

UNITED STATES – SUBSIDIES ON UPLAND COTTON

Recourse to Article 21.5 of the DSU by Brazil

(WT/DS267)

**EXECUTIVE SUMMARY OF THE FIRST SUBMISSION AND
REQUEST FOR PRELIMINARY RULINGS OF
THE UNITED STATES OF AMERICA**

December 22, 2006

1. The United States requests that the Panel reject Brazil's claims and find that the United States has complied with the DSB's recommendations and rulings and, further, that the U.S. measures taken to comply are not inconsistent with the *SCM Agreement* or the *Agreement on Agriculture*. The Step 2 program for users and exporters of U.S. cotton, worth *hundreds of millions of dollars* annually, was not the only program that the United States ceased to operate. It also ceased issuing guarantees under two export credit guarantee programs, namely, the GSM 103 program and the Supplier Credit Guarantee Program ("SCGP") program, under which the United States had been issuing applications for guarantees covering *hundreds of millions of dollars* of export transactions; the United States now issues *no* guarantees under either of the two programs. The third export credit guarantee program at issue in the underlying proceeding, the GSM 102 program, has been substantially modified and does not constitute an export subsidy. Further, the United States requests the Panel to make a preliminary ruling (as explained below) that certain measures and claims relating to export credit guarantees are not within the scope of this proceeding.

2. With respect to the Dispute Settlement Body's ("DSB") recommendations and rulings on actionable subsidies, the panel's finding of "present" serious prejudice in the original proceeding applied to a package of *payments* made under the Step 2, marketing loan, and counter-cyclical payment programs in marketing years ("MY")1999-2002. Those *payments* were, thus, the only measures subject to the DSB's recommendation under Article 7.8 of the *SCM Agreement* that the United States "take appropriate steps to remove the adverse effects or . . . withdraw the subsidy." Brazil submits no evidence whatsoever as to the present effects, if any, of the payments that were subject to the original panel's finding and thus appears to concede that these payments no longer have any effect. The United States requests the Panel to make preliminary rulings (as explained below) that certain measures and claims relating to certain U.S. *programs* are not within the scope of this proceeding. Without prejudice to those requests, the United States demonstrates that Brazil's claims with respect to U.S. programs also fail to withstand scrutiny.

3. **Export credit guarantees – GSM 102 guarantees have been provided subsequent to 1 July 2005 consistently with U.S. WTO obligations.** Brazil fails to make a *prima facie* case that GSM 102 export credit guarantees were provided subsequent to 1 July 2005 in a manner inconsistent with Articles 3.1 and 3.2 of the *SCM Agreement*. Article 3.1(a) of the *SCM Agreement* prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in Annex I." Item (j) of the Illustrative List of Export Subsidies in Annex I "illustrates" or "makes clear" the conditions under which export credit guarantees may be considered export subsidies within the meaning of Article 3.1(a). Item (j) was the basis of the DSB's recommendations and rulings with respect to the U.S. export credit guarantee programs and, thus, it was the provision of the *SCM Agreement* that provided guidance to the United States in determining how to implement the DSB's recommendations and rulings. Item (j) is also the item that most directly addresses the issue in this dispute. Accordingly, in this case, it is item (j) that provides the basis for assessing whether or not GSM 102 export credit guarantees are export subsidies within the meaning of Articles 3.1(a) and 3.2 of the *SCM Agreement*.

4. The approach advocated by Brazil – to assess whether GSM 102 guarantees are export subsidies within the meaning of item (j) in the "alternative," only if the Panel finds that they are

not ‘financial contributions’ that confer ‘benefits’ and that are export contingent under Articles 1.1 and 3.1(a) of the *SCM Agreement* – would lead to the fatally flawed result that a measure that was specifically found to fall *outside* the definition of an export subsidy could then be found to be an export subsidy.

5. In addition to ceasing to issue guarantees under the GSM 103 and SCGP, the United States has taken a number of steps to ensure that the graduated risk-based fee structure of the GSM 102 program covers the program’s long-term operating costs and losses. Fees for the program now increase with both risk category and tenor (the length of the loan). The United States also reclassified into an ineligible risk category a large number of countries previously eligible under the programs. These changes made to implement the DSB’s recommendations and rulings bolster other disciplines already in place.

6. The U.S. budget accounting data that has become available since the original proceeding show that, for all programs, for the fourteen-year period commencing with fiscal year 1992, the export credit guarantee programs received hundreds of millions of dollars more in premia and interest than required to pay out in operating costs and losses, including interest. These numbers indicate that the United States earned a substantial *profit* on its programs *even under the fee structure preceding the changes implemented on July 1, 2005*. With respect to the GSM 102 program, alone, the budget data also reflects that for every fiscal year cohort since 1992 the net lifetime re-estimates have been negative. Given that the programs charged premium rates *more than* adequate to cover the long-term operating costs and losses of the programs even before any changes were made to implement the DSB’s recommendations and rulings, the changes can only result in even more favorable financial results.

7. Brazil’s emphasis on the original subsidy estimates for the 2006 and 2007 cohorts in the U.S. budget data – and the alleged “guaranteed loan subsidy” for the GSM 102 program – cannot be credited. The original “subsidy” estimate is made well before virtually any activity in the program has occurred in the fiscal year and begins with a historically overly-optimistic projection of actual use of the program. The requirement to use government-wide estimation rules – including mandated risk assessment country grades – without regard to the actual experience specific to the CCC export credit guarantee programs routinely results in initial overestimation of both utilization of the programs and a corresponding overestimation of guaranteed loan subsidy estimates.

8. There is also no textual basis for Brazil’s suggestion that an appropriate method of assessing “benefit” under Article 1.1(b) of the *SCM Agreement* is simply to compare fees of different guarantees, and it ignores the myriad reasons why fees might be different for different guarantees. A difference in fees does not necessarily reflect that any “benefit” is being conferred. Brazil’s comparison of GSM 102 fees to Ex-Im Bank fees is flawed, all the more so given that Brazil has not even taken into account *other* guarantees available in the marketplace.

9. – **The United States has not provided export credit guarantees under the GSM 102 program inconsistently with Articles 10.1 and 8 of the *Agreement on Agriculture*.** Article 10.1 of the *Agreement on Agriculture* prohibits the provision of export subsidies (other than those listed in Article 9.1) “in a manner which results in, or which threatens to lead to,

circumvention of export subsidy commitments.” While Article 1(e) of the *Agreement on Agriculture* defines “export subsidies” as “subsidies contingent upon export performance,” there is no further elaboration as to the kinds of measures that meet this definition. Accordingly, the panel in the original proceeding found that the *SCM Agreement* – which also includes provisions dealing with export subsidies – could provide useful “contextual guidance.” The fact that the GSM 102 export credit guarantees are not export subsidies within the meaning of item (j) is relevant to the question under the *Agreement on Agriculture*, and supports a finding that GSM 102 guarantees are not export subsidies for purposes of Articles 8 and 10.1 of that Agreement.

10. – **The United States has “taken action” to withdraw the subsidy with respect to GSM 102, GSM 103, and SCGP export credit guarantees issued prior to 1 July 2005.** There are no export credit guarantees “still outstanding” under the SCGP program. To the extent there are any export credit guarantees outstanding under the GSM 102 and GSM 103 programs, the United States has “taken action” with respect to them by changing the cost and fee structure of the entire portfolio of programs of which they are part. The United States ceased to provide “export credit guarantee . . . programmes at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes” and, thus, withdrew the subsidy with respect to these export credit guarantees regardless of when they were issued.

11. **Actionable Subsidies – Brazil fails to substantiate its arguments that the effects of eliminating the Step 2 program are “relatively modest.”** Brazil fails to substantiate its claims that the elimination of the Step 2 program is insufficient to meet the U.S. obligation “to remove the adverse effects [of]” the subsidy found to cause serious prejudice in the original proceeding. Brazil’s primary argument is that the counter-cyclical payment rate will increase due to a drop in U.S. farm prices following elimination of the Step 2 program. However, Brazil cannot show that this will happen in the current marketing year (*i.e.*, in the year that is relevant for Brazil’s “present” serious prejudice claims). To the contrary, the season average farm price is projected to be below the marketing loan threshold of 52 cents/lb in the current marketing year (and would likely have been below the threshold even if the Step 2 program were in effect). In these circumstances, the marketing loan rate – and not the season average farm price – is factored into the calculation of the counter-cyclical payment rate and no drop in the season average farm price (whether due to elimination of the Step 2 program or any other reason) will result in any change in the counter-cyclical payment rate. Moreover, even in future years, any possible increase is likely to be small and less than the price effect of the elimination of the Step 2 program.

12. Brazil also fails to explain that elimination of the Step 2 program likely has caused *lower* marketing loan program payments because of a resulting increase in world prices and, thus, also in the adjusted world price (or “AWP”) that is calculated on the basis thereof. Since marketing loan payments are calculated as the difference between the AWP and the 52 cents/lb marketing loan threshold, an increase in the AWP results in a concurrent *decrease* in payments under the marketing loan program. Thus, elimination of the Step 2 program is likely to *minimize* any adverse effects that Brazil claims are being caused by the marketing loan program. Any positive effect of reducing the amount of marketing loan payments, in turn, further amplifies the impact on the market of eliminating the Step 2 program.

13. In addition, Brazil argues that the effect of eliminating the Step 2 program is allegedly

“relatively modest” because the program is smaller in size than the counter-cyclical payment program and marketing loan program. However, Brazil has acknowledged before that the focus of the serious prejudice analysis is on the effect of the challenged subsidy, not its size (and that size does not necessarily say anything about effect). Indeed, in the original proceeding, Brazil considered that the Step 2 program had the second largest impact on world prices and exports, even though payments were smaller under that program than others. Brazil also ignores its own earlier arguments that the “production effects” of the Step 2 program are only one way in which, in Brazil’s view, Step 2 payments could have affected world market prices. Brazil fails to take into account the other effects it alleged in the original proceeding, including the alleged “export-enhancing” nature of the program. Moreover, to the extent that it is even possible to draw conclusions from the data available for the first three months of MY 2006, the data do not appear to support Brazil’s conclusion that elimination of the Step 2 program has had “relatively modest” effects on production, exports, and world prices.

14. **Brazil does not demonstrate that the marketing loan or counter-cyclical payment program mandate a breach of U.S. obligations under Articles 5(c) and 6 of the *SCM Agreement*.** Brazil appears to be challenging, as such, the U.S. marketing loan and counter-cyclical payment *programs*, which the United States understands to be the legal/regulatory provisions for the grant or maintenance of the subsidies. As Brazil has recognized both in this dispute and others, it is established under WTO law that a Member can only challenge measures of another Member *per se* (i.e., “as such”) if such measures mandate a violation of the WTO Agreement. Brazil has not shown that the legal/regulatory provisions for the grant or maintenance of marketing loan and counter-cyclical payments mandate a breach of Articles 5(c) and 6.3(c) or 6.3(d) of the *SCM Agreement*.

15. **Brazil fails to make a *prima facie* case of WTO-inconsistency under Articles 5(c) and 6.3(c) of the *SCM Agreement*.** Brazil fails to make a *prima facie* case that “the effect” of the marketing loan and counter-cyclical payment programs is “significant price suppression” within the meaning of Article 6.3(c) of the *SCM Agreement*. That is, therefore, not a basis for a finding of serious prejudice within the meaning of Article 5(c) of the *SCM Agreement*.

16. – **Evidence regarding the structure, design, and operation of the counter-cyclical and marketing loan payment programs do not support Brazil’s claims.** Although Brazil asserts that “the nature” of the counter-cyclical payment program, in terms of its structure, design and operation, provides evidence of a causal link between the program and the alleged present “significant price suppression,” Brazil fails to take into account the recent empirical research finding that there is no evidence that counter-cyclical payments are the cause of any significant changes in plantings. This empirical research was not available at the time the original panel reviewed the counter-cyclical payment program.

17. There also continues to be substantial evidence showing that decoupled payments, such as counter-cyclical payments, are capitalized into land values and land rents. Where land is rented – and the data show that a substantial portion (almost half) of all U.S. farmland was rented in 2005 – some amount of the value of decoupled payments is transferred from operators (to whom the payments are actually made) to the owners of base acres in the form of higher rents and sales values, thereby minimizing further any possible effects that counter-cyclical payments

may have on production.

18. The empirical research regarding the minimal production effects of the counter-cyclical payment program is bolstered by data that show that traditional U.S. cotton farms receiving cotton counter-cyclical payments planted *approximately 40 percent fewer cotton acres* over MY 2002-2005 than they had in the period used to calculate cotton base acres. This decline in cotton planted acres on traditional U.S. cotton farms reflects the fact that other factors, such as weather and competing crops drive planting, not counter-cyclical payments.

19. In the case of marketing loan payments, Brazil has acknowledged (through its economist) that whether marketing loan payments have any effect on production depends on, *inter alia*, producers' *expectations at the time of planting* both as to prices for the harvested crop and of payments. Despite this, to support its arguments about the effects of the marketing loan program, Brazil points to data showing that the *actual* AWP rates in MY 1999-present have been below the loan rate in a number of years. Since farmers did not know at the time of planting what the *actual* AWP would be during the marketing year commencing up to seven months later, however, a comparison of the *actual* AWP to the loan rate says nothing about whether the marketing loan program actually affected farmers' planting decisions from MY 1999 to the present. An examination of the planting decisions made by U.S. producers in the light of the actual conditions as they existed as of the time of planting shows that in many of the marketing years since MY 1999 – including the present marketing year (MY 2006) – *expected prices were higher than the loan rate*. Under these conditions, it cannot be said that the marketing loan distorted U.S. producers' production decisions. Even in other years, however – in which marketing loan payments could possibly have had an effect on planting – information about actual planting decisions show that they were, in fact, shaped by market factors, not the expectation of marketing loan payments.

20. Brazil's emphasis on what it terms variously the "large," "very large," "huge," and "massive" government outlays under the marketing loan and counter-cyclical payments programs is misplaced. The size of government outlays alone says nothing about their effect, if any, on world market prices. Moreover, Brazil's allegations of the "advantage" given by the counter-cyclical payment and marketing loan payment programs to U.S. producers and exporters to lower their prices and increase their market share are unsubstantiated and do not support Brazil's claim of significant price suppression.

21. – **The facts demonstrate that U.S. producers and exporters have reacted to market signals and are not "insulated" by the marketing loan and counter-cyclical payment programs.** The facts do not support Brazil's argument that the marketing loans and counter-cyclical payment programs "fuel" plantings and production by "insulating" U.S. producers and exporters from normal market signals. To the contrary, U.S. share of world production has been *stable* over the life of the FSRI Act. This reflects the fact that U.S. production has increased and decreased in much the same way as production elsewhere in the world. Similarly, U.S. share of world *exports* has been stable over the life of the Farm Security and Rural Investment Act of 2002 ("the FSRI Act"). Even the increase in U.S. share of world market exports that occurred between MY 1999 and MY 2002 is the result of market conditions (primarily, the decline in U.S. mill use and corresponding increase in consumption elsewhere), not "the effect" of the counter-

cyclical payment and marketing loan payment programs. Thus, neither U.S. production nor U.S. export behavior supports the claim that U.S. producers and exporters are insulated from market forces as Brazil alleges.

22. Contrary to Brazil's assertions, Brazil does not demonstrate a "strong link" between the counter-cyclical payment and marketing loan payment programs, on the one hand, and world market prices, on the other, through its attempts to show the *absence* of a "link" between "prices" and U.S. planted acreage, production, and exports. Brazil's argument about the absence of such a link seems to be inconsistent with its arguments elsewhere that the U.S. market is the "single most important market" in *influencing* cotton prices. Moreover, Brazil's analysis of the sensitivity of U.S. planted acreage, production, and exports to prices is flawed.

23. First, Brazil's comparison of planted acreage to New York futures prices for cotton *alone* ignores the fact that the cotton futures prices is *not* the sole basis for a farmer's planting decision; other factors including, *inter alia*, the futures prices of competing crops are important considerations. Second, Brazil's comparison of U.S. upland cotton production to actual prices again assumes, incorrectly, that planting decisions could be explained through an examination of cotton prices alone. It also assumes incorrectly that U.S. farmers *know* at the time that they plant (in January-March of a given year) what the actual farm price will be in the upcoming marketing year, which does not even start until August. Third, Brazil's comparison of upland cotton exports and farm price fails to take into account the market conditions – for example, important developments in the U.S. textile and apparel industry – that were responsible for the changes in U.S. export patterns in the period MY 1998 to 2002. It also fails to address the fact that *since the FSRI Act came into effect*, U.S. share of world exports has been fairly stable, showing that U.S. exporters have reacted to market conditions in the same general way as foreign exporters.

24. – **"Absolute" increases in U.S. production are "the effect" of improvements in yields, not the marketing loan and counter-cyclical payment programs.** Brazil argues erroneously that an increasing "*absolute*" volumes of U.S. production of upland cotton from MY 2002-2005 are indicative of alleged trade-distortive effects of the U.S. marketing loan and counter-cyclical payment program. The increasing *absolute* volumes of production were the result of *record U.S. yields* in the period from MY 2002 through 2004, not the counter-cyclical payment and marketing loan payment programs. There is no basis for Brazil's argument that any increase due to yield improvements should nonetheless be attributed to the counter-cyclical payment and marketing loan payment programs.

25. – **Brazil fails to demonstrate a "temporal coincidence" between marketing loan payments and counter-cyclical payments and the alleged price suppression.** Contrary to Brazil's assertions, it does not identify facts that "reinforce" the original panel's finding of a discernable temporal coincidence between U.S. subsidies and price suppression. Instead, consideration of each of the factors reviewed by the original panel in coming to this conclusion demonstrate that there is no such temporal coincidence now. First, U.S. planted acreage has been stable for the entire period that the FSRI Act has been in effect and is lower now than in the period examined in the original proceeding; there has been no "overall increase" in plantings similar to that observed by the panel in the original proceeding. Second, U.S. share of production has *not* increased over the period of the FSRI Act, as it appeared to do between MY

1998 and MY 2002, the period examined by the original panel. Third, the U.S. prices received by U.S. upland cotton producers have not decreased since the FSRI Act came into effect. Fourth, while the A-Index in MY 2002-2005 was lower than the 1980-2001 average, this is not evidence of price *suppression*. Moreover, the fact that the A-Index has trended downwards for more than 25 years – from well before the FSRI Act came into effect – and that the A-Index has gone *up* from the levels that prevailed *before* the FSRI Act came into effect would tend to suggest that, to the extent there is any price *suppression*, it is not “the effect” of the marketing loan and counter-cyclical payment programs. Fifth, while the absolute volume of U.S. exports went up over the period of the FSRI Act, U.S. share of world exports did *not* increase. This shows that U.S. export behavior is shaped by the same market forces that shape the behavior of foreign producers and exporters, not by “U.S. subsidies.” Sixth, there have been low levels of U.S. cotton imports for decades; this has little to do with the programs under the 2002 FSRI Act. In short, none of these factors support a finding of a “temporal coincidence” now with respect to the marketing loan and counter-cyclical payment programs.

26. – **Brazil does not demonstrate that U.S. producers would “switch to alternative crops” in the absence of payments under the marketing loan and counter-cyclical payment programs.** Brazil fails to show that “but for” the marketing loan and counter-cyclical payment programs, many upland cotton producers would have had to discontinue growing upland cotton and switch to alternative crops. Brazil’s argument is based on the incorrect assumption that decisions about whether to plant cotton or an alternative crop are made by reference to the “long-term total costs of production” of upland cotton. That assumption is inconsistent with the accepted principle in agricultural economics that the measure producers use when deciding what crops to grow is *variable costs* of production, not “long-term total costs of production.” The data show that, in the period MY 2002 to 2005, U.S. producers have not only covered variable costs but in almost all years have covered most if not all of their total costs of growing cotton as well.

27. Total costs may be relevant, for example, to such long-term decisions as whether to continue or exit cotton farming. However, those decisions are not made on the basis of a segmented cotton-only analysis of costs and returns that Brazil presents in its first written submission. Rather, those types of whole-farm decisions will be made taking into consideration whole-farm costs and returns, including, for example, costs and revenue generated from other crops that have been (or may be) grown as well as off-farm revenues. Brazil has provided no analysis of whole farm costs and revenues that would support its conclusion that, absent payments under the marketing loan and counter-cyclical payment programs, certain cotton producers in the United States would exit cotton farming altogether.

28. Brazil’s analysis also ignores entirely the substantial number of producers who do not receive payments. Moreover, Brazil does not address the possibility that any exit of high-cost U.S. producers would be offset by the expansion of the production of more efficient lower-cost U.S. producers, leaving U.S. plantings and production at the same levels overall.

29. – **Brazil attempts to attribute the price effects of other factors to the marketing loan and counter-cyclical payment programs.** Brazil’s claim that the U.S. marketing loan and counter-cyclical payment programs are “fueling” U.S. planting, production, and exports and thereby significantly suppressing world market prices is also premised on an overly-simplistic

view of the world cotton market. Brazil ignores – and, in fact, attempts to attribute to the marketing loan and counter-cyclical payment programs – the effects of other factors, including, importantly, China’s trade in cotton. While Brazil fails to provide evidence that the United States “drives” world market prices for upland cotton, there is substantial evidence of a close correlation between China’s net trade in cotton and the A-Index. Thus, contrary to Brazil’s assertions, the United States is not the most important market influencing cotton prices throughout the world, nor the “driver” of the world market price. Brazil’s attempts to ascribe price-suppressive effects to the marketing loan and counter-cyclical payment programs on the basis of these representations – without properly addressing and distinguishing the effects of such other factors as the impact of China’s net trade and trade policies – are untenable.

30. Indeed, what Brazil believes is the measure of the “world price” itself – the A-Index – has been changed to reflect the importance of China in the world cotton market. The A-Index is now no longer calculated on the basis of prices of cotton delivered to Northern Europe. Rather, the A-Index is now calculated on the basis of cotton delivered *to Far East ports*. This is not a mere “technical change,” as Brazil alleges. The fact that such a shift was necessary to allow proper measurement of “international cotton price movements” and that this shift was driven primarily by the impact on the market of a single country – China – confirms what the market reports overwhelmingly recognize: the price trends for upland cotton cannot be explained except by accounting for China’s influence on the market.

31. Moreover, contrary to Brazil’s assertions, downward pressure on prices results from uncertainty about the reliability of China’s supply and demand statistics as well as *ad hoc* changes in government policies. Uncertainty leads to increased price volatility and risk to world market participants. These effects are reflected in prices. This is even confirmed by the market reports that Brazil itself submits.

32. – **The econometric modeling cited by Brazil is flawed and greatly exaggerates any effects of removing the programs.** Even based on a preliminary review of the econometric model submitted by Brazil, it is apparent that the model relies on a series of flawed economic assumptions that grossly overstate any possible effect of removing the marketing loan and counter-cyclical payment programs. Contrary to Brazil’s assertions, the important parameters used in the model are not commonly used by U.S. Department of Agriculture (“USDA”) or Food and Agricultural Policy Research Institute (“FAPRI”) economists. Indeed, the parameters in Brazil’s new model are even more exaggerated than the parameters used in what Brazil termed was the “FAPRI-like” model presented in the original proceeding. Brazil now ascribes to the marketing loan and counter-cyclical payment programs almost the *same* price effects that it had previously ascribed to *six* programs (the marketing loan and counter-cyclical payment programs plus four others). The marketing loan and counter-cyclical payment programs have not changed; what has changed are the assumptions that Brazil makes to produce the more egregious effects.

33. The United States demonstrates that, when certain “key elasticities” and some other basic assumptions are re-calibrated to *actually* reflect FAPRI and other well-established parameters, the price effects predicted by Brazil’s new model decline sharply (ranging, for example, from only 0.96 percent to 1.52 percent over the period MY 2006-2008). More detailed analysis and re-calibration would presumably reduce the price effects even more. Both this model and the

World Bank study to which Brazil also cites greatly exaggerate any possible impact of removing the marketing loan and counter-cyclical payment programs. They are, thus, also inconsistent with other recent studies showing only minimal price impacts from removing those programs.

34. – **Brazil has not demonstrated that “the effect” of the marketing loan and counter-cyclical payment program is “significant” price suppression.** The *SCM Agreement* does not define “significant” price suppression. The ordinary meaning of significant, however, is “important, notable; consequential,” which suggests that any price suppression must reach a level at which it is important, notable, and consequential in order to be inconsistent with Article 6.3(c). Brazil does little more than cite back to the same arguments it makes in its causation discussion to attempt to show “significant” price suppression. In so doing, Brazil effectively writes “significant” out of Article 6.3(c) altogether. Brazil does not explain how any of the arguments it makes in its causation discussion demonstrate that the *degree* of the alleged price suppression is “important, notable; consequential.”

35. – **Brazil fails to make a *prima facie* case of WTO-inconsistency under Articles 5(c) and 6.3(d) of the *SCM Agreement*.** Brazil fails to make a *prima facie* case that the United States is causing “serious prejudice” to Brazil’s interests within the meaning of Articles 5(c) of the *SCM Agreement* because “the effect” of U.S. marketing loan and counter-cyclical payment programs under the FSRI Act is an increase in the U.S. world market share within the meaning of Article 6.3(d) of the *SCM Agreement*. Even leaving aside the lack of legal basis for Brazil’s claims against the programs, as such, Brazil does not demonstrate that all of the elements of Article 5(c) and 6.3(d) are satisfied.

36. In the original proceeding, the panel interpreted “world market share” under Article 6.3(d) to mean “share of the world market supplied by the subsidizing Member of the product concerned.” Brazil has proposed two different measures of “supply” – either production in a marketing year or production plus beginning stocks in a marketing year. It is not necessary for the Panel to decide, for purposes of this proceeding, which is the more appropriate measure because *Brazil’s claim fails under either approach*. First, while Brazil asserts its claim in respect of MY 2005, Brazil fails to segregate from the adverse effects it alleges any effects of the Step 2 program. Second, Brazil fails to demonstrate that the slight increase in share of world production or production plus beginning stocks over the average share in MY 2002-2004 “follows a consistent trend over a period when subsidies have been granted.” To the contrary, the data show clearly that it is a part of the ordinary fluctuations in U.S. share of world production. This is true no matter how far back in time one looks. There is, therefore, no basis for Brazil’s claim under Articles 5(c) and 6.3(d) of the *SCM Agreement*.

37. **Requests For Preliminary Rulings – Brazil’s claims relating to GSM 102 guarantees in respect of exports of pig meat and poultry meat are outside the scope of this proceeding.** GSM 102 guarantees in respect of exports of pig meat and poultry meat have never been found to be WTO-inconsistent nor been subject to any DSB recommendation. Under these circumstances, the GSM 102 guarantees in respect of exports of pig meat and poultry meat are not measures taken to comply with the recommendations and rulings of the DSB and are not measures within the scope of this proceeding. Further, Brazil’s claims under Articles 10.1 and 8 of the *Agreement on Agriculture* and Articles 3.1(a) and 3.2 of the *SCM Agreement* are outside

the scope of this proceeding to the extent that they relate to GSM 102 guarantees in respect of exports of pig meat and poultry meat. There is no merit to Brazil's argument that it is entitled to re-assert its claims in respect of these GSM 102 guarantees because it "successfully appealed" the panel's findings regarding the GSM 102 guarantees in respect of exports of pig meat and poultry meat. Even though the original panel's findings were reversed, that changes nothing about the fact that the Appellate Body did not complete the legal analysis and, thus, made no finding of WTO-inconsistency against the measures (and the DSB also issued no rulings and recommendations addressed to them).

38. – **Brazil's claims in respect of the marketing loan and counter-cyclical payment programs are outside the scope of this proceeding.** To the extent that Brazil's claims of serious prejudice and threat of serious prejudice are against the marketing loan and counter-cyclical payment *programs* under the FSRI Act, the claims are outside the scope of this proceeding. The original panel made only one actionable subsidy finding – with respect to Brazil's claim of "present" serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement* against certain *payments* made in MY 1999-2002. The marketing loan and counter-cyclical payment *programs* were not subject either to a finding of WTO-inconsistency or any DSB rulings and recommendations. They are, therefore, not measures within the scope of this proceeding. Moreover, Brazil's claims relating to these programs under Articles 5 and 6 of the *SCM Agreement* are not within the scope of this proceeding.

39. – **Brazil's claims against the marketing loan program and the counter-cyclical program are outside the scope of this dispute because these measures were not "taken to comply" under DSU Article 21.5.** Brazil's claims against the marketing loan and counter-cyclical payment programs are also outside the scope of these proceedings because the programs have not been changed in response to DSB recommendations and rulings or otherwise. Brazil may not renew in an Article 21.5 proceeding claims made in the original proceeding against a measure which is the same measure as in the original proceeding. In the present case, Brazil may not raise again the claims of serious prejudice or threat of serious prejudice under Article 5(c) and 6.3(c) and (d) of the *SCM Agreement* against the marketing loan payment program and the counter-cyclical program. These claims are outside the scope of this Article 21.5 proceeding.

40. – **Brazil's claims that there were no measures taken to comply in a past period are not within the scope of the proceeding.** Brazil claims that the United States failed to take measures to comply with the DSB's actionable subsidy-related recommendation in a timely fashion and seeks a finding that there was a period in the past (21 September 2005 to 31 July 2006) in which no measure taken to comply existed. However, as Brazil does not dispute that measures taken to comply exist, there is no "disagreement" (as required by Article 21.5) over the "existence" of measures taken to comply. There is also no textual basis for an exercise such as the one Brazil is seeking and it would seem contrary to the statement in DSU Article 3.7 that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Thus, Brazil's claim that there were no U.S. measures taken to comply between 22 September 2005 and 31 July 2006 is not within the scope of this proceeding.