

Before the Appellate Body of the World Trade Organization

United States – Subsidies on Upland Cotton

Recourse to Article 21.5 of the DSU by Brazil

(AB-2008-2)

Third Participant's Submission of Australia

Geneva, 13 March 2008

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<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Panel Report, <i>United States - Subsidies on Upland Cotton - Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/RW

INTRODUCTION

1. Australia considers that arguments raised in the Appellant Submission of the United States¹ and Other Appellant Submission of Brazil² raise a number of issues of systemic importance and legal interpretation, which Australia will address in this written submission. These issues are:

- (a) The proper scope of proceedings under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU);
- (b) Whether the Article 21.5 Panel erred in concluding that Brazil's claims relating to GSM 102 export credit guarantees issued for exports of pig meat and poultry meat were within the scope of the proceedings under Article 21.5 of the DSU;
- (c) Whether the Article 21.5 Panel erred in concluding that Brazil's claim that the United States failed to comply with its obligation under Article 7.8 of the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement) with respect to marketing loan payments and counter-cyclical payments made by the United States after 21 September 2005 was properly before the Panel;
- (d) Whether the Article 21.5 Panel acted within its discretion in its appreciation of the evidence and whether its reliance on the findings made in the original proceedings was appropriate; and
- (e) Whether the Article 21.5 Panel failed to meet the requirements of Article 11 of the DSU.

1. SCOPE OF PROCEEDINGS UNDER ARTICLE 21.5 OF THE DSU

1. Article 21.5 of the DSU establishes the scope of a compliance proceeding conducted pursuant to that provision. It defines that scope as circumstances in which "there is

¹ 19 February 2008.

² 27 February 2008.

disagreement as to the existence of or consistency with a covered agreement of measures taken to comply”. “Article 21.5 proceedings are therefore limited to those ‘measures *taken to comply* with the recommendations and rulings’ of the DSB.”³ As the Appellate Body has stated

“[T]he phrase ‘measures taken to comply’ refers to measures which have been, or which should be, adopted by a Member to bring about compliance with the recommendations and rulings of the DSB. In principle, a measure which has been ‘taken to comply with the recommendations and rulings’ of the DSB will *not* be the same measure as the measure which was the subject of the original dispute, so that, in principle, there would be two separate and distinct measures: the original measure which *gave rise* to the recommendations and rulings of the DSB, and the ‘measures taken to comply’ which are - or should be - adopted to *implement* those recommendations and rulings.”⁴

2. It is well established that ultimately, it is for an Article 21.5 panel – and not for the complainant or the respondent – to determine which of the measures listed in the request for its establishment are ‘measures taken to comply’.⁵ As the Appellate Body has stated, “[i]t is ... for the Panel itself to determine the ambit of its jurisdiction.”⁶
3. In determining whether a measure that is the subject of Article 21.5 proceedings is a ‘measure taken to comply’ with the recommendations and rulings of the DSB, the Appellate Body has found that an Article 21.5 panel must objectively consider the new measure in its ‘totality’⁷ through an examination of the facts and circumstances of the case⁸ – including the timing and nature of the measure in question.⁹ In undertaking this analysis, an Article 21.5 panel applies a ‘nexus-based test’¹⁰ to

³ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

⁴ *Ibid.*, para. 36.

⁵ Appellate Body Report, *EC – Bed Linen (Article 21.5 - India)*, para. 78.

⁶ *US – Softwood Lumber IV (Article 21.5 - Canada)*, para. 73. See also Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 78; Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.4; and Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, sub-para. 22.

⁷ Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para 87; and Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para 101.

⁸ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

⁹ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 - Canada)*, para. 74.

¹⁰ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 79.

determine whether the measures are 'inextricably linked to'¹¹ or 'clearly connected to'¹² the steps taken by the respondent to implement the recommendations and rulings of the DSB. Australia considers that a measure which is sufficiently connected to a 'measure taken to comply' can fall within the scope of Article 21.5 proceedings even where that measure itself has not been the subject of DSB recommendations and rulings in the original proceedings.¹³

4. Australia acknowledges that the phrase 'measures taken to comply' does place some limit on the scope of proceedings under Article 21.5. For example, an Article 21.5 panel cannot re-examine an unchanged measure that was found to be WTO-consistent,¹⁴ nor can an Article 21.5 panel re-examine certain matters ("the *particular* claim and the *specific* component of a measure that is the subject of that claim"¹⁵) when the original panel made findings in respect of these matters and those findings were not appealed.¹⁶ However, these limits should not operate so as to allow circumvention by Members by enabling them to comply through one measure, while, at the same time, negating compliance through another.¹⁷
5. Once satisfied that a claimed measure constitutes a 'measure taken to comply', the Article 21.5 panel must undertake an analysis of the measure's consistency with the covered agreements within the parameters established by the complaining Member.¹⁸ In making this determination, the Article 21.5 panel is not confined to examining the 'measures taken to comply' from the perspective of the claims, arguments, and

¹¹ Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, para. 6.5.

¹² Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.10, sub-para. 22.

¹³ Appellate Body Report, *United States – Tubular Goods (Article 21.5 – Argentina)*, para. 150. See also Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.26.

¹⁴ In *US – Shrimp (Article 21.5 – Malaysia)*, the Appellate Body found at para. 89 of its Report that the panel had committed no error in refusing to "re-examine, for WTO-consistency, even those aspects of a new measure that were part of a previous measure that was the subject of a dispute, and were found by the Appellate Body to be *WTO-consistent* ... and that remain unchanged as part of the new measure." (original emphasis).

¹⁵ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 93.

¹⁶ *Ibid.*, paras. 92-93; see also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, paras. 121-122.

¹⁷ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 71.

¹⁸ Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, para. 7.9; see also Appellate Body Report, *Canada – Aircraft (Article 21.5)*, paras. 36-37.

factual circumstances relating to the measure that was the subject of the *original* proceedings.¹⁹ As the Appellate Body has stated, the “measure at issue in proceedings under Article 21.5 will, in principle, be a different measure than the measure at issue in the original proceedings.”²⁰

1.1 EXPORT CREDIT GUARANTEES FOR PIG MEAT AND POULTRY MEAT WERE WITHIN THE SCOPE OF THE ARTICLE 21.5 PROCEEDINGS

6. Australia submits that the ‘measure taken to comply’ at issue in the current proceedings is the amended General Service Manager (GSM) 102 program.²¹ The GSM 102 program was amended²² in response to the rulings and recommendations of the DSB in the original proceeding.²³ As such, this measure constitutes a “new measure” that has been adopted to implement the recommendations and rulings of the DSB.

7. Australia further submits that the export credit guarantees issued under the amended GSM 102 program with respect to pig meat and poultry meat have a ‘particularly close relationship’ to the measure taken to comply with the recommendations and rulings of the DSB (the amended GSM 102 program). Australia submits that this conclusion is supported by a consideration of the amended GSM program in its totality, and the factual and legal background against which the GSM 102 program was amended.²⁴ In this regard Australia notes that the amended GSM 102 program necessarily has a particularly close relationship to the export credit guarantees issued

¹⁹ Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 41.

²⁰ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 89; Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

²¹ Other Appellant Submission of Brazil, para. 161.

²² The amendments made to the program apply to exports of all products covered under the program, including pig meat and poultry meat.

²³ United States’ First Written Submission and Request for Preliminary Rulings in the Article 21.5 Proceedings, 15 December 2006, para. 72. At paragraph 7 of this submission, the United States described the amendments to the GSM 102 program as comprising a new risk-based fee structure and increased premiums, as well as reclassification of previously eligible countries into an ineligible risk category.

²⁴ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para.77.

under that program. As such, these guarantees were properly considered to fall within the scope of the Article 21.5 proceedings.²⁵

8. In the event that the Appellate Body finds, however, that the relevant ‘measures taken to comply’ with the recommendations and rulings of the DSB are, in fact, the *export credit guarantees* issued under the amended GSM 102 program in respect of those measures that were found to be WTO-inconsistent (i.e. export credit guarantees for unscheduled products, and one scheduled product, rice), Australia submits that the export credit guarantees issued under the amended GSM 102 program with respect to pig meat and poultry meat have a ‘particularly close relationship’ to the measures taken to comply. This is because the amended GSM 102 program applies, without distinction, to all eligible products falling within its scope.²⁶ This conclusion is supported by the factual and legal background against which those guarantees were issued.²⁷ In this regard, Australia recalls the history of Brazil’s arguments concerning the export credit guarantees issued under the original GSM 102 program with respect to pig meat and poultry meat.²⁸ Accordingly, Australia submits that there is a ‘particularly close relationship’ between all export credit guarantees issued under the GSM 102 program, as amended, including those with respect to pig meat and poultry meat, and that therefore these particular measures fall within the scope of these proceedings.
9. Australia does not agree with the United States that to allow Brazil’s claims concerning the export credit guarantees for pig meat and poultry meat would give

²⁵ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.25.

²⁶ Other Appellant Submission of Brazil, para. 178; Panel Report, *US – Upland Cotton (Article 21.5 Panel – Brazil)*, para. 9.25.

²⁷ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 - Canada)*, para. 77.

²⁸ Brazil’s claims that the United States had applied export credit guarantees constituting export subsidies within the meaning of Article 10.1 of the *Agreement on Agriculture* in a manner resulting in circumvention of the United States’ export subsidy commitments was rejected by the Panel in the original proceedings. On appeal by Brazil, the Appellate Body reversed this finding, but considered that there were insufficient undisputed facts in the record to enable it to complete the legal analysis to determine whether the application of the export credit guarantees in this context resulted in circumvention of export subsidy commitments. See the Appellate Body Report, *US – Upland Cotton*, paras. 693-694.

Brazil a second chance to argue against the WTO-consistency of those guarantees.²⁹

This argument is misplaced and does not take into account the fact that the guarantees at issue in the Article 21.5 proceedings related to the *amended* GSM program.³⁰

10. Following the reasoning of the Appellate Body in *United States – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*,³¹ and taking into account the history of these proceedings with respect to these claims, Australia submits that the inability of the Appellate Body in the original proceedings to complete the analysis of the WTO-consistency of the export credit guarantees issued under the amended GSM 102 program for pig meat and poultry meat is not a basis for excluding those guarantees from the scope of the Article 21.5 proceedings.³² There has been no final resolution to the dispute between the parties in respect of the particular claim and the specific component of a measure that is the subject of the claim.³³ Rather, the guarantees at issue relate to a *new* measure that was taken to comply with the rulings and recommendations of the DSB.

11. A consideration of the nature and purpose of Article 21.5 proceedings, including the goal to achieve prompt compliance with the recommendations and rulings of the DSB in order to ensure effective resolution of disputes (Article 21.1 of the DSU), supports this conclusion. In particular, a complainant, having prevailed before the Appellate Body with respect to a claim advanced in the original proceedings, should not have to institute fresh dispute settlement proceedings to examine the WTO consistency of the guarantees issued under a program that has been amended in

²⁹ Appellant Submission of the United States, para. 49.

³⁰ Other Appellant Submission of Brazil, para. 160.

³¹ Appellate Body Report, *United States – Tubular Goods (Article 21.5 – Argentina)*, paras. 138 – 152.

³² In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body indicated that, “in a situation where a panel, in declining to rule on a certain claim, has provided only a partial resolution of the matter at issue, a complainant should not be held responsible for the panel’s false exercise of judicial economy, such that a complainant would not be prevented from raising the claim in a subsequent proceeding.”: Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 96, footnote 115.

³³ *Ibid*, para. 93.

response to the recommendations and rulings of the DSB in the original proceedings.

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12. For these reasons, Australia submits that an examination of the interdependency and close relationship between the GSM 102 program, as amended, and the guarantees issued under the amended program with respect to pig meat and poultry meat leads to the conclusion that it was appropriate for the Panel to conclude that the GSM 102 export credit guarantees for exports of pig meat and poultry meat have a “particularly close relationship to the declared measure taken to comply and to the rulings and recommendations of the DSB.”³⁵ Accordingly, it was within the scope of the Article 21.5 Panel’s jurisdiction to consider the consistency of the GSM 102 export credit guarantees for exports of pig meat and poultry meat in the light of the United States’ obligations under “any provision of any of the covered agreements.”³⁶
13. Australia therefore submits that the Appellate Body should not grant the United States’ request for a finding that the Panel erred in concluding that Brazil’s claims relating to GSM 102 export credit guarantees for exports of pig meat and poultry meat were within the scope of the Article 21.5 proceedings.

**1.2 MARKETING LOAN AND COUNTER-CYCLICAL PAYMENTS MADE AFTER
21 SEPTEMBER 2005 WERE WITHIN THE SCOPE OF THE ARTICLE 21.5
PROCEEDINGS**

14. The United States asserts that the Panel’s reading of Article 7.8³⁷ of the *SCM Agreement* is “overly broad and should be reversed”, and that the Panel disregarded the proper relationship between Article 7.8 of the *SCM Agreement* and Article 21.5 of the DSU.³⁸ For the reasons set out below, Australia does not agree with this assertion, and submits that the marketing loan and counter-cyclical payments made after 21 September 2005 were properly considered by the Article 21.5 Panel to be within the scope of the Article 21.5 proceedings, having regard to the nature of the

³⁴ Appellate Body Report, *United States – Tubular Goods (Article 21.5 – Argentina)*, para. 151.

³⁵ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.25.

³⁶ Article 21.5 of the DSU; Panel Report, *Australia – Salmon (Article 21.5 – Canada)*, paras. 7.10-7.22.

remedy provided by Article 7.8 of the SCM Agreement in the context of serious prejudice/adverse effects claims; and the nature of Article 21.5 proceedings and the relationship of this provision with Article 7.8 of the *SCM Agreement*.

15. The remedy provided under Article 7.8 has two limbs – it requires a respondent either to take steps to remove the adverse effects; or to withdraw the subsidy: withdrawal of the subsidy being an alternative, available to the subsidizing Member, to some other action.³⁹ Australia therefore agrees with the United States that under Article 7.8 of the *SCM Agreement*, withdrawal is one option, but so is taking appropriate steps to remove the adverse effects.⁴⁰ However, Australia submits that in the present case, by repealing the Step 2 program, but by continuing to make payments of a subsidy “on the same legal basis and under the same conditions and criteria as the subsidy found to have caused serious prejudice in the original proceeding”⁴¹ the United States has failed to fulfil the requirements of that Article.⁴²
16. The United States submits that the obligation under Article 7.8 only extends to the DSB’s recommendations and rulings, which, it asserts, applied only to payments made under the Step 2, market loss assistance, marketing loan and counter-cyclical payment programs in marketing years (MY) 1999-2002, and did not cover either future payments, or the subsidy programs themselves.⁴³ The United States further submits that it had no implementation or compliance obligations concerning

³⁷ Article 7.8 provides:

Where a panel report or an Appellate Body report is adopted in which it is determined that any subsidy has resulted in adverse effects to the interests of another Member within the meaning of Article 5, the Member granting or maintaining such subsidy shall take appropriate steps to remove the adverse effects or shall withdraw the subsidy.

³⁸ Appellant Submission of the United States, paras. 65 and 66, referring to para. 9.79, Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*.

³⁹ *Australia - Automotive Leather II (Article 21.5 - US)*, para. 6.28. We consider “withdrawal” of the subsidy in Article 7.8 of the *SCM Agreement* to have the same meaning as under Article 4.7 of that Agreement, or rather, that Article 7.8 reflects the language of Article 4.7.

⁴⁰ Appellant Submission of the United States, para. 64.

⁴¹ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.80.

⁴² As to the meaning of “withdraw”, the Appellate Body in *Brazil - Aircraft (Article 21.5 - Canada)* stated, in the context of prohibited subsidies: “In our view, to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to ‘withdraw’ prohibited export subsidies, in the sense of ‘removing’ or ‘taking away.’” Appellate Body Report, *Brazil - Aircraft (Article 21.5 - Canada)*, para. 42.

payments made after MY 2002, the original panel having rejected or declined to reach [a finding on] Brazil's claims regarding payments made after MY 2002.⁴⁴ Australia submits that the adoption of this argument, in circumstances in which two of the three subsidies that were found to have caused serious prejudice continue to be paid, would result in a situation in which taking *no action* to remove the adverse effects or to withdraw the subsidy would be sufficient to fulfil the obligations imposed by Article 7.8. Such an interpretation would be contrary to the plain meaning of Article 7.8, which imposes a positive obligation on the subsidizing Member to take appropriate steps to remove the adverse effects, or to withdraw the subsidy. It is clear that lack of action to remove the adverse effects or withdraw the subsidy does not and could not satisfy the subsidizing Member's obligations under Article 7.8. To suggest that it could would leave the complaining Member without a remedy.

17. As Australia emphasized in the third party hearing before the Article 21.5 Panel,⁴⁵ an approach such as that suggested by the United States would require a successful complaining Member to bring a fresh actionable subsidies claim with respect to each set of subsidies paid subsequently to those originally found to have caused adverse effects. This approach raises fundamental systemic concerns concerning the nature of dispute settlement proceedings, as it would lead to a complaining Member becoming involved in a permanent litigation loop of annual challenges concurrent with the expiry of each marketing year. Such a result would defeat the object and purpose of Article 21.5 proceedings, and would also be contrary to Articles 3 and 21.1 of the DSU, which recognize that prompt compliance with the recommendations and

⁴³ Appellant Submission of the United States, para. 65.

⁴⁴ The United States, at paragraph 60 of its Appellant Submission, states that the original Panel declined to make any finding of "threat" of serious prejudice with respect to payments "mandated" to be made in MY 2003-2007 or of "threat" of serious prejudice with respect to the Step 2, marketing loan, and counter-cyclical payment programs themselves. Australia recalls that the Panel declined to make these findings because "upon required implementation by the United States of this Panel's prohibited subsidy findings and present serious prejudice findings, the basket of measures in question may be so significantly transformed or manifestly different from the measures that are currently in question that it is not necessary or appropriate to address Brazil's claims of threat of serious prejudice..." (Panel Report, *US – Upland Cotton*, para. 7.1503, see also paras. 7.1510-1511 on Brazil's *per se* claims).

rulings of the DSB is essential to the effective functioning of the WTO and the effective resolution of disputes. Article 21.5 of the DSU promotes this aim.⁴⁶ A permanent litigation loop cannot be the remedy that was contemplated by Article 7.8 nor by Article 21.5 in the case of successful claims made under Article 5 of the *SCM Agreement*.

18. Furthermore, the United States would seek to confine the operation of Article 7.8 in the context of Article 21.5 proceedings to “issues of compliance concerning *exactly those measures* that were the subject of the DSB’s recommendations and rulings in the first place.”⁴⁷ (emphasis added) Australia submits that this interpretation of Article 7.8 and its relationship with Article 21.5 is based on a misconception of the nature and scope of Article 21.5 proceedings, and in particular, of the proper meaning of “measures taken to comply”. Such an approach would exclude examination by an Article 21.5 panel of the “measures taken to comply which are – or should be – adopted to implement those recommendations and rulings”, the very task with which a Panel composed under Article 21.5 is charged, which measures may, in principle, be different from the measure at issue in the original proceedings.⁴⁸
19. In the present case, Australia therefore submits that the Panel properly considered the continued payment of subsidies under the *unamended* marketing loan and counter-cyclical payment programs after the period for implementation had expired to fall within the scope of the Article 21.5 proceedings. Indeed, a finding that these measures were not within the scope of the Article 21.5 proceedings would have been contrary to the Panel’s task of examining the “existence or consistency with a covered agreement of measures taken to comply” with the DSB’s recommendations and rulings.

⁴⁵ Australia’s Oral Submission at the Third Party Hearing in the Article 21.5 Proceedings, 28 February 2007.

⁴⁶ Appellate Body Report, *United States – Softwood Lumber IV (Article 21.5 – Canada)*, para. 72.

⁴⁷ Appellant Submission of the United States, para. 71.

⁴⁸ Appellate Body Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 89; Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 36.

20. Australia therefore submits that the Appellate Body should not grant the United States' request for a finding that the Panel erred in concluding that Brazil's claim that the United States failed to comply with its obligation under Article 7.8 of the *SCM Agreement* with respect to marketing loan payments and counter-cyclical payments made by the United States after 21 September 2005 was properly before the Panel.

2. THE PANEL ACTED WITHIN ITS DISCRETION IN ITS APPRECIATION OF THE EVIDENCE AND MADE APPROPRIATE USE OF THE FINDINGS IN THE ORIGINAL PROCEEDINGS

21. The United States asserts that the Panel, in finding that the "effect of marketing loan and counter-cyclical payments provided to US upland cotton producers ... is significant price suppression ... in the world market for upland cotton constituting 'present' serious prejudice to the interests of Brazil"⁴⁹ "consistently misapplied the law to the facts, made inherently contradictory findings, and failed to make findings where they were required for a proper analysis of significant price suppression."⁵⁰ The United States also argues that in reaching its findings, the Article 21.5 Panel placed excessive reliance on findings made by the Panel and Appellate Body in the original proceedings.⁵¹

22. On the basis of Australia's reading of the Appellant Submission of the United States, Australia is of the view that many of the United States' concerns relate to perceptions that the Panel either failed to take into account evidence that was submitted by the United States or failed to accord that evidence the weight that the United States felt it should have been accorded.⁵² As noted by the Appellate Body, "it is generally within the discretion of the Panel to decide which evidence it chooses to utilize in making findings."⁵³ Furthermore:

⁴⁹ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 15.1(a).

⁵⁰ Appellant Submission of the United States, para. 131.

⁵¹ *Ibid*, paras. 134-135, 178.

⁵² See, for example, Appellant Submission of the United States, paras. 141, 144, 145, 179, 181, 183, 191-192, 205, 208, 213.

⁵³ Appellate Body Report, *EC – Hormones*, para. 135.

Determination of the credibility and weight properly to be ascribed to (that is, the appreciation of) a given piece of evidence is part and parcel of the fact finding process and is, in principle, left to the discretion of a panel as the trier of facts.⁵⁴

As a result, unless a panel "has exceeded the bounds of its discretion ... in its appreciation of the evidence", the Appellate Body will not interfere with the findings of the panel.⁵⁵

23. Australia submits that the United States has not demonstrated that the Article 21.5 Panel has exceeded the bounds of its discretion in its appreciation of the evidence. Australia further submits that the manner in which the Article 21.5 Panel took account of the original findings of the Panel and Appellate Body was appropriate in the circumstances of this case. The Appellate Body has recognized that a panel operating under Article 21.5 of the DSU may take account ... of the reasoning of the original panel, as Article 21.5 proceedings form part of a "continuum of events".⁵⁶
24. Consistent with its submissions to the Article 21.5 Panel made at the third party hearing,⁵⁷ Australia submits that given the fact that two of the price-contingent subsidies that formed part of the collective assessment of serious prejudice in the original proceedings have continued in unaltered form, it was appropriate for the Article 21.5 Panel to have followed the analytical approach that was adopted by the Panel in the original proceedings. It was also appropriate that the original findings, recommendations and rulings relating to those subsidies formed the starting point for the Article 21.5 Panel's analysis of Brazil's claims of serious prejudice under Articles 5(c) and 6.3(c) of the *SCM Agreement*.⁵⁸ To decide otherwise would result

⁵⁴ *Ibid*, para. 132.

⁵⁵ Appellate Body Report, *US – Gambling*, para. 330.

⁵⁶ Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, paras. 101-105.

⁵⁷ Australia's Oral Submission at the Third Party Hearing in the Article 21.5 Proceedings, 28 February 2007.

⁵⁸ An example of the way in which the Article 21.5 panel used the findings in the original proceedings as a starting point for its analysis of the present serious prejudice claims in the Article 21.5 proceedings is found at paragraphs 10.61-10.70 of the Article 21.5 Panel report. The Panel built upon these findings by considering the new and updated evidence provided by both parties in relation to the design, structure and

in requiring every aspect of the claims of serious prejudice to be relitigated in the context of accelerated compliance proceedings, an approach which Australia submits would not be consistent with the aims of the dispute settlement process as set out in Articles 3, 21.1 and 21.5 of the DSU.

25. Australia further submits that in examining the approach taken by the Article 21.5 Panel, it is important to maintain the distinction between the arguments made by the parties, and the evidence submitted to support those arguments. The United States, in arguing that it could not have relied on the "same arguments" rejected by the original Panel and Appellate Body in the original proceedings, because the evidence before the Article 21.5 Panel was not identical to that before the original Panel and pertained to an entirely different time period,⁵⁹ blurs this distinction. It is possible, and in fact the United States has done so at every stage of these proceedings, to make the same arguments, but with updated evidence relevant to the particular time period under consideration to support those arguments, which evidence was taken into account by the Panel. Such an approach is not remarkable in circumstances where the legislative basis for the subsidies under consideration had not changed.
26. A careful review of the Article 21.5 Panel's analysis therefore indicates that, rather than placing excessive reliance on the Panel and Appellate Body findings in the original proceedings, the Article 21.5 Panel examined the facts and evidence, including the new and updated economic evidence, that was submitted by both parties to the dispute in reaching its conclusions concerning the continuing market-insulating effects of the marketing loan and counter-cyclical payments.⁶⁰

operation of the marketing loan and counter-cyclical payments (see for example Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.80-10.83, 10.90-10.93.)

⁵⁹ Appellant Submission of the United States, para. 139.

⁶⁰ For example, Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.23-10.25; 10.26-10.40; and 10.57. The finding pointed to by the United States concerning the continuing influence of the availability of marketing loan payments on producers' planting decisions (para. 138 of its Appellant Submission, citing para. 10.81 of the Article 21.5 Panel report) was made as a result of the Panel conducting an objective assessment of the matter before it as required by Article 11 of the DSU. Rather than merely reiterating the original findings, the Article 21.5 Panel relied on evidence submitted in the Article 21.5 proceedings relating to more recent years to support its conclusion that the availability of the payments had an effect on producer expectations: Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.81-10.82. Furthermore, the Article 21.5 Panel conducted an objective assessment of the

27. Australia further submits that the Panel’s conclusion that without the marketing loan and counter-cyclical payments, the level of United States upland cotton acreage and production would likely be significantly lower, was based on an examination of a number of factors, taken together, including, but not limited to, the design, structure and operation of the payments, including their market-insulating nature; the large magnitude of the payments; the fact that the adjusted world price in most recent years had been below the marketing loan rate; the importance of these payments as a share of the revenues of United States upland cotton producers; and their role in covering a significant part of the costs of production of these producers.⁶¹ Thus the Panel’s conclusion that the subsidies protect or “insulate” revenues of United States upland cotton producers when prices are low was not the sole basis for the Panel’s finding that the marketing loan and counter-cyclical payments cause significant price suppression. The Panel’s task was to determine whether the price suppression caused by these subsidies was significant, not to determine the degree of the effect of one factor, albeit an important one, amongst many.⁶² Australia therefore submits that the Panel’s findings with respect to market insulation, taken together with the Panel’s findings on each of the factors identified by the Panel, supported its ultimate finding of significant price suppression.⁶³

28. Australia further submits that the Article 21.5 Panel was also entitled to take into account the findings in the original proceedings as to the effect of other factors that the United States asserted affected the causal link between the subsidies at issue and significant price suppression, including the role of China’s trade in cotton.⁶⁴ This factor was relied upon by the United States in the original proceedings. Australia

economic studies submitted by both parties as to the price-minimizing effect of counter-cyclical payments, in reaching its conclusion that “recent literature is fairly divided on the magnitude of the production impact of counter-cyclical payments” (Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.93).

⁶¹ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 10.104, see also paras. 10.244 - 10.252.

⁶² Cf. Appellant Submission of the United States, paras. 164-166.

⁶³ Australia notes that the United States in its most recent Notification to the WTO Committee on Agriculture concerning its domestic support commitments for MY 2002-2005 (G/AG/N/USA/60) notifies both the marketing loan and counter-cyclical payment measures as trade distorting support, which by definition, means that this support alters price signals and influences producers’ expectations and risk-related decisions.

submits that after consideration of the arguments made by the parties and the evidence before it in relation to this factor, it was open to the Article 21.5 Panel to conclude, just as the original Panel had, that this factor did not attenuate the link between significant price suppression and the subsidies at issue in this proceeding⁶⁵.

29. Australia therefore submits that the Appellate Body should not grant the United States’ request for a finding that the Panel erred in concluding that the United States acted inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to US upland cotton producers after 21 September 2005 was significant price suppression constituting present serious prejudice to the interests of Brazil.

3. THE PANEL DID NOT FAIL TO UNDERTAKE AN “OBJECTIVE ASSESSMENT” OF THE SERIOUS PREJUDICE CLAIMS AS REQUIRED UNDER ARTICLE 11 OF THE DSU

30. The United States submits that the Article 21.5 Panel acted inconsistently with Article 11 by failing to carry out an objective assessment of Brazil’s claims that marketing loan and counter-cyclical payments made after 21 September 2005 caused significant price suppression in the world market for upland cotton, and therefore that the Panel’s findings regarding significant price suppression should be reversed.⁶⁶ Australia notes that in making this claim, the United States makes arguments similar to those which it raised in arguing that the Article 21.5 Panel’s legal conclusion as to serious prejudice was in error and was based on erroneous findings on issues of law and related legal interpretations.
31. Australia submits that the conduct of the Article 21.5 Panel in assessing the new evidence presented to it on the serious prejudice claims is not such as to amount to “the deliberate disregard of, or refusal to consider, the evidence submitted to a panel”

⁶⁴ Panel Report, *US – Upland Cotton*, paras. 7.1344-46; 7.1357-63; see also Appellate Body Report, *US – Upland Cotton*, para. 437.

⁶⁵ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, paras. 10.243, 10.252.

⁶⁶ Appellant Submission of the United States, paras. 131, 227.

nor to “the wilful distortion or misrepresentation” of that evidence so as to amount to an “egregious error that calls into question the good faith of a panel”.⁶⁷ Rather, many of the United States’ submissions amount to arguments that the Article 21.5 Panel failed to accord the weight to the evidence that it believed should have been accorded to it.⁶⁸ This does not amount to a failure to comply with Article 11 of the DSU.⁶⁹ As a result, Australia further submits that Article 11 provides no ground for reversing the Article 21.5 Panel’s findings regarding significant price suppression.

CONCLUSION

32. For the reasons set out in this submission, Australia requests that the Appellate Body:

- (a) Uphold the Article 21.5 Panel’s finding that Brazil’s claims relating to export credit guarantees for exports of pig meat and poultry meat were within the scope of the proceedings under Article 21.5 of the DSU.⁷⁰
- (b) Uphold the Article 21.5 Panel’s finding that Brazil’s claim that the United States failed to comply with its obligation under Article 7.8 of the *SCM Agreement* with respect to marketing loan payments and counter-cyclical payments made by the United States after 21 September 2005 was properly before that Panel.⁷¹
- (c) Uphold the Article 21.5 Panel’s finding that the United States acted “inconsistently with its obligations under Articles 5(c) and 6.3(c) of the *SCM Agreement* in that the effect of marketing loan and counter-cyclical payments provided to US upland cotton producers pursuant to the FSRI Act of 2002 [was] significant price suppression within the meaning of Article 6.3(c) of the *SCM Agreement* in the world market for upland cotton constituting "present" serious prejudice to the interests of Brazil within the meaning of Article 5(c) of the

⁶⁷ Appellate Body Report, *EC – Hormones*, para. 133.

⁶⁸ See paragraph 22 and footnote 52 thereto, above.

⁶⁹ Appellate Body Report, *Korea - Alcoholic Beverages*, para. 164.

⁷⁰ Panel Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 9.27.

SCM Agreement ... [and that] the United States has failed to comply with its obligation under Article 7.8 of the *SCM Agreement* "to take appropriate steps to remove the adverse effects or ... withdraw the subsidy".⁷²

⁷¹ Ibid, para. 9.81.

⁷² Ibid, 15.1(a).