

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)

Oral Statement of the United States of America

April 14, 2008

I. Introduction

1. Good morning, Mr. Chairman and members of the Division. On behalf of the United States, we would like to thank you for the opportunity to appear before you today. Since this is Ms. Hillman’s first oral hearing, the United States would like to welcome her to the Appellate Body and express our appreciation for her willingness to serve. We look forward to your service.
2. The United States had hoped that the dispute with Brazil over subsidies on upland cotton would not have come this far. We instituted several significant changes in response to the recommendations and rulings of the Dispute Settlement Body (“DSB”) in *United States – Subsidies on Upland Cotton*,¹ conditions have changed significantly since that first proceeding, and those changes in our measures and conditions mean that the U.S. measures are now in full compliance with our WTO obligations. The compliance Panel erroneously found otherwise, and so here we are before you today.
3. The United States demonstrated in its appellant submission the legal errors that the compliance Panel committed in interpreting and applying the covered agreements. Brazil’s nearly 300 page-long appellee submission fails to respond to these legal errors but instead re-makes and re-casts the voluminous factual arguments that it put before the compliance Panel.² Even with 45 minutes for our opening statement, it would not be possible to respond in detail to all of the arguments from Brazil’s appellee submission, but we would of course be very pleased to address any questions that the Division may have about any of them.

¹U.S. Appellant Submission, para. 1.

²*See, e.g.*, Annex I to Brazil’s Appellee Submission.

4. The United States instead will focus today on several of the compliance Panel’s legal errors and respond to some of Brazil’s arguments in support of the Panel’s findings.

5. First, the Panel impermissibly considered measures outside the scope of a compliance proceeding – because they are not “measures taken to comply” – in particular GSM 102 export credit guarantees for pig meat and poultry meat and U.S. marketing loan and counter-cyclical payments made after September 21, 2005.

6. Second, the compliance Panel erred in drawing the legal conclusion that U.S. marketing loan and counter-cyclical payments caused significant price suppression in the world market for upland cotton. This morning, we will focus on four key errors: (1) the Panel’s inconsistent findings on the alleged market insulation of U.S. cotton producers, (2) its failure to recognize that the specific nature of the payments under the remaining two programs demonstrates that they do not cause significant price suppression, (3) its failure to ensure that it was not attributing to U.S. payments the effects of other factors on prices, and (4) its failure to analyze, explain or support how any price suppression was of such a degree as to be “significant.”

7. Third, the compliance panel erred in drawing the legal conclusion that the GSM 102 export credit guarantees are an export subsidy under item (j) of the Illustrative List. Again, today we will focus on three key errors: (1) the Panel’s failure to draw the appropriate legal conclusion from the U.S. budgetary re-estimates showing that the United States covers its long-term operating costs and losses for the guarantees, (2) its imposition of a non-existent scaling requirement for fees that is nowhere found in item (j), and (3) its reliance on a comparison between GSM 102 fees and minimum premium rates (“MPRs”) under the OECD Arrangement

when the Arrangement does not apply to agricultural export credits and is designed for different conditions.

II. The Compliance Panel Impermissibly Considered Measures Outside the Scope of an Article 21.5 Proceeding

8. The text of Article 21.5 defines the scope of a compliance proceeding as a “disagreement as to the existence of or consistency with a covered agreement of measures taken to comply with the recommendations and rulings” of the DSB. The text makes clear that the *DSB’s recommendations and rulings* are at the very core of Article 21.5 and shape the possible scope of the compliance proceedings.³ Only claims as to the existence of measures taken to comply with the DSB’s recommendations and rulings, or as to the consistency with the covered agreements of measures taken to comply, are properly before a compliance panel.

9. As the United States explained in its appellant submission,⁴ the compliance Panel improperly found that export credit guarantees as to pig meat and poultry meat were within the scope of the Article 21.5 proceeding. The Panel also ruled against the United States’ objection that marketing loan and counter-cyclical payments made after September 21, 2005 were outside the scope of the compliance proceeding, even though the DSB’s recommendations and rulings only covered U.S. payments made during MY 1999-2002.⁵

10. Part of the compliance Panel’s finding on marketing loan and counter-cyclical payments relied on an improper interpretation of Article 7.8 of the SCM Agreement. Article 7.8 provides

³Canada – Aircraft (21.5) (AB), para. 36.

⁴U.S. Appellant Submission, paras. 33-55.

⁵U.S. Appellant Submission, paras. 56-74.

for two ways in which a Member can come into compliance with DSB recommendations and rulings in which a subsidy has been found to cause adverse effects – a Member must either withdraw the subsidy or remove its adverse effects. The compliance Panel viewed Article 7.8 as applying to U.S. marketing loan and counter-cyclical payments made after September 21, 2005, and considered that claims against these payments could be brought in an Article 21.5 compliance proceeding. What the Panel overlooked was that the two compliance options in Article 7.8 cannot be read in isolation from the DSB’s recommendations and rulings. Here, as the compliance panel itself found, the subsidies subject to the DSB’s recommendations and rulings were U.S. payments made during MY 1999-2002. Therefore, the United States (“the Member granting or maintaining *such subsidy*”) only had an obligation under Article 7.8 to “take appropriate steps to remove the adverse effects or . . . withdraw *the subsidy*,” that is, those particular payments. Likewise, under Article 21.5 of the DSU, only compliance claims related to the DSB’s recommendations and rulings against payments made during MY 1999-2002 could properly fall within the scope of the proceeding.

11. The compliance Panel’s finding on the U.S. preliminary objections in part rested on the finding of the Appellate Body in *US – Softwood Lumber IV (21.5)* that “measures with a particularly close relationship to the declared ‘measure taken to comply’ and to the recommendations and rulings of the DSB” may fall within the scope of an Article 21.5 proceeding.⁶ The reasoning in that dispute is inapplicable here. Brazil also invokes the

⁶Panel Report, paras. 9.24, 9.25, 9.80 (citing *US – Softwood Lumber IV (21.5) (AB)*, para. 77).

Appellate Body report in *Softwood Lumber IV (21.5)* to defend the Panel’s findings⁷ and erroneously asserts that the United States has accepted a “‘particularly close relationship’ test.”⁸

12. As an initial matter, the United States would like to note that the compliance panel and the Appellate Body in *Softwood Lumber IV (21.5)* were explaining how they were applying the requirements of Article 21.5 to the particular facts before them. Neither claimed to be establishing a comprehensive standard to replace the agreed text of Article 21.5.

13. *Softwood Lumber IV (21.5)* involved the DSB’s recommendations and rulings against a discrete administrative determination (pass-through analysis in a countervailing duty investigation), a declared measure taken to comply (a section 129 determination on pass-through) and an aspect of a new measure (the pass-through in an assessment review) that allegedly superseded the declared measure taken to comply around the time of the implementation deadline. The panel, and the Appellate Body, found that the aspect of the assessment review could properly be reviewed as part of the Article 21.5 review of the new determination concerning the investigation.⁹

14. Unlike in that dispute, however, the compliance Panel here was not faced with the question as to whether a second measure had undone or superseded compliance with the DSB’s recommendations and rulings as to export credit guarantees for pig meat and poultry meat – there were no such DSB recommendations and rulings in the first place, so the question considered by the Appellate Body in *Softwood Lumber IV (21.5)* did not arise.

⁷Brazil’s Appellee Submission, paras. 174-82, 194-99, 226-39.

⁸Brazil’s Appellee Submission, para. 170.

⁹US – *Softwood Lumber IV (21.5) (AB)*, paras. 77-92.

15. Brazil, attempting to explain the rationale behind the compliance Panel’s finding on the GSM 102 guarantees for pig meat and poultry meat, erroneously claims that the declared U.S. measure taken to comply was the amended GSM 102 program¹⁰ and tries to demonstrate how the GSM 102 guarantees for pig meat and poultry meat were “measures taken to comply” because they have a “particularly close relationship” to the amended GSM 102 program.¹¹ As the United States explained in its Appellee Submission, the entire amended program was not the declared measure taken to comply. In fact, only those changes with respect to the guarantees for unscheduled products and rice were the measures taken to comply.¹² Moreover, the reasoning from *Softwood Lumber IV (21.5)* does not make sense here – the amended export credit guarantees for exports of pig meat and poultry meat are not somehow undoing or superceding the changes to the GSM 102 program that were adopted to comply with the DSB’s recommendations and rulings concerning unscheduled products and rice. The compliance Panel never took this important distinction from *Softwood Lumber IV (21.5)* into account, and merely relied on the finding of a “particularly close relationship” between the measure taken to comply and the GSM 102 guarantees as to pig meat and poultry meat to say that the latter also was a “measure taken to comply.”¹³ In other words, the compliance Panel re-writes Article 21.5 to read “measures taken to comply or closely related measures.”

16. It is important for panels to remain faithful to the scope of Article 21.5 that was actually negotiated and agreed by Members. A complaining party may not use Article 21.5 to challenge

¹⁰Brazil’s Appellee Submission, para. 86.

¹¹Brazil’s Appellee Submission, paras. 194-206.

¹²U.S. Appellee Submission, paras. 80-82, 86.

¹³Panel Report, para. 9.25.

measures that are not measures taken to comply. This is because Members only agreed to the truncated, expedited procedures under Article 21.5 in the specific case involving a measure taken to comply and did not agree to have these different dispute settlement procedures used in the case of measures not taken to comply. One has only to look to the example of the difference in the availability of a reasonable period of time for compliance to appreciate the important differences between the proceedings.

17. The Panel's finding as to GSM 102 guarantees for pig meat and poultry meat also raises serious systemic concerns.¹⁴ If left to stand, it would create a disincentive for WTO Members to extend the consequences of a finding beyond the DSB's recommendations and rulings by making broad changes to a program as a whole for administrative convenience or other reasons. The Member would risk having the changed measure subjected to Article 21.5 proceedings. In other words, the Panel's approach would tell Members to make no changes to their measures other than what is strictly required for compliance, and to make no changes to any other measures or else risk Article 21.5 proceedings against those other changes or other measures. The Panel's approach would say that Members should avoid making changes even where they are in the interest of good government policy or to address another Member's concerns.

18. Brazil also attempts to justify the compliance Panel's reliance on *Softwood Lumber IV* (21.5) in the context of marketing loan and counter-cyclical payments made after September 21, 2005.¹⁵ Brazil argues that the payments after September 21, 2005 have replaced the earlier ones,

¹⁴U.S. Appellant Submission, paras. 52-54.

¹⁵Brazil's Appellee Submission, paras. 226-39.

and that the effects of those payments have superceded the earlier effects. This is not the same situation as in *Softwood Lumber IV (21.5)*. Here, Brazil never alleged that the U.S. payments after September 21, 2005 undid any compliance related to the payments made during MY 1999-2002.¹⁶ Instead, it simply asserted claims of non-compliance against the U.S. payments after September 21, 2005. In any event, the new payments would not have undone compliance concerning the old ones, as the parties knew at the time of the original proceeding that there would be new payments, and the original panel rejected Brazil's claims of threat of serious prejudice against those new payments.

19. Brazil, as well as several third parties, expresses concern that if the Appellate Body accepts the U.S. position as to the marketing loan and counter-cyclical payments made after September 21, 2005, then Members will be left without a remedy against adverse effects when there are findings of WTO-inconsistency against subsidy payments made during a given year.¹⁷ As the United States explained,¹⁸ Members are not without recourse. Here, Brazil brought a claim against the programs *per se*, including a threat of serious prejudice. The original panel did not accept that claim. Just because Brazil did not get the result it wanted does not mean Brazil should now be able to get a finding from the Appellate Body as though the DSB's recommendations and rulings covered the marketing loan and counter-cyclical payment programs. (The compliance Panel confirmed that the original panel's findings, and the DSB's

¹⁶Brazil's Appellee Submission, paras. 237-38.

¹⁷Brazil's Appellee Submission, paras. 243-45; Third Participant's Submission of Australia, para. 17; Third Party Submission of Canada, para. 17; Third Party Submission of New Zealand, para. 3.9.

¹⁸U.S. Appellant Submission, para. 72.

recommendations and rulings, pertained only to payments, and not programs.¹⁹⁾ Moreover, Brazil overlooks the fact that nothing stops a Member from claiming before a compliance panel that the subsidy payments have not been withdrawn and continue to have adverse effects. In this proceeding, Brazil did not even try to make such a claim.

III. The Panel’s Findings on Significant Price Suppression Are Characterized by Interpretative Errors and Analytical Flaws

20. The United States will not repeat or summarize today all of its arguments against the Panel’s finding concerning the U.S. marketing loan and counter-cyclical payments.²⁰ We instead would like to focus the Appellate Body’s attention on several important legal findings that the United States has appealed and which mandate a reversal of the compliance Panel’s findings on significant price suppression.

21. The United States observes that the Panel, using a counterfactual approach, considered several factors, including the structure, design, and operation of the marketing loan and counter-cyclical payments, the magnitude of the payments, and the alleged “gap” between cotton producers’ costs and revenues.²¹ It is considered that each one of its findings on these individual factors was an analytical “building block” towards the ultimate finding that the “effect” of the payments “is . . . significant price suppression.”²² Brazil accuses the United States of looking at these findings “in clinical isolation from the totality of the compliance Panel’s findings and the evidence before it.”²³ However, what Brazil seemingly fails to understand is that legal errors as

¹⁹U.S. Appellee Submission, para. 15; Panel Report, para. 9.54.

²⁰U.S. Appellant Submission, Part IV.

²¹Panel Report, paras. 10.45-10.51, Part X.B.4-X.B.12.

²²Panel Report, paras. 10.244-10.254.

²³Brazil’s Appellee Submission, para. 517.

to each of the analytical factors, which the United States has appealed, undermine the very foundation on which the compliance Panel's finding of significant price suppression rests.

A. The Panel Erred, and Contradicted Its Own Conclusions, in Finding Market Insulation

22. The Panel's finding rested in large part on the Panel's erroneous conclusion that the U.S. payments "insulated" U.S. producers from market signals to such an extent that the payments had significant effects on planting, production, exports, and ultimately, price.²⁴ The Panel's market insulation analysis is marked by internal contradiction and inconsistency.²⁵ In particular, the compliance Panel found that U.S. shares of world cotton production and exports were stable over MY 2002-05, a fact that "suggest[ed] to [the Panel] that US producers have increased production and exports in proportionately the same way as foreign cotton producers."²⁶ The Panel, however, disregarded this finding, and concluded, in support of its finding of significant price suppression, that U.S. marketing loan and counter-cyclical payments insulated U.S. producers from price signals.²⁷ Because of this analytical inconsistency, the Panel's finding as to market insulation cannot stand as a matter of law. If the U.S. share of world production and exports was stable, and if U.S. producers acted in much the same way as producers in other countries, the Panel could not rationally have found that U.S. payments insulated U.S. producers to any meaningful degree.

²⁴U.S. Appellant Submission, paras. 132-33.

²⁵U.S. Appellant Submission, paras. 157-63.

²⁶Panel Report, para. 10.127.

²⁷Panel Report, paras. 10.127, 10.248, 10.251, 10.254.

23. Brazil, recognizing the problem with the Panel’s inconsistent finding, would like the Appellate Body to believe that stable U.S. shares tell us little about the response of U.S. producers to market signals, since a multitude of factors, from disease and weather to technology, influence levels of production and exports.²⁸ According to Brazil, the United States is wrong to suggest that the stable market shares can be explained by the uniform response by producers everywhere to market prices.²⁹

24. Brazil mischaracterizes the U.S. argument. The United States has acknowledged all along that other factors influence production and exports³⁰ – if anything, it is Brazil that has taken a simplistic approach in this proceeding by alleging that U.S. subsidies drive U.S. planted acreage, production, and exports, regardless of other factors.³¹ We also have not asserted that all producers respond exactly the same way to expected prices of upland cotton. What Brazil overlooks is the fact that the level of production and exports also reflect planting decisions, and that if U.S. producers were insulated from market signals by U.S. marketing loan and counter-cyclical payments, they would act differently, for example, planting significantly more cotton in response to a given set of market conditions than their foreign counterparts do as a whole. Overall, and even accounting for other factors influencing production and exports across countries, we would expect to see increasing U.S. shares of production and exports as foreign producers cut back in response to price declines. The data demonstrate otherwise – U.S. and foreign producers have responded to prices in similar ways, as even the compliance Panel

²⁸Brazil’s Appellee Submission, para. 669-73.

²⁹Brazil’s Appellee Submission, para. 675.

³⁰*See, e.g.*, Panel Report, para. 10.118.

³¹Panel Report, paras. 10.112-10.113.

recognized³² – and this has resulted in stable U.S. shares of production and exports during MY 2002-2005. The Panel erred as a matter of law in finding a significant degree of market insulation despite its finding on stable market shares.

B. The Panel Failed to Recognize that the Specific Nature of the Remaining Payments Do Not Cause Significant Price Suppression

25. The compliance Panel essentially assumed that just because U.S. cotton producers receive government support payments, they act in a manner inconsistent with the market. Under the Panel's logic, a small amount of marketing loan or counter-cyclical payments, even one cent, would have significant price-suppressing effects. However, a proper analysis of whether U.S. marketing loan and counter-cyclical payments cause significant price suppression must go further and examine the *nature* of these payments and the *actual* effect, if any, they have on planting decisions, production and ultimately on prices. As the United States demonstrated in its appellant submission,³³ the Panel's analysis of the nature of U.S. payments was insufficient and fails as a matter of law.

26. The Panel, for instance, relied on the original panel's conclusions that counter-cyclical payments distort producers' production decisions because of the link between those payments and the world price of upland cotton, even though producers receive counter-cyclical payments if they grow nothing at all.³⁴ At the time the original panel was established, counter-cyclical payments were new. Since the original panel proceeding, however, economic studies have been

³²Panel Report, para. 10.127.

³³U.S. Appellant Submission, paras. 134-56.

³⁴*See, e.g.*, Panel Report, paras. 10.65-10.68, 10.101, 10.104.

published concerning the effect of counter-cyclical payments on planting decisions, which demonstrate *minimal* impacts on production.³⁵ In other words, the actual experience to date confirms that where a program is not linked to production, it is not likely to have any impact on production. The United States put these studies before the Panel, but the Panel erroneously relied on them to support a finding that the structure, design, and operation of counter-cyclical payments had market-insulating and revenue effects, that they led to increased acreage and production, and that the effect of the payments was significant price suppression.³⁶

27. The Panel also concluded that the fact that U.S. farmers know that they will receive marketing loan payments when the adjusted world price is below the marketing loan rate “continues to be an important factor affecting the level of planted acreage to cotton (and thus the level of production), even when, as in MY 2006, the expected price for upland cotton at the time of planting is higher than the marketing loan rate.”³⁷ Once again, the compliance Panel’s analysis falls short. The Panel never determined if producers did in fact believe that actual prices at harvest time would be below the marketing loan rate in MY 2006 or in any other year, nor did it assess the actual effect on production of the income guarantee provided by marketing loan payments.³⁸

28. The Panel has substituted assumption for analytical rigor. The United States, however, demonstrated just how the structure, design, and operation of the marketing loan and counter-cyclical payments did not insulate U.S. cotton farmers from market signals. In fact, they were no

³⁵U.S. Appellant Submission, paras. 144-53.

³⁶Panel Report, paras. 10.95, 10.104, 10.248, 10.254.

³⁷Panel Report, para. 10.81.

³⁸U.S. Appellant Submission, paras. 142-43.

more insulated in MY 2006, than they are now. The Panel noted that U.S. producers were projected to plant 14 percent less cotton in 2007 than the preceding year. That projection was grossly understated, as U.S. cotton plantings fell by 30 percent in 2007 and are projected to fall by another 13 percent this year while cotton acreage abroad continues to grow. In fact, Brazil, the Member claiming serious prejudice here, is also increasing its plantings. It is difficult to understand how U.S. support could be causing significant price suppression when U.S. production is decreasing significantly and Brazilian production is increasing. And while the Panel noted that farmers at planting in 2006 expected prices to be above the marketing loan rate, prices have reached over 90 cents per pound, well above the marketing loan rate of 52 cents per pound. This is not what we would expect to see were the nature of U.S. payments as the Panel concluded.

C. The Panel Erred in Failing to Analyze Rigorously and Ensure that the Effects of Other Factors Were Not Improperly Attributed to Subsidies

29. The compliance Panel's finding of serious prejudice is also in error because it failed to ensure, in conducting its analysis under Article 6.3(c) of the SCM Agreement, that the price suppression it found was "the effect of the subsidy" challenged and not of other factors. As the Appellate Body has interpreted that provision, "it is necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies."³⁹ The compliance Panel therefore had to undertake a meaningful assessment of the world upland cotton market, and of the factors observed to be affecting U.S. and foreign supply and demand, and ultimately, world

³⁹*Upland Cotton (AB)*, para. 437; see also *Korea – Commercial Vessels (Panel)*, paras. 7.617-7.618.

prices. For example, as the United States explained and demonstrated, China is one of the most important “other factors” influencing the world price for upland cotton, yet the compliance Panel failed to conduct a proper non-attribution analysis taking into account China.⁴⁰

30. Brazil asserts that the Panel accounted for several subsidy and non-subsidy related factors, including China.⁴¹ Subsidy-related factors, however, are not part of a non-attribution analysis. And the United States has demonstrated how the Panel did not account for non-subsidy related factors that influenced producers’ decisions, such as the cost of competing crops, weather, and changes in technology.⁴²

31. As to China’s role in world cotton production, imports, and consumption, as well as other factors affecting the world market, Brazil seems to believe that it was enough for the Panel simply to cite a report of Brazil’s “expert” on the world cotton market, and to rely on the relative U.S. shares of production and exports of upland cotton.⁴³ The Panel was required to do more.

32. To conclude properly that it had not attributed to subsidies the impact of China’s position as the top producer, importer, and consumer of cotton, the compliance Panel should have removed and isolated China’s influence on supply and demand and determined the impact that it had on world prices for upland cotton. Merely using current factual conditions as a baseline was not enough to account for China’s influence, as Brazil asserts.⁴⁴ To say that the baseline includes

⁴⁰U.S. Appellant Submission, paras. 211-14.

⁴¹Brazil’s Appellee Submission, paras. 922-26.

⁴²*See, e.g.*, U.S. Appellant Submission, paras. 136-41.

⁴³Brazil’s Appellee Submission, paras. 927-33.

⁴⁴Brazil’s Appellee Submission, paras. 936-38.

China's production and consumption says nothing about the effect of China's place in the world market, apart from other factors.

33. By alleging that the United States is asking the Appellate Body to disturb the Panel's discretion as trier of fact, Brazil is mischaracterizing the U.S. appeal.⁴⁵ The compliance Panel's mere citation to evidence cannot substitute for a rigorous non-attribution analysis required by the SCM Agreement. In essence, Brazil would like the Appellate Body to avoid holding the compliance Panel accountable in any way for its findings – a theme repeated throughout its Appellee Submission. We respectfully ask that the Appellate Body not accept Brazil's misplaced attempt to argue "discretion" as a way of insulating the Panel from review when questions of law are involved.

D. The Panel Failed to Determine the Degree of Price Suppression that Was "Significant"

34. The United States now turns to an issue of serious implications for the multilateral trading system. The Panel's bottom-line finding was that the "effect" of U.S. marketing loan and counter-cyclical payments was "significant price suppression" within the meaning of Article 6.3(c).⁴⁶ The Panel, however, never explained the *degree* of price suppression that it considered to be "significant," as applied to the facts before it, and its finding of significant price suppression cannot stand as a matter of law.

35. The SCM Agreement does not define "significant" price suppression in Article 6.3 or elsewhere. The ordinary meaning of "significant," however, is "important, notable;

⁴⁵Brazil's Appellee Submission, para. 941.

⁴⁶Panel Report, para. 10.254.

consequential,”⁴⁷ which suggests that any price suppression must reach a level at which it is important, notable, and consequential in order to be inconsistent with Article 6.3(c). The original panel made such an interpretation in the original proceeding.⁴⁸ Further, drawing contextual guidance from Article 15.2 of the SCM Agreement, the original panel clarified that “it is the *degree* of price suppression or depression itself that must be ‘significant’ (i.e. important, notable or consequential) under Article 6.3(c) of the SCM Agreement.”⁴⁹ We agree that, to conclude that there is significant price suppression under Article 6.3(c), a panel must find that the *degree* of price suppression is “significant,” and that degree must be “important, notable; consequential.”

36. Brazil asserts that a panel need only make a “binary” determination of whether price suppression is significant or not, which begs the question of how a panel is to reach that conclusion in the context of a given dispute.⁵⁰ Brazil’s analysis also ignores the original panel’s view that Article 15.2 of the SCM Agreement provides contextual support for an interpretation of Article 6.3(c), requiring a panel to determine the *degree* of price suppression that is “significant.”⁵¹

37. Brazil misrepresents the U.S. argument by asserting that the United States interprets Article 6.3(c) as requiring a precise quantification of the degree of price suppression.⁵² The United States, however, has never said that the Panel had to provide a precise number as to what

⁴⁷*The New Shorter Oxford English Dictionary*, vol. 2, at 2860 (1993 ed.) (second definition) (Exhibit US-51).

⁴⁸*Upland Cotton (Panel)*, para. 7.1325; *see also Upland Cotton (AB)*, para. 426; *Korea – Commercial Vessels (Panel)*, para. 7.571.

⁴⁹*Upland Cotton (Panel)*, para. 7.1328 (emphasis added).

⁵⁰Brazil’s Appellee Submission, para. 812.

⁵¹Brazil’s Appellee Submission, para. 812.

⁵²Brazil’s Appellee Submission, paras. 809, 813, 823.

degree of price suppression it considered significant. What is clear is that the Panel did not do enough in merely stating that the price suppression was “significant.”⁵³ The parties submitted quantitative evidence, including econometric modeling, and qualitative evidence. The Panel should have applied its definition of “significant” to this evidence⁵⁴ and reached a finding as to the degree of suppression it found to be significant.

38. Aside from the Panel’s numerous other errors related to findings that U.S. marketing loan and counter-cyclical payments had trade distortive, market-insulating effects – the compliance Panel essentially wrote the word “significant” out of Article 6.3(c). It failed to undertake a rigorous analysis and made a conclusory finding about significance. If left to stand, the compliance Panel’s finding would render the term “significant” *inutile*, and if looked to as guidance by other panels, would lead to findings of WTO-inconsistency against measures that had only minimal or no price effects.

III. The Compliance Panel Erred in Finding that Brazil Carried Its Burden of Proof Under Item (j) and in Reading a Scaling Requirement and Other Criteria into Item (j)

39. The United States will not repeat each of the arguments set forth in its Appellant Submission demonstrating the compliance Panel’s legal errors in finding that the GSM 102 export credit guarantees issued after July 1, 2005 are inconsistent with provisions of the *Agreement on Agriculture* and the SCM Agreement. However, we would like to focus our

⁵³Panel Report, para. 10.254.

⁵⁴Panel Report, para. 10.254 (citing definition of “significant” at para. 10.50).

attention today on three key issues related to the Panel’s finding that the GSM 102 guarantees are export subsidies within the meaning of item (j) of the Illustrative List.

A. The Panel Failed to Draw the Appropriate Legal Conclusion from the U.S. Budgetary Re-Estimates

40. The findings of the compliance Panel with respect to the export credit guarantees turned largely on the Panel’s “quantitative” analysis under item (j).⁵⁵ At its core, this analysis relied on the unsupportable premise that “there are, in sum, no changes in the underlying circumstances that would justify us revisiting the original panel’s reasoning” concerning the use of initial U.S. budget estimates on the profitability of U.S. export credit guarantees.⁵⁶ Brazil, in its Appellee Submission, repeatedly acknowledges that the compliance Panel’s rigid repetition of the original panel’s conclusions depends on “the absence of any change in the underlying evidence.”⁵⁷

However, the budgetary re-estimate data presented by the United States to the compliance Panel constituted a fundamental change to the underlying circumstances, and the Panel was wrong to adhere blindly to the original panel’s findings on initial estimates to conclude that Brazil had carried its burden of proof on item (j).⁵⁸ Moreover, the Panel’s disregard for these re-estimates constitutes a failure to conduct an objective assessment as required by Article 11 of the DSU.⁵⁹

41. The U.S. budget figures showed an overall projected profit of \$403 million for all guarantee transactions issued from 1992 through 2006.⁶⁰ The compliance Panel acknowledged

⁵⁵Panel Report, para. 14.133; *see also* Panel Report, paras. 14.47, 14.132, 14.134, 14.135.

⁵⁶Panel Report, para. 14.75.

⁵⁷Appellee Submission of Brazil, paras. 268, 315.

⁵⁸U.S. Appellant Submission, para. 88.

⁵⁹U.S. Appellant Submission, paras. 117-19.

⁶⁰Panel Report, para. 14.79; U.S. Response to Panel Question 111; U.S. First Written Submission, paras. 87-89; U.S. Appellant Submission, para. 78.

that these re-estimates “indicate that the US Government now projects the cohorts of guarantees at issue to be profitable.”⁶¹

42. Such figures, from the same U.S. budgetary sources relied upon by the original panel, simply did not exist at the time of the original panel. The re-estimate data at that time did not indicate profitability, but instead showed an anticipated loss of \$230 million.⁶² Brazil nevertheless urges the Appellate Body to uphold the compliance Panel’s error in dismissing such a significant change in circumstances and rely, as the original panel did, on the initial estimates of the budget, which “would only be unreliable if the methodology used to generate them suffered from some flaw, for example by overstating the risk of default as compared with *actual* experience.”⁶³ The profitability reflected in the re-estimate figures, however, demonstrates that the initial estimates do suffer from such a flaw.

43. It is also noteworthy that the re-estimates take into account the GSM 102 program before it was amended – and before the repeal of the GSM 103 program and Supplier Credit Guarantee Program – and yet still show a profit. The risk of loss under the amended program is significantly less than under the antecedent programs. The United States substantially increased fees and made the highest risk countries altogether ineligible. Such substantially reduced risk commensurately increases the likelihood of profit. If the compliance Panel (as Brazil argues) recognized the significance of the re-estimate figures to show profitability of the *old* programs,⁶⁴

⁶¹Panel Report, para. 14.81; U.S. Appellant Submission, para. 78.

⁶²*Upland Cotton (Panel)*, para. 7.852; U.S. Appellant Submission, para. 79.

⁶³Brazil’s Appellee Submission, para. 311 (emphasis added).

⁶⁴Brazil’s Appellee Submission, para. 354.

the compliance Panel could not have concluded otherwise for the amended GSM 102 program (and to conclude otherwise would not have been an objective assessment).

44. Brazil seeks to divert the Appellate Body from the Panel’s errors by improperly suggesting that “the burden of proof to establish that the re-estimates data ‘demonstrate[d] an anticipated profit’ fell on the United States as the party asserting this fact.”⁶⁵ Although the United States has in fact so demonstrated, Brazil had the affirmative burden of proving that the current GSM 102 export credit guarantee program constituted an export subsidy within the meaning of item (j). Consequently, the burden was on Brazil to demonstrate that the program was provided at premium rates inadequate to cover the long-term operating costs and losses to the U.S. Government, which it did not do. The compliance Panel erred as a matter of law in finding that Brazil’s budgetary and other quantitative evidence satisfied the requisite burden of proof, despite a change in the underlying circumstances from the original proceeding regarding the budgetary re-estimates.⁶⁶

B. The Panel Imposed a Non-Existent Scaling Requirement for Export Credit Guarantee Fees

45. The United States maintains that the compliance Panel erroneously interpreted item (j) because, among other things, it required a relative “scaling” of fees between highest risk obligors and lowest risk obligors under an export credit guarantee program. In so doing, the Panel made improper comparisons between the GSM 102 program and dissimilar programs of Ex-Im Bank, which, unlike the GSM 102 program, are subject to MPR requirements under the OECD

⁶⁵Brazil’s Appellee Submission, para. 335.

⁶⁶U.S. Appellant Submission, para. 88.

Arrangement for industrial goods. Item (j), however, not only contains no such scaling requirement, it does not even impose a “risk-based” condition.

46. As its principal response, Brazil repeatedly and disingenuously alleges that the “United States itself agreed that ‘scaling’ was relevant.”⁶⁷ This is false. Further, contrary to Brazil’s assertions, the United States certainly did not “formulate the issue in this way.”⁶⁸ Examined in context, the response of the United States to a panel question that Brazil offers in support of its assertion clearly indicates to the contrary. As the United States said: “neither in the text of the *SCM Agreement* nor in its application in the present proceeding, is there any independent issue of ‘sufficient scaling’ to take into account country risk.”⁶⁹ Similarly, “the United States is not aware of any provision in the *SCM Agreement* that establishes what constitutes ‘sufficient’ scaling.”⁷⁰

47. Brazil evidently believes that the Panel was right to interpret item (j) as imposing a risk-based condition and a specific scaling requirement. Brazil flatly states that the word “cost” in item (j) is synonymous with “risk,” as “risk is a cost.”⁷¹ However, risk itself is not a “cost,” and the word “risk” nowhere appears in item (j). Strangely, Brazil alleges that the proposition “risk is a cost” “is a proposition that the United States has not appealed.”⁷² The United States, however, is completely unaware that such a proposition constitutes a finding of the compliance Panel. The sole question for the Panel under item (j) was whether premia under the reformed GSM 102 program were adequate to cover long-term operating costs and losses. Risk is in effect

⁶⁷Brazil’s Appellee Submission, paras. 417-18, 432, 476; *see also* Brazil’s Appellee Submission, para. 395.

⁶⁸Brazil’s Appellee Submission, para. 394.

⁶⁹U.S. Answer to Panel Question 99, para. 234.

⁷⁰U.S. Answer to Panel Question 99, para. 233.

⁷¹Brazil’s Appellee Submission, para. 424.

⁷²Brazil’s Appellee Submission, para. 424.

a way of describing the *potential* for loss, but it is not a loss or cost itself. This risk can be mitigated in various ways, and neither item (j) nor any other WTO rule dictates the manner in which an export credit guarantee program must address such risk. The Panel, however, imposed an *ad hoc* fee scaling requirement that is found nowhere in the language of item (j).

48. Brazil derides as “non-sensical” the argument of the United States that a proper examination of the fee structure of the GSM 102 program, even were a scaling analysis appropriate, should have taken account of those countries that are now wholly ineligible under the program, and therefore no longer present a risk of default.⁷³ Brazil suggests that the task under item (j) was to assess fees only in connection with risks actually assumed by CCC. Brazil says the analysis should give no credit for the exclusion of eligibility of the highest risk countries and should include “only those fees applicable to countries eligible for GSM 102 coverage.”⁷⁴ Brazil, therefore, in effect argues that, for the United States to design a conforming program under item (j) with “sufficient scaling,” it should affirmatively assume the risk of default of the highest risk countries, make all countries eligible, and then demand an exorbitant premium from those highest risk countries. In that way, seemingly, the United States would satisfy the scaling requirement of the compliance Panel under item (j) and have a conforming program. But such a premium would necessarily be prohibitive. Brazil’s approach and that of the compliance Panel would therefore elevate form over substance. There is no real substantive difference between a prohibitive premium and outright exclusion from the program.

⁷³Brazil’s Appellee Submission, para. 434; U.S. Appellant Submission, para. 104.

⁷⁴Brazil’s Appellee Submission, para. 435.

C. The Panel Improperly Relied on a Comparison Between GSM 102 Fees and MPRs under the OECD Arrangement

49. Finally, it was improper for the Panel to use MPRs under the OECD Arrangement in its analysis of scaling and item (j). Brazil suggests that panels may liberally rely “on evidence not expressly identified in the treaty text.”⁷⁵ Brazil offers as an illustrative example that Article 1.1(b) of the *SCM Agreement* “provides no indication of the specific evidence that is admissible in finding that a ‘benefit’ exists, [and] as a result, most benchmarks used for the purpose of assessing the ‘benefit’ flowing from a financial contribution have been drawn from sources external to the *SCM Agreement*.”⁷⁶ Brazil’s argument misses the point. First, the positive U.S. budgetary re-estimates are direct evidence demonstrating the GSM 102 premia are adequate to cover the long-term operating costs and losses of the GSM 102 guarantees, and this evidence could not be overcome by an analogy drawn from the MPRs. Second, the MPRs under the OECD Arrangement, as the Panel itself recognized, are not even applicable to the export of agricultural commodities.⁷⁷ There was no logical reason to use MPRs as a basis for comparing GSM 102 fees for the purposes of an item (j) analysis, and the Panel erred as a matter of law in doing so.

IV. Conclusion

50. For all of the forgoing reasons, as well as those set out in our written submissions, we respectfully request that the Appellate Body find that the compliance Panel erred as a matter of

⁷⁵Brazil’s Appellee Submission, para. 379.

⁷⁶Brazil’s Appellee Submission, para. 379.

⁷⁷Panel Report, para. 14.94.

law in finding that the United States was not in compliance with the DSB's recommendations and rulings.

51. We thank you for your attention and look forward to answering your questions.