BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States – Subsidies on Upland Cotton

(AB-2004-5)

Appellee's Submission of the United States of America

November 16, 2004

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SERVICE LIST

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Panel Report, *India – Patent (EC)*	Panel Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products (Complaint brought by EC)*, WT/DS79/R, adopted 22 September 1998
Panel Report, *India – Quantitative Restrictions*	Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, adopted 22 September 1999

I. Introduction and Executive Summary

1. The United States is pleased to present this appellee submission pursuant to Rule 23(3) of the Working Procedures for Appellate Review in response to Brazil's other appellant submission. The United States requests the Appellate Body to reject Brazil's appeals and requests for findings and recommendations for the reasons set out in this submission.

2. ***Export Credit Guarantees:*** The United States requests that the Appellate Body reject Brazil's appeals relating to the export credit guarantee programs and their consistency with U.S. obligations and commitments under the *Agreement on Agriculture*[1] and *Agreement on Subsidies and Countervailing Measures*.[2]

3. The Panel found that the CCC export credit guarantee programs do not threaten to circumvent the export subsidy commitments of the United States within the meaning of Article 10.1 of the Agreement on Agriculture.

4. The Appellate Body should reject Brazil's entreaties to overturn this finding. In the first instance, without actually appealing the particular finding, Brazil effectively asks the Appellate Body to expand the Panel's finding that the obligations under Article 10.1 extend only to the product coverage of the Agreement on Agriculture, as set forth in Article 2 and Annex 1 of that agreement. Brazil, however, asks the Appellate Body to impose findings on all goods "eligible" under the export credit guarantee without regard to whether the Agreement on Agriculture applies to them.

5. The Appellate Body should also uphold the Panel's finding that no threat of circumvention exists under Article 10.1 with respect to agricultural products for which no export

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[1] *Agreement on Agriculture* ("Agreement on Agriculture" or "Agriculture Agreement").
[2] *Agreement on Subsidies and Countervailing Measures* ("Subsidies Agreement" or "SCM Agreement").

credit guarantees have been provided at all ("unsupported") merely because of a potential availability of the program in the future for such agricultural products.

6. The Panel's finding that the export credit guarantee programs do not threaten circumvention of export subsidy commitments is not, contrary to Brazil's argument, an articulation of a broad standard that "circumvention of export subsidy commitments would only be 'threatened' if beneficiaries had an 'absolute' or 'unconditional statutory legal entitlement' to receive the subsidies such that the United States would 'necessarily' be required' to grant subsidies after the commitment level had been reached." Rather, in concluding that the programs did not pose a threat of circumvention, the Panel, correctly noting that Brazil retained the burden of proof to establish its claims, simply was responding to and declining to adopt Brazil's erroneous factual and legal characterizations of the program. The Panel rightly distinguished these programs from the mandatory subsidies at issue in *U.S. – FSC*, and the Panel's decision presents no conflict with that Appellate Body report. Brazil effectively argued that a mere possibility of issuance of export credit guarantees presented a threat of circumvention, and the Panel simply did not adopt this theory in the context of the export credit guarantee programs.

7. The Appellate Body has no need to "complete the analysis" regarding threat of circumvention, as Brazil urges. The Panel did not err in its threat analysis. The Panel also appropriately exercised judicial economy in declining to examine threat of circumvention with respect to those agricultural products for which it found actual circumvention. Further analysis would not have been necessary to resolve the matter in dispute as it would not affect implementation of the obligation to apply export subsidies only in conformity with applicable WTO commitments.

8. The Appellate Body should also reject Brazil's request for additional findings of actual circumvention of export subsidy commitments for pigmeat, poultry meat, vegetable oil and rice.

Brazil has not asserted a proper claim under Article 11 of the DSU,[3] and in any event the data do not support the conclusions Brazil advances. In addition, the Appellate Body should reject Brazil's attempt to make a de facto appeal of the Panel's findings concerning rice. Brazil only made its claim for one year, yet seeks to have the Appellate Body impose such a finding for a three-year period.

9. The Appellate Body should reject Brazil's request for further findings under Article 3.1(a) of the SCM Agreement. Such findings would be utterly redundant and would create affirmative obligations under item (j) of the Illustrative List of Export Subsidies of the SCM Agreement where none in fact exist. Such findings would also serve to deprive the Illustrative List of significant meaning in respect of standards for determining what practices constitute prohibited export subsidies. Any such finding, moreover, would not affect implementation of the Panel's recommendations.

10. In addition, contrary to Brazil's assertions, the Panel did address Brazil's claim under Article 3.1(a) but simply declined to make additional factual findings that Brazil requests. The Panel made a determination under Article 3.1(a) of the SCM Agreement. The Panel properly exercised judicial economy in declining to address such additional requests of Brazil, particularly since Brazil had in fact failed to demonstrate that the CCC export credit guarantee programs do not confer a benefit within the meaning of Article 1.1 of the SCM Agreement.

11. ***ETI Act:*** With respect to Brazil's appeal relating to the ETI Act of 2000, the Appellate Body should reject Brazil's request that it find that the Panel erred in interpreting and applying Articles 8 and 10.1 of the Agreement on Agriculture and Articles 3.1(a) and 3.2 of the SCM Agreement and in concluding that Brazil did not make a *prima facie* case before the Panel under those provisions. The Appellate Body should not decide Brazil's appeal because Brazil acknowledges that the appeal is not necessary to resolve the dispute between the parties. Brazil

[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

explicitly does not ask the Appellate Body to complete the analysis with respect to its claims. Brazil, therefore, is not asking the Appellate Body to make findings that would result in DSB rulings and recommendations with respect to the ETI Act. For that reason alone, the Appellate Body should decline to decide Brazil's appeal.

12. Brazil also did not make a *prima facie* case with respect to the ETI Act. Brazil simply did not present any evidence at all regarding the ETI Act itself. The Panel acted properly under the text of the DSU, including DSU Article 11, by declining to find that the short shrift that Brazil gave to the ETI Act satisfied Brazil's burden to make its *prima facie* case concerning that Act.

13. ***Direct Payments under the 2002 Act:*** The Appellate Body should reject Brazil's conditional request to find that the direct payments under the 2002 Act are inconsistent with the green box criteria set forth in paragraph 6(a) of Annex 2 to the Agreement on Agriculture on the grounds that eligibility for payments was not determined in accordance with a "fixed base period." The sole basis for Brazil's conditional appeal is that direct payments use a different base period than that used by an earlier program; therefore, Brazil argues direct payments do not employ "a defined and fixed base period" within the meaning of paragraph 6(a). However, the uncontroverted facts are that direct payments do employ "a defined and fixed base period." Further, Brazil's argument that the direct payments program is identical (or nearly identical) to an earlier decoupled income support program is wrong and not supported by Panel factual findings or uncontroverted facts. Thus, the Appellate Body should reject Brazil's conditional request to find that direct payments do not conform to paragraph 6(a) of Annex 2 to the Agreement on Agriculture.

14. ***Article 6.3(d) of the Subsidies Agreement:*** The United States requests the Appellate Body to reject Brazil's appeal of the Panel's finding that Brazil did not establish a *prima facie* case under Article 6.3(d) or Article 5(c) of the Subsidies Agreement. The Panel correctly found that Brazil erroneously interpreted the phrase "world market share" in Article 6.3(d). Brazil, in effect, argues that the phrase "world market share" does not mean what it says, the share of

markets comprising the world. Rather, Brazil would have the Appellate Body read Article 6.3(d) as "the world market share of *exports*." Plainly, the words "of exports" are not in Article 6.3(d), and Brazil must supply them to find its preferred meaning.

15. The Panel correctly concluded that the phrase "world market share" did *not* mean "world market share of exports" (or other formulations Brazil uses, such as share of "world export trade" or share of "world trade"). Thus, as Brazil's legal arguments and supporting evidence were presented according to its erroneous reading of "world market share," the Panel did not err in finding that Brazil had failed to make a *prima facie* case of inconsistency with Articles 6.3(d) and 5(c) of the Subsidies Agreement.

16. Brazil also requests that the Appellate Body complete the analysis and find that the effect of the U.S. price-based subsidies is an increase in the U.S. world market share of exports, within the meaning of Article 6.3(d) of the SCM Agreement. While this portion of Brazil's appeal should not be reached because of its erroneous interpretation of "world market share," in any event, the Appellate Body would not be in a position to complete the analysis because there are insufficient factual findings or uncontroverted facts. The Panel made no analysis of causation and market share – that is, whether "the effect of the subsidy is an increase in the world market share of the subsidizing Member" within all of the terms of Article 6.3(d). Brazil only points to the Panel's flawed interpretation of "the effect of the subsidy" for purposes of its significant price suppression claim under Article 6.3(c), which presumably would be different, and is itself the subject of a U.S. appeal.

17. ***Article XVI:3 of the GATT 1994:***[4] The Appellate Body should reject Brazil's request to find that the Panel erred in concluding that Article XVI:3 of the GATT 1994 applies solely to export subsidies as defined in the Agreement on Agriculture and the Subsidies Agreement. The Panel was correct and its finding should be affirmed. Because Brazil errs in asserting that Article

[4]*General Agreement on Tariffs and Trade 1994* ("GATT 1994").

XVI:3 applies to subsidies that are not export subsidies, including the price-based domestic support it challenges, the Appellate Body should also reject Brazil's appeal that U.S. price-based subsidies are applied in a manner that results in the United States having more than an equitable share of world export trade in upland cotton. Even were Brazil's interpretation of Article XVI:3 correct, it still would not have demonstrated a breach of Article XVI:3 because Brazil did not establish causation (that the subsidy "operates to increase the export" and "results in" a more than equitable share within the meaning of Article XVI:3) and has offered no tenable standard for determining what is a "more than an equitable share" of world export trade.

18. We turn now to a more detailed examination of all these supposed errors of the Panel alleged by Brazil.

II. The Appellate Body Should Reject Brazil's Appeal Relating to Export Credit Guarantees and Article 10.1 of the Agreement on Agriculture

A. The Appellate Body Should Uphold the Panel Finding that CCC Export Credit Guarantee Programs Pose No Threat of Circumvention of Export Subsidy Commitments under Article 10.1 of the Agreement on Agriculture

1. Brazil's Appeal Can Only Apply to Agricultural Products Within the Product Coverage of Annex 1 of the Agreement on Agriculture

19. In paragraphs 380(3)-(7) of Brazil's Other Appellant Submission, Brazil sets forth its requests for findings by the Appellate Body with regard to circumvention and threat of circumvention under Article 10.1 of the Agreement of Agriculture. Of these, only paragraphs 380(6) and 380(7) are limited in their requested scope to products actually covered by the

Agreement on Agriculture and therefore subject to Article 10.1 at all.[5] As Article 2 of the Agreement on Agriculture makes clear, the provisions of Article 10.1 have the same product coverage as the Agreement on Agriculture as a whole. The product coverage is described in Annex 1 of that Agreement. In paragraphs 380(3)-(5), Brazil has not explicitly requested that the Appellate Body reverse the finding of the Panel that Article 10.1 can apply only to agricultural products within the scope of coverage of the Agreement on Agriculture.[6] Nonetheless, Brazil's requests of the Appellate Body concerning threat of circumvention under Article 10.1 would improperly apply with respect to all eligible goods under the export credit guarantee programs, whether scheduled, unscheduled, supported or unsupported, including goods outside the scope of the applicable product coverage.[7] The Panel has rejected such breadth of application. Brazil has not appealed the finding of the Panel with respect to product coverage, and the Appellate Body should not permit a veiled attempt to do so.

20. Even if Brazil had properly framed its request as appealing the finding of the Panel in this regard, such an appeal would have failed on the merits.[8] Article 2 of the Agreement on Agriculture specifically provides: "This Agreement applies to the products listed in Annex 1 to this Agreement, hereinafter referred to as agricultural products." The Panel correctly noted that "Article 2 and Annex 1 of the Agreement on Agriculture set out the product coverage of that agreement; the core distinction between 'scheduled' and 'unscheduled' products is rooted in the scheduled commitments under the Agreement on Agriculture."[9] The Panel concluded that its

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[5]Paragraph 380(6) is limited to pigmeat, poultry meat, rice, and vegetable oil. Paragraph 380(7) pertains to upland cotton only.

[6]Panel Report, paras. 6.37, 7.875, fn. 1056, para. 8.1(d).

[7]Although paragraph 380(5) is the only request for a finding specifically adopting the impermissibly broad scope of "all [] products eligible" to receive export credit guarantees, Brazil's submission is replete with this formulation of the scope of the request. *See, e.g.*, Brazil's Other Appellant Submission, paras. 5, 64, 66, 72, 75, 78, 131, 132, 134, 139, 141, 155, 166, 167, 178, 179, 182, 183, and 202. *See also* section headings 3.3, 3.3.3.3, 3.4.1 and 3.4.2.

[8]As the United States has demonstrated in its appellant submission, the Panel erred in considering that export credit guarantees for products other than cotton were within the Panel's terms of reference. *See, e.g.*, U.S. Appellant Submission, paras. 455-489. This alone is sufficient reason to reject Brazil's appeal on Article 10.1 for any product other than cotton.

[9]Panel Report, para. 6.37.

terms of reference "include export credit guarantees to facilitate the export of United States upland cotton and other eligible *agricultural* commodities as addressed in document WT/DS267/7."[10] It is also abundantly clear that the Panel intended the references to "agricultural products" in 8.1(d) to conform with such product coverage.[11]

21. Brazil has appealed neither the Panel's determinations regarding its terms of reference nor the product coverage of Article 10.1. Nevertheless, Brazil requests the Appellate Body to make findings beyond such terms of reference and scope of product coverage.[12] Accordingly, without regard to evaluation of Brazil's appeal on the merits, the Appellate Body should reject Brazil's requests to the extent they purport to apply to goods beyond the scope of Annex 1 of the Agreement on Agriculture.[13]

2. The Appellate Body Should Uphold the Panel Finding that the Potential Availability of Export Credit Guarantees in Connection with Unsupported Agricultural Products Poses No Threat of Circumvention Under Article 10.1

22. Brazil objects to the Panel's finding that CCC export credit guarantees are not applied in a manner that threatens to lead to circumvention of U.S. export subsidy commitments with respect to both "unsupported"[14] scheduled products and "unsupported" unscheduled products[15]

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[10]Panel Report, paras. 6.37, 7.69, 7.103. *See also id.*, para. 7.875, fn. 1056, and Exhibit BRA-73.

[11]Panel Report, para. 6.37.

[12]Nor can Brazil's request be understood to pertain to a finding under Article 3.1(a) of the SCM Agreement. Only after issuance of the interim report did Brazil request the Panel "to conclude that GSM 102, GSM 103 and SCGP also constitute prohibited export subsidies within the meaning of item (j) and Article 3.1(a) of the SCM Agreement, for all products not covered by the Agreement on Agriculture." The Panel rightly rejected this request, "[r]ecalling that: interim review is not the time to raise new arguments." Panel Report, para. 6.37. Brazil has also not appealed this determination of the Panel.

[13]As the United States noted to the Panel in paragraph 64 of its Request by the United States for Review of Precise Aspects of the Interim Report (May 17, 2004), Exhibit BRA-73 clearly includes goods outside the scope of the product coverage of the Agreement on Agriculture (Annex 1). Examples include fish products, wood products, yarn, and fabrics.

[14]"Unsupported" simply refers to goods with respect to which no export credit guarantees were provided at all.

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

and criticizes the Panel for failing even to examine whether actual circumvention occurred with respect to such unsupported commodities.[16] This completely disregards the logic of the Panel's finding. Subject to inclusion within the product coverage of the Agreement on Agriculture, the Panel expressly limited its finding to agricultural products supported under the programs.[17] The fact that the agricultural products were "unsupported" means by definition that for the period of time examined the United States did not provide export credit guarantees in connection with such products *at all.* The Panel finding with respect to supported goods logically means that the Panel made the utterly unremarkable finding that no actual circumvention occurred with respect to agricultural products for which no export credit guarantees were provided. The fact that export credit guarantees never applied to such commodities necessarily precludes the possibility of actual circumvention.

23. For numerous reasons explained below, the Appellate Body should affirm the findings of the Panel that the export credit guarantee programs present no threat of circumvention of the applicable export subsidy commitments. However, irrespective of those arguments, the Appellate Body should affirm the Panel's finding of no threat of circumvention for unsupported agricultural products. Applying the reasoning Brazil advances in its Other Appellant Submission, the fact that the United States has not provided these programs in connection with unsupported commodities at all demonstrates there is no threat of circumvention.

24. Brazil offers, for the first time on appeal, numerous phrases on which it alleges a determination of threat of circumvention should rest. These include "a consistent pattern of past circumvention,"[18] "a consistent pattern of use,"[19] "consistent pattern of granting behavior,"[20] or the "signaling effects"[21] of providing a measure. Brazil further alleges, as it did before the Panel,

[16]Brazil's Other Appellant Submission, para. 71.
[17]Para. 7.875, fn. 1056, and para. 6.32.
[18]Brazil's Other Appellant Submission, para. 117.
[19]Brazil's Other Appellant Submission, para. 120.
[20]Brazil's Other Appellant Submission, paras. 78, 164, 171, 178, 185.
[21]Brazil's Other Appellant Submission, paras. 108, 119.

that the export credit guarantee programs are a runaway train of unrestrained profligacy, under which there is "no mechanism in the measure for stemming, or otherwise controlling" the issuance of export credit guarantees.[22]

25. Despite such allegedly unbridled and spendthrift ways, by definition, the United States has not provided export credit guarantees *at all* with respect to unsupported agricultural products. Even under Brazil's criteria, the consistent pattern and the "signaling effect" with respect to these agricultural products is that the United States has not provided export credit guarantees. On this basis alone, the Appellate Body should affirm the Panel's finding that no threat of circumvention of export subsidy commitments exists with respect to unsupported agricultural products.

3. Brazil Misstates the Basis of the Panel's Finding that the CCC Export Credit Guarantee Programs Do Not Pose a Threat of Circumvention under Article 10.1

26. The Panel has properly reached the unremarkable conclusion that "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the Agreement on Agriculture, we do not believe that it is sufficient that an export credit guarantee program might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments."[23] In reaching this conclusion, the Panel has done nothing more than refuse to subscribe to the erroneous factual and legal characterizations of Brazil with respect to the manner in which the CCC export credit guarantee programs operate.

27. Brazil objects to the Panel's conclusion that "the statutory and legal framework of the United States export credit guarantee programs is such that the CCC would not necessarily be required to issue guarantees . . . in a manner which threatens to lead to circumvention."[24] In

[22]Brazil's Other Appellant Submission, para. 169, fn. 171.
[23]Panel Report, para. 7.893.
[24]Brazil's Other Appellant Submission, para. 88.

making this determination, the Panel is not suggesting that it is necessary in every case to show such a requirement to demonstrate threat, but merely responding to the factual and legal bases on which Brazil had argued these programs presented such threat of circumvention. In this regard, it is worth recalling that the Panel prefaced its findings on actual and threatened circumvention with the phrase, "Keeping the applicable burden of proof in mind."[25] Brazil would have the Appellate Body fault the Panel for responding to the arguments Brazil actually made before it, rather than those it is making for the first time before the Appellate Body.

28. Alluding to the Appellate Body report in *U.S. – FSC*[26], Brazil succinctly articulated its argument on threat of circumvention with respect to scheduled agricultural products: "[T]he CCC cannot decline to grant an export credit guarantee even in cases where the program conditions are met. The CCC cannot 'stem[], or otherwise control[], the flow of' CCC export credit guarantees. The CCC export credit guarantee programs therefore threaten to lead to (and in fact have led to) circumvention of the United States' export subsidy reduction commitments, within the meaning of Article 10.1 of the Agreement on Agriculture."[27]

29. Brazil also relied on *U.S. – FSC* for its arguments to the Panel regarding threat of circumvention with respect to unscheduled agricultural products. Brazil argued the mere "availability" of potential issuance of export credit guarantees in connection with unscheduled commodities "at the very least" threatens to lead to circumvention of the export subsidy commitments within the meaning of Article 10.1.[28]

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[25]*E.g.*, Panel Report, paras. 7.896, 7.875.

[26]The specific reference is in fn. 113 of Brazil's Comment on Panel Question 142, para. 88 (October 27, 2003), citing to Appellate Body Report, *U.S. – FSC*, para. 149.

[27]Panel Report, para. 7.872; Brazil's Comment on Panel Question 142, para. 88, 98, 102 (October 27, 2003). *See also* First Submission of Brazil (June 24, 2003), para. 302; Rebuttal Submission of Brazil (August 22, 2003), para. 121; Further Submission of Brazil (November 18, 2003), paras. 257-258; Statement of Brazil - Second Panel Meeting (December 2, 2003), para. 89, 91; Answer to Panel Question 257(a)(i) (January 20, 2004), para. 12; Brazil repeats these arguments in its Other Appellant Submission. *See, e.g.*, paras. 169, 179.

[28]First Submission of Brazil (June 24, 2003), para. 296-299; Brazil's Comment on Panel Question 142, para. 97 (October 27, 2003); Further Submission of Brazil (November 18, 2003), para. 256; Statement of Brazil - Second Panel Meeting (December 2, 2003), paras. 87-88; Answer to Panel Question 257(a)(i) (January 20, 2004), para. 12.

30. The Panel rightly addressed the factual and legal elements of the export credit guarantee programs that *Brazil* argued compelled issuance of export credit guarantees in a wholly unconstrained manner and addressed the applicability of the Appellate Body report in *U.S. – FSC*. In an appropriately workmanlike fashion, the Panel analyzed and knocked down each of the elements that Brazil alleged precluded the United States from "controlling the flow" of export credit guarantees.

31. The Panel therefore considered and rejected:

(a) Brazil's arguments that "the United States export credit guarantee programs require the provision of an 'unlimited amount'" of such guarantees;[29]

(b) Brazil's arguments that the statutory provisions applicable to the programs preclude discretion by the United States in the issuance of guarantees;[30]

(c) Brazil's arguments that the applicable program regulations preclude discretion by the United States in the issuance of guarantees.[31]

32. The Panel also therefore considered and rejected the Brazilian argument, based on *U.S. – FSC*, that the alleged mere "availability" of the export credit guarantees gives rise to a threat of circumvention with respect to unscheduled agricultural products. Contrary to Brazil's assertions, the Panel's findings present no conflict with the Appellate Body's report in *U.S. – FSC*. The facts of the two disputes are markedly different. Brazil correctly describes the automatic nature of the FSC subsidy: "Under the FSC measure, beneficiaries enjoyed a 'legal entitlement' to

[29]Panel Report, para. 7.882, 7.883.
[30]Panel Report, paras. 7.884-7.890. *See also* Brazil's Comments on Panel Question 142, para. 91, 95, 100 (October 27, 2003).
[31]Panel Report, paras. 7.890-7.892. *See also* Brazil's Comments on Panel Question 142, para. 90.

receive export subsidies, with no discretion on the part of authorities to refuse FSC subsidies if the program conditions were met."[32] This crucial distinction between the FSC measure and the CCC export credit guarantees is emphasized by the Panel in its findings with respect to the discretion retained by the United States in the issuance of CCC export credit guarantees:

> "We thus believe that the export credit guarantee programs we are examining are of a fundamentally different nature than the mandatory and essentially unlimited subsidy (in the form of revenue forgone that is otherwise due) examined in *U.S. – FSC*."[33]

33. Consequently, as the Panel's findings of fact with respect to the operation of the CCC export credit guarantee programs correctly note, CCC can stem the flow of export credit guarantees being issued, and the "availability" of the export credit guarantees remains within the discretion of CCC. This is fundamentally unlike the benefits available and *automatically* conferred under FSC. The analogy Brazil draws to the *U.S. – FSC* dispute is simply inapt.

34. The Panel logically had to respond to the arguments on threat of circumvention as framed by Brazil. Yet Brazil now argues that the Panel erred by doing so. In part, Brazil does this by mischaracterizing the Panel's findings. Ignoring the fact that Brazil itself emphasized that U.S. programs "required" "unlimited" payments, it accuses the Panel of limiting threat findings to situations "where a measure creates an '*absolute*' or '*unconditional legal entitlement*' that '*necessarily requires*' that products will continue to benefit from subsidies after reduction commitment levels have been reached."[34] The Panel did nothing of the sort, nor did it claim to be doing so. The Panel explained that if, as Brazil claimed, the U.S. programs required the provision of unlimited amounts of subsidies, the Panel "would conclude that the export credit guarantee programmes constituting export subsidies within the meaning of Article 10.1 are

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[32]Brazil's Other Appellant Submission, para. 153, citing Appellate Body Report, *U.S. – FSC*, para. 149.
[33]Panel Report, para. 7.894 and fn. 1082.
[34]Brazil's Other Appellant Submission, para. 89.

applied in a manner that, at the very least, *threatens*, to lead to circumvention."[35] In other words, if a program requires outlays that will exceed a Member's export subsidy commitments, it will, at a minimum, "threaten" within the meaning of Article 10.1. Brazil surely can find no fault with this conclusion and should not fault the Panel for keeping in mind "the applicable burden of proof" and responding to Brazil's factual argument on the requirements of U.S. law.[36] Had the Panel agreed with Brazil's argument, it would merely have found threat for the same reason as the Appellate Body did in *U.S. – FSC*.

35. Just as Brazil faults the Panel for responding to Brazil's arguments on the "requirements" of U.S. export credit guarantee programs, it also faults the Panel for responding to Brazil's arguments that Article 10.1 obligated the United States to include in its statute and regulations provisions precluding the exercise of discretion in the issuance of guarantees. Here as well, Brazil mischaracterizes the Panel's analysis, suggesting that, "the Panel rejected any standard based on a 'possibility' that circumvention might occur."[37] Again, the Panel did nothing of the sort and was merely responding to Brazil's argument. As noted at the outset of this section, the Panel reached the unremarkable conclusion that, "[i]n order to pose a 'threat' within the meaning of Article 10.1 of the Agreement on Agriculture, we do not believe that it is sufficient that an export credit guarantee program might possibly, or theoretically, be used in a manner which threatens to lead to circumvention of export subsidy commitments."[38] Were it otherwise, the concept of "threat" would be hollow, and virtually any program would breach Article 10.1.

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[35]Panel Report, paras. 7.882-7.883.

[36]Brazil also intuits from the Panel's response to its argument on the requirements of the U.S. measure that the Panel, "appears to have reached its conclusion as a consequence of applying the mandatory/discretionary distinction to measures covered by Article 10.1." Brazil's Other Appellant Submission, para. 90. As Brazil acknowledges in the following sentence, however, the Panel specifically denied this distinction was the "sole legally determinative" one for the Article 10.1 analysis. Panel Report, para. 7.886. Again, the Panel was merely responding to Brazil's arguments, and applying the logic of *U.S. – FSC*, that if a program requires outlays that will exceed a Member's export subsidy commitments, it will, at a minimum, "threaten" within the meaning of Article 10.1.

[37]Brazil's Other Appellant Submission, para. 90.

[38]Panel Report, para. 7.893.

36. Brazil also faults the Panel for not, at the outset, defining the circumstances under which a measure would threaten circumvention under Article 10.1[39]. In this regard, Brazil presents an extensive argument on the meaning of "threat" and sets forth several conditions under which it considers a measure would threaten circumvention, conditions largely representing refinements on its arguments before the Panel that threat exists if a Member does not preclude any possibility of payments in excess of commitments.[40] Again, however, it is worth recalling, as did the Panel, the applicable burden of proof. Brazil did not present these arguments before the Panel, and the Panel did not err by not considering them. Brazil posited specific legal and factual arguments for why U.S. programs breached Article 10.1, and the Panel rejected them. It was not incumbent on the Panel to make Brazil's case for it by identifying different theories of why the U.S. measures might have breached Article 10.1, nor was it the Panel's place to "make law" outside the context of resolving the dispute, as the Appellate Body has noted.[41] For these reasons as well, the Appellate Body need not reach Brazil's arguments in this regard.[42] The Panel did not err in how it considered, and rejected, Brazil's arguments in the panel proceeding.

37. The Panel did not err in addressing Brazil's arguments that U.S. programs "required" "unlimited outlays" and that Article 10.1 required that U.S. law preclude any possibility of outlays in excess of commitments. The Appellate Body should reject Brazil's attempts to suggest that the Panel erred based on mischaracterizations of the Panel findings and on arguments that Brazil did not make below.[43]

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[39]Brazil's Other Appellant Submission, paras. 80, 83.

[40]Brazil's Other Appellant Submission, paras. 93-109.

[41]Appellate Body Report, *U.S. – Wool Shirts*, at 19-20.

[42]Thus, for example, the Appellate Body need not, in the context of this dispute, undertake an analysis of how the "threat" standard under Article 10.1 is similar to, or different from, the "threat" standard in other WTO agreements.

[43]In para. 7.894 of the Report, the Panel further notes that it "would be entitled to take into account historical practice under the measure in order to discern its nature in terms of whether or not a 'threat' arises. However, we cannot accept that, just because an export subsidy has, historically, actually circumvented within the meaning of Article 10.1 with respect to certain unscheduled and scheduled products, a 'threat' of circumvention under Article 10.1 of the Agreement on Agriculture necessarily exists in respect of all other products." In making this statement, the Panel correctly distinguished between taking into historical practice as a means of illustrating how a measure operates and assuming a breach from past behavior. Moreover, Brazil would assume breach based on past behavior for unrelated products – it would find threat for products which had never received support based on the

4. The Appellate Body Does Not Need to Complete the Analysis with Respect to the Panel's Findings that the CCC Export Credit Guarantee Programs Do Not Pose a Threat of Circumvention under Article 10.1

38. Brazil argues that the Appellate Body must complete the Article 10.1 analysis, both because the Panel's analysis was incorrect, and because the Panel did not examine threat for particular products for which it had already found actual circumvention. The Appellate Body should reject Brazil's request.

39. Brazil has argued that the programs as a whole constitute export subsidies *per se*. The United States argued that the analysis of conformity with export subsidy commitments should examine the particular program as applied to individual commodities.[44] Brazil, having previously contested this approach, now appears to embrace it for purposes of examination of threat of circumvention. The Panel declined to examine the program in this way, but rather adopted a "programme-wide analysis" under item (j) of the SCM Agreement.[45] If a determination of threat of circumvention should be made with respect to particular agricultural products, so too should there be a similar examination of the adequacy of premia for export credit guarantees for particular agricultural products.

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fact that other products *had* received support.

In any event, notwithstanding Brazil's repeated invocation of the phrase "consistent pattern of granting behavior," the uncontested facts show that the historical practice of granting export credit guarantee programs is in steady *decline*. As reflected in the table set forth in the U.S. Answer to Panel Question 82(b) (August 11, 2003), para. 177, the dollar value of guarantees provided by the United States in U.S. fiscal year 1992 was $5,671.8 million; in fiscal year 1993 it was $3,853.7 million; and in fiscal year 1994 it was $3,177.4 million. The annual average value of guarantees issued for fiscal years 1995-2002 was only $3,061.9 million. *See also* Panel Report, fn. 1067; U.S. Further Submission (September 30, 2003), para. 148 (table of actual sales registrations by year); Brazil's Other Appellant Submission, para. 162.

[44]*See, e.g.,* U.S. First Written Submission (July 11, 2003), paras. 171-183, entitled: "The Export Credit Guarantee Programs, As Applied to Exports of Upland Cotton, Do Not Constitute an Export Subsidy Under the Subsidies Agreement".

[45]Panel Report, para. 7.763.

40. The Appellate Body should reject Brazil's request on several grounds. First, as noted above, the Panel did not err in its threat analysis, and there is thus no need to "complete the analysis" for the products for which the Panel undertook this examination.[46]

41. Second, the Panel did not err in not examining threat for agricultural products for which it found actual circumvention. The Panel noted: "With respect to rice and to unscheduled agricultural products supported under programmes, we have found, in paragraphs 7.875 and 7.881, that the United States applies export credit guarantee programmes constituting export subsidies in a manner which *results in* circumvention of its export subsidy commitments inconsistently with Article 10.1. We consider that the 'or' in Article 10.1 indicates that either one (resulting in circumvention) or the other (threatening to lead to circumvention) or both in combination would be adequate to trigger the remedies associate with this provision."[47]

42. Third, the Panel properly exercised judicial economy in not examining threat of circumvention for agricultural products with respect to which it found actual circumvention. The Appellate Body first addressed judicial economy in its report on *U.S. – Wool Shirts*. In that report, the Appellate Body approved the practice of WTO and GATT 1947 panels to "address[] only those issues that such panels considered necessary for the resolution of the matter between the parties, and have declined to decide other issues. Thus, if a panel found that a measure was inconsistent with a particular provision of the GATT 1947, it generally did not go on to examine whether the measure was also inconsistent with other GATT provisions that a complaining party may have argued were violated."[48] The Appellate Body considered that this practice was in

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[46]By Brazil's own analysis, the Panel examined actual circumvention with respect to rice and other supported agricultural products, both scheduled and unscheduled. Brazil's Other Appellant Submission, para. 71. Although Brazil maintains that no such examination occurred with respect to unsupported agricultural products, the United States points out that by definition the United States never applied export credit guarantees to unsupported commodities, and actual circumvention therefore could not possibly occur. Brazil's own analysis asserts that the Panel examined threat of circumvention with respect to supported scheduled agricultural products and all unsupported agricultural products. *Id.*, para. 71.

[47]Panel Report, fn. 1061 (italics in original).

[48]Appellate Body Report, *U.S. – Wool Shirts*, part VI (footnote 27 omitted).

accord with the aims of the dispute settlement system, and in that context noted the provisions of Articles 3.4 and 3.7 of the DSU. The Appellate Body concluded:

> "A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute."[49]

43. The Appellate Body has upheld panels' exercise of judicial economy in a number of subsequent disputes. For example, after upholding findings by panels that safeguard measures were inconsistent with Articles 2 and 4 of the *Agreement on Safeguards*, the Appellate Body has upheld decisions by panels not to examine claims under Article XIX:1(a) of the GATT 1994[50] and Article 5 of the *Agreement on Safeguards*.[51] Moreover, the Appellate Body did so notwithstanding arguments that by exercising judicial economy the Panel had failed to enable the DSB to make sufficiently precise recommendations and rulings for the effective resolution of the dispute.[52]

44. Finally, even had the Panel explicitly stated that its threat analysis extended to products for which it found actual circumvention, it would not have changed that analysis, or the Panel's conclusion that Brazil had failed to meet its burden of demonstrating threat. The Panel's analysis is "program-wide" and yields a finding "with respect to the scheduled and unscheduled products at issue under Articles 10.1 (and 8) of the Agreement on Agriculture."[53] In response to Brazil's arguments, the Panel examined "whether the United States export credit guarantee programs require the provision of an 'unlimited amount'."[54]

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[49]Appellate Body Report, *U.S. – Wool Shirts*, part VI (footnote 30 omitted).

[50]Appellate Body Report, *Argentina – Footwear,* para. 98, and Appellate Body Report, *U.S. – Wheat Gluten*, para. 183.

[51]Appellate Body Report, *U.S. – Wheat Gluten*, para. 184, and *U.S. – Lamb Meat*, paras. 194-195.

[52]*E.g.,* Appellate Body Report, *U.S. – Lamb Meat*, paras. 190 (New Zealand's argument) and 194 (Appellate Body's disposition of that argument).

[53]Panel Report, para. 7.763.

[54]Panel Report, para. 7.882.

45. After rejecting each of the Brazil's arguments in this regard, the Panel declined to find that the programs are applied "in a manner which threatens to lead to circumvention of United States export subsidy commitments within the meaning of Article 10.1 of the Agreement on Agriculture."[55] The only reason Brazil gives for questioning the Panel's approach is an unspecified benefit for "implementation." Yet that reason does not withstand scrutiny. If a Member's measure has been found to be an export subsidy that is circumventing the Member's export subsidy commitments under the *Agreement on Agriculture*, then the Member will not be able to apply that measure in excess of its commitments. In removing the actual circumvention (by respecting its commitments), a Member would appear to be removing any threat of circumvention as well. Brazil can never clearly articulate what further impact on implementation a threat finding would have.

[55]Panel Report, para. 7.896.

46. Brazil's request for a completion of the analysis[56] is completely unfounded, and the Appellate Body should reject it.[57]

B. The Appellate Body Should Reject Brazil's Arguments Regarding Additional Findings of Actual Circumvention of Export Subsidy Commitments for Pigmeat, Poultry Meat, and Vegetable Oil, and Rice

1. Brazil Does Not Assert a Proper Claim Under DSU Article 11

47. With respect to all scheduled agricultural products, Brazil asserted only that the United States had circumvented its export subsidy commitments during the period July 2001-June 2002.[58] The Panel found that Brazil demonstrated actual circumvention for only one scheduled agricultural product: rice. This finding was limited to one year (July 2001-June 2002).[59]

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[56]In asking the Appellate Body to "complete the analysis" with respect to the findings of the Panel regarding threat of circumvention, Brazil trots out many of the same arguments in connection with the operation of the CCC export credit guarantee programs that the Panel specifically addressed and rejected. Brazil now asserts an additional argument, however, which demands comment.

Brazil repeatedly presents a bootstrap argument in which it asserts that because the United States' CCC export credit guarantee programs allegedly have not been "applied with a view to ensuring respect for the United States' WTO [export subsidy] commitments," the Appellate Body should find a threat of circumvention of such commitments. Brazil's Other Appellant Submission, paras. 5, 78, 105, 106, 122, 164, 177, 178, 182, 192, 193, 201. First, there is no obligation, as Brazil seems to suggest, that Members must explicitly reference their WTO obligations in their domestic laws. It is sufficient that Members have the ability to take their WTO obligations into account when exercising the discretion provided under domestic law.

Second, to the extent that Brazil is only suggesting that past U.S. practice must reflect that the United States took its export subsidy commitments into account when exercising discretion, this presupposes that the United States understood its export credit guarantee programs to be subject to discipline as export subsidies. To state the obvious, as reflected in the U.S. submission to the Appellate Body as well as the myriad submissions to the Panel, the United States had no reason to understand – and did not in fact understand – that its export credit guarantee programs were subject to discipline as export subsidies. It is thus nonsensical to conclude that U.S. programs are threatening circumvention because the United States failed to exercise discretion so as to avoid breaching obligations it never had reason to believe applied.

The applicability of these obligations is, after all, the core of the dispute with respect to the export credit guarantee programs. As the Panel correctly framed this aspect of the current dispute: "A question arises as to whether or not the United States export credit guarantee programs at issue in this dispute are subject to the export subsidy disciplines of the Agreement on Agriculture (and the SCM Agreement) at all." Panel Report, para. 7.669.

[57]For the same reasons, Brazil's appeal requesting "a threat analysis [] extended [specifically] to rice," should also be rejected. (Brazil's Other Appellant Submission, paras. 380(4) and 133).

[58]First Submission of Brazil (June 24, 2003), para. 265 and Figure 18.

[59]Panel Report, paras. 8.1(d)(i), 7.881 and fn. 1060.

48. The Panel also found: "It has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities."[60] These commodities include pigmeat, poultry meat, and vegetable oil.[61] Brazil appeals this latter finding.[62] The Appellate Body should reject this request from Brazil.

49. The Panel found as a factual matter, based on the evidence of record, that *Brazil* did not establish "that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities." In so concluding, the Panel did indeed make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the conformity of such facts with the relevant covered agreements: the Agreement on Agriculture and the Subsidies Agreement.

50. Notwithstanding Brazil's attempt to assert to the contrary, Brazil is contesting findings of the Panel on matters of disputed fact.[63] To refute Brazil's allegations and supporting data that the United States exceeded its relevant export subsidy reduction commitments,[64] the United States submitted data in response (explained in some detail below). The Panel found that the facts presented did not demonstrate actual circumvention. Brazil's claim of error under DSU Article 11, however, is limited to: "[T]he Panel failed to make an objective assessment of the matter, including of admitted and uncontested facts supplied by the United States."[65] That is, Brazil does *not* appeal the Panel's factual findings that the facts did not demonstrate that subsidized exports exceeded U.S. quantitative reduction commitments for poultry, pig meat, and vegetable oils.[66]

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[60]Panel Report, paras. 8.1(d)(ii), 7.881.

[61]Panel Report, para. 7.876 and fn. 1057.

[62]Brazil's Other Appellant Submission, paras. 380(6), 203-204.

[63]*See* Brazil's Other Appellant Submission, fn. 216 ("As the facts were uncontested and admitted, the Panel did not commit an error of law in *finding* the facts as such. Instead, the Panel committed an error in *applying* those uncontested facts to the law.").

[64]First Submission of Brazil (June 24, 2003), para. 265 and Figure 18.

[65]Brazil's Other Appellant Submission, para. 211.

[66]Panel Report, paras. 8.1(d)(ii), 7.881 ("It has not been established, however, that such actual circumvention has resulted in respect of the twelve other United States scheduled commodities.").

An appeal under DSU Article 11 must stand by itself and be substantiated with respect to the challenged findings.[67] Brazil has not done so here. Accordingly, the Panel's factual findings are not on appeal, and there is no basis to reverse the Panel's finding of no actual circumvention for these products. On this basis alone, the Appellate Body should reject Brazil's request to modify the Panel's findings of circumvention to cover pig meat, poultry meat, and vegetable oils.

2. Brazil Cannot Make a De Facto Appeal Concerning Actual Circumvention and Rice

51. The United States first notes that Brazil mischaracterizes both the Panel's findings and the U.S. position with respect to rice. Brazil asserts that "the United States did not contest that, for rice, it was not in compliance with its commitments."[68] To similar effect, Brazil contends: "In the case of rice, the United States also accepts that it circumvented its commitments through ECG export subsidies in both 2001 and 2002."[69] In all respects, both statements are false.

52. The United States maintains that the export credit guarantee programs are not subject to the export subsidy disciplines of Article 10.1 of the Agreement on Agriculture. Consequently, with respect to all agricultural products, including rice, the United States is in compliance with its export subsidy commitments.

53. Secondly, with respect to rice, Brazil alleged before the Panel that the United States exceeded its quantitative export subsidy commitment only during the period July 2001- June 2002.[70] For that period, and that period alone, the United States acknowledged only that actual

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[67]As the Appellate Body has stated, "[a] challenge under Article 11 of the DSU must not be vague or ambiguous. On the contrary, such a challenge must be clearly articulated and substantiated with specific arguments. An Article 11 claim is not to be made lightly, or merely as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement. A claim under Article 11 of the DSU must stand by itself and be substantiated, as such, and not as a subsidiary to another alleged violation." Appellate Body Report, *U.S. – Steel Safeguard*, para. 498.

[68]Brazil's Other Appellant Submission, para. 67.

[69]Brazil's Other Appellant Submission, para. 176.

[70]First Written Submission of Brazil (June 24, 2003), para. 265 and Figure 18.

exports of rice in connection with the export credit guarantee programs exceeded the applicable quantity of permissible rice export subsidies.[71] The fact that the United States acknowledges the quantity of rice exports exceeded the particular listed quantitative limitation for rice export subsidies does not constitute an acceptance or acknowledgment that such exports occurred with export subsidies or caused circumvention of export subsidy commitments.

54. Third, again with respect to rice, Brazil states in its Other Appellant Submission that it "considers that [] actual circumvention of commitments [] for rice [occurred] in 2001, 2002, 2003."[72] To similar effect, Brazil states that it "asserted that the volume of exports exceeded the United States' reduction commitment level for financial years 2001, 2002, and 2003."[73] To the contrary, Brazil made no such assertion before the Panel for a three-year period. It only asserted its claim with respect to the one-year period of July 2001- June 2002. The Panel notes that "the United States did not rebut Brazil's initial allegation in respect of this period."[74] Brazil prepared and presented data with respect to the additional two years for the first time in Exhibit BRA-300 and solely for the purpose of responding to a Panel question oriented to the issue of "threaten[ing] to lead to circumvention."[75] The question did not pertain to actual circumvention, nor can the submission of an exhibit on an another issue be understood to expand the evidence and arguments actually put forward by Brazil to support its claim.

55. Brazil has not appealed the determination of the Panel regarding actual circumvention of the export subsidy reduction commitment as to rice for the one-year period of July 2001- June

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[71]U.S. Further Rebuttal Submission (November 18, 2003), para. 188 and fn. 150. (In fn. 176 of Brazil's Other Appellant Submission, Brazil inadvertently indicates the date of this U.S. submission as September 30, 2003).

[72]Brazil's Other Appellant Submission, fn. 178. The United States notes that the Panel was established on March 18, 2003, with standard terms of reference. WT/DS267/15 (May 23, 2003). Therefore, "the matter referred to the DSB by Brazil" would not include a claim of actual circumvention of export subsidy reduction commitments for 2003 as export credit guarantees for most of 2003 had not yet been provided and were not mandated to be provided.

[73]Brazil's Other Appellant Submission, para. 206.

[74]Panel Report, fn. 1060.

[75]Panel Report, para. 6.33; Comments of the United States on Brazil's Request for Review of Precise Aspects of the Interim Report (June 3, 2004), para. 20.

2002. The Appellate Body should not permit Brazil to attempt a *de facto* appeal by mere mischaracterization of the findings of the Panel and the position of the United States.

3. The Data Support the Panel's Finding that the United States Did Not Circumvent its Export Subsidy Commitments with Respect to Pigmeat, Poultry Meat, and Vegetable Oil

56. Although there are other grounds on which Brazil's appeal needs to be rejected before even turning to the data themselves, the United States notes that the actual data also support the Panel's finding that Brazil had not demonstrated actual circumvention for these products. As with rice, Brazil alleged before the Panel that the United States exceeded its quantitative export subsidy commitment for each of pigmeat, poultry meat, and vegetable oil only during the period July 2001-June 2002.[76]

57. Quantitative data with respect to the export credit guarantee program is maintained only on a U.S. fiscal year (October - September) basis.[77] Fiscal year 2001 for the United States government commenced October 1, 2000 and ended on September 30, 2001. Fiscal year 2002 then began. As the fiscal year does not match precisely the July-June period applicable to export subsidy commitments, the United States supplied data for two fiscal years.

58. Nine of the 12 months of Brazil's claims fall within fiscal year 2002. For the 12 month period comprising fiscal year 2002, the uncontested data indicates that the United States was well below the 2002 export subsidy quantitative commitment for poultry meat.[78] Even if one were to take the average monthly amount of poultry meat exports supported under the export credit guarantee programs during fiscal year 2001 (6,190 mt), and then add three months of such

[76]Panel Report, para. 7.878; First Written Submission of Brazil (June 24, 2003), para. 265 and Figure 18.
[77]U.S. Rebuttal Submission (August 22, 2003), fn. 220.
[78]Brazil's Other Appellant Submission, para. 207; U.S. Rebuttal Submission (August 22, 2003), para. 183, fn. 220.

activity (18,570 mt) to fiscal year 2002 activity, the quantity would remain below the 2002 commitment. The United States provided no export subsidies with respect to poultry meat during the period July 2001- June 2002 (leaving aside whether export credit guarantees are export subsidies).[79] The Panel reasonably found that the United States did not commit actual circumvention of its export subsidy commitments with respect to poultry meat.

59. During fiscal year 2002 no exports of pigmeat were supported by the export credit guarantee programs. As in the case of poultry meat, even if one were to take the average monthly amount of pigmeat exports supported under the export credit guarantee programs during fiscal year 2001 (56.58 mt), and then add three months of such activity (169.75 mt) to the zero amount of activity in fiscal year 2002, the quantity would remain below the 2002 commitment. The United States provided no export subsidies with respect to pigmeat during the period July 2001-June 2002 (leaving aside whether export credit guarantees are export subsidies).[80] It is reasonable to find, as the Panel did, that the United States did not commit actual circumvention of its export subsidy commitments with respect to pigmeat.

60. Similarly, aggregating the uncontroverted data for the two fiscal years that overlap the contested period July 2001-2002, to address the lack of chronological uniformity with the scheduled reduction commitments, shows that during those two fiscal years the United States did not provide export credit guarantees with respect to quantities of vegetable oil in excess of the combined 2001 and 2002 export subsidy commitment for vegetable oil. Uncontroverted evidence is that for fiscal year 2002 the monthly average quantity of exports supported under the export credit guarantee program equaled 13,576.25 metric tons. Over the nine months of fiscal year 2002 corresponding to Brazil's claim, such amount was 122,186.25 metric tons. The monthly average during fiscal year 2001 was 5,968.3 metric tons. Multiplying that amount over the remaining 3 months corresponding to Brazil's claim would total 17,905 metric tons. For the

[79]Exhibit US-100 (Notification: G/AG/N/USA/47).
[80]Exhibit US-100 (Notification: G/AG/N/USA/47).

12 months, therefore, the total amount would equal 140,091.25 metric tons, below the quantitative commitment of 141,299 metric tons. The United States provided no export subsidies with respect to vegetable oil during that time (leaving aside whether export credit guarantees are export subsidies).[81] It is therefore also reasonable to find, as the Panel did, that the United States did not commit actual circumvention of its export subsidy commitments with respect to vegetable oil.

61. Accordingly, the Panel did not err in the application of Article 10.1 to uncontested facts nor did the Panel fail to make an objective assessment of the matter as required by Article 11 of the DSU. The Appellate Body should reject Brazil's request as set forth in paragraph 380(6) of its submission.

III. The Appellate Body Should Reject Brazil's Appeal Relating to Export Credit Guarantees and Articles 1.1 and 3.1(a) of the Subsidies Agreement

A. Further Findings with Respect to the CCC Export Credit Guarantees and Article 3.1 of the SCM Agreement Are Not Appropriate

1. Further Findings Would be Redundant

62. Although the Panel has already determined that the CCC export credit guarantee programs "constitute *per se* export subsidies prohibited by Articles 3.1(a) and 3.2 of the SCM Agreement,"[82] Brazil requests that the Appellate Body redundantly find that the export credit guarantee programs constitute export subsidies "within the meaning of Articles 1.1 and 3.1(a) of the SCM Agreement."[83] The Appellate Body should reject Brazil's request.

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[81]Exhibit US-100 (Notification: G/AG/N/USA/47).
[82]Panel Report, para. 8.1(d)(i).
[83]Brazil's Other Appellant Submission, paras. 380(1) and 380(2).

63. The Panel found (erroneously)[84] that the U.S. export credit guarantee programs constitute a prohibited export subsidy because the programs' premium rates were inadequate to cover the long-term operating costs and losses of the program.[85] Therefore, the Panel found that the program constituted an export subsidy under item (j) of the Illustrative List of Export Subsidies ("Illustrative List").[86] As a result of the finding regarding item (j), the Panel found that the export credit guarantee programs were inconsistent with the obligations set forth in Articles 3.1(a) and 3.2 of the SCM Agreement.[87]

64. Brazil asserts that the Panel erred by limiting its findings regarding these programs to what Brazil describes as its claim under item (j). Brazil argues that when its panel request referred to "prohibited export subsidies under Articles 3.1(a), 3.2 *and* item (j) of the Illustrative List,"[88] the request was referring to two different claims; one under Articles 3.1(a) and 3.2, and a separate claim under item (j). According to Brazil, "The contested measures were explicitly claimed to be 'subsidies' under Article 1 and export contingent under Article 3.1(a) '*and*' they were also claimed to be export subsidies under item (j)."[89]

65. There are at least two problems with Brazil's assertion of error. First, neither item (j) nor the Illustrative List imposes obligations *per se*. Second, Brazil's approach would deprive the Illustrative List of its meaning.

a. Neither Item (j) Nor the Illustrative List Imposes Obligations

66. Neither item (j) nor the Illustrative List imposes obligations *per se*. Instead, the obligation regarding export subsidies is found in Article 3.1(a) and Article 3.2. By its terms,

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[84]*See* U.S. Appellant Submission, paras. 332-420 (October 28, 2004).
[85]Panel Report, para. 8.1(d)(i).
[86]The Illustrative List is contained in Annex I to the SCM Agreement.
[87]*See* Panel Report, fn. 1125 and para. 7.948.
[88]Brazil's Other Appellant Submission, para. 36, quoting from WT/DS267/7, page 3 (emphasis added by Brazil).
[89]Brazil's Other Appellant Submission, para. 37 (emphasis in original).

Article 3.1(a) applies to export-contingent subsidies, "including those illustrated in Annex I" (footnote omitted). Accordingly, it would have been error for the Panel to have found the U.S. export credit guarantee programs to be inconsistent with item (j) *per se*.[90] In fact, the Panel did not make such a finding, but instead found that the programs were inconsistent with Articles 3.1(a) and 3.2 because they ran afoul of the standard set forth in item (j). The Panel correctly found that Brazil made only a single claim supported by different arguments.

b. Brazil's Approach Would Deprive the Illustrative List of Its Meaning

67. A second problem with Brazil's approach is that it would render the Illustrative List largely meaningless. The Illustrative List is by its very name intended to be "illustrative" which means to "shed light on" what is and is not an export subsidy.[91] Brazil would render the List meaningless by saying that the items in the list do not provide any distinctions for the particular situations described, and that it does not matter if a practice meets or does not meet the criteria set forth. This would defeat the purpose of being illustrative. The List would lose its function of shedding light on the distinction between what is and is not an export subsidy if it were read as, in fact, not illustrating or illuminating any distinctions.

68. This issue concerning the status of item (j) should be quite familiar to the Appellate Body, because it involves the "*a contrario*" argument that arose in the *Brazil-Aircraft* dispute. A major difference between *Brazil-Aircraft* and the instant dispute, however, is that Brazil advances a position in this dispute contrary to the position it advanced in the earlier dispute. As the Appellate Body may recall, *Brazil-Aircraft* involved a challenge by Canada to export financing subsidies provided by Brazil under its PROEX program. Canada (joined by the European Communities as a third party) argued that Brazil's financing was prohibited because it was a subsidy under Article 1 that was export contingent under Article 3.1(a) of the SCM

[90]In this regard, Brazil commits a similar error when it refers to obligations under Article 1.1 of the SCM Agreement, a definitional provision. Brazil's Other Appellant Submission, para. 23.

[91]*See* definition of "illustrate" in *New Shorter Oxford English Dictionary* (2003).

Agreement. Brazil (joined by the United States as a third party) argued that even if Brazil's financing otherwise met the definition of an export contingent subsidy under Articles 1 and 3.1(a), it was not prohibited if it could be shown that the subsidies were not "used to secure a material advantage in the field of export credit terms" within the meaning of the first paragraph of item (k) of the Illustrative List. This was referred to as the "*a contrario* argument"; *i.e.*, the argument that by describing the standard for determining what *is* a prohibited export subsidy, certain items of the Illustrative List "*a contrario*" describe what is not prohibited.[92]

69. By way of background, the argument against the *a contrario* approach has been that because the Illustrative List is, as its title suggests, a non-exhaustive list, the various items contained in the list do not necessarily set forth the standard for determining whether a particular type of practice is a prohibited export subsidy. According to this view, if a practice does not constitute a prohibited export subsidy under the standard set forth in a particular item of the Illustrative List – such as the item (j) standard of covering long-term operating costs and losses under item (j) – that very same practice nonetheless can constitute a prohibited export subsidy under some other standard.

70. This is not what the term "illustrative" means in the context of the "Illustrative List." Rather, the term "illustrative" signifies that not all types of potential export subsidy practices are addressed in the Illustrative List, but to the extent it does address a practice this constitutes the standard to determine whether a particular practice constitutes a prohibited export subsidy. For example, with the exception of export credits (which are dealt with in item (k) and which relate to the sale of goods), the Illustrative List does not address export-contingent loans, such as government loans provided solely to exporters for purposes of capacity expansion. Similarly, with the exception of export credit-related guarantees (which are dealt with by item (j)), the list does not address loan guarantees to producers that are contingent on export performance. Likewise, the list does not address forgiveness of government-held debt that may be contingent

[92]*See* Appellate Body Report, *Brazil-Aircraft*, paras. 19, 90.

upon export performance. As a further example, the list does not address export-oriented equity infusions, a practice alleged by Brazil in its dispute on Canadian regional aircraft subsidies.[93]

71. However, where a particular item of the Illustrative List does address a particular type of practice, that item sets forth the conditions that make the practice a prohibited export subsidy. A consideration of item (j) demonstrates why this is so. Looking just at the standard for premium rates, such rates give rise to an export subsidy if they are "inadequate to cover the long-term operating costs and losses of the programmes." Implicit in item (j) is the notion that premium rates do not give rise to an export subsidy if they are "adequate" to cover long-term operating costs and losses. Thus, on its face, item (j) provides Members with a predictable standard to use in establishing and administering export guarantee and insurance programs – in other words, it illustrates the distinction between programs that are and are not export subsidies.

72. In this regard, it should be noted that the prior version of item (j) in the Illustrative List to the Tokyo Round Subsidies Code used a standard of "*manifestly* inadequate". In the Uruguay Round, the word "manifestly" was deleted, presumably in order to tighten subsidies disciplines with respect to export credit guarantees. However, if item (j) is not "illustrative" of the distinction between export credit guarantees that are export subsidies and those that are not, then the deletion of the word "manifestly" is without consequence. Under such an interpretation, export credit guarantees could be considered to be prohibited export subsidies if the premiums charged were "manifestly inadequate", "inadequate", or even "adequate."[94]

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[93]Panel Report, *Canada – Aircraft*, paras. 9.197-9.203.

[94]The same would be true with respect to item (d) of the Illustrative List, which deals with governmental supply of inputs to exporters. The Uruguay Round negotiators replaced the word "delivery" in the Tokyo Round Subsidies Code version of item (d) with the word "provision", presumably to expand the range of government measures covered by item (d). As in the case of item (j), however, such an exercise would not have been necessary if item (d) was not "illustrative" with respect to situations involving governmental supply of inputs. If item (d) were not "illustrative" of when a measure is or is not an export subsidy, the fact that the Tokyo Round version of item (d) referred only to the government "delivery" of inputs would not have precluded considering the government "provision" of an input as an export subsidy.

73. It is extremely unlikely that the drafters of the SCM Agreement went to the trouble of crafting in the Illustrative List specific and detailed rules for particular types of practices, such as the rules in item (j), with the intent that those rules say nothing about how to tell if a measure is an export subsidy and resort is needed instead to more general standards found elsewhere in the SCM Agreement. Instead, the drafters used the Illustrative List as a vehicle for establishing detailed and predictable rules for certain types of measures, rules that elaborate on the general principles contained in Article 1 but that cannot be ignored in favor of those more general principles. The quality of predictability is particularly important, because these are prohibited practices that are actionable without regard to – and without any requirement to demonstrate – their actual trade effects. With respect to these types of practices, Members have a greater need to know exactly what the rules are.

74. This reading of the Illustrative List is supported by footnote 5 of the SCM Agreement, which specifies that a measure referred to in the Illustrative List as not constituting an export subsidy "shall not be prohibited under [Article 3.1(a)] or any other provision of this Agreement." Footnote 5 would lose its meaning if an export-related measure could be regarded as a prohibited export subsidy notwithstanding the fact that the measure does *not* constitute an export subsidy under the standard contained in the item of the Illustrative List that specifically deals with the type of measure in question. Because such an outcome is incorrect under the principle of effectiveness of treaty interpretation, a correct interpretation of the Illustrative List is that its provisions are controlling with respect to the types of measures addressed therein.

75. Brazil, abandoning the position it took in *Brazil Aircraft*, asserts that: "In the event that a measure falls within an item of the Illustrative List, it need not meet the definition of a 'subsidy' under Article 1, as it is deemed to be an export subsidy."[95] This assertion is contradicted, however, by the text of Article 3.1(a) of the SCM Agreement, which provides, in pertinent part:

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

> 3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:
>
> (a) subsidies contingent . . . upon export performance, including those illustrated in Annex I . . . [footnotes omitted].

It is clear that the reference to "those illustrated in Annex I" is a reference to "subsidies . . . contingent upon export performance". The "subsidies . . . contingent upon export performance", in turn, form part of "the following subsidies" referred to in the chapeau that are subsidies "within the meaning of Article 1". Thus, Brazil is incorrect when it asserts that a subsidy can fall within the Illustrative List without satisfying the definition of "subsidy" under Article 1.

76. Moreover, contrary to what Brazil suggests, this result does not create some sort of inconsistency with the "benefit to recipient" standard and its reliance upon a marketplace benchmark.[96] Premium rates designed merely to break even – the standard of item (j) – are, *ceteris paribus*, lower than those that would be available in a marketplace that includes institutions attempting to earn a profit; *i.e.*, such premium rates will confer a "benefit."

77. In *Brazil – Aircraft*, the Appellate Body signaled its agreement with the *a contrario* interpretation. In the proceeding under Article 21.5 of the DSU, the Appellate Body stated that if Brazil had been able to demonstrate that its subsidies did not run afoul of the standard in item (k), it "would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List."[97] The Appellate Body's conclusion applies with equal, if not more, force to item (j).

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[96]*See* Brazil's Other Appellant Submission, paras. 29-31.
[97]Appellate Body Report, *Brazil - Aircraft (21.5),* para. 80.

78. For the foregoing reasons, therefore, the Panel did not err when it limited its analysis of the export credit guarantee programs to item (j) of the Illustrative List.

2. An Additional Finding of Benefit Would Have No Effect on Implementation

79. Brazil asserts that a redundant finding under Articles 1.1 and 3.1(a) of the SCM Agreement is necessary to "chart the full course of implementation for the United States."[98] Brazil asserts that the United States could "comply with its obligations under item (j) but still fail to comply with its obligations under Article 1.1 and 3.1(a)."[99] Brazil's assertion is very puzzling however. The United States has no obligations under item (j) (which is an illustrative item) or Article 1.1 (which is a definition). The obligations of the United States, with respect to export subsidies are set forth in Articles 3.1(a) and 3.2 of the SCM Agreement, and in Article 3 and Part V of the Agreement on Agriculture.

80. Whether or not a separate finding of "benefit" were made under Article 1.1, the recommendations would remain precisely the same under paragraphs 8.3(a) and 8.3(b) of the Panel Report. The United States would have to bring its export credit guarantee programs into conformity with its WTO obligations. Brazil insists that further findings are necessary to ensure effective resolution of the dispute since "a measure that no longer constitutes an export subsidy under item (j) may still constitute an export subsidy under Articles 1.1 and 3.1(a)."[100] Brazil's premise that the "benchmark" under item (j) and Articles 1.1 and 3.1(a) are different is wrong, as discussed above. Furthermore, Brazil appears to be arguing that the Appellate Body should opine on how any potentially changed measure could be inconsistent with the WTO. However, any such measure is outside the terms of reference of this dispute – it does not exist and by definition would differ from the measure that is at issue. Neither the Panel nor Appellate Body is

[98]Brazil's Other Appellant Submission, paras. 2, 22, 39.
[99]Brazil's Other Appellant Submission, para. 23.
[100]Brazil's Other Appellant Submission, para. 23.

in a position to speculate as to what form any compliance by a Member would take or to opine in the abstract on the consistency of those hypothetical measures.

3. Brazil Mischaracterizes the Panel's Finding as Failing to Address Brazil's Claims under Articles 1.1 and 3.1(a) of the SCM Agreement

81. Brazil's appeal misconstrues what the Panel actually decided in paragraph 6.31 of its report. Brazil asserts that it is appealing:

> "the Panel's findings in paragraph 6.31 of the Panel Report that, having found that the U.S. export credit guarantee ("ECG") programs constitute export subsidies under the terms of item (j) of the Illustrative List of Export Subsidies in Annex I of the *SCM Agreement* ("Illustrative List"), it was unnecessary to address Brazil's claim that the programs also constitute export subsidies under the terms of Articles 1.1 and 3.1(a) of the *SCM Agreement*.[101]

82. In fact, however, the Panel in paragraph 6.31 did something different. It did not decline to "address a claim" raised by Brazil; instead, the Panel declined to make additional *factual findings* that Brazil has requested. In the Panel's words:

> **Brazil** requests the Panel to make certain *additional "factual" findings* regarding the parties' evidence and argumentation relating to Brazil's allegation that the CCC export credit guarantee programmes at issue constitute prohibited export subsidies under the elements of Articles 1 and 3.1(a) of the SCM Agreement. . . . The **Panel** declines to make the additional findings requested by Brazil.[102]

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[101]Brazil's Other Appellant Submission, para. 15.
[102]Panel Report, para. 6.31 (italics added, bold in original).

83. It is worth recalling that paragraph 6.31 – the paragraph that Brazil is appealing – appears in the Interim Review section of the report, and was a response to Brazil's comments on the interim report.[103] In those comments, Brazil did *not* request the Panel to "address Brazil's claim . . . under . . . Articles 1.1 and 3.1(a) of the SCM Agreement" (to use the words that Brazil now uses on appeal). To the contrary, Brazil expressly requested *only* that the Panel make additional "factual findings" – indeed, Brazil once even italicized those words in its interim review comments.[104] Brazil listed four "specific factual findings" that it wished the Panel to make in its final report; its list included no request for any legal findings at all.[105] It is not as though Brazil misunderstood what the Panel had done; Brazil acknowledged that the Panel had not addressed its SCM Article 1.1 / Article 3.1(a) "claim".[106]

84. Having asked only for *factual* findings in its interim review comments, Brazil is now in no position to complain that, in response, the Panel did not make a *different* set of findings about a *legal claim*.[107] In the view of the United States, the Appellate Body should reject Brazil's appeal on this basis alone.

4. Brazil Misapplies the Principle of "Judicial Economy"

85. For the reasons given above, the Appellate Body should not consider Brazil's appeal on the merits. In any event, however, in section 2.3.2 of its submission Brazil has misapplied the concept of "judicial economy," and that the Panel acted properly in not reaching Brazil's claims with respect to SCM Articles 1.1 and 3.1(a). As described in detail in paragraphs 41-42 above, in the *U.S. – Wool Shirts* report, the Appellate Body considered that the practice of judicial

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[103]Brazil's Requests for Reviews of the Panel's Interim Report (17 May 2004), paras. 19-23 (not included in any annex to the Panel Report).

[104]Brazil's Requests for Reviews of the Panel's Interim Report (17 May 2004), para. 22.

[105]Brazil's Requests for Reviews of the Panel's Interim Report (17 May 2004), para. 23.

[106]Brazil's Requests for Reviews of the Panel's Interim Report (17 May 2004), para. 19.

[107]We also note that Brazil has not, in this portion of its appeal, challenged any finding in any other paragraph of the Panel's report.

economy was in accord with the aims of the dispute settlement system, and in that context noted in particular the provisions of Articles 3.4 and 3.7 of the DSU. The Appellate Body concluded:

> A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[108]

86. In this dispute, Brazil has given the Appellate Body no reason to believe that its claim under Article 3.1 of the SCM Agreement must be addressed in order to resolve the matter at issue.

87. First, Brazil argues that its claim under SCM Agreement Articles 1.1 and 3.1(a) is a separate claim from its claim under SCM Agreement Article 3.1(a) and item (j) of the Illustrative List.[109] In addition to the redundancy resulting from such argument, as noted above, the argument is also irrelevant. By definition, as the Appellate Body pointed out in *U.S. – Wool Shirts*, an exercise of judicial economy involves a decision by a panel not to address certain claims. Brazil therefore cannot object to an exercise of judicial economy simply on the grounds that one of its claims was omitted.

88. Similarly, Brazil misconstrues the *Australia – Salmon* report to which it cites. In that dispute, the panel had made findings under Articles 5.1, 5.5, and 5.6 with respect to one species of salmon at issue in the dispute, but made findings only under Article 5.1 with respect to the other species at issue. The Appellate Body was struck by the Panel's decision that, for one species, the Panel thought it necessary to make findings under all three articles, while at the same time omitting two of those three findings for the other species: "The Panel gave no convincing reason why it examined Article 5.5 and 5.6 for only one category of the products in dispute, i.e., ocean-caught Pacific salmon, and did not undertake the same analysis for other categories, i.e.,

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[108]Appellate Body Report, *U.S. – Wool Shirts*, part VI (footnote 30 omitted).
[109]Brazil Appellant Submission, paras. 36-37.

other Canadian salmon."[110] Contrary to the suggestion in paragraph 39 of Brazil's other appellant's submission, therefore, that Appellate Body report cannot be reduced to the observation that a measure could be consistent with Article 5.1 of the SPS Agreement but still inconsistent with Article 5.5 or 5.6 of the SPS Agreement. (Indeed, as noted above, judicial economy necessarily involves a panel's declining to make findings on one or more claims.)

89. Third, Brazil argues, in paragraph 39, that the Panel's report leaves the dispute unresolved. Brazil, however, does not identify any concrete way in which this might be so: Brazil merely *asserts* that the dispute is unresolved but does not actually explain in what way. In fact, Brazil says only that the recommendations and rulings of the DSB "may well not be sufficiently precise" to resolve the dispute. Brazil's inability to explain why the dispute should be considered "unresolved" means that there is no basis for overturing the Panel's exercise of judicial economy in this instance.

90. Brazil adds that it "wishes to avoid further litigation in the event the United States were to take no implementation action with respect to its distinct obligation not to maintain ECG programs that involve financial contributions conferring a benefit and that are contingent upon export"; but, as the Appellate Body noted in *U.S. – Wool Shirts*, the touchstone for assessing an exercise of judicial economy is whether the panel's findings have "address[ed] those claims which must be addressed in order to resolve the matter in issue in the dispute" – *not* whether the findings might avoid litigation on some hypothetical future event.

91. For these reasons, the Appellate Body should find that the Panel did not exercise judicial economy improperly and should reject Brazil's appeal.

[110]Appellate Body Report, *Australia – Salmon*, para. 225.

B. Brazil Has Failed to Demonstrate that the CCC Export Credit Guarantees Confer a Benefit within the Meaning of Article 1.1 of the SCM Agreement

92. Brazil repeatedly exhorts the Appellate Body to find that the programs confer a benefit within the meaning of Article 1.1 of the SCM Agreement on the basis of "undisputed facts of record."[111] Although the Appellate Body has noted that it can complete the analysis under such circumstances, it is not compelled to do so, and the for the reasons the United States has already articulated it need not do so in this dispute. Furthermore, even if the Appellate Body opted to do so, insufficient undisputed facts exist to enable the Appellate Body to do so in this case. Contrary to Brazil's assertions of "undisputed facts of record," the United States vigorously contested Brazil's allegations of fact in this regard and, in fact, affirmatively demonstrated that the export credit guarantee programs do *not* confer such a benefit.

93. The United States demonstrated that the programs "do not confer a 'benefit' in the marketplace, as identical instruments are available in the form of 'forfaiting' (and private 'insurance').[112]

94. Furthermore, Brazil has conceded that it has not quantified any "benefit" from the export credit guarantee programs.[113]

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[111]Brazil's Other Appellant Submission, paras. 45, 47, 56, 58, and 62.

[112]Panel Report, para. 7.773. *See also, e.g.*, U.S. Answer to Panel Question 76 (August 11, 2003), para. 144; U.S. Rebuttal Submission (August 22, 2003), paras. 186-191; U.S. Further Submission (September 30, 2003), paras. 157-164. Indeed, as the U.S. also pointed out to the Panel, according to a background paper on export credits prepared by the WTO Secretariat: "While guarantees could be unconditional, they usually have conditions attached to them, so that in practice there is little distinction between credits which are guaranteed and credits which are subject to insurance." U.S. Answers to Panel Question 223 (December 22, 2003), para. 108, citing *Export Credits and Related Facilities*, G/AG/NG/S/13 (26 June 2000).

Brazil further contends that "the Panel made no finding that Brazil had failed to make a *prima facie* case relating to its claim that the ECG programs constitute financial contributions, confer benefits and are contingent on export." Brazil's Other Appellant Submission, fn. 31. The Panel clearly made a finding, however, of export contingency with respect to the export credit guarantee programs. Panel Report, fns. 951, 1125. The United States does not appeal this findings. The Panel, however, did not, because it could not, find that Brazil had satisfied its burden of making a *prima facie* case with respect to alleged benefit conferred by such programs within the meaning of Article 1.1 of the SCM Agreement.

[113]Brazil Answers to Panel Question 140 (October 27, 2003), para. 82.

95. It is not surprising that Brazil continues to insist that a benefit is conferred in light of its continuing demonstration of a fundamental lack of understanding of how the export credit guarantee programs operate. Brazil misunderstands and therefore misrepresents the nature of the recipient of the export credit guarantee, the credit risk analysis undertaken in respect of issuance of such guarantees, and the absence of any correlation between the issuance of a CCC export credit guarantee and the ability of the importer of agricultural products to obtain a loan in his home market.

96. With the exception of the Supplier Credit Guarantee Program, the CCC Export Credit Guarantee Programs do not take risk of importer default.[114] Brazil maintains that a benefit is incurred because in the absence of the CCC export credit guarantee, "a purchaser could not secure a loan to buy agricultural exports at all."[115] To the contrary, as the United States repeatedly demonstrated to the Panel, there is no necessary correlation between the issuance of an export credit guarantee and the ability or inability of an importer to secure a loan.[116]

97. Brazil further asserts a benefit is conferred because "[i]gnoring country risk and the creditworthiness of borrowers in these countries constitutes a considerable benefit that would not

[114]*See, generally,* Panel Report, paras. 7.242 and 7.243: "[Under GSM 102 program,] the CCC does not provide financing, but rather guarantees payments due from foreign banks." "The GSM 103 program operates in a similar fashion to GSM 102." *See also* Exhibit BRA-71.

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

[116]"Whether or not the foreign bank has extended a loan to the importer - and the terms of any such loan - is exclusively an issue between such foreign bank and its importer customer. CCC has no role in that financial relationship. Consequently, the importer may have to pay its bank in full upon disbursement under the documentary letter of credit, but the foreign bank itself may be able to repay the U.S. financial institution over time for the amount disbursed under the letter of credit. That bank, however, continues to bear the risk of fluctuation in rates of foreign exchange, because all obligations must be denominated in dollars to be eligible for an export credit guarantee. The CCC guarantee provides no coverage for foreign exchange risk." U.S. First Written Submission (July 11, 2003), fn. 135. *See also* U.S. Further Submission (September 30, 2003), para. 162; U.S. Answer to Panel Question 223 (December 22, 2003), para. 109.

be afforded in the marketplace."[117] To the contrary, the United States ignores neither.[118] Under the GSM 102 and GSM 103 programs, the United States is exposed to the financial risk of default exclusively from *banks*.[119] CCC therefore indeed undertakes a credit analysis and establishes exposure limits with respect to each such bank.[120] Such bank credit limits inherently include an analysis with respect to the risk of the bank's default as a function of its particular location.

98. Furthermore, the program has no requirement that the foreign bank in a particular transaction be located in the same country to which particular goods may be destined. Brazil acknowledges that "there is no requirement that the foreign bank be based in the country of destination of goods."[121] Notwithstanding Brazil's parade of countries eligible to receive agricultural products in connection with the program,[122] the mere fact that export credit guarantees may be issued in connection with exports to particular countries does not mean that CCC is exposed to the credit risk of such country nor (except in the case of the Supplier Credit Guarantee Program) to the risk of default by the importer.[123] CCC conducts a risk assessment with respect to the banks to whose risk CCC is exposed.

99. Accordingly, for the foregoing reasons, the United States requests the Appellate Body to reject Brazil's request for the Appellate Body (1) to find that the Panel erred in its interpretation

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[117]Brazil's Other Appellant Submission, para. 55.

[118]Brazil's submission in many ways reveals Brazil's continuing misunderstanding of the program. "Recipients" of the guarantees are exclusively U.S. exporters, with respect to whom the United States has no credit exposure. Hence, whether or not the recipient has "an extremely bad credit history" is completely irrelevant. *See* Brazil's Other Appellant Submission, para. 55. Section 2.4.3 of Brazil's submission refers to "non-creditworthy purchasers". With the exception of the Supplier Credit Guarantee Program, a small part of the overall export credit guarantee programs, the U.S. assumes *no* financial risk with respect to purchasers. Under GSM-102 and GSM-103, CCC takes on risk exclusively with respect to foreign *banks*.

[119]*See* U.S. First Written Submission (July 11, 2003), para. 151.

[120]U.S. Answer to Panel Question 142 (October 27, 2003), para. 57 and fn. 27. *See also* U.S. Answer to Panel Question 82(c) (August 11, 2003), para. 178.

[121]Brazil's Other Appellant Submission, para. 185.

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

[123]In the case of the Supplier Credit Guarantee Program, because the exporter or assignee retains exposure to default on 35 percent of the debt, CCC relies on the creditworthiness analysis by the exporter of its customer.

and application of Articles 1.1 and 3.1(a) of the SCM Agreement, and Article 3.7 of the DSU, in exercising false judicial economy in making its findings in paragraph 6.31 of the Panel Report and (2) to find that, upon completing the analysis, the ECG programs constitute export subsidies, within the meaning of Articles 1.1 and 3.1(a) of the SCM Agreement.[124]

IV. The Appellate Body Should Reject Brazil's Claim of Error Relating to the ETI Act of 2000

A. The Appellate Body Should Not Decide Brazil's Appeal Because Brazil Acknowledges that the Appeal is Not Necessary to Resolve the Dispute Between the Parties

100. Brazil's appeal with respect to the ETI Act of 2000 (the "ETI Act") is peculiar. Brazil merely asks the Appellate Body to find that the Panel erred in concluding that Brazil did not make a *prima facie* case on its claims concerning the ETI Act. Brazil explicitly "does not ask the Appellate Body to complete the analysis."[125] Brazil, therefore, is not asking the Appellate Body to make findings that would result in DSB rulings and recommendations with respect to the ETI Act. For that reason alone, the Appellate Body should decline to decide Brazil's appeal.

101. The Appellate Body has previously declined to decide issues in circumstances that provide guidance here. Recently, in its report on the *U.S. – Steel Safeguard* dispute, the Appellate Body declined to make findings on the issue of causation, even though a number of the disputing parties had asked it to do so, because it was unnecessary, for purposes of resolving that dispute, to decide that issue.[126]

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[124]Brazil's Other Appellant Submission, paras. 380(1) and (2).
[125]Brazil Appellant Submission, para. 214.
[126]*U.S. – Steel Safeguard*, para. 483.

102. In this case, Brazil's appeal – even if fully successful – would not result in any findings with respect to the ETI Act, and therefore no recommendations or rulings of the DSB with respect to the ETI Act.[127] Brazil's appeal therefore would not resolve any dispute between the United States and Brazil with respect to the ETI Act.

103. We recall the analysis of the Appellate Body in the *U.S. – Wool Shirts* dispute:

> Given the explicit aim of dispute settlement that permeates the *DSU*, we do not consider that Article 3.2 of the *DSU* is meant to encourage either panels or the Appellate Body to "make law" by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute.[128]

104. The Appellate Body's analysis in the *Wool Shirts* report is equally applicable to Brazil's appeal here. Brazil is inviting the Appellate Body purely to "'make law' . . . outside the context of resolving [this] particular dispute." Particularly in a proceeding such as this one, where there are already a sufficiently large number of issues that may have an actual effect on the rulings and recommendations of the DSB, the Appellate Body should decline that invitation.

[127]The United States notes that, contrary to the implication in Brazil's submission, it did not "admit" any inconsistency of the ETI Act with the WTO obligations of the United States. The United States did, however, acknowledge to the Panel that it intended to implement the recommendations and rulings of the DSB in the dispute between the United States and the European Communities.

[128]Appellate Body Report, *U.S. – Wool Shirts*, part VI (footnote 30 omitted).

B. The Panel Correctly Found that Brazil Failed to Make a *Prima Facie* Case with Respect to its Claims Concerning the ETI Act of 2000

105. For the reasons given above, the Appellate Body should not consider Brazil's appeal on its merits. In any event, however, Brazil did not make a *prima facie* case with respect to the ETI Act.

106. Although Brazil now asserts that it submitted evidence in support of its claim in its first submission to the Panel,[129] in fact it did not. In paragraphs 315-327 of that submission, Brazil gave a brief description of the DSU Article 21.5 proceedings in the dispute *United States – Tax Treatment for "Foreign Sales Corporations"*. Brazil then asked the Panel "to apply the reasoning as developed by the panel and as modified by the Appellate Body in that case *mutatis mutandis*." Despite attaching 101 exhibits to its first submission, Brazil submitted not a single document on the ETI Act. As the Panel put it, "Brazil has chosen not to offer its own arguments or description of the [ETI] Act."[130]

107. In essence, therefore, Brazil was asking the Panel not to make an objective assessment of the ETI Act, but merely to adopt findings from a previous proceeding. (Actually, Brazil asked the Panel to adopt those findings "*mutatis mutandis*" – *i.e.*, making such changes as needed to be made – but Brazil never made clear what those necessary changes might be and how its proposed approach to the ETI Act would allow the Panel to consider them.)

108. Brazil does not, and cannot, point to anything in the DSU or past WTO or GATT practice to support its approach. As the United States explained to the Panel, it is by now well-established that the complainant in a WTO dispute – in this case, Brazil – bears the burden of presenting evidence sufficient to establish a presumption that a challenged measure is WTO-

[129]Brazil Appellant Submission, para. 225.
[130]Panel Report, para. 7.979.

inconsistent.[131] It also is well-established that even though panels may take into account prior panel and Appellate Body reports, "panels are not *bound* by previous decisions of panels or the Appellate Body even if the subject-matter is the same."[132]

109. Each of these principles serves to reinforce the fundamental requirement of Article 11 of the DSU, that each panel "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."

110. Brazil's approach, if accepted, would have put the Panel in the position of having to violate its obligation under Article 11. Brazil did not present any evidence at all regarding the ETI Act itself. Instead, Brazil did nothing more than cite to and quote from prior panel and Appellate Body reports. Indeed, the Panel was not even in a position to make factual findings concerning the Act, because Brazil has not offered a description of it. In short, as a result of Brazil's approach, the Panel was in no position to exercise its judgment to follow, or decline to follow, the prior reports concerning the ETI Act, the very type of "objective assessment" called for by Article 11.

111. Brazil essentially abdicated its responsibilities to the Panel, in the apparent hope that the Panel would do Brazil's work for it (for example, by conducting its own factual research concerning the ETI Act). However, as the Appellate Body has stated, while a panel has the authority to seek information under Article 13 of the DSU, that authority is not to be used "to make the case for a complaining party."[133] The Panel properly recognized that it could not do so.[134] (In fact, the Panel even took the additional step of offering Brazil an additional opportunity to submit evidence and argumentation; Brazil declined the offer.[135])

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[131]*See, e.g.*, Appellate Body Report, *U.S. – Wool Shirts*, at 13.
[132]Panel Report, *India – Patent (EC)*, para. 7.30 (italics in original).
[133]Appellate Body Report, *Japan – Agricultural Products*, para. 129.
[134]Panel Report, para. 7.985.
[135]Panel Report, paras. 7.980-7.982.

112. In short, the Panel acted properly under the text of the DSU by declining to find that the short shrift that Brazil gave to the ETI Act satisfied Brazil's burden to make its *prima facie* case concerning that Act.

113. On appeal, Brazil has addressed none of these problems with its approach. It has, however, made a number of new arguments, none of which has merit.

114. *First*, Brazil says (without any citation or other support) that the principles of burden of proof "presume that a Member is in compliance with its obligations"; Brazil goes on to say that where a measure has been found WTO-inconsistent that presumption disappears.[136] It is unclear what point Brazil is making, but it appears that Brazil has confused concepts involving burden of proof with the concepts involving the presumption that WTO Members will act consistently with their obligations. Furthermore, Brazil's approach is tautological. Brazil presumes that a finding of inconsistency in one dispute establishes a finding of inconsistency in a separate dispute with different parties. But such a presumption is contrary to the status of adopted DSB recommendations and rulings which only apply in the particular dispute to those parties. Brazil approach would in effect impose *stare decisis* on the WTO dispute settlement system.

115. As explained above, the principles of burden of proof in WTO dispute settlement are in fact well settled; as articulated by the Appellate Body, "the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption."[137] As one panel has noted, "we also view the rules stated by the Appellate

[136]Brazil Other Appellant's Submission, para. 220.
[137]Appellate Body Report, *U.S. – Wool Shirts*, page 14.

Body as requiring that the . . . complainant cannot limit itself to stating its claim."[138] That, however, is the most that Brazil has done in this case.

116. To the extent Brazil is suggesting a different approach in situations such as this one, its suggestion is misguided. For one thing, taking Brazil's approach of substituting a presumption of WTO-consistency for the principles of burden of proof would suggest that the complaining Member should also bear the burden of proof with respect to affirmative defenses, but that of course is not correct.

117. For another thing, Brazil seems not to perceive (and therefore does not address) a logical problem with this approach. That problem arises from Brazil's assumption that, in its words, there is a "legal impossibility . . . to argue that an identical measure subject to identical claims [that were successful in a previous dispute] is WTO-consistent."[139] This assumption is simply false for at least three basic reasons. First, the reasoning of one panel or Appellate Body report is not binding on the panel or Appellate Body in a separate dispute. Second, not all Members are situated equally with respect to other Members (for example due to special and differential treatment provisions, accession provisions, or waivers). Third, a measure may remain the same while surrounding circumstances change. If, for example, a WTO Member applies a tariff to a particular product above the rate bound in its Schedule annexed to the GATT 1994, another Member may successfully challenge that tariff as inconsistent with Article II of the GATT 1994. The first Member may respond by changing its binding pursuant to Article XXVIII of the GATT 1994 and leaving its applied tariff unchanged. Under Brazil's approach in this dispute, however, a third Member could now challenge the first Member's tariff (the "identical measure" in Brazil's terminology) under GATT Article II and the first Member would be faced with a "legal impossibility . . . to argue" that the tariff is WTO-consistent; but that of course is not so. Another

[138]Panel Report, *India – Quantitative Restrictions*, para. 5.119.
[139]Brazil's Other Appellant's Submission, para. 234.

example would be where a different panel made findings similar to those adopted by the DSB, but that panel's findings were subsequently reversed by the Appellate Body on appeal.

118. The principles of burden of proof thus correctly impose on the complaining party the obligation to present evidence and argument about the measure at issue – at issue, that is, in the complaining party's dispute, not a previous one – and why that measure is *in this dispute* WTO-inconsistent. Merely referring in a general way to submissions and reports in a previous dispute, and doing nothing more, cannot meet that burden.

119. *Second,* Brazil argues that the Appellate Body's discussion of DSU Article 12.7 in *Mexico – High Fructose Corn Syrup (Recourse to Article 21.5)* supports its approach here; that argument is incorrect. First of all, Brazil does not explain why a complaining party's obligation to make a *prima facie* case should be interpreted similarly to a panel's obligation to set forth its basic rationale. Next, Brazil exaggerates the Appellate Body's statements in that report. The Appellate Body noted that "[w]e can, for example, envisage cases in which a panel's 'basic rationale' *might* be found in reasoning that is set out in other documents, such as in previous panel or Appellate Body reports – provided that such reasoning is quoted or, at a minimum, incorporated by reference."[140] Brazil's approach to the burden of proof contains none of the nuance of the Appellate Body's statement.

120. *Third,* Brazil refers to the panel report in *India – Patents (EC)* and to DSU Article 17.14. Neither is relevant to the question of whether Brazil made a *prima facie* case in this dispute (and Brazil in fact does not argue otherwise). The parties in fact reached common ground on this question early in the dispute. In Brazil's words: "Brazil agrees with the United States that this Panel is not formally bound by the decision of the panel and the Appellate Body in the earlier ETI dispute."[141] Moreover, while this Panel acknowledged the relevance of the findings of the

[140]Appellate Body Report, *Mexico - High Fructose Corn Syrup (Recourse to Article 21.5)*, para. 109.
[141]Brazil's Statement at the First Substantive Meeting, 22 July 2003, para. 138.

panel and the Appellate Body in the Article 21.5 proceedings in the *FSC* dispute, it also recognized that its obligations under DSU Article 11 required it to carry its own assessment of the matter before it.

121. *Fourth*, we note that while Brazil says in paragraph 215 (in the section labeled "scope of the appeal") that it will pursue an argument with respect to "the meaning of 'prompt settlement'" in DSU Article 3.3, Brazil in fact does not discuss that provision again and therefore has not "set out . . . the legal arguments in support" of its appeal with respect to that provision.[142]

122. *Finally*, Brazil's failure to acknowledge its obligation to present a *prima facie* case in accordance with the principles of burden of proof applicable generally in WTO dispute settlement is particularly surprising in light of its acknowledgment to the Special Session of the Dispute Settlement Body (the negotiating body for the DSU Review negotiations) that "one of the drawbacks of the current dispute settlement mechanism is the necessity for a Member to litigate a case *de novo* through all the established phases even if the same measure nullifying or impairing benefits of this Member has already been found WTO inconsistent in previous panel or appeal proceedings initiated by another Member."[143]

123. For all of the foregoing reasons, although the Appellate Body need not reach the issue, the Panel correctly found that Brazil failed to make a *prima facie* case on its claims concerning the ETI Act.

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[142] *Working Procedures for Appellate Review*, WT/AB/WP/7, Rule 21(2)(b)(i) (applicable here pursuant to Rule 23(2)).

[143] *Contribution of Brazil to the Improvement of the WTO Dispute Settlement Understanding*, TN/DS/W/45, circulated 11 February 2003, para. 1.

V. Direct Payments under the 2002 Act Conform Fully to Paragraph 6(a) of Annex 2 of the Agreement on Agriculture

A. Introduction

124. Brazil anticipates that the Appellate Body may well accept the U.S. appeal that production flexibility contract payments under the 1996 Act and direct payments under the 2002 Act are consistent with Annex 2, paragraph 6(b) of the *Agreement on Agriculture*. Consequently, Brazil conditionally requests the Appellate Body to find that direct payments do not conform to paragraph 6(a) of Annex 2 to the *Agreement on Agriculture*.[144] The sole basis for Brazil's conditional appeal is that direct payments use a different base period than that used by an earlier program, and therefore, direct payments do not employ "a defined and fixed base period" within the meaning of paragraph 6(a). Brazil's appeal does not contend that production flexibility contract payments do not employ "a defined and fixed base period."[145] Upon acceptance of the U.S. appeal, Brazil's conditional appeal should be rejected as direct payments do employ "a defined and fixed base period."

B. Direct Payments under the 2002 Act Do Employ "a Defined and Fixed Base Period" and Conform Fully to Paragraph 6(a) of Annex 2 to the Agreement on Agriculture

125. We begin by noting what Brazil is *not* arguing to the Appellate Body. Before the Panel, Brazil argued that the use of different base periods for production flexibility contract payments and direct payments was inconsistent with *both* paragraphs 6(a) and paragraph 6(b) of Annex 2. Brazil now drops its arguments with respect to paragraph 6(b). Brazil also argued before the Panel that "the possibility of updating encourages producers to plant more acreage to

[144]Brazil's Other Appellant Submission, para. 239.
[145]Brazil's Other Appellant Submission, fn. 253.

commodities covered by the programme in the expectation that they would be able to update base acreage in the successor programme."[146] The Panel, however, made no findings that U.S. farmers expect future updating because Brazil provided no such evidence: "The Panel notes that Brazil expresses its argument as a hypothetical: the effect on current production choices depends on 'if' farmers expect future updating."[147] The Panel further wrote:

> The Panel notes that updating was not permitted throughout the term of the FAIR Act of 1996, and is not permitted throughout the term of the FSRI Act of 2002. It has been permitted only once since 1996. There is no evidence before the Panel as to what the United States Congress intends to do in future farm bills. There is no evidence, only speculation, as to whether producers will expect to be able to update their base acres under future farm bills.[148]

Thus, despite Brazil's arguments, the Panel did not make any findings to support the notion that the different base periods for direct payments and production flexibility contract payments somehow were impacting farmers' current production choices through expectations of different base periods in the future.

126. Now, Brazil makes only the argument that, pursuant to paragraph 6(a) of Annex 2, direct payments under the 2002 Act, which provide decoupled income support, may not use a different base period than that used for production flexibility contract payments under the 1996 Act. That is, "[i]f the structure, design, and eligibility criteria have not significantly changed between the original measure (containing the 'fixed base period') and its replacement, then there is no basis for any updating of the 'fixed base period.'"[149] Brazil's appeal relies on an erroneous reading of the phrase "a fixed and defined base period" in paragraph 6(a) of Annex 2 and a

[146]Panel Report, para. 7.402.
[147]Panel Report, para. 7.404.
[148]Panel Report, para. 7.405.
[149]Brazil's Other Appellant Submission, para. 256.

mischaracterization of direct payments under the 2002 Act as "even identical" to production flexibility contract payments.

127. Paragraph 6(a) of Annex 2 reads:

> Eligibility for such payments shall be determined by clearly-defined criteria such as income, status as a producer or landowner, factor use or production level in a defined and fixed base period.

Brazil would interpret this provision to mean that once one type of green box payment to producers is made, such as decoupled income support, *all* subsequent measures providing such support must be made with respect to the same base period.[150] The Annex 2 text does not support such a reading, however.

128. ***Ordinary meaning of the terms in their context and in light of object and purpose of the treaty:*** The ordinary meaning of "defined" is "clearly marked, definite" and "set out precisely."[151] "Fixed" means "stationary or unchanging in relative position."[152] Thus, as used in paragraph 6(a), a "defined and fixed base period" means a base period that is "set out precisely" and "stationary or unchanging in relative position." Direct payments under the 2002 Act satisfy this criterion because eligibility is determined by historical production of any of a number of crops (including upland cotton) in a base period that is "definite" (set out in the 2002 Act) and "stationary or unchanging in a relative position" (does not change for the duration of the 2002 Act).[153] Brazil conceded as much when it noted before the Panel that a farm's contract or base

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[150]Brazil's Other Appellant Submission, para. 250 ("[A] Member may not, to reflect more recent production or factor use, *update* the amount of eligible acreage for the particular crops that are eligible for a particular type of decoupled income support, and maintain consistency with Annex 2, paragraph 6(a). A continuing support program that is set forth in a series of legislative measures cannot provide a 'moving target' of changing production- and factor use-related criteria.").

[151]*The New Shorter Oxford English Dictionary*, vol. 1, at 618 (1993 ed.).

[152]*The New Shorter Oxford English Dictionary*, vol. 1, at 962 (1993 ed.).

[153]Panel Report, para. 7.221 ("Owners had a one-time opportunity to elect the method for calculation of their base acreage.").

acreage for direct payments is the acreage "resulting from either MY 1993-95 or MY 1998-2001 production."[154]

129. Brazil criticizes this interpretation as a "relative position" argument,[155] but the phrase it finds objectionable ("stationary or unchanging in a relative position") is one of the ordinary meanings of the term "fixed." In fact, Brazil itself provides this definition.[156] Brazil even makes use of *part of* this definition when it writes "the particular 'factor' and 'production' criteria must be established in a single baseline that is fixed and *unchanging*."[157] The full ordinary meaning of "fixed" from which Brazil draws "unchanging" is "unchanging in a relative position," the very definition on which the United States relies. Thus, the ordinary meaning of "fixed" supports the U.S. interpretation.

130. The United States also notes that in writing that "the particular 'factor' and 'production' criteria must be established in a single baseline that is fixed and *unchanging*,"[158] Brazil inadvertently draws attention to the additional meaning that it seeks to impose on paragraph 6(a). That is, the base period must not only be "fixed," it must *in addition* be "unchanging." We recall that Brazil and the Cairns Group have proposed in the ongoing agriculture negotiations that Annex 2, paragraph 6, be amended to change the reference from "a defined and fixed base period" to "a defined, fixed *and unchanging* historical base period."[159] The revised Harbinson text, in Attachment 8, incorporates this Cairns Group proposal by proposing adding to paragraphs 5, 6, 11, and 13 of Annex 2 the text: "Payments shall be based on activities in a *fixed and*

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[154]Brazil's Answer to Question 23 from the Panel (paras. 24-25) (italics in original).

[155]Brazil's Other Appellant Submission, para. 252.

[156]Brazil's Other Appellant Submission, para. 248 ("This is confirmed by the dictionary meaning of the term "fixed," which is "definitely and permanently placed or assigned; stationary or unchanging in relative position; definite, permanent, lasting.") (footnote omitted).

[157]Brazil's Other Appellant Submission, para. 248 (italics added).

[158]Brazil's Other Appellant Submission, para. 248 (italics added).

[159]Cairns Group Negotiating Proposal, *Domestic Support*, JOB(02)/132, at 3, 5, 6 (4 October 2002) (Attachment - Tightening the Green Box - Amendments to Annex 2, paras. 5, 6, 11, and 13) (emphasis added).

unchanging historical base period."[160] That is, Brazil itself suggests that the current text of paragraph 6(a) would need to be amended to achieve its interpretation in this appeal that, for a particular type of direct payment to producers (such as decoupled income support), there can be only one, single base period for all support maintained or provided in the future.

131. The full context of paragraph 6(a) supports the U.S. interpretation. Annex 2, paragraph 1, establishes that "[d]omestic support measures for which exemption from the reduction commitments is claimed shall meet the fundamental requirement" of the first sentence through the relevant basic and policy-specific criteria of the second sentence.[161] For example, in the case of decoupled income support, the "[d]omestic support measure[] for which exemption from the reduction commitments is claimed" must meet "policy-specific criteria and conditions as set out" in paragraph 6.

132. Paragraph 6(a) states that "[e]ligibility for such payments shall be determined by clearly-defined criteria . . . in a defined and fixed base period." Thus, for a "domestic support measure" to qualify for "exemption from the reduction commitments," "such payments" must satisfy conditions relating to "*a* defined and fixed base period." In this case, direct payments under the 2002 Act are a "[d]omestic support measure[] for which exemption from the reduction commitments is claimed,"[162] and "eligibility for such payments" are "determined by clearly-defined criteria . . . in a defined and fixed base period."[163]

133. There is no textual requirement in paragraph 6(a) that decoupled income support measures for which exemption from the reduction commitments is claimed must utilize the *same* "defined and fixed base period" as any prior measures nor that any particular base period be used

[160]U.S. Opening Statement at the First Meeting of the Panel with the Parties, para. 21 (July 22, 2003); U.S. Rebuttal Submission, para. 26 (August 22, 2004).

[161]Agreement on Agriculture, Annex 2, paragraph 1.

[162]*See* Panel Report, paras. 7.356-7.357.

[163]Panel Report, para. 7.221 ("Owners had a one-time opportunity to elect the method for calculation of their base acreage.").

for a decoupled income support measure Brazil reads paragraph 6 as though the text were "*the* defined and fixed base period." However, this is not what the text says nor what the negotiators agreed. The use of "a" defined and fixed base period contrasts with the use of the phrase "*the* base period" in paragraph 9 of Annex 3, which is defined in that same paragraph as "the years 1986 to 1988."[164]

134. Further, paragraphs 6(b), (c), and (d) use the term "*the* base period." As these subparagraphs all follow paragraph 6(a), in which eligibility is set in "a" defined and fixed base period, the later references to "the base period" should be read to refer to the base period used for eligibility under paragraph 6(a). Again, because paragraph 6(a) does not mandate that any particular base period be used (as opposed to paragraph 9 of Annex 3), "the base period" for paragraphs 6(b), (c), and (d) will be the "defined and fixed base period" used for purposes of eligibility under the decoupled income support measure. The definite article "the" is commonly used to refer back to a member of a indefinite set identified by the indefinite article "a." For example, it would be common grammatically to say: "A Member may take action if the Member makes the appropriate notification to the WTO."

135. Nowhere in paragraph 6(a) of Annex 2 or elsewhere in the Agreement on Agriculture is there a ban on Members revising their support programs or adopting new ones. Just the opposite is true. The "process of reform" and "substantial progressive reductions in agricultural support and protection" called for in the preamble to the Agreement on Agriculture clearly contemplate that Members will be revising their support programs. Brazil itself admits as much when it says that "Brazil is not arguing that Members cannot add additional commodities covered by green box domestic support, or even replace amber box domestic support by green box domestic

[164]Agriculture Agreement, Annex 3, paragraph 9 ("The fixed external reference price *shall be based on the years 1986 to 1988* and shall generally be the average f.o.b. unit value for the basic agricultural product concerned in a net exporting country and the average c.i.f. unit value for the basic agricultural product concerned in a net importing country *in the base period*.") (emphasis added). *See also id.*, Annex 3, paragraph 5 ("The AMS calculated as outlined below for *the* base period shall constitute the base level for the implementation of the reduction commitment on domestic support.") (emphasis added). Appellate Body Report, *Korea – Beef*, paras. 115-16.

support and establish a new base period for the new green box domestic support measures replacing an older non-green box measure."[165] That is, Brazil accepts that when a Member changes a program, it can change the "defined and fixed" base period that existed for a previous program. Nothing in the text of Annex 2 would limit this to a conversion from amber or blue box support to green box support, and Brazil points to no textual basis for its argument.

136. Brazil's interpretation would seemingly foreclose reform options to Members with past green box support programs, contrary to the object and purpose of the WTO Agreement as reflected in the preamble to the Agreement on Agriculture.[166] Separately, Brazil's interpretation of paragraph 6(a) would render direct payments under the 2002 Act non-green box even though in this very dispute the Panel did not find that such payments had more than minimal trade-distorting effects or effects on production.[167] That is, even though such payments had a different "defined and fixed base period" than production flexibility contract payments under the 1996 Act, such payments did satisfy "the fundamental requirement" of Annex 2.

C. Brazil's Arguments Fail to Convince

137. At one point, Brazil argues that, "to be consistent with Annex 2, paragraph 6(a), a decoupled income support measure can only have one 'fixed' base period."[168] We agree, and direct payments under the 2002 act *are* "a decoupled income support measure" with "one 'fixed' base period." Brazil has never claimed, nor does it now, that direct payments and production

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[165]Brazil's Other Appellant Submission, para. 255.

[166]In this regard, we note Brazil's misunderstanding of the use of "object and purpose" in treaty interpretation. Brazil states that "[t]he object and purpose of Annex 2, paragraph 6 of the Agreement on Agriculture is to ensure that decoupled payments 'have no, or at most minimal, trade-distorting effects or effects on production.'" Brazil's Other Appellant Submission, para. 251. Under the customary rules of interpretation of public international law, as reflected in Article 31 of the Vienna Convention, a provision of a treaty, such as paragraph 6, does not have its own "object and purpose" for purposes of treaty interpretation. Rather, the treaty itself is interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its [the treaty's] object and purpose." *Vienna Convention on the Law of Treaties*, art. 31(1).

[167]*See, e.g.*, U.S. Appellant's Submission, para. 37; Panel Report, paras. 7.1307, 7.1355.

[168]Brazil's Other Appellant Submission, para. 250.

flexibility contract payments are the *same* measure, nor could it since they are different payments made at different times, under different statutory instruments, with different recipients, base periods, base acreage, payment rates, base period commodities, payment rates, terms of contract, etc.[169] In fact, Brazil refers to these different payments as a "set of prior and later measures" and an "original measure" and "its replacement."[170] Thus, Brazil recognizes that direct payments are a "measure," and the United States has demonstrated that "[e]ligibility for such payments" is determined with reference to "a defined and fixed base period."

138. The United States also notes that the Panel did not find that direct payments and production flexibility contract payments were the same measure. Brazil misleadingly suggests that the panel found that "the eligibility criteria and recipients under the PFC and DP program were identical in many respects."[171] In fact, the Panel wrote that "[t]he fact that they are 'successor' programmes *does not tell us whether they are or are not the same income support programme* for which the base period has been changed. The Panel notes that the PFC and DP programmes share *certain structural elements*" and also "have certain differences."[172] That these payments "share certain structural elements" is unremarkable, given that they are both decoupled income support measures. The Panel did not conclude that these programs were "the same" program nor that support under these programs were the same measure. In case of interest, we

[169]*See, e.g.*, Panel Report, paras. 7.212-7.215, 7.218-7.222, 7.398-7.399
[170]Brazil's Other Appellant Submission, para. 256.
[171]Brazil's Other Appellant Submission, para. 244.
[172]Panel Report, para. 7.398-7.399 (italics added).

set out in the accompanying footnote some of the actual differences between direct payments and production flexibility contract payments.[173]

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[173]Naturally, some direct payment "structural elements" may be "similar" to elements of the production flexibility contract program as both were decoupled income support programs. Panel Report, para. 7.398. However, there are significant differences in the programs as the Panel itself notes. Panel Report, paras. 7.212-215, 7.218-222, 7.399. Each program had a separate statutory scheme, its own regulations, its own history, its own operational and eligibility criteria and terms, and each was provided for in omnibus bills covering many aspects of agricultural endeavor, some six years apart. Had one (direct payments) been a mere modification of the other (production flexibility contract payments), it would have been simple enough to amend or extend the authorities for the first. In fact, the direct payments program is a new decoupled income support measure that merely draws upon what came before. There were ten Titles to the 2002 Farm Bill – the direct payments provisions were merely a part of one Title of that legislation. *See* Exhibits Bra-27, US-1.

There are significant difference in the programs even apart for the very different time periods covered. For example, while on eligible farms the determination of who was an "eligible recipient" might have been defined in the same manner (Panel Report, para. 7.398(i)) as it might for any farm program, new crops were covered in the direct payments, and the eligibility provisions were different. A farm's direct payments base might not only be different in amount, as compared to its production flexibility contract base, but could be for a wholly different crop. For example, a farm with a corn production flexibility contract base that planted to soybeans in 1998-2001 could retain the corn base or could take a soybean base and a soybean yield for the direct payments, or could have a base for both depending on its actual history in the new base period and choices. *See* Panel Report, paras. 7.221, 7.399(i). *See also* 2002 Act, section 1101-1102 (Exhibit US-1).

That is, while the payment formulas had some similarities and could reflect historical acreages or production flexibility contract acreages (Panel Report, para. 7.398(ii)-(vi)), base and yield options for direct payments could produce very different payment amounts based on actual plantings in the new base period. Indeed, a farm without a production flexibility contract base could obtain a direct payments base if it grew soybeans or other covered crops during the 1998-2001 period. By contrast, a farm's production flexibility contract base had to be the same as that which preceded its production flexibility contract participation.

The Panel notes that the direct payments payment rates were not the same as the production flexibility contract rates. Panel Report, paras. 7.214, 7.220, 7.399(ii) and (iv). Rather, production flexibility contract payment rates varied from year to year, depending on the allocation of funds among contract commodities. Direct payment rates are fixed for the full length of the program's course, that is, through 2007, the period covered by the 2002 Act.

Land use requirements and planting flexibility provisions (Panel Report, para. 7.398(vii and viii) were also not the same. Rather, as the Panel notes, the production flexibility contract program, unlike the direct payments, was a multi-year program in that there was a one-time entry into that program. *See* Panel Report, paras. 7. 213, 7.219, 7.399(iii); *compare* 1996 Act, section 112 (Exhibit US-22) *with* 2002 Act, sections 1103 and 1105 (Exhibit US-1). Because it was a multi-year program, a production flexibility contract planting violation in one year could affect payments for several program years. The 1996 Act allowed the Secretary upon a violation to terminate all of the producer's or owner's production flexibility contract contracts and demand a refund for benefits obtained for the "period of the violation" along with the forfeit of "future contract payments." *See* 1996 Act, section 116 (Exhibit US-22); 7 CFR 1412.401(2002 ed.) (Exhibit Bra-31). There are no similar direct payment provisions. Rather, as direct payments contracts are year-to-year, a violation affects one year's payments and one contract. Thus, a direct payments participant may elect to forego payments one year without losing future payments. 2002 Act, sections 1103 and 1105 (Exhibit US-1); 7 CFR 1412.601-602(2003 ed.) (direct payments program) (Exhibit Bra-33).

Under the direct payments program, a violation of the acreage flexibility provisions relates to harvesting of fruit and vegetables. Under the production flexibility contract program, a violation occurred if non-permitted fruits and vegetables were planted. *Compare* 1996 Act, section 118 (Exhibit US-22), *with* 2002 Act, section 1106 (Exhibit US-1).

For the direct payments program, the 2002 Act statutorily mandates that a participant control noxious weeds

139. Significantly, the production flexibility contract program did not make payments for historical acreage devoted to oilseeds. The direct payments program establishes eligibility for an estimated 71.5 million acres (28.9 million hectares) historically planted to at least ten commodities not covered under the previous program: (1) peanuts, (2) soybeans, (3) sunflower seed, (4) canola, (5) rapeseed, (6) safflower, (7) flaxseed, (8) mustard seed, (9) crambe, (10) sesame seed, and (11) other oilseeds at the discretion of the U.S. Secretary of Agriculture.[174] Since no base acreage under the production flexibility contract program existed for these crops, a different base period was needed to bring those acres previously devoted to these crops within the scope of direct payments under the 2002 Act.

140. Brazil's suggested approach is to examine whether "the structure, design, and eligibility criteria have . . . significantly changed between the original measure (containing the 'fixed' base period) and its replacement."[175] There is no provision in Annex 2 or the Agreement on Agriculture that supports Brazil's approach. There is no reference in Annex 2 to a "single" base period for all direct payments, no provision on comparing whether two green box measures are "essentially the same," and no text pointing to the relevance of the "structure, design, and eligibility criteria" of two different measures. Brazil merely points to the phrases "clearly defined criteria," "in a defined and fixed base period," and "after the base period," and as explained above, these do not support its approach.

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and follow sound agricultural practices on non-cultivated base acres. This was not as such statutorily mandated for the production flexibility contract program by the 1996 Act. *Compare* 2002 Act, section 1105 (Exhibit US-1), *with* 1996 Act, section 111 (Exhibit US-22).

As to payment limits (Panel Report, para. 7.398(ix)), the direct payments provisions set a new adjusted gross income test which would deny eligibility for direct payments to persons with large quantities of non-farm income. The production flexibility contract program did not. *See* Exhibit Bra-27, at 12 (side-by-side comparison for payment limits); *compare* 2002 Act, section 1604 (setting adjusted gross income test) (Exhibit US-1) *with* 1996 Act, Section 161 *et seq.* (no comparable provision) (Exhibit US-22).

Moreover, the direct payments program was part of a new overall scheme which included counter-cyclical payments whose rates were tied to a formula which factored in the direct payment rates. Panel Report, para. 7.225; *see also* 2002 Act, section 1104 (Exhibit US-1). There was no comparable production flexibility contract provision nor program factoring in production flexibility contract payment rates.

[174]*See, e.g.*, U.S. Rebuttal Submission, para. 33 (August 22, 2003); U.S. First Written Submission, para. 60 (July 11, 2003).

[175]Brazil's Other Appellant Submission, para. 256.

141. Finally, Brazil attempts to add teeth to its critique of the U.S. interpretation by arguing that it "would lead to absurd results and render the disciplines of the provisions [of paragraph 6(a)] a nullity."[176] Brazil posits a hypothetical in which "a Member could change its legal measure every year and permit an updating of the eligibility criteria for the same producers."[177] Brazil's argument may be that a measure that would not be inconsistent with paragraph 6(a) on its face could nonetheless, as part of a series of identical measures, *de facto* constitute a single measure with a non-fixed base period. Presumably, "allow[ing] a[] Member to effectively re-link last year's production to the present year's payment"[178] would be of concern because a farmer would know that current planting decisions would determine the base for next year's payment.

142. However, the *de facto* situation and concern underlying Brazil's hypothetical is not present here. The Panel did *not* conclude that the direct payments program and production flexibility contract payments program were "the same."[179] Neither did the Panel find that producers knew what the base period would be for direct payments under the 2002 Act such that their production decisions could have been affected.[180] Further, the Panel concluded that there was no evidence that a new base period would be used in any future U.S. farm legislation and "no evidence, only speculation, as to whether producers will expect to be able to update their

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[176]Brazil's Other Appellant Submission, para. 252. Brazil then stated: "The United States argued before the Panel that Annex 2, paragraph 6(a) permits Members to continually enact new legislation and measures to create new 'fixed' 'base periods.'" *Id.* Brazil's statement is patently not true. As the allegedly supporting quote provided by Brazil immediately thereafter demonstrates, the United States simply argued that U.S. direct payments conform to paragraph 6(a) because "eligibility for direct payments is determined by criteria in a 'defined and fixed base period' in the ordinary meaning of those terms: a base period that is 'definite' and 'stationary or unchanging in relative position.'"

[177]Brazil's Other Appellant Submission, para. 253.

[178]Brazil's Other Appellant Submission, para. 254.

[179]*See* Panel Report, paras. 7.398-7.405. For further information regarding relevant differences between these payments, see U.S. Rebuttal Submission, paras. 30-35 (August 22, 2003).

[180]Brazil asserts that "the purpose of 'decoupled income support' is to break that link between production decisions and the amount of support." Brazil's Other Appellant Submission, para. 251. The United States notes that Brazil provided no evidence, and the Panel made no finding, that production decisions and the amount of support were linked through a new base period for direct payments. In fact, the Panel's determination to exclude direct payments from its price suppression analysis, Panel Report, para. 7.1307 – as opposed to those price-based measures that "stimulate production," *id.*, para. 7.1294 – suggests that no such "link" to production decisions exists.

base acres under future farm bills."[181] Indeed, there is no evidence that the United States will even provide decoupled income support after the expiry of the 2002 Act. Thus, for purposes of an inquiry into whether two measures providing decoupled income support may *de facto* constitute a single measure with a non-fixed base period, Brazil errs in asserting that "[w]hether such a system is set up on an annual basis or, as the United States did in the FSRI Act of 2002, on a six-year basis, is not material."[182] Rather, the duration of the measure and evidence that it could be projected that there would be regular updates relating to its replacement would presumably be relevant to a *de facto* analysis.

D. Conclusion

143. We recall that Brazil in fact admits that a Member could use different bases for different programs. For example, Brazil gives the example of conversion from an amber to a green box program as justifying a new base period.[183] This concession on Brazil's part undermines its whole argument. Under Brazil's interpretation of "defined and fixed base period," it should not matter that the green box domestic support measure replaces an existing amber box measure if a Member already has or had that same type of measure (for example, decoupled income support). It would seem that even Brazil recognizes that its reading could produce the unreasonable result that a Member seeking to introduce a decoupled income support measure years from now would be compelled to utilize the base period used for its first decoupled income support program after the entry into force of the WTO Agreement. Thus, Brazil accepts that when a Member changes a program, it can change the base period. Nothing in the text of Annex 2 would limit this to a conversion from amber or blue box support to green box support.

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[181]Panel Report, para. 7.405.

[182]*See* Brazil's Other Appellant Submission, para. 254.

[183]Brazil's Other Appellant Submission, para. 255 ("Brazil is not arguing that Members cannot add additional commodities covered by green box domestic support, or even replace amber box domestic support by green box domestic support and establish a new base period for the new green box domestic support measures replacing an older non-green box measure.").

144. For the foregoing reasons, the Appellate Body should reject Brazil's conditional request that the Appellate Body find that direct payments do not conform to paragraph 6(a) of Annex 2 to the *Agreement on Agriculture* on the grounds that eligibility for such payments was not determined by criteria in a fixed base period.[184]

VI. Brazil Continues to Err in Its Interpretation of Article 6.3(d) of the Subsidies Agreement, and There Is No Basis to "Complete the Analysis"

A. Introduction

145. Brazil appeals the Panel's finding that Brazil did not establish a *prima facie* case under Article 6.3(d) or Article 5(c) of the Subsidies Agreement because of Brazil's erroneous legal interpretation of the phrase "world market share" in Article 6.3(d).[185] Brazil, in effect, argues that the phrase "world market share" does not mean what it says, the share of markets comprising the world. Rather, Brazil would have the Appellate Body read Article 6.3(d) as "the world market share of *exports* [italics in original]."[186] Plainly, the words "of exports" are not in Article 6.3(d), and Brazil must supply them to find its preferred meaning.

146. The Panel correctly concluded that the phrase "world market share" did *not* mean "world market share of exports"[187] or share of "world export trade"[188] or share of "world trade."[189] Thus, as Brazil's legal arguments and supporting evidence were presented according to its erroneous reading of "world market share," the Panel did not err in finding that Brazil had failed to make a *prima facie* case of inconsistency with Articles 6.3(d) and 5(c) of the Subsidies Agreement.

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[184]Brazil's Other Appellant Submission, paras. 239, 262, 380(8).
[185]Brazil's Other Appellant Submission, para. 263.
[186]Brazil's Other Appellant Submission, para. 271.
[187]Panel Report, para. 7.1435.
[188]Panel Report, paras. 7.1439-7.1440, 7.1442.
[189]Panel Report, paras. 7.1439, 7.1441.

147. Brazil also requests that the Appellate Body complete the analysis and find that the effect of the U.S. price-based subsidies is an increase in the U.S. world market share of exports, within the meaning of Article 6.3(d) of the SCM Agreement.[190] While this portion of Brazil's appeal should not be reached because of its erroneous interpretation of "world market share," in any event, the Appellate Body would not be in a position to complete the analysis because there are insufficient factual findings or uncontroverted facts. The Panel made no analysis of causation and market share – that is, whether "the effect of the subsidy is an increase in the world market share of the subsidizing Member" within all of the terms of Article 6.3(d). Brazil only points to the Panel's flawed panel interpretation of "the effect of the subsidy" for purposes of its significant price suppression claim under Article 6.3(c), which presumably would be different, and is itself the subject of a U.S. appeal.[191]

B. The Panel Correctly Rejected Brazil's Interpretation of "World Market Share" in Article 6.3(d) as "World Market Share for Exports"

148. ***Ordinary Meaning:*** The Panel first interpreted the term "world market share" according to the ordinary meaning of its terms. The Panel found that the ordinary meaning of "market" is "a geographical area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices, that is, a locus of competition for sales of a particular commodity."[192] The Panel noted that the "ordinary meaning of 'world market' is the *global* [italics added] geographical area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices" and that there was "no foundation in the plain meaning of these terms to find that 'world market' as used in Article 6.3(d) would necessarily *not* include the domestic market of the subsidizing Member."[193] Finally, the Panel noted that the

[190]Brazil's Other Appellant Submission, paras. 296, 380(10).
[191]U.S. Appellant Submission, paras. 125-231.
[192]Panel Report, para. 7.1429.
[193]Panel Report, paras. 7.1431-7.1432.

"ordinary meaning of the word 'share' is 'a: a portion belonging to, due to, or contributed by an individual or group; b: one's full or fair portion."[194]

149. Putting the ordinary meaning of the terms "world market share" together (along with the following phrase in Article 6.3(d), "of the subsidizing Member"), the Panel concluded: "Thus, we need to examine the portion of the world market that is satisfied by the subsidizing Member's producers."[195] The United States agrees that this reflects the ordinary meaning of the terms. The Panel then continued that a plain reading of these terms "calls for an examination of the portion of the world's supply that is satisfied by the subsidizing Member's producers."[196] The United States does not fully agree with this suggestion as it deviates somewhat from the ordinary meaning of the terms as presented by the Panel.

150. Specifically, "the portion of the world *market* that is satisfied by the subsidizing Member's producers" is not necessarily the same as "the portion of the world's *supply* that is satisfied by the subsidizing Member's producers" since a "market" is (as the Panel correctly noted) a "geographical area of economic activity in which *buyers and sellers* come together and the forces of *supply and demand* affect prices."[197] By focusing on the portion of the world's "supply" satisfied by certain "producers," the Panel appears to ignore the complementary role in a market of "buyers" setting "demand." Thus, to reflect the ordinary meaning of the term "market," the Panel should have looked at where "the forces of supply and demand" meet, that is, the level of world sales or consumption of cotton, rather than simply the level of world supply.

151. It may be that the Panel was suggesting that "the portion of the world's *supply* that is satisfied by the subsidizing Member's producers" could serve as an approximation of the portion of the world's *sales (or consumption)* that is satisfied by the subsidizing Member's producers

[194]Panel Report, para. 7.1433.
[195]Panel Report, para. 7.1434.
[196]Panel Report, para. 7.1434.
[197]Panel Report, para. 7.1429 (italics added).

since producers grow cotton to make sales. One would expect that the world's supply would correlate with the world's sales or consumption over time. In fact, the Panel Report demonstrates that the share of world supply (production) and the share of world consumption satisfied by U.S. cotton producers have both remained largely stable over the period in question at similar levels.

	MY1995	MY1996	MY1997	MY1998	MY1999	MY2000	MY2001	MY2002
U.S. cotton's share of world consumption[198]	21.3	20.4	21.6	17.4	18.6	16.9	19.8	19.6
U.S. cotton's share of world production[199]	--	--	--	--	19.2	19.3	20.6	19.6

Thus, the Panel should have interpreted "world market share of the subsidizing Member" as the portion of the world's *sales (or consumption)* that is satisfied by the subsidizing Member's producers. The data reveal that there was no increase in U.S. world market share over a period when subsidies have been granted; in fact, the data demonstrate that U.S. world market share had, if anything, decreased. However, Brazil did not put forward a correct legal interpretation of "world market share," nor did Brazil bring forward necessary supporting evidence, and the Panel would not have been free to make Brazil's case for it.[200]

152. Brazil suggests that "world market share" means "world market share of export trade,"[201] but it is notable that Brazil does not cite to any ordinary meaning of "market" that would limit its scope to "export trade."[202] If Members had intended "market" to be so limited, one would have

[198]Panel Report, para. 7.1465 n. 1534.

[199]Panel Report, para. 7.1282.

[200]*See* Appellate Body Report, *Japan – Agricultural Products*, paras. 123-130 ("A panel is entitled to seek information and advice from experts and from any other relevant source it chooses, pursuant to Article 13 of the DSU . . . to help it understand and evaluate the evidence submitted and the arguments made by the parties, but not to make the case for a complaining party.").

[201]Brazil's Other Appellant Submission, para. 274.

[202]In this regard, we note Brazil's grossly misleading assertion that "[a]s a factual matter, the Panel found that the United States, the European Communities and Canada *use the term 'world market share' to mean the 'world market share of exports*.'" Brazil's Other Appellant Submission, para. 275 (italics added). The Panel found no such thing. The Panel noted that Brazil's "evidence indicates that some WTO Members, including the United States itself, *sometimes* utilize the phrase 'world market share' *when referring, in the context of world agricultural trade,*

expected the term in Article 6.3(d) to be "world export share." The use of the term "market" suggests that, as the Panel found, Members intended a meaning broader than the share of "exports" or "trade."

153. ***Context:*** The Panel also correctly noted that the context of Article 6.3(d) supported its view that Brazil's interpretation of "world market share" as "world market share of exports" was untenable. The Panel noted that "Brazil would have us read the terms 'world market share' in Article 6.3(d) to be synonymous with the phrases 'world export trade' [in GATT 1994 Article XVI:3] or the share of a Member's exports in world trade [in Article 27.6 of the Subsidies Agreement]."[203] The Panel concluded that the use of the phrase "world market share" *as opposed to* the different formulations found in GATT 1994 Article XVI:3 or Article 27.6 of the Subsidies Agreement suggested that Members had not meant to restrict "world market share" in Article 6.3(d) to a Member's share of "world export trade" or "world trade." The United States agrees that this context supports the interpretation of Article 6.3(d) according to the ordinary meaning of its terms, as explained above.

C. Brazil's Arguments Relating to the Text and Context of Article 6.3(d) Do Not Support Its Interpretation

154. ***The text of footnote 17 of Article 6.3(d):*** Against the Panel's reading of the text of Article 6.3(d) in its context, Brazil brings forward two principal sets of arguments. First, it argues that footnote 17 of Article 6.3(d), which follows the phrase "the effect of the subsidy is an increase in the world market share of a subsidizing Member in a particular subsidized primary

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including world trade of upland cotton, to the proportional share of a Member's exports in relation to world exports." Panel Report, para. 7.1444 (italics added). The Panel went on to say: "However, we do not view this evidence as determinative for the interpretation of the phrase 'world market share' in Article 6.3(d) of the *SCM Agreement.* It is not a formal interpretative tool within the meaning of Articles 31 or 32 of the *Vienna Convention*, much less a universally agreed interpretation among WTO Members within the meaning of the *WTO Agreement*." Panel Report, para. 7.1445. Brazil has pointed to *no instance* in which the United States has ever suggested that "world market share" in Article 6.3(d) means "world export share."

[203]Panel Report, para. 7.1439.

product or commodity[17]," suggests that "world market share" must be read as "world market share of trade."

155. Footnote 17 reads: "Unless other multilaterally agreed specific rules apply to the trade in the product or commodity in question." By its own terms, however, footnote 17 does *not* purport to define the term "world market share" nor limit its scope to the share of "trade." Furthermore, it is not the case, as Brazil appears to suggest, that footnote 17 would only make sense if the phrase "world market share" were concerned with the share of world exports or share of world trade. Rather, "other multilaterally agreed specific rules" applying to trade in a product *could* impact a Member's world market share since trade (or restrictions on trade) would likely impact production and consumption patterns and levels. Thus, where such rules on trade apply, Members have agreed that the disciplines of Article 6.3(d) should not be applied.

156. We also note that it is logical that the exception in footnote 17 applies only to "trade" because "multilaterally agreed specific rules" would be unlikely to apply exclusively to domestic consumption. However, the use of the world "trade" in the *footnote* to Article 6.3(d) but *not* in the text of the Article itself suggests that "world market share" does not merely encompass shares in world "trade."

157. ***Context in GATT 1994 Article XVI:3 and Subsidies Agreement Article 6.3:*** Second, Brazil points to context in GATT 1994 Article XVI:3 and Article 6.3 of the Subsidies Agreement. With respect to GATT 1994 Article XVI:3, Brazil merely asserts that, "[i]n this case, the fact that Article 6.3(d) uses the term 'market,' whereas Article XVI:3 of the GATT 1994 uses the term "export trade," has no impact on this interpretation. In the particular context of Article 6.3(d), both "world market share" of trade and "export trade" describe the same factual circumstances."[204] However, Brazil fails to deal with the simple fact that the ordinary meaning of "market" is not the same as the meaning of "export trade." In fact, we note that, in arguing that

[204]Brazil's Other Appellant Submission, para. 279.

"[i]n the particular context of Article 6.3(d), both 'world market share' *of trade* and 'export trade' describe the same factual circumstances," Brazil has to insert the words "of trade" after "world market share" in order to convey its preferred meaning. This highlights the fact that the ordinary meaning of "world market share" does not mean world "export trade." Thus, Brazil's interpretation would ignore the customary rules of interpretation of public international law.[205]

158. Brazil also argues that Articles 6.3(a) and (b) (and Article 6.4 and 6.7, which develop "displacement or impeding of exports" further) deal with "aggregated volume effects" of subsidies on the trade of the complaining Member and that "the term 'markets,' in the context of the subparagraphs dealing with volume effects, focuses on the *exports* of the complaining Member in relation to the subsidized product."[206] There is no question that Articles 6.3(a) and (b) deal with the effect of subsidies on exports of the non-subsidizing Member *because these provisions explicitly say so*. That is, Article 6.3(a) reads "the effect of the subsidy is to displace or impede *the imports of a like product of another Member* into the market of the subsidizing Member"; Article 6.3(b) reads "the effect of the subsidy is to displace or impede *the exports of a like product of another Member* from a third country market."

159. In contrast, Article 6.3(d) does *not* identify the exports (or imports) of the non-subsidizing Member as germane to its test, nor exports (or imports) generally. The focus is on the "world market share of the subsidizing Member," which in its ordinary meaning is not limited to "exports" or "imports." Thus, neither the context in Article 6.3 of the Subsidies Agreement nor the context in GATT 1994 Article XVI:3 supports Brazil's interpretation of "world market share" as the share of "world export trade."

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[205]*See, e.g.*, Panel Report, para. 7.1442 ("Rather, the Uruguay Round negotiators used different words in Article 6.3(d) of the *SCM Agreement*. We attribute meaning to the fact that the negotiators used such different words. It is not our task to read into the text obligations which do not exist or concepts which are not there. We therefore cannot read the terms 'world market share' in Article 6.3(d) as referring to a Member's share of 'world export trade'.").

[206]*See, e.g.*, Brazil's Other Appellant Submission, paras. 281-285, 288.

D. Conclusion on "World Market Share"

160. Brazil raises the specter that "the Panel's interpretation of the phrase 'world market share' in Article 6.3(d) leaves it a hollow, *inutile* shell. Non-subsidized exporting Members competing in agricultural commodity markets struggle to maintain or gain market share in the world market for *exports*."[207] Brazil's concern is misplaced, and its own interpretation unduly limits the scope of Article 6.3(d).

161. The Panel's interpretation of "world market share" does not render Article 6.3(d) *inutile*. Article 6.3(d) applies where the effect of a subsidy is to increase a Member's share of the world market for a particular subsidized primary product or commodity and the other conditions of Article 6.3(d) are met. Thus, Article 6.3(d) has a broader geographic scope than Article 6.3(a), which is concerned solely with imports of a Member's products into the subsidizing Member's market; Article 6.3(b), which is concerned solely with imports of a Member's products into a third-country market; or Article 6.3(c), which is concerned with price effects or lost sales in a particular market in which subsidized and non-subsidized products compete. Article 6.3(d), by contrast, looks to changes in the subsidizing Member's share of markets comprising the world, even if a non-subsidizing Member's products are not competing in any particular market with the subsidizing Member's products. A correct reading of Article 6.3(d) does not render that provision *inutile*; it gives that provision the effect it was intended to have and allows a Member, in effect, to defend the export interests of its producers and exporters by opening export *opportunities*, even when its products are not competing in a particular market in which the subsidized product is found.

162. For the foregoing reasons, the United States requests the Appellate Body to reject Brazil's request that it find that "the ordinary meaning of the phrase 'world market share' of the subsidizing Member [in Article 6.3(d) of the Subsidies Agreement] refers to 'world market share

[207]Brazil's Other Appellant Submission, para. 266.

of *exports.*'"[208] Consequently, the United States also requests the Appellate Body to reject Brazil's contingent request that the Appellate Body complete the analysis and find that "the effect of U.S. price-based subsidies is an increase in the U.S. world market share of exports, within the meaning of Article 6.3(d) of the *SCM Agreement*, thereby constituting serious prejudice to the interests of Brazil, within the meaning of Article 5(c) of the *SCM Agreement*."[209]

E. There is No Basis to Complete the Analysis on Brazil's Article 6.3(d) Claim

163. Brazil also requests that the Appellate Body complete the analysis and find that the effect of the U.S. price-based subsidies is an increase in the U.S. world market share of exports, within the meaning of Article 6.3(d) of the SCM Agreement.[210] For the reasons set out above, this portion of Brazil's appeal should not be reached because of its erroneous interpretation of "world market share." In any event, however, the Appellate Body would not be in a position to complete the analysis because there are insufficient panel factual findings or uncontroverted facts to make a finding on this claim.

164. As Brazil recognizes, the Panel made no analysis of causation and market share for purposes of Article 6.3(d).[211] Thus, the Panel has made no findings whether "the effect of the subsidy is an increase in the world market share of the subsidizing Member" within the meaning of that provision. Brazil only points to the Panel's flawed panel interpretation of "the effect of the subsidy" for purposes of its significant price suppression claim under Article 6.3(c). The causation analysis as it relates to "world market share" would presumably be different – for example, the Panel would have needed to look at other factors affecting market share particularly, such as weather, harvests in other countries, changes in demand, etc., beyond those

[208]Brazil's Other Appellant Submission, para. 380(9) (italics in original).
[209]Brazil's Other Appellant Submission, para. 380(10).
[210]Brazil's Other Appellant Submission, paras. 296, 380(10).
[211]*See* Brazil's Other Appellant Submission, paras. 303-304.

factors that it considered for its price suppression analysis.[212] The United States also notes that it has appealed the causation finding with respect to Article 6.3(c) and set out in detail the legal and logical errors committed by the Panel in making this finding.[213]

165. In sum, the Appellate Body would not be in a position to complete the analysis under Brazil's Article 6.3(d) claim because there are insufficient panel factual findings or uncontroverted facts to establish that "the effect of the subsidy is an increase in the world market share of the subsidizing Member" satisfying the conditions of that provision. Thus, the United States requests the Appellate Body to reject Brazil's appeal that the effect of the U.S. price-based subsidies is an increase in the U.S. world market share of exports, within the meaning of Article 6.3(d) of the SCM Agreement, thereby constituting serious prejudice to the interests of Brazil, within the meaning of Article 5(c) of the Subsidies Agreement.

VII. The Appellate Body Should Reject Brazil's Appeal As Brazil Continues to Err in Its Interpretation of the Second Sentence of Article XVI:3 of GATT 1994

A. Introduction

166. Brazil requests the Appellate Body to find that the Panel erred in concluding that Article XVI:3 of the GATT 1994 applies solely to export subsidies as defined in the Agreement on Agriculture and the Subsidies Agreement.[214] The Panel was correct and its finding should be affirmed. Because Brazil errs in asserting that Article XVI:3 applies to subsidies that are not export subsidies, including the price-based domestic support it challenges, the Appellate Body should also reject Brazil's appeal that U.S. price-based subsidies are applied in a manner that

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[212]*See, e.g.,* Brazil's Other Appellant Submission, paras. 308-09 (recognizing possibility that the U.S. argument relating to "the decline of the U.S. textile industry" as the key factor leading to "the fact that the United States exports more upland cotton and re-imports it in the form of finished textile imports" could be "more relevant in the context of Brazil's claim under Article 6.3(d)" than it was "in the context of Brazil's 'significant price suppression' claim").

[213]U.S. Appellant Submission, paras. 125-231.

[214]Brazil's Other Appellant Submission, paras. 316, 380(11).

results in the United States having more than an equitable share of world export trade in upland cotton.[215] Even were Brazil's interpretation of Article XVI:3 correct, it still would not have demonstrated a breach of Article XVI:3 because Brazil did not establish causation (that the subsidy "operates to increase the export" and "results in" a more than equitable share within the meaning of Article XVI:3) and has offered no tenable standard for determining what is a "more than equitable share" of world export trade.

B. The Panel Correctly Found that GATT 1994 Article XVI:3 Applies Only to Export Subsidies

167. The Panel began its evaluation by noting that Article XVI of the GATT 1994 consists of two parts. Part A, which comprises solely paragraph 1, is entitled "Subsidies in General." Part B, which comprises paragraphs 2 through 5, is entitled "Additional Provisions on *Export Subsidies*." Thus, Members agreed that Article XVI:3 is a "[p]rovision[] on [e]xport [s]ubsidies."[216]

168. The Panel noted that the term "export subsidy" is now defined in the Agreement on Agriculture and the Subsidies Agreement as a subsidy contingent on export and that these Agreements, together with the GATT 1994, were agreed at the same time as part of a package of rights and obligations. The Panel concluded that "[t]his reading of the text of Article XVI:3 of the *GATT 1994*, in its context, supports a conclusion that Article XVI:3 applies only to 'export subsidies' as that term is currently understood in the *WTO Agreement*."[217]

169. The Panel's interpretation finds confirmation in the provisions defining and illustrating export subsidies in the Subsidies Agreement. Article 3.1(a) of the Subsidies Agreement prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon

[215]Brazil's Other Appellant Submission, paras. 318, 380(12).
[216]Panel Report, para. 7.998.
[217]Panel Report, para. 7.1006.

export performance, including those illustrated in Annex I [footnotes omitted]." Item (l) of the Illustrative List of Export Subsidies (Annex I of the Subsidies Agreement) reads: "Any other charge on the public account constituting an export subsidy in the sense of Article XVI of GATT 1994." The only use of the term "export subsidy" in Article XVI occurs in the title to Part B, "Additional Provisions on Export Subsidies." Thus, "an export subsidy in the sense of Article XVI of GATT 1994" would include all of those subsidies identified in Part B, including those in the second sentence of Article XVI:3. Such "export subsidies" are, by virtue of item (l), export subsidies ("subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance") for purposes of the Subsidies Agreement. Thus, these provisions support the Panel's conclusion that "Article XVI:3 applies only to 'export subsidies' as that term is currently understood in the *WTO Agreement*."[218]

170. The Panel further noted that the drafting history of the Agreements, in particular, the relevant provisions of the Tokyo Round Subsidies Code,[219] supported its interpretation. The Panel noted that the "relevant provisions of the *Tokyo Round Subsidies Code* clearly distinguished between export and other subsidies." Article 8 established the distinction, "with Article 8.2 referring to 'export subsidies' and Articles 8.3(c) and 8.4 dealing with 'serious prejudice' in the sense of Article XVI:1" through the "use of any subsidy." Article 9 carried forward this distinction by dealing "with 'export subsidies on products other than certain primary products', with Article 9.1 providing: 'Signatories shall not grant export subsidies on products other than certain primary products'."[220]

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[218]Thus, the Panel misspeaks slightly when it writes: [O]ther than the common reference to "export subsidies" found in all of the three relevant texts (i.e. (i) Article XVI:3; (ii) the export subsidies provisions of the *Agreement on Agriculture*; and (iii) Article 3.1(a) of the *SCM Agreement*) there is no further explicit textual linkage or cross-reference between any relevant provision of the *Agreement on Agriculture*, any provision of the *SCM Agreement* - including Articles 3, 5 and 6 (in particular, Article 6.3(d)) - and Article XVI:3 of the *GATT 1994* that would compel us to find any other scope of application for the obligation contained in Article XVI:3 of the *GATT 1994*." Panel Report, para. 7.1012. To the contrary, item (l) of the Illustrative List provides an "explicit textual linkage or cross-reference" between export subsidies for purposes of the Subsidies Agreement and export subsidies for purposes of Article XVI of the GATT 1994.

[219]*Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade* ("Subsidies Code").

[220]Panel Report, paras. 7.1007-7.1008.

171. Importantly, the Panel noted that "Article 10 dealt with 'export subsidies on certain primary products'" and provided: "*In accordance with the provisions of Article XVI:3 of the General Agreement*, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product . . . ."[221] The Panel concluded that "[t]his suggests that the drafters of the *Tokyo Round Subsidies Code* considered that the export subsidies in Article 10 of the *Tokyo Round Subsidies Code* were those subject to Article XVI:3 of the *GATT 1994*."[222] We recall that both the United States and Brazil were signatories to the Tokyo Round Subsidies Code and thus expressed their shared understanding that the measures subject to Article XVI:3 of the GATT 1994 were limited to "any export subsidy on certain primary products."[223]

172. That is, in the Tokyo Round Subsidies Code the United States and Brazil expressed their shared understanding that "any form of subsidy which operates to increase the export" means "any export subsidy." This is strikingly evident comparing the substantially identical text of the two provisions:

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[221]Panel Report, para. 7.1008 (italics in original).

[222]Panel Report, para. 7.1009. The Panel also considered Article 11 of the Subsidies Code, which dealt with "subsidies other than export subsidies." The Panel concluded: "Read together with Article 10, this provision similarly suggests that the drafters of the *Tokyo Round Subsidies Code* distinguished between the export subsidies referred to in Article XVI:3 of the *GATT 1994* and other subsidies. The drafters indicated in Articles 9 and 10 that export subsidies were subject to certain disciplines, while subsidies other than export subsidies were subject to other disciplines and could form the main basis for a serious prejudice claim. This confirms our view of the distinction between export subsidies and other (actionable) subsidies maintained in the current text of the *SCM Agreement*." Panel Report, para. 7.1011 (footnote omitted).

[223]We also note the additional context provided by paragraphs 2 and 3 of Article 10 of the Subsidies Code. Article 10.2(a) states that, "*[f]or purposes of Article XVI:3 of the General Agreement and paragraph 1* above . . . 'more than an equitable share of world export trade' shall include any case in which the effect of an *export subsidy* granted by a signatory is to displace or impede the exports of another signatory bearing in mind the developments on world markets [italics added]." Similarly, Article 10.3 states that "[s]ignatories further agree not to grant *export subsidies* on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market [italics added]."

> • GATT 1994 Article XVI:3: "If, however, a contracting party grants directly or indirectly *any form of subsidy which operates to increase the export* of any primary product from its territory, product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product [italics added]"
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> • Subsidies Code, Article 10: "In accordance with the provisions of Article XVI:3 of the General Agreement, signatories agree not to grant directly or indirectly *any export subsidy* on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares of the signatories in trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product.

The two texts are substantially identical, except that Article 10 of the Subsides Code replaces the phrase "any form of subsidy which operates to increase the export" in Article XVI:3 with "any export subsidy." Article 10 also indicates the view of the signatories that this is "[i]n accordance with the provisions of Article XVI:3 of the General Agreement." Thus, the Subsidies Code, to which both Brazil and the United States subscribed, supports the Panel's view that Article XVI:3 is concerned with certain export subsidies on primary products.[224]

[224]We also note that the term "export subsidies" used in Subsidies Code Article 10 is also used in Article 9 on "export subsidies on products other than certain primary products." Article 9.2 states that the "practices listed in points (a) through (l) in the Annex are illustrative of export subsidies." Point (l) of that "Illustrative List of Export Subsidies" reads: "Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement." This is the same cross-reference one finds today in item (l) of the current Illustrative List, and again confirms that "any form of subsidy which operates to increase the export" means "export subsidy."

173. Brazil asserts that the Panel limited its interpretation of the second sentence to the words "subsidy which operates to increase the export of any primary product," to the exclusion of the preceding phrase "any form of," solely on the basis the Panel italicized the former words but not the latter.[225] However, there is no indication that the Panel did not consider the words "any form of" since the Panel twice quoted the entire phrase "any form of subsidy which operates to increase the export of any primary product."[226] Curiously, Brazil itself does not interpret all of the words in this phrase, instead interpreting the phrase "any form of subsidy" separately from the succeeding words "which operates to increase the export of any primary product."[227]

174. While, in its ordinary meaning, "any form of subsidy" would mean "every subsidy,"[228] at issue is only "every subsidy" "which operates to increase the export of any primary product." Brazil suggests that the phrase "any form of subsidy" does not establish "any *a priori* limitations on the type of subsidies that are subject to discipline" and further argues that the phrase "directly or indirectly" indicates that "any subsidy that a Member may grant is subject to its disciplines."[229] The error in Brazil's interpretation is evident in comparing the text of Article XVI:1 with Article XVI:3.

175. Article XVI:1 reads:

> • "If any contracting party grants or maintains any subsidy, including any form of income or price support, *which operates directly or indirectly to increase exports* of any primary product from, or to reduce imports of any product into, its territory . . . [italics added]."

Article XVI:3 reads:

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[225]Brazil's Other Appellant Submission, paras. 325-326.
[226]Panel Report, paras. 7.996, 7.1000.
[227]Brazil's Other Appellant Submission, paras. 326, 328.
[228]*See* Brazil's Other Appellant Submission, para. 326 (quoting definitions).
[229]Brazil's Other Appellant Submission, paras. 326-327.

> • "If, however, a contracting party *grants directly or indirectly* any form of subsidy *which operates to increase the export* of any primary product from its territory . . . [italics added]."

176. Brazil would apparently read these provisions as having an identical meaning since it understands the scope of Article XVI:3 to reach "any subsidy that a Member may grant" which has the effect of "increasing exports" (that is, "export-enhancing subsidies").[230] However, the provisions are not identical.

> • Article XVI:1 as drafted has a broader reach since it concerns subsidies "which operate[] directly or indirectly to increase exports . . *or reduce imports*." These subsidies would not be confined to subsidies operating directly to affect trade.[231] Furthermore, Article XVI:1 has a broader reach because it also applies to subsidies operating to reduce imports.
>
> • Article XVI:3, however, does not use the phrase "directly or indirectly" to explain the way in which the subsidy "operates to increase the export"; rather, "directly or indirectly" modifies the *grant* of the subsidy. Article XVI:3 also would not reach subsidies affecting imports.

177. GATT 1994 Article XVI:3 was added through the 1955 Protocol Amending the Preamble and Parts II and III of the General Agreement. The text of Article XVI:1 was before the drafters as they developed the language of Article XVI:3, yet Members chose to use different words.

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[230]Brazil's Other Appellant Submission, paras. 327-328.

[231]*See* WTO, *GATT Analytical Index*, at 448 (1995 ed.) ("The New York Report notes, with regard to the draft Charter provision corresponding to Article XVI:1, "It will be observed that the provision in this sentence as now drafted applies to cases in which the subsidy operates, 'directly or indirectly', to increase exports or reduce imports of any product and can thus not be interpreted as being confined to subsidies operating directly to affect trade in the product under consideration'.") (citing New York Report, p. 26).

What is more, the drafters *also* deviated from the text of Article 28 of the Havana Charter, which formed the basis for GATT 1994 Article XVI:3.[232] Article 28:1 of the Havana Charter stated:

> • "Any Member granting any form of subsidy, *which operates directly or indirectly to maintain or increase the export* of any primary commodity from its territory, shall not apply the subsidy in such a way as to have the effect of maintaining or acquiring for that Member more than an equitable share of world trade in that commodity [italics added]."[233]

As with Article XVI:1 of the GATT 1994, Article 28:1 of the Havana Charter was drafted to capture any form of subsidy "which *operates directly or indirectly* to maintain or increase the export." In contrast, Article XVI:3 as agreed by Members only reaches any form of subsidy "which *operates* to increase the export." Brazil's interpretation of Article XVI:3 assigns no meaning to the deletion of "directly or indirectly" from the phrase "operates to increase the export." Thus, the text of Article XVI:3, the context provided by Article XVI:1, and the drafting history revealed by Article 28:1 of the Havana Charter all point to the narrower scope of Article XVI:3.

178. Brazil concludes that "the context of the second sentence of Article XVI:3 supports what could already have been discerned from the ordinary meaning of that provision: it contains disciplines on the use of 'any form of subsidy which operates to increase the export of a primary product,' i.e., any export-enhancing subsidy."[234] However, on Brazil's interpretation, the disciplines contained in Article XVI:1 would *also* apply to "any export-enhancing subsidy," i.e., "any subsidy, including any form of income or price support, which operates directly or indirectly

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[232]*See* WTO, *GATT Analytical Index*, at 467 (1995 ed.) ("At the Review Session in 1954-55, various proposals were made for amendment to Article XVI, including conforming the text to Article 25 of the Charter, and incorporating the text of Articles 26, 27 and 28 into the GATT. . . . Paragraph 3 of Article XVI was based on paragraphs 1 and 4 of Article 28.") (footnote omitted).

[233]*See* WTO, *GATT Analytical Index*, at 466 (1995 ed.).

[234]Brazil's Other Appellant Submission, para. 338.

to increase exports of any primary product." If both Article XVI:1 and Article XVI:3 apply to "any export-enhancing subsidy," why would the former be found in Part A on "Subsidies in General" while the latter is found in Part B on "Additional Provisions on Export Subsidies"? Brazil's interpretation not only misreads the plain text of these provisions, it fails to make sense of the structure of Article XVI.

179. Brazil also presents a lengthy argument relating to whether Article XVI:3 of the GATT 1994 remains applicable despite the subsidy provisions of the Subsidies Agreement and the Agreement on Agriculture, the principle of effectiveness in the interpretation of treaties, presumptions against conflicts, and whether the subsidies provisions in the WTO Agreements are in conflict or can be read harmoniously.[235] We do not accept that the second sentence of Article XVI:3 of the GATT 1994 is deprived of effect by the Panel's interpretation; it is merely given the effect that Members agreed when the provision is read according to the ordinary meaning of its terms in their context and in light of the object and purpose of the WTO Agreement (as explained above). In this regard, we simply note that – putting aside Brazil's belief that the Panel erred in its legal interpretation – it is not clear how Brazil believes Article XVI:3would be deprived of effect, nor how this follows from the Panel Report, which is not cited at all in this section of Brazil's submission.[236]

180. For all these reasons, the United States requests the Appellate Body to reject Brazil's request that it find that the Panel erred in concluding that Article XVI:3 of the GATT 1994 applies solely to export subsidies as defined in the Agreement on Agriculture and the Subsidies Agreement and reject Brazil's request that it find that Article XVI:3 applies to any form of subsidy.

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[235]Brazil's Other Appellant Submission, paras. 344-369.
[236]*See* Brazil's Other Appellant Submission, paras. 344-369.

C. The Appellate Body Should Reject Brazil's Appeal that U.S. Price-Based Subsidies Are Applied in a Manner That Results in the United States Having More Than an Equitable Share of World Export Trade in Upland Cotton

181. Because Brazil errs in asserting that GATT 1994 Article XVI:3 applies to subsidies that are not export subsidies, including the price-based domestic support it challenges, the Appellate Body should also reject Brazil's appeal that U.S. price-based domestic support measures are applied in a manner that results in the United States having more than an equitable share of world export trade in upland cotton.[237] That is, since Article XVI:3 is directed to export subsidies (and not, as in Article XVI:1, "any subsidy . . . which operates directly or indirectly to increase exports"), Brazil cannot make a claim under Article XVI:3 to challenge price-based domestic support measures.

182. Even were Brazil's interpretation of Article XVI:3 correct, however, Brazil still would not have demonstrated a breach of Article XVI:3. *First*, with respect to whether the subsidy "operates to increase the export" and "results in" a more than equitable share, Brazil is simply trying to skip over the real factual issues involved in a causation analysis. Brazil refers to the Panel's findings on the "nature" of the price-contingent measures at issue for purposes of Brazil's significant price suppression claim under Article 6.3(c).[238] The Panel did not make any findings on causation relative to trade share, which is a different analysis than price suppression. For example, the Panel would have needed to look at other factors affecting trade share, such as weather, harvests in other countries, changes in demand, etc., beyond those factors that it considered for its price suppression analysis. Further, the United States has appealed the Panel's finding of significant price suppression, including its finding of "the effect of" these payments.[239] Given the legal and logical errors detailed in the U.S. submission, the Panel's analysis of "the effect of" these payments in the context of Brazil's significant price suppression claim does not

[237]Brazil's Other Appellant Submission, para. 370.
[238]Brazil's Other Appellant Submission, para. 372 n. 398.
[239]*See, e.g.*, U.S. Appellant Submission, paras. 151-226 (October 28, 2004).

support a finding that U.S. price-contingent payments "operate[] to increase the export" and "results in" a more than equitable share within the meaning of GATT 1994 Article XVI:3.

183. *Second*, Brazil has suggested no tenable standard for determining what is a "more than equitable share" of world export trade. While it is unclear exactly what Brazil proposes is "more than an equitable share," the only standard we can infer from Brazil's submission is a share that is more than what would prevail in the absence of the challenged subsidies:

> • "[T]he ordinary meaning of 'equitable' is 'characterized by equity or fairness; fair, just.' While the GATT panel in *EC - Sugar Exports II (Brazil)* noted that there is no definition for 'equitable share,' it emphasized that a panel should look for 'any causal relationship' between an increase in exports and the subsidies provided.

Thus, Brazil is apparently suggesting that "any causal relationship between an increase in exports and the subsidies provided" would suffice to find that a subsidy had been applied in a manner resulting in more than an equitable share of world export trade.

184. This standard is inadequate. First, it would read the phrase "more than an equitable share" completely out of Article XVI:3. This provision addresses "any form of subsidy which operates to increase the export"; thus, it presupposes a "causal relationship between an increase in exports and the subsidies provided." If this latter phrase were the standard, there would have been no need to include the further condition of a subsidy resulting in a "more than an equitable share of world export trade." Brazil's interpretation would render the "more than an equitable share" language *inutile*, inconsistent with the principle that a treaty should not be interpreted in such a manner that whole clauses or paragraphs of the treaty would be reduced to redundancy or inutility.[240]

[240]*See* Appellate Body Report, *U.S. - CDSOA*, para. 271, and Appellate Body Report, *Korea - Dairy*, para. 80.

185. Second, because Brazil argues that any subsidy that enhances exports would come within the scope of Article XVI:3, and any expansion in exports would result in a Member having a "more than an equitable share," Brazil's interpretation would transform GATT 1994 Article XVI:3 into an outright prohibition on export-enhancing subsidies. Indeed, to provide the meaning Brazil ascribes to it, Article XVI:3 would have to read "a contracting party shall not grant any form of subsidy which operates directly or indirectly to increase the export of any primary product from its territory."[241] This is not, however, what the text says. Article XVI:3 only disciplines the *application* of export subsidies on primary products in a particular circumstance (such subsidies "shall not be applied in a manner" which results in a Member's having a more than equitable share of world export trade) but does not prohibit the grant of such export subsidies altogether.[242] Brazil's interpretation that Article XVI:3 prohibits any subsidy with export-enhancing effects would put Article XVI:3 in conflict with Article XVI:1 and Subsidies Agreement Articles 5 and 6, which only discipline the use of "any subsidy" if they cause certain "adverse effects," such as "serious prejudice."

186. Brazil has put forward no credible standard for determining what is a "more than an equitable share" of world export trade. Its suggestion that "any causal relationship between an increase in exports and the subsidies provided" would suffice simply reads the "more than an equitable share" phrase out of GATT 1994 Article XVI:3. Thus, the Appellate Body should reject Brazil's appeal that U.S. price-based domestic support measures "caused the United States to have a more than equitable share of world export trade, in violation of Article XVI:3 of the GATT 1994."[243]

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[241]We move "directly or indirectly" to modify "operates" to reflect the broader range of measures which Brazil believes come within the scope of Article XVI:3.

[242]This stands in contrast, for example, to the prohibition ("[e]xcept as provided in the Agreement on Agriculture") on export subsidies in Article 3 of the Subsidies Agreement.

[243]Brazil's Other Appellant Submission, paras. 379, 380(12).

187. In closing, the United States recalls its arguments to the Panel that the inherent difficulties in finding any objective meaning in the "more than equitable share" language of GATT 1994 Article XVI:3 were well understood by Members as a result of a series of GATT panels that stated that the concept was not capable of application.[244] This frustration provided a large part of the impetus to strengthen and make more operational subsidies disciplines through the negotiation of the WTO Subsidies Agreement. Specifically, Article 3 extended a general prohibition on export subsidies for all products, whether agricultural or manufactured, and Article 6.3(d) provided a new discipline specifically on primary agricultural products not dependent on notions of "equity." The Panel correctly resisted Brazil's invitation to misinterpret GATT 1994 Article XVI:3 as applying to all subsidies for agricultural products, rather than export subsidies, which would diminish the clarification of obligations on agricultural subsidies achieved in the Uruguay Round. We request the Appellate Body to similarly reject Brazil's flawed arguments.

VIII. Conclusion

188. For the reasons set out above, the United States asks the Appellate Body to reject Brazil's requests[245] to:

> (1) find that the Panel erred in its interpretation and application of Articles 1.1 and 3.1(a) of the SCM Agreement, and Article 3.7 of the DSU, in exercising false judicial economy in making its findings in paragraph 6.31 of the Panel Report;
>
> (2) find that, upon completing the analysis, the ECG programs constitute export subsidies, within the meaning of Articles 1.1 and 3.1(a) of the SCM Agreement;

[244] *See, e.g.*, U.S. Answer to Panel Question 186, paras. 129-133 (October 27, 2003); U.S. Further Submission, paras. 108-109 (September 30, 2003).

[245] *See, e.g.*, Brazil's Other Appellant Submission, para. 380.

(3) find that the Panel erred in concluding, in paragraphs 7.896 and 8.1(d)(ii) of the Panel Report, that ECG export subsidies are not applied in a manner that threatens to lead to circumvention of the United States' export subsidy commitments for certain "unsupported" unscheduled products, "unsupported" scheduled products, and "supported" scheduled products (other than rice) on the grounds of an erroneous interpretation of the word "threatens" in Article 10.1 of the Agreement on Agriculture;

(4) find that the Panel erred in not examining whether a threat of circumvention exists, under Article 10.1 of the Agreement on Agriculture, for "supported" unscheduled products and rice, a scheduled product, on the grounds that these products were, in fact, part of Brazil's threat claim;

(5) find that, upon completing the analysis, ECG export subsidies are applied, within the meaning of Article 10.1 of the Agreement on Agriculture, in a manner that threatens to lead to circumvention of the United States' export subsidy commitments for all scheduled and all unscheduled agricultural products eligible to receive ECG export subsidies;

(6) find that the Panel erred, in applying Article 10.1 of the Agreement on Agriculture and Article 11 of the DSU, in concluding, in paragraphs 7.881 and 8.1(d)(i) of the Panel Report, that the United States applied ECG export subsidies in a manner that leads to circumvention of the United States' export subsidy commitments for one scheduled product only (rice); and modify this conclusion to cover four scheduled products, namely: pigmeat, poultry meat, rice, and vegetable oil;

(7) find that the Panel erred, in interpreting and applying Articles 8 and 10.1 of the Agreement on Agriculture, Articles 3.1(a) and 3.2 of the SCM Agreement, and the burden of proof applicable under these provisions, in concluding, in paragraphs 7.986-7.987 and 8.1(h) of the Panel Report, that Brazil did not make a prima facie case before the Panel

that the ETI Act of 2000, with respect to upland cotton, is inconsistent with those provisions;

(8) on a contingent basis and upon completing the analysis, find that the direct payment program of the FSRI Act of 2002 is inconsistent with the green box criteria set forth in paragraph 6(a) of Annex 2 to the Agreement on Agriculture on the grounds that eligibility for payments was not determined in accordance with a fixed base period;

(9) find that the Panel erred in concluding, in paragraphs 7.1464-7.1465 of the Panel Report, that the ordinary meaning of the phrase "world market share" of the subsidizing Member, in Article 6.3(d) of the SCM Agreement, refers to "world market share of production" or "world market share of supply," and, instead, find that the ordinary meaning of the phrase "world market share" of the subsidizing Member refers to "world market share of exports;"

(10) on a contingent basis and upon completing the analysis, find that the effect of the U.S. price-based subsidies is an increase in the U.S. world market share of exports, within the meaning of Article 6.3(d) of the SCM Agreement, thereby constituting serious prejudice to the interests of Brazil, within the meaning of Article 5(c) of the SCM Agreement;

(11) find that the Panel erred in concluding, in paragraph 7.1016 of the Panel Report, that Article XVI:3 of the GATT 1994 applies solely to export subsidies as defined in the Agreement on Agriculture and the SCM Agreement, and, instead, find that Article XVI:3 applies to any form of subsidy which operates to increase the export of any primary product from the territory of a Member; and,

(12) on a contingent basis and upon completing the analysis, find that the U.S. price-based subsidies are applied in a manner that results in the United States having more than an equitable share of world export trade in upland cotton.

189. The United States requests the Appellate Body to reject Brazil's request that the Appellate Body recommend that the United States bring the measures found to be inconsistent with the Agreement on Agriculture and the GATT 1994 into conformity with its obligations, pursuant to Article 19.1 of the DSU.

190. The United States requests the Appellate Body to reject Brazil's further requests that the Appellate Body recommend that the United States withdraw measures found to be prohibited subsidies under Article 3.1 of the SCM Agreement by 1 July 2005, pursuant to Article 4.7 of the SCM Agreement and as recommended by the Panel in paragraph 8.3(c) of the Panel Report.

191. Finally, the United States requests the Appellate Body to reject Brazil's requests that the Appellate Body recommend that the United States withdraw the U.S. price-based subsidies or remove their adverse effects found to be inconsistent with Articles 5(c) and 6.3 of the SCM Agreement, pursuant to Article 7.8 of the SCM Agreement.