

UNITED STATES – SUBSIDIES ON UPLAND COTTON:

Recourse to Article 21.5 of the DSU by Brazil

(WT/DS267)

**Answers of the United States of America
to Parts A-C of the Questions from the Panel to the Parties
prior to the Meeting with the Panel**

February 27, 2007

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Exhibit US-	Title
112	CCC Commodity Estimates Book, Feb. 5, 2007 (Program Yields)

A. GENERAL QUESTIONS

Questions to both parties

1. *Is Brazil/US of the view that a party to a dispute referred to a panel established under Article 21.5 of the DSU (a party in a compliance panel) can make the same legal argument as it did in the original Panel proceedings?*

1. Article 21.5 “compliance” proceedings are limited in terms of the *claims* that can be made and the *measures* in respect of which the claims can be made. As the Appellate Body has explained, “[p]roceedings 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.”¹ Moreover, “[i]f a *claim challenges a measure which is not a ‘measure taken to comply,’ that claim cannot properly be raised in Article 21.5 proceedings.*”² While Article 21.5 of the DSU does not set out any similar express limitation on the legal arguments that can be made in a compliance proceeding, the necessary implication of the limitation on claims and measures is that, for legal arguments to be relevant in a compliance proceeding, they must relate to claims and measures that are properly within the scope of DSU Article 21.5.

1. The Appellate Body has explained that “Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel.”³ Accordingly, it is not clear that parties would make *exactly* the same legal arguments in a compliance proceeding (*i.e.*, in support of claims against measures taken to comply) as those it made in the original proceeding (*i.e.*, in support of original claims against original measures). Nonetheless, nothing in Article 21.5 of the DSU precludes parties from applying the same *logic* or *reasoning* in the two different contexts. Indeed, the situation with Brazil in this proceeding, where it has made one set of arguments in the original proceeding and then made directly contradictory arguments in the compliance proceeding – for example, regarding the effects of the Step 2 program and the appropriateness of the FAPRI approach to modeling – would appear to be exceptional and not the approach required by Article 21.5 of the DSU.

2. *Could each party explain its view on the question of whether, and to what extent, this Panel must rely on the legal and factual analysis underlying the*

¹ *Canada – Aircraft (21.5 Brazil) (AB)*, para. 36 (italics in original; underlining added).

² *EC – Bed Linen (21.5 India) (AB)*, para. 78 (emphasis in original).

³ *Canada – Aircraft (21.5 Brazil) (AB)*, para. 41.

original panel's findings? What are the relevant provisions of the DSU in this regard?

2. The relevance of an original panel's legal and factual analysis to the resolution of the matter presented to a compliance panel depends on the measure challenged in the compliance proceeding.

3. Where a complaining party claims that a Member has *failed* to implement the recommendations and rulings of the DSB – *i.e.*, that no measure taken to comply exists – the original panel's analysis (as modified by the Appellate Body) is a key consideration. In that case, it is important to examine the DSB's recommendations and rulings in order to determine whether the responding Member was, in fact, required to take measures to come into compliance and, if so, the scope of the obligation to do so. As the DSB's recommendations and rulings are based on the original panel's analysis (as modified by the Appellate Body), that analysis is important in discerning what the DSB's recommendations and rulings actually are in the particular dispute.⁴

4. **The second case is one in which the complaining party agrees that a Member has taken measures to comply with the recommendations and rulings of the DSB but challenges its “consistency with a covered agreement.” In that case, the original panel's legal and factual analysis may be much less important. As the Appellate Body reasoned in *Canada – Aircraft (21.5 – Brazil)*, “Article 21.5 proceedings involve, in principle, not the original measure, but rather a new and different measure which was not before the original panel.”⁵ Accordingly, “the relevant facts bearing upon the ‘measure taken to comply’ may be different from the relevant facts relating to the measure at issue in the original proceedings.”⁶ Moreover, “the claims, arguments and factual circumstances which are pertinent to the ‘measure taken to comply’ will not, necessarily, be the same as those which were pertinent in the original dispute.”⁷ The Appellate Body has, therefore, clarified that:**

the utility of the review envisaged under Article 21.5 of the DSU would be seriously undermined if a panel were restricted to examining the new measure from the perspective of the claims, arguments and factual circumstances that related to the original measure, because an Article 21.5 panel would then be unable to examine fully the ‘consistency with a covered agreement of the measures taken to comply,’ as required by Article 21.5 of the DSU.⁸

⁴ See *e.g.*, *United States – Final Countervailing Duty Determination (21.5 – Canada) (AB)*, para. 68.

⁵ *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.

⁶ *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.

⁷ *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.

⁸ *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 41.

5.. The same reasoning precludes “restricting” a panel to following the exact same legal and factual reasoning as the original panel.⁹ However, under DSU Article 11, the task of a compliance panel – like that of an original panel – is to make an “*objective* assessment of the matter before it, including an *objective* assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements.” In so doing, it may well consider that the reasoning of the original panel to be persuasive on points that are apposite. The Appellate Body confirmed this in *United States – Shrimp (21.5 – Malaysia)*, where the Appellate Body found that the compliance panel was justified in “taking into account the reasoning” in the adopted Appellate Body report from the original proceeding. The Appellate Body recalled, in this regard that adopted panel and Appellate Body report “are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute.”¹⁰

B. QUESTIONS WITH RESPECT TO BRAZIL'S REQUEST UNDER ARTICLE 13.1 DSU

Questions to the US

3. *Is the United States arguing that Brazil must identify the subsidized product for each of the types of subsidies from which it claims serious prejudice? Is the United States arguing that payments which permit planting flexibility are not tied to the production of upland cotton, so that they must be allocated by Brazil across the total value of production of each recipient?*

6. The United States *does* consider that Brazil must identify the subsidized product for each of the types of subsidies from which it claims serious prejudice. As the Appellate Body explained in the original proceeding, this is a requirement of Article 6.3(c) itself:

the ‘subsidized product’ must be properly identified for purposes of significant price suppression under Article 6.3(c) of the SCM Agreement. And if the challenged payments do not, in fact, subsidize that product, this may undermine the conclusion that the effect of the subsidy is significant suppression of prices of that product in the relevant market.¹¹

⁹ This is also consistent with the fact that there is no principle of *stare decisis* applicable in WTO dispute settlement.

¹⁰ *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 108 (citing *Japan – Alcoholic Beverages (AB)* at 108).

¹¹ *Upland Cotton (AB)*, para. 472.

7.. The same requirement exists with respect to Article 6.3(d) of the *SCM Agreement*, which specifically refers to “subsidized primary product or commodity.”¹²

8.. Brazil and the United States agreed in the original proceeding – and the original panel found – that the “subsidized product” was upland cotton lint.¹³ Brazil has signaled that it considers that the same “subsidized product” is at issue here in this compliance proceeding.¹⁴ Under the Appellate Body’s reasoning it is necessary to ensure that “the challenged payments do . . . , in fact, subsidize that product.”¹⁵ The challenged payments, in the case of counter-cyclical payments, are payments in respect of upland cotton base acres.¹⁶ The United States maintains that the appropriate allocation methodology for payments such as the counter-cyclical payments – which are not tied to the production or sales of any particular product – can be found in Annex IV of the *SCM Agreement*. That Annex sets out methodologies for determining the rate of “subsidization” of a “product” for purposes of the now-defunct Article 6.1(a) of the *SCM Agreement*.

9.. Annex IV does not apply directly to the serious prejudice determinations under Articles 5(c) and 6.3(c). However, as it is the only allocation methodology that Members have agreed in the *SCM Agreement* and deals specifically with the question of how to allocate subsidies that are not tied to production or sale of a given product, it provides essential context.¹⁷

¹² Article 6.3(d) of the *SCM Agreement* provides that “the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.” (Footnote omitted).

¹³ See *Upland Cotton (AB)*, para. 407, nn. 450-451 (stating that “the subsidized product is United States upland cotton lint. (Panel Report, paras. 7.139, 7.1221-7.1224 and footnote 191 to para. 7.139)” and “[t]he United States and Brazil confirmed during the oral hearing that they do not contest this identification of the subsidized product.”)

¹⁴ Brazil First Written Submission, para. 80.

¹⁵ *Upland Cotton (AB)*, para. 472.

¹⁶ As the United States explained in its letter dated January 19, 2007 and again in its rebuttal submission “support-conferring measures with respect to non-cotton historical base acres” were *not* included in the support found to exceed the limitation in the Peace Clause proviso, such measures were exempt by virtue of the Peace Clause in the *Agreement on Agriculture* from actions, including Brazil’s serious prejudice claims. Therefore, there could have been no, and there were no, DSB recommendations and rulings with respect to such measures, and counter-cyclical payments for non-cotton base acres are not “measures taken to comply” within the meaning of DSU Article 21.5.

¹⁷ While this methodology was not applied in the original proceeding, the primary reason was Brazil’s insistence that no precise calculation need be undertaken in the context of claims under Part III of the *SCM Agreement*. See e.g., *Upland Cotton (AB)*, paras. 98 (“the remedy under Part III focuses on the effects of the subsidy, rather than the imposition of duties, and, according to Brazil, the size of a subsidy does not necessarily determine its effects”) and 467. To the extent that calculation of the precise amount of the subsidy is undertaken – and the United States

10. Under paragraph 2 of Annex IV, “the value of the product” that is subsidized in the case of subsidies that are not tied to production or sales is equal to “the total value of the recipient firm’s sales.”¹⁸ (By way of contrast, where a “subsidy is tied to the production or sale of a given product, the value of the [subsidized] product shall be calculated as the total value of the recipient firm’s sales of that product.”¹⁹) Thus, Annex IV suggests a methodology for determining the amount of a non-tied subsidy that benefits a given product: the subsidy would be allocated to the product according to the ratio of the value of sales of that product to the total value of the recipient firm’s sales. In this way, the Annex IV methodology recognizes that a payment that is not tied to the production or sale of a given product benefits all of the products the recipient produces. Allocating such a non-tied payment exclusively to one product over another would be economically arbitrary. Annex IV indicates an economically neutral methodology to allocate the benefits of non-tied subsidies to which Members have agreed.

11. Applying that methodology in the present circumstance yields the following results:

Value of cotton production for farm household that harvested cotton (2003-2005)

	2003	2004	2005	2003-05 average
Total value of farm production	388,720	367,634	406,181	387,512
Total value of cotton	162,379	198,276	189,831	183,495
Cotton as percent of total	41.8%	53.9%	46.7%	47.4%

Source: 2003-05 USDA Agricultural Resource Management Survey.

continues to believe that it is important that this be done – it is appropriate to use the allocation methodology in Annex IV.

¹⁸ *SCM Agreement*, Annex IV, para. 2 (footnote omitted).

¹⁹ *SCM Agreement*, Annex IV, para. 3 [italics added].

Allocating counter-cyclical payments (million dollars)

	2003	2004	2005
Total CCP payments (A)	392	1,375	1,375
Ratio of total cotton base acres up to cotton planted acres to total cotton base acres (B) ^{1/}	59.1%	59.0%	60.2%
CCP payments paid on total cotton base acres on farms that planted cotton (C = A * B)	231.7	811.3	827.8
Cotton as percent of total on farms that harvested cotton (D)	41.8%	53.9%	46.7%
CCP payments allocated based on cotton's share of total crop value (E = D * C)	96.8	437.3	386.6
As percent of total CCPs (F= E/A)	24.7%	31.8%	28.1%

^{1/}U.S. First Written Submission, para 224

4. Does the United States contest the accuracy of the figures for 2003 – 2005 cited in “Table 6” of Brazil's first submission and “Table 5” of Brazil's rebuttal submission? If so, please provide the accurate figures, or the figures the US deems to be more accurate.

1.. The United States does not agree that the figures in “Table 6” of Brazil’s first written submission for MY2004 and MY2005 are accurate for marketing loan payments.²⁰ **These**

²⁰ The United States considers that only the MY 2005 data is relevant for purposes of Brazil’s “present” serious prejudice claims. Nonetheless, for sake of completeness, the United States has tested that figures for MY 2003-2005. The United States has not tested the figures shown for crop insurance payments, direct payments, PFC payments, MLA payments, or cottonseed payments, as these are not at issue in the present proceeding.

payments are composed of three separate components – loan deficiency payments (“LDP”), marketing loan gains (“MLG”), and certificate exchange gains (“CEG”). As Brazil notes, USDA budget projections now include a “stochastic add-on” to account for variability in the projections.²¹ But this “add-on” is done only for projection purposes. Brazil has incorrectly included the projected figures – including the “add-on” for MY 2004 and MY 2005.²²

2. The actual outlays for MY 2004 and MY 2005 are the following:

	MY2004	MY2005
LDP	374	256
MLG	10	8
CEG	1,396	1,005
TOTAL	1,780	1,269

3. The United States understands that Brazil intends the counter-cyclical payment figures shown in “Table 5” of Brazil’s rebuttal submission to supercede the counter-cyclical payment figures shown in “Table 6” of its first written submission. Brazil has sought to allocate counter-cyclical payments in respect of upland cotton base acres using the so-called “cotton-to-cotton” methodology.²³ **For the reasons discussed in response to question 3 above, the United States considers that the methodology set out in Annex IV of the SCM Agreement is the more accurate and more appropriate approach.**

4. **Nonetheless, the United States has attempted to test the calculations conducted by Brazil in Table 5 of its Rebuttal Submission. Brazil cites Exhibit BRA-567 (Agricultural Outlook Indicators, Table 19) as the source of payments rates and payments yields. However, this source only includes data through MY 2002. The United States has used publicly available data to try and replicate Brazil’s figures. These figures are shown below:**

²¹ Budget Estimates from USDA’s Mid-Session Review (Exhibit BRA-456).

²² See Budget Estimates from USDA’s Mid-Session Review (Exhibit BRA-456).

²³ The Appellate Body indicated that the so-called cotton-to-cotton methodology was appropriate for the Peace Clause analysis. See *Upland Cotton (AB)*, para. (“for purposes of the comparison envisaged by Article 13(b)(ii), the values of the four measures, namely, production flexibility contract payments, market loss assistance payments, direct payments and counter-cyclical payments in the years 1999, 2000, 2001, and 2002 are properly determined by using the “cotton to cotton” methodology. . . .”)

Item	MY2003	MY2004	MY2005
Total cotton base acres up to cotton planted acres (a) ^{1/}	11,108	11,041	11,155
Payment acres (b) ^{2/}	9,442	9,385	9,482
Program yield (c) ^{3/}	639	636	634
Payment rate (d) ^{4/}	.0393	.1373	.1373
CCP payment (e) ^{5/}	237	820	825

^{1/}U.S. First Written Submission, December 15, 2007, para. 224.

^{2/} 85 percent of cotton base acres (a).

^{3/} Data for MY 2002 is from Budget Estimates from USDA's Mid-Session Review (Exhibit BRA-456). Other years are from CCC Commodity Estimates Book, Feb. 5, 2007, page 202 (Exhibit US-112).

^{4/} MY2003 is from FSA Press Release 0455.04, available at <http://content.fsa.usda.gov/pas/FullStory.asp?StoryID=1897>.

^{5/} The CCP payments (e) are equal to b*c*d.

Question to Brazil

5. *The Panel refers to Brazil's communication dated 22 January 2007 concerning its request in relation to Article 13.1 of the DSU. Is it correct for the Panel to understand that as far as data for 2005 is concerned, data included in Exhibit US-64 satisfies all of the requests Brazil made in Part A of Annex 1 of its 1 November communication?*

C. QUESTIONS CONCERNING THE PRELIMINARY OBJECTIONS RAISED BY THE UNITED STATES

1. **Preliminary objections of the United States in respect of claims of Brazil regarding export credit guarantees in respect of pig meat and poultry meat**

Question to both parties:

6. *The parties disagree with respect to whether in a proceeding under Article 21.5 of the DSU a party may present a claim that was raised in the original proceeding but on which no finding of WTO-inconsistency was made due to the fact that the Appellate Body was unable to complete the analysis.*

- a. ***Could the parties explain the legal basis in the text of Article 21.5 of the DSU and other relevant provisions of the DSU for their position on this question?***
- b. ***Could the parties explain whether and how their position on this issue is consistent with prior panel and Appellate Body reports?***

1.. Where there is no finding of WTO-inconsistency with respect to a measure – whether it is because the panel or Appellate Body was unable to make proper findings, because the complaining party failed to make a *prima facie* case, or some other reason – there are no DSB recommendations and rulings in respect of the measure. As the measure has never been found to be *out* of compliance with any covered agreement there logically is no question of bringing it *into* compliance. A WTO panel is not permitted to presume that a Member is out of compliance and there is no basis to expect that a Member should do so despite its own carefully considered views of what its WTO obligations entail.²⁴ **Simply put, an implementation obligation arises only when DSB recommendations and rulings exist that require implementation.**

2.. Under Article 21.5 of the DSU, “compliance” proceedings may address two categories of matters: (a) that measures taken to comply with recommendations and rulings of the DSB do not exist; and (b) that (extant) measures taken to comply with recommendations and rulings of the DSB are not consistent with a covered agreement.²⁵ In both cases, a necessary predicate is that there be DSB recommendations and rulings.

3. Where a measure is not subject to any DSB recommendations and rulings because no finding of WTO-inconsistency has been found in respect of it, there is, logically, no basis for any claim that a Member has not implemented the DSB’s recommendations and rulings in respect of the measure (*i.e.*, that no measure taken to comply *exists* with respect to the measure). Moreover, unless the original measure is *itself* considered to be a measure taken to comply with other recommendations and rulings – and any such determination

²⁴ It is well-established that Members’ measures cannot be presumed to be WTO-inconsistent. See *e.g.*, *United States – Argentina OCTG Sunset Reviews (AB)*, paras. 173 (“The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged ‘as such.’”)

²⁵ The fact that “compliance” proceedings deal with implementation of recommendations and rulings is apparent not only from the text of Article 21.5 but also its context; for example, the fact that it is part of Article 21, which deals in the whole with “Surveillance of Implementation of Recommendations and Rulings.” The first paragraph of DSU Article 21.1 provides that “prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all Members.” And the provisions that follow all relate to implementation. For example, Articles 21.3 and 21.4 of the DSU deal with rules and procedures for establishing a reasonable period of time to implement the recommendations and rulings of the DSB. Article 21.5 deals with the dispute settlement procedures available when there is a disagreement as to whether a Member has implemented DSB recommendations and rulings consistently with its WTO obligations. And Article 21.6 deals with surveillance by the DSB of implementation by Members.

must be compelled by the particular the recommendations and rulings that are issued, not the unilateral assertions of the complaining party – there is no basis for claims to be made against the measure in a compliance proceeding alleging that it is inconsistent with a covered agreement. In short, the measure would not be the type of measure properly within the scope of Article 21.5 and the claims that could be made against it would not be the type of claims properly within the scope of that provision.

4. This reasoning is consistent with the reasoning in prior Appellate Body reports interpreting the scope of Article 21.5. For example, in *Canada – Aircraft (21.5 – Brazil)*, the Appellate Body clarified that:

[p]roceedings 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.²⁶

5. The Appellate Body, thus, confirmed that the focus of compliance proceedings is on the DSB’s recommendations and rulings – whether they have been complied with and, if so, whether the compliance measures are themselves consistent with the covered agreement.

6. The Appellate Body’s (consistent) reasoning in *EC – Bed Linen (21.5 – India)* is even more salient. There the Appellate Body confirmed again that “the mandate of Article 21.5 panels is to examine either the ‘existence’ of ‘measures taken to comply’ or, more frequently, the ‘consistency with a covered agreement’ of *implementing measures*.”²⁷ The Appellate Body acknowledged that the Article 21.5 panel proceeding was *not* intended to provide complaining parties with a “second chance” to reassert claims that had been unsuccessful in the original proceeding.²⁸ Indeed, there the Appellate Body rejected India’s attempt to reassert the same claim against an aspect of an antidumping determination (the “other factors” analysis) that had been dismissed by the original panel for failure to make a *prima facie* case.²⁹

7. In doing so, the Appellate Body tracked precisely the reasoning set out above as to why measures are outside the scope of Article 21.5 proceedings when they have never been found to be WTO-inconsistent and are not themselves measures taken to comply. Specifically, the Appellate Body concluded, first, that “the investigating authorities of the

²⁶ *Canada – Aircraft (21.5 – Brazil) (AB)*, para. 36 (emphasis added).

²⁷ *EC – Bed Linen (21.5 – India) (AB)*, para. 79 (emphasis added).

²⁸ *EC – Bed Linen (21.5 – India) (AB)*, para. 74.

²⁹ *EC – Bed Linen (21.5 – India) (AB)*, para. 87.

European Communities were not required to change the determination as it related to the ‘effects of other factors’ in this particular dispute.”³⁰ In other words, the Appellate Body recognized that there was no basis for a claim regarding the *existence* of measures taken to comply in respect of that aspect of the determination. Next, the Appellate Body noted that “we do not see why that part of the redetermination that merely incorporates elements of the original determination on ‘other factors’ would constitute an inseparable element of a measure taken to comply with the DSB rulings in the original dispute.”³¹ In other words, the Appellate Body determined that the “other factors” determination was not itself a measure taken to comply with any DSB recommendations and rulings.

8. Although *EC – Bed Linen (21.5 – India)* involved slightly different facts than those at issue here – namely, there, a finding of WTO-inconsistency was made because of a failure by the complaining party to make a *prima facie* case rather than because the Appellate Body had insufficient facts before it to determine whether the measures at issue were WTO-inconsistent – the reasoning in both cases is the same. Where there is neither a basis for a claim of *existence* of measures taken to comply (because there are no DSB recommendations and rulings that must be implemented with respect to the measure) nor a claim of *consistency with a covered agreement* (because the measure is not a measure taken to comply with other DSB recommendations and rulings), neither the measure nor any claims against it are properly within the scope of an Article 21.5 proceeding.

Questions to Brazil:

7. *Is Brazil of the view that it is only in the circumstances identified by the Appellate Body in EC – Bed Linen (Article 21.5 – India) that the scope of Article 21.5 proceedings is limited by the scope of the original proceedings? [Paragraphs 11-15 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling]*
8. *How does Brazil respond to the arguments of the United States that Brazil "incorrectly assumes that the standard is one of whether there has been a 'final resolution' of the issue in the original proceeding" and that Brazil misreads the Appellate Body report in EC – Bed Linen (Article 21.5 – India) and confuses the issue of "the scope of a compliance proceeding pursuant to Article 21.5 of the DSU" and the distinct issue of "when a claim against a specific measure or aspect of a measure can be considered to be 'finally resolved' for purposes of WTO dispute settlement"? [Paragraphs 8 and 12 of the Rebuttal Submission of the United States]*

³⁰ *EC – Bed Linen (21.5 – India)* (AB), para. 86.

³¹ *EC – Bed Linen (21.5 – India)* (AB), para. 86.

9. What are the comments of Brazil on the arguments in footnote 22 of the United States' rebuttal submission?

Question to the US:

10. Could the United States explain why it considers that what it describes as the "final resolution" standard is not the correct standard to decide whether Brazil's claims regarding export credit guarantees for pig meat and poultry meat are within the scope of this proceeding?

9. Article 21.5 of the DSU defines the scope of compliance proceedings conducted pursuant to that provision. It defines the measures that are properly within the scope of a compliance proceeding – “measures taken to comply with the recommendations and rulings of the DSB.” And it defines the claims that can be made in respect of such measures – (a) claims regarding the “existence” of measures taken to comply and (b) claims regarding the “consistency with a covered agreement” of measures taken to comply. Article 21.5 does not define the scope of claims properly reviewed in a compliance proceeding in terms of whether or not the claims have been finally resolved.

10. Whether or not a claim has been finally resolved between parties to a dispute is a separate question. As the Appellate Body explained in *EC - Bed Linen*, that question is governed by Article 17.14 of the DSU, which provides that “an Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute”³² **The Appellate Body clarified that the same reasoning applies also with respect to any unappealed finding included in an adopted panel report.³³ Where a particular claim has been finally resolved with respect to a particular measure (or component of a measure) that was the subject of the claim, that particular resolution is binding on the parties and cannot be raised again on the basis of the same facts and arguments in any other proceeding. By contrast, even where a claim is outside the limited scope of a “compliance” proceeding under Article 21.5 of the DSU, it may well be raised in a separate proceeding.**

2. Preliminary objections of the United States with respect to claims of Brazil regarding marketing loan and counter-cyclical payment programmes

Questions to Brazil:

³² *EC – Bed Linen (21.5 – India) (AB)*, para. 91.

³³ *EC – Bed Linen (21.5 – India) (AB)*, para. 93 (“an unappealed finding included in a panel report that is adopted by the DSB must be treated as a final resolution to a dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of that claim.”)

11. ***Is Brazil of the view that a finding under Article 6 of the SCM Agreement that a "subsidy" is causing serious prejudice necessarily always applies to both the subsidy "payments" and the subsidy "programme"? [Paragraphs 31-35 of Submission of Brazil Regarding US Requests for Preliminary Ruling and paragraph 38 of the Rebuttal Submission of Brazil]***

12. ***In paragraph 44 of its Rebuttal Submission, Brazil states:***

“Accordingly, there is no need for Brazil to challenge per se the FSRI Act of 2002. Nor does it assert an 'as applied' challenge to the FSRI Act of 2002. Rather, Brazil challenges the counter-cyclical and marketing loan programs in the FSRI Act of 2002 and the payments that such programmes require to U.S. upland cotton farmers, as they cause adverse effects.”
(emphasis added)

Could Brazil please explain:

- a. ***How its claims against "programmes and payments... as they cause adverse effects" differ from claims against programmes as such?***
- b. ***How these claims differ from claims against programmes as applied?***

13. ***In paragraph 45 of its Rebuttal Submission, Brazil refers to the failure of the United States "to implement the original recommendation of the DSB requiring the United States to take actions concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments".***

- a. ***Does Brazil consider that the statement in paragraph 7.1501 of the original panel report that "the United States is obliged to take action concerning its present statutory and regulatory framework..." forms an integral part of the recommendation made by the original panel in paragraph 8.3(d) of its report?***
- b. ***Does Brazil consider that the absence of actions by the United States "concerning its present statutory and regulatory framework providing for marketing loan and counter-cyclical payments" is in itself a sufficient basis for this Panel to find that the United States has not complied with the DSB recommendation under Article 7.8 of the SCM Agreement?***

- c. *Is there any difference, in Brazil's view, between, on the one hand, the nature of the action the United States was obliged to take with respect to its statutory and regulatory framework as a consequence of the recommendation in paragraph 8.3(d) of the original panel report and, on the other, the nature of the action the United States would have been obliged to take if the original panel had found that the relevant provisions of this statutory and regulatory framework were WTO-inconsistent as such?*
14. *Could Brazil please explain how this Panel should interpret the relationship between the three categories of measures identified in paragraph 3.1(v),(vii) and (viii) of the original panel report? Is it the view of Brazil that "subsidies provided" or "subsidies mandated to be provided" must be interpreted to encompass both payments of subsidies and the regulatory provisions pursuant to which such payments were "provided" or "mandated to be provided"?*
15. *Does Brazil agree or disagree with the United States that the listing of certain legislative and regulatory provisions in paragraph 7.1107 of the original panel report reflects the original panel's view that "payments under a programme constitute programmes 'as applied' "? [Paragraphs 46-47 of the Rebuttal Submission of the United States]*
16. *Could Brazil clarify whether or not its claim in this Article 21.5 proceeding regarding a threat of serious prejudice caused by marketing loan and counter-cyclical payments is a claim with respect to the marketing loan and counter-cyclical payment programmes as such? [Paragraphs 237-314 of the First Written Submission of Brazil]*

Questions to the United States

17. *The United States argues in paragraph 16 of its Rebuttal Submission that "[a]ccording to Brazil, its claims apply not only to the marketing loan and counter-cyclical payment programs, as such, but to the programs in addition to all payments authorized under the programs" (original emphasis). The United States also argues in this respect that "it is abundantly clear that the original panel did not make any finding under Article 5(c) and 6.3(c) of the SCM Agreement against the marketing loan and counter-cyclical payment programs, as such, whether alone or in addition to payments". [Paragraph 43 of Rebuttal Submission of the United States]*
- a. *How does the United States respond to the argument of Brazil that the United States mischaracterizes Brazil's claims in these proceedings in that Brazil is not challenging the subsidy programmes at issue as such?*

[Paragraph 31 of Submission of Brazil to the Panel Regarding US Requests for Preliminary Ruling; paragraph 33 of Rebuttal Submission of Brazil]

11. Brazil asserts in paragraph 31 of its submission regarding the U.S. preliminary ruling requests – the same paragraph noted by the Panel above – that it is “challenging in this proceeding the U.S. subsidies inasmuch as they cause adverse effects.” According to Brazil “the *measures that constitute these “subsidies”* are the statutory and regulatory provisions of the FSRI Act of 2002 that relate to upland cotton, *i.e.*, the marketing loan and counter-cyclical payment provisions” as well as payments under the program that allegedly “have been and will continue to be made over the lifetime of the FSRI Act of 2002, *i.e.*, until MY 2007. . . .”³⁴ **Therefore, Brazil contradicts its own statement that it is not challenging the marketing loan and counter-cyclical payment programs “as such.” As the Appellate Body explained in *United States – Sunset Reviews on OCTG from Argentina*: “[b]y definition, an “as such” claim challenges laws, regulations, or other instruments of a Member that have general and prospective application, asserting that a Member’s conduct – not only in a particular instance that has occurred, but in future situations as well – will necessarily be inconsistent with that Member’s WTO obligations.”³⁵**

12. Brazil’s statement cited above indicates that it is not seeking to challenge the marketing loan and counter-cyclical payment *only* “as such,” and that it is seeking to *also* challenge the programs “as applied” (*i.e.*, the payments under the program). However, tacking on claims “as applied” does not relieve Brazil of proving its claims against the marketing loan and counter-cyclical payment programs “as such.” This includes the obligation of proving that application of “the statutory and regulatory provisions of the FSRI Act of 2002 that relate to upland cotton, *i.e.*, the marketing loan and counter-cyclical payment provisions” “will necessarily be inconsistent with that Member’s WTO obligations.”³⁶ Indeed, as the Appellate Body has emphasized:

In our view, “as such” challenges against a Member’s measures in WTO dispute settlement proceedings are serious challenges. . . .In essence, complaining parties bringing ‘as such’ challenges seek to prevent Members *ex ante* from engaging in certain conduct. The implications of such challenges are obviously more far-reaching than “as applied” claims. We also expect that measures subject to “as such” challenges would normally have undergone, under municipal law, thorough scrutiny through various deliberative processes to ensure consistency with the Member’s international obligations, including those found in the covered agreements, and that the

³⁴ Brazil Submission Regarding U.S. Requests for Preliminary Rulings, para. 31.

³⁵ *United States – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.

³⁶ *United States – Argentina OCTG Sunset Reviews (AB)*, paras. 172-173.

enactment of such a measure would implicitly reflect the conclusion of that Member that the measure is not inconsistent with those obligations. The presumption that WTO Members act in good faith in the implementation of their WTO commitments is particularly apt in the context of measures challenged “as such.”³⁷

- b. Could the United States also comment in this regard on the arguments in paragraph 31 of the Third Party Submission of Chad? Does the United States agree or disagree with the proposition that statutory or regulatory provisions can be challenged on an as applied basis and that Brazil's claims in the original proceeding "were as applied claims regarding measures that included legislative and regulatory provisions"?*

13.. To the extent that Chad is arguing that Brazil’s claims in the original proceeding were *limited* to “as applied” claims, the United States respectfully disagrees. That argument cannot be reconciled with the original panel’s own explanation of the claims made by Brazil in the original proceeding. Specifically, the original panel explained that “concerning selected provisions of the FSRI Act of 2002 and the ARP Act of 2000,” Brazil was challenging “the following sections” as “violat[ing], *as such*, Articles 5(c), 6.3(c), 6.3(d) of the SCM Agreement and Articles XVI: 1 and 3 of the GATT 1994 to the extent that they relate to upland cotton”³⁸

14.. On the question of whether the application of statutory and regulatory provisions can be challenged in WTO dispute settlement, the United States agrees that statutory and regulatory provisions can be challenged “as applied.” Indeed, in the original dispute, Brazil challenged payments made under, *inter alia*, the Step 2, marketing loan, and counter-cyclical payment program in MY 1999-2002 as having caused significant price suppression and serious prejudice to the interests of Brazil within the meaning of Articles 5(c) and 6.3(c) of the *SCM Agreement*.³⁹ That constituted a challenge to the application of the programs in those years. And Brazil prevailed on that claim:

[i]n 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

³⁷ United States – Argentina OCTG Sunset Reviews (AB), paras. 172-173.

³⁸ Upland Cotton (Panel), para. 3.1(viii).

³⁹ Upland Cotton (Panel), para. 3.1(vi) (emphasis added).

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.⁴⁰

15. Brazil did not prevail, however, on its claims regarding payments allegedly “mandated” to be provided in MY 2003-2007 (*i.e.*, the (alleged) application of the programs in future marketing years).⁴¹ Nor did Brazil prevail on its claims regarding, *inter alia*, the Step 2, marketing loan and counter-cyclical payment program *per se*.⁴² The question is whether Brazil has any basis now, in this “compliance” proceeding, to make claims in respect of those measures again.

16. There is no such basis. Under the express terms of Article 21.5 of the DSU, a “compliance” proceeding under Article 21.5 of the DSU provides for an assessment of whether a Member has complied with the recommendations and rulings of the DSB consistently with its WTO obligations. Where there are no DSB recommendations and rulings in respect of statutory and regulatory provisions as such, and there are no DSB recommendations and rulings in respect of the application of those provisions in future years, there is no implementation obligation in respect of those measures. Therefore, there is no basis for a claim that measures taken to comply do not *exist* with respect to them. Moreover, where the measures have not been changed in order to comply with any recommendations and rulings, there is no basis for claims regarding their “consistency with a covered agreement.” The fact that the *application* of statutory and regulatory provisions can be challenged does not change that analysis.

18. *The United States submits that the only measures subject to the DSB's recommendation under Article 7.8 of the SCM Agreement are payments made under the Step 2, marketing loan, and counter-cyclical payment programmes in 1999-2002. The United States also asserts, in this regard, that Brazil fails to submit evidence "as to the present effects, if any, of the measures that were subject to the original panel's actionable subsidy finding".*

a. Do these statements mean that the United States considers that the DSB recommendation under Article 7.8 of the SCM Agreement only obliged the United States to ensure that payments made in 1999-2002 would no longer have any adverse effects?

17. The recommendation of the original panel – which was adopted by the DSB – was that the United States was “under an obligation to ‘take appropriate steps to remove the adverse

⁴⁰ *Upland Cotton (Panel)*, para. 7.1416 (emphasis added).

⁴¹ *Upland Cotton (Panel)*, paras. 7.1503-7.1505.

⁴² *Upland Cotton (Panel)*, paras. 7.1511.

effects or ... withdraw the subsidy.”⁴³ **Therefore, consistent with Article 7.8 of the SCM Agreement, the United States had a choice between withdrawing the “subsidy” subject to the original panel’s “present” serious prejudice finding *or* removing its adverse effects.**

18.. The subsidies that were subject to Brazil’s claim of “present” serious prejudice were “the subsidies provided during MY 1999-2002,”⁴⁴ including Step 2, marketing loan, and counter-cyclical *payments*.⁴⁵ The panel concluded that these subsidies caused “present” serious prejudice in the years MY 1999-2002:

[i]n 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 Agreement⁴⁶

19.. It was these subsidies that were, thus, also the subject to the U.S. “obligation to ‘take appropriate steps to remove the adverse effects or ... withdraw the subsidy.’”⁴⁷

b. Could the United States comment on the argument of New Zealand in paragraph 4.08 of the Third Party Submission of New Zealand?

20.. New Zealand argues in paragraph 4.08 of its third party submission that “the United States distinction between payments and programmes leads to an absurd result” because, according to New Zealand, “serious prejudice would have to proved annually in the light of payments that have been made by which time the adverse effects have already occurred and it would be too late to withdraw the measure that caused them.”⁴⁸ **New Zealand’s argument appears to be based on a number of incorrect assumptions that do not square even with the facts of this dispute.**

21.. First, New Zealand assumes that the distinction between the payments and programs is a “United States distinction.”⁴⁹ In fact, the distinction between payments and

⁴³ *Upland Cotton (Panel)*, para. 8.3(d).

⁴⁴ *Upland Cotton (Panel)*, para. 3.1(vi). *See also Upland Cotton (Panel)*, para. 7.1108 (“Brazil claims that United States subsidies provided during MY 1999-2002 have caused, cause and continue to cause “serious prejudice” to Brazil’s interests. . . .”)

⁴⁵ *Upland Cotton (Panel)*, para. 7.1120.

⁴⁶ *Upland Cotton (Panel)*, para. 7.1416 (emphasis added).

⁴⁷ *Upland Cotton (Panel)*, para. 8.3(d).

⁴⁸ New Zealand Third Party Submission, para. 4.08.

⁴⁹ New Zealand Third Party Submission, para. 4.08.

programs is one of *fact* that Brazil recognized when it brought separate claims against particular payments and the programs themselves in the original proceeding.⁵⁰ The original panel recognized this distinction in its resolution of the separate claims raised by Brazil.⁵¹ And the distinction has been recognized and respected in other disputes.⁵²

22.. Second, New Zealand appears to assume incorrectly that recognizing the *fact* that payments are measures distinct from the statutory and regulatory provisions that authorize them means that the latter cannot be challenged in WTO dispute settlement. That is not a necessary implication of recognizing that payments and programs are distinct measures. Indeed, this dispute is a case in point that programs *can* be challenged as such.⁵³ Brazil simply did not prevail on the claims against the programs as such. The fact is, however, that Brazil only prevailed on its claims regarding particular payments made in MY 1999-2002.

23. Third, New Zealand appears to ignore the fact that a complaining Member may make claims of “threat” of serious prejudice about payments in future years (or, indeed, regarding the program authorizing the payments) should it not want to make claims of “present” serious prejudice against particular payments that have been made or claims against the programs, *per se*. This, too, is illustrated in this dispute.

24.. Fourth, New Zealand appears to assume that the effects of a recurring payment are limited to the year in which the subsidy is paid so that “the subsidy is over and the subsidizing effect is past” “annually.” This argument was rejected by the Appellate Body in this dispute: “The context of Article 6.3(c) within Part III of the SCM Agreement does not support the suggestion that the effect of a subsidy is immediate, short-lived, or limited to one year, regardless of whether or not it is paid every year.”⁵⁴ Indeed, the Appellate Body used this reasoning to conclude that Brazil could challenge U.S. payments made in MY 1999-2001, not just the payments in MY 2002, the year in which Brazil initiated the original proceeding.⁵⁵ Here, again, New Zealand’s argument is contradicted by the facts of this dispute.

19. *Regarding the argument of the United States that the marketing loan and counter-cyclical payments programmes are not measures "taken to comply", is it the view of the United States that Article 21.5 of the DSU only applies to*

⁵⁰ See *Upland Cotton (Panel)*, paras. 3.1(vi)-(viii) and U.S. Rebuttal Submission, paras. 30-37.

⁵¹ New Zealand Third Party Submission, para. 4.08.

⁵² See e.g., *Brazil – Aircraft (21.5 II – Canada)*, para. 2.1.

⁵³ See *Upland Cotton (Panel)*, paras. 3.1(vi)-(viii) and U.S. Rebuttal Submission, paras. 30-37.

⁵⁴ *Upland Cotton (AB)*, para. 477.

⁵⁵ *Upland Cotton (AB)*, paras. 484.

measures actually taken by a party to comply and does not apply to measures that a Member should have taken to comply?

25. The United States considers that Article 21.5 of the DSU provides two categories of claims: (a) claims that no measure taken to comply exist and (b) claims that measures taken to comply exist but that these measures are not consistent with a covered agreement. In the first case, there is – by definition – no measure taken to comply and, in that sense, the “measure” could be the absence of “measures that a Member should have taken to comply.” In the second case, there is a measure taken to comply and that is the only proper subject of any WTO-inconsistency in the proceeding.

20. *How does the United States respond to the argument in the Third Party Submission of Japan that the Appellate Body report in EC – Bed Linen (Article 21.5 – India) does not support the argument of the United States that the marketing loan and counter-cyclical payments programmes are not within the scope of this Article 21.5 proceeding?*

26.. Japan appears to misunderstand the U.S. argument. Contrary to Japan’s assertion, the United States has *not* argued that a complaining Member is “cut[] off” from “access to review under Article 21.5” where the responding Member has taken no action to comply with the recommendations and rulings of the DSB.⁵⁶ **To the contrary, the United States notes that Article 21.5 specifically contemplates that a complaining Member can invoke “compliance” review under that provision “where there is disagreement as to the *existence . . . of measures taken to comply with the recommendations and rulings.*” (Emphasis added)** The United States considers that this covers the situation where a Member has taken no measures to comply with recommendations and rulings.

27. The U.S. arguments to which Japan refers deal with the question of what measures may be subject to new or renewed “claims of consistency with a covered agreement” in an Article 21.5 proceeding. Article 21.5 of the DSU provides that such claims can only be made in respect of *measures taken to comply* with the recommendations and rulings of the DSB. In the present case, neither the marketing loan and counter-cyclical payment programs – nor the programs and “all payments” thereunder – are measures taken to comply with any DSB recommendations and rulings. The fact that they have not been changed, either to implement any DSB recommendations and rulings or for any other reason, confirms this. And as these measures are not “measures taken to comply,” they cannot – under the express terms of Article 21.5 – be subject to new and renewed “claims of consistency with a covered agreement.”

28.. The Appellate Body’s reasoning in *EC – Bed Linens* is entirely consistent with the U.S. argument. The Appellate Body recognized there that “[i]f a claim challenges a

⁵⁶ Japan Third Party Submission, para. 18.

measure which is not a ‘measure taken to comply,’ that claim cannot properly be raised in Article 21.5 proceedings.”⁵⁷ In other words, an Article 21.5 proceeding is about whether implementation of DSB recommendations and rulings is consistent with a Member’s WTO obligations. As the Appellate Body recognized, it does not provide complaining Members with a “second chance” to make “claim[s] which, as a legal and practical matter, could have been raised and pursued in the original dispute.”⁵⁸

3. Claim of Brazil regarding the failure of the United States to comply with the DSB recommendations between 21 September 2005 and 1 August 2006

Questions to Brazil

21. *Could Brazil please explain whether its request for a finding that the United States failed to comply with the DSB recommendations between 21 September 2005 and 1 August 2006 is supported by prior panel practice in Article 21.5 proceedings? [Paragraph 68 of the Rebuttal Submission of the United States]*
22. *How does Brazil respond to the argument of the European Communities that "the lack of positive action taken by the United States to comply with the panel and Appellate Body's findings and recommendations between the implementation date of 21 September 2005 and 31 July 2006 is not necessarily fatal to its defence"? [Paragraph 48 of the Third Party Submission of the European Communities]*

Question to the United States

23. *Does the United States consider that the text of Article 21.5 of the DSU should be interpreted to mean that a compliance panel may only review the "existence" or "consistency" with a covered agreement of measures taken to comply as of the date that the matter was referred to the panel and not as of the date of the end of the implementation period? [Paragraph 68 of the Rebuttal Submission of the United States]*
29. In paragraph 68 of the U.S. rebuttal submission, the United States explained that Brazil has not identified any textual basis for making *both* (a) a claim about “existence” of measures taken to comply with a recommendation of the DSB relating to factual circumstances that both parties agree no longer even exist *and* (b) a claim about “measures taken to comply” with respect to the *same* recommendation of the DSB under factual circumstances that both parties agree *do* actually exist.

⁵⁷ EC – Bed Linen (21.5 – India) (AB), para. 78.

⁵⁸ EC – Bed Linen (21.5 – India) (AB), para. 74.

30.. To the contrary, as the panel recognized in *United States – Shrimp (21.5 Malaysia)*, a finding such as the one described in (a) above regarding superceded facts does not “favour[] a prompt settlement of the dispute.”⁵⁹ **Similarly, the panel in *EC – Bed Linen (21.5 – India)* declined to “make two decisions on the existence or consistency of measures taken to comply – one as of the end of the reasonable period of time, and one as of the date of establishment of the Panel”⁶⁰ because “[w]e do not consider that it would be either necessary or appropriate, as a matter of judicial economy, to first examine whether compliance had occurred as of the end of the reasonable period of time, and second consider compliance as of the later date.”⁶¹ This clarification by the *EC – Bed Linen (21.5 – India)* panel – that the issue is one of “judicial economy” – is especially helpful. “Judicial economy” refers to the principle that panels have to “[make] findings only on those claims that such panels concluded were necessary to resolve the particular matter.”⁶² In *EC – Bed Linens*, the complaining party did not show that findings regarding compliance as of the end of the implementation period would be “necessary or appropriate” to resolving the particular matter before the panel. Similarly, here, Brazil has not shown that the requested findings regarding compliance under the superceded facts that existed on the date of implementation are necessary or appropriate to resolving the particular matter before this Panel.**

⁵⁹ *United States – Shrimp (21.5 – Malaysia) (AB)*, para. 5.12.

⁶⁰ *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.

⁶¹ *EC – Bed Linen (Panel) (21.5 – India)*, para. 6.28.

⁶² *United States – Shirts and Blouses (21.5 – India) (AB)*, p. 18.