BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

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

(AB-2008-2)

Appellee Submission of the United States of America

March 13, 2008

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SERVICE LIST

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I. Introduction and Executive Summary

1. In its other appeal, Brazil raises claims in the alternative with respect to the compliance Panel's findings on the scope of the proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing Settlement of Disputes* ("DSU"). Specifically, Brazil's claims concern the scope of measures taken to comply with the Dispute Settlement Body's ("DSB") recommendations and rulings with respect to "present" serious prejudice for marketing loan and counter-cyclical payment programs and guarantees under the GSM 102 program. Brazil's claims would bring before the compliance Panel claims with respect to programs as such that were not before the original panel, are not part of the recommendations and rulings of the DSB, and cannot be part of the scope of the proceedings before this compliance Panel under Article 21.5 of the DSU.

2. Article 21.5 proceedings are limited to the examination of the existence or consistency of measures taken to comply with the recommendations and rulings of the DSB, which in turn are determined by the findings of the original panel (as modified, if applicable, by the Appellate Body). Thus, a compliance Panel's review is limited by the findings of the original panel.[1] In other words, one must look to the DSB recommendations and rulings to ascertain whether a measure is "taken to comply."

A. Brazil's Claims Regarding Marketing Loan and Counter-Cyclical Payment Programs

[1] Of course, a compliance panel is also limited by its terms of reference – a compliance panel may only examine those claims with respect to the existence or consistency of a measure taken to comply that are within its terms of reference.

3. With respect to "present" serious prejudice related to the marketing loan and counter-cyclical payments, the original panel made findings with respect to *payments* under these programs, not with respect to the programs as such. In its appeal, Brazil argues that these findings should be interpreted also to include a finding of "present" serious prejudice with respect to the marketing loan and counter-cyclical payment programs.

4. Brazil's argument is in error. First, the original panel's findings could not include a finding of "present" serious prejudice for the marketing loan and counter-cyclical payment programs, because Brazil did not make a claim with respect to the programs as such. Brazil made a claim of "present" serious prejudice for *payments* pursuant to the marketing loan and counter-cyclical payment programs, but not the programs themselves. Brazil's claim regarding *payments* pursuant to those programs was properly reflected in the original panel findings.

5. Second, contrary to Brazil's assertions, the "measures at issue" before the original panel, to the extent they include marketing loan and counter-cyclical payment programs, do not define the scope of the original panel's findings. Those findings are determined by the claims before the panel. In the original proceeding, there were no claims of "present" serious prejudice regarding the marketing loan and counter-cyclical payment programs, and therefore there were no (and could be no) findings of "present" serious prejudice regarding the marketing loan and counter-cyclical payment programs.

6. Finally, again contrary to Brazil's assertions, the fact that the original panel's analysis included "structure," "design," and "operation," does not change the scope of the original panel findings. For "present" serious prejudice, the panel findings were limited to findings regarding

payments pursuant to the marketing loan and counter-cyclical payment programs for MY 1999-2002.

7. None of Brazil's arguments change the fact that the claims of "present" serious prejudice before the panel for the marketing loan and counter-cyclical payment programs were limited to claims with regard to payments pursuant to those programs for MY 1999-2002, and that the scope of the panel findings, DSB recommendations and rulings, and Article 21.5 proceedings regarding those programs are also limited to payments pursuant to those programs for MY 1999-2002.

8. Brazil raises two alternative requests regarding measures taken to comply with the DSB's recommendations and rulings in the event that the Appellate Body were to find in favor of Brazil, reverse the compliance Panel's finding that the DSB recommendations and rulings were limited to "payments" under the marketing loan and counter-cyclical programs, and find that the programs themselves are within the scope of the compliance proceeding.

9. Brazil asks that (1) the Appellate Body find that marketing loan and counter-cyclical payments made after September 21, 2005[2] are "measures taken to comply" with the recommendations and rulings of the DSB in view of their allegedly "close relationship" to the marketing loan and counter-cyclical payment programs; or (2) that the "continued use" of the marketing loan and counter-cyclical payment programs is properly within the scope of these

[2]September 21, 2005 was expiration of the period to comply with the DSB's recommendations and rulings concerning serious prejudice.

compliance proceedings.[3]

10. Neither payments pursuant to the marketing loan and counter-cyclical payment programs after September 21, 2005 nor the continued use of these programs were within the scope of the compliance Panel.

11. With regard to continued use of the marketing loan and counter-cyclical payment programs, these unchanged programs cannot be considered measures taken to comply with the recommendations and rulings of the DSB.

B. Brazil's Claims Regarding Export Credit Guarantees for Pig Meat and Poultry Meat

12. Brazil argues that the entire GSM 102 program, as amended, is a measure taken to comply with the recommendations and rulings of the DSB and therefore within the scope of the compliance Panel. Brazil uses this as a basis for the compliance Panel to consider whether export credit guarantees for pig meat and poultry meat are consistent with the covered agreements.

13. The original panel findings for export credit guarantees, consistent with Brazil's claims, were made with respect to export credit guarantees for particular products, not with respect to the GSM 102 program itself . Thus, the GSM 102 program was not the subject of DSB recommendations and rulings. And Brazil explicitly conceded to the compliance Panel that it was *not* challenging the GSM 102 program as such.

II. Marketing Loan and Counter-Cyclical Payment Programs Are Outside the Scope of this Article 21.5 Proceeding

[3]Brazil's Other Appellant Submission, paras. 132 & 135.

14. Brazil asks the Appellate Body to find that the marketing loan and counter-cyclical payment programs themselves are within the scope of the compliance proceeding, based on Brazil's claim that the findings of the original panel and the recommendations and rulings of the DSB covered the programs as such.[4] In effect, Brazil asks the Appellate Body to revisit the proceedings before the original panel to ascertain whether the compliance Panel correctly interpreted the findings of the original panel. Brazil would have the Appellate Body reexamine in full the proceedings of the original panel regarding the measures at issue and the claims made.

15. However, there is no need to revisit and reexamine the original panel proceedings in this way. Under Article 21.5 of the DSU, the critical element is the findings of the original panel, as adopted by the DSB, as these set the scope of the compliance proceeding under Article 21.5 of the DSU. In other words, the compliance panel focuses on the scope of the original panel's findings. Significantly, one of the panelists on the original panel also served on the compliance Panel. Therefore, the compliance Panel benefitted from first-hand knowledge of the scope of the original panel's findings. Drawing on that expertise, the compliance Panel correctly recognized that for "present" serious prejudice claims related to marketing loan and counter-cyclical payments, the original panel's findings were only with respect to payments under the marketing loan and counter-cyclical payment programs for MY 1999-2002. Neither the panel's findings nor the DSB recommendations and rulings that resulted from those findings extended to the programs as such.

16. Brazil, however, suggests that there is some doubt about scope of the original panel's

[4]Brazil's Other Appellant Submission, para. 1.

findings.[5] Brazil then suggests that it – rather than the compliance Panel – has the correct understanding of the scope of the original panel's findings and recommendation, and these "doubts" should be resolved by adhering to Brazil's interpretation. Brazil's position does not withstand scrutiny.

A. The Proper Scope of the Compliance Panel Is Determined by the Findings of the Original Panel and the Recommendations and Rulings of the DSB

17. Under Article 21.5 of the DSU, a compliance panel examines "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]." In other words, a compliance panel may consider whether (a) a measure taken to comply with the recommendations and rulings of the DSB does not exist; or whether (b) a measure taken to comply with the recommendations and rulings of the DSB is not consistent with a covered agreement. In both cases, the DSB recommendations and rulings determine the maximum[6] scope of the proceedings.

18. Thus, the Appellate Body has stated that:

> Proceedings under Article 21.5 do not concern just any measure of a Member of the WTO; rather, Article 21.5 proceedings are limited to those "measures taken to comply with the recommendations and rulings" of the DSB. In our view, the phrase "measures taken to comply" refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. [7]

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[5] Brazil's Other Appellant Submission, paras. 71-73.

[6] As noted above, the scope is further limited by the measures and claims in the compliance panel's terms of reference.

[7] *Canada Aircraft (21.5) (AB)*, para. 36.

19. Contrary to Brazil's assertions, there were no findings with respect to the marketing loan and counter-cyclical "programs."

B. The Panel's Findings and Recommendations Did Not Include a Finding of "Present" Serious Prejudice with Respect to Marketing Loan and Counter-Cyclical Payment Programs

20. The original panel's findings and recommendations with respect to "present" serious prejudice were limited to payments under the marketing loan and counter-cyclical programs, and did not encompass the programs themselves.

21. The original panel report stated:

> In conclusion, in light of all of these considerations, we find that the effect of the mandatory, price contingent United States subsidies at issue – that is, marketing loan programme *payments*, user marketing (Step 2) *payments* and MLA payments and CCP *payments* – is significant price suppression in the same world market for upland cotton in the period MY 1999-2002 within the meaning of articles 6.3(c) and 5(c) of the *SCM Agreement.*[8]

And further:

> The effect of the mandatory price-contingent United States subsidy measures – marketing loan programme *payments*, user marketing (Step 2) *payments*, MLA payments and CCP *payments* – is significant price suppression in the same world market within the meaning of Article 6.3(c) of the *SCM Agreement* constituting serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the *SCM Agreement*.[9]

22. In these findings, the original panel centered on *payments* that were made pursuant to the different programs and the effects of these payments. Or, as the compliance Panel observed, the

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[8] *Upland Cotton* (Panel), para. 7.1416 (emphasis added).

[9] *Upland Cotton* (Panel), para. 8.1(g)(i) (emphasis added).

original panel's findings were "defined in terms of certain kinds of payments."[10]

23. In spite of the clear language in the original panel's findings, by which the original panel definitively limited its findings to marketing loan and counter-cyclical payments, Brazil nonetheless insists that the panel's findings encompassed the marketing loan and counter-cyclical payment programs themselves. In its argument, Brazil confuses "as such" and "as applied" claims.[11]

24. However, the original panel was not confused. Rather, the panel conducted its analysis consistent with Brazil's claims, which, as explained in more detail below, included a claim of "present" serious prejudice regarding *payments* under marketing loan and counter-cyclical payment programs, but did not include a claim of "present" serious prejudice regarding the marketing loan and counter-cyclical payment programs themselves.

25. It is, of course, possible to bring a claim with regard to a program as such. Indeed, the original panel had no difficulty distinguishing different types of claims in its analysis of Brazil's claims of "threat" of serious prejudice with respect to marketing loan and counter-cyclical payments programs. For "threat" of serious prejudice, Brazil's claims fell into two categories: (1) claims of "threat" of serious prejudice against payments allegedly "mandated" to be made in MY 2003-2007;[12] and (2) claims of "threat" of serious prejudice against the legal regime

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[10]Panel Report, para. 9.49.

[11]Brazil's Other Appellant Submission, paras. 48-65.

[12]*Upland Cotton (Panel)*, para. 3.1(vii).

providing for these payments.[13] In the panel's findings, each of these claims is reflected separately.[14]

26. Unlike with regard to "threat" of serious prejudice, for "present" serious prejudice, the original panel did not have before it a claim with regard to the marketing loan and counter-cyclical payment programs themselves. Instead, as reflected in the original panel's findings, it understood the issues before it for "present" serious prejudice as particular to the effects of *payments* made in MY 1999-2002. In turn, this understanding of the issues forms the basis of the scope of the DSB recommendations and rulings and the corresponding scope of the these compliance proceedings under Article 21.5 of the DSU.

C. The Original Panel Made No Finding of "Present" Serious Prejudice for the Marketing Loan and Counter-Cyclical Payment Programs Because there Was No Claim Before it of "Present" Serious Prejudice for the Marketing Loan and Counter-Cyclical Payment Programs

27. Not only did the original panel not make a finding (as explained in the previous section), it could not have done so. The original panel's understanding that there was no claim of "present" serious prejudice before it for the marketing loan and counter-cyclical payment programs was correct. Brazil had not made such a claim, and so the original panel could not make a finding on it.

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[13] *Upland Cotton (Panel)*, paras. 3.1(vii) and (viii).

[14] The two separate threat claims are not the only example of the original panel differentiating in its analysis between two related claims. For Step 2, Brazil raised a prohibited subsidy claim and also a claim of "present" serious prejudice. The original panel made separate findings with respect to each legal claim. As in the separate claims with respect "present" serious prejudice and "threat" of serious prejudice, the findings parallel the legal claims**.** *Upland Cotton (Panel)*, paras. 8.1(e) and (g)(i).

28. In the case of its actionable subsidy claims in the original proceeding, Brazil presented claims in three categories: (a) claims of "present" serious prejudice with respect to payments made in MY 1999-2002;[15] (b) claims of "threat" of serious prejudice with respect to payments that were allegedly "mandated" to be made in MY 2003 to 2007;[16] and (c) claims of "threat" of serious prejudice against the provisions of the FSRI Act and ARP Act of 2000, as such, to the extent that they provided for the aforementioned subsidies in respect of upland cotton.[17] With respect to the "threat" claims in (b) and (c), Brazil made payment-related claims (item (b)) and program-related claims (item (c)). By contrast, there is only one claim with respect to "present" serious prejudice: the claim with respect to payments made in MY 1999-2002.

1. Brazil Did Not Present a Claim of "Present" Serious Prejudice with Respect to the Marketing Loan and Counter-Cyclical Payment Programs

29. As part of its attempt to rewrite the Panel's findings and recommendations, Brazil goes back in time to its original panel request, citing the listing of "measures that are the subject of this request" as "prohibited and actionable subsidies provided to U.S. producers, users and/or exporters of upland cotton, as well as legislation, regulations and statutory instruments and amendments thereto providing such subsidies."[18]

30. But the issue here is the scope of the panel's findings on the *claims* Brazil presented, not

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[15] *Upland Cotton (Panel)*, para. 3.1(vi).

[16] *Upland Cotton (Panel)*, para. 3.1(vii).

[17] *Upland Cotton (Panel)*, para. 3.1(viii).

[18] Brazil Appellant Submission, para. 75, citing Brazil panel request, WT/DS267/7, page 1.

measures at issue. The list of measures in the original panel request is broadly worded to encompass a number of possible claims, and the request does not describe the particular legal claims that will actually be made. For example, although claims of "threat" of serious prejudice and of "present" serious prejudice were separate in the original panel's proceedings, they are not separated in the panel request. Similarly, the particular list of measures at issue that Brazil cites applies without distinction to a long list of possible issues, including both "threat" and "present" serious prejudice claims.

31. Brazil did articulate before the original panel the specific legal claims it was making in detail, albeit not in the panel request. These claims did not include a claim of "present" serious prejudice with respect to marketing loan and counter-cyclical programs as such. In Brazil's Further Submission to the original panel, Brazil argued that it had suffered "present" serious prejudice as a result of "subsidies provided in MY 1999-2002" pursuant to the marketing loan and counter-cyclical payment programs, among others.[19] There was no claim regarding the programs themselves. By contrast, Brazil did make a separate as such challenge to the programs, including marketing loan and counter-cyclical payment programs, in respect of "threat" of serious prejudice.[20]

32. The original panel's findings thus paralleled the claims made by Brazil, showing that the original panel well understood the issues before it. Moreover, when the compliance Panel recognized that the scope of its proceedings under Article 21.5 of the DSU covered *payments*

[19]Brazil's Further Submission, 9 Sept. 2003, para. 9; *see also*, e.g., paras. 14, 71

[20]Brazil's Further Submission, 9 Sept. 2003, para 27 and paras. 413 et seq.

under the marketing loan and counter-cyclical payment programs, it did not fail to give effect to a claim by Brazil about these "programs" that was before the original panel or should have been understood to be part of the original panel's findings. Instead, there was no such claim on which the original panel or the compliance Panel could have ruled. As the compliance Panel recognized, the original panel's "finding of 'present' serious prejudice in paragraphs 7.146 and 8.1(g)(i) logically cannot have been broader in scope than the claims of Brazil in respect of which the panel made this finding."[21]

2. Being "Measures at Issue" Before the Original Panel Does Not Bring Marketing Loan and Counter-cyclical Payment Programs Within the Scope of the DSB Recommendations and Rulings

33. Notwithstanding that it did not make a claim of "present" serious prejudice in respect of marketing loan and counter-cyclical payment programs, Brazil nonetheless tries to bring marketing loan and counter-cyclical payment programs within the scope of the compliance proceeding by relying on an argument regarding their status as "measures at issue" before the original panel.

34. Brazil's argument is presented in the following way: First, Brazil uses the premise that the "scope of the measures at issue and the scope of the measures subject to a panel's findings and conclusions must be considered coincident unless a panel makes an express statement to the contrary."[22] Second, Brazil argues that the marketing loan and counter-cyclical payment programs are "measures at issue." Therefore, Brazil concludes, the marketing loan and counter-

[21]Panel Report, para. 9.47.

[22]Brazil's Other Appellant Submission, para. 86.

cyclical payment programs were subject to the panel's findings.

35. However, the analysis does not work as Brazil suggests. The scope of a panel's findings is not determined by simply identifying the measures at issue, but is determined by the claims on which findings are made. Notably, in *Canada – Autos*, which Brazil cites in footnote 59 of its submission, the Appellate Body does not state that the panel should address expressly those "measures" it declines to rule upon, but states that a panel "should . . . in all cases, address expressly those *claims* which it declines to rule upon for reasons of judicial economy."[23] As discussed above, Brazil did not raise a claim of "present" serious prejudice with respect to marketing loan and counter-cyclical payment programs. No discussion of "measures at issue" can change that.

36. Brazil seems to contend that if a program is arguably a "measure at issue" and a claim with respect to the program could have been made, a panel should both assume that the claim was made and either make findings on the possible claim or expressly exercise judicial economy. Thus, Brazil states that the scope of the original panel's conclusions "is not free from doubt"[24] and states that Section III of the original report "perpetuates the ambiguity" with respect to the measures at issue.[25]

37. Brazil even tries to inject doubt into the panel's findings by pointing out that the titles of the programs included the word "payment." Brazil is implying that the original panel meant to

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[23]*Canada – Autos (AB)*, para. 117 (emphasis added).

[24]Brazil's Other Appellant Submission, para. 72.

[25]Brazil's Other Appellant Submission, para. 73.

say "program," but said "payment" instead because the names of the programs caused confusion.[26] Effectively, Brazil reads "program payments" as though it were "payment programs," but obviously the original panel's use of the two terms showed that the panel distinguished between the two.

38. But the scope of the issues before a panel is not so elastic as Brazil would suggest. If it were, a panel would be forced to consider all possible claims, regardless of the claims actually made by a party.

39. It is not the task of the panel (original or compliance) to guess what claims a complaining party intends to make. Under Article 6.2 of the DSU, a the party's request for a panel shall provide "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The party would then present the arguments in support of its specific legal claims. Here, it is clear that the "program" claim Brazil now asserts simply was not within the scope of the original panel proceedings.

40. In fact, because Brazil raises these arguments in the context of a compliance panel, it is claiming that the scope of issues before a panel remains elastic not only after it presented its claims to the original panel, but even after the original panel has made its findings, and the recommendations and rulings have been issued by the DSB. This is contrary to Article 21.5 of the DSU, which limits the scope of a compliance proceeding to the measures taken to comply with the DSB recommendations and rulings.

41. In any case, the original panel's discussions of "measures at issue" do not support

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[26] Brazil's Other Appellant Submission, para. 69.

Brazil's contention that marketing loan and counter-cyclical payment programs themselves were the subject of claims before the panel, and thus the subject of findings of the panel. For example, the original panel lists the legislative and regulatory provisions providing for payments under, *inter alia*, Step 2, marketing loan, and counter-cyclical payment programs as among the "measures at issue." But this says nothing about the claims pursuant to those programs.

42. Similarly, Brazil's focus on the word "subsidy" in the original panel's characterization of issues (e.g. "US subsidies provided during MY 1999-2002.")[27] does not show that the original panel had before it any claim regarding the marketing loan and counter-cyclical payment programs.

43. Under Brazil's reading, the reference to "subsidies" refers to the "program" in itself. But, in fact, a plain reading of the description means rejection of Brazil's claims. First, the term "subsidies" has actually been associated with "payments" pursuant to programs. Notably, the original panel identified the "challenged measures" that were alleged to be "subsidies" for the purposes of Brazil's claim of "present" serious prejudice as "user marketing (Step 2) *payments* to domestic users and exporters; marketing loan programme *payments*; PFC *payments*; MLA *payments*; DP *payments*; CCP *payments*; crop insurance *payments*; and cottonseed *payments*."[28] Further, the original panel found that these constituted "subsidies" within the meaning of Article 1 of the *SCM Agreement* because they were "financial contributions" conferring a "benefit."[29]

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[27]Brazil Appellant Submission, para. 73.

[28]*Upland Cotton (Panel)*, para. 7.1120 (emphasis added).

[29]*Upland Cotton (Panel)*, para 7.1120.

The most logical interpretation of "financial contribution" here would be payments. Second, to correctly interpret the phrase "US subsidies provided during MY 1999-2002," it is necessary not only to look at the word "subsidy" but also to give effect to the verb "provided" and the limitation to MY 1999-2002. Both of these are consistent with the fact that the original panel's findings were limited to actual payments during those years.

44. The scope of the panel's findings corresponds to the claims raised by the parties, not to "measures at issue." Here, quite simply, Brazil did not raise a claim of "present" serious prejudice with respect to marketing loan and counter-cyclical payment programs. Instead, it made an "as applied" claim with respect to payments under those programs. Thus, regardless of whether the "measures" were "at issue" in the context of the "as applied" claim, the original panel did not make findings on a claim regarding the programs as such, and such a claim is outside the scope of this compliance proceeding.

3. The Original Panel's Analysis with Respect to "Present" Serious Prejudice Examined Payments Under Marketing Loan and Counter-Cyclical Payment Programs, not the Programs Themselves

45. Brazil tries to use the fact that the original panel analyzed "structure, design, and operation" of subsidies provided under the marketing loan and counter-cyclical payment programs to imply that the original panel had before it a claim regarding the programs themselves. Brazil's arguments fail.

46. First, Brazil assumes that when the panel referred to "structure, design, and operation" of subsidies, it meant "structure, design, and operation" of *programs* and the panel was therefore analyzing the *programs*. There is no basis for this assumption. The term "subsidies" does not

necessarily refer to a program as such, but often – and in the original panel proceedings, as discussed in paragraph 43 above – refers to payments.

47. Second, Brazil's argument that "payments" do not have "structure," "design" or "operation" is simply wrong. In an attempt to minimize the scope of the analysis for a claim limited to payments, Brazil characterizes a payment as "simply a dollar amount transferred to the recipient."[30] In Brazil's view, any analysis of structure, design, or operation is necessarily a "program" analysis because it could not be analysis of a payment.

48. Contrary to Brazil's position, even a "simple" payment can be analyzed in terms of "structure," "design," and "operation." For example, in the case of "a dollar amount transferred to the recipient," a panel could review the identity of the recipient, the amount of the transfer, and the time of the transfer. Then, the panel could look to the market context to determine the effects, if any, of the transfer. Indeed, under Brazil's approach, where a Member provided a one-time payment that was not pursuant to some "program" there would be no "design, structure or operation" to analyze. Yet that would ignore all of the surrounding circumstances of the payment, such as the conditions under which it was made.

49. The fact that the original panel analyzed the "structure, design, and operation of subsidies" was perfectly consistent with the claims before it regarding *payments* under the marketing loan and counter-cyclical payment programs. This analysis does not in any way suggest that claims regarding the programs as such were before the panel.

50. Again, the scope of the compliance Panel proceedings are determined by the DSB

[30]Brazil's Other Appellant Submission, para. 93.

recommendations and rulings, which are in turn determined by the findings of the original panel with respect to the claims before it. In the original proceeding, Brazil did not make a claim of "present" serious prejudice with regard to the marketing loan and counter-cyclical payment programs. No line of reasoning by the original panel, much less a re-interpretation during a compliance proceeding of the original panel's reasoning, can alter the claims before an original panel.

4. The Panel Did Not Make Findings Brazil Stated Were Necessary for a Finding of "Present" Serious Prejudice with Respect to Marketing Loan and Counter-Cyclical Payment Programs

51. Another reason that it is evident that claims of present serious prejudice for marketing loan and counter-cyclical payments programs are not within the scope of the compliance Panel or the original panel findings is the conspicuous absence of the particular findings that Brazil had viewed as necessary components of a finding on the programs as such. Brazil described the findings that the panel would have had to make, and it is evident that these findings are absent from the original panel's findings.

52. For example, in the case of its threat of serious prejudice claims against the challenged programs, as such, Brazil asked the panel "to find that the mandatory provisions of the 2002 FSRI Act and the 2000 ARP Act together with their implementing regulations, as listed above, cannot be applied in a WTO consistent manner."[31] Explaining what this would mean in the context of this dispute, Brazil argued "[f]irst, the Panel needs to evaluate whether the U.S. subsidies will necessarily threaten to cause serious prejudice at price levels below the trigger

[31]Brazil 9 September 2003 Further Submission, paras. 435-436.

prices of the U.S. subsidies. Second, the Panel needs to consider whether the U.S. subsidies threaten to cause serious prejudice even at price levels at which only crop insurance subsidies and direct payments are made."[32] The original panel did not conduct the requested evaluation and did not make the requested findings.

53. The fact that the original panel neither conducted the requested evaluations, nor made any findings along the lines requested by Brazil confirms – once again – there were no claims regarding "present" serious prejudice for marketing loan and counter-cyclical payment programs before the panel. [33]

54. If claims for "present" serious prejudice had been before the original panel, but the panel had not made findings Brazil viewed as necessary with respect to that claim,[34] one might expect that Brazil would have appealed on this issue. But, Brazil did not. In fact, its arguments to the Appellate Body in the original proceeding reflect that the original panel did not make findings with respect to the marketing loan and counter-cyclical payment programs. For example, Brazil challenged the U.S. position that, under the *SCM Agreement*, the benefit of the subsidies provided in MY 1999-2002 would need to be allocated to the year in which they were provided. Brazil argued that, if the U.S. argument were credited, "Brazil will have no remedy under Article 7.8 of the SCM Agreement for its serious prejudice, since it is allegedly legally impossible for the MY 2002 price-contingent recurring subsidies to have any adverse effects after 31 August

[32]Brazil 9 September 2003 Further Submission, para. 426.

[33]*Upland Cotton (Panel)*, para. 8.1(g)(i).

[34]*Upland Cotton (Panel)*, para. 8.1(g)(i).

2003 (the close of MY 2002)." [35] It is difficult to see how Brazil could claim to have "no remedy" if, as Brazil attempts to argue now, the original panel had actually made a "serious prejudice" finding against the marketing loan and counter-cyclical payment programs themselves. Indeed, Brazil's argument only makes sense if – as is the case – the original panel's serious prejudice finding applied in respect of payments made in MY 1999-2002.

5. Brazil's Argument Regarding the Panel's Exercise of Judicial Economy on "Threat" Claims and the Implications for "Present" Serious Prejudice Do Not Bring the Marketing Loan and Counter-Cyclical Programs into the Scope of the Compliance Proceeding

55. Brazil tries to use statements by the original panel regarding possible implementation of the recommendations and rulings of the DSB to bring marketing loan and counter-cyclical payment programs into the scope of the original panel's findings. In particular, Brazil points to the panel's remark that the United States would make changes in its statutory and regulatory framework as a result of its findings on "present" serious prejudice.[36]

56. However, this point regarding possible implementation measures – and the effect of the particular implementation measures – actually confirms that Brazil is in error. Brazil would have the "measures taken to comply" with the recommendations and rulings of the DSB stretch to include the marketing loan and counter-cyclical payment programs. But if that were the case, then the original panel would have had no need to discuss claims concerning threat of serious prejudice with respect to future payments – the original panel would have already found that the programs "as such" caused serious prejudice and that finding (erroneous as it necessarily must

[35] *Upland Cotton (AB),* para. 529.

[36] *Upland Cotton (Panel)*, para. 7.1501.

be)[37] would have then had implications for any payments under the programs.

D. Brazil has not Demonstrated that the Panel Failed to Undertake an Objective Assessment of Brazil's Argument that the Original Panel's Findings and Conclusions Covered the Marketing Loan and Counter-Cyclical Payment Programs

57. Brazil alleges that the Panel's finding that the original panel's conclusions, and the DSB's recommendations and rulings, relate only to marketing loan and counter-cyclical payments, and not also to the marketing loan and counter-cyclical payment programs, constitutes a breach of Article 11 of the DSU.[38] Brazil, however, has failed to demonstrate that the Panel's analysis of the original panel's report, and the resulting DSB recommendations and rulings, rises to a level that calls into question whether the Panel undertook an objective assessment of the matter before it.

58. As an initial matter, Brazil made its Article 11 claim in the alternative, stating that "the Appellate Body need not address this claim under Article 11 of the DSU if it finds that the compliance panel erred under Article 21.5 of the DSU. . . ."[39] There are one of two possible outcomes on Brazil's Article 11 claim – the Appellate Body will either never address it, or it will find against Brazil. If the Appellate Body reverses the compliance Panel and concludes that the original panel's findings included the marketing loan and counter-cyclical payment programs,

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[37] Among other things, in the context of this dispute, where there are agricultural markets and production at issue that vary greatly due to a number of factors, it would have been pure speculation to conclude that there would be adverse effects on Brazil's interests under any possible set of circumstances.

[38]Brazil's Other Appellant Submission, Part II.E.

[39]Brazil's Other Appellant Submission, para. 130.

then it would not need to reach the Article 11 claim, since Brazil only asked for a finding on that claim in the alternative. If the Appellate Body agrees with the United States that the compliance Panel did not commit legal error in analyzing the original panel's findings, then it could not logically find that the compliance Panel failed to conduct an objective assessment of the matter before it.

59. In any event, Brazil has failed to demonstrate under Article 11 that the compliance Panel disregarded or misconstrued the findings of the original panel, or the parties' arguments concerning those findings. The compliance Panel undertook a detailed legal analysis of the original panel's report.[40] Its conclusion, as explained above, correctly interprets the original panel's findings. Brazil, rather than the compliance Panel, has distorted those findings, and has asked the Appellate Body to do the same. As the compliance Panel stated, "Section III of the [original] panel report ('Parties' Requests for Findings and Recommendations') identifies the measures subject to Brazil's claims of 'present' serious prejudice as 'subsidies provided during MY 1999-2002'without mentioning the legal provisions or programmes providing for these subsidies."[41] Importantly, the compliance Panel concluded that "[t]he panel's finding of 'present' serious prejudice in paragraphs 7.1416 and 8.1(g)(i) logically cannot have been broader in scope than the claims of Brazil in respect of which the panel made this finding."[42] The Panel understood that even though the marketing loan and counter-cyclical payment programs were

[40]Panel Report, paras. 9.44-9.54.

[41]Panel Report, para. 9.47.

[42]Panel Report, para. 9.47.

within the original panel's terms of reference and were listed as "measures at issue," the original panel's findings could not have gone beyond the "present" serious prejudice claims that Brazil actually made – and those claims were only made with respect to payments. The compliance Panel did not err in assessing the scope of the original panel's findings and conclusions, let alone fail to undertake an objective assessment.

III. The Marketing Loan and Counter-Cyclical Payments or Programs are not Measures Taken to Comply with the DSB's Recommendations and Rulings

A. Marketing Loan and Counter-Cyclical Payments After September 21, 2005 as Alleged Measures to Comply

60. Brazil has asked conditionally that the Appellate Body find that the marketing loan and counter-cyclical payments made after September 21, 2005 are "'measures taken to comply' in view of their exceptionally close relationship to the ML and CCP *programs* that were found to cause adverse effects in MY 1999 to 2002."[43] Brazil's analysis depends on Appellate Body and panel reports that do not support its view of what the "measure taken to comply" is in this dispute. The marketing loan and counter-cyclical payments cannot be considered measures taken to comply with the DSB's recommendations and rulings, even aside from the fact that the those recommendations and rulings do not even include the marketing loan and counter-cyclical payment programs. The Appellate Body should reject Brazil's attempt to expand impermissibly the reach of the compliance proceeding under Article 21.5.

61. At the outset, the United States reiterates its earlier argument that the original panel's findings, and the DSB's recommendations and rulings, do not include the marketing loan and

[43]Brazil's Other Appellant Submission, para. 133.

counter-cyclical payment programs, but only payments made under those programs (and two others), from MY 1999-2002. Therefore, as Brazil's claims of serious prejudice related to the programs themselves are not within the scope of the Article 21.5 compliance proceeding, neither would be its claims against payment against payments after September 21, 2005 made under those programs, and the United States is confident that the Appellate Body will not reach those claims here.

62. Even aside from the fact that the programs were not the subject of the DSB's recommendations, Brazil appears to downplay significantly the fact that the United States repealed the Step 2 program. This repeal effectively ended the payments made under Step 2 that were part of a basket of payments whose effect was found to be significant price suppression in the market for upland cotton. To the extent Brazil is asserting claims against post-September 21, 2005 payments on the basis of an alleged close link to (non-existent) findings against certain U.S. *programs*, the United States contests Brazil's attempt here to make claims of WTO-inconsistency against measures *other* than the termination of the Step 2 program, and which were not in any way measures taken to comply. As a logical matter, any claims as to the marketing loan and counter-cyclical programs, or the payments made under them after September 21, 2005, would go to the question of the *existence* of measures taken to comply with the alleged recommendations and rulings related to the marketing loan and counter-cyclical payment programs. Brazil, however, has only asserted that the payments after September 21, 2005 are "measures taken to comply" and questioned the *consistency* of such measures with the covered agreements.

63. Article 21.5 provides for recourse to dispute settlement to determine "the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings [of the DSB]." It follows that a Member may bring a claim as to the consistency of the measures taken to comply with a covered agreement. Where there are no measures taken to comply, there can be no claim that a non-existent measure is inconsistent.

64. The Appellate Body has explained before that "[i]n our view, the phrase 'measures taken to comply' refers to measures which have been, or which should be, *adopted by a Member to bring about compliance with the recommendations and rulings of the DSB*."[44] Neither marketing loan payments nor counter-cyclical payments made after September 21, 2005 were "adopted by [the United States] to bring about compliance with the recommendations and rulings of the DSB." As the Panel recognized, it is undisputed that these payments are being made under the same legislative and regulatory provisions as those that were at issue in the original proceeding.[45] In fact, Brazil observes in its own submission that the United States "continued to grant" marketing loan and counter-cyclical payments "through the use of these very same programs."[46] These payments, made according to the same criteria as those at the time of the original proceeding, cannot reasonably be considered "measures taken to comply" within the sense of Article 21.5.

65. Brazil depends on the Appellate Body report in *US – Softwood Lumber (Article 21.5)* and

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[44]*Canada – Aircraft (AB) (Article 21.5)*, para. 36.

[45]Panel Report, paras. 3.9, 3.12.

[46]Brazil's Other Appellant Submission, para. 148.

the panel report in *Australia – Salmon (Article 21.5)* to support its argument that the marketing loan and counter-cyclical payments made after September 21, 2005 are measures taken to comply.[47] Brazil's reliance is misplaced. First, in both those disputes the compliance panel and the Appellate Body were explaining how they were attempting to apply the particular requirements of Article 21.5. Neither were claiming to be proclaiming a comprehensive standard to replace the agreed text of Article 21.5. Accordingly, the approaches explained there may be useful reference points but that would need to be determined in the context of a particular dispute. Furthermore, those disputes involved findings of WTO-inconsistency against an administrative determination (*Softwood Lumber IV (Article 21.5)*), or an import ban (*Australia – Salmon (Article 21.5*)). The Members concerned took a measure to comply with the DSB's recommendations and rulings, but then adopted another, new measure, which superceded or undid the declared measure taken to comply.[48] The new measure was found to fall within the scope of the compliance proceeding under Article 21.5.

66. The present dispute is different. Brazil made an actionable subsidies claim under the SCM Agreement, and the original panel found against the cumulative adverse effects of the measures at issue. The United States repealed the Step 2 program. The marketing loan and counter-cyclical payments continued under the same programs, both before and after the repeal of Step 2, and cannot be considered discrete new administrative or regulatory measures adopted by the United States after the declared measure taken to comply that would have superceded the

[47]Brazil's Other Appellant Submission, paras. 139-45.

[48]*US – Softwood Lumber IV (AB) (Article 21.5)*, para. 85; *Australia – Salmon (Panel) (Article 21.5)*, para. 22.

measure taken to comply.

67. Even aside from the fact that the marketing loan and counter-cyclical payment programs were not subject to the DSB's recommendations and rulings, and even were the approach from *Softwood Lumber IV (Article 21.5)* useful here, Brazil fails in its attempt to demonstrate that the marketing loan and counter-cyclical payments made after September 21, 2005 are "measures taken to comply."

68. For example, as to *timing*, in *Softwood Lumber IV (Article 21.5)*, the first assessment review was adopted around the time of the implementation deadline, and replaced the section 129 determination, which was the declared measure taken to comply.[49] By contrast, the marketing loan and counter-cyclical payments were not started or adopted around the time of the implementation deadline, and did not supercede a measure that was taken to comply around the same time.

69. As to the *effects*, the Appellate Body in *Softwood Lumber IV (Article 21.5)* considered that the cash deposit rate in the first assessment review could possibly "supercede" the cash deposit rate set in the compliance proceeding.[50] The concept of "superceding" does not make sense in the context of the challenged measures in this dispute. The marketing loan and counter-cyclical payments are made under the same statutory and regulatory criteria as in the original proceeding; they were not adopted or implemented after the implementation deadline to "supercede" anything.

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[49] *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 84.

[50] *US – Softwood Lumber IV (Article 21.5) (AB)*, para. 85.

70. Brazil alleges that the marketing loan and counter-cyclical payments somehow move the United States further away from compliance, and that for this reason they have an "effect" for purposes of the *Softwood Lumber IV (Article 21.5)* analysis, but this cannot be the kind of "effect" that the Appellate Body meant in its report in *Softwood Lumber IV*. Brazil's argument confuses two separate issues: the permissible scope of a compliance proceeding, and the substantive consistency of a measure with a Member's WTO obligations. There is no way of knowing at the outset of a proceeding whether payments are actually causing "present" serious prejudice, inconsistent with the SCM Agreement. To the contrary, the question of serious prejudice can only be determined after a detailed examination by the panel of economic evidence. It does not stand to reason that the question of whether a measure has the "effects" (as that term was used in *Softwood Lumber IV* in discussing the parameters of a compliance proceeding) should turn on a question that can only be decided at the end of a proceeding.

71. Lastly, Brazil claims that if the Appellate Body finds that the marketing loan and counter-cyclical payments made after September 21, 2005 are measures taken to comply, "it would *not* be necessary for the Appellate Body to complete the analysis of Brazil's adverse effects claims regarding the new payments, because the compliance Panel has already conducted this examination, and found that they do."[51] The United States believes that the Appellate Body will find that the marketing loan and counter-cyclical payments made after September 21, 2005 are *not* measures taken to comply. However, even if the Appellate Body does not reach such a conclusion and proceeds to examine the Panel's findings on the alleged adverse effects of the

[51]Brazil's Other Appellant Submission, para. 134.

marketing loan and counter-cyclical payments, the Appellate Body should reverse the Panel's conclusion in favor of Brazil and find that the marketing loan and counter-cyclical payments do not cause present serious prejudice to the interests of Brazil within the meaning of Articles 5(c) and 6.3(c) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[52]

B. The Continued "Use" of the Marketing Loan and Counter-Cyclical Payment Programs

72. Brazil, once again in the alternative, asks the Appellate Body to find that the "continued 'use'" of the marketing loan and counter-cyclical payment programs causes adverse effects to Brazil within the meaning of Articles 6.3(c) and 5(c) of the SCM Agreement. However, Brazil made no such "continued 'use'" claim before the compliance Panel, and the Appellate Body cannot consider it for the first time on appeal. Brazil also asks that the Appellate Body complete the analysis concerning this claim,[53] but the Appellate Body can only complete the analysis for a claim that was before the compliance Panel in the first place.

73. Perhaps Brazil would like the Appellate Body to consider that "continued 'use'" is another formulation for an "as such" claim against the marketing loan and counter-cyclical payment programs. In that case, it is remarkable that Brazil on appeal would assert an "as such" claim, considering its numerous denials before the compliance Panel that it was not making an "as such" claim.[54] Further, Brazil may not advance an "as such" claim at this stage of the

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[52] The United States detailed the legal errors in the Panel's analysis in Part IV of its Appellant Submission.

[53]Brazil's Other Appellant Submission, para. 136.

[54]Panel Report, para. 9.52 & n.150.

proceeding, given that Brazil did not appeal the Panel's specific finding that Brazil was not making an "as such" claim in the compliance proceedings.[55]

74. As an aside, the United States notes that Brazil fails to articulate exactly how its "as such" claim as to the "continued 'use'" of the programs relates to mandate of panel under Article 21.5 of the DSU. The marketing loan and counter-cyclical payment programs in use after September 21, 2005 are not measures taken to comply, any more than the marketing loan and counter-cyclical payments made after that date were measures taken to comply. These programs were the same as at the time of the original proceeding, as Brazil itself acknowledges,[56] and can in no way be considered measures taken to comply with the recommendations and rulings of the DSB. They therefore fall outside of the scope of the compliance proceeding under Article 21.5 of the DSU.

V. Brazil's Claims with Respect to Export Credit Guarantees for Pig Meat and Poultry Meat Must Fail Because the GSM 102 Program Is Not a Measure Taken to Comply with the DSB's Recommendations and Rulings

75. In its appeal regarding export credit guarantees for pig meat and poultry meat, Brazil argues that the Panel erred in concluding that Brazil was not making a claim as to the amended GSM 102 program and that the amended GSM 102 program itself – including with respect to pig and poultry meat – is before the panel in this proceeding as a measure taken to comply with the recommendations and rulings of the DSB.

76. Brazil did not make a claim to the original panel as to the GSM 102 program as a whole,

[55]Panel Report, paras. 9.53-9.54.

[56]Brazil's Other Appellant Submission, paras. 136, 148, 151.

but rather was challenged the GSM 102 guarantees for individual products. Thus, the *entire* GSM 102 program was not the subject of the original panel's findings and the DSB's recommendations and rulings.

A. The Original Panel Found Export Guarantees, not the Export Guarantee Program, to Constitute Prohibited Subsidies and the Guarantees Were Subject to the Recommendations and Rulings of the DSB

77. The original panel made findings with respect to guarantees, not the GSM 102 program in itself. The original panel stated:

> [I]n 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 the 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.[57]

78. As is clear from the language cited above, the original panel considered guarantees to constitute export subsidies. And it was only those guarantees "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)" to which the finding of actual circumvention – through the recommendations and rulings of the DSB – applied.

79. In the compliance Panel proceeding, Brazil followed the approach in the original panel proceeding and stated that its claims were "product specific" and it "does not assert that the GSM 102 program itself circumvents the United States' export subsidy commitments, within the

[57] *Upland Cotton (Panel)*, para. 8.1(d)(i).

meaning of article 10.1 of the Agreement on Agriculture."[58] Brazil also stated that its claim is that "the United States has applied the GSM 102 program in a manner that circumvents U.S. export subsidy commitments with respect to three unscheduled products – rice, pig meat and poultry meat."[59] In other words, Brazil's claim was an as applied claim that was product-specific and not a claim against the program as such.

80. Despite the fact that Brazil itself conceded that it was not challenging the program, Brazil now attempts to bring the entire GSM 102 program before the compliance Panel by casting the program as the "declared" U.S. implementation measure for export credit guarantees.[60] The implication is that the United States acknowledged that the actual changes to the GSM 102 program were coextensive with compliance with the DSB recommendations and rulings. However, the statements made by the United States when the GSM 102 program was changed do not amount to any such "declaration" that the GSM 102 program was a measure taken to comply, nor do these statements amount to any acknowledgment about the scope of the DSB recommendations and rulings and the scope of the changes to GSM 102.

81. In fact, in the Agreed Procedures for proceedings under Articles 21 and 22 of the DSU and Article 4 of the SCM Agreement, the parties state:

"Noting that the United States informed the DSB, on 20 April 2005, that it intends to

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[58]Brazil Rebuttal Submission, para. 378.

[59]Brazil Rebuttal Submission, para. 378.

[60]Brazil's Other Appellant Submission, para. 158.

implement the recommendations and rulings of the DSB in this dispute."[61]

And, in a *separate* preambulatory clause, the parties state:

> "Recognizing:
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> * that the United States Department of Agriculture announced, on 30 June 2005, changes to the Commodity Credit Corporations's (CCC) Export Credit Guarantee Program (GSM 102), Intermediate Export Credit Guarantee Program (GSM 103), and Supplier Credit Guarantee Program (SCGP); and
>
> * that a legislative proposal has been sent to the United States' Congress with a view to repealing, as soon as possible, the user marketing (Step 2) program for exporters of upland cotton and domestic users of upland cotton."[62]

82. These clauses appear in the same document, but they do not speak to whether the possible actions would be "measures taken to comply." Indeed, the words "declare" and "taken to comply" do not appear in them. Furthermore, the text only *recognizes* actions that have been announced (with respect to guarantees) and proposed to Congress (with respect to Step 2) – the actions had not yet been implemented nor could they be viewed as measures *taken* to comply based on such announcements and proposals.

83. Brazil also once again makes an Article 11 claim, this time directed at the Panel for

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[61]Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 4 of the SCM Agreement in the follow-up to the dispute *United States – Subsidies on Upland Cotton* (WT/DS267), WTO/DS267/22, page 2.

[62]Agreed Procedures under Articles 21 and 22 of the Dispute Settlement Understanding and Article 4 of the SCM Agreement in the follow-up to the dispute *United States – Subsidies on Upland Cotton* (WT/DS267), WTO/DS267/22, page 2.

allegedly failing to undertake an objective assessment of Brazil's claim concerning the amended GSM 102 program.[63] Brazil asserts that the compliance Panel "unilaterally change[d] its terms of reference by excluding measures specifically identified" by Brazil in its panel request.[64] However, the Panel did not "exclude measures" listed by Brazil; rather, the Panel addressed the claims that Brazil made as to the specific GSM 102 guarantees with respect to individual products. As discussed above, the amended GSM 102 program was not the subject of Brazil's claims, so the compliance Panel committed no error by failing to address non-existent claims as to that alleged measure.

84. Even aside from the fact that Brazil did not make claims under the *Agreement on Agriculture* and the SCM Agreement with respect to the amended GSM 102 program, the Panel was entitled to limit its review to Brazil's claims under the same provisions of the covered agreements with respect to the GSM 102 export credit guarantees for individual products.[65] The Appellate Body has stated that "nothing in Article 11 'or in previous GATT practice *requires* a panel to examine *all* legal claims by the complaining party,' and that '[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.'"[66] The Panel here was able to address Brazil's claims as to the specific GSM 102 export credit

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[63]Brazil's Other Appellant Submission, paras. 189-90.

[64]Brazil's Other Appellant Submission, para.190.

[65]Brazil does not deny here that it included the guarantees among the measures at issue, or that it made claims as to those specific guarantees. Brazil's Other Appellant Submission, paras. 162, 179 & n.153.

[66]*EC – Poultry (AB)*, para. 135 (citing *US – Wool Shirts (AB)*, pp. 18-19).

guarantees to reach its finding, and was not required to consider Brazil's other claims concerning a different measure to resolve the same issue.[67]

B. The Amended GSM 102 Program was not a Measure Taken to Comply

85. As explained in Part V.A above, the proper scope of a compliance proceeding under Article 21.5 of the DSU is determined by the underlying recommendations and rulings of the DSB. Here, the original panel's findings of WTO-inconsistency, and the DSB's recommendations and rulings, did not apply to the *entire* GSM 102 program, but rather to the specific guarantees issued under that program "in respect of exports of upland cotton and other unscheduled agricultural products supported under the programmes, and in respect of one scheduled product (rice)."[68] The United States was only required to "withdraw the subsidy" with respect to those specific guarantees that were found to be WTO-inconsistent. Accordingly, there was no "compliance" necessary with respect to pig meat and poultry meat and the United States accordingly did not take any measure "to comply" with nonexistent recommendations and rulings.

86. While the United States made changes with respect to guarantees for pig meat and poultry meat, it did so as a matter of administrative convenience and not "to comply." Brazil's approach apparently is that Members should refrain from efficient management or good public policy because otherwise they risk an expedited compliance proceeding with no reasonable period of time to respond to any adverse findings. The specific measures taken to comply concerned

[67]The United States, of course, disagrees with the Panel's ultimate findings on those claims. U.S. Appellant Submission, Part III.

[68]*Upland Cotton (Panel)*, para. 8.1(d)(i).

changes to the export credit guarantees with respect to unscheduled products, and one scheduled product, rice – i.e., the export credit guarantees that were subject to the DSB's recommendations and rulings.

87. Brazil mistakenly relies on the Appellate Body report in *US – Shrimp (Article 21.5)* to support its position that "under Article 21.5 of the DSU, a 'new' measure can be challenged in compliance proceedings 'in its totality', without any limitation on the claims that may be made regarding that measure," including claims as to "*any* product falling within the scope of that 'new' measure."[69] Brazil asserts that the amended GSM 102 program is the "new" measure that is now before the Appellate Body. In *US – Shrimp (Article 21.5)*, the Appellate Body considered that the "new" measure in the Article 21.5 proceeding was the *"measure 'taken to comply*,'" and it was this measure that could be reviewed "in its totality."[70] Here, the amended GSM 102 program is not the measure taken to comply. Rather, the measure taken to comply comprises changes to GSM 102 guarantees for unscheduled products and one scheduled product, rice, because only guarantees with respect to these products were the subject of the DSB's recommendations and rulings. Brazil is free to make compliance claims concerning the guarantees for any one of these products – and it did do so before the compliance Panel – but it cannot make claims with respect to guarantees for pig meat and poultry meat, which were not found to be WTO-inconsistent and which are not in any way measures taken to comply.

88. Brazil also cites the Appellate Body report in *Canada – Aircraft (Article 21.5)* in support

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[69]Brazil's Other Appellant Submission, para. 195.

[70]*US – Shrimp (Article 21.5)(AB)*, para. 87 (emphasis added).

of its argument that it may raise any claim as to any product covered by the amended GSM 102 program.[71] In *Canada – Aircraft (Article 21.5)*, Canada was required to withdraw the subsidy with respect to *all* "[Technology Partnerships Canada or 'TPC'] assistance to the Canadian regional aircraft industry" consistent with Article 4.7 of the SCM Agreement.[72] Unlike the recommendations and rulings in the present dispute, Canada was not required to withdraw the subsidy only with respect to a subset of the TPC assistance. It is only natural, therefore, that the "new" measure (that is, the "measure taken to comply") that was considered by the Appellate Body in that dispute concerned the changes made with respect to *all* TPC assistance, rather than some subset thereof. In this dispute, by contrast, it is to be expected that the "measure taken to comply" encompasses only the changes made with respect to that subset of measures – GSM 102 guarantees for unscheduled products ands one scheduled product, rice – with respect to which the United States was required to implement the DSB's recommendations and rulings.

89. Lastly, Brazil claims that "there are more than sufficient factual and legal *findings by the compliance Panel* to enable the Appellate Body to complete its legal analysis and find that the amended GSM 102 program results in circumvention of U.S. export subsidy commitments with respect to pig meat and poultry meat."[73] Brazil asserts that the Appellate Body can rely on the Panel's finding that the GSM 102 program is an export subsidy under item (j) of the Illustrative List in that the premia charged under the program are inadequate to meet the long-term operating

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[71]Brazil's Other Appellant Submission, para. 194.

[72]*Canada – Aircraft (Article 21.5) (AB)*, para. 2.

[73]Brazil's Other Appellant Submission, para. 196.

costs and losses of the program. However, aside from the fact that the amended GSM 102 program is not a measure taken to comply, the United States demonstrated in its Appellant Submission that the compliance Panel erred as a matter of law in concluding that the GSM 102 program is an export subsidy under item (j) and should be reversed.[74]

VI. Conclusion

90. With respect to marketing loan and counter-cyclical payment programs, the United States requests that the Appellate Body uphold the finding of the compliance Panel that the original panel's findings, and the DSB's recommendations and rulings, include only marketing loan and counter-cyclical payments made in MY 1999-2002.

91. Should the Appellate Body reverse the compliance Panel, and find that the original panel's findings, and the DSB's recommendations and rulings, include the marketing loan and counter loan and counter-cyclical payment programs, the United States requests that the Appellate Body (1) deny Brazil's request to find that marketing loan and counter-cyclical payments made after September 21, 2005 are measures taken to comply with the DSB's recommendations and rulings; and (2) deny Brazil's request to find that the United States, through continued use of the marketing loan and counter-cyclical payment programs, causes serious prejudice to Brazil's interests.

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[74]U.S. Appellant Submission, Part III. Furthermore, the United States also has put substantial evidence on the record showing that the GSM 102 export credit guarantees are not export subsidies and which would support a finding in favor of the United States were the Appellate Body to complete the analysis. *See, e.g.*, U.S. First Written Submission, paras. 71-104; U.S. Rebuttal Submission, paras. 84-128.

92. With respect to the amended GSM 102 program, the United States requests that the Appellate Body uphold the compliance Panel's conclusion that the measure that is the subject of Brazil's claims is the amended GSM 102 program itself.

93. Should the Appellate Body reverse this finding by the compliance Panel, the United Sates requests that the Appellate Body find that the amended GSM 102 program was not a "measure taken to comply" under Article 21.5 of the DSU and therefore find that the amended GSM 102 program was not within the scope of the compliance proceeding. The United States further requests that the Appellate Body deny Brazil's request to find that the GSM 102 program is applied in a manner that results in circumvention of U.S. export subsidy commitments with respect to pig meat and poultry meat.