) of the FAIR Act of 1996 reproduced in Exhibits BRA-28 and US-22). The Panel added that Section 136(a)(5) limited total expenditures under this program to $701 million, but this was later repealed. (*Ibid*., footnote 286 to para. 7.210)

[735]*Ibid*., para. 7.211.

[736]*Ibid*.

[737]*Ibid*., para. 7.211 (referring to Section 1207(a) of the FSRI Act of 2002, reproduced in Exhibits BRA-29 and US-1, and 7 CFR 1427.107 (1 January 2003 edition), reproduced in Exhibit BRA-37).

Panel's finding in respect of Step 2 payments to *exporters* of United States upland cotton in the next Section of this Report.

2. Panel Findings

518. Before the Panel, Brazil argued that Step 2 payments to domestic users of upland cotton are *per se* import substitution subsidies that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.[738] Brazil explained that Step 2 payments to domestic users are "contingent on the use of domestic over imported goods within the meaning of Article 3.1(b) of the *SCM Agreement*" because the payments "are 'conditional' on proof of consumption of domestically produced upland cotton".[739]

519. The United States did not dispute that Step 2 payments are "subsidies" and that to receive a Step 2 payment a domestic user must "open a bale of domestically produced baled upland cotton".[740] The United States, however, asserted that Step 2 payments to domestic users of upland cotton are included, and they comply with, the United States' domestic support reduction commitments pursuant to Article 6.3 of the *Agreement on Agriculture*.[741] As Step 2 payments to domestic users are permitted under the *Agreement on Agriculture*, the United States argued that these payments cannot be contrary to Article 3 of the *SCM Agreement*. This is because the introductory language of Article 3.1 of the *SCM Agreement* makes it clear that that provision applies "[e]xcept as provided in the *Agreement on Agriculture*".[742] The United States additionally asserted that "pursuant to Article 21 of the *Agreement on Agriculture*, all of the Annex 1A agreements (including the *SCM Agreement*) apply subject to the provisions of the *Agreement on Agriculture*".[743]

520. The Panel began its examination by observing that "[t]he introductory clause of Article 3.1 of the *SCM Agreement* ('[e]xcept as provided in the Agreement on Agriculture') indicates that any examination of the WTO-consistency of a subsidy for agricultural products under the *SCM*

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[738]Panel Report, para. 7.1019. Before the Panel, Brazil also claimed that Step 2 payments to *domestic users* are contrary to Article III:4 of the GATT 1994 and that they are not justified under Article III:8(b) because they are not exclusively paid to domestic *producers* of cotton, but rather to domestic *users*.

The Panel exercised judicial economy in respect of this claim, in the light of the fact that it had already found the same measure to be inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*. Brazil has not appealed the Panel's exercise of judicial economy. (*Ibid*., paras. 7.1099 and 7.1106)

[739]*Ibid*., para. 7.1019.

[740]*Ibid*., para. 7.1022 (quoting the United States' response to Question 144 Posed by the Panel (Panel Report, p. I-128, para. 217 and p. I-249, para. 58)).

[741]*Ibid*., para. 7.1023.

[742]*Ibid*., para. 7.1024.

[743]*Ibid*.

Agreement may depend upon the provisions of the *Agreement on Agriculture*.[744] The Panel then examined Article 21.1 of the *Agreement on Agriculture* and observed that this provision "expressly acknowledges the application of the *GATT 1994* and the *SCM Agreement* to agricultural products, while indicating that the *Agreement on Agriculture* would take precedence in the event, and to the extent, of any conflict".[745] The Panel described the situations in which, in its view, Article 21.1 of the *Agreement on Agriculture* applies[746], and then turned to "the relevant provisions of the *Agreement on Agriculture* in order to discern whether, and/or to what extent, these provisions affect a claim concerning the prohibition on import substitution subsidies in Article 3.1(b) of the *SCM Agreement*."[747] The Panel concluded that "none of the situations" it described arises in this dispute from the relevant provisions in the *Agreement on Agriculture*.[748]

521. The Panel examined Article 13 of the *Agreement on Agriculture*, but concluded that this provision did not affect its analysis of Brazil's claims under Article 3.1(b) of the *SCM Agreement*.[749] The Panel then looked at Article 6.3 and paragraph 7 of Annex 3 of the *Agreement on Agriculture*, rejecting the United States' contention that "user marketing (Step 2) payments to upland cotton domestic users that provide support to domestic producers contingent on the use of domestic goods [are] consistent with the *Agreement on Agriculture*".[750] The Panel reasoned instead that:

> Article 6.3 does *not* provide that compliance with such "domestic support reduction commitments" shall necessarily be considered to be in compliance with other applicable WTO obligations. Nor does it contain an explicit textual indication that otherwise prohibited measures are necessarily justified by virtue of compliance with the domestic support reduction commitments. The obligations are parallel, and the operation of Article 6.3 of the *Agreement on Agriculture* does not pre-empt or exclude the operation of the obligation under Article 3.1(b) of the *SCM Agreement*.[751]

522. From this the Panel concluded that "Article 3.1(b) of the *SCM Agreement* can be read together with the *Agreement on Agriculture* provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms".[752] Accordingly, the

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[744]Panel Report, para. 7.1034. (footnote omitted)

[745]*Ibid*., para. 7.1036.

[746]*Ibid*., para. 7.1038. See *infra*, para. 532.

[747]*Ibid*., para. 7.1041. (footnote omitted)

[748]*Ibid*., para. 7.1039.

[749]*Ibid*., para. 7.1052.

[750]*Ibid*., para. 7.1056.

[751]*Ibid*., para. 7.1058. (original emphasis)

[752]*Ibid*., para. 7.1071.

Panel found no conflict between the domestic support provisions of the *Agreement on Agriculture* and Article 3.1(b) of the *SCM Agreement* and, therefore, saw no necessity to apply the rules in Article 21.1 of the *Agreement on Agriculture*.[753]

523. Having examined the relationship between the relevant provisions of the *Agreement on Agriculture* and the *SCM Agreement*, the Panel proceeded to examine whether the Step 2 payments to domestic users are contingent on the use of domestic products contrary to Article 3.1(b) of the *SCM Agreement*. The Panel noted that the United States had acknowledged that "to receive a payment under the user marketing (Step 2) programme, a domestic user must open a bale of domestically produced baled upland cotton" and, therefore, did "not dispute that user marketing (Step 2) payments to domestic users constitute a subsidy conditional or dependent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the *SCM Agreement*".[754] The Panel also conducted its own examination and found that:

> ... user marketing (Step 2) payments to domestic users under section 1207(a) of the FSRI Act of 2002 will not be made except upon proof of consumption of eligible upland cotton – which must be "domestically produced", and "not imported". It is not just that it will invariably be easier for domestic users to meet the conditions for user marketing (Step 2) payments to domestic users by using domestic -- rather than imported -- upland cotton. The text of the measure explicitly *requires* the use of domestically produced upland cotton as a pre-condition for receipt of the payments.
>
> The use of United States domestically produced upland cotton is a condition for obtaining the subsidy. User marketing (Step 2) payments to domestic users under section 1207(a) of the FSRI Act of 2002 are clearly conditional, or dependent upon, such use.[755]

524. The Panel, furthermore, recalled its finding that the "fact that the user marketing (Step 2) payments are also available in another factual situation ... —i.e. exporters—would not have the effect of dissolving such contingency in respect of domestic users, particularly ... where the other factual contingency (upon export performance) also gives rise to a prohibited subsidy".[756]

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[753]Panel Report, para. 7.1071.

[754]*Ibid*., para. 7.1082 (referring to the United States' response to Question 144 Posed by the Panel (Panel Report, p. I-249, para. 58) and Appellate Body Report, *Canada – Autos*, para. 126). (footnotes omitted)

[755]*Ibid*., paras. 7.1085-7.1086. (original emphasis)

[756]*Ibid*., para. 7.1087.

525. Therefore, the Panel concluded that "section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users is inconsistent with Article 3.1(b) of the *SCM Agreement*".[757] In addition, the Panel found that "[t]o the extent that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to domestic users is inconsistent with Article 3.1(b), it is, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*".[758]

3. Arguments on Appeal

526. On appeal, the United States requests us to reverse the Panel's findings. According to the United States, the Panel's conclusion fails to give meaning to the introductory phrase "[e]xcept as provided in the Agreement on Agriculture" of Article 3.1 of the *SCM Agreement*.[759] This phrase not only applies to export subsidies covered by Article 3.1(a) of the *SCM Agreement*, but also to import substitution subsidies covered by Article 3.1(b). The United States contends that Step 2 payments to domestic users are properly classified as domestic support subject to reduction commitments under Article 6 of the *Agreement on Agriculture*.[760] Indeed, paragraph 7 of Annex 3 requires that measures directed at agricultural processors shall be included in the AMS to the extent that such measures benefit the producers of the basic agricultural products. This approach is consistent with the objective of the *Agreement on Agriculture* of providing for substantial progressive reductions in agricultural support and protection sustained over an agreed period of time.[761] Furthermore, the United States argues that the lack of any reference to domestic content subsidies in Article 13(b) of the *Agreement on Agriculture* does not support the Panel's interpretation.[762] Article 13(b) does not refer to Article 3 of the *SCM Agreement* because the substantive obligation of Article 3.1(b) does not apply in the case of domestic content subsidies in favour of agricultural producers.

527. Brazil requests that we uphold the Panel's findings. According to Brazil, "[t]he obligations in the *Agreement on Agriculture* and the *SCM Agreement* apply cumulatively, unless there is an exception or a conflict".[763] In Brazil's view, no conflict arises. Under the *Agreement on Agriculture*, WTO Members enjoy a right to grant domestic support in favour of agricultural producers. However, this does not create a conflict with Article 3.1(b) of the *SCM Agreement*, because it is perfectly possible for Members to grant domestic support without making payments contingent on domestic

[757]Panel Report, para. 7.1097. (footnote omitted)

[758]*Ibid*., para. 7.1098.

[759]United States' appellant's submission, paras. 429-430.

[760]*Ibid*., para. 434.

[761]*Ibid*., para. 435.

[762]*Ibid*., paras. 431-432.

[763]Brazil's appellee's submission, para. 75.

content. In other words, Members can fully enjoy their right to grant domestic support *and* comply with Article 3.1(b).[764]

528. Brazil asserts that this interpretation is consistent with a primary objective of the covered agreements, namely, avoiding discrimination under the national treatment rule. It is also consistent with an adopted 1958 GATT panel report involving a subsidy to agricultural producers that was contingent on purchase of domestic goods.[765] Thus, Brazil states that domestic content subsidies in favour of agricultural producers have been understood to be impermissible since 1958, so there is nothing novel about Brazil's complaint.[766] The *Agreement on Agriculture* did not mark a step back to allowing discrimination and protection that was prohibited under the GATT 1947. Therefore, domestic support under the *Agreement on Agriculture* can and must be granted consistently with Article 3.1(b) of the *SCM Agreement* and Article III:4 of the GATT 1994.[767]

4. Does Article 3.1(b) of the *SCM Agreement* Apply to Agricultural Products?

529. At the outset, we note that the United States did not dispute before the Panel that, if the *SCM Agreement* were applicable, "user marketing (Step 2) payments to domestic users [would] constitute a subsidy conditional or dependent upon the use of domestic over imported goods within the meaning of Article 3.1(b)" of that Agreement.[768] Instead, before the Panel and on appeal, the United States asserts that Article 3.1(b) of the *SCM Agreement* is inapplicable to Step 2 payments to domestic users because these payments are consistent with the United States' domestic support reduction commitments under the *Agreement on Agriculture*.[769]

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[764]Brazil's appellee's submission, para. 867.

[765]*Ibid*., para. 860 (referring to GATT Panel Report, *Italy – Agricultural Machinery*, para. 16). According to Brazil, that panel recognized that the GATT contracting parties were entitled to grant support to agricultural producers but found that this could be done without granting domestic content subsidies.

[766]Brazil's appellee's submission, para. 861.

[767]*Ibid*., paras. 863-865.

[768]Panel Report, para. 7.1082.

[769]*Ibid*., para. 7.1023; United States' appellant's submission, paras. 434-436.

530. Article 3.1(b) of the *SCM Agreement* provides:

> *Article 3*
>
> *Prohibition*
>
> Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> ...
>
> (b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

We note that the introductory language of the chapeau makes it clear that the *Agreement on Agriculture* prevails over Article 3 of the *SCM Agreement*, but only to the extent that the former contains an exception.

531. Article 21.1 of the *Agreement on Agriculture*, which deals more broadly with the relationship between that Agreement and the other covered agreements relating to the trade in goods, provides:

> The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement.[770]

532. We agree that Article 21.1 could apply in the three situations described by the Panel, namely:

> ... where, for example, the domestic support provisions of the *Agreement on Agriculture* would prevail in the event that an explicit carve-out or exemption from the disciplines in Article 3.1(b) of the *SCM Agreement* existed in the *text* of the *Agreement on Agriculture*. Another situation would be where it would be impossible for a Member to comply with its domestic support obligations under the *Agreement on Agriculture* and the Article 3.1(b) prohibition simultaneously. Another situation might be where there is an explicit authorization in the text of the *Agreement on Agriculture* that would authorize a measure that, in the absence of such an express authorization, would be prohibited by Article 3.1(b) of the *SCM Agreement*.[771]

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[770]The *SCM Agreement* is among the Multilateral Trade Agreements in Annex 1A to the *WTO Agreement*.

[771]Panel Report, para. 7.1038. (original emphasis) The Panel concluded that "none of the situations just mentioned arise[s] in this dispute from the relevant provisions in the *Agreement on Agriculture*". (Panel Report, para. 7.1039)

The Appellate Body has interpreted Article 21.1 to mean that the provisions of the GATT 1994 and of other Multilateral Trade Agreements in Annex 1A apply, "except to the extent that the *Agreement on Agriculture* contains specific provisions dealing specifically with the same matter".[772] There could be, therefore, situations other than those identified by the Panel where Article 21.1 of the *Agreement on Agriculture* may be applicable.

533. The key issue before us is whether the *Agreement on Agriculture* contains "specific provisions dealing specifically with the same matter" as Article 3.1(b) of the *SCM Agreement*, that is, subsidies contingent upon the use of domestic over imported goods. We, therefore, turn to the relevant provisions of the *Agreement on Agriculture*.

534. The United States draws our attention to the domestic support provisions in the *Agreement on Agriculture*, particularly to Article 6.3 and to paragraph 7 of Annex 3. Article 6 of the *Agreement on Agriculture* deals with domestic support commitments. Pursuant to Article 6, WTO Members have committed themselves to reduce the domestic support that they provide to their agricultural sector.[773] For this purpose, domestic support is calculated using what is known as the AMS, which is defined in Article 1(a) as:

> ... the annual level of support, expressed in monetary terms, provided for an agricultural product in favour of the producers of the basic agricultural product or non-product-specific support provided in favour of agricultural producers in general, other than support provided under programmes that qualify as exempt from reduction under Annex 2 to this Agreement ...

A WTO Member's domestic support reduction commitments are registered in Part IV of its Schedule.

535. Article 6.3 of the *Agreement on Agriculture*, the particular provision relied on by the United States, reads:

> A Member shall be considered to be in compliance with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level specified in Part IV of the Member's Schedule.

[772]Appellate Body Report, *EC – Bananas III*, para. 155. (See also Appellate Body Report, *Chile – Price Band System*, para. 186)

[773]Certain domestic measures are exempted from these reduction commitments under Articles 6.4 and 6.5 and Annex 2 of the *Agreement on Agriculture*.

The United States also relies on paragraph 7 of Annex 3 of the *Agreement on Agriculture*. This Annex explains how WTO Members are to calculate AMS. Paragraph 7 of Annex 3 states, in relevant part, that "[m]easures directed at agricultural processors shall be included [in the AMS calculation] to the extent that such measures benefit the producers of the basic agricultural products".

536. Before determining whether Article 6.3 and paragraph 7 of Annex 3 of the *Agreement on Agriculture* deal specifically with the same matter as Article 3.1(b) of the *SCM Agreement*, we must address the question whether the Step 2 payments to domestic users of United States upland cotton fall within paragraph 7 of Annex 3 because the United States claims that they are "[m]easures directed at agricultural processors" and "benefit the producers of the basic agricultural products". The United States argues that Step 2 payments to domestic users fall within paragraph 7 of Annex 3 because, even though the payment is provided to persons opening a bale of cotton, the payment *benefits* producers of United States cotton. The United States explains that this is the case "because [the program] serves to maintain the price competitiveness of U.S. cotton vis-a-vis foreign cotton through a payment to capture some differential between prevailing foreign and domestic cotton prices."[774]

537. We recall that "domestic users" are defined, under the United States' regulations, as "person[s] regularly engaged in the business of opening bales of eligible upland cotton for the purpose of manufacturing such cotton into cotton products in the United States".[775] The United States has acknowledged that the domestic users of United States cotton that receive Step 2 payments include textile mills.[776] There is no dispute between the parties that the producers of United States cotton are "producers of ... basic agricultural products" for purposes of paragraph 7 of Annex 3. Moreover, Brazil has not disputed the United States' claim that Step 2 payments to domestic users may "benefit" the producers of United States cotton. Therefore, we will proceed with our examination on the *assumption* that Step 2 payments to domestic users of United States cotton are contemplated by paragraph 7 of Annex 3 of the *Agreement on Agriculture*.[777]

538. We thus turn to the issue raised by the United States' appeal, that is, whether Article 6.3 and paragraph 7 of Annex 3 of the *Agreement on Agriculture* are "specific provisions dealing specifically with the same matter" as Article 3.1(b) of the *SCM Agreement*, namely, subsidies contingent upon the use of domestic over imported goods.

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[774]United States' appellant's submission, para. 428.

[775]See *supra*, para. 514.

[776]United States' response to questioning at oral hearing.

[777]In this dispute we do not decide whether subsidies paid to textile manufacturers on their purchases of cotton could be regarded as measures directed at "agricultural processors" within the meaning of paragraph 7 of Annex 3.

539. The United States finds in the second sentence of paragraph 7 of Annex 3 of the *Agreement on Agriculture* an exception to the broad prohibition against subsidies contingent upon the use of domestic over imported goods that is established in Article 3.1(b) of the *SCM Agreement*. We note that Annex 3 sets out instructions on how to calculate WTO Members' AMS. Paragraph 7 is one of 13 paragraphs contained in Annex 3. It reads:

> The AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned. Measures directed at agricultural processors shall be included to the extent that such measures benefit the producers of the basic agricultural products.

540. Neither of the two sentences in paragraph 7 of Annex 3 refers to import substitution subsidies. Paragraph 7 of Annex 3 reflects a preference for calculating domestic support as near as possible to the stage of production of an agricultural good. Hence, the first sentence of paragraph 7 of Annex 3 provides that "[t]he AMS shall be calculated as close as practicable to the point of first sale of the basic agricultural product concerned". The second sentence of paragraph 7 recognizes situations where subsidies are not provided directly to the agricultural producer, but rather to an agricultural processor, yet the measures may benefit the producers of the basic agricultural good. This sentence also clarifies that only the portion of the subsidy that benefits the producers of the basic agricultural good, and not the entire amount, shall be included in a Member's AMS.

541. It may well be that a measure that is an import substitution subsidy could fall within the second sentence of paragraph 7 as "[m]easures directed at agricultural processors [that] shall be included [in the AMS calculation] to the extent that such measures benefit the producers of the basic agricultural products". There is nothing, however, in the text of paragraph 7 that suggests that such measures, when they are import substitution subsidies, are exempt from the prohibition in Article 3.1(b) of the *SCM Agreement*. We agree with the Panel that there is a clear distinction between a provision that requires a Member to include a certain type of payment (or part thereof) in its AMS calculation and one that would authorize subsidies that are contingent on the use of domestic over imported goods.[778]

542. The United States argues that, if payments to processors that fall within paragraph 7 are not exempted from the prohibition in Article 3.1(b) of the *SCM Agreement*, paragraph 7 would be rendered inutile.[779] According to the United States, if domestic users were allowed to claim Step 2 payments, regardless of the origin of the cotton, this "would cause the benefit to [domestic] cotton

[778]Panel Report, para. 7.1059.

[779]United States' appellant's submission, para. 428.

producers to evaporate" and the "subsidy would be transformed from a subsidy 'in favor of agricultural producers' to a simple input subsidy".[780] Rather than "a cotton subsidy", it would become a "textile subsidy".[781] Like the Panel, we do not believe that the scope of paragraph 7 is limited to measures that have an import substitution component in them. There could be other measures covered by paragraph 7 of Annex 3 that do not necessarily have such a component. Indeed, Brazil submits that if the Step 2 payments were provided to United States processors of cotton, regardless of the origin of the cotton, these processors "would still buy *at least* some U.S. upland cotton, so producers would continue to derive *some* benefit".[782] Thus, paragraph 7 of Annex 3 refers more broadly to measures directed at agricultural processors that benefit producers of a basic agricultural product and, contrary to the United States' assertion, it is not rendered inutile by the Panel's interpretation. WTO Members may still provide subsidies directed at agricultural processors that benefit producers of a basic agricultural commodity in accordance with the *Agreement on Agriculture*, as long as such subsidies do not include an import substitution component.

543. In addition to paragraph 7 of Annex 3, the United States draws our attention to Article 6.3 of the *Agreement on Agriculture*. The United States points out that Article 6.3 explicitly provides that a WTO Member "shall be considered to be *in compliance* with its domestic support reduction commitments in any year in which its domestic support in favour of agricultural producers expressed in terms of Current Total AMS does not exceed the corresponding annual or final bound commitment level". (emphasis added)

544. Like paragraph 7 of Annex 3, Article 6.3 does not explicitly refer to import substitution subsidies. Article 6.3 deals with domestic support. It establishes only a *quantitative* limitation on the amount of domestic support that a WTO Member can provide in a given year. The quantitative limitation in Article 6.3 applies generally to all domestic support measures that are included in a WTO Member's AMS. Article 3.1(b) of the *SCM Agreement* prohibits subsidies that are contingent—that is, "conditional"[783]—on the use of domestic over imported goods.[784]

545. Article 6.3 does not authorize subsidies that are contingent on the use of domestic over imported goods. It only provides that a WTO Member shall be considered to be in compliance with its domestic support *reduction commitments* if its Current Total AMS does not exceed that Member's annual or final bound commitment level specified in its Schedule. It does not say that compliance

[780]United States' appellant's submission, para. 428.

[781]*Ibid*. (emphasis omitted)

[782]Brazil's appellee's submission, footnote 1242 to para. 854. (original emphasis)

[783]Appellate Body Report, *Canada – Autos*, para. 123.

with Article 6.3 of the *Agreement on Agriculture* insulates the subsidy from the prohibition in Article 3.1(b). We, therefore, agree with the Panel that:

> Article 6.3 does *not* provide that compliance with such "domestic support reduction commitments" shall necessarily be considered to be in compliance with other applicable WTO obligations. Nor does it contain an explicit textual indication that otherwise prohibited measures are necessarily justified by virtue of compliance with the domestic support reduction commitments.[785]

546. For these reasons, we find that paragraph 7 of Annex 3 and Article 6.3 of the *Agreement on Agriculture* do not deal specifically with the same matter as Article 3.1(b) of the *SCM Agreement*, that is, subsidies contingent upon the use of domestic over imported goods.

547. We are mindful that the introductory language of Article 3.1 of the *SCM Agreement* clarifies that this provision applies "[e]xcept as provided in the Agreement on Agriculture". Furthermore, as the United States has pointed out, this introductory language applies to both the export subsidy prohibition in paragraph (a) and to the prohibition on import substitution subsidies in paragraph (b) of Article 3.1. As we explained previously, in our review of the provisions of the *Agreement on Agriculture* relied on by the United States, we did not find a provision that deals specifically with subsidies that have an import substitution component. By contrast, the prohibition on the provision of subsidies contingent upon the use of domestic over imported goods in Article 3.1(b) of the *SCM Agreement* is explicit and clear. Because Article 3.1(b) treats subsidies contingent on the use of domestic over imported products as prohibited subsidies, it would be expected that the drafters would have included an equally explicit and clear provision in the *Agreement on Agriculture* if they had indeed intended to authorize such prohibited subsidies provided in connection with agricultural goods. We find no provision in the *Agreement on Agriculture* dealing specifically with subsidies contingent upon the use of domestic over imported agricultural goods.

548. Our approach in this case is consistent with the Appellate Body's approach in *EC – Bananas III*. In that case, the European Communities relied on Article 4.1 of the *Agreement on Agriculture* in arguing that the market access concessions it made for agricultural products pursuant to the *Agreement on Agriculture* prevailed over Article XIII of the GATT 1994.[786] The Appellate Body, however, found that "[t]here is nothing in Articles 4.1 or 4.2, or in any other article of the *Agreement on Agriculture*, that deals specifically with the allocation of tariff quotas on agricultural

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[784]See Panel Report, para. 7.1067.

[785]Panel Report, para. 7.1058. (original emphasis)

[786]Appellate Body Report, *EC – Bananas III*, para. 153.

products".[787] It further explained that "[i]f the negotiators had intended to permit Members to act inconsistently with Article XIII of the GATT 1994, they would have said so explicitly".[788] The situation before us is similar. We have found nothing in Article 6.3, paragraph 7 of Annex 3 or anywhere else in the *Agreement on Agriculture* that "deals specifically" with subsidies that are contingent on the use of domestic over imported agricultural products.

549. We recall that the *Agreement on Agriculture* and the *SCM Agreement* "are *both* Multilateral Agreements on Trade in Goods contained in Annex 1A of the *Marrakesh Agreement Establishing the World Trade Organization* (the "*WTO Agreement*"), and, as such, are *both* 'integral parts' of the same treaty, the *WTO Agreement*, that are 'binding on all Members'".[789] Furthermore, as the Appellate Body has explained, "a treaty interpreter must read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously".[790] We agree with the Panel that "Article 3.1(b) of the *SCM Agreement* can be read together with the *Agreement on Agriculture* provisions relating to domestic support in a coherent and consistent manner which gives full and effective meaning to all of their terms".[791]

550. In sum, we are not persuaded by the United States' submission that the prohibition in Article 3.1(b) of the *SCM Agreement* is inapplicable to import substitution subsidies provided in connection with products falling under the *Agreement on Agriculture*. WTO Members may still provide domestic support that is consistent with their reduction commitments under the *Agreement on Agriculture*. In providing such domestic support, however, WTO Members must be mindful of their other WTO obligations, including the prohibition in Article 3.1(b) of the *SCM Agreement* on the provision of subsidies that are contingent on the use of domestic over imported goods.

551. Turning to the particular measure before us in this dispute, we recall that the United States acknowledged before the Panel that, if the *SCM Agreement* were applicable, "user marketing (Step 2) payments to domestic users [would] constitute a subsidy conditional or dependent upon the

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[787]Appellate Body Report, *EC – Bananas III*, para. 157.

[788]*Ibid*.

[789]Appellate Body Report, *Argentina – Footwear (EC)*, para. 81 (quoting from *WTO Agreement*, Article II:2). (original emphasis) In that case, the Appellate Body was referring to the GATT 1994 and the *Agreement on Safeguards*.

[790]Appellate Body, *Argentina – Footwear (EC)*, para. 81 and footnote 72 thereto (referring to Appellate Body Report, *Korea – Dairy*, para. 81; Appellate Body Report, *US – Gasoline*, p. 23, DSR 1996:I, 3 at 21; Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 12, DSR 1996:I, 97 at 106; and Appellate Body Report, *India – Patents (US)*, para. 45). (original emphasis)

[791]Panel Report, para. 7.1071.

use of domestic over imported goods within the meaning of Article 3.1(b)" of that Agreement.[792] The Panel also conducted its own analysis and concluded that:

> The use of United States domestically produced upland cotton is a condition for obtaining the subsidy. User marketing (Step 2) payments to domestic users under section 1207(a) of the FSRI Act of 2002 are clearly conditional, or dependent upon, such use.[793]

The United States has not appealed this finding and, therefore, we need not review it.

552. Accordingly, we *uphold* the Panel's findings, in paragraphs 7.1088, 7.1097-7.1098 and 8.1(f) of the Panel Report, that Step 2 payments to domestic users of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*.

B. *Step 2 Payments to Exporters*

553. We turn to the United States' claim that the Panel erred in finding that Step 2 payments provided to *exporters* of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on exportation and, therefore, are inconsistent with Articles 3.3 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*. We described the Step 2 payments program in the previous Section of this Report, where we examined the Panel's findings relating to Step 2 payments provided to *domestic users* of United States upland cotton.[794]

554. Before the Panel, Brazil argued that Step 2 payments to exporters are *per se* export subsidies listed in Article 9.1(a) of the *Agreement on Agriculture* and are inconsistent with Article 3.3 and/or Article 8 of the *Agreement on Agriculture*, as well as with Articles 3.1 and 3.2 of the *SCM Agreement*.[795] The United States denied that Step 2 payments constitute export subsidies for purposes of the *Agreement on Agriculture* or Articles 3.1(a) and 3.2 of the *SCM Agreement*, arguing that these payments are available not only to exporters, but also to domestic users of upland cotton.[796]

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[792]Panel Report, para. 7.1082.

[793]*Ibid*., para. 7.1086.

[794]See also *ibid*., paras. 7.209-7.211.

[795]*Ibid*., para. 7.649(i). Brazil also made an alternative claim under Article 10.1 of the *Agreement on Agriculture*, but the Panel found it unnecessary to examine this claim because of its findings under Article 9. (*Ibid*., para. 7.750)

[796]*Ibid*., para. 7.651(i).

555. Because Brazil challenged the alleged United States export subsidies under the *Agreement on Agriculture* and the *SCM Agreement*, the Panel first examined the relationship between these Agreements. The Panel explained what it considered to be the proper order of analysis as follows:

> ... it is appropriate to examine an alleged export subsidy in respect of an agricultural product first under the *Agreement on Agriculture* before, if and as appropriate, turning to any examination of the same measure under the *SCM Agreement.*[797]

556. Accordingly, the Panel began its examination of Brazil's claims against the Step 2 payments to exporters with Article 9.1 of the *Agreement on Agriculture*. In this respect, the Panel observed that the United States did not appear to dispute that Step 2 payments are subsidies provided by a government to producers of agricultural products, or to cooperatives or associations of such producers for purposes of Article 9.1(a) of the *Agreement on Agriculture*.[798] The "key issue" before it, the Panel explained, was whether Step 2 payments to exporters are subsidies "contingent on export performance" within the meaning of Article 9.1(a) of the *Agreement on Agriculture*.[799]

557. The Panel then noted that the *Agreement on Agriculture* does not define the phrase "contingent on export performance". Given that a similar phrase is used in the *SCM Agreement*, the Panel saw no reason to read the phrase differently in the *Agreement on Agriculture*.[800] The Panel also equated Brazil's claim that Step 2 payments to exporters are "*per se*" export subsidies with a claim that the subsidies are *de jure* export contingent under Article 3.1(a) of the *SCM Agreement*.[801] Such a claim of *de jure* export contingency had to be demonstrated, according to the Panel, "on the basis of the words of the relevant legislation, regulation or other legal instrument"[802] or "where the condition to export can be derived by necessary implication from the words actually used in the measure".[803]

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[797]Panel Report, para. 7.673. The order of analysis was not an issue on appeal.

[798]*Ibid*., para. 7.695. The Panel also conducted it own assessment and concluded that the measure meets the description in Article 9.1(a). (*Ibid*., para. 7.696)

[799]*Ibid*., para. 7.697.

[800]*Ibid*., para. 7.700 and footnote 872 thereto (relying on Appellate Body Report, *US – FSC*, para. 141 and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 192).

[801]*Ibid*., para. 7.702.

[802]*Ibid*., (relying on Appellate Body Report, *Canada – Aircraft*, para. 167).

[803]*Ibid*., para. 7.702 (relying on Appellate Body Report, *Canada – Autos*, para. 100 and Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 112).

558. In assessing whether the Step 2 payments to exporters are contingent on export performance under Article 9.1(a) of the *Agreement on Agriculture*, the Panel found:

> It is undeniable that a condition of the receipt of user marketing (Step 2) payments to exporters under section 1207(a) of the FSRI Act of 2002 will always and inevitably be proof of exportation. The only way to receive such a payment is through exportation. Export performance is, therefore, a condition of receipt for this discrete segment of eligible recipients.
>
> Every user marketing (Step 2) payment to an eligible exporter is contingent upon export.[804]

559. The Panel rejected the United States' contention that Step 2 payments are not contingent on export performance because they are available to both exporters and domestic users. According to the Panel, the program under which Step 2 payments are granted "involves payment to two distinct sets of recipients (exporters or domestic users) in two distinct factual situations (export or domestic use)".[805] In the Panel's view, "[t]he fact that the subsidies granted in the second situation may not be export contingent does not dissolve the export contingency arising in the first situation".[806]

560. Having found that Step 2 payments to exporters are mandatory when certain market conditions exist[807], the Panel concluded:

> We therefore find that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters constitutes a subsidy "contingent on export performance" within the meaning of Article 9.1(a) of the *Agreement on Agriculture*.[808]

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[804]Panel Report, paras. 7.734 and 7.735.

[805]*Ibid*., para. 7.732.

[806]*Ibid*., para. 7.739 and footnote 907 thereto (relying on Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 119).

[807]*Ibid*., paras. 7.7745 and 7.746.

[808]*Ibid*., para. 7.748.

561. Consequently, the Panel also found:

> User marketing (Step 2) payments to exporters under section 1207(a) of the FSRI Act of 2002 are an export subsidy listed in Article 9.1 of the *Agreement on Agriculture*. In providing such subsidies, the United States has acted inconsistently with its obligation under Article 3.3 of the *Agreement on Agriculture* to "not provide subsidies in respect of any agricultural product not specified in ... its Schedule". The United States has furthermore acted inconsistently with its obligation in Article 8 of the *Agreement on Agriculture* "not to provide export subsidies otherwise than in conformity with [the *Agreement on Agriculture*] and with the commitments as specified in [its] Schedule".[809]

562. As for Brazil's claims under the *SCM Agreement*, the Panel found "that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters is inconsistent with Article 3.1(a) of the *SCM Agreement*".[810] The Panel additionally found that "[t]o the extent that section 1207(a) of the FSRI Act of 2002 providing for user marketing (Step 2) payments to exporters is inconsistent with Article 3.1(a), it is, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*".[811]

563. On appeal, the United States requests us to reverse the Panel's findings that Step 2 payments provided to exporters of United States upland cotton are export subsidies within the meaning of Article 9.1(a) of the *Agreement on Agriculture* and, therefore, are inconsistent with Articles 3.3 and 8 of that Agreement. The United States also requests that we reverse the Panel's finding that Step 2 payments to exporters are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*, because they are not exempted from action by Article 13(c) of the *Agreement on Agriculture*.[812]

564. The United States does not contest that Step 2 payments are subsidies to producers of an agricultural product for purposes of Article 9.1(a) of the *Agreement on Agriculture*; nor does it contest the Panel's finding in this regard. The focus of the United States' appeal is the Panel's finding that Step 2 payments are contingent on export performance under Article 9.1(a).[813] In support of its claim, the United States reiterates on appeal the arguments that it made before the Panel. The United States asserts that Step 2 payments are not contingent on export performance because Step 2 payments

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[809]Panel Report, para. 7.749.

[810]*Ibid*., para. 7.760.

[811]*Ibid*., para. 7.761.

[812]United States' appellant's submission, para. 516(6).

[813]*Ibid*., para. 442.

are also available to domestic users of United States upland cotton.[814] The United States contends that the payments are contingent on use, not exportation.

565. Brazil requests that we uphold the Panel's finding that Step 2 payments to exporters are contingent upon export performance.[815] According to Brazil, the measure pursuant to which Step 2 payments are granted establishes two mutually exclusive conditions of payment that address two different factual situations where a Step 2 payment can be made.[816] These situations are mutually exclusive because the same bale of cotton cannot be both opened for domestic use and exported.[817] In one situation under the Step 2 measure, proof of exportation is required as a condition of payment. This export contingency is not dissolved because the payment can also made in another situation to domestic users, on other conditions.[818]

566. In addition, Brazil rejects the United States' contention that Step 2 payments are contingent on use and not on exportation. Brazil explains that Step 2 payments do not apply to all United States production of upland cotton because domestic brokers, resellers and other persons not regularly engaged in opening bales of cotton for manufacturing are not eligible to receive the payments.[819] Furthermore, Brazil asserts that, in the case of Step 2 payments to exporters, the payment is not contingent on use because the measure is indifferent to whether, how or when the upland cotton is used so long as it is exported.[820]

567. The issue raised on appeal is whether the Step 2 payments provided to exporters of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are contingent on export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* and Article 3.1(a) of the *SCM Agreement*.

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[814]United States' appellant's submission, para. 443. The United States submits that its position is consistent with the reasoning of the panel in *Canada – Dairy*. (*Ibid*., para. 444 (relying on Panel Report, *Canada – Dairy*, para. 7.41))

[815]Brazil's appellee's submission, para. 872.

[816]*Ibid*., para. 888.

[817]*Ibid*.

[818]Brazil finds support for its argument in the Appellate Body's reasoning in *US – FSC (Article 21.5 – EC)*. See *supra*, footnote 806. (Brazil's appellee's submission, paras. 883-884)

[819]Brazil's appellee's submission, para. 886.

[820]*Ibid*., para. 891.

568. Article 9.1(a) of the *Agreement on Agriculture* reads :

> [T]he provision by governments or their agencies of direct subsidies, including payments-in-kind, to a firm, to an industry, to producers of an agricultural product, to a cooperative or other association of such producers, or to a marketing board, contingent on export performance[.]

569. Article 3.1(a) of the *SCM Agreement* provides:

> *Article 3*
>
> *Prohibition*
>
> 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[4], whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I[5];

[4] This standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

[5] Measures referred to in Annex I as not constituting export subsidies shall not be prohibited under this or any other provision of this Agreement.

570. In previous appeals, the Appellate Body has explained that the WTO-consistency of an export subsidy for agricultural products has to be examined, in the first place, under the *Agreement on Agriculture*[821]; the examination under the *SCM Agreement* would follow if necessary. Turning, then, to the *Agreement on Agriculture*, we note that Article 1(e) of that Agreement defines "export subsidies" as "subsidies contingent upon export performance, including the export subsidies listed in Article 9 of this Agreement".

571. Although an export subsidy granted to agricultural products must be examined, in the first place, under the *Agreement on Agriculture*, we find it appropriate, as has the Appellate Body in previous disputes, to rely on the *SCM Agreement* for guidance in interpreting provisions of the *Agreement on Agriculture*. Thus, we consider the export-contingency requirement in Article 1(e) of

[821] See, for example, Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 123.

the *Agreement on Agriculture* having regard to that same requirement contained in Article 3.1(a) of the *SCM Agreement*.[822]

572. The Appellate Body has indicated, in this regard, that the ordinary meaning of "contingent" is "conditional" or "dependent"[823] and that Article 3.1(a) of the *SCM Agreement* prohibits subsidies that are conditional upon export performance, or are dependent for their existence on export performance.[824] It has also emphasized that "a 'relationship of conditionality or dependence', namely that the granting of a subsidy should be 'tied to' the export performance, lies at the 'very heart' of the legal standard in Article 3.1(a) of the *SCM Agreement*".[825] We are also mindful that in demonstrating export contingency in the case of subsidies that are contingent in law upon export performance, the "existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure".[826]

573. It is clear that the legal provisions pursuant to which Step 2 payments are granted to exporters of United States upland cotton, on their face, apply to exporters of United States upland cotton. Section 1207(a) of the FSRI Act of 2002 provides that, when certain market conditions exist, the United States Secretary of Agriculture:

> ... shall issue marketing certificates or cash payments, at the option of the recipient, to domestic users and *exporters* for documented purchases by domestic users and *sales for export by exporters*. (emphasis added)

The regulations define "eligible exporters" as:

> A person, including a producer or a cooperative marketing association ... regularly engaged in selling eligible upland cotton for exportation from the United States (exporter), who has entered into an agreement with CCC[827] to participate in the upland cotton user marketing certificate program.[828]

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[822]Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 192.

[823]Appellate Body Report, *Canada – Aircraft*, para. 166.

[824]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47. See also Appellate Body Report, *Canada – Aircraft*, para. 166.

[825]Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil*), para. 47 (quoting Appellate Body Report, *Canada – Aircraft*, para. 171).

[826]The legal instrument does not have to provide expressly for the export contingency; the conditionality may be derived by necessary implication from the text of the measure. (Appellate Body Report, *Canada – Autos*, para. 100)

[827]Additional information about the CCC is provided, *infra*, footnote 859; see also Panel Report, para. 7.702.

[828]7 CFR Section 1427.104(a)(2).

"Eligible upland cotton" is defined as "domestically produced baled upland cotton which bale is opened by an eligible domestic user ... or *exported* by an eligible *exporter*."[829]

574. Furthermore, in order to claim Step 2 payments, exporters must submit an application and provide supporting documentation to the CCC, including "proof of export of eligible cotton by the exporter".[830] This provision confirms that the payment is "tied to" exportation. As the Panel explained, "a condition of the receipt of user marketing (Step 2) payments to exporters under section 1207(a) of the FSRI Act of 2002 will always and inevitably be proof of exportation".[831] Thus, on the face of the statute and regulations pursuant to which Step 2 payments are granted to exporters, the payments are "conditional upon export performance" or "dependent for their existence on export performance".[832]

575. The United States directed the Panel's attention to the fact that the same statute and regulations also provide for similar payments to domestic users conditioned on the domestic use of United States upland cotton. According to the United States, Step 2 payments to exporters and domestic users are governed by a single legislative provision and a single set of regulations. In addition, the form and payment rate to domestic users and exporters are identical, and the payments are made from a single fund.[833] As Step 2 payments are available to both domestic users and exporters, the United States submits that exportation is not a condition to receive payment and, therefore, the payments are not export-contingent.[834]

576. We are not persuaded by the United States' arguments. Like the Panel, we recognize that Step 2 payments to exporters and domestic users are governed by a single legislative provision and a single set of regulations, that the form and rate of payment to exporters and domestic users are identical, and that the fund from which payments are made is a single fund.[835] Nevertheless, we agree with the Panel that the statute and regulations pursuant to which Step 2 payments are granted do not establish a "single class" of recipients of the payments; rather, the statute and regulations clearly distinguish between two types of eligible recipients, namely, eligible exporters and eligible domestic users.[836] As we have seen, an eligible exporter must be "[a] person, including a producer or a

[829]7 CFR Section 1427.103(a). (emphasis added)

[830]7 CFR Section 1427.108(d).

[831]Panel Report, para. 7.734.

[832]See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47.

[833]United States' appellant's submission, para. 442.

[834]*Ibid*., para. 454.

[835]Panel Report, para. 7.709.

[836]*Ibid*., paras. 7.721-7.723.

cooperative marketing association ... regularly engaged in selling eligible upland cotton for *exportation* from the United States".[837] In contrast, an "eligible domestic user" is "[a] person regularly engaged in the business of opening bales of eligible upland cotton for the purpose of manufacturing such cotton into cotton products in the United States".[838] Thus, the statute and regulations themselves clearly distinguish between exporters and domestic users.

577. In addition, the statute and regulations establish different conditions that eligible exporters and eligible domestic users must meet to receive Step 2 payments. An eligible domestic user must "open" a bale of cotton to qualify for payment.[839] For its part, an eligible exporter must demonstrate the upland cotton has been exported. These are distinct conditions that the statute and regulations themselves set out for the two distinct recipients of Step 2 payments. Because the conditions to qualify for payment are different, the documentation required from eligible domestic users and eligible exporters is also different. An eligible exporter must submit proof of exportation; an eligible domestic user must provide documentation indicating the number of bales opened.[840] We agree, therefore, with the Panel's view that the statute and regulations pursuant to which Step 2 payments are granted "involve[] payment to two distinct sets of recipients (exporters or domestic users) in two distinct factual situations (export or domestic use)".[841]

578. Furthermore, we agree with the Panel's conclusion that the fact that the subsidy is also available to domestic users of upland cotton does not "dissolve" the export-contingent nature of the Step 2 payments to exporters.[842] The Panel's reasoning is consistent with the approach taken by the Appellate Body in *US – FSC (Article 21.5 – EC)*.[843] In that case, the United States argued that the tax exclusion at issue was not an export-contingent subsidy because it was available for both (i) property produced within the United States and held for use outside the United States and (ii) property produced outside the United States and held for use outside the United States. The United States

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[837]7 CFR Section 1427.104(a)(2). (emphasis added)

[838]7 CFR Section 1427.104(a)(1).

[839]United States' response to questioning at oral hearing. 7 CFR Section 1427.103(a).

[840]Panel Report, para. 7.727.

[841]*Ibid*., para. 7.732.

[842]*Ibid*., para. 7.739.

[843]The Panel also found support for its reasoning in the Appellate Body's statement, in *Canada – Aircraft*, that:

> ... the fact that some of TPC's contributions, in some industry sectors, are *not* contingent upon export performance, does not necessarily mean that the same is true for all of TPC's contributions. It is enough to show that one or some of TPC's contributions do constitute subsidies "contingent ... in fact … upon export performance".

(Appellate Body Report, *Canada – Aircraft*, para. 179) (original emphasis)

asserted that, as the tax exemption was available in both circumstances, it was "export-neutral".[844] According to the United States, the panel's separate examination of each situation in which the tax exemption was available "artificially bifurcat[ed]" the measure.[845]

579. The Appellate Body rejected the United States' contention in *US – FSC (Article 21.5 – EC)* because it considered it necessary, under Article 3.1(a) of the *SCM Agreement*, "to examine separately the conditions pertaining to the grant of the subsidy in the two different situations".[846] It then confirmed the Panel's finding that the tax exemption in the first situation, namely for property produced within the United States and held for use outside the United States, is an export-contingent subsidy.[847] In its reasoning, the Appellate Body explained that whether or not the subsidies were export-contingent in both situations envisaged by the measure would not alter the conclusion that the tax exemption in the first situation was contingent upon export:

> Our conclusion that the ETI measure grants subsidies that are export contingent in the first set of circumstances is not affected by the fact that the subsidy can also be obtained in the second set of circumstances. The fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances. Conversely, the export contingency arising in these circumstances has no bearing on whether there is an export contingent subsidy in the second set of circumstances.[848]

580. As in *US – FSC (Article 21.5 – EC)*, the Panel in this case found that Step 2 payments are available in two situations, only one of which involves export contingency.[849] The Panel's conclusion, therefore, is consistent with the Appellate Body's holding in *US – FSC (Article 21.5 – EC)* quoted above that "the fact that the subsidies granted in the second set of circumstances *might* not be export contingent does not dissolve the export contingency arising in the first set of circumstances".

581. The United States submits that the facts in this case are similar to those before the panel in *Canada – Dairy*.[850] In that dispute, the complaining parties argued that the provision of milk to exporters/processors under various mechanisms (described as "special milk classes") constituted

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[844]Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 110.

[845]*Ibid*.

[846]*Ibid*., para. 115.

[847]*Ibid*., para. 120.

[848]*Ibid*., para. 119. (original emphasis; footnote omitted)

[849]See, *supra*, para. 577.

[850]United States' appellant's submission, paras. 444-445 (referring to Panel Report, *Canada – Dairy*, para. 7.41 and footnote 496 to para. 7.124).

export-contingent subsidies. The panel in *Canada – Dairy* found, nevertheless, that certain special milk classes were *not* export-contingent because the "milk under such other classes is also available (often exclusively) to processors which produce for the domestic market".[851] The Panel, in this dispute, did not see any relevance in the Panel Report in *Canada – Dairy* because, in that case, "there was no explicit condition limiting a discrete segment of the payments of the subsidies concerned to exporters".[852] Brazil also seeks to distinguish the factual situation in *Canada – Dairy*, explaining that it involved a single regulatory class of milk instead of two mutually exclusive regulatory categories, as is the case in the present dispute.[853] We agree with the Panel and Brazil that the facts in *Canada – Dairy* differ from those of the present dispute. In this case, we have before us a statute and regulations that clearly distinguish between two sets of recipients—that is, eligible exporters and eligible domestic users—that must meet different conditions to receive payment.[854] In the case of one set of recipients, eligible exporters, exportation is a necessary condition to receive payment.

582. In sum, we agree with the Panel's view that Step 2 payments are export-contingent and, therefore, an export subsidy for purposes of Article 9 of the *Agreement on Agriculture* and Article 3.1(a) of the *SCM Agreement*. The statue and regulations pursuant to which Step 2 payments are granted, on their face, condition payments to exporters on exportation.[855] In order to claim payment, an exporter must show proof of exportation. If an exporter does not provide proof of exportation, the exporter will not receive a payment. This is sufficient to establish that Step 2 payments to exporters of United States upland cotton are "conditional upon export performance" or "dependent for their existence on export performance".[856] That domestic users may also be eligible to receive payments under different conditions does not eliminate the fact that an exporter will receive payment only upon proof of exportation.

583. For these reasons, we *uphold* the Panel's findings, in paragraphs 7.748-7.749 and 8.1(e) of the Panel Report, that Step 2 payments to exporters of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, constitute subsidies contingent upon export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* and that, therefore, in providing such subsidies the United States has acted inconsistently with its obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*.

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[851]Panel Report, *Canada – Dairy*, para. 7.41.

[852]Panel Report, para. 7.718.

[853]Brazil's appellee's submission, paras. 898-899.

[854]See *supra*, para. 577.

[855]Panel Report, para. 7.734.

[856]See Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 47.

584. Having explained that there is no reason to read the export-contingency requirement in the *Agreement on Agriculture* differently from that contained in Article 3.1(a) of the *SCM Agreement*[857], and having found that Step 2 payments to exporters of United States upland cotton are contingent upon export performance within the meaning of Article 9.1 of the *Agreement on Agriculture*, we also find that such payments are export-contingent for purposes of Article 3.1(a) of the *SCM Agreement*.[858] Consequently, we *uphold* the Panel's findings, in paragraphs 7.760-7.761 and 8.1(e) of the Panel Report, that Step 2 payments provided to exporters of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are inconsistent with Articles 3.1(a) and 3.2 of the *SCM Agreement*.

C. *Export Credit Guarantees – Article 10.2 of the Agreement on Agriculture*

585. We turn next to the United States' and Brazil' appeals of the Panel's findings relating to the United States' export credit guarantee programs.

1. United States' Export Credit Guarantee Programs

586. Brazil challenges three types of export credit guarantee programs. The first two programs, GSM 102 and GSM 103, provide guarantees to exporters when credit is extended by foreign financial institutions. The third type, the SCGP, applies when credit is extended by the exporter to the purchaser of United States agricultural products.[859]

587. The GSM 102 program is available to cover commercial exports of United States agricultural commodities on credit terms of between 90 days and 3 years. To obtain the credit guarantee under GSM 102, the exporter must have received a letter of credit in its favour from the foreign bank and must apply for the guarantee before making the exportation. The exporter will pay a fee for the guarantee based on a schedule of rates that vary according to the credit period, but are capped by law

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[857]See *supra*, para. 571.

[858]As the Panel observed, pursuant to Article 13(c)(ii) of the *Agreement on Agriculture*, "to the extent that the export subsidy at issue does not conform fully to the provisions of Part V of the *Agreement on Agriculture*, it is not exempt from actions based on Articles 3.1(a) and 3.2 of the *SCM Agreement*". (Panel Report, para. 7.751)

[859]These export credit guarantee programs are established under Section 5622 of Title 7 of the United States Code and implemented in Part 1493 of Title 7 of the United States Code of Federal Regulations. (See Panel Report, para. 7.250(vi)) Subpart B of Part 1493 relates to the GSM 102 and the GSM 103 programs and Subpart D deals with the SCGP program. GSM 102 and 103 export credit guarantees have been issued since late 1980, while the SCGP program began in 1996. (United States' first written submission to the Panel, paras. 151 and 152 and footnote 133 thereto) Export credit guarantee programs are administered through the CCC, created under the Commodity Credit Corporation Charter Act of 1948. The CCC is a federal corporation established within the USDA. (Panel Report, para. 7.236 and footnote 346 thereto) A further description of the GSM 102, GSM 103 and SGCP is provided in Panel Report, paras. 7.236-7.244.

at one per cent of the guaranteed dollar value of the transaction. In the event that the foreign bank fails to make a payment, the exporter informs the CCC of the default and "[t]he CCC generally covers 98 per cent of the principal and a portion of the interest".[860]

588. The GSM 103 is similar to the GSM 102. The difference between the two programs is that GSM 103 guarantees export credits that have longer terms. Specifically, GSM 103 guarantees credits with terms of between 3 and 10 years. An additional difference is that, contrary to GSM 102, the fee that an exporter must pay to obtain a guarantee under GSM 103 is not capped by law.

589. The SCGP guarantees credits extended by the exporter itself to foreign buyers of United States agricultural commodities. Under the SCGP, the United States exporter is required to submit to the CCC a promissory note signed by the importer prior to exportation. The exporter will pay a fee at a rate that varies according to the term of the loan, and, like GSM 102, is capped by law at one per cent of the guaranteed dollar value of the transaction. If the importer defaults on the promissory note, then the CCC will pay the exporter 65 per cent of the dollar value of the exported product (excluding interest).

2. Panel Findings

590. Before the Panel, Brazil asserted that these three United States export credit guarantee programs—GSM 102, GSM 103 and SCGP—violate Articles 10.1 and 8 of the *Agreement on Agriculture* and are therefore not exempt, under Article 13(c)(ii) of the *Agreement on Agriculture*, from actions based on Articles 3.1(a) and 3.2 of the *SCM Agreement*.[861] Brazil also argued that the three programs violate Articles 3.1(a) and 3.2 of the *SCM Agreement*.[862]

591. The United States responded that Article 10.2 of the *Agreement on Agriculture* makes it clear that the export subsidy disciplines in the *Agreement on Agriculture* and the *SCM Agreement* are not applicable to export credit guarantee programs. According to the United States, Article 10.2 of the *Agreement on Agriculture* "reflects the deferral of disciplines on export credit guarantee programs contemplated by WTO Members".[863] The United States argued that, even if the export subsidy disciplines in the *SCM Agreement* were applicable, its export credit guarantee programs are not prohibited export subsidies under Article 3.1(a) because they do not meet the criteria in item (j) of

[860]Panel Report, para. 7.242.

[861]Panel Report, para. 7.765.

[862]*Ibid*., para. 7.765.

[863]United States' first written submission to the Panel, para. 160 (quoted in Panel Report, para. 7.770).

the Illustrative List of Export Subsidies attached to the *SCM Agreement* as Annex I, namely that the premiums are inadequate to cover the programs' long-term operating costs and losses.[864]

592. At the outset of its analysis, the Panel observed that it would adopt the parties' shared view that "export credit guarantees are not included in the non-exhaustive list of export subsidies in Article 9.1, and that Article 10 of the *Agreement on Agriculture* is the relevant provision".[865] The Panel then stated that Article 10.1 "covers any subsidy contingent on export performance that is not listed in Article 9.1".[866] The Panel observed that, other than the list of export subsidies listed in Article 9.1, the *Agreement on Agriculture* does not specify what is a subsidy contingent upon export performance.[867] Thus, the Panel sought contextual guidance in the *SCM Agreement*, to assist it in its interpretation of the term "export subsidies" in Article 10.1 of the *Agreement on Agriculture*. In particular, the Panel looked at item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*, observing that "there is no disagreement between the parties ... that, if an export credit guarantee programme meets the elements of item (j), it is a *per se* export subsidy".[868]

593. The Panel then examined whether the United States' export credit guarantee programs challenged by Brazil met the criteria set out in item (j) and concluded that:

> On the basis of the totality of the record evidence, including approaches regularly relied upon by the United States government itself, we find that Brazil has established that the United States CCC provides the GSM 102, GSM 103 and SCGP export credit guarantee programmes "at premium rates which are inadequate to cover the 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*.[869]

594. Having reached this general conclusion, the Panel next examined Brazil's claims that the United States' export credit guarantees "result[ ] in" or "threaten[ ] to lead to" circumvention of the United States' export subsidy commitments, contrary to Article 10.1 of the *Agreement on Agriculture*. In its analysis, the Panel distinguished between, on the one hand, "supported" and "unsupported" products, and, on the other, "scheduled" and "unscheduled" products. The Panel used the term "supported products" to refer to products for which there was evidence in the record showing that they

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[864]Panel Report, para. 7.772.

[865]*Ibid*., para. 7.788.

[866]*Ibid*., para. 7.796.

[867]*Ibid*., para. 7.797.

[868]*Ibid*., para. 7.803.

[869]Panel Report, para. 7.867.

were not only eligible under the programs, but that export credit guarantees were in fact received in connection with exports of those products.[870] "Scheduled products" are those for which a WTO Member has assumed a commitment to limit the amount of export subsidies in terms of budgetary outlays and quantities exported pursuant to Articles 3, 8, and 9 of the *Agreement on Agriculture*.[871]

595. The Panel found that, "in respect of upland cotton and other such [supported] *unscheduled* agricultural products on record, the United States applies export credit guarantees constituting export subsidies in a manner which results in circumvention of its export subsidy commitments inconsistently with Article 10.1 of the *Agreement on Agriculture*".[872] In addition, the Panel found that "the United States has applied export credit guarantees constituting export subsidies within the meaning of Article 10.1 – and therefore, necessarily, not listed in Article 9.1 – in a manner which results in circumvention of export subsidy commitments in respect of" rice (a scheduled commodity).[873] The Panel, nonetheless, found that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[874] Finally, the Panel "decline[d] to find that the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States' export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*."[875]

596. After making these findings, the Panel turned to the United States' argument that "the text of Article 10.2 of the *Agreement on Agriculture* reflects the deferral of disciplines on export credit guarantee programmes contemplated by [WTO] Members".[876] This argument was rejected by the

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[870]*Ibid*., para. 6.32; see also footnote 1056 to para. 7.875. At the oral hearing, the participants confirmed that this is also their understanding of what the Panel meant by the distinction that it drew between "supported" and "unsupported" products. In respect of "supported" products, the Panel stated that "[t]o the extent that it identifies products within the product coverage of the *Agreement on Agriculture* that are within our terms of reference, we consider Exhibit BRA-73 to be the relevant record evidence of such products for the purposes of this dispute". (Panel Report, footnote 1056 to para. 7.875; see also *ibid*., footnote 1575 to para. 8.1(d)(i))

[871]The Panel noted that "[t]he United States has scheduled export subsidy reduction commitments in respect of the following thirteen commodities: wheat, coarse grains, rice, vegetable oils, butter and butter oil, skim milk powder, cheese, other milk products, bovine meat, pigmeat, poultry meat, live dairy cattle, eggs". (Panel Report, footnote 1057 to para. 7.876 (referring to Schedule XX of the United States of America, Part IV, Section II, entitled "Export Subsidies: Budgetary Outlays and Quantitative Reduction Commitments", reproduced in Exhibit BRA-83 and Exhibit US-13))

[872]Panel Report, para. 7.875. (original emphasis)

[873]Panel Report, para. 7.881.

[874]*Ibid*.

[875]*Ibid*., para. 7.896.

[876]*Ibid*., para. 7.900.

Panel, which was of the opposite view, namely, that the text of Article 10.1 "clearly indicat[es] that export credit guarantee programmes constituting export subsidies for the purposes of Article 10.1 must not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments".[877] The Panel found support for this interpretation in the provision's context and in its object and purpose, emphasizing in particular that Article 10.2 is a subparagraph of Article 10. According to the Panel, "[t]he title of Article 10, and the text of Article 10.1, indicates an intention to prevent Members from circumventing or 'evading' their 'export subsidy commitments'".[878] The Panel also rejected the United States' arguments based on subsequent practice and the drafting history.[879] In respect of the United States' argument on subsequent practice, the Panel stated that "[t]he record ... does not suggest that there is a discernible pattern of acts or pronouncements implying an agreement among WTO Members on the United States' interpretation of Article 10.2".[880] Although the Panel did not see a need to examine the drafting history, it found that "nothing in the drafting history of [Article 10.2] would compel [the Panel] to reach a different conclusion".[881]

597. Finally, the Panel turned to Brazil's claims under Articles 3.1(a) and 3.2 of the *SCM Agreement*, and found:

> To the extent that the United States export credit guarantee programmes at issue – GSM 102, GSM 103 and SCGP – do not conform fully to these provisions in Part V of the *Agreement on Agriculture* and do not benefit from the exemption from actions provided by Article 13(c)(ii) of the *Agreement on Agriculture*, they are also export subsidies prohibited by Article 3.1(a) ...
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> To the extent that the three United States export credit guarantee programmes at issue are inconsistent with Article 3.1(a), they are, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*.[882]

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[877] *Ibid*., para. 7.901.

[878] *Ibid*., para. 7.912. (footnote omitted)

[879] *Ibid*., paras. 7.928-7.944.

[880] *Ibid*., para. 7.929. (footnotes omitted)

[881] Panel Report, para. 7.933. The Panel did not see a need to examine the drafting history because it considered that its "examination of the text of Article 10.2 of the *Agreement on Agriculture*, in its context and in light of the object and purpose of that agreement leads to a clear interpretation of the text". (Panel Report, para. 7.933)

[882] *Ibid*., paras. 7.947 and 7.948. (footnote omitted)

3. Arguments on Appeal

598. The United States contends that the Panel erred in analyzing whether export credit guarantees are export subsidies subject to the disciplines of Article 10.1 solely by reference to the *SCM Agreement.* According to the United States, the proper context in which to analyze the meaning of Article 10.1 with respect to export credit guarantees is Article 10.2 of the *Agreement on Agriculture*.[883] This provision reflects the fact that, during the Uruguay Round, WTO Members did not agree on disciplines to be applied to agricultural export credits, export credit guarantees, and insurance programs, opting instead to continue discussions, deferring the imposition of substantive disciplines until a consensus was achieved.

599. According to the United States, this interpretation of Article 10.2 is consistent with Article 10 as a whole.[884] Article 10.2 contributes to the prevention of circumvention of export subsidy commitments by imposing two obligations on Members: first, they must undertake to work toward the development of internationally agreed disciplines on export credit guarantees; and second "after agreement on such disciplines", they must provide export credit guarantees "only in conformity therewith".[885] Moreover, excluding export credit guarantees from the application of Article 10.1 is also consistent with the treatment of food aid transactions under Article 10. Because Article 10.4 of the *Agreement on Agriculture* does not explicitly exempt food aid transactions from the applicability of Article 10.1, the Panel's interpretative approach would mean that all food aid transactions constitute export subsidies under Article 10.1.[886]

600. The United States submits that the negotiating history confirms its interpretation that Article 10.2 makes the export subsidy disciplines in Article 10.1 inapplicable to export credit guarantees.[887] In addition, the United States argues that it defies logic, as well as the object and purpose of the *Agreement on Agriculture*, to take the view of the Panel whereby export credit guarantees, export credits and insurance programs would be treated as already disciplined export subsidies, yet would not be permitted to be included within the applicable reduction commitments expressly contemplated by the text.[888] The United States therefore requests that we reverse the Panel's finding that export credit guarantees are subject to the disciplines of Article 10.1. In addition, the United States requests that we reverse the Panel's findings that export credit guarantees to

[883]United States' appellant's submission, para. 341.

[884]*Ibid*., para. 346.

[885]Quoting Article 10.2 of the *Agreement on Agriculture*.

[886]United States' appellant's submission, paras. 349 and 358.

[887]*Ibid*., paras. 367-380.

[888]*Ibid*., paras. 384-385.

agricultural commodities are subject to Articles 3.1 and 3.2 of the *SCM Agreement*. The United States asserts that, because export credit guarantees currently are not subject to export subsidy disciplines under the *Agreement on Agriculture*, the export subsidy disciplines of the *SCM Agreement* are also inapplicable to these measures pursuant to Article 21.1 of the *Agreement on Agriculture* and the introductory language of Article 3.1 of the *SCM Agreement*.[889]

601. Brazil requests that we reject the United States' appeal from the Panel's finding that export credit guarantees are subject to the export subsidy disciplines in Article 10.1 of the *Agreement on Agriculture*. Brazil asserts that subsidized export credit guarantees are covered by the general definition of "export subsidies" under Article 1(e) of the *Agreement on Agriculture* and that these measures are, therefore, subject to Article 10.1 of the *Agreement on Agriculture*, unless an exception is provided in Article 10.2.[890] The text of Article 10.2 establishes two obligations, but does not provide an exception.[891]

602. According to Brazil, the Panel's interpretation is consistent with the context and object and purpose of Article 10.2. Each of the paragraphs in Article 10 pursues the aim of "preventing circumvention" of export subsidy commitments and, thereby, contributes to the purpose of the *Agreement on Agriculture* of establishing specific binding commitments on export competition. Therefore, Article 10.2 also must be interpreted in a manner that ensures that it contributes to the purpose of preventing circumvention of commitments on export competition.[892] The United States' interpretation of Article 10.2 would tend in the opposite direction, leaving Members free to grant unlimited export subsidies in the form of export credit guarantees and would permit wholesale circumvention of commitments.[893] Brazil, furthermore, disagrees with the United States' assertion that the Panel's interpretation is an "assault" on international food security.[894] According to Brazil, food aid is subject to the specific disciplines in Article 10.4 of the *Agreement on Agriculture*, as well as to the general disciplines in Article 10.1.[895]

603. In addition, Brazil disagrees with the conclusions drawn by the United States from the negotiating history of the *Agreement on Agriculture*.[896] Brazil also rejects the United States'

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[889]*Ibid*., para. 391.

[890]Brazil's appellee's submission, paras. 905-906.

[891]*Ibid*., para. 912.

[892]Brazil's appellee's submission, paras. 951-952.

[893]*Ibid*., para. 953.

[894]United States' appellant's submission, para. 350.

[895]Brazil's appellee's submission, para. 940.

[896]*Ibid*., para. 975.

contention that the Panel's reading of Article 10.2 is "manifestly unreasonable".[897] Brazil explains that, at the close of the Uruguay Round, Members agreed that they would calculate their respective export subsidy commitment levels using exclusively the export subsidies listed in Article 9.1 and thus chose to leave out of the calculation export subsidies referred to in Article 10.1. Finally, Brazil emphasizes that the Panel's interpretation does not mean that Members cannot grant export credit guarantees. Instead, it means that subsidized export credit guarantees are subject to disciplines as trade-distorting measures, and cannot be used to override export subsidy commitments.[898]

604. Argentina, Australia, Canada, and New Zealand are of the view that Article 10.2 of the *Agreement on Agriculture* does not provide an exception from WTO export subsidy disciplines for export credit guarantees, export credits or insurance programs, and assert that the Panel correctly interpreted this provision.[899] Before the Panel, the European Communities submitted that Article 10.2 of the *Agreement on Agriculture* cannot be seen as exempting export credit guarantees granted to agricultural products from WTO disciplines as this provision makes it clear that export credit guarantees are not one of the types of export subsidies listed in Article 9.1 that a Member is given a limited authorization to apply[900]; the European Communities did not express a view on this issue on appeal.

4. Does Article 10.2 Exempt Export Credit Guarantee Programs from Export Subsidy Disciplines?[901]

605. The United States argues that because export credit guarantees are specifically dealt with in Article 10.2, and this provision expressly acknowledges that Uruguay Round negotiators did not reach an agreement on the disciplines that apply to them, they cannot properly be considered to be included within the "export subsidies" covered by Article 10.1.

606. As usual, our analysis begins with the text of the provision in question. Article 10.2 reads:

> Members undertake to work toward the development of internationally agreed disciplines to govern the provision of export credits, export credit guarantees or insurance programmes and, after

[897] *Ibid*., paras. 926-934 (referring to the United States' appellant's submission, para. 384).

[898] *Ibid*., paras. 977-978.

[899] Argentina's third participant's submission, para. 39; Australia's third participant's submission, para. 71; Canada's third participant's submission, para. 42; and New Zealand's third participant's submission, para. 3.65.

[900] Panel Report, para. 7.781.

[901] A separate opinion on this issue of one of the Members of the Division is set out *infra*, paras. 631-641. The relevant findings and conclusions for purposes of the recommendations and rulings to be adopted by the DSB in this dispute, pursuant to Article 17.14 of the DSU, are those set out in paragraph 763(e) and (f) of this Report.

> agreement on such disciplines, to provide export credits, export credit guarantees or insurance programmes only in conformity therewith.

607. Article 10.2 refers expressly to export credit guarantee programs, along with export credits and insurance programs. Under Article 10.2, WTO Members have taken on two distinct commitments in respect of these three types of measures: (i) to work toward the development of internationally agreed disciplines to govern their provision; and (ii) after agreement on such disciplines, to provide them only in conformity therewith. The text includes no temporal indication with respect to the first commitment. There is no deadline for beginning or ending the negotiations. The second commitment does have a temporal connotation, in the sense that it is triggered only "after agreement on such disciplines". This means that "after" international disciplines have been agreed upon, Members shall provide export credit guarantees, export credits and insurance programs only in conformity with those agreed disciplines. There is no dispute between the parties that, to date, no disciplines have been agreed internationally pursuant to Article 10.2.

608. Article 10.2 does not, however, expressly define the disciplines that *currently* apply to export credits, export credit guarantees and insurance programs under the *Agreement on Agriculture*. The Panel reasoned that "in order to carve out or exempt particular categories of measures from general obligations such as the prevention of circumvention of export subsidy commitments in Article 10.1 of the *Agreement on Agriculture*, it would be reasonable to expect an explicit indication revealing such an intention in the text of the Agreement".[902] The Panel saw "no language in Article 10.2 which would modify the scope of application of the general export subsidy disciplines in Article 10.1 in the *Agreement on Agriculture* so as to carve out or exempt export credit guarantees from the export subsidy disciplines imposed by that Agreement".[903]

609. We agree with the Panel's view that Article 10.2 does not expressly exclude export credit guarantees from the export subsidy disciplines in Article 10.1 of the *Agreement on Agriculture*. As the Panel observes, were such an exemption intended, it could have been easily achieved by, for example, inserting the words "[n]otwithstanding the provisions of Article 10.1", or other similar language at the beginning of Article 10.2.[904] Article 10.2 does not include express language suggesting that it is intended as an exception, nor does it expressly state that the application of any export subsidy disciplines to export credits or export credit guarantees is "deferred", as the United States suggests. Given that the drafters were aware that subsidized export credit guarantees, export credits and insurance programs could fall within the export subsidy disciplines in the *Agreement on Agriculture* and the *SCM Agreement*, it would be expected that an exception would have been clearly provided had this been the drafters' intention.

610. Moreover, as the Panel explained, Article 10.2 "contrasts starkly with the text of other provisions in the covered agreements, which clearly carve out or exempt certain products or measures from certain obligations that would otherwise apply pending the development of further multilateral disciplines".[905] The Panel referred to Article 6.1(a) and the footnote 24 to Article 8.2(a) of the *SCM Agreement* and Article XIII of the *General Agreement on Trade in Services*, which expressly indicate that existing disciplines do not apply pending the negotiation of future disciplines.[906] However, Article 10.2 does not expressly exclude the application of the existing disciplines in the *Agreement on Agriculture* until such time as the specific disciplines on export credits, export credit guarantees and insurance programs are internationally agreed upon.

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[902]Panel Report, para. 7.903. (footnote omitted)

[903]*Ibid*., para. 7.904.

[904]*Ibid*., para. 7.909.

[905]*Ibid*., para. 7.906.

[906]*Ibid*., paras. 7.907-7.908.

611. The Panel rejected the United States' submission[907] that Brazil's approach would render Article 10.2 irrelevant.[908] In the Panel's view, "the purpose of any eventual disciplines could be further to facilitate the determination of when export credit guarantee programmes in respect of agricultural products constitute export subsidies *per se* by developing and refining existing disciplines".[909] Put another way, "the work envisaged in Article 10.2 would presumably elaborate further and more specific disciplines that could facilitate identification of the extent to which such export credit guarantee programmes constitute export subsidies, or to what extent export credit guarantee programmes are not permitted".[910] The use of the term "development" in Article 10.2 is consistent with this view. The definitions of the term "development" include: "[t]he action or process of developing; evolution, growth, maturation; ... a gradual unfolding, a fuller working-out" and "[a] developed form or product ... an addition, an elaboration".[911] This suggests that the disciplines to be internationally agreed will be an elaboration of the export subsidy disciplines that are currently applicable.

612. This interpretation is consistent with the reference in Article 10.2 to internationally agreed disciplines "to govern the provision of" export credits, export credit guarantees or insurance programs; alternatively, Article 10.2 could have referred to internationally agreed disciplines "to govern" export credits, export credit guarantees or insurance programs. The latter formulation ("to govern") would have been broader in scope, whereas the formulation used in Article 10.2 ("to govern the provision") is narrower. If the drafters had intended that currently no disciplines at all would apply to export credit guarantees, export credits and insurance programs, it would have made more sense for them to have chosen the broader formulation "to govern". The drafter's choice of the narrower formulation "to govern the provision of" suggests that export credit guarantees, export credits and insurance programs are not "undisciplined" in all respects, and that the disciplines to be developed have to do *only* with their *provision*. In other words, export credit guarantees, export credits and insurance programs are governed by Article 10.1 of the *Agreement on Agriculture*, but WTO Members will develop specific disciplines on the provision of these instruments.

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[907]United States' first written submission to the Panel, paras. 163-165.

[908]Panel Report, para. 7.925.

[909]*Ibid*.

[910]*Ibid*., para. 7.926. (footnote omitted)

[911]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 662.

613. The Panel's interpretation of Article 10.2, which is based on a plain reading of the text, is confirmed when, in accordance with the customary rules of treaty interpretation codified in Article 31 of the *Vienna Convention*, that provision is examined in its context and in the light of the object and purpose of the *Agreement on Agriculture*, and in particular Article 10, which is entitled "Prevention of Circumvention of Export Subsidy Commitments".

614. We note that Article 10.1 of the *Agreement on Agriculture*, the provision that immediately precedes Article 10.2, reads:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

615. Although Article 10.2 commits WTO Members to work toward the development of internationally agreed disciplines on export credit guarantees, export credits and insurance programs, it is in Article 10.1 that we find the disciplines that currently apply to export subsidies not listed in Article 9.1. A plain reading of Article 10.1 indicates that the only export subsidies that are excluded from its scope are those "listed in paragraph 1 of Article 9". The United States and Brazil agreed that export credit guarantees are not listed in Article 9.1.[912] Thus, to the extent that an export credit guarantee meets the definition of an "export subsidy" under the *Agreement on Agriculture*, it would be covered by Article 10.1. Article 1(e) of the *Agreement on Agriculture* defines "export subsides" as "subsidies contingent upon export performance, *including* the export subsidies listed in Article 9 of this Agreement". (emphasis added) The use of the word "including" suggests that the term "export subsidies" should be interpreted broadly and that the list of export subsidies in Article 9 is not exhaustive. Even though an export credit guarantee may not necessarily include a subsidy component, there is nothing inherent about export credit guarantees that precludes such measures from falling within the definition of a subsidy.[913] An export credit guarantee that meets the definition of an export subsidy would be covered by Article 10.1 of the *Agreement on Agriculture* because it is not an export subsidy listed in Article 9.1 of that Agreement.

[912]Panel Report, para. 7.788.

[913]For discussion of the definitional elements of a subsidy in the context of the *Agreement on Agriculture*, see Appellate Body Report, *US – FSC*, para. 136, and Appellate Body Report, *Canada – Dairy*, para. 87.

616. We find it significant that paragraph 2 of Article 10 is included in an Article that is titled the "Prevention of Circumvention of Export Subsidy Commitments". As Brazil correctly points out, each paragraph in Article 10 pursues this aim.[914] Article 10.1 provides that WTO Members shall not apply export subsidies not listed in Article 9.1 of the *Agreement on Agriculture* "in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments". Article 10.3 pursues the aim of preventing circumvention of export subsidy commitments by providing special rules on the reversal of burden of proof where a Member exports an agricultural product in quantities that exceed its reduction commitment level; in such a situation a WTO Member is treated as if it has granted WTO-*inconsistent* export subsidies for the excess quantities, unless the Member presents adequate evidence to "establish" the contrary.[915] Article 10.4 provides disciplines to prevent WTO Members from circumventing their export subsidy commitments through food aid transactions. Similarly, Article 10.2 must be interpreted in a manner that is consistent with the aim of preventing circumvention of export subsidy commitments that pervades Article 10. Otherwise, it would not have been included in that provision.

617. The United States submits that Article 10.2 contributes to the prevention of circumvention because it commits WTO Members to work toward the development of internationally agreed disciplines and to provide export credit guarantees, export credits and insurance programs only in conformity with these disciplines once an agreement has been reached.[916] We are not persuaded by this argument. The necessary implication of the United States' interpretation of Article 10.2 is that, until WTO Members reach an agreement on international disciplines, export credit guarantees, export credits and insurance programs are subject to no disciplines *at all*. In other words, under the United States' interpretation, WTO Members are free to "circumvent" their export subsidy commitments through the use of export credit guarantees, export credits and insurance programs until internationally agreed disciplines are developed, whenever that may be. We find it difficult to believe that the negotiators would not have been aware of and did not seek to address the potential that subsidized export credit guarantees, export credits and insurance programs could be used to

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[914]Brazil's appellee's submission, para. 951. See Appellate Body Report, *US – FSC*, para. 148 and Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 74.

[915]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 74. Article 10.3 of the *Agreement on Agriculture* provides:

> Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

[916]United States' appellant's submission, para. 346.

circumvent a WTO Member's export subsidy reduction commitments. Indeed, such an interpretation would *undermine* the objective of preventing circumvention of export subsidy commitments, which is central to the *Agreement on Agriculture*.

618. The United States submits that, under the Panel's approach, international food aid transactions would be subject to the "full array of export subsidy disciplines" because they are not expressly excluded from Article 10.1.[917] According to the United States, this would adversely affect food security in the less developed world, which cannot be construed as the intent of the drafters.[918] Furthermore, the United States asserts, the Panel's approach would mean that international food aid transactions are subject to both the specific disciplines in Article 10.4 and those in Article 10.1 of the *Agreement on Agriculture*.[919]

619. We are unable to subscribe to the United States' arguments because we do not see Article 10.4[920] as excluding international food aid from the scope of Article 10.1.[921] International food aid is covered by the second clause of Article 10.1 to the extent that it is a "non-commercial transaction". Article 10.4 provides specific disciplines that may be relied on to determine whether international food aid is being "used to circumvent" a WTO Member's export subsidy commitments. There is no contradiction in the Panel's approach to Article 10.2 and its approach to Article 10.4. The measures in Article 10.2 and the transactions in Article 10.4 are both covered within the scope of Article 10.1. As Brazil submits, "Article 10.4 provides an example of specific disciplines that have been agreed upon for a particular type of measure and that complement the general export subsidy

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[917]United States' appellant's submission, para. 349.

[918]*Ibid*., para. 350.

[919]*Ibid*., para. 358.

[920]Article 10.4 of the *Agreement on Agriculture* provides:

> 4. Members donors of international food aid shall ensure:
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> (a) that the provision of international food aid is not tied directly or indirectly to commercial exports of agricultural products to recipient countries;
>
> (b) that international food aid transactions, including bilateral food aid which is monetized, shall be carried out in accordance with the FAO "Principles of Surplus Disposal and Consultative Obligations", including, where appropriate, the system of Usual Marketing Requirements (UMRs); and
>
> (c) that such aid shall be provided to the extent possible in fully grant form or on terms no less concessional than those provided for in Article IV of the Food Aid Convention 1986.

A new Food Aid Convention was concluded in 1999.

[921]Brazil's appellee's submission, para. 940.

rules" but, like Article 10.2, it does not "establish any exceptions for the measures that [it] covers".[922] WTO Members are free to grant as much food aid as they wish, provided that they do so consistently with Articles 10.1 and 10.4. Thus, Article 10.4 does not support the United States' reading of Article 10.2.

620. The United States also relies on the negotiating history of the *Agreement on Agriculture* to support its position.[923] The Panel identified the drafting history in the record. It referred to paragraph 22 of the Framework Agreement on Agriculture Reform Programme (known as the "DeZeeuw Text"), circulated in July 1990, which envisaged "concurrent negotiations to govern the use of export assistance, including 'disciplines on export credits'".[924] There was also a "Note on Options in the Agriculture Negotiations" of June 1991, in which the Chairman of the negotiations "requested decisions by the principals on 'whether subsidized export credits and related practices ... would be subject to reduction commitments unless they meet appropriate criteria to be established in terms of the rules that would govern export competition'".[925] An addendum circulated in August of 1991 set out an Illustrative List of Export Subsidy Practices and included, as item (i), "[s]ubsidized export credit guarantees or insurance programs".[926] In December 1991, a "Draft Text on Agriculture" was circulated by the Chairman, Article 9.3 of which stated that "[f]or the purposes of this Article, whether export credits, export credit guarantees or insurance programmes provided by governments or their agencies constitute export subsidies shall be determined on the basis of paragraphs (j) and (k) of Annex 1 to the [*SCM Agreement*]."[927] That paragraph was omitted from the "Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations"[928], which was circulated later that month. Article 10.2 of the Draft Final Act reads as follows:

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[922]Brazil's appellee's submission, para. 950.

[923]The United States refers to the negotiating history pursuant to Article 32 of the *Vienna Convention*. (United States' appellant's submission, para. 367; see also Panel Report, footnote 1112 to para. 7.933) Article 32 provides that recourse may be had to supplementary means of interpretation, including negotiating history, to determine the meaning when the interpretation according to Article 31 "leads to a result which is manifestly absurd or unreasonable".

[924]Panel Report, para. 7.934.

[925]*Ibid*., para. 7.935.

[926]*Ibid*., para. 7.936. Item (h) referred to"[e]xport credits provided by governments or their agencies on less than fully commercial terms."

[927]Panel Report, para. 7.937. Article 8.2 of that text listed export subsidies subject to reduction commitments "somewhat resembling the current Article 9.1 of the *Agreement on Agriculture*", while Article 9.1 was similar to the current Article 10.1. (Panel Report, para. 7.937)

[928]MTN.TNC/W/FA (20 December 1991), reproduced in Exhibit US-29.

> Participants undertake not to provide export credits, export credit guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines.

This language was subsequently replaced by the current text of Article 10.2.[929]

621. The Panel did not consider that this negotiating history supported the United States' position that "the drafters intended to defer the application of any and all disciplines on agricultural export credit guarantees".[930] According to the Panel, "[t]he omission of paragraph 3 of Article 9 of the December 1991 Draft Text is consistent with a decision that the words were mere surplusage, because export credits, export credit guarantees and insurance programmes were within the disciplines on export subsidies according to the terms of the agreement captured".[931] "The omission", the Panel added, "is much less consistent with a decision to exclude such programmes from the disciplines altogether, considering the clear textual ability of the disciplines to extend to such programmes and the lack of any attention to an explicit carve-out of such programmes from the disciplines".[932]

622. On appeal, the United States again relies on the drafting history of the *Agreement on Agriculture*, which it considers "reflects that the Members very early specifically included export credits and export credit guarantees as a subject for negotiation and specifically elected *not* to include such practices among export subsidies in the WTO Agreements with respect to those goods within the scope of ... the *Agreement on Agriculture*".[933] The United States adds that "[b]y deleting an explicit reference to export credit guarantees from the illustrative list of export subsidies in Article 9.1, Members demonstrated that they had not agreed in the case of agricultural products that export credit guarantees constitute export subsidies that should be subject to export subsidy disciplines".[934] Finally, the United States takes issue with the Panel's explanation that draft Article 9.3 was omitted because it was mere surplusage.[935]

623. We agree with the Panel that the meaning of Article 10.2 is clear from the provision's text, in its context and in the light of the object and purpose of the *Agreement on Agriculture*, consistent with Article 31 of the *Vienna Convention*.[936] The Panel did not think it necessary to resort to negotiating history for purposes of its interpretation of Article 10.2. Even if the negotiating history

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[929]Panel Report, paras. 7.938-7.939.

[930]*Ibid*., para. 7.939.

[931]*Ibid*., para. 7.940.

[932]*Ibid*.

[933]United States' appellant's submission, para. 377. (original emphasis)

[934]*Ibid*., para. 378.

[935]*Ibid*., para. 379.

were relevant for our inquiry, we do not find that it supports the United States' position. This is because it does not indicate that the negotiators did not intend to discipline export credit guarantees, export credits and insurance programs *at all*. To the contrary, it shows that negotiators were aware of the need to impose disciplines on export credit guarantees, given their potential as a mechanism for subsidization and for circumvention of the export subsidy commitments under Article 9. Although the negotiating history reveals that the negotiators struggled with this issue, it does not indicate that the disagreement among them related to whether export credit guarantees, export credits and insurance programs were to be disciplined at all. In our view, the negotiating history suggests that the disagreement between the negotiators related to which kinds of specific disciplines were to apply to such measures. The fact that negotiators felt that internationally agreed disciplines were necessary for these three measures also suggests that the disciplines that currently exist in the *Agreement on Agriculture* must apply pending new disciplines because, otherwise, it would mean that subsidized export credit guarantees, export credits, and insurance programs could currently be extended without any limit or consequence.

624. The United States contends that the Panel's interpretation leads to a result that is "manifestly absurd or unreasonable".[937] According to the United States, it "defies logic ... to take the view of the Panel in which such practices would be treated as already disciplined export subsidies yet not permitted to be included within the applicable reduction commitments expressly contemplated by the text".[938] The Panel's interpretation thus results in an enormous "windfall" for Brazil because the United States would have been permitted to grant export credit guarantees had such measures been listed in Article 9 of the *Agreement on Agriculture*.[939] The United States also submits that exemption of export credit guarantees from export subsidy disciplines of the *Agreement on Agriculture* is further demonstrated by the fact that "no export credit guarantees are reported in the schedules of the United States or any other Members ... nor are they currently subject to reporting as export subsidies".[940]

625. We do not agree with the United States' submission in this regard. There could have been several reasons why Members chose not to include export credit guarantees, export credits and insurance programs under Article 9.1 of the *Agreement on Agriculture*. One reason, for instance, may be that they considered that their export credit guarantee, export credit or insurance programs did

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[936]Panel Report, para. 7.933.

[937]United States' appellant's submission, para. 383.

[938]*Ibid*., para. 384.

[939]*Ibid*.

not include a subsidy component, so that there was no need to subject them to export subsidy reduction commitments. There could have been other reasons. Thus, the fact that export credit guarantees, export credits and insurance programs were not included in Article 9.1 does not support the United States' interpretation of Article 10.2. We also observe that whether WTO Members with export credit guarantee programs have reported them in their export subsidy notifications is not determinative for purposes of our inquiry into the meaning of Article 10.2. In any event, the United States and Brazil disagree about whether such programs are subject to notification requirements.[941]

626. Accordingly, we do not believe that Article 10.2 of the *Agreement on Agriculture* exempts export credit guarantees, export credits and insurance programs from the export subsidy disciplines in the *Agreement on Agriculture*. This does not mean that export credit guarantees, export credits and insurance programs will necessarily constitute export subsidies for purposes of the *Agreement on Agriculture*. Export credit guarantees are subject to the export subsidy disciplines in the *Agreement on Agriculture* only to the extent that such measures include an export subsidy component. If no such export subsidy component exists, then the export credit guarantees are not subject to the Agreement's export subsidy disciplines. Moreover, even when export credit guarantees contain an export subsidy component, such an export credit guarantee would not be inconsistent with Article 10.1 of the *Agreement on Agriculture* unless the complaining party demonstrates that it is "applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments". Thus, under the *Agreement on Agriculture*, the complaining party must first demonstrate that an export credit guarantee program constitutes an export subsidy. If it succeeds, it must then demonstrate that such export credit guarantees are applied in a manner that results in, or threatens to lead to, circumvention of the responding party's export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*.

627. For these reasons, we *uphold* the Panel's finding, in paragraphs 7.901, 7.911 and 7.932 of the Panel Report, that Article 10.2 of the *Agreement on Agriculture* does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1.

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[940]*Ibid*., para. 385. (footnote omitted) The United States makes this argument within the context of its assertion that the Panel's interpretation leads to a result that is "manifestly absurd or unreasonable".

[941]The notification requirements are set out in *Notification Requirements and Formats under the WTO Agreement on Agricultur*e (PC/IPL/12, 2 December 1994), submitted by the United States to the Panel as Exhibit US-99. The United States argues that the absence of a reporting requirement for export credit guarantees provides further proof that such measures are not subject to export subsidy disciplines under the *Agreement on Agriculture*. (United States' appellant's submission, paras. 384-385) Brazil disagrees and submits that, to the extent export credit guarantees constitute export subsidies, such measures are subject to notification requirements. (Brazil's appellee's submission, para. 934)

628. Before proceeding further, we refer to the order followed by the Panel in its analysis of Brazil's claims against the United States' export credit guarantee programs. We do not find that the Panel's order of analysis was wrong or that it constituted legal error. Nor has the United States made such a claim on appeal. Nevertheless, we are struck by the fact that the Panel addressed Article 10.2 only at the end of its analysis, especially given that this provision constituted the core of the United States' defence that the disciplines of the *Agreement on Agriculture* currently do not apply to export credit guarantees at all.

5. Articles 3.1 and 3.2 of the *SCM Agreement*

629. We turn to the United States' appeal of the Panel's findings under Articles 3.1 and 3.2 of the *SCM Agreement*. According to the United States, "Article 3 of the *SCM Agreement* ... is subject in its application to Article 21.1 of the *Agreement on Agriculture*".[942] The United States then argues that, because "export credit guarantees are not subject to the disciplines of export subsidies for purposes of the *Agreement on Agriculture*, Article 21.1 of that Agreement renders Article 3.1(a) of the *SCM Agreement* inapplicable to such measures".[943] Furthermore, the United States asserts that "the exemption from action under Article 13(c) is inapplicable, because it only is effective with respect to export subsidies disciplined under the *Agreement on Agriculture*."[944]

630. The United States' argument is premised on the proposition that Article 10.2 of the *Agreement on Agriculture* exempts export credit guarantees from the export subsidy disciplines in that Agreement. The Panel rejected this proposition and we have upheld the Panel's finding in this regard. Therefore, because it is premised on an incorrect interpretation of Article 10.2 of the *Agreement on Agriculture*, we reject the United States' argument. We examine the United States' appeals from other aspects of the Panel's assessment of the export credit guarantee programs under Article 3 of the *SCM Agreement* in the following section of our Report.

6. Separate Opinion

631. One Member of the Division hearing this appeal wishes to set out a brief separate opinion. At the outset, I would like to make it absolutely clear that I agree with the findings and conclusions and reasoning set out in all preceding Sections of this Report, but one, namely, Section C above, which relates to Article 10.2 of the *Agreement on Agriculture*. It is only on the interpretation of Article 10.2 that I must respectfully disagree.

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[942]United States' appellant's submission, para. 393.

[943]*Ibid*.

[944]*Ibid*., para. 395.

632. First I wish to point out that although Article 10.1 of the *Agreement on Agriculture* covers a range of export subsidies that do not fall within the ambit of Article 9.1 of the Agreement, Members considered that it was necessary to carve out three types of programs, namely export credit guarantees, export credits and insurance programs, and to spell out in Article 10.2 their commitments with respect to those three areas. The fact that they chose to deal with these three types of measures in Article 10.2 shows that this special treatment of the three types of measures must be given meaning and weight. Put differently, Article 10.2 is the only provision in the *Agreement on Agriculture* that speaks directly to export credit guarantees, export credits and insurance programs provided in connection with agricultural goods. I read Article 10.2 as saying that WTO Members have committed to two specific undertakings: (1) "to work *toward* the *development*" of international agreed disciplines and (2) to provide export credit guarantees in conformity with these disciplines "*after* agreement on such disciplines". (emphasis added) Thus, the text of Article 10.2 obliges Members to "work toward the *development*" of internationally agreed disciplines to regulate the provision of export credit guarantees, as well as export credits and insurance programs.

633. A specific provision that calls on Members to "work toward the development" of disciplines strongly suggests to me that disciplines do not yet exist. Certainly reference is not made in Article 10.2 to any other disciplines found in the *Agreement on Agriculture* that apply to export credit guarantees, export credits and insurance programs provided in connection with agricultural goods. Furthermore, the second part of Article 10.2 clearly limits the application of disciplines to *after* such time as the international disciplines have been agreed upon. This is a further indication that there are no current disciplines under the *Agreement on Agriculture* that apply to export credit guarantees, export credit and insurance programs.

634. I recognize that the language of this provision is not free from ambiguity. As noted by my colleagues on the Division, the drafters could have—dare I say, should have—made their intentions even more plain. If there were no Article 10.2, then I might concur with my colleagues that to the extent that an export credit guarantee provided an export subsidy then the *Agreement on Agriculture* envisions that that subsidy portion should be addressed by Article 10.1. However, Article 10.2 does exist and the meaning of the words as I read them is entirely prospective, at least with respect to the existence of applicable disciplines.

635. I do not see my reading of Article 10.2 to be inconsistent with the provision's context and with the object and purpose of the *Agreement on Agriculture*. Article 10 is entitled "Prevention of Circumvention of Export Subsidy Commitments". I see the first part of Article 10.1 as setting out a catch-all provision, designed to potentially cover an export subsidy that is used to circumvent the reduction commitments under Article 9. In contrast, as discussed above, Article 10.2 is designed to

specifically deal with export credit programs, export credits and insurance programs, and its provisions are controlling with respect to any such programs. Although it speaks to prospective development and application of agreed disciplines, Article 10.2 is also consistent with the objective of prevention of circumvention. Its placement in Article 10 suggests a recognition that export credits, export credit guarantees and insurance programs can have the potential to circumvent export subsidy commitments.[945] Article 10.3 pursues the aim of preventing circumvention of export subsidy commitments by providing special rules on reversal of burden of proof when a Member's exports exceed the quantitative reduction commitments, and Article 10.4 itemizes a series of specific commitments or disciplines that apply in the area of international food aid. It is accurate, as my colleagues reason, that the language of Article 10.2 is quite different from that used in Article 10.4. While Article 10.4 establishes disciplines for food aid transactions, Article 10.2 merely foresees that disciplines will be established, in the future, for export credit guarantees, export credits and insurance programs. The fact that a single Article contains commitments with varying degrees of temporal effect and both specific and general provisions, does not support an interpretation that the general undertaking (Article 10.1) overrides the specific and prospective provision (that is, Article 10.2).

636. I also find support for my view in the negotiating history. Of course, care must be taken in relying on negotiating history and I do not wish to imply that resort to Article 32 of the *Vienna Convention* is strictly necessary in these circumstances.[946] Nevertheless, as I read it this history confirms my view that at the end of the Uruguay Round, negotiators had not agreed to subject export credit guarantees, export credits and insurance programs provided in connection with agricultural goods to the disciplines of the *Agreement on Agriculture* or to any other disciplines that existed at that time. Article 10.2, in my view, was intended to reflect this outcome. At one point in the negotiations, there was a proposal for applying to agricultural products the disciplines in the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.[947] This proposal was dropped in the Draft Final Act in favour of an "undertak[ing] not to provide export credits, export credit

[945]In this sense, I find the United States' term "deferral" to be more meaningful than "exception" in thinking about the nature of Article 10.2 in that it acknowledges that Members are already under an obligation to develop such disciplines, albeit in the future.

[946]I also recognize that the negotiating materials referred to by the Panel may not formally constitute *travaux préparatoires* for purposes of Article 32 of the *Vienna Convention*.

[947]Panel Report, para. 7.937. Specifically, in December 1991, a "Draft Text on Agriculture" was circulated by the Chairman. Article 9.3 of the draft text stated that "[f]or the purposes of this Article, whether export credits, export credit guarantees or insurance programmes provided by governments or their agencies constitute export subsidies shall be determined on the basis of paragraphs (j) and (k) of Annex 1 to the [SCM Agreement]". (*Ibid*., para. 7.937) Later, the Draft Final Act was circulated and it omitted paragraph 3 of Article 9 that had appeared in the previous draft. (*Ibid*., para. 7.938)

guarantees or insurance programs otherwise than in conformity with internationally agreed disciplines"[948], which in turn was replaced by the current version of Article 10.2. The previous version of Article 10.2 (in the Draft Final Act) reflected an immediate undertaking "not to provide export credit guarantees, export credits or insurance programs otherwise than in conformity with internationally agreed disciplines", whatever those may have been. In contrast, no immediate commitment is evident from the current version of Article 10.2, which instead calls for continued negotiations and for WTO Members to provide export credits, export credit guarantees or insurance programs only in conformity with internationally agreed disciplines *after* agreement on such disciplines. This suggests to me that the negotiators were aware of the need to impose disciplines on export credit guarantees, given their potential as a mechanism for circumvention, but they were unable to agree upon and identify the disciplines that were to apply to such measures until disciplines were developed in the future. Thus, in my view, the negotiating history supports an interpretation that Article 10.2 was inserted to commit WTO Members to continue negotiating on the disciplines that would apply, in the future, and that no disciplines would apply to such measures until such time as disciplines were internationally agreed upon.

637. As noted by my colleagues on the Division, the United States argues that "it defies logic, as well as the obvious object and purpose of the agreement, to take the view of the Panel in which such practices would be treated as already disciplined export subsidies yet not permitted to be included within the applicable reduction commitments expressly contemplated by the text".[949] Brazil argues that the United States was never willing to accept that its export credit guarantee programs constituted an export subsidy and took a calculated risk by not including them under its Article 9 reduction commitments.[950]

638. I agree with my colleagues on the Division that the decisions of WTO Members regarding how to schedule their export subsidy commitments have limited value for purposes of an interpretation of Article 10. However, it seems anomalous that WTO Members with export credit guarantee programs would not have sought to preserve some flexibility to provide subsidies through such programs, which flexibility would have been available to them had such programs been included under Article 9 of the *Agreement on Agriculture*. My colleagues' reading of Article 10 perceives that WTO Members intended to impose upon themselves the more onerous obligation of immediately subjecting export credit guarantees, export credits and insurance programs to the export subsidy disciplines of the *Agreement on Agriculture* rather than the less demanding obligation of working

[948]Panel Report, para. 7.938.

[949]United States' appellant's submission, para. 384.

[950]Brazil's response to questioning at the oral hearing.

toward the development of such disciplines. We are bound to rely upon what we have before us in the treaty provisions, and I find the same text and context leads me in the opposite direction. Namely, that the absence of reference in Article 9 to export credit guarantees, export credits and insurance programs suggests that it was believed that such measures would not be subject to any disciplines until such time as disciplines were internationally agreed upon pursuant to Article 10.2.

639. In conclusion, for these reasons and particularly my reading of the text, it is my view that, pursuant to Article 10.2, export credit guarantees, export credits and insurance programs are not currently subject to export subsidy disciplines under the *Agreement on Agriculture*, including the disciplines found in Article 10.1. In the light of Article 21.1 of the *Agreement on Agriculture* and the introductory language to Article 3.1 of the *SCM Agreement*, I am also of the view that export credit guarantees, export credits and insurance programs provided in connection with agricultural goods are not subject to the prohibition in Article 3.1(a) of the *SCM Agreement*.

640. I recognize that this interpretation of Article 10.2 perceives a significant gap in the *Agreement on Agriculture* with respect to export credit guarantees, export credits and insurance programs that apply to agricultural products. This underscores the importance of working "toward the development of international disciplines" as envisioned by Article 10.2.

641. I also recognize that this interpretation of Article 10.2 has consequential results for some of the other claims on appeal brought by both the United States and Brazil in connection with the United States' export credit guarantee programs. As to the other Sections of this Report dealing with export credit guarantees[951], I agree that the legal interpretation and analyses contained therein follow logically from the view of my colleagues on the Division with respect to Article 10.2, as set forth in paragraphs 605 through 630 of this Report.[952]

D. *Export Credit Guarantees – Burden of Proof*

642. The United States submits that the Panel erred in three different ways in respect of the application of the burden of proof in assessing the United States' export credit guarantee programs under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*. First, the United States asserts that the Panel erred by applying the special rules on the burden of proof provided

[951]I am referring to Sections D. *Export Credit Guarantees – Burden of Proof*, E. *Export Credit Guarantees – Necessary Findings of Fact*, F. *Export Credit Guarantees – Circumvention*, G. *Export Credit Guarantees – Articles 1.1 and 3.1(a) of the SCM Agreement* of this Report.

[952]The relevant findings and conclusions for purposes of the recommendations and rulings to be adopted by the DSB in this dispute, pursuant to Article 17.14 of the DSU, are those set out in paragraph 763(e) and (f) of this Report.

in Article 10.3 of the *Agreement on Agriculture* in its examination of Brazil's claim under the *SCM Agreement*. The United States emphasizes that "the burden of proof articulated in ... Article 10.3 has no application to the *SCM Agreement*".[953] Secondly, the United States argues that the Panel erred by applying the special rules on burden of proof in Article 10.3 of the *Agreement on Agriculture* in examining whether the United States circumvented its export subsidy commitments in respect of upland cotton and certain other *unscheduled* agricultural products.[954] According to the United States, Article 10.3 does not apply at all in respect of export subsidies to an agricultural good for which the respondent has no reduction commitments.[955] Finally, the United States refers to three specific instances in which the Panel allegedly applied the wrong burden of proof.[956]

643. Brazil responds by highlighting the Panel's finding that, whichever party bore the burden of proof, Brazil had demonstrated that the export credit guarantee programs constitute export subsidies under the terms of item (j) of the Illustrative List of Export Subsidies.[957]

644. Before examining the specific points raised by the United States on appeal relating to the Panel's application of the burden of proof, we recall the general rule that "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence".[958] Article 10.3 of the *Agreement on Agriculture*, however, "provides a special rule for proof of export subsidies that applies in certain disputes under Articles 3, 8, 9 and 10 of the *Agreement on Agriculture*".[959] The text of Article 10.3 reads:

> Any Member which claims that any quantity exported in excess of a reduction commitment level is not subsidized must establish that no export subsidy, whether listed in Article 9 or not, has been granted in respect of the quantity of exports in question.

This provision "cleaves the complaining Member's claim" into two parts: a quantitative aspect, and an export subsidization aspect, "allocating to different parties the burden of proof with respect to the two parts".[960]

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[953]United States' appellant's submission, para. 400. (emphasis omitted)

[954]*Ibid*., para. 403.

[955]*Ibid*., para. 404.

[956]*Ibid*., paras. 405-408.

[957]Brazil's appellee's submission, paras. 95 and 1015 (referring to Panel Report, para. 7.793 and footnote 948 thereto and para. 7.867).

[958]Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, DSR 1997:1, 323 at 335.

[959]Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 69.

[960]*Ibid*., para. 71.

645. As the Appellate Body has explained in a previous dispute, the burden of proof under Article 10.3 operates in the following manner:

> ... where 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.[961] (original emphasis)

Pursuant to Article 10.3 "the complaining Member ... is relieved of its burden, under the usual rules, to establish a *prima facie* case of export subsidization, provided that [it] has established the quantitative part of [its] claim".[962]

646. Having briefly set out the applicable rules on the burden of proof, we now turn to the specific points raised by the United States in this appeal. First, the United States alleges that the Panel erred by applying the "special rule" on the burden of proof set out in Article 10.3 of the *Agreement on Agriculture* to its examination of the export credit guarantees under the *SCM Agreement*, where such a rule "has *no* application at all".[963] To support its contention that the Panel applied Article 10.3 in the context of examining Brazil's claim under the *SCM Agreement*, the United States points to the following statement by the Panel:

> Moreover, recalling the burden of proof articulated in Article 10.3 of the *Agreement on Agriculture*, the United States has not established that it does not provide these export credit guarantee programmes at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes.[964]

647. We agree with the United States that Article 10.3 of the *Agreement on Agriculture* does not apply to claims brought under the *SCM Agreement*. However, the Panel did not make the error attributed to it by the United States. The Panel made the statement relied on by the United States in the context of its assessment of the United States' export credit guarantee program under the *Agreement on Agriculture*. Although the Panel made use of the criteria set out in item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement* (providing these programs at premium rates inadequate to cover long-term operating costs and losses) it did so as contextual

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

[962]*Ibid*., para. 75.

[963]United States' appellant's submission, para. 399. (emphasis added)

[964]Panel Report, para. 7.868.

guidance for its analysis under the *Agreement on Agriculture*, and both the United States and Brazil appear to have agreed with the appropriateness of this approach.[965] Thus, the Panel's reference to Article 10.3 did not relate to its assessment of the United States' export credit guarantee programs under the *SCM Agreement*.

648. Moreover, we note that in the immediately preceding paragraph, which the United States fails to mention, the Panel stated:

> We have conducted a detailed examination of the relevant evidence and argumentation submitted by the parties. On the basis of the totality of the record evidence, including approaches regularly relied upon by the United States government itself, we find that Brazil has established that the United States CCC provides the GSM 102, GSM 103 and SCGP export credit guarantee programmes "at premium rates which are inadequate to cover the 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*. Our view is based on a careful consideration of the evidence, taken as a whole, and no one element, in isolation, is determinative.[966] (underlining added)

It is clear from this paragraph that the Panel placed the burden of proof on Brazil and determined that Brazil met its burden of proving that the United States' export credit guarantees are provided at premium rates that are inadequate to cover long-term operating costs and losses. The Panel's statement on which the United States relies simply makes the point that the United States did not rebut the case that was made out by Brazil. The reference to Article 10.3 does not, by itself, change the fact that the Panel ultimately placed the burden of proof on Brazil.

649. After making its findings under the *Agreement on Agriculture*, the Panel examined the United States' export credit guarantees under the *SCM Agreement*. There is no reference to Article 10.3 of the *Agreement on Agriculture* in this discussion.[967] We are aware that the Panel applied the "'contextual' analysis" that it had conducted "under item (j) of the Illustrative List of Export Subsidies ... for the purposes of determining whether or not an export subsidy exists within the meaning of Article 10.1 of the *Agreement on Agriculture*" to its examination of "Brazil's claims under item (j)/Article 3.1(a) of the *SCM Agreement*".[968] In doing so, it would have been useful for the Panel to have clarified that the special rules on the burden of proof in Article 10.3 of the *Agreement on Agriculture*, to which it had referred previously in its "contextual" analysis of item (j) under the

[965]Panel Report, para. 7.803.

[966]*Ibid*., para. 7.867.

[967]See *ibid*., paras. 7.946-7.948.

[968]*Ibid*., para. 7.946 (footnote omitted)

Agreement on Agriculture, were not applicable for purposes of its analysis under the *SCM Agreement*.[969] Because we have found that the Panel did not ultimately relieve Brazil of its burden of proof in determining that the United States' export credit guarantee programs constituted export subsides under the *Agreement on Agriculture*, we do not believe that the Panel's failure to clarify that Article 10.3 of the *Agreement on Agriculture* did not apply to its examination of the same measures under the *SCM Agreement* constitutes reversible legal error.

650. Secondly, the United States submits that the Panel erred by applying the special rules on the burden of proof in Article 10.3 of the *Agreement on Agriculture* in examining whether the United States circumvented its export subsidy commitments in respect of upland cotton and certain other *unscheduled* agricultural products.[970] According to the United States, Article 10.3 applies only to agricultural products for which a WTO Member has assumed export subsidy reduction commitments in its schedule, pursuant to Article 9.1 of the *Agreement on Agriculture*.[971]

651. The Panel's view was that Article 10.3 does apply to unscheduled products:

> With respect to upland cotton and other unscheduled products, the Panel considers that the United States' reduction commitment level, for the purposes of Article 10.3, is zero for each unscheduled product. By virtue of the second clause of Article 3.3, that is the level to which a Member must reduce any Article 9.1 export subsidies that were not in fact specifically made subject to "scheduled" reduction commitments. Accordingly, in the case of upland cotton and other unscheduled products the same sequence is to be followed, with Brazil as the complaining party first having to prove that United States' exports of unscheduled products exceed that "zero" level.[972]

652. We disagree with the Panel's view that Article 10.3 applies to *unscheduled* products. Under the Panel's approach, the only thing a complainant would have to do to meet its burden of proof when bringing a claim against an *unscheduled* product is to demonstrate that the respondent has exported that product. Once that has been established, the respondent would have to demonstrate that it has not provided an export subsidy.[973] This seems to us an extreme result. In effect, it would mean that any

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[969]Panel Report, paras. 7.946-7.948.

[970]United States' appellant's submission, para. 403 (referring to Panel Report, para. 7.875).

[971]*Ibid*., para. 404.

[972]Panel Report, para. 7.793. (footnote omitted)

[973]As the Appellate Body explained, when the special rule on burden of proof in Article 10.3 applies, then "the complaining party is not required to lead in the presentation of evidence to panels, and it might well succeed in its claim even if it presents no evidence—should the responding Member fail to meet its legal burden to establish that no export subsidy has been granted with respect to the excess quantity". (Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and the US II)*, para. 75)

export of an unscheduled product is *presumed* to be subsidized. In our view, the presumption of subsidization when exported quantities exceed the reduction commitments makes sense in respect of a *scheduled* product because, by including it in its schedule, a WTO Member is reserving for itself the right to apply export subsidies to that product, within the limits in its schedule. In the case of *unscheduled* products, however, such a presumption appears inappropriate. Export subsidies for both unscheduled agricultural products and industrial products are completely prohibited under the *Agreement on Agriculture* and under the *SCM Agreement*, respectively. The Panel's interpretation implies that the burden of proof with regard to the same issue would apply differently, however, under each Agreement: it would be on the respondent under the *Agreement on Agriculture*, while it would be on the complainant under the *SCM Agreement*.

653. Although we disagree with the Panel's interpretation of Article 10.3 of the *Agreement on Agriculture* in respect of unscheduled products, we do not believe that the Panel's ultimate finding is erroneous. This is because the Panel did not rely on its interpretation of Article 10.3. In a footnote to the paragraph quoted above, the Panel stated:

> In any event, even if there is *no* reduction commitment level in respect of unscheduled products, affecting the rules of burden of proof that apply to Brazil's claims pertaining to unscheduled products so as to remove the burden entirely from Brazil or to place the entire burden on Brazil to prove not only that exports have been made, but even that export subsidies have been provided in respect of such exported products, this would not materially affect our analysis, as we are of the view that Brazil has discharged this burden as well, and the United States has failed to discharge its burden in this respect.[974] (original emphasis)

Thus the Panel placed the burden on Brazil to establish that the United States provided export subsidies, through export credit guarantees, to upland cotton and other unscheduled products. This is confirmed in the following paragraph:

[974]Panel Report, footnote 948 to para. 7.793.

> Recalling our discussion of the applicable burden of proof, we find that Brazil has shown that export credit guarantees – constituting export subsidies within the meaning of Article 10.1 (and therefore, necessarily, not listed in Article 9.1) – have been provided under the programmes in question during the period we have examined in respect of exports of upland cotton and certain other unscheduled agricultural products. The United States has not shown that no export subsidy has been granted in respect of such products. We therefore conclude that, in respect of upland cotton and other such *unscheduled* agricultural products on record, the United States applies export credit guarantees constituting export subsidies in a manner which results in circumvention of its export subsidy commitments inconsistently with Article 10.1 of the *Agreement on Agriculture*.[975] (footnote omitted; original emphasis)

654. It is clear from the first sentence in this paragraph that the Panel imposed on Brazil the burden of demonstrating that export subsidies have been granted to upland cotton and other unscheduled agricultural products supported under the programs. The second sentence, on which the United States relies in its submission, simply indicates that the United States did not rebut the evidence and arguments put forward by Brazil; it does not indicate that the Panel erroneously placed the burden of proof on the United States.

655. Finally, the United States refers to three specific instances in which the Panel allegedly erred by improperly placing the burden of proof on the United States. The first example cited by the United States is the Panel's statement that the premiums charged by the CCC for the export credit guarantees "are not geared toward *ensuring* adequacy to cover long-term operating costs and losses for the purposes of item (j)".[976] The United States assert that this is "a much higher threshold" than that provided in text of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.[977] Next, the United States takes issue with the Panel's statements that "[i]n terms of the structure, design, and operation of the export credit guarantee programmes [we] believe that the programmes are not designed to avoid a net cost to government"[978] and that the Panel was entitled to inquire whether revenue "would be likely to cover the total of all operating costs and losses under the programme".[979] According to the United States, "to 'avoid a net cost' prospectively is simply not the requirement of item (j)" and the "'likelihood' standard of performance" imposed by the Panel is

[975]Panel Report, para. 7.875.

[976]United States' appellant's submission, para. 406 (referring to Panel Report, para. 7.859). (emphasis added by the United States)

[977]*Ibid*., para. 406.

[978]*Ibid*., para. 407 (referring to Panel Report, para. 7.857).

[979]*Ibid*., para. 407 (referring to Panel Report, paras. 7.805 and 7.835).

"higher than that found in item (j)".[980] The third example cited by the United States is the Panel's statement that "[w]e have not been persuaded that cohort re-estimates over time, will *necessarily* not give rise to a net cost to the United States government."[981] The United States contends that "[u]nder the applicable burden of proof, however, it is not for the United States to make such incontrovertible demonstrations to the Panel, and the Panel erred in requiring it".[982]

656. In our view, none of these statements demonstrates that the Panel improperly applied the rules on burden of proof. The United States is selecting statements made by the Panel within its broader analysis of how the United States' export credit guarantee programs operate, reading them in isolation, and disregarding the context in which they were made. As indicated earlier[983], it is clear that the Panel imposed on Brazil the overall burden of proving that the premiums charged under the United States' export credit guarantee programs are inadequate to cover long-term operating costs and losses. This approach is consistent with the usual rules on the allocation of the burden of proof whereby the complaining party is responsible for proving its claim.[984] As for the Panel's rejection of the United States' submissions relating to the cohort re-estimates[985], we agree with Brazil that "[a]s the party asserting that the trends existed, the United States bore the burden of proving that they existed".[986] Thus, the Panel cannot be said to have improperly reversed the burden of proof. Accordingly, the isolated statements referred to by the United States do not demonstrate an error by the Panel in the application of the burden of proof.

657. We, therefore, *reject* the United States' allegations that the Panel improperly applied the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the *SCM Agreement* and are consequently inconsistent with Article 3.2 of that Agreement.

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[980]United States' appellant's submission, para. 407.

[981]*Ibid*., para. 408 (quoting Panel Report, para. 7.853). (emphasis added by the United States) The United States also mentions the following statement by the Panel: "[w]hile there may be a possibility (based on the experience of certain of other cohorts) that this figure may diminish over the lifetime of the cohort concerned, there is no assurance that this figure will *necessarily* evolve towards, and conclude as, zero or a negative figure." (Panel Report, footnote 1028 to para. 7.853) (emphasis added by the United States)

[982]United States' appellant's submission, para. 408.

[983]See *supra*, para. 648 (quoting Panel Report, para. 7.867).

[984]We emphasize that the United States' argument on this specific point is limited to the Panel's application of the burden of proof. The United States has not argued that the Panel incorrectly *interpreted* item (j) as requiring that export credit guarantee programs be "geared toward ensuring adequacy to cover long-term operating costs and losses" or that such programs "'avoid a net cost' prospectively".

[985]Panel Report, para. 7.853; see *supra*, para. 655.

[986]Brazil's appellee's submission, para. 1027.

E. *Export Credit Guarantees – Necessary Findings of Fact*

658. We turn to the United States' claim that the Panel erred by failing to make factual findings that were allegedly necessary for the Panel's analysis of whether premiums are adequate to cover the long-term operating costs and losses of the United States' export credit guarantee programs under item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*.

659. In the United States' view, "the absence of a specific factual finding on the basis for and monetary extent to which the United States has allegedly not covered its long-term operating costs and losses for the CCC export credit guarantee programs, compels the reversal of the Panel's finding in respect of item (j)".[987] The United States explained that item (j) requires a determination whether premium rates are inadequate to cover long-term costs and losses and that this requires some determination as to what the operating costs and losses are. The United States further argued that the Panel's failure consisted in not making any determination about how to treat the rescheduled debt within operating costs and losses.[988]

660. Brazil responds that the United States has not made a proper claim under Article 11 of the DSU and is thus precluded from challenging the Panel's appreciation of the facts.[989] In any event, Brazil submits that neither item (j), nor Articles 3.1(a) and 3.2 of the *SCM Agreement*, nor Articles 10.1 and 8 of the *Agreement on Agriculture*, required the Panel to make specific factual findings on the "monetary extent to which" premium rates are inadequate to cover the long-term operating costs and losses of the United States' export credit guarantee programs. It was sufficient for the Panel to have found that, under any and all methodologies that it reviewed and accepted, premium rates are *inadequate* to cover the long-term operating costs and losses of the export credit guarantee programs.[990]

661. In addition, Brazil asserts that the Panel made sufficient factual findings "on the basis for"[991] its conclusion that premium rates are inadequate to cover the long-term operating costs and losses of the export credit guarantee programs. Specifically, the Panel assessed the performance of the export credit guarantee programs under the elements of item (j) in various ways. In its assessment of the *past performance* of the ECG programs during the period 1992-2002, the Panel used two accounting

[987]United States' appellant's submission, para. 419.

[988]United States' response to questioning at the oral hearing.

[989]Brazil's appellee's submission, para. 1065.

[990]*Ibid*., para. 99.

[991]*Ibid*., para. 100.

methodologies—*net present value accounting*, and *cash basis accounting*—to determine whether premium rates are inadequate to cover the long-term operating costs and losses of the programs.[992]

662. Before proceeding to the merits of the United States' claim, we examine first Brazil's allegation that the United States had to bring its claim, that the Panel did not make the necessary findings of fact, under Article 11 of the DSU. Article 11 of the DSU provides that a "panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case".[993] The Appellate Body stated in *Canada – Wheat Exports and Grain Imports* that "an appellant is free to determine how to characterize its claims on appeal"[994], but observed that "due process requires that the legal basis of the claim be sufficiently clear to allow the appellee to respond effectively."[995]

663. The United States has styled its claim as related to the interpretation and application of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*. According to the United States, the Panel could not have reached a legal conclusion under item (j) without having necessarily determined what were the long-term operating costs and losses of the United States' export credit guarantee programs, and more specifically, made a determination in respect of the treatment of rescheduled debt. We find no difficulty with the United States' approach. Its claim relates to the Panel's application of item (j) to the specific facts of the case. The United States is not asking us to review the Panel's factual findings, nor is it arguing that the Panel's assessment of the matter was not objective. Instead, the United States' claim relates to the application of the legal standard set out in item (j) of the Illustrative List of Export Subsidies to the specific facts of this case.[996] It is an issue of legal characterization.[997] Thus, we do not agree with Brazil's contention that the United States was under an obligation to bring its claim under Article 11 of the DSU. Consequently, our inquiry will be limited to the Panel's application of the law to the facts in this case.

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[992]Brazil's appellee's submission, para. 101.

[993]The Appellate Body has emphasized that "a claim, by an appellant, that a panel erred under Article 11 of the DSU, and a request for a finding to this effect, must be included in the Notice of Appeal, and clearly articulated and substantiated in an appellant's submission with specific arguments". (Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 60 to para. 71; see also Appellate Body Report, *Japan – Apples*, para. 127; Appellate Body Report, *US – Steel Safeguards*, para. 498; and Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177)

[994]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177.

[995]The Appellate Body, however, did not need to decide in that appeal whether to reject the appellant's claim on the basis that it was brought under the substantive provision at issue, rather than Article 11 of the DSU. (Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 177)

[996]Appellate Body Report, *Canada – Periodicals*, p. 22, DSR 1997:1, 449 at 468.

[997]Appellate Body Report, *EC – Hormones*, para. 132.

664. Turning to the merits of the United States' allegation, we note that item (j) of the Illustrative List of Export Subsidies, which is attached to the *SCM Agreement* as Annex I, 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.

665. The Panel provided the following explanation of the examination that is required under item (j) of the Illustrative List of Export Subsidies:

> ... item (j) calls for an examination of whether the premium rates of the export credit guarantee programme at issue are inadequate to cover the long-term operating costs and losses of the programmes. Beyond that, item (j) does not set forth, or require us to use, any one particular methodological approach nor accounting philosophy in conducting our examination. Nor are we required to quantify precisely the amount by which costs and losses exceeded premiums paid.[998]

We agree with the Panel's approach. The text of item (j) does not suggest that this provision requires a Panel to choose one particular basis for the calculation and then to make a precise quantification of the difference between premiums and long-term operating costs and losses on that basis. Indeed, at the oral hearing, the United States acknowledged that the text of item (j) does not, by its own terms, require precise quantification, but asserted that the Panel should have precisely quantified the long-term operating costs and losses "in this particular case".[999]

666. In our view, the focus of item (j) is on the inadequacy of the premiums.[1000] To us, this focus suggests 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, and not a finding of the precise difference between premiums and long-term operating costs and losses.[1001]

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[998]Panel Report, para. 7.804.

[999]United States' response to questioning at the oral hearing.

[1000]The Panel observed that there was no disagreement between the parties in this case about the meaning of the term "premiums" for purposes of item (j). According to the Panel, "[u]nder the GSM 102, GSM 103 and SCGP export credit guarantee programmes, such 'premiums' are the fees paid by the applicant exporter constituting the consideration for the payment guarantee provided by the CCC". (Panel Report, paras. 7.817-7.818)

[1001]"Inadequate" is defined as "Not adequate; insufficient". (*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1338)

667. Having said this, we recognize that item (j) sets out a test that is 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 and losses. Our review of the Panel record confirms that, in this case, the Panel conducted a financial analysis of the United States' export credit guarantee programs using three approaches. First, the Panel looked at the method used by the United States government, which "utilizes a 'net present value' approach to budget accounting for its export credit guarantee programmes".[1002] The Panel explained that "a positive net present value means that the United States government is extending a 'subsidy' to borrowers; a negative present value means that the programme generates a 'profit' (excluding administrative costs) to the United States government".[1003] Having explained the method used by the United States government, the Panel then observed that:

> The annual entries in the "guaranteed loan subsidy" line in the United States budget, 1992-2002 (plus 2003 and 2004 estimates) show us that, according to this formula, there has been a positive "guaranteed loan subsidy" every year. If administrative expenses are added thereto, the annual amount of cost to the United States government increases under this formula by approximately $39 million.[1004]

This shows that the Panel viewed the accounting data provided under this method used by the United States government as evidence that the premiums charged for the export credit guarantees are inadequate to cover long-term operating costs and losses.[1005]

668. Next, the Panel examined data submitted by Brazil based on a constructed "cost" formula.[1006] This formula compares the revenues and costs of the export credit guarantee programs.[1007] The revenue column includes premiums collected, recovered principal and interest, and interest

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[1002]Panel Report, para. 7.842. According to the Panel, the United States government adopted the "net present value" approach starting with fiscal year 1992, pursuant to the Federal Credit Reform Act of 1990 (the "FCR Act of 1990"). A specific formula is provided under the FCR Act of 1990 for the "net present value" calculation. (*Ibid*., footnotes 996 and 997 to para. 7.842)

[1003]*Ibid*., para. 7.842.

[1004]*Ibid*., para. 7.842. (footnotes omitted)

[1005]The Panel recognized that the "net present value" approach relies on "*initial estimates* of the long-term costs to the United States government". The Panel, however, stated that these were not "random guesses" but rather were based on "[a]ctual historical experience". Furthermore, the Panel reasoned that "[t]he consistently positive numbers in the United States budget guaranteed loan subsidy line indicate to us that the United States government believes, based upon its own assessment, that it may not, even over the long term, be able to operate the export credit guarantee programmes without some net cost to government". (Panel Report, para. 7.843) (original emphasis)

[1006]*Ibid*., para. 7.844.

[1007]In its appellee's submission, Brazil describes this method as following a "cash basis accounting" approach, in which the programs' receipts are netted against disbursements on a fiscal year basis. The data on receipts and disbursements "reflect actual cash flows". (Brazil's appellee's submission, para. 985)

revenue.[1008] The costs column includes administrative expenses, default claims, and interest expense.[1009] The data used in this formula are "taken from the 'prior year' column of the United States government budget".[1010] The formula shows that there was a difference of a little more than US$ 1 billion between premiums and long-term costs and losses for the period 1993-2002.[1011] Accordingly, the data submitted by Brazil showed that the export credit guarantee programs of the United States did not charge premiums that were adequate to cover long-term operating costs and losses.

669. After examining the data submitted by Brazil, the Panel then referred to "fiscal year/cash basis" evidence submitted by the United States. According to the United States, these data reflect "actual performance of the programmes, unlike the data in the US budget to which Brazil alludes ... which ... are based on estimates and re-estimates required under the Federal Credit Reform Act of 1990".[1012] The data submitted by the United States showed that, during the same period, total revenues exceeded total expenses by approximately US$ 630 million.[1013]

670. The Panel proceeded to compare the two sets of data.[1014] In contrasting the results under the two methods, the Panel came to the conclusion that the difference between the two was mainly due to treatment of rescheduled debt. This rescheduled debt amounted to approximately US$ 1.6 billion.[1015] The United States asserts that "the Panel did not make any determination about how to treat rescheduled debt".[1016] We disagree. In fact, the Panel rejected the approach suggested by the United States for the treatment of rescheduled debt. Under the United States' approach, rescheduled debt is

[1008]Brazil states that this is a "conservative" formula that credits the programs with interest revenue, even though item (j) calls for only an assessment of revenue from premiums. (Brazil's appellee's submission, para. 985)

[1009]See Table 3 in Panel Report, para. 7.845.

[1010]Panel Report, para. 7.846.

[1011]*Ibid*., paras. 7.845-7.846.

[1012]United States' response to Question 264 Posed by the Panel (Panel Report, p. I-673, para. 21). The data were presented in a spreadsheet and submitted to the Panel as Exhibit US-128. See also Panel Report, para. 7.846.

[1013]Panel Report, para. 7.846.

[1014]The Panel acknowledged certain limitations inherent in the comparison, including the fact that some of the data "may not directly correlate", that "United States budget data may not always reflect 'actual performance'" and the need to be especially "sensitive" to "the particular time periods covered by the data". Nevertheless, the Panel concluded that "none of these considerations undermine[s] the comparison made". (Panel Report, footnote 1006 to para. 7.846)

[1015]*Ibid*., para. 7.846.

[1016]United States' response to questioning at the oral hearing.

not treated as an outstanding claim, but rather as a new direct loan.[1017] In the Panel's view, however, this approach "understates the net cost to the United States government associated with the export credit guarantee programmes at issue".[1018] Thus, contrary to the United States' submission, the Panel did make a determination in respect of the treatment of rescheduled debt.[1019] Furthermore, we read this as indicating that the Panel considered that the data submitted by the United States, once rescheduled debt was properly taken into account, also showed that premiums did not offset long-term operating costs and losses.

671. The Panel went further in its analysis and considered the evidence submitted by the United States concerning re-estimates. According to the Panel, this evidence showed a subsidy of approximately US$ 230 million, without including administrative expenses of approximately US$ 39 million.[1020] The Panel was not persuaded by the United States' submission that "over time" the re-estimates would necessarily do away with the subsidy shown by the current figures.[1021] In addition, we note that the Panel looked not only at the past financial performance of the United States' export credit guarantee programs, but also at the structure, design, and operation of the programs. The Panel concluded that the programs "are not designed to avoid a net cost to government"[1022] and "the premiums are not geared toward ensuring adequacy to cover long-term operating costs and losses for the purposes of item (j)".[1023]

672. In the light of the above, it is clear that the Panel undertook a sufficiently detailed examination of the financial performance of the United States' export credit guarantee programs. Its analysis showed that none of the methods proposed by the parties indicated that the premiums charged under the United States' export credit guarantee programs are adequate to cover long-term costs and

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[1017]Panel Report, para. 7.851. In its appellee's submission, Brazil states that it "accepted that repayments made pursuant to re-scheduled debt agreements should be included as receipts under the [export credit guarantee] programs ... [but] disagreed that the full amount of re-scheduled debt should be treated as received the moment the re-scheduling agreement is completed". Instead, according to Brazil, "the default claim should continue to be treated as a loss unless the United States receives payment from the debtor, and only then should be credited as a receipt in the amount actually received from the debtor". (Brazil's appellee's submission, para. 988)

[1018]Panel Report, para. 7.851. The Panel was struck by the fact that "no amounts have actually been determined uncollectible, written off or forgiven" after 1992. (*Ibid*., para. 7.848)

[1019]We recall that the United States has not challenged the Panel's assessment of the matter, including the assessment of the facts of the case, pursuant to Article 11 of the DSU. Thus, the United States has not asked us to review the evidentiary basis on which the Panel relied to reject the treatment of rescheduled debt by the United States.

[1020]Panel Report, para. 7.852. The Panel noted that figures submitted by Brazil showed a subsidy of US$ 211 million, without administrative expenses.

[1021]*Ibid*., para. 7.853.

[1022]*Ibid*., para. 7.857.

[1023]*Ibid*., para. 7.859.

losses. In these circumstances, we agree with the Panel that, in this particular case, it was not necessary to choose a particular method nor determine the precise amount by which long-term operating costs and losses exceeded premiums. Although it did not provide a final figure for the long-term operating costs and losses of the United States' export credit guarantee programs, as the United States suggests it should have, the Panel found that the various methods put forward by the parties led to the same conclusion, namely, that the premiums for the United States' export credit guarantee programs are inadequate to cover the programs' long-term operating costs and losses. The Panel's decision not to choose between methods or make a finding on the precise difference between premiums and long-term costs and losses does not, in our view, invalidate the Panel's ultimate findings under Articles 3.1(a) and 3.2 of the *SCM Agreement*.

673. For these reasons, we reject the United States' claim that the Panel failed to make the "necessary" findings of fact.

674. Consequently, we *uphold* the Panel's finding in paragraph 7.869 of the Panel Report 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*". In addition, we *uphold* the Panel's findings, in paragraphs 7.947 and 7.948 of the Panel Report, 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.

F. *Export Credit Guarantees – Circumvention*

1. Introduction

675. We turn to the issues raised by Brazil in relation to the Panel's findings under Article 10.1 of the *Agreement on Agriculture*.

676. The Panel divided its analysis of Brazil's claims under Article 10.1 into different categories, distinguishing between scheduled and unscheduled products, and supported and unsupported products (and rice as a result of its finding in respect of this product). "Scheduled products" are those for which a WTO Member has assumed a commitment to limit the amount of export subsidies in terms of budgetary outlays and quantities exported pursuant to Articles 3, 8, and 9 of the *Agreement on*

Agriculture.[1024] The Panel used the term "supported products" to refer to products for which there was evidence in the record showing that they were not only eligible under the programs, but that export credit guarantees were in fact received in connection with exports of those products.[1025]

677. The Panel first examined whether the United States' export credit guarantees to exports of upland cotton and other unscheduled agricultural products supported under the export credit guarantee programs are applied in a manner that "results in" circumvention for purposes of Article 10.1 of the *Agreement on Agriculture*. In other words, the Panel examined whether there is actual circumvention with respect to exports of these products. The Panel found that, "in respect of upland cotton and other such *unscheduled* agricultural products on record, the United States applies export credit guarantees constituting export subsidies in a manner which results in circumvention of its export subsidy commitments inconsistently with Article 10.1 of the *Agreement on Agriculture*".[1026] This finding has not been appealed.

678. The Panel next examined whether the United States' export credit guarantees to scheduled products supported under the export credit guarantee programs are applied in a manner that "results in" circumvention for purposes of Article 10.1 of the *Agreement on Agriculture*. The Panel found that "the United States has applied export credit guarantees constituting export subsidies within the meaning of Article 10.1 – and therefore, necessarily, not listed in Article 9.1 – in a manner which results in circumvention of export subsidy commitments in respect of" rice.[1027] In addition, the Panel found, that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[1028] Brazil appeals the latter finding by the Panel. According to Brazil, the Panel erred in finding that the United States' export credit guarantee programs are not applied in a manner that "results in" circumvention of the United States'

[1024]The Panel noted that "[t]he United States has scheduled export subsidy reduction commitments in respect of the following thirteen commodities: wheat, coarse grains, rice, vegetable oils, butter and butter oil, skim milk powder, cheese, other milk products, bovine meat, pigmeat, poultry meat, live dairy cattle, eggs". (Panel Report, footnote 1057 to para. 7.876 (referring to Schedule XX of the United States of America, Part IV, Section II, entitled "Export Subsidies: Budgetary Outlays and Quantitative Reduction Commitments", reproduced in Exhibit BRA-83 and Exhibit US-13))

[1025]Panel Report, para. 6.32; see also footnote 1056 to para. 7.875. At the oral hearing, the participants confirmed that this is also their understanding of what the Panel meant by the distinction that it drew between "supported" and "unsupported" products. In respect of "supported" products, the Panel stated that "[t]o the extent that it identifies products within the product coverage of the *Agreement on Agriculture* that are within our terms of reference, we consider Exhibit BRA-73 to be the relevant record evidence of such products for the purposes of this dispute". (Panel Report, footnote 1056 to para. 7.875; see also *ibid*., footnote 1575 to para. 8.1(d)(i))

[1026]*Ibid*., para. 7.875.

[1027]*Ibid*., para. 7.881.

[1028]*Ibid*.

export subsidy commitments with respect to pig meat and poultry meat in 2001.[1029] Brazil further submits that "[i]n making this finding, the Panel erred in the interpretation and application of Article 10.1 of the *Agreement on Agriculture*, and also of Article 11 of the DSU".[1030]

679. The Panel also examined whether the United States' export credit guarantees to scheduled products other than rice and unscheduled products not supported under the United States' export credit guarantee programs are applied in a manner that "threatens to lead to" circumvention of the United States' export subsidy commitments for purposes of Article 10.1 of the *Agreement on Agriculture*. The Panel "decline[d] to find that the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States' export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*."[1031]

680. Brazil makes two claims on appeal in relation to the Panel's examination of threat of circumvention. First, Brazil submits that the Panel erred in the interpretation and application of Article 10.1 in examining Brazil's claims that the United States' export credit guarantee programs "threaten[] to lead to" circumvention of the United States' export subsidy commitments.[1032] If the Appellate Body were to agree with Brazil and modify the Panel's interpretation, Brazil requests that the Appellate Body complete the analysis and determine that, contrary to Article 10.1 of the *Agreement on Agriculture*, export credit guarantees have been applied in a manner that threatens to lead to circumvention of the United States' export subsidy commitments for all agricultural products eligible to receive these subsidies.[1033] Secondly, Brazil argues that the Panel erred "by confining its examination of threatened circumvention to scheduled products other than rice and unsupported unscheduled products", despite the fact that Brazil's claim "extended to all scheduled and unscheduled agricultural products eligible to receive [export credit guarantees] export subsidies".[1034] We examine Brazil's allegations, in turn, below.

[1029]Brazil's other appellant's submission, para. 65. Brazil initially included vegetable oil in this claim. At the oral hearing, however, Brazil indicated that it was no longer pursuing this claim in respect of vegetable oil. See *infra*, para. 683.

[1030]*Ibid*., para. 76.

[1031]Panel Report, para. 7.896.

[1032]Brazil's other appellant's submission, para. 63.

[1033]*Ibid*., para. 64.

[1034]*Ibid*., para. 75.

2. Actual Circumvention

681. We begin with Brazil's claim that the Panel erred by failing to find that the United States' export credit guarantees are applied in a manner that led to *actual* circumvention of the United States' export subsidy commitments with respect to pig meat and poultry meat in 2001.[1035]

682. The Panel found:

> We note that the United States has not specifically discharged its burden of establishing that it did not grant WTO-inconsistent export subsidies, for the excess quantities of rice exported. Therefore, we find that the United States has applied export credit guarantees constituting export subsidies within the meaning of Article 10.1 – and therefore, necessarily, not listed in Article 9.1 – in a manner which results in circumvention of export subsidy commitments in respect of this particular scheduled commodity. It has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities.[1036]

683. In its appellant's submission, Brazil states that "according to uncontested evidence of record, supplied by the United States, actual circumvention also occurred for pig meat and poultry meat in 2001, and for vegetable oils in 2002".[1037] Brazil adds that the Panel "failed to properly apply a proper interpretation of Article 10.1 to the admitted facts".[1038] "By failing to do so", Brazil submits that the Panel "erred in the application of Article 10.1 to uncontested facts", and also "failed to make an objective assessment of the matter, including of admitted and uncontested facts supplied by the United States, as required by Article 11 of the DSU".[1039] In its statement at the oral hearing, Brazil acknowledged that data submitted by the United States indicated that the United States did not exceed its reduction commitment levels for vegetable oil in 2001-2002. We understand from Brazil's statement that it no longer wished to pursue this claim in respect of vegetable oil.

684. The United States responds that Brazil has not made a proper claim under Article 11 of the DSU. According to the United States, Brazil "is contesting findings of the Panel on matters of

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[1035]The United States has scheduled export subsidy reduction commitments for pig meat and poultry meat. Consequently, the special rule on the burden of proof established in Article 10.3 applies to any quantities exported that exceed the United States' reduction commitment levels. In respect of these quantities, the United States would be "treated as if it has granted WTO-*inconsistent* export subsidies ... unless the [United States] presents adequate evidence to 'establish' the contrary". (Appellate Body Report, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 74. (original emphasis))

[1036]Panel Report, para. 7.881.

[1037]Brazil's other appellant's submission, para. 204. (footnote omitted)

[1038]*Ibid*., para. 210.

[1039]*Ibid*., para. 211. (footnote omitted)

disputed fact".[1040] Because "Brazil does *not* appeal the Panel's factual findings that the facts did not demonstrate that subsidized exports exceeded U.S. quantitative reduction commitments for poultry, pig meat, and vegetable oils", the United States submits that Brazil's appeal is improper as it does not "stand by itself" and is not "substantiated with respect to the challenged findings".[1041]

685. In addition, the United States points out that Brazil's allegation of actual circumvention related to the period July 2001 through June 2002.[1042] In contrast, quantitative data on exports under the United States' export credit guarantee program are maintained on a fiscal year basis, which extends from 1 October to 30 September of the following year.[1043] In any event, even if this difference between periods can be overcome, the United States argues that "the actual data also support[ ] the Panel's finding that Brazil had not demonstrated actual circumvention for these products".[1044]

686. We understand Brazil to argue that the Panel erred both in the application of Article 10.1 of the *Agreement on Agriculture* and in its assessment of the matter pursuant to Article 11 of the DSU.[1045] As we explained earlier, the application of a legal rule to the specific facts of a case is an issue of legal characterization.[1046] In this case, we understand that Brazil's claim under Article 11 of the DSU is additional to its claim of legal error in respect of Article 10.1. We thus turn first to Brazil's claim that the Panel erred in it application of Article 10.1 of the *Agreement on Agriculture* to the facts before it.

687. It will be recalled that Article 10.1 provides:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

[1040]United States' appellee's submission, para. 50 (footnote omitted)

[1041]*Ibid*., para. 50 (referring to Appellate Body Report, *US – Steel Safeguards*, para. 498). (original emphasis; footnote omitted)

[1042]*Ibid*., para. 56 (referring to Panel Report, para. 7.878 and Brazil's first written submission to the Panel, para. 265 and Figure 18). We note that the period from July of one year to June of the next year is the period used in the United States' schedule of concessions for its quantitative export subsidy commitments. See Schedule XX of the United States submitted by Brazil to the Panel as Exhibit BRA-83.

[1043]The fiscal year of the United States federal government is designated according to the calendar year in which it ends. Therefore, fiscal year 2001 ran from 1 October 2000 to 30 September 2001.

[1044]United States' appellee's submission, para. 56.

[1045]Brazil's response to questioning at the oral hearing; Brazil's other appellant's submission, para. 211.

[1046]Appellate Body Report, *EC – Hormones*, para. 132.

688. Brazil asserts that "the Panel's legal analysis of the circumstances in which actual circumvention occurs for scheduled products was correct" and draws our attention to the Panel's statement that "where the United States exports an agricultural product in quantities that exceed its quantity commitment level, it will be treated for the purposes of Article 10.1 as if it has granted WTO-inconsistent export subsidies, for the excess quantities, unless it presents adequate evidence to 'establish' the contrary".[1047] Brazil adds that although the Panel correctly applied this interpretation to rice, it failed to do so in respect of pig meat and poultry meat.[1048]

689. We observe that after finding that the United States had circumvented its commitments for rice, the Panel went on to reject Brazil's claim in respect of the other scheduled products supported under the programs without providing an explanation of the basis for its conclusion. Looking at the Panel's analysis, we note that, in paragraph 7.878, the Panel recognized that Brazil's claim of actual circumvention extended to thirteen agricultural products, including pig meat and poultry meat. In the next paragraph, the Panel refers to the United States' submission that it was in compliance with respect to nine of the products mentioned by Brazil", and that, in fiscal year 2002 it would also be true for poultry meat".[1049] Pig meat is not mentioned at all. As for poultry meat, the use of the conditional "would also be true" suggests some question about compliance with respect to that product as well, as the condition is not identified. Oddly, however, these issues are not taken up by the Panel, which does not examine any further whether there was actual circumvention for these products.

690. Instead, from that point on, the Panel focused exclusively on rice, in respect of which the Panel found that the United States failed to establish "that it did not grant WTO-inconsistent export subsidies, for the excess quantities of rice exported."[1050] It would appear that the Panel satisfied itself with what it considered to be an admission by the United States in respect of rice, and declined to examine further Brazil's claim in respect of the other products. In concluding, the Panel merely stated that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[1051] There is no further explanation of the reasons leading to this conclusion.

691. The Panel may have decided to satisfy itself with the United States' admission regarding rice because it allowed it to avoid having to resolve the problem posed by the different time periods used, on the one hand, to track exports under the United States' export credit guarantee programs and, on

[1047]Brazil's other appellant's submission, para. 205 (quoting Panel Report, para. 7.877).

[1048]*Ibid*., paras. 206-207.

[1049]Panel Report, para. 7.879.

[1050]*Ibid*., para. 7.881.

[1051]*Ibid*.

the other, to determine the export subsidy reduction commitments under the United States' schedule. Exports under the United States' export credit guarantee programs are tracked on a fiscal year basis, extending from 1 October to 30 September of the following year. Meanwhile, the United States' export reduction commitments are based on a year that extends from 1 July to 30 June of the following year. These periods overlap, albeit only in part.

692. We find nothing wrong in the Panel having relied on an admission by the United States relating to rice to conclude that the United States had failed to rebut Brazil's initial allegation of circumvention.[1052] This did not excuse the Panel, however, from specifically analyzing Brazil's claim in respect of the other products. Consequently, we find no basis to support the Panel's finding that "[i]t has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities".[1053]

693. We must determine next whether there are sufficient uncontested facts in the record to permit us to complete the analysis with respect to the other commodities.[1054] In our view, there are not. First, the parties disagree about the time period covered by Brazil's claim. The United States asserts that Brazil's claim was limited to the period July 2001 to June 2002, while Brazil contends that its claim was not limited to that period.[1055] Second, as we noted previously[1056], different time periods are used for the sets of data that have to be compared. The data regarding United States exports under the export credit guarantee programs are maintained on a fiscal year basis, which extends from 1 October to 30 September of the following year.[1057] The United States' export subsidy commitments are registered based on a year that extends from 1 July to 30 June of the following year. Both Brazil and the United States have sought to reconcile the data.[1058] In each case, Brazil and the United States assert that the data support their position. Given the differences between the participants in respect of the data that we would have to examine to determine whether the United States applied export credit guarantees in a manner that results in circumvention of its export subsidy commitments for pig meat

[1052]Panel Report, footnote 1060 to para. 7.880.

[1053]*Ibid*., para. 7.881.

[1054]Appellate Body Report, *US – Section 211 Appropriations Act*, para. 343.

[1055]Brazil's and the United States' responses to questioning at the oral hearing.

[1056]*Supra*, para. 691.

[1057]The fiscal year of the United States federal government is designated according to the calendar year in which it ends. Therefore, fiscal year 2001 ran from 1 October 2000 to 30 September 2001.

[1058]United States' appellee's submission, paras. 58-60; Brazil's statement at the oral hearing.

and poultry meat, we do not believe there are sufficient undisputed facts in the record to enable us to complete the analysis.

694. We recall that Brazil's claim on appeal is limited to the Panel's findings relating to pig meat and poultry meat. For the reasons mentioned above, we *reverse* the Panel's finding, in paragraph 7.881 of the Panel Report, that Brazil did not establish actual circumvention in respect of poultry meat and pig meat. Nevertheless, because there are insufficient uncontested facts in the record to enable us to do so, we do not complete the legal analysis to determine whether the United States' export credit guarantees to poultry meat and pig meat have been applied in a manner that "results in" circumvention of the United States' export subsidy commitments.

695. Brazil has made an additional claim that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU. Having reversed the Panel's ultimate finding, we find that it is not necessary for us to rule on Brazil's additional claim under Article 11 of the DSU. This is because, even if we were to agree with Brazil, it would lead to the same result that we have reached after examining the Panel's application of Article 10.1 of the *Agreement on Agriculture* to the facts before it.

3. Threat of Circumvention

(a) Scheduled Products Other than Rice and Unscheduled Products not Supported under the Export Credit Guarantee Programs

696. We move next to Brazil's two claims on appeal relating to the Panel's examination of *threat* of circumvention. We recall that the Panel examined whether the United States' export credit guarantees are applied in a manner that "threatens to lead to" circumvention of the United States' export subsidy commitments in respect of *scheduled products other than rice* and *unscheduled products not supported* under the export credit programs.

697. For ease of reference, we note again the text of Article 10.1, which reads:

> Export subsidies not listed in paragraph 1 of Article 9 shall not be applied in a manner which results in, or which threatens to lead to, circumvention of export subsidy commitments; nor shall non-commercial transactions be used to circumvent such commitments.

698. The Panel explained that its conclusion on whether the United States' export credit guarantees are applied in a manner that threatens to lead to circumvention would depend on whether the Panel considered that:

> ... the United States export credit guarantee programmes require the provision of an 'unlimited amount' of subsidies, so that scheduled commodities other than rice and unscheduled agricultural products not supported under the programmes, therefore, benefit from those subsidies when the reduction commitment levels specified in the United States' Schedule for those agricultural products have been reached.[1059]

The Panel cautioned, however, that even if it made an affirmative finding, "if these programmes are not such as to necessarily create an *unconditional legal entitlement* to receive them, then there would not necessarily be such a threat".[1060] The Panel therefore proceeded to "examine whether an unconditional statutory legal entitlement to an export credit guarantee exists in respect of such products".[1061]

699. In its examination, the Panel noted that "United States export credit guarantee programmes are classified as 'mandatory' under the United States Budget Enforcement Act of 1990."[1062] It went on to explain, however, that it did "not believe that the 'mandatory/discretionary' distinction is the sole legally determinative one for [its] examination of whether or not 'threat' of circumvention of export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture* has been proven to the required standard".[1063] The Panel, moreover, stated that, "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the *Agreement on Agriculture*, [it did] not believe that it is sufficient that an export credit guarantee programme might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments".[1064]

700. After examining the statutory and regulatory framework of the United States' programs under which the export credit guarantees are issued, the Panel concluded that this statutory and regulatory framework "is such that the CCC would not necessarily be required to issue guarantees in respect of any other unscheduled agricultural product (not supported under the programmes), or in respect of

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[1059]Panel Report, para. 7.882. (footnote omitted)

[1060]*Ibid*., para. 7.883. (emphasis added)

[1061]*Ibid*., para. 7.883.

[1062]*Ibid*., para. 7.884. (footnote omitted)

[1063]*Ibid*., para. 7.886.

[1064]*Ibid*., para. 7.893.

scheduled agricultural products other than rice, in a manner which 'threatens to lead to' circumvention of export subsidy commitments".[1065] The Panel, therefore, found:

> Keeping the applicable burden of proof in mind, we therefore decline to find that the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*.[1066]

701. Brazil asserts that the Panel erred in interpreting and applying Article 10.1 of the *Agreement on Agriculture*. According to Brazil, "[by] declaring that a 'possibility' of circumvention was not sufficient for a 'threat' finding under Article 10.1, the Panel mischaracterized the threat obligation, reducing it to situations of near certainty".[1067] Brazil explains that the ordinary meaning of the term "threat" can "encompass events that are a possibility or that appear likely; the word can also include events whose occurrence is indicated or portended by circumstances".[1068] Furthermore, Brazil asserts, that the meaning of the term "threatens" is clarified by its immediate context, particularly by the use of the word "prevent" in the title of Article 10.[1069] Brazil explains that "[t]o give proper meaning to the aim of 'prevention,' the threat obligation should, therefore, be read in a way that it thwarts, forestalls, or stops circumvention from occurring by requiring a Member to take appropriate precautionary action".[1070] If, on the contrary, "the degree of likelihood necessary to trigger the threat obligation were set too high, the threat obligation would fail to 'prevent' circumvention, contrary to the express aim of the provision".[1071]

[1065]Panel Report, para. 7.895.

[1066]*Ibid*., para. 7.896.

[1067]Brazil's other appellant's submission, para. 95. Brazil is referring to the Panel's statement that "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the *Agreement on Agriculture*, we do not believe that it is sufficient that an export credit guarantee programme might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments". (Panel Report, para. 7.893)

[1068]Brazil's other appellant's submission, para. 97.

[1069]*Ibid*., paras. 98-99. The title of Article 10 is "Prevention of Circumvention of Export Subsidy Commitments".

[1070]*Ibid*., para. 100. According to Brazil, "[t]his reading of Article 10.1 of the *Agreement on Agriculture* is consistent with the Appellate Body's observation, in *US – FSC*, that the FSC measure did not provide a mechanism for "stemming or otherwise controlling" the "flow" of export subsidies. (Appellate Body Report, *US – FSC*, para. 149)

[1071]Brazil's other appellant's submission, para. 101.

702. Having set out its views on the meaning of the term "threatens" as used in Article 10.1 of the *Agreement on Agriculture*, Brazil then distinguishes it from the connotation that the same term is given in other covered agreements. Brazil submits that the *Agreement on Safeguards* and the *Anti-Dumping Agreement* require a higher degree of likelihood because, under both Agreements, the demonstration of "threat" triggers the *right* of a WTO Member to apply trade remedy measures involving suspension or modification of WTO commitments.[1072] In contrast, "Article 10.1 of the *Agreement on Agriculture* aims at the effective *enforcement* of a Member's export subsidy *obligations*".[1073] Finally, Brazil submits that the assessment of whether a threat exists under Article 10.1 must be done on a case-by-case basis and suggests a list of factors that could be considered as part of the assessment.[1074]

703. The United States responds by asserting that Brazil mischaracterizes the Panel's findings. Contrary to Brazil's argument, the Panel's finding that the export credit guarantee programs do not threaten circumvention of export subsidy commitments is not an articulation of a broad standard that circumvention of export subsidy commitments would only be "threatened" if beneficiaries had an "absolute" or "unconditional statutory legal entitlement" to receive the subsidies such that the United States would "necessarily" be required to grant subsidies after the commitment level had been reached.[1075] Rather, in concluding that the programs did not pose a threat of circumvention, the United States argues, the Panel simply was responding to and declining to adopt Brazil's erroneous factual and legal characterizations of the program.[1076] The United States submits, furthermore, that the Panel rightly distinguished these programs from the mandatory subsidies at issue in *US – FSC*, and the Panel's decision presents no conflict with that Appellate Body Report.[1077] According to the United States, Brazil effectively argued that a mere possibility of issuance of export credit guarantees presented a threat of circumvention, and the Panel simply did not adopt this theory in the context of the export credit guarantee programs.[1078]

[1072]Brazil's other appellant's submission, para. 103.

[1073]*Ibid*., para. 104. (original emphasis)

[1074]*Ibid*., para. 105.

[1075]United States' appellee's submission, paras. 6 and 27 (referring to Brazil's other appellant's submission, para. 89).

[1076]*Ibid*., paras. 6 and 30.

[1077]*Ibid*., para. 32.

[1078]*Ibid*., paras. 6 and 35.

704. The Appellate Body has explained that "under Article 10.1, it is not necessary to demonstrate *actual* 'circumvention' of 'export subsidy commitments'".[1079] It suffices that "export subsidies" are "applied in a manner which … threatens to lead to circumvention of export subsidy commitments".[1080] We note that the ordinary meaning of the term "threaten" includes "[c]onstitute a threat to", "be likely to injure" or "be a source of harm or danger".[1081] Article 10.1 is concerned not with injury, but rather with "circumvention". Accordingly, based on its ordinary meaning, the phrase "threaten[] to lead to ... circumvention" would imply that the export subsidies are applied in a manner that is "likely to" lead to circumvention of a WTO Member's export subsidy commitments. Furthermore, we observe that the ordinary meaning of the term "threaten" refers to a *likelihood* of something happening; the ordinary meaning of "threaten" does not connote a sense of certainty.[1082]

705. The concept of "threat" has been discussed by the Appellate Body within the context of the *Agreement on Safeguards* and the *Anti-Dumping Agreement*. It has explained that "threat" refers to something that "has *not* yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty".[1083] In *US – Line Pipe*, the Appellate Body stated that there is a continuum that ascends from a "threat of serious injury" up to the "serious injury" itself.[1084] We emphasize that the Appellate Body's discussion of the concept of "threat" in previous appeals related to the interpretation of other covered agreements that contain obligations relating to injury that differ from those relating to circumvention of export subsidy reduction commitments contained in Article 10.1 of the *Agreement on Agriculture*. Our interpretation of "threat" in Article 10.1 of the *Agreement on Agriculture* is consistent with the Appellate Body's interpretation of the term "threat" in these other contexts.

[1079]Appellate Body Report, *US – FSC*, para. 148. (original emphasis)

[1080]*Ibid*., para. 148.

[1081]*Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3251.

[1082]Both participants agree that the determination of threat of circumvention has to be done on a case-by-case basis. (Brazil's and the United States' responses to questioning at the oral hearing.)

[1083]Appellate Body Report, *US – Lamb*, para. 125. (original emphasis) The Appellate Body was interpreting the phrase "threat of serious injury" within the context of Article 4.1(b) of the *Agreement on Safeguards*. Article 4.1(b) defines "threat of serious injury" as "serious injury that is clearly imminent, in accordance with the provisions of paragraph 2. A determination of the existence of a threat of serious injury shall be based on facts and not merely on allegation, conjecture or remote possibility".

[1084]The Appellate Body explained that "[i]n terms of the rising continuum of an injurious condition of a domestic industry that ascends from a 'threat of serious injury' up to 'serious injury', we see 'serious injury'—because it is something *beyond* a 'threat'—as necessarily *including* the concept of a 'threat' and *exceeding* the presence of a 'threat'". (Appellate Body Report, *US – Line Pipe*, para. 170) (original emphasis)

706. The Panel explained that, in its view, "threat" of circumvention under Article 10.1 requires that there be a "an unconditional legal entitlement".[1085] We see no basis for this requirement in Article 10.1. The Panel also stated that "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the *Agreement on Agriculture*, [it did] not believe that it is sufficient that an export credit guarantee programme might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments".[1086] In both of these statements, the Panel seems to conflate the phrase "threaten to lead to .... circumvention" with certainty that the circumvention will happen. We find it difficult, moreover, to reconcile the Panel's interpretation with the ordinary meaning of the term "threaten", which, as we indicated earlier, connotes that something is "likely" to happen.[1087] We also find it difficult to reconcile these statements of the Panel with its own view that it did "not believe that the 'mandatory/discretionary' distinction is the sole legally determinative one for our examination of whether or not 'threat' of circumvention of export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture* has been proven to the required standard".[1088]

707. Nor are we prepared to accept Brazil's suggestion that the concept of "threat" in Article 10.1 should be read in a manner that requires WTO Members to take "anticipatory or precautionary action".[1089] The obligation not to apply export subsidies in a manner that "threatens to lead to" circumvention of their export subsidy commitments does not extend that far. There is no basis in Article 10.1 for requiring WTO Members to take affirmative, precautionary steps to ensure that circumvention of their export subsidy reduction commitments does not occur.[1090]

708. In concluding as it did, the Panel appears to have relied on the Appellate Body Report in *US – FSC* for guidance.[1091] In our view, however, the Panel misapplies that analysis. We recall that, in *US – FSC*, the Appellate Body underscored the importance of considering "the structure and other characteristics of [the] measure" when examining whether the specific measure at issue is "applied in

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[1085]Panel Report, para. 7.883.

[1086]*Ibid*., para. 7.893.

[1087]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 85.

[1088]Panel Report, para. 7.886.

[1089]Brazil's other appellant's submission, para. 100.

[1090]We note in this respect that Article 10 is titled "Prevention of Circumvention of Export Subsidy Commitments". Brazil's assertion that Article 10.1 requires WTO Members to take precautionary action would imply that the aim of the provision would also include the prevention of *threat* of circumvention.

[1091]In a footnote, the Panel states that the United States' export credit guarantee programs that it was "examining are of a fundamentally different nature than the mandatory and essentially unlimited subsidy (in the form of revenue forgone that is otherwise due) examined in *US – FSC*". (Panel Report, footnote 1082 to para. 7.894)

a manner which ... threatens to lead to circumvention of export subsidy commitments".[1092] The Appellate Body then went on to note that the specific measure at issue in that dispute created "a *legal entitlement* for recipients to receive export subsidies, not listed in Article 9.1, with respect to agricultural products, both scheduled and unscheduled".[1093] This meant that there was "no discretionary element in the provision by the government of the FSC export subsidies".[1094] Furthermore, the Appellate Body noted that the "legal entitlement that the FSC measure establishes is unqualified as to the *amount* of export subsidies that may be claimed".[1095] This meant that the measure was "unlimited" because there was "no mechanism in the measure for stemming, or otherwise controlling the flow of ... subsidies that may be claimed with respect to any agricultural products".[1096]

709. A proper reading of the Appellate Body's statement in *US – FSC*, however, reveals that it did not intend to provide an exhaustive interpretation of threat of circumvention under Article 10.1 of the *Agreement on Agriculture*. In noting that the measure at issue in that dispute created a "legal entitlement" and had no "discretionary element", the Appellate Body was merely describing characteristics of the measure at issue in that case that it found relevant for its analysis of "threat". In other words, the Appellate Body did not foreclose, in *US – FSC*, the possibility that a measure that does not create a "legal entitlement" or that has a "discretionary element" could be found to "threaten[] to lead to circumvention" under Article 10.1 of the *Agreement on Agriculture*.

710. We therefore modify the Panel's interpretation, in paragraphs 7.882-7.883 and 7.896 of the Panel Report, of the phrase "threatens to lead to .... circumvention" in Article 10.1 of the *Agreement on Agriculture* to the extent that the Panel's interpretation requires "an unconditional legal entitlement" to receive the relevant export subsidies as a condition for a finding of threat of circumvention.

711. Having interpreted the phrase "threatens to lead to ... circumvention", we turn to Brazil's request that we complete the legal analysis and find that, contrary to Article 10.1 of the *Agreement on Agriculture*, the United States' export credit guarantee programs have been applied in a manner that threatens to lead to circumvention of the United States' export subsidy reduction commitments for all

[1092]Appellate Body Report, *US – FSC*, para. 149.

[1093]*Ibid*. (original emphasis)

[1094]*Ibid*., para. 149.

[1095]*Ibid*. (original emphasis)

[1096]*Ibid*., para. 149.

agricultural products eligible to receive these subsidies.[1097] According to Brazil, the alleged discretion retained by the CCC, as found by the Panel, does not operate in a manner that "mitigates the threat of circumvention".[1098] Brazil submits that the initial allocations by country of funds available for export credit guarantees "are repeatedly increased during the year".[1099] "The same is also true", Brazil asserts, "of product allocations, although the CCC makes relatively limited use of these".[1100] In addition, Brazil points out that "the record does not contain one single example of a situation where the CCC was unable to provide [export credit guarantees] because a country or product allocation had been exhausted ... [i]nstead, the record discloses that country and product allocations are repeatedly increased, by significant amounts, during the fiscal year as demand for [export credit guarantees] exhausts existing allocations".[1101]

712. Brazil also questions the significance attributed by the Panel to the fact that, under United States law, export credit guarantees may not be provided in relation to exports to a country that the Secretary of Agriculture determines "cannot adequately service the debt associated with such sale".[1102] According to Brazil, this statutory provision does not constrain the overall amount of export credit guarantees because "the possible exclusion of a country does not prevent the CCC from using all the [export credit guarantees] that would have gone to that country to support exports to other, eligible countries".[1103] Moreover, Brazil submits that the record shows that the Secretary of Agriculture has used this authority "other than sparingly" and that the current list of countries that are eligible under the United States' export credit guarantee programs include "the very large majority of the world's highly indebted poor countries".[1104]

713. We are not persuaded that the arguments put forward by Brazil establish that the United States' export credit guarantee programs are applied in a manner that threatens to lead to circumvention of the United States' export subsidy commitments in respect of scheduled products other than rice and unscheduled products not supported under the programs. In our view, the fact

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[1097]Brazil's other appellant's submission, paras. 63-64 and 140.

[1098]*Ibid*., para. 187.

[1099]*Ibid*., para. 188.

[1100]*Ibid*., para. 189. According to Brazil, less than eight percent of allocations were product-specific in 2003.

[1101]Brazil's other appellant's submission, para. 191. (footnote omitted)

[1102]Panel Report, para. 7.888 (quoting 7 USC 5622(f)(1)). The Panel stated that "[w]hile this does not curtail the amount of guarantees that may ultimately be made available, it does indicate to us that there exists a discretion (on the part of the Secretary [of Agriculture]) to determine situations in which guarantees cannot be made available". (*Ibid*., para. 7.888)

[1103]Brazil's other appellant's submission, para. 195.

[1104]*Ibid*., para. 196.

alone that exports of certain products are eligible for export credit guarantees is not sufficient to establish a threat of circumvention. This is particularly the case where there is no evidence in the record that exports of such products have been "supported" by export credit guarantees in the past.[1105] As we stated earlier, Article 10.1 of the *Agreement on Agriculture* does not require WTO Members to take affirmative, precautionary steps to ensure that circumvention of their export subsidy reduction commitments never happens. Nor is it sufficient for Brazil to have alleged that the United States has provided export credit guarantees to exports of *other* unscheduled products or to exports of scheduled products in excess of its export subsidy reduction commitments. Therefore, we agree with the Panel that Brazil has not established that the United States applies its export credit guarantee programs to scheduled agricultural products other than rice and other unscheduled agricultural products (not "supported" under the programs) "in a manner ... which threatens to lead to ... circumvention" of the United States' export subsidy commitments.

714. We thus *uphold*, albeit for different reasons, the Panel's finding, in paragraph 7.896, that Brazil has not established that "the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*".

(b) Rice and Unscheduled Products Supported by the Export Credit Guarantee Programs

715. We turn to Brazil's claim that the Panel improperly confined its examination of Brazil's threat claim to scheduled products other than rice and unscheduled products not supported under the programs. Put another way, Brazil submits that the Panel's analysis of "threat" of circumvention should have also included rice (a scheduled product) and unscheduled products supported by the programs (including upland cotton).[1106]

716. As Brazil acknowledges, the products that the Panel allegedly excluded from its "threat" analysis had been the subject of the Panel's analysis of "actual" circumvention.[1107] In fact, for these products, the Panel had *already* found that the United States' export credit guarantees are applied in a manner that "results in" circumvention. That is, the Panel found *actual* circumvention.[1108] The

[1105]"Supported" products are described, *supra*, para. 676.

[1106]Brazil's other appellant's submission, para. 75.

[1107]*Ibid*., para. 135 (referring to Panel Report, paras. 7.875 and 7.881).

[1108]Panel Report, para. 7.875.

Panel, however, explained that it was unnecessary for it to examine whether export credit guarantees for the same products were also applied in a manner that "threatens to lead to" circumvention:

> Article 10.1 of the *Agreement on Agriculture* provides that export subsidies not listed in Article 9.1 "shall not be applied in a manner which results in, *or* which threatens to lead to, circumvention of export subsidy commitments ..." (emphasis added). With respect to rice and to unscheduled agricultural products supported under programmes, we have found, in paragraphs 7.875 and 7.881, that the United States applies export credit guarantee programmes constituting export subsidies in a manner which *results in* circumvention of its export subsidy commitments inconsistently with Article 10.1. We consider that the "or" in Article 10.1 indicates that either one (resulting in circumvention) or the other (threatening to lead to circumvention) or both in combination would be adequate to trigger the remedies associated with this provision. We also see "resulting in circumvention" as including and exceeding the concept of "threatening to lead to circumvention". ... We therefore do not believe that it is necessary to conduct any additional examination here.[1109] (original emphasis)

717. We believe the Panel was within its discretion in declining to examine whether scheduled products other than rice and unscheduled products supported by the programs are applied in a manner that "threatens to lead to" circumvention. The Panel had already found that the United States acted inconsistently with Article 10.1 of the *Agreement on Agriculture* because it applied its export credit guarantee program in a manner that "results in" (actual) circumvention of its export subsidy commitments for these products. We do not see why the Panel had to examine also whether the United States acted inconsistently with the *same* provision in respect of the *same* products, but on the basis of there being a *threat* of circumvention, rather than *actual* circumvention.

718. The Appellate Body has stated that panels may exercise judicial economy and refrain from addressing claims beyond those necessary to resolve the dispute.[1110] In this case, the Panel did not expressly state it was exercising judicial economy.[1111] We agree with the United States, however, that the Panel's approach can be properly characterized as an exercise of judicial economy.[1112] Moreover, we believe that the Panel was within its discretion in refraining from making additional findings and it

[1109]Panel Report, footnote 1061 to para. 7.882.

[1110]Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[1111]The Panel stated that it did not believe it "necessary to conduct any additional examination". (Panel Report, footnote 1061 to para. 7.882)

[1112]The United States asserts that "the Panel properly exercised judicial economy in not examining threat of circumvention for agricultural products with respect to which it found actual circumvention". (United States' appellee's submission, para. 42)

was not improper for the Panel to have exercised judicial economy given that its finding of *actual* circumvention resolved the matter.[1113]

719. Therefore, we reject Brazil's appeal that the Panel erred in confining its examination of Brazil's threat of circumvention claim to scheduled products other than rice and unscheduled products not supported under the United States' export credit guarantee programs.

G. *Export Credit Guarantees – Articles 1.1 and 3.1(a) of the SCM Agreement*

720. We turn now to Brazil's allegation that the Panel erred by exercising judicial economy in respect of Brazil's claim that the United States' export credit guarantees are export subsidies within the meaning of Articles 1.1 and 3.1(a) of the *SCM Agreement*.

721. The Panel first examined the United States' export credit guarantees under the *Agreement on Agriculture* using the benchmark provided in item (j) of the Illustrative List of Export Subsidies attached to the *SCM Agreement* as Annex 1, albeit as context.[1114] The Panel found:

> On the basis of the totality of the record evidence, including approaches regularly relied upon by the United States government itself, we find that Brazil has established that the United States CCC provides the GSM 102, GSM 103 and SCGP export credit guarantee programmes "at premium rates which are inadequate to cover the 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*.
>
> ...
>
> We therefore find 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*.[1115]

722. After completing its examination under the *Agreement on Agriculture*, the Panel moved to Brazil's claims under the *SCM Agreemen*t. The Panel noted that it had "conducted a 'contextual' analysis under item (j) ... for the purposes of determining whether or not an export subsidy exists within the meaning of Article 10.1 of the *Agreement on Agriculture*" and, therefore, saw "no reason ... why this analysis may not also be applied directly in an examination of the merits of Brazil's claims

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[1113]Appellate Body Report, *Australia – Salmon*, para. 223. See also Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 133.

[1114]Panel Report, para. 7.803.

[1115]*Ibid*., paras. 7.867 and 7.869.

under item (j)/Article 3.1(a) of the *SCM Agreement* in respect of the export credit guarantee programmes in this factual situation".[1116] The Panel found:

> To the extent that the United States export credit guarantee programmes at issue – GSM 102, GSM 103 and SCGP – do not conform fully to these provisions in Part V of the *Agreement on Agriculture* and do not benefit from the exemption from actions provided by Article 13(c)(ii) of the *Agreement on Agriculture*, they are also export subsidies prohibited by Article 3.1(a) for the reasons we have already given.[1125]
>
> Article 3.2 of the *SCM Agreement* provides: "A Member shall neither grant nor maintain subsidies referred to in paragraph 1" of Article 3. To the extent that the three United States export credit guarantee programmes at issue are inconsistent with Article 3.1(a), they are, consequently, also inconsistent with Article 3.2 of the *SCM Agreement*.[1117]
>
> [1125] We recall that Article 3.1(a) of the *SCM Agreement* sets out a prohibition on subsidies contingent upon export performance, "including those illustrated in Annex I". Annex I - the Illustrative List of Export Subsidies - contains item (j). We have found that the challenged United States export credit guarantee programmes meet the definitional elements of a *per se* export subsidy in item (j). As they are among those "illustrated in Annex I" for the purposes of Article 3.1(a), they are included in the subsidies contingent upon export performance prohibited by Article 3.1(a) of the *SCM Agreement*.

723. During the interim review, Brazil requested the Panel "to make certain additional 'factual' findings regarding the parties' evidence and argumentation relating to Brazil's allegation that the CCC export credit guarantee programmes at issue constitute prohibited export subsidies under the elements of Articles 1 and 3.1(a) of the *SCM Agreement*".[1118] Brazil asserted that "in the event one of the parties appeals and the Appellate Body reverses the Panel's conclusion on item (j), it might not have the necessary facts at its disposal to 'complete the analysis' with respect to Brazil's claims under Articles 1 and 3.1(a) of the *SCM Agreement*".[1119]

724. The United States asked the Panel to reject Brazil's request, asserting that "the Panel ha[d] already made findings on the claims cited by Brazil" and, therefore, Brazil was improperly requesting

[1116] Panel Report, para. 7.946. (footnote omitted)

[1117] *Ibid*., paras. 7.947-7.948. (footnote 1124 omitted)

[1118] *Ibid*., para. 6.31.

[1119] *Ibid*.

the Panel "to make unnecessary and unsupported additional factual findings with respect to its *SCM Agreement* claims, and to reverse the applicable burden of proof".[1120]

725. The Panel declined Brazil's request because, in its view:

> Brazil's allegation invoking the elements of Articles 1 and 3.1(a) of the *SCM Agreement* is not a separate claim, but merely another argument, on a different factual basis, as to how the United States export credit guarantee programmes would meet the definition of an export subsidy in Article 3.1(a) of the *SCM Agreement*. Given our finding in paragraphs 7.946-7.948, we do not believe that it is necessary to address Brazil's additional arguments about how the Article 3.1(a) definitional elements would be fulfilled on another factual basis in order to resolve this dispute. For greater clarity, we have inserted footnote 1125.[1121]

726. On appeal, Brazil asserts that the Panel's rejection of Brazil's request constitutes a false exercise of judicial economy. According to Brazil, "[i]n concluding that Brazil's allegations under item (j) and under Articles 1.1 and 3.1(a) of the *SCM Agreement* constitute alternative 'arguments, on a different factual basis,' the Panel failed to recognize the distinct obligations that flow from Article 3.1(a), and the potentially distinct course of implementation triggered by a Member's maintenance of export subsidies within the meaning of Articles 1.1 and 3.1(a)".[1122] Brazil explains that "because of the different benchmarks that apply under item (j), on the one hand, and Articles 1.1 and 3.1(a), on the other, a measure that no longer constitutes an export subsidy under item (j) may still constitute an export subsidy under Articles 1.1 and 3.1(a)".[1123]

727. Brazil asserts that a "panel is obligated to address all claims on which a finding is necessary to enable the Dispute Settlement Body to make sufficiently precise recommendations and rulings to allow for 'prompt settlement' of the dispute, and for prompt compliance by a Member with those recommendations and rulings 'in order to ensure effective resolution of disputes to the benefit of all Members.'"[1124] It then adds that "[b]ecause a measure that no longer constitutes an export subsidy under item (j) may still constitute an export subsidy under Articles 1.1 and 3.1(a), the Panel's exercise of judicial economy in this case was in error".[1125] Brazil further explains that the United States "could comply with its obligations under item (j) but still fail to comply with its obligations under

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[1120]Panel Report, para. 6.31.

[1121]*Ibid*. See *supra*, para. 722.

[1122]Brazil's other appellant's submission, para. 22 (quoting Panel Report, para. 6.31).

[1123]*Ibid*., para. 22.

[1124]*Ibid*., para. 23 (quoting Articles 3.2 and 21.1 of the DSU). (footnotes omitted)

[1125]*Ibid*., para. 23.

Articles 1.1 and 3.1(a)".[1126] Therefore, in Brazil's view, the Panel's failure "to examine Brazil's claim ... leaves open a dispute and creates uncertainty concerning the scope of the United States' obligations, and the consistency of its existing measures with those obligations".[1127] If the Appellate Body were to agree with Brazil's assertion that the Panel's exercise of judicial economy was improper, then Brazil requests that the Appellate Body complete the analysis, and find that the United States' export credit guarantee programs constitute export subsidies under Articles 1.1 and 3.1(a) of the *SCM Agreement*.[1128]

728. The United States requests us to reject Brazil's claim. According to the United States, any further findings by the Panel would have been redundant as the Panel had already determined that the export credit guarantees "constitute *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the *SCM Agreement*."[1129] The United States explains that "[n]either item (j) nor the Illustrative List imposes obligations *per se*".[1130] Rather, the obligations regarding export subsidies are found in Articles 3.1(a) and 3.2.[1131] The United States asserts, furthermore, that an additional finding by the Panel on the issue of whether the export credit guarantees programs confer a "benefit" would not change the United States' compliance obligations.[1132]

729. In addition, the United States submits that Brazil mischaracterizes what the Panel did as a failure to address a claim by Brazil when, in fact, Brazil's request at the interim review stage was for the Panel to make additional factual findings.[1133] Even if Brazil had made a separate claim before the Panel under Articles 1.1 and 3.1 of the *SCM Agreement*, the United States submits that the Panel could have properly exercised judicial economy, as the Appellate Body recognized, in *US – Wool Shirts and Blouses*, that panels "need only address those *claims* which must be addressed to resolve the matter in issue in the dispute".[1134] Finally, the United States rejects the contention that Brazil has demonstrated that the United States' export credit guarantees confer a "benefit".[1135]

[1126]Brazil's other appellant's submission, para. 23.

[1127]*Ibid*.

[1128]*Ibid*., para. 42.

[1129]United States' appellee's submission, para. 62 (referring to Panel Report, para. 8.1(d)(i)).

[1130]*Ibid*., para. 66

[1131]*Ibid*., para. 66. The United States submits that, under Brazil's reading, the Illustrative List would be deprived of meaning. (*Ibid*., para. 67)

[1132]*Ibid*., para. 80.

[1133]*Ibid*., paras. 81-82 (referring to Panel Report, para. 6.31).

[1134]*Ibid*., para. 85 (referring to Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, 323 at 339). (emphasis added)

[1135]*Ibid*., paras. 92-99.

730. We observe that Brazil premises its claim on appeal on its submission that item (j) of the Illustrative List of Export Subsides annexed to the *SCM Agreement* is a distinct obligation from that contained in Article 3.1(a), read together with Article 1.1.[1136] In other words, Brazil submits that the requirement in item (j) for an export credit guarantee program to charge premiums that are adequate to cover long-term operating costs and losses is distinct from the requirement, under Articles 1.1 and 3.1(a), not to confer a "benefit". The United States rejects the premise of Brazil's argument, asserting instead that the Illustrative List of Export Subsidies, and more specifically item (j), do not establish a separate obligation from that in Article 3.1(a).[1137] Rather, the Illustrative List provides examples (hence "illustrative") of the types of measures that constitute "export subsidies" within the meaning of Article 3.1(a) and "to the extent that it does address a practice this constitutes the standard to determine whether a particular practice constitutes a prohibited export subsidy".[1138]

731. We need not decide, in this case, whether an export credit guarantee program that meets the standard of item (j) of the Illustrative List of Export Subsidies—because the premiums charged are adequate to cover long-term operating costs and losses—may nevertheless be challenged as a prohibited export subsidy under Article 3.1(a) on the basis that it confers a benefit. This is because, even if we were to assume that such a claim were possible, we would conclude that the Panel was within its discretion in exercising judicial economy in respect of Brazil's claim.[1139]

732. As we explained earlier, panels may refrain from ruling on every claim as long as it does not lead to a "partial resolution of the matter".[1140] The Panel found that the United States' export credit guarantee programs constitute a prohibited export subsidy under Article 3.1(a) because they do not meet the criteria in item (j) of the Illustrative List of Export Subsidies. This finding, in our view, is sufficient to resolve the matter. Therefore, we are not persuaded that the Panel's exercise of judicial

[1136]Brazil's other appellant's submission, para. 22.

[1137]United States' appellee's submisison, para. 66.

[1138]*Ibid*., para. 70.

[1139]The Panel did not expressly state that it was exercising judicial economy. Instead, the Panel stated that it did not believe that it was "necessary to address Brazil's additional *arguments*". (Panel Report, para. 6.31) (emphasis added) Brazil initially describes the Panel's failure as an error by the Panel in the "interpretation and application of Article 3.1(a) of the *SCM Agreement*, as well as of Article 3.7 of the DSU". (Brazil's other appellant's submission, para. 22) Later in its submission, however, Brazil describes the Panel's error as a "misapplication of the principle of judicial economy". (*Ibid*., para. 23; see also *ibid*., paras. 33 and 39-41)

[1140]Appellate Body Report, *Australia – Salmon*, para. 223.

economy was improper, as Brazil has not demonstrated that it has led to "a partial resolution of the matter".[1141]

733. For these reasons, we reject Brazil's claim that the Panel erred by exercising judicial economy in respect of Brazil's allegation that the United States' export credit guarantees are prohibited export subsidies, under Article 3.1(a) of the *SCM Agreement*, because they confer a "benefit" within the meaning of Article 1.1.

H. *ETI Act of 2000*

734. We turn to Brazil's claim that the Panel erred in the "interpretation and application of the burden of proof"[1142], in connection with its finding that Brazil did not establish a *prima facie* case that the ETI Act of 2000[1143] and the subsidies granted thereunder are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1 and 3.2 of the *SCM Agreement*, in respect of upland cotton.

735. Before the Panel, Brazil argued that the ETI Act of 2000 provides an export subsidy to upland cotton, within the meaning of Article 10.1 of the *Agreement on Agriculture*, because it eliminates tax liabilities for exporters who sell upland cotton in foreign markets. According to Brazil, the ETI Act of 2000 threatens to circumvent the United States' export subsidy commitments by providing an export subsidy to upland cotton, despite the fact that the United States has not scheduled any export subsidy reduction commitments for that commodity, thereby violating Articles 8 and 10.1 of the *Agreement on Agriculture*. In addition, Brazil asserted that the ETI Act of 2000 provides prohibited export

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[1141]Appellate Body Report, *Australia – Salmon*, para. 223. As the United States argues, the circumstances of this case are different from those in *Australia – Salmon.* In that case, the panel limited its findings for other Canadian salmon to Article 5.1 of the *SPS Agreement* and "gave no convincing reason why it examined Article 5.5 and 5.6 for only one category of the products in dispute, i.e., ocean-caught Pacific salmon, and did not undertake the same analysis for other categories, i.e., other Canadian salmon". (Appellate Body Report, *Australia – Salmon*, para. 225) The present case does not involve a panel incorrectly limiting its findings under other provisions to certain products. Instead, Brazil is questioning the Panel's refusal to make an additional finding of inconsistency with the same provision for the same products.

[1142]Brazil's other appellant's submission, para. 7.

[1143]Public Law 106-519. The ETI Act of 2000 is a measure that was taken by the United States to comply with the recommendations and rulings of the DSB after the original FSC measure was found to be WTO-inconsistent in *US – FSC*. (Appellate Body Report, *US – FSC*, para. 178) It is the same measure that the European Communities challenged in *US – FSC (Article 21.5 – EC)*, part of which the panel and Appellate Body found, in that dispute, to be inconsistent with the United States' WTO obligations. (Appellate Body Report, *US – FSC (Article 21.5 – EC)*, paras. 1 and 256(d)) Brazil acknowledges that, after the Panel Report was circulated, the "United States enacted legislation ... that seems to repeal most of the illegal aspects of the ETI Act of 2000". (Brazil's other appellant's submission, para. 214) Brazil is referring to the American Jobs Creation Act of 2004, enacted as Public Law 108-357.

subsidies to upland cotton within the meaning of Articles 3.1(a) and 3.2 of the *SCM Agreement*.[1144] Brazil pointed out that, in *US – FSC (Article 21.5 – EC)*, both the panel and Appellate Body found that the ETI Act of 2000 violates Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*. Brazil requested the Panel to apply the reasoning developed by that panel, as modified by the Appellate Body, *mutatis mutandis*, to this dispute.[1145]

736. The United States responded that the Panel should reject Brazil's claim because Brazil failed to make a *prima facie* case.[1146] According to the United States, "[a]s a result of Brazil's '*mutatis mutandis*' approach, the Panel [was] in no position to exercise its judgment to follow, or decline to follow, prior dispute settlement findings concerning the ETI Act of 2000, nor even in a position to make factual findings concerning the Act".[1147]

737. The Panel began its analysis by noting that, apart from referring the Panel to the European Communities' claims and arguments in *US – FSC (Article 21.5 – EC)*, Brazil had submitted no direct evidence reflecting the nature, function or WTO-inconsistency of the ETI Act of 2000.[1148] It then observed that Brazil appeared to:

> ... seek a Panel process whereby we would simply apply the reasoning, and findings and conclusions of the panel, as modified by the Appellate Body, in the *US – FSC (Article 21.5 – EC)* dispute, without going through the ordinary procedural steps constituting panel proceedings set out in the *DSU*, including the examination of the legal claims against the measures constituting the matter before this Panel on the basis of direct evidence and argumentation submitted by the complaining and defending parties in this dispute. While Brazil has supplemented the evidence and argumentation in that dispute, it has not purported directly to establish the elements comprising the basis of the findings and conclusions in that dispute.[1149]

[1144]Panel Report, para. 7.950. (footnote omitted) Brazil explained that the subsidies granted to upland cotton under the ETI Act of 2000 do not fully conform to Part V of the *Agreement on Agriculture* and, therefore, are not exempt from action under the *SCM Agreement* pursuant to Article 13(c) of the *Agreement on Agriculture*.

[1145]Panel Report, para. 7.949. (footnotes omitted) Brazil incorporated by reference into its submissions (i) the Panel Report in *US – FSC (Article 21.5 – EC)*, (ii) the Appellate Body Report in *US – FSC (Article 21.5 – EC)*, and (iii) all submissions of the European Communities in that case. Brazil contends that an approach whereby the complaining Member incorporates by reference the reasoning of another panel, as modified by the Appellate Body, is consistent with the Appellate Body's reasoning in *Mexico – Corn Syrup (Article 21.5 – US)*. (Brazil's other appellant's submission, para. 224 (referring to Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109))

[1146]Panel Report, para. 7.951.

[1147]*Ibid*.

[1148]*Ibid*., para. 7.959.

[1149]Panel Report, para. 7.961. (footnotes omitted)

The Panel saw "no basis in the text of the *DSU* ... for such incorporation by reference of claims and arguments made in a previous dispute nor for a quasi-automatic application of findings, recommendations and rulings from a previous dispute".[1150] In addition, the Panel rejected Brazil's reliance on Article 17.14 of the DSU[1151] to support its claim, reasoning that, because Brazil was not a party in *US – FSC (Article 21.5 – EC)*, the panel and Appellate Body reports in that case "cannot be taken as a providing a final resolution to the part of the matter before [it] concerning the ETI Act of 2000".[1152]

738. The Panel then identified other differences between the present dispute and *US – FSC (Article 21.5 – EC)*.[1153] These differences meant, according to the Panel, that the evidence and argumentation relating to the present dispute are distinct from those in *US – FSC (Article 21.5 – EC)*.[1154] The differences in the evidence and argumentation, in turn, led the Panel to decide that "no direct transposition or incorporation of the panel and Appellate Body findings and conclusions would, in any event, be appropriate on the basis of the evidence and argumentation submitted in this dispute".[1155] Moreover, the Panel observed that, in a written communication to the parties after the first meeting, it had "put Brazil on notice that the evidence and arguments submitted up to that point in the Panel proceedings did not provide sufficient basis for [the Panel] to make a finding".[1156]

[1150]*Ibid*., para. 7.962.

[1151]Article 17.14 of the DSU provides:

> An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members. (footnote omitted)

[1152]Panel Report, para. 7.967. (footnote omitted)

[1153]The Panel explained that, in *US – FSC (Article 21.5 – EC),* the claims under the *SCM Agreement* were examined before those under the *Agreement on Agriculture*, an order contrary to that adopted by the Panel in this case. (Panel Report, para. 7.971) Also, the Panel pointed out that, in *US – FSC (Article 21.5 – EC),* there was no discussion relating to issues under Article 13 of the *Agreement on Agriculture*. (Panel Report, para. 7.972) Finally, the Panel observed that the findings in *US – FSC (Article 21.5 – EC)* were not specific to upland cotton. (Panel Report, para. 7.973)

[1154]*Ibid*., para. 7.975.

[1155]*Ibid*.

[1156]Panel Report, para. 7.980. The written communication is dated 5 September 2003 and in it the Panel "indicated to the parties that, 'on the basis of the evidence and arguments presented to date, it is unable to form any view on whether the ETI Act of 2000 satisfies the relevant provisions of the *Agreement on Agriculture*'".

The Panel also referred to "its discretionary authority to put questions to the parties to clarify the factual and legal aspects of the matter". (*Ibid*., para. 7.983) In this respect, the Panel explained that its authority to ask questions or seek information is not conditional on a party having established a *prima facie* case. Nevertheless, the Panel observed that it was "not permitted to make Brazil's case for Brazil". (*Ibid*., para. 7.985)

739. For these reasons, the Panel concluded:

> [O]n the basis of the evidence and arguments submitted, we are not in a position to conclude that Brazil has established a *prima facie* case that the ETI Act of 2000 and subsidies granted thereunder are inconsistent with Articles 8 and 10.1 of the *Agreement on Agriculture* in respect of upland cotton.[1157]

740. On appeal, Brazil asserts that the Panel erred in the "interpretation and application of the burden of proof under Articles 8 and 10.1 of the *Agreement on Agriculture*, and Articles 3.1(a) and 3.2 of the *SCM Agreement*, in light of the goal of the WTO dispute settlement system, under Article 3.3 of the DSU, to provide for the 'prompt settlement' of disputes".[1158] Brazil submits that it challenged before the Panel exactly the same measure that the panel and the Appellate Body in *US – FSC (Article 21.5 – EC)* held violated the *Agreement on Agriculture* and the *SCM Agreement*. This measure had not changed since it was enacted in 2000[1159] and thus the legislation that forms the basis for the United States measure that is subject to Brazil's claims is identical to the legislation at issue in *US – FSC (Article 21.5 – EC)*.[1160] According to Brazil, the United States did not dispute the identity between the measures.[1161]

741. In addition, Brazil asserts that the United States never rebutted Brazil's arguments, or the supporting documents that Brazil referenced, that demonstrate the inconsistency of the ETI Act of 2000 with Articles 8 and 10.1 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.[1162] Brazil refers to *Mexico – Corn Syrup (Article 21.5 – US)*, where the Appellate Body held that a panel may incorporate the reasoning of another panel by reference and still meet the requirement in Article 12.7 of the DSU to set out the "basic rationale" for its findings and conclusions.[1163] Brazil sees no reason why this reasoning should not also apply to submissions by a

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[1157]*Ibid*., para. 7.986. The Panel also concluded that:

> ... in accordance with Article 13(c)(ii) of the *Agreement on Agriculture*, to the extent that Brazil has not demonstrated that the United States ETI Act of 2000 is not in conformity with the United States export subsidy commitments under Part V of the *Agreement on Agriculture* in respect of upland cotton, the United States is "exempt from actions based on" Articles 3.1(a) and 3.2 of the *SCM Agreement*. We therefore decline to examine Brazil's claims based on those provisions.

(*Ibid*., para. 7.987) (footnote omitted)

[1158]Brazil's other appellant's submission, para. 7.

[1159]Brazil notes that legislation "that seems to repeal most of the illegal aspects of the ETI Act of 2000" was enacted in 2004. (Brazil's other appellant's submission, para. 214) See *supra*, footnote 1143.

[1160]Brazil's other appellant's submission, para. 221.

[1161]*Ibid*.

[1162]Brazil's other appellant's submission, para. 222.

[1163]Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 109.

complaining Member that incorporate by reference the reasoning of another panel, as modified by the Appellate Body, addressing the exact same measure. [1164]

742. Brazil acknowledges that the "United States enacted legislation ... that seems to repeal most of the illegal aspects of the ETI Act of 2000".[1165] Consequently, Brazil expressly states that, were we to modify the Panel's "interpretation and application of the burden of proof"[1166], it is not requesting us to complete the legal analysis and find that the export subsidies to upland cotton, provided under the ETI Act of 2000, are inconsistent with Articles 8 and 10.1 of *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement*.[1167]

743. The United States responds that we should not decide Brazil's appeal because Brazil acknowledges that the appeal is not necessary to resolve the dispute between the parties. Brazil explicitly does not ask the Appellate Body to complete the analysis with respect to its claims. The United States argues that the Appellate Body should abstain from deciding this issue because Brazil is not asking "the Appellate Body to make findings that would result in DSB rulings and recommendations with respect to the ETI Act".[1168] For that reason alone, the Appellate Body should decline to decide Brazil's appeal.[1169]

744. In any event, the United States submits that the Panel correctly concluded that Brazil did not make a *prima facie* case with respect to the ETI Act of 2000. Brazil simply did not present any evidence at all regarding the ETI Act of 2000 itself. According to the United States, the Panel acted properly under the text of the DSU, including Article 11, by declining to find that the "short shrift" that Brazil gave to the ETI Act of 2000 satisfied Brazil's burden to make its *prima facie* case concerning that Act.[1170]

745. At the outset, we observe that Article 17.6 of the DSU provides that appeals "shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel". Furthermore, Article 17.12 of the DSU states that "[t]he Appellate Body shall address each of the

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[1164]In addition, Brazil states that it submitted to the Panel arguments and evidence that addressed the specific nature of its claims, in particular with respect to Article 13(c)(ii) of the *Agreement on Agriculture*. (Brazil's other appellant's submission, para. 225)

[1165]*Ibid*., para. 214.

[1166]*Ibid*., para. 7.

[1167]*Ibid*., para. 214.

[1168]United States' appellee's submission, para. 100. The United States relies for support on the Appellate Body Reports in *US – Steel Safeguards* and *US – Wool Shirts and Blouses*.

[1169]United States' appellee's submission, para. 100.

[1170]United States' appellee's submission, para. 112.

issues raised in accordance with paragraph 6 during the appellate proceeding". The United States does not argue that Brazil has failed to appeal an issue of law or a legal interpretation. Thus, the United States is not asserting that Brazil could not have brought this claim on appeal or that we are legally precluded from addressing it. The United States' assertion is that it is not *necessary* for us to resolve Brazil's claim because Brazil is not requesting us to make findings that would result in DSB rulings and recommendations.

746. We agree. Article 3.3 of the DSU explains that the aim of the WTO's dispute settlement system 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". For its part, Article 3.4 of the DSU provides that "[r]ecommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter". Similarly, Article 3.7 states that "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute". The Appellate Body, moreover, has cautioned that "[g]iven the explicit aim of dispute settlement that permeates the *DSU*, ... Article 3.2 of the *DSU* is [not] meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute". [1171]

747. In this case, Brazil's claim on appeal is limited to the Panel's application of the burden of proof. Brazil has expressly stated that it is not requesting us to complete the analysis. In view of Brazil's request, our ruling would not result in recommendations or rulings by the DSB in respect of the ETI Act of 2000. In these circumstances, we fail to see how our examination of Brazil's claim would contribute to the "prompt" or "satisfactory settlement" of this matter or would contribute to "secure a positive solution" to this dispute.[1172] Even if we were to disagree with the manner in which the Panel applied the burden of proof, we would not make any findings in respect of the WTO-consistency of the ETI Act of 2000. We recognize that there may be cases in which it would be useful for us to make a finding on an issue, despite the fact that our decision would not result in rulings and recommendations by the DSB. In this case, however, we find no compelling reason for doing so on this particular issue.

[1171] Appellate Body Report, *US – Wool Shirts and Blouses*, p. 19, DSR 1997:1, 323 at 340.

748. For these reasons, we decline Brazil's request that we reverse the Panel's conclusion that Brazil did not make a *prima facie* case that the ETI Act of 2000 is inconsistent with the United States' WTO obligations. In declining to rule on Brazil's request, we neither endorse nor reject the manner in which the Panel applied the burden of proof in the context of examining Brazil's claim against the ETI Act of 2000.

I. *Interpretation of Article XVI:3 of the GATT 1994*

1. Introduction

749. Before the Panel, Brazil claimed that the United States applied its domestic and export subsidies to upland cotton during the 1999-2002 marketing years in a manner that resulted in the United States having more than an equitable share of world export trade within the meaning of Article XVI:3 of the GATT 1994, and thereby caused serious prejudice within the meaning of Article XVI:1 of the GATT 1994.[1173]

750. In addressing this claim, the Panel considered whether paragraphs 1 and 3 of Article XVI could be considered together, to address both the domestic support and export subsidy measures at issue. The Panel said that "we do not believe that these provisions are susceptible to such joint application", on the grounds that "each provision – Article XVI:1 and Article XVI:3 – requires application in accordance with its own terms in respect of measures that fall within its respective scope of application".[1174]

751. The Panel dealt with Brazil's allegation that the subsidies at issue resulted in the United States enjoying "more than an equitable share of world export trade" under Article XVI:3 of the GATT 1994

[1172]Our approach is consistent with the approach of the Appellate Body in *US – Steel Safeguards*, where it did not find it necessary to examine the Panel's findings on the causation analysis because it had "already found that the measures before [it] are inconsistent with Article XIX:1(a) of the GATT 1994 and with Articles 2.1, 3.1 and 4.2 of the *Agreement on Safeguards*". (Appellate Body Report, *US – Steel Safeguards*, para. 483)

The Appellate Body noted, in that appeal, that "several participants expressed an interest in having [it] rule on causation as it would provide guidance to Member on applying safeguard measures in the future consistently with their WTO obligations". (Appellate Body Report, *US – Steel Safeguards*, para. 484) Despite this request for guidance, the Appellate Body declined to make a ruling on this specific aspect of the case. (Appellate Body Report, *US – Steel Safeguards*, paras. 485-491)

[1173]Brazil's further submission to the Panel, para. 277.

[1174]Panel Report, para. 7.992. The Panel thus addressed elements of Brazil's claim in different parts of its Report. The Panel's response to Brazil's allegation of "serious prejudice" under Article XVI:1 of the GATT 1994 is dealt with in the section of the Panel Report addressing "Actionable Subsidies: Claims of 'Present' Serious Prejudice". (*Ibid*., Section VII:G) In the light of its findings of present serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*, the Panel exercised judicial economy with respect to Brazil's claim of serious prejudice under Article XVI:1 of the GATT 1994. (*Ibid*., para. 7.1476)

in the section of the Panel Report dealing with "Export Subsidies".[1175] The Panel examined whether Article XVI:3 applies only to export subsidies, or whether it also applied to all of the types of subsidies covered by Article XVI:1 as well. The Panel found that:

> Article XVI:3 applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*.[1176]

752. Because the Panel had concluded that Step 2 payments to exporters and export credit guarantees under the GSM 102, GSM 103 and SCGP programs constituted export subsidies prohibited by the relevant provisions of the *Agreement on Agriculture* and the *SCM Agreement*, the Panel—as it had done in respect of Brazil's claims under Article XVI:1 of the GATT 1994—exercised judicial economy with respect to Brazil's claim under Article XVI:3 of the GATT 1994.[1177]

753. Brazil's appeal regarding the Panel's findings with respect to the application of Article XVI:3 of the GATT 1994 has two elements. First, Brazil appeals the Panel's finding that Article XVI:3 applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*. Brazil stresses that its appeal in this regard, that is, the Panel's legal interpretation of the second sentence of Article XVI:3 of the GATT 1994, is *not conditional*.[1178] Brazil argues that, in reaching the view that Article XVI:3 applies only to export subsidies, as currently defined in the *SCM Agreement* and the *Agreement on Agriculture*, the Panel misinterpreted the second sentence of Article XVI:3, which establishes disciplines upon "any form of subsidy which operates to increase the export of any primary product", that is, all subsidies that have an export-enhancing effect, and not just subsidies that are contingent on export performance. According to Brazil, the focus of Article XVI:3 is upon the effect of subsidies in enhancing exports, and not upon formal distinctions between export contingent and other subsidies.[1179]

754. Secondly, Brazil *conditionally* requests the Appellate Body to complete the analysis of its claim that United States price-contingent subsidies[1180] result in the United States having a "more than equitable share of world export trade" in upland cotton, in violation of Article XVI:3, second sentence.[1181] Brazil's request to complete the analysis is conditional upon two events: (i) a reversal by

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[1175]*Ibid*., Section VII:E.

[1176]*Ibid*., para. 7.1016.

[1177]*Ibid*., para. 7.1017.

[1178]Brazil's other appellant's submission, para. 319.

[1179]Brazil's other appellant's submission, paras. 323-327.

[1180]That is, marketing loan payments, Step 2 payments, market loss assistance payments and counter-cyclical payments.

[1181]Brazil's other appellant's submission, para. 318.

the Appellate Body of the Panel's finding regarding *significant price suppression* (resulting in serious prejudice in terms of Articles 6.3(c) and 5(c) of the *SCM Agreement*); and, (ii) denial by the Appellate Body of Brazil's request for a ruling that the United States' measures at issue resulted in an increase of the United States' *world market share* in upland cotton (resulting in serious prejudice in terms of Articles 6.3(d) and 5(c) of the *SCM Agreement*).[1182] Brazil submits that there are sufficient factual findings by the Panel or undisputed facts on the record to allow the Appellate Body to complete the analysis of Brazil's claim regarding violation of Article XVI:3 by the United States price-contingent subsidies.[1183]

755. The United States emphasizes that the text of Article XVI distinguishes between "Subsidies in General" (Section A) and "Additional Provisions on Export Subsidies" (Section B). By locating Article XVI:3 in Section B, Members agreed that Article XVI:3 is a provision on export subsidies.[1184] The term "export subsidy" is now defined in the *SCM Agreement* and the *Agreement on Agriculture* as referring to subsidies that are contingent on export performance.[1185] Both the context provided by these Agreements, as well as their negotiating history, confirm that the export subsidies referred to in Article XVI:3 are also subsidies contingent on export performance.[1186]

756. With respect to Brazil's conditional request to complete the analysis, the United States contends that, even if the Appellate Body reverses the Panel's interpretation regarding the scope of Article XVI:3, there would be insufficient undisputed facts on the record or factual findings by the Panel to complete the analysis. The United States observes that the Panel did not make any findings on causation relative to trade shares. Nor has Brazil put forward a tenable standard for assessing what is more than an "equitable" trade share.[1187]

2. Analysis

757. Article XVI of the GATT 1994 contains two sections. "Section A" lays down certain rules for "Subsidies in General". "Section B", containing paragraphs 2-5 of Article XVI, provides "Additional Provisions on Export Subsidies". In Article XVI:2, the Members "recognize" that the

[1182]*Ibid*., para. 319. We observe that Brazil does *not appeal* the Panel's findings with regard to Article XVI:1 and the relationship between Articles XVI:1 and XVI:3 (Panel Report, paras. 7.1470-7.1476), and does not appear to rely to any great extent on Article XVI:1 in its arguments relating to this part of its appeal.

[1183]Brazil's other appellant's submission, paras. 371-379.

[1184]United States' appellee's submission, para. 167.

[1185]*Ibid*., para. 168.

[1186]*Ibid*., paras. 169-180.

[1187]United States' appellee's submission, paras. 181-187.

provision of "a subsidy on the export of any product may have harmful effects ...". Article XVI:3, the provision at issue in this part of Brazil's appeal, sets forth that "[a]ccordingly":

> Members should seek to avoid the use of subsidies on the export of primary products. *If, however, a Member grants directly or indirectly any form of subsidy which operates to increase the export of any primary product from its territory*, such subsidy shall not be applied in a manner which results in that Member having more than an equitable share of world export trade in that product, account being taken of the shares of the Members in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.* (*ad note* omitted; emphasis added)

758. The Panel found "that Article XVI:3 applies only to export subsidies as that term is now defined in the *Agreement on Agriculture* and the *SCM Agreement*".[1188] In the light of its rulings under the *Agreement on Agriculture* and the *SCM Agreement* with regard to the United States' export subsidies at issue in the proceedings, the Panel exercised judicial economy with respect to Brazil's claims under Article XVI:3 of the GATT 1994.[1189]

759. Brazil's appeal of these findings has two elements. First, Brazil's appeal focuses on the phrase "any form of subsidy which operates to increase the export of any primary product". It argues that the ordinary meaning of this phrase encompasses all subsidies with an export-enhancing effect, not just those that are *contingent* on export performance. Second, Brazil requests the Appellate Body to complete the analysis and find that the United States' price-contingent subsidies violate Article XVI:3, second sentence, *conditional* upon two events: reversal by the Appellate Body of the Panel's finding of significant price suppression and serious prejudice within the meaning of Articles 6.3(c) and 5(c) of the *SCM Agreement*, as well as denial, by the Appellate Body, of Brazil's appeal concerning the interpretation and application of Articles 6.3(d) and 5(c) of the *SCM Agreement*.

760. With respect to the second element of Brazil's appeal, we note that, above, we upheld the Panel's finding that the effect of the price-contingent subsidies at issue in these proceedings is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*.[1190] We observe, therefore, that the initial condition upon which Brazil's request to complete the analysis of this claim rests is *not* made out, and thus there is no need for us to complete the analysis and to examine whether or not the United States subsidies challenged by Brazil resulted in the United States having more than an equitable share of world export trade in upland cotton.

[1188]Panel Report, para. 7.1016.

[1189]*Ibid*., para. 7.1017

[1190]*Supra*, para. 496.

761. Nor do we believe that it is necessary to make a finding on the interpretation of the phrase "any form of subsidy which operates to increase the export of any primary product" in the second sentence of Article XVI:3 of the GATT 1994 in order to resolve this dispute. Given our ruling under Article 6.3(c) of the *SCM Agreement*, we observe that, although any ruling by the Appellate Body on the scope of the subsidies covered by Article XVI:3 of the GATT 1994 in the abstract might at best offer some degree of "guidance", it would not affect the resolution of this dispute.[1191] Indeed, irrespective of whether we were to uphold or reverse the Panel's finding on this issue, upon adoption of the recommendations and rulings by the DSB, the United States would be under no additional obligation regarding implementation. Thus, although we recognize that there may be cases in which it would be useful for us to make a finding on an issue, despite the fact that our finding would not result in recommendations and rulings by the DSB, we find no compelling reason for doing so in this case in respect of this particular issue.

762. We therefore believe that an interpretation of the phrase "any form of subsidy which operates to increase the export" in Article XVI:3 of the GATT 1994 is unnecessary for purposes of resolving this dispute. We emphasize that we neither uphold nor reverse the Panel's interpretation of this phrase in the second sentence of Article XVI:3.

[1191]We note in this regard that, in *US – Steel Safeguards*, the Appellate Body noted that "several participants expressed an interest in having [it] rule on causation as it would provide guidance to Members on applying safeguard measures in the future consistently with their WTO obligations". (Appellate Body Report, *US – Steel Safeguards*, para. 484) (original emphasis) Despite this request for guidance, the Appellate Body declined to make a ruling on this specific aspect of the case. (Appellate Body Report, *US – Steel Safeguards*, paras. 485-491)

VIII. Findings and Conclusions

763. For the reasons set out in this Report, the Appellate Body:

(a) as regards procedural matters:

(i) in relation to production flexibility contract payments and market loss assistance payments:

- upholds the Panel's finding, in paragraphs 7.118, 7.122, 7.128, and 7.194(ii) of the Panel Report, that Articles 4.2 and 6.2 of the DSU do not exclude expired measures from the potential scope of consultations or a request for establishment of a panel and, therefore, that production flexibility contract payments and market loss assistance payments fell within the Panel's terms of reference; and

- finds that the Panel set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind this finding, as required by Article 12.7 of the DSU; and

(ii) in relation to export credit guarantee programs:

- upholds the Panel's ruling, in paragraph 7.69 of the Panel Report, that "export credit guarantees to facilitate the export of United States upland cotton, and other eligible agricultural commodities ... are within its terms of reference"; and

- upholds the Panel's ruling, in paragraph 7.103 of the Panel Report, that "Brazil provided a statement of available evidence with respect to export credit guarantee measures relating to upland cotton and eligible United States agricultural products other than upland cotton, as required by Article 4.2 of the *SCM Agreement*";

(b) as regards the application of Article 13 of the *Agreement on Agriculture* to this dispute:

(i) in relation to Article 13(a)(ii):

- upholds the Panel's finding, in paragraphs 7.388, 7.413, 7.414, and 8.1(b) of the Panel Report, that production flexibility contract

payments and direct payments are not green box measures that fully conform to paragraph 6(b) of Annex 2 of the *Agreement on Agriculture*; and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

- declines to rule on Brazil's conditional request that the Appellate Body find that the updating of base acres for direct payments under the FSRI Act of 2002 means that direct payments are not green box measures that fully conform to paragraph 6(a) of Annex 2 of the *Agreement on Agriculture*; and, therefore, are not exempt from actions under Article XVI of GATT 1994 and Part III of the *SCM Agreement* by virtue of Article 13(a)(ii) of the *Agreement on Agriculture*; and

(ii) in relation to Article 13(b)(ii):

- modifies the Panel's interpretation, set out in paragraph 7.494 of the Panel Report, of the phrase "support to a specific commodity" in Article 13(b)(ii) of the *Agreement on Agriculture*; but upholds the Panel's finding, in paragraphs 7.518 and 7.520 of the Panel Report, that Step 2 payments to domestic users, marketing loan program payments, production flexibility contract payments, market loss assistance payments, direct payments, counter-cyclical payments, crop insurance payments, and cottonseed payments (the "challenged domestic support measures") granted "support to a specific commodity", namely, upland cotton;

- declines to rule on the United States' appeal that only the price gap methodology described in paragraph 10 of Annex 3 of the *Agreement on Agriculture* may be used to measure the value of marketing loan program payments and deficiency payments for the purposes of the comparison required by Article 13(b)(ii) of the *Agreement on Agriculture*; and

- upholds the Panel's finding, in paragraphs 7.608 and 8.1(c) of the Panel Report, that the "challenged domestic support measures"

granted, in the years 1999, 2000, 2001 and 2002, support to a specific commodity, namely, upland cotton, in excess of that decided during the 1992 marketing year; and, therefore, that these measures are not exempt from actions based on Articles 5 and 6 of the *SCM Agreement* and Article XVI:1 of the GATT 1994 by virtue of Article 13(b)(ii) of the *Agreement on Agriculture*;

(c) as regards serious prejudice:

(i) in relation to Article 6.3(c) of the *SCM Agreement*:

- upholds the Panel's finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, 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 of Article 6.3(c) of the *SCM Agreement*, by in turn upholding the Panel's findings:

(A) regarding the "market" and "price" in assessing whether "the effect of the subsidy is ... significant price suppression ... in the same market" within the meaning of Article 6.3(c) of the *SCM Agreement*:

- in paragraphs 7.1238-7.1240 of the Panel Report, that the "same market" may be a "world market";

- in paragraph 7.1247 of the Panel Report, that a "world market" for upland cotton exists; and

- in paragraph 7.1274 of the Panel Report, that "the A-Index can be taken to reflect a world price in the world market for upland cotton"; and

(B) regarding the "effect" of the price-contingent subsidies under Article 6.3(c) of the *SCM Agreement*:

- in paragraphs 7.1312 and 7.1333 of the Panel Report, that "significant price suppression" occurred within the meaning of Article 6.3(c);

- in paragraphs 7.1355 and 7.1363 of the Panel Report, that "a causal link exists" between the price-contingent subsidies and the significant price suppression found by the Panel under Article 6.3(c) and that this link is not attenuated by other factors raised by the United States;

- in paragraphs 7.1173, 7.1186, and 7.1226 of the Panel Report, that it was not required to quantify precisely the benefit conferred on upland cotton by the price-contingent subsidies and, consequently, not identifying the precise amount of counter-cyclical payments and market loss assistance payments that benefited upland cotton; and

- in paragraph 7.1416 of the Panel Report, that the effect of the price-contingent subsidies for marketing years 1999 to 2002 "is significant price suppression ... in the period MY 1999-2002"; and

- finds that the Panel, as required by Article 12.7 of the DSU, set out the findings of fact, the applicability of relevant provisions, and the basic rationale behind its finding, in paragraphs 7.1416 and 8.1(g)(i) of the Panel Report, that the effect of the price-contingent subsidies is significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement*; and

(ii) in relation to Article 6.3(d) of the *SCM Agreement*:

- finds it unnecessary, for the purposes of resolving this dispute, to rule on the interpretation of the phrase "world market share" in Article 6.3(d) of the *SCM Agreement*, and neither upholds nor reverses the Panel's findings in this regard; and

- declines to rule on Brazil's conditional request for the Appellate Body to find that the effect of the price-contingent subsidies is an increase in the United States' world market share in upland cotton within the meaning of Article 6.3(d) of the *SCM Agreement*;

(d) as regards user marketing (Step 2) payments:

(i) upholds the Panel's findings, in paragraphs 7.1088, 7.1097-7.1098, and 8.1(f) of the Panel Report, that Step 2 payments to *domestic users* of United States upland cotton, under Section 1207(a) of the FSRI Act of 2002, are subsidies contingent on the use of domestic over imported goods that are inconsistent with Articles 3.1(b) and 3.2 of the *SCM Agreement*; and

(ii) upholds the Panel's findings, in paragraphs 7.748-7.749, 7.760-7.761, and 8.1(e) of the Panel Report, that Step 2 payments to *exporters* of United States upland cotton, pursuant to Section 1207(a) of the FSRI Act of 2002, are subsidies contingent upon export performance within the meaning of Article 9.1(a) of the *Agreement on Agriculture* that are inconsistent with Articles 3.3 and 8 of that Agreement and Articles 3.1(a) and 3.2 of the *SCM Agreement*;

(e) as regards export credit guarantee programs:

(i) upholds the Panel's finding, in paragraphs 7.901, 7.911, and 7.932 of the Panel Report, that Article 10.2 of the *Agreement on Agriculture* does not exempt export credit guarantees from the export subsidy disciplines in Article 10.1 of that Agreement[1192];

(ii) finds that the Panel did not improperly apply the burden of proof in finding that the United States' export credit guarantee programs are prohibited export subsidies under Article 3.1(a) of the *SCM Agreement* and are consequently inconsistent with Article 3.2 of that Agreement;

(iii) declines to find that the Panel erred by failing to make the necessary findings of fact in assessing whether the export credit guarantee programs are provided at premium rates that are inadequate to cover long-term operating costs and losses within the meaning of item (j) of the Illustrative List of Export Subsidies annexed to the *SCM Agreement*; and, consequently,

(iv) upholds the Panel's finding, in paragraph 7.869 of the Panel Report, 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

[1192]See Separate Opinion, *supra*, paras. 631-641.

of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement*", and upholds the Panel's findings, in paragraphs 7.947 and 7.948 of the Panel Report, 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; and

(v) finds that the Panel did not err in exercising judicial economy in respect of Brazil's allegation that the United States' export credit guarantee programs are prohibited export subsidies, under Article 3.1(a) of the *SCM Agreement*, because they confer a "benefit" within the meaning of Article 1.1 of that Agreement;

(f) as regards circumvention of export subsidy commitments:

(i) reverses the Panel's finding, in paragraph 7.881 of the Panel Report, that Brazil did not establish actual circumvention in respect of poultry meat and pig meat; finds, however, that there are insufficient uncontested facts in the record to complete the legal analysis to determine whether the United States' export credit guarantees to poultry meat and pig meat have been applied in a manner that "results in" circumvention of the United States' export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture*;

(ii) modifies the Panel's interpretation, in paragraphs 7.882-7.883 and 7.896 of the Panel Report, of the phrase "threatens to lead to .... circumvention" in Article 10.1 of the *Agreement on Agriculture* to the extent that the Panel's interpretation requires "an unconditional legal entitlement" to receive the relevant export subsidies as a condition for a finding of threat of circumvention, but upholds, for different reasons, the Panel's finding, in paragraph 7.896 of the Panel Report, that Brazil has not established that "the export credit guarantee programmes at issue are generally applied to scheduled agricultural products other than rice and other unscheduled agricultural products (not supported under the programmes) in a manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the *Agreement on Agriculture*"; and

(iii) finds that the Panel did not err in confining its examination of Brazil's threat of circumvention claim to scheduled products other than rice and unscheduled products not supported under the United States' export credit guarantee programs;

(g) as regards the ETI Act of 2000, declines Brazil's request that the Appellate Body reverse the Panel's conclusion that Brazil did not make a *prima facie* case that the ETI Act of 2000 is inconsistent with the United States' WTO obligations; and

(h) as regards Article XVI:3 of the GATT 1994:

(i) finds it unnecessary, for the purposes of resolving this dispute, to rule on the interpretation of the phrase "any form of subsidy which operates to increase the export" in Article XVI:3 of the GATT 1994, and neither upholds nor reverses the Panel's findings in this regard; and

(ii) declines to rule on Brazil's conditional request for the Appellate Body to find that the price-contingent subsidies cause the United States to have "more than an equitable share of world export trade" in upland cotton, in violation of the second sentence of Article XVI:3 of the GATT 1994.

764. The Appellate Body recommends that the Dispute Settlement Body 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 10th day of February 2005 by:

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Merit E. Janow
Presiding Member

_____ _____

Luiz Olavo Baptista
Member

A.V. Ganesan
Member

ANNEX 1

WORLD TRADE ORGANIZATION

WT/DS267/17
20 October 2004

(04-4441)

Original: English

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Notification of an Appeal by the United States
under paragraph 4 of Article 16 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes ("DSU")

The following notification, dated 18 October 2004, 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 on *United States – Subsidies on Upland Cotton* (WT/DS267/R) 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 legal conclusion that certain U.S. decoupled income support measures – that is, production flexibility contract payments under the Federal Agricultural Improvement and Reform Act of 1996 ("1996 Act"), direct payments under the Farm Security and Rural Investment Act of 2002 ("2002 Act"), and "the legislative and regulatory provisions which establish and maintain the [direct payments] programme" – are not exempt from actions under Article 13(a) of the *Agreement on Agriculture*.[1] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, that these decoupled income support measures do not conform to Annex 2.

2. The United States seeks review by the Appellate Body of the Panel's legal conclusion that certain U.S. domestic support measures[2] are not exempt from actions under Article 13(b) of the *Agreement on Agriculture*.[3] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that the challenged U.S. measures granted support to a specific commodity in excess of that decided in marketing year 1992 and therefore breached the proviso of Article 13(b) in each year from marketing year 1999-2002.

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[1] *See, e.g.*, Panel Report, paras. 8.1(b), 7.337-7.414.

[2] *See* Panel Report, para. 7.337.

[3] *See, e.g.,* Panel Report, paras. 8.1(c), 7.415-7.647.

3. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of unscheduled agricultural products supported under the programs and one scheduled commodity (rice) are "export subsidies applied in a manner which results in circumvention of United States export subsidy commitments, within the meaning of Article 10.1 of the *Agreement on Agriculture*," are therefore inconsistent with Article 8 of the *Agreement on Agriculture*, and are not exempt from actions under Article 13(c) of the *Agreement on Agriculture*.[4] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings, include, for example, the Panel's finding that export credit guarantees, notwithstanding Article 10.2 of the *Agreement on Agriculture*, constitute measures subject to Article 10.1 of the *Agreement on Agriculture*.

4. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of other scheduled agricultural products constitute export subsidies within the meaning of Article 10.1 of the *Agreement on Agriculture*.[5] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings, include, for example, the Panel's finding that export credit guarantees, notwithstanding Article 10.2 of the *Agreement on Agriculture*, constitute measures subject to Article 10.1 of the *Agreement on Agriculture*.

5. The United States seeks review by the Appellate Body of the Panel's legal conclusion that U.S. export credit guarantees under the GSM 102, GSM 103, and SCGP export credit guarantee programs in respect of unscheduled agricultural products supported under the programs and one scheduled commodity (rice) are *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[6] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that the program for each product constitutes an export subsidy for purposes of the WTO Agreements and is provided by the United States at premium rates which are inadequate to cover long-term operating costs and losses of the programs within the meaning of item (j) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement.

6. The United States seeks review by the Appellate Body of the Panel's legal conclusion that section 1207(a) of the 2002 Act, which provides for user marketing (Step 2) payments to exporters of upland cotton, is an export subsidy that is listed in Article 9.1(a) of the *Agreement on Agriculture* that is inconsistent with U.S. obligations under Articles 3.3 and 8 of the *Agreement on Agriculture*, is not exempt from actions under Article 13(c) of the *Agreement on Agriculture*, and is inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.[7] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that payments under the user marketing (Step 2) program are contingent on export performance.

7. The United States seeks review by the Appellate Body of the Panel's legal conclusion that section 1207(a) of the 2002 Act providing for user marketing (Step 2) payments to domestic users of upland cotton is an import substitution subsidy prohibited under Articles 3.1(b) and 3.2 of the

[4]*See, e.g.,* Panel Report, paras. 8.1(d)(1), 7.762-7.945.

[5]*See, e.g.,* Panel Report, paras. 8.1(d)(2), 7.762-7.945.

[6]*See, e.g.,* Panel Report, paras. 8.1(d)(1), 7.787-7.869, 7.946-7.948.

[7]*See, e.g.,* Panel Report, paras. 7.678-7.761, 8.1(e).

Agreement on Subsidies and Countervailing Measures.[8] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that domestic support payments that are consistent with a Member's domestic support reduction commitments under the *Agreement on Agriculture* may nonetheless be prohibited under the SCM Agreement.

8. The United States seeks review by the Appellate Body of the Panel's legal conclusion that "the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan programme payments, user marketing (Step 2) payments and MLA payments and CCP payments – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of Articles 6.3(c) and 5(c)" of the SCM Agreement.[9] This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the following:

(a) the Panel's finding that Brazil need not demonstrate, and the Panel need not find, the amount of the challenged subsidy that benefits the subsidized product, upland cotton;

(b) the Panel's finding that subsidies not directly tied to current production of upland cotton (decoupled payments) need not be allocated to all products produced and sold by the firms receiving such subsidies;

(c) that the Panel could make findings concerning subsidies that no longer existed at the time of panel establishment and that present serious prejudice could be, and was, caused by such subsidies;

(d) the Panel's finding that the challenged subsidies provided to cotton producers "passed through" to cotton exporters;

(e) the Panel's finding that there was price suppression "in the same market";

(f) the Panel's finding that significant price suppression existed;

(g) the Panel's finding that the price suppression it found under an erroneous legal standard was "significant";

(h) the Panel's finding that "the effect of" the U.S. subsidies "is" significant price suppression;

(i) the Panel's finding that "significant price suppression" is sufficient to establish "serious prejudice" for purposes of Articles 5(c) and 6.3 of the SCM Agreement; and

(j) the Panel's finding that its "'present' serious prejudice findings include findings of inconsistency that deal with the FSRI Act of 2002 and subsidies granted thereunder in MY 2002."[10]

9. The United States seeks review by the Appellate Body of the Panel's finding that decoupled payments made with respect to non-upland cotton base acres were within its terms of reference.[11] This finding is in error and is based on erroneous findings on issues of law and related legal

[8] *See, e.g.,* Panel Report, paras. 7.1018-7.1098, 8.1(f).

[9] Panel Report, paras. 7.1416, 7.1107-7.1416, 8.1(g)(i).

[10] *See, e.g.*, Panel Report, para. 7.1501.

[11] *See, e.g.*, Panel Report, paras. 7.129-7.136.

interpretations. These erroneous findings include, for example, the Panel's finding that these payments were measures at issue within the meaning of Articles 4.4 and 6.2 of the DSU.

10. The United States requests the Appellate Body to find that the Panel failed to set out the findings of fact, the applicability of the relevant provisions, and the basic rationale behind its findings and recommendations, as required by Article 12.7 of the DSU. The Panel's failure to set these out include, for example, the findings or lack of findings concerning the following areas: the amount of the challenged subsidies, including the amount of payments not directly tied to current production of upland cotton (decoupled payments); that significant price suppression existed; the degree of price suppression it deemed "significant"; that "the effect of" the U.S. subsidies "is" significant price suppression; that decoupled payments made with respect to non-upland cotton base acres were within its terms of reference; and the basis for its ability to make findings with respect to subsidies that no longer existed at the time of panel establishment.

11. The United States seeks review by the Appellate Body of the Panel's finding that export credit guarantees to facilitate the export of "other eligible agricultural commodities" besides upland cotton were within its terms of reference.[12] This finding is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that such export credit guarantees were included in Brazil's consultation request and its finding that, contrary to Articles 4.2, 4.4, and 6.2 of the DSU, it could examine measures that were not included in Brazil's request for consultations.

12. The United States seeks review by the Appellate Body of the Panel's finding that Brazil provided the statement of available evidence required by Article 4.2 of the SCM Agreement with respect to export credit guarantee measures relating to eligible United States agricultural products other than upland cotton, and that accordingly, Brazil's claims concerning these measures were within the terms of reference of this dispute.[13] This finding is in error and is based on erroneous findings on issues of law and related legal interpretations.

13. In the event Brazil appeals the Panel's exercise of judicial economy with respect to Brazil's claims concerning the compatibility of U.S. export credit guarantee measures with Part III of the SCM Agreement,[14] in this U.S. appeal the United States conditionally requests the Appellate Body to find that Brazil also failed to provide a statement of available evidence as required by Article 7.2 of the SCM Agreement, and that accordingly, Brazil's claims concerning these measures would not be within the terms of reference of this dispute.

14. The United States seeks review by the Appellate Body of the Panel's legal conclusion that two types of expired measures, production flexibility contract payments and market loss assistance payments, were within the Panel's terms of reference. This conclusion is in error and is based on erroneous findings on issues of law and related legal interpretations. These erroneous findings include, for example, the Panel's finding that measures that are no longer in existence as of the date of establishment of a panel are nonetheless within a panel's terms of reference.[15]

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[12]*See, e.g.*, Panel Report, para. 7.69.

[13]*See, e.g.*, Panel Report, para. 7.103.

[14]*See, e.g.*, Panel Report, para. 7.78.

[15]*See, e.g.*, Panel Report, para. 7.104-7.122.

ANNEX 2

Table 1: Comparison of Support for Purposes of Article 13(b)(ii) of the *Agreement on Agriculture* (using budgetary outlays for marketing loan program payments and deficiency payments)

$ million	MY 1992	MY 1999	MY 2000	MY 2001	MY 2002
Step 2 payments (domestic users) *	102.7	165.8	260	144.8	72.4
Crop insurance payments *	26.6	169.6	161.7	262.9	194.1
Cottonseed payments *	0	79	184.7	0	50
PFC payments +	0	434.9	411.7	329.5	0
MLA payments +	0	432.8	438.3	452.3	0
DP payments +	0	0	0	0	391.8
CCP payments +	0	0	0	0	864.9
Marketing loan program *	866	1761	636	2609	897.8
Deficiency payments *	1017.4	0	0	0	0
Total	**2012.7**	**3043.1**	**2092.4**	**3798.5**	**2471**

Table 2: Comparison of Support for Purposes of Article 13(b)(ii) of the *Agreement on Agriculture* (using price gap methodology for marketing loan program payments and deficiency payments)

$ million	MY 1992	MY 1999	MY 2000	MY 2001	MY 2002
Step 2 payments (domestic users) *	102.7	165.8	260	144.8	72.4
Crop insurance payments *	26.6	169.6	161.7	262.9	194.1
Cottonseed payments *	0	79	184.7	0	50
PFC payments +	0	434.9	411.7	329.5	0
MLA payments +	0	432.8	438.3	452.3	0
DP payments +	0	0	0	0	391.8
CCP payments +	0	0	0	0	864.9
Marketing loan program §	-84	-133	-136	-162	-130
Deficiency payments §	867	0	0	0	0
Total	**912.3**	**1149.1**	**1320.4**	**1027.5**	**1443.2**

Table 3: Values Attributable to the Price-Contingent Subsidies

$ million	**MY 1999**	**MY 2000**	**MY 2001**	**MY 2002**
Marketing loan program *	1761	636	2609	897.8
Step 2 payments (domestic users & exporters) [#]	279.3	445.3	235.7	177.8
MLA payments [+]	432.8	438.3	452.3	0
CCP payments [+]	0	0	0	864.9
Total	**2473.1**	**1519.6**	**3297**	**1940.5**

Notes to Tables:

For the panel's findings regarding the values of support relevant for the analysis under Article 13(b)(ii) of the *Agreement on Agriculture*, see Panel Report, para. 7.596.

* Panel Report, para. 7.596.

[+] The values of production flexibility contract payments, market loss assistance payments, direct payments, and counter-cyclical payments are based on the "*cotton to cotton*" *methodology*, discussed *supra*, paras. 377-380. Figures are drawn from Panel Report, para. 7.641.

[§] Panel Report, para. 7.564 and footnote 727 to para. 7.565.

[#] For the value of Step 2 payments to domestic users, see Panel Report, para. 7.596. To these figures we have added data submitted by the United States for the value of Step 2 payments *to exporters*: see United States' response to questions posed by the Panel, Panel Report, p. I-126, para. 211.